



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADONI HEALTH INSTITUTE,  
Appellant Below,  
Appellant/Cross Appellee.

No. 470, 2018

v.

DELAWARE BOARD OF  
NURSING,  
Appellee Below,  
Appellee/Cross Appellant

**APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-  
APPELLANT'S OPENING BRIEF ON CROSS-APPEAL**

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## NATURE AND STAGE OF THE PROCEEDINGS

The Cross Appellant and Appellee in the instant appeal is the Delaware Board of Nursing (“Board”). The General Assembly has charged the Board with regulating nursing education programs in Delaware.<sup>1</sup> In order to conduct such a nursing education program, an institution is required to apply to the Board and submit satisfactory evidence that it is “ready and qualified to instruct students in the prescribed basic curriculum for educating nurses and that it is prepared to meet other standards . . . established by the Board.”<sup>2</sup>

Under Delaware Board of Nursing Regulation 2.0, *et seq.* (“Regulation 2.0”)<sup>3,4</sup> the Board established a three phase process to start nursing education programs in Delaware and the standards expected of such programs. In the instant action, the Appellant, Adoni Health Institute FKA Leads School of Technology (“Adoni”) applied to the Board for approval as a practical nursing program in Delaware, and the Board permitted Adoni to begin admitting students in January of

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<sup>1</sup> 24 *Del. C.* § 1919(a).

<sup>2</sup> *Id.*

<sup>3</sup> Pursuant to 24 *Del. C.* § 1906(a)(1), the Board promulgates regulations. 24 *Del. Admin. C.* § 1900 *et seq.* For clarity, these regulations will be referred to in the brief by the word “regulation” followed by the appropriate section number—*e.g.*, 24 *Del. Admin. C.* § 1900-2.0 is referred to as Regulation 2.0.

<sup>4</sup> The Delaware Board of Nursing significantly rewrote its Regulations in November of 2011. The references to the regulations are as they existed before that rewrite; that is, in the manner applicable to Adoni during its application process. *See* B247-257. References to record evidence not included in Adoni’s Opening Brief will be cited as “B\_\_.”

2007.<sup>5</sup> Unfortunately Adoni was unable to maintain the standards established by the Board while operating and was never granted full approval. The Board ultimately voted to withdraw its Adoni's conditional approval.<sup>6</sup>

Under 24 *Del. C.* § 1919(b), should the Board determine that a conditionally-approved nursing 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 statute further mandates that “[t]he Board shall withdraw such program's approval if [the program] fails to correct the specified deficiency . . . .”<sup>7</sup>

Consistent with this statutory scheme, on April 25, 2012, the Board sent Adoni a notice of deficiency outlining the program's failures to comply with the Board Regulations and advising it to submit an action plan to cure these deficiencies.<sup>8</sup> Adoni submitted a plan, which after revision was approved by the Board, with the understanding that all deficiencies would be corrected by the time the 2014 Annual Report was to be submitted.<sup>9</sup>

On December 16, 2014, the Practice and Education Committee reviewed Adoni's 2014 Annual Report and noted that the report contained several internal

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<sup>5</sup> B8.

<sup>6</sup> B22-23.

<sup>7</sup> 24 *Del. C.* § 1919(b).

<sup>8</sup> B26-33.

<sup>9</sup> B41-44.



discrepancies and, overall, demonstrated that the program continued to operate with numerous deficiencies.<sup>10</sup> As such, the Committee voted to recommend that the Board withdraw Adoni's initial approval, and on January 14, 2015, the Board unanimously voted to accept the Committee's recommendation.<sup>11</sup>

Adoni was notified of the Board's proposal to withdraw and the bases therefore by letter dated April 9, 2015.<sup>12</sup> Adoni requested a hearing, and on May 6, 2015, the Board notified Adoni that a hearing on the proposal to withdraw would be held on June 4, 2015.<sup>13</sup> At the conclusion of this hearing, the Board voted to withdraw its approval of Adoni's nursing program based on the program's failure to maintain the minimum standards established by the Board's Regulations.<sup>14</sup> The Board signed its order memorializing that decision on July 8, 2015.<sup>15</sup> Adoni appealed the Board's order to the Superior Court, and on July 29, 2016, the Superior Court issued an Opinion reversing the Board's decision in part, and remanding in part.<sup>16</sup> The Superior Court found that the Board failed to provide Adoni the requisite notice and opportunity to cure its deficiencies in regard to student enrollment numbers; program deficiencies; misleading hearing testimony; and inconsistent

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<sup>10</sup> B59-65.

<sup>11</sup> B67.

<sup>12</sup> B68-73.

<sup>13</sup> B74.

<sup>14</sup> B121.

<sup>15</sup> A103.

<sup>16</sup> A6-54.

enrollment dates.<sup>17</sup> Conversely, the Superior Court found that the Board provided Adoni proper notice that the school's 2014 Annual Report misstated the length of time it takes to complete the school's curriculum and remanded the matter to the Board to determine whether the misstated curriculum length justified withdrawing the school's approval.<sup>18</sup>

Upon remand, the Board requested documentation from Adoni in an attempt to determine Adoni's true curriculum length.<sup>19</sup> After review of documentation submitted by Adoni regarding its curriculum length, the Board unanimously voted to withdraw the school's approval based upon the misstated curriculum length.<sup>20</sup> Adoni was notified of the Board's proposal to withdraw and the basis therefore by letter dated February 8, 2017.<sup>21</sup> After Adoni requested the hearing be postponed several times, the Board scheduled the hearing for July 12, 2017.<sup>22</sup> At the conclusion of the hearing, the Board voted to withdraw approval of Adoni's nursing program based on the program's misstated curriculum length in its 2014 Annual Report.<sup>23</sup> The Board signed its order memorializing that decision on September 13, 2017.<sup>24</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> B164.

<sup>20</sup> B166-171.

<sup>21</sup> *Id.*

<sup>22</sup> B180.

<sup>23</sup> A295.

<sup>24</sup> A351-376.

Adoni filed a timely appeal of the Board's Order to the Superior Court. The Superior Court issued an Opinion affirming the Board's decision on August 9, 2018. Adoni appealed the Superior Court's 2018 decision, and the Board filed a cross-appeal to the Superior Court's July 2016 decision. Adoni filed its Opening Brief with this Court on November 12, 2018. This is the Board's timely-filed Answering Brief on appeal and Opening Brief on cross appeal.

## **SUMMARY OF ARGUMENT**

1. Denied. The Board did not improperly expand the record during the remand hearing.
2. Denied. The Board did not create new or different bases to withdraw Adoni's approval on remand.
3. The Board's 2017 decision that Adoni did not show good cause to extend its conditional approval was based on substantial evidence.
4. The Board provided Adoni sufficient notice that the school repeatedly failed to accurately report student populations; program deficiencies; and inconsistent enrollment dates.

## STATEMENT OF FACTS

In 2007, Adoni Health Institute, then known as Leads School of Technology, applied to the Delaware Board of Nursing for approval of its practical nursing education program.<sup>25</sup> Over the next year, Adoni attempted to demonstrate it had secured the minimal requirements necessary for operating a nursing program consistent with the Board's standards. In January of 2008, Adoni obtained approval to admit its first students.<sup>26</sup> Pursuant to Board Regulation 2.4.3.1,

following initial approval, the director of the program shall submit a copy of a progress report to the Board at least every six months. This shall be a general report of progress to date to include *number of students enrolled, attrition rate, faculty credentials, curriculum design, and use of clinical facilities*. After the admission of students, these reports shall continue to be submitted at six month intervals *until discontinued by the Board*. (emphases added).

On September 17, 2008, Adoni was asked to provide action plans to address deficiencies observed during its first site visit,<sup>27</sup> and on February 19, 2009, it was notified that it would remain on probation/conditional approval.<sup>28</sup> The 2009 notice stated that Adoni was to submit a Plan of Corrective Action by March 17, 2009, and the program administrator was required to attend the April 2009 Board meeting in order to discuss the 2008 Annual Report and recommendations of the Board's

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<sup>25</sup> B8.

<sup>26</sup> *Id.*

<sup>27</sup> B9-10.

<sup>28</sup> B11-13.

