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Case Number 470,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADONI HEALTH INSTITUTE,	*	
	*	No. 470,2018
Appellant Below,	*	
Appellant/Cross-Appellee,	*	
	*	Court Below – Superior Court
v.	*	of the State of Delaware
	*	
	*	C.A. No. N17A-10-003-JAP
DELAWARE BOARD OF NURSING,	*	
	*	
Appellee Below,	*	
Appellee/Cross-Appellant.	*	
	*	

APPELLANT, CROSS-APPELLEE ADONI HEALTH INSTITUTE'S AMENDED OPENING BRIEF IN SUPPORT OF ITS APPEAL

LAW OFFICE OF
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Dated: November 28, 2018

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NATURE OF THE PROCEEDINGS

This appeal results from a contentious relationship between Appellant Adoni Health Institute (the "School") and the Delaware Board of Nursing (the "Board"). The School operates a practical nursing education program in Delaware. The Board has taken robust measures over of several years to withdraw the School's conditional approval to operate. The Board recently succeeded – the subject of this appeal.

The Board's original challenge to the School's existence culminated in a hearing before the Board on June 4, 2015 (the "2015 Hearing"). The School challenged the Board's conclusions from the 2015 Hearing through an appeal to the Superior Court. The School, by-in-large, won that appeal. *See Leads School of Technology Practical Nursing Program*[1] *v. Delaware Board of Nursing*, C.A. No. 15A-08-002 JAP (Del Super. Ct. July 29, 2016) (A-006-054) (hereinafter, the "2016 Opinion"). However, the Superior Court remanded the matter to the Board to consider whether its finding that the School misstated the length of its curriculum in a single annual report justified the extreme measure of withdrawing approval – and thereby shutting down – the School. Specifically, the Superior Court instructed the Board to consider whether that finding *alone* – as opposed to in conjunction with other findings or criticisms (many of which the Superior Court threw out) – warranted such an extreme measure (A-053).

[1] The School's former name.

Despite these narrow considerations and associated clear instructions from the Superior Court, the Board intensified its effort to shut down the School by garnering evidence from 2011 to 2016. In other words, instead of operating within the confines of merely the 2014 Annual Report and the alleged misstatement therein, the Board sought and used evidence from various other years to justify taking what the Court characterized as the extreme measure of withdrawing the School's conditional approval. From that evidence, the Board concluded many additional deficiencies concerning the School's operation existed. Using these alleged deficiencies at a July 12, 2017 Hearing (the "2017 Hearing"), the Board again revoked the School's conditional approval to operate.

The School appealed to the Superior Court for a second time. The School argued that (1) Board inappropriately expanded the record it considered at the 2017 Hearing beyond the alleged issues within the 2014 Report and therefore did not follow the Court's instruction on remand and (2) the Board failed to afford the School due process pursuant to Delaware law and the Board's own regulations (such regulations requiring notice of, an opportunity to be heard concerning, and an opportunity to cure each and every alleged School-issue); instead, the Board piled-on allegations spanning a six-year period that the School could not meaningfully challenge or cure. *See, generally*, the School's Opening Brief and Exhibits thereto (A-055-388) and Reply Brief (A-389-412).

The Superior Court sided with the Board. *See Adoni Health Institute v. Delaware Board of Nursing*, C.A. No. N17A-10-003 JAP (Del. Super. Aug. 9, 2018) (attached hereto) (hereinafter, the "2018 Opinion").

This is the School's Opening Brief in Support of its Appeal of the Superior Court's decision to affirm the Board's revocation of the School's conditional approval.

SUMMARY OF THE ARGUMENT

1. The Board erred as a matter of law by disregarding the Superior Court's instructions on remand. The Board used significant justification outside of the narrow issue it was instructed to consider in order to justify its desire – and decision – to close the School.

2. The Board abused its discretion by failing to provide the School "due process" pursuant to Delaware law and its own regulations. Instead, the Board used a variety of alleged deficiencies to justify closing the school post-remand for which the School had no opportunity to meaningfully address or cure.

STATEMENT OF FACTS

a. The 2016 Opinion

The 2016 Opinion provides helpful background to the parties' relationship, in additional to creating the foundation on which this appeal sits. The Board originally granted the School approval to operate in 2017 (A-009). Thereafter, the School's performance fluctuated (measured by its students' pass rates of the National Council Licensure Examination ("NCLEX")) (A-010-011).

The School prepared an improvement-action plan that the Board ultimately accepted in 2012 (A-011-012). The Board monitored the School as a result, and the School submitted annual reports to the Board (A-012-014).

Unfortunately, the Board voted to withdraw the School's conditional approval in January 2015, advising the School of the same a few months thereafter (A014-015). The reasons for withdrawal (at that time) were the poor NCLEX test results and because the Board viewed the School's annual reports as "unclear" (A-015).

The Superior Court largely found the Board's conclusions arbitrary, particularly with respect to the conclusions the Board drew related to NCLEX test scores (A-017-031).

Concerning the Board's conclusion that the School's annual reports were "unclear", the Court held that the Board did not provide the School "the required notice and opportunity to cure most of the deficiencies . . ." (A-032). Critical then,

and now, the Superior acknowledged that Delaware law mandates that the Board provide the School notice of an alleged deficiency along with a time that the same should be corrected (A-035) (citing 24 *Del. C.* § 1919(b)). The Board of Nursing Regulations mandate similar "due process" procedures where allegations of deficiencies are made (A-035) (citing Regs. 2.5.10.4 and 2.5.10.8).

