



BEFORE THE OHIO BOARD OF NURSING

IN THE MATTER OF:

ORDER: 2029

CASE # 10-0719 & 10-3057

**MIAMI-JACOBS CAREER COLLEGE
PRACTICAL NURSING PROGRAM**

ADJUDICATION ORDER

This matter came for consideration before the Ohio Board of Nursing (hereinafter "Board") on January 21, 2011. At such time the Board verified that it reviewed the following materials prior to consideration of this matter:

Hearing Transcript; State's Exhibits; Respondent's Exhibits; Hearing Examiner's Report and Recommendation; Objections to Report and Recommendation; Respondent's Board Address; and State's Board Address.

Ronda Shamansky was the Hearing Examiner designated in this matter pursuant to Section 119.09, Ohio Revised Code (ORC). *A true copy of the Report and Recommendation of Ronda Shamansky is attached hereto and incorporated herein.*

On this date, the Board accepted all of the Findings of Fact and Conclusions of Law and modified the Recommendation in the Hearing Examiner's Report and Recommendation and **ORDERED** that the conditional approval status of the **MIAMI-JACOBS CAREER COLLEGE PRACTICAL NURSING PROGRAM (PROGRAM)** is hereby withdrawn and full approval status is hereby denied, effective January 21, 2011.

The rationale for this modification is as follows:

The **PROGRAM** has been provided too many opportunities to correct the issues that resulted in the **PROGRAM's** failure to meet and maintain the minimum requirements established for licensed practical nursing education programs. The **PROGRAM** continued to provide misleading information to the Board, as is noted, for example, in Findings of Facts numbered 2 and 7. The **PROGRAM** exhibited a disregard for students, as is substantiated, for example, in Findings of Facts numbered 4 and 8. The **PROGRAM** and its legal counsel, in their appearance before the Board, did not persuade the Board with a mitigating argument in favor of continuing the **PROGRAM's** approval status.

This ORDER shall become effective immediately and is hereby entered upon the Journal of the Board for the 21st day of January, 2011.

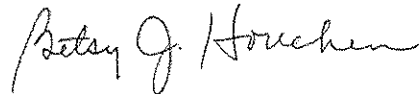
TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the Ohio Board of Nursing, 17 S. High St., Ste 400, Columbus OH 43215-7410, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed by the appellant with the Franklin County Court of Common Pleas, Columbus, Ohio. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the Ohio Board of Nursing's Order as provided in Section 119.12 of the Ohio Revised Code.

CERTIFICATION

The State of Ohio
County of Franklin

I, the undersigned Betsy J. Houchen, Executive Director for the Ohio Board of Nursing, hereby certify that the foregoing is a true and exact reproduction of the original Order of the Ohio Board of Nursing entered on its journal, on the 21st day of January, 2011.



Betsy J. Houchen, R.N., M.S., J.D.
Executive Director

January 21, 2011
Date

(SEAL)

CERTIFICATE OF SERVICE

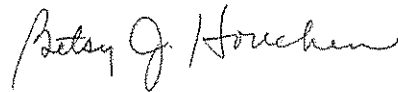
I hereby certify that a true and accurate copy of the foregoing Adjudication Order, concerning **MIAMI-JACOBS CAREER COLLEGE PRACTICAL NURSING PROGRAM (PROGRAM)** was sent via certified mail; return receipt requested, this 24 day of January, 2011 to the following:

Miami-Jacobs Career College Practical Nursing Program
Attn: Brenda Cottrell, Program Administrator
401 East 3rd Street
Dayton, Ohio 45402

Elizabeth Y. Collis
Collis, Smiles & Collis, LLC
1650 Lake Shore Drive, Suite 225
Columbus, Ohio 43204

Janet K. Feldcamp
Benesch, Friedlander, Coplan & Aronoff, LLP
41 South High Street, Suite 2600
Columbus, OH 43215-6164

I also certify that a copy of the same was sent via regular U.S. mail this 24 day of January, 2011 to Lamont Pugh, SAC, Sanctions & Exclusions, Department of Health and Human Services, Office of Inspector General, Office of Investigations, PO Box 81020, Chicago IL 60601-81020.



Betsy J. Houchen, R.N., M.S., J.D.
Executive Director

tlb

cc: Melissa L. Wilburn, Assistant Attorney General

Certified Mail Receipt No. 7010 1870 0002 0349 6895
Attorney Collis' Certified Mail Receipt No. 7010 1870 0002 0349 6901
Attorney Feldcamp's Certified Mail Receipt No. 7010 1870 0002 0349 6918

BEFORE THE OHIO BOARD OF NURSING

RECEIVED

2010 NOV 15 PM 1:14

BOARD OF NURSING
OHIO

In the Matter of
Miami Jacobs Career College
Practical Nursing Program,

Ronda Shamansky
Hearing Examiner

Respondent

Case No. 10-0719

November 15, 2010

REPORT AND RECOMMENDATION

Appearances: For the Ohio Board of Nursing: Richard Cordray, OHIO ATTORNEY GENERAL, and Melissa Wilburn, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3400. Telephone: (614) 466-8600; Fax: (866) 521-9869.

For the Respondent-Licensee: Elizabeth Collis, COLLIS, SMILES & COLLIS, 1650 Lake Shore Drive, Suite 225, Columbus, Ohio 43204. Telephone: (614) 486-3909; Fax: (614) 486-2129.

Hearing Date: October 13-14-15, 2010

SUMMARY OF THE EVIDENCE

All exhibits, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background

1. Miami Jacobs Career College [Miami Jacobs] is a private, for-profit college operated by Delta Career Education Corporation, with schools in several regions of the United States. Darlene Waite, the president of Miami Jacobs, testified that the school was founded in 1860 in Dayton, Ohio as a business college. In 1974, the college began offering a medical assisting program, and since then, it has offered training in many other areas such as veterinary technology, medical billing, automotive technology, paralegal studies, cosmetology, massage therapy, and dental assisting, although the programs offered vary by location. (Transcript [Tr.] at 325-330, 362-363, Respondent's Exhibit [Resp. Ex.] T)
2. Many of the students who attend Miami Jacobs are students who have previously attended other educational programs. The average age of the school's students is 28. Many students are

unemployed or underemployed, and are seeking to learn new skills and begin a new career. It is strictly a commuter school, with no students residing on campus. At issue in this case is the practical nursing program that Miami Jacobs offers at its Dayton, Troy, and Springboro campuses. Students in the practical nursing program must complete a 15-month fulltime course of study in order to obtain a diploma from the college. (Tr. at 325-330, 362-363)

New Practical Nursing Program Started in 2006

3. The Ohio Revised Code [R.C.] grants broad authority to the Ohio Board of Nursing [Board] to license and regulate pre-license nursing education programs in this State. R.C. 4723.06(A)(4) requires the Board to establish minimum standards for nursing education programs. Subsections (A)(5), (6) and (7) authorize the Board to survey, inspect, and grant approval to those programs that meet certain criteria. The Board has promulgated extensive administrative rules that set out the particular requirements of nurse education programs. Those Rules appear at Chapter 4723-5 of the Ohio Administrative Code [OAC].
4. According to R.C. 4723.06(A)(6), the Board may grant "conditional approval" to a new program if the program, as described in the proposal, meets the minimum standards in the Rules. If the Board grants conditional approval, the Rule further requires that, at the first Board meeting after the first class has completed the program, the Board must determine whether to grant full approval to the program. An agent for the Board is required to visit the school to conduct a Survey Visit, to ensure that the program is compliant with the Rules contained in the OAC.
5. The Board granted conditional approval to Miami Jacobs to begin offering a practical nursing program at its campuses in Dayton, Troy, and Springboro, Ohio, effective September 21, 2006. (State's Exhibit [St. Ex.] 1 at 12)

September 2007 Survey Visit and Subsequent Consent Agreement in March 2008

6. In accordance with the administrative rules for new nursing programs, the Board conducted an announced survey visit on September 18-19, 2007, prior to the graduation of the first class of students, and found deficiencies, which were detailed in a Survey Visit Report in October 2007. Miami Jacobs submitted a response, but the Board nonetheless issued a Notice of Opportunity for Hearing on January 17, 2008. (St. 1 at 12-13)
7. Instead of proceeding with a hearing, Miami Jacobs entered into a Consent Agreement with the Board in March 2008. (St. Ex. 1 at 11-17) One of the problems addressed in the Consent Agreement was a change in the school's Program Administrator, and how that change was brought to the Board's attention. Ohio Administrative Code [OAC] Rule 4723-5-09 requires the school to have a Program Administrator, who is held accountable for all aspects of the program. The Rule requires that the Board be notified in writing of any change in the Program Administrator, and requires the new Program Administrator's qualifications to be provided to the Board to demonstrate that the new administrator meets the minimum requirements for that position, as set forth in Rule 5723-5-11.

8. In June 2007, the Program Administrator for Miami Jacobs emailed the Board to inform it that she had resigned effective June 18, 2007. On July 23, 2007 the Board received a letter from Miami Jacobs stating that it was advertising and recruiting to locate a new Program Administrator. It was not until August 23, 2007 that the Board received a letter from Miami Jacobs identifying A. Schilling as the Interim Administrator and forwarding her qualifications. However, Ms. Schilling was later found not to have met the minimum qualifications for that position. On October 9, 2007, the Board sent a letter to Miami Jacobs, informing the college that Ms. Schilling did not meet the minimum requirements to be a Program Administrator because she did not have at least five years experience in the practice of nursing as a registered nurse, two of which must be acquired as a faculty member of a nursing program. (St. Ex. 1 at 12-13)
9. Thereafter, Miami Jacobs informed that Board that it hired a new Program Administrator on December 3, 2007, and it claimed that the new Program Administrator met the minimum qualifications. However, that Administrator served only two months, before resigning on February 7, 2008. Later that month, Miami Jacobs notified the Board that it had yet another Program Administrator, M. Seale, and forwarded her transcripts and credentials to the Board, showing that she met the qualifications to be a Program Administrator.
10. The Consent Agreement continued the school's conditional approval status through March 2009, and provided for additional Board monitoring by requiring Miami Jacobs to submit quarterly progress reports. It also specified that the Board would conduct at least one Survey Visit of the school, prior to the Board's consideration of the school's status at the March 2009 Board meeting. For its part, Miami Jacobs agreed that it would inform the Board in writing within 10 business days of any change in its Program Administrator. It also agreed that it would not expand to any other locations prior to the Board's consideration of the program at its March 2009 meeting; that it would submit a detailed one-year plan for the systematic evaluation of the program; and that it would not submit any false, misleading, or deceptive statements to the Board or to students or prospective students.