Practice and Education Committee.<sup>29</sup> According to the April 2009 Board minutes, Adoni's then-program director, Earl Robinson, attended the meeting and discussed the school's action plan.<sup>30</sup> Adoni was again notified of its continued probationary status on March 6, 2010<sup>31</sup> and February 21, 2011.<sup>32</sup> In February 2011, the Board advised Adoni that it voted to keep the school on probation because: "it is unclear how many students actually graduated"; "47 students have not taken the NCLEX exam"<sup>33</sup>; and the school reported only 49% of its student body actually completed the nursing program.<sup>34</sup> On February 13, 2012, the Board notified Adoni that due to four consecutive years of it operating with numerous deficiencies while on probation, the Board was proposing to withdraw the school's conditional approval, and Adoni had until April 20, 2012 to submit an action plan to correct the deficiencies.<sup>35</sup> This February 13, 2012 notice questioned Adoni's reporting of student population, including why one aspect of the report noted that 93 of 93 students were progressing, representing no attrition, while another section noted that only 52 of 93 graduated, representing a 44% attrition rate.<sup>36</sup> It further advised the

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<sup>29</sup> *Id.*

<sup>30</sup> B14-16.

<sup>31</sup> B17-18.

<sup>32</sup> B19-20.

<sup>33</sup> The NCLEX is the exam all nursing school graduates must take after graduation in order to obtain licensure.

<sup>34</sup> B19.

<sup>35</sup> B22-23.

<sup>36</sup> *Id.*

school that the Board was confused about beginning and ending dates of students, and questioned why almost no student completed the program on schedule.<sup>37</sup> Finally it pointed out that Adoni's Annual Report NCLEX numbers were inaccurate, stating that according to one section of the Annual Report, "3 students passed, 2 failed and 47 have not taken the exam" while another section of the Annual Report stated that 64 additional students took the exam.<sup>38</sup>

On March 23, 2012 Adoni responded to the Board's proposal to withdraw by requesting clarification of its deficiencies.<sup>39</sup> By letter dated April 25, 2012, the Board reiterated in great detail each identified program deficiency and confusing submission by Adoni that made compliance with the Board regulations impossible to determine, including Adoni's: failure to ever achieve an 80% NCLEX pass rate in violation of Board Regulation 2.5.10.6.7; unclear annual reports; failure to establish that the school was maintaining administrative and faculty support of adequate size and qualification in violation of Board Regulation 2.5.10.6.3; and failure to establish that the school was adhering to its stated curriculum objectives in violation of Board Regulation 2.5.10.6.1.<sup>40</sup> The April 25, 2012 notice invited the program administrator to the June 13, 2012 Board meeting to address an action plan

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> B24-25.

<sup>40</sup> B26-33.

to correct these enumerated deficiencies.<sup>41</sup> The Practice & Education Committee reviewed these documents at a meeting on June 5, 2012 and found that the school's Annual Report still contained multiple inconsistencies in regard to enrollment, NCLEX statistics, curriculum, and academic calendar.<sup>42</sup> On July 3, 2012, Adoni was again afforded unlimited time to meet with Committee members to explain its plan to remediate these deficiencies.<sup>43</sup> At the conclusion of this meeting, the Committee voted to recommend approval of Adoni's plans based on Adoni's representation that all deficiencies would be corrected by the time of the 2014 Annual Report.<sup>44</sup> Adoni initially requested one year to correct all of its deficiencies. The Committee allowed Adoni an additional year to correct the deficiencies in light of the represented curriculum of 12 months for full-time students and 15 months for part time students.<sup>45</sup> The Committee noted that under a one year curriculum 2014 would be sufficient time for students under the new curriculum to graduate and take the NCLEX.<sup>46</sup>

In January of 2013 and 2014, the Board reminded Adoni that it remained on probation and that the school must continue to implement its action plans so as to

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<sup>41</sup> *Id.*

<sup>42</sup> B34-39.

<sup>43</sup> B41-44.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



remediate the deficiencies identified in the Board's April 25, 2012 letter.<sup>47</sup> On December 16, 2014, the Practice and Education Committee reviewed Adoni's Annual Report and noted that the school's Annual Report still contained several discrepancies.<sup>48</sup> The Committee voted to recommend that the Board finally withdraw Adoni's initial approval, and on January 14, 2015, the Board unanimously voted to accept the Committee's recommendation.<sup>49</sup>

By letter dated April 9, 2015, the Board spelled out for Adoni in great detail each program deficiency that formed the basis for the proposed withdraw of approval, including: "(1) Adoni's failure to maintain a NCLEX pass rate of at least 80% for first time candidates pursuant to Board Regulation 2.5.10.6.7;" and "(2) Adoni's submission of a 2014 Annual Report that makes a determination of compliance with Board Regulations impossible regarding the adequacy of resources for cognitive learning and clinical practice (Board Regulation 2.5.10.6.5), and adherence to the school's stated philosophy and curriculum objectives (Board Regulation 2.5.10.6.1)." <sup>50</sup> Despite its close oversight during Adoni's *seven years* of probation, ultimately the Board determined that Adoni never came into full compliance with the Regulations, and Adoni's 2014 Annual Report did not address

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<sup>47</sup> B45-48.

<sup>48</sup> B59-65.

<sup>49</sup> B67

<sup>50</sup> B68-73.

its current deficiencies in a meaningful way.<sup>51</sup> The Board concluded its April 9, 2015 letter noticing Adoni of its decision to propose to withdraw Adoni’s approved status by offering Adoni the opportunity for a hearing, indicating an extension of the period for correcting its deficiencies would be granted upon good cause shown.<sup>52</sup>

On June 4, 2015, a hearing was held before the Board so that Adoni could contest the Board’s proposal to withdraw Adoni’s approved status.<sup>53</sup> At the hearing, Dr. Ola Aliu, President of Adoni Practical Nursing Program, Dr. Lucille Gambardella, PhD a consultant for nursing education programs, and Adeyemo Dania, an Adoni graduate, all testified on behalf of Adoni.<sup>54</sup>

Adoni’s expert witness, Dr. Gambardella, testified that the maximum amount of time it should take a student to graduate from the school is one and a half times the stated curriculum timeframe, and she does not believe that a situation—where no one graduates in 12 months—should exist.<sup>55</sup> Adeyemo Dania testified that his class expected to graduate in 12 months but then realized that would not happen as his class was going to “bear the brunt” of all of the action plan changes.<sup>56</sup> His class complained to the school about their evolving graduation requirements and date, and

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> B76.

<sup>54</sup> *Id.*

<sup>55</sup> B108, 110.

<sup>56</sup> B116.

he could not point to any student who graduated from the program in 12 months.<sup>57</sup>

Mr. Dania testified that his class was frequently advised that their performance was not satisfactory, and they would be required to “prepare again and retake it,” without explanation as to what “it” was.<sup>58</sup>

Dr. Aliu testified that five students from the 2012 thirty student cohort took and passed the NCLEX at the end of 2014.<sup>59</sup> He stated he *thought* the September 2012 cohort graduated in April of 2014, “or there about.”<sup>60</sup> When asked how long current students under the action plan will take to graduate, Dr. Aliu testified twelve months for full-time students and 15 months for part-time students.<sup>61</sup> When asked to confirm that full-time students would actually graduate after 12 calendar months, Dr. Aliu backtracked, stating the advertised 12 month curriculum length is based on contact hours, which actually takes far greater than 12 calendar months to complete.<sup>62</sup> Nonetheless, he testified the school tells prospective students it is a 12 month program.<sup>63</sup>

When a Board member pointed out that the 2014 Annual Report clearly describes the curriculum as four twelve week quarters and four weeks of enrichment

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<sup>57</sup> B115-116.

<sup>58</sup> B116.

<sup>59</sup> B83.

<sup>60</sup> B88.

<sup>61</sup> B92.

<sup>62</sup> B87-88, 92.

<sup>63</sup> B92.

