COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000622

COMMONWEALTH OF KENTUCKY,
KENTUCKY BOARD OF NURSING
APPELLANT

v.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2011-CA-000853

SULLIVAN UNIVERSITY SYSTEM, INC.,
D/B/A SPENCERIAN COLLEGE,
APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served upon the following by first class mail on December 23, 2013: Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; David Domene and Tyler M. Jolley, Blackburn Domene & Burchett, PLLC, 614 West Main Street, Suite 3000, Louisville, Kentucky 40202; Mark A. Robinson, Michael A. Valenti, John E. Hanley, Valenti Hanley & Robinson, PLLC, One Riverfront Plaza, Suite 1950, 401 W. Main Street, Louisville, Kentucky 40202.

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INTRODUCTION

Appellant Commonwealth of Kentucky, Kentucky Board of Nursing (the "Board") appeals from an opinion and order of the Kentucky Court of Appeals in which the Court held that the Board acted arbitrarily and capriciously by applying its amended administrative regulations retroactively to circumstances that pre-dated the amended administrative regulations to deprive Appellee, The Sullivan University System, Inc. d/b/a Spencerian College ("Spencerian") of its ability to admit new students. In so holding, the Court of Appeals recognized that the Board's own interpretation of the prior version of the regulations, which contradicted the actual language of the regulations, was not entitled to any deference. The Court's decision should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Spencerian does not desire oral argument and believes that oral argument is unnecessary for resolution of the straightforward legal issues presented by this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

Page

INTRODUCTION i

STATEMENT REGARDING ORAL ARGUMENT i

COUNTERSTATEMENT OF THE CASE 1

KRS 314.021 2

KRS 314.131 2

201 KAR 20:360 ..... *passim*

ARGUMENT 11

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE BOARD RETROACTIVELY ENFORCED ITS REGULATIONS IN VIOLATION OF KENTUCKY LAW 12

A. Kentucky Law Prohibits the Retroactive Application of Newly Amended Regulations 12

2 AM. JUR. 2D *Administrative Law* § 242 (2004) 12

Peach v. 21 Brands Distillery, 580 S.W.2d 235 (Ky. App. 1979) 12-13

Commonwealth of Ky. Dep't of Agric. v. Vinson, 30 S.W.3d 162 (Ky. 2000) 13

KRS 446.080 13

Kerr v. Ky. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors, 797 S.W.2d 714 (Ky. App. 1990) 13-14

Duff v. Ky. Bd. of Med. Licensure, 2008 WL 4367845 (Ky. App. 2008) 14

2 *Sutherland Statutes and Statutory Construction*, § 41.2 (7th ed. 2009) 15

B. The Board's Interpretation of the Pre-2009 Regulations Is Not Entitled to Deference. 15

Com., Cabinet for Health Services v. Family Home Health Care, Inc., 98 S.W.3d 524 (Ky. App. 2003) 16, 19

Hagan v. Farris, 807 S.W.2d 488 (Ky. 1991) 16

Camera Ctr., Inc. v. Rev. Cab., 34 S.W.3d 39 (Ky. 2000) 16

St. Luke Hospitals, Inc. v. Com., 186 S.W.3d 746 (Ky. App. 2005) 17

Monumental Life Ins. Co. v. Dep't of Rev., 294 S.W.3d 10 (Ky. App. 2008) 17-18

SmithKline Beecham Corp. v. Rev. Cab., 40 S.W.3d 883 (Ky. App. 2001) 18

C. The Board's Interpretation of the Pre-2009 Regulation is Not Consistent With the Regulation's Purpose 18

D. The Court of Appeals Opinion Will Not Have Far Reaching Adverse Consequences 20

II. THE COURT OF APPEALS OPINION SHOULD BE AFFIRMED ON OTHER GROUNDS 21

A. Spencerian Was Not Required to File a Cross Motion for Discretionary Review to Preserve 21

Fischer v. Fischer, 348 S.W.3d 582 (Ky. 2011) 22

B. The Board Arbitrarily and Capriciously Placed The AND Program on Probational Approval Status in Violation of Section 2 of the Kentucky Constitution 22

Commonwealth of Ky. Nat. Res. & Envtl. Cabinet v. Kentec Coal Co., 177 S.W.3d 718 (Ky. 2005) 22-23

Commonwealth of Ky. Transp. Cabinet v. Express Mart, Inc., 759 S.W.2d 600 (Ky. App. 1988) 23

C. The Board Failed to Provide Due Process to Spencerian Before Placing it on Probational Approval Status in Violation of Section 14 of the Kentucky Constitution 28

The Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972) 28-29

KRS 314.111 29

Goldberg v. Kelly, 397 U.S. 254 (1970) 29-30

Barry v. Barchi, 443 U.S. 55 (1979) 30

State ex rel. Great Lakes Coll., Inc. v. Med. Bd., 280 N.E.2d 900 (Ohio 1972) 30

Excelsior Coll. v. California Bd. of Registered Nursing, 136 Cal. App. 4th 1218 (Cal. Ct. App. 2006) 30-31

Headen v. Commonwealth, 87 S.W.3d 250 (Ky. App. 2002) 31-32

CONCLUSION 32

COUNTERSTATEMENT OF THE CASE

The ADN Program. Spencerian is a private proprietary career college with campuses in Louisville and Lexington, Kentucky [R. 1: Compl.]. Since 2001, Spencerian's Louisville campus has operated the ADN Program, in which non-traditional students can obtain an Associate of Applied Science Degree in Nursing [*Id.*]. Spencerian is accredited by the Accrediting Council for Independent Colleges and Schools, a national accrediting agency recognized by the United States Department of Education [*Id.*], as well as thirteen (13) other programmatic accrediting/regulatory bodies, including the Board [R. 120: Gordon Aff. ¶2; R. 129: Charles Aff. ¶2].

The ADN Program is designed to allow Practical Nurses ("PNs") to "bridge" their prior training to become Registered Nurses ("RNs") [R. 3: Compl.; R. 121: Gordon Aff. ¶3; R. 130: Charles Aff. ¶4]. Beginning with the class that started in June 2010, the ADN Program allows Kentucky residents to obtain an Associate of Applied Science Degree in Nursing through an eighteen-month didactic and clinical education program [30-6-10 VR 122, 4:02:10].[1] The majority of Spencerian's students are non-traditional students who must work while attending nursing school in order to meet personal and/or family obligations [R: 4: Compl. 10; 30-6-10-VR 122, 4:13:19; R. 121: Gordon Aff. ¶4; R. 130: Charles Aff. ¶5].[2] Between the ADN Program's inception and the July 9, 2010 injunction

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[1] Resident students who began the ADN Program before June 2010 could complete the program within one year whereas non-resident students could obtain the same degree in two years through on-line study [R: 3: Compl; R: 121: Gordon Aff. ¶3; R: 130: Charles Aff. ¶4].

