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REGULATORY BOARD REVIEW

BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES

AUDIT OVERVIEW

The West Virginia Board of Examiners for Registered Professional Nurses Has Complied With Most Provisions of Chapter 30, Article I, But There Are Concerns With Its Complaint Process

The Board's Process of Resolving Complaints and Administering Disciplinary Action Has Areas of Weakness, Including a Lack of Timeliness, Allowing Long Delays in Nurses Responding to Complaints and Allowing Multiple Violations of Consent Agreements for Impaired Nurses

The Board's Website Is in Need of Improvement in Both User-Friendliness and Transparency



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CONTENTS

Executive Summary 5

Issue 1: The West Virginia Board of Examiners for Registered Professional Nurses Has Complied With Most Provisions of Chapter 30, Article 1, But There Are Concerns With Its Complaint Process 9

Issue 2: The Board’s Process of Resolving Complaints and Administering Disciplinary Action Has Areas of Weakness, Including a Lack of Timeliness, Allowing Long Delays in Nurses Responding to Complaints and Allowing Multiple Violations of Consent Agreements for Impaired Nurses..... 19

Issue 3: The Board’s Website Is in Need of Improvement in Both User-Friendliness and Transparency35

List of Tables

Table 1: Number of Registrants FY 2008 Through FY 2013 10

Table 2: Revenues and Expenditures FY 2009 Through FY 2013..... 11

Table 3: Amount of Revenue Collected Online FY 2011 to FY 2013..... 13

Table 4: Neighboring States’ Continuing Education Requirements For Registered Nurses 14

Table 5: Complaint Decision Statistics FY 2011 Through FY 2013 21

Table 6: Drug Detection Windows.....28

Table 7: WV Board of Examiners for Registered Professional Nurses Website35

Table 8: Website Evaluation Score36

List of Figures

Figure 1: Board’s Complaint Process.....20

List of Appendices

Appendix A: Transmittal Letter39

Appendix B: Objective, Scope and Methodology41

Appendix C: Response From Purchasing Division.....43

Appendix D: WV Legislative Legal Opinion.....83

Appendix E: Website Criteria Checklist and Points System89

Appendix F: Agency Response93

EXECUTIVE SUMMARY

This evaluation of the West Virginia Board of Examiners for Registered Professional Nurses (Board) is authorized by the West Virginia Performance Review Act, Chapter 4, Article 10, of the *West Virginia Code*, as amended. This review evaluates the Board's compliance with the general provisions of Chapter 30, Articles 1 and 7, of the *West Virginia Code*; the Board's handling of complaints, and the Board's website. The findings of our review are highlighted below.

Report Highlights

Issue 1: The West Virginia Board of Examiners for Registered Professional Nurses Has Complied With Most Provisions of Chapter 30, Article 1, But There Are Concerns With Its Complaint Process.

- The Board is financially self-sufficient and in compliance with most of the general provisions of Chapter 30, Article 1 of *West Virginia Code*.
- The Board violated the State's purchasing requirement to seek competitive bids through the Department of Administration's (DOA) Purchasing Division by entering into a no-bid contract with a Florida vendor that is most recently valued at over \$219,000.
- The Board indicates that it was advised by the DOA's Purchasing Division that the Board could make the determination concerning whether or not *WVC §30-7E-3* allows the Board to contract for nurse health programs without competitive bids. The Board was unable to supply documentation from the Purchasing Division. However, the Purchasing Division stated in communications with the Legislative Auditor that it does not agree with the position taken by the Board that it is exempt from purchasing requirements in this transaction.

Issue 2: The Board's Process of Resolving Complaints and Administering Disciplinary Action Has Areas of Weakness, Including a Lack of Timeliness, Allowing Long Delays in Nurses Responding to Complaints and Allowing Multiple Violations of Consent Agreements for Impaired Nurses.

- The Board has allowed four licensees who were in substance-abuse recovery programs repeated opportunities to return to practice despite multiple failures of drug tests and/or failure to report for drug tests while in a recovery program.
- The Board did not fully investigate a complaint it received from the Board of Medicine that implicated three nurses of falsifying medical records and Medicare fraud.
- Although the Board's procedural rules require licensees to respond to complaints against them within 14 days, it has been slow to take action in 3 cases when licensees took months to respond to a complaint or consent agreement. One licensee was allowed

to practice for two years without formally responding to a complaint before the Board took action.

- The Board has sought to alter its complaint process through a change in procedural rules. Legislative Services has determined that the proposed rule change is inconsistent with *West Virginia Code*, unlawful, and susceptible to a legal challenge.

Issue 3: The Board's Website Is in Need of Improvement in Both User-Friendliness and Transparency.

- The Board's website is navigable but can be improved by adding user-friendly features such as site functionality, a mobile-friendly website, feedback options, and foreign language accessibility.
- The Board can increase the transparency of its website by adding its mission statement, biographies for administrative officials, performance measures, budget data, and information detailing how to submit a Freedom of Information Act request.

PERD Evaluation of the Agency's Written Response

The Board is in agreement with the report's positive findings such as the need for the Board, the Board is financially self-sufficient, and that the Board's internal controls are adequate. The Board also agrees with most of the report's recommendations such as the need for additional investigators, that scanning complaint files would assist in managing files, and that the requirement for notarization of complaints is unnecessary. The Board is in agreement with the third issue of the report and is currently implementing the suggested changes to the board website.

The Board disagrees with legal opinions rendered by Legislative Services stating that the Board is not exempt from the Department of Administration's Purchasing Division thus requiring it to competitively bid the contract for the WV Restore Program; and that the Board's propose rule change is in violation of *West Virginia Code*. The Legislative Auditor believes that the Board is not exempt from the Purchasing Division and that the Board's proposed rule change is inconsistent with Chapter 30 of Code relating to public complaints and is in violation of the Administrative Procedures Act.

The Board also disagrees with the overall findings of the second issue of the report. The Board contends that its actions have not subjected the public to increased risk. The Legislative Auditor disagrees with the Board's assessment. Although the cases identified in this report represent a relatively small percentage of complaints received by the Board, the potential for public harm is substantial due to the sensitive nature of work performed by health professionals. The Board's actions have resulted in licensees continuing to practice after repeatedly violating

consent agreements while allowing licensees to effectively ignore public complaints. With respect to nurses struggling with addiction, the Legislative Auditor understands the need for treatment, but is concerned that the Board's relatively permissive handling of these licensees does expose the public to nurses who may have questionable decision-making abilities due to impairment.

Recommendations

1. *The Board should competitively bid the contract for the West Virginia Restore Program through the Purchasing Division when it is due for renewal on June 30, 2015.*
2. *The Board should have a low tolerance for nurses who repeatedly violate or relapse while they are in a substance-abuse program. Consideration should be given to at least increasing the amount of the fines for repeated violation of consent orders and monitoring agreements.*
3. *The Board should improve its timeliness in taking action when complainants do not promptly respond to complaints or consent orders.*
4. *The Board should consistently send six-month status updates and letters of final decisions to complainants.*
5. *The Board should improve its efforts to resolve complaints within 18 months and consistently request permission from complainants to extend the resolution process beyond 18 months when necessary.*
6. *The Board should consider removing the requirement for complaints to be notarized from its complaint form.*
7. *The Legislative Auditor recommends that the proposed procedural rule change altering Title 19 Chapter 1 of the Code of State Regulations to create a "statement of allegation" should not be adopted by the Board of Examiners for Registered Professional Nurses.*
8. *The Board should consider hiring additional nurse investigators.*
9. *The Legislature should consider amending Chapter 30, Article 1 of the West Virginia Code to require boards to notify complainants of a board's final decision in their complaints.*
10. *The Board should consider taking action to streamline the management of complaint files and begin scanning documents to allow for better tracking of required documentation.*
11. *The Legislative Auditor recommends that the Board of Examiners for Registered Professional Nurses make the suggested improvements to its website to increase user-friendliness and transparency.*

ISSUE1

The West Virginia Board of Examiners for Registered Professional Nurses Has Complied With Most Provisions of Chapter 30, Article 1, But There Are Concerns With Its Complaint Process.

Issue Summary

The Legislative Auditor determines that the West Virginia Board of Examiners for Registered Professional Nurses (Board) should be continued because it is needed to protect the public. The Legislative Auditor also found that while the Board is in compliance with most general provisions of Chapter 30, Article 1 and its enabling statute (§30-7), there are concerns that the complaint process has material weaknesses that increase the risk of harm to the public (discussed in Issue 2). Furthermore, the Board did not seek competitive bids through the Purchasing Division for contracts with a Florida vendor that is most recently valued over \$219,000. However, the Board indicates that it was advised by the Purchasing Division that the Board could make the determination concerning whether or not WVC Code §30-7E-3 allows the Board to contract for nurse health programs without competitive bids. However, the Purchasing Division stated to the Legislative Auditor that the Board's purchase was not exempt. A legal opinion by Legislative Services also indicates that there is no language in West Virginia Code that exempts regulatory boards from state purchasing regulations.

There are concerns that the complaint process has material weaknesses that increase the risk of harm to the public.

The Board Is Needed for Public Safety.

In the 2001 performance audit of the West Virginia Board of Examiners for Registered Professional Nurses (Board), the Legislative Auditor concluded that the licensing of registered nurses was needed for public safety. For this current review, the Legislative Auditor comes to the same conclusion. The Board was established by the Legislature in 1945, and its enabling statutory authority is in *West Virginia Code*, Chapter 30, Article 7. The Board is responsible for protecting the health, safety and welfare of the public by regulating the practice of Registered Professional Nurses (RPNs). The Board also approves, accredits, and reviews nursing programs within West Virginia. Currently there are 21 schools of nursing within the state.

The Board grants three types of licenses as well as prescriptive authority. Table 1 shows the number of registrants for FY 2008 through FY 2013. The number of RPNs has steadily increased each year since FY 2008.

Table 1
Number of Registrants
FY 2008 Through FY 2013

Type	2008	2009	2010	2011	2012	2013
Registered Professional Nurse*	25,686	27,032	28,218	29,196	30,057	30,643
Advanced Practice Registered Nurse	1,219	1,120	1,423	1,454	1,502	1,540
Midwife	61	64	61	60	68	67
Nurses with Prescriptive Authority	569	547	657	735	800	902

*These numbers include all other licensure types.

Source: Board's Annual Reports, FY 2008 through FY 2013 (unaudited).

The Board Has Complied With Most of the General Provisions of Chapter 30.

The Board is compliant with most of the general provisions of Chapter 30, Article 1 of the *West Virginia Code*. Some of the more significant general provisions that the Board complies with are listed below, and others are discussed in greater detail. However, there are some concerns with the Board's complaint procedures and practices that increase the risk of harm to the public. These concerns are discussed in the second issue of this report.

The Board is compliant with most of the general provisions of Chapter 30, Article 1 of the West Virginia Code.

- The Board's chairperson, executive director or chief financial officer has annually attended the State Auditor's orientation session (§30-1-2a (c)(2));
- Each board member has attended at least one of the State Auditor's orientation sessions (§30-1-2a(c)(3));
- Two of the Board's seven members are lay persons as required by §30-1-4a;
- The Board promulgated rules specifying the investigation and resolution procedure of all complaints (§30-1-8(k));
- The Board has maintained a register of all applicants (§30-1-

- 12(a));
- The Board has complied with public access requirements as specified by Code (§30-1-12(c)); and
 - The Board has maintained a complete roster of the names and addresses of all licensees and applicants (§30-1-13).

The Board Is Financially Self-Sufficient.

Financial self-sufficiency of regulatory boards is required by WVC §30-1-6(c). As Table 2 demonstrates, the Board's end-of-year cash balance has increased by 49 percent between FY 2009 and FY 2013.

FY	Beginning-of-Year Cash Balance	Revenues	Expenditures	End-of-Year Cash Balance
2009	\$638,941	\$1,077,261	\$937,871	\$778,332
2010	\$825,370	\$1,019,885	\$986,167	\$859,088
2011	\$878,590	\$1,198,155	\$1,032,753	\$1,043,992
2012	\$1,118,810	\$1,138,019	\$1,197,483	\$1,059,347
2013	\$1,094,188	\$1,291,451	\$1,222,699	\$1,162,939

Source: West Virginia State Auditor's Office.

Table 2 further illustrates the Board's expenditures are usually more than the Board's end-of-year cash balance. The Legislative Auditor considers an end-of-year cash balance that is more than a year's expenditures to be a good financial position. Although the Board's end-of-year cash balances are below the Board's expenditures on average, the difference is relatively small and the cash balances are catching up to expenditures. Additionally, the Board was granted by the Legislature a fee increase last year increasing the renewal fee by \$30, going from \$35 to \$65. Half of the \$30 increase will go towards funding the WV Restore Program, which the Board is authorized to create by WVC §30-7E-2 for impaired nurses. The remaining \$15 of the fee increase should generate an additional \$450,000 in annual renewal revenue beginning in FY 2014. **Because of the recent fee increase and increasing cash balances, the Legislative Auditor finds the Board to be financially self-sufficient.**

Although the Board's end-of-year cash balances are below the Board's expenditures on average, the difference is relatively small and the cash balances are catching up to expenditures.

The Board's Internal Controls Are Sufficient and the Risk of Fraud Is Low.

Many regulatory boards are relatively small, with a limited number of staff. Consequently, internal control may invariably be deficient, particularly in the area of segregation of control duties. Proper internal controls are necessary for effective and efficient operations, and for the protection of an agency's resources.

The Legislative Auditor's staff made several visits to the Board's office during this review to develop an understanding of the Board's processes. The Board employs 11 staff and has an adequate number of staff to allow for proper segregation of duties in most cases. With respect to managing the receipt of revenue, the Board has written policy listing appropriate control activities; however, the policy does not require the segregation of these duties. The five control activities listed in the Board's policy for managing revenues received are:

1. receipt of revenues,
2. recording revenues,
3. safeguarding revenues,
4. depositing revenues, and
5. reconciling revenues received.

Appropriate segregation of these five control activities would not allow the same person to perform more than one of them. The Legislative Auditor finds the Board's internal controls when receiving revenue to be sufficient.

With respect to purchasing, the Board does not have its own written policies, but follows guidelines established by the Purchasing Division. In general, the control activities used in purchasing involve purchase orders, purchase approval, receipt and reconciliation of ordered merchandise, and inventory accounting. The Board's purchasing practices involve five staff members and are properly segregated.

The Legislative Auditor also assessed the risk of fraud. This assessment is done on the revenue and expenditure sides. The assessment of fraud risk on the revenue side consists of determining if actual license renewal revenue equals or exceeds expected renewal revenue, and determining how much of a board's revenue is received electronically. If a relatively high percentage of revenue is received electronically and

The Legislative Auditor finds the Board's internal controls when receiving revenue to be sufficient.

actual revenue is not below expected revenue, this would suggest a low risk of revenue being lost through fraudulent activity.

The Legislative Auditor calculated the minimum expected renewal revenue for FYs 2011 through 2013 by multiplying the annual renewal fees by the number of individuals on the Board's register. The calculations determined that the minimum expected revenue is lower than actual revenue. Furthermore, Table 3 illustrates that since FY 2011 more than 59 percent of all revenues on average have been paid electronically using the Treasurer's online system. The combination of a relatively high percentage of revenue collected electronically, and actual revenue exceeds expected revenue indicates a relatively low risk of fraud.

Fiscal Year	Total Revenue	Collected Online	Percent Collected Online
2011	\$1,130,019	\$656,675	58%
2012	\$1,198,405	\$688,175	57%
2013	\$1,291,325	\$800,600	62%

**All Totals have been rounded to the nearest dollar and percent.
Source: West Virginia State Auditor's Office.*

The combination of a relatively high percentage of revenue collected electronically, and actual revenue exceeds expected revenue indicates a relatively low risk of fraud.

The risk assessment of fraud on the expenditure side includes determining a board's required and expected expenditures as a percentage of total expenditures. Several categories of required expenditures are considered to be low-risk for fraud. Some of these expenditures include salaries and benefits, increment pay, payroll taxes, rent (office building), utilities, and insurance. If such expenditures are at least 90 percent of total expenditures, then the risk that fraud occurred is considered relatively low. If the percentage of low-risk expenditures is significantly below 90 percent, then the risk of fraud is considered relatively high and a more detailed analysis of a board's expenditures would be warranted. The Legislative Auditor's review of the Board's expenditures for FY 2011 through FY 2013 found for each year over 90 percent of the Board's expenses consisted of expected expenditures. The Legislative Auditor considers this a low-risk indicator that fraud occurred on the expenditure

side.

The Board Has Established Continuing Education Requirements.

The Board has established continuing education requirements for its registrants. Each RPN is required to complete a minimum of 12 hours of continuing education during the annual renewal period. All registrants are required to provide the Board with proof the registrant took the continuing education course at the time of renewal.

The Board-established continuing education requirements are consistent with requirements in West Virginia's neighboring states. Table 4 displays the continuing education requirements for West Virginia and neighboring states.

Table 4 Neighboring States' Continuing Education Requirements For Registered Nurses		
State	CE Hours	Renewal Period
Kentucky	14	Annual
Maryland	10	Annual
Ohio	24	Biennial
Pennsylvania	30	Biennial
Virginia	30	Biennial
West Virginia	12	Annual

Source: Legislative Auditor review of regulations from neighboring states.

The Board-established continuing education requirements are consistent with requirements in West Virginia's neighboring states.

Renewals along with proof of continuing education are due by October each year. The Board reviews renewal forms for proof of continuing education. From FY 2011 through FY 2013 a total of 46 licensees were found to be in noncompliance with continuing education rules established by the Board.

The Board Routinely Visits Nursing Schools to Review Accreditation.

The Board has established standards for nursing programs in Title 19, Series 1 of the *Code of State Rules*. Whenever a school wishes to

create a nursing program, it must be accredited by the Board. *CSR §19-1-5 et.al* specifies several requirements that must be met in order for a nursing program to become accredited by the Board. These requirements include:

- an administrator with an active WV nursing license who has earned a graduate degree in nursing education and has at least five years of nursing experience;
- nursing faculty members that have a graduate degree in nursing, are licensed within West Virginia, and have nursing experience;
- not admitting students without the proper educational requirements and not admitting more students than the program has been approved for; and
- appropriate access to classrooms, laboratories, libraries, and computers.

West Virginia Code §30-7-5 requires the Board to visit all nursing schools “from time to time” to determine if the school is maintaining the standards required by *Code* and the Board. These visits are meant to review a program’s compliance with rules and determine the effectiveness of the education delivered by the program. The Board has visited 7 of the 21 approved nursing schools from FY 2011 through FY 2013.

The Board has visited 7 of the 21 approved nursing schools from FY 2011 through FY 2013.

The Board has established a visitation schedule that plans for two or three nursing schools each year. As there are 21 nursing schools approved by the Board, the visitation schedule allows up to eight years to pass in some cases without a program undergoing an intensive site-visit by the Board. However, the Board indicates that since nursing schools are required to provide annual reports and it occasionally visits programs earlier than scheduled, there is enough flexibility to visit nursing programs more frequently if needed. As an example of the Board’s compliance review process of nursing program accreditations, the Board revoked the nursing program accreditation at Mountain State University in Beckley because of a lack compliance with Board standards. This resulted in the closure of the nursing program.

The Board Did Not Competitively Bid a Contract for Its Impaired Nurses Monitoring Program Based on the Advice of the Purchasing Division.

In 2012, the Legislature amended *West Virginia Code* to authorize the Board to create a treatment and recovery program for nurses suffering

from alcoholism, chemical dependency and major mental illnesses (§30-7E), and to encourage voluntary participation in such programs (§30-7-11a). In November 2012, the Board created a treatment and recovery program called WV Restore and entered into a contract with a Florida vendor, Linda L. Smith, LLSA, Inc., to implement the WV Restore program. The initial contract was in effect from November 1, 2012 through June 30, 2013 for no more than \$24,999.99. The agreement was renewed with the same vendor for July and August of 2013 for \$24,999.99 in total. From September 2013 through June 30, 2014, the Board contracted with a Florida vendor named Florida IPN for the total amount of \$123,541.¹ This contract has been recently renewed with Florida IPN for another year through June 30, 2015, which agrees to pay the vendor more than \$219,000.

As part of the contract agreement, Florida IPN is to provide a phone-line operational 8 a.m. to 4 p.m., Monday through Friday for nurses to seek information about the WV Restore Program, instruct licensees through the associated paperwork, facilitate an evaluation by a treatment provider, then follow-up with treatment resources to ensure appointments have been met. Whenever a licensee is non-compliant with a signed monitoring agreement, Florida IPN is to notify the Board.

The Legislative Auditor found no evidence that the Board sought competitive bids as required by WVC §5A-3-11(a) for the contracts with Linda L. Smith that each totaled nearly \$25,000 in payments. In addition, the contracts with Florida IPN that exceeded \$25,000 were not competitively bid through the Purchasing Division as required by law (§5A-3-10). Furthermore, these two Florida vendors are not registered with the Secretary of State or the State Tax Department.

According to the Board, it chose Florida IPN because it is nationally recognized and it has administered Florida's nurse monitoring program for over 26 years. The Board also stated that it believes the purchase of the contracted services were exempt from purchasing requirements because the language in statute (§30-7E-3) authorizing the program states that: "*The West Virginia Board of Examiners of Registered Professional Nurses has the sole discretion to designate nurse health programs for licensees of the board...*" According to the Board, it did not bid the contract for the WV Restore program based on advice from the Purchasing Division that the Board determine through its legal research how it should proceed and to document its decision for the record. The Board did not provide documentation from the Purchasing Division on this discussion. The Legislative Auditor contacted the Purchasing Division to verify the

According to the Board, it did not bid the contract for the WV Restore program based on advice from the Purchasing Division that the Board determine through its legal research how it should proceed and to document its decision for the record. The Board did not provide documentation from the Purchasing Division on this discussion.

The Purchasing Division informed the Legislative Auditor that it does not agree with the Board's position and it does not consider the Board to be exempt.

¹ Linda L. Smith, LLSA, Inc. changed its name to Florida IPN.

accuracy of the Board's statement. The Purchasing Division stated that it had not had any conversations with the Board regarding its claimed exemption. Furthermore, the Purchasing Division informed the Legislative Auditor that it does not agree with the Board's position and it does not consider the Board to be exempt. The Purchasing Division then conducted a Purchasing Review of the Board. Appendix C on page 43 provides the Purchasing Division's response to the Legislative Auditor and the Purchasing Review report of the Board.

A legal opinion from Legislative Services dated March 12, 2014 states that no exemptions from purchasing requirements for Chapter 30 licensing boards could be found in *Code*. It is the Legislative Auditor's opinion that since the Board's enabling statute does not exempt it from purchasing requirements under Chapter 5A, Article 3 of the *West Virginia Code*, and the Purchasing Division does not consider the Board to be exempt, that the contract with Florida IPN should have been competitively bid as required by WVC §5A-3-10.

A legal opinion from Legislative Services dated March 12, 2014 states that no exemptions from purchasing requirements for Chapter 30 licensing boards could be found in Code.

The Legislative Auditor informed the Division of Purchasing of this contract. Although the Purchasing Director has newly established authority to issue a cease and desist order (§5A-3-3(11)), it may not be possible for this authority to be exercised without interrupting necessary services. **If such is the case, the Legislative Auditor recommends that this contract be competitively bid at the time the contract is up for its next renewal.**

Conclusion

The West Virginia Board of Examiners for Registered Professional Nurses is compliant with most general provisions of Chapter 30, Article 1, and its enabling statute (§30-7) of the *West Virginia Code*. The Board's internal controls are adequate and the risk of fraud is relatively low. The Board should have competitively bid the contract for the WV Restore Program. It is the Legislative Auditor's opinion that the legislative intent for services to be purchased utilizing competitive bidding is clearly established in *Code*.

Recommendation

1. *The Board should competitively bid the contract for the West Virginia Restore Program through the Purchasing Division when it is due for renewal on June 30, 2015.*

ISSUE 2

The Board's Process of Resolving Complaints and Administering Disciplinary Action Has Areas of Weakness, Including a Lack of Timeliness, Allowing Long Delays in Nurses Responding to Complaints and Allowing Multiple Violations of Consent Agreements for Impaired Nurses.