November 2008 Survey Visit and March 2009 Addendum to the Consent Agreement

11. On November 5-6, 2008, the Board conducted an announced survey visit to Miami Jacobs Career College, in accordance with the Consent Agreement that had been signed. Later that month, the Board sent Miami Jacobs a Survey Visit Report, identifying standards that were not being met by the program. Although Miami Jacobs provided a response to that report in February 2009, its response was found insufficient, and in March 2009, the Board and Miami Jacobs entered into an Addendum to the Consent Agreement. (St. Ex. 1 at 6-10)
12. In the Addendum, Miami Jacobs acknowledged deficiencies in its maintenance of faculty files, including the fact that 40 files did not contain verification of instructors' academic credentials. It also acknowledged that it could not verify that some of its graduates engaged in the necessary clinical experiences as set forth in course syllabi or as required by administrative rule. In addition, it acknowledged that it allowed a faculty member who did

not have a baccalaureate degree in nursing to teach "Nursing 125," and that it allowed another faculty member who was not a nurse but was instead a licensed dietician, to teach "Nursing 120 Nutrition" in violation of Rule 4723-5-11. In the Consent Agreement, Miami Jacobs affirmed that it had replaced the unqualified instructors with faculty members who held baccalaureate degrees in nursing. (St. Ex. 1 at 7-8)

13. The March 2009 Addendum provided that all the terms of the March 2008 Consent Agreement remained in effect, and that the Addendum imposed requirements that were "*in addition to the terms, conditions, and limitations set forth in the March 2008 Consent Agreement.*" Pursuant to the signing of the Addendum, the school's conditional approval status was extended for an additional year, until March 18, 2010. The Addendum provided that at that time, the Board would review its status and make a decision to grant or deny full approval status. (St. Ex. 1 at 8-9)
14. During the additional year of conditional approval, Miami Jacobs agreed not to expand its nursing program to any other locations without express approval of the Board, and it agreed to continue to provide quarterly progress reports to the Board. It also agreed to notify any facility with which it had an affiliation agreement for student clinical experiences, of the extension of its conditional approval status. And, once again, it agreed that it would not submit or cause to be submitted any false, misleading, or deceptive statements to its staff, students, prospective students, or to the Board. (St. Ex. 1 at 8-9)

Pre-Survey Visit Report not Received; October 2009 Survey Visit Postponed to December

15. On June 10, 2009, the Board sent a letter to Diane Cook¹, the nursing Program Administrator at that time for Miami Jacobs. (St. Ex. 10) The letter gave Ms. Cook more than four months' notice that the Board would conduct a Survey Visit on October 28-29, 2009, and that she was required to submit a Pre-Survey Visit Report no later than October 7, 2009. The letter advised her that the Pre-Survey Visit Report was required to be submitted electronically, on a CD-ROM, and described in detail the acceptable formats that could be successfully accessed by the Board. It directed her to a "Pre-Survey Visit Report packet" that was available on the Board's website that would detail the information that should be included in the school's Pre-Survey Visit Report. The letter was signed by Joyce Zurmehly, RN, Ph.D., who was at that time the Nursing Education Consultant assigned to this college.²
16. At the hearing, Lisa Emrich, the Board's Programs Manager for the Education Unit, testified that the October 7 deadline came and went without any Pre-Survey Visit Report being submitted. At that time, Dr. Zurmehly was no longer on staff with the Board, and Ms. Emrich was planning to do the Survey Visit herself. She said that she asked the Board staff to forward Miami Jacobs's Pre-Survey Visit Report to her, and she was told that none had been received. On October 15, 2009, Ms. Emrich contacted Diane Cook by email and informed her that the Board had not received the school's Pre-Survey Visit Report. The

¹ It was agreed at the hearing that Ms. Cook's full name is "Laura Diane Cook." On some documents and emails, she is called "Laura Cook," or "L.D. Cook," but more often she is called "Diane Cook."

² Dr. Zurmehly is no longer employed by the Ohio Board of Nursing.

email was also sent to Faith Mitchell, the Campus Director at that time for Miami Jacobs. It asked that the report be sent to the Board as soon as possible, and attached a copy of the Board's earlier letter, outlining the instructions for preparing and submitting the report. (Tr. at 49, 55-56, St. Ex. 7)

17. Ms. Emrich testified that Diane Cook contacted her and told her that she had been ill and had not prepared the Pre-Survey Visit Report. By that time, however, there was not enough time for the report to be submitted and reviewed before the Survey Visit, so Ms. Emrich agreed to postpone the Survey Visit. It was agreed that the Survey Visit would instead be conducted on December 2 and 3, 2009. Ms. Emrich sent a letter, dated October 21, 2009, confirming that the Survey Visit had been rescheduled and would be held on December 2-3, 2009. The letter also advised Ms. Cook that the Pre-Survey Visit Report was required to be submitted no later than November 12, 2009, and again advised her of the format requirements for the electronic submission of the report. (Tr. at 56-58, St. Ex. 15)
18. Miami Jacobs failed to submit a Pre-Survey Visit Report by the November 12, 2009 deadline. Lisa Emrich testified that she received nothing at all until November 20, 2009. On that date, she received the Pre-Survey Visit Report that appears at State's Exhibit 16. Although the date on the first page of the document is "November 1, 2009," Ms. Emrich testified that it was not actually received until some time later. She said that there had been an attempt to submit it electronically on November 17, but the document was in a format that could not be opened. Ms. Emrich identified email communications between her assistant, Ebony Turner, and Diane Cook, in which Ms. Turner related that she was not able to open the attachment to Ms. Cook's email. On November 20, Ms. Cook sent the report again, with the message, "Let me know if you cannot open this one," and Ms. Turner responded that it was successfully received. Therefore, The Pre-Survey Visit Report was not received in a format that could be opened until November 20, 2009. (Tr. at 58-60, 148-150, 229-237, St. Ex. 28)
19. Ms. Emrich testified that even after Miami Jacobs submitted its Pre-Survey Visit Report, the Board found that it was not complete because it did not include a Part I form, which is the verification and signature page. Ms. Emrich testified that the signature page is important because it is the Program Administrator's affirmation that the documentation included in the report is true and correct, as of the date it was signed. Ms. Emrich's assistant, Ebony Turner, emailed Diane Cook to advise her that the signature page had not been included, and asked her to complete it and fax it or email it to her as soon as possible. Ms. Cook completed the attestation page and faxed it to the Board later in the day on November 20, 2009. (Tr. at 58-60, 148-150, St. Exs. 8, 9, 16, 28)

Students Advised of Incorrect Date of Board's Survey Visit

20. OAC Rule 4723-5-06(B)(1) requires a school's Program Administrator to notify students and staff of the Board's Survey Visit:

(1) If the program has two or more locations, the Program Administrator shall notify the faculty and students at each program location of the

anticipated date of the survey, and provide contact information for the board so that faculty and students at each location may directly forward any comments to the board concerning the program.

21. Miami Jacobs did notify students and faculty of the Board's upcoming Survey Visit; however, the school notified them of incorrect dates on which it would take place. Ms. Emrich testified that she received a copy of the notice that appears at State's Exhibit 11. That notice informed students and staff that the survey would take place on December 1 and 2, 2009. The Survey Visit was actually scheduled for December 2 and 3, 2009, as shown by the Board's letter of October 21, 2009, confirming the dates of the visit. Ms. Emrich sent an email to Ms. Cook to let her know that the Survey Visit was actually scheduled for December 2 and 3, 2009, and to advise her that she would need to inform students and staff of the correct date of the visit. She explained at the hearing that it is important to provide correct dates to students or faculty who may want to provide information to the board, and that by giving an incorrect date, part of their opportunity to communicate with the Board could be cut off. She added that it is important to notify faculty members of the correct dates when they must have documents and materials, such as student records, available for the Board's surveyor to review. (Tr. at 60-64, St. Exs. 11, 12, 15)
22. Ms. Emrich testified that she spoke with Ms. Cook on the telephone about the incorrect dates being provided in the school's notice, but that Ms. Cook's response was simply, "I told everyone that it's the 1st and 2nd." On cross-examination, Ms. Emrich acknowledged that the result of Ms. Cook's incorrect notice would have been for the school to be ready for the Survey Visit one day *earlier* than it occurred. She said that Ms. Cook informed her that a correction had been made, so as to notify students and faculty that the Survey Visit would take place on December 2-3, 2009, but Ms. Emrich said that she had not seen the corrected notice. Miami Jacobs introduced Respondent's Exhibits C-1 through C-4, which are a chain of emails between Diane Cook and other Miami Jacobs employees, including Faith Mitchell, the Campus Director. (Tr. at 63-64, 119-121, Resp. Exs. C1-C4)
23. At the hearing, Faith Mitchell testified that the first time she knew of the correct date was November 30, 2009, when she received an email from Penny Audia, another Miami Jacobs employee, stating "Diane just told me that the Nursing Board is not coming until Wed & Thursday, not tomorrow as she thought." Ms. Mitchell stated that there were signs posted around the building with the correct dates, and that a team went room by room to talk to the students about the upcoming visit. However, the signs were apparently posted on or after November 30, 2009, since Ms. Mitchell had not known of the correct date prior to receiving the email on November 30, 2009. (Resp. Ex. C-2) (Tr. at 382-383)

Survey Visit on December 2-3, 2009

24. Lisa Emrich testified that she went to the Dayton campus of Miami Jacobs Career College and conducted the Survey Visit on December 2 and 3, 2009. After the Survey Visit, Ms. Emrich prepared a Survey Visit Report, which appears at State's Exhibit 17. The Survey Visit Report is dated December 17, 2009, and it identifies the deficiencies that Ms. Emrich found when she conducted the Survey Visit. Miami Jacobs then submitted a response to the

Survey Visit Report on or about February 16, 2010, which appears at State's Exhibit 13. This report was submitted, not by Diane Cook, but by Brenda Cottrell, who identified herself as the "Practical Nursing Program Administrator" for Miami Jacobs Career College. (St. Exs. 17, 13, Tr. at 49-51, 64)

25. The Board considered the Survey Visit Report and the response received from Miami Jacobs, and issued a Notice of Opportunity for Hearing at its March 2010 meeting, citing numerous ways in which it alleged that Miami Jacobs has not complied with the requirements of a nursing education program, as set forth in OAC Chapter 4723-5.

Deficiencies Alleged in March 19, 2010 Notice of Opportunity for Hearing

Change in Program Administrator Without Notifying Board Within 10 Days

26. OAC Rule 4723-5-09(D)(1) requires that the Board be notified in writing if a school's Program Administrator vacates the position, or is absent from the program for more than 30 consecutive business days. In the March 2008 Consent Agreement, Miami Jacobs agreed that, in addition to the requirements of that Rule, it would notify the Board in writing within 10 business days of any change in its Program Administrator. (St. Ex. 1 at 15, Agreed Conditions, Paragraph 9)
27. Lisa Emrich testified that when she conducted the Survey Visit on December 2 and 3, 2009, Diane Cook was the Program Administrator. However, when she received the response to the Survey Visit Report by electronic transmission on February 16, 2010, it was accompanied by an email from "Brenda Cottrell, Practical Nursing Program Administrator." (St. Ex. 5 at 3) Ms. Emrich inquired about the change that same day in another email:

Hello Brenda,

When were you appointed as the administrator of the PN Program?

(St. Ex. 5 at 2)

Ms. Cottrell replied the following day with a message stating, "I stepped in as Program Administrator on January 11, 2010." (St. Ex. 5 at 2)

Ms. Emrich responded with the following email to Ms. Cottrell, with a copy to Faith Mitchell, the Campus Director:

Brenda and Faith,

The Board's records reflect that Diane Cook is the PN [Practical Nursing] Program Administrator for Miami Jacobs. The Board has not received notification that Brenda was appointed Program Administrator of the PN program. Rule 4723-5-09(D) OAC requires the controlling agency to notify the Board in writing of its appointment of any vacancy in the Program Administrator position/appointment of new administrator. In addition, paragraph 9 of the Board's March 14, 2008 Consent Agreement with Miami Jacob's PN Program requires the Program to, in addition to the requirements

of Rule 4723-5-09, to notify the Board in writing within 10 business days of any change in the Program Administrator.

(St. Ex. 5 at 1-2)

Faith Mitchell replied with the following:

I planned on notifying you. I requested the meeting with you to go over the changes we were making. Our hope was to let you know then and submit it in writing. Brandy and I will send you the notification in writing.³

(St. Ex. 5 at 1)(Tr. at 50-54)

28. At the hearing, Faith Mitchell testified that she had requested a meeting with Lisa Emrich after she received the Survey Visit Report, but that she was not offered a meeting. (Tr. at 388-390) She identified her email dated January 20, 2010 to Lisa Emrich, which provided, in pertinent part, as follows:

Thank you for the detailed site visit report. We were surprised to learn some of the things that were in the report. We have made some changes based on the details in the report that we would like to discuss with you, including staffing changes. If possible, we would like to schedule a meeting with you soon to go over the details before we prepare our response to the report due February 16, 2010.

We are also working diligently on the RN application. I would like to bring Brandy Cottrell, the proposed Administrator, to meet you. Is there a time within the following schedule that would work for you[?]

* * *

(Resp. Ex. 1a at 2)

29. Ms. Emrich denied Ms. Mitchell's request for a meeting, and explained the reason in her email dated January 22, 2010:

Regarding your request for a meeting to discuss changes you have made in response to the PN Program (Program) survey visit report, a "written" report of its survey of the Program has been issued. The Board will consider the survey report and the Program's approval status at its March 2010 meeting during which it may also consider a "written" response that the Program Administrator may choose to submit. Therefore the next step is for the Program Administrator to submit a written response. It is not appropriate for me to meet with you to discuss the SVR or any of your potential responses to

³ Brenda Cottrell goes by the nickname "Brandy." Testimony at the hearing established that Brenda Cottrell and Brandy Cottrell are the same person. (Tr. at 324-325, Resp. Ex. T-2)

the survey visit report. I can however address procedural questions as I have done here.