[2] At the Jefferson Circuit Court's July 9, 2010 injunction hearing, the ADN's Program Administrator, Dale Charles, testified that over ninety percent (90%) of the ADN (continued...)

hearing, 620 graduates of the ADN Program have taken the National Council Licensing Examination-Registered Nurse ("NCLEX-RN"), and 585 of those students have passed, constituting a 94% pass rate for graduates of Spencerian's ADN Program [R. 3: Compl.; R. 121: Gordon Aff. ¶3; R: 130: Charles Aff. ¶4].[3]

The Board and the Evaluative Standards Governing the ADN Program. The Board is charged with the duty of regulating the practice of nursing in Kentucky. KRS 314.021. Pursuant to KRS 314.131, the Board promulgates regulations establishing evaluative standards for pre-licensure RN programs, such as the ADN Program. These evaluative standards are set forth in 201 KAR 20:260 through 201 KAR 20:360. As Patricia Spurr, the Board's Education Consultant, admitted during the July 9, 2010 injunction hearing, the Board's evaluation of those standards is very subjective [30-6-10 VR 122, 5:48:41].

On July 31, 2009, the Board enacted major changes with respect to pre-licensure RN programs. In doing so, it greatly expanded the Administrative Regulations and increased the number of evaluative standards for pre-licensure RN programs from 133 to

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(...continued)

Program's students are non-traditional single parents who must juggle full-time jobs with their education in pursuit of a new career [30-6-10 VR 122, 4:13:19].

[3] Students are not allowed to practice as Registered Nurses in the Commonwealth until successfully passing the NCLEX-RN examination. **Importantly, the Board allows applicants who fail their first time to take the test an unlimited number of times** [R. 4: Compl.]. In his 2006 Opinion and Order, Jefferson Circuit Court Judge Geoffrey Morris acknowledged that Sullivan presented "a provocative argument that it is nonsensical for the Board to consider first-time [NCLEX-RN] takers' pass rates as the measure to determine whether standards have been met when the Board itself allows anyone seeking licensure to take the [NCLEX-RN] as many times as necessary to pass it." [R. 25].

193 [R. 6: Compl.; R. 122: Gordon Aff. ¶8; R. 131: Charles Aff. ¶9; 30-6-10 VR 122, 4:15:57]. The Board also amended 201 KAR 20:360 to make three important changes to the NCLEX-RN pass rate standard: (1) the evaluation period was changed from a fiscal year to a calendar year; (2) specific language was added making the regulation applicable only to first-time test takers; and (3) the evaluation period was amended to evaluate NCLEX-RN pass rates over a single calendar year period as opposed to a three-year period [R. 6: Compl; R. 122: Gordon Aff. ¶8; R. 131: Charles Aff. ¶9].

Prior to that amendment, 201 KAR 20:360 § 1(4) provided :

> If for three (3) consecutive fiscal years the graduates of a program of nursing achieve a pass-rate less than eighty-five (85) percent on the national licensure examination, the nurse administrator and the head of the governing institution or designee shall appear before the board to show cause that approval of the program be continued.

Contrary to the Board's position, the prior version of the regulation did not specifically restrict pass rates only to first-time test takers.[4] Although the Board claims it is data-driven [30-6-10 VR 121, 4:09:19], **both Dr. Spurr and the Board's Executive Director, Charlotte Beason, admit they can point to no empirical data to establish or support that the 85% standard for first-time NCLEX-RN testers is a quality measurement which supports the evaluation of nursing programs.** [30-6-10 VR 121,

[4] In 2006, under this prior version of 201 KAR 20:360, the Board withdrew approval of the ADN Program at Spencerian as a result of its students having less than an 85% annual percent pass rate for graduates taking the NCLEX-RN for the first time. Spencerian appealed the Board's action to the Jefferson Circuit Court, which overturned the Board's action as being arbitrary and capricious [R. 4: Compl.; R.14]. Following the 2006 ruling, which the Board did not appeal, the ADN Program at Spencerian was continued on Conditional Approval Status [R. 5: Compl.].

4:13:10; 30-6-10 VR 122, 1:28:40; 30-6-10 VR 122, 5:45:20].[5] Dr. Beason admitted that she was not aware of the basis used by the Board in adopting the 85% rule [30-6-10 VR 121, 4:12:10] and was not aware of any empirical data supporting the 85% rule [30-6-10 VR 122, 1:30:30]. Dr. Beason's effort to explain the use of only the first NCLEX-RN testing as a basis for a quality measurement was unconvincing [*Id.* at 1:29:23]. Dr. Beason tacitly acknowledged the inconsistency of judging a nursing program on the basis of one year's NCLEX-RN test scores and allowing applicants to take the NCLEX-RN test an unlimited number of times [*Id.* at 1:31:27]. As Dr. Beason admitted, an applicant may take the NCLEX-RN examination 100 times and be licensed in Kentucky if the applicant eventually passes [*Id.* at 1:32:40].

In reality, the 85% standard for first time NCLEX-RN testers constitutes an arbitrarily adopted standard that provides no factual or rational basis for evaluating the quality of nursing programs. The methodology employed by the Board is fatally flawed, arbitrary and without any rational basis, particularly given the fact that the Board has adopted no limit on taking the NCLEX-RN by applicants for licensure.

The Board's May 2009 Evaluation. On May 4 and 5, 2009, Dr. Spurr conducted a Nursing Survey Visit of the ADN Program and determined it met 131 of 133 pre-amendment evaluative standards for pre-licensure RN programs. Dr. Spurr determined the ADN Program partially met the other two evaluative standards which dealt with course syllabi and the reporting of faculty appointments [*See, e.g.*, R. 5: Compl.; R. 32-49; R. 121-122: Gordon Aff. ¶6; 30-6-10 VR 122, 4/14:45]. By letter

[5] Judge Morris was also unsure of the connection between the first-time pass rates and the evaluative standards given that "the Board itself allows anyone seeking licensure to take the [NCLEX-RN] as many times as necessary to pass it." [R: 25].

dated June 12, 2009, the Board notified Spencerian that its ADN Program would be continued on Conditional Approval Status [R. 5: Compl.; R. 50-51; R. 122: Gordon Aff. ¶7; R. 131: Charles Aff. ¶8]. The Board also advised Spencerian that Dr. Spurr would return in January 2010 to conduct another site visit [*Id.*].

The Board's January 2010 Evaluation. Dr. Spurr conducted a second Nursing Survey Visit of the ADN Program on January 28 and 29, 2010 [R. 122-123: Gordon Aff. ¶10; R. 132: Charles Aff. ¶11]. During this visit, in which she used the recently enacted evaluative criteria under the revised versions of 201 KAR 20:260 through 201 KAR 20:360, Dr. Spurr determined the ADN Program at Spencerian met 136 evaluative standards, partially met 19 evaluative standards, and did not meet 35 evaluative standards [R. 52-85]. Importantly, Dr. Spurr found that the ADN Program now met the evaluative standard regarding course syllabi that was only partially met in May 2009 [*Id.*]. The other evaluative standard the ADN Program partially met in May 2009 – pertaining to reporting faculty appointments – is no longer a standard under the expanded regulations and was not considered during this site visit [*Id.*].

Despite the ADN Program's noted improvement over its cited May 2009 deficiencies, Dr. Spurr nevertheless hinted at the Board's predetermination of the ADN Program's fate during a meeting with Spenercian's faculty. One faculty member, Maria McCormick, testified during the July 9, 2010 injunction hearing that within the first fifteen minutes of that meeting, Dr. Spurr indicated that the Board was going to put the ADN Program on probation [30-6-10 VR 122, 3:13:15; *see also* 30-6-10 VR 122, 3:26:00].