Ultimately, the Court concluded that "**One Board Finding Survives**" (A-051) (emphasis in original). The Board concluded that "[a]ccording to the 2014 Annual Report, the full time (day) program is 12 months and the part time (evening) program lasts 15 months" . . . but "no students are completing the program within this time frame" (A-051). The Court held that the Board provided the School proper notice of this, "just barely" by way of a letter (A-051). The Superior Court found the notice questionable, but sufficient[2] (A-052).

At the end of the 2016 Opinion, the Court wrote the following:

> The court's decision to uphold the Board's finding concerning the misstated length of the curriculum is not sufficient, at this juncture, to sustain the Board's decision to withdraw [the School's] approval. Although the Board found that the faults in [the School's] 2014 Annual report, in their entirety, justified withdrawal of [the School's] approval, it made no finding that the misstatement of the curriculum length alone justified such an extreme measure. The court, of course, is not equipped

[2] To be clear, whether the Board afforded the School proper "due process" at and around this time (2014-2015) is not directly at issue in this appeal. However, whether proper "due process" was afforded to the School leading to the 2017 Hearing and confirmation of the Board's decision to withdraw the School's approval to operate is directly at issue.

> to make that decision, and therefore the matter will be remanded to the Board for its determination of that issue.

(A053).

b. The Board's Expansive Efforts to Shut Down the School on Remand.

The Board informed the School it would hold another hearing in early 2017. Using statutory authority, the Board demanded information related to the School and its students from 2011 through "present" (which, at the time, was near the end of 2016) (A-353). The School complied with the request on December 7, 2016 (A-352-353) (hereinafter, the "2016 Production").

Shortly thereafter, a committee of the Board recommended that the Board again withdraw the School's approval "based on the remand issue and related documents" (A-353). Less than one month later, on January 11, 2017, the Board accepted its committee's recommendation to shut down the School (A-353). This was communicated by a February 8, 2017 letter (the "Notice Letter") (A-344-350).

The Notice Letter included accusations and conclusions[3] as follows:

> - On April 25, 2012, [the School] was notified in writing that its annual report number should "accurate reflect the student population, or modify the manner in which the numbers are presented to allow

[3] The School denies the Board's accusations and conclusions related to its operations and nothing in this submission should be construed as an admission on the part of the School. The School, instead, highlights the Board's additional accusations and conclusions concerning the School to highlight the manner in which it failed to follow the Superior Court's instructions on remand and failed to provide the School due process.

assessment of the program completion, attrition rates and faculty compliment" (A-345);

- The Board noted that it was unable to determine if [the School] was maintaining a faculty and administration of adequate size and qualification, pursuant to Board Rule 2.5.2.6.3, without an accurate report of student population (A-345);

- The [B]oard advised the [S]chool that its corrective plan of action should include proposed remedial measures for ensuring student populations are accurate reported going forward in a manner that clearly communicates the information (A-345);

- When comparing the student lists and transcripts [the School] provided to the Board in November of 2016 (Exhibits) to the 2012-2014 Annual Reports, it is apparent that the Annual Reports have never accurately reflected the length of the [S]chool's curriculum (A-345);

- Not only did [the School] misstate the length of its curriculum in its 2014 Annual Report to the Board, but it also misadvised current and prospective students (A-349);

- It is clear that [the School] was well aware that these timeframes were wholly inaccurate; yet it continued to misstate in its advertisement the program's actual curriculum length (A-349);

As is clear, the Board acted on much more than the narrow issue on remand.

The School submitted letters and a motion contesting the Board's expansion of the record on remand to no avail.

c. The 2017 Hearing and Order.

The Board capitalized on its expansive position at the 2017 Hearing.

School President-Dr. Aliu testified that the School had previously used a "contact hour" method to report the School's curriculum length (A-197-207). In

other words, while students were not necessarily completing the School's curriculum within twelve months, the amount of days actually spent in the classroom or otherwise receiving education through the school amounted to twelve months, total (*i.e.*, it could be twelve months' schooling received over the course of eighteen months taking into consideration holidays and breaks).

Dr. Aliu testified about the School's 2016 annual report as follows:

> Q. . . . So how was curriculum length reported in the 2016 annual report?
>
> A. Yes, the holidays. Because that's 2014 when the Board now said that 12 months and 15 months kind of wrong, basically, time of a student. They asked us to correct that.
>
> And we actually respond back to the Board letting them know that, yes, we made a mistake with only the contact hours, and that moving forward should include holidays as requested by the Board.
>
> And that was why we changed it and put the appropriate contact -- I'm sorry -- the duration adding in holidays with the contact hours to make 15 hours -- 15 months for the part time and 17 months for the part time. That's what's reflected on the 2016 reports moving forward.
>
> Q. So you are saying the 2016 annual report you changed it because the Board had told you you now have to include holidays and breaks?
>
> A. Sure, yes.
>
> Q. In the curriculum length; is that correct?
>
> A. Correct.

Q. And that was asked of you in an October 18, 2016 letter from the Board to [the School]?

A. Correct.

(A-207-208). As a result, when the School was *specifically* put on notice that the "contact hour" method of reporting its curriculum length was problematic, it changed its reporting method.

The School was not given the opportunity to clarify, respond to questions, or potentially cure issues related to the 2016 Production (A-248-249). Nevertheless, the Board introduced seventeen new exhibits related to student admission and graduation from 2011 through 2016. The alleged issues flowing from these exhibits were not discussed with the School during the relevant time periods leading to the 2016 Opinion.