Issue Summary

The Legislative Auditor reviewed the Board's complaint data and a sample of complaint files to evaluate the Board's process of resolving complaints against licensees. The Legislative Auditor reports the following findings:

- During the 2011-13 audit period, the Board has allowed 4 licensees who were in substance-abuse recovery programs repeated opportunities to return to practice despite multiple failures of drug tests or failure to report for drug tests while in the recovery program.
- The Board did not fully investigate a complaint received from the Board of Medicine that implicated nurses licensed by the Board in a serious matter.
- Although the Board requires licensees to respond to complaints against them within 14 days, it has been slow to take action in 3 cases when licensees took months to respond to a complaint or consent agreement.

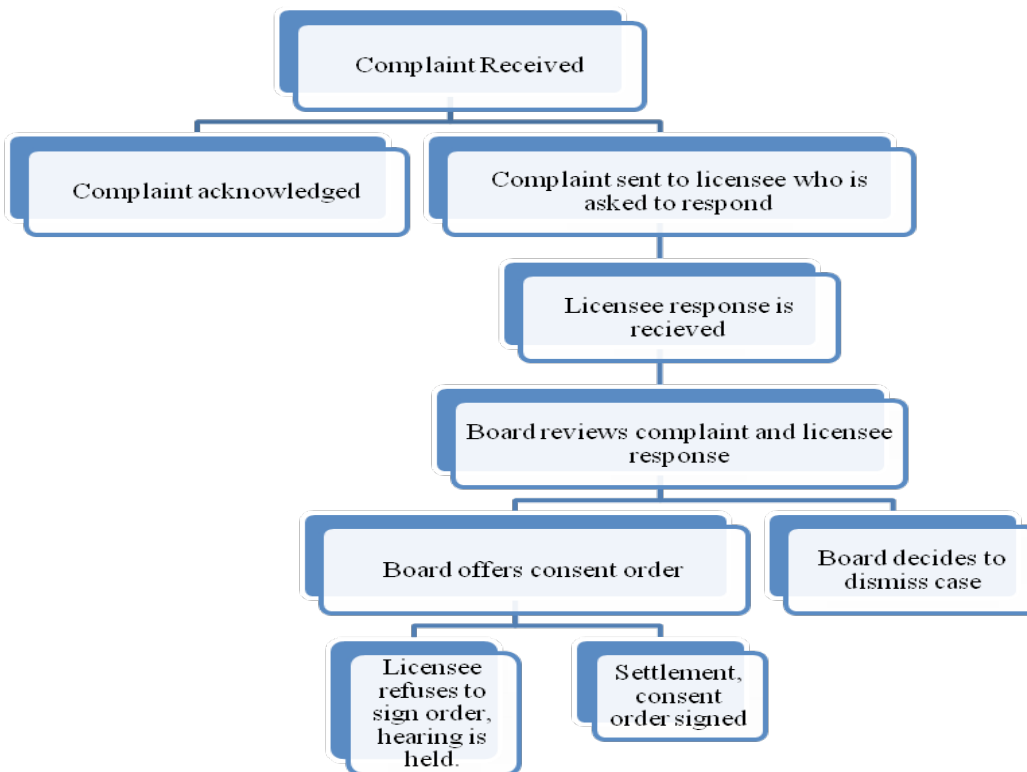
The Legislative Auditor identified 6 complaints of a serious nature representing 7 percent of the sample (81 cases) drawn by PERD.

The Board reports that 16 percent of its complaints are going beyond 18 months to resolve and our sample shows that in most cases the Board is not requesting an extension of time from the complainants as required by law (WVC §30-1-5(c)). Evidence suggests that the number and nature of complaints, along with the disorganization of the Board's complaint files, involve a workload that may be too large for two investigators to adequately manage. The Legislative Auditor identified 6 complaints of a serious nature representing 7 percent of the sample (81 cases) drawn by PERD. Assuming the sample is representative of the 808 complaints filed in the 2011-13 time period, 60 (7 percent) of the Board's total complaints could have issues similar in nature to the 6 complaints identified in the sample. **This is concerning and the Legislative Auditor considers it a material weakness in judgment because the potential consequences in each case is life-threatening.**

The Board Needs to Improve the Timeliness of Its Complaint Resolution Process

The Board has more than 30,000 licensees, making it the largest licensing Board in the state. This increases the importance of a well established complaint procedure. Figure 1 details the Board's complaint procedure:

Figure 1
Board's Complaint Process



As the data show, nearly 16 percent of the complaints filed during 2011 and 2012 took more than 18 months to resolve.

The Board reports that it received a total of 808 complaints from FY 2011 through FY 2013. Common complaints were about nurses not adequately providing proper care to patients, alcohol abuse, and drug diversion. Table 5 shows the Board's complaint data for this time period and the average time to resolution. As the data show, nearly 16 percent of the complaints filed during 2011 and 2012 took more than 18 months to resolve. The Legislature encourages licensing boards to resolve complaints within 18 months of receiving complaints (WVC §30-

1-5(c)). The average length of time to resolve complaints in 2011 and 2012 was 13 and 10 months respectively. The cases that were resolved in 2013 have an average resolution time of seven months. However, this average will increase depending on how long it takes to resolve the 44 pending cases. PERD reviewed a sample of 81 complaints (10 percent) of the Board's complaint files and finds no reason to question the Board's resolution time of all complaints resolved.

Table 5
Complaint Decision Statistics
FY 2011 Through FY 2013

Fiscal Year	Number of Complaints Filed	Number of Complaints Closed Within 18 Months	Number of Closed Complaints Exceeded 18 Months	Average Months to Case Closure
2011	262	201	61	13
2012	310	277	30*	10*
2013	236	192	0**	7**

*Three (3) cases from FY 2012 are still pending and have fallen outside of the 18-month time frame. Therefore, the number of closed complaints exceeding 18 months and the average months to case closure will increase depending on the length of time it takes to resolve the 3 pending cases.

**Forty-four (44) cases from FY 2013 are still pending and have not fallen outside of the 18-month time frame. Therefore, the number of closed complaints exceeding 18 months and the average months to case closure will likely increase depending on the length of time it takes to resolve the 44 pending cases.

Source: West Virginia Board of Examiners for Registered Nurses (audited through a sample of cases).

PERD's sample review found that the Board does not consistently follow *West Virginia Code* requirements or its own rules for addressing complaints. *West Virginia Code* §30-1-5(c) requires all licensing boards to provide 6-month updates to complainants and to resolve cases within 18 months of the complaint being received. If the complaint is not resolved within 18 months, *Code* requires licensing boards to contact the complainant and request more time to complete the case. PERD's sample review found that the Board did so in two cases, but not in three other cases, which suggests that most cases exceeding 18 months do not have requests to exceed the 18-month time frame. PERD's sample review also found seven cases that did not have six-month update letters as required. The Board's database records indicate that in four of the seven cases it sent status letters to complainants but copies of the letters were not in the paper file.

PERD's sample review also found seven cases that did not have six-month update letters as required.

The Board Did Not Fully Investigate a Complaint From Another Board.

The Legislative Auditor reviewed a complaint received by the Board that was not part of the sample of 81 complaints. This complaint was forwarded to the Board in May 2010 by the Board of Medicine (BOM) which implicated three Advanced Practice Registered Nurses (APRN) of illegal activities. PERD became aware of this case through our analysis of a 2013 Sunrise application for expanding the scope of practice for Advanced Practice Registered Nurses. Although this case falls outside of the audit review period by two months, it was included in this current board review because of the seriousness of the case, its relatively close proximity to the review period, and because the Board's decisions in the case are reflective of what is identified in the cases PERD sampled.

For this review of the Board, PERD requested additional information from the BOM concerning the case it referred to the Board in May 2010. The BOM provided PERD court records indicating that a physician and three APRNs were operating a pain clinic where the APRNs wrote prescriptions for narcotics utilizing the physician's Drug Enforcement Agency (DEA) identification number instead of their own.² The physician was not present in the clinic and observed patient charts from his home several counties away. The physician was investigated by the US Attorney's Office (Southern District of West Virginia), charged with several crimes, and pled guilty to the charges. Several statements made by the US Attorney's Office indicate that it was improper and illegal for the physician to allow the nurses to utilize his DEA number.

After this information was forwarded to the Board by the BOM, it did not begin the formal complaint process against the nurses. According to the Board, it contacted the U.S. Attorney's Office and requested any information it had concerning the nurses. The Legislative Auditor requested documentation from the Board on its dialogue with the U.S. Attorney's Office, but the Board has not provided such documentation. The Board has stated that the physician's conviction documents do not provide enough information to determine the specific violations of each nurse, and that the U.S. Attorney's Office indicated to the Board that there were not concerns with respect to the nurses. Again, the Legislative Auditor has not received any documentation from the Board to confirm these statements. Moreover, the court records supplied by the BOM clearly state that nurses at the clinic were involved in illegal activities.

Several statements made by the US Attorney's Office indicate that it was improper and illegal for the physician to allow the nurses to utilize his DEA number.

The Legislative Auditor requested documentation from the Board on its dialogue with the U.S. Attorney's Office, but the Board has not provided such documentation.

² The DEA does not allow nurses to write prescriptions for these medications other than maintenance doses not to exceed 72 hours while a physician may write prescriptions for a 30-day supply.

The court documents state the following:

“It was further part of the scheme that employees of the clinic . . . would and did issue controlled substance prescriptions using the name and DEA registration number of [name redacted], thereby, falsely indicating that controlled substances had been prescribed by defendant”

The doctor involved in this case entered a guilty plea to the above charge, and several others, filed by the U.S. Attorney’s Office. It is the Legislative Auditor’s opinion that this guilty plea provides ample evidence to pursue complaints against the nurses involved. To date, no complaints against the nurses have been initiated by the Board. Moreover, there is no evidence in the Board’s minutes that this case was ever brought before the Board. The court documents implicating the nurses in wrong-doing also implicated a physician’s assistant (PA) licensed by the BOM. It is unknown why the US Attorney’s Office did not pursue formal charges against the PA or nurses involved. The BOM initiated a complaint against the PA in question based on the same court documents it supplied to the Board. The BOM required the PA to sign a consent order, be publically reprimanded, pay a \$500 fine, and to complete a continuing medical education course on the subject of appropriate prescribing of controlled substances. **Given the nature of the information supplied to the Board concerning three of its licensees, the decision to not initiate a complaint is questionable. In instances of this nature, one would expect the Board to err on the side of caution.**

It is the Legislative Auditor’s opinion that this guilty plea provides ample evidence to pursue complaints against the nurses involved.

The Board Has Not Taken Prompt Action When Licensees Do Not Timely Respond to Complaints.

Whenever a complaint is initiated against a licensee, the Board provides a copy of the complaint to the licensee and then requests a response to the allegations. The Board’s legislative rule (CSR §19-9-3.8) states that licensees can have up to 14 days to respond. Although it is understandable that in some cases licensees may respond after 14 days of receiving a response, PERD found 3 of the 81 cases sampled where the Board allowed months to go by without receiving responses from licensees to complaints and a consent order. In one case, the Board sent a complaint in December 2011 to a licensee from her employer indicating that she was required to submit to a drug screen on a day that she was unable to perform her job duties. An oral screen failed and the employer required, according to policy, a urine test, which the licensee would not provide. The licensee did not respond to the complaint within

PERD found 3 of the 81 cases sampled where the Board allowed months to go by without receiving responses from licensees to complaints and a consent order.

14 days. During the same month the Board received another complaint from a police department alleging that the licensee knowingly altered a prescription for Hydrocodone by changing the count amount from 20 to 120. The Board sent this complaint to the licensee and the licensee again did not respond. After two years transpired (December 2013), the Board issued a Summary Suspension of the license stating that:

The Board has made numerous attempts to contact [Licensee]. [Licensee] has failed to properly respond to the pending complaints or contact the Board. Therefore, based on the foregoing, the Board finds that public health, safety and welfare are threatened and emergency action is necessary. The Board ORDERS that license number [number] issued to [Licensee] is herein SUMMARILY SUSPENDED. [emphasis included]

The licensee pled guilty to charges of “Attempt to Commit a Felony” and in December 2012 she was placed on probation for two years. During this time period the licensee was able to continue practicing until the Board revoked her license in December 2013. PERD found nothing in the case file that would warrant such a long delay by the Board in responding to the licensee’s inaction to complaints of this magnitude.

In another case, the Board offered a licensee a consent order in April 2009. For nine months the licensee did not respond to the consent order by either agreeing to it or requesting a hearing. The Board indicated that it was in communication with the licensee’s attorney during this time but there is no written documentation of the communication. After nine months the Board sent the consent order again. In February 2010 the licensee’s employer inquired to the Board concerning the licensee working without a signed consent order. The consent order was signed after the employer’s inquiry in February 2010, nearly 11 months after it was originally sent to the licensee, during which time the nurse was still practicing.

In the third case, a complaint was filed against a licensee in August 2011. The Board allowed 16 months to transpire before the licensee responded and signed a consent order. The Board indicated that it was in communication with the licensee’s attorney during this time but the Board has not supplied written documentation of the communication. When the licensee responded to the complaint, she signed a consent order that resulted in a suspension and a \$1,000 fine.

Board staff stated they follow advice from the West Virginia

In another case, the Board offered a licensee a consent order in April 2009. For nine months the licensee did not respond to the consent order by either agreeing to it or requesting a hearing.

After nine months the Board sent the consent order again.

Attorney General's Office when deciding if decisive action should be taken when a licensee does not respond to complaints and consent orders. Board staff also stated that the Attorney General's Office has advised the Board to exhaust all avenues of contact before engaging in a summary suspension order. The Legislative Auditor understands this concern, but also emphasizes that the Board's primary duty is to protect the public. A board that allows a licensee to continue practicing without formally responding to complaints or consent agreements may be increasing the risk of harm to the public. Board inaction allows licensees to serve the public while effectively ignoring complaints raised by the public. The need for action is even greater for boards that regulate health professions because decisions made by these boards can subject the public to risk.

The Board Allows Licensees in Substance-Abuse Recovery Programs Repeated Chances to Return to Practice Despite Relapses and Agreement Violations.

The Board has procedures in place that help nurses receive substance-abuse recovery services who are suffering through substance abuse or alcoholism. Nurses can either voluntarily admit themselves into the Board's recovery program or be required by the Board to receive recovery services as an alternative to license revocation. From FY 2011 through FY 2013 the Board has temporarily suspended 87 licenses to allow nurses to receive substance-abuse counseling.

When nurses voluntarily admit themselves into the WV Restore program, the Board only knows that a licensee has been admitted, but the identity of the licensee is withheld from the Board. However, the program requires that when a licensee fails any part of the program, either by not attending a counseling session, failing a drug test or failing to show for a drug test, the Board is then informed of the licensee's identity.

The Board now utilizes the WV Restore Program to serve impaired nurses. Before the WV Restore Program, the Board utilized the Impaired Nurse Program as a disciplinary program. According to statements from the Board, the Restore program has shifted the Board's involvement from a disciplinary focus to a rehabilitative focus. As part of the WV Restore Program, the nurse is not allowed to practice during the first phase of the program which involves counseling for a minimum of six weeks, depending on the counselor's decision. If nurses successfully complete the first phase, they are allowed to return to practice under certain restrictions on their scope of practice as they relate to having access to controlled prescription medications and being in the vicinity of such

According to statements from the Board, the Restore program has shifted the Board's involvement from a disciplinary focus to a rehabilitative focus.

drugs. When they return to practice they are still considered enrolled in the restore program, with counseling and drug testing continuing until it is determined by the Board or a counselor (if voluntarily admitted) when they are released from the program.

PERD's sample review identified four cases in which the participants have had multiple violations of the Board's restore services and have been allowed further opportunities to return to practice. Although these individuals were in the program during 2011-2013, some of the participants' history in the Board's impaired program extends back before 2011. A description of these cases is provided below:

Case #1: In November 2008, a licensee admits to taking ephedrine for two months from her place of employment. A consent order was sent to the licensee in April 2009 requiring a fine and admittance into the Board's Impaired Nurse Program. The consent order was signed nearly 15 months later in February 2010, during which time the nurse was still practicing and the employer called the Board regarding the licensee working without a signed consent order. The licensee was admitted into the Impaired Nurse Program in February 2010. The licensee passed Phase 1 and returned to practice. In October 2010, the licensee failed to appear for a drug test, was tested several days later and tested positive for Hydrocodone. In November 2010 the licensee tested positive for Opiates. The Board suspended her license a month later in December 2010 and required her to enter Phase 1 of the program again. In February 2011 the licensee tested positive for Hydrocodone; on the same day Board received allegations from her employer that the licensee stole a couple of prescription pads and was "writing rx for herself and 3 children 17, 19, and 21." The licensee's license was suspended. Other allegations were made in April 2011 stating that the licensee was arrested for unemployment compensation fraud and was accused of talking about patients' medical conditions and treatment from her previous employment. In June 2011 the Board sent a letter to the licensee concerning the recent complaints filed against her. The letter indicated how it would address the complaint in the following statement:

The West Virginia Board of Examiners for Registered Professional Nurses reviewed the information related to the complaint filed against your license. Since your license is suspended, the DRC is waiting until you reinstate to further pursue the matter.³ Until the time you reinstate, the Board of Nursing [and] will provide this information

In October 2010, the licensee failed to appear for a drug test, was tested several days later and tested positive for Hydrocodone. In November 2010 the licensee tested positive for Opiates.

This response by the Board reflects its philosophy to allow reinstatements even in cases with matters of this magnitude.

³ DRC represents the Board's disciplinary committee.

to any other state requesting information about your West Virginia registered nurse license.

This response by the Board reflects its philosophy to allow reinstatements even in cases with matters of this magnitude. The Board received a letter from the licensee requesting reinstatement in May 2012. Currently, the licensee is listed as inactive by the Board, her license

has not been revoked, and the Board has left open the opportunity for her to be reinstated. During this time of inactive status, the Board received a request for information in March 2012 from a pharmacy concerning the licensee's license because she sought employment at the pharmacy.

Case #2: The licensee was admitted into the Impaired Nurse Program by the Board beginning in 2001 and has never been released from the program to date. She relapsed in 2002 and her license was suspended. She was reinstated in 2003 and suspended again in 2004 for failure to call-in for a drug test. The license was reinstated again in 2005 and suspended in 2006 again for failure to call the drug test line. She was not licensed from 2006 through 2011. She was reinstated in January 2012 and entered into the WV Restore Program. In June 2012 the licensee did not call to see if she was to be drug tested. She was fined \$250 and allowed to continue practicing once the fine was paid. The licensee committed the same occurrence in August 2012, pays the fine and returns to practice. In February 2013 the licensee again failed to call for a drug test. The licensee was fined \$250 and returned to practice after the fine was paid.

Case #3: The licensee was admitted into the Impaired Nurse Program by the Board in May 2007 because of substance abuse (Opiates and Cocaine). The licensee passed Phase 1 and returned to practice. The licensee did not call-in drug test in February 2008. Her license was suspended in March 2008 and she re-entered the Impaired Nurse Program. The licensee passed Phase 1 and returned to practice in September 2008. The licensee went nearly three years without incident and was released from the program in July 2011. In June 2012 the licensee tested positive for Dilaudid as a result of an employer-required drug test and the employer reported it to the Board. The employer reported that the licensee stole the medication from the hospital. The license was suspended and the licensee was admitted into the restore program. The consent agreement requires the licensee to be monitored for the next five years and the licensee may continue practice with restrictions as long as she complies with the consent order.

The licensee was admitted into the Impaired Nurse Program by the Board beginning in 2001 and has never been released from the program to date.

The employer reported that the licensee stole the medication from the hospital. The license was suspended and the licensee was admitted into the restore program. The consent agreement requires the licensee to be monitored for the next five years and the licensee may continue practice with restrictions as long as she complies with the consent order.

Case #4: The licensee was admitted into the restore program by the Board in January 2012 because of abuse of Lortab. The licensee passed Phase 1 and returned to practice. In June 2012 the licensee failed to call for a drug test. She was fined \$250 and allowed to continue practicing once the fine was paid. In August 2012 the licensee failed to call for a drug test. She was fined and allowed to continue practicing when the \$250 fine was paid.

It is reasonable to assume that some of the nurses who failed to call for random drug tests did so because they knew they were chemically impaired and did not want to test positive for substance abuse. If this assumption is true, then the obvious concern is that some of these nurses were practicing while chemically impaired. Drugs have certain “detection windows”—the amount of time after ingestion during which evidence of drug use can be detected by a drug test. Some drugs, such as Heroin and Oxycodone, can be undetectable after 48 hours. Table 6 below details the detection window for some common drugs found in the Board’s complaint files.

Some drugs, such as Heroin and Oxycodone, can be undetectable after 48 hours.

When a licensee is required to report for a drug test and does not, the Board indicates that the license is immediately suspended; yet, this did not occur with respect to Case #1 discussed above.

Substance	Detection Window by Urine Test	Detection Window by Blood Test
Cocaine	2-10 days	24 Hours
Dilaudid	2-4 days	24 Hours
Hydrocodone	2-6 days	24 Hours
Heroin	2-4 days	6 Hours
Lortab	2-4 days	24 Hours
Oxycodone	2-4 days	24 Hours

*These times are guidelines. Detection windows can change based on a variety of factors such as prolonged use, metabolism, and body mass.
Source: PERD research from various sources including the United States Department of Labor, universities, and various substance abuse testing companies.

Generally, the consent agreements stipulate that failure to report or call for a drug screen is grounds for immediate suspension of the licensee’s license; however, it may take several days for the Board to inform the licensee of the suspension by formal letter. In the cases sampled, the time for suspension letters to be received by licensees ranged from two to seven days. In the meantime, the licensee can continue to practice. When a licensee does not call-in for a drug screen, the Board indicate that

it then requires the licensee to test the next day and contacts the licensee's employer. When a licensee is required to report for a drug test and does not, the Board indicates that the license is immediately suspended; yet, this did not occur with respect to Case #1 discussed above. Board staff also indicated that they maintain close contact with substance abuse counselors who are treating its licensees.

Once the licensee has been notified of the suspension, the Board's standard response has been to impose a fine of \$250 and the licensee is allowed to practice once the fine is paid. Moreover, the fine is not increased for repeated violations. It would seem logical that the Board would either increase the fine with each violation of consent orders or take more serious actions against the licensee's license, but this did not occur in these four cases. Licensees who fail to call for drug screens should not be allowed to practice for any length of time following the failure to report because the drugs remain in the bloodstream for several hours.

The Board's staff stated it is the philosophy of the Board that drug addiction is a disease that requires counseling and that its licensees should be allowed repeated attempts to become restored. Additionally, the Board believes that licensees dealing with drug addiction should have the opportunity to regain their license and has utilized suspensions instead of revocations. According to board staff when dealing with drug abuse it is treated as a disease as stated by the American Society of Addiction Medicine, the U.S. Department of Health and Human Services National Institutes of Health (NIH), and the American Psychiatric Association (APA). The American Society of Addiction Medicine states that addiction is characterized by the impairment in behavioral control; diminished recognition of significant problems with one's behavior and interpersonal relationships; and cycles of relapse and remission. In addition, the APA has designated drug addiction as a mental disorder and the NIH has stated that addiction is a chronic disease. According to the Board, the decision to treat drug addiction as a disease is endorsed by the National Council of State Boards of Nursing.

The Legislative Auditor agrees that drug addiction is a disease that requires intensive and sustained treatment. Nevertheless, the Legislative Auditor is concerned that by allowing licensees who have relapsed or repeatedly broken the terms of their consent agreements to remain licensed that the Board is exposing the public to unnecessary risk. Information from the NIH suggests that long-term drug abuse causes changes in brain activity and cognitive function. According to the NIH, "Brain imaging studies of drug-addicted individuals show changes in areas of the brain

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The NIH also states that "Drug addiction erodes a person's self-control and ability to make sound decisions."

that are **critical to judgment, decision making**, learning and memory, and behavior control (emphasis added).” The NIH also states that “Drug addiction erodes a person’s self-control and ability to make sound decisions.” The Legislative Auditor’s concern comes from the fact that prolonged drug abuse can alter a nurse’s ability to make sound decisions, and thus exposes patients to a nurse who may be unable to make proper and logical patient care decisions due to the effects of addiction. **While nurses suffering from drug addiction are in need of treatment, it is the Legislative Auditor’s opinion that the Board has the primary responsibility of protecting the public, and the Board should have a low tolerance for nurses who repeatedly violate or relapse while they are in a substance-abuse program.**

Complainants Are Not Consistently Notified of the Board’s Final Decision.