(totaling 52 weeks, or 12 calendar months) and questioned why Dr. Aliu was now testifying that 12 months meant longer than 12 actual calendar months, Dr. Aliu confusingly explained the discrepancy was due to holidays and vacation days and that the 2012 class was unique as they were still trying to perfect the action plan.<sup>64</sup> After so testifying, Dr. Aliu later conceded that the class that began in September of 2013 may graduate—not in September of 2014—but in March of 2015.<sup>65</sup> At different times during the same hearing, Dr. Aliu testified that there were currently 25 students enrolled in the school, or 40 students if you include those that are not graduating, or “about” 22, or exactly 22, and finally that there were currently 30 students enrolled.<sup>66</sup> Interestingly, Adoni’s then Program Administrator advised the Committee in June of 2014 that the 2012 cohort included 30 students, while Dr. Aliu testified that it was only 24 students.<sup>67</sup> Following the presentation of Adoni’s case, the Board deliberated and determined that Adoni failed to correct its deficiencies over the preceding two years and did not demonstrate good cause to extend the period for correcting the specified deficiencies, as required by 24 *Del. C.* § 1919(b).<sup>68</sup> The Board rejected the argument that the high NCLEX passage rate for five students in the 2012 cohort was good cause to remain open as Dr. Aliu repeatedly failed to

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<sup>64</sup> B93.

<sup>65</sup> B113.

<sup>66</sup> B92, 100-101, 104.

<sup>67</sup> B51, 103.

<sup>68</sup> B117-121.

clearly advise the Board about the pertinent facts regarding who such students were including: when Adoni students began and completed the program; the duration of the program's curriculum; how many students were enrolled in the school at any one time; why students graduate at several different times throughout the year; and why students fail to progress or graduate until well over the 12 or 15 months allotted to each program.<sup>69</sup> Adoni appealed the Board's 2015 decision to withdraw the school's approval as a Delaware nursing program.

On July 29, 2016, the Superior Court issued an Opinion reversing in part, and remanding in part, the Board's 2015 decision to withdraw approval of Adoni.<sup>70</sup> The Superior Court found that the Board failed to provide Adoni the requisite notice and opportunity to cure its deficiencies as to student enrollment numbers; program deficiencies; misleading hearing testimony; and inconsistent enrollment dates.<sup>71</sup> However, the Superior Court found that the Board provided Adoni proper notice that "the Board was concerned about the accuracy of the statement in Adoni's Annual Report that its students graduate within 12 or 15 months."<sup>72</sup> The Court remanded the matter to the Board to determine whether the misstated curriculum length alone justified withdrawing the school's approval.<sup>73</sup>

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<sup>69</sup> A98-99.

<sup>70</sup> A7-54.

<sup>71</sup> *Id.*

<sup>72</sup> A51-52.

<sup>73</sup> A53.

On October 24, 2016, the Board sent Adoni and its attorneys a request for documentation of Adoni’s actual curriculum length, including lists of students by cohort; when those students began at the school; when and how each student separated from the school; and student transcripts.<sup>74</sup> Adoni produced the documents without objection, and on December 19, 2016, the Board’s Practice and Education Committee reviewed the documents and determined that the documents demonstrated a long-standing pattern of the school misstating its curriculum length to the Board and its students.<sup>75</sup> In fact, the student transcripts revealed that almost no student graduated within the 12 or 15 month timeframe that Adoni reported on its 2014 Annual Report.<sup>76</sup> The Committee recommended that the Board move forward with withdrawal of the school’s approval based upon the “misstatement of [Adoni’s] curriculum length in its 2014 Annual Report,”<sup>77</sup> and on January 11, 2017, the Board accepted the Committee’s recommendation.<sup>78</sup>

Adoni was notified of the Board’s proposal to withdraw its approved status due to the misstatement of its curriculum length in its 2014 Annual Report by letter dated February 8, 2017.<sup>79</sup> On February 27, 2017, Adoni requested a postponement of any hearing, stating without explanation that the Board’s letter was “in violation

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<sup>74</sup> B164.

<sup>75</sup> B166-171.

<sup>76</sup> *Id.* and B66.

<sup>77</sup> B166-171.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

of the Superior Court’s remand Order.”<sup>80</sup> On March 13, 2017, the Board notified Adoni that it would be scheduling the hearing for April 12, 2017.<sup>81</sup> On that same date, Adoni again asked that the hearing be stayed, and the Board agreed.<sup>82</sup> On April 19, 2017, Adoni requested that the hearing be postponed from May until June.<sup>83</sup> The Board again granted Adoni’s request and scheduled the hearing for June 14, 2017.<sup>84</sup> On June 2, 2017, Adoni again requested a hearing continuance as one of its witnesses was scheduled to be out of town on June 14<sup>th</sup>.<sup>85</sup> The Board once again granted the school’s request and re-scheduled the hearing for July 12, 2017.<sup>86</sup> On July 6, 2017, the Board notified Adoni that it would introduce as exhibits the documents produced by the school pursuant to the Board’s October 24, 2016 request.<sup>87</sup> On July 9, 2017, Adoni notified the Board that it planned to file a Motion *in limine* to exclude the exhibits and requested a ruling on the Motion “before the exhibits are distributed to all the board members.”<sup>88</sup> The school submitted the Motion at 8:49 p.m. on July 10,

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<sup>80</sup> B172.

<sup>81</sup> B174.

<sup>82</sup> B175.

<sup>83</sup> B179.

<sup>84</sup> B180.

<sup>85</sup> B182.

<sup>86</sup> B186.

<sup>87</sup> B188.

<sup>88</sup> B190.

2017.<sup>89</sup> The Board nonetheless agreed to withhold distribution of the exhibits and hear the school's Motion prior to the commencement of the July 12, 2017 hearing.<sup>90</sup>

Adoni's Motion argued that on remand, the Board should only consider the evidence presented at the original June 2015 hearing, as the Court did not indicate in its remand decision that the Board was authorized to re-open the record.<sup>91</sup> Adoni proposed what it believed was the appropriate legal proceeding on remand: oral argument from the school with no additional testimony or documentary evidence, with the Board simply answering the Court's inquiry without questioning the school or considering any of the documents the school submitted evidencing true length of its curriculum.<sup>92</sup> The Board denied Adoni's Motion *in limine* and proceeded with the hearing.<sup>93</sup> At the hearing, Dr. Ola Aliu, President of Adoni, and consultant Lucille Gambardella again testified on behalf of Adoni, and Adoni submitted documents in support of its position that good cause existed to permit it to remain open.<sup>94</sup> Despite being provided clear notice that the matter under consideration would be Adoni's misstatement of its curriculum length, Adoni did not provide any evidence explaining why almost no student completes its curriculum within the

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<sup>89</sup> B192.

<sup>90</sup> *Id.*.

<sup>91</sup> A378-388.

<sup>92</sup> A128-133.

<sup>93</sup> A168-169.

<sup>94</sup> A105-344.



advertised time or why almost no cohort ever begins and ends at the same time.<sup>95</sup> Instead, Adoni spent most of the remand hearing touting its graduates' recent improvement on the NCLEX.

Dr. Gambardella testified that she worked with Adoni to improve its curriculum and NCLEX scores and that she believes the school serves a unique role in the New Castle community.<sup>96</sup> Dr. Gambardella testified that the function of a curriculum's timeframe is "to provide structure" to nursing programs, and average LPN programs are a year or 18 months.<sup>97</sup> Despite the fact that the Board's concerns about Adoni's misstated curriculum length were raised to Adoni in writing in 2009, 2011, 2012 and 2014, and addressed as part of the 2015 hearing which she attended, Dr. Gambardella testified that the issue of misstated curriculum length was "new to [her]."<sup>98</sup>

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 graduate, 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 Adoni

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<sup>95</sup> *Id.*

<sup>96</sup> A172.

<sup>97</sup> A175.

<sup>98</sup> A177-178.

students were not meeting that expectation.<sup>99</sup> The Board asked the following: as a professional consultant who understands that the school must report truthfully to the Board in the same format as every other school, on the exact same criteria, why is it that the data presented by Adoni in regard to program length never seems to fit within the parameters requested by the Board?<sup>100</sup> Unable to answer, Dr. Gambardella instead explained that when she was first hired, she worked to ensure that the ratio of clinical-to-classroom hours was adequate.<sup>101</sup> The Board noted that Adoni's explanation that many students take well over the stated curriculum time to graduate was because "life gets in the way."<sup>102</sup> The Board further noted that students at all nursing schools deal with life's challenges, but all other schools are able to consistently adhere to their stated curriculum length.<sup>103</sup> The curriculum length is how the Board evaluates programs to ensure they are providing education in a systematic way that meets basic standards. Why, Dr. Gambaradella was asked, is the Board repeatedly left with more questions than answers from Adoni data?<sup>104</sup> Dr. Gambardella, confirming the Board's concerns, stated that the calendar of a program is determined by a school based upon the number of courses and how those hours span a particular period of time and conceded that there should be "consistency or

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<sup>99</sup> A180-181.

