

BACKGROUND PAPER FOR THE Board of Registered Nursing

**(Oversight Hearing, March 6, 2017, Senate Committee on
Business, Professions and Economic Development and the Assembly
Committee on Business and Professions)**

IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE CALIFORNIA BOARD OF REGISTERED NURSING

BRIEF OVERVIEW OF THE BOARD OF REGISTERED NURSING

Functions of the BRN

The Board of Registered Nursing (BRN) regulates the practice of registered nurses (RNs) in California. BRN implements and enforces the Nursing Practice Act (Act), the laws and regulations related to nursing education, licensure, practice, and discipline.

The BRN's mission statement is as follows:

The Board of Registered Nursing protects and advocates for the health and safety of the public by ensuring the highest quality registered nurses in the state of California.

BRN regulates over 500,000 licensees in California. In addition to licensing RNs, BRN issues permits for pending licensees and certificates to the following advanced practice registered nurses (APRN): nurse practitioners (NPs), nurse anesthetists, nurse midwives (NMs), and clinical nurse specialists (CNSs). BRN also issues furnishing numbers to NPs and NMs with furnishing authority, maintains a list of psychiatric/mental health nurse specialists, issues certificates to public health nurses, and approves continuing education providers (CEPs).

BRN is responsible for setting educational standards for RN, NP, and NM programs, approving such programs, approving continuing education providers, evaluating and licensing RN and APRN applicants, administering discipline, managing a Intervention Program for licensees with substance use disorders or mental illness, and providing stakeholder information and outreach.

History of the BRN

California first tasked the University of California Board of Regents with regulating nurses in 1905. BRN's functional predecessor, the Bureau of Registration of Nurses, was created in 1913, becoming the current BRN in 1975. The Board had been continuously in existence under various titles until

December 31, 2011 when it was allowed to sunset. The sunset was the culmination of a series of events stemming from a 2009 newspaper story critical of BRN's enforcement efforts, "When Caregivers Harm: Problem Nurses Stay on the Job as Patients Suffer."¹ The investigative report charged that BRN often took years to act on complaints of egregious misconduct, resulting in nurses with histories of drug abuse, negligence, violence, and incompetence continuing to provide care. When BRN did act, it often took more than three years to investigate and discipline licensees.

In the wake of the *Los Angeles Times* revelations, the Executive Officer (EO) of BRN resigned and Governor Schwarzenegger replaced four board members and filled two long-time vacancies. BRN's Supervising Nursing Education Consultant, Louise Bailey, became the EO. To adequately empower BRN to make needed changes, the Legislature passed SB 538 (Price) in 2011. The bill authorized BRN's investigators to have the authority of peace officers in order to more effectively provide enforcement, in addition to extending BRN's sunset and making a number of other changes. Establishing peace officer status and the attendant pension benefits was contrary to Governor Brown's pension reform plans and he vetoed the bill, eliminating BRN at the end of 2011.

BRN became the Registered Nursing Program (Program) under an interagency agreement with the Department of Consumer Affairs (DCA) that provided for the continued administration of the Act "in an uninterrupted and stable manner until legislation re-establishing the Board takes effect."² The Program allowed BRN staff to continue to operate administratively with Ms. Bailey directing activities as the Registered Nursing Program Manager.

The Board was reconstituted on February 14, 2012 and declared Ms. Bailey as the interim EO.³ She was voted unanimously as the permanent EO on July 27, 2012.

BRN did not get a quorum of board members, however, until May 2012, and the first Board meeting was held on June 21, 2012. Because of this delay, numerous actions that required Board input were backlogged.⁴ BRN's member positions were completely filled by February 2014. Following a critical 2015 Sunset Report, stemming in part from significant licensing delays and troubled information technology implementation, Ms. Bailey retired in 2016, replaced by Dr. Joseph Morris on July 11, 2016.⁵ Dr. Morris has academic preparation as a nurse practitioner and clinical nurse specialist and substantial prior experience in academics and administration.

Board Composition

BRN is composed of nine members: seven appointed by the Governor, one by the Senate Committee on Rules, and one by the Assembly Speaker. Four must represent the public at large, two must be RNs, one an APRN, one an RN educator or administrator, and one must be an RN administrator of a nursing service.

¹ See Charles Ornstein, Tracy Weber & Maloy Moore, *When Caregivers Harm: Problem Nurses Stay on the Job as Patients Suffer*, Los Angeles Times, July 11, 2009, available at <http://www.latimes.com/news/local/la-me-nurse12-2009jul12.0,2185588.story>, accessed March 3, 2015.

² Interagency Agreement Between the Department of Consumer Affairs and California Board of Registered Nursing, Dec. 14, 2011.

³ SB 98 (Committee on Budget and Fiscal Review), Chapter 4, Statutes of 2012.

⁴ BRN is statutorily required to have at least one meeting every three months. California Business and Professions Code (BPC) Section 2709. It may be argued that BRN missed only one board meeting during this transition period.

⁵ BRN News Release, June 17, 2016.

The current members are as follows:

Name and Short Bio	Appointment Date	Term Expiration Date	Appointing Authority
<p>Michael Deangelo Jackson, MSN, RN, CEN, MICN, Board President</p> <p>Mr. Jackson has been a clinical nurse II in the Department of Emergency Medicine at the University of California, San Diego Medical Center since 2000. He has been an adjunct clinical faculty member in the registered nursing program at Southwestern Community College and an operations supervisor at Scripps Mercy Medical Center. Mr. Jackson’s career also includes time as a mental health worker at Scripps Mercy Medical Center from 1992 to 2000 and service as a lance corporal in the United States Marine Corps Reserve from 1989 to 1993.</p>	May 10, 2012	June 1, 2016	Governor
<p>Raymond Mallel, Board Vice President</p> <p>Mr. Mallel has been a private investor since 2001. He was previously the director of marketing and operations at Long Beach Mortgage Company and Ameriquest Bank from 1991 to 2001 and vice president of Loubella Extendables Inc. from 1971 to 1991. Mr. Mallel served as vice president of the State Bar of California Board of Governors from 1983 to 1986 and was chair of the Client Security Fund at the State Bar of California from 1986 to 1990. From 1982 to 1994, he served three consecutive terms on the Medical Board of California, including as president and vice president. Mr. Mallel is a co-founder and member of the International Executive Board for the Sephardic Educational Center in Jerusalem, Israel. He also serves as president of the Raymond Mallel Foundation.</p>	February 6, 2014	June 1, 2017	Governor
<p>Donna Gerber</p> <p>Ms. Gerber graduated from UC Santa Barbara in social work and started her career as a social worker. She later worked for several labor unions as an advocate and educator for healthcare workers. Donna was elected to the Contra Costa Board of Supervisors in 1996 and again in 2000 and she was appointed as a public member of the California Medical Board by Governor Gray Davis.</p> <p>She is currently on the Board of Directors of Greenbelt Alliance, a non-profit organization in the San Francisco Bay Area that promotes mixed use urban development and rural conservation through urban growth boundaries. She also serves on the Board of the National Charrette Institute, a national non-profit educational institution that provides training to elected officials, private professionals and community members that empowers all parties toward land use project planning, design and implementation.</p>	February 4, 2016	June 1, 2020	Speaker of the Assembly
<p>Elizabeth (Betty) Woods, RN, FNP, MSN</p> <p>Ms. Woods is a volunteer nurse practitioner at the Jewish Community Free Clinic in Rohnert Park, Ca. Ms. Woods was previously a labor representative with the California Nurses Association from 1994 to 2007, and worked as a NP at Kaiser Permanente, Santa Rosa from 1976 to 1994 in Family Medicine and</p>	June 10, 2014	June 1, 2018	Governor

<p>as a member of the HIV Consult Team. From 1984 to 1994 she was an Adjunct Clinical Professor for NP students at Sonoma State University, and from 1982 to 1988, a NP Sexual Assault Examiner at Sonoma County Community Hospital. Before earning her NP certification and MSN from Sonoma State University, Woods was an ICU and medical/surgical RN.</p>			
<p>Imelda Ceja-Butkiewicz</p> <p>Ms. Ceja-Butkiewicz has been a Project Specialist at Kern County Public Health Services Department since 1999. She has served in multiple positions at the Kern County Department of Public Health, including with the Medi-Cal Outreach Program, Maternal Child Disability Program, Child Health and Disability Program, Kern Access to Children’s Health Program, Child’s Dental Program, and Refugee Health Assessment Program. She is currently working with individuals living with HIV/AIDS.</p> <p>Ms. Ceja-Butkiewicz is a community advocate and has served on several professional and community organizations, including the Kern Homeless Collaborative, International Women’s Program, Central Democratic Party Committee, Democratic Women of Kern (past President), Inyo, Kern Central Labor Council and Service International Union local 521.</p>	February 6, 2014	June 1, 2017	Governor
<p>Pilar De La Cruz-Reyes, MSN, RN</p> <p>Ms. De La Cruz-Reyes has been the director of the Central California Center for Excellence in Nursing at Fresno State since 2013. She was dean at the United States University in Chula Vista School of Nursing from 2011 to 2013, a project manager at the Hospital Council of Northern and Central California from 2007 to 2011, a faculty member at San Joaquin Valley College from 2003 to 2007 and a staff nurse to the chief nurse executive at the Fresno Community Medical Center from 2002 to 2006. She was chief nurse executive at the Fresno Heart Hospital from 2003 to 2006, held several positions at the Community Medical Centers from 1996 to 2003, including vice president and executive director of the Education Department, vice president of continuum services and facility service integrator. Ms. De La Cruz-Reyes was administrative director and service integrator at the Clovis Community Hospital from 1992 to 1995 and held several positions at the Fresno Community Hospital from 1969 to 1992, including director of nurses, nursing manager, supervisor of the Education and Training Department and critical care and clinical instructor. She earned a Master of Science degree in nursing from California State University, Dominguez Hills.</p>	October 28, 2015	June 1, 2019	Governor
<p>Trande Phillips, RN</p> <p>Ms. Phillips has been a registered nurse at Kaiser Permanente Walnut Creek Medical Center in the pediatric-flex unit and the medical, surgical, hospice and oncology unit since 1983. She was a registered nurse at the Merrithew Memorial Hospital in Contra Costa County from 1979 to 1981 and the Wichita General Hospital in Texas from 1971 to 1972.</p>	October 28, 2015	June 1, 2019	Governor
<p>Cynthia Cipres Klein, RN</p> <p>Ms. Klein is a registered nurse with the Internal Medicine/Subspecialty Department of Kaiser Permanente Medical Group in Riverside, California. She has served in multiple positions with Kaiser, including as the RN charge nurse</p>	June 6, 2014	June 1, 2018	Governor

