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**IN THE FOURTH DISTRICT COURT
OF APPEAL**

CASE NO. 19-0512
DOAH Case No. 19-0442RU

EMERGENCY EDUCATION INSTITUTE,
Appellant,

v.

PROPOSED DIRECTIONS TO CLERK

BOARD OF NURSING,
Appellee/ Cross-Appellant.

_____/

In accordance with the Fourth District Court of Appeal's Order dated June 17, 2019, Appellant, Emergency Education Institute, directs the clerk to include the following items from the record:

ITEM	DATE FILED
Video Teleconference Deposition of Michelle Ugalde Taken on Behalf of the Respondent	9/12/2018
Respondent's Notice of Filing Deposition Transcript of Marianne Griffin in Lieu of Live Testimony	9/17/2018
Petitioner's Notice of Filing Respondent's Responses to Petitioner's First Set of Interrogatories to Board of Nursing, First Request for Admissions, and First Request for Production	9/21/2018
Recommended Order	1/29/2019

1 STATE OF FLORIDA

2 DIVISION OF ADMINISTRATIVE HEARINGS

3 DOAH CASE NO.: 18-1872

4
5 EMERGENCY EDUCATION INSTITUTE,

6 Petitioner,

7 vs.

8
9 BOARD OF NURSING,

10 Respondent.

11 _____/

12
13 VIDEO TELECONFERENCE DEPOSITION OF

14 MICHELLE UGALDE

15 TAKEN ON BEHALF OF THE RESPONDENT

16 NOVEMBER 7, 2018

17 2:01 p.m. - 3:39 p.m.

18
19
20 REPORTED BY:

21 CRISTINA BARROCAS, COURT REPORTER

22 NOTARY PUBLIC, STATE OF FLORIDA

23
24
25

INDEX TO APPEARANCES

ON BEHALF OF THE PETITIONER:

Shavon L. Jones, Esq.

SEC Outsourcing, Inc.

PO Box 612851

North Miami, Florida 33181

(786) 463-4450

ON BEHALF OF THE RESPONDENT (via video):

Timothy Frizzell, Esq.

Office of the Attorney General

PL-01 the Capitol

Tallahassee, Florida 32399

ALSO PRESENT:

Judge Robert E. Meale (via telephone)

1230 Apalachee Parkway

Tallahassee, Florida 32399

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1 DEPOSITION OF
2 MICHELLE UGALDE
3 NOVEMBER 7, 2018
4

5 MICHELLE UGALDE

6 having first been duly sworn, testified as follows:
7

8 COURT REPORTER: We're now on the matter of
9 Emergency Education Institute versus Board of
10 Nursing. My name is Cristina Barrocas. I'm the
11 court reporter present today. Today is November 7,
12 2018, and the time approximately is 2:02 p.m. This
13 deposition is being held at 110 Southeast 6th Street
14 on the 10th floor in Fort Lauderdale, Florida 33301.

15 Would all attorney present please identify
16 themselves and who they represent, please.

17 MS. JONES: Savon Jones of SEC Outsourcing for
18 Emergency Education Institute.

19 MR. FRIZZELL: Timothy Frizzell, that's F-R-I-Z-
20 Z-E-L-L, and I represent the Department -- excuse me,
21 the Board of Nursing.

22 JUDGE MEALE: And I'm Bob Meale. I'm the
23 administrative law judge, and we had a telephone
24 conference this morning and we all agreed that this
25 proceeding will be part of the hearing, it will not

1 be a discovery deposition.

2 Further that the Board of Nursing may proceed
3 with direct examination of Ms. Ugalde, and so we're
4 calling her as his witness, and then after completing
5 that, conduct his cross examination of Ms. Ugalde
6 based on the previously filed affidavits, at which
7 point the Witness will be turned over to the
8 Petitioner, the Institute, which then can have cross
9 and re-direct. Is that correct, counsel?

10 MS. JONES: Yes, Your Honor.

11 MR. FRIZZELL: Yes, Your Honor, that's my
12 understanding.

13 JUDGE MEALE: Okay. And one last thing. Make
14 sure the microphone is close the witness. I had a
15 little trouble hearing her when she stated her name.
16 We're doing this by video to connect Mr. Frizzell
17 with the witness, Ms. Jones, and the court reporter
18 in Fort Lauderdale. I'm connected by telephone.
19 Thank you.

20 MR. FRIZZELL: I'm ready to begin whenever the
21 parties are.

22 JUDGE MEALE: Go right ahead.

23
24 DIRECT EXAMINATION

25 BY MR. TIMOTHY FRIZZELL, ESQ.:

1 Q As I stated before, my name is Tim Frizzell.
2 I'm the attorney for the Board of Nursing, and I'll be
3 taking your direct testimony today at this moment and
4 again in a little bit we'll be taking your cross
5 regarding the affidavit that you submitted earlier. I
6 would remind you that even though I can see you on video
7 and I can see you shake your head or nod your head, and
8 that is how we do ourselves in normal, daily life, but
9 keep in mind that this is being recorded. The lady next
10 to you is the court reporter and she needs to be able to
11 take down a verbal response. Even more importantly
12 today, the Judge cannot see you and therefore he needs
13 to be able to hear your response. So just make your
14 response clear.

15 One final thing, just because me, Ms. Jones, and
16 the Judge have already discovered, I tend to start
17 talking very fast, and I will take absolutely no offense
18 if you need me to slow down, repeat myself, and start
19 over a question.

20 A Okay.

21 Q Do not be afraid to speak up.

22 A Okay. Thank you.

23 MS. JONES: Judge, can you hear better now.

24 JUDGE MEALE: Yes. Mr. Frizzell is coming
25 through loud maybe because it's the telephone, but

1 I'll tell you if I have trouble hearing Ms. Ugalde.

2 MR. FRIZZELL: Madam court reporter, can you
3 hear me okay?

4 COURT REPORTER: Yes, I hear you fine. Thank
5 you.

6 MR. FRIZZELL: Thank you.

7 BY MR. FRIZZELL:

8 Q Ms. Ugalde, you already stated your name for the
9 record, so what is your relationship with Emergency
10 Education Institute?

11 A I am the current president and CEO.

12 Q And do you operate any other roles within
13 Emergency Education Institute?

14 A I'm also the director of nursing.

15 Q And how long have you been the president and
16 CEO?

17 A Since December 21st of 2016.

18 Q Very good. And how long have you operated in
19 the role of director of nursing?

20 A Approximately around the time of April of 2017.
21 I don't recall the exact date.

22 Q That's fine. So just approximately April of
23 2017. I'm not going to hold you to that.

24 Were you previously associated with EEI prior to
25 the purchase of that school?

1 A No.

2 Q Okay. And is EEI a not-for-profit school or is
3 for-profit?

4 A For-profit.

5 Q When you purchased EEI, were you familiar with
6 the statutory and rule requirements for ADN programs?

7 A Rules -- what -- could you --

8 Q Were you -- I'm sorry, let me rephrase.

9 Were you familiar with the laws that govern ADN
10 programs within the state of Florida?

11 A Yes. If -- if you're recalling meaning to the
12 NCLEX rules?

13 Q Well, I'm meaning the statute in general and the
14 requirements of not only the legislature but also those
15 requirements that are put in place by the Board of
16 Nursing?

17 A Yes.

18 Q And, generally, when appropriate?

19 A Correct.

20 Q Okay. And how are you -- how were you familiar
21 with those programs, I think it's covered in your
22 affidavit, but I just kind of want a general synopsis?

23 A I've been in nursing education since 1997, I
24 believe, I've been teaching for many, many years, and
25 I've also been. I was running a nursing program that I

1 started from scratch prior to owning EEI, so I have the
2 knowledge as far as Florida State nursing regulations
3 when it comes to the nursing program.

4 Q Perfect. And did the then existing stat -- did
5 the existing statutory requirements, as they existed in
6 2016, did they have any impact on your decision to
7 purchase and ultimately running EEI? Were they part of
8 the decision-making process?

9 A I'm trying to understand your question. I
10 apologize.

11 Q No, it's okay. It's probably a -- it's probably
12 a poorly worded question.

13 Did you believe that you could run EEI within
14 the scope of the then existing statutes and rules?

15 A Yes. Thank you for clarifying.

16 Q No problem. So that was part of your decision-
17 making process in order to purchase EEI?

18 A Correct.

19 Q Okay. Thank you.

20 Once you purchased EEI, what -- as far as the
21 ADN program is concerned, did you implement any changes
22 after the purchase of EEI?

23 A Numerous. It took me a little while to see
24 where the deficiencies were and my first battle was the
25 nursing program, and the first battle I had was the

1 nursing faculty along with the nursing instructors and I
2 had to change that and bring more qualified instructors
3 in, as well as implement exit exams in the specialty of
4 the nursing program as well as implement HESI and
5 overall do an overhaul of the nursing program, which
6 took me some time.

7 Q Were those -- did you start those changes before
8 or after you became -- after you became the director?

9 A I started some of them before. I believe I
10 implemented the exit -- exit exams around February of
11 2017, if I recall.

12 Q What policies were in place regarding students
13 who had tested more than six months prior to taking the
14 NCLEX examination, purchased the program?

15 A There wasn't any that I had found.

16 Q And what of those -- what policies did you
17 implement at that time regarding those older students?

18 A The older students that had graduated?

19 Q Yes, ma'am.

20 A The ones that had graduated, I had went through
21 and reached out to them to offer them remediation once
22 we had implemented the HESI exit comprehensive.

23 Q So when did you -- I'm sorry, when did you
24 implement that exit comprehensive?

25 A I apologize. There were two different types of

1 exits. So there was an exit exam that was implemented
2 in February of '17, that was not -- that was called
3 Prep-U. The old director of nursing was using what was
4 called Wolters Kluwer. I then went and changed to
5 evolve HESI some time in middle of 2017, and at that
6 point is when I reached out to the old owner's graduates
7 and offered to -- sorry.

8 Q No, go ahead.

9 A And offered to pay for them to take an exit
10 comprehensive to see where they're at to assist them in
11 achieving the NCLEX.

12 Q So forgive me, when did you start that -- when
13 did you start that process? I'm a little confused, and
14 that's probably just me.

15 A I don't recall the exact date. It was sometime
16 in 2017.

17 Q Early 2017 around the time you became the
18 program director?

19 A I don't recall. I apologize.

20 Q So were you aware that prior to June 23, 2017
21 that Florida statutes required that approved ADN program
22 require a graduate from the program who does not take
23 the licensure exam within six months after graduation to
24 enroll and successful complete a licensure examination
25 preparatory course?

1 A Yes.

2 Q Okay. And I believe you've already testified to
3 this, but I just want to go into a little bit more
4 detail. How much effort -- how much effort did you put
5 in to try and locate these students?

6 A We had actually when I purchased EEI, we have a
7 storage room that is up on the 7th floor, we're on the
8 3rd floor and spent weekends after weekends going
9 through old boxes highlighting old students and being
10 able to find them wasn't easy, and offering emailing and
11 calling and sending out letters to locate them.

12 Q Was that before or after the 20 -- was that in
13 2017 or was that in 2018, as you stated in your
14 affidavit?

15 A No, that was in 2018. That was after I went to
16 the board meeting in February of '18.

17 Q Okay. Well, what I'm trying to find out is
18 specifically what did you do specifically regarding your
19 older graduates in 2017 prior to finding out that the
20 Board of Nursing was going to vote to extend your
21 probation?

22 A Revoke? I'm sorry, is that what you said,
23 revoke?

24 Q With a vote to extend your probation?
25 What I'm trying to find out is what did you do -

1 -- go ahead, sorry.

2 A I'm just a little confused, I'm sorry.

3 Q No problem. What policies and steps did your
4 school take regarding older graduates prior to June 23,
5 2017?

6 A As -- I believe the old director of nursing was
7 reaching out to them. I don't have definitive what she
8 was doing. I also at that point, I knew that the six-
9 month rule was still in place, and at that point, when I
10 had purchased EEI, he didn't have a recent nursing
11 graduate class from my understanding.

12 Q What steps did you personally take to reach out
13 to those students before June of 2017 when the law
14 changed?

15 A Personally take --

16 Q Yes, as the director of nursing, what steps did
17 you personally take to reach out to your older graduates
18 to comply with 469 -- 464.019?

19 A What is that statute, I'm sorry?

20 Q The requirement that your students complete a
21 preparatory course before taking the NCLEX if they've
22 been more than six months since graduation?

23 A Oh, okay. I see what you're saying.

24 I don't recall at this time, and I cannot recall
25 as far as the old director of nursing. She is not there

1 as of now.

2 Q Wasn't that an obligation that you took on when
3 you purchased EEI?

4 A Sure.

5 MS. JONES: What was the question?

6 THE WITNESS: I'm a little confused.

7 MS. JONES: What obligation --

8 MR. FRIZZELL: I was asking -- I was asking if
9 the statutory obligation that existed prior to June
10 23, 2017 was an obligation that was taken on by Ms.
11 Ugalde when she purchased EEI in December of 2016.

12 MS. JOES: Oh, okay. No objection.

13 BY MR. FRIZZELL:

14 Q So, Ms. Ugalde, if the affirmative duty to
15 ensure that your older graduates took a prep course
16 existed by statute prior to June 23, 2017, how is that
17 the change the law established a new duty to ensure that
18 your older graduates took a preparatory course?

19 A How did the -- how did the new law change? I
20 don't --

21 Q So the change of the law --

22 A Right, I didn't know about the -- I apologize,
23 but I didn't know about the change of the law until I
24 attended the board of nursing meeting in February of
25 2018.

1 Q No, no, I understand that, but you were under --
2 during that period of time, you were under an
3 affirmative obligation by statute to reach out to your
4 six-month students to make sure they took a preparatory
5 course.