On September 13, 2017, the Board issued an order confirming its decision to shut down the School (A-352-376) (the "2017 Order"). The 2017 Order summarized the evidence it considered, which included the seventeen exhibits it described as "[s]tudent cohort lists from April, 2011 through October, 2016 including dates of enrollment and transcripts for each student[.]" (A-360). Additional evidence the Board considered (as summarized in the 2017 Order) is as follows:

- When asked by the Board why, if the program is such a unique asset to the New Castle community, only a small percentage of students who enroll in the program ultimately take the NCLEX and become nurses, Dr. Gambardella stated that "the expectation is yes, they are going to take the boards within a reasonable period of time" but she could

provide no explanation for why [the School] students were not meeting that expectation (A-362);

- The Board asked the following: as a professional consultant who has testified that the curriculum length is only a guideline, who understands that the school must report data to the Board in the same format as every other school, on the exact same criteria, why is it that the data presented by [the School] in regard to program length never seems to fit with the parameters requested by the Board? Dr. Gambardella explained that when she was first hired, she worked to ensure that the ratio of clinical-to-classroom hours was adequate (A-362);

- When asked how many absences a student may have before being dismissed from the program, Dr. Aliu stated one. When a Board member noted that LPN programs typically require students to reapply the following academic year if the student had three absences, Dr. Aliu stated that [the School] buses absences according to level, and students are allowed one absence per level. When asked if such students may reapply to the program, Dr. Aliu stated that when students fail a course, they are graded us incomplete and can return when the course is going to be repeated. They do not have to start from the beginning. When asked how many courses are offered at one time, Dr. Aliu stated, "technically, we're supposed to have like four. But right now we have three." When asked if the school had a decrease in enrollment, Dr. Aliu testified that enrollment dropped almost 50 percent "as we speak, because, like I said, we used to have four courses, but we only again have three courses now (A-365) (internal footnotes omitted);

- In reference to the transcripts the school provided the Board, the Board asked how it was possible that a student who was required to repeat a course was then able to graduate at the same times as the other students in the cohort. Dr. Aliu stated that when students are close to passing a course, such as receiving a 76.5 versus the requisite 77, they are not required to repent the course, only complete remediation. When Dr. Aliu was advised that [the School's] records indicate that at least one student initially received an F in a course, appeared to have retaken the course, but still managed to graduate with the rest of the cohort, Dr. Aliu said it is possible the course was "starting at the same time." When asked how one student was able to repeat a course and graduate with his cohort whereas two other students were required to repeat a course

and were enrolled an additional 12 months, Dr. Aliu stated it was because they were transfer students. When asked where on the transcript it would indicate the students were transfers, he stated that "it's not showing there, but I believe that's the condition in this case." When the Board pointed out that other student transcripts provided by Lends indicate when a student is a transfer, Dr. Aliu stated that "there are times when we give them a test to transfer in to give them the credit, rather than give them the transfer, so that's why I don't know about this case, because I was not program director." When a Board member then indicated the curriculum "seems like it can vary," Dr. Aliu testified that the school has two standards, such that a student who is close to receiving a sufficient grade can remediate and a student who is not must repeat the course (A-365-366) (internal footnotes omitted);

- In regard to Dr. Aliu's testimony about the school's NCLEX scores, the Board questioned why only 32.5 percent of the students who enrolled in the program from November of 2013 to September of 2015 have taken the NCLEX. Dr. Aliu said that [the School] is very particular about the quality of its students. When asked why only three of the 13 students that graduated in May of 2016 took the NCLEX, Dr. Aliu did not know. When asked why students with identical transcripts, including no repeat courses, no indication of transferred courses, and no "R" indicating remediation, had divergent enrollment times, Dr. Aliu said the differences could be due to "transplants" or repeating courses. When asked if the information set forth in the annual reports is derived from student populations and student transcripts, Dr. Aliu stated, "Yes, l guess." Dr. Aliu stated that the program director from 2012 would have been more able to answer questions from that timeframe, but she left the program. [The School] chose not to have her testify (A-366-388) (internal citations omitted);

- The Board then questioned Dr. Aliu as to why the transcripts the school provided the Board are not consistent with the school's NCLEX reports. For example, the transcripts do not list any students who graduated in September of 2014; yet, the NCELX reports list students who graduated at that time. Dr. Aliu stated that he has no explanation for how this occurred. When asked why a cohort of only three students begun in April of 2013, Dr. Aliu stated that the school bad very low enrollment at that time. When he was advised that a cohort of 16 students began one month later, he stated that one must have been part-time. When

> reminded that his testimony that no students had ever complained about the curriculum length was not consistent with the student testimony provided in the original hearing, wherein a [the School] graduate testified that his cohort began to complain because they were not graduating, Dr. Aliu stated, "Yeah, I remember that. That was, again, that was presented in that particular student's action plan cohort. And like I just said, that's no longer because of the action plan at that time." (A-367).

