



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADONI HEALTH INSTITUTE,

Appellant Below,
Appellant/Cross-Appellee,

v.

DELAWARE BOARD OF NURSING,

Appellee Below,
Appellee/Cross-Appellant.

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* No. 470,2018
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* Court Below – Superior Court
* of the State of Delaware
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* C.A. No. N17A-10-003-JAP
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**APPELLANT, CROSS-APPELLEE ADONI HEALTH INSTITUTE’S
ANSWERING BRIEF IN OPPOSITION OF APPELLEE, CROSS-
APPELLANT DELAWARE BOARD OF NURSING’S APPEAL**

**LAW OFFICE OF
DANIEL C. HERR LLC**

Dated: January 11, 2019

Daniel C. Herr, Esquire, Bar. ID 5497
1225 N. King Street, Suite 1000
Wilmington, DE 19801
302-483-7060 (tel); 302-483-7065 (fax)
dherr@dherrlaw.com
*Attorney for Appellant Below,
Appellant/Cross-Appellee Adoni
Health Institute*

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NATURE OF THE PROCEEDINGS

Cross-Appellant the Delaware Board of Nursing (the “Board”) challenges the Superior Court’s July 29, 2016 decision, captioned *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”). As indicated in the School’s Opening Brief in support of its Appeal, the School largely prevailed in this decision.

In the 2016 Opinion, the Superior Court considered a variety of alleged issues with the School and the manner through which the Board attempted to revoke its conditional approval. With this cross-appeal, however, the Board limits its challenge to a singular issue: “Did the Board provide [the School] adequate notice of its deficiencies beyond just the misstated curriculum length?” Cross-Appellant’s Opening Brief on Cross Appeal at p. 45. While this “question presented” seems broad, the Board’s opening brief makes clear it is only challenging the Superior Court’s determination that it failed to provide notice and an opportunity to cure alleged issues with the School’s reporting of its student populations.

In its 2016 Opinion the Superior Court focused its inquiry as to whether the Board did provide adequate notice and an opportunity to cure on one particular communication: A Board letter dated April 25, 2012 (B-26-33) (the “April 2012

¹ Appellant, Cross-Appellee Adoni Health Institute’s (the “School”) former name.

Letter”). For a variety of reasons – to be expounded upon herein – the Superior Court concluded that the Board could only rely upon this letter for its position that it did in fact provide adequate notice and an opportunity to cure. Along the same lines, the Superior Court concluded that the Board could not rely upon various other communications as adequate notice and an opportunity to cure.

The Board now challenges this, claiming adequate notice flowed from communications before and after the April 2012 Letter. Additionally, the Board argues the April 2012 Letter, itself, amounted to adequate notice and an opportunity to cure.

For reasons to be detailed herein, the Board waived its right to claim adequate notice and an opportunity to cure flowed from communications before the April 2012 Letter². And, the Board’s April 2012 Letter, in and of itself, was inadequate.

This is the School’s Answering Brief in Opposition to the Board’s Cross-Appeal.

² Communications after the April 2012 Letter did not provide the requisite opportunity to cure, which shall be detailed herein.

SUMMARY OF THE ARGUMENT³

4. Denied. Pursuant to Delaware Supreme Court Rule 8, the Board waived its right to argue that evidence outside the April 2012 Letter amounted as proper notice and opportunity to cure the alleged School deficiencies (and the Board has failed to set forth facts justifying an excusal of its waiver in the interests of justice). The Board failed to preserve this argument at both the trial and intermediate appellate levels.

Further, the April 2012 Letter (and a subsequent letter dated July 8, 2015) did not amount to adequate notice and an opportunity to cure the 2014 Annual Report's discrepancy in communicating the number of students enrolled at the School. The discrepancy was trivial, and precisely the type of error that warranted opportunity to cure.

These two arguments, as they directly relate to the Board's Argument Number 4 (as set forth in its Summary of Argument), shall be split into two separate arguments, below, as both involve separate legal standards.

³ This is referenced as number 4 as it corresponds with the fourth argument summarized in the Board's Summary of Argument in its Cross-Appeal.

