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April 10, 2023

Sen. Trevor Squirrell, Chair
Legislative Committee on Administrative Rules
c/o Charlene Dindo, Committee Assistant
Vermont State House
Montpelier, Vermont 05602

Re: Administrative Rules of the Board of Nursing: Technical Corrections and Discussion of Public Records Act

Dear Chair Squirrell and Committee Members:

The Office of Professional Regulation (OPR or the Office) wishes to inform you about several technical changes OPR recommends making to the final proposed Administrative Rules of the Board of Nursing (Rules). These technical changes are recommended in addition to the revisions proposed in OPR's previous filing paperwork for the Rules. This letter also provides an explanation of how the provisions in Rule 12-4 of the Rules, regarding confidential records, relate to the Public Records Act.

Technical Corrections

Upon review of the Rules, legislative counsel noted several necessary technical corrections that OPR wishes to propose for this Committee's consideration. The corrections, a list of which follow, address incorporating conjunctions into lists, removal of a typographic error, and reorganization of a section for clarity:

- Revision of term in Rule 5-7
- Removal of typographic error in Rule 6.3(a)
- Conjunction corrections in lists in the following rules:
 - Rule 5-20
 - Rule 9-5(b)
 - Rule 10-4(a)
 - Rule 10-10 and
 - Rule 11-6(a)
- Reorganization of Rule 9-7
- Addition of word "Rule" to Rule 10-14 and
- Removal of conjunction from Rule 11-1(b).

Excerpts from the Rules are enclosed with this letter. The excerpts reflect the technical corrections in red text.

Rule 12-4 and the Public Records Act

OPR also wishes to provide additional information about the relationship between the Public Records Act and Rule 12-4, which ensures the confidentiality of certain records related to the nursing Alternative to Discipline Program. Per 3 V.S.A. § 838(15), proposed rules must include information about “whether the rule contains an exemption from inspection and copying of public records or otherwise contains a Public Records Act exemption by designating information as confidential or limiting its public release and, if so, the asserted authority for the exemption and brief summary of the reasons for the exemption.” OPR reported in its initial coversheets filed with the Secretary of State’s Office that the Rules do not contain a Public Records Act exemption because OPR does not consider Rule 12-4, itself, as creating an exemption to the Public Records Act. Rather, OPR understands Rule 12-4 to reflect exemptions to the Public Records Act that are established in statute.

Rule 12-4 states that certain records relating to nurses engaged in the alternative to discipline program are confidential and, thus, exempt from disclosure under the Public Records Act. The alternative to discipline program is authorized under 26 V.S.A. § 1574(a)(10), which provides that OPR and the Board of Nursing have the option to establish “an alternative to the disciplinary process for nurses with chemical dependencies or other professional practice issues.” When a complaint is received about a nurse, the nurse, OPR, and the Board may elect to have the nurse become engaged in the alternative to discipline program rather than be subject to discipline, such as a revocation, suspension, or reprimanding the license of the nurse.

Per 3 V.S.A. § 131 and 1 V.S.A. § 317(c)(7), the records regarding a nurse’s participation in the alternative to discipline program are exempt from disclosure under the Public Records Act. Specifically, 3 V.S.A. 131 provides that, except for the date and the nature of a complaint (not including the identity of the licensee), and a summary of the completed investigation, OPR is prohibited from “mak[ing] public any other information regarding unprofessional conduct complaints, investigations, proceedings, and related records except the information required to be released under this section [131].” 3 V.S.A. §§ 131(c)(1) and (3). This statute allows for the disclosure of limited additional information “only with respect to complaints resulting in filing of disciplinary charges or stipulations or the taking of disciplinary action.” 3 V.S.A. § 131(c)(2).

Because the complaint leading to a nurse’s participation in the alternative to discipline program does not “result in the filing of disciplinary charges or stipulations or in the taking of disciplinary action” against the nurse, 3 V.S.A. § 131 prohibits OPR from “mak[ing] public any other information regarding...proceedings and related records” about the complaint. In turn, OPR is obligated by the statutes to maintain the confidentiality of the alternative to discipline program records for individual nurses. Rule 12-4 reflects this prohibition and requires all materials be maintained as confidential.

The Public Records Act also exempts from disclosure many of the records regarding a nurse participating in the alternative to discipline program. Per 1 V.S.A. § 317(c)(7), records containing “medical or psychological facts concerning any individual or corporation” are exempt from the disclosure requirements of the Public Records Act. Many of the records maintained about a nurse in the alternative to discipline program are medical or psychological in nature, as the nurse participants are often struggling with a substance use disorder. In turn, those records are already exempt from the Public Records Act, and Rule 12-4 reflects this exemption.

Based on the above, Rule 12-4 does not create a Public Records Act exemption but rather reflects the exemptions already established in the statutes. In turn, in its initial filings, OPR and the Board reported to the Secretary of State that the Rules do not create an exemption from the inspection and copying of public records or otherwise include a Public Records Act exemption.