The 2017 Order's "FINDINGS OF FACT AND CONCLUSIONS OF LAW" section included the following:

- The Board finds as a matter of fact that the student lists and transcripts provided by the school establish that the misstated curriculum length in the 2014 Annual Report reveals a long-standing pattern of deception towards the Board and its students, and the testimonial and documentary evidence presented by [the School] at the hearing did not provide any valid explanation for the overwhelming number of inconsistencies in the documents. This finding is based upon Exhibits 1-17 setting forth students' actual enrollment dates in conjunction with those students' transcripts, which demonstrate that students within the same cohort had wildly different start dates, graduation dates, and enrollment times. This finding is also based on the misstated curriculum lengths in the 2012 -- 2016 annual reports. The Board finds Dr. Aliu's contention that student enrollment times ran over the 12 and 15 months set forth in the 2012-2015 annual reports because these times were based on contact hours and omitted holidays not credible. The Board finds the contention that the amended curriculum lengths of 15 and 17.5 months set forth in the 2016 Annual Reports are accurate also not credible. The transcripts do not bear out that it was a 12-month program, or a 12-month program with the holidays contemplated such that it was 15 months, or any single consistent time across cohorts (A-367-368);

- The Board does not find credible [the School]' explanation that curriculum length varies from student to student due to remediation of ce1iain courses because the admission dates are not consistent; the graduation dates are not consistent; and the proffered explanation for why it may be reasonable for a student to graduate two weeks late does

not explain why students are starting a month or two weeks later than the rest of their cohort. The start dates vary wildly; yet students are still graduating at the same time. Remediation does not explain this; this is simply not credible (A-368);

- The Board finds that the school's consistent failure to accurately set forth the curriculum time in its annual reports was not an innocent mistake but rather an attempt by the school to mislead students and the Board about the true nature of the school's curriculum. Similarly, the Board finds not plausible the school's explanation that it listed the program as 12 and 15 months because of Dr. Contino 's statement in 2012 that the contact hours between the full-time and part-time program must align. The school reported contact hours in the 2014 and subsequent annual reports but also calendar months and a breakdown of the number of weeks for each quarter in each program. Yet no student actually completes the curriculum within the advertised time. Moreover, Dr. Aliu conceded at both hearings that prior to 2016, all students who enrolled in the program believed that the program would be either 12 months for full-time or 15 months for part-time. If the misstatement in the annual reports was based upon a misunderstanding regarding contact hours, there would be no reason for the school to advise prospective and current students that the program was significantly shorter than its actual time. The transcripts do not support the statement that this has been a single misstatement in a report; rather those transcripts are the telling proof that the school is not operating a consistent program that comports with the information set forth in the 20 I 4 annual report or any report submitted thereafter (A-368-369);

- [T]he Board finds the [S]chool has exhibited a lack of transparency for a number of years (A-370);

- [The School]'s misstatement about the length of its curriculum in the 2014 report is sufficient justification to withdraw the [S]chool's conditional approval as it reveals that [the School] is not operating a legitimate practical nursing education program. The students begin and end at arbitrary and erratic times with no reasonable explanation, and by Dr. Aliu's own admission, the school picks and chooses the courses it offers for reasons unrelated to what is set forth in the annual reports (A-374).

Determined to close the School, the Board did.

d. The Second, Unsuccessful Appeal to the Superior Court.

The School appealed again. The School argued that (1) the Board's reopening – and significantly expanding of – the factual record defied the Superior Court's instructions on remand and (2) that the Board denied the School due process by failing to allow the School proper notice of, an opportunity to be heard concerning, and an opportunity to cure each and every alleged School-deficiency the Board used to prosecute the School on remand.

The Superior Court issued the 2018 Opinion on August 9, 2018, which affirmed the Board's decision to close the School. The Superior Court focused its analysis on the School's argument that the factual record was improperly opened and dramatically expanded post-remand. The Superior Court concluded that opening and expanding the record was appropriate to contextualize the Board's inquiry; further, the Superior Court held the opening and expansion of the record was not inconsistent with its remand instructions. Finally, the Superior Court explained that the "Board indeed answered the question posed on remand; that withdrawal of [the School's] conditional approval was warranted by [the School's] misstatement of its curriculum length." (2018 Opinion at p. 12).

Then, the Superior Court quickly addressed the School's second argument concerning due process. The Superior Court concluded that the School was

informed before the 2017 Hearing that it had '"the right to present evidence, to be represented by counsel, and to appear personally" and that [the School] or its counsel had the 'right to examine and cross-examine witnesses"' (2018 Opinion at pp. 12-13). The Court did not address the School's argument that the Board violated 24 *Del. C.* § 1919(b) and its own regulations by not affording the School notice and an opportunity to cure or clarify the dramatically expanded record that led to the January 11, 2017 decision to close the school, the Notice Letter confirming the same, and the 2017 Hearing and 2017 Order that again confirmed the same.

The Court did not consider that the School did not have the opportunity post-remand to address or "cure", by way of due process, the Board's allegations and misconduct *outside of* the alleged misstatement in the 2014 Annual Report that were used to justify closing the school.

ARGUMENT

I. THE BOARD ERRED AS A MATTER OF LAW BY FAILING TO FOLLOW THE SUPERIOR COURT'S CLEAR AND NARROW INSTRUCTIONS ON REMAND.

a. Question Presented

Did the Board err as a matter of law by failing to follow the Superior Court's instructions on remand (preserved at A-073-081)?

b. Scope of Review

This Court applies the same standard applied by the Superior Court, reviewing for errors of law and determining whether substantial evidence supports the Board's findings of fact and conclusions of law. *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009). The Court does not "weigh the evidence, determine questions of credibility, or make our own factual findings." *Bd. of Adjustment v. Verleysen*, 36 A.3d 326, 329 (Del. 2012) (citing *CCS Investors, LLC*, 977 A.2d at 320). The Superior Court's legal determinations are reviewed *de novo*. *CCS Investors, LLC*, 977 A.2d at 320.

c. Merits of Argument

With respect to a trial court's treatment of a litigation on remand, the Third Circuit has explained as follows:

> It is axiomatic that on remand for further proceedings after decision by an appellant court, the trial court must proceed with the mandate and the law of the case as established on appeal.

> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.
>
> Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length.

Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949-950 (3d Cir. 1985) (internal citations omitted).

"From the proposition that a trial court must adhere to the decision and mandate of an appellate court there follows the long-settled corollary that upon remand, it may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (emphasis added) (internal citations omitted). "A trial court is thereby free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision." *Bankers Trust Co.*, 761 F.2d at 950.

From the language of the Notice Letter and the 2017 Order (that heavily cited the 2017 Hearing transcript), it is apparent the Board went well beyond the parameters of the 2016 Opinion to justify, *post hoc*, closing the School. Indeed, the Superior Court was specific and clear in the 2016 Opinion: the Board, on remand, was to consider whether the misstatement of curriculum length in the 2014 Annual

Report, *alone*, was a sufficient basis to close the School. The Superior Court did not instruct, even impliedly, that the Board would be permitted to consider that single issue along with considering any related deficiencies the Board could conclude the School committed to somehow augment the severity of the 2014 Annual Report misstatement.

But, that is precisely what the Board did. It made robust efforts to conclude the School engaged in other misconduct before and after the 2014 Annual Report-submission. In form, the Board indicated in its 2017 Order that it was the severity of the 2014 Annual Report's misstatement that caused it to conclude the School ought to be shut down. In substance, however, the Board threw the kitchen sink at the School, questioning and concluding as follows:

- The Board did not know if the School maintained adequate faculty (A-345);
- The Board did not know if the School maintained adequate administration (A-345);
- The Board did not have an accurate report of student population (A-345);
- The School did not accurately reflect to the School's curriculum length for several years (A-345);
- The School misadvised current and prospective students (A-349);
- The School has three courses instead of four (A-365);

- Only a small percentage of the School's students were taking the NCLEX (A-362);
- The School engaged in a "long-standing pattern of deception" (as opposed to the single misstatement within the 2014 Annual Report) (A-367);
- The School's students' start dates varied "wildly" (A-368);
- The School is not operating a consistent program based on its annual reports submitted after 2014 (A-369);
- The School has lacked transparency for a number of years (as opposed to the single misstatement within the 2014 Annual Report) (A-370);
- The School's students begin and end "at arbitrary and erratic times with no reasonable explanation" (A-374); and
- The School's annual reports do not accurately set forth what courses the School offers (A-374).

Indeed, the Board's desire to close the School was not subtle. The Board was tasked with considering a single issue: whether the misstatement in the 2014 Annual report of the School's curriculum length justified closing the school. Determined with a means to an end, the Board garnered every criticism of the School's operation and leadership it could, claiming such criticisms were related to the isolated issue within the 2014 Annual Report. In reality, the only relation is that all criticisms were associated with the School's operations.

The Board's conduct was inconsistent with the Superior Court's remand instructions. Rather than focus on the singular issue at hand, the Board threw everything it could at the School to see what stuck. Confident most of it did, it reasoned closing the School was appropriate. This is much different than considering an isolated misstatement within a single annual report.

For these reasons, the Board erred as a matter of law by disregarding the Superior Court's instructions on remand, and its decision must be reversed.

II. THE BOARD ABUSED ITS DISCRETION BY JUSTIFYING ITS DECISION TO CLOSE THE SCHOOL WITH ALLEGED DEFICIENCIES FOR WHICH IT FAILED TO PROVIDE THE SCHOOL "DUE PROCESS".

a. Question Presented

Did the Board abuse its discretion by using criticisms and alleged deficiencies of the School for which it failed to provide "due process" to justify closing the school (preserved at A-081-086)?

b. Scope of Review

This Court applies the same standard applied by the Superior Court, reviewing for errors of law and determining whether substantial evidence supports the Board's findings of fact and conclusions of law. *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009). The Court does not "weigh the evidence, determine questions of credibility, or make our own factual findings." *Bd. of Adjustment v. Verleysen*, 36 A.3d 326, 329 (Del. 2012) (citing *CCS Investors, LLC*, 977 A.2d at 320). The Superior Court's legal determinations are reviewed *de novo*. *CCS Investors, LLC*, 977 A.2d at 320.

c. Merits of Argument

As the Superior Court pointed out in the 2016 Opinion, Delaware law and regulations require that the Board provide the School notice of an alleged deficiency

along with time to cure the same (A030) (citing 24 *Del. C.* § 1919(b) and Regs. §§ 1900-2.5.10.4 and 1900-2.5.10.8).

24 *Del. C.* § 1919(b) provides as follows:

> If the Board determines that any approved nursing education program is not maintaining the standards required by this chapter and by the Board, written notice thereof, specifying the deficiency and the time within which the same shall be corrected, shall immediately be given to the program. The Board shall withdraw such program's approval if it fails to correct the specified deficiency, and such nursing education program shall discontinue its operation; provided, however, that the Board shall grant a hearing to such program upon written application and extend the period for correcting specified deficiency upon good cause being shown.

24 *Del. C.* § 1919(b). However, this statutory requirement is just the start of what the Board must afford the School in the way of "due process."