In the Program of Nursing Survey Visit Report for the January 28 and 29, 2010 site visit, Dr. Spurr recommended to the Board that the ADN Program "has not shown a concerted and sustained effort to meet all the Board requests for the analysis and commitment to the improvement of graduate scores for first time NCLEX-RN testers" and "should be placed on Probational Status as outlined in 201 KAR 20:360" [R. 6: Compl.; R. 52-85; R. 123: Gordon Aff. ¶11; R. 132: Charles Aff. ¶12]. It is telling that the entirety of Dr. Spurr's recommendation is framed in the context of Spencerian's failure to achieve the 85% pass rate for first time NCLEX-RN testers [30-6-10 VR 122, 5:41:30]. Dr. Spurr admitted that everything in her review was driven by the 85% pass rate on the NCLEX-RN examination for first time testers [30-6-10 VR 122, 5:42:07]. At the July 9, 2010 injunction hearing, Dr. Spurr admitted that she did not recommend that the other schools with NCLEX-RN pass rates lower than Spencerian's be placed on probation [30-6-10 VR 122, 5:32:15].

The Board Singles Out the ADN Program for Probational Status. Spencerian's ADN Program was placed on the Board's agenda for its February 18 and 19, 2010 Board meeting because it did not achieve an 85% pass rate for first-time test takers on the NCLEX-RN in calendar year 2009. Two (2) other nursing programs were also placed on the Board agenda for that meeting because they too did not meet that standard for first-time NCLEX-RN testers in calendar year 2009: Northern Kentucky University and Hazard Community and Technical College – Lees Campus, both of which are public institutions [R. 7: Compl.; R. 123: Gordon Aff. ¶12; R. 132: Charles Aff. ¶13].

On February 18, 2010, the Board voted to place the ADN Program at Spencerian on Probational Approval Status under 201 KAR 20:360 for failing to achieve an 85%

pass rate for first-time NCLEX-RN takers in calendar year 2009 [R. 7: Compl.; R. 123: Gordon Aff. ¶13; R. 133: Charles Aff. ¶14]. The Board did not place the two (2) public schools, Northern Kentucky University and Hazard Community and Technical College – Lees Campus, on Probational Approval Status even though both schools failed to achieve an 85% pass rate for first-time NCLEX-RN takers for calendar year 2009.[6] In addition, the following four (4) nursing schools all failed to achieve an 85% pass rate for first-time NCLEX-RN test takers in calendar year 2009, but none were placed on Probational Approval Status: Spalding University (76%), Bluegrass Community and Technical College – Lawrenceburg (67%), Southeast Community and Technical College – Pineville (76%) and St. Catharine College (79%) [R. 8: Compl.; R. 124: Gordon Aff. ¶15; R. 133: Charles Aff. ¶16; Plaintiffs' Hearing Ex. 2]. For calendar year 2009, seven (7) prelicensure registered nursing programs failed to maintain an 85% pass rate for first-time test takers on the NCLEX-RN. **The ADN Program at Spencerian was the only one (1) of the seven (7) programs to be placed on Probational Approval Status.**[7] Of the seven (7) programs, only the ADN Program at Spencerian had a pass rate for first-time test takers on the NCLEX-RN of 80% or more (81%) [R. 8: Compl.; R. 124: Gordon Aff. ¶16; R. 133: Charles Aff. ¶17].

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[6] Spencerian had an 81% pass rate for first-time test takers on the NCLEX-RN for calendar year 2009. Northern Kentucky University had a 72% pass rate and Hazard Community and Technical College – Lees Campus had a 78% pass rate during calendar year 2009 for first-time takers on the NCLEX-RN [R: 7-8: Compl.; R. 123-24: Gordon Aff. ¶14; R. 133: Charles Aff. ¶15; Plaintiffs' Hearing Ex. 2].

[7] Spencerian's Executive Director, Jan Gordon, testified at the July 9th injunction hearing that the Board was openly hostile and critical of her as well as the ADN Program [30-6-10 VR 122, 3:55:27].

Dr. Beason explained at the July 9th injunction hearing that the other schools that did not achieve an 85% pass rate were not placed on probation because of their proposed program redesign [30-6-10 VR 122, 1:27:05]. The Board did not, however, take into consideration the myriad of significant changes and "redesign" that Spencerian was making to its ADN Program (*i.e.*, extending the Program from 12 to 18 months) [30-6-10 VR 122, 4:1:05]. The Board's animus toward the ADN Program at Spencerian is obvious even from a cursory review of the audio recording of the Board's February 18th Meeting [Item 13, Board Record, Discs 4-6]. Dale Charles, the ADN Program Administrator, made a three (3) hour presentation to the Board on the changes implemented by Spencerian, but his testimony was ignored by the Board [30-6-10 VR 122, 4:59:15]. Instead of using that information as evidence of Spencerian's efforts to change, the Board treated it as an indictment of the ADN Program [*See* 30-6-10 VR 122, 4:28:30].

The Board Continues to Deny Spencerian Adequate Due Process. By letter dated February 19, 2010 [R: 86-89], the Board identified alleged "continued areas of deficiency" under 201 KAR 20:260, 310, 320, 340, 350 and 360 and notified Spencerian that its ADN Program was being placed on Probational Approval Status in accordance with 201 KAR 20:360. With the exception of the first-time pass rate of NCLEX-RN takers, the other areas of alleged deficiencies cited in the letter had not been previously identified to Spencerian and, therefore, were not ***continuing*** areas of deficiency. Indeed, of the two (2) evaluative standards that had been partially met in May 2009, one was met and the other was no longer a standard under the newly-expanded regulations [R. 52-85]. Moreover, the letter merely "parrots" the Administrative Regulations and does not cite

any specific deficiencies [R. 8-9: Compl.; R. 124: Gordon Aff. ¶17; R. 133-34; Charles Aff. ¶18].

Following the Board's February 19, 2010 letter [R. 86-89] notifying Spencerian of the Board's action in placing the ADN Program on Probational Approval Status, Spencerian requested to appear before the Board at its April 15, 2010 meeting to contest the alleged deficiencies. Spencerian did not receive a formal hearing before action was taken. On April 15, 2010, by a vote of 7-6, with three (3) members absent, the Board upheld its prior action in placing the ADN Program on Probational Approval Status for failing to maintain an 85% pass rate for first-time test takers on the NCLEX-RN for calendar year 2009 [R. 9: Compl.].[8] By letter dated April 19, 2010, the Board notified Spencerian of that decision. Although that letter purported to cite "continued areas of deficiency," it – like the February 19th letter – merely repeated the language of the regulation and failed to identify a single area of deficiency [30-6-10 VR 122, 1:48:45]. Moreover, as several of the "deficiencies" cited had only gone into effect since the Board's last site visit, they could not, by definition, be "continued" areas of deficiency. The Board's April 19, 2010 letter [R. 226 Administrative Record Ex. 24] further prohibited Spencerian from admitting new students.

Proceedings Below. On April 26, 2010, Spencerian filed its Complaint for Declaratory Judgment and Injunctive Relief against the Board alleging (1) that the Board acted arbitrarily and capriciously in violation of Section 2 of the Kentucky Constitution by placing the ADN Program on Probational Approval Status; (2) that the Board's

[8] Ms. McCormick attended that meeting and testified at the July 9th injunction hearing that the Board's treatment of the ADN Program was unprofessional and made her feel humiliated to be a nurse [30-6-10 VR 122, 3:18:17].

decision violated Spencerian's Due Process rights; and (3) that the Board impermissibly retroactively applied the 2009 revisions to the Administrative Regulations when placing the ADN Program on Probational Approval Status.