<p>in urgent care from 2003 to 2005 and an ambulatory care RN team leader in family medicine, pediatrics, allergy and obstetrics and gynecology from 1998 to 2003. Ms. Klein worked as a RN supervisor for U.S. Family Care West from 1997 to 1998, as a general pediatric floor nurse at Miller’s Children’s Hospital in 1996, and as a RN lead for the Universal Care Medical Group from 1992 to 1995.</p>			
<p>Barbara Yaroslavsky</p> <p>Ms. Yaroslavsky has been active on many boards of both nonprofit and public organizations for the last 35 years. Some of the organizations that she is currently active with include the following: Friends Board of the Saban Community Clinic, LA’s Best Board, the Midwifery Advisory Council of the Medical Board of California (MBC), and Board of Executive Service Corps.</p> <p>She is also served on the MBC for 13 years in a variety of roles including President, chair of the Education Committee and Discipline panel, co-chair of the overprescribing task force.</p>	<p>June 1, 2016</p>	<p>June 1, 2020</p>	<p>Senate Rules Committee</p>

The Board is vested with the authority to implement and enforce the Act, and appoints an EO to carry out its will administratively. The EO is responsible for managing more than 150 staff, a budget of \$37.6 million, and must be a licensee, an uncommon requirement among all DCA health boards.

Standing and Advisory Committees

BRN divides itself into five standing committees to focus on aspects of the Act’s requirements. Each committee is comprised of two or more Board members and at least one staff liaison. The committees conduct public meetings, review and analyze issues, make enforcement decisions, and make recommendations to the full Board at least five times per year.

The committees and functions are as follows:

- Administrative Committee – Considers and advises the Board on matters related to Board organization and administration, including contracts, budgets, and personnel.
- Intervention/Discipline Committee – Advises the Board on matters related to laws and regulations pertaining to the Intervention Program and Enforcement Division and reviews enforcement and intervention related statistics.
- Education/Licensing Committee – Advises the Board on matters related to nursing education, including approval of prelicensure and advanced practice nursing programs, the National Council Licensure Examination for Registered Nurses (NCLEX-RN), annual school survey data and reports, licensing unit policies and procedures, and continuing education and competence.
- Nursing Practice Committee – Advises the Board on matters related to nursing practice, including common nursing practice issues and advanced practice issues related to NP, NM, nurse anesthetist, and CNS practice. This committee also reviews staff responses to proposed regulation changes that may affect nursing practice.

- Legislative Committee – Advises and makes recommendations to the Board and committees on matters relating to legislation affecting RNs.

BRN is statutorily authorized to appoint Intervention Evaluation Committees and a Nurse-Midwifery Advisory Committee (NMAC).⁶

- Intervention Evaluation Committees (IECs) – Each IEC is comprised of three RNs, a public member, and a physician who each have expertise in substance use disorders or mental illness. Currently there are 14 IECs throughout California that meet with Intervention Program participants on a regular basis.
- Nurse-Midwifery Advisory Committee (NMAC) –NMAC advises the Board on NM practice and education issues. NMAC is composed of at least one NM knowledgeable about NM practice and education, one physician who practices obstetrics, one RN familiar with NM practice, and one public member.

The Board is also authorized, with the DCA Director’s consent, to convene advisory committees as needed. Members of these committees may include a variety of experts and stakeholders invited by BRN. The following advisory committees have been created by the Board:

- Nursing Education and Workforce Advisory Committee (NEWAC) – NEWAC is the combination of the prior Nursing Workforce Advisory Committee and the Education Issues Workgroup (EIW). BRN voted to combine the two in June 2015. NEWAC provides guidance to the Board on RN workforce surveys, recommends strategies to address disparities in workforce projections, and identifies factors in the workplace that positively and negatively affect the health and safety of consumers and nursing staff. NEWAC includes members from nursing education, nursing associations, and other state agencies. EIW will be continued as a workgroup within NEWAC for the specific function of providing review and advising BRN staff regarding the Annual School Survey.
- Nurse Practitioner Advisory Committee (NPAC) –NPAC advises the Board on NP education and practice issues. NPAC is comprised of NPs who represent NP educational programs, RNs familiar with NP practice and education, and representatives of NP organizations.
- CNS Task Force – The CNS Task Force was created and charged with establishing categories of CNSs, developing regulations that set standards and educational requirements for each category, and providing consultation to Board on matters related to CNSs. The CNS Task Force includes representatives from education and different clinical areas of CNS practice.

Fiscal and Fund Analysis

The BRN is a self-supporting, special fund agency that obtains its revenues from licensing fees. The primary source of revenues is renewal fees. As indicated by the BRN, revenue has been stable since FY 2011/2012 when it implemented its first fee increase in 19 years. However, expenditures have

⁶ BPC §§ 2770.2 and 2746.2.

increased due to additional enforcement staff and the costs to process increasing numbers of discipline cases. The statutory reserve fund limit for the BRN is 24 months.

At the end of FY 2015/16, the BRN had a fund balance of \$9.4 million dollars, which represented a 2.5 month reserve. SB 1039 (Hill, Chapter 799, Statutes of 2015) raised statutory fee caps, and the Board’s reserve is expected to increase to 17.5 months by FY 2018/19.

Cost Recovery

BRN implemented a cost recovery program in 1994 which authorizes it to collect the reasonable costs of its investigation and enforcement against disciplined licensees.⁷ The authorizing statute requires the Board to request restitution and gives the administrative law judge (ALJ) discretion to set the amount. The Board may reduce or eliminate, but not increase, the cost award.

The percentage of cases for which cost recovery is sought has changed dramatically since the last Sunset Report. Cost recovery is executed through the Enforcement Division’s Legal Desk, and is agreed upon through stipulated agreements and/or probation requirements. Consequences for RNs not fulfilling cost recovery include extending probation or placing a hold on the RN’s license until the payment is received in full. The amount of cost recovery ordered remained fairly consistent until FY 2013/14 when it increased 53% to over 1.8 million. In subsequent fiscal years, the number of potential cases for recovery dropped by approximately 20%, but cost recovery was sought for nearly every case, resulting in substantially higher total cost recovery orders.

Cost Recovery	(dollars in thousands)			
	FY 2012/13	FY 2013/14	FY 2014/15	FY 2015/16
Potential Cases for Recovery *	2,110	2,060	1,538	1,695
Cases Recovery Ordered	279	428	1,505	1,552
Amount of Cost Recovery Ordered	\$1,197	\$1,836	\$2, 583	\$3,329
Amount Collected	\$736	\$930	\$1,427	\$1,092
* “Potential Cases for Recovery” are those cases in which disciplinary action has been taken based on violation of the license practice act.				

Staffing Levels

The BRN staff works in four interdependent program areas:

- Licensee and Administrative Services – This division provides assistance to the public and licensees through the information/call center, mail services, cashiering, and license renewals. It also handles BRN’s personnel, budget, and information technology concerns and provides coverage of legislative and regulatory issues.
- Licensing Program – The Licensing Program reviews the qualifications of U.S. and international RN and APRN applicants. Staff interfaces with examination services vendors, domestic and international RN programs, and other states’ boards of nursing.

⁷ The BRN does not have statutory authority to order restitution for consumers.

- Enforcement Division – This division handles the enforcement process from complaint through penalty and is comprised of five subdivisions: Complaint Intake, Investigations, Discipline, Probation Monitoring, and Intervention.
- Nursing Education – Nursing Education is staffed by Nursing Education Consultants (NECs) who assist new nursing schools through the approval process and monitor existing approved programs.

Licensing

The Board recently launched an innovative technology initiative to accelerate the licensing process that ensures secure electronic transcript and document sharing between the Licensing Program and certain California nursing programs. Early reports indicate this successful program is making initial licensing much easier for new California nurses.

BRN issues the following licenses, certifications, and approvals:

Registered Nursing (RN) license: RNs may apply for a California license either by examination or by endorsement. Individuals seeking licensure by examination are required to meet BRN’s education requirements, which are verified by reviewing official school transcripts and/or the review of the nursing program curriculum, pass the national examination, and have a clear background.

Licensure by endorsement is available to applicants who are already permanently licensed in another state or U.S. territory. These individuals are eligible for licensure if they passed either the current national examination or its predecessor; possess an active, current and clear RN license, successfully completed California educational requirements, and have a clear background. Applicants licensed in other countries who have not passed the national examination are not eligible for endorsement and may become licensed through examination.

Clinical Nurse Specialist (CNS) Certification: CNSs are RNs with advanced education who participate in expert clinical practice, education, research, consultation, and clinical leadership. BRN certification may be obtained by successful completion of a master’s program in a clinical field of nursing or a clinical field related to nursing with specified coursework.

Nurse Anesthetist Certification: Nurse anesthetists are RNs who provide anesthesia services at the direction of a physician, dentist, or podiatrist. Nurse anesthetist applicants must provide evidence of certification by the Council on Certification of Nurse Anesthetists and Council on Recertification of Nurse Anesthetists.

Nurse-Midwife (NM) Certification: NMs are RNs who are authorized, under the supervision of a licensed physician and surgeon, to attend normal childbirth and provide prenatal, intrapartum and postpartum care, including family planning care for the mother and immediate care for the newborn. BRN certification may be obtained by successful completion of a BRN-approved nurse-midwifery program or certification as a NM by the American Midwifery Certification Board. There is an equivalency method for applicants who completed a non BRN-approved midwifery program and who are not nationally certified.