6 A We -- we could recommend --

7 Q So how did that change -- how did the change in
8 law change that duty?

9 A We could -- we were reaching out to students.
10 We can't hold the student's hand to take a remediation
11 course. We weren't approved. The school was not
12 approved to offer remediation courses.

13 Q No, I understand that. I'll move on, I think my
14 point -- I think the issue -- the question has been
15 asked and answered.

16 So if I heard you correctly, you in sense you
17 redoubled your effort to reach out to older graduates
18 since learning of the -- of the new requirements,
19 correct?

20 A Correct.

21 Q And can you just kind of tell the court just
22 briefly what additional -- what steps you've taken
23 regarding specifically those six-month students since
24 learning of the new change in the law?

25 MS. JONES: When you say the six-month students,

1 do you mean the older grads?

2 MR. FRIZZELL: Yes, I'm sorry. I'll use the
3 phrase older graduates.

4 A Older graduates with the old owner?

5 BY MR. FRIZZELL:

6 Q Older graduates who had graduated from your EEI
7 program -- from your ADN program who had not had passed
8 it within six months, regardless of which owner they
9 graduated from?

10 A Okay. What's been implemented with me is they
11 sign a form when they come in now that if they do not
12 sit to take their NCLEX within six months they have to
13 attend an NCLEX boot camp by EEI as well as complete a
14 remediation course.

15 Q What other changes have you made to the program
16 since learning of the change in the law?

17 A All classes we have implemented the exit HESI
18 where they have to obtain an 850, they get two chances.
19 They have to also pass the exit comprehensive at the end
20 of the program.

21 Q Can I get you to slow down for just a second for
22 somebody -- can you explain that to somebody who has
23 absolutely no idea what those terms mean?

24 A Oh, I'm so sorry. It's a --

25 Q It's okay.

1 A It's an exit exam that is standardized that -- I
2 don't want to say similar, but that mimics the NCLEX
3 type of questions to assist those students in being able
4 to pass the NCLEX test. And so we've implemented that
5 throughout the whole program from day one.

6 Q And would you have made any additional changes
7 to your policies or business practices had you
8 discovered the change in the law of June of 2017?

9 A Could you repeat the question? I'm sorry.

10 Q Would you have made an additional changes in
11 your policies or business practices had you discovered
12 the change in the law in June of 2017?

13 A I don't have an answer for that.

14 Q Okay. That's fine.

15 Your students now that wait more than six
16 months, as of today, let's say you have a student that
17 waits more than six months to take the NCLEX after
18 graduation. What is your policy regarding that?

19 A That student is not allowed to sit for their
20 NCLEX. They are to come back and take an NCLEX boot
21 camp with us, and they are to take a remediation
22 approved course.

23 Q Okay. And does that requirement -- was that
24 requirement located in a rule or a statute?

25 A No, that's an EEI.

1 Q What is EEI's status right now with the Florida
2 Board of Education?

3 A The Florida Board of Education?

4 Q I think you're familiar with CIE --

5 A Correct. You mean as far as --

6 Q -- the Commission on Independent Education?

7 A You mean the status as far as annual or
8 provisional?

9 Q Yes.

10 A It's on provisional because we're on probation
11 with the Board of Nursing.

12 Q Okay. And when was EEI placed on probationary
13 status with the -- with the CIE?

14 MS. JONES: Provisional?

15 THE WITNESS: Correct.

16 BY MR. FRIZZELL:

17 Q Provisional. Thank you. Sorry.

18 A I don't recall the exact date. I would believe
19 sometime in 2017. I think our annual date is around
20 July, so I would say July of 2017 is when we went to
21 provisional.

22 Q Okay. And was that the same time -- was that
23 about the same time that you were placed on probational
24 status through the Board of Nursing?

25 A No. The Board of Nursing placed us on

1 probation, I believe it was in April of 2017.

2 Q So April of 2017 was your initial probationary
3 year.

4 What -- what year's scores were used to
5 determine that the ADN program should be initially
6 placed on probationary status?

7 A What score? I think those were 2015 and '16; if
8 I'm correct.

9 Q And weren't those scores established based on
10 students who graduated prior to your ownership of EEI?

11 A That is correct.

12 Q Did you challenge the initial probation?

13 A Did I challenge?

14 Q Did you file a challenge? Did you -- did you
15 file a notice of rights? Did you attempt to anyway
16 challenge the Board's actions?

17 A I actually reached to Ms. Sutton when I took
18 over EEI and asked her that since it was a new owner
19 what -- did they give a new NCLEX number, and I don't
20 remember, this is probably in the beginning of 2017 and
21 she said no, but I did not challenge at that time, if
22 that's what you mean.

23 Q And do you know why -- can you say why or why
24 you did not decide to challenge the initial
25 establishment of probation?

1 A Oh, I'm sorry, I'm misunderstanding you. I
2 thought you meant when I first purchased EEI because it
3 wasn't on probation then.

4 Q No, no, but they got put on probation the two
5 months after you purchased?

6 A Right. Correct.

7 Q Okay. And at that point, did you challenge the
8 action of the board?

9 A No. No, I mean his score was 15 or 17 percent I
10 believe for 2016.

11 Q All right. And with the statute excluding older
12 graduates from consideration in place during all of
13 2016?

14 A The six-month -- the six-month, yes, was in
15 place.

16 Q And was it in place at the time the board at the
17 time the Board of Nursing voted to place your program on
18 probation?

19 A Yes.

20 Q How many of your students have tested for the
21 first time so far in 2018?

22 A I don't have a definitive answer.

23 Q Are you still -- do you keep track of those,
24 assuming you don't keep a running --

25 A I do -- yes, I do. It's in my pack. I don't

1 have a definitive --

2 Q Are you -- are you aware of whether or not
3 you're on -- you are track to meet to exceed your score
4 from last year, the 74 point -- or 75 percent?

5 A From 2017:

6 Q Yes, the one that's currently in contention.
7 I'm just curious as to whether or not you believe that
8 you're on track to be at approximately 75 percent this
9 year?

10 A I believe we would be on track if two students
11 somehow got through to the Board of Nursing and took
12 their boards without being released by myself.

13 Q Okay. So --

14 A Which we've -- I've already reached out to
15 Ms. Sutton and I forgot the other lawyer's name.
16 Diane --

17 MS. JONES: Okay. Ms. Gomet (phonetic) --

18 THE WITNESS: Yes.

19 MS. JONES: Okay. So there seems to be another
20 issue --

21 THE WITNESS: There's a separate issue. I
22 apologize if you're not aware of it.

23 MR. FRIZZELL: I was not, and I don't think that
24 has any bearing today. I was just trying to get a
25 bearing. Just trying to get an idea of where you're

1 at this year, and that's fine.

2 BY MR. FRIZZELL:

3 Q What is ACEN?

4 A ACEN, that's the programmatic accreditation.

5 Q And have you applied for ACEN accreditation?

6 A Yes, actually the 1st it was -- it was started
7 under the old owner initially.

8 Q Okay. And do you know when -- when that
9 started?

10 A I believe it was in 2016.

11 Q And what criteria does ACEN use in order to
12 determine your school should be accredited or not?

13 A There's different criteria as far as meeting
14 outcomes, NCLEX pass rates.

15 Q And so since you brought up NCLEX pass rates,
16 what is the NCLEX pass rate for ACEN?

17 A I believe that they're 80 percent, if I'm
18 correct.

19 Q Eighty percent and over what period of time is
20 that 80 percent calculated?

21 A I think it's two -- if I'm correct, it's two
22 years.

23 Q Would -- if I -- if I say that it was 12 months,
24 would that sound correct?

25 A Okay. Yes. I'm sorry. I've been dealing with

1 APAZ (phonetic) numbers for two days.

2 Q Okay. And where are you at in the process
3 regarding -- where are you at in the process regarding
4 your ACEN -- your ACEN accreditation?

5 A I had been working with Ms. Ard (phonetic).
6 She's our mentor. They are not able to come out and do
7 a site visit with being on probation with the board of
8 nursing. She did -- so she has mentor --

9 Q So is it -- is it only the Board of Nursing
10 that's held the whole -- is it only the accreditation
11 issue with the Board of -- I'm sorry, the probationary
12 issue with the Board of Nursing that's holding up your
13 accreditation?

14 A No, there were some other deficiencies that I'm
15 working on with her.

16 Q Including the 80 percent passage rate?

17 A Yes. She did acknowledge though that there was
18 a huge improvement.

19 Q Yes, and nobody -- nobody is saying there
20 wasn't. There was an amazing improvement.
21 Congratulations for that. That was obviously a lot of
22 hard work.

23 A Thank you.

24 Q But would you be able to be accredited today if
25 the Board of Nursing had not -- had not voted to extend

1 your probation another year?

2 A From what I was informed by Ms. Ard that they
3 would -- as long as by the time they came out to do the
4 visit and at that exact time that my students were at 80
5 percent, that is what I was told.

6 Q Eighty percent for the prior 12 months?

7 A That is correct.

8 Q Okay. And does that -- does that allow you to
9 remove students who had not tested within six months of
10 your graduation date?

11 A Does that allow --

12 Q I mean, is there any provision that ACEN would
13 allow you to disregard from that number any of the
14 students who tested -- who did not test within six
15 months of graduating from your class?

16 A I didn't discuss that with her. That wasn't
17 discussed.

18 Q Okay. Are you -- are you personally aware of
19 anything that would allow you to remove those six-month
20 students from that consideration?

21 A No, not that I'm aware of.

22 Q Okay. So as far as you're aware, students who
23 graduated under the old owner who waited a year to test
24 could impact your ability to obtain accreditation today?

25 A It is impacting my ability right now.

1 Q Okay. Do you believe that you're currently on
2 track to meet 80 percent in -- as required by ACEN?

3 A I can't predict the future, but I sure am trying
4 the best I can.

5 Q Okay. But as it stands today, would -- if -- as
6 it stands today, and notwithstanding that the issue of
7 the two students that you brought up earlier, would you
8 -- if they were to review you today, would you be able
9 to pass that 80 percent?

10 A Reviewing today, based on --

11 Q You said at the moment that they came to the
12 school you were -- how far are you away today from being
13 able to make that 80 percent?

14 A Well, they don't come for a while though. So
15 she wouldn't -- like, for example, the way she had
16 explained it is if they approved today, they don't come
17 for another year a visit or two years. So at that time
18 it's a different calendar year they're looking at, if
19 that makes sense.

20 Q Oh, I got you. So you'd be placed on
21 accreditation today and then in a year or two years
22 they'd come back and review and if you're not at 80
23 percent at that point, they would remove you from
24 accreditation?

25 A Right. Because they said it depends by the time

1 it goes to their commission that at that time that you
2 have to be at 80 percent.

3 Q Okay. And how often does that commission meet?

4 A I thought she said twice a year. I thought
5 that's what she said.

6 Q Okay. No problem.

7 If the Board had removed -- if the Board were
8 today to remove your probation status and place you on
9 approved status and then for whatever reason voted to
10 remove you and you got accredited, what would happen if
11 you got placed back on probation again in say 2019,
12 would you lose your accreditation at that point?

13 A Would I lose my accreditation --

14 Q Like if you're -- if you became accrediat -- if
15 you became an approved program through the board of
16 nursing --

17 A Correct.

18 Q -- and got accredited through ACEN and then
19 later went back on probational status, would you then
20 lose your accreditation?

21 A I believe that we go on probation then with
22 ACEN from my understanding. I don't have an exact
23 answer to that question.

24 MS. JONES: Counsel, if you want to make her
25 aware of some ACEN policy, you might need to show

1 them to her because you're asking her to testify from
2 memory regarding what all the ACEN policies are.

3 MR. FRIZZELL: I understand. I just was curious
4 as to to what her understanding was.

5 MS. JONES: Okay.

6 MR. FRIZZELL: And, actually, that was my last
7 question for direct.

8 MS. JONES: Okay. Are you going to cross the
9 affidavit, or you've kind of incorporated that into
10 the direct?

11 MR. FRIZZELL: No, I do plan on crossing. Are
12 you redirecting now or do you want to --

13 MS. JONES: Yes. I do have redirect questions.
14 I just was -- okay.

15 MR. FRIZZELL: Yeah, thank you.

16 MS. JONES: I want to -- first, I want to see if
17 I want to cross anything that he just --

18 JUDGE MEALE: Take your time to review your
19 notes.

20 MS. JONES: Thank you, Your Honor.

21 I don't have any cross. Let me go to the
22 redirect.

23 REDIRECT EXAMINATION

24 BY MS. SHAVON JONES, ESQ.:

25 Q You weren't present for the testimony, but there

1 was an exhibit introduced, it's Board of Nursing's
2 Exhibit Number --

3 MS. JONES: Exhibit Number 8, counsel.

4 (Thereupon, Respondent's Exhibit 8 was entered
5 into the record.)

6 BY MS. JONES:

7 Q And this a table of your first time testers and
8 the two calculations reached by the Board of Nursing and
9 by you.

10 A Correct.

11 Q That is what that is. Okay. So when you that's
12 correct, you didn't say it loud enough for the Court to
13 hear.

14 A I apologize. That's correct.

15 Q Okay. And so you were reaching a calculation of
16 75 percent, and it may be a bit confusing as to how you
17 were getting there. So I think we need to clear that
18 up. I want to give you two other exhibits that I think
19 we have some testimony on those would clear up how you
20 were getting the 75 percent. One is the Board of
21 Nursing's Exhibit Number 11, and are you familiar with
22 this particular --

23 A Yes, this is the clerk order from May 3rd. This
24 was a clerk order that put us -- that they accepted our
25 remediation plan for 2017 and put us on probation.

1 (Thereupon, Respondent's Exhibit 11 was entered
2 into the record.)

3 BY MS. JONES:

4 Q So this Exhibit Number 11 is the Board of
5 Nursing's order placing the program on probation?

6 A Correct.

7 Q Okay. And then there's one other order that we
8 kind of need to testify about. And it is EEI's Exhibit
9 J. And these are already exhibits that have been
10 admitted into the record.