PERD’s sample review found that the Board has the practice of notifying complainants of the Board’s final decision concerning their complaint. This procedure is not required by law or by the Board’s legislative rules. However, this is a useful procedure and is in line with the statutory requirement to provide six-month updates. PERD’s sample review shows that in 71 cases, the Board sent final-decision letters to complainants but did not send them in the other 10 cases. The Board should be consistent in this practice. **Furthermore, the Legislature should consider amending Chapter 30, Article 1 of the West Virginia Code to require boards to notify complainants of the Board’s final decision in their complaint.**

The Legislature should consider amending Chapter 30, Article 1 of the West Virginia Code to require boards to notify complainants of the Board’s final decision in their complaint.

The Board Could Utilize More Staff and a Better Record-Keeping System.

The Legislative Auditor’s review of the Board’s complaint files has raised several issues with missing or incomplete documentation, violations of requirements established within *West Virginia Code*, and questionable decision-making by the Board. Board staff indicated that the paper complaint files are organized in reverse chronological order with the most recent action in the case at the front of the file. The Board’s cataloguing system was accurate in some complaint files but not all. The Legislative Auditor’s staff found some files to be incomplete and disjointed without a clear organization process and paper files did not always include required documentation. In addition, the Board was

unable to provide paper documentation of some required communications with complainants.

The issues related to the Boards complaint process may be attributed to the Board's small number of investigators. The Board utilizes two investigators, both with a nursing background and not an investigative background. Both investigators have completed additional training in investigation techniques and practices. The Board has opened an average of 270 complaints each year from FY 2011 through FY 2013. Additionally, the Board still largely relies on paper documentation to manage complaints each year as opposed to scanning all documentation sent and received and then saving it to an electronic file.

Evidence suggests that the number and nature of complaints investigated by the Board, along with the disorganization of some complaint files, involve a workload that may be too burdensome for two staff to adequately manage. Hiring more investigators and utilizing electronic means to manage case files may serve to assist the Board in better fulfilling its duties related to the complaint process.

Requiring complaints to be notarized is not common among other West Virginia medical licensing boards.

The Board's Requirement for Complaints to Be Notarized Is Unnecessary.

The Board has published a complaint form on its website. This form allows members of the public who wish to file a complaint against a nurse to have access to the proper form without contacting the Board. The form requires the complaint to be notarized by a public notary. The requirement for complaints to be notarized is not established in the Board's rules. Requiring complaints to be notarized is not common among other West Virginia medical licensing boards.

The Legislative Auditor reviewed complaint forms for the Board of Examiners for Registered Professional Nurses, the Board of Medicine, the Board of Examiners for Licensed Practical Nurses, the Board of Osteopathic Medicine, the Board of Dentistry, and the Board of Pharmacy. This review found only the Registered Professional Nurses Board and the Board of Osteopathic Medicine require complaints to be notarized. The Legislative Auditor finds this requirement to be unnecessary and it does not add any additional layer of protection for the public. Furthermore, it may be deterring some complaints from being filed. In previous reports, the Legislative Auditor has recommended against the practice of requiring complaints to be notarized. Therefore, the Legislative Auditor

recommends that the Board remove the requirement for notarization from its complaint form.

The Board Is Seeking to Alter Its Complaint Process In a Manner That Would Be Inconsistent With Legislative Intent.

In April 2014 the Board submitted a proposed Procedural Rule to the Secretary of State’s Office significantly altering its complaint process as established in Title 19, Series 1 of the *Code of State Rules*. This rule change would alter the meaning of the word “complaint” and create a new term “statement of allegation” that does not appear anywhere within *West Virginia Code* with respect to boards established by Chapter 30.

Currently, complaint means “any written, verbal, or other communication with the Board or its representatives which indicates or tends to indicate a licensee is acting or has acted in violation of *W. Va Code*.” This rule change would alter the meaning of complaint to mean “a statement of allegation that is deemed sufficient.” These statements of allegations will be investigated the same way as a complaint, but will not have timelines for resolution until they are “deemed sufficient” enough to be a complaint by board staff. **The Legislative Auditor determines that a statement of allegation will add time to the resolution process because it will not begin the complaint process, it will delay when the Board has to contact a licensee for a response, it will circumvent the requirement to provide six-month updates on a complaint, and it will circumvent the requirement to resolve complaints within 18 months.**

Due to the concerns with the proposed rules, PERD sought a legal opinion. A legal opinion (see Appendix D) provided by the Legislative Services Division confirms that the proposed procedural rule is contrary to legislative intent, and it violates the West Virginia Administrative Procedures Act. The opinion states:

The proposal to redefine “Complaint” would allow the Board to evade the clear mandates of West Virginia Code § 30-1-5(c), which requires professional boards to investigate all complaints regarding professional misconduct within a certain timeline. By redefining “Complaint” to include only those statements that are “deemed sufficient in fact and in jurisdiction” upon initial review, the Board attempts

A legal opinion (see Appendix C) provided by the Legislative Services Division confirms that the proposed procedural rule is contrary to legislative intent, and it violates the West Virginia Administrative Procedures Act.

to avoid its statutory duty to investigate and respond to all reports of professional misconduct. The Board does not have the authority to alter its statutory duties through a procedural rule change.

In addition, since procedural rules are not promulgated by an act of the Legislature, there are by law limitations of content that can be included in such rules. The legal opinion indicates that “*The courts have made clear that agencies may not promulgate interpretive or procedural rules ‘affecting private rights, privileges or interests.’*” However, the legal opinion indicates that “*Discounting a portion of complaints filed with the Board as “statements of allegation” and failing to follow the statutory mandates regarding notice, investigation, and record-keeping clearly affects the private rights, privileges and interests of complainants.*” **Therefore, the legal opinion concludes that the Board’s procedural rules are unlawful and susceptible to a legal challenge.** The Legislative Auditor recommends that this proposed rule not be adopted by the Board.

Conclusion

The findings of this issue give the impression that the Board leans more towards protecting the professionals at the expense of protecting the public. While the Legislative Auditor’s Office understands the need for treatment for impaired nurses, it reminds the Board that regulatory boards are primarily responsible for protecting the public. The Board’s actions in these cases reveal a clear philosophy that reinstatement of licenses after repeated substance-abuse relapses and recovery violations will be allowed. The Board’s complaint process shows signs of lacking appropriate and timely responses to serious cases. In some cases the Board is not consistently following the *West Virginia Code* or the Board’s own rules. The serious findings raised in this issue represent 7 percent of a sample. If this sample is representative of the total number of complaints over the last three years, then as many as 60 cases (7 percent) of the Board’s total complaints could have issues similar in nature to the 6 complaints identified in the sample. Given the magnitude of the consequences suggests a material matter that needs to be addressed by the Board.

The Board’s actions in these cases reveal a clear philosophy that reinstatement of licenses after repeated substance-abuse relapses and recovery violations will be allowed.

Recommendations

2. *The Board should have a low tolerance for nurses who repeatedly violate or relapse while they are in a substance-abuse program. Consideration should be given to at least increasing the amount of the fines for repeated violation of consent orders and monitoring agreements.*
3. *The Board should improve its timeliness in taking action when licensees do not promptly respond to complaints or consent orders.*
4. *The Board should consistently send six-month status updates and letters of final decisions to complainants.*
5. *The Board should improve its efforts to resolve complaints within 18 months and consistently request permission from complainants to extend the resolution process beyond 18 months when necessary.*
6. *The Board should consider removing the requirement for complaints to be notarized from its complaint form.*
7. *The Legislative Auditor recommends that the proposed procedural rule change altering Title 19 Chapter 1 of the Code of State Rules to create a “statement of allegation” should not be adopted by the Board of Examiners for Registered Professional Nurses.*
8. *The Board should consider hiring additional nurse investigators.*
9. *The Legislature should consider amending Chapter 30, Article 1 of the West Virginia Code to require boards to notify complainants of a board’s final decision in their complaints.*
10. *The Board should consider taking action to streamline the management of complaint files and begin scanning documents to allow for better tracking of required documentation.*

ISSUE 3

The Board's Website Is in Need of Improvement in Both User-Friendliness and Transparency.

Issue Summary

The Legislative Auditor's Office conducted a literature review on assessments of governmental websites and developed an assessment tool to evaluate West Virginia's state agency websites (see Appendix E). The assessment tool lists several website elements. Some elements should be included in every website, while other elements such as social media links, graphics and audio/video features may not be necessary or practical for state agencies. Table 7 indicates that the Board integrates 38 percent of the checklist items in its website. This measure shows that the Board website is in need of more improvement in both user-friendliness and transparency.

Substantial Improvement Needed	More Improvement Needed	Modest Improvement Needed	Little or No Improvement Needed
0-25%	26-50%	51-75%	76-100%
	38%		

Source: The Legislative Auditor's review of the Board's website as of February 26, 2014.

The Board's Website Scores Low in Both User-Friendliness and Transparency.

In order for citizens to engage with a board online, they should be able to gain access to the website and to comprehend the information posted there. A user-friendly website employs up-to-date software applications, is readable, well-organized and intuitive, provides a thorough description of the organization's role, displays contact information prominently and allow citizens to understand the organization of the board. Governmental websites should also include budget information and income sources to maintain transparency and the trust of citizens. The Legislative Auditor reviewed the Board's website for both user-friendliness and transparency. As illustrated in Table 8, the website scores low in both user-friendliness and transparency. **The Board should consider making website improvements to provide a better online experience for the public and its registrants.**

Table 8
Website Evaluation Score

Category	Possible Points	Agency Points	Percentage
User-Friendly	18	8	44%
Transparent	32	11	34%
Total	50	19	38%

Source: Legislative Auditor's review of the Board's website as of February 26, 2014.

The Board's Website Is Navigable But Needs Additional User-Friendly Features.

The Board's website readability is at the 9th grade reading level, which is close to standard criteria. A report published by the Brookings Institute determined that government website should be written at an 8th grade reading level to facilitate readability. Readable, plain language helps the public find information quickly, understand the information easily and use the information effectively. The Board's website has a search tool and help link displayed on every page, along with a site-map and FAQ section. Every page also has a navigation bar at the top of the page. These features allow website users to navigate the page, search for information they may need, and find answers to their questions.

The Board's website readability is at the 9th grade reading level, which is close to standard criteria.

User-Friendly Considerations

The following are attributes that could lead to a more user-friendly Board website:

- **Site Functionality** – The website should include buttons to adjust the font size, and the resizing of text should not distort site graphics and text.
- **Mobile Functionality** – The agency's website should be available in a mobile version and/or the agency has created mobile applications.
- **Feedback Options** – A page where users can voluntarily submit feedback about the website or particular section of the website.
- **Foreign language accessibility** – The website should contain a link to translate all pages into languages other than English.

The Board's website does not have elements such as the ability to change the size of text, the ability to access the website from a mobile friendly version, feedback options, a survey that allows users to evaluate the website, or the ability to post information to social media sources or follow the page using RSS feeds. The Board's website also does not allow users to translate pages into languages other than English. The absence of these elements lower the Board's overall user-friendliness score but are not necessarily essential for the Board to convey the Board's role and do not unduly impede the public from finding information.

The Board's Website Needs to Be More Transparent.

A website that is transparent will have elements such as email contact information, the location of the agency, the agency's phone number, as well as public records, budgetary data and performance measures. A transparent website will also allow for citizen engagement so that their government can make policies based on the information shared. The Website Criteria Checklist and Points System (see Appendix D) demonstrates that the Board's website has 10 of 32 core elements that are necessary for a general understanding of the Board.

The Board's home page has the Board's office email and physical address as well as its telephone number. Additionally, all board member names are on the homepage. This allows citizens to locate the information necessary to communicate with the Board. The Board also has pertinent public information on its website including enabling statute, governing rules and some information about disciplinary action it has taken. The Board website also has several years of meeting minutes.

Several other elements could be added to improve the website's transparency score.

Transparency Considerations

Several other elements could be added to improve the website's transparency score. The following are a few attributes that could be beneficial to the Board in increasing its transparency:

- **Location of Agency Headquarters** – The agency's contact page should include an embedded map that shows the agency's location.
- **Administrator's Biography** – A biography explaining the administrator(s) professional qualifications and experience.
- **Budget Data** – Budget data should be available at the checkbook level, ideally in a searchable database.

- **Agency Organizational Chart** – A narrative describing the agency organization should be included, preferably in a pictorial representation such as a hierarchy/organizational chart.
- **FOIA Information** – Information on how to submit a FOIA request, ideally with an online submission form.
- **Performance Measures/Outcomes** – A page linked to the homepage explain the agencies performance measures and outcomes
- **Website Updates** – The website should have a website update status on screen and ideally for every page.

While the Board has information on its website detailing the complaint process, users cannot submit a complaint online. The Board could also include information detailing the State privacy policy, the history of the Board, and contact information for all administrative officials and Board members. Based on the results of this website evaluation, the Legislative Auditor recommends that the Board make improvements to its website to increase user-friendliness and transparency.

While the Board has information on its website detailing the complaint process, users cannot submit a complaint online.

Conclusion

Overall, the Board’s website scores low in both user-friendliness and transparency. While users can find most needed information such as a list of registrants, meeting minutes, and contact information adding other elements would improve the website and make it more accessible for the public.

Recommendation

11. *The Legislative Auditor recommends that the Board of Examiners for Registered Professional Nurses make the suggested improvements to its website to increase user-friendliness and transparency.*

Appendix A Transmittal Letter

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

August 6, 2014

Laura Rhodes, Executive Director
West Virginia Board of Examiners for Registered Professional Nurses
101 Dee Drive, Suite 102
Charleston, WV 25311

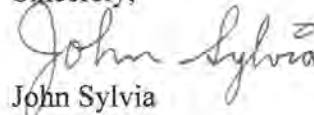
Dear Director Rhodes:

This is to transmit a draft copy of the Regulatory Board Review of the West Virginia Board of Examiners for Registered Professional Nurses. This report is scheduled to be presented on **Tuesday, August 26, 2014 at 9 a.m. in Ballroom A through D** during the 2014 interim meetings of the Joint Committee on Government Operations, and the Joint Committee on Government Organization at the **Bridgeport Conference Center in Bridgeport, West Virginia**. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committees may have.

We have scheduled an exit conference to discuss the report on Thursday, August 6, 2014 at 10 a.m. at the Board's office. In addition, we need your written response by noon on Thursday, August 14, 2014 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 304-340-3192 by Thursday, August 21, 2014 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,


John Sylvia

Enclosure

Joint Committee on Government and Finance

Appendix B

Objective, Scope and Methodology

The Performance Evaluation and Research Division (PERD) within the Office of the Legislative Auditor conducted this Regulatory Board Review of the West Virginia Board of Examiners for Registered Professional Nurses (Board) as required and authorized by the West Virginia Performance Review Act, Chapter 4, Article 10, of the *West Virginia Code (WVC)*, as amended. The purpose of the Board, as established in *West Virginia Code* §30-7, is to protect the public and be the regulatory and disciplinary body for registered professional nurses throughout the state.

Objectives

The objectives of this regulatory board review are to assess the Board's compliance with the general provisions of Chapter 30, Article 1, of the *West Virginia Code*; the Board's enabling statute (*WVC* §30-7-et al.); and the Board's handling of complaints. Finally, it is also the objective of the Legislative Auditor to assess the Board's website for user-friendliness and transparency.

Scope

The regulatory board review included an assessment of the Board's financial internal controls; policy and procedures regarding internal controls and complaints; meeting minutes; complaint files from fiscal years 2011 through 2013; complaint-resolution process; disciplinary procedures and actions; revenues and expenditures for the period of fiscal years 2011 through 2013; continuing education requirements and verification; the Board's compliance with the general statutory provisions (*WVC* §30-1-et al.) for regulatory boards and other applicable laws; and key features of the Board's website. A complaint was brought to the Legislative Auditor's attention from another audit that was two months outside of the 2011-2013 period. This complaint was included in the evaluation because of the close proximity to the audit period, its significance, and relevance to the issues raised in other complaints that were sampled.

Methodology

PERD gathered and analyzed several sources of information and conducted audit procedures to assess the sufficiency and appropriateness of the information used as audit evidence. The information gathered and audit procedures are described below.

Testimonial evidence was gathered for this review through interviews or discussions with the Board's staff and confirmed by written statements. PERD staff made several visits to the Board's office to review files and meet with board staff. PERD collected and analyzed the Board's meeting minutes; complaint data; budgetary information; annual reports; procedures for investigating and resolving complaints; continuing education; and procedures for collecting revenue and disbursing expenditures. Information was gathered from Ohio, Virginia, Pennsylvania, Kentucky, and Maryland's regulatory boards regarding their continuing education requirements and license fee structures.

The Legislative Auditor also tested the Board's expenditures for fiscal years 2011 through 2013 to assess risks of fraud on the expenditure side. The test involved determining if low-risk expenditures were at least 90 percent of total expenditures. Some low-risk expenditures include salaries, board-member compensation, office rent and utilities, printing and binding costs, rental equipment fees, and telecommunication costs.

Additionally, the Legislative Auditor also compared the Board's actual revenue to expected revenue in order to assess the risks of fraud, and to obtain reasonable assurance that revenue figures were sufficient and appropriate. Expected revenues were approximated by applying license fees to the number of licensees for the period of fiscal years 2011 through 2013.

In order to evaluate state agency websites, the Legislative Auditor conducted a literature review of government websites, reviewed top-ranked government websites, and reviewed the work of groups that rate government websites in order to establish a master list of essential website elements. The Brookings Institute's "2008 State and Federal E-Government in the United States," and the Rutgers University's 2008 "U.S. States E-Governance Survey (2008): An Assessment of State Websites," helped identify the top ranked states in regards to e-government. The Legislative Auditor identified three states (Indiana, Maine and Massachusetts) that were ranked in the top 10 in both studies and reviewed all 3 states' main portals for trends and common elements in transparency and open government. The Legislative Auditor also reviewed a 2010 report from the West Virginia Center on Budget and Policy that was useful in identifying a group of core elements from the master list that should be considered for state websites to increase their transparency and e-governance. It is understood that not every item listed in the master list is to be found in a department or agency website because of some of the technology may not be practical or useful for some state agencies. Therefore, the Legislative Auditor compared the Board's website to the established guidelines for user-friendliness and transparency so that the Board can determine if it is progressing in step with the e-government movement and if improvements to its website should be made.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix C Response from Purchasing Division



LEGISLATIVE

AUG 25 2014

EARL RAY TOMBLIN
GOVERNOR

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
2019 WASHINGTON STREET, EAST
P.O. BOX 50130
CHARLESTON, WEST VIRGINIA 25305-0130

MANAGER

ROSS TAYLOR
CABINET SECRETARY
DAVID TINCHER
DIRECTOR

August 25, 2014

Aaron Allred, Legislative Manager/Auditor
West Virginia Legislature
Building 1, Room E-132
1900 Kanawha Boulevard, East
Charleston, WV 25305

**Re: West Virginia Board of Examiners for Registered Professional Nurses
Claimed Exemption from Purchasing under W. Va. Code § 30-7E-3**

Dear Mr. Allred,

I have received your letter dated August 8, 2014. In that letter you reference a prior letter dated July 9, 2014 from Michael Midkiff. My office has obtained approval to submit a response to that letter and that response is enclosed with this response.

In your August 8 letter, you also state that one or more employees of the West Virginia Board of Examiners for Registered Professional Nurses ("Board") had a conversation with Guy Nisbet regarding the issue of its claimed exemption from the Purchasing Division. Guy Nisbet has no recollection of a conversation with any employee of the Board relating to its claimed exemption. I would also note that Guy Nisbet is not an attorney and would not be qualified to provide legal advice to the Board, particularly when the Board has its own counsel.

In response to the questions you have posed, please see below.

- 1. Has anyone employed by the Purchasing Division informed the Board that it was exempt from Purchasing Requirements or told the Board to make its own determination?**

To my knowledge, no one from the Purchasing Division has advised the Board that it was exempt from W. Va. Code 5A-3-1 et seq. or told the Board to make its own determination.

PHONE: (304) 558-2306
FAX: (304) 558-4115

www.state.wv.us/admin/purchase

E.E.O./AFFIRMATIVE ACTION EMPLOYER

In fact, the Purchasing Division is in the process of finalizing an inspection report that it believes highlights the expenditures in question as violating procurement law. More specifically, as part of its routine inspection plan, the Purchasing Division notified the Board on June 10, 2014 that the Board would be inspected. The Board was given until June 24, 2014, to provide the requested documentation. The document review continued until sometime after July 17, 2014, and as of August 8, the Purchasing Division has prepared a draft audit report for transmission to the Board for response. Page 17 of the draft report would notify the Board that its expenditures with Linda L. Smith & Associates (a vendor that our inspection found to be providing WV Restore Service) could be construed as stringing (a violation of W. Va. Code 5A-3-10(b)). In deference to your office's investigation, the Purchasing Division has not yet submitted the draft report to the agency for review. A copy of the draft report is enclosed with this letter.

2. Please provide documentation detailing what guidance the Purchasing Division supplied to the Board related to this contract.

See response to question 1 above.

3. In your opinion, is the Board exempt from purchasing requirements relating to its nurse health program as established in WVC § 30-7E-2?

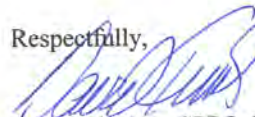
Please see the attached response to the July 9, 2014 letter.

4. Has the Board requested an exemption from purchasing requirements for this or any other program or procedure?

Not that I can recall.

If you have any further questions, please let me know.

Respectfully,



David Tincher, CPPO, Director
Purchasing Division



EARL RAY TOMBLIN
GOVERNOR

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
2019 WASHINGTON STREET, EAST
P.O. BOX 50130
CHARLESTON, WEST VIRGINIA 25305-0130

ROSS TAYLOR
CABINET SECRETARY
DAVID TINCHER
DIRECTOR

August 25, 2014

Marty Alston, Secretary II
West Virginia Board of Examiners for Registered Professional Nurses
101 Dee Drive, Suite 102
Charleston, WV 25311-1620

Dear Ms. Alston:

This is to transmit a copy of the Purchasing Review of the West Virginia Board of Examiners for Registered Professional Nurses.

Please review the attached report and reply with any comments by noon on September 8, 2014. Any findings of Stringing **must** be answered with an explanation, but in the absence of comments regarding other findings, we assume that you agree and will comply with the report recommendations. Your comments will become part of the final report, a copy of which will be mailed to you.

Should you have any questions or require further clarification, please contact me at 558-5780. Your cooperation is greatly appreciated

Respectfully,

A handwritten signature in black ink, appearing to read "Alan Cummings".

Alan Cummings
Contracts Manager

AC:cj

Enclosure

Cc: Laura Rhodes, Executive Director
West Virginia Board of Examiners for Registered Professional Nurses

PHONE: (304) 558-2306
FAX: (304) 558-4115

www.state.wv.us/admin/purchase

E.E.O./AFFIRMATIVE ACTION EMPLOYER

WV PURCHASING DIVISION INSPECTION REPORT

Boards and Commissions

*West Virginia Board of Examiners for Registered Professional
Nurses*

FISCAL YEAR
2013

Table of Contents

1. Inspection Report
2. Comparison With Prior Inspection
3. Inspection Report – Attachment A, Attachment B

INTRODUCTION

We conducted a review of the internal procurement policies and procedures of the West Virginia Board of Examiners for Registered Professional Nurses. Our review was conducted on June 25, 2014 and was made under the authority provided by West Virginia Code §5A-3-4(a) (5) and the Code of State Rules §148-1-4.16.

The review was directed principally to determine whether agency purchasing transactions for the period under review were, in all material respects, in compliance with statute, rules and procedures

Our review indicated that, for the period of July 1, 2012 through June 30, 2013, the agency processed 450 procurement transactions with a value of \$276,011.92 (These amounts are approximate, subject to reporting limitations from WVFIMS (including possible data entry error) and errors caused by elimination of duplicate results).