NMs in California may apply for a NM furnishing number, enabling them to write a medication order and furnish drugs to a patient. To obtain a furnishing number, the NM must satisfactorily complete physician and surgeon supervised experience in the furnishing or ordering of drugs or devices, as determined by the physician and surgeon, and complete an advanced pharmacology course. Upon completion of the course and notification to the BRN, the NM then applies to the Drug Enforcement Administration (DEA) to obtain a DEA number.

Nurse Practitioner (NP) Certification: NPs are RNs who possess additional preparation and skills in the physical diagnosis, psycho-social assessment, and management of health-illness needs in primary health care. BRN certification can be obtained by successful completion of a program which meets BRN standards or by certification through a national organization whose standards are equivalent to those of the BRN. An applicant for initial certification as a NP who has not been qualified or certified as a NP in California or any other state must possess a master's or other graduate degree in nursing, or in a clinical field related to nursing. There is an equivalency method for RNs who have completed a NP program that does not meet BRN standards. These applicants must submit verification of clinical competence and experience verified by a NP or physician.

NPs may apply for a NP furnishing number, enabling them to write a medication order and furnish drugs to a patient. To obtain a furnishing number, the NP must take an advanced pharmacology course and complete physician-supervised experience in the furnishing of drugs or devices. Upon completion of the course and notification to the BRN, the NP then applies to the DEA to obtain a DEA number.

Psychiatric/Mental Health Nurse Listing: The BRN maintains a listing of RNs who possess a master's degree in psychiatric/mental health nursing and two years of supervised experience as a psychiatric/mental health nurse. To be eligible for the listing, RNs must complete and submit verification of the required education and experience to the BRN. The BRN also accepts American Nurses Credentialing Center certification as a clinical specialist in psychiatric/mental health nursing. This voluntary listing enables the psychiatric/mental health nurse to receive direct insurance reimbursement for counseling services.

Public Health Nurse (PHN) Certification: PHNs provide direct patient care and services related to maintaining the public and community's health and safety. To be considered for BRN certification, the applicant must hold a baccalaureate or entry-level master's degree in nursing awarded by a school accredited by a BRN-approved accrediting body and proof of supervised clinical experience. Equivalency methods are provided for individuals whose baccalaureate or entry-level master's degree in nursing is from non-approved accredited schools and for those who have a baccalaureate degree in a field other than nursing.

Continuing Education Provider (CEP) Approval: The BRN regulates and approves RN CEPs, discussed further below.

Continuing Education (CE) and Continuing Education Provider (CEP) Requirements.

RNs are required, upon renewal, to complete 30 contact hours of direct participation in a CE course or courses offered by an approved CEP. CEPs are required to provide courses that enhance the knowledge of the RN at a level above that required for licensure. BRN approves a CEP by reviewing a single course to ensure that it contains post-RN licensure content and is not for self-improvement, financial gain, or for lay people.

BRN posts on its website that it explicitly prohibits the following types of CE:⁸

- Courses which deal with self-improvement, changes in attitude, self-therapy, self-awareness, weight loss and yoga.
- Courses designed for lay people.
- Liberal Arts courses in music, art, philosophy, and others, when unrelated to patient/client care

The CEP is then required to ensure that subsequent courses meet the same content standards. BRN currently recognizes 2,963 CEPs, 824 of which are located out of state.

Enforcement

The BRN's Enforcement Division protects the public by ensuring licensees' safe practice. The Enforcement Division includes units responsible for receiving complaints, performing investigations, overseeing discipline cases, and monitoring RNs on probation.

The lifecycle of an enforcement action typically begins with a complaint, which is reviewed by the Enforcement Division's Complaint Intake Unit. If it appears a violation may have occurred, the complaint is transferred to the BRN's Investigation Unit, which should, in theory, determine if it should be investigated by internal, non-sworn special investigators in the BRN Investigation Unit or by DCA's Division of Investigation (DOI) sworn peace officers (see "Recent Audits of the Board"). If disciplinary action is warranted, the Discipline Unit at BRN processes disciplinary documents and monitors the case as it is transferred to the Attorney General's (AG's) Office for the filing of an accusation and prosecution. Cases that proceed from this point head to the State Office of Administrative Hearings (OAH) for a disciplinary hearing. Lastly, the case goes back to the Board for a final decision.

Substance Abuse Intervention Program

The BRN's Intervention Program was created in 1985 as an alternative to disciplinary action for RNs whose practice may be impaired due to chemical dependency or mental illness. The BRN relies on a contractor to provide oversight and treatment of its licensees. Those who have substance abuse problems can avoid license sanctions by taking part in a confidential "intervention" program of drug testing, treatment and practice restrictions.

In an attempt to provide uniform operational standards for health care boards' diversion programs, the DCA was mandated by legislation (SB 1441 (Ridley-Thomas) Chapter 548, Statutes of 2008) to put forth "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees" (Uniform Standards). The BRN anticipates finalizing regulations incorporating the Uniform Standards by the end of 2017.

⁸ Board of Registered Nursing, Continuing Education for License Renewal, available at <http://www.rn.ca.gov/licensees/ce-renewal.shtml#acceptable>

PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS

BRN was last reviewed by the Legislature through sunset review in 2014-15. During the previous sunset review, 22 issues were raised. In December 2016, BRN submitted its required sunset report to the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business and Professions (Committees). In this report, BRN described actions it has taken since its prior review to address the recommendations made. The following are some of the more important programmatic and operational changes, enhancements and other important policy decisions or regulatory changes made. For those which were not addressed and which may still be of concern to the Committees, they are addressed and more fully discussed under “Current Sunset Review Issues.”

- The Board has made significant progress in its licensing program under its new executive officer, Dr. Joseph Morris. Dr. Joseph Morris is very accessible to the Legislature and has significantly improved relations between the Board and Legislative staff.
- All Nursing Education Consultant positions are currently filled.
- Disciplinary actions taken prior to 2005 are currently posted.
- Formal MOUs with partner entities are being developed.
- In collaboration with the Attorney General’s Office and the Office of Administrative Hearing, the BRN launched the FastTrack project in spring 2015 to improve case times and reduce costs on cases that do not require any additional investigation or paperwork, such as notification of discipline from out-of-state Boards of Nursing.
- In September 2015, the Board began publishing processing time frames on the Board’s Web site to better inform the public.
- In September 2015, the Board re-established the Nurse-Midwifery Committee to meet biannually to address current midwifery issues and facilitate communication.
- Beginning in February 2016 in conjunction with Board meetings, the Board’s Licensing Program management staff offer presentations providing an overview of the application and eligibility process to California students to assist them with their Board application.
- In May 2016, the Board launched a new and improved website which is more user-friendly and easier to navigate for consumers, licensees and applicants.
- In the summer 2016, collaborative efforts of the Board and DCA staff brought the application licensing times from four to five months to within the regulatory requirements of 90 days.
- BRN worked with Senator Hill on SB 1039 (Chapter 799, Statutes of 2016) to increase BRN fees.
- The Board implemented video conferencing capabilities in October 2016 that allow Board members and staff to communicate via video tele-conferencing as a cost saving measure.

- The Board's Recommended Guidelines for Disciplinary Orders and Conditions of Probation, including the Uniform Standards for Substance Abusing Licensees were submitted to Office of Administrative Law in November 2016.
- The Board developed an innovative technology program that ensures secure electronic transcript and document sharing between the Licensing Program and California nursing programs. This was implemented in December 2016 in order to facilitate more timely receipt and processing of transcripts towards licensure.
- The Board submitted regulations requiring schools to provide credit for military training and experience, pursuant to SB 466 (Hill, Chapter 489, Statutes of 2015) to Office of Administrative Law and is awaiting final approval to be effective January 1, 2017.
- In an effort to encourage men and minority groups to become registered nurses, the Board developed and is distributing a targeted flyer at K-12 schools, colleges, universities, minority nursing organizations, and at Board meetings. This information is also posted on its Web site.
- Board-approved nursing program information, including school and program accreditation, attrition, and retention rates, national licensure examination (NCLEX) pass rates, and a program's warning status are currently available on the Web site.
- The Board completed the posting to the Web site and to the National Council of State Boards of Nursing NURSIS system all historical public disciplinary documents.
- A Consumer Satisfaction Survey was conducted in which 21,759 respondents replied in the six week data collection period. The results were analyzed and are currently being used to improve the Board's processes and services.
- The Board re-established the Mental Health Ad-Hoc Committee to determine best practice strategies for mental health participants in the Board's Intervention Program.
- The Board has increased outreach efforts to professional organization and industry partners (i.e. Association of California Nurse Leaders Conference, California Association of Associate Degree Nursing Directors/California Association of College Nursing, minority nursing groups, etc.).

RECENT AUDIT OF THE BOARD

Due to complaints received about BRN's enforcement processes during the prior sunset review, SB 466 (Hill, Chapter 289, Statutes of 2015) requested that the California State Auditor (Auditor) do a performance audit of the Board's enforcement program by January 1, 2017.

The following is excerpted from that report, State Auditor, Report Number 2016-046, Board of Registered Nursing: Significant Delays and Inadequate Oversight of the Complaint Resolution Process Have Allowed Some Nurses Who May Pose a Risk to Patient Safety to Continue Practicing

Results in Brief

The Board of Registered Nursing (BRN), a state regulatory entity that operates within the California Department of Consumer Affairs (Consumer Affairs), is responsible for resolving consumer complaints against registered nurses as part of its mission to protect the health and safety of consumers by promoting quality registered nursing care. Historically, BRN has reportedly struggled to resolve consumer complaints in a timely manner, often allowing significant delays to occur throughout the various stages of the resolution process. Our review found that BRN continues to experience significant delays in processing complaints. Although state law does not specify a time frame within which BRN must resolve complaints, Consumer Affairs has set a goal for BRN to process complaints within 18 months. However, BRN has consistently failed to achieve this goal, in large part due to its ineffective oversight of the complaint resolution process and the lack of accurate data regarding complaint status. Such delays allow nurses to continue practicing who may have committed serious violations, and could potentially result in harm to patients.