11 Are you familiar with Exhibit J?

12 A Yes. This is February 23, 2018, the Board of
13 Nursing clerk order requesting to extend our probation.

14 (Thereupon, Petitioner's Exhibit J was entered
15 into the record.)

16 BY MS. JONES:

17 Q Okay. So I want to start with Exhibit J, this
18 notice extending your probation.

19 What were you seeking -- let me start with --
20 did you attend a public meeting on February 8th of 2018?

21 A Yes. I received a letter to attend.

22 Q Okay. What relief were you seeking at the
23 public meeting? What did you want the Board to do for
24 you at the public meeting?

25 A To remove EEI off of probation.

1 Q Okay. On what basis were you entitled to have
2 your probationary status removed?

3 A Based on meeting the Florida standards from the
4 May 3, 2017 work order.

5 Q Okay. Exhibit 11?

6 A Yes, sorry.

7 Q From Exhibit 11. Okay.

8 And what in Exhibit 11 -- how did you meet these
9 standards in Exhibit 11?

10 A Okay. So the May 3, 2017 says that the students
11 who take the licensure examination within six months
12 after graduation from the program that is not more than
13 10 percent below lower than the average pass rate during
14 the same calendar year for graduates that I would come
15 off -- EEI, I apologize, would come off of probation.
16 So by what I calculated, I would be at 75 percent, which
17 literally, I think I was right there. I think it was at
18 74 point something if I'm right for the Florida
19 standard.

20 Q Okay. So let me -- if your answer was a bit
21 confusing, it's because my question was bad, so I need
22 to rephrase my question.

23 Okay. Did the six-month rule -- and I think you
24 testified to this earlier with counsel. Did the six-
25 month rule -- was the six-month rule in place on May 3,

1 2017 when the school was put on probation?

2 A Yes.

3 Q And Exhibit 11 -- does Exhibit 11 include
4 reference to the six-month rule?

5 A Yes.

6 Q Okay. Did you contest Exhibit 11 with being
7 placed on probation?

8 A Exhibit --

9 Q Yes, did you contest this order, this clerk
10 order dated May 3, 2017 placing the institution on
11 probation?

12 A No.

13 Q Did you think that this order dated May 3, 2017
14 was enforceable?

15 A Yes, it's a clerk order.

16 Q Okay. Did the Board in fact place the
17 institution on probation pursuant to this order?

18 A Yes.

19 Q So it changed your status from approve to
20 probationary on its website and in the public records?

21 A That's correct.

22 Q Okay.

23 A The CIE also made us have the students that come
24 in to enroll sign an acknowledge form that we are on
25 probation.

1 Q And the CIE is the Department of Education
2 Commission for Independent Education?

3 A Yes. Sorry.

4 Q It's okay. So from now on, we'll call them CIE.
5 Did you comply with the May 3, 2017 order -- did
6 you comply with the May 3, 2017 order?

7 A Yes. I believe I did. It said that graduate
8 pass rate for the first-time test takers who take the
9 test within six months after graduation and pass, and as
10 long as my pass rate was not more than 10 percent below
11 -- 10 percent points lower than the average pass rate,
12 so I was -- the way I calculated it, I was at 75
13 percent.

14 Q Okay. So both the Board of Nursing and EEI
15 proceeded as if this particular notice was enforceable
16 because they placed you on probation and you went about
17 complying with this notice; is that a correct statement?

18 A Correct.

19 Q Okay. The law changed on June 23, 2017; is that
20 correct?

21 A Correct.

22 Q Did the Board issue a new order on or after June
23 23, 2017 nullifying this -- this May 3, 2017 order
24 placing you on probation?

25 A No.

1 Q Okay. When did you learn that the Board was not
2 going to follow this order and remove your probation?
3 When did you learn that the Board was nullifying this
4 order?

5 A When we went to the -- when I went to the public
6 nursing meeting in February of 2018.

7 MR. FRIZZELL: Your Honor, I'm going to object.

8 This is the first time this argument has been made
9 about this nullification of the -- of the 2017 order.

10 JUDGE MEALE: Overruled.

11 BY MS. JONES:

12 Q Was there any communication with anyone at the
13 board prior to the meeting on February 8, 2018? Was
14 there any communication by mail or telephone or any
15 email, any kind of way? Did you talk to anyone before
16 February 8th when you went to the meeting? How did you
17 know to go to the meeting?

18 A I was sent a -- I was sent a -- I'm so sorry,
19 I'm losing my mind, a letter to appear.

20 Q Okay. Approximately when did you receive this
21 letter to appear at the --

22 A I want to say it was around close to the end of
23 January.

24 Q Okay. This notice to appear, there was some
25 testimony before, would that be a public meeting notice?

1 Is that your understanding when you get a notice to
2 appear that's a public meeting that you're supposed to
3 appear at?

4 A Yes.

5 Q Okay. So you received this public meeting
6 notice sometime at the end of January and what did you
7 do then? What, if anything did you do after you
8 received the notice -- this is a printed notice, a mail
9 notice or an email -- how -- what kind of notice is
10 this?

11 A It was an email that came before the -- before
12 the annual numbers came out for 2017.

13 Q So you get an email and you then go to the
14 meeting, or do you do something else before you go to
15 the meeting? Does anything happen between when you get
16 the email saying go to the meeting on February 8th or do
17 you just show up at the meeting on February 8th?

18 A No, I just show up at the meeting.

19 Q Okay. So I don't have the meeting -- the
20 meeting notice is not a part of the record, so if you
21 don't remember, that's fine, but do you remember what
22 the meeting notice said about your scores? Did it say
23 anything about your scores or?

24 A I think I might have it my bag, but I'm not
25 sure. I don't -- I don't -- I don't recall to be

1 honest.

2 Q Okay. That's fine.

3 A And I could have left it in the car, so, no, I
4 don't.

5 Q Okay. That's fine. Does -- so now you're at
6 the February 8, 2018 public meeting, what was the -- we
7 may need that notice because we need to know what the
8 purpose -- what was the purpose for you going?

9 A The letter did talk about -- about -- it was
10 either they were going to review extending my probation
11 for another year or -- oh, yes, they were going to
12 extend my probation for another year or they were going
13 to terminate my nursing program.

14 Q Okay. Did you ask the board for any other
15 relief beyond what they offered, extension or
16 termination, did you ask for anything else, any other
17 relief?

18 A At the meeting?

19 Q Yes, or at any time. Did you ask them to do --
20 to do anything different?

21 A I had reached out to Ms. Sutton and spoke with
22 her over the phone. She had just mentioned to show up
23 to the public meeting and it would be discussed there.

24 Q Okay. Turning now to Exhibit J. I have
25 highlighted there, and I guess I need to point out to

1 counsel where I'm highlighting.

2 MS. JONES: Counsel, I'm in the first paragraph
3 at the last three sentences -- the last three lines
4 of the first paragraph of Exhibit J.

5 MR. FRIZZELL: Okay.

6 BY MS. JONES:

7 Q Is this the relief that you asked the board for
8 at the February 3 -- the February 8, 2018 public
9 meeting?

10 A Yes.

11 Q So that refreshed your memory.

12 A Yes, I'm sorry. Yes, when they called us up, we
13 did request that. That is correct.

14 Q So the court may not have that in front of --

15 A I apologize --

16 Q -- in front of the Court. So what relief did
17 you ask the Board for at the public meeting?

18 A EEI requested that the Board base the school's
19 2017 pass rate upon only first-time test takers who took
20 the test within six months of graduation.

21 Q Okay. What, if anything, did the Board say
22 during your -- when you made your motion?

23 A The lawyer that was there had -- I believe she
24 said it would be noted, but that she had denied, and
25 that the probation would stay. I could be using the

1 wrong terminology, due to the statute being changed in
2 June.

3 Q Okay. Did -- did the Board or the Board's
4 counsel or anyone representing the Board say why it was
5 nullifying your May 3rd -- Exhibit 11, which says that
6 you could have your probation removed if your six-month
7 testers met the statutory passage rate?

8 A Their lawyer mentioned something, something
9 about they went back to -- I think 2016 and they changed
10 the numbers that the way that they interpreted the
11 legislation change.

12 Q Okay. I think I understand that.

13 A Sorry.

14 Q No. No. No. It's always the questioner, it's
15 never the witness. So I need to ask it differently.

16 A They were going backwards to previous testers.

17 Q Okay. Did the -- did the board either at the
18 meeting or at any time afterward show you the part of
19 the statute that required them to go backward as you
20 said to -- to go backward as you testified?

21 A No.

22 Q No.

23 I'm going to show you another exhibit. This is
24 -- this is Exhibit -- Petitioner's Exhibit D3. It's
25 emails between Diane Gilmet (phonetic) and Ms. Janet

1 Dogue (phonetic). I don't believe you've seen these
2 before.

3 Are you familiar with these -- with these
4 emails?

5 A I just saw them once prior.

6 (Thereupon, Petitioner's Exhibit D3 was entered
7 into the record.)

8 BY MS. JONES:

9 Q When did you see them?

10 A Just a few minutes before we came in.

11 Q Oh, okay. So looking at my binder, you saw
12 them?

13 A Correct. Correct. But not prior to today.

14 Q Okay. Okay. Could you -- what is the date of
15 these -- this email correspondence between Ms. Gilmet
16 and Ms. Doque?

17 A November 17, 2017.

18 MR. FRIZZELL: I'm going to object to hearsay.

19 JUDGE MEALE: I don't have that exhibit in front
20 of me. Hold on.

21 MS. JONES: The date is hearsay or the exhibit
22 itself is hearsay? The exhibit has already been
23 admitted into -- into evidence.

24 MR. FRIZZELL: Yes, I understand, but she is
25 neither noted on here on in any part -- in any part

1 of this email.

2 MS. JONES: Okay.

3 JUDGE MEALE: So what was the question to which
4 you objected?

5 MR. FRIZZELL: I'm objecting to the -- to the
6 use of the email that's hearsay.

7 MS. JONES: Okay. I'm not offering it for the
8 truth. I'm offering it to -- the question I asked
9 her was did someone at the board show her this rule.
10 I didn't ask her if this rule was correct or not.

11 JUDGE MEALE: Overruled.

12 BY MS. JONES:

13 Q Has anyone at the board ever shown you this
14 rule, this email with the rule in it? And really we're
15 just looking at the -- I should

16 A No, no one has showed me this.

17 Q And you said the date of the rule -- now that
18 you've seen the rule, have you seen it -- have you heard
19 it before -- this is the rule I mean, the Board need to
20 apply the law --

21 A Oh, "the Board need to apply the law/rule as
22 effective the time a ruling, no need for the custom
23 report, just base all the numbers on all the first-time
24 time test takers." Yes, that's what the lawyer said --
25 when we went up in February of 2018, when we asked to

1 come off of probation. That's what Ms. Diane -- I don't
2 know how to say her last name, I apologize, had said,
3 something to that effect.

4 Q Was that the first time that anyone at the Board
5 had explained this policy or rule to you regarding the
6 board needing to apply the law in effect at the time of
7 the ruling?

8 A You mean at the meeting?

9 Q Yes.

10 A Yes.

11 Q Okay. So yeah at the meeting was the first time
12 that you were provided with this policy?

13 A Correct.

14 Q So the first time you learned of the policy that
15 was being applied against you was at your hearing where
16 the policy was being applied?

17 A Correct.

18 Q You had no prior notice of what the policy was
19 that was --

20 A No.

21 Q And based upon this policy, they rejected your
22 contention that your pass rate was 75 percent?

23 A That is correct.

24 Q The Board, when I say, "they," I mean the Board
25 rejected? Okay.

1 MS. JONES: I have nothing further on redirect.

2 MR. FRIZZELL: Your Honor, may I -- may I
3 rehabilitate or redirect as well?

4 JUDGE MEALE: Sure.

5 MR. FRIZZELL: Thank you. And I'll keep this
6 brief.

7 REDIRECT EXAMINATION

8 BY MR. TIMOTHY FRIZZELL, ESQ.:

9 Q Ms. Ugalde, would you please -- I'm going to
10 direct you to go back to Exhibit 11, which was the
11 notice of intent to place program on probation, and I'm
12 going to ask you to look at that and please point out on
13 this -- on this -- on this particular exhibit, where
14 does it say what steps you need to take in order to
15 remove yourself from probation?

16 A You said Exhibit 11, correct?

17 Q Yes, this is the -- this is the May of 2017
18 notice of intent to place program on probation.

19 A What steps. I'm sorry, I'm just reading through
20 it.

21 Q That's fine. Just take your time.

22 A Are you meaning where it says, "an approved
23 program must achieve a graduate pass rate"?

24 Q No, what I'm asking you -- what I'm asking you
25 is where does this order that your counsel has argued

1 has been nullified by the Board, where does this order
2 state what steps you need to take in order to remove
3 yourself from a probation?

4 MS. JONES: Take your time.

5 THE WITNESS: I'm not understanding what he's
6 asking. I'm sorry.

7 BY MR. FRIZZELL:

8 Q What I'm asking is does this -- does this order
9 that is merely applying the law that existed at the time
10 that they made the determination in May of 2017?

11 A Well, it says that I'm to remain on probation
12 until I achieve the graduate pass rate that equals or
13 exceeds the required pass rate for one calendar year,
14 which is what I did based on the May 3, 2017 clerk
15 order.

16 Q But you would agree that the Board of Nursing
17 simply applied the law and reviewed your program based
18 upon the law that was in effect of May of 2017 pursuant
19 to this order, correct?

20 A I'm sorry. I'm a nurse, I don't understand some
21 of the questions you're asking. Can you repeat that
22 again?

23 Q Would you agree that the Board of Nursing simply
24 applied the law as it existed to -- as it existed in May
25 of 2017 to EEI's ADN program in May of 2017?