STATEMENT OF FACTS

The Board first attempted to revoke the School's conditional approval to operate through a July 8, 2015 "OPINION AND ORDER" (A-089-104) (the "July 2015 Order"). The Board indicated in the July 2015 Order that the April 2012 Letter amounted notice of the "bases for [the School's] LPN program's continued conditional approval, and the Board's proposal to withdraw approval." (A-089). Likewise, the Board clarified that it "noticed [the School] by letter of its to withdraw [the School's] approved status, based on the deficiencies the Board identified in its April 25, 2012 letter, and the [S]chool's failure to address those deficiencies over the preceding two and a half years." (A-090).

The Board continued to reiterate that it was indeed the April 2012 Letter that amounted to formal notice (and the only notice it relied upon); it explained that "[b]ack on April 25, 2012, the Board advised [the School] that it was unable to determine if [the School] was maintaining a faculty and administration of adequate and qualifications as required by Board rule 2.5210.6.3." (A-101).

Prior to the July 2015 Order, the Board further clarified that it was only relying upon the April 2012 Letter as proper notice. Through an April 9, 2015 Letter, the Board informed the School of its intent to withdraw the School's conditional approval (B68-73) (the "April 2015 Letter"). The Board wrote that "[i]n response to questions from [the School], the Board sent a follow-up letter dated April 25, 2012

detailing and clarifying the bases for [the School's] LPN program's continued conditional approval, and the Board's proposal to withdraw approval." (B68). *Even clearer*, the Board wrote that its "proposal to withdraw its approval of [the School's] Practical Nursing program is based on the deficiencies the Board identified in its April 25, 2012 letter, and the [S]chool's failure to address those deficiencies over the past two and a half years."⁴ (B69).

Thereafter, the parties briefed the School's first appeal to the Superior Court, which resulted in the 2016 Opinion. In the Board's Answering Brief to the Superior Court, it acknowledged that the April 2012 Letter was in fact the "notice of deficiency", writing that "on April 25, 2012, the Board provided [the School] a notice of deficiency, which outlined with specificity the program's failures to comply with the Board Rules as well as advising the program to submit an action plan outlining its proposal to cure these deficiencies." (B131). Further, the Board reiterated as follows:

Contrary to the assertion in the Opening Brief, the Board relied upon and complied with both its statute and regulations when it determined that the Leads' program was not adequately educating its students and

⁴ Additional references to the same are within the April 2015 Letter: "Each deficiency identified in the Board's April 25, 2012 letter for which an acceptable corrective plan of action outcome was not achieved is clarified in detailed below." (B70); "[The School's] original corrective plan of action submitted in April 2012 and approved by the Board extended [the School's] condition approval until 2014, during which time [the School] was to continue to implement its corrective plan of action to remediate the deficiencies identified in the board's April 25, 2012 letter." (B72).

withdrew its condition approval. (See Ex. 19, Board’s Six-page, single-spaced April 9, 2015 letter outlining [the School’s’ deficiencies; Ex. 3, Board’s eight paged singled-spaced April 25, 2012 letter outlining Lead’s specific deficiencies; and Ex. 27, Board’s fifteen page July 16, 2015 Opinion and Order).

(B147). The Superior Court, however, noted that the two documents referenced other than the April 2012 letter (referencing the April 2015 Letter and the July 2015 Order) “did not supply the mandatory opportunity to cure.” (A-039).

The Board’s Answering Brief included references to pre-April 2012 communications from the Board to the School including alleged School-deficiencies. (B134-135). However, and as the Superior Court aptly pointed out in its 2016 Opinion, such evidence was not part of the record and was not admitted into evidence before the Board (A-040, n.44).

For these reasons, the Superior Court concluded that the “only document cited by the Board which is in the record is the Board’s April 25, 2012 letter – the letter the court finds to be the sole relevant notice and opportunity to cure provided to [the School].”⁵ (A-040-41).

Next, the Superior Court considered the quality of the April 2012 Letter’s notice and opportunity to cure. The Superior Court considered there to be only three

⁵ The Court reasoned that “[h]ere, 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 not in the record) to determine whether the deficiencies now relied upon by the Board were at some time brought to [the School’s] attention.” (A-037).

categories of deficiency-notice, but only considered the second category – that the “Annual Reports are unclear”⁶. (A041).