(Resp. Ex. A-1 at 1)

30. At the hearing, Ms. Emrich explained that it would not have been appropriate for her to assist Ms. Mitchell in preparing the Program's response to the Survey Visit Report. She also explained this email came from Faith Mitchell, the Campus Director who is not a nurse, and that the Board's policy is to communicate through the Program Administrator, who is held responsible for all aspects of the nursing program, pursuant to the administrative rules. She referred to this in her responding email, advising Ms. Mitchell, "[I]t is imperative that any and all Board communications concerning a program's compliance with the requirements of Chapter 4723-5 OAC * * * be with and inclusive of Miami Jacob's Program Administrator." (Tr. at 103-105, Resp. Ex. A-1)
31. Miami Jacobs submits that the email from Faith Mitchell on January 20, 2010 effectively did provide the Board with notice of the new Program Administrator, but Lisa Emrich maintained that it did not:

Q: * * * So a couple of questions here. First, you knew, though, before you sent this February 22nd email, you knew from a previous email that you received where she requested the meeting that a new program administrator had been named; is that correct?

A: That's not correct.

Q: Okay.

A: In this email to me on January the 20th she wanted to meet with me, she wanted to go over the details of the survey visit before they prepared their report.

Q: Okay.

A: And then she goes on to say she would like to bring Brandy Cottrell, the, quote, "proposed Administrator." That does not tell me that the program has appointed a new program administrator.

(Tr. at 106-107)

32. At the hearing, some attention was given to the fact that Faith Mitchell's email on January 20, 2010 referred to Brandy Cottrell as "the *proposed* Administrator," (emphasis added) and yet there is no dispute that Ms. Cottrell had already begun serving as the Program Administrator on January 11, 2010. (Tr. at 364, 367) Ms. Mitchell explained why she called Ms. Cottrell the "proposed" administrator even though she had already been on the job for nine days by that time:

Q: Why did you call Brandy Cottrell the proposed Program Administrator when you wrote to Lisa Emrich on January 20, 2010?

A: I think it was out of habit because in the past we never actually presented the offer to the administrator until we ran their credentials through the Board.

But in this case we knew that we could not be without an administrator so when we terminated Ms. Cook, we immediately presented the offer to Ms. Cottrell. So I think I just used "proposed" out of habit because that's what we had done in the past.

(Tr. at 413)

Darlene Waite, the president of Miami Jacobs Career College, also testified at the hearing. She admitted that the email in which Ms. Cottrell was called the "proposed administrator" made her uneasy, conceding, "It's not correct." (Tr. at 368, Resp. Ex. T)

33. It was not until March 10, 2010 that the Board received written notification from Miami Jacobs that it had replaced its Program Administrator. An undated letter from Faith Mitchell advised the Board that Diane Cook's employment had been terminated effective January 6, 2010, and that the college had appointed Brenda Cottrell as the new administrator of the Practical Nursing program. It stated that Ms. Cottrell was offered the position on January 7, 2010, and began working in that capacity on January 11, 2010. The letter attached Ms. Cottrell's resume and asserted that the college had already submitted that change "with the Site Visit Survey Report and in an email requesting a meeting prior to submitting the site visit survey report." (St. Ex. 6)

Unqualified Staff Not Replaced, as Miami Jacobs Represented in March 2009 Addendum

34. In the March 2009 Addendum, Miami Jacobs acknowledged that it violated OAC Rule 4723-5-11 by allowing a person who did not have a baccalaureate degree in nursing to teach "Nursing 125" and by allowing a licensed dietitian, Tawna Richards, who did not hold a nursing degree or license, to teach "Nursing 120: Nutrition." The Addendum provided the following assurance that these faculty members were no longer teaching nursing:

MIAMI-JACOBS explains that it has replaced these individuals with faculty members holding baccalaureate degrees in nursing.

(St. Ex. 1 at 8)

35. Lisa Emrich testified that when she conducts a Survey Visit, part of her job includes reviewing the minutes of faculty meetings. When she did the Survey Visit at Miami Jacobs on December 2 and 3, 2009, Diane Cook, the Program Administrator at that time, made the school's faculty minutes available to her. (Tr. at 69-72) Ms. Emrich found the following notes in the minutes of a faculty meeting held on April 1, 2009, concerning Tawna Richards, one of the faculty members that Miami Jacobs had represented that it had replaced:

Ms. Richards - OBN site says you must have a BSN to teach an LPN nursing class and we said in the report that we have complied but Ms. Richards is a nutritionist and not a nurse. Jim states that she is an assistant and can teach 3

or 4 weeks. Get her name off of the syllabus. Ms. Scandrick would be the primary instructor. It is a pre-licensure course with the nursing process involved so a nurse has to teach it. Ms. Richards is a masters prepared nutritionist so we will keep Ms. Richards over another nurse instructor and there will be no instructor involved with the class until Ms. Richards leaves because MJCC will not pay for an instructor to do nothing.

* * *

Plan of action: Ms. J.D. said to leave nutrition alone for now.⁴

(St. Ex. 14)

36. The State contends that Miami Jacobs has violated its agreement that it would not submit or cause to be submitted any false or misleading statements, because although it represented in the March 2009 Addendum that it had replaced Ms. Richards, the faculty minutes of April 1, 2009 show that she was, in fact, still employed, and that the school intended to continue to employ her despite its knowledge that she was not qualified to teach a nursing class.
37. Miami Jacobs asserts that these minutes are not official minutes because they do not include a sign-in sheet for attendance, and because there is nothing to show that they were approved as official minutes at a subsequent board meeting. However, on cross-examination, Lisa Emrich explained that these were the minutes that the school's Program Administrator presented to her at the Survey Visit, and therefore, she had no reason to believe they were not "official" minutes. (Tr. at 140-143)
38. During her testimony, Brenda Cottrell, the current Program Administrator, said that she had examined payroll records to determine when Ms. Richards last taught at Miami Jacobs. She found that Ms. Richards's last pay was issued in the first week of May, which reflected her employment for the last two weeks of April, and that it was issued for only about \$90, indicating that she had not taught very much during that time. Ms. Cottrell testified that she was not able to find information about which instructor had been hired to replace Tawna Richards, but she said that she knew Ms. Richards was no longer employed as a faculty member. (Tr. at 550-553)
39. Ms. Cottrell disputed the validity of State's Exhibit 14 as the official minutes of the April 1, 2009 faculty meeting, explaining that there was no sign-in sheet to show who was in attendance at the meeting, and there was nothing to show that these documents had been read and approved at the next meeting. (Tr. at 553-555, 625-626) However, on cross-examination, she acknowledged that these were the only minutes that Miami Jacobs has for the April 1, 2009 meeting:

Q: Ms. Collis asked you a moment ago whether you located another version of the faculty meeting minutes that are shown in State's Exhibit

⁴ Brenda Cottrell identified "Ms. J.D." as Ms. Jarvis-Durham, and testified that she is no longer employed with Miami Jacobs. (Tr. at 623)

14, whether there was an approved version anywhere in the State's Exhibits. I will extend that question, is there an approved version of the minutes in the Respondent's exhibits?

A: These are the only minutes we have of that meeting.

(Tr. at 627-628)

And, in Ms. Cottrell's responses to other questions, she confirmed that she did not know of any other minutes that exist for that particular meeting. (Tr. at 621)

Agreement with Harborside Healthcare Not Signed by a Program Representative

40. OAC Rule 4723-5-17(A) sets out the following requirements for agreements between a nursing program and any affiliates that the program has, such as an a clinical site where nursing students gain clinical experience:
- (A) When a program has any type of cooperative relationship with another entity or a separate division within the same entity including, but not limited to, clinical agencies, a written agreement with the cooperating entity shall:
- (1) Exist and be current;
 - (2) Be entered into and signed by representatives of both the program and the entity or division with which it has entered into a cooperative relationship; and
 - (3) Be on file at the program office.
41. Lisa Emrich testified that when she conducted the Survey Visit on December 2 and 3, 2009, Miami Jacobs identified Harborside Healthcare in New Lebanon, Ohio, as one of its clinical sites where students go to engage in practical experience under faculty supervision. As part of her survey, Ms. Emrich reviewed the contracts for each facility with which Miami Jacobs had an affiliation agreement. She observed that the school's contract with Harborside Healthcare was not "an executed agreement," because it was not signed by both parties to the agreement; it was signed by only one party. She said that there was a Post-it note on the document that said, "Signature in vault." Ms. Emrich explained that the signed affiliation agreement is the Board's way of knowing that the clinical agency is willing to have the program's students present at its facility. Without a fully executed agreement, she could not know that the agency was in agreement with students being present, and that there had been no changes to the agreement before it was signed by both parties. (Tr. at 66-67, 150-151)
42. Ms. Emrich said that she asked Diane Cook, the Program Administrator about the contract, and Ms. Cook told her that the executed contract was kept "in the vault." Ms. Emrich explained to her that she needed to see an executed copy of the agreement, but stated that she did not receive one at any time during her Survey Visit. Ms. Emrich pointed out that in emails shortly before the Survey Visit, Penny Audia, a Nursing Administrative Assistant for Miami Jacobs, asked that two Clinical Agreements for other affiliates be retrieved from the vault in preparation for the Survey Visit; therefore, Ms. Emrich concluded that someone must have gone to the vault to obtain other signed documents, but there was no explanation

as to why the signed Harborside agreement was not one of those made available to her. (Tr. at 64-69, 150-151, Resp. Ex. C-2)

43. During her testimony, Ms. Emrich said that the Harborside agreement had been signed by only one of the parties, and she could not recall which one had signed it. However, on cross examination, she was directed to her Survey Visit Report, in which she documented that the Harborside agreement was signed by a facility representative, but not by a representative from the Miami Jacobs program. (St. Ex. 17 at 5) Ms. Emrich emphasized that the rule requires the agreement to be signed by both parties, and available on site at the Program, but that no one obtained the signed agreement for her during the Survey Visit, even though she asked for it to be produced. Moreover, she testified that although Miami Jacobs wrote that it had attached the agreement in its written response to the Survey Visit Report, the agreement was not actually attached to the response. She acknowledged that she never contacted Miami Jacobs to inform them that one of the attachments to its response had not actually been attached. (St. Ex. 13 at 4, Tr. at 168-170)
44. At the hearing, Miami Jacobs introduced Respondent's Exhibit D. That document is the Program's fully-executed agreement with Harborside Healthcare, which indicates that it was signed on March 14, 2008 by Nikkita Tracey, R.N., the Director of Nursing for Harborside Healthcare, and on May 2, 2008 by Mary Percell, as Campus Director for Miami Jacobs. Ms. Emrich said that she had never seen the fully-executed agreement until she received the documents that were marked as exhibits for this hearing, just several days before the hearing began. (Resp. Ex. D, Tr. at 150-151)
45. Cynthia Hasseman, one of the Clinical Coordinators of the Miami Jacobs Program, agreed that the affiliation agreement is the contract between Miami Jacobs and the clinical site where its students gain experience. She admitted that the agreement with Harborside Healthcare had only a signature from the clinical site, and did not have a signature from someone representing Miami Jacobs. She said that she did not know why there was no signature from anyone on behalf of Miami Jacobs on the agreement. Ms. Hasseman explained that original signed affiliation agreements were kept in "the vault" in Dayton, which is a fireproof locked room, and that a copy of each agreement was kept in a binder in the clinical coordinator's office. Ms. Hasseman said that she knew that there was an agreement in existence with Harborside at the time of the Survey Visit, but she said that it was not retrieved from the vault because it was not requested. On cross-examination, she conceded that she was merely told that the fully executed agreement had not been requested, and that she was not present so as to witness whether or not the Board's agent requested the signed agreement. Ms. Hasseman said that Jacqueline Ferguson, the other Clinical Coordinator for the program, whom she believed was present during the Survey Visit, told her that it had not been requested. However, during Jacqueline Ferguson's cross-examination, Ms. Ferguson acknowledged that she was not present for the Survey Visit except for being present *in the building*, and that the only time she was in the room with the Board's agent was during the exit interview. (Tr. at 444-446, 468-470, 522-523.)