During our review of 40 investigated complaints resolved between January 1, 2013, and June 30, 2016, we found that BRN struggled to promptly resolve complaints, which potentially placed patients at additional risk. Specifically, BRN failed to resolve 31 of the 40 complaints within the 18-month goal, and 15 of those 31 complaints took longer than 36 months to resolve—more than twice as long as Consumer Affairs' goal. Further, BRN took longer than 48 months to resolve seven of those 15 complaints, six of which included allegations of patient harm resulting from a nurse's actions.

A primary reason for the delays in processing these complaints was BRN's failure to move the complaints through the various key stages of the complaint resolution process in a timely manner. For example, BRN took more than 45 days—the high end of its informal goal for this stage—to assign 24 of the 40 complaints we reviewed to an investigative unit, the stage that precedes assignment of the complaint to an investigator. Further, BRN took more than a year to assign nine of the 24 complaints to an investigative unit. For example, we found that BRN delayed assigning to Consumer Affairs' Division of Investigation (DOI) a complaint alleging that a nurse caused a toddler's death by administering the incorrect dosage of medication. BRN initially assigned the complaint to its investigative unit, and BRN's chief of complaint intake and investigations (chief of investigations) acknowledged that it did nothing with the complaint for roughly 18 months. She indicated that the complaint should have been prioritized and referred to DOI faster due to its sensitivity. Ultimately, the nurse was allowed to practice for 39 months without BRN taking action against her license while it processed the complaint. BRN's nine-member board concluded that the nurse violated the Nursing Practice Act (Nursing Act) by inaccurately recording the dosage of medication administered to the toddler and placed the nurse on three years of probation.

Delays such as these have also contributed to a large backlog of complaints received, but not yet assigned to one of BRN's investigators. Specifically, according to a report provided by BRN, as of the end of July 2016 at least 184 complaints had not yet been assigned by BRN to one of its investigators. Of those, 138 were pending assignment for more than 10 days. Roughly 70 of those complaints involved urgent or high-priority allegations, such as patient death, harm, or criminal activity, and had been waiting to be assigned for an average of 79 days. Unnecessary delays in the complaint resolution process enable nurses who are the subject of serious allegations to continue practicing and may risk patient safety.

BRN lacks accurate data to assess the timeliness of its complaint resolution process. BreZE, the system that Consumer Affairs' health boards use for licensing and enforcement activities, lacks adequate controls to ensure that BRN's staff members accurately enter information into the system regarding the status of complaints, such as when a case is closed. As a result, we found several errors when attempting to calculate the length of each stage in the complaint resolution process. Ultimately, we had to remove nearly 4,800, or 17 percent of the complaints from our analysis due to these errors. Using the remaining data, we found that complaints which included an investigation, averaged about 24 months, with the investigative stage taking the longest amount of time compared to other stages, which averaged between 15 and 19 months. However, these results may be inaccurate because of control weaknesses within BreZE that do not require staff members to input activities in a manner that follows BRN's established business processes. According to BRN's chief of investigations, it is difficult to manage caseloads when the data are not reliable. Further, because of these errors, BRN is using inaccurate information to assess its workload and staffing needs.

Additionally, BRN has not adhered to Consumer Affairs' direction or state law requiring that it assign complaints categorized as urgent or high priority to DOI for investigation. Since 2009, Consumer Affairs has maintained complaint prioritization guidelines (complaint guidelines) for the health boards to refer to when determining the priority to assign to complaints. The complaint guidelines establish four categories for complaints, based on priority—urgent, high, and two levels that are considered routine. Consumer Affairs and DOI officials maintain that they have consistently verbally communicated to the health boards, including BRN, that complaints categorized as urgent and high priority must be referred to DOI for investigation. DOI's investigators are sworn peace officers and are required to complete specific training, whereas BRN investigators are not. However, during the course of our review, we found that BRN chose to have its non-sworn investigators investigate numerous high-priority and urgent complaints internally, rather than refer them to DOI. BRN attributes the continued use of its non-sworn investigators to investigate these complaints to the complaint guidelines' lack of a specific, written requirement that urgent- and high-priority complaints be referred to DOI. Because of a lack of adherence by some health boards to Consumer Affairs' verbal direction regarding the referral of complaints, state law effective January 2016 requires the health boards to use the complaint guidelines to prioritize their complaints and investigative workloads, and to refer complaints determined to be either urgent or high priority to DOI to investigate.

According to a DOI report, BRN should have forwarded roughly 170 cases during the period from December 2014 through June 2016 to DOI for investigation, but instead chose to investigate those cases internally. Further, when we reviewed 10 additional complaints that BRN received between January 1, 2016, and June 30, 2016—subsequent to when the requirement was established in state law—we found that it should have referred seven of the complaints to DOI to investigate, but did not. One of these complaints alleged that a nurse failed to follow proper procedures after an alarm sounded during a patient's dialysis procedure, which may have contributed to the patient's death. BRN's assistant executive officer stated that, although DOI directed BRN to refer complaints it categorizes as

urgent and high priority to DOI, BRN had understood this to be a guideline and not a requirement. By not referring cases involving patient death and criminal allegations to DOI's sworn peace officers to investigate, BRN risks that the appropriate attention and resources are not being directed toward urgent and high-priority complaints. As a result, it could be prolonging its complaint processing timelines and, more importantly, placing the public at a higher risk of potential harm.

Although BRN identified the hourly cost of conducting investigations as another reason for its failure to comply with Consumer Affairs' direction and state law, state law specifies that the protection of the public shall be the highest priority for BRN and whenever the protection of the public is inconsistent with the promotion of other interests—such as cost savings—the protection of the public shall be paramount. The chief of investigations stated that BRN can reduce its enforcement costs considerably when its non-sworn investigators investigate the complaints because the cost per hour is lower. In fiscal year 2014–15, the most recent fiscal year in which actual cost information was available for both investigative units, DOI's hourly rate to conduct an investigation was \$235, more than twice BRN's hourly rate of \$88. Because BRN's lower hourly rate makes it less costly for BRN to conduct an investigation, the chief of investigations stated that having BRN's non-sworn investigators conduct investigations means that BRN can commit additional resources to training staff or increasing hourly pay in an effort to recruit additional expert witnesses, which she indicated BRN does not have the budget for otherwise. Nevertheless, cost is not a reasonable justification for choosing not to comply with requirements concerning BRN's most egregious complaints. BRN's mission is to protect and advocate for the health and safety of the public by ensuring the highest quality registered nurses in the State—not to minimize costs. Moreover, an advantage sworn peace officers have is that they have additional training, skills, and authority that BRN's non-sworn investigators lack.

Further, investigators did not always obtain the necessary evidence before forwarding complaints to the Office of the Attorney General (Attorney General) or appropriate expert witnesses, resulting in unnecessary delays and additional resources. In our review of 40 investigated complaints, we identified five that the BRN investigated and three that DOI investigated in which supplemental investigations were requested because the investigator did not obtain sufficient evidence the first time. For example, we reviewed a complaint alleging that a nurse improperly administered a medication that resulted in patient harm, in which the deputy attorney general assigned to the case requested BRN to conduct a supplemental investigation to obtain the perspective of both the patient and the patient's spouse, who witnessed the incident. According to BRN's chief of investigations, the non-sworn investigator should have obtained this information during the initial investigation, but did not due to inexperience. It took the investigator an additional three months to obtain this requested evidence, which unnecessarily prolonged the amount of time BRN took to resolve this complaint. Additional training in evidence gathering might have helped avoid such a delay. A senior assistant attorney general for the Attorney General's licensing section indicated that both BRN non-sworn investigators and DOI sworn investigators would benefit from training in what constitutes sufficient evidence to substantiate that a nurse has violated the Nursing Act.

Finally, BRN lacks sufficient oversight of its enforcement activities. For instance, it lacks a formal training program for its enforcement staff. According to BRN managers, rather than providing formal training sessions, BRN conducts the majority of staff training through a shadowing process during which new staff members learn their jobs by reviewing complaints in collaboration with existing staff members. As a result, BRN risks that its staff is not appropriately processing and resolving complaints. We believe this is one reason for the delays we identified in BRN's processing of complaints. Further, BRN has not ensured that all nurses are fingerprinted, as the law requires. As a result, BRN is not always notified by the California Department of Justice (Justice) when a nurse is

arrested or convicted. As of November 2016, BRN was working with Justice and Consumer Affairs to reconcile the number of nurses who BreEZe shows as having fingerprints compared with data provided by Justice. By not ensuring that all nurses comply with this requirement, BRN limits its ability to learn of criminal behavior and promptly take appropriate action against the nurse's license if the nurse poses a risk to patients.

Recommendations of the Auditor

Legislature

If BRN does not develop and implement an action plan by March 1, 2017, to prioritize and resolve its deficiencies, as mentioned in the first recommendation to BRN, the Legislature should consider transferring BRN's enforcement responsibilities to Consumer Affairs.

BRN

To ensure that it promptly addresses this report's findings, BRN should work with Consumer Affairs to develop an action plan by March 1, 2017, to prioritize and resolve the deficiencies we identified.

To ensure that BRN resolves complaints regarding nurses in a timely manner, it should do the following by March 1, 2017:

- Develop and implement formal policies that specify required time frames for each key stage of the complaint resolution process, including time frames for how quickly complaints should be assigned to the proper investigative unit or expert witness, and how long the investigation process should take.
- Establish a formal, routine process for management to monitor each key stage of the complaint resolution process to determine whether the time frames are being met, the reasons for any delays, and any areas in the process that it can improve.
- Establish a plan to eliminate its backlog of complaints awaiting assignment to an investigator.