SCOPE

We conducted our review in accordance with applicable provisions of Code and Rule; the Purchasing Division's Procedures Handbook; and guidelines, procedures and processes that govern the purchasing process. Our review encompassed an analysis of the internal procurement operating procedures of the spending unit and its related policies to the extent we deemed necessary to formulate an opinion on the adequacy of the system to properly manage procurement transactions.

For the stated period, we selected a judgmental sample of procurement transactions for compliance testing and performed other procedures that we considered necessary to formulate this opinion. Specifically, the scope of our review included, but was not limited to, an examination of the following:

- (1) Proper award (lowest responsible bidder meeting specifications),
- (2) Use of Statewide Contracts,
- (3) Use of internal resources,
- (4) Proper bid documentation,
- (5) Verification of vendor registration,
- (6) Verification of Unemployment and Workers' Compensation,
- (7) Presence of signed notarized Affidavit,
- (8) Issuance of purchase order,
- (9) Fixed Asset transactions,
- (10) Certification of Non-Conflict,
- (11) Evidence of stringing, and
- (12) Attendance of Purchasing Division training conferences.

RESULTS OF REVIEW

Issue 1 (Three Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
06/01/13	Network Services	Advanced Technical Solutions LLC	\$3,107.50	I014686625

Summary:

Although the amount of the individual transaction listed above is \$3,107.50 and the aggregate amount was over \$7,000.00, the Agency Agreement with this vendor was for \$24,999.99.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

Issue 2 (Three Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
12/07/12	Computer Support	Devarakonda Nagakumar	\$3,605.00	I013839500

Summary:

Although the amount of the individual transaction listed above is \$3,605.00 and the aggregate amount was over \$5,000.00, the Agency Agreement with this vendor was for \$24,999.99.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

Issue 3 (Three Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
06/01/13	Disciplinary Review	Grimm Laura E	\$525.00	I014676932

Summary:

Although the amount of the individual transaction listed above is \$525.00 and the aggregate amount was over \$8,000.00, the Agency Agreement with this vendor was for \$24,999.00.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

Issue 4 (Three Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
06/01/13	WV Restore Program	Linda L Smith & Associates	\$3,124.88	I014676915

Summary:

Although the amount of the individual transaction listed above is \$3,124.88 and the aggregate amount was \$24,999.04, the Agency Agreement with this vendor was for \$24,999.99.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

Issue 5 (Four Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
08/08/12	Program Review	Alderman Pamela L	\$2,129.90	1013648444

Summary:

Although the amount of the individual transaction listed above is \$2,129.90, the Agency Agreement with this vendor was for \$24,999.99.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

- **Finding – D**

The listed file did not include the required purchasing "Affidavit."

- **Requirement**

See Attachment A, point #7 – Affidavit.

- **Recommendation**

We recommend maintaining purchasing files with all documentation including the Affidavit.

Issue 6 (Four Findings)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
02/28/13	Consulting	Spilman Thomas & Battle	\$8,000.00	I014381440

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

- **Finding – B**

The listed purchase did not include proof of coverage for either workers' compensation or unemployment compensation.

- **Requirement**

See Attachment A, point #6 – Workers' Compensation/Unemployment Compensation.

- **Recommendation**

We recommend verifying proof of workers' compensation and unemployment compensation coverage prior to award. Further, we recommend retaining this documentation with the purchasing file.

- **Finding – C**

The listed purchase did not include documentation showing that vendor registration had been verified.

- **Requirement**

See Attachment A, point #5 – Vendor Registration.

- **Recommendation**

We recommend verifying, prior to award, that successful bidders are registered with the Purchasing Division and retaining that documentation with the purchasing file.

- **Finding – D**

The listed file did not include the required Certification of Non-Conflict of Interest.

- **Requirement**

See Attachment A, point #12 – Certification of Non-Conflict of Interest.

- **Recommendation**

We recommend maintaining purchasing files with all documentation including the Certification of Non-Conflict of Interest (where applicable).

Issue 7 (One Finding)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
06/04/13	Background Check	Lexisnexis Risk Mgt	\$260.00	S00809711

Summary:

Although the individual transaction listed above falls below bid limits, the agency spent a total of \$3,120.00 in 11 transactions with this vendor during the fiscal year under review.

- **Finding – A**

Documentation showed no evidence of competitive bidding and no justification for a sole-source purchase.

- **Requirement**

See Attachment A, point #4 – Bid Documentation.

- **Recommendation**

We recommend maintaining purchasing files with all documentation, including, but not limited to: specifications used when making the purchase, listing of bids, all correspondence and any justification/explanation required for the transaction.

Issue 8 (One Finding)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
03/18/13	Server	Pomeroy IT Solutions	\$7,338.70	1014700968

- **Finding – A**

The listed equipment did not contain an asset number tag and/or was not added to the WVFIMS Fixed Asset System.

- **Requirement**

See Attachment A, point #10 – Asset Number Required.

- **Recommendation**

We recommend that all purchases of applicable equipment be tagged and added to the WVFIMS Fixed Asset System.

Issue 9 (One Finding)

<u>Date</u>	<u>Description</u>	<u>Vendor</u>	<u>Amount</u>	<u>Invoice</u>
01/31/13	WV Restore service	Linda L Smith & Associates	\$12,499.99	1015040310

Summary:

The year for this transaction was entered incorrectly by the agency. As a result, this transaction was pulled for our report. We reviewed this service even though it was processed during the 2014 fiscal year. Although the amount of the individual transaction listed above is \$12,499.99, the Contract for Services Agreement with this vendor is for \$123,541.00.

- **Finding – A**

The pattern of transactions and amount spent with this vendor during the fiscal year could be construed as stringing.

- **Requirement**

See Attachment A, point #1 – Stringing.

- **Recommendation**

1. We strongly recommend that the Agency monitor its ongoing purchases to avoid crossing delegated purchasing limits without applicable bids.
2. Abandon the claimed exemption for nurse health programs and process any additional contracts for nurse health programs in accordance with Purchasing Division procedure.

Additional note:

The Purchasing Division has learned that the Board of Registered Nurses views this purchase as exempt by virtue of WV Code §30-7E-3 which grants the Board "sole discretion to designate nurse health programs" More specifically, the Board's General Counsel provided an email to the Board taking this position. A copy of that email correspondence is attached as "Attachment B." The Purchasing Division does not agree with the Board's claimed exemption. The Purchasing Division's opinion is that an exemption requires either a direct reference to 5A-3 or clear language that the requirements of the Purchasing Division are inapplicable. Neither is apparent in

the exemption claimed by the Board, and the Purchasing Division does not agree that the phrase "sole discretion to designate" is sufficient to grant an exemption.

SUMMARY

This review of 27 selected transactions from an approximate 450 total transactions yielded 24 findings associated with 10 of the selected transactions. This indicates that approximately 37% of the transactions reviewed had one or more problems of potential nonconformity with Purchasing Division laws, rules and/or regulations.

It should be noted that the Board of Registered Nurses issued 5 agency agreements, each with a maximum spend amount limited to \$24,999.99. This amount falls just below the formal bid limit of \$25,000.01 as established by the Purchasing Division. Agency agreements are reviewed based the declared dollar amount and estimated value. As such, it is highly recommended that the agency follow the prescribed bid limit procedures as established by the Purchasing Division Handbook (See Attachment A) for the estimated dollar amount of the annual expenditure.

In November of 2012, the Purchasing Division conducted our annual purchasing conference for Agency procurement officers at Stonewall Resort. At this conference, attendees were offered the opportunity to attend 11 workshops focusing on more than 20 different topics.

Listed below, you will find the names of your Agency employees who participated in our conference and the number of classes they attended:

There were no attendees from Board of Examiners for Registered Professional Nurses.

Based on the findings contained in this report, we strongly suggest that the West Virginia Board of Examiners for Registered Professional Nurses comply with all recommendations and take appropriate action as required.

Inspection Report – Attachment A

Requirements from the West Virginia Purchasing Division Procedures Handbook (Issuance Date: August 4, 2010), the West Virginia Code, the West Virginia Code of State Rules (148 CSR 1) and the West Virginia State Travel Policy (September 1, 2010)

1. Stringing:

According to the Purchasing Division's Procedures Handbook, the definition for "stringing" is "issuing a series of requisitions or purchase orders to circumvent competitive bidding or to defeat the State purchasing card transaction or delegated purchasing limit."

The West Virginia Code, §5A-3-10 states:

- (a) A purchase of and contract for commodities, printing and services shall be based, whenever possible, on competitive bids.*
- (b) . . . No spending unit shall issue a series of requisitions or divide or plan procurements to circumvent this twenty-five thousand dollar threshold or otherwise avoid the use of sealed bids. Any spending unit which awards multiple contracts for the same or similar commodity or service to an individual vendor over any twelve-month period, the total value of which exceeds twenty-five thousand dollars, shall file copies of all contracts awarded to the vendor within the twelve preceding months with the director immediately upon exceeding the twenty-five thousand dollar limit, along with a statement explaining how the multiple contract awards do not circumvent the twenty-five thousand dollar threshold. If the spending unit does not immediately report to the director, the director may suspend the purchasing authority of the spending unit until the spending unit complies with the reporting requirement of this subsection. The director may conduct a review of any spending unit to ensure compliance with this subsection. Following a review, the director shall complete a report summarizing his or her findings and forward the report to the spending unit. In addition, the director shall report to the Joint Committee on Government and Finance on the first day of January and July of each year the spending units which have reported under this subsection and the findings of the director. . . .*

Additionally, the Legislative Rule §148-1 states that the Director shall:

4.18. Suspend or reduce purchasing authority for any spending unit that fails to report multiple contract awards that are deemed by the Director to circumvent the \$25,000 threshold within a twelve (12) month period. In the event of suspension or reduction of purchasing authority, the Director shall prescribe revised procedures and limits which may require all spending unit purchases, regardless of amount, be made by the Purchasing Division.

2. Statewide Contract Availability:

Section 4.6.2.1 of the Handbook states:

"No agency may be exempt from using statewide contracts without prior written approval from the Purchasing Director."

Section 6.1.1 of the Handbook states:

"Prior to seeking competitive bids, agencies must first check the following mandatory contracts or internal resources: statewide contract or agency open-end contract existing for the commodity or service. . ."

3. Internal Resources:

Section 6.1.1 of the Handbook states:

"Prior to seeking competitive bids, agencies must first check the following mandatory contracts or internal resources. . . Surplus Property, Correctional Industries and the West Virginia Association of Rehabilitation Facilities."

Section 4.6.1.2 of the Handbook states:

"In accordance with WEST VIRGINIA CODE, §28-5B-4, all offices, departments, institutions and agencies of the state. . .shall purchase. . .from the state commissioner of public institutions all articles or products required by such offices, departments, institutions, agencies. . .produced or manufactured by the state commissioner of public institutions by convict labor. . ."

Section 4.6.1.3 of the Handbook states:

"All state agencies are required by West Virginia Code, §5A-3-10, to purchase commodities and services from sheltered workshops whenever such commodities and services are available and meet certain quality and price standards which are comparable to open-market sources."

4. Bid Documentation:

Section 6.1.2 of the Handbook states:

"Purchases \$2,500.01 to \$5,000.00: A minimum of three (3) verbal bids are required, when possible, and must be present in the file. Bids shall be documented and recorded for public record."

Section 6.1.3 of the Handbook states:

"Purchases \$5,000.01 to \$25,000.00: A minimum of three (3) written bids are required, when possible . . . All bids must be present with the file."

"A Request for Quotation form, WV-43, or TEAM-Generated RFQ. . .should be used for documenting and making these requests. In all cases, state agencies must attempt to obtain at least three (3) written bids for a product or service. A "no bid" is not considered a bid."

5. Vendor Registration:

Section 6.2.3 of the Handbook states:

*"Prior to an award, a vendor must be in compliance with the following and the agency shall retain documentation in the file:
Vendor registration process (must be registered and the fee paid if applicable)."*

6. Workers' Compensation/Unemployment Compensation:

Section 6.2.3 of the Handbook states:

"Prior to an award, a vendor must be in compliance with the following and the agency shall retain documentation in the file:

*. . . In accordance with the **WEST VIRGINIA CODE, §21A-2-6, verification of current unemployment fee status and Workers Compensation coverage. . ."***

7. Affidavit:

Section 6.2.3 of the Handbook states:

"Prior to an award, a vendor must be in compliance with the following and the agency shall retain documentation in the file:

*. . . **Purchasing Affidavit (required on all contracts exceeding \$5,000);"***

8. Proper Award:

Section 6.2.3 of the Procedures Handbook states:

"After the evaluation of all bids by the agency personnel, an award is made to the lowest responsible bidder who meets the specifications. Generally defined, a responsible bidder is able to furnish the required needs of the organization as requested in the specifications.

If an award is made to other than the lowest bidder, a detailed justification as to why the lowest bidder was not considered "responsible" must be written and retained for public record and inspection. The justification must be signed by the evaluator(s) and retained as part of the bid file. . . . A public record of all purchasing transactions must be kept on file at the agency location, and subject to inspection at the discretion of the Purchasing Division.

[Emphasis supplied]

9. PO Issued:

Section 6.1.2 of the Handbook states:

"An Agency Purchase Order, WV-88, or TEAM-generated Purchase Order is required for purchases exceeding \$2,500.00. Awards are to be made only to vendors who are properly registered with the Purchasing Division."

Section 6.1.3 of the Handbook states (for purchases of \$5,000.01 to \$25,000.00):

"An Agency Purchase Order or TEAM-Generated Purchase Order is required."

10. Asset Number Required:

Section 6.5 of the Handbook states:

"After payment has been made to the vendor and the I-document and/or S-document numbers established, reportable property must be added to the WVFIMS Fixed Asset System".

11. Receiving:

Section 6.3 of the handbook states:

". . . materials must be opened and inspected within 24 hours of receipt. . . Agencies must verify the shipment against the specifications in the purchase order and retain a copy of the receiving report prepared for the Auditor's office with the purchasing file. For receipt of services, a receiving report similar in form to that required by the Auditor's office shall be completed, signed and retained with the purchasing file.

". . . spending units may include a memorandum to file in the purchasing file indicating the storage location of the receiving reports. The actual reports shall be produced on demand, in accordance with the Code of State Rules, §148-1-4-16."

R.6 (05/25/12)

Attachment A Page 5 of 6

12. Certificate of Non-Conflict of Interest:

Section 6.2.3 of the handbook states:

"A public record of all purchasing transactions must be kept on file at the agency location. . . This file must also include a Certificate of Non-Conflict of Interest. . ."

13. Travel:

Section 4.2.4.1 of the State Travel Policy states:

"Privately-owned vehicles may be used for state travel with agency approval when agency owned or leased vehicles are unavailable. A privately-owned vehicle should not be used when reimbursement costs are expected to exceed \$50.00 per day or mileage reimbursement is expected to cost more than the cost of commercial travel (air, rental car, etc.). Reimbursement will be made at the prevailing rate per mile established by the Travel Management Office, excluding normal daily commuting mileage, for actual miles traveled using the shortest predictable route to the point of arrival at the traveler's destination. This rate is intended to cover all operating costs of the vehicle (including fuel, maintenance, depreciation, insurance, etc.) and no additional reimbursement will be made."

Section 4.2.5.1 of the State Travel Policy states:

"A commercial rental vehicle should only be used when a temporary need arises, a state vehicle is unavailable, and the cost will be less than the reimbursement associated with a privately owned vehicle. Only the state employee renting the vehicle is permitted to operate the vehicle."

Attachment B

FY2014

REPORT ID: WVFA70U0 STATE OF WEST VIRGINIA 02/03/14
PAGE 1 FINANCIAL INFORMATION MANAGEMENT SYSTEM 16:39:09
OFFICE OF THE STATE AUDITOR

BASKET ESSENTIAL
INVOICE COVER SHEET

AUDITOR ENTRY ID: I 4 15040310
WVFIMS DOCUMENT ID: I 15040310

STATE ORGANIZATION: 0907
STATE ORGANIZATION NAME: REGISTERED NURSES BOARD OF
ORGANIZATION CONTACT: LAURA RHODES
ORGANIZATION ADDRESS: REGISTERED PROFESSIONAL NURSES
101 DEE DR STE 102
CHARLESTON WV 25311-1620

ORGANIZATION: 0907
ORGANIZATION NAME: REGISTERED NURSES BOARD OF

DATE PREPARED: 02/03/14
DOCUMENT AMOUNT: 12,499.99
VENDOR INVOICE NUMBER: 1024
AGENCY COMMITMENT:
AGENCY DOCUMENT:

SPECIAL AUTHORIZATION: 3
OPEN END CONTRACT NUMBER:
DUE DATE: 02/05/14
SPECIAL HANDLING: N
VENDOR NUMBER: 598202
VENDOR NAME: LINDA L SMITH & ASSOCIATES

VENDOR ADDRESS: 420 LOWER 36TH AVE S
JACKSONVILLE BEACH FL 32250-

CONTACT PERSON/PHONE: MARGARET E ALSTON 304-558-3596 EXT:
CASH ADVANCE: N BEGIN TRAVEL: / / END TRAVEL: / /

COMMENTS: MONTHLY COMPREHENSIVE MONITORING SERVICE
FOR WVRESTORE NURSE HEALTH PROGRAM AS
PER 30-7E-1 FOR JANUARY 2014

ELECTRONICALLY AUTHORIZED BY: MARGARET E ALSTON DATE: 2014-02-03
SEC II/ACCTG ASST II

APPROVED BY AUDITOR: _____ DATE: _____

FUND	FY	ORG	ACT	OBJ	GRANT	AMOUNT
9090	2014	0907	099	025		12,499.99
TOTAL INVOICE AMOUNT						12,499.99

Linda L. Smith and Associates

Mail payment to:
Linda L. Smith
420 Lower 36th Ave. South
Jacksonville Beach Florida 32250

Date:
1/14/2014

INVOICE #
1024

Salesperson	Job	Payment Terms	Due Date
		Due on receipt	

SERVICE	Description	Unit Price	Total
	One Months service January 1-January 31, 2014 Provided one month of comprehensive monitoring service to WV RESTORE		12,499.99

I hereby certify that the items listed hereon have been received and approved for payment.
 2/3/14 *[Signature]*
 Date Name

Subtotal	
TOTAL	\$12,499.99

CHAPTER 30. PROFESSIONS AND OCCUPATIONS.**ARTICLE 7E. NURSE HEALTH PROGRAMS. §30-7E-1. Definitions.**

For the purposes of this article, the following words and terms have the meanings ascribed to them, unless the context clearly indicates otherwise.

- (1) "Board" means the West Virginia Board of Examiners for Registered Professional Nurses.
- (2) "Major mental illness" means a diagnosis of a mental disorder within the axis of psychotic or affective or mood, alcohol or chemical abuse or alcohol or chemical dependency as stipulated in the International Code of Diagnosis.
- (3) "Nurse" means those health care professionals licensed by the West Virginia Board of Examiners for Registered Professional Nurses.
- (4) "Nurse health program" means a program meeting the requirements of this article.
- (5) "Qualifying illness" means the diagnosis of alcohol or substance abuse, alcohol or substance dependency or major mental illness.

§30-7E-2. Nurse health program.

(a) The board is authorized to designate one or more nurse health programs. To be eligible for designation by the board, a nurse health program shall:

- (1) Enter into an agreement with the board outlining specific requirements of the program;
- (2) Agree to make its services available to all licensed West Virginia registered professional nurses with a qualifying illness;
- (3) Provide for the education of nurses with respect to the recognition and treatment of alcohol, chemical dependency and mental illness and the availability of the nurse health program for qualifying illnesses;
- (4) Offer assistance to any person in referring a nurse for purposes of assessment or treatment or both for a qualifying illness;
- (5) Monitor the status of a nurse who enters treatment for a qualifying illness pursuant to a written, voluntary agreement during treatment;
- (6) Monitor the compliance of a nurse who enters into a written, voluntary agreement for a qualifying illness with the nurse health program setting forth a course for recovery;
- (7) Agree to accept referrals from the board to provide monitoring services pursuant to a board order; and
- (8) Include such other requirements as the board deems necessary.

(b) A designated nurse health program shall:

- (1) Set and collect reasonable fees, grants and donations for administration and services provided;
- (2) Work collaboratively with the board to develop model compliance agreements;
- (3) Work collaboratively with the board to identify qualified providers of services as may be needed by the individuals participating in the nurse health program;
- (4) Report to the board, no less than annually, statistics including the number of individuals served; the number of compliant individuals; the number of individuals who have successfully completed their agreement period; and the number of individuals reported to the board for suspected noncompliance. *Provided*, That in making such report the nurse health program shall not disclose any personally identifiable information relating to any nurse participating in a voluntary agreement as provided herein: *Provided, however*, That in the case of a nurse not in compliance with the requirements, full disclosure of information will be provided to the board.

(c) The fact that a nurse is participating in a designated nurse health program is confidential, as is all nurse patient information acquired, created or used by the nurse health program, and it shall remain confidential and may not be subject to discovery or subpoena in a civil case. The disclosure of participation and noncompliance to the board, as required by a compliance agreement, waives the confidentiality as to the board for disciplinary purposes.

(d) The nurse health program and all persons engaged in nurse health program activities are immune from civil liability and no civil action may be brought or maintained while the nurse health program and all persons engaged in nurse health program activities are acting in good faith and within the scope of their duties.

(e) The board is immune from civil liability and no civil action may be brought or maintained against the board or the state for an injury alleged to have been the result of the activities of the nurse health program or the board referral of an individual to the nurse health program when they are acting in good faith and within the scope of their duties. §30-7E-3. **Discretionary authority of boards to designate programs.**

The West Virginia Board of Examiners of Registered Professional Nurses has the sole discretion to designate nurse health programs for licensees of the board and no provision of this article may be construed to entitle any nurse to the creation or designation of a nurse health program for any individual qualifying illness or group of qualifying illnesses. *Note: WV Code updated with legislation passed through the 2012 1st Special Session*

Contract for Services

This contract for services made effective September 1, 2013, is by and between the West Virginia Board of Examiners for Registered Professional Nurses (hereinafter, "Board") of 101 Dee Drive, Suite 102, Charleston, WV 25311 and Florida IPN (hereinafter, "IPN") of PO Box 49130, Jacksonville Beach, Florida, 32250-9130.

DESCRIPTION OF SERVICES

Beginning on September 1, 2013 and ending June 30, 2014, IPN shall maintain, administer and support West Virginia Restore, a monitoring program for nurses for the agreed Budget of \$123,541.00. IPN will invoice the Board in equal amounts monthly.

Specifically, IPN agrees to provide the following services:

1. Answer a designated phone lines, both direct line and 800 number, for individuals calling for information regarding WV Restore. The phone will be from 8:00 AM – 4:00 PM EST Monday through Friday. It is not answered on holidays or weekends. This time frame may be expanded if it falls within the confines of the current contract as determined by both parties.
2. Use the designated phone number, e-mail address and mailing address for WV Restore until and unless a different arrangement is agreed upon by both parties.
3. Implement the policies, procedures, guidelines and practices in place for the Florida Intervention Program for Nurses, these guidelines were adopted by the Board during its meeting in October 2012. This will include, but is not limited to, walking the licensee through the expectations, paperwork, providing information regarding treatment resources, facilitate the initial evaluation of the licensee, monitor whether or not the nurse has set up the appointment as required, review the evaluation including safety to practice, prepare the contract, identify non-compliance, re-direct the licensee according to program requirements, immediately report to the Board any licensee failing to follow the requirements, and quarterly program Performance Measures and Standards Reporting.
4. Communicate as needed and provide a quarterly report to Dr. Robin A. Lewis, EdD, Associate Director and Program Consultant for WV Restore to include the number of participants, review and progress with the program, identifying and addressing any issues that arise as the relationship is developing. Additionally, will provide quarterly program Contact Reports that include contact information (i.e. pending, sent information, enrolled, completed, reported to the board), demographic data (i.e., specialty area upon contact with the program, substance of choice, Geographic area county and state, Axis I Diagnosis). Furthermore, will provide quarterly program Performance Measures and Standards reports that include confidentiality releases executed, non-compliant intakes reported to the Board within 10 days, non-compliant contracted participates referred to Board

within 1 business day, contracted participants that successfully complete the program, program completers complete exit survey within 60-90 days, completers give program positive approval rating, WVR impaired referrals offered an evaluation within 10 days, positive UDS reviewed within 24 hours of receipt of report, contracted participants required to attend a facilitated group that are in compliance, psychiatric reports received and reviewed within 7 days, checkups reviewed within 7 days, and grievances submitted and addressed within 30 days.