Deficiencies Related to Survey Review Process

46. In addition to the deficiencies found during the December 2-3, 2009 Survey Visit, the Notice also cited Miami Jacobs with violations related to its performance in the survey process. Those issues have been previously discussed in this report, and include the program's failure to submit a timely pre-survey visit report in time for the Survey Visit that was planned for October 28-29, 2009, and its failure again to submit a timely pre-survey visit report for the rescheduled December 2-3, 2009 Survey Visit, as required by OAC Rule 4723-5-06(C). The Board further alleged that when Miami Jacobs finally did submit the Pre-Survey Visit Report on November 12, 2009, it did not contain some of the required information regarding its compliance with OAC Rules 4723-5-15 and 4723-5-12.
47. The Notice also alleged Miami Jacobs did not comply with OAC Rule 4723-5-06(B)(1) because it advised students that the Survey Visit would be held on December 1 and 2, 2009, when it was actually scheduled for December 2 and 3, 2009.

Announced Survey Visit to Dayton and Troy Campuses on June 8, 2010

48. On June 8, 2010, the Board sent agents to the Dayton and Troy campuses of Miami Jacobs Career College to conduct an announced Survey Visit of the practical nursing program. Lisa Emrich did not participate in the Survey Visit on that date, but she assisted in evaluating some of the information that was obtained during the visit and prior to the visit. Jody Hostetler is the Education Regulatory Surveyor who conducted the Survey Visit at the program's Troy campus, which is about 30-45 minutes away from the Dayton campus. Cathy Learn is a Surveyor for the Board's education unit, and she conducted the Survey Visit on the same day at the Dayton location. (Tr. at 179-180, 241)
49. On June 16, 2010, the Board sent Miami Jacobs a Survey Visit report, identifying standards that it claimed were not met. (St. Ex. 18) Miami Jacobs provided a response to that report on June 29, 2010, but the Board nonetheless issued a second Notice of Opportunity for Hearing on July 30, 2010, citing new deficiencies found during the June 2010 Survey Visit. (St. Ex. 1-b)

Deficiencies Alleged in July 30, 2010 Notice of Opportunity for Hearing

Failure to Implement an Orientation Process for New Faculty

50. OAC Rule 4723-5-09(B) requires, in pertinent part, as follows:

The Program Administrator shall have the authority, accountability, and responsibility for all aspects of the program including but not limited to:

* * *

- (4) Implementing an orientation process for new faculty.
- (5) Recommending faculty for appointment, promotion, tenure, or retention, and termination;

* * *

51. Cathy Learn, a surveyor for the Board, conducted the Survey Visit at the Dayton campus on June 8, 2010. She said that in the quarterly progress reports that Miami Jacobs submitted in compliance with the Consent Agreement, there was a "nicely-composed" manual detailing how new faculty would be oriented to the nursing program. She said that it had "a check sheet" in the front with a signature line, and she expected to see that in the faculty files that she reviewed. Ms. Learn identified State's Exhibit 29 as the policy she was referring to as the program's nursing faculty orientation procedure. That document is an excerpt from the December 2008 Quarterly Report prepared by Miami Jacobs for the Board, and Appendix G, which begins on the second page of the exhibit, is titled "Nursing Faculty Orientation Manual." It contains a "New Nursing Faculty Orientation Checklist" in which the person conducting the orientation is asked to write the date that the new hire underwent orientation to "General MJCC," and to the "Practical Nursing Program," as well as orientation to the computer system and a clinical orientation. It also includes an extensive "Practical Nursing Handbook" covering attendance and grading policies, standards for satisfactory student progress, and policies regarding clinical components of the nursing program. This same Nursing Faculty Orientation Manual appears at Respondent's Exhibit E, but it has an effective date of January 2008, as opposed to State's Exhibit 29, which has an effective date of October 2008. Although the two documents use different type styles, which cause the page numbering to be different, they appear to be essentially the same document with the same procedure for faculty orientation. (Tr. at 241, 298-299, 304-317, St. Ex. 29)
52. Ms. Learn testified that although Miami Jacobs had a policy in effect for new faculty orientation, she found that it was not being implemented. When she reviewed the files for newly-hired faculty members, she found no evidence that the instructors hired in 2010 had gone through any orientation process. Ms. Learn explained that she was looking for the checklist, "because that's what they had sent in their progress report as to what their orientation was for new faculty." (Tr. at 308) She stated that the files of faculty hired prior to 2010 did contain orientation materials, similar to the ones submitted by Miami Jacobs in its faculty orientation manual, but the files of employees hired in 2010 did not. Ms. Learn said that she asked Brenda Cottrell if those records for faculty hired in 2010 were kept somewhere else, but Ms. Cottrell told her that she was still fairly new to her position and that there wasn't an orientation process in place yet. Another person who was with Ms. Cottrell, "Jennifer"⁵, told Ms. Learn that David Hessen had recently been hired to conduct faculty orientations, starting in April 2010. Ms. Learn asked if David Hessen was a nurse, and she was told that he was not. (Tr. at 243-245, 248-250, 308-312)
53. Ms. Learn testified that under the Administrative Code, it is the responsibility of the Program Administrator to have a plan to orient the new nursing faculty. Lisa Emrich likewise testified that the Program Administrator is responsible for implementing the

⁵ Although "Jennifer" was not fully identified during the hearing, the Nursing Faculty Orientation Manual at State's Exhibit 29 identifies "Jennifer Yarnell" as the "Troy Associate Campus Director/Academic Dean" as of October 2008. The manual at Respondent's Exhibit E had previously listed her in January 2008 as the "Dayton Academic Dean." (St. Ex. 29, Resp. Ex. E)

orientation program, and that this must be done by a nurse, adding, "It's not possible that a non-nurse can orient faculty to the complexities of a pre-license nursing education curriculum and all the elements that go into teaching nursing." (Tr. at 125) Ms. Emrich explained that although nothing prevents a program from having faculty members complete a generalized orientation program to familiarize them with the institution in general, there must be a process in place to orient faculty to the nursing program in particular, and the surveyor would expect to see the process in place that the school created. She summarized, "The program provided us with their process and that process was not -- there was no evidence that the process had been implemented." (Tr. at 123-128)

54. Miami Jacobs submits that David Hessen was hired to conduct only a generalized orientation for new faculty members for all of Miami Jacobs's programs, and not to orient new faculty to the nursing program in particular. Brenda Cottrell identified Respondent's Exhibit F-8 as the orientation guide that Mr. Hessen used to orient all new faculty to the college in general. Ms. Cottrell testified that newly-hired nursing faculty go through two orientation programs. One program orients them to the procedures, processes, and forms used by the college as a whole. In addition, they are oriented to the nursing program by the nursing faculty. Ms. Cottrell stated that she and Anita Schilling, another nurse, provided faculty orientation at the Dayton campus. She said that Alberta Jean and Cynthia Hasseman, both nurses, provided it at the Springboro campus, and that Eva Villamor-Goubeaux, also a nurse, provided it at the Troy campus. The clinical coordinators, Jacqueline Ferguson and Cynthia Hasseman, provided orientation for clinical nursing faculty. (Tr. at 276-277, 570-574)
55. Ms. Cottrell identified Respondent's Exhibit F as a powerpoint presentation that was used to orient clinical faculty. She said that all new faculty members hired between February and June 2010 received faculty orientation, emphasizing, "It was not a formalized orientation, but it did occur." (Tr. at 572) However, she acknowledged that there may not have been standardized records of the orientation:

Q: And did the faculty members who, like Ms. Schilling or Ms. Jean, did they keep any notes or records or anything that faculty had been -- new faculty had been oriented?

A: Not in -- Ms. Jean, I believe had developed a form for keeping track of that. There was not a standard form in use with the three campuses for nursing.

Q: But do you know if all faculty members who were hired between February and June, if they received faculty orientation?

A: Yes, they did.

(Tr. at 572-573, Resp. Ex. F)

56. Ms. Cottrell identified Respondent's Exhibit F1, with the heading, "Practical Nursing Program Faculty Development Meeting, as a new clinical orientation packet that she gave to the Board's surveyor to show that faculty orientation had taken place. On cross-examination, she stated that this was used as the new orientation process. She explained

that there was not necessarily verification in a teacher's file to indicate that he or she had completed this process, but that the clinical coordinators would know that, because Ms. Cottrell had delegated the orientation responsibility to them. She conceded that this verification should be kept by one of the clinical coordinators, and she acknowledged that her only way to know that one of the clinical coordinators actually completed this task was to ask them. Ms. Cottrell further explained that a formal orientation process has now been implemented which begins with a general orientation and includes a nursing-specific orientation. That process is set forth at Respondent's Exhibit F-8. However, she said that it has not been used yet, because Miami Jacobs is not currently admitting new students and has not hired any new faculty. (Tr. at 573, 605, 607, 573-574, Resp. Ex. F-8)

57. Several of Miami Jacobs's instructors corroborated Ms. Cottrell's testimony that they did provide an orientation to new nursing faculty members, although not necessarily following the formal policy at State's Exhibit 29 or Respondent's Exhibit E. Eva Villamor-Goubeaux testified that when she was the lead faculty at the Troy campus, she oriented new faculty using the class syllabus for the class that the new instructor would be teaching, as well as portfolios maintained by instructors that outline the requirements of the course. Concerning whether she followed the new Nursing Faculty Orientation Manual that appears as Respondent's Exhibit E, Ms. Villamor-Goubeaux said she did not remember if she followed that document's guidelines. (Tr. at 436) She identified an email that she sent to Brenda Cottrell to confirm that she provided orientation to two new faculty members, Noel Madic and Doug Caserta, on April 15 and May 19, 2010, respectively. (Tr. at 427-429, 433-436, Resp. Exs. F-5, F-9) In responding to later questions, Ms. Villamor-Goubeaux confirmed that she did not follow a specific document when she oriented new faculty:

THE HEARING EXAMINER: So just to clarify, it sounds like you didn't sit with a document in your hands or a checklist and go through what you had to teach the new instructors for the orientation. You used, instead, the syllabus and the portfolio to make sure they knew the requirements of the class and how to go about teaching it.

THE WITNESS: Correct.

(Tr. at 439)

58. Cynthia Hasseman, one of the Clinical Coordinators, provided orientation to new nursing faculty at the Springboro campus, where she was lead faculty before becoming a Clinical Coordinator. She testified that she did not use the orientation manual at Respondent's Exhibit E, but instead, she explained that the instructors doing the orientation formulated their own checklists. However, she added that although she did not follow Exhibit E as an "exact guide," she covered everything in it. She added that since Brenda Cottrell has been the Program Administrator, there has been a new orientation policy that includes a day with the clinical instructors to go over policies and procedures, and a checklist that would be maintained in the instructor's faculty file kept at the Dayton campus. (Tr. at 453-456)
59. Jacqueline Ferguson, another Clinical Coordinator, testified that she also conducted faculty orientations. She said that she used the Powerpoint presentation at Respondent's Exhibit F

as her guide when she conducted the orientations. However, in April 2010, a new procedure was put into effect, and she began using the document that appears at Respondent's Exhibit F-1. She explained that she developed this document through her master's degree program, and had it approved by Brenda Cottrell to use for orientation of newly-hired clinical instructors. Ms. Ferguson clarified that all faculty members, newly-hired to any program within the college, received general faculty orientation from either Sharon Danforth or David Hessen, before going through the orientation process specific to the nursing program. She maintained that between February and June 2010, there were no new clinical faculty members to her knowledge who were not provided a nursing orientation. However, she stated that there was no checklist that was completed and placed in faculty files. Instead, instructors attending the orientation were asked to sign a "sign-in sheet," and those sheets were kept in a binder in the Clinical Coordinator's office. She completed no other documentation to show that those faculty members had completed orientation. Ms. Ferguson did not know if the surveyors were provided with any of those sign-in sheets when they conducted the Survey Visit in June 2010. (Tr. at 509-514, 526-528, Resp. Ex. F-1)

60. On cross-examination, Ms. Ferguson acknowledged that different documents were used at different times to verify orientations:

Q: Between February and June of 2010, and then I'll ask you another question, was State's [sic] Exhibit E in full force and effect at Miami Jacobs? Was this the policy?

A: Not to my knowledge, no.

Q: What was in effect?

A: All I can speak to is clinical. It was -- from February to about April I'm not sure of that date of when mine was approved. I used the PowerPoint, I don't know which exhibit it was, but I had been using that Powerpoint --

Q: (Indicating)

A: No; that's the one I developed that was in effect approximately April of this year.

Q: Could I ask you if State's [sic] Exhibit F is it?⁶

A: That's it.

Q: That's the PowerPoint?