The Superior Court turned to the “going forward” instructions of the April 2012 Letter to consider what, if any, issues identified in the Annual Reports persisted from April 2012. The only issue the Board appears to challenge is whether or not the Board properly notified the School – and provided the School an opportunity to cure – the alleged failure to accurately report student populations.⁷ The relevant April 2012 Letter “going forward” items that relate to this consideration are as follows:

1. “[The School’s] corrective action plan should include the proposed remedial measure for ensuring student populations are accurately reported going forward.” (internal citation omitted); and
2. “[The School’s] corrective action plan should include the proposed remedial measure for ensuring student populations are accurately reported going forward in a matter that clearly communicates the [student population] information.”

⁶ The reasons for the Court not considering the quality of notice and opportunity to cure concerning categories one and three are irrelevant to this motion practice as the Board does not claim error concerning the same. (*see* A-041).

⁷ The Board’s briefing is unclear on this point. However, page 48 of the Board’s Cross-Appeal summarized its concerns with the School flowing from the April 2012 Letter as follows: “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.” The remainder of the Board’s brief, as well, appears to focus on this issue (with the exception of what the Board argues was adequate notice *before* April 2012).

(A-043). An obvious point the Superior Court made, which is important to mention here as well, is the Board could not possibly provide the School notice in April 2012 concerning alleged deficiencies with the 2014 Annual Report. (A-044).

In considering the Board's opinion that the School's 2014 Annual Report contained inconsistent information about the number of student's enrolled, the Superior Court wrote that the Board "seized upon" a discrepancy between two portions of the 2014 Annual report, one of which indicating 25 students were enrolled and the other of which indicating 40 students received student survey questionnaires. (A-044-450). The Superior Court opined that a "matter[]" such as this could easily be clarified or corrected", which is the "whole point of the statutory and regulatory requirement of an opportunity to cure" (A-045). This language suggests the Superior Court viewed this discrepancy as trivial. Along these lines, the Superior Court held that the April 2012 Letter's purported notice was insufficient, particularly when considering the School's right to have an opportunity to cure an easily-correctable mistake.

ARGUMENT

I. THE BOARD FAILED TO PRESENT – AND THEREFORE FAILED TO PRESERVE – ITS POSITION THAT COMMUNICATIONS OUTSIDE OF THE APRIL 2012 LETTER AMOUNTED TO PROPER NOTICE AND ADEQUATE OPPORTUNITY TO CURE.

a. Question Presented

Did the Board preserve its right to argue on appeal that communications outside of the April 2012 Letter amounted to proper notice and adequate opportunity to cure?

b. Scope of Review

Supreme Court Rule 8 instructs that “[o]nly questions fairly presented to the trial court may be presented for review . . .” Del. Supr. Ct. R. 8. “Where a party did not preserve the question in the trial court, counsel shall state why the interests of justice exception to Rule 8 may be applicable.” Del. Supr. Ct. R. 14(b)(vi)A.(1).

c. Merits of Argument

We are faced with a unique scenario where the Board is both an Appellant and the “trial court” where this matter began. As is set forth at length in the Statement of Facts, *infra*, the Board exclusively relied upon the April 2012 Letter as its basis to conclude that the School had adequate notice and an opportunity to cure the various issues the Board took with the School (asserting this in the July 2015 Order closing the School). (*See* A-089; A-090; A-104; B68; and B69). The Board could

have concluded that communications and evidence outside of the April 2012 Letter amounted to proper notice and an opportunity to cure alleged deficiencies, but it did not.⁸

The Board did not change course when it responded in opposition to the School's appeal to the Superior Court. The Board's Answering Brief, like its July 2015 Order, relied on the April 2012 Letter. (*See* B131, B147).

For these reasons, the Board failed to preserve its position that communications outside of the April 2012 Letter amounted to adequate notice and opportunity to cure to the School. Further, the Board has not stated why the interests of justices would be satisfied if it were allowed to revive a position it failed to make at the trial and intermediate appeal levels of this litigation.

The Board attempts to use the *Denham v. Del. Bd of Mental Health and Chemical Dependency Professionals* decision to support that it may, at this late juncture, use arguments not properly presented at the trial and intermediate appellate levels. The Board uses a quote from the *Denham* decision in a vacuum and therefore out of context.