Board regulations require that after this notice, the School would have to submit an "action plan" that would identify "Deficiency(ies)", "Proposed corrective action(s)", "Objective (measurable) measures of success", and "Projected timeline to remediate the deficiency(ies)." 24 *Del. Admin. C.* §§ 1900-2.5.8.3.1.1-4. Thereafter, this action plan is presented to the Board by the School's program director (and the School must receive advance written notice of the presentation date). 24 *Del. Admin. C.* §§ 1900-2.5.8.3.2. To finalize the "process", the Board can then approve, recommend that revisions occur, or reject the action plan – if revisions are recommended or rejection is asserted, the School then has thirty days

to re-submit the action plan (thereby re-starting some of the process the School is afforded). 24 *Del. Admin. C.* §§ 1900-2.5.8.3.3.

Administrative agencies, like the Board, must follow their own procedures. *United States v. Caceres*, 440 U.S. 741, 751 n.14 (1979) (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)). An agency abuses its discretion if it fails to follow its own regulations. *Furnari v. Warden*, 218 F.3d 250, 258 (3d Cir. 2000) (citing *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984)).

The post-remand timeline is as follows:

- The Board demanded additional documentation spanning a six-year timeframe, and the School complied on December 7, 2016 (A-352-353);
- On December 19, 2016, a Board committee voted to recommend that the Board close the School (A-353);
- On January 11, 2017, the Board accepted this recommendation and decided to close School (A-353);
- The Board communicated this by letter dated February 8, 2017 (the Notice Letter) (A-344-350);
- The 2017 Hearing occurred on July 11, 2017; and
- The Board issued the 2017 Order on September 13, 2017 re-confirming its decision to close the School (A-352-376).

Simply put, the Board bypassed 24 *Del. C.* § 1919(b) and its own regulations. It did not do the following concerning its "new" issues with the School: (1) provide written notice specifying the deficiencies; (2) specify a time to cure deficiencies; (3) allow the School to draft an action plan; (4) allow the School to present an action plan; and (5) consider the action plan, allowing for revisions or re-submission if necessary. These detailed steps were required for all the additional deficiencies or criticisms the Board capitalized on post-remand, which were as follows:

- The Board did not know if the School maintained adequate faculty (A-345);
- The Board did not know if the School maintained adequate administration (A-345);
- The Board did not have an accurate report of student population (A-345);
- The School did not accurately reflect to the School's curriculum length for several years (A-345);
- The School misadvised current and prospective students (A-349);
- The School has three courses instead of four (A-365);
- Only a small percentage of the School's students were taking the NCLEX (A-362);
- The School engaged in a "long-standing pattern of deception" (as opposed to the single misstatement within the 2014 Annual Report) (A-367);
- The School's students' start dates varied "wildly" (A-368);

- The School is not operating a consistent program based on its annual reports submitted after 2014 (A-369);
- The School has lacked transparency for a number of years (as opposed to the single misstatement within the 2014 Annual Report) (A-370);
- The School's students begin and end "at arbitrary and erratic times with no reasonable explanation" (A-374); and
- The School's annual reports do not accurately set forth what courses the School offers (A-374).

For these reasons, the Board violated its own regulations post-remand and abused its discretion. The Board could not use these additional deficiencies to justify closing the School when it had not provided the School due process concerning the same in the first instances.

It is clear the Board needed these additional alleged deficiencies to justify closing the school. Ironically, that proves the inverse: the 2014 Annual Misstatement, alone, would be insufficient to justify the "extreme measure" of closing the School.

As a result, the Board's decision must be reversed.

CONCLUSION

For all the foregoing reasons, Appellant/Cross-Appellee Adoni Health Institute respectfully requests that the Board's decision to close the School be reversed.

Respectfully,

LAW OFFICE OF
DANIEL C. HERR LLC

Dated: November 28, 2018

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ADONI HEALTH INSTITUTE,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N17A-10-003 JAP
	)	
DELAWARE BOARD OF NURSING,	)	
	)	
Appellee.	)	
	)	
	)	

Upon appeal from the Delaware Board of Nursing: **AFFIRMED**.

OPINION

This is Adoni Health Institute's second appeal from the Delaware State Board of Nursing.[1] In 2015, the Board revoked Adoni's conditional approval to operate its practical nursing program. On appeal in 2016, this court reversed all of the Board's factual findings except one, and remanded the matter to the Board with instructions to decide one remaining issue: whether the fact that the school misstated the duration of its curriculum warranted the

[1] Adoni Health Institute was formerly known as "Leads School of Technology."

Board's withdrawal of the school's conditional approval to operate. On remand, the Board considered evidence that was not previously considered in its original 2015 hearing, but was related to the duration of the school's curriculum. The Board issued a decision in September 2017, holding that Adoni's misstatement of its curriculum length warranted revocation of its approval. Adoni appealed to this court arguing, among other things, that the Board erred as a matter of law by reopening the factual record. For the reasons that follow, the Board's decision should be **AFFIRMED**.

I. BACKGROUND

The underlying facts of this case are described in some detail in this court's July 2016 opinion,[2] and will be summarized only briefly here. In 2007, the Board granted Adoni a conditional approval to operate after determining the school did not qualify for full approval. The Board identified three deficiencies in Adoni's program: (1) substandard NCLEX exam pass rates; (2) inadequate annual reports; and (3) student complaints. Adoni implemented an action plan intended to revamp its program, and in July 2012 the Board

[2] Ex. A to Appellant's Opening Br. at 2-11 (Court's Opinion dated July 29, 2016).

approved Adoni's action plan. Under the plan, continued approval for the school to operate hinged on the success of the 2012 cohort on the NCLEX, that is, approval hinged on only the students who started in September 2012 and participated in the revamped program. Yet, when the NCLEX results for the pre-2012 cohort continued to be poor and the school's 2014 annual report was deficient, the Board voted to withdraw its approval. A hearing was held in June 2015. On July 8, 2015, the Board issued a written opinion formally withdrawing Adoni's approval.[3]