1 A How it existed then?

2 Q Yes.

3 A Yes.

4 Q And when the Board reviewed AEI's scores in 2018
5 or 20 -- yeah, 2018, didn't they simply apply the law as
6 it existed in April or in February 2018? How is that
7 any different than what they did in May of 2017?

8 A Okay. When they -- I'm just rephrasing --

9 Q They applied the law as it existed to put your
10 program on probation --

11 A Okay.

12 Q -- on the date they decided to put your program
13 on probation, didn't they simply apply the law as it
14 existed on the date they voted to extend your probation
15 in February of 2018?

16 A Yes, but I wasn't notified of the law being
17 changed. I was under the impression the clerk order was
18 still in effect.

19 Q So I'm not asking if you were notified and I'm
20 not asking that, I'm asking did the Board of Nursing
21 simply apply the law as it existed in February 2018?

22 MS. JONES: Calls for a legal conclusion.

23 JUDGE MEALE: Excuse me.

24 MS. JONES: It calls for a legal conclusion.

25 JUDGE MEALE: Sustained. Move on.

1 MR. FRIZZELL: That's all I have, Your Honor,
2 for redirect.

3 JUDGE MEALE: Okay. Are there any more
4 questions of the witness whatever label they might be
5 asked under?

6 MR. FRIZZELL; Yes, Your Honor, I am prepared to
7 give -- to take cross examination of her affidavit
8 that was submitted on October 31.

9 JUDGE MEALE: Okay. Is it okay to do that now,
10 Ms. Jones?

11 MS. JONES: Yes, Your Honor.

12 JUDGE MEALE: Go right ahead, Mr. Frizzell.

13 MS. JONES: I'm going to give her a copy of her
14 affidavit so that she has it --

15 MR. FRIZZELL: Yeah, I have her affidavit here
16 as well.

17 And I apologize -- I apologize, Ms. Ugalde, I
18 may -- this may cover some of the same -- the same
19 area, and I apologize for that. These were done --
20 these questions were drafted separately, and usually
21 these two processes are done quite a bit apart, so I
22 will try to keep the duplicative nature of my
23 questions to a minimum, but that might not be
24 possible.

25 THE WITNESS: Okay.

1 MR. FRIZZELL: Just I apologize.

2 THE WITNESS: That's okay.

3 CROSS EXAMINATION

4 BY MR. TIMOTHY FRIZZELL, ESQ.:

5 Q Ms. Ugalde, you stated in your affidavit that
6 you acquired EEI on December 21, 2016; is that correct?

7 A That is correct.

8 Q And at that time EEI had an NCLEX pass rate of
9 around 17.39 percent; is that correct?

10 A Yes, but I didn't -- I didn't -- I apologize. I
11 did not know that pass rate until sometime in I believe
12 I was February of 2017 when the numbers come out -- came
13 out.

14 Q What was the pass rate to your knowledge for, I
15 guess at that point, it would have been 2015 --

16 A Correct. Yes, I knew it was ppor.

17 Q Okay. So you also state that before you
18 acquired EEI you spent time with the practicing
19 registered nurse, a nurse educator, and two years as the
20 director of nursing?

21 A Director of nursing -- at another school,
22 correct.

23 Q So is it fair to say that you were quite
24 familiar with the requirements that the Board of Nursing
25 and the legislature had placed on nursing programs in

1 Florida?

2 A Yes, a lot had changed over the years.

3 Q Okay. And as you stated, you developed a
4 strategy working within the then existing rules and
5 statutes to significantly improved EEI's NCLEX passage
6 rate; is that correct?

7 A That is correct.

8 Q When the Board placed EEI on probation in April
9 of 2017, it used the passage rates based on students who
10 completed the ADN program before you purchased EEI,
11 correct?

12 A Correct.

13 Q And are you aware of the difference between a
14 rule and a statute, specifically that a statute is
15 requirement codified by law, by the legislature, that a
16 rule is requirement established in this case by the
17 Board of Nursing?

18 A I'm sorry, that time you did talk --

19 Q The difference between a rule and a statute.

20 A You did talk a little fast that time. I'm
21 sorry.

22 Q Okay. Do you know the difference between a rule
23 and a statute?

24 A I believe I do.

25 Q Okay. So are you aware that a statute is a

1 requirement that's codified by the legislature?

2 A Yes.

3 Q Okay. And that a rule would be something that
4 would be established by EEI?

5 MS. JONES: By the Board? By EE --

6 BY MR. FRIZZELL

7 Q I'm sorry. I apologize. By the Board of
8 Nursing. I would say it's been a long day, but.

9 A Yes.

10 Q Okay. I asked because you refer to the
11 statutory requirement that excludes students who
12 graduated more than six months prior to taking the NCLEX
13 exam as the six-month rule. Are you aware that that was
14 enacted by the -- that was enacted by the legislature
15 and not by the Board of Nursing?

16 A I don't recall to be honest.

17 Q In April of 2017, the statutory requirement was
18 that students who tested more than six months after
19 graduation were excluded from EEI's passage rate
20 calculation; is that correct?

21 A That's correct.

22 Q Okay. The Board of Nursing applied the laws
23 that existed in April of 2017 when placing the ADN
24 program on probation, correct?

25 A Correct.

1 Q You state that the Board of Nursing confirmed
2 that EEI was only responsible for testers who sat within
3 six months of graduation, and that the program would be
4 taken off probation if your 2017 six-month testers
5 achieved Florida's 2017 pass rate; is that a correct
6 statement?

7 A Yes, based on the clerk order I received.

8 Q But you said -- so you said that you confirmed.
9 How did you confirm it, with the court order?

10 A From May 3, 2017, the clerk order I received.

11 Q Okay. So then you say in your affidavit that
12 you and your team implemented a rigorous remediation
13 plan to address the deficiencies that led to poor NCLEX
14 results achieved under the prior owner. Can you please
15 provide the specific changes you implemented to address
16 those decisions? You did address it in some in your
17 cross, I apologize.

18 A That's okay. That's okay. Do you need me to
19 restate?

20 Q Yes, please.

21 A I had -- I had to assess the current nursing
22 faculty. I had to bring in nursing faculty that was
23 qualified in their actual specialty area. I had to
24 bring in the exit exams as well as evolve with the HESI
25 and implement the 850 Rule.

1 MS. JONES: Feel free to explain those things.

2 If you want her to. If you don't need her to, just
3 keep going.

4 MR. FRIZZELL: That's fine, we can get it.

5 BY MR. FRIZZELL:

6 Q Were all your then enrolled students held to the
7 same standard? All --

8 A Yes, actually.

9 Q -- all students that were enrolled at that time
10 held to your same standard?

11 A Yes, we actually -- we actually went back at
12 that point and made them sign an addendum stating that
13 they needed at that point that they would be responsible
14 for taking exit -- specialty exit exams in the current
15 nursing courses they were in, and they were expected to
16 pass at a certain score.

17 Q Including those who had been admitted under the
18 prior owner, I believe that's what you just stated?

19 A Yes. They hated me. They probably still do.

20 Q And I think -- I think the results speak for
21 themselves, so, ultimately, those efforts were
22 successful, correct?

23 A Correct.

24 Q So by the end of 2017, you believed that you had
25 achieved a passage rate of 75 percent on NCLEX; is that

1 correct?

2 A That is correct.

3 Q Were you aware at that time that the legislature
4 had changed the law governing nursing schools?

5 A Governing -- meaning the six-month change?

6 Q Yes. And any other change that affected your
7 program?

8 A No, not about -- no.

9 Q And as owner of EEI and the director of the
10 nursing program, isn't it part of your responsibility to
11 be aware of the legal requirements which affects your
12 school and program?

13 A Yes.

14 Q What steps did you have in place to assure that
15 you remained aware of the changing steps or
16 requirements?

17 A I attended every was it quarterly board nurse
18 meetings that Ms. Sutton had.

19 MS. JONES: Explain that.

20 THE WITNESS: Ms. Sutton sends out -- I believe
21 it's Ms. Sutton, she sends out a quarterly conference
22 call that instructors of nursing are required --
23 well, not required, but invited to attend to discuss
24 for example the nurse compact licensure change and
25 recent changes, and I was on all of the conference

1 calls for 2017 and I did not recall hearing that the
2 statute was changed.

3 BY MR. FRIZZELL:

4 Q So you would consider that the response is
5 solely the responsibility of the Board of Nursing to
6 inform you of a change in a law that affects your
7 program?

8 A Well, those weren't the only calls. I mean, I
9 also am part of the Fanze (phonetic), you know, I've
10 also been part of other -- other resources as well.

11 Q But none of them inform -- none of them made you
12 aware of the changes in the statute -- of the statutes?

13 A NO.

14 Q Did you at any point contact the board of
15 nursing to determine how the change in law would affect
16 your program?

17 A You mean after I was made aware?

18 Q No, before. Sometime during 2017, did you let
19 the Board of Nursing -- did you find out what impact
20 the change of the law would have on your program?

21 A No, because I didn't know the law had changed.

22 Q Okay. Therefore, based upon your understanding,
23 the law that's been in existence in December of 2017
24 remained in effect for all of 2017?

25 A The law that was in affect for --

1 Q So, in other words, the law didn't change at all
2 from the moment that you acquired EEI to at least
3 December of 2017 according to your understanding; is
4 that correct?

5 A I'm just talking about the six-month rule.

6 Q No, I understand, but -- okay, so talking about
7 -- so, specifically, addressing the six-month rule --

8 A Correct.

9 Q Well, we'll call it a six-month statutory
10 obligation because it wasn't a rule.

11 A Okay. I apologize.

12 Q It's okay. So as far as you were concerned,
13 that stat -- that specific requirement was in effect for
14 all of 2017 until you learned differently correct, in
15 2018?

16 A That is correct.

17 Q Okay. And you operated your program
18 accordingly?

19 A That is correct.

20 Q You stated in paragraph 18 of your affidavit
21 that it was your business practice to instruct students
22 to sit for the NCLEX within six months of graduation to
23 avoid spending the month taking a refresher course the
24 Board had required prior to the new law; is that
25 correct?

1 A (Reading.)

2 Q You want me to repeat, I'm sorry, that probably
3 was --

4 A No, no, no. It's okay. I'm just reading what
5 18 says, you're correct.

6 Q Okay. So but that requirement wasn't instituted
7 based upon the Board, it was -- it was a legislative
8 requirement, correct?

9 A Again, I'm sorry, I'm not a lawyer. I don't
10 understand.

11 Q I understand.

12 A My motto has been, I'm just a nurse, I don't --

13 Q No problem.

14 So before learning of the change in the law,
15 what was your standard business practice regarding the
16 older students, the one who failed to pass within six
17 months of graduation?

18 A The ones that failed the NCLEX within six months
19 of graduation?

20 Q Who failed to pass within six months. What was
21 your -- before learning of the change in the law, what
22 was your standard business practice regarding older
23 students, the ones who failed to pass within six months
24 of graduation?

25 A I think we discussed this prior.

1 Q We discussed it in your direct. I'm asking you
2 this as part of your cross.

3 A Sorry.

4 Q It's okay.

5 A That -- well, I had implemented where they sign
6 an acknowledgment form that they are to come and take an
7 EEI NCLEX bootcamp as well as on the outside take an
8 approved remediation course.

9 Q And did that include any students who graduated
10 in 2016 or before?

11 A 2016 or before? Well, we did our best to reach
12 out to them. We did have one student that he did come
13 back and took our NCLEX and was able to pass on the
14 third try.

15 Q But that was after you learned of the change in
16 the law, not before, correct?

17 A I don't recall to be honest. I'm sorry.

18 Q Okay. And you state that -- in paragraph 19 of
19 your affidavit that the -- that the change in the law
20 changed the way you do business with respect to older
21 graduates; is that correct?

22 A Correct.

23 Q And that you spent days looking through boxes of
24 records to identify and track down older graduates who
25 had not tested, correct?

1 A Correct.

2 Q That you attempted to convince them to not
3 take the NCLEX without a review course, even though the
4 statute requiring a review course had been eliminated,
5 correct?

6 A Correct.

7 Q Why had you not already spent time to track
8 down and identify these old -- to identify these older
9 graduates to ensure that they had taken a licensed
10 examination preparatory course before taking the NCLEX?

11 A Okay. Well, when I first came in, I was the
12 owner, I was not the director of nursing. I was told
13 that this was already done. So when I took over the
14 director of nursing role, there was a reason I had to
15 take over the director of nursing role was because she
16 was terminated because she was not performing her role
17 to her duty. So at that point, I had to realize of what
18 was not being completed, and then I had to dig back into
19 things that needed to be completed again.

20 Q So when you took over the director of nursing
21 program, did you look and make sure that these students
22 had been contacted?

23 A Well, it said -- though something might have
24 stated that they were contacted, I didn't take the -- I
25 didn't take that person's word for it, and I personally

1 reached out to every graduate and --

2 Q But that was after finding out that the statute
3 changed, correct?

4 A That was -- I'm sorry, I didn't hear.

5 Q You reached out to every graduate personally
6 after you found out that the statute had changed,
7 correct?

8 A After the statute changed --

9 Q After you learned of the statute -- so you said
10 you personally reached out to each and every student who
11 had graduated. When was that?

12 A Well, I still do that.

13 Q Did you begin doing that before or after you
14 found out that the statute changed?

15 A I did it more after the statute changed because
16 I was director of nursing at that point.

17 Q Okay. But you've been director of nursing since
18 April of 2017, correct?

19 A That is correct.

20 Q Why did you have to assert so much effort then
21 to identify and contact the older graduates when you
22 already had an affirmative statutorily imposed
23 obligation to do so?

24 A What are you meaning?

25 Q Well, you said that you had to go through all

1 this effort to locate the older graduates and identify
2 and contact them, but you already had an affirmative
3 statutory obligation to make sure that was done, why
4 then did you have to go through all that effort after
5 you learned that the statute change?