<sup>100</sup> A189.

<sup>101</sup> A190-191.

<sup>102</sup> A189.

<sup>103</sup> *Id.*

<sup>104</sup> A189-190.

some way that you can determine a start time and an end time for the average of every program.”<sup>105</sup> Dr. Gambaradella never provided an explanation for why that was not the case with Adoni.

Dr. Ola Aliu, president of Adoni, provided testimony that was equally unhelpful. Dr. Aliu testified that the school *now* advises students at orientation that despite what is indicated in the Annual Reports, the 12 month program will not be 12 months, and the 15 month program will not be 15 months as an unknowable amount of time will be added for holidays and breaks.<sup>106</sup> When asked why Adoni’s Annual Reports do not reflect the actual curriculum length, as they clearly list the programs as 12 and 15 months, Dr. Aliu, ignoring that the reports list incorrect *calendar* durations, stated that he “believed strongly that we are supposed to put in only contact hours.”<sup>107</sup> Dr. Aliu’s testimony further confused the issue of what Adoni’s actual curriculum length is, stating that beginning in 2016, the school changed its Report “to put the appropriate contact—I’m sorry—the duration adding holidays with the contact hours....”<sup>108</sup> Dr. Aliu asserted that the 2016 Annual Report also incorporated an additional two weeks for something called “admission into program” including “ATI, registration, and stuff like that.”<sup>109</sup> The contact hours

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<sup>105</sup> A192.

<sup>106</sup> A204.

<sup>107</sup> A205.

<sup>108</sup> A207.

<sup>109</sup> A209.

allegedly remain the same but the time it takes to complete the curriculum was increased.<sup>110</sup> Despite a finding from the Superior Court that the Board communicated its concern with the misstated curriculum in at least 2012 and 2014 and a significant portion of the 2015 hearing being devoted thereto, Dr. Aliu claimed that it was not until after he received the Board's October 18, 2016 letter that the school changed its reported curriculum length on its 2016 Annual Report.<sup>111</sup>

Dr. Aliu acknowledged that the students reflected on the 2014 Annual Report expected a 12 or 15 month program.<sup>112</sup> When asked how Adoni defines a 12-month program, Dr. Aliu stated that Adoni groups its curriculum into four levels and each level is 12 weeks with the contact hours spread out over the weeks.<sup>113</sup> After enrolling, Dr. Aliu alleged that students are advised at orientation that the program will take longer due to holidays.<sup>114</sup> Dr. Aliu testified that he was holding a document demonstrating that Adoni *now* provides students a clear calendar with set holidays, but when he showed that document to Board members, no holidays were indicated.<sup>115</sup> Dr. Aliu next insisted that the school's calendar, which he claimed is provided to the students at orientation, sets forth the true curriculum length, but he

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<sup>110</sup> *Id.*

<sup>111</sup> A211.

<sup>112</sup> A218.

<sup>113</sup> A221.

<sup>114</sup> A223.

<sup>115</sup> A224-225.

did not bring a copy of the alleged calendar to the hearing, nor did he submit any such updated calendar at any time after the hearing concluded.<sup>116</sup>

When asked how many courses Adoni offers at one time in order to adhere to its stated curriculum length, Dr. Aliu admitted that the school is not actually doing what it claimed on its Annual Report, stating, “technically, we’re supposed to have like four. But right now we have three.”<sup>117</sup> No explanation was given for how Adoni is complying with its stated curriculum length when it is not even offering as many courses as it self-represented it must in order for students to complete the program during the advertised time period.

The problems with Adoni’s misstated curriculum length became more and more concerning with every nonsensical explanation Dr. Aliu provided. When Dr. Aliu was advised that Adoni’s records indicate that at least one student initially received an F in a course, appears to have retaken the course, but still managed to graduate with the rest of the cohort, Dr. Aliu inexplicably said it is possible the course was “starting . . . at the same time.”<sup>118</sup> When asked why that one student was able to repeat a course and graduate with his cohort while two other students who were required to repeat a course ended up enrolled for an additional 12 months, Dr.

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<sup>116</sup> A225-226.

<sup>117</sup> A230.

<sup>118</sup> A238.

Aliu guessed it was because they were transfer students.<sup>119</sup> 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.”<sup>120</sup> When the Board pointed out that other student transcripts clearly 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 . . . .”<sup>121</sup>

Despite its misstated curriculum length on its 2014 Annual Report, Adoni argued at the remand hearing that it should be permitted to remain open because Adoni’s NCLEX passage rate for graduates in 2015 and 2016 was over 90%.<sup>122</sup> In follow up, the Board questioned why only 32.5 percent of the students who were reportedly enrolled in the program from November of 2013 to September of 2015 had even taken the NCLEX.<sup>123</sup> Refusing to explain why he was relying on the passage rate of only 32.5% of the students enrolled during that time, Dr. Aliu stated that Adoni is “very particular about the quality of its students. . . . So most of them maybe they do well or they drop out of the program. So something may have happened to them.”<sup>124</sup> When asked why only three of the 13 students that reportedly

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<sup>119</sup> A239.

<sup>120</sup> A241.

<sup>121</sup> A241-242.

<sup>122</sup> The school submitted the 2015 and 2016 NCLEX reports as exhibits. A109.

<sup>123</sup> A243.

<sup>124</sup> *Id.*

graduated in May of 2016 took the NCLEX, Dr. Aliu did not know.<sup>125</sup> When asked why students with identical transcripts, including no repeat courses, had wildly divergent enrollment times, Dr. Aliu stated, incredibly, the differences could be due to “transplants,” repeating courses or “[m]aybe the person is repeating college or something like that.”<sup>126</sup> When asked why a cohort of only three students began in April of 2013, Dr. Aliu stated that the school had very low enrollment at that time, despite the fact that 16 students began one month later.<sup>127</sup> Because Adoni was relying on its NCLEX passage rate for 2015 and 2016 as justification for remaining open, the Board questioned Dr. Aliu as to why its student transcripts are not consistent with the school’s 2015 and 2016 NCLEX reports.<sup>128</sup> For example, the transcripts do not list any students who graduated in September of 2014; yet, the NCLEX reports indicate students who graduated at that time.<sup>129</sup> Dr. Aliu had no explanation for why NCLEX passage rates include students who, according to Adoni’s own records, did not graduate when the NCLEX reports indicate they did.

Following the presentation of Adoni’s case, the Board determined that Adoni’s misstated curriculum length on its 2014 Annual Report was an adequate basis to withdraw the school’s conditional approval because, in the absence of any

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<sup>125</sup> A244.

<sup>126</sup> A246-247.

<sup>127</sup> A257-258.

<sup>128</sup> A249.

<sup>129</sup> A249-251.

rational explanation, the misstated curriculum length reveals that Adoni is not operating a legitimate practical nursing education program; is deceiving its students about when or if they will graduate and become employable; is deceiving the Board in order to obscure the fact that it is deceiving its students; and is rendering the Board wholly incapable of determining whether the school is providing adequate resources for cognitive learning and clinical practice or maintaining faculty and administration of adequate size and resources.<sup>130</sup> The Board found that Adoni did not demonstrate good cause to extend the period for correcting the specified deficiencies, as required by 24 *Del. C.* § 1919(b). On September 13, 2017, the Board issued an order, setting forth the bases for its decision to withdraw Adoni's approved status.<sup>131</sup> This appeal followed.

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<sup>130</sup> A374-375.

<sup>131</sup> A352-376.



# APPELLEE'S ANSWERING BRIEF ON APPEAL

## ARGUMENT

### **I. THE BOARD DID NOT IMPROPERLY EXPAND THE RECORD DURING THE REMAND HEARING.**

#### **1. Question Presented**

Did the Delaware Board of Nursing fail to follow the Superior Court's instruction on remand? B216-227

#### **2. Scope of Review**

This Court has jurisdiction to entertain this appeal from an administrative board's final order pursuant to the Delaware Administrative Procedures Act ("APA"). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board's decision and the board's ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, "[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted." 29 *Del. C.* § 10142(d). This Court's limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal

error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

### 3. Merits of Argument

Adoni argues that on remand, the Board erred as a matter of law by going “well beyond the parameters of the 2016 Opinion....”<sup>132</sup> In so doing, Adoni must be arguing that in 2018 the Superior Court misinterpreted its own 2016 ruling. As Adoni notes in its Opening Brief, a trial court is free to make its own decisions “in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.”<sup>133</sup> In other words, upon remand, the Board was free to determine the appropriate means to answer the question of whether Adoni’s misstated curriculum length was a sufficient basis to withdraw the school’s approval. To that end, the same court that remanded the matter later found that the Board considered evidence that although not considered in 2015, “*was related to the duration of the school’s curriculum.*”<sup>134</sup> *Adoni Health Institute v. Del. Bd. of Nursing*, 2018 WL 3815047 at \*1 (Del. Super. Aug. 9, 2018). Adoni would have this Court believe that the Board questioning the school as to “adequate faculty” for its curriculum; misstatements of “the School’s curriculum length for several years”;

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<sup>132</sup> Opening Br. p. 18.