On July 7, 2010, the Board filed its Motion for Summary Judgment. Spencerian filed its own summary judgment motion on September 30, 2010. On April 12, 2011, the Court issued its Opinion and Order in which it determined that although Spencerian had a constitutionally protected property interest in its conditional status absent a showing of continued deficiencies, the Board did not act arbitrarily in placing the ADN Program on probation. The Court also determined the Board did not impermissibly retroactively apply the July 2009 amendments in its evaluation of the ADN Program.

The Kentucky Court of Appeals reversed the Jefferson Circuit Court, finding that summary judgment in the Board's favor was inappropriate, because the board retroactively applied the amended Administrative Regulations to conduct that pre-dated the amendments. In so holding, the Court of Appeals stated that the "prior version of the regulation did not have the 85% pass rate apply to first time test takers; it only stated the program must have a pass rate of 85% on the NCLEX-RN" [Court of Appeals Opinion, p. 8]. Moreover, it noted that the Board's interpretation of the prior version was not entitled to any deference because it was in "direct conflict with the actual language" of the prior version [*Id.*, p. 10]. The Court of Appeals correctly held that Spencerian was entitled to judgment in its favor based on the Board's improper retroactive application of the July 2009 revisions to NCLEX-RN exam test results that pre-dated those revisions.

The ADN Program Attains Full Approval Status. During the pendency of this action, Spencerian has continued to operate the ADN Program with great success. In

April 2012, the Board placed the ADN Program back on Conditional Approval Status under the amended Administrative Regulations. In doing so, the Board acknowledged that Spencerian's NCLEX-RN pass rate remained below 85% for first-time test takers and directed Spencerian to conduct an evaluation to analyze program factors contributing to the pass rates and to develop strategies to improve NCLEX-RN pass rates for its graduates. The Board continued to make site visits to evaluate Spencerian's ADN Program throughout the remainder of 2012. For the calendar year 2012, the ADN Program achieved a 98% pass rate for its graduates taking the NCLEX-RN for the first time. The ADN Program also succeeded in meeting all of the requirements identified in the report of the Board's November 2012 site visit. Accordingly, on February 15, 2013, the Board placed the ADN Program back on Full Approval Status. Spencerian's ADN Program remains on Full Approval Status to this day. Because the Board only evaluates a nursing program based on its NCLEX-RN pass rates for the preceding calendar year, the NCLEX-RN pass rates for 2009 and the preceding years—the pass rates at issue in this case—are no longer relevant to the ADN's approval status.

ARGUMENT

The only reason the Board placed Spencerian's ADN Program on Probational Approval Status is because it did not meet the newly-amended 85% pass rate standard during the 2009 calendar year. As the Court of Appeals correctly found, the Board's retroactive application of the amended Administrative Regulations to test scores that predated the July 2009 amendments was inappropriate as a matter of law. Moreover, Spencerian was the **only** school placed on probation despite the fact that several other schools did not meet the requirements of the newly amended Administrative Regulations. Even if the Board's retroactive application of the amended Administrative Regulations

was appropriate (which it was not), the Board nevertheless arbitrarily and capriciously deprived Spencerian of its ability to admit new students without due process of law. The opinion of the Court of Appeals should be affirmed.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE BOARD RETROACTIVELY ENFORCED ITS REGULATIONS IN VIOLATION OF KENTUCKY LAW.

A. Kentucky Law Prohibits the Retroactive Application of Newly Amended Regulations.

The Court of Appeals correctly held that the Board could not retroactively enforce its newly-enacted regulations. The Administrative Regulations were amended effective July 31, 2009 to provide that a nursing program's approval status "shall be determined annually by the board on the basis of the program's annual report, NCLEX examination pass rates for first time test takers, and other pertinent data." 201 KAR 20:360 § 2(1). Under 201 KAR 20:360 § 2(4) "[a] program of nursing shall maintain at least an eighty-five 85 percent annual pass rate for graduates taking the NCLEX-RN . . . for the first time." It was not until this amendment that 201 KAR 20:360 contained any language stating that the 85% pass rate was limited to first-time test takers. As the Court of Appeals correctly found, the Board's retroactive application of this amendment was improper as a matter of law.

"Retroactivity is not favored in the law, and a strong presumption exists against retroactive application of regulations." 2 AM. JUR. 2D *Administrative Law* § 242 (2004). It is widely held that administrative regulations apply only to conduct occurring after their effective date and are not construed to have a retroactive effect unless such intent is clearly expressed in the regulatory language. *Id.* Kentucky law has long disfavored the retroactive application of statutes. *See Peach v. 21 Brands Distillery*, 580 S.W.2d 235,

236 (Ky. App. 1979) ("courts apply a strict rule of construction against retrospective operation [of statutes] and presume that legislatures intended a prospective application, especially when new rights and duties are created."); *Commonwealth of Ky. Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000) ("Kentucky law prohibits the amended version of a statute from being applied retroactively to events which occurred prior to the effective date of the amendment unless the amendment expressly provides for retroactive application."). This fundamental principle is so essential to statutory construction that it has been codified in KRS 446.080(3), which states "[n]o statute shall be construed to be retroactive, unless expressly so declared."

Kentucky recognizes that this prohibition against retroactive application of statutes is equally applicable to administrative regulations. In *Kerr v. Ky. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 797 S.W.2d 714 (Ky. App. 1990), the court held KRS 446.080(3) applied to prohibit the retroactive application of regulations governing the standards for land surveyor licensing. Kerr lost his land surveyor license after it was alleged he acted with gross negligence and incompetence under KRS 322.180 in conducting four (4) land surveys. The Board heard a complaint on the matter and suspended his license after making five (5) conclusions of law, three of which relied on KRS 322.180. The trial court upheld the Board's decision and Kerr appealed. According to the appellate court, the conclusions reached by the Board and upheld by the trial court relied upon the application of standards developed by the Board pursuant to KRS 322.180 and codified in 201 KAR 18:150, which did not become effective until several months ***after*** the surveys in question had been completed. Kerr argued, and the court agreed, that the retroactive application of the regulation to Kerr's work on those land surveys violated

KRS 446.080(3). The court held that retroactive application of a regulation that did not exist until after the alleged violations could not be used to strip Kerr of his professional license.

In *Duff v. Ky. Bd. of Med. Licensure*, 2008 WL 4367845 (Ky. App. 2008), the court held that a regulatory amendment could not be applied retroactively to revoke Duff's physician license. Duff's license was revoked after the Board determined he had treated seven bariatric patients with phentermine, a Schedule IV amphetamine. All of the patients were treated before February 7, 2002. The Board found that Duff's practice did not comply with the Board's regulation 201 KAR 9:016 guidelines for prescribing controlled substances. Duff argued the Board erred in relying on amendments to the regulation that became effective February 7, 2002. Unlike the amended version, the pre-amended version of the regulation did not regulate Schedule IV amphetamines, including prescriptions of phentermine. The Court of Appeals, citing previous case law stated, "a statute or regulation will always be interpreted to operate prospectively unless a clear intention to the contrary is expressed or necessarily inferred." *Id.* at 2. The court held that "[t]o apply the amended version of 201 KAR 9:016 retroactively would not only be fundamentally unfair but would impermissibly impose new legal duties upon a physician." *Id.* The court vacated the case and remanded consideration to the Board with directions to apply the pre-amended version of the regulation.

