



GOVERNOR GREG ABBOTT

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Texas Board of Nursing

From: Caleb Gunnels, Counsel
Regulatory Compliance Division, Office of the Governor

Date: October 18, 2023

Subject: Proposed Title 22 Texas Administrative Code Sections 214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 (RCD Rule Review #2023-003)

I. Syllabus

On June 11, 2021, the Texas Board of Nursing (“board”) filed an intent to review 22 TAC Chapters 214, 215, and 221 pursuant to Section 2001.039, Texas Government Code.¹ Chapters 214 and 215 include §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 which contain program, administration, and faculty requirements for vocational and professional nursing schools. As authorized in Section 57.106(g), Texas Occupations Code, the Regulatory Compliance Division (“division”) initiated a review of §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 on July 8, 2021, and subsequently submitted a request for additional information to the board regarding the rules on August 2, 2021.² On June 30, 2023, the board proposed amended requirements for vocational and professional nursing schools.³ The board subsequently submitted the proposed amended rules to the division for review on August 31, 2023.⁴ The division invited public comments on the proposed amended rules for a period ending on October 6, 2023, but received no comments.

Based on the following analysis, the division has determined that the proposed rules are consistent with state policy, and, thus, proposed amended §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 are approved by the division and may be finally adopted and implemented.

¹ 46 Tex. Reg. 3621 (2021) (notice of intent to review 22 TAC ch. 214, 215, and 221) (published June 11, 2021) (Tex. Bd. Of Nursing).

² Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023) at 14-18 (on file with the Regulatory Compliance Division of the Office of the Governor).

³ 48 Tex. Reg. 3481 (2023) (to be codified at 22 TAC §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7) (proposed June 30, 2023) (Tex. Bd. Of Nursing).

⁴ Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023).

II. Analysis

On February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners merged into one agency. The educational standards specific to vocational nursing education under 22 TAC Chapter 214 were adopted on February 13, 2005, and the educational standards specific to professional nursing education under 22 TAC Chapter 215 were adopted on January 9, 2005.⁵ The board has amended current 22 TAC §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 on numerous occasions after stakeholder input through advisory committee hearings and in response to legislative changes.⁶ On June 11, 2021, the board filed an intent to review 22 TAC Chapters 214 and 215 pursuant to Section 2001.039, Texas Government Code. Because the readoption of current §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 places limitations on nursing education programs and establishes minimum qualifications and requirements for nursing education program directors and faculty members, which may create barriers to ongoing market participation and increase the cost of compliance for market participants, the division identified these rules as affecting market competition pursuant to Section 57.105(d)(1) and (2), Texas Occupations Code. After the board proposed amendments to the rules, which only received one public comment, proposed amended §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 were submitted to the division for review on August 31, 2023.⁷

A. The division finds that proposed amended §§214.3 and 215.3 are consistent with state policy.

To begin, proposed amended §§214.3 and 215.3 generally set the minimum requirements for new nursing programs in Texas, the qualifying criteria to open an extension site or campus, and the protocol for the closure of a program. According to the board, the proposed rules are intended to ensure the success of Texas nursing programs and to adequately prepare nursing students for practice as licensed nurses.⁸ The division notes that many of the requirements in proposed amended §§214.3 and 215.3 establish typical standards intended to lay out a general timeline of events during the approval process for nursing programs, ensure the board has sufficient information to vet each program submitted for approval, establish general standards for reactivation of a closed extension program and required administrative steps intended to notify the board of the closure of an extension site or campus, and set requirements for safe record-keeping practices, for example. The division, however, addresses specific provisions which may have an affect on market competition.

Of note, proposed §§214.3(a)(2)(B) and 215.3(a)(2)(B) require new vocational and professional nursing education programs be approved, licensed, or deemed exempt by the appropriate Texas agency, the Texas Higher Education Coordinating Board (“THECB”), or the Texas Workforce Commission (“TWC”), before approval can be granted by the board for a program to be

⁵ Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023), at 5.

⁶ *Id.* at 5.

⁷ *Id.* at 7.