<sup>133</sup> Opening Br. p. 18 (citing *Bankers Trust Co. v. Bethlehem Steel Copr.*, 761 F. 2d 943 (3d Cir. 1985).

<sup>134</sup> B233. Hereinafter, all references to the 2018 Superior Court Opinion will reference the Appendix.

the school misadvising “current and prospective students” about its curriculum; the school offering a different number of courses than that set forth in its stated curriculum; the school’s varying enrollment, and thus curriculum, dates; the school operating an inconsistent program and lacking transparency; and the school’s annual reports “not accurately [setting] forth what courses the school offers” are somehow unrelated to the remand issue of whether the school misstating the curriculum length was a basis to revoke its approval. In reality all of these issues are subparts of that precise question, which is why the Superior Court held that “the Board did not disregard the Superior Court’s instruction on remand, and therefore, did not err as a matter of law.”<sup>135</sup>

Under Delaware case law, “[w]hen an administrative decision is remanded because it fails to be supported by substantial evidence, the general practice in Delaware is to entitle each party to a new hearing. In a new hearing, both parties may present evidence to support their positions within the scope of the agency’s inquiry.” *Haggerty v. Bd. of Pension Trustees*, 2012 WL 3029580, at \*5 (Del. Super. Jul. 20, 2012). There is a wealth of case law in Delaware where courts remanded an administrative matter back to a board pursuant to 29 *Del. C.* § 10142(c) with the clear understanding that there would be a second hearing and a supplemented record. *See Bankers Tr. Co. v. Bethlehem*, 761 F.2d 943, 950 (3d Cir. 1985) (noting the

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<sup>135</sup> B243.

general rule is “upon a reversal and remand for further consistent proceedings, the case goes back to the trial court *and there stands for a new determination of the issues presented as though they had not been determined before . . . .*” (emphasis added)). *Wright v. Moore*, 953 A.2d 223, 226 (Del. 2008) (“there is no absolute bar in Delaware to admitting new evidence in a second trial after reversal and remand”); *see also Briscoe v. PNC Bank Corp.*, 2010 WL 746242, at \*2 (Del. Super. Mar. 5, 2010) (remanding under Section 10142 noting “Upon remand, the Board shall make a decision based on evidence from the initial hearing and, if necessary, additional evidence and legal argument presented at a remand hearing”); and *Dep’t of Corr. v. Unemployment Ins. Appeal Bd.*, 1999 WL 743440, at \*5 (Del. Super. Aug. 23, 1999) (remanding under Section 10142(c), noting “the Board may take such additional further testimony as it deems necessary);

Adoni argues that the Board “threw the kitchen sink” at it to *post-hoc* justify closing the school.<sup>136</sup> In truth the Board fully investigated the issue of misstated curriculum length to ensure it *did not* engage in such tactics. In *Haggerty*, the Superior Court noted that had the Court remanded the matter “with a limitation on the scope of evidence that could be introduced at the new hearing, the Board might [have been] encouraged to engage in *post-hoc* rationalization.”<sup>137</sup> Here, despite a

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<sup>136</sup> Opening Br. 19.

<sup>137</sup> *Haggerty* at \*5.

request from the school that the Board do just that, the Board did not want to merely deliberate the issue of whether misstated curriculum length was enough to justify the Board's earlier decision. Instead, the Board fully investigated this issue to determine if it, standing alone, was a sufficient basis to justify withdrawing the school's approval.

The Board is statutorily tasked with supervising the education of nurses<sup>138</sup>; approving curricula and developing criteria and standards for evaluating educational programs;<sup>139</sup> and *withdrawing approval from educational programs for failure to meet approved curricula*.<sup>140</sup> By requesting documentation of Adoni's actual curriculum length in preparation for the remand hearing, the Board was simply complying with its statutory duty. Demonstrative of the Board's compliance with its duty was the following Board member comment during deliberations on Adoni's

*Motion in limine* :

It's my understanding that a remand, in and of its definition, is set forth in an effort to expand the record, typically with respect to a particular issue and/or the components of the initial hearing that was deemed warranting further deliberation and insight.

And that's where we, as a board, come in. And I think that, doing our due diligence, it's important to further explore that one particular issue, and part of that is expanding the record.<sup>141</sup>

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<sup>138</sup> 24 Del. C. § 1901

<sup>139</sup> 24 Del. C. § 1906(a)(2)

<sup>140</sup> 24 Del. C. § 1906(a)(5) (emphasis added).

<sup>141</sup> A160.

Another member then followed up by stating: “here was my impression of what I listened to [in Adoni’s Motion *in limine* presentation], that the motion was based on the idea that this was such a little thing that we shouldn’t get into it further. But it hasn’t been completely resolved for me that it is just a little thing. And I personally need to discuss it further, be able to ask questions in order for that to be resolved for me.”<sup>142</sup> It is clear that the Board complied with its statutory duties and carefully considered this matter. It was not, as Adoni alleges, a *post hoc* attempt to justify closing the school by delving into matters previously unexplored.

In order to make such a determination, on October 24, 2016, the Board sent Adoni and its attorneys a request for documentation of Adoni’s actual curriculum length, including lists of students by cohort; when those students began at the school; when and how each student separated from the school; and student transcripts.<sup>143</sup> As the Superior Court noted, “[t]he Board requested ...student enrollment dates and transcripts because it needed ‘the additional information in order to understand the program’—specifically to clarify its confusion about the length of Adoni’s curriculum.”<sup>144</sup>

The documentary evidence provided by Adoni in response to this request demonstrated that the 2014 misstated curriculum length was not just an anomaly or

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<sup>142</sup> A161.

<sup>143</sup> B164.

<sup>144</sup> B241.

trivial one-time error, but rather was illustrative of long-standing deceit by the school toward the Board and its students.<sup>145</sup> In fact, the school failed to offer a single argument in rebuttal to the Board's numerous findings and conclusions in its Order that the misstated curriculum length in the 2014 Annual Report was indicative of widespread problems with the program overall and, consequently, a sufficient basis to withdraw Adoni's approval.<sup>146</sup>

The Board had the authority to address the remand question anew. The law of the case was that the Board provided Adoni sufficient notice and opportunity to cure its misstated curriculum before the 2015 hearing.<sup>147</sup> The documents sought and considered directly pertained to Adoni's misstated curriculum length.<sup>148</sup> The Board did not invent a new basis to withdraw the school's approval; it acted consistently with the Superior Court's Opinion and Delaware case law.

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<sup>145</sup> A345-350.

<sup>146</sup> A352-376.

<sup>147</sup> A53.

<sup>148</sup> B235..

## **II. THE BOARD DID NOT CREATE ANY NEW OR DIFFERENT BASES TO WITHDRAW ADONI'S APPROVAL ON REMAND.**

### **1. Question Presented**

Did the Delaware Board of Nursing comply with its regulations and procedural due process when affording Adoni a hearing to respond to an issue the Superior Court found the school was provided adequate notice of and opportunity to cure? A\*-\*

### **2. Scope of Review**

This Court has jurisdiction to entertain this appeal from an administrative board's final order pursuant to the Delaware Administrative Procedures Act ("APA"). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board's decision and the board's ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, "[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted." 29 *Del. C.* § 10142(d). This Court's limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal



error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

### **3. Merits of Argument**

On July 29, 2016, the Superior Court found that the Board provided Adoni proper notice in regard to the fact that the school’s annual report “misrepresents the length of time it takes to complete its curriculum.”<sup>149</sup> As such, the Court remanded the matter to the Board for a final determination on whether that issue was enough standing alone to justify withdrawing the school’s approved status.