The amendment to 201 KAR 20:360 amounted to a substantive change in the law because it redefined Spencerian's obligations regarding its ADN Program license. Specifically, the July 2009 amendments changed the evaluation period to a calendar year and added new language making the regulation applicable to first-time test takers. The

regulation was also amended to evaluate pass rates over a single calendar year period as opposed to a three-year period. It was fundamentally unfair for the Board to apply these changes after many, if not most, 2009 exams had been completed. The Board's actions run counter to the fundamental principle against retroactivity that "notice or warning of a rule should be given in advance of the actions whose effects will be judged." 2 *Sutherland Statutes and Statutory Construction*, § 41.2 (7th ed. 2009).

Moreover, during the 2010 site visit, Spencerian was judged on evaluative standards that did not exist prior to July 2009. Spencerian was placed on probation for "continued" deficiencies. But the regulations cited in the notification to Spencerian had not previously been in existence and could not have been "continuing" deficiencies. The Board retroactively applied the new standards contained in the July 2009 amendments and punished Spencerian for pre-amendment NCLEX-RN exam results. The Board's actions violated the Commonwealth's prohibition against retroactive application of regulations. The opinion of the Court of Appeals should be affirmed.

B. The Board's Interpretation of the Pre-2009 Regulations Is Not Entitled to Deference.

The Board acknowledges that the express language of the pre-2009 Administrative Regulations did not contain any reference to first-time test takers. Nevertheless, the Board contends that its "longstanding interpretation" of the pre-2009 Administrative Regulations as applying to first-time test takers is controlling. The Board further contends that the Court of Appeals, in holding that the Board's interpretation of the pre-July 2009 version of 201 KAR 20:360 conflicted with the actual language of the regulation, ignored Kentucky precedent stating that a court "must defer" to an administrative agency's interpretation of its own regulations. This is incorrect. The

Court of Appeals properly acknowledged that an administrative agency's interpretation of a regulation is valid only if the interpretation complies with the actual language of the regulation [Opinion, p. 9].

An administrative agency's interpretation of its own regulations is entitled to judicial deference. However, a court is not required to defer to an agency's interpretation in every situation. A reviewing court may substitute its own judgment if the agency's interpretation is incompatible with the statute under which it was promulgated, or is otherwise defective as arbitrary or capricious. *Com., Cabinet for Health Services v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003). Moreover, "[a]n agency's interpretation of a regulation is valid ... only if the interpretation complies with the actual language of the regulation." *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991). A court "is not bound by an erroneous administrative interpretation no matter how long standing such an interpretation." *Camera Ctr., Inc. v. Rev. Cab.*, 34 S.W.3d 39, 41 (Ky. 2000). There is no dispute that the pre-2009 version of 201 KAR 20:360 did not contain language limiting the 85% pass rate to first-time test takers. As held by the Court of Appeals, the Board's contrary interpretation conflicted with the language of the regulation and was invalid.

The Board argues that because the pre-2009 version speaks in terms of "graduates" (as opposed to first-time test takers), the Board's interpretation of that regulation as applying to first-time test takers is somehow tenable. It is not. The term "graduates" does not, as the Board suggests, clearly imply only those individuals taking the NCLEX-RN exam for the first time immediately after graduation.

"Graduate" is defined as "a person who has completed a course of study at a school or college and has received a degree or diploma." Webster's New World College Dictionary 585 (3d ed. 1997). *See also* Webster's II New Riverside Dictionary 300 (rev. ed. 1996) (defining "graduate" as "one who has received an academic degree or diploma."); Random House Webster's Unabridged Dictionary 827 (2nd ed. 1998) (defining "graduate" as "a person who has received a degree or diploma on completing a course of study, as in a university, college, or school."). None of these definitions imply that the term "graduate" has a temporal limitation. Rather, the term applies to all persons who have successfully completed a course of study.

The Board further argues that *Hagan* stands for the proposition that a reviewing court must apply an agency's long-standing interpretation of its regulations, even if that interpretation is incorrect. This is simply wrong. The *Hagan* decision held that, even though improper, a decades old, interpretation of a liquor license regulation would be applied prospectively. *St. Luke Hospitals, Inc. v. Com.*, 186 S.W.3d 746, 751 (Ky. App. 2005). "However, the rule in *Hagan* applies only in cases where there is strong, reasonable detrimental reliance on the incorrect, decades-old interpretation of a regulation. Without such reliance,'[a]n erroneous interpretation or application of the law is reviewable by the court which is not bound by an erroneous administrative interpretation no matter how long standing such an interpretation.'" *Id.* (quoting *Camera Center, Inc.*, 34 S.W.3d at 41.). The Board's reliance on *Hagan* is misplaced.

Unambiguous regulations must be given a literal interpretation. *Monumental Life Ins. Co. v. Dep't of Rev.*, 294 S.W.3d 10, 19 (Ky. App. 2008) ("The first principle of

statutory construction is to use the plain meaning of the words used in the statute.").[9] As the Board concedes, **the pre-July 2009 version of the regulations contained no reference to first-time test takers.** They applied broadly to "graduates of a program of nursing." 201 KAR 20:360. In other words, they applied to those individuals who successfully completed a nursing program without reference to when those individuals obtained their degrees or took the NCLEX-RN exam. The Court of Appeals correctly held that the Board's interpretation of the old Administrative Regulations as applying to first-time test takers was "in direct conflict with the actual language of the old version" [Opinion, p. 10]. Accordingly, the Court of Appeals correctly disregarded the Board's erroneous interpretation.

C. The Board's Interpretation of the Pre-2009 Regulation Is Not Consistent with the Regulation's Purpose.

Not only did the Board's interpretation conflict with the express language of the regulation, it was arbitrary and capricious as a matter of law. Although the Board argued that its interpretation of the pre-2009 version of the Administrative Regulations was consistent with the policy of the regulations, both Dr. Spurr and the Board's Executive Director, Charlotte Beason, admit they can point to no empirical data to establish or support the Board's position that the 85% standard for first-time NCLEX-RN testers is a quality measurement which supports the evaluation of nursing programs. [30-6-10 VR

[9] It is well settled that in the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation. *SmithKline Beecham Corp. v. Rev. Cab.*, 40 S.W.3d 883, 885 (Ky. App. 2001)

121, 4:13:10; 30-6-10 VR 122, 1:28:40; 30-6-10 VR 122, 5:45:20].[10] Dr. Beason admitted that she was not aware of the basis used by the Board in adopting the 85% rule [30-6-10 VR 121, 4:12:10] and was not aware of any empirical data supporting the 85% rule [30-6-10 VR 122, 1:30:30]. Dr. Beason's effort to explain the use of only the first NCLEX-RN testing as a basis for a quality measurement was unconvincing [*Id.* at 1:29:23]. Dr. Beason tacitly acknowledged the inconsistency of judging a nursing program on the basis of one year's NCLEX-RN test scores and allowing applicants to take the NCLEX-RN test an unlimited number of times [*Id.* at 1:31:27]. As Dr. Beason admitted, an applicant may take the NCLEX-RN examination 100 times and be licensed in Kentucky if the applicant eventually passes [*Id.* at 1:32:40].