⁸ *Id.* at 3 and 4.

implemented. This proposed requirement falls squarely within the board's statutory authority, per Section 301.157(d-6), Texas Occupations Code, which requires the board to cooperate with THECB and TWC to establish guidelines for the initial approval of schools of nursing or educational programs, identify the approval processes to be conducted by those agencies, and require such approval process to precede the subsequent approval process conducted by the board. And, while Section 301.157(d-5), Texas Occupations Code, requires the board to streamline the approval process by eliminating tasks performed by the board that duplicate or overlap tasks performed by THECB or TWC, the board notes that it has held a board staff meeting once or twice a year since the inception of Section 301.157(d-5) for that very purpose, leading to the adoption of the approval process required today.⁹

The proposed rules further require governing entities with programs in other jurisdictions to submit evidence in their program proposals that the nursing program's National Council Licensure Examination for Practical Nurses or National Council Licensure Examination for Registered Nurses (individually referred to as "national exam") pass rates are at least 80% for the current examination year, and that the nursing programs hold full approval from the state boards of nursing in the other states and are in good standing. Section 301.157(d-4), Texas Occupations Code, authorizes the board to approve a school of nursing or educational program that is operated in another state and is approved by a state board of nursing or other regulatory body of that state, and requires the board to adopt rules to ensure that the other state's standards are substantially equivalent to the board's standards. Further, Section 301.157(d-8)(5)(C) states that, with respect to subsection (d-4), one of the standards such nursing programs must meet is to graduate students who pass the national exam at a rate equivalent to the board's required passage rate for students of approved in-state programs. Under current 22 TAC §§214.4(a)(1)(C) and 215.4(a)(1)(C), all professional or vocational nursing programs must reach a national exam pass rate of at least 80% after a full examination year before moving forward from initial board approval to full approval. Therefore, requiring the same pass rate for governing entities with programs in other jurisdictions directly follows the statutory authority granted to the board.

Proposed §§214.3(a)(2)(B) and 215.3(a)(2)(B) also state that evidence of poor performance by a governing entity's nursing program in another jurisdiction is sufficient grounds for the board to deny a proposal. The board has identified that a common risk factor for program failure in Texas is a school's poor performance in other jurisdictions.¹⁰ Part of the board's mission is to ensure the adequate preparation of nursing students in Texas for practice as licensed nurses and to prevent the failure of Texas nursing programs.¹¹ The latter of which, in the board's experience, can cause catastrophic financial and professional damage to nursing students.¹² Section 301.157(b)(2) and (3), Texas Occupations Code, grants the board authority to prescribe and publish the minimum requirements and standards for a course of study in each program that

⁹ Agency Response to Request for Additional Information (Aug. 31, 2023), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

¹⁰ Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023), at 5 and 9.

¹¹ *Id.* at 4 and 7.

¹² *Id.*

prepares registered nurses or vocational nurses, as well as to prescribe “other rules as necessary” to conduct approved schools of nursing and educational programs. Given the broad authority granted to the board to set the minimum requirements and standards for a course of study, and that these standards are intended to alleviate the risks of inadequate educational preparation, program failure, and potential threats to public health and safety, proposed §§214.3(a)(2)(B) and 215.3(a)(2)(B) are a valid exercise of the board’s statutory authority and are consistent with state policy.

Proposed §§214.3(a)(2)(F) and 215.3(a)(2)(F) require new program proposals to include information outlined in Board Education Guideline 3.1.1, which is available on the board’s website. Section 301.157(b)(2)-(3) and (d-6), Texas Occupations Code, grant the board broad authority to prescribe the minimum requirements and standards for a course of study, prescribe other rules as necessary to conduct approved schools or programs, and cooperate with THECB and TWC to establish guidelines for the initial approval of schools of nursing or educational programs, which must also be published on the board’s website. As such, proposed §§214.3(a)(2)(F) and 215.3(a)(2)(F) are a reasonable exercise of the board’s authority and are consistent with state policy.