Adoni argues that the Board violated the school’s due process rights by raising “new” or “additional” deficiencies during the remand hearing without providing the school notice or an opportunity to cure these new deficiencies.<sup>150</sup> In support of this argument, Adoni sets forth a bullet-point list of the alleged additions.<sup>151</sup> However, the bullet-point list provided in the Opening brief consists entirely of deficiencies that relate to the school’s curriculum length; were not a basis of the Board’s decision to withdraw Adoni’s approval; or were raised by Adoni—and not the Board—at the time of the hearing.

The first three of these alleged additional bases for withdrawing approval are the Board’s findings that: 1) it did not know if the school was maintaining adequate

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<sup>149</sup> A51.

<sup>150</sup> Opening Br., 26.

<sup>151</sup> *Id.*

faculty; 2) it did not know if the school was maintaining adequate administration; and 3) it did not “have an accurate report of student population.”<sup>152</sup> The citation provided in the Opening brief for each of these alleged new bases the Board created for the first time after the remand hearing is the February 2, 2017 proposal to withdraw notice sent to the school before the hearing. In that notice, the Board reiterated that since April 25, 2012 the Board had been notifying the school that it “was unable to determine if [Adoni] was maintaining a faculty and administration of adequate size and qualifications, pursuant to Board Rule 2.5.2.6.3, without an accurate report of the student population.”<sup>153</sup> In other words, Adoni’s argument is not based upon the Board’s actual decision and order, but rather the procedural history narrative of the notice letter. When looking to the Board Order after the remand hearing that is on appeal here, it is clear the Board’s decision was based entirely upon the school misstating its curriculum.<sup>154</sup>

Adoni’s next three bullet points inexplicably assert the following Board findings are in no way related to misstated curriculum length: the school *misstated its curriculum length* for several years; the school misadvised its students *about the curriculum length*; and the school’s president, Dr. Aliu, admitted to offering a

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<sup>152</sup> Opening Br., 25.

<sup>153</sup> A340.

<sup>154</sup> A352-376.

different number of courses than the number required under *the stated curriculum*.<sup>155</sup> Adoni never explains how or why these finding of the Board relating to Adoni's misstated curriculum length are not wholly related to the remand question, as it is clear these Board findings are squarely within the Superior Court's remand instruction.

Adoni's next bullet-point that it portends is a new basis for withdrawing approval is the Board's criticism regarding the percentage of students who take the NCLEX.<sup>156</sup> What Adoni neglects to mention is that Adoni itself raised the school's NCLEX results as its primary defense during the 2017 hearing.<sup>157</sup> Adoni's counsel moved the admission of the 2015 and 2016 NCLEX scores and questioned the school's expert about such scores during the remand hearing.<sup>158</sup> It was only upon cross examination of this expert that the Board questioned why the overwhelming majority of students who enroll in the school never ultimately take the licensure exam.<sup>159</sup> The school presented evidence of its NCLEX results *sua sponte* during the remand hearing that was supposed to deal with the misstated curriculum length and now, on appeal once again, the school is criticizing the Board for discussing the school's proffered evidence of its NCLEX results.

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<sup>155</sup> Opening Br., 25-26 (emphasis added).

<sup>156</sup> Opening Br., 25.

<sup>157</sup> A170, 173.

<sup>158</sup> *Id.*

<sup>159</sup> A179-180.

Two additional bullet-points note that the Board found the “students’ start dates varied ‘wildly’” and “begin and end ‘at arbitrary and erratic times with no reasonable explanation.’”<sup>160</sup> The argument that when students are enrolled in the program is somehow not wholly related to curriculum length is illogical. The final two bullet points note that the Board found the school was not operating a program consistent with what it set forth in its Annual Report and that the school was submitting annual reports that do not accurately reflect the courses offered.<sup>161</sup> These two points are a virtual restatement of the remand question—is the school’s misstated curriculum length in its annual report a sufficient basis to withdraw its approval.

Despite the fact that in 2016 the Superior Court specifically found that the Board provided Adoni notice and an opportunity to cure its deficiency relating to its misstated curriculum length, Adoni now argues that the Board violated its due process rights for failing to do just that. Adoni does so under the incorrect premise that the Board raised “new” or “additional” deficiencies upon remand.<sup>162</sup> At the July 12, 2017 hearing, the Board found that the school’s misstated curriculum demonstrated the school’s long-standing deceit toward its students and voted to withdraw the school’s approval. The Board did not set out to address NCLEX

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<sup>160</sup> Opening Br., 25.

<sup>161</sup> Opening Br., 26.

<sup>162</sup> Opening Br., 25.

scores, student complaints, student populations, or any issue beyond the narrow issue on remand. At the time of the hearing, *Adoni itself* submitted the 2015 and 2106 NCLEX reports into evidence. Adoni's contention that the Board raised new issues or claims following the remand ignores the Board's Order, which references numerous curricular inconsistencies and misstatements and repeatedly concludes that the school's misstated curriculum length was a sufficient basis to withdraw its approval.

### **III. THE BOARD'S 2017 DECISION THAT ADONI DID NOT SHOW GOOD CAUSE TO EXTEND ITS CONDITIONAL APPROVAL WAS BASED UPON SUBSTANTIAL EVIDENCE.**

#### **1. Question Presented**

Was the Delaware Board of Nursing's decision that the school misstated its curriculum length in order to obscure the fact that it had no set curriculum based upon substantial evidence? B228-231.

#### **2. Scope of Review**

This Court has jurisdiction to entertain this appeal from an administrative board's final order pursuant to the Delaware Administrative Procedures Act ("APA"). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board's decision and the board's ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). This Court's limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

### 3. Merits of Argument

Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *see also Breeding v. Contractors-One-Inc*, 549 A.2d 1102, 1104 (Del. 1988). The Court’s application of this standard of review “[r]equires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.” *Nat’l Cash Register v. Riner*, 424 A.2d 669, 674, 675 (Del. 1980). “In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.” *Gen. Motors Corp. v. Guy*, 1991 WL 190491, \*2 (Del. Super. Aug. 16, 1991). Upon determining that the record contains “substantial competent evidence to support the findings of the Board,” it is this Courts function “to affirm the findings.” *Johnson v. Chrysler Corp*, 213 A.2d 64, 65 (Del. 1965).

Here, it is clear that the Board relied on an abundance of evidence that the school misstated it curriculum length in 2014 in order to obscure overwhelming shortcomings in its curriculum. The Board found when looking to the exhibits provided by Adoni setting forth students’ enrollment dates in conjunction with those students’ transcripts, students within the same cohort had wildly different enrollment

times, even when their transcripts were identical.<sup>163</sup> The Board found that transcripts do not bear out that Adoni was providing a 12-month program, a 12-month program with holidays contemplated such that it was 15 months, or any single consistent time within or across cohorts.<sup>164</sup> The Board found Adoni's explanation that curriculum length varies from student to student due to remediation not credible because the admission dates are not even 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 later than the rest of their cohort. Although start dates vary wildly, students are still graduating at the same time. Remediation does not explain this.<sup>165</sup> 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.<sup>166</sup> If the misstatement in the annual reports was based upon a misunderstanding that the Annual Report sought only contact hours, there is no reason for the school to advise prospective and current students that the program was significantly shorter than its actual time.

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<sup>163</sup> A367.

<sup>164</sup> A368.

<sup>165</sup> *Id.*

<sup>166</sup> B92 and A217-218.



The Board found Dr. Aliu’s multiple and varied explanations for the curriculum length lacked credibility and thus did not provide good cause to extend the time for the school to remedy the discrepancies. This finding was based on Dr. Aliu’s inconsistent—and sometimes incomprehensible—answers and explanations for why students with identical transcripts took very different times to graduate.<sup>167</sup>

As the Board noted at the hearing, the Board’s confusion as to the length of the program led it to request documents that should have supported the school’s stated curriculum length.<sup>168</sup> Despite its repeated requests for clarification of the stated curriculum length, answers have been ambiguous, contradictory, or deemed by Adoni to be “not important in the big scheme of things.”<sup>169</sup>

In sum, the Board found that Adoni’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.<sup>170</sup> The transcripts do not evidence that this was a single misstatement in a report; rather the transcripts are the telling proof that the school is not operating a consistent program that comports with the stated curriculum length

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<sup>167</sup> A368.

<sup>168</sup> A372.

<sup>169</sup> A284.