6 A Well, I wanted to make sure that it was done. I
7 wanted to confirm, even though the older director of
8 nursing had told me that this was done, I wanted to
9 confirm that it was done because these numbers were
10 going to affect my overall NCLEX.

11 Q Whereas before they were not?

12 A I wouldn't say that they would not, but they
13 weren't included.

14 Q Right, so they wouldn't affect your NCLEX score
15 because they weren't counted?

16 A Correct.

17 Q So that statutory requirement wasn't going to be
18 a high priority for you, was it?

19 A Sure.

20 Q Paragraph 20, you state that single students who
21 graduated in June of 2016 but waited until July 22nd of
22 2017 to take the NCLEX, "represent the difference
23 between EEI meeting the Florida pass rate standard under
24 the Board's calculations, and EEI not meeting the
25 Board's standard as applied by the Board." Is that

1 correct?

2 A Correct.

3 Q Can you go into what you mean by that, because I
4 look at the exhibits and specifically the Respondent's
5 Exhibit Number 8, which you've already seen today, and
6 it appears to me that there were three students that
7 graduated in 2016 that failed. So I just need kind of
8 the map that you come to in order to make that
9 statement?

10 A She was one of the three students that
11 graduated --

12 Q Why is she -- why is she the one that caused you
13 to fail to meet the Board's -- the statutory
14 requirement?

15 A Well, because she is graduated in June of 2016
16 and waited over a year to take the NCLEX.

17 Q Right, but my review, there are two other
18 students that while they didn't wait a year, they
19 certainly waited more than six months?

20 A Correct.

21 Q And then didn't pass.

22 A Correct.

23 Q I'm just curious as to why you singled out
24 Ms. Menendez -- Mendez.

25 A She was just used as an example.

1 Q Okay. But you say a single student represents
2 the difference between EEI meeting and not meeting that
3 requirement?

4 A How are you wanting me to respond? Is that a
5 question?

6 Q Well, I'm just kind of curious as to where that
7 math came from, that's all.

8 You stated that Ms. Mendez tested fewer than 30
9 days after the law changed, so you could not find her
10 and prepare her for the test? When did Ms. Menendez --
11 Mendez graduate from EEI's ADN program?

12 MS. JONES: Just referencing her chart,
13 otherwise she wouldn't know --

14 MR. FRIZZELL: That's okay.

15 JUDGE MEALE: Did you just say June of 2016?

16 MR. FRIZZELL: I think we did.

17 JUDGE MEALE: Well, yeah. I trust you. I hope
18 the witness does, so --

19 MR. FRIZZELL: Very good.

20 JUDGE MEALE: 2016. Move on, Mr. Frizzell.

21 BY MR. FRIZZELL:

22 Q So she didn't test until June of 2017. Didn't
23 that give you almost seven months to identify, locate,
24 and inform Ms. Menendez that she was not to sit for the
25 NCLEX before taking a prep course?

1 A Okay. Again, as I have stated before, I was not
2 the director of nursing. There were other people that
3 were in this role. I was also the owner taking over a
4 school that had many areas of deficiencies, and my
5 priority has always been students are number one and
6 that's what I was taking care of was many road blocks.
7 And there was a director of nursing that was supposed to
8 be dealing with this.

9 Q So you claim that much harm has been inflicted
10 by the Board's interpretation of the changes to 464.019,
11 that's the six-month statutory requirement by now
12 requiring you to seek out and make sure that your older
13 graduates take a preparatory -- preparatory course
14 before sitting for the NCLEX; is that correct?

15 A Correct.

16 Q Are you aware that that -- that actual
17 requirement was removed from the statute in June 23,
18 2017?

19 A Was removed in June of when? I'm sorry.

20 Q June 23rd of 2017, that that is no longer a
21 statutory obligation?

22 A Yes, I am aware of that now, yes.

23 Q Do you claim that the harm you now suffer is a
24 result of the duty now imposed upon you by the
25 legislator -- legislature to identify these older

1 graduates to make sure -- certain they take a prep
2 course, but under the Florida statute, you were already
3 under an affirmative duty to be doing that, correct?

4 A Correct.

5 Q Your school is under -- was under an affirmative
6 duty prior to June 23, 2017 to seek out graduate
7 students, regardless of whether or not you did it, there
8 was an affirmative duty, correct?

9 A Correct.

10 Q And that -- that affirmative duty has now been
11 removed by the legislature --

12 JUDGE MEALE: Okay. We've covered that. Move
13 on.

14 MR. FRIZZELL: Yes, Your Honor. Give me one
15 second, Your Honor. I want to see which other
16 questions I still have written down that I want to
17 ask so we can stop wasting our time.

18 JUDGE MEALE: Okay. Raise the bar a little bit,
19 Mr. Frizzell.

20 MR. FRIZZELL: I will try, Your Honor.

21 JUDGE MEALE: Thank you.

22 MS. JONES: Your Honor, the Witness has asked
23 for a five-minute break if she can, a restroom break.

24 JUDGE MEALE: Okay.

25 (Thereupon a short break was taken.)

1 (Deposition resumed.)

2 COURT REPORTER: Back on, Your Honor.

3 MR. FRIZZELL: Your Honor, I have gone through
4 my questions, and I only have a couple of more
5 questions.

6 BY MR. FRIZZELL:

7 Q I'll just repeat that last question.

8 Ms. Ugalde, in paragraph 24, you mention the
9 cases pending before Judge Chisenhall. Do you have
10 personal knowledge of the facts surrounding those cases?

11 A No, I do not.

12 Q Are the schools represented before Judge
13 Chisenhall directly related to EEI?

14 A NO.

15 Q And I just have one final question. Did you at
16 any time, either when you were purchasing the --
17 deciding to purchase the program or after you found out
18 that the law had changed or any time in between,
19 establishing a new ADN program with the Board of
20 Nursing?

21 A Did I ever discuss establishing a --

22 Q Yes, instead of purchasing a program or just --
23 because you mention I think in paragraph 24 that you
24 were not able to start a new ADN program, and I'm just
25 wondering if you ever had a conversation about starting

1 a new ADN program with the Board of Nursing or anyone -
2 anyone -- with anyone with the state?

3 A I don't recall to be honest.

4 MR. FRIZZELL: That's all the questions that I
5 have.

6 JUDGE MEALE: Okay. Ms. Jones?

7 MS. JONES: Can I just clear up one issue.

8 RECROSS EXAMINATION

9 BY MS. SHAVON JONES, ESQ.:

10 Q There was a bit of testimony earlier about a
11 duty to inform students to -- a pre-existing duty to
12 inform students who didn't sit for the exam within six
13 months that they needed to take a review course. Do you
14 remember that?

15 A Correct.

16 Q Okay. When would you have given a graduate of
17 EEI this notice that they needed to sit within six
18 months or they would have to take a review course?

19 A The time they would have enrolled. When the
20 students enrolled under me.

21 Q Okay. Would you also notify a student that they
22 needed to sit for the exam at the time of graduation?

23 A Yes. We also go over it in their last semester
24 of nursing as well.

25 Q When you say, "in their last semester of

1 nursing," you mean in a class -- in a course that
2 they're taking they're told that they need --

3 A Right, right. Before they graduate.

4 Q In a class that --

5 A Class, yes.

6 Q Okay. Okay.

7 A I apologize.

8 Q Okay. And what was the institution's role in
9 notifying the Board of Nursing about who could sit for
10 the exam -- what was the -- what was the institution's
11 role in notifying the Board of Nursing of which of your
12 graduates was eligible to sit for the exam? How -- how
13 did you do it, when I say, "what was your role," how did
14 you go about notifying the Board of Nursing which of
15 your graduates could sit for the exam?

16 A Under me?

17 Q Yes.

18 A Once they're cleared and they meet all the
19 requirements under me, we have to submit a roster to the
20 Board of Nursing, I think it's called to MQA and that
21 says that they're approved to sit for their NCLEX.

22 Q When -- when is that roster submitted to the
23 Board of Nursing?

24 A Usually anywhere from a couple weeks after
25 graduation to 30 days depending on when all the grades

1 are -- come back from their instructors.

2 Q Okay. Is a new notice sent to the Board of
3 Nursing after a graduate has been -- after -- six months
4 after graduation, do you send a new notice to the Board
5 of Nursing regarding eligible?

6 A NO.

7 Q Okay. And last thing, this roster, is this --
8 this is Board of Nursing's Exhibit 3. Is this a sample
9 of the roster that you might submit to the Board or
10 Nursing -- or any of these, 3, 4, 5, all of these, are
11 these examples of the type of roster that is submitted
12 to the Board of Nursing regarding who is eligible to sit
13 for the NCLEX --

14 A Yes.

15 Q -- from the institution?

16 A Yes.

17 (Thereupon Exhibits 3, 4, and 5 were entered
18 into the record.)

19 JUDGE MEALE: Okay. Mr. Frizzell, anything
20 else?

21 MR. FRIZZELL: No, sir.

22 JUDGE MEALE: Okay. Thank you, Ms. Ugalde.

23 MS. JONES: Judge, can we -- and maybe this
24 isn't the appropriate time to do this, but there were
25 exhibits attached to our affidavit that we want to

1 move into evidence. Can we do that now or am I
2 supposed to do it some other time?

3 JUDGE MEALE: No, no, now sounds good. Let me
4 open up the affidavit.

5 MS. JONES: Counsel, has Exhibit 12, your
6 Exhibit 12 the contract already been admitted. I
7 can't recall. Did you admit --

8 MR. FRIZZELL: I don't believe that we did. We
9 were planning on introducing that Ms. Ugalde, but
10 decided that it wasn't necessary, but, no, it has
11 not.

12 MS. JONES: Okay.

13 MR. FRIZZELL: Obviously, no objection.

14 JUDGE MEALE: Do we want to add the asset
15 purchase agreement?

16 MS. JONES: Yes.

17 THE COURT: All right. Exhibit 12 is admitted,
18 that is Respondent Exhibit.

19 (Thereupon, Repondent's Exhibit 12 was entered
20 into the record.)

21 JUDGE MEALE: And, Ms. Jones, go ahead, more?

22 MS. JONES: And there's just one -- I think
23 there's just -- oh, there's two more. The second one
24 is Exhibit E, Petitioner's Exhibit E, and it is a
25 notice from Ms. Ugalde to Ms. Sheri Sutton at the

1 Board of Nursing that Ms. Ugalde is the -- had become
2 the new program director. It's a notice of change of
3 program director.

4 JUDGE MEALE: Okay. Any objection to Petitioner
5 E as in Edward?

6 MR. FRIZZELL: No, Your Honor.

7 THE COURT: E is admitted.

8 (Thereupon, Petitioner Exhibit E was entered
9 into the record.)

10 MS. JONES: And the last one is an email from a
11 student to Ms. Ugalde and other employees at the
12 institution just it thanks for the training that
13 helped the student pass the NCLEX.

14 JUDGE MEALE: Has that been identified
15 previously in the exhibits pre-trial?

16 MS. JONES: No, this is a new one. It's
17 Petitioner's Exhibit K for identification purposes.
18 It has not previously been submitted.

19 JUDGE MEALE: And it's what letter?

20 MS. JONES: K like karate.

21 JUDGE MEALE: Okay. K. So a thank you note.
22 And have you attached that to the affidavit?

23 MS. JONES: Yes, Your Honor.

24 JUDGE MEALE: Any objection?

25 MR. FRIZZELL: No, Your Honor.

1 JUDGE MEALE: It's admitted.

2 (Thereupon, Petitioner's Exhibit K was entered
3 into the record.)

4 MS. JONES: Those are all the new exhibits.

5 JUDGE MEALE: Okay. Let me see if I can spare
6 you that notice by identifying admitted exhibits,
7 MS. Jones.

8 MS. JONES: Okay.

9 JUDGE MEALE: I'm going to go through the
10 exhibits that have been admitted under the Institute,
11 the Petitioner, and do you have a list to see if I've
12 got it right?

13 MS. JONES: I do, Your Honor. I think -- I
14 don't think that's the issue. My concern was that if
15 they -- if they are not attached to the -- how are
16 they made a part of the record if there's an appeal
17 that goes up on appeal, how does that --

18 JUDGE MEALE: They're in my binder. I have
19 them.

20 MS. JONES: Oh, okay. And there was one that
21 was not in your binder, and so I'll send that one and
22 then they'll all be -- they'll all be there. Then
23 they'll be a part of the record, so I don't think
24 there's an issue as long as I know that they can be
25 made part of the record even though they're not

1 attached to the -- attached to the transcript.

2 JUDGE MEALE: Is it J?

3 MS. JONES: No, it was the -- it was the 2014 --
4 it was G2. It was an agency bill analysis that was
5 omitted from your original binder that we introduced
6 at the final hearing, so I just need to submit that
7 one to make sure that it becomes part of the binder,
8 and then all of them will be there as part of the
9 record.

10 JUDGE MEALE: I'll give you ten days from today
11 to file G as in Geoffrey 2. Now, I don't have J in
12 the binder.

13 (Thereupon, Petitioners Exhibit G2 was entered
14 into the record.)

15 MS. JONES: Oh, then I will send that one as
16 well.

17 JUDGE MEALE: Okay. Ten days to file that.
18 Okay.

19 MR. FRIZZELL: J is -- remind me which one is J,
20 if you don't mind.

21 JUDGE MEALE: Notice of intent for a probation
22 2/23/18.

23 MR. FRIZZELL: Yes.

24 JUDGE MEALE: I think that's E11?

25 MS. JONES: No, E11 is the 2017 notice. Similar

1 notice, but different year.