To ensure that it is able to accurately monitor the performance of its complaint resolution process and that it has accurate data to address its staffing needs, BRN should immediately begin working with Consumer Affairs to implement cost-effective input controls for BreEZe that will require BRN staff members to enter information into a complaint record in a way that is consistent with BRN's business processes.

BRN should immediately comply with state law and adhere to the complaint guidelines. Additionally, BRN should establish and maintain a process for communicating with DOI to discuss any questions that arise in assigning a priority to a complaint or referring a complaint to the proper investigative unit.

To ensure that BRN and DOI consistently conduct adequate investigations and obtain sufficient and appropriate evidence to discipline nurses accused of violating the Nursing Act if warranted, BRN in collaboration with Consumer Affairs should do the following:

- Implement a mechanism by March 2017 to track and monitor supplemental investigation requests that result from investigators' failure to obtain required documentation or sufficient evidence and use this information to mitigate the causes of these failures.

- Coordinate with the Attorney General to develop a biennial training program that includes techniques for gathering appropriate evidence and ensure that all investigators, including DOI's investigators, participate in this training.
- Use this training program to develop a procedural guide that specifies proper evidence-gathering techniques, including a description of what constitutes sufficient evidence, for investigators to follow when investigating complaints. They should then distribute this guide to all investigators, including DOI's investigators, by December 2017, and jointly instruct them to adhere to the guide when conducting investigations.

To ensure that its enforcement unit employees appropriately address and process complaints in a consistent and efficient manner, BRN should do the following:

- By March 2017, develop a process to centrally track the internal and external trainings it's staff participate in. On a regular basis, managers should review this information to ensure enforcement staff are participating in a timely manner in appropriate trainings that address the enforcement activities they specifically perform and the types of complaints they may investigate.
- Implement a formal training program no later than December 2017. In developing this program, BRN should consult with DOI and the Attorney General to identify training that could benefit its enforcement staff, and also solicit input of its enforcement staff on areas of their job duties where they believe they need additional training.

BRN should continue working with Justice and Consumer Affairs and finalize its reconciliation, by March 1, 2017, of Justice's fingerprint data with its data in BreZE to identify any nurses who are missing fingerprint records. Once this reconciliation is performed, BRN must take the steps necessary to immediately obtain fingerprints from those nurses for which Justice has no fingerprint records.

CURRENT SUNSET REVIEW ISSUES

The following are unresolved issues pertaining to the BRN or areas of concern that should be considered, along with background information for each issue. There are also recommendations Committee staff have made regarding particular issues or problem areas BRN needs to address. BRN and other interested parties have been provided with this Background Paper and BRN will respond to the issues presented and the recommendations of staff.

BRN ADMINISTRATION

ISSUE #1: (NURSE-MIDWIFERY ADVISORY COMMITTEE (NMAC)) The NMAC has been reconvened, but within the Nursing Practice Committee, and is only authorized to hold two meetings per year. Is this an appropriate location for NMAC, and are biannual meetings sufficient to address all NM issues?

Background: The BRN reconvened the NMAC at its September 2015 board meeting. NMAC is tasked with advising the Board regarding nurse-midwifery practice.

Although the BRN's sunset report indicates that NMAC meetings are public, and that agendas, meeting materials, and minutes are posted on the BRN website, nowhere is it apparent on the website that the NMAC exists. This is because BRN reconstituted NMAC as a unit within the Nursing Practice Committee. While the Sunset Report indicates that the California Nurse Midwife Association (CNMA) was complicit in this structure, it was the Legislature's intent to re-establish a separate committee because the Nursing Practice Committee was unresponsive to NM's practice needs. Requiring that NMAC issues again percolate through the Nursing Practice Committee is structurally problematic.

Further, BRN authorized NMAC to meet only biannually. In its initial meeting, the NMAC recommended reviewing and updating NM regulations and discussed the "need for review and updating to be consistent and congruent with contemporary/current and evolving NM practices and standards; a variety of practice and educational issues; review of nurse-midwifery advisories so they are reflective of current practice; and the need to explore ways to effectively communicate NM information to NMs, other stakeholders and the general public." It does not seem that meeting twice per year is sufficient to address the issues that have been backlogged for so long.

There is a distinct need to update practice guidance for NMs. A bulletin released in 2001, and updated in 2011 by the Nursing Practice Committee, defines a NM's practice as "the *independent*, [emphasis added] comprehensive management of women's health care in a variety of settings focusing particularly on pregnancy, childbirth, the postpartum period. It also includes care of the newborn, and the family planning and gynecological needs of women throughout the life cycle." This contradicts current law, which clearly states that such practice is not independent: "the certificate to practice nurse-midwifery authorizes the holder, *under the supervision of a licensed physician and surgeon*, [emphasis added] to attend cases of normal childbirth and to provide prenatal, intrapartum, and postpartum care, for the mother, and immediate care for the newborn."⁹ Such misinterpretation of basic law does a disservice to licensees and consumers, and BRN should reevaluate all guidance available. Further, the NMAC should examine existing laws that do not facilitate safe NM home birth practices –

⁹ BPC § 2746.5 (a).

a perfectly legal and increasingly commonplace setting. For example, current laws only allow a NM to repair first- and second-degree lacerations of the perineum in a licensed acute care hospital or a licensed alternative birth center.¹⁰ However, according to the Mayo Clinic, vaginal tears during childbirth “are relatively common.”¹¹ Unfortunately under current law, a NM attending a home birth would not be able to legally attend to a common consequence of childbirth without jeopardizing his or her license, risking the health of the mother, or immediately transferring the patient to the hospital, which is contrary to the principles of home birth and may not be otherwise necessary. The BRN and the NMAC should ensure current laws and regulations facilitate all practice settings.

Staff Recommendation: *BRN should advise NMAC to develop a schedule and timeline for devising its recommendations. BRN should ensure that relaying information through the Nursing Practice Committee is not an unnecessary barrier to bringing issues to the full board, and the BRN should establish a presence for NMAC directly on its website along with other committees. NMAC should address barriers to home birth practice.*

ISSUE #2: (ADVANCE PRACTICE REGISTERED NURSING) BRN regulates four categories of APRNs, but laws and regulations governing each are uneven and should be examined to ensure they are accurate and up-to-date.

Background: The BRN regulates four categories of advance practice registered nurses: CNSs, nurse anesthetists, NMs, and NPs. Each of these professions is educated and trained to a comparable level of independence, yet all have varying degrees of guidance and scope restrictions.

There are no regulations specifically for CNSs or nurse anesthetists at all, and the practice bulletins issued by the BRN are equally imbalanced; there have been 18 issued and directed specifically at NPs, with the most recent from November 2014; 13 for NMs, the most recent in 2013, and none of which address home birth settings; only 3 for CNSs, the most recent in 2008; and none for nurse anesthetists. BRN should evaluate all existing laws and regulations against APRN training and education to determine what, if anything, is needed to rationalize practice scopes and regulatory direction to facilitate APRN practice in all settings.

The creation of an Advanced Practice Subcommittee to examine these issues was placed on the January Board agenda, but the BRN president put the issue over until the next meeting because he did not feel there was sufficient justification for this additional committee.

Staff Recommendation: *The BRN should establish an Advanced Practice Committee, separate from the Nursing Practice Committee, whose goal is to survey existing laws and regulations and determine what is lacking for regulation of APRNs. The BRN should seek legislation, promulgate regulations, and develop advisories to ensure APRNs have sufficient guidance in all practice settings.*

¹⁰ BPC § 2746.52

¹¹ Mayo Clinic, Health Lifestyle; Slide show: Vaginal tears in childbirth. Available at <http://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/multimedia/vaginal-tears/sls-20077129>.

ENFORCEMENT

ISSUE #3: (COST RECOVERY) There is over one million dollars in fines outstanding from prior licensees residing out-of-state. Is there more the BRN can do to recover this money?

Background: Potential cases for cost recovery have dropped since the prior sunset, but a substantially greater percentage of those have been ordered for cost recovery than in the past. (See Table 11 included below.)

Cost Recovery	(dollars in thousands)			
	FY 2012/13	FY 2013/14	FY 2014/15	FY 2015/16
Potential Cases for Recovery *	2,110	2,060	1,538	1,695
Cases Recovery Ordered	279	428	1,505	1,552
Amount of Cost Recovery Ordered	\$1,197	\$1,836	\$2, 583	\$3,329
Amount Collected	\$736	\$930	\$1,427	\$1,092

* "Potential Cases for Recovery" are those cases in which disciplinary action has been taken based on violation of the license practice act.

BRN's main leverage for repayment of cost recovery orders is to withhold a license until the licensee meets his or her obligations. BRN also indicates that it is now using the Franchise Tax Board to enhance its collection efforts. However, if a licensee has no plans to use his or her license again and lives out of state, their current list of recovery options are exhausted. There is currently \$1,072,861 in outstanding debt for enforcement costs for out-of-state prior licensees.

Staff Recommendation: *The BRN should explain why there are fewer cases eligible for cost recovery compared to prior years, and why so many more comparatively are considered eligible for cost recovery. BRN should investigate alternate means of cost recovery, and evaluate whether the potential returns justify any costs incurred.*

ISSUE #4: (BRN DISCIPLINARY CONSISTENCY) Staff of the Committees have received a large number of complaints that BRN takes severe enforcement actions for cases that may not warrant such harsh disciplinary action. BRN also appears to have settled cases alleging significant patient harm for the same terms offered to those with less harmful violations of the Act. Finally, BRN spent significant enforcement resources prosecuting a case, only to settle with the licensee after a superior court judge deemed the BRN's actions as "arbitrary and capricious."

Background: Due to complaints received about BRN's enforcement processes during the prior sunset review, SB 466 (Hill, Chapter 289, Statutes of 2015) requested that the California State Auditor (Auditor) do a performance audit of the Board's enforcement program. Staff had been, and continues to be, contacted by numerous individual RNs and several attorneys representing multiple RNs who state that BRN is inconsistent -- too severe at times and lax at others -- in meting out discipline.