Proposed §§214.3(a)(2)(H) and 215.3(a)(2)(I) detail criteria that the board considers when determining if a program may be considered “high-risk.” Such considerations include unfamiliarity of the governing entity with nursing education, inexperience of a potential director or coordinator in directing a nursing program, potential for director or faculty turnover, multiple admissions cycles per year, lack of rigor in admission criteria, use of a national curriculum, or potential for a high attrition rate among students. Each of these factors have been linked to poor program performance, which can lead to program failure or inadequate preparation of nursing students.¹³ For example, the adoption of a national curriculum in all programs often omits Texas rules about jurisprudence and required competencies, and often ignores input from faculty, which results in educational deficits.¹⁴ The proposed rules also allow for board assignment of an appropriate mentor to assist a director during a program’s first year of operation, and removes current language that requires programs to pay for monitoring fees. The board intends this requirement to support programs that have known risk factors through engaging in additional monitoring and offering guidance in addressing the specific needs of a particular program.¹⁵ The board claims that any additional monitoring required for high-risk programs is unlikely to have an impact on prices or competition in Texas nursing education, which is bolstered by the fact that the proposed rules remove language requiring payment of monitoring fees.¹⁶ Section 301.157(b)(2)-(6), Texas Occupations Code, grants the board broad authority to publish the minimum requirements and standards for a course of study in each program that prepares registered or vocational nurses, to prescribe other rules as necessary to conduct approved schools, and to approve, deny, or withdraw approval from a school or program that meets or fails

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10.

to meet board approved standards. Given the broad authority granted to the board to prescribe the minimum requirements and standards for a course of study, that the proposed rules are intended to enhance program success and ensure the adequate preparation of Texas nursing students, and that additional monitoring is unlikely to impact prices in Texas nursing education, proposed §§214.3(a)(2)(H) and 215.3(a)(2)(I) are a reasonable exercise of the board's authority and are consistent with state policy.

Proposed §§214.3(b) and 215.3(b) detail the requirements for board approval of an extension site, reactivation of an extension program, and the administrative requirements for closure of an extension site or campus or the consolidation of extension sites or campuses. Of note, proposed § 214.3(b)(3)(B) and 215.3(b)(3)(B) require approved vocational and professional nursing education programs desiring to establish an extension site or campus to submit a board application form that provides information to assist the board in considering a number factors, including a strong rationale for the establishment of the extension site in the community, adequate educational resources (classrooms, labs, and equipment), and documentation of communication and collaboration with other programs within fifty miles of the extension site, for example. The rules are intended to ensure a program has the necessary resources, faculty, and clinical sites to support an extension.¹⁷ The board also submitted data indicating that for fiscal years 2016-2021, it had approved seven applications for extension sites and denied none.¹⁸ The data displays that the anticompetitive affect of proposed §§214.3(b) and 215.3(b), if any, is minimal. And, while Section 301.157(b)(2) and (3), Texas Occupations Code, authorizes the board to prescribe minimum requirements and standards for a course of study in each program that prepares registered nurses or vocational nurses and to prescribe other rules as necessary to conduct approved schools, the board contends that under such authority, proposed §§214.3(b) and 215.3(b) are required to operationalize the board's authority to approve schools of nursing and education programs that meet the board's requirements pursuant to Section 301.157(b)(4).¹⁹ Given that the rules are intended to enhance the overall readiness and success of nursing programs, the data provided by the board, and the broad statutory authority granted to the board to establish such standards, proposed §§214.3(b) and 215.3(b) are a reasonable exercise of the board's authority and are consistent with state policy.

B. The division finds that proposed amended §§214.6 and 215.6 are consistent with state policy.

Proposed amended §§214.6 and 215.6 establish general administrative and organizational requirements, including establishing the minimum qualifications for a director or coordinator of a nursing program, detailing the administrative actions a program must complete when the director of a program changes or an interim director is appointed, and the authority granted to a director to conduct a program, for example. Such provisions are a reasonable exercise of the board's authority to establish minimum requirements and standards for a course of study in each

¹⁷ *Id.* at 9.

¹⁸ Agency Response to Request for Additional Information (Aug. 31, 2023), at 4-5.

¹⁹ Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023), at 10.

program and to prescribe other rules as necessary to conduct approved schools of nursing and educational programs under Section 301.157, Texas Occupations Code. The division, however, addresses specific provisions which may have an affect on market competition.