2 JUDGE MEALE: Oh, right, right. I'm sorry.

3 MR. FRIZZELL: You did say that. I apologize.

4 JUDGE MEALE: No, that's my fault. Okay. Yeah,
5 you're right. So right send me J, please.

6 MS. JONES: Yes, Your Honor.

7 JUDGE MEALE: Okay. Anything else?

8 MS. JONES: Not --

9 MR. FRIZZELL: We want to -- I'm sorry.

10 MS. JONES: Go ahead.

11 MR. FRIZZELL: Do we want to discuss when the
12 PRO will be due?

13 JUDGE MEALE: Yes, we'll do that provided that
14 we're closing the evidentiary record now.

15 So either of you based on today feel a need to
16 ask me for leave to keep the record open?

17 MS. JONES: Petitioner does not.

18 MR. FRIZZELL: We're not planning on it, Your
19 Honor. Obviously, though we will need time to order
20 this transcript.

21 JUDGE MEALE: Oh, we'll get to that. Okay.
22 Record is closed.

23 And how does ten days after the filing of
24 today's transcript suit both of you for filing, not
25 serving proposed recommended orders?

1 MR. FRIZZELL: That depends on when that day --

2 JUDGE MEALE: The first few days of December.

3 MR. FRIZZELL: Your Honor, we were really hoping
4 to be able to file it by December 21st. That would
5 give us time to order the transcript.

6 JUDGE MEALE: Okay. Okay. So PRO are due to be
7 filed on or before 12/21/18, right?

8 MR. FRIZZELL: Is that okay with you, Ms. Jones?

9 MS. JONES: Yes, that's fine.

10 JUDGE MEALE: Okay. Good. Anything else?

11 MR. FRIZZELL: That is all we have for today,
12 Your Honor.

13 MS. JONES: Nothing further, Your Honor. Thank
14 you.

15 JUDGE MEALE: It's been very nice working with
16 both of you, and, Ms. Ugalde thank you for your
17 participation today.

18 MR. FRIZZELL: And, Your Honor, we appreciate --
19 I appreciate you making yourself available to allow
20 us to resolve this matter today. Thank you very
21 much.

22 MS. JONES: Me as well.

23 JUDGE MEALE: Okay. Good. Well, I am glad I
24 was able to do my part as well. Again, thank you,
25 and that will be it.

1 Our hearing is over. I'm going to hang up now.

2 (Deposition ended at 3:39 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF BROWARD

I, CRISTINA BARROCAS do hereby certify that the foregoing testimony was taken before me; that the witness was duly sworn; and that the foregoing pages constitute a true record of the testimony given by said witness.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel, nor financially interested in the action.

Under penalties of perjury, I declare that I have read the foregoing certificate and that the facts stated herein are true.

Signed this 7TH day of NOVEMBER 2018.

Cristina Barrocas

CRISTINA BARROCAS

CERTIFICATE OF OATH

STATE OF FLORIDA

COUNTY OF BROWARD

I, the undersigned authority, certify that
MICHELLE UGALDE personally appeared before me and was
duly sworn.

Witness my hand and official seal this 7TH day
of NOVEMBER 2018.

Cristina Barrocas

Cristina Barrocas, Court Reporter

Notary Public, State of Florida

Commission No.: FF 923285

Commission Expiration: 10/01/2019

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERGENCY EDUCATION INSTITUTE, LLC,

Petitioner,

v.

Case No.: 18-1872

FLORIDA BOARD OF NURSING,

Respondent.

**RESPONDENT'S NOTICE OF FILING
DEPOSITION TRANSCRIPT OF MARIANNE GRIFFIN IN LIEU OF LIVE
TESTIMONY**

COMES NOW, the Board of Nursing, pursuant to Fla. R. Civ. P. 1.330(a)(3)(B), and notices the filing of the Deposition Transcript of Marianne Griffin to be used in lieu of live testimony. Ms. Griffin resides in Bloomington, MN, as evidenced by her resume, Exhibit 1 to the transcript.

Respectfully submitted, this 16th day of September 2018.

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Timothy Frizzell MARLENE K.
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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: Shavon L. Jones, Esq., at consultiiTeuulatorauards.com, this 16th day of September
2018.

/s/ Timothy Frizzell
Timothy Frizzell

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STATE OF FLORIDA

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DIVISION OF ADMINISTRATIVE HEARINGS

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Emergency Education Institute,

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Petitioner,

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vs.

DOAH Case No. 18-1872

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Board of Nursing,

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Respondent.

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TELEPHONIC DEPOSITION OF MARIANNE GRIFFIN

16

Taken September 14, 2018

17

Commencing at 9:05 a.m.

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REPORTED BY: KELLEY E. ZILLES, RPR

25

www.paradigmreporting.com

1 Telephonic deposition of MARIANNE GRIFFIN, taken on
2 the 14th day of September 2018, commencing at 9:05 a.m.,
3 at the offices of Pearson Vue, 5601 Green Valley Drive,
4 Bloomington, Minnesota, before Kelley E. Zilles,
5 Registered Professional Reporter and a Notary Public of
6 and for the State of Minnesota.

7 *****

8
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10
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19 ALSO PRESENT: Catrinia Griffith

20

21

22 NOTE: The original transcript will be delivered to
23 Timothy Frizzell, Esq., as the taking party of the
24 deposition.

25

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WITNESS: MARIANNE GRIFFIN

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OBJECTIONS 12, 14

EXHIBITS MARKED AND REFERRED TO:

Exhibit 1 Resume of Marianne E. Griffin 5

Exhibit 2 Candidates Educated in My Jurisdiction .. 5

(Original exhibits attached to original transcript.
Copies attached to transcript copies.)

1 (Deposition Exhibit Numbers 1 and 2
2 marked prior to the deposition.)

3 MARIANNE GRIFFIN,
4 duly sworn, was examined and testified as follows:

5 EXAMINATION

6 BY MR. FRIZZELL:

7 Q. Good morning, everyone, and good morning, Ms.
8 Griffin. My name is Tim Frizzell and I represent the
9 Board of Nursing, I am an Assistant Attorney General
10 with the Florida Attorney General's Office. We have
11 requested your deposition today regarding the case of
12 the Florida Board of Nursing versus Emergency Education
13 Institute. Actually, I think I wrote that down wrong,
14 it's the Emergency Education Institute versus the
15 Florida Board of Nursing.

16 I was present in your last deposition, so I know
17 you've been through this before, and I'm certain that
18 you will remember that I got to address some formalities
19 before we begin. Since this is a deposition by
20 telephone, I need to make sure that you answer clearly
21 and with a spoken answer, for instance, a spoken yes or
22 a spoken no because the court reporter, although they
23 can see you, cannot take down head nods and head shakes,
24 and we certainly can't see you.

25 A. I understand.

1 Q. I'm sorry?

2 A. I said I understand.

3 Q. Okay. Also please refrain from answering mm-hmm
4 or huh-un, even though we use those in everyday language
5 and it's certainly understandable, it doesn't really
6 translate very well into a record. If you do not
7 understand a question, please ask me to repeat it If
8 you do not know the answer to a question, I don't know
9 is a perfectly acceptable response.

10 I tend to speak very quickly, it's just a
11 personal trait, so I won't be offended if you need me to
12 slow down or reask a question. Ms. Jones may make
13 objections to any of my questions as may your attorney,
14 but since this is a deposition you will need to answer a
15 question unless there is some sort of privilege
16 involved, your attorney will then describe the privilege
17 on the record.

18 Do you have any questions for me or anyone
19 so far?

20 A. I do not.

21 Q. Okay. Did you receive a copy of the two
22 exhibits that I mailed you labeled Exhibit 1 and
23 Exhibit 2?

24 A. I did.

25 Q. Did you print out hard copies?

1 A. I did.

2 Q. Okay.

3 MR. FRIZZELL: And does the court reporter
4 have copies to mark these exhibits?

5 COURT REPORTER: I do.

6 MR. FRIZZELL: And as we go through this
7 deposition I will be asking that these exhibits be
8 marked and the court reporter needs to do that.

9 BY MR. FRIZZELL:

10 Q. I think we're ready to start. Would you please
11 state your name for the record.

12 A. Marianne Elizabeth Griffin.

13 Q. Okay. What is your current position and
14 employer?

15 A. I am the senior program manager at Pearson Vue.

16 Q. Okay. And how long have you held that position?

17 A. For nine years.

18 Q. Okay. And please describe your job
19 responsibilities?

20 A. I serve as the primary operational contact for
21 the National Council State Boards of Nursing. I oversee
22 day-to-day operations as far as projects, internal
23 projects, projects with NCSBN, and the delivery of the
24 exam.

25 Q. Okay. And I will ask you in a minute what NCSBN

1 stands for and a little bit more about Pearson Vue, but
2 first I would like you to take a look at the document
3 that we have marked as Exhibit 1.

4 A. Okay.

5 Q. Do you recognize this document?

6 A. It's my resume.

7 Q. Excellent. Does it accurately reflect your
8 education and experience?

9 A. It does.

10 Q. Okay. And what experience have you had prior to
11 your current position that helped you prepare to be a
12 senior program manager at Pearson Vue?

13 A. Prior to coming to Pearson Vue I worked at a
14 company called Personnel Decisions International where I
15 was both a program manager and a deployment consultant,
16 a project manager and a deployment consultant, and those
17 are similar roles to what I am doing here.

18 Q. Okay.

19 MR. FRIZZELL: Madam Court Reporter, I'd
20 ask that this exhibit, Exhibit 1, be marked as part of
21 the record. Thank you so much.

22 Q. Ms. Griffin, what do the acronyms NCSBN and
23 NCLEX, which we'll refer to later during this deposition
24 as NCLEX, what do they mean?

25 A. NCSBN is the National Council State Boards of

1 Nursing, and NCLEX is the National Council Licensing
2 Exam, the nursing exam.

3 Q. Okay. And in that vein can you give a brief
4 description of what Pearson Vue does and their
5 relationship with NCSBN, the National Council State
6 Boards of Nursing?

7 A. Pearson Vue is a vendor of National Council
8 and we develop content and deliver the exam.

9 Q. And do you also maintain the data for the
10 exam as well?

11 A. We do.

12 Q. Okay. What is your specific knowledge regarding
13 the contract between, and you may have already answered
14 this and I apologize, NCSBN and Pearson Vue regarding
15 the acceptance of the data recorded by Pearson Vue?

16 A. Pearson Vue collects registration data and scores
17 the exam. We house those pieces of data in our database
18 system and we enable reporting off of that database
19 through a reporting platform that we internally call
20 IntelView.

21 Q. Okay. And is that data collected during
22 your normal course of business?

23 A. It is.

24 Q. Okay. I'm going to switch gears a little bit
25 here and I'm going to ask you to describe what an NCLEX

1 number is?

2 A. An NCLEX number is a unique ID that is assigned
3 to a candidate when they register for an exam -- well,
4 when they create a profile in our system.

5 Q. Was that assigned to a candidate?

6 A. The NCLEX ID, yes.

7 Q. Okay. And do each, do each schools that have
8 candidates that graduate from those schools, are they
9 also assigned an NCLEX number?

10 A. Yes, they're assigned something called a program
11 code.

12 Q. Okay.

13 A. And it's a ten digit number.

14 Q. Very good. And is Emergency Education's program
15 code number, and I'll read this, US70705600?

16 A. Yes.

17 Q. Okay. And has that to your knowledge into the
18 records of Pearson Vue, has that number changed since
19 2015?

20 A. No.

21 Q. Okay. All right. Now I'm going to direct your
22 attention to the document premarked by us as Exhibit
23 Number 2.

24 A. I have it.

25 Q. Do you recognize this document?

1 A. I do.

2 Q. Okay. And can you give just kind a brief
3 description of what this document is?

4 A. This document is a program report for the
5 Emergency Education Institute for all candidates who
6 took the exam between 1/1/17 and 12/31, so essentially
7 the year 2017.

8 Q. Excellent. And did you generate this report?

9 A. I did.

10 Q. Okay. And is this report accurate?

11 A. Yes, it is.

12 Q. Okay. Is it based upon data that was collected
13 by, where did the data come from that was used to
14 generate this report?

15 A. From our database.

16 Q. Okay. And when did you generate this report?

17 A. On September 5, 2018.

18 Q. Okay. And was this report generated from data
19 and information regularly received by and kept in the
20 regular course of business of Pearson Vue?

21 A. It was.

22 Q. Okay. And is it the regular practice of Pearson
23 Vue to make such reports?

24 A. It is.

25 Q. Okay.

1 MR. FRIZZELL: Madam Court Reporter, I do
2 ask that this document be entered into the record as
3 Exhibit Number 2.

4 Q. And one final question, Ms. Griffin. Does this
5 document reflect the average pass rate for Emergency
6 Education Institute for their ADN program for first time
7 test takers with such a degree from 2017?

8 A. It does.

9 Q. Okay. That's all the questions.

10 MS. JONES: Objection to form.

11 Q. Okay. Let me reask it. What does this document
12 reflect?

13 A. The pass rate summary for 2017 for this program.

14 Q. For first time test takers?

15 A. For first time, first timers, yes.

16 Q. Okay. And for graduates of EEI's ADN program,
17 correct?

18 A. Correct.

19 Q. Okay. That's all the questions I have. Thank
20 you.

21 MR. FRIZZELL: Ms. Jones, do you have any
22 questions?

23 MS. JONES: Are you finished with your
24 examination?

25 MR. FRIZZELL: I am.

1 MS. JONES: Okay.

2 EXAMINATION

3 BY MS. JONES:

4 Q. Are you the principal contact for the Florida
5 Board of Nursing, yes or no?

6 A. Could you tell me what you mean by principal? I
7 do support the Board of Nursing if they have questions
8 regarding our systems or operations.

9 Q. Okay. I guess I should ask a different
10 question. Does each state board have a contact at
11 Pearson for its vendor relationship?

12 A. No, I would, I'm the only contact.

13 Q. Okay. For all of the State Boards of Nursing
14 you're the contact?

15 A. Correct, within Pearson Vue.

16 Q. Okay. And you've been the primary contact for
17 the nine years that you mentioned earlier, that has not
18 changed in that nine years?