Although the Auditor found that "BRN Adequately and Consistently Imposed Discipline on Nurses in Accordance With Its Discipline Guidelines for the Complaints We Reviewed," the Auditor states that they only reviewed 20 complaint files. At an average of 7,000 complaints per year, their review

represents merely 0.2% of all cases the BRN receives in a year; thus, the Auditor's narrow review cannot be understood as a verdict on all BRN's case handling, as the available evidence shows.

For example,

- A California-licensed RN working in Nevada signed exam forms for physicals using a physician's stamp in lieu of a signature and was charged with unprofessional conduct by Nevada's Board of Registered Nursing. No one was hurt. Nevada fined her \$800, gave her a public reprimand, and required 30 units of CE.
 - The BRN investigated the same charge, fined the nurse \$2,887 and put her license on probation for two years.
- A NM was found guilty of unprofessional conduct for not having proper standardized procedures. She was not found guilty of incompetence, gross negligence, or gross negligence in her delivery of care to a particular patient, or in her home practice in general.
 - BRN imposed three years' probation on the nurse's license.
- Among the complaints reviewed for consistency by the Auditor were two cases alleging that nurses failed to appropriately interpret a fetal heart rate during the patients' labor and delivery, resulting in the infants' deaths, and complaints alleging that the nurses failed to appropriately respond to patients' changes in condition and failed to notify the physician about the changes, and the patients later died.
 - For each of these cases, BRN's board imposed three years' probation.

Apparently, BRN deems multiple years' probation appropriate for both paperwork violations and patient deaths.

Another case that resulted in three years' probation is that of Yelena M. Kolodji, a RN since 1985, a NM since 1988 in a home birth practice, and who had a clean license until BRN filed an accusation against her in 2013— five years after the initial incident. The facts of the case are as follows:

In 2008, Ms. Kolodji was called to assist in the home birth of a colleague's patient. Ms. Kolodji was not involved in the patient's care prior to that point, but assisted in the delivery and postpartum care, and care of the newborn. The patient later filed a complaint and BRN charged her with seven causes for discipline.

The case went to hearing, and the ALJ noted in the adopted opinion that Ms. Kolodji was "not charged with incompetence, negligence, or gross negligence in her delivery of care to a particular patient, or in her home birth practice in general."¹² Although Ms. Kolodji did not have a formal supervision agreement, the ALJ determined that, using the BRN's own General Information bulletin and testimony, that Ms. Kolodji had sufficient informal, collaborative relationships with physicians in order to satisfy the supervisory relationship. However, Ms. Kolodji was in violation of the statutes requiring supervision and standardized procedures to furnish dangerous drugs and prohibiting the repair of vaginal lacerations outside of a hospital or licensed alternate birth center.

The ALJ wrote:

¹² In the Matter of the Accusation Against Yelena Marie Kolodji, Case No. 2013-811, OAH No. 2013050197.

Respondent has had an exemplary career as a midwife in excess of 25 years. By all accounts she is a well-trained, hardworking, highly competent, and caring professional. She has the best intentions to provide her patients with safe and positive experiences during pregnancy and childbirth. There is no reason to revoke the license of someone with her skill, experience, and dedication.

As set forth above, however, respondent performed functions that overlapped with the practice of medicine without legally sufficient standardized procedures and physician supervision. In so doing, she violated a number of statutes under the Act and acted in excess of her authority as a nurse-midwife. In mitigation, like many others in her profession, including experts in the field, respondent misunderstood her responsibilities under the Act. Although license revocation is clearly not warranted for the protection of the public, a period of probation will be ordered, if only to ensure that respondent understands her legal obligations under the Act and puts procedures in place to follow them.

Given the unique facts of this case, the Board's standard probation conditions ...will be modified to enable respondent to continue practicing as a home birth midwife.....

The decision was approved by the Board on August 8, 2014.

As part of her probation, Ms. Kolodji was required to get approval from the BRN for specific details of her probation terms before she could resume work. On September 24, 2014, her attorney sent a letter to Ms. Kolodji's probation monitor requesting approval of the standardized procedures.

Her attorney sent another letter to the BRN on October 20, 2014, requesting at least confirmation of receipt of the letter, if not approval of the content, so that Ms. Kolodji could resume working.

Ms. Kolodji was unable to get a response from BRN at all, effectively prohibiting her from employment. Her only recourse was to go to court for a writ of mandate to compel the Board to comply with the terms of its own enforcement decision.

BRN argued to the court that Ms. Kolodji's standardized procedures were deficient because she had to get physician supervision and a furnishing number in order to administer prescription medication and repair vaginal lacerations. However, Ms. Kolodji stated that she has no intention of furnishing medications or repairing lacerations, so she did not need them. BRN argued that Ms. Kolodji had to meet those terms regardless of whether she was going to perform those functions.

On May 22, 2015, *nine months* after the BRN approved the order for probation, a court issued a ruling in favor of Ms. Kolodji's standardized procedures. The court correctly noted that those arguments were against the plain language of the very statutes the BRN cited in evidence, and stated further that [emphasis added]:

[BRN] makes essentially no effort to support their reading of the statutes, relying instead on pre *ipse dixit*.¹³ But agency interpretations are entitled to no deference when the rest on nothing more than bureaucratic say-so. [citations omitted].

¹³ *Ipse dixit* is Latin for "He himself said it." This term is used in the legal context as an unsupported statement that rests solely on the authority of the individual who makes it.

Rather than meet Ms. Kolodji's writ head-on, respondents argue that relief is not available because **they have no duty to approve her standardized procedures.** However, having (1) issued a decision that explicitly allows Kolodji to continue her home-birth practice so long as she complies with statutory obligations and (2) required Kolodji to submit standardized procedures subject to approval before she can resume practice, respondents cannot claim they have no duty to approve the procedures when they in fact comply with Kolodji's statutory obligations. The ministerial duty to approve compliant standardized procedures derives from the board's own imposition of the requirement upon Kolodji. Moreover, **respondents have also acted in an arbitrary and capricious manner.**¹⁴

The court then ordered BRN to approve Ms. Kolodji's standardized procedures within ten days of receipt. Rather than comply with this order, the BRN appealed the writ, knowing that drawing out the case would further delay Ms. Kolodji's return to work.

On June 23, 2015, the Superior Court of San Francisco again found for Ms. Kolodji, acknowledging how:

...she forcefully articulates how her midwife practice is being destroyed and her personal finances devastated. She has already been barred from working in her profession for 10 months, with more months looming during the BRN's appeal.

The BRN relies on other inapposite cases to argue that it is "not usual" for a licensee's business to be wiped out during an appeal. [citations omitted] The BRN adds: "nor is there any suggestion that these kinds of damages...could not be awarded following the appeal" – no suggestion, that is, except the one the BRN itself makes parenthetically: "(assuming she were entitled to collect from the Board)." [citations omitted] In other words, sue us after we lose our appeal, and then we can claim governmental immunity, so you get nothing for your devastated business."¹⁵

The BRN argues that the court should get out of its way and defer to "state actors' performance of their public duties." The court demurs, saying, "As a general matter that is true, but with great power comes great responsibility. The latter has been lacking here."

On August 8, 2015, BRN dropped its appeal and settled with Kolodji.

Staff Recommendation: BRN should ensure that similarly situated cases receive comparable enforcement determinations and ensure that appeals against licensees have merit. BRN should make it a policy to respond to probationers within a reasonable period of time.

¹⁴ Yelena M. Kolodji v. Board of Registered Nursing; Department of Community Affairs; Rose Garcia; Regina McLellan, Superior Court of California, County of San Francisco, Court No. CPF-15-514098, Order Granting Writ of Mandate and Overruling Demurrer.

¹⁵ Yelena M. Kolodji v. Board of Registered Nursing *et al*, Superior Court of California, County of San Francisco, Court No. CPF-15-514098, Order Granting Relief From Stay on Appeal.

ISSUE #5: (POSTING DISCIPLINARY ACTIONS) The BRN should make it easier to find disciplinary information for licensees holding multiple licenses.

Background: APRNs typically have multiple license types listed under BreEZe. For example, a NP who furnishes drugs may have an RN, NP, and a NP furnishing license. However, discipline is only attached to one license type in BreEZe, typically the highest one. In researching a licensee, there is no indication to a consumer that there may be different information on additional license types linked to the same person.

Staff Recommendations: *The BRN should make BreEZe disciplinary information consistent across all license types for licensees.*

LICENSING AND EDUCATION

ISSUE #6: (CALIFORNIA STATE AUDITOR 2014 RECOMMENDATIONS) The State Auditor made several recommendations to the BRN to improve its staffing management in 2014. One remains incomplete.

Background: The California State Auditor reviewed BRN's licensing processes in 2014 and directed it to make four changes to effectively manage its resources and workload. Three years later, BRN has satisfied three of the concerns, but cannot yet prove it can formally track and monitor the timeliness of its processing of applications by type and the cause of any delays.

Staff Recommendation: *BRN should implement the Auditor's final 2014 recommendation and notify the Legislature upon completion.*

ISSUE #7: (FINGERPRINTS) BRN is failing to provide RNs adequate notice that updated fingerprints are needed as part of their license renewal.

Background: Since 2009, nurses who were not previously fingerprinted or do not have a fingerprint record with the BRN have been required to submit fingerprints to the Department of Justice (Justice) upon license renewal so that BRN may receive subsequent arrest and conviction reports. However, many licensees still lack fingerprints on file with either BRN or Justice.

From the State Auditor's report:

According to BRN's chief of licensing, from 2009 through 2015 BRN focused its efforts on ensuring fingerprints were obtained for those nurses who its records indicated did not have any fingerprints on file with Justice. However, it was not until recently that BRN began working with the results of a reconciliation Consumer Affairs conducted between its records and those provided by Justice.