5. Communicate with licensees, counselors and treatment facilities regarding submission of electronic reports and assist with this transition.
6. Notify the Board when a license is non-compliant, by sending a copy of the letter dismissing the licensee from WV Restore.
7. Provide the Board with the IPN policies, procedures and educational resources as developed and updated.
8. Review e-mails in wvrestore@wvrestore.org every business day for notification of licensees being referred to the program and subsequently notify the Board of any candidate not following through on contacting WV Restore.
9. Assist Board staff in being oriented to the Affinity System, obtaining login, password, and identifying user responsibilities.
10. Provide Peer Facilitator orientation and access to Affinity and other available resources.
11. Purchase all needed stationary and office supplies.
12. Assure collection of required fees and transfer of fees to the Board.
13. Provide an Education Program in West Virginia for Peer Facilitators and the nursing community by June 30, 2014.
14. Participate in Peer Facilitator orientation sessions as available.
15. Participate in weekly phone meetings with a member of the Board staff to provide an update on the status of nurses referred to IPN and any related issues. Specifically, those who have not contacted IPN.

The Board agrees to provide the following services:

1. Have personnel available in the Board office for communications specific to this program. The Program Consultant is Dr. Robin Lewis, EdD, MSN, RN, Associate Director, the assistant is Marty Alston, Executive Assistant. Legal questions will be routed to the Board's legal counsel, Alice R. Faucett.

2. Provide copies of documents related to current and pending participants and any future participants to IPN within 2 business days or sooner. This will include performance measures and all current data.
3. Provide all current documents for WV Restore and access to the WV Restore e-mail and web site (web site in development).
4. Provide documentation to IPN for any candidate referred back to the Board from IPN and then Board ordered to IPN.
5. Send an e-mail to WV Restore with notification of any licensee sent information regarding WV Restore.
6. Orient to the Affinity System and review information as needed for program success.
7. Perform site visits of Peer Facilitated Meetings and share the evaluation with IPN.
8. Provide Peer Facilitator Orientation and share information with IPN.
9. Upon receipt of a copy of the letter dismissing the licensee from WV Restore, the Board will update the license status of the nurse.

Both the Board and IPN agree to maintain open communication and dialogue relative to issues involving the fulfillment of this contract and agree that if an issue arises that is not covered in the above responsibilities, the parties will work together to mutually determine who is responsible for the service.

Agreed to by:

Linda L Smith
Florida, IPN

9/1/13

and

Saura Annina Rhodes

9/1/13

WV-96
Rev. 9/11

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES** - Any references in the agreement to arbitration or to the jurisdiction of any court are hereby deleted. Disputes arising out of the agreement shall be presented to the West Virginia Court of Claims.
2. **HOLD HARMLESS** - Any provision requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** - The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a State entity, the Agency is exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.
5. **PAYMENT** - Any references to prepayment are deleted. Payment will be in arrears.
6. **INTEREST** - Any provision for interest or charges on late payments is deleted. The Agency has no statutory authority to pay interest or late fees.
7. **NO WAIVER** - Any language in the agreement requiring the Agency to waive any rights, claims or defenses is hereby deleted.
8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **FEES OR COSTS** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to another State of West Virginia agency, board or commission upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** - The Agency, as a State entity, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services rendered or goods received prior to the effective date of termination.
15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** - Any reference to automatic renewal is deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** - Any provision requiring the Agency to purchase insurance for Vendor's property is deleted. The State of West Virginia is insured through the Board of Risk and Insurance Management, and will provide a certificate of property insurance upon request.
18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** - Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.
20. **CONFIDENTIALITY** - Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. State contracts are public records under the West Virginia Freedom of Information Act.
21. **AMENDMENTS** - All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Purchasing Division and the Attorney General.

ACCEPTED BY:

STATE OF WEST VIRGINIA

Spending Unit: WVRN Board
 Signed: Jane Skidmore Rhodes
 Title: Executive Director
 Date: 9.1.13

VENDOR

Company Name: Florida IPN
 Signed: L L Smith
 Title: CEO
 Date: 9/1/13

Alston, Margaret E

From: Faucett, Alice R
Sent: Wednesday, May 07, 2014 4:34 PM
To: Alston, Margaret E
Subject: FW: Nurse Health Program

From: Faucett, Alice R
Sent: Friday, June 14, 2013 12:36 PM
To: Rhodes, Laura S
Cc: Alston, Margaret E
Subject: Nurse Health Program

Dear Laura and Marty,

I have reviewed WV Code §§ 30-7E-2 and 30-7E-3 g, as well as the purchasing legislative rule, series 148, and I find that pursuant to Title 148, the WV Board of Nursing is statutorily exempted from the purchasing requirements contained in said rule in that WV Code §30-7E-3 grants it "sole discretion" to designate a nurse health program.

Alice R. Faucett
General Counsel

Appendix D

WV Legislative Legal Opinion

INTER

LEGISLATIVE
SERVICES

MEMO

OFFICE

To: John Sylvia, Director, Performance Evaluation and Research Division
From: Sarah Rogers, Counsel, Legislative Services
Subject: Legal Opinion – Board of Registered Professional Nurses Proposed Change to State Rules
Date: August 13, 2014

On July 30, 2014, you requested a legal opinion regarding a proposal by the Board of Registered Professional Nurses to redefine the term “Complaint” in West Virginia Code of State Rules § 19-9-1, et seq. Below is a brief legal analysis of the Board’s proposed rule change, based upon the facts that you provided.

I. QUESTION PRESENTED

Is the Board’s proposed rule change, as written, contrary to the legislative intent of West Virginia Code § 30-1-5(c) or the Board’s legislative rules?

II. BRIEF ANSWER

Yes, the Board’s proposed rule change is contrary to legislative intent. The proposal to redefine “Complaint” would allow the Board to evade the clear mandates of West Virginia Code § 30-1-5(c), which requires professional boards to investigate all complaints regarding professional misconduct within a certain timeline. By redefining “Complaint” to include only those statements that are “deemed sufficient in fact and in jurisdiction” upon initial review, the Board attempts to avoid its statutory duty to investigate and respond to all reports of professional misconduct. The Board does not have the authority to alter its statutory duties through a procedural rule change.

III. FACTS

The Board of Registered Professional Nurses (the Board) is the state agency in West Virginia responsible for regulating the industry of registered nursing, pursuant to the authority set out in West Virginia Code § 30-7-1, et seq. Among other things, § 30-7-1 requires the Board to promulgate agency rules regarding licensure, education, and discipline of registered nurses (licensees). Like all agencies that are not specifically exempted, West Virginia Code § 30-1-5(c) requires the Board to “investigate and resolve complaints which it receives” and send a status report to the complainant within “six months of the complaint being filed.” To carry out these

duties, the Board has promulgated procedural rules (the Rules) detailing the process by which the Board investigates complaints of misconduct by licensees and responds to individuals filing such complaints. See W. Va. CSR § 19-9-3.

a. The Current Procedure for Processing Complaints

Currently, the Rules define “Complaint” as “any written, verbal, or other communication with the board or its representatives which indicates or tends to indicate that a licensee is acting or has acted in violation of §§30-7-1, et seq. or 30-15-1, et seq., or the rules governing the practice of registered professional nursing.” W. Va. CSR § 19-9-2.1.b. The current Rules require the Board to respond to all complainants by letter, informing them that: (1) their allegations are being reviewed, (2) their allegations are beyond the jurisdiction of the Board, or (3) more information is required to investigate the complaint. W. Va. CSR § 19-9-3.7. The Board sends the licensee that is the subject of the complaint notice and a copy of the complaint. W. Va. CSR § 19-9-3.8. The licensee must respond to the complaint within 14 days. *Id.* The Board keeps detailed records of the disposition of all complaints. W. Va. CSR § 19-9-3.4.

b. The Proposed Change to the Procedural Rules Regarding Complaint Processing

Recently, the Board submitted a proposal for a procedural rule change to the Secretary of State’s Office which alters the current definition of “Complaint” and adds the term “statement of allegation” to the Rules. The new term, “statement of allegation,” is defined as “a written assertion filed with the Board by a party against a licensee or applicant.” The proposed rules redefine “Complaint” as “a statement of allegation that is deemed sufficient in fact and jurisdiction tending to support a violation of §§30-7-1 et seq. or 30-15-1 et seq., or rules governing the practice of registered professional nursing.”

By labeling certain reports of misconduct “statements of allegation” rather than “Complaints,” the Board attempts to exclude reports that have traditionally been classified as “Complaints” from its investigatory process. For example, the current Rules require the Board to send every complainant an acknowledgement letter, notifying them of their complaint status and later, the disposition of their complaint. According to the proposed rules, the Board will no longer be required to respond to or even acknowledge a report of misconduct if, upon initial review, the report is labeled a “statement of allegation” rather than a “Complaint.” Additionally, there is no requirement in the proposed rules that a “statement of allegation” be included in the log of Complaints that the Board maintains for public review. In sum, once a report of misconduct is classified as a “statement of allegation,” the Rules do not require to Board to investigate or review the claim further, communicate with either the licensee or complainant regarding the allegations, or even make a record of the report.

IV. LEGAL ANALYSIS

The Board’s proposed rule change is contrary to legislative intent and violates the West Virginia Administrative Procedures Act. As explained in detail below, the proposed rule attempts to evade statutory mandates by redefining an ordinary term and in doing so, the Board redefines the rights, privileges and interests of individuals reporting licensee misconduct.

a. The Plain Meaning of Complaint

The courts have explained that “Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency’s] Rules and Regulations that it has in the statute.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 588 (W. Va. 1995); *Ranger Fuel Corp. v. West Virginia Human Rights Commission*, 180 W. Va. 260 (1988) (internal citations omitted). Where language has a plain and obvious meaning, courts will not engage in statutory construction to guess at what the legislature intended in passing a law. See e.g. *Appalachian Power*, 195 W. Va. at 588 (“If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed”).

In *In Re Snuffer*, the Court considered the statutory term “for cause,” in the context of when the State Division of Natural Resources could revoke an individual’s fishing or hunting license. 193 W. Va. 412, 414 (W. Va. 1995). The plaintiff challenged the Division’s revocation of his hunting and fishing license “for cause,” after he had repeatedly violated laws regulating when hunting and fishing could take place within the State. The plaintiff argued that the term “for cause” was vague and gave the Director too much discretion. The court rejected this theory, explaining that the term’s ordinary meaning—“good cause”—was obvious in light of the legislature’s intent to regulate hunting and fishing practices “in a manner which comports with the public policy underlying the management of wildlife resources [. . .] to preserve our wildlife.” *Id* at 415, 456.

Likewise, the term “complaint” has a plain and obvious meaning in the West Virginia Code, which is not subject to agency interpretation. The Merriam Webster Dictionary defines “complaint” in the administrative procedures context as “a formal allegation against a party.” “Complaint.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 11 Aug. 2014. <<http://www.merriam-webster.com/dictionary/complaint>>. The purpose behind the requirement for a complaint review process is to “protect the public.” W.V. Code § 30-1-1a. Other state agencies, charged with regulating medical professions, do not even provide a definition of “complaint” in their rules, but do require that their Boards formally respond to every allegation of misconduct.¹

In accordance with other professional boards, the Board’s current rules reflect the ordinary and common meaning of complaint. Currently, the rules define a “complaint” as “any written, verbal, or other communication with the board or its representatives which indicates or tends to indicate that a licensee is acting or has acted in violation of W. Va. Code §§30-7-1 et seq. or 30-15-1 et seq., or rules governing the practice of registered professional nursing.” W. Va. CSR § 19-9-2. This definition has been in place ever since the procedural rules for the complaint

¹ The following State Rules pertain to Administrative Complaint procedures for other medical professions: W. Va. CSR § 10-1-2; 10-2-1 et seq. (Practical Nurses); W. Va. CSR § 4-5-3 (Chiropractors); W. Va. CSR § 17-4-1 et seq. (Psychologists); W. Va. CSR § 11-3-1 et seq. (Doctors of Medicine); W. Va. CSR § 24-6-1 et seq. (Doctors of Osteopathic Medicine); W. Va. CSR § 5-5-1, et seq. (Dentists); W. Va. CSR § 26-2-1 et seq. (Veterinarians); W. Va. CSR § 15-1-2; 15-9-1 et seq. (Pharmacists); W. Va. CSR § 14-4-1 et seq. (Optometrists); W. Va. CSR § 30-5-1 et seq. (Respiratory Practitioners).

review process were promulgated, and it mirrors the interpretation of at least ten² other boards of medical professions in the state. “Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” (Citations omitted). *Appalachian Power Co.*, 195 W. Va. at 588; *West Va. Dep’t of Health v. Blankenship*, 189 W. Va. 342 (1993); *Boley v. Miller*, 187 W. Va. 242 (1992); *Blennerhassett Historical Park v. Public Serv. Comm’n of W. Va.*, 179 W. Va. 250 (1988). The Board has already interpreted “Complaint” in accordance with its ordinary and common meaning, thus, a change to the word’s definition in the Rules marks an intentional departure from the meaning that the legislature and agency has traditionally ascribed.

b. Statutory Requirements for Complaints: Time Frame and Response

The Board’s proposal to redefine “Complaint” in conflict with its plain meaning in the Code is problematic, because the resulting process will violate West Virginia Code § 30-1-5(c). This section of the Code sets out the specific requirements that apply to the complaint review process for all professional boards in the state. According to the Code, every professional board:

[. . .] has a duty to investigate and resolve complaints which it receives and shall, within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and within one year of the status report’s return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.

W.V. Code § 30-1-5(c). The board must also “provide public access to the record of the disposition of the complaints which it receives [. . .].” W.V. Code § 30-1-5(d).

According to the proposed Rules, if a report of misconduct is deemed factually insufficient upon an initial review and labeled a “statement of allegation” rather than a “Complaint,” the Board will not investigate the matter further and will not even notify the filing party of its decision. In addition, the proposed rules do not require that a “statement of allegation” be entered into the Board’s log of complaints for public review. Thus, the proposed rules will put the complaint review process in violation of the statutory mandate that the Board notify complainants of the status and disposition of their complaint, as well as the requirement that the Board keep a formal record of complaint disposition for public review. See W.V. Code § 30-1-5.

c. The Administrative Procedures Act: The Board Cannot Alter Statutory Requirements through Procedural Rules

Because the Board’s proposed change to its procedural rules are contrary to statutory authority and affect the rights, privileges and interests of complaints, the Board will violate the Administrative Procedures Act if the proposed rules are promulgated. The Administrative Procedures Act defines executive rule-making authority in West Virginia and enumerates the three types of rules that agencies may promulgate. The three types of rules—legislative rules, interpretive rules, and procedural rules—have different levels of authority based on their purpose and the manner by which they are promulgated.

² Id.

The Supreme Court of Appeals of West Virginia has explained that while, [i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions [. . .] an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority. *Hornbeck v. Caplinger*, 227 W. Va. 611, 615 (W. Va. 2011); *Rowe v. West Virginia Department of Corrections*, 170 W.Va. 230, Syl. Pt. 329 (1982). However, one type of rule—the legislative rule—has the authority to be “determinative on any issue affecting private rights, privileges or interests.” W.Va. Code § 29A-1-2(d); *See State ex rel. Kincaid v. Parsons*, 191 W.Va. 608, 610, 447 S.E.2d 543, 545 (1994) (viewing express legislative authorization of rule promulgating authority as indicative of legislative characterization of regional jail’s rule banning tobacco use). Legislative rules are presumed to accurately reflect legislative intent, because legislative rules are promulgated by an official Act of the legislature itself. W.Va. Code § 2A-3-9.

On the other hand, interpretive and procedural rules are promulgated without an official Act of the Legislature and are therefore less authoritative than legislative rules. In order to promulgate an interpretive or procedural rule, an agency must file a proposed rule in the State Register along with the text of the proposed rule. W.Va. Code § 29A-3-4. The agency must also file a copy of the proposed rule with the Secretary of State, along with a date, time and place for receipt of public comment on the proposed rule. W.Va. Code § 29A-3-5. Within 6 months after the close of public comment, the agency must decide whether to adopt the new rule and file a notice of withdrawal or adoption of the rule with the State Register. W.Va. Code § 29A-3-8. To amend a procedural or interpretive rule, an agency must simply file the proposed rule change with the State Register, and the rule will become effective on a date specified in the rule or within thirty days after the filing, whichever is later. *Id.*

Because interpretive and procedural rules are not promulgated by an Act of the legislature, they are much more limited in permissible scope and authority than legislative rules. A “procedural rule” is defined as a rule “which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency.” W.Va. Code § 29A-1-2(g). The courts have made clear that agencies may not promulgate interpretive or procedural rules “affecting private rights, privileges or interests.” *State ex rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 6 (W. Va. 2002) (overruled on other grounds); *West Va. Chiropractic Soc’y v. Merritt*, 178 W. Va. 173, 176 (W. Va. 1987). When an agency exceeds its authority and attempts to enforce procedural or interpretive rules affecting “private rights privileges or interests,” a court may issue a writ of mandamus to enjoin the agency’s enforcement of the rule.

For example, in *Ohio Valley Envtl. Coalition v. Elk Run Coal Co.*, 2014 U.S. Dist. LEXIS 75814 (S.D. W. Va. 2014), a federal court considered a citizen lawsuit against a company that discharged harmful substances into a stream in West Virginia. In determining whether the company had violated West Virginia’s Water Pollution Control Act, the plaintiffs presented evidence of the stream’s pollution level on the West Virginia Stream Condition Index (WVSCI), developed by the Department of Environmental Protection (WVDEP) to measure stream pollution based on six biological metrics. *Id.* at 12. The Code required the agency to promulgate rules measuring compliance with the Water Pollution Control Act based on “the holistic health of

the aquatic ecosystem” and a determination that the stream supported an adequately balanced and varied aquatic life. *Id.* at 22-23 (*quoting* W. Va. Code § 22-11-7b).

The WVDEP had traditionally used the WVSCI scale to measure compliance with the Water Pollution Control Act. *Id.* at 25. However, before the suit, the WVDEP promulgated an interpretive rule stating that a determination that the Water Pollution Control Act had been violated could not be based on the WVSCI scale alone. *Id.* The court rejected the agency’s Rule in making its own determination, explaining that:

To the extent that the WVDEP purports to redefine the methodology used to find a violation of the biological standard in subsection 3.2.i to include a "holistic approach to ecosystem assessment," which is wholly undefined except that it requires something more than solely obtaining a WVSCI score, the Court does not find such a redefinition persuasive or, indeed, even permissible.

Id. at 39.

Similarly, the Board of nursing cannot redefine a term in its procedural rules in order to modify its statutory duties. The Board’s procedural rules may only further the purpose of statutes that grant the Board rulemaking authority and may not attempt to alter the statutory rights, privileges and interests of complainants. Discounting a portion of complaints filed with the Board as “statements of allegation” and failing to follow the statutory mandates regarding notice, investigation, and record-keeping clearly affects the private rights, privileges and interests of complainants.

V. CONCLUSION

While the Board may wish for greater efficiency in reviewing complaints, it cannot adopt procedures that violate statutory requirements. Currently, the Rules require the Board to respond to all complainants by letter, informing them that: (1) their allegations are being reviewed, (2) their allegations are beyond the jurisdiction of the Board, or (3) more information is required to investigate the complaint. W. Va. CSR § 19-9-3.7. This process allows the Board to quickly dispose of complaints outside of its jurisdiction, but also give complainants the opportunity to provide additional information if their initial complaints are valid, yet lack all of the necessary facts necessary for investigation. The Board should continue to respond to all complainants within the legally required time limits, investigate all complaints indicating misconduct by a licensee, and keep records on the disposition of all complaints. Any procedural rule change that skirts these statutory duties is unlawful and susceptible to a legal challenge.

Appendix E

Website Criteria Checklist and Points System

Board of Examiners for Registered Professional Nurses			
User-Friendly	Description	Total Points Possible	Total Agency Points
Criteria	The ease of navigation from page to page along with the usefulness of the website.	18	8
		Individual Points Possible	Individual Agency Points
Search Tool	The website should contain a search box (1), preferably on every page (1).	2 points	2 points
Help Link	There should be a link that allows users to access a FAQ section (1) and agency contact information (1) on a single page. The link's text does not have to contain the word help, but it should contain language that clearly indicates that the user can find assistance by clicking the link (i.e. "How do I...", "Questions?" or "Need assistance?")	2 points	2 points
Foreign language accessibility	A link to translate all webpages into languages other than English.	1 point	0 points
Content Readability	The website should be written on a 6 th -7 th grade reading level. The Flesch-Kincaid Test is widely used by Federal and State agencies to measure readability.	No points, see narrative	
Site Functionality	The website should use sans serif fonts (1), the website should include buttons to adjust the font size (1), and resizing of text should not distort site graphics or text (1).	3 points	0 points
Site Map	A list of pages contained in a website that can be accessed by web crawlers and users. The Site Map acts as an index of the entire website and a link to the department's entire site should be located on the bottom of every page.	1 point	1 point
Mobile Functionality	The agency's website is available in a mobile version (1) and/or the agency has created mobile applications (apps) (1).	2 points	0 points
Navigation	Every page should be linked to the agency's homepage (1) and should have a navigation bar at the top of every page (1).	2 points	2 points

Board of Examiners for Registered Professional Nurses			
FAQ Section	A page that lists the agency's most frequent asked questions and responses.	1 point	1 point
Feedback Options	A page where users can voluntarily submit feedback about the website or particular section of the website.	1 point	0 points
Online survey/poll	A short survey that pops up and requests users to evaluate the website.	1 point	0 points
Social Media Links	The website should contain buttons that allow users to post an agency's content to social media pages such as Facebook and Twitter.	1 point	0 points
RSS Feeds	RSS stands for "Really Simple Syndication" and allows subscribers to receive regularly updated work (i.e. blog posts, news stories, audio/video, etc.) in a standardized format.	1 point	0 points
Transparency	Description	Total Points Possible	Total Agency Points
Criteria	A website which promotes accountability and provides information for citizens about what the agency is doing. It encourages public participation while also utilizing tools and methods to collaborate across all levels of government.	32	11
		Individual Points Possible	Individual Agency Points
Email	General website contact.	1 point	1 point
Physical Address	General address of state agency.	1 point	1 point
Phone Number	Correct phone number of state agency.	1 point	1 point
Location of Agency Headquarters	The agency's contact page should include an embedded map that shows the agency's location.	1 point	0 points
Administrative officials	Names (1) and contact information (1) of administrative officials.	2 points	1 point
Administrator(s) biography	A biography explaining the administrator(s) professional qualifications and experience.	1 point	0 points
Privacy policy	A clear explanation of the agency/state's online privacy policy.	1 point	0 points

Board of Examiners for Registered Professional Nurses			
Public Records	<p>The website should contain all applicable public records relating to the agency's function. If the website contains more than one of the following criteria the agency will receive two points:</p> <ul style="list-style-type: none"> • Statutes • Rules and/or regulations • Contracts • Permits/licenseses • Audits • Violations/disciplinary actions • Meeting Minutes • Grants 	2 points	2 points
Complaint form	A specific page that contains a form to file a complaint (1), preferably an online form (1).	2 points	1 point
Budget	Budget data is available (1) at the checkbook level (1), ideally in a searchable database (1).	3 points	0 points
Mission statement	The agency's mission statement should be located on the homepage.	1 point	1 point
Calendar of events	Information on events, meetings, etc. (1) ideally imbedded using a calendar program (1).	2 points	1 point
e-Publications	Agency publications should be online (1) and downloadable (1).	2 points	2 points
Agency Organizational Chart	Anarrativedescribingtheagencyorganization (1), preferably in a pictorial representation such as a hierarchy/organizational chart (1).	2 points	0 points
Graphic capabilities	Allows users to access relevant graphics such as maps, diagrams, etc.	1 point	0 points
Audio/video features	Allows users to access and download relevant audio and video content.	1 point	0 points
FOIA information	Information on how to submit a FOIA request (1), ideally with an online submission form (1).	2 points	0 points

Board of Examiners for Registered Professional Nurses			
Performance measures/ outcomes	A page linked to the homepage explaining the agencies performance measures and outcomes.	1 point	0 points
Agency history	The agency's website should include a page explaining how the agency was created, what it has done, and how, if applicable, has its mission changed over time.	1 point	0 points
Website updates	The website should have a website update status on screen (1) and ideally for every page (1).	2 points	0 points
Job Postings/links to Personnel Division website	The agency should have a section on homepage for open job postings (1) and a link to the application page Personnel Division (1).	2 points	0 points

Appendix F Agency Response

Laura S. Rhodes, M.S.N., R.N.
Executive Director

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TELEPHONE:

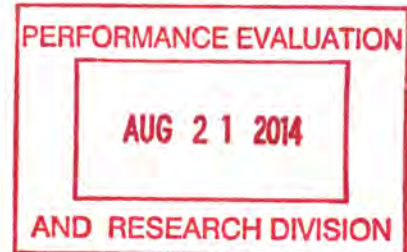
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STATE OF WEST VIRGINIA
BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES
101 Dee Drive, Suite 102
Charleston, WV 25311-1620

August 20, 2014

Mr. John Sylvia
WV Legislature PERD
Building 1, Room W-314
1900 Kanawha Blvd., E.
Charleston, WV 25305



Dear Mr. Sylvia:

The Board is in receipt of the draft copy of the Performance Review dated August 5, 2014. We appreciate your willingness and availability to have the exit interview on August 6, 2014, and modifying the report in several, but not all, areas about which the Board had concern. The Board daily operates in a manner that includes following laws, rules, policies and procedures finding this is the only way to prepare for an audit of this magnitude.