Rule 12-4 does provide several exceptions to the general confidential nature of alternative to discipline program records. Two of these exceptions are based on legal requirements, such as orders of a court or the use of knowledge of participation in the alternative to discipline program in a future disciplinary matter that a nurse may be subject to. Two of these exceptions are based on a nurse’s choices when electing to pursue the alternative to discipline program instead of being subject to disciplinary action. First, when choosing to participate in the alternative to discipline program, a nurse elects to permit the Office to disclose records to monitor compliance of the nurse with the program, such as confirming compliance with an employer or the maintenance of treatment. Second, OPR must inform the Nurse Licensure Compact Commission if a nurse with a Nurse Licensure Compact license is participating in the alternative to discipline program. This is part of the statutes adopted when the General Assembly passed the Nurse Licensure Compact. Nurses are aware of this requirement when electing to participate in the Nurse Licensure Compact.

Thank you for taking the time to review these corrections and explanations. OPR is excited to speak with you on Thursday about the Administrative Rules of the Board of Nursing.

Sincerely,
/s/ Lauren K. Layman

Lauren K. Layman
General Counsel
Vermont Office of Professional Regulation

Encl.

Excerpts from Rules reflecting technical corrections

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Excerpts from Administrative Rules of the Board of Nursing Technical Corrections

5-20 Refresher Course Clinical Practice Permit.

The Board may grant a refresher course clinical practice permit, valid in six month increments and renewable not more than twice, to an applicant who:

- (a) holds a Vermont RN license; **and**
- (b) holds a national APRN certification.

A person practicing under a permit shall be conspicuously identified as an “APRN Applicant” on name badges, signature blocks, medical record entries, and other locations calling for a professional designation.

9-5 Education

To be eligible for an APRN license, an applicant shall:

- (a) have a degree or certificate as shown by the official transcripts from the applicant’s graduate nursing program in one of the four recognized APRN roles from:
 - (1) a Vermont graduate nursing program approved by the Board; or
 - (2) a United States graduate nursing program approved by a state or a national accrediting agency approved by the Board; and
- (b) have successfully completed graduate level courses in:
 - (1) advanced pharmacotherapeutics;
 - (2) advanced patient assessment; **and**
 - (3) advanced pathophysiology.

9-7 Education and Practice Requirement. To be eligible for initial licensure or to renew or reinstate an APRN license, an applicant must have

- (a) **For initial licensure and renewal**
 - (1) graduated from an APRN program within two years of making the application;
 - (2) practiced as a licensed APRN for a minimum of:
 - i.** 50 days (400 hours) in the previous two years; or
 - ii.** 120 days (960 hours) in the previous five years; **and** ~~or~~
 - (3) maintained certification by a national certification accreditation body; or
- (b) **For reinstatement,** completed a Board approved APRN Refresher Course as set forth in 9-14 through 9-17 of these Rules within two (2) years of making the application.

10- 4 Scope of Practice

- (a) An LNA’s scope of practice includes:
 - (1) Basic Nursing Care;
 - (2) Personal Care;
 - (3) Basic Restorative Care;
 - (4) Psychosocial Support;
 - (5) Care of the Cognitively Impaired;
 - (6) Communication; **and**
 - (7) Patient Safety.

Excerpts from Administrative Rules of the Board of Nursing Technical Corrections

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10-10 Limitations. An MNA may:

- (a) administer medications to a newly admitted resident only after the delegating nurse determines that the resident is stable, and then only according to facility policy; ~~and -~~
- (b) administer prn medication only after an RN assessment confirms the need for the medication.

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10-14 MNA Program Review. An annual report shall be submitted to the Board by each MNA program as per [Rule 5-9](#) of these rules and site visits to MNA programs may be conducted by the Board in accordance with section 5-3 of these rules.

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11-1 Determination of Scope of Practice. An activity not prohibited by Vermont Administrative Rules or Statutes and that is consistent with current national professional nursing organizational standards, accreditation standards and or credible nursing research may be considered within an individual nurse's scope of practice if the following conditions are met:

- (a) the nurse has completed the necessary education and possesses adequate knowledge to perform the activity;
- (b) there is evidence of the nurse's current competency and skill; ~~and~~
- (c) a reasonable and prudent nurse with similar training and experience would perform the activity;
- (d) there are institutional policies and /or procedures in place governing the activity, and the activity is consistent with those;
- (e) There are adequate resources, equipment and supports in the care setting to ensure patient safety; and
- (f) The nurse is prepared to accept and manage the consequences of performing the activity.

11-6 Informed Consent. Each person has a right to determine what shall be done with his or her body and a right to accept or refuse medical treatment. For those determinations to be informed, the person, as patient, must be capable of making relevant decisions, based not only on personal capacity, but also upon the provision of accurate and adequate information by providers of care. If a patient lacks capacity, informed consent is to be obtained from a parent or legal guardian.

- (a) An APRN or RN may obtain a patient's informed consent for a treatment or procedure if:
 - (1) The APRN or RN will perform the treatment or procedure;
 - (2) The treatment or procedure is within the APRN or RN's scope of practice; and
 - (3) The APRN or RN is able accurately to convey to the patient:
 - i. A description of the treatment or procedure;

Excerpts from Administrative Rules of the Board of Nursing Technical Corrections

- ii. The indications for the treatment or procedure;
- iii. Risks and benefits of the treatment or procedure;
- iv. Alternatives and their risks and benefits;
- v. The probable consequences of declining the recommended treatment or procedure; and
- vi. Roles of others who may be involved in executing the treatment or procedure.