A: That's it. That's what I used along with the shadow experience to orient clinical faculty.

(Tr. at 527-528)

61. Wynne Simpkins, a consultant hired by Miami Jacobs to review its program, testified that according to the Ohio Administrative Code, the Program Administrator does not have to orient faculty herself; she merely has to make sure that there is an orientation process and that it is carried out. She further stated that the Rules do not require that the orientation process use a checklist, nor that there be any paperwork in the faculty file to show

⁶ The document being referred to is actually *Respondent's* Exhibit F, since the State's exhibits use numbers instead of letters to identify them.

successful completion of orientation. Finally, she said that she was "unaware" of any requirement that the faculty orientation be conducted by a nurse. (Tr. at 648-650, 658)

Appointment of an Associate Program Administrator Who Did Not Meet Minimum Qualifications

62. OAC Rule 4723-5-11(A) (2) requires the following minimum qualifications of an individual appointed to serve as an Associate Program Administrator of a practical nursing program:

(a) Completion of an approved registered nursing education program in a jurisdiction as defined in paragraph (S) of rule 4723-5-01 of the Administrative Code.

(b) At least five years of experience in the practice of nursing as a registered nurse, **including two years as a faculty member in a registered or practical nursing program;** (Emphasis added)

(c) A master's degree [which must be in nursing if the bachelor's degree is not a Bachelor's of Science in Nursing.] * * *

(d) Current, valid licensure as a registered nurse in Ohio.

63. On February 2, 2010, Miami Jacobs's Campus Director, Faith Mitchell, wrote to Lisa Emrich at the Board with a question concerning whether either of two faculty members would meet the qualifications to be named as an Associate Program Administrator. Brenda Cottrell was copied on Ms. Mitchell's email of that date, which provides, in relevant part, as follows:

We have two employees internally that come close to meeting the criteria. We want to run their backgrounds by you to see if it is possible to put a plan in place to move them into the role as soon as they meet the criteria or on an interim basis until they meet the criteria. Please review the following information:

1. Eva Villamor-Goubeaux - Ms. Villamor has a Master degree in Nursing. She also has 21 months of teaching experience in a pre-licensure program. She was hired as the Lead Faculty member for the Troy campus prior to the letter the college received from the Ohio Board of Nursing.
2. Alberta Jean - Ms. Jean has an RNBSN from Indiana Wesleyan, a Master degree in Community Health, and a doctoral degree in Naturopathic Medicine. Ms. Jean meets the two years of teaching in a pre-licensure program requirement.

Please provide the board's perspective on whether or not these people would be qualified candidates for the associate administrator position assuming Ms. Villamor-Goubeaux completes three more months of teaching experience at Miami-Jacobs Career College.

(St. Ex. 19 at 3-5)(Reprinted as in original)

64. Lisa Emrich responded to Faith Mitchell in an email dated February 4, 2010, with a copy to Diane Cook, who was still on the Board's records as the Program Administrator as of that date. Her response provided the following assessment of the qualifications of the two faculty members that were suggested:

The qualifications for associate administrator in a PN program are found in Rule 4723-5-11(A)(2), OAC: [minimum requirements paraphrased]

* * *

If all of the above requirements are currently met, with the exception of the length of time Ms. Villamor-Goubeaux has served as a faculty member in an RN or PN program, Ms. Jean currently meets and Ms. Villamor-Goubeaux would meet qualifications as an associate administrator upon completion of the two years of teaching.

(St. Ex. 19 at 3)

65. Eva Villamor-Goubeaux was appointed to be the associate Program Administrator at the Troy campus on May 1, 2010. Since Faith Mitchell's email was dated February 2, 2010, it appears that Ms. Villamor-Goubeaux taught for the additional months of February, March, and April, before being appointed to that position on May 1. And, since Ms. Mitchell had represented in her email that Ms. Villamor-Goubeaux had "21 months of teaching experience," Lisa Emrich's response had confirmed that only 3 more months of teaching experience were needed for her to meet the qualifications for that position. However, when Ms. Emrich reviewed Ms. Villamor-Goubeaux's resume that was brought back from the Survey Visit, she found that Ms. Villamor-Goubeaux actually had significantly less experience than the 21 months that were represented. (Tr. at 89-95, Resp. Ex. T-6)
66. Ms. Emrich referred to Ms. Villamor-Goubeaux's resume at Respondent's Exhibit T-6, and summarized Ms. Villamor-Goubeaux's teaching experience -- as of the date of Faith Mitchell's February 2, 2010 email -- as follows:

December 2009 to February 2, 2010: 2 months at Miami Jacobs Career College
July 2009 to December 2009: 5 months at RETS College School of Nursing (Centerville)
April 2009 to July 2009: 3 months at Boecker RETS College (Cincinnati)
September 2008 to November 2008: 3 months at Wright State University

Ms. Emrich explained that, according to her count, Ms. Villamor-Goubeaux had only 13 months of experience as of February 2, 2010, and not 21 months, as Faith Mitchell had represented to the Board in her email on that date. In responding to later questions, Ms.

Emrich conceded that if it is assumed that Ms. Villamor-Goubeaux began teaching on the first day of the month she listed as her start date, and finished on the last day of the month she listed as the end date, some extra time could have been accumulated. For example, if she had begun teaching at RETS College in Centerville on July 1, 2009 and continued through December 31, 2009, that would amount to 6 months, and not 5 months, as Ms. Emrich had calculated. Likewise, if she taught at Bohecker RETS College for the entire months of April, May, June, and July 2009, that would amount to 4 months rather than 3 months. However, Ms. Emrich maintained that, even under those assumptions, Ms. Villamor-Goubeaux was still significantly short of the 21 months of teaching experience that had been represented in the February 2, 2010 email. (Tr. at 89-95, 156-158)

67. Cathy Learn, the Board agent who conducted the Survey Visit on June 8, 2010 at the Dayton campus, testified that when she reviewed faculty files, it appeared to her that Ms. Villamor-Goubeaux did not have enough teaching experience to be an associate Program Administrator. She said that Miami Jacobs had a consultant, Wynne Simpkins, on campus on that date, and that she mentioned her concern about Ms. Villamor-Goubeaux's experience to Ms. Simpkins, and to Brenda Cottrell, the Program Administrator:

And about that point in time, Ms. Cottrell and Wynne Simpkins, who was with Ms. Cottrell, came in and I asked them to take a look at it and see if they believed that the work experience as a faculty member would equal the two years. They took the file with them and they left and * * *

And they were gone 20 minutes to a half an hour at the most and they both came back together and stated that they had looked at it additionally and they agreed that Ms. Villamor-Goubeaux did not have two years of teaching experience, that they had come to that decision too.

(Tr. at 246-247)

68. Ms. Villamor-Goubeaux testified that she was appointed to be the Associate Program Administrator for the Troy campus on May 1, 2010 and was removed from that position when the Board came to conduct the June 2010 Survey Visit. Ms. Villamor-Goubeaux summarized her teaching experience. She testified that she taught one quarter (12 weeks) at Wright State University as an adjunct faculty member, followed by one semester (16 weeks) at Bohecker College in Cincinnati, and one semester (16 weeks) at RETS in Centerville. She then began teaching at Miami Jacobs on December 28, 2009, where she is still employed today. She testified that Miami Jacobs uses academic quarters, and that there are 12 weeks in a quarter. She taught the winter quarter at Miami Jacobs, adding 12 weeks of experience to her resume. On May 1, 2010, she was six weeks into the spring quarter, so as of that date, she had taught for a total of 18 weeks at Miami Jacobs. She contends that this gave her a total of 62 weeks of experience, and that if the definition for "academic year" is used to count years of teaching experience, then only 60 weeks of experience are needed. Ms. Villamor-Goubeaux said that when she was being considered for the Associate Program Administrator position, she was asked to send her resume, which she believed had been sent to the Board of Nursing for its approval. (Tr. at 418-427)

69. Despite the fact that Ms. Mitchell's email said that Ms. Villamor-Goubeaux had "21 months" of teaching experience, Miami Jacobs contends that it calculated her experience by counting *weeks* of experience, as used in the definition of one "academic year" found in OAC Rule 4723-5-01(A):

4723-5-01 Definitions

For the purpose of this chapter, the following definitions shall apply:

- (A) "Academic year" means the equivalent of a minimum of thirty weeks of full-time instruction that may include time for examinations.

70. Using this definition, Brenda Cottrell asserted that only 60 weeks of teaching experience is necessary to meet the requirements of the rule that requires an Associate Program Administrator to have "two years" of experience, and therefore, Eva Villamor-Goubeaux was qualified for the Associate Program Administrator position:

Q: * * * [W]hen you added up [Ms. Villamor-Goubeaux's] teaching time, did you add up months of teaching experience or did you add up weeks of teaching experience in the academic -- weeks of academic teaching?

A: We added up weeks of academic teaching.

Q: Why did you do that?

A: Because that's how it was defined in the Administrative Code.

Q: And in your review of the Administrative Code, how many weeks of instruction equals one academic year?

A: Thirty.

Q: And if the job required two years of academic instruction, how many weeks of instruction were you looking for in Eva's resume?

A: Sixty.

Q: And when you offered her the position effective May 1, 2010, did you believe at that time that she met the 60 weeks?

A: Yes, I did.

(Tr. at 559-560)

71. Ms. Cottrell identified Respondent's Exhibits G-1 and G-2, the emails between Faith Mitchell and Lisa Emrich, on which Ms. Cottrell was copied. She testified that her understanding was that the Board had reviewed this question, that Ms. Villamor-Goubeaux would meet the teaching experience qualification on May 1, 2010, and that is why Miami Jacobs waited until May 1 to offer her the position. However, once she was informed by the Board's surveyor that Ms. Villamor-Goubeaux did not meet the qualifications, she was removed from that position. Ms. Cottrell is serving in that position in the interim. (Tr. at 557-560)

72. Lisa Emrich disputed Miami Jacobs's use of the "academic year" definition as applied to the "two years as a faculty member" required in order to be appointed as the Associate Program Administrator under Rule 4723-5-11(A)(2). Ms. Emrich testified that the definition of "academic year" applies to Rules 4723-12 and 4723-13, which address the minimum length of curricula for nursing programs. She asserted that the rule about faculty does not reference "academic year" as the way experience is counted. (Tr. at 175-176)
73. On cross-examination, Brenda Cottrell acknowledged that the term "academic year" was not used in Rule 4723-5-11(A)(2), the Rule that requires an associate Program Administrator to have two years of teaching experience. She responded that she did not know why Faith Mitchell represented Ms. Villamor-Goubeaux's experience as "21 months" if Miami Jacobs was instead using weeks to calculate her experience. (Tr. at 593-599) She explained why Ms. Villamor-Goubeaux's experience was calculated in weeks, even though the program had represented her experience to the Board in terms of months:

Q: Did you think --

A: No.

Q: -- at any time it was important for the Board to know Ms. Villamor-Goubeaux's number of weeks of teaching experience?

A: In terms of weeks specifically?

Q: Uh-huh.

A: No. But that is the definition used and supplied by the Board when we attempted to calculate out her experiences teaching.

Q: Well, where was that supplied by the Board?

A: Your definition.

* * *

A: That was the only definition of year that was supplied that we could find.

Q: But Ms. Cottrell, that's not a definition for year. It's a definition for academic year. Did you make a distinction in that definition?

A: Well, academic year is teaching.

(Tr. at 596-598)

74. Wynne Simpkins, the Consultant hired by Miami Jacobs in April 2010 to review its practical nursing program, testified that the only definition in the Administrative Rules that defines what a "year" of faculty experience is appears at Rule 4723-5-01(A), which provides the definition of "academic year." She explained that many colleges and universities function on an academic year, and that two academic years of experience would be only sixty weeks. She asserted that there is nothing in the Rules that requires a faculty member's experience to be calculated in months. Ms. Simpkins acknowledged that when the Board's Surveyor asked her on June 8, 2010 how many months of experience she counted for Ms. Villamor-Goubeaux, she reviewed the resume and found that Ms. Villamor-Goubeaux had 18 months of experience. (Tr. at 638-642, 654-657)
75. Ms. Simpkins submits that 18 months of teaching experience would equate to 72 weeks of experience, and therefore, using the definition of "academic year," the minimum

requirement of 60 weeks of experience is met. (Tr. at 634, 638-642, 653-654) On cross-examination, Ms. Simpkins elaborated on why she believed it was appropriate to count a faculty member's experience in terms of weeks of experience:

A: Given that the entire Chapter deals with an education program and given that when I look at the requirement for a pre-licensure nursing education program that educates someone to sit for the NCLEX PN the requirement for that is it be a requirement of a minimum of one academic or calendar year; there's an option. And the only one of those options that the board has chosen to define is "academic year."