The Board appreciates the opportunity to review its processes and implement changes to improve them to further enhance its more than 106 years of successful public protection. As such, the Board agrees with most of the findings of the report, yet disputes several sections, and finds factual errors in the report, some of which could not be confirmed until we received the names related to the cases represented in the report, which was after 4:00 P.M. August 15, 2014, after the exit interview.

The Board agrees it is needed for Public Safety. The Board agrees it complies with the general provisions of Chapter 30 with a few incidents of exceptions. The Board agrees it is financially self-sufficient, that its internal controls are sufficient, and the risk of fraud is very low. The Board agrees it has established continuing education requirements and enforces them; and, that it routinely and effectively regulates schools of nursing. The Board agrees that stronger language in Chapter 30 would enhance its ability to take action against licensee's who fail to respond in a timely fashion, yet recognizes that taking a person's livelihood requires great discretion in the absence of verifying an immediate threat to public safety. The Board follows national standards in relation to monitoring the licenses of individuals enrolled in WV Restore, the Board's monitoring and recovery program for registered nurses. The Board agrees that additional staff may be helpful in managing the workload related to 30,000 licensees who may have multiple licenses and privileges, and Dialysis Technicians. The Board agrees that the requirement of a Notary on complaint forms can be removed as the Board accepts complaints that are not notarized.

Page 2

PERD Response

We agree there are functions in which we can improve and are already in the process of taking steps towards doing so. Specifically, for FY2013 we implemented changes in the discipline process whereby the completion time of all resolved cases to date in FY2013 is less than 18 months. There are 44 pending cases. We continue to make every effort to sustain this completion timeline and implement related legal requirements. (Recommendation 3, 4, 5, and 6).

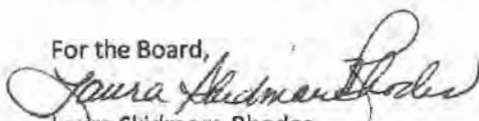
The Board is on the schedule to work with the National Council of State Boards of Nursing to implement a new regulatory office management system which will enhance the effectiveness of the Board in terms of licensure processes, tracking of disciplinary cases, and customer service to licensees and others. The Board has already established a new web site (Recommendation 11) which is awaiting transfer of information from the current site to the new site. Now that funding is consistently available, the Board is moving forward with hiring additional staff, one for Information Technology. This new position will be valuable to the Board in continuing to move forward with the process to begin scanning documents. This will enhance record keeping and foster the goal of "less paper" in relation to our work (Recommendation 10). The Board will evaluate its ability to sustain another Nurse Investigator and move forward with garnering approval for this position (Recommendation 8).

The Board does not agree with the interpretation of the matter related to a complaint filed by another Board or its inclusion in this report, and has offered alternative language to be used. The Board does not agree with the factual errors or much of the interpretation of information related to management of licensees in the Impaired Nurse Treatment Program (INTP) (Recommendation 2). None of the cases outlined are part of the WV Restore Program, the Board's monitoring and recovery program established in June 2012. The Board does not agree that "sole discretion" means the nurse health program must be competitively bid (Recommendation 1). The Board does not agree that its proposed procedural rule violates current West Virginia law (Recommendation 7).

The Board wants me to share with you, under separate cover, some concerns about the process.

The Board's response to the Draft Report is included with this letter. For ease of reading and identifying the correction of factual errors and additional information the Board found important to include in the report, changes are "tracked" on the Revised Draft.

We are available to respond to any additional changes to the report and to answer questions or provide any additional information that your office may need. The Board appreciates the opportunity to review its processes and implement changes to improve them to further enhance its more than 106 years of successful public protection.

For the Board,

Laura Skidmore Rhodes
Executive Director

**West Virginia Board of Examiners for Registered
Professional Nurses
Response to the
Revised Draft Report Of the
Legislative Auditor Performance Evaluation and
Research Division
Received
August 13, 2014**

The document includes underlines where the Board provides corrections to factual errors and respectfully offers additional information for clarity.
Board Comments are identified as such throughout the report.

Issue 1: The West Virginia Board of Examiners for Registered Professional Nurses Has Complied With Most Provisions of Chapter 30, Article 1, But There Are Concerns With Its Complaint Process.

Issue Summary

The Legislative Auditor determines that the West Virginia Board of Examiners for Registered Professional Nurses (Board) should be continued because it is needed to protect the public. The Legislative Auditor also found that while the Board is in compliance with most general provisions of Chapter 30, Article 1 and its enabling statute (§30-7), there are concerns that the complaint process has material weaknesses that increase the risk of harm to the public (discussed in Issue 2). Furthermore, the Board did not seek competitive bids through the Purchasing Division for contracts with a Florida vendor that is most recently valued over \$219,000. However, the Board indicates that it was advised by the Purchasing Division that the Board could make the determination concerning whether or not W. Va. Code §30-7E-3 allows the Board to contract for nurse health programs without competitive bids. A legal opinion by Legislative Services indicates that there is no language in West Virginia Code that exempts regulatory boards from state purchasing regulations.

Board Comment: The Board is in compliance with most general provisions of Chapter 30, Article 1 and its enabling statute (§30-7), and recognizes the Auditor has concerns that the complaint process has issues with timeliness in some portions of the resolution process (discussed in Issue 2). The Board has “sole discretion” regarding contracting services related to the Nurse Recovery and Monitoring Program now known as “WV Restore”. Therefore, the Board did not seek competitive bids through the Purchasing Division for contracts with a Florida vendor that is most recently valued at \$219,220.0. Even so, the Board did follow up with the Purchasing Division for guidance regarding the process. The law related to “sole discretion” for the RN Board is identical to that for the Board of Medicine and the Board of Osteopathy for the Physician Health Program. The Board Is Needed for Public Safety.

In the 2001 performance audit of the West Virginia Board of Examiners for Registered Professional Nursing (Board), the Legislative Auditor concluded that the licensing of registered nurses was needed for public safety. For this current review, the Legislative Auditor comes to the same conclusion. The Board was established by the Legislature in 1945, and its enabling statutory authority is in *West Virginia Code*, Chapter 30, Article 7. The Board is responsible for protecting the health, safety and welfare of the public by regulating the practice of Registered Professional Nurses (RPNs). The Board also approves, accredits, and reviews nursing programs within West Virginia. Currently there are 21 schools of nursing within the state.

The Board grants three types of licenses as well as prescriptive authority. Table 1 shows the number of registrants for FY 2008 through FY 2013. The number of RPNs has steadily increased each year since FY 2008.

Type	2008	2009	2010	2011	2012	2013
Registered Professional Nurse*	25,686	27,032	28,218	29,196	30,057	30,643
Advanced Practice Registered Nurse	1,219	1,120	1,423	1,454	1,502	1,540
Midwife	61	64	61	60	68	67
Nurses with Prescriptive Authority	569	547	657	735	800	902

*These numbers include all other licensure types.
Source: Board's Annual Reports, FY 2008 through FY 2013 (unaudited).

The Board Has Complied With Most of the General Provisions of Chapter 30.

The Board is compliant with most of the general provisions of Chapter 30, Article 1 of the *West Virginia Code*. Some of the more significant general provisions that the Board complies with are listed below, and others are discussed in greater detail. However, there are some concerns with the Board's complaint procedures and practices that increase the risk of harm to the public. These concerns are discussed in the second issue of this report.

- The Board's chairperson, executive director or chief financial officer has annually attended the State Auditor's orientation session (§30-1-2a (c)(2));
- Each board member has attended at least one of the State Auditor's orientation sessions (§30-1-2a(c)(3));
- Two of the Board's seven members are lay persons as required by §30-1-4a.
- The Board promulgated rules specifying the investigation and resolution procedure of all complaints (§30-1-8(k));
- The Board has maintained a register of all applicants (§30-1-12(a));
- The Board has complied with public access requirements as specified by Code (§30-1-12(c)); and

- The Board has maintained a complete roster of the names and addresses of all licensees and applicants (§30-1-13).

The Board Is Financially Self-Sufficient.

Financial self-sufficiency of regulatory boards is required by *WVC* §30-1-6(c). As Table 2 demonstrates, the Board's end-of-year cash balance has increased by 49 percent between FY 2009 and FY 2013.

FY	Beginning-of-Year Cash Balance	Revenues	Expenditures	End-of-Year Cash Balance
2009	\$638,941	\$1,077,261	\$937,871	\$778,332
2010	\$825,370	\$1,019,885	\$986,167	\$859,088
2011	\$878,590	\$1,198,155	\$1,032,753	\$1,043,992
2012	\$1,118,810	\$1,138,019	\$1,197,483	\$1,059,347
2013	\$1,094,188	\$1,291,451	\$1,222,699	\$1,162,939

Source: West Virginia State Auditor's Office.

Table 2 further illustrates the Board's expenditures are usually more than the Board's end-of-year cash balance. The Legislative Auditor considers an end-of-year cash balance that is more than a year's expenditures to be a good financial position. Although the Board's end-of-year cash balances are below the Board's expenditures on average, the difference is relatively small and the cash balances are catching up to expenditures. Additionally, the Board was granted by the Legislature a fee increase last year increasing the renewal fee by \$30, going from \$35 to \$65. Half of the \$30 increase will go towards funding the WV Restore Program, which the Board is authorized to create by *WVC* §30-7E-2 for impaired nurses. The remaining \$15 of the fee increase should generate an additional \$450,000 in annual renewal revenue beginning in FY 2014. **Because of the recent fee increase and increasing cash balances, the Legislative Auditor finds the Board to be financially self-sufficient.**

The Board's Internal Controls Are Sufficient and the Risk of Fraud Is Low.

Many regulatory boards are relatively small, with a limited number of staff. Consequently, internal control may invariably be deficient, particularly in the area of segregation of control duties. Proper internal controls are necessary for effective and efficient operations, and for the protection of an agency's resources.

The Legislative Auditor's staff made several visits to the Board's office during this review to develop an understanding of the Board's processes. The Board employs 11 staff and has an adequate number of staff to allow for proper segregation of duties in most cases. With

respect to managing the receipt of revenue, the Board has written policy listing appropriate control activities; however, the policy does not require the segregation of these duties. The five control activities listed in the Board's policy for managing revenues received are:

1. receipt of revenues,
2. recording revenues,
3. safeguarding revenues,
4. depositing revenues, and
5. reconciling revenues received.

Appropriate segregation of these five control activities would not allow the same person to perform more than one of them. The Legislative Auditor finds that in practice the Board's Data Systems Coordinator receives, records, safeguards, and reconciles revenue received. The Board utilizes a second staff person to reconcile revenues received. The Legislative Auditor finds the Board's internal controls when receiving revenue to be sufficient.

With respect to purchasing, the Board does not have its own written policies, but follows guidelines established by the Purchasing Division. In general, the control activities used in purchasing involve purchase orders, purchase approval, receipt and reconciliation of ordered merchandise, and inventory accounting. The Board's purchasing practices involve five staff members and are properly segregated.

The Legislative Auditor also assessed the risk of fraud. This assessment is done on the revenue and expenditure sides. The assessment of fraud risk on the revenue side consists of determining if actual license renewal revenue equals or exceeds expected renewal revenue, and determining how much of a board's revenue is received electronically. If a relatively high percentage of revenue is received electronically and actual revenue is not below expected revenue, this would suggest a low risk of revenue being lost through fraudulent activity.

The Legislative Auditor calculated the minimum expected renewal revenue for FYs 2011 through 2013 by multiplying the annual renewal fees by the number of individuals on the Board's register. The calculations determined that the minimum expected revenue is lower than actual revenue. Furthermore, Table 3 illustrates that since FY 2011 more than 59 percent of all revenues on average have been paid electronically using the Treasurer's online system. The combination of a relatively high percentage of revenue collected electronically, and actual revenue exceeds expected revenue indicates a relatively low risk of fraud.

Fiscal Year	Total Revenue	Collected Online	Percent Collected Online
2011	\$1,130,019	\$656,675	58%
2012	\$1,198,405	\$688,175	57%
2013	\$1,291,325	\$800,600	62%

**All Totals have been rounded to the nearest dollar and percent.
Source: West Virginia State Auditor's Office.*

The risk assessment of fraud on the expenditure side includes determining a board's required and expected expenditures as a percentage of total expenditures. Several categories of required expenditures are considered to be low-risk for fraud. Some of these expenditures include salaries and benefits, increment pay, payroll taxes, rent (office building), utilities, and insurance. If such expenditures are at least 90 percent of total expenditures, then the risk that fraud occurred is considered relatively low. If the percentage of low-risk expenditures is significantly below 90 percent, then the risk of fraud is considered relatively high and a more detailed analysis of a board's expenditures would be warranted. The Legislative Auditor's review of the Board's expenditures for FY 2011 through FY 2013 found for each year over 90 percent of the Board's expenses consisted of expected expenditures. The Legislative Auditor considers this a low-risk indicator that fraud occurred on the expenditure side.

The Board Has Established Continuing Education Requirements.

The Board has established continuing education requirements for its registrants. Each RPN is required to complete a minimum of 12 hours of continuing education during the annual renewal period. All registrants are required to provide the Board with proof the registrant took the continuing education course at the time of renewal.

The Board-established continuing education requirements are consistent with requirements in West Virginia's neighboring states. Table 4 displays the continuing education requirements for West Virginia and neighboring states.

State	CE Hours	Renewal Period
Kentucky	14	Annual
Maryland	10	Annual
Ohio	24	Biennial
Pennsylvania	30	Biennial
Virginia	30	Biennial
West Virginia	12	Annual

Source: Legislative Auditor review of regulations from neighboring states.

Renewals along with proof of continuing education are due by October each year. The Board reviews renewal forms for proof of continuing education. From FY 2011 through FY 2013 a total of 46 licensees were found to be in noncompliance with continuing education rules established by the Board.

The Board Routinely Visits Nursing Schools to Review Accreditation.

The Board has established standards for nursing programs in Title 19, Series 1 of the *Code of State Regulations*. Whenever a school wishes to create a nursing program, it must be accredited by the Board. CSR §19-1-5 et.al specifies several requirements that must be met in order for a nursing program to become accredited by the Board. These requirements include:

- an administrator with an active WV nursing license who has earned a graduate degree in nursing education and has at least five years of nursing experience;
- nursing faculty members that have a graduate degree in nursing, are licensed within West Virginia, and have nursing experience;
- not admitting students without the proper educational requirements and not admitting more students than the program has been approved for; and
- appropriate access to classrooms, laboratories, libraries, and computers.

West Virginia Code §30-7-5 requires the Board to visit all nursing schools “from time to time” to determine if the school is maintaining the standards required by *Code* and the Board. These visits are meant to review a program’s compliance with rules and determine the effectiveness of the education delivered by the program. The Board has visited 7 of the 21 approved nursing schools from FY 2011 through FY 2013.

The Board has established a visitation schedule that plans for two or three nursing schools each year. As there are 21 nursing schools approved by the Board, the visitation schedule allows up to eight years to pass in some cases without a program undergoing an intensive site-visit by the Board. However, the Board indicates that since nursing schools are required to provide annual reports and it occasionally visits programs earlier than scheduled,

there is enough flexibility to visit nursing programs more frequently if needed. As an example of the Board's compliance review process of nursing program accreditations, the Board revoked the nursing program accreditation at Mountain State University in Beckley because of a lack compliance with board standards. This resulted in the closure of the nursing program.

Board Comment: Many programs are approved by a national nursing accreditation agency which visits approximately every 8 years. The timing of these visits is between the Board's visits, resulting in most programs having an in depth on-site visit every four years. Schools are required to provide the Board with all site visit information related to the national accreditation visit reports and recommendations

The Board Did Not Competitively Bid a Contract for Its Impaired Nurses Monitoring Program Based on the Advice of the Purchasing Division.

Board Comment: Based upon WV Code §30-7E which states that: "The West Virginia Board of Examiners for Registered Professional Nurses has the sole discretion to designate nurse health programs for licensees of the board. . . ." the Board did not competitively bid a contract for its Nurse Monitoring and Recovery Program. This enabling language is identical to that for the Board of Medicine and Board of Osteopathy in selecting its Physician Health Program.

West Virginia Restore (WV Restore) is the Board's nurse monitoring and recovery program established in June 2012. The program models national standards related to monitoring and recovery programs. WV Restore's mission is first and foremost to protect the public. This is why it was developed and is funded. Early identification and swift action to protect the public from unsafe/potentially unsafe nurses in WV is its purpose. WV Restore provides opportunity for rehabilitation "restoring the nurse" and retaining safe nurses in the profession. However, should nurses in WV Restore fail to adhere or become non-compliant with WV Restore policies (approved by the Board) the nurse will be terminated from the program and the Board will take appropriate action to protect the public. This is the mantra

In 2012, the Legislature amended *West Virginia Code* to authorize the Board to designate one or more nurse health program or a recovery and monitoring program for nurses with a qualifying illness meaning a diagnosis of alcohol or substance abuse, alcohol or substance dependency or major mental illness. A major mental illness means a diagnosis of a mental disorder within the axis of psychotic or affective or mood, alcohol or chemical abuse or alcohol or chemical dependency as stipulated in the International Code of Diagnosis. (§30-7E), and to encourage voluntary participation in such programs (§30-7-11a). In June 2012, the Board created a treatment and recovery program called WV Restore and entered into a contract with a Florida vendor, Linda L. Smith, LLSA, Inc., to implement the WV Restore program. The initial contract was in effect from November 1, 2012 through June 30, 2013 for no more than \$24,999.99. The agreement was renewed with the same vendor for July and August of 2013 for \$24,999.99 in total. From September 2013 through June 30, 2014, the Board contracted with a Florida vendor named Florida IPN for the total amount of \$123,541.¹ This contract has been recently renewed with Florida IPN for another year through June 30, 2015, which agrees to pay the vendor \$219,220.00. Appropriate Vendor registration has occurred.

In 2012, the Legislature amended *West Virginia Code* to authorize the Board to create a treatment and recovery program for nurses suffering from alcoholism, chemical dependency and

major mental illnesses (§30-7E), and to encourage voluntary participation in such programs (§30-7-11a). In November 2012, the Board created a treatment and recovery program called WV Restore and entered into a contract with a Florida vendor, Linda L. Smith, LLSA, Inc., to implement the WV Restore program. The initial contract was in effect from November 1, 2012 through June 30, 2013 for no more than \$24,999.99. The agreement was renewed with the same vendor for July and August of 2013 for \$24,999.99 in total. From September 2013 through June 30, 2014, the Board contracted with a Florida vendor named Florida IPN for the total amount of \$123,541.¹ This contract has been recently renewed with Florida IPN for another year through June 30, 2015, which agrees to pay the vendor \$219,220.00.

As part of the contract agreement, Florida IPN is to meet all legal requirements for designation as a nurse health program by the Board, including but not limited to: provide a phone-line operational 8 a.m. to 4 p.m., Monday through Friday for nurses to seek information about the WV Restore Program, provide support through the process, review reports, monitor the drug screening process, train Peer Facilitators, provide education for participants, employers, nurses and evaluators, follow up with Facilitators, assure adherence to all requirements of the program, instruct licensees through the associated paperwork, facilitate an evaluation by a treatment provider, then follow-up with treatment resources to ensure appointments have been met. Whenever a licensee is non-compliant with a signed monitoring agreement, Florida IPN is to notify the Board.

The Legislative Auditor found no evidence that the Board sought competitive bids as required by *WVC* §5A-3-11(a) for the contracts with Linda L. Smith that each totaled nearly \$25,000 in payments which are in accordance with Purchasing Policies. In addition, the contracts with Florida IPN that exceeded \$25,000 were not competitively bid in accordance with (§30-7E-3) authorizing the program states that: “*The West Virginia Board of Examiners of Registered Professional Nurses has the sole discretion to designate nurse health programs for licensees of the board. . .*” “through the Purchasing Division as required by law (§5A-3-10). Furthermore, these two Florida vendors are not registered with the Secretary of State or the State Tax Department.

According to the Board, it chose Florida IPN because it is nationally recognized and it has administered Florida’s nurse monitoring program for over 26 years. The Board also stated that it believes the purchase of the contracted services were exempt from purchasing requirements because the language in statute (§30-7E-3) authorizing the program states that: “*The West Virginia Board of Examiners of Registered Professional Nurses has the sole discretion to designate nurse health programs for licensees of the board....*” According to the Board, it did not bid the contract for the WV Restore program based on advice from the Purchasing Division that the Board determine through its legal research how it should proceed and to document its decision for the record. The Board did not provide documentation from the

¹ Linda L. Smith, LLSA, Inc. changed its name to Florida IPN.

Purchasing Division on this discussion. The Legislative Auditor contacted the Purchasing Division to verify the accuracy of the Board's statement. To date, the Purchasing Division has not denied the Board's claim.

A legal opinion from Legislative Services dated March 12, 2014 states that no exemptions from purchasing requirements for Chapter 30 licensing boards could be found in *Code*. It is the Legislative Auditor's opinion that since the Board's enabling statute does not exempt it from purchasing requirements under Chapter 5A, Article 3 of the *West Virginia Code*, and the Purchasing Division does not list the Board as being exempt, that the contract with Florida IPN should have been competitively bid as required by *WVC* §5A-3-10.

The Legislative Auditor informed the Division of Purchasing of this contract. Although the Purchasing Director has newly established authority to issue a cease and desist order (§5A-3-3(11)), it may not be possible for this authority to be exercised without interrupting necessary services. **If such is the case, the Legislative Auditor recommends that this contract be competitively bid at the time the contract is up for its next renewal.**

Conclusion

The West Virginia Board of Examiners for Registered Professional Nurses is compliant with most general provisions of Chapter 30, Article 1, and its enabling statute (§30-7) of the *West Virginia Code*. The Board's internal controls are adequate and the risk of fraud is relatively low. The Board should have competitively bid the contract for the WV Restore Program. It is the Legislative Auditor's opinion that the legislative intent for services to be purchased utilizing competitive bidding is clearly established in *Code*.

Recommendation

1. *The Board should competitively bid the contract for the West Virginia Restore Program through the Purchasing Division when it is due for renewal on June 30, 2015.*

Board Comment: The Board continues to find that the law is clear in providing it with sole discretion in determining by whom and how the monitoring and recovery program is managed. Based upon the law, the vendor has met all legal registration requirements. The requirements listed as being missing apply only if a bidding process is required. The Board disagrees with this recommendation and related information provided in support of the Auditor's conclusion regarding WV Restore.

Issue 2: The Board's Process of Resolving Complaints and Administering Disciplinary Action Has Areas of Weakness, Including a Lack of Timeliness, Allowing Long Delays in Nurses Responding to Complaints and Allowing Multiple Violations of Consent Agreements for Impaired Nurses.