A reviewing court may substitute its own judgment if the agency's interpretation is arbitrary or capricious. *Family Home Health Care, Inc.*, 98 S.W.3d at 527. The methodology employed by the Board is fatally flawed, arbitrary, and without any rational basis, particularly given the fact that the Board has adopted no limit on taking the NCLEX-RN by applicants for licensure. The Court of Appeals correctly held that the Board's interpretation of the pre-2009 version of the Administrative Regulations was flawed and could not support the Board's claim that it did not retroactively apply the new version of the Administrative Regulations in violation of Kentucky law. The Board has not presented any argument sufficient to reverse the Court of Appeals' well-reasoned ruling.

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[10] Judge Morris was also unsure of the connection between the first-time pass rates and the evaluative standards given that "the Board itself allows anyone seeking licensure to take the [NCLEX-RN] as many times as necessary to pass it." [R: 25].

D. The Court of Appeals Opinion Will Not Have Far Reaching Adverse Consequences.

The Board claims that the Court of Appeals ruling will have "far reaching adverse effects" because undermines (1) the Board's mission to ensure that nursing programs adequately prepare students for licensure; and (2) the ability of administrative agencies to rely on longstanding interpretations of their regulations [Appellant's Brief, p. 18]. Neither argument provides a compelling reason to revisit the Court of Appeals' correct conclusions.

The Court of Appeals held that the Board could not retroactively apply the July 2009 amendments to first-time NCLEX-RN testers whose tests pre-dated those amendments. The Court made no statement as to the validity of the July 2009 amendments and did nothing to limit the Board's ability to evaluate prelicensure programs such as the ADN Program based on NCLEX-RN results of first-time test takers occurring after July 2009. This decision confirms long-standing Kentucky precedent holding that an agency cannot apply modifications to its regulations retroactively. It does not undermine the Board's ability to enforce the current regulations going forward.

Likewise, the Court of Appeals opinion does not undermine the ability of agencies to rely on their interpretations of their own regulations, as long as those interpretations are consistent with the actual language of the regulation and not arbitrary or capricious. As detailed above, administrative agencies do not have *carte blanche* to interpret regulations as they please without judicial interference. Rather, they must interpret their regulations in accordance with the actual language of the regulation and the intent of the statute. This has always been the law in this Commonwealth. As confirmed by the Court of Appeals, the Board's interpretation of the pre-2009 version 201 KAR

20:360 directly conflicted with the unambiguous language of the regulation. As such, it was not entitled to any deference. This correct statement of the law does not, as the Board suggests, "introduce a permanent cloud of uncertainty" on regulatory bodies [Appellant's Brief, p. 19]. It only reinforces the fact that courts are not required to defer to arbitrary agency interpretations that directly conflict with the unambiguous language of regulations.

Moreover, the Court of Appeals ruling will not, as the Board suggests, undermine the Board's regulation of the ADN Program going forward. Regardless of the Board's improper actions in 2010, the issue is now moot as the Board has since acknowledged that the ADN Program has increased its NCLEX-RN pass rates for first-time test takers and is entitled to Full Approval Status under the July 2009 amendments to the Administrative Regulations. Indeed, the ADN Program has been operating under Full Approval Status since February 2013. Because the Board evaluates nursing programs based on their NCLEX-RN exam pass rates for only the preceding year, the ADN's Program's pass rates for 2009 (and the present issue of how the Board evaluated those rates) no longer have any bearing on the ADN Program's approval status.[11]

II. THE COURT OF APPEALS OPINION SHOULD BE AFFIRMED ON OTHER GROUNDS.

A. Spencerian Was Not Required to File a Cross Motion for Discretionary Review.

[11] As Spencerian argued in its motion to dismiss this appeal, the issue in this appeal – whether the Board improperly retroactively applied amended regulations to place Spencerian's ADN Program on Probational Approval Status— is now moot based on Spencerian's continued compliance with program requirements under the amended Administrative Regulations.

The Board contends that this Court may not consider other arguments supporting Spencerian's right to judgment in its favor as a matter of law—namely, its argument that the Board violated Kentucky law by arbitrarily and capriciously depriving Spencerian of its ability to admit new students without due process of law—because Spencerian did not seek this Court's discretionary review of these arguments. This is incorrect.

It is well-settled law in Kentucky that "the judgment of a lower court can be *affirmed* for any reason in the record." *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011) (emphasis in original). Where, as here, a prevailing party seeks only to have this Court affirm a judgment of the Court of Appeals, that party is entitled to argue that the Court of Appeals reached the correct result for any reason brought to the court's attention. *Id.* At 591-92. *Id.* Because this Court affirms judgments rather than issues, there is "no logical reason for the prevailing party to appeal, regardless of the ground or grounds upon which affirmance occurs." *Id.* At 592. Simply put, Spencerian was not required to file a cross-appeal and the Court of Appeals' judgment may be affirmed on any grounds previously argued.

B. The Board Arbitrarily and Capriciously Placed The ADN Program on Probational Approval Status in Violation of Section 2 of the Kentucky Constitution.

Section 2 of the Kentucky Constitution prohibits unequal enforcement of the law. *Commonwealth of Ky., Natural Res. & Envtl. Prot. Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718 (Ky. 2005). In *Kentec,* the Supreme Court held:

> Section 2 of the Kentucky Constitution provides the Commonwealth shall be free of **arbitrary** action. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a **due process** provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures. (Citations omitted.) (Emphasis added.) *Id.* at 724.

> "**Unequal enforcement** of the law, if it rises to the level of a conscious violation of the principle of uniformity, is prohibited by this section." (Citations omitted.) (Emphasis in original.) *Id.* at 726.

See also Commonwealth of Ky., Transp. Cab., Dep't of Highways v. Express Mart, Inc., 759 S.W.2d 600, 601 (Ky. App. 1988) (internal citation omitted) ("Violation of the principle of uniformity occurs where administration or enforcement 'rests upon reasons so unsubstantial' as to amount to a violation of the constitutional protection against the arbitrary exercise of official power."). The Board's disparate treatment of Spencerian plainly violates the Kentucky Constitution's proscription against arbitrary state action.

The Board placed the ADN Program on Probational Approval Status because Spencerian failed to achieve an 85% pass rate for the past seven years. This, however, was insufficient grounds on which to place the ADN Program on Probational Approval Status pursuant to the Board's own regulations, which had only recently been amended to expressly consider pass rates for first-time test takers. Moreover, the Board failed to place similarly-situated institutions on probation, a fact which the Circuit Court was admittedly "concerned with" [R. 518: Circuit Court Opinion and Order].

The Board has consistently treated Spencerian – a private, proprietary college – arbitrarily. For example, in 2006, the Jefferson Circuit Court found that the Board's actions in seeking to withdraw approval of the ADN program was "arbitrary and capricious in light of the fact that at least three other schools had the same problem but were not shut down" [R. 14-31]. The same is true here where the Board has yet again treated Spencerian arbitrarily in comparison with other institutions.