(Tr. at 654)

76. Ms. Simpkins went on to explain that since a "year" is not defined by the Rules, she believed it could be defined in various different ways, depending on the organization interpreting it:

Q: Well, let me ask you this, the beginning of the sentence at subsection (A)(2)(b) is at least five years experience in the practice of nursing as a registered nurse. Should that five-year period be counted as five academic years?

A: I suppose that depends on where the person is working, doesn't it, because everyone -- or, each business in the state of Ohio defines their fiscal year differently.

Q: Well --

A: So it could be anything, quite frankly.

(Tr. at 654-655)

Failure to implement consistent policies for student progression and completion of courses

a. Inconsistent attendance policies for clinical hours: "Attendance Contract"

77. In its Practical Nursing Handbook, revised as of December 2009, which appears at State's Exhibit 22, Miami Jacobs states the following policy for student attendance at clinical experiences:

ATTENDANCE POLICY FOR CLINICALS

The faculty and administration believes all students must attend all clinical sessions to be successful. All area healthcare providers have strict attendance policies and support nursing education's commitment to this important employability skill.

- A. You must attend 100% of clinical hours. There may be an opportunity for make up, but only 1 make-up clinical. Absenteeism greater than the make-up hours allowed will result in a grade of Unsatisfactory (U) in clinical and failure of the current course.

(St. Ex. 22 at page 18)

78. Jody Hostetler testified that when she reviewed the file of Student #4 during her Survey Visit at the Troy campus, she found a document called an "attendance contract⁷." (Tr. at 181-184) The document appears below, in a redacted form:



This attendance contract exists between Miami Jacobs Career College and [REDACTED]. Mr. [REDACTED] has not completed his missed clinical day, 10/20/10, from PN 102. Mr. [REDACTED] also missed two clinical days, 1/21 and 1/25/2010 from PN 103 due to an arm injury. Mr. [REDACTED] will abide by the following conditions:

1. Mr. [REDACTED] will make up his missed clinical day from PN 102 by February 19, 2010.
2. Mr. [REDACTED] will makeup his two missed clinical days from PN 103 by completion of PN 103.
3. Mr. [REDACTED] will not be absent or tardy for any more class or clinical days for the remainder of PN 103
4. Mr. [REDACTED] will not exceed absences per the PN handbook in PN 104.
5. Mr. [REDACTED] will abide by the guidelines for attendance and class in the PN handbook, realizing that he:
 - a. has met and exceeded the allowed absences
 - b. cannot miss any more class or clinical.
 - c. will be withdrawn from the nursing program if any absence occurs.
6. Failure to comply with this contract will result in dismissal from the PN program.

(Resp. Ex. M)

The bottom of the document was signed by the student, by Lead Faculty Eva Villamor-Goubeaux, by Program Administrator Brenda Cottrell, and by the Academic Dean, Eric Clark.

79. Ms. Hostetler testified that OAC Rule 4723-5-12(A)(4) requires a program to have written policies for student progression. She explained that by allowing this student an "attendance contract" that was not authorized in the school's official written policies, Miami Jacobs is not in compliance with the Administrative Rule. She said that she spoke with Eva Villamor-Goubeaux, the associate Program Administrator; with Eric Clark, the academic dean; and with "Letha," whose last name she could not recall, who was the campus director at the Troy campus. Ms. Hostetler said she was told that there was not a written policy pertaining to attendance contracts, but that the school is proactive and looks for students who might not be successful in completing the program otherwise. Further, she was told that the Troy location was the only campus that offered the option of an attendance contract. (Tr. at 187-190)

⁷ In the Notice of Opportunity for Hearing, the students whose files were involved in the citations were identified by number in the Notice, with a confidential student key admitted under seal, which identified them by name.

80. At the hearing, Miami Jacobs Clinical Coordinator Jacqueline Ferguson testified that this particular student had broken his arm, and could not be in the clinical setting due to infection control issues with his cast. She explained, "[I]n order that he could move on and not lose ground and lose that, just to keep that knowledge base going, he was allowed to continue once that arm was better and the cast was off." (Tr. at 519) She stated that he was rescheduled to go back and complete the clinical assignment from PN102 after he recovered, and that he did, in fact, complete the make-up that was assigned. On cross-examination, Ms. Ferguson was asked if there was some way to track the skills that this particular student had missed by not completing PN 102, and she said that students have a "skills checklist" that they keep with them, so that if an opportunity arises for them to have a skill checked off, they can present it to their instructor. She said that she believed copies of the checklists were also kept in student files at the Dayton location. (Tr. at 518-519, 528-531)
81. Ms. Hostetler testified that Ms. Villamor-Goubeaux had not explained this student's circumstances during the Survey Visit, except that "they had been trying to keep the student in the program." (Tr. at 190-192) She acknowledged on cross-examination that the attendance contract said the student had injured his arm, and that was the reason for the missed clinicals. She said that she understood that the student had been assigned a make-up date for the missed clinicals, but she did not know if he actually completed them. (Tr. at 210-211, 219)
82. Ms. Hostetler asserted that it was not acceptable for a student to progress to PN 103 without having completed PN 102, because the skills that are learned in the more advanced class build on the skills learned in the earlier class:

[T]heir clinical course would be everything that they've learned up to the time of that program, the opportunity for them to actually perform those nursing skills and deliver nursing care to the client in the clinical setting, so it's a very important safety factor to make sure that students complete one course before they move on to a next course because they're bridging information from that first course into the next course, but if they don't have that opportunity to complete that clinical course to culminate what they have learned and their achievement, to even see if that student would be satisfactory to complete to be able to progress to the next course.

(Tr. at 219-220)

83. Ms. Hostetler agreed that there are some skills that absolutely require the use of one's hands, such as taking a pulse or working with an IV, and that having the opportunity to perform those skills in a clinical setting is crucial, even if it means the student must delay his or her progress in the program. Likewise, the other Surveyor, Cathy Learn, testified that the skills taught in clinical experiences often involve tactile components such as catheterization, dressing changes, and tracheotomy care -- skills that a student must be able to practice with his or her hands in order to master. When Ms. Hostetler was asked why it was unacceptable for the student to go back at a later date and make up the missed classes, she explained that

this program had a policy in place that did not allow for any exceptions, adding that if they had a policy that had exceptions, then that should be spelled out in the written policy so that all students at Miami Jacobs would know that the same opportunity is available to them. (Tr. at 219-222, 297-298)

84. Ms. Hostetler acknowledged that State's Exhibit 22, the Practical Nursing Handbook that contained the policy as of December 2009 was the policy that would have been in effect for this student, whose attendance contract was entered into in February 2009. However, she identified State's Exhibit 20 as a revised Practical Nursing Handbook that became effective in April 2010. Although the revised handbook would not have applied to this particular student's situation in February 2010, Ms. Hostetler pointed out that it still contains the identical policy on Clinical Attendance that the earlier handbook provided, with no provision in the written policy for an "attendance contract." (Tr. at 186-191)

85. Cathy Learn, the Surveyor who conducted the June 8, 2010 Survey Visit at the Dayton campus also testified that she found information in student files that conflicted with the program's written policies on student progression. She said that she saw both versions of the Practical Nursing Handbook: the December 2009 version at State's Exhibit 22, and the April 2010 revision that appears at State's Exhibit 20. She commented that it was hard to tell which policy was in effect. (Tr. at 251-256)

b. Opportunity to make up missed clinical experience by writing a paper

86. Ms. Learn testified that although Miami Jacobs had a policy that required 100% attendance at clinicals, three of the student files contained a document that stated, "The Student may select to either write a 25-page paper titled 'Team Playing/Why Racism Doesn't Work' or do 1 clinical make-up without complaining." These findings were included in the Survey Visit Report dated June 16, 2010, and Miami Jacobs responded to them in a letter from its counsel dated June 29, 2010. In that letter, the program explained that its "**former** Program Administrator" (emphasis in original) offered Students #1, 2, and 3 the opportunity to write a paper in the past to satisfy all clinical components of a course; however, each student declined that opportunity and was assigned a clinical make-up date. (Tr. at 253-254, 266-267, 280, St. Ex. 18 at 4, St. Ex. 21 at 5)

87. At the hearing, Miami Jacobs Clinical Coordinator Jacqueline Ferguson testified that she was aware that the previous Program Administrator, Diane Cook, had offered students the opportunity to write a paper instead of making up the missed clinical. Ms. Ferguson confirmed that none of the students chose to write the paper, and that each was assigned a clinical make-up date. Two of those students attended the make-up date, and one of them was dismissed from the program for other reasons not related to the missed clinical. (Tr. at 517-518)

88. On cross-examination, Cathy Learn was asked if there was anything wrong with a verbal change to a school's written policies, or if it would be possible for a school to have a written policy that would allow for some flexibility in its implementation, and still comply with the

Administrative Code. She responded that the Rules do require the program to have written policies, so verbal changes to those policies would not be compliant. She acknowledged that a school could build in some flexibility to its written policies, "if they put it in writing how they were going to make a change or to implement some other process into that." (Tr. at 262) She summarized the problem with Miami Jacobs's deviation from its written policy:

Q: (By Ms. Wilburn) Did you find that Students 1, 2, and 3 had been treated differently for missing clinicals than what the written policy for Miami Jacobs contained at State's Exhibit 20 would have required?

A: The policy states you must attend 100% of your clinical hours and it doesn't state that you can write a 25-page paper in lieu of going to clinical, so they were offered a different opportunity than the other students if they missed.

(Tr. at 269)

c. Inconsistent policies concerning program completion and ATI exam

89. The ATI examination is a test taken by students at many schools as they complete their studies. Board surveyor Jody Hostetler testified that the ATI is considered to be a "predictor" of a student's success on the NCLEX, the licensure exam that all students must pass to become nurses. She elaborated that the ATI is made up of "a series of testing components that can be given throughout the program to ascertain students' achievement level." In 2010, Miami Jacobs instituted a policy to implement the use of the ATI exams. Cynthia Hasseman, the Clinical Coordinator for Miami Jacobs, explained that there are seven ATI "modules" that are taken at various points in the curriculum, plus a final "predictor exam" that is taken at the end of the program, in preparation for the NCLEX. (Tr. at 194, 461-462)

90. Miami Jacobs had a written policy in its Practical Nursing Handbook titled, "Nursing Program ATI Competency / Raising the Bar." This policy, stated in the handbook that became effective in April 2010, put the following policies in place:

The college has also reviewed and modified the ATI testing policy. In order to encourage the use of ATI, which is a tool meant to prepare you for the NCLEX, the new policy builds in use of the tool in the classroom, remediation for any areas you need to review, an opportunity to re-take the practice tests until you are prepared to take the proctored exam and the comprehensive predictor exam. On the proctored exam you must attain a score of a Level 2 to be able to progress in the program. A level 2 shows that you are competent in the area tested and thus better prepared for the NCLEX exam. On the comprehensive predictor exam a score of 85% is required. This is predictive of passing the NCLEX-PN with an 85% chance on the first attempt. The instructors will give the first online practice test with the rationales on at the beginning of the term. The rationales will be turned off for the second practice test. Then, the proctored exam will be given one week before the end of the quarter. If a retake is necessary it must be taken before the end of the term; Students will be required to pay an out of pocket fee for the second proctored exam. Student needs to attain the required level 2 ATI and pass the class to progress in the program.