According to the reconciliation Consumer Affairs conducted at the end of October 2016 of fingerprint data in BreEZe and data provided by Justice, Consumer Affairs identified approximately 24,000 active licensed nurses who did not have fingerprint records on file with Justice and another 4,700 active licensed nurses who did not have fingerprint records in either BreEZe or with Justice. These results indicate that BRN would not

potentially be notified by Justice of any subsequent arrests or convictions for these approximately 29,000 nurses. The chief of data governance at Consumer Affairs stated that, for the population of approximately 24,000 nurses for which the data in the BreEZe system and Justice's system is out of alignment, while a subset of those licensees may indeed need to be re-fingerprinted in order to ensure BRN receives subsequent arrest notifications from Justice, some of these nurses may be showing up on the reconciliation due to either timing issues between BRN's and Justice's systems or minor data errors between the systems. He explained that Consumer Affairs and BRN are working on analyzing this population to determine how many nurses actually need to be fingerprinted.¹⁶

Currently licensed nurses caught in this information gap are now required to re-submit fingerprints without any reasonable way of knowing they are required to do so. Legislative staff has been contacted by several active nurses who were unable to renew their license because BRN held their renewals for failure to provide updated fingerprints. However, these individuals had provided fingerprints years before and BRN did not notify them that new ones were necessary. When one RN asked a BRN representative how she was supposed to know she needed to resubmit her fingerprints, a BRN representative told her that the information is "all on our website" and the RN's lack of direct notification was because BRN "couldn't link names with numbers." This individual was able to find out that she needed new fingerprints not through the website, a letter, or by contacting BRN via telephone, but through Google.

Google reviews are full of similar stories; 72 individuals rate BRN 1.2 stars out of 5 for their services. The following are examples of the communication problems between BRN and licensees regarding fingerprints within the past month (as of 2/28/17):

- "Absolutely impossible to reach by phone. Extremely slow to process licensure by mail (but they cash your check fast!). And recently, thousands of nurses are scrambling to get re-fingerprinted before tomorrow's deadline due to a lack of communication by them. Supposedly, we only needed Lifespan fingerprints if we received a letter from the board. I never received a single letter, email or any other communication, and found out through a friend that I had 24 hours to do it, or face suspension and a fine up to \$2500! I know a lot of nurses who will probably be in some serious trouble here, due to a lack of the board of nursing to notify the appropriate nurses. And my license fee has increased from \$85 to \$160 for what? ZERO stars to this joke of a website / business. are ruining the lives of many valuable nurses waiting to work!"¹⁷
- "I am writing this in hopes that I can help someone else not have the problem I had. PLEASE READ THIS IF YOU DID NOT GET YOUR LICENSE IN THE MAIL AFTER 3 DAYS WHEN RENEWING ONLINE!!!! It is likely due to the need for a digital finger print background check with LifeScan that is needed from the Department of Justice and the FBI. You can download the needed piece of paper that LifeScan will use from the board website.

¹⁶ State Auditor, Report Number 2016-046, Board of Registered Nursing: Significant Delays and Inadequate Oversight of the Complaint Resolution Process Have Allowed Some Nurses Who May Pose a Risk to Patient Safety to Continue Practicing, p. 48.

¹⁷ Google reviews, "Board of Registered Nursing," Available at https://www.google.com/search?q=google+maps&oq=google+&aqs=chrome.0.0j69i60j0j69i60j69i57j0.1391j0j4&sourceid=chrome&ie=UTF-8#q=board+of+registered+nursing&*&lrd=0x809ad63072caec6d:0x1bd36a7bc2345253.1,

Google the nearest certified LifeScan digital finger print location. Bring the paper downloaded from the board for the prints with you to LifeScan location so they can fill in their portion and fax it to the board at 916-574-7699. The board does not make this clear nor will you be able to contact anyone by email or phone. I don't even know why they have a phone number listed or an email to contact them. You won't hear from anyone so don't waste your time. The only one who will lose out is you when they don't issue your license after taking your money and only listing your license online as pending. You will never get an explanation until it's too late. I wouldn't even give the BRN a star except I have to.”¹⁸

- “Agree with all negative reviews. No way at all to speak with anyone or even leave a message. Waiting over 2 months for regular renewal but credit charges were taken the same day! No fingerprint letter either and no way to find out what the issues are if you do have a delay. This agency is a disgrace. Perhaps a direct call to the governor is the answer but don't hold out hope. Such a shame as patient care suffers as well.”¹⁹

Staff Recommendation: *BRN should determine which licensees need updated fingerprints and notify each personally, and in a timely manner. For those licensees who submitted renewal applications without knowing a LiveScan was necessary, BRN should notify each individual immediately and provide an adequate grace period for compliance.*

ISSUE #8: (LVN TO RN 30-UNIT OPTION) **Is this abridged educational pathway appropriate for today's nursing practice?**

Background: Since 1969, all BRN-approved nursing programs have been required to offer an educational track for licensed vocational nurses (LVNs) that requires no more than 30 semester/45 quarter units of specified coursework (“the 30-unit option”) to be eligible to take the RN licensing examination, NCLEX.

According to the BRN, the LVN 30-unit option is a limited path towards RN licensure and employment opportunities because it offers only a certificate of completion, rather than a degree, which affords limited mobility. When the 30-unit option was established, the introductory educational components for an RN program were very similar to those required of LVNs. However, this is no longer the case. RN programs in California do not promote these programs, and most students are accepted on a space-available basis after degree-bound students are admitted.

BRN conducted informal discussions on this issue with California nursing program deans and directors at their annual meeting in October 2016, and stakeholders indicated overwhelming support for removing the 30-unit option entirely. BRN also formally posed this question to nursing program deans and directors as part of its 2015- 2016 Annual School Survey (Survey); data collection is ongoing, but preliminary results indicate that the vast majority of reporting schools would like to see it removed from law.

Further, data from the Survey indicate that very few students were enrolled in and complete the 30-unit option. Only eight students statewide were initially enrolled, and only half of those completed the program in 2014-2015. It is unclear whether this is due to the unpopularity of the 30-unit option or

¹⁸ Ibid.

¹⁹ Id.

because impacted programs limited entry. Data also indicates that individuals taking the NCLEX after preparation via the 30-unit option have lower success rates than degree program graduates.

Staff Recommendation: *The BRN should continue to review this issue and present further evidence as to why this pathway may no longer be relevant or necessary for an LVN seeking licensure as an RN. It should also examine whether RN licensees who completed the 30-unit option have increased rates of discipline, and/or other indications that these individuals are not properly prepared to meet the minimum level of experience and education necessary to succeed.*

ISSUE #9: (CLINICAL PLACEMENTS) The Board approves new programs that impact the ability of existing programs to place their students in clinical settings. Should the Board consider displacement of existing students in clinical programs by students in new programs prior to approving new programs, and what more can the Board do to rationalize placements across programs and facilities?

Background: RN students are required to have concurrent clinical and academic education. Clinical placements in California continue to be a significant concern for the Board, with many existing programs testifying at various board meetings against approving new programs or expanding existing programs due to impacted placements.

Although BRN is required to consider a new program's impact on existing clinical placements, it does so only by requiring a new program to guarantee that it has sufficient placements for its proposed enrollment. BRN may not know if, in approving a new program, prior placement agreements with other schools have been changed by the facilities in order to accommodate the new program.

Unfortunately, BRN has no authority over the facilities housing the clinical placements, only those programs needing the placements, and it has no authority to enforce agreements between programs and facilities.

Because the Board is given broad authority to approve or disapprove nursing programs, student displacement could be one of the criteria by which the Board approves programs.

Staff Recommendation: *The BRN should contact existing schools that will share clinical placement space with a potential new or expanding program to comprehensively evaluate the impact of new programs prior to approval. BRN and the Legislature should convene a working group with programs and facilities to determine a long-term solution to managing clinical placements.*

ISSUE #10: (MALPRACTICE SETTLEMENT REPORTING) Should the threshold reporting for specified malpractice settlement(s) amounts be raised since in some instances they may be too low to warrant an investigation?

Background: Current law requires RNs to report any judgment or settlement requiring the licensee or his or her insurer to pay anything above \$3,000. BRN is currently collecting data to determine whether this is an appropriate amount. The \$3,000 figure was set in 1975, and BRN gets many low-dollar reports that do not represent sufficiently egregious violations to warrant investigation.

BRN indicates that 199 cases were reported from January 1, 2014 through October 24, 2016. Of those, 39 were between \$3,000 and \$29,999, and 150 were between \$30,000 and \$6,000,000, with the average being \$345,908.

Staff Recommendation: *The BRN should continue to investigate what monetary threshold would best capture the information necessary to warrant the investigation of the nurse practitioner. BRN should indicate what types of cases it would not receive if it were to raise the cap.*

CONTINUING COMPETENCY

ISSUE #11: (CONTINUING EDUCATION FOR LICENSEES) The BRN has not provided appropriate oversight of its continuing education program despite admonition to do so in the previous sunset review, and in the interim between reviews.

Background: All licensees are required by statute to complete 30 hours of continuing education (CE) during each two year renewal cycle to ensure continued competence. Statute requires that the BRN establish regulations ensuring that CE courses are either related to the scientific knowledge or technical skills required for the practice of nursing, or to direct or indirect patient care.²⁰ The BRN promulgated regulations further specifying appropriate coursework, including the requirement that all content be relevant to the practice of nursing.²¹ CE providers (CEPs) are approved by BRN based on the evaluation of a single course, and then are on their honor to ensure the balance of their offerings meet established criteria. The BRN is the sole agency tasked with defining and interpreting the practice of nursing and is required to exercise their discretion to “withhold or rescind approval from any [CE] provider that is in violation of the regulatory requirements.”^{22 23}

Prior to 2002, the BRN conducted random audits of RNs CE and CEPs, averaging 2,700 RNs CE and 282 CEPs per year. The BRN has not completed any CEP audits since 2001, citing lack of staff and “the current structure of the CRNE [continuing registered nursing education] laws and regulations on its inability to do its job.”²⁴ This is particularly concerning because the BRN acknowledges that CE compliance is “essential to ensure public safety and protection.”²⁵ It is unclear why BRN feels that current law does not facilitate the exercise of their enforcement obligations, because the plain reading of statute gives them authority to approve and disapprove CEPs based on multiple CE content criteria.