19 A. I've been at Pearson Vue for nine years, but
20 I've only been on the NCLEX account for five years, five
21 of those years.

22 Q. Okay. So dating back to January 1, 2014 this
23 would have been your role, at least until January 1,
24 2014 would this have been your role?

25 A. Yes.

1 Q. Okay. Are you aware that at some point the
2 Florida, the State of Florida has a six-month tester
3 rule?

4 MR. FRIZZELL: I'm going to object, that
5 question is outside the scope of our direct questioning.

6 MS. JONES: Do you want me to subpoena her
7 to testify or do you want me to do it here in this
8 deposition?

9 MR. FRIZZELL: Well, the only thing, I
10 mean, we only currently have a notice for her as our
11 direct witness. So since you are going outside the
12 scope of our direct, I will be objecting accordingly.

13 MS. JONES: Okay.

14 MS. STERN: We will not produce her twice,
15 so you can go ahead.

16 MR. FRIZZELL: We're not going to stop her
17 from answering the question, but we are simply going to
18 object accordingly.

19 MS. JONES: Okay.

20 BY MS. JONES:

21 Q. So are you aware that the State of Florida has
22 implemented a six-month tester rule instead of a first
23 time tester rule?

24 MR. FRIZZELL: Same objection.

25 MS. JONES: And if you'd just let me finish

1 my questions and then you can put the objection, that
2 would be probably more conducive to us getting --

3 MR. FRIZZELL: I agree, I apologize.

4 MS. JONES: Okay.

5 A. I think, so I knew, I knew that Florida was
6 implementing this, but I did not track it. I did not
7 do, you know, I was aware of it, I was aware of it,
8 that's what I can say.

9 Q. Okay. So whose role would it be at Pearson Vue
10 to generate data for the Florida Board of Nursing
11 regarding NCLEX results?

12 A. So what Pearson does is they provide a reporting
13 platform and the State, Florida State Board of Nursing
14 has access to that platform. They can, they can run ad
15 hoc reports, so they can go in, we have six or seven
16 different categories of reports, they can go in and run
17 a report. We also have something called quarterly
18 reports that again they have to go in and actively
19 select some parameters and click the run button. So we
20 do not push specific reports to them, they are
21 self-servicing as far as running the reports off of our
22 system.

23 Q. Thank you. That was educating for me. Is it
24 possible in your system to run a report based upon the
25 testing dates of the students?

1 A. Yes.

2 Q. Is there a query that can be run in the system?

3 A. Yes, you can run a report by delivery date.

4 Q. Okay. And delivery date means testing date,
5 would that be the same thing?

6 A. Yes, we just use a different word.

7 Q. Delivery date, okay. Now that I understand what
8 your role is, I have fewer questions than I had
9 anticipated having that I didn't know that you would
10 have an answer. Actually, I really don't have, I don't
11 have questions now that I understand the role of Pearson
12 Vue.

13 A. Okay.

14 MS. STERN: Okay. Then I think we're done.

15 COURT REPORTER: Do you both want copies of
16 the transcript?

17 MR. FRIZZELL: Yes, and we'll order it
18 expedited for us.

19 COURT REPORTER: And, Ms. Jones, did you
20 want a copy?

21 MS. JONES: No, they subpoenaed, so they
22 have to provide it.

23 MS. BAUMANN: No.

24 (Proceedings concluded for the day at
25 9:23 a.m., 09-14-2018)

1 REPORTER'S CERTIFICATE

2
3 STATE OF MINNESOTA)

4 SS.

5 COUNTY OF WASHINGTON)

6 I hereby certify that I reported the telephonic
7 deposition of MARIANNE GRIFFIN on the 14th day of
8 September 2018, in Bloomington, Minnesota, and that
the witness was by me first duly sworn to tell the
whole truth;9 That the testimony was transcribed by me and is
10 a true record of the testimony of the witness;11 That the cost of the original has been charged to
12 the party who noticed the deposition, and that all
parties who ordered copies have been charged at the
same rate for such copies;13 That I am not a relative or employee or attorney
14 or counsel of any of the parties, or a relative or
employee of such attorney or counsel;15 That I am not financially interested in the action
16 and have no contract with the parties, attorneys, or
persons with an interest in the action that affects or
has a substantial tendency to affect my impartiality;17 That the right to read and sign the deposition
18 by the witness was not reserved.19 WITNESS MY HAND AND SEAL THIS 14th day of
20 September 2018.21
22  '260t-21)23
24 Kelley E. Zilles, RPR
25 Notary Public, Washington County, Minnesota
My commission expires 1-31-2020

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5601 Green Valley Drive
Bloomington, MN 55437
Phone: 952-681-3778

Professional Experience

Pearson VUE, Bloomington, MN
SENIOR PROGRAM MANAGER

July 2009 — Present

- Responsible for the successful implementation and maintenance of large global client program.
- Serves as the principal communication point between the client and Pearson VUE.
- Develops and maintains complete, up-to-date documentation, including project plans, and scopes of work.
- Ensures that internal departments fulfill their client commitments and maintain adequate service level agreements relative to timelines, quality standards and budget.
- Ensures contracts are executed according to defined timelines, contract deliverables, compliance and service standards.
- Attend program specific committee meetings, conferences and annual delegate assembly.
- Prepare and deliver presentation to executive client team on program performance, key technology initiatives and contract compliance.

Personnel Decisions International, Minneapolis, MN
DEPLOYMENT CONSULTANT — MANAGER (May 2008- Present)

2000-2009

- Provide leadership to team of deployment consultants and supporting project coordinators.
- Conduct performance reviews.
- Maintain Quality Metrics for the Product Division.
- Lead weekly team meetings
- Manage off-site and on-site personnel.
- Plan the internal and external roll-out for new technology and products.
- Assist in the day-to-day management of vendor relationships.
- Provide training and sales support to personnel in satellite offices
- Provide ongoing customization and process support to large, global clients

DEPLOYMENT CONSULTANT (2005- 2008)

Responsibilities:

- Managed multiple client projects at a detailed level from implementation to completion
- Created client specific project plans, managed timelines and assigned responsibilities to multiple team members
- Conducted product demonstrations and software training to clients using Microsoft Live Meeting.
- Conducted two day training sessions for newly hired team members; and created and delivered presentation during annual product conference
- Identified and implemented ways to streamline and improve processes
- Resolved client issues escalated through vendor or internal channels
- Partnered with regional sales director, account executives, and consultants to review proposals for accuracy and manage client deliverables to assure contract requirements are met

TRAINING SPECIALIST (February 2002- April 2005)

Responsibilities:

- Scheduled and conducted 360 software training sessions for clients in Europe, Africa, Asia, Australia, North and South America using Webex and Live Meeting
- Created training materials to support online training sessions

PROJECT MANAGER (2000-2002)

Responsibilities:

- Organized and coordinated the processing and delivery of 360 feedback reports for workshops and seminars held by internal and external clients
- Processed the requests for clients involved in ongoing 360 feedback for employees

- Served as the primary client contact responsible for resolving client concerns
- Maintained database of client information in multiple software applications

Brighton Area School District, Brighton, MI

1996-2000

ENGLISH TEACHER

Responsibilities:

- Taught American Literature, Freshmen and Sophomore English, Honors English, Reading Skills, and Senior Expository Writing. Developed and taught a writing course for college-bound seniors.
- Worked on a curriculum revision project that focused on the planning and development of the Language Arts curriculum from kindergarten through twelfth grade, including text book review and selection. Responsible for the development of instructional materials for diverse learning styles and abilities.
- Served as chairperson of the Tolerance Committee as part of a school improvement plan for the North Central Association. Facilitated staff meetings, designed the collection process for baseline data and planned multi-tiered strategies. Presented a breakdown of the process for state representatives.
- Worked with students to plan and develop the school newspaper. As the advisor my duties included: designing and running a nine station computer lab, teaching students PageMaker and PhotoShop, teaching students the elements of good page design, selling advertising space and managing the budget.

Lake Michigan Catholic High School, St. Joseph, MI

1993- 1996

DEPARTMENT CHAIR AND ENGLISH TEACHER

Responsibilities:

- Taught Freshman, Sophomore, Junior, and Senior English. Coached the Academic Challenge team.
- As Chairperson of the department, my duties included: handling the purchasing of department curricular materials and textbooks, assisting in the hiring of English department personnel and hosting various school functions.

Melvindale — Northern Allen Park School District, Melvindale, MI

1991- 1993

ENGLISH TEACHER

Responsibilities:

- Taught Freshmen and Junior English, and Drama.
- Worked with students and printing companies to publish a newspaper for school wide distribution.
- Served as the yearbook advisor. My duties included: managing a significant budget, selling advertising space, negotiating with publishing companies, and the planning, designing and organizing of the pages. I also managed the sales and distribution of the books.

Education

Eastern Michigan University: Master of Liberal Studies	Interdisciplinary Technology	2000
Marquette University: Bachelor of Arts	English Teaching	1990
University of Minnesota: Continuing Education	Project Management Certificate	2007

Custom Date Range (Click Run Below to Enter)

All Time

NCLEX Education Program: FL - EMERGENCY EDUCATION INSTITUTE - ADN (US70705600)

1/1/2017

12/31/2017

Printed By: Marianne Griffin

Report Date: 05-Sep-2018 04:05 PM

Data as of (CST): 05-Sep-2018 01:56 PM

• Florida • Boicra Nursing (70) EMEFidENDY ECillationiiiTlfttitit:Ka(T6' /06606)-Tazi4

Pass Rate Summary

	First Timers	Repeaters	Total
Total Delivered	15	37	52
Total Passed	9	9	18
Total Failed	6	28	34
Total On Hold	0	0	0
Total Pass Rate	60.00%	24.32%	34.62%

Candidate Details

Candidate Last Name	Candidate First Name	Client ID NCLEX	Graduation Date	Delivery Date	Grade	Repeater	Jurisdiction
Abundiz	Ashley	23135999	02/2016	6/12/2017 7:47:22 AM	Fail	Yes	Arizona Board of Nursing (96)
Abundiz	Ashley	23135999	04/2016	12/4/2017 1:18:46 PM	Fail	Yes	Arizona Board of Nursing (98)
Amoroso	Francesco	23123280	02/2016	7/12/2017 7:53:55 AM	Fail	Yes	New York State Board of Nursing(03)
Arlt	Michael	23122249	10/2015	2/9/2017 8:19:05 AM	Fail	Yes	Florida Board of Nursing (70)
Arlt	Michael	23122249	10/2015	6/15/2017 8:26:12 AM	Pass	Yes	Florida Board of Nursing (70)
Bates	Corey	23207662	02/2016	7/20/2017 8:15:00 AM	Fail	Yes	Hawaii Board of Nursing (37)
Beagle	Shawn	23394601	02/2017	6/6/2017 2:01:15 PM	Pass	No	Florida Board of Nursing (70)
CECIL	JAMES	22992050	11/2014	2/3/2017 11:37:38 AM	Fail	Yes	Hawaii Board of Nursing (37)
Coleman	Ashley	23155372	02/2016	3/20/2017 7:47:37 AM	Fail	Yes	Hawaii Board of Nursing (37)
Coleman	Ashley	23155372	02/2016	5/9/2017 8:11:38 AM	Pass	Yes	Hawaii Board of Nursing (37)

The numbers included in the report reflect the most up-to-date and accurate numbers at the time the report was generated. Page

Candidate Last Name	Candidate First Name	Client Candidate ID	NCLEX Graduation Date	Delivery Date	Grade	Repeater	Jurisdiction
CONTRERAS	ADRIAN	23216132	06/2016	8/1/2017 2:01:23 PM	Fail	Yes	Florida Board of Nursing (70)
Dara	Viviane	23218292	06/2016	5/2/2017 11:05:11 AM	Pass	Yes	Florida Board of Nursing (70)
DeCarolis	Anthony	23440637	08/2017	11/7/2017 8:00:04 AM	Pass	No	Florida Board of Nursing (70)
Gamboa	Alicia	23349224	02/2017	6/14/2017 7:58:07 AM	Pass	No	Florida Board of Nursing (70)
Golding	Dionne	23146764	02/2016	5/15/2017 1:29:49 PM	Fail	Yes	Hawaii Board of Nursing (37)
Golding	Dionne	23146764	02/2016	7/6/2017 12:11:09 PM	Fail	Yes	Hawaii Board of Nursing (37)
Golding	Dionne	23146764	02/2016	11/3/2017 12:35:54 PM	Fail	Yes	Hawaii Board of Nursing (37)
HENRY	KETTENIE	23245541	06/2016	1/6/2017 8:32:20 AM	Fail	No	Florida Board of Nursing (70)
HENRY	KETTENIE	23245541	06/2016	12/19/2017 8:18:40 AM	Fail	Yes	Florida Board of Nursing (70)
Hernandez	Alain	23094351	10/2015	10/7/2017 7:47:52 AM	Fail	Yes	Arizona Board of Nursing (96)
Hernandez	Alain	23094351	11/2015	7/17/2017 8:15:59 AM	Fail	Yes	Arizona Board of Nursing (96)
Hill	Laryn	23126408	02/2016	6/15/2017 2:10:59 PM	Fail	Yes	Texas Board of Nursing (41)
HOMUSKA	JOSEPH	23219995	06/2016	2/11/2017 8:13:39 AM	Fail	Yes	Florida Board of Nursing (70)
HOMUSKA	JOSEPH	23219995	06/2016	12/16/2017 11:49:02 AM	Fail	Yes	Hawaii Board of Nursing (37)
HUGHES	NATHAN	23054724	07/2015	3/30/2017 7:57:00 AM	Fail	Yes	Florida Board of Nursing (70)
HUSBANDS	SANDRA	23225072	06/2016	2/27/2017 1:59:22 PM	Pass	Yes	Florida Board of Nursing (70)
JAKOB	HEIDI	22047932	02/2017	4/12/2017 7:52:54 AM	Pass	No	Florida Board of Nursing (70)
Jean Baptiste	Sendy	23473903	09/2017	12/8/2017 7:59:48 AM	Fail	No	Florida Board of Nursing (70)
JEAN-LOUIS	YAMILEE	23215538	06/2016	12/8/2017 2:00:35 PM	Pass	Yes	Florida Board of Nursing (70)
Kola	Kolby	23434590	08/2017	10/20/2017 7:49:00 AM	Fail	No	Florida Board of Nursing (70)
Kola	Kolby	23434590	08/2017	12/6/2017 7:42:04 AM	Pass	Yes	Florida Board of Nursing (70)
MAKBARRAN	JENNIFER	21263373	02/2017	5/11/2017 8:03:19 AM	Pass	No	Florida Board of Nursing (70)
Mendes	Marione	23299401	06/2016	7/22/2017 8:00:54 AM	Fail	No	Florida Board of Nursing (70)
Moya	Monique	23405988	09/2017	9/16/2017 10:06:04 AM	Pass	No	Montana State Board of Nursing (98)
NEITA	ROHAN	23215499	06/2016	3/24/2017 8:17:01 AM	Fail	Yes	Florida Board of Nursing (70)
OWENS	CHRISTINA	03755202	06/2016	3/18/2017 12:03:01 PM	Pass	Yes	Florida Board of Nursing (70)
Perez	Andres	23440602	08/2017	12/23/2017 7:41:38 AM	Fail	No	Florida Board of Nursing (70)
PIERRE-LOUIS	MARIE JEANESTAL	23066399	10/2015	3/15/2017 8:27:14 AM	Fail	Yes	Hawaii Board of Nursing (37)
PIERRE-LOUIS	GHYSLAINE	23123385	02/2016	6/5/2017 8:14:33 AM	Fail	Yes	Florida Board of Nursing (70)
PIERRE-LOUIS	GHYSLAINE	23123385	02/2016	11/21/2017 8:21:52 AM	Fail	Yes	Florida Board of Nursing (70)

The numbers included in the report reflect the most up-to-date and accurate numbers at the time the report was generated.