Issue Summary

Board Comment: Prior to establishing WV Restore, the Board was authorized to have an Impaired Nurse Treatment Program (INTP). This program was managed by Board staff and was a disciplinary based program, unlike WV Restore which allows for an individual to self-report or be referred by the Board prior to disciplinary action being taken. In both programs, upon mutual agreement to participate the licensee refrains from all nursing practice. These programs provide some confidentiality for the nurse however, the employer is aware of the restricted practice and must be provided with a copy of the agreement. Disciplinary action is public information and published in national data banks, on the Board's web site and in its quarterly news magazine.

The Legislative Auditor reviewed the Board's complaint data and a sample of complaint files to evaluate the Board's process of resolving complaints against licensees. The Legislative Auditor reports the following findings:

- During the 2011-13 audit period, the Board has allowed 4 licensees who were in given the opportunity to return to practice despite multiple occasions of failing to call the drug screen phone number to determine if they were selected for a drug test. Three (3) of these licensees were in the INTP and 1 case includes a person who was not in the INTP program and had public discipline against the license.

The Board disagrees with the finding that it did not fully investigate a complaint received from the Board of Medicine that implicated nurses licensed by the Board in a serious matter.

The Legislative Auditor reviewed the Board's complaint data and a sample of complaint files to evaluate the Board's process of resolving complaints against licensees. The Legislative Auditor reports the following findings:

- During the 2011-13 audit period, the Board has allowed 4 licensees who were in substance-abuse recovery programs repeated opportunities to return to practice despite multiple failures of drug tests or failure to report for drug tests while in the recovery program.
- The Board did not fully investigate a complaint received from the Board of Medicine that

implicated nurses licensed by the Board in a serious matter.

- Although the Board requires licensees to respond to complaints against them within 14 days, it has been slow to take action in 3 cases when licensees took months to respond to a complaint or consent agreement.

The Board reports that 16 percent of its complaints are going beyond 18 months to resolve and our sample shows that in most cases the Board is not requesting an extension of time from the complainants as required by law (*WVC* §30-1-5(c)). Evidence suggests that the number and nature of complaints, along with the disorganization of the Board's complaint files, involve a workload that may be too large for two investigators to adequately manage. The Legislative Auditor identified 6 complaints of a serious nature representing 7 percent of the sample (81 cases) drawn by PERD. Assuming the sample is representative of the 808 complaints filed in the 2011-13 time period, 60 (7 percent) of the Board's total complaints could have issues similar in nature to the 6 complaints identified in the sample. **This is concerning and the Legislative Auditor considers it a material weakness in judgment because the potential consequences in each case is life-threatening.**

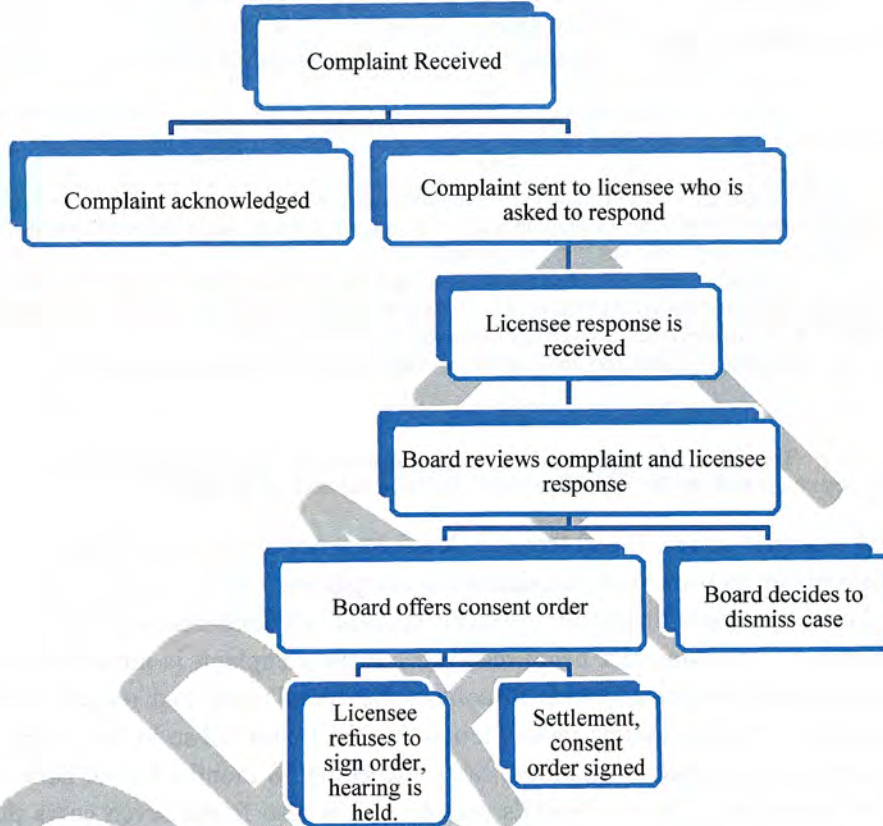
Board Comment: The Board recognizes the Legislative Auditor's concern regarding the timelines in these cases, however takes issue with the determination that there is a material weakness in judgment or that there were any life-threatening situations occurring as a result of the Board's actions as there is no evidence to support this.

The Board Needs to Improve the Timeliness of Its Complaint Resolution Process

Board Comment: The report indicates that "PERD reviewed a sample of 81 complaints (10 percent) of the Board's complaint files and finds no reason to question the Board's resolution time of all complaints resolved." Still yet, the Board recognizes the need to continue to improve the timeliness of managing situations when a nurse doesn't comply with timelines during the investigation process.

The Board has more than 30,000 licensees, making it the largest licensing Board in the state. This increases the importance of a well established complaint procedure. Figure 1 details the Board's complaint procedure, **except that Summary Suspension is not included in the chart. Summary Suspension occurs when the Board finds that the nurse is an immediate threat to public safety. All complaints closed at this point in FY2013 have been within the 18 month time frame for a 0 percent of complaints filed during 2013 taking more than 18 months to resolve. This shows a continuous improvement in the timeliness of resolving cases. During the reporting period the Board Summarily Suspended 20 licenses:**

**Figure 1
Board's Complaint Process**



The Board reports that it received a total of 808 complaints from FY 2011 through FY 2013. Common complaints were about nurses not adequately providing proper care to patients, alcohol abuse, and drug diversion. Table 5 shows the Board's complaint data for this time period and the average time to resolution. As the data show, nearly 16 percent of the complaints filed during 2011 and 2012 took more than 18 months to resolve. The Legislature encourages licensing boards to resolve complaints within 18 months of receiving complaints (*WVC* §30-1-5(c)). The average length of time to resolve complaints in 2011 and 2012 was 13 and 10 months respectively. The cases that were resolved in 2013 have an average resolution time of seven months. However, this average may increase depending on how long it takes to resolve the 44 pending cases. PERD reviewed a sample of 81 complaints (10 percent) of the Board's complaint files and finds no reason to question the Board's resolution time of all complaints resolved.

**Table 5
Complaint Decision Statistics
FY 2011 Through FY 2013**

Fiscal Year	Number of Complaints Filed	Number of Complaints Closed Within 18 Months	Number of Closed Complaints Exceeded 18 Months	Average Months to Case Closure
2011	262	201	61	13
2012	310	277	30*	10*
2013	236	192	0**	7**

*Three (3) cases from FY 2012 are still pending and have fallen outside of the 18-month time frame. Therefore, the number of closed complaints exceeding 18 months and the average months to case closure will increase depending on the length of time it takes to resolve the 3 pending cases.
**Forty-four (44) cases from FY 2013 are still pending and have not fallen outside of the 18-month time frame. Therefore, the number of closed complaints exceeding 18 months and the average months to case closure will likely increase depending on the length of time it takes to resolve the 44 pending cases.
Source: *West Virginia Board of Examiners for Registered Nurses (audited through a sample of cases).*

Board Comment: The Board requested the language in this chart be the same as that in the similar chart represented in the PERD report for the Board of Medicine.

PERD's sample review found that the Board does not consistently follow *West Virginia Code* requirements or its own rules for addressing complaints. *West Virginia Code* §30-1-5(c) requires all licensing boards to provide 6-month updates to complainants and to resolve cases within 18 months of the complaint being received. If the complaint is not resolved within 18 months, Code requires licensing boards to contact the complainant and request more time to complete the case. PERD's sample review found that the Board did so in two cases, but not in three other cases, which suggests that most cases exceeding 18 months do not have requests to exceed the 18-month time frame. PERD's sample review also found seven cases that did not have six-month update letters as required. The Board's database records indicate that in four of the seven cases it sent status letters to complainants but copies of the letters were not in the paper file.

The Board Did Not Fully Investigate a Complaint From Another Board.

Board Comment: The Board fully investigated the complaint from the Board of Medicine just as it does all complaints. The Board disagrees with this information being in this report and has on two previous occasions provided the details related to this concern. Initial, the PERD researcher indicated this matter was part of the random selection of disciplinary cases. The Board questions this fact and the Board was later informed that it was not included in PERD's random selection but that it was brought to their attention through another process. The RN Board wants to point out that the Board of Medicine did not take action against the physician until he was convicted of a felony. No nurses were convicted of any crime in relation to these allegations. The Board does not find that the guilty plea of one individual establishes guilt for another. The Board completed the following:

Before receiving the letter from the Board of Medicine the RN Board had previously been contacted by the U.S. Attorney's office and the Inspector General and the records of

several APRNs were reviewed as part of an investigation. The Board was told there was no evidence about which the RN Board needed to be concerned. The Board sent letters of inquiry to the nurses having a collaborative agreement with the convicted physicians as there were not specific charges brought against any individual nurse and therefore a Notice of Complaint was not warranted. The allegations remained general in nature. The information from the Board of Medicine did not link any specific nurse with any specific crime. The RN Board contacted the U.S. Attorney's office to request specific information and was told there was not information to be shared with the RN Board at that time with regarding to the registered nurses. RN Board staff members went to the court house and reviewed all available public documents in regard to the convicted physicians to determine if there was information to support further action by the RN Board. There was not any information supporting a violation of the law by a registered nurse. As of this day, no nurse has been found guilty of a crime in relation to these allegations.

The Legislative Auditor reviewed a complaint received by the Board that was not part of the sample of 81 complaints. This complaint was forwarded to the Board in May 2010 by the Board of Medicine (BOM) which implicated three Advanced Practice Registered Nurses (APRN) of illegal activities. PERD became aware of this case through our analysis of a 2013 Sunrise application for expanding the scope of practice for Advanced Practice Registered Nurses. Although this case falls outside of the audit review period by two months, it was included in this current board review because of the seriousness of the case, its relatively close proximity to the review period, and because the Board's decisions in the case are reflective of what is identified in the cases PERD sampled.

For this review of the Board, PERD requested additional information from the BOM concerning the case it referred to the Board in May 2010. The BOM provided PERD court records indicating that a physician and three APRNs were operating a pain clinic where the APRNs wrote prescriptions for narcotics utilizing the physician's Drug Enforcement Agency (DEA) identification number instead of their own.² The physician was not present in the clinic and observed patient charts from his home several counties away. The physician was investigated by the US Attorney's Office (Southern District of West Virginia), charged with several crimes, and pled guilty to the charges. Several statements made by the US Attorney's Office indicate that it was improper and illegal for the physician to allow the nurses to utilize his DEA number.

After this information was forwarded to the Board by the BOM, it did not begin the formal complaint process against the nurses. According to the Board, it contacted the U.S. Attorney's Office and requested any information it had concerning the nurses. The Legislative Auditor requested documentation from the Board on its dialogue with the U.S. Attorney's Office, but the Board has not provided such documentation. The Board has stated that the physician's conviction documents do not provide enough information to determine the specific violations of each nurse, and that the U.S. Attorney's Office indicated to the Board that there were not concerns with respect to the nurses. Again, the Legislative Auditor has not received any documentation from the Board to confirm these statements. Moreover, the court records supplied by the BOM clearly state that nurses at the clinic were involved in illegal activities. The court documents state the following:

"It was further part of the scheme that employees of the clinic . . . would and did issue controlled substance prescriptions using the name and DEA registration

number of [name redacted], thereby, falsely indicating that controlled substances had been prescribed by defendant”

The doctor involved in this case entered a guilty plea to the above charge, and several others, filed by the U.S. Attorney’s Office. It is the Legislative Auditor’s opinion that this guilty plea provides ample evidence to pursue complaints against the nurses involved.

² *The DEA does not allow nurses to write prescriptions for these medications other than maintenance doses not to exceed 72 hours while a physician may write prescriptions for a 30-day supply.*

To date, no complaints against the nurses have been initiated by the Board. Moreover, there is no evidence in the Board’s minutes that this case was ever brought before the Board. It is unknown why the US Attorney’s Office did not pursue formal charges against the nurses involved. **Given the nature of the information supplied to the Board concerning three of its licensees, the decision to not initiate a complaint is questionable. In instances of this nature, one would expect the Board to err on the side of caution.**

The Board Has Not Taken Prompt Action When Licensees Do Not Timely Respond to Complaints.

Board Comment: The Board recognizes the concern regarding timeliness of processing complaints in some of the cases. There is no evidence to support that the public has been at risk.

Whenever a complaint is initiated against a licensee, the Board provides a copy of the complaint to the licensee and then requests a response to the allegations. The Board’s legislative rule (CSR §19-9-3.8) states that licensees can have up to 14 days to respond. Although it is understandable that in some cases licensees may respond after 14 days of receiving a response, PERD found 3 of the 81 cases sampled where the Board allowed months to go by without receiving responses from licensees to complaints and a consent order. In one case, the Board sent a complaint in December 2011 to a licensee from her employer indicating that she was required to submit to a drug screen on a day that she was unable to perform her job duties. An oral screen failed and the employer required, according to policy, a urine test, which the licensee would not provide. The licensee did not respond to the complaint within 14 days. During the same month the Board received another complaint from a police department alleging that the licensee knowingly altered a prescription for Hydrocodone by changing the count amount from 20 to 120. The Board sent this complaint to the licensee and the licensee again did not respond. After two years transpired (December 2013), the Board issued a Summary Suspension of the license stating that:

The Board has made numerous attempts to contact [Licensee]. [Licensee] has failed to properly respond to the pending complaints or contact the Board. Therefore, based on the foregoing, the Board finds that public health, safety and welfare are threatened and emergency action is necessary. The Board ORDERS that license number [number] issued to [Licensee] is herein SUMMARILY SUSPENDED. [emphasis included]

The licensee pled guilty to charges of “Attempt to Commit a Felony” and in December 2012 she was placed on probation for two years. During this time period the licensee was able to continue

practicing until the Board Summarily Suspended her license in December 2013. PERD found nothing in the case file that would warrant such a long delay by the Board in responding to the licensee's inaction to complaints of this magnitude.

In another case, the Board offered a licensee a consent order in April 2009. For nine months the licensee did not respond to the consent order by either agreeing to it or requesting a hearing. The Board indicated that it was in communication with the licensee's attorney during this time but there is no written documentation of the communication. After nine months the Board sent the consent order again. In February 2010 the licensee's employer inquired to the Board concerning the licensee. The consent order was signed after the employer's inquiry in February 2010, nearly 11 months after it was originally sent to the licensee, during which time the nurse was still practicing.

In the third case, a complaint was filed against a licensee in August 2011. The Board allowed 16 months to transpire before the licensee responded and signed a consent order. The Board indicated that it was in communication with the licensee's attorney during this time but the Board has not supplied written documentation of the communication. When the licensee responded to the complaint, she signed a consent order that resulted in a suspension and a \$1,000 fine.

Board staff stated they follow advice from the West Virginia Attorney General's Office when deciding if decisive action should be taken when a licensee does not respond to complaints and consent orders. Board staff also stated that the Attorney General's Office has advised the Board to exhaust all avenues of contact before engaging in a summary suspension order. The Legislative Auditor understands this concern, but also emphasizes that the Board's primary duty is to protect the public. A board that allows a licensee to continue practicing without formally responding to complaints or consent agreements may be increasing the risk of harm to the public. Board inaction allows licensees to serve the public while effectively ignoring complaints raised by the public. The need for action is even greater for boards that regulate health professions because decisions made by these boards can subject the public to risk.

The Board Allows Licensees in Substance-Abuse Recovery Programs Repeated Chances to Return to Practice Despite Relapses and Agreement Violations.

Board Comment: The Board Follows National Standards in Relation to Implementing its Nurse Monitoring and Recovery Program

The Board has procedures in place that help nurses receive substance-abuse recovery services who meet requirements for admission into the program. Nurses can either voluntarily admit themselves into the Board's recovery program or be required by the Board to receive recovery services as an alternative to license discipline. From FY 2011 through FY 2013 the Board has temporarily suspended 87 licenses to allow nurses to receive substance-abuse counseling.

When nurses voluntarily admit themselves into the WV Restore program, the Board only knows that a licensee has been admitted, but the identity of the licensee is withheld from the Board. However, the program requires that when a licensee fails any part of the program, either by not attending a counseling session, failing a drug test or failing to show for a drug test, the Board is then informed of the licensee's identity.

Prior to June 2012 the Board was authorized to implement the Impaired Nurse Treatment Program (INTP). The Board now utilizes the WV Restore Program for nurses with substance use disorders and qualifying mental health conditions. In each program, upon agreement to enter, the licensee immediately refrains from practice. Before the WV Restore Program, the Board utilized the INTP. According to statements from the Board, the WV Restore program has shifted the Board's involvement from a disciplinary focus to a rehabilitative focus. As part of the WV Restore Program, the nurse is not allowed to practice during the first phase of the program which involves counseling for a minimum of six weeks, depending on the counselor's decision. If nurses successfully complete the first phase, they are allowed to return to practice under certain restrictions on their scope of practice as they relate to having access to controlled prescription medications and being in the vicinity of such drugs. When they return to practice they are still considered enrolled in WV Restore program, with counseling and drug testing and other requirements continuing until it is determined by the Board or a counselor (if voluntarily admitted) when they have met all requirements of the program and are released from the program.

PERD's sample review identified four cases in which the participants have had multiple violations of the Board's INTP and have been allowed further opportunities to return to practice in accordance with national standards. Although these individuals were in the program during 2011-2013, some of the participants' history in the Board's impaired program extends back before 2011. A description of these cases is provided below:

Case #1: In November 2008, a licensee admits to taking ephedrine for two months from her place of employment. A consent order and information regarding the INTP was sent to the licensee in April 2009. The licensee failed to complete the INTP information. The licensee had an attorney. A Consent Agreement was sent in January 2010. This disciplinary consent order was signed into effect on March 2, 2010, nearly 15 months later. During which time due process was observed and no action was taken against the license. The nurse was still practicing. In January 2010 an employer called the Board regarding the licensee. The employer spoke with the licensee who said she had signed a consent agreement and sent it to her attorney. The attorney had no record of receiving the agreement. The licensee then followed up with her attorney and pursued the Consent Agreement. The licensee returned to practice under the restrictions of the agreement. In October 2010, the licensee failed to call the drug screen line to determine if she was to submit to a drug screen. On October 29, 2010 she was selected to test was tested, and tested positive for Hydrocodone for which she had a valid prescription. In November 2010 the licensee tested positive for Opiates for which she had a valid prescription. The Board suspended her license a month later in December 2010 for failure to comply with multiple portions of the Consent Agreement. In February 2011, while the license remained suspended, the licensee

tested positive for Hydrocodone; on the same day Board received allegations from her employer that the licensee stole a couple of prescription pads and was “writing rx for herself and 3 children 17, 19, and 21.” The licensee’s license remained suspended. Other allegations were made in April 2011 stating that the licensee was arrested for unemployment compensation fraud and was accused of talking about patients’ medical conditions and treatment from her previous employment. In June 2011 the Board sent a letter to the licensee concerning the recent complaints filed against her. The letter indicated how it would address the complaint in the following statement:

The West Virginia Board of Examiners for Registered Professional Nurses reviewed the information related to the complaint filed against your license. Since your license is suspended, the DRC is waiting until you reinstate to further pursue the matter.³ Until the time you reinstate, the Board of Nursing [and] will provide this information to any other state requesting information about your West Virginia registered nurse license.

This response by the Board reflects its philosophy to allow reinstatements even in cases with matters of this magnitude. The Board received a letter from the licensee requesting reinstatement in May 2012. Currently, the licensee is listed as inactive by the Board, her license has not been revoked, and the Board has left open the opportunity for her to be reinstated. During this time of inactive status, the Board received a request for information in March 2012 from a pharmacy concerning the licensee’s license because she sought employment at the pharmacy.

Board Comment: The response to the facts in Case #1 reflects the Board’s commitment to public protection, compliance with case law, and direction from legal counsel, that individuals have the opportunity to demonstrate rehabilitation by allowing licensees the opportunity to apply for reinstatement upon verification of rehabilitation. In addition, this action reflects appropriate management of human resources and finances because to pursue additional action against the license when the public is already protected would not meet these standards. When individuals apply to reinstate a license or petition to reinstate a license, if the licensee fails to demonstrate to the Board that they are successfully working a recovery program and have maintained sobriety, the license is not reinstated. When the licensee does demonstrate this, the license may be reinstated to a restricted status for several years. The Board received a letter from the licensee requesting reinstatement in May 2012. Currently, the licensee is listed as inactive and suspended. She cannot practice as a registered professional nurse. This disciplinary action is reported to several national nursing databases, placed on the Board’s web site and published in its quarterly news magazine for all to see as are all disciplinary actions.

Case #2: The licensee was admitted into the Impaired Nurse Treatment Program by the Board beginning in 2001. She relapsed in 2002 and her license was suspended. She was reinstated in 2003 after meeting Board requirements and suspended again in 2004 for failure to call the drug screen line to determine if she was scheduled to submit for a drug test. The license was reinstated again in 2005 to a disciplinary Consent Agreement and suspended in 2006 again for failure to renew her license as maintaining an active license is one of the requirements of the Consent Agreement. . She was not licensed from 2006 through 2011.

During this time she entered The Healing Place, a homeless shelter with a long term, residential, recovery program. She was reinstated in January 2012 and through another disciplinary Consent Agreement. One of the requirements for reinstatement was to complete a refresher course before returning to work. . In June 2012 the licensee did not call to see if she was to be drug tested. She was fined \$250 and allowed to continue practicing once the fine was paid. The licensee committed the same occurrence in August 2012, pays the fine and returns to practice.

In February 2013 the licensee again failed to call for a drug test. The licensee was fined \$250 and returned to practice after the fine was paid.

Case #3: The licensee was admitted into the Impaired Nurse Treatment Program by the Board in May 2007 because of substance abuse (Opiates and Cocaine). The licensee returned to practice with restrictions according to the terms of the INTP contract.. The licensee did not call-in the drug screen phone line to determine if she was to be tested on February 16, 2008. Her license was suspended in a letter dated March 5, 2008. The licensee submitted a reinstatement application in September 2008. Her license was reinstated through a disciplinary Consent Agreement placing her license on Probation for a period of 3 years on October 10, 2008. The licensee went nearly three years without incident and was released from the program in July 2011. In June 2012 the licensee tested positive for Dilaudid as a result of an employer-required drug test and the employer reported it to the Board. The employer reported that the licensee was responsible for “diversion of controlled substances and theft of property”. The licensee also self-reported to the Board through her attorney. The licensee kept appointments with health care providers regarding her recovery. Upon review and consideration of information from her counselors, her license was reinstated through a disciplinary Consent Agreement requiring the licensee to be monitored for the next five years and the licensee may continue practice with restrictions as long as she complies with the consent order. The licensee remains compliant with the agreement.

Case #4: The licensee was admitted into the INTP by the Board in January 2012 after self-reporting abuse of Lortab. The licensee returned to practice. In June 2012 the licensee failed to call the drug screen line to determine if she was selected for a drug test. She was fined \$250 and allowed to continue practicing once the fine was paid. In August 2012, when the licensee was unemployed, the licensee failed to call the drug screen line to determine is she was selected for a drug test. She phoned the Board office to self-report missing the call and went the next day for a drug screen which was negative. She was fined and allowed to continue holding a license when the \$250 fine was paid. The licensee remains in compliance with the contract.