Adoni appealed to the Superior Court. On July 29, 2016, this court reversed the Board's decision and all but one of its factual findings. The court upheld the Board's finding that Adoni misstated the duration of its curriculum in its 2014 annual report. The court remanded the matter, holding in relevant part:

> The court's decision to uphold the Board's finding concerning the misstated length of the curriculum is not sufficient, at this juncture, to sustain the Board's decision to withdraw [Adoni's] approval. Although the Board found that the faults in [the school's] 2014 Annual report, in their entirety, justified withdrawal of [Adoni's] approval, it made no finding that the misstatement of the curriculum length alone justified such an extreme measure. The court, of course, is not equipped to make that decision, and therefore

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[3] *See* Ex. 1 to Declaration of Michael R. Grandy (Board's July 8, 2015 Opinion and Order).

> the matter will be remanded to the Board for its determination of that issue.[4]

Following the court's remand, the Board wrote a letter to Adoni in October 2016 stating its intent to schedule a hearing "in early 2017," and also requesting that Adoni produce certain information related to the school's curriculum length in preparation for the hearing. The requested documents included: (1) a list of the students in each cohort beginning in 2011 through 2016; (2) the date each student began at the school; (3) the date each student finished at the school; (4) an indication of how each student separated from the school; and (5) an indication of whether there were duplicate names in different cohorts.[5] Adoni produced the documents on December 7, 2016.

On December 19, 2016, the Board's Practice and Education Committee reviewed the documents, determined that the documents demonstrated a long-standing pattern by Adoni of misstating its curriculum length to the Board and its students, and then recommended that the Board move forward with withdrawal of the

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[4] Ex. A to Appellant's Opening Br. at 48.

[5] *See* Ex. 4 to the Declaration of Michael R. Grandy at 1-2 (Board's September 13, 2017 Opinion and Order).

school's approval. The Board reviewed the documents and voted to accept the Committee's recommendation to withdraw based on the misstatement of its curriculum length. The Board notified Adoni of it proposal to withdraw and later scheduled a hearing, which was postponed several times at the request of Adoni.

On July 10, 2017, two days before the scheduled hearing, Adoni filed a motion *in limine* "to preclude the re-opening of the factual record on remand as contrary to the directive of the Superior Court." The Board, however, denied the motion *in limine* finding that, "the Court's Opinion does not state that the Board is limited to considering only the record established in the original proceeding," and emphasizing that the court "remanded the matter to the Board for *proceedings* consistent with the Court's Opinion."[6]

At the July 12, 2017 hearing, the Board considered the seventeen exhibits produced by Adoni, consisting of the student enrollment dates, transcripts, and annual reports. The school also presented its own evidence. The Board heard testimony from Dr. Ola

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[6] *Id.* at 5-6 (emphasis in original).

Aliu, the President of the school, and Dr. Lucille Gamberdella, former Board President who helped Adoni revamp its nursing program.

The Board issued its decision on September 13, 2017, finding that Dr. Aliu's "multiple and varied explanations for the curriculum length" during his testimony were not credible.[7] It also found Dr. Gamberdella's testimony did not provide good cause to extend the school's conditional approval.[8] The Board held that Adoni's misstatement about the length of its curriculum in its 2014 annual report was sufficient justification to withdraw the school's conditional approval because it: 1) "reveals that [Adoni] is not operating a legitimate practical nursing education program;" 2) "exposes that the school is deceiving its students about when they will become employable;" 3) "reveals that [Adoni] has repeatedly deceived the Board about the length of its curriculum in order to obscure the fact that it's also deceiving students;" and 4) the misstatement "renders the Board wholly incapable of determining whether the school is providing adequate resources . . . ." The school again appealed the

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[7] *Id.* at 18.
[8] *Id.* at 21.

Board's decision to the Superior Court; this time on the basis that the record was improperly expanded on remand.

II. ANALYSIS

This court reviews the Board's decision to determine "whether it acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on sufficient substantial evidence and is not arbitrary."[9] Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[10] But, this court will not weigh evidence, determine questions of credibility, or make its own factual findings.[11] Questions of law are reviewed *de novo*.[12] And absent an error of law, the Board's decision is reviewed for an abuse of discretion.[13]

It is well-settled that when the Superior Court remands a matter to the Board for further proceedings, the Board must follow the court's "instruction concerning treatment of an issue on remand even

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9 *Avallone v. State/Dep't of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011).
10 *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 425 (Del. 2012).
11 *Id.* at 426.
12 *Id.*
13 *Sweeney v. Del. Dep't of Transp.*, 55 A.3d 337, 341-42 (Del. 2012).

if the [court] has left the ultimate issue undecided."[14] The Delaware Supreme Court held:

> It is axiomatic that on remand for further proceedings after decision by an appellant court, the trial court must proceed with the mandate and the law of the case as established on appeal. A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length.[15]

Although the Board must follow the remand instruction and law of the case as established by the appellate court, the Board is not precluded from holding further proceedings to determine outstanding issues.[16] The Board on remand can "make any order or direction in further progress of the case so long as it is not inconsistent with the decision of the appellate court, as to any question not settled by the decision."[17]

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[14] *See Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 988 F.2d 414, 429 n.19 (3d Cir. 1993).

[15] *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir.1985) (internal quotations citations omitted).