Candidate Last Name	Candidate First Name	Client Candidate ID	NCLEX Graduation Date	Delivery Date	Grade	Repeat	Jurisdiction
RANKINE	DIONNE	22775908	02/2017	4/29/2017 1:48:36 PM	Pass	No	Florida Board of Nursing (70)
Rodriguez	Edel	23129336	02/2016	1/27/2017 12:01:59 PM	Pass	Yes	Hawaii Board of Nursing (37)
Sroka	John	23434310	08/2017	11/7/2017 8:08:08 AM	Pass	No	Florida Board of Nursing (70)
THOMANY	CHARDYNE	23128819	02/2016	2/25/2017 7:49:01 AM	Fail	Yes	Hawaii Board of Nursing (37)
THOMANY	CHARDYNE	23128819	02/2016	5/27/2017 8:00:01 AM	Fail	Yes	Hawaii Board of Nursing (37)
THOMPSON	JACQUELINE	22854683	11/2014	4/19/2017 8:30:07 AM	Fail	Yes	Hawaii Board of Nursing (37)
THOMPSON	JACQUELINE	22854683	11/2014	7/26/2017 8:15:28 AM	Fail	Yes	Hawaii Board of Nursing (37)
THOMPSON	JACQUELINE	22854683	11/2015	2/18/2017 8:08:35 AM	Fail	Yes	Hawaii Board of Nursing (37)
THOMPSON	MICHAEL	23230018	02/2016	6/28/2017 8:38:29 AM	Fail	Yes	Hawaii Board of Nursing (37)
Trujillo	Louis	23379711	02/2017	7/21/2017 12:57:00 PM	Pass	No	Florida Board of Nursing (70)
VANEGAS GALVAN	DARWIN	23059167	10/2015	3/15/2017 1:34:07 PM	Pass	Yes	Hawaii Board of Nursing (37)
Worges	Charlene	23222439	06/2016	1/17/2017 8:07:29 AM	Fail	No	Florida Board of Nursing (70)

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

EMERGENCY EDUCATION INSTITUTE,
Petitioner,

v.

DOAH Case No.: 18-001872

BOARD OF NURSING,
Respondent.

**PETITIONER'S NOTICE OF FILING
RESPONDENT'S RESPONSES TO PETITIONER'S FIRST SET OF INTERROGATORIES
TO BOARD OF NURSING, FIRST REQUEST FOR ADMISSIONS, AND FIRST REQUEST
FOR PRODUCTION**

COMES NOW, the Petitioner, and files this Notice of Filing Respondent's Responses to Petitioner's First Set of Interrogatories to Board of Nursing, Petitioner's First Request for Admissions, Respondent's Responses to Petitioner's First Request for Admissions, and Respondent's Responses to Petitioner's First Request for Production. Respondent's Responses to Petitioner's First Request for Production is filed without the produced documents except for the curriculum vitae of Dr. Doyoung Kim.

Respectfully submitted this 21st day of September 2018.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by e-mail to: Timothy Frizzell at timothy.frizzell@myfloridalegal.com and Marlene Stern at marlene.stern@myfloridalegal.com this 21st day of September 2018.

SEC OUTSOURCING, P.L.
250-95th Street, #6394
Miami Beach, FL 33154
(786) 463-4450 Phone

(786) 463-4890 Fax

/s/Shavon L. Jones

SHAVON L. JONES

Fla. Bar No.: 0636827

WENDY BREWSTER MAROUN

Fla. Bar No.: 103179

consult@regulatorguards.com

Attorneys for Emergency Education Institute

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

EMERGENCY EDUCATION INSTITUTE,
Petitioner,

DOAH Case No.: 18-001872

v.

BOARD OF NURSING,
Respondent.

**BOARD'S RESPONSE TO EMERGENCY EDUCATION INSTITUTE'S
FIRST SET OF INTERROGATORIES TO BOARD OF NURSING**

The Board responds to Emergency Education Institute's (EEI) First Set of Interrogatories as follows:

Interrogatory No. 1: Please state the name, address, job title, and present employer of each person providing information responsive to these interrogatories. Please indicate which interrogatory and what information was supplied by each person providing information.

All the interrogatories responses and information contained within are supplied by:

Sherri Sutton-Johnson
Director Nursing Education
Florida Board of Nursing
4052 Bald Cypress Way Bin C-02
Tallahassee, FL 32399-3252
Phone no.: (850) 617-1496
Sherri.Sutton-Johnson@flhealth.gov

Interrogatory No. 2: Please state the full name, current address, telephone number, qualifications, and present employment of each person who the Board expects to call as an expert witness at the formal hearing of this case, the subject matter on which such expert is expected to testify, the substance of the facts and opinions to which such expert is expected to testify, and a summary of the grounds for each opinion expected to express by such expert.

Dr. Doyoung Kim
Senior Psychometrician, Examination
National Council of State Boards of Nursing (NCSBN)
111 E. Wacker Drive, Ste. 2900
Chicago, IL 60601-4277
Phone no.: (312) 525-3600
Fax no.: (312) 279-1032
dkim@ncsbn.org
CV produced (Exhibit C)

Dr. Kim is expected to testify to:

The 2017 National NCLEX passage rates.

The 2017 passage rate specific to EEI NCLEX no.: US70705600.

Data specific to test dates of EEI graduates who were first-time test-takers and their respective graduation information.

The methodology by which NCSBN collects that information.

Documents related to Dr. Kim's testimony are attached:

The EEI specific NCLEX data, (Exhibit A)

and the 2017 national passage rate summary (Exhibit B)

Interrogatory No. 3: Please state the name, current address and telephone number of each person who participated in developing or arriving at the Board's interpretation of F.S. § 464.019(5) as amended on June 23, 2017.

The Board of Nursing participated as a whole and voted on the on interpretation of the 464.019(5) as amended, with advice from legal counsel to the Board.

Interrogatory No. 4: What is the Board's interpretation of F.S. § 464.019(5) as amended on June 23, 2017?

464.019(5)(a)1. **An approved program must achieve a graduate passage rate for first-time test takers which is not more than 10 percentage points lower than the average passage rate during the same calendar year for graduates of comparable degree programs** who are United States educated, first-time test takers on the National Council of State Boards of Nursing Licensing Examination, as calculated by the contract testing service of the National Council of State Boards of Nursing. For purposes of this subparagraph, an approved program is comparable to all degree programs of the same program type from among the following program types:

Beginning with graduate passage rates for calendar year 2010, if an approved program's graduate passage rates do not equal or exceed the required passage rates for 2 consecutive calendar years, the board shall place the program on probationary status pursuant to chapter 120 and the program director shall appear before the board to present a plan for remediation, which shall include specific benchmarks to identify progress toward a graduate passage rate goal. **The program must remain on probationary status until it achieves a graduate passage rate that equals or exceeds the required passage rate for any 1 calendar year.** The board shall deny a program application for a new prelicensure nursing education program submitted by an educational institution if the institution has an existing program that is already on probationary status.

3. Upon the program's achievement of a graduate passage rate that equals or exceeds the required passage rate, the board, at its next regularly scheduled meeting following release of the program's graduate passage rate by the National Council of State Boards of Nursing, shall remove the program's probationary status. If the program, during the 2 calendar years following its placement on probationary status, does not achieve the required passage rate for any

1 calendar year, **the board may extend the program's probationary status for 1 additional year, provided the program has demonstrated adequate progress toward the graduate passage rate goal by meeting a majority of the benchmarks established in the remediation plan.** If the program is not granted the 1-year extension or fails to achieve the required passage rate by the end of such extension, the board shall terminate the program pursuant to chapter 120.

As related to EEI, The Board looked at the 2017 passage rate for EEI's Associate Degree in Nursing program (60.00%) and compared it to 10% points below the 2017 national average passage rate as computed by NCSBN (74.24% is 10 points lower than 84.24%).

Interrogatory No. 5: List any verbal instructions or guidance you provided to Board of Nursing staff prior to February 8, 2018 regarding how to apply F.S. § 464.019(5) as amended on June 23, 2017.

As it relates to EEI, Board staff was instructed to compare 2017 first-time test-taker passage rate to 74.24%, prepare a summary for the Board, and notice the program.

Interrogatory No. 6: List each communication between the Board and the Legislature or any committee or subcommittee thereof regarding the Legislature's consideration or passage of F.S. § 464.019(5) as amended on June 23, 2017.

Please see 2017 Agency Legislative Bill Analysis for 1-1B 543 (Exhibit D)

Interrogatory No. 7: List every position at the Board of Nursing, together with each individual who held such position between June 23, 2017 and February 8, 2018, that is involved in calculating the Florida NCLEX passage rates or communicating them to Program Directors.

Sherri Sutton-Johnson
Director Nursing Education
Florida Board of Nursing
4052 Bald Cypress Way Bin C-02
Tallahassee, FL 32399-3252
Phone no.: (850) 617-1496
Fax no.: (850) 617-6460
Sherri.Sutton-Joluison@flhealth.gov
CV produced (Exhibit E)

Janet Doke
Nursing Education Consultant
Florida Board of Nursing
4052 Bald Cypress Way Bin C-02
Tallahassee, FL 32399-3252
Phone no.: (850) 245-4147
Fax no.: (850) 617-6460
Janet.Doke@flhealth.gov

Serina McGlockton
Regulatory Specialist III
Florida Board of Nursing
4052 Bald Cypress Way Bin C-02
Tallahassee, FL 32399-3252
Phone no.: (850)245-4174
Fax no.: (850) 617-6460
Serina.McGlockton@flhealth.gov
BS in Health Information Management

Interrogatory No. 8: Please state the name, current address and telephone number of each person who the Board expects to call as a witness at the formal hearing in this case and a brief description of the subject matter upon which such person will testify.

Sherri Sutton-Johnson
Director Nursing Education
Florida Board of Nursing
4052 Bald Cypress Way Bin C-02
Tallahassee, FL 32399-3252
Phone no.: (850) 617-1496
Fax no.: (850) 617-6460
Sherri.Sutton-Johnson@flhealth.gov
CV produced

Interrogatory No. 9: Please identify each document that the Board expects or anticipates introducing at the final hearing in this case.

CV Dr. Kim

Deposition Dr. Kim

CV Sherri Sutton-Johnson

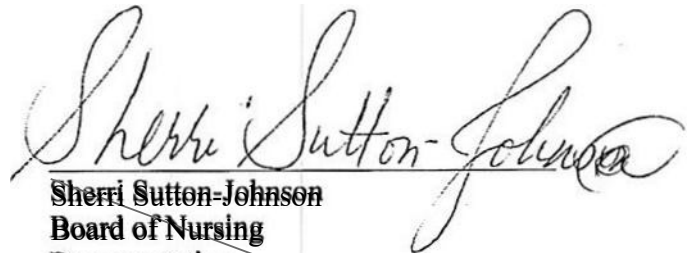
2017 National Average passage rate print out

2017 EEI passage rate print out

Interrogatory No. 10: Provide the total number of traditional (non-bridge) Associate Degree in Nursing Programs in Florida without regard to whether the program is accredited.

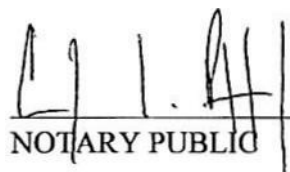
138 programs.

I HEREBY
CERTIFY that the answers
to the foregoing
Interrogatories are true and
correct to the best of my
knowledge.


Sherri Sutton-Johnson
Board of Nursing
Representative

STATE OF
FLORIDA
COUNTY OF

The foregoing instrument was acknowledged before me this 4th day of July, 2018, by 4 enfiSit#00--JohncOn who is personally known to me or who has produced a- Aacile, as identification and who took an oath.


NOTARY PUBLIC

Typed or printed Name: Cwei (. Pe -ft wc¹/₄/
My Commission Expires:



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

0. 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

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Filed with the Clerk of the
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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.

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