First, proposed §§214.6(d)-(e) and 215.6(d)-(e) require nursing education programs to have salaries adequate to recruit, employ, and retain sufficient qualified nursing faculty members with the expertise necessary for students to meet program goals. The rules further require the governing entity of each program to provide financial support and resources needed to operate a nursing education program that meets board requirements and fosters achievement of program goals, including provision of adequate educational facilities, equipment, and qualified administrative and instructional personnel. The board maintains that such requirements are necessary to avoid common pitfalls that lead to program failure, and, naturally, to ensure that such programs have the adequate resources to operate successfully.²⁰ Ensuring that nursing programs have adequate resources to prepare and instruct future nurses follows the same rationale for those found under proposed §§214.3(b)(3)(B) and 215.3(b)(3)(B). Section 301.157(a) and (b), Texas Occupations Code, grants the board broad authority to prescribe programs of study, to publish the minimum requirements and standards for a course of study in each program, and to prescribe other rules as necessary to conduct approved schools of nursing for the preparation of registered and vocational nurses. Proposed §§214.6(d)-(e) and 215.6(d)-(e) do not establish the amount of resources required for operation of a nursing education program, but rather, ensure that such programs have adequate resources necessary to operate and achieve program goals. As such, proposed §§214.6(d)-(e) and 215.6(d)-(e) are a reasonable exercise of the board's statutory authority and are consistent with state policy.

Similarly, proposed §§214.6(f) and 215.6(f) establish the minimum qualifications of the individual tasked with administering a professional or vocational nursing education program. Program directors, for example, are accountable for the planning, implementation, and evaluation of the program. Both of the proposed rules require such an individual to be licensed to practice as a registered nurse in Texas, but differ in the experience required to perform the responsibilities of the role. Proposed §214.6(f)(2) requires a director or coordinator of a vocational nursing education program to have been actively employed in nursing for the past five years, with a minimum of one year of teaching experience in a pre-licensure nursing education program. The board grants flexibility under proposed §214.6(f)(3) by allowing other prior relevant nursing employment to be taken into consideration by the board. Likewise, proposed §214.6(f)(5) requires a director or coordinator to have at least five years of varied nursing experience since graduating from a professional nursing education program, but grants the flexibility (for fully approved vocational nursing education programs) under proposed §214.6(f)(6) to consider other qualifications. §214.6(f)(8)-(9) authorizes a director or coordinator to have responsibilities other than the program, barring major teaching responsibilities, so long as a qualified nursing faculty member is designated to assist with program management. Proposed §215.6(f)(2)-(6) differs by requiring the dean or director of a professional nursing

²⁰ *Id.*

education program to hold a master's or a doctoral degree in nursing, or hold a doctoral degree if administering a baccalaureate or master's degree program. The latter must have a minimum of two years teaching experience in a professional nursing education program, have demonstrated knowledge, skills, and abilities in administration within a professional nursing education program, and not carry a teaching load of more than three clock hours per week if required to teach. Proposed §215.6(g) grants the flexibility (for fully approved professional nursing programs) to consider other qualifications.

The board suggests that the qualifications for a dean, director, or coordinator are necessary for ensuring the successful conduct of a nursing education program, observing this as a common risk that has led to program failures and resulted in disastrous damage to individual students.²¹ As previously noted, ensuring that nursing programs have sufficient resources, including a program director with competency in the profession to oversee the administration of the program and the preparation of registered or vocational nurses is a rational requirement. The flexibility offered in proposed §§214.6(f)(3), 214.6(f)(6), 215.6(f)(5), and 215.6(g) allows the board to consider a broad range of relevant experience, as opposed to imposing stricter limitations that would narrow the field of qualified directors. While the board has general authority to regulate the practice of professional and vocational nursing pursuant to Section 301.151, Texas Occupations Code, Section 301.157 grants it broad authority to prescribe the minimum requirements and standards for courses of study and other rules as necessary to conduct approved schools of nursing for the preparation of registered or vocational nurses. Under the broad authority granted by statute, the board has crafted a rational approach to ensure that the individual overseeing the implementation of a nursing education program has the industry competence to successfully oversee the adequate preparation of Texas nursing students. As such, proposed §§214.6(f) and 215.6(f) are a reasonable exercise of the board's authority and are consistent with state policy.

C. The division finds that proposed amended §§214.7 and 215.7 are consistent with state policy.

Proposed amended §§214.7 and 215.7 generally provide the requirements and qualifications for faculty of vocational and professional nursing programs. The division notes that many of the provisions in proposed amended §§214.7 and 215.7 establish general administrative and organizational requirements for a program's organization of faculty, including a requirement to have written policies or bylaws and a faculty handbook, program considerations for determining the number of faculty needed to accomplish program objectives, and general faculty and non-nursing faculty responsibilities, for example. Those provisions, being necessary for the implementation and administration of nursing education programs, are a reasonable exercise of the board's authority to establish minimum requirements and standards for a course of study in each program and to prescribe other rules as necessary to conduct approved schools of nursing and educational programs under Section 301.157, Texas Occupations Code. The division, however, addresses specific provisions which may have an affect on market competition.