[16] *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 38 (Del. 2005) ("Although the trial court on remand is not constrained by the mandate as to issues not addressed on appeal, the trial court is required to comply with the appellate court's determinations as to all issues expressly or implicitly disposed of in its decision.").

[17] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1129 (Del. 2015), *as corrected* (Dec. 28, 2015).

On appeal, Adoni argues that the Board erred as a matter of law by reopening the factual record because, according to Adoni, the court's "mandate required the Board to make a single determination on a closed factual record." By opening the record, Adoni argues, the Board failed to follow the court's instruction and law of the case. The only authority cited by Adoni in support of its position are cases standing for the proposition that on remand the Board must follow the court's mandate and make findings consistent with the appellate court's rulings. But this legal requirement is not in dispute, and importantly, it is not inconsistent with the Board's authority to hold further proceedings and consider additional evidence necessary to decide outstanding issues.

Here, the court's mandate narrowed the scope of remand to one outstanding issue:

> One issue remains: the Board found that Leads' 2014 report was deficient because it misstated the duration of its curriculum. The remaining matter will be remanded to the Board for its determination whether this deficiency alone warrants withdrawal of Leads' approval to operate.[18]

The court then instructed that the matter was "reversed and remanded for *proceedings consistent*" with its opinion—for

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[18] Ex. A to Appellant's Opening Br. at 13.

determination of whether the misstatement of the curriculum length warranted revocation of the school's approval—and the court did not retain jurisdiction.[19] The Board's hearing that followed in July 2017 was both within the power of the Board and consistent with the court's opinion.

The Board's consideration of additional evidence related to the curriculum length and was not inconsistent with the court's mandate. The Board requested that Adoni produce student enrollment dates and transcripts because it needed "the additional information in order to understand the program"[20]—specifically to clarify its confusion about the length of Adoni's curriculum.[21] The Board was not considering evidence to determine if there was sufficient evidence supporting that the curriculum was misstated—that was already sustained by this court—but rather, the Board considered evidence to determine if the lone fact that the curriculum was misstated was enough to warrant the revocation as the court instructed. Any factual findings based on the seventeen new exhibits

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19 *Id.* at 49.
20 June 2015 Hearing Tr. at 155.
21 *See* Ex. 4 to the Declaration of Michael R. Grandy at 21.

that were added to the record on remand[22] were simply related to the Board's reasoning that the school's past conduct warranted revocation. The Board's reasoning was *also* based on its determination that the testimonies from Dr. Aliu and Dr. Gamberdella presented by Adoni at the hearing should be given little to no weight.

When the case was before the Board the first time in 2015, the Board had no reason to believe it had to decide whether the misstatement of Adoni's curriculum length alone was sufficient for revocation of the school's license to operate. In fact, the Board's revocation was based on a number of its factual findings. Only after this court reversed all of its factual findings except one—misstatement of the curriculum length—was the Board faced with the necessity of determining whether that fact alone was sufficient to sustain the revocation. Holding a hearing to make that determination was reasonable.

The school's current position that it wanted the Board to take the case under advisement on remand without conducting a further

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[22] *Id.* at 16.

review belies Adoni's later argument that its due process rights were violated. Because the Board had no reason to believe it had to consider such a narrow issue at the 2015 hearing, the parties also had no reason to argue (nor did they argue) the specific issue of whether the curriculum misstatement alone warranted revocation. On remand the parties had the right to comment on that issue before the Board made its determination. Accordingly, the Board held a hearing, where it was permitted to consider evidence within the scope of the remanded issue. The Board indeed answered the question posed on remand; that withdrawal of Adoni's conditional approval was warranted by Adoni's misstatement of its curriculum length. Thus, the Board did not disregard the Superior Court's instruction on remand, and therefore, did not err as a matter of law.

Adoni also argues on appeal that the Board violated its due process rights by adding evidence not included in its original 2015 hearing and by failing to give the school notice and opportunity to respond to the Board's new factual findings on the expanded record. This argument is without merit. Before the hearing, the Board informed Adoni that it had "the right to present evidence, to be represented by counsel, and to appear personally" and that Adoni or

its counsel had the "right to examine and cross-examine witnesses."[23] Adoni was well aware of the exhibits that would be submitted at the hearing; it produced the documents approximately seven months prior, and then two days before the hearing, filed a motion *in limine* trying to suppress them.

Likewise, Adoni had ample notice of the purpose of the hearing. The school had ample opportunity to prepare for the hearing and respond to the evidence, and it indeed took advantage of those opportunities by obtaining postponements of the hearing on several occasions, and by calling witnesses. Adoni presented its own evidence at the hearing in the form of testimony from Dr. Aliu and Dr. Gamberdella. That the Board ultimately found this testimony not credible was within the Board's power alone, and not this court's.[24] Any alleged prejudice was non-existent or inconsequential as the school got another bite at the apple, or otherwise had the opportunity to respond to the evidence at the hearing.

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[23] App. to Answering Br. at B13.

[24] *Gillespie*, 41 A.3d at 426 (stating that on appeal this court will not weigh evidence, determine questions of credibility, or make its own factual findings).

III. CONCLUSION

Therefore, for the foregoing reasons, the judgment of the Delaware Board of Nursing is **AFFIRMED**.

IT IS SO ORDERED.

Dated: August 09, 2018

John A. Parkins, Jr., Judge

oc: Prothonotary

cc: Matthew F. Boyer, Esquire, Connolly Gallagher LLP, Wilmington, Delaware
Jennifer L. Singh, DAG, Department of Justice, Dover, Delaware