<sup>170</sup> A282-283, 268.

in the 2014 Annual Report.<sup>171</sup> Accordingly, it is respectfully requested that the August 9, 2018 decision of the Superior Court be affirmed.

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<sup>171</sup> *Id.*

## **CROSS-APPELLANT’S OPENING BRIEF ON CROSS APPEAL**

### **IV. THE BOARD PROVIDED ADONI SUFFICIENT NOTICE THAT THE SCHOOL REPEATEDLY FAILED TO ACCURATELY REPORT STUDENT POPULATIONS; PROGRAM DEFICIENCIES; AND INCONSISTENT ENROLLMENT DATES.**

#### **1. Question Presented**

Did the Board provide Adoni adequate notice of its deficiencies beyond just the misstated curriculum length? B147-153.

#### **2. Scope of Review**

This Court has jurisdiction to entertain this appeal from an administrative board’s final order pursuant to the Delaware Administrative Procedures Act (“APA”). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board’s decision and the board’s ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972).

#### **3. Merits of Argument**

The Board initially issued an Order withdrawing Adoni’s approved status as a nursing school in Delaware on July 8, 2015. The Board concluded that Adoni:

did not meet its burden of showing just cause to extend the period for correcting its deficiencies in regard to Regulations 2.5.10.6.5, providing adequate resources for cognitive learning and clinical practice; 2.5.10.6.3, maintaining faculty and administration of adequate size and resources; and 2.5.10.6.1, adhering to the school’s stated

philosophy and curriculum objectives, *as Leads repeatedly mislead the Board in regard to student population, curriculum objectives vis a vis program duration, and faculty size and resources.*<sup>172</sup>

The Board found that Adoni’s students were being misled “in regard to the duration and make-up of the program they have paid \$16,000 to attend.”<sup>173</sup> On appeal, Adoni, practically as an aside, argued that the Board “failed to adhere to the hearing’s stated scope” by questioning Dr. Aliu about the length of the program and status of current students.<sup>174</sup> The vast majority of Adoni’s appeal focused on the school’s improved NCLEX scores, noting that five students, out of 25-30 who started the program in the fall of 2012, had passed the NCLEX, thus giving the school a 100% pass rate for that particular class.<sup>175</sup> Putting aside this argument—that Adoni should remain open because 20% of the students admitted two years prior ultimately became employable nurses—the school’s contention that the Board expanded the scope of the hearing without notice was simply untrue. Nonetheless, the Superior Court found that the Board did not provide Adoni adequate notice of and opportunity to cure several of the deficiencies the Board relied upon to withdraw the school’s approval.

In support of its argument that the Board did not provide the school adequate notice, Adoni cited to an offhand remark offered by a Board member during the

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<sup>172</sup> A102.

<sup>173</sup> *Id.*

<sup>174</sup> Docket entry 11 of *Adoni v. Del. Bd. of Nursing*, C.A.No.: 15A-08-002 JAP (Del. Super.).

<sup>175</sup> *Id.* (“[A]ll five out of the seven Action Plan students who graduated and took the NCLEX passed, resulting in a 100 percent pass rate.”)

hearing, in which she stated that questions from the Board about student population and enrollment dates “were not necessarily items that were specifically cited . . . in the letters.”<sup>176</sup> Despite the fact that this statement was completely inaccurate, the Superior Court also relied upon it to find that the Board did not provide sufficient notice.<sup>177</sup> In reality, the Board’s 2012 and 2015 notice letters repeatedly raised these concerns. The 2012 notice included the following statements:

The Annual Report should, by definition, include information concerning the year that has elapsed since the time of the last report . . . That is, according to Leads’ 2011 Annual Report, 93 students either carried over from the last reporting period or enrolled at some point from October 1, 2010 to September 30, 2011 (there is no indication in the report of when the school year begins or ends) and by September 30, 2011 not one student had left the program.<sup>178</sup>

The Board is unable to determine if Leads is maintaining a faculty and administration of adequate size and qualifications, pursuant to Board Rule 2.5.2.6.3, without an accurate report of the student population.<sup>179</sup>

The Board is not clear if these 52 graduates are included in the 93 students identified on page three. If these 52 students graduated at some point in time from October 1, 2010 to September 30, 2011, page three should not indicate that no student completed the program during the past year.<sup>180</sup>

Again, the Board is unable to determine if Leads is maintaining a faculty and administration of adequate size and qualifications, pursuant to Board Rule 2.5.2.6.3, without an accurate report of the student population. In addition to clarifying this information on the corrected 2011 Annual Report, Leads’ corrective plan of action should include

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<sup>176</sup> *Id.*

<sup>177</sup> A34-35.

<sup>178</sup> B28.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

proposed remedial measures for ensuring student populations are accurately reported going forward....<sup>181</sup>

It may be that 52 students did in fact complete the LPN program during the October 1, 2010 to September 30, 2011 timeframe, but that can't be ascertained by the information provided.<sup>182</sup>

The committee members attempted to determine how courses were arranged over the school year and which clinical training was associated with each course but were unable to do so due to the unclear manner in which the information was presented.<sup>183</sup>

In other words, in 2012, the Board repeatedly advised the school that it needed to accurately notify the Board of student populations and enrollment times.

In 2015, the Board again notified Adoni of its concerns about the school's reporting of student populations and enrollment dates. For example, the Board's April 9, 2015 withdrawal notice to the school stated the following:

Looking to the 2014 Annual Report, there are numerous discrepancies regarding student enrollment, completion, attrition, and when students take the NCLEX exam.<sup>184</sup>

Leads represents that its full-time LPN program is 12 months in duration; yet the December 2014 update references students who began two years prior (Sept/Oct 2012 first class cohort). As previously stated, the Annual Report should include information concerning the year that has elapsed since the time of the last report. Leads 2014 Annual Report does not indicate how many students entered the program in 2013 and finished in 2014.<sup>185</sup>

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<sup>181</sup> B29.

<sup>182</sup> B30.

<sup>183</sup> B31.

<sup>184</sup> B71.

<sup>185</sup> B72.

Leads LPN program is a 12 month program; yet this answer indicates that the class that entered the school in 2012 did not take the NCLEX until the spring of 2014 at the earliest. In other words, the action plan indicates that students are not graduating in anywhere near the 12 or 15 months allotted for the full or part time program.<sup>186</sup>

Back on April 25, 2012, the Board advised Leads that it was unable to determine if Leads was maintaining a faculty and administration of adequate size and qualifications as required by Board Rule 2.5.10.6.3, as the school had not submitted an accurate report of the student population. Despite that advisement, the Board is still unable to make that determination as it remains, to this day, wholly unclear from all of Leads Annual and Interim Reports how many students are enrolled in the school at any one time.<sup>187</sup>

Despite the Board's clear, repeated advisements that Adoni must accurately report its student population and enrollment dates in at least 2012 and 2015, as of June 4, 2015, the school's president could not accurately report that information when testifying before the Board. Then, after over ten years of operation, when placed with the burden to establish it had corrected one deficiency—accurately reporting how long its curriculum is—Adoni, through Dr. Aliu's testimony, left the Board more confused than it was in 2012.

In addition to relying on an offhand comment from one Board member in 2016, the Superior Court also found that the Board “relie[d] upon a single letter, dated April, 2012, as providing the requisite notice and opportunity to cure.”<sup>188</sup> As

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> A34.

outlined above, even if the Board had only relied upon only the 2012 notice, it clearly provided Adoni the requisite notice and opportunity to cure deficiencies regarding student population and enrollment dates. However, the Board did not rely upon only one letter from 2012. In reality, the Board relied upon the true administrative record in the case, which is every single communication between the Board and the school dating back to 2006. Under the APA, judicial review of administrative agency case decisions “shall be on the record without a trial *de novo*”<sup>189</sup> and the record is defined as “*all notices, correspondence between the agency and the parties*, all exhibits, documents and testimony admitted into evidence and all recommended orders, summaries of evidence and findings and all ... final orders of the agency....”<sup>190</sup> The Superior Court incorrectly distinguished this case from an earlier case in which the Board withdrew approval of a nursing, stating:

In *Camtech* the Board relied upon all the prior correspondence between it and the school to establish notice under the due process clause.... This case is different. Here the Board relies exclusively on its April 25, 2012 letter to supply the necessary notice. The court therefore need not, and should not, scour the correspondence between the parties over the years (most of which is not in the record) to determine whether the deficiencies now relied upon by the Board were at some time brought to Leads’ attention.<sup>191</sup>

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<sup>189</sup> 29 Del. C. § 10142(c).