²¹ *Id.* at 11.

Proposed §214.7(d) details faculty requirements for vocational nursing education programs. The proposed rule requires each nurse faculty member to hold a current license to practice nursing in Texas, have either actively been employed in nursing for the past three years or have advanced preparation in nursing, nursing education, or nursing administration, have at least three years varied nursing experiences since graduation, and show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject areas of teaching responsibility. Proposed §214.7(e) grants flexibility for a fully approved program director to waive certain board requirements for up to a year if the program and prospective faculty member under waiver meet certain board-prescribed requirements. A program director may also petition the board for an extension of an original faculty waiver.

Proposed §215.7(d) similarly details faculty requirements for professional nursing education programs. The proposed rule requires faculty members to hold a current license to practice as a registered nurse in Texas, show evidence of teaching abilities and maintain current knowledge, clinical expertise, and safety in the subject areas of teaching responsibility, and hold a master's degree or doctoral degree. The rule further caveats that a nurse faculty member holding a master's degree or doctoral degree in a discipline other than nursing must hold a bachelor's degree in nursing from an approved or accredited baccalaureate program in nursing, and if teaching in a diploma or associate degree nursing program, to have at least six graduate semester hours in nursing appropriate to assigned teaching responsibilities. If teaching in a baccalaureate level program, such an individual must have at least twelve graduate semester hours in nursing appropriate to assigned teaching responsibilities. Proposed §215.7(e) grants flexibility for a fully approved program director to waive certain board requirements for up to a year if the program and the prospective faculty member under waiver meet certain board-prescribed requirements. The rule additionally allows for submittal of an emergency waiver if the program or prospective faculty member does not meet the requirements in proposed §215.7(e)(2)-(3)(C) under certain circumstances, including when qualified applicants or prospective faculty are not available. A program director may also petition the board for an extension of an original faculty waiver.

Similar to the qualifications for program directors under proposed §§214.6(f) and 215.6(f), the purpose of proposed amended §§214.7 and 215.7 is to ensure that sufficient faculty resources exist, including faculty competency and experience, to prepare and instruct students for licensure and to ensure safe nursing practices in Texas.²² The board asserts that the proposed rules are no more restrictive, and in some cases, less restrictive than those of other states.²³ The allowance of faculty waivers under proposed §§214.7(e) and 215.7(e) highlights the flexibility offered to

²² *Id.* at 4 and 7.

²³ The board has recognized the scarcity of Masters-prepared faculty for all programs and allows instructors of varying educational backgrounds to participate in the instruction of students, while some states require Masters-prepared faculty. Rule Submission Memorandum from the Texas Board of Nursing (Aug. 31, 2023), at 7. The division also notes that proposed §§214.7(g)-(i) and 215.7(f)-(h) allow for an exemption of the faculty qualifications for non-nursing faculty, so long as such individuals are not teaching nursing content or clinical nursing courses, and have sufficient educational preparation appropriate for the curriculum under their responsibility.

nursing education programs when determining the needs of their students. To justify its rules, the board points to its general authority to regulate the practice of professional and vocational nursing under Section 301.151, Texas Occupations Code, and to its authority to prescribe programs of study, publish the minimum requirements and standards for a course of study in each program, and to prescribe other rules as necessary to conduct approved schools of nursing for the preparation of registered or vocational nurses pursuant to Section 301.157.²⁴ The division agrees that faculty qualifications, including proven experience and competency in nursing, are reasonable standards for nursing programs and are necessary to conduct courses in schools of nursing, both for public safety and for the preparation of registered and vocational nurses in Texas. Given the flexibility of the proposed rules, and the broad statutory authority granted to the board, proposed amended §§214.7 and 215.7 are a reasonable exercise of the board's authority and are consistent with state policy.

III. Determination

Based on the above analysis, proposed amended §§214.3, 214.6, 214.7, 215.3, 215.6, and 215.7 are approved by the division and may proceed to final adoption and implementation.

²⁴ *Id.* at 11-12.