(St. Ex. 20 at 12)

91. Brenda Cottrell testified that the new policy was put in place to require students to achieve a Level 2 score on all proctored ATI exams. She said that the policy change was made to raise academic standards and help students be better prepared for the NCLEX. Ms. Cottrell explained that it required a policy change, and she identified Respondent's Exhibit H as the notice that was disseminated to all students to advise them that they must get a Level 2 score on each proctored ATI test. She said that all students, at any campus, would have received the Notice at Respondent's Exhibit H. Ms. Cottrell stated that this requirement was incorporated into course syllabi after the policy took effect, explaining that courses were modified so as to incorporate more of the ATI materials into each course. She called attention to the Master Syllabus, which contains that course syllabus for PN 103, as an example of a modification in the syllabus to add the requirement that students achieve Level 2 results on each exam. (Tr. at 561-564, Resp. Ex. H, Resp. Ex. H-1 at 12)
92. Cynthia Hasseman, Clinical Coordinator for Miami Jacobs, corroborated Brenda Cottrell's testimony that the notice at Respondent's Exhibit H was given to all students. She said that before this policy change, students had been taking the ATI tests, but were not required to obtain a Level 2 score on each part. Ms. Hasseman explained that the policy change became effective in January 2010, but that it was not implemented immediately because the "Silver Light" software that was needed in order to download the tests to each computer that students would use to take the test, was not able to be used. On cross-examination, she admitted that it was the responsibility of the IT staff at Miami Jacobs's three campuses to download the Silver Light program so that students could use it to take their ATI proctored exams on the school's computers. (Tr. at 458-463, 467)
93. Ms. Hasseman acknowledged that although the new policy became effective in January 2010, students were not held to the requirement of attaining a Level 2 score until April. And, at that time, not all students on all campuses took the test at the same time. Ms. Hasseman explained that because students are admitted at different times at different campuses, students at one campus might be farther along in their studies, so they would take the test sooner than students who were admitted later. Each group of students that was admitted at the same time was referred to as a "cohort" of students. (Tr. at 458-463)
94. Ms. Hasseman stated that there was one small cohort of students, consisting of only four students, that was not held to the Level 2 standard for all ATI tests. She explained that these particular students were at the end of their program, nearing graduation. Although they were required to obtain a Level 2 on all remaining modules of the ATI, they would not have to "retro back to the previous courses to obtain a Level 2." Likewise, Brenda Cottrell testified that the policy was not applied to students who were halfway through a course. She added that students were not held to the Level 2 standard for the course they were in when the policy took effect, but they would be held to that standard for the next course they took. (Tr. at 463-464, 599-600)
95. When Jody Hostetler conducted the Survey Visit at the Troy campus, Eva Villamor-Goubeaux provided her with a course syllabus for "PN 120 Advanced Medical Surgical." (Tr. at 193, St. Ex. 24) The syllabus for that course provides the following statement about the ATI exam:

ATI proctored exam: Students will be required to take the ATI proctored exam and must receive a LEVEL 2 in order to progress to the next course. Practice test A will be given (with rationales on) to assist students to obtain this level. At approximately the 4th or 5th week, Practice test B will be given (with rationales off) to assess the student's level of understanding. Students will have the opportunity for remediation on this practice test prior to taking the proctored exam.

(St. Ex. 24 at 3)

96. Ms. Hostetler said that when she returned from her Survey Visit at the Troy campus, she compared her findings with those of Cathy Learn, who had conducted the Survey Visit at the Dayton campus. Ms. Learn had been given a different syllabus for the course "PN 120 Advanced Medical Surgical," which contains a different policy concerning the ATI exam. It appears at State's Exhibit 23, and includes a provision for "remediation" by completing a project with notes on index cards, for which an instructor could award discretionary points:

ATI proctored exam: Students will be required to take the ATI proctored exam and must receive a LEVEL 2 in order to progress to the next course. Practice test A will be given (with rationales on) to assist students to obtain this level. At approximately the 4 or 5 week, Practice test B will be given (with rationales off) to assess the student's level of understanding. Students will have the opportunity for remediation on this practice test prior to taking the proctored exam by completing 3.5 index cards on "topics to review" on ATI report. Points may be awarded for remediation per instructor's discretion.

(St. Ex. 23 at 2)(Tr. at 270-271)

97. Ms. Hostetler emphasized that there were two different syllabi for the same course, given to the surveyors at different campuses, with different policies on the ATI exam, yet each syllabus was presented to the surveyor as the current policy. And, each syllabus states on the top of the front page that it "Applies to: All Campuses." Finally, neither syllabus states the ATI policy exactly the same as it appears in the Practical Nursing Handbook. She also testified that she was told various verbal policies had been applied. For example, she testified that Ms. Villamor-Goubeaux, Mr. Clark, and the campus director, "Letha" told her that they did not have a written policy addressing the number of "retakes" allowed; that each campus implemented the ATI program at different times because of problems with the Silver Light program; and that the Troy campus was giving students two weeks before the end of the quarter to take the ATI, in contrast to the written policy in the Practical Nursing Handbook that states that the proctored exam would be given one week before the end of the quarter. She concluded that "there wasn't anything in writing that was being followed for students" so that they would know what was expected of them, and what requirements they would be held to." (Tr. at 195-206, 208, 217, St. Ex. 20, St. Ex. 18 at 7)
98. Cathy Learn testified that during the Survey Review, Brenda Cottrell told her about verbal deviations from the written ATI policy. She said that Ms. Cottrell told her the school was going to allow certain students to take the test as many times as they needed, and that they would not be charged a fee for the re-takes, as the written policy provides. She asked for clarification, and was told that there was a "special group of 4 students" who were on a different path than the other students. Also, she said that Ms. Cottrell told her that students

at the Springboro campus were going to be given two extra weeks to take the ATI, because of problems with the Silver Light software used to take the test. Finally, she said that she had never seen Respondent's Exhibit H, the notice to students about the ATI policy, before the hearing, and that Ms. Cottrell did not give it to her at the Survey Visit. She said that Ms. Cottrell told her that she had personally gone to each classroom to tell students about the change. (Tr. at 254-262, 282-283, 291-293, 300-301)

99. On cross-examination, Ms. Learn explained why it was important that the policy in the handbook matched the policy that was stated in course syllabi:

Q: Is there anything in the handbook or in the Board's rules that limit a teacher's ability to award extra credit points?

A: Well, they would follow that policy that they've established for their course. If that was written in their policy, then they could; if it wasn't in the policy, then that wouldn't be fair.

Q: But if this teacher wants to give some extra credit or extra help to students so that they can pass the ATI at the level 2, how is that against their policy?

A: It wasn't in the handbook that they would follow that policy.

(Tr. at 289-290)

100. Brenda Cottrell testified that the intent was for St. Ex. 24 to replace St. Ex. 23 as the syllabus for PN 120: Advanced Medical Surgical, and that Cathy Learn should have been given the later revision of the syllabus. Ms. Cottrell stated that St. Ex. 24, revised on April 14, 2010, eliminated some of the ways that a student could remediate a low score, but she emphasized that students were still required to obtain a Level 2 score. Ms. Cottrell conceded that she may have mistakenly printed the earlier syllabus from her printer and given the document to Ms. Learn without checking that it was the most recent revision. She drew attention to the fact that the syllabus at State's Exhibit 24 shows that it was revised on January 26, 2010, so all students at all campuses would have received the revised syllabus. However, Cathy Learn testified that she did not know there had been a revision to the policy because Ms. Cottrell gave her State's Exhibit 23, and she had no reason to believe that it was not the current policy. (Tr. at 566-568, 286-289)
101. Ms. Cottrell acknowledged that teachers were permitted to award "extra credit" in the past, but she said they may no longer do this:

Q: Do teachers have the flexibility in their classes to have, to put into the syllabus extra credit or extra help that students can get even if it's not completely outlined in the handbook?

A: They did it this time. They no longer -- for extra credit. They no longer can put in extra credit.

Q: Okay.

A: At this time there was a possibility, they were doing it.

(Tr. at 565)

She acknowledged on cross-examination that she did not know if every student had the opportunity to earn extra credit. (Tr. at 600)

102. Ms. Cottrell emphasized that although instructors may implement different remediation policies at different campuses, all students are still required to attain a Level 2 score on the ATI:

Q: Are there different ways they can remediate at different campuses?

A: There's different ways they can remediate, yes.

Q: But they still have to attain the same passing level on the ATI.

A: Correct.

Q: But teachers can implement different policies in terms of how they can best prepare for the ATI.

A: Correct.

(Tr. at 567)

103. Concerning the "special group" of four students who, according to the surveyor's testimony, were going to be allowed to take the ATI as many times as they needed, Ms. Cottrell explained that there was a small group of students who, for a variety of reasons, needed to re-enter the program after dropping out. These students had to make up only one more class to finish their programs. Ms. Cottrell testified that there were eventually seven students in this class, and that they were still required to achieve a Level 2 on the ATI. Therefore, she contends that there was no one that was not held to the standard of attaining a Level 2. (Tr. at 568-570)
104. Wynne Simpkins, the consultant that Miami Jacobs retained in April 2010, testified that the "Raising the Bar" policy was in the student handbook when she first saw the handbook, although she was aware that it was a relatively new policy at that time. She testified that she believed students were being held to that standard, and that it was being consistently applied. (Tr. at 647)
105. Three students from Miami Jacobs also testified at the hearing. Two of those students, Carla Antwi and Jonathan Rike, discussed their familiarity with the ATI exams. Carla Antwi stated that she has been required to take the ATI exams throughout her time at Miami Jacobs, and that remediation was offered to help her study for the ATI exams. She said there is lab time and tutoring available for students who have not passed the ATI, or if a student feels weak in any particular areas, even if he or she has not failed a test. Jonathan Rike also testified that he has taken the ATI exams, and that he felt very prepared for them, although they required some self-study. He said that when the ATI policy was changed to require a Level 2, he received notification through an email, with an updated copy of the student handbook, and through being spoken to by someone in the administration, to advise him that the new policy would take effect in three months. (Tr. at 494-496, 481-484)

Contracts with two clinical affiliates did not specify expectations of preceptors.

106. OAC Rule 4723-5-17(B) requires the following:

4723-5-17 Program contractual relationships

* * *

(B) When a program is using preceptors, the contract shall expressly set forth the expectations the preceptors are to fulfill.

107. Cathy Learn testified that when she conducted the Survey Visit at the Dayton campus on June 8, 2010, she asked Brenda Cottrell to show her any agreements that Miami Jacobs had with pediatric clinical affiliates, sites where students learn clinical skills. Miami Jacobs submits that there were only two clinical affiliates at that time in which students were participating in clinical pediatric rotation. Ms. Cottrell produced affiliation agreements with Adolescent and Pediatric Care in Tipp City, Ohio, and with United Rehabilitation Services in Dayton, Ohio. Ms. Learn identified Respondent's Exhibit N as the contract that she was given to show Miami Jacobs's affiliation with United Rehabilitation Services. She testified that neither that contract, nor the one with Adolescent and Pediatric Care, included the required language that sets forth what expectations the preceptors at those locations were expected to fulfill. Ms. Learn said that she asked the clinical coordinator if there was another contract that had not yet been provided, but she was told that the contracts she had been given were the only ones. This finding was included in the Survey Visit report, and addressed in Miami Jacobs's response to the report. (Tr. at 262-264, Resp. Ex. N, St. Ex. 18 at 8, St. Ex. 21 at 7-8)
108. Ms. Learn gave examples of some of the types of responsibilities that might be expected of preceptors, including how many students could be assigned to a preceptor, whether the preceptor would contribute to the student's grade or evaluation, and the method by which the preceptor could discuss a student's progress with the faculty. (Tr. at 264-266)
109. At the hearing, the two Clinical Coordinators for Miami Jacobs, Jacqueline Ferguson and Cynthia Hasseman, conceded that the contracts with those two affiliates did not contain language that set forth the responsibilities that preceptors would be expected to fulfill. Cynthia Hasseman testified that Miami Jacobs has now had all of its affiliates sign new agreements that contain the language required by the Rule, even if preceptors are not used at a particular location. She said that she was not aware that those terms were missing from the contracts, before the Board brought it to the program's attention. Jacqueline Ferguson pointed out that not all clinical sites use preceptors; at some clinical sites, Miami Jacobs send its own instructors out to the facility to work with the students there. However, in responses to later questions, she acknowledged that preceptors were used at these two particular sites. (Tr. at 447-449, 506-507, 533-534)
110. Ms. Hasseman and Ms. Ferguson both identified Respondent's Exhibit N-1 as the new agreement that was executed with United Rehabilitation Services, signed by the agency on July 30, 2010 and by the program on August 2, 2010, to include this information. Ms.