<sup>190</sup> 29 Del. C. § 10127 (emphasis added).

<sup>191</sup> A33-37.



In reality, this case is identical to *Camtech*, as the Board relied upon a long-standing history of communications with Adoni. The Superior Court acknowledged that it did not consider anything pre-dating April 25, 2012 when it noted that the “Board refers to documents dated September 3, 2008; February 9, 2009; April, 2009; March 6, 2010; February 21, 2011; and February 13, 2012....none of these documents” was admitted into evidence at the hearing.<sup>192</sup> However, the Superior Court noted in a subsequent case, “there is no requirement that the record be comprised solely of facts referenced in the Complaint *or presented at a hearing.*” *Denham v. Del. Bd of Mental Health and Chemical Dependency Professionals*, 2017 WL 592763, at \*6 (Del. Super. Nov. 30, 2017). As such, the Superior Court erred in disregarding all of the communications the Board sent to the school prior to April 25, 2012.

Upon review of the entire record, it is clear Adoni was repeatedly advised of the deficiencies that formed the basis of the Board’s 2015 decision to withdraw the school’s approval. On July 30, 2008, the Board conducted a site visit to address a faculty complaint and to review the school’s progress under Phase II approval.<sup>193</sup> In follow up to that visit, on September 17, 2008, the Board noted several deficiencies, including: students graduating before completing coursework, inconsistent student start dates, and no reasonable explanation as to why some students were “almost

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<sup>192</sup> A40.

<sup>193</sup> B9-10.

ready' to graduate, while others [had] completed classes and [were] ready to graduate.”<sup>194</sup>

On February 19, 2009, the Board advised Adoni that the school would continue on conditional approval/probation, noting that the Board could not grant the school final approval due to the following issues: NCLEX scores below the 80% threshold; untimely submission of the Annual Report; disproportionate number of students admitted every six months compared to number of faculty; and “what appear[ed] to be fifteen students enrolled on October 30, 2008 [who had] already graduated [by February 2009].”<sup>195</sup> On March 6, 2010, the Board advised the school that it must submit a revised six-month progress report addressing the 2009 Plan of Corrective Action, required due to the school’s probationary status, as the report originally submitted was cumbersome and did not adequately update the Board about the school’s progress or lack thereof under its action plans.<sup>196</sup>

On February 21, 2011, the Board advised Adoni that it again voted to maintain the school on probation, noting: “it is unclear how many students actually graduated”; “47 students have not taken the NCLEX exam”; and the school reported only a 49% completion rate.<sup>197</sup> Regarding the school’s 2011 interim report, the

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<sup>194</sup> *Id.*

<sup>195</sup> B11-13.

<sup>196</sup> B17-18.

<sup>197</sup> B19-20.

Board advised Adoni on June 14, 2011 that its response to the deficiencies the Board set forth in February 2011 did not address what happens to students who are required to repeat a course.<sup>198</sup>

On February 13, 2012, the Board notified Adoni that it had until April 20, 2012 to submit an action plan to correct the following deficiencies: the school's confusing reporting of student population, including why one aspect of the report noted that 93 of 93 students were progressing, representing no attrition, while another section noted that 52 of 93 graduated, representing a 44% attrition rate; the school's confusing reporting of beginning and ending dates of students, including why students did not complete the program when they were scheduled to do so; and the school's inaccurate reporting of NCLEX numbers which at one point in the Annual Report were reported as "3 students passed, 2 failed and 47 have not taken the exam" while another section of the Annual Report stated that 64 additional students took the exam.<sup>199</sup>

On March 23, 2012 Adoni responded to the Board's proposal to withdraw by requesting clarification as to the school's specific deficiencies.<sup>200</sup> As noted above, on April 25, 2012, the Board reiterated in great detail each program deficiency.<sup>201</sup>

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<sup>198</sup> B21.

<sup>199</sup> B22-23.

<sup>200</sup> B24-25.

<sup>201</sup> B26-33.

On June 5, 2012, after Adoni submitted its proposed action plans, the Practice and Education committee sought additional information and clarification from Adoni in regard to enrollment, NCLEX statistics, corrected curriculum, and a corrected academic calendar.<sup>202</sup> On June 7, 2012, the Board’s Executive Director emailed the school’s Program Director stating that the enrollment section of the school’s Annual Report, “should only include those students from October 1, 2010 to September 20, 2011.”<sup>203</sup> They should be broken down by cohorts, or graduating classes and by full-time and part-time students.”<sup>204</sup> On July 3, 2012, the Practice and Education Committee noted that Adoni’s main problem since its inception has been that its ***“numbers [of students referenced in its reports] do not add up”; “the classes are not kept on a schedule”; and students seemingly complete the program but do not graduate.***<sup>205</sup>

During a June 13, 2014 Committee meeting, Adoni’s program administrator, predicted that 7-10 students who started in 2012 would graduate, despite the fact that 30 started in the cohort.<sup>206</sup> The Committee noted “this [is] a very high attrition rate.”<sup>207</sup> In follow up to this meeting, the Board advised Adoni on July 15, 2014,

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<sup>202</sup> B34-39.

<sup>203</sup> B40.

<sup>204</sup> *Id.*

<sup>205</sup> B41-44. (emphasis added).

<sup>206</sup> B51.

<sup>207</sup> *Id.*

that the Committee had concerns about Adoni's lack of objective numbers when referring to current enrollees and the attrition rate of the students.<sup>208</sup>

In other words, when looking to the entire record in this case, it is abundantly clear that the Board repeatedly placed Adoni on notice that it needed to accurately report student populations, enrollment dates, attrition rates, and curriculum make-up. In addition, Adoni met with the Board on multiple occasions; was granted two additional years to remediate; and submitted two subsequent sets of action plans in 2013 and 2014. Nonetheless, it still could not establish a nursing education program that met the Board's standards. Under Regulation 2.5.10.8, "[a] program that fails to correct these deficiencies to the satisfaction of the Board within a reasonable time shall be discontinued after a hearing in which facts regarding such deficiencies are established." Adoni was provided well more than "a reasonable time" to right its ship and repeatedly failed. The Board clearly complied with its regulations, and the failure of the Adoni's program is its own.

Two previous nursing schools whose approval was withdrawn unsuccessfully argued that the Board failed to follow the requisite procedure for withdrawing approval. *See Camtech Sch. of Nursing and Technological Scis. v. Del. Bd. of Nursing*, 2014 WL 604980 (Del. Super. Jan. 31, 2014) *aff'd* 100 A.3d 1020 (Del. 2014) (Table); *and Del. Inst. of Health Scis., Inc. v. Del. State Bd. of Nursing*, 2011

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<sup>208</sup> B57.

WL 3247798 (Del. Super. Jul. 29, 2011) *aff'd* 36 A.3d 348 (Del. 2012). In both *Camtech* and *Delaware Institute of Health Sciences, Inc.* (“DIHS”), the Court upheld withdrawal of approval of the schools, finding that the schools—who were provided the identical type of notice as Adoni was in the instant case—were provided constitutionally sufficient notice prior to withdraw. *Id.* In addition, DIHS’s approval was withdrawn after only two years on probation, and Camtech’s approval was withdrawn after four years on probation. *Del. Inst. of Health Scis., Inc.*, 2011 WL 3247798, at \*1; *Camtech Sch. of Nursing and Technological Scis.*, 2013 WL 9884399, at \*1. As of June 4, 2015, Adoni had been on probation for over seven years, yet still argued that it was not provided enough time to correct its deficiencies. Accordingly, it is respectfully requested that the July 29, 2016 decision of the Superior Court be reversed, and the July 8, 2015 decision of the Board of Nursing, withdrawing the approved status of Adoni as a Delaware nursing school be affirmed.

**CONCLUSION**

Consequently, the Board of Nursing respectfully requests this honorable Court affirm its July 8, 2015 and September 13, 2017 Orders withdrawing Adoni's approval.

Respectfully submitted,

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DATED: December 18, 2018

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**ADONI HEALTH INSTITUTE,  
Appellant Below,  
Appellant/Cross Appellee.**

**No. 470, 2018**

**v.**

**DELAWARE BOARD OF  
NURSING,  
Appellee Below,  
Appellee/Cross Appellant**

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