A 2009 article titled, “*State-Sponsored Quackery: Feng Shui and Snake Oil for California Nurses*”²⁶ detailed the BRN’s lax CEP approval process. Reporters uncovered a nursing CEP called ClearSight, which offered credits for a class in “energetic medicine.”

²⁰ Business and Professions Code (BPC) Section 2811.5 (b).

²¹ California Code of Regulations, Title 16, Section 1456.

²² BPC 2811.5 (c).

²³ BPC 2725 (e).

²⁴ 2016 Supplemental Sunset Report, p. 11.

²⁵ BRN 2014 Sunset, p. 95.

²⁶ Committee for Skeptical Inquiry, “State-Sponsored Quackery: Feng Shui and Snake Oil for California Nurses” December 2009, available at <http://www.csicop.org/si/show/state-sponsored-quackery-feng-shui-and-snake-oil-for-california-nurses>, accessed March 7, 2015.

“Energetic medicine” is ClearSight’s name for therapeutic touch, the manipulation of alleged energy fields such as chakras and auras over the body. (The practitioner’s hands make no actual contact with the patient.)

ClearSight introduces you to the skills of Free Will, the art of energy diagnosis, how to make Separations from your Healee so you do not take another person’s energy or disease home and how to release old patterns and stuck energy in your body and auric field. When you use ClearSight healing skills you clear and clean the entire energy field (chakras, channels and aura) and grow and evolve evenly at the rate of growth you are ready to access.

After some prodding to remind the BRN that ClearSight’s provider application was public record, the IIG received a copy of the application and discovered that it was blank in some places and that the instructor’s educational credentials consisted of a BA in comparative religion and a ministerial certificate from the Church of Divine Man, a psychic institute that offers healings, psychic readings, and other such activities.²⁷

ClearSight is no longer an approved CEP, but only because its license lapsed in 2014; no disciplinary actions were ever taken against it.²⁸ This is understandable because, as the article notes, the BRN supported the approval of CEPs that promote education with little to no scientific merit.

History repeated itself in January 2016, when Rewire, a nonprofit publication focusing on evidence-based news published, “*The Miseducation of California Nurses: Legal Loophole Enables Spread of Anti-Choice Medical Myths*,”²⁹

The article featured two BRN-approved CEPs, Heartbeat International and Care Net, who provided, respectively, courses in abortion pill reversal and fetal pain -- the science behind both of which is marginal at best.

According to the article,

A single 2012 paper in *Annals of Pharmacotherapy* claimed to have reversed the medication abortions of four of six women included in the study.... Experts say the six cases cited in the *Annals of Pharmacotherapy* paper are insufficient to draw conclusions. The American Congress of Obstetricians and Gynecologists (ACOG), a professional organization of 58,000 OB-GYNs and women’s health-care professionals, is dismissive of the purported treatment.

There is really no clear evidence that this works,” said Dr. Daniel Grossman, ACOG fellow and director of Advancing New Standards in Reproductive Health, a research

²⁷ Committee for Skeptical Inquiry (CSI), “State-Sponsored Quackery: Feng Shui and Snake Oil for California Nurses” December 2009.

²⁸ A list of current approved CEPs is not available on BRN’s website, and confirmation of an approved CEP can be found through BreEZe’s license lookup process.

²⁹ Nicole Knight, *Rewire*, “The Miseducation of California Nurses: Legal Loophole Enables Spread of Anti-Choice Medical Myths,” January 19, 2016, available at <https://rewire.news/article/2016/01/19/miseducation-california-nurses-legal-loophole-enables-spread-anti-choice-medical-myths/>

group at the University of California, San Francisco, in an interview with MedPage Today about the “science” behind abortion pill reversal.³⁰

Care Net advertised a class discussing fetal pain, a concept that the medical establish has dismissed as “unlikely” before the third trimester. The article further noted that no studies since 2005 demonstrate any recognition of fetal pain.³¹

The article astutely points out that BRN is effectively undermining California’s significant progress for reproductive rights in allowing these courses to be taught with the state’s endorsement. “The state in recent years passed a law allowing women to obtain birth control from pharmacists and has forced crisis pregnancy centers (CPCs), faith-based facilities that often masquerade as abortion clinics, to make disclosures about the availability of abortion care and birth control services. And in what may serve as a model for municipalities nationwide, San Francisco demands truth in advertising for CPCs, which frequently use misinformation to dissuade women from ending their pregnancies.”³² BRN’s approval of quasi-medical coursework is counterproductive to the Legislature’s demonstrated will to provide accessible and accurate medical information to California consumers.

In response to these articles, BRN’s assistant EO told the Legislature in January of 2016 that cease and desist letters would be sent to these two providers. In April 2016, the Board was contacted because the providers were still listed as currently licensed with no disciplinary actions. These providers remained active without discipline in November 2016, when Senator Hill sent a letter to the new EO expressing concern about the BRN’s handling of CEPs. This prompted a meeting between legislative staff, the BRN EO, BRN’s Assistant EO, BRN’s counsel, and a deputy director of DCA. During this meeting, BRN staff and counsel stated that they were unable to take action against any CEP if the CEP presented any evidence, however insubstantial, that a CE fit within the parameters of acceptable coursework. When asked if the BRN could disprove *any* provider based on faulty scientific evidence, BRN counsel said no. If the Board wanted to disapprove CEPs on this basis, counsel stated, it would have to promulgate regulations to define what it believes to be “scientific.”

This is clearly counter to the plain reading of statute and regulations. The BRN defines and interprets the practice of nursing, and is required to exercise its discretion as to what furthers this practice, be it relevant to scientific principles or related to direct or indirect patient care. A self-interested CEP’s perspective on science is not intended to trump the state regulatory board’s interest in educating licensees on appropriate practices.

Legislative staff requested an opinion from Legislative Counsel on this matter, which concluded that:

In sum, both the statutes and regulations require the board to withhold or rescind the approval of a continuing education provider that does not meet the applicable statutory and regulatory requirements, which mandate that the continuing education be relevant to the practice of nursing. Thus, the board must necessarily determine whether a provider’s content is relevant to the practice of nursing in the course of its duties. For this purpose, the board’s interpretation of the “practice of nursing” would generally be granted deference by a reviewing court. [citations omitted] Moreover, the determination of how an existing regulation or statute applies in a specific instance is not, itself, a regulation. [citations omitted] Accordingly, the board would

³⁰ Ibid.

³¹ Id.

³² Id.

not be required to adopt a regulation in compliance with the Administrative Procedure Act in order to determine whether any particular course of continuing education is relevant to the practice of nursing.³³

BRN counsel later conceded that BRN was authorized to use its discretion in deciding what is and is not the practice of nursing, and, by extension, what may be “scientific,” but that if the Board wanted to define what it required all CEPs to provide as evidence of course merit, it would have to promulgate regulations. This does not relieve the BRN of currently disapproving CEPs whose coursework does not fall within acceptable guidelines, however.

In February 2017, both providers remain actively licensed and with no disciplinary actions taken. However, BRN told legislative staff that the providers were sent a letter (not a cease and desist, but merely a request) to stop offering the classes in question. These are not the only two suspect CEPs, however; it does not take long for an internet search for BRN approved CEPs to yield opportunities to take yoga,³⁴ “healing with divine energy,”³⁵ and “Mindful Eating: Cultivating True Nourishment”³⁶ for credit, all in violation of BRN’s criteria.

Until the BRN recognizes its responsibilities in protecting California consumers, it should be relieved of its CEP approval duties.

Staff Recommendation: *The BRN should cease CE approval and renewals for two years. In the interim, the Board should accept CE only from existing providers and those approved by specified accrediting entities.*

The Board should withdraw approval for CE providers that do not meet statutory and regulatory standards.

By March 1, 2019, the BRN should deliver a report to the appropriate Legislative policy committees with a comprehensive plan for approving and disapproving CE providers and courses, which shall include a cost-benefit analysis comparing the cost of doing this work entirely within the Board or relying on outside accreditors. The Board should consider additional staff and staff time necessary and compare costs for both licensees and CE providers for each option.

³³ Legislative Counsel Bureau, February 14, 2017, “Board of Registered Nursing: Approval of Continuing Education Providers - #1709315”

³⁴ iRest Yoga Nidra Meditation. Available at <http://www.yogayoga.com/iRestLevel2>, CEP number 11909.

³⁵ Healing with Divine Energy, available at <https://www.expandinglight.org/holistic-health/retreats/spiritual-healing.php>, CEP number 10747.

³⁶ Equanimity in the Dharma and in Your Brain, available at <http://www.spiritrock.org/non-residential-programs-offering-ce-credit>, CEP number 10318.

CONTINUED REGULATION OF THE NURSING PROFESSION
BY THE CALIFORNIA BOARD OF REGISTERED NURSING

ISSUE #12. (CONTINUED REGULATION BY THE BRN) Should the licensing and regulation of the nursing profession be continued and be regulated by the current BRN membership?

Background: The BRN and its current membership should continue to license and regulate the nursing profession. However, the BRN faces serious problems in managing its licensing and enforcement program as indicated by the State Auditor, and it has been recommended that the Legislature remove the BRN's enforcement responsibilities absent significant reform plans by March 1, 2017. It is also evident that BRN needs to develop a plan to manage its CE and CEP responsibilities properly, examine its APRN regulations, and address other issues as identified in this Background Paper.

Staff Recommendation: *Due to the substantial enforcement concerns which were identified by the State Auditor and reflected in this Background Paper, and in particular removing the enforcement authority of the BRN if it does not address concerns raised by the State Auditor, the Committee should consider reviewing the BRN in two years. This is to ensure that it has made progress in implementing the recommendations made in the 2016 California State Auditor report and in addressing other issues which have been raised by the Committees.*