⁸ It is worth mentioning that it appears (but is unclear) the Board argues that its April 2015 Letter amounted to proper notice as to alleged deficiencies. Such an argument, if the Court considers it made, should be summarily dismissed as the April 2015 Letter announced the Board's decision to withdraw conditional approval and did not provide the School any opportunity to cure. (B68-73).

In *Denham*, the Court considered a counselor's argument that because her disciplinary history was not entered into the "record" during an agency hearing, then it should not have been used as an aggravating factor during the disciplinary phase of the hearing. *Denham*, 2017 LEXIS 622, at *14 (Del. Super. Nov. 30, 2017). The Superior Court rejected Denham's argument. *Id.*

What occurred in *Denham* is markedly different than what occurred *sub judice*. The Board, itself, narrowed the relevant record as far as what it believed amounted adequate notice and an opportunity to cure. Rule 8 prohibits the Board from now asserting – after failing to do so at the trial and intermediate appellate levels – that there are varying other sources of notice and opportunity to cure that should be part of the "record" at trial (but which the Board indicated were not).

For these reasons, the School respectfully requests the Court find that the Board failed to preserve its position that communications outside the April 2012 Letter amounted to proper notice and an opportunity to cure.

II. THE APRIL 2012 LETTER DID NOT PROVIDE THE SCHOOL NOTICE AND AN OPPORTUNITY TO CURE THE DISCREPANCY WITHIN THE 2014 ANNUAL REPORT CONCERNING STUDENT ENROLLMENT.

a. Question Presented

Did the April 2012 Letter provide the School proper notice and an opportunity to cure an alleged deficiency with the 2014 Annual Report concerning student enrollment, particularly if that alleged deficiency was trivial and occurred two years later?

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

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).

It is critical to examine the language of the Board's ask in its "going forward" portion of the April 2012 Letter to the School. Once again, here are the pertinent sections:

1. "[The School's] corrective action plan should include the proposed remedial measure for ensuring student populations are accurately reported going forward." (internal citation omitted); and
2. "[The School's] corrective action plan should include the proposed remedial measure for ensuring student populations are accurately reported going forward in a matter that clearly communicates the [student population] information.

(A-043). This focuses on creating remedial measures – it does not state that, for example, the School cannot include a single further typographical or clerical error in its annual reports. “Be more careful” is something very different than “you cannot make a single mistake ever again”. And, the former is what was conveyed, not the latter.

This is mind, the Superior Court’s consideration of the discrepancy as lacking importance and something the Board opted to “seize upon” makes perfect sense.

This Court has explained administrative due process requirements as follows:

'In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings.' Due process, unlike some legal rules, is not a technical notion with a fixed content unrelated to time, place, and circumstances; rather it is a flexible concept which calls for such procedural protections as the situation demands. As it relates to the requisite characteristics of the proceeding, due process entails providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends. Further, due process requires that the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings.

Vincent v. Eastern Shore Markets, 970 A.2d 160, 163-64 (Del. 2009).

Applying these principles, the Court considered the circumstances of the Board “seizing” the trivial discrepancy as grounds to withdraw conditional approval

with inadequate notice and opportunity to correct. Most important is the opportunity to correct. Again, the Court aptly discerned and exercised its judgment that the discrepancy could have been “easily [] clarified or corrected”, which is the “whole point of the statutory and regulatory requirement of an opportunity to cure . . .” (A-045).

For these reasons, the Board did not provide the School adequate notice and an opportunity to cure what was a trivial discrepancy in the 2014 Annual Report (two years after the April 2012 Letter), and the Superior Court’s decision should be affirmed.

CONCLUSION

For all the foregoing reasons, Appellant/Cross-Appellee Adoni Health Institute respectfully requests that the Board's 2016 decision finding, in part, a failure to adequately provide notice to the School with appropriate time to cure be affirmed.

Respectfully,

**LAW OFFICE OF
DANIEL C. HERR LLC**

Dated: January 11, 2019

/s/Daniel C. Herr

Daniel C. Herr, Esquire, Bar. ID 5497

1225 N. King Street, Suite 1000

Wilmington, DE 19801

302-483-7060 (tel); 302-483-7065 (fax)

dherr@dherrlaw.com

*Attorney for Appellant Below,
Appellant/Cross-Appellee Adoni
Health Institute*