It is reasonable to assume that some of the nurses who failed to call for random drug tests did so because they knew they were chemically impaired and did not want to test positive for substance abuse. If this assumption is true, then the obvious concern is that some of these nurses were practicing while chemically impaired.

³ DRC represents the Board's disciplinary committee.

Drugs have certain “detection windows”—the amount of time after ingestion during which evidence of drug use can be detected by a drug test. Some drugs, such as Heroin and Oxycodone, can be undetectable after 48 hours. Table 6 below details the detection window for some common drugs found in the Board’s complaint files.

Substance	Detection Window by Urine Test	Detection Window by Blood Test
Cocaine	2-10 days	24 hours
Dilaudid	2-4 days	24 Hours
Hydrocodone	2-6 days	24 Hours
Heroin	2-4 days	6 hours
Lortab	2-4 days	24 Hours
Oxycodone	2-4 days	24 Hours

*These times are guidelines. Detection windows can change based on a variety of factors such as prolonged use, metabolism, and body mass.
Source: PERD research from various sources including the United States Department of Labor, universities, and various substance abuse testing companies.

Board Comment: It is possible that some of the nurses who fail to call the drug screen line to determine if they are selected to be tested do so because they know they are chemically impaired and do not want to test positive for substance abuse. With the system the Board uses, the company automatically schedules a person for a test the day after it is reported that the licensee didn’t phone in to the drug screen line. In addition, Board staff can, and sometimes does, go into the system and add more drug screens per month if needed. When a licensee is under contract with the Board, the employer is also involved in the process to assure workplace supervision. If an employer finds that a nurse is impaired the employer will remove the unsafe nurse from the workplace to ensure patient safety as well.

Generally, the consent agreements stipulate that failure to report or call for a drug screen is grounds for immediate suspension of the licensee’s license; however, it may take several days for the Board to inform the licensee of the suspension by formal letter. In the cases sampled, the time for suspension letters to be received by licensees ranged from two to seven days. In the meantime, the licensee can continue to practice. When a licensee does not call-in for a drug screen, the Board indicates that it then requires the licensee to test the next day and contacts the licensee’s employer if the nurse is employed. When a licensee is required to report for a drug test and does not, the Board indicates that the license is immediately suspended; yet, this did not occur with respect to Case #1 discussed above. Board staff also indicated that they maintain close contact with substance abuse counselors who are treating its licensees.

When a licensee fails to call the drug screen line to determine if they are selected to submit to a drug screen the records are reviewed to determine if all other aspects of the contract have been met. Once the licensee has been notified of the suspension, the Board’s standard

response has been to talk with the licensee and determine, as much as possible, that the circumstances were situational and not a result of deception. Once it is determined that a human error occurred, the Board requires the licensee to apply for reinstatement, imposes a fine of \$250 and the licensee is allowed to practice once the fine is paid. Moreover, the fine is not increased for repeated violations. It would seem logical that the Board would either increase the fine with each violation of consent orders or take more serious actions against the licensee's license, but this did not occur in these four cases. Licensees who fail to call for drug screens should not be allowed to practice for any length of time following the failure to report because the drugs remain in the bloodstream for several hours.

The Board's staff stated the Board follows national standards in relation to monitoring nurses in WV Restore. Drug addiction is a disease that requires counseling and licensees should be allowed the opportunity to transition to a life of sobriety. During this transition there may be events that occur that are not related to a relapse, that upon verification that all other requirements are met, the nurse can return to practice and provide safe care to the public. . Additionally, the Board believes that licensees dealing with substance use disorders and qualifying mental health conditions should have the opportunity to regain their license when they demonstrate rehabilitation and sustained recovery and has utilized suspensions instead of revocations. According to board staff when working with licensees with substance use disorders they recognize that is it a as stated by the American Society of Addiction Medicine, the U.S. Department of Health and Human Services National Institutes of Health (NIH), and the American Psychiatric Association (APA). The American Society of Addiction Medicine states that addiction is characterized by the impairment in behavioral control; diminished recognition of significant problems with one's behavior and interpersonal relationships; and cycles of relapse and remission. In addition, the APA has designated drug addiction as a mental disorder and the NIH has stated that addiction is a chronic disease. According to the Board, the decision to treat drug addiction as a disease is endorsed by the National Council of State Boards of Nursing.

The Legislative Auditor agrees that drug addiction is a disease that requires intensive and sustained treatment. Nevertheless, the Legislative Auditor is concerned that by allowing licensees who have relapsed or repeatedly broken the terms of their consent agreements to remain licensed that the Board is exposing the public to unnecessary risk. Information from the NIH suggests that long-term drug abuse causes changes in brain activity and cognitive function. According to the NIH, "Brain imaging studies of drug-addicted individuals show changes in areas of the brain that are **critical to judgment, decision making**, learning and memory, and behavior control (emphasis added)." The NIH also states that "Drug addiction erodes a person's self-control and ability to make sound decisions." The Legislative Auditor's concern comes from the fact that prolonged drug abuse can alter a nurse's ability to make sound decisions, and thus exposes patients to a nurse who may be unable to make proper and logical patient care decisions due to the effects of addiction. **While nurses suffering from drug addiction are in**

need of treatment, it is the Legislative Auditor's opinion that the Board has the primary responsibility of protecting the public, and the Board should have a low tolerance for nurses who repeatedly violate or relapse while they are in a substance-abuse program.

Board Comment: WV Restore participants are continuously evaluated for fitness for practice. This is accomplished through evaluations by the licensed health care treatment provider, Peer Facilitator, Work Site Monitor, and WV Restore Case Management Staff. The Board finds that suspension of a license accomplishes the goal of removing the unsafe nurse from practice when necessary.

Complainants Are Not Consistently Notified of the Board's Final Decision.

PERD's sample review found that the Board has the practice of notifying complainants of the Board's final decision concerning their complaint. This procedure is not required by law or by the Board's legislative rules. However, this is a useful procedure and is in line with the statutory requirement to provide six-month updates. PERD's sample review shows that in 71 cases, the Board sent final-decision letters to complainants but did not send them in the other 10 cases. The Board should be consistent in this practice. **Furthermore, the Legislature should consider amending Chapter 30, Article 1 of the *West Virginia Code* to require boards to notify complainants of the Board's final decision in their complaint.**

The Board Could Utilize More Staff and a Better Record-Keeping System.

The Legislative Auditor's review of the Board's complaint files has raised several issues with missing or incomplete documentation, violations of requirements established within *West Virginia Code*, and questionable decision-making by the Board. Board staff indicated that the paper complaint files are organized in reverse chronological order with the most recent action in the case at the front of the file. The Board's cataloguing system was accurate in some complaint files but not all. The Legislative Auditor's staff found some files to be incomplete and disjointed without a clear organization process and paper files did not always include required documentation. In addition, the Board was unable to provide paper documentation of some required communications with complainants.

The issues related to the Board's complaint process may be attributed to the Board's small number of investigators. The Board utilizes two investigators, both with a nursing background and not an investigative background. Both investigators have completed additional training in investigation techniques and practices. The Board has opened an average of 270 complaints each year from FY 2011 through FY 2013. Additionally, the Board still largely relies on paper documentation to manage complaints each year as opposed

to scanning all documentation sent and received and then saving it to an electronic file.

Evidence suggests that the number and nature of complaints investigated by the Board, along with the disorganization of some complaint files, involve a workload that may be too burdensome for two staff to adequately manage. Hiring more investigators and utilizing electronic means to manage case files may serve to assist the Board in better fulfilling its duties related to the complaint process.

Board Comment: The Board will evaluate the ability to sustain an additional nurse investigator and garner approval for the position and the related budget increase. The Board is already in discussion with the Statewide vendor and the National Council of State Boards of Nursing in identifying workable scanning procedures and software.

The Board's Requirement for Complaints to Be Notarized Is Unnecessary.

The Board has published a complaint form on its website. This form allows members of the public who wish to file a complaint against a nurse to have access to the proper form without contacting the Board. The form requires the complaint to be notarized by a public notary. The requirement for complaints to be notarized is not established in the Board's rules. Requiring complaints to be notarized is not common among other West Virginia medical licensing boards.

The Legislative Auditor reviewed complaint forms for the Board of Examiners for Registered Professional Nurses, the Board of Medicine, the Board of Examiners for Licensing Practical Nurses, the Board of Osteopathic Medicine, the Board of Dentistry, and the Board of Pharmacy. This review found only the Registered Professional Nurses Board and the Board of Osteopathic Medicine require complaints to be notarized. The Legislative Auditor finds this requirement to be unnecessary and it does not add any additional layer of protection for the public. Furthermore, it may be deterring some complaints from being filed. In previous reports, the Legislative Auditor has recommended against the practice of requiring complaints to be notarized. Therefore, the Legislative Auditor recommends that the Board remove the requirement for notarization from its complaint form.

The Board Is Seeking to Alter Its Complaint Process That Would Be Inconsistent With Legislative Intent.

Board Comment: The Board's proposed procedural rule received no comments during the public comment period.

In April 2014 the Board submitted a proposed Procedural Rule to the Secretary of State's Office significantly altering its complaint process as established in Title 19, Series 1 of the *Code of State Regulations*. This rule change would alter the meaning of the word "complaint" and create a new term "statement of allegation" that does not appear anywhere within *West Virginia Code* with respect to boards established by Chapter 30.

Currently, complaint means “any written, verbal, or other communication with the Board or its representatives which indicates or tends to indicate a licensee is acting or has acted in violation of W. Va Code.” This rule change would alter the meaning of complaint to mean “a statement of allegation that is deemed sufficient.” These statements of allegations will be investigated the same way as a complaint, but will not have timelines for resolution until they are “deemed sufficient” enough to be a complaint by board staff. **The Legislative Auditor determines that a statement of allegation will add time to the resolution process because it will not begin the complaint process, it will delay when the Board has to contact a licensee for a response, it will circumvent the requirement to provide six-month updates on a complaint, and it will circumvent the requirement to resolve complaints within 18 months.**

Due to the concerns with the proposed rules, PERD sought a legal opinion. A legal opinion provided by the Legislative Services Division confirms that the proposed procedural rule is contrary to legislative intent, and it violates the West Virginia Administrative Procedures Act (see Appendix C). The opinion states:

The proposal to redefine “Complaint” would allow the Board to evade the clear mandates of West Virginia Code § 30-1-5(c), which requires professional boards to investigate all complaints regarding professional misconduct within a certain timeline. By redefining “Complaint” to include only those statements that are “deemed sufficient in fact and in jurisdiction” upon initial review, the Board attempts to avoid its statutory duty to investigate and respond to all reports of professional misconduct. The Board does not have the authority to alter its statutory duties through a procedural rule change.

In addition, since procedural rules are not promulgated by an act of the Legislature, there are by law limitations of content that can be included in such rules. The legal opinion indicates that “*The courts have made clear that agencies may not promulgate interpretive or procedural rules ‘affecting private rights, privileges or interests.’*” However, the legal opinion indicates that “*Discounting a portion of complaints filed with the Board as ‘statements of allegation’ and failing to follow the statutory mandates regarding notice, investigation, and record-keeping clearly affects the private rights, privileges and interests of complainants.*” **Therefore, the legal opinion concludes that the Board’s procedural rules are unlawful and susceptible to a legal challenge.** The Legislative Auditor recommends that this proposed rule not be adopted by the Board.

Board Comment: The purpose of this rule is to provide a process similar to that used by the WV Ethics Commission in determining merit of ethics violations as well as the process used by the Board of Medicine to determine if there is probable cause before filing a complaint against a licensee.

Conclusion

The findings of this issue give the impression that the Board leans more towards protecting the professionals at the expense of protecting the public. While the Legislative Auditor’s Office understands the need for treatment for impaired nurses, it reminds the Board that regulatory boards are primarily responsible for protecting the public.

The Board's actions in these cases reveal a clear philosophy that reinstatement of licenses after repeated substance-abuse relapses and recovery violations will be allowed. The Board's complaint process shows signs of lacking appropriate and timely responses to serious cases. In some cases the Board is not consistently following the *West Virginia Code* or the Board's own rules. The serious findings raised in this issue represent 7 percent of a sample. If this sample is representative of the total number of complaints over the last three years, then as many as 60 cases (7 percent) of the Board's total complaints could have issues similar in nature to the 6 complaints identified in the sample. Given the magnitude of the consequences suggests a material matter that needs to be addressed by the Board.

Board Comment: The Board protects the public. The Board has Summarily Suspended 20 licenses during the audit reporting period. The Board takes its public protection mandate seriously and imposes disciplinary action when appropriate. The Board also supports a culture of justness when evaluating complaints as it recognizes the seriousness of its purpose of public protection as well as the seriousness of affecting a nurse's livelihood. In the balance, generally speaking, the Board is recognized more for its disciplinary nature rather than one of leniency, particularly among nurses.

Recommendations

2. *The Board should have a low tolerance for nurses who repeatedly violate or relapse while they are in a substance-abuse program. Consideration should be given to at least increasing the amount of the fines for repeated violation of consent orders and monitoring agreements.*
3. *The Board should improve its timeliness in taking action when complainants do not promptly respond to complaints or consent orders.*
4. *The Board should consistently send six-month status updates and letters of final decisions to complainants.*
5. *The Board should improve its efforts to resolve complaints within 18 months and consistently request permission from complainants to extend the resolution process beyond 18 months when necessary.*
6. *The Board should consider removing the requirement for complaints to be notarized from its complaint form.*

7. *The Legislative Auditor recommends that the proposed procedural rule change altering Title 19 Chapter 1 of the Code of State Regulations to create a “statement of allegation” should not be adopted by the Board of Examiners for Registered Professional Nurses.*
8. *The Board should consider hiring additional nurse investigators.*
9. *The Legislature should consider amending Chapter 30, Article 1 of the West Virginia Code to require boards to notify complainants of a board’s final decision in their complaints.*
10. *The Board should consider taking action to streamline the management of complaint files and begin scanning documents to allow for better tracking of required documentation.*

Board Comments related to the recommendations are listed throughout the document and in the cover letter.

Issue 3: The Board's Website Is in Need of Improvement in Both User-Friendliness and Transparency.

Board Comment: The Board has a new web site that is awaiting transfer of information from the current web site. Links to the Board's Annual Reports that include financial information are on the Board's current web site.

Issue Summary

The Legislative Auditor's Office conducted a literature review on assessments of governmental websites and developed an assessment tool to evaluate West Virginia's state agency websites (see Appendix D). The assessment tool lists several website elements. Some elements should be included in every website, while other elements such as social media links, graphics and audio/video features may not be necessary or practical for state agencies. Table 7 indicates that the Board integrates 38 percent of the checklist items in its website. This measure shows that the Board website is in need of more improvement in both user-friendliness and transparency.

Substantial Improvement Needed	More Improvement Needed	Modest Improvement Needed	Little or No Improvement Needed
0-25%	26-50%	51-75%	76-100%
	38%		
<i>Source: The Legislative Auditor's review of the Board's website as of February 26, 2014.</i>			

The Board's Website Scores Low in Both User-Friendliness and Transparency.

In order for citizens to engage with a board online, they should be able to gain access to the website and to comprehend the information posted there. A user-friendly website employs up-to-date software applications, is readable, well-organized and intuitive, provides a thorough description of the organization's role, displays contact information prominently and allow citizens to understand the organization of the board. Governmental websites should also include budget information and income sources to maintain transparency and the trust of citizens. The Legislative Auditor reviewed the Board's website for both user-friendliness and transparency. As illustrated in Table 8, the website scores low in both user-friendliness and transparency. **The Board should consider making website improvements to provide a better online experience for the public and its registrants.**

Category	Possible Points	Agency Points	Percentage
User-Friendly	18	8	44%
Transparent	32	11	34%
Total	50	19	38%

Source: Legislative Auditor's review of the Board's website as of February 26, 2014.

The Board's Website Is Navigable But Needs Additional User-Friendly Features.

The Board's website readability is at the 9th grade reading level, which is close to standard criteria. A report published by the Brookings Institute determined that government website should be written at an 8th grade reading level to facilitate readability. Readable, plain language helps the public find information quickly, understand the information easily and use the information effectively. The Board's website has a search tool and help link displayed on every page, along with a site-map and FAQ section. Every page also has a navigation bar at the top of the page. These features allow website users to navigate the page, search for information they may need, and find answers to their questions.

User-Friendly Considerations

The following are attributes that could lead to a more user-friendly Board website:

- Site Functionality** – The website should include buttons to adjust the font size, and the resizing of text should not distort site graphics and text.
- Mobile Functionality** – The agency's website should be available in a mobile version and/or the agency has created mobile applications.
- Feedback Options** – A page where users can voluntarily submit feedback about the website or particular section of the website.
- Foreign language accessibility** – The website should contain a link to translate all pages into languages other than English.

The Board's website does not have elements such as the ability to change the size of text, the ability to access the website from a mobile friendly version, feedback options, a survey that allows users to evaluate the website, or the ability to post information to social media sources or follow the page using RSS feeds. The Board's website also does not allow users to translate pages into languages other than English. The absence of these elements lower the Board's

overall user-friendliness score but are not necessarily essential for the Board to convey the Board's role and do not unduly impede the public from finding information.

The Board's Website Needs to Be More Transparent.

A website that is transparent will have elements such as email contact information, the location of the agency, the agency's phone number, as well as public records, budgetary data and performance measures. A transparent website will also allow for citizen engagement so that their government can make policies based on the information shared. The Website Criteria Checklist and Points System (see Appendix D) demonstrates that the Board's website has 10 of 32 core elements that are necessary for a general understanding of the Board.

The Board's home page has the Board's office email and physical address as well as its telephone number. Additionally, all board member names are on the homepage. This allows citizens to locate the information necessary to communicate with the Board. The Board also has pertinent public information on its website including enabling statute, governing rules and some information about disciplinary action it has taken. The Board website also has several years of meeting minutes.

Transparency Considerations

Several other elements could be added to improve the website's transparency score. The following are a few attributes that could be beneficial to the Board in increasing its transparency:

- Location of Agency Headquarters** – The agency's contact page should include an embedded map that shows the agency's location.
- Administrator's Biography** – A biography explaining the administrator(s) professional qualifications and experience.
- Budget Data** – Budget data should be available at the checkbook level, ideally in a searchable database.
- Agency Organizational Chart** – A narrative describing the agency organization should be included, preferably in a pictorial representation such as a hierarchy/organizational chart.
- FOIA Information** – Information on how to submit a FOIA request, ideally with an online submission form.

- **Performance Measures/Outcomes** – A page linked to the homepage explain the agencies performance measures and outcomes
- **Website Updates** – The website should have a website update status on screen and ideally for every page.

While the Board has information on its website detailing the complaint process, users cannot submit a complaint online. The Board could also include information detailing the State privacy policy, the history of the Board, and contact information for all administrative officials and Board members. Based on the results of this website evaluation, the Legislative Auditor recommends that the Board make improvements to its website to increase user-friendliness and transparency.

Conclusion

Overall, the Board’s website scores low in both user-friendliness and transparency. While users can find most needed information such as a list of registrants, meeting minutes, and contact information adding other elements would improve the website and make it more accessible for the public.

Recommendation

11. *The Legislative Auditor recommends that the Board of Examiners for Registered Professional Nurses make the suggested improvements to its website to increase user-friendliness and transparency.*

Board Comment: The Board has a new web site that is awaiting transfer of information from the current web site. Thank you for the opportunity to respond.

Appendix D			
Website Criteria Checklist and Points System			
Board of Examiners for Registered Professional Nurses			
User-Friendly	Description	Total Points Possible	Total Agency Points
Criteria	The ease of navigation from page to page along with the usefulness of the website.	18	8
		Individual Points Possible	Individual Agency Points
Search Tool	The website should contain a search box (1), preferably on every page (1).	2 points	2 points
Help Link	There should be a link that allows users to access a FAQ section (1) and agency contact information (1) on a single page. The link's text does not have to contain the word help, but it should contain language that clearly indicates that the user can find assistance by clicking the link (i.e. "How do I...", "Questions?" or "Need assistance?")	2 points	2 points
Foreign language accessibility	A link to translate all webpages into languages other than English.	1 point	0 points
Content Readability	The website should be written on a 6 th -7 th grade reading level. The Flesch-Kincaid Test is widely used by Federal and State agencies to measure readability.	No points, see narrative	
Site Functionality	The website should use sans serif fonts (1), the website should include buttons to adjust the font size (1), and resizing of text should not distort site graphics or text (1).	3 points	0 points
Site Map	A list of pages contained in a website that can be accessed by web crawlers and users. The Site Map acts as an index of the entire website and a link to the department's entire site should be located on the bottom of every page.	1 point	1 point
Mobile Functionality	The agency's website is available in a mobile version (1) and/or the agency has created mobile applications (apps) (1).	2 points	0 points
Navigation	Every page should be linked to the agency's homepage (1) and should have a navigation bar at the top of every page (1).	2 points	2 points
FAQ Section	A page that lists the agency's most frequent asked questions and responses.	1 point	1 point
Feedback Options	A page where users can voluntarily submit feedback about the website or particular section of the website.	1 point	0 points
Online survey/poll	A short survey that pops up and requests users to evaluate the website.	1 point	0 points

Appendix D Website Criteria Checklist and Points System Board of Examiners for Registered Professional Nurses			
Social Media Links	The website should contain buttons that allow users to post an agency’s content to social media pages such as Facebook and Twitter.	1 point	0 points
RSS Feeds	RSS stands for “Really Simple Syndication” and allows subscribers to receive regularly updated work (i.e. blog posts, news stories, audio/video, etc.) in a standardized format.	1 point	0 points
Transparency	Description	Total Points Possible	Total Agency Points
Criteria	A website which promotes accountability and provides information for citizens about what the agency is doing. It encourages public participation while also utilizing tools and methods to collaborate across all levels of government.	32	11
		Individual Points Possible	Individual Agency Points
Email	General website contact.	1 point	1 point
Physical Address	General address of stage agency.	1 point	1 point
Phone Number	Correct phone number of state agency.	1 point	1 point
Location of Agency Headquarters	The agency’s contact page should include an embedded map that shows the agency’s location.	1 point	0 points
Administrative officials	Names (1) and contact information (1) of administrative officials.	2 points	1 point
Administrator(s) biography	A biography explaining the administrator(s) professional qualifications and experience.	1 point	0 points
Privacy policy	A clear explanation of the agency/state’s online privacy policy.	1 point	0 points
Public Records	The website should contain all applicable public records relating to the agency’s function. If the website contains more than one of the following criteria the agency will receive two points: <ul style="list-style-type: none"> • Statutes • Rules and/or regulations • Contracts • Permits/licensees • Audits • Violations/disciplinary actions • Meeting Minutes • Grants 	2 points	2 points

Appendix D			
Website Criteria Checklist and Points System			
Board of Examiners for Registered Professional Nurses			
Complaint form	A specific page that contains a form to file a complaint (1), preferably an online form (1).	2 points	1 point
Budget	Budget data is available (1) at the checkbook level (1), ideally in a searchable database (1).	3 points	0 points
Mission statement	The agency's mission statement should be located on the homepage.	1 point	1 point
Calendar of events	Information on events, meetings, etc. (1) ideally imbedded using a calendar program (1).	2 points	1 point
e-Publications	Agency publications should be online (1) and downloadable (1).	2 points	2 points
Agency Organizational Chart	A narrative describing the agency organization (1), preferably in a pictorial representation such as a hierarchy/organizational chart (1).	2 points	0 points
Graphic capabilities	Allows users to access relevant graphics such as maps, diagrams, etc.	1 point	0 points
Audio/video features	Allows users to access and download relevant audio and video content.	1 point	0 points
FOIA information	Information on how to submit a FOIA request (1), ideally with an online submission form (1).	2 points	0 points
Performance measures/outcomes	A page linked to the homepage explaining the agencies performance measures and outcomes.	1 point	0 points
Agency history	The agency's website should include a page explaining how the agency was created, what it has done, and how, if applicable, has its mission changed over time.	1 point	0 points
Website updates	The website should have a website update status on screen (1) and ideally for every page (1).	2 points	0 points
Job Postings/links to Personnel Division website	The agency should have a section on homepage for open job postings (1) and a link to the application page Personnel Division (1).	2 points	0 points



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