For instance, the Board did not place the two public schools, Northern Kentucky University and Hazard Community and Technical College – Lees Campus, on Probational Approval Status at its February 2010 meeting even though both schools

failed to achieve an 85% pass rate for first-time NCLEX-RN takers for calendar year 2009. Both of these schools had a lower pass rate during calendar year 2009 than Spencerian [R. 7-8: Compl.; R. 338].[12]

In addition, four (4) other nursing schools all failed to achieve an 85% pass rate for first-time NCLEX-RN takers in calendar year 2009, but none were placed on Probational Approval Status: Spalding University (76%), Bluegrass Community and Technical College – Lawrenceburg (67%), Southeast Community and Technical College – Pineville (76%) and St. Catharine College (79%) [R. 8: Compl.]. In total seven (7) schools failed to achieve an 85% pass rate for first-time test takers in calendar year 2009. Of those seven (7) schools only one was placed on probation—Spencerian. This disparate treatment is ample evidence of the Board's arbitrary and capricious actions.

The record shows the Board decided long before its February meeting that it was going to find fault with Spencerian's ADN Program during the 2010 site visit so that it could place Spencerian on Probational Approval Status. Indeed, Dr. Spurr admitted as much during her January 2010 site visit to the school. During the May 2009 site visit, Spencerian met 131 of 133 evaluative standards for prelicensure registered nursing programs and partially met the other two evaluative standards [R. 5: Compl.]. During the 2010 site visit, which occurred after the Board adopted new regulations in the Summer of 2009 – including 60 new evaluative standards which, by definition, cannot form the basis for ***continued*** areas of deficiency –Dr. Spurr found that Spencerian met the standards it

[12] Dr. Beason admitted at the July 2010 injunction hearing that the pass rate at Hazard Community Technical College–Lees Campus had only increased by two (2) percentage points from 76% to 78% between 2008 and 2009 [30-6-10 VR 122, 1:28:18]. Spencerian's pass rate, on the other hand, went up nine (9) percentage points during that same time frame from 72% to 81% [*Id.* at 1:27:05].

had partially met in May 2009. It is impossible for Spencerian to ***continually*** fail to meet new annual evaluative standards that were in effect for only five (5) months and upon which Spencerian had not previously been evaluated.[13] Moreover, Dr. Spurr found that Spencerian no longer met certain standards that it had previously met despite the fact that the handbooks and policies being reviewed had not changed. Specifically, in its 2010 Survey Visit Report the Board:

- Identified Spencerian as not having written administrative policies for the program despite the fact that the report itself stated that "There are policies within the orientation binder that each faculty member has a copy of." Although Spencerian was found to have complied with this standard during the May 2009 site visit, Dr. Spurr now found the policies, which were only eight months older, to be "badly out of date" [R. 58].

- Stated that Spencerian only partially met a written plan for the orientation of the faculty despite its own comments that "an extensive orientation manual [was] developed in 9/2002 and updated in 4/2009." Dr. Spurr apparently leapt to this conclusion because development forms from three faculty members were not signed, which is not required by plain terms of the regulation [R. 58].

- Stated that the assessment plans that met the Board's standards during the previous visit are now not "data driven" [R. 59].

- Identified development of selection and evaluation criteria for clinical facilities as a standard that was not met despite the fact that Spencerian staff "verbalize[d] areas that [are] consider[ed] when visiting a prospective site" [R. 60]. Stated that Spencerian did not facilitate regular communication with faculty even though Spencerian held faculty meetings on a monthly basis and required those not in attendance to read the minutes and e-mail that they had read them [R. 52-62].

[13] The Board will likely aver that "continued" does not mean the failure to meet the same standards. That preposterous interpretation has no legal support. Given the Board's admission that its interpretation of its administrative regulations is subjective, then the failure to be in compliance with even one evaluative standard could be the basis for placing a nursing program on probation.

- Stated that Spencerian did not evaluate student achievement of curricular outcomes related to nursing knowledge and practice because the faculty's use of a particular scan-tron test was inconsistent [R. 64].

- Found that Spencerian only partially met the standard requiring that nurse faculty hired without prior teaching experience shall have a mentor assigned and an educational development plan implemented despite noting that "all criteria are met," "all faculty meet regulatory requirements," that "mentoring is occurring" and that the "college holds a program each quarter for all full-time faculty on educational topics" [R. 67].

- Found that the evaluation plan and student handbook that previously met standards now no longer do [R. 73, 78].

- Stated that Spencerian did not use the assessment to validate outcomes and provide evidence of improvement based on analysis of results even though Spencerian "utilizes both testing and skills lab to validate knowledge and skill prior to graduation" and that the "program utilizes a number of tools from ATI to assess student outcomes" [R. 70].

- Found that Spencerian only partially met the standard that a system of acquisition and deletion shall exist that ensures currency and appropriateness of library resources despite stating that "essential resources [are] available," that the "librarian reminds faculty each quarterly faculty meeting to send in requests," and that faculty and students were "able to obtain all resources they need" [R. 74].

Clearly, the findings in the January 2010 Survey Visit Report, which differ dramatically from the prior visit in May 2009, evince the Board's arbitrary actions and insincere justification for its foregone conclusion to place Spencerian on probation.

The Circuit Court determined that even though other schools had lower pass rates, they met more evaluative standards than Spencerian's ADN Program. Yet this finding is incorrect for a number of reasons. First, Dr. Spurr and Dr. Beason admitted at the injunction hearing that the standards are highly subjective and some are not even based on any kind of empirical data. Second, but for the pass rate, the ADN Program ***met*** the only remaining evaluative standard that it had only partially met in May 2009 [R. 52-85]. Therefore, the ***only*** standard that arguably "continued" to be unmet was the 85% pass

rate, which was true for the six (6) other schools that did not get placed on probation.[14] Finally, the Board claims it did not place the other schools on probation due to changes those programs planned to implement. Spencerian also presented significant proposed changes to the Board (*i.e.*, extending the ADN Program from 12 to 18 months), which the Board ignored. And although the Board admittedly took the so-called "unique issues and challenges" facing the other schools that failed to meet the 85% pass rate into consideration, it completely ignored the challenges facing Spencerian and its students.[15] The Board has no explanation for this obviously disparate treatment.

The Board cannot legitimately argue that it applied 201 KAR 20:360 uniformly. It did not. It treated Spencerian differently than every other school that failed to achieve an 85% pass rate for first-time test takers in the 2009 calendar year. Moreover, it has failed to show that this was not a conscious violation of uniformity. The pass rates spoke for themselves. Without question, the Board knew that six (6) other schools failed to achieve the requisite pass rate, yet it consciously decided that Spencerian was the ***only*** school to be placed on probation. The Board did not make a mistake. It knew full well that it was purposefully treating Spencerian differently from other nursing programs with the same deficiency.[16] And despite the fact that Board members may have specialized

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[14] In addition, 201 KAR 20:360's reliance on first-time NCLEX-RN test taker pass rates is not rationally related to any legitimate state interest as the Board itself allows anyone seeking registered nurse licensure to take the NCLEX-RN as many times as necessary to pass it.

[15] As stated above, the vast majority of students in the ADN Program are non-traditional students facing the unique challenge of balancing work and family life while trying to obtain their education.

[16] It is incredible that the Board did this to Spencerian considering the Jefferson Circuit Court already found that the Board's 2006 action of placing the ADN on probation (continued...)

knowledge in the nursing field, that does not give them the right to violate fundamental tenets of fairness ensured by the Kentucky Constitution.

C. The Board Failed to Provide Due Process to Spencerian Before Placing it on Probational Approval Status in Violation of Section 14 of the United States Constitution

Spencerian has a legitimate claim of entitlement to its ADN Program's approval status absent continued deficiencies by virtue of the Board's own regulations. Yet the Board violated Section 14 of the United States Constitution by failing to provide Spencerian adequate due process before placing the ADN Program on Probational Approval Status.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *The Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972). Constitutionally protected property interests may take many forms. *Id.* To have a constitutionally protected property interest, a person must "have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property interests are defined by existing rules from an independent source or stem from understandings that secure claims of entitlement to certain benefits. *Id.* As the Circuit Court properly ruled, Spencerian has a "legitimate property interest in remaining on conditional approval status absent a showing of continued deficiencies" [Opinion and Order 3].

(...continued)

approval status was "arbitrary and capricious in light of the fact that at least three other schools had the same problem but were not shut down." [R. 14].

The Board argued below that Spencerian does not have a protected interest in its approval status because the only substantial statutory restriction of the Board's authority is KRS 314.111(3), which requires a KRS 13B hearing only when the Board seeks to discontinue a program. KRS 314.111 is not the source of Spencerian's legitimate claim of entitlement to its approval status. Indeed, 201 KAR 20:360 provides that a nursing program shall remain on conditional approval status unless and until the standards of 201 KAR 20:260 through 201 KAR 20:360 have ***continued*** to be unmet. Spencerian therefore had a legitimate entitlement by way of the Board's own regulations to remain on conditional approval status and admit new students absent ***continued*** deficiencies.

In *Roth*, the plaintiff based his Fourteenth Amendment due process claim on the defendant's decision not to rehire him as a teacher at Wisconsin State University after his first year. Unlike this case, there was nothing in either the applicable statutory or administrative law that guaranteed Roth's employment beyond his first year. In fact, his employment contract – which the Court found highly relevant – specifically provided that plaintiff's fixed term of employment ended on June 30, 1969. *Roth*, 408 U.S. at 566. Because there was nothing to secure any interest in Roth's continued employment, the Court held that Roth could not show that he was deprived of a constitutionally protected property interest. *Id.* at 579.

Unlike Roth's employment contract, the ADN Program's approval status does not expire on a date certain. Instead, the regulations clearly provide that the Board cannot reduce a nursing program's approval status unless certain conditions precedent occur. This gives all Spencerian's ADN Program, a legitimate claim of entitlement to their approval status – even if it is conditional as opposed to full. *See also Goldberg v. Kelly*,

397 U.S. 254 (1970) (holding that welfare recipients had a property interest in their benefits based on the statutory and administrative procedures governing benefit termination); *Barry v. Barchi*, 443 U.S. 55 (1979) (holding that a horse trainer had a constitutionally protected property interest in his horse training license, which could not be suspended absent a sufficient showing that his horse had been drugged and that he was at least negligent in failing to stop the drugging).

In a factually similar case, the Ohio State Medical Board withdrew its approval of the Great Lakes College, Inc. ("Great Lakes") to give instruction in mechanotherapy and massage. The court, finding that Great Lakes had a legitimate claim of entitlement to its approval status, held that "[t]o arbitrarily withdraw approval and deny entrance to an examination for licensure to all of [Great Lakes'] graduates is to deny fundamental due process to [Great Lakes]." *State ex rel. Great Lakes Coll., Inc. v. Med. Bd.*, 280 N.E.2d 900, 902 (Ohio 1972). Implicit in the court's decision is the existence of the school's property interest in its approval status because the board had a duty to exercise its discretion regarding approval status "cautiously to safeguard the rights of those concerned." *Id.*

Excelsior College v. California Board of Registered Nursing, 136 Cal.App.4th 1218 (Cal. Ct. App. 2006), upon which the Board has relied, is distinguishable and not controlling here. In that case, the California Court of Appeals held that Excelsior College ("Excelsior") did not have a property interest in its approval status with the California Board of Registered Nursing. Important to the court's holding was that the board did not have a statutory or administrative duty to prospectively evaluate out-of-state nursing schools to determine if their curriculum was sufficient to permit their graduates to apply

for licensure in California. Rather, the board was to evaluate each school's curriculum at the time that an individual graduate applied for licensure. Without the board having a prospective duty to evaluate nursing programs, Excelsior could not have a property interest in the approval of its program. The fact that Excelsior had a "de facto" exemption did not confer a legitimate property interest.

Unlike Excelsior, Spencerian has a de jure right to continue admitting students into the ADN Program until it continually fails to meet the applicable evaluative standards which the Board promulgated. Because the applicable regulations state that a nursing program cannot be placed on probational status until it ***continually*** fails to meet defined evaluative criteria, nursing schools throughout Kentucky have a constitutional protected interest in their right to admit new students.

Because Spencerian has a constitutionally protected property interest in its approval status, the Board was required to provide sufficient due process before placing the ADN Program on Probational Approval Status. But the Board wholly failed to do so. It did not give Spencerian a formal order or advise Spencerian of the purported deficiencies; it merely sent Spencerian a letter quoting the regulations. Moreover, the Board did not provide Spencerian a hearing to contest the deficiencies. The Board took action at its regularly scheduled meeting to place Spencerian on Probational Approval Status and prohibited Spencerian from admitting new students. Fundamental due process requires that Spencerian be provided an opportunity to be heard in accordance with KRS Chapter 13B before prohibiting Spencerian from admitting new students.

Moreover, the Board exceeded its powers and abused its discretion. The Board "'must be bound by the regulations it promulgates.'" *Headen v. Commonwealth*, 87

S.W.3d 250, 254 (Ky. App. 2002) (quoting *Hagan* 807 S.W.2d at 490). It cannot alter a regulation in the course of an adjudication. *See id.* In this case, the Board acted contrary to its own regulations – 60 of which were newly promulgated. In violation of 201 KAR 20:360 §1 (5)(a), the Board failed to notify Spencerian of any "continued areas of deficiency." Instead, the Board merely sent a letter restating the regulations. Similarly, KRS 314.111(3) requires the Board to specify any deficiencies and to allow Spencerian a "reasonable time" to correct the deficiencies set forth. The Board failed to specify any deficiencies and failed to allow Spencerian any time to correct any deficiencies after it issued the February 19, 2010 Letter. Instead, it placed Spencerian on Probational Approval Status and prohibited it from admitting new students. The Board's decision to place the ADN Program on Probational Approval Status violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which prohibits the deprivation of property without due process of law, and the Kentucky Constitution.

CONCLUSION

The pre-July 2009 version of 201 KAR 20:360 did not contain any reference to first-time test takers. Yet the Board placed Spencerian's ADN Program on probation based on the NCLEX-RN pass rates of graduates taking the exam for the first time prior to July 2009. In accordance with Kentucky law, the Court of Appeals correctly held that the Board unlawfully retroactively applied the Administrative Regulations, and that Spencerian was entitled to judgment as a matter of law. Moreover, the Board acted arbitrarily and capriciously in placing the ADN Program on probational approval status without due process of law.

For the reasons stated herein, Spencerian respectfully requests this Court to affirm the judgment of the Court of Appeals holding that Spencerian is entitled to judgment in its favor as a matter of law.

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