Hassemann explained that Miami Jacobs did not execute a new agreement with Adolescent and Pediatric Care, because it is no longer using that office as a clinical site for its students. She stated that with these changes, she believes the program is now in full compliance with the administrative rule. (Tr. at 447-451, 507, Resp. Ex. N-1 at 3)

Remediation Evidence

Testimony of Darlene Waite

111. At the hearing, Miami Jacobs emphasized that many of the violations that the program was cited for occurred while the previous Program Administrator, Diane Cook, was in charge of the program. Miami Jacobs terminated Ms. Cook's employment effective January 6, 2010, and it submits that it has made significant changes to its management structure and to its staff, to improve its program and prevent the same kind of problems from occurring in the future.
112. Darlene Waite, the president of Miami Jacobs Career College, testified that she realized that she was having problems getting information from Diane Cook, and that Ms. Cook appeared "semiscattered" at meetings. She said that when Ms. Cook informed her that the 2009 Survey Visit had been changed from October to December, she did not inform her that the date change was due to any failing on the part of Miami Jacobs. Ms. Waite said that when she read the Board's Survey Visit report on January 5, 2009, she was surprised about much of the information in it, including the missed deadlines. She met with Faith Mitchell to discuss whether the school had anyone else that could assume the Program Director's position. At that time, Brenda Cottrell had been working on creating an RN program for Miami Jacobs, and it was determined that she should stop working on the RN program, because she was needed as the Program Administrator of the PN program. (Tr. at 336-342)
113. Ms. Waite testified that she was "stunned" when she learned that the Board was seeking to revoke the college's approval for the PN program, and that she knew the program was in "serious trouble." She hired a human resources consultant, a business consultant, and a personal coach for Brenda Cottrell, all with the goal of improving leadership and management skills. In addition, Miami Jacobs retained the services of Wynne Simpkins as a nursing program consultant. Finally, in April 2010, the college made the decision to stop admitting new students to the program, so that it could focus on correcting deficiencies and building a strong practical nursing program. The management structure was also changed. Ms. Waite testified that Diane Cook used to report to Faith Mitchell, the Campus Director, who in turn reported to her (Ms. Waite.) Now, the new Program Administrator reports directly to Ms. Waite, without a Campus Director in between. Faith Mitchell, the Campus Director at the time that Diane Cook was the Program Administrator, has been reassigned as the Campus Director at the Sharonville campus, which does not have a nursing program. (Tr. at 341-345, 366, 547-548)
114. Ms. Waite testified that she had a strong nursing team that took part in the program that Wynne Simpkins directed, and this team also wrote policies to comply with the

Administrative Code. Ms. Waite said that the college is committed to compliance, if the Board continues its approval status:

[I]t's my sincere commitment and all of ours that we would comply fully with every element of the Ohio Administrative Code. It's our goal to exceed the expectations of the Ohio Board of Nursing. We really want to build a partnership with the Board of Nursing so that they feel proud of the graduates of our school. And basically we just, we think through this hearing that and it's our goal to show that commitment and to provide evidence that anything of the past is in the past.

(Tr. at 346)

Testimony of Brenda Cottrell

115. Brenda Cottrell, the current Program Administrator for the practical nursing program at Miami Jacobs, testified that she was appointed to that position on January 11, 2010, after serving as a faculty member for the college. When she was a faculty member, she taught pharmacology, anatomy & physiology, and maternal/child health courses. While she was an instructor in 2008, she had heard that Miami Jacobs had a Consent Agreement with the Board of Nursing. (Tr. at 592, 544-545, 592) However, she did not read the Consent Agreement until a month or two after she was appointed as the Program Administrator:

Q: When did you first read the consent agreement?

A: I don't know specifically the answer to that in terms of the time frame.

Q: Was it shortly after you began as Program Administrator? Can you estimate how long you were in that role before you read it?

A: A month or two maybe.

Q: And would that have been the same time you read the addendum?

A: Most likely. I can't speak to that exactly.

(Tr. at 620)

116. Ms. Cottrell explained that she came into "a mess" when she was suddenly placed in the role of the Program Director, and that she had many other responsibilities that caused her to delay reading the Consent Agreement and Addendum:

Q: When you decided to accept the job as the Program Administrator, did you ask about whether there was a consent agreement?

A: Eventually, yes.

Q: Why wasn't that the very first thing you asked about? If you were going to be responsible for this new program and you had heard that there might be this consent agreement, wouldn't that be foremost in your mind?

A: There was a lot of things foremost in my mind at that point along with the fact that I was finishing up faculty duties. I was teaching three classes at that

time till approximately the third weekend of February. I had the site visit report I had to formulate on a visit where I was not in the administration, I was faculty at that time, so I was not privy to the preinterview, the exit interview, or any of that during that site visit. So I was coming in responding to a report that, in essence, I was not involved with at that visit. There's also a progress report that was due March 4. So within a couple months of assuming the position I had to teach out my classes, write two reports, and try to orient myself to this position. So there were many things going on at that time.

(Tr. at 619-620, 548)

117. Ms. Cottrell identified Respondent's Exhibit U, a document that is being used to monitor progress, outlining the changes in policy that the school has been developing and reviewing. It includes a summary of policies put into place since she has been the Program Administrator, upon the recommendations of the Board. Ms. Cottrell said that the college has put in associate administrators at two of the campuses and has a lead faculty member at the other. It has also retained a nursing hiring manager to deal with faculty hiring, and has reviewed student files and the student handbook to make sure they comply with the Board's rules. Linda Kimble, a consultant, was hired to review the entire curriculum. Ms. Cottrell said that the program has revised its faculty orientation process, and has gone over the systematic plan of evaluation in great detail. (Tr. at 581-585, Resp. Exs. T-9, U)
118. Ms. Cottrell was asked why the college did not close the Springboro and Troy campuses and bring those students to the Dayton campus, when it stopped admitting new students to the program in April 2010. She explained that the students who enrolled at the Troy and Springboro campuses signed a contract to have their classes at that campus. The last class is scheduled to graduate from those campuses in July 2011. (Tr. at 583-585)
119. Ms. Cottrell summarized why she believes Miami Jacobs should be permitted to continue its practical nursing program:

Q: * * * [W]hy should this board either grant full approval or extend conditional approval of this program?

A: I've thought a lot about that, and to me, it boils down to kind of a takeoff of *A Tale of Two Cities* which was this was the best of times and the worst of times, but this is, I'd say kind of the best thing that ever happened to us but also the worst. The best in that it opened the door for all the improvements that we were allowed to make.

It took down the real or perceived discrepancies or disparities between the nursing program and the academic side, whether it's the deans or the campus directors, whomever, but it was like we were playing tug of war, we were pushing and pulling against each other, and through this process with the Board of Nursing it took that away.

And we have all the resources that we have needed. I'll say Miami Jacobs, to separate that off from nursing, is fully, 100 percent behind the

program. The nursing administrative team is dedicated a hundred percent. We are for this program. We worked very hard the last six months in terms of making these changes not only retroactive to the ones that we were deficient in, but also proactive to look ahead to be more visionaries in the program of what we could do to make our program the best in Ohio because that's where we're going if we are allowed the chance.

We have good faculty; they have expressed to me that they really see the difference now, and we believe that even though they're not official statistics, we believe by the NCLEX statistics that we've pulled from reports received from the Board of Nursing that it is showing an improvement, that our nurses are graduating with more skills and better prepared to enter that work force.

And we are under no assumption that it's going to be easy, whatever the Board rules. We know it's a continuous process of improvement, and we are all motivated, and myself in particular, to continue this process for improvement.

(Tr. at 588-589)

Improvement in NCLEX Scores

120. Miami Jacobs submits that it has shown evidence of improvement in its program by increased NCLEX scores. It offered Respondent's Exhibit Q to show the pass rates for its graduates. This document separates the pass rates by campus, and by graduation date. Ms. Cottrell explained that this spreadsheet was created by Miami Jacobs to track progress, and to demonstrate that students who were educated under the new standards in use at the school, including classroom changes and the use of the ATI exams, have performed significantly better on the NCLEX exam than previous students. Respondent's Exhibit Q-1 was also introduced, which Ms. Cottrell identified as a spreadsheet to show the scores of 2010 graduates only. It shows a total pass rate of 78.95%, whereas the average pass rates for earlier classes, as shown on Exhibit Q, were typically in the 60% range. Ms. Cottrell said she is very hopeful that this trend is leading up, and that the higher standards implemented in 2010 will continue to result in higher pass rates. Darlene Waite, the college's president, likewise characterized the pass rates for May and July as "phenomenal." (Tr. at 575-580, 347, Resp. Exs. Q, Q-1)
121. The State disputes the statistics advanced by Miami Jacobs, and offered State's Exhibits 25 and 26 into evidence. Lisa Emrich testified that the Board of Nursing uses the statistics compiled by the Pearson company, which administers the NCLEX. She said that the Board itself does not calculate results, nor does it accept results that a school tabulates for itself. She identified State's Exhibit 25 as the "Pearson Vue" spreadsheet that shows the pass rates for Miami Jacobs's students. Ms. Emrich stated that the college's pass rate in 2008 was 57.14% (St. Ex. 25 at 3); in 2009 it was 63.82% (St. Ex. 25 at 2); and for the first two quarters of 2010 it was 63.21% (St. Ex. 25 at 1)

Ms. Emrich then referred to State's Exhibit 27, to show that in 2008, the national average pass rate for all nursing schools was 85.62%, and the average pass rate of Ohio test-takers was 89.27%. She explained that State's Exhibit 26 shows the pass rates for the year 2009. In 2009, the national average pass rate was 85.73%, while Ohio test-takers had an average pass rate of 88.14%. (Tr. at 127-135)

122. Ms. Emrich also disputed the propriety of applying the statistics shown at Respondent's Exhibit Q-2, which Miami Jacobs submits were taken from the NCLEX website. She said the statistics shown on Exhibit Q-2 were not analogous to the Pearson-Vue data because they separated results by U.S.-educated candidates vs. internationally-educated candidates, whereas the Board looks at all first-time test candidates, whether educated in the United States or abroad. (Tr. at 137-139)
123. At the start of the hearing, only the first two quarters' scores for the year 2010 were available from Pearson Vue, and those were shown at State's Exhibit 25. However, by the third day of the hearing, additional scores were released, and the State introduced State's Exhibit 30. It shows that first-time test candidates who graduated from Miami Jacobs in May 2010 had a pass rate of 74.07%, and first-time candidates who graduated from Miami Jacobs in July 2010 had a pass rate of 87.10%. Miami Jacobs's year-to-date pass rate for 2010 thus far is shown as 69.15%. The same document shows on the second page that Ohio's year-to-date pass rate thus far is 91.14%, and the national average, shown on the third page, is 87.26%. (Tr. at 665-666, St. Ex. 30)
124. Ms. Emrich testified that the Ohio Board uses statistics relating to first-time test candidates, because OAC Rule 4723-5-23, known as the "95% Rule," uses statistics based on first-time candidates. She explained that the Board has a benchmark that a school's pass rate should be at least 95% of the national average. The 95% Rule requires the Board to review any program that does not meet that standard for three consecutive years; however, she said that the Rule applies only to programs that are on full approval, and not those on conditional approval. On cross-examination, Ms. Emrich acknowledged that the Board has not cited Miami Jacobs with violating the 95% Rule, and in fact, that it has never withdrawn a school's approval because it fell below the standards required by that Rule. (Tr. at 135-139, 162-167)
125. Miami Jacobs submits that it has not presented its scores in such a way as to artificially inflate them. Brenda Cottrell testified that the reason the school separated its pass rates by campus on Respondent's Exhibits Q and Q-1 is that the different campuses have different student demographics. She said that the intent was to track whether the changes implemented in the nursing program have resulted in higher test scores, among the different demographic groups at each campus. Ms. Cottrell emphasized that the reason the scores were broken down by graduation date is to show whether the higher standards that were put in place in 2010 have resulted in higher pass rates for the NCLEX exam, and she submits that the improvement is documented. (Tr. at 575-580)
126. On cross-examination, Ms. Cottrell acknowledged that if Miami Jacobs showed its NCLEX scores the same way that Pearson-Vue does, those scores would be different. She said that

Miami Jacobs does monitor the Pearson-Vue data, but chose to present its NCLEX scores differently in Respondent's Exhibit Q because the Pearson-Vue scores come out on a quarterly basis only. She stated that she believes Miami Jacobs is monitoring the data on a more current, weekly basis, to see if its students' scores are improving. (Tr. at 612-617)

Testimony of Students or Past Students: Jonathan Rike, Carla Antwi, and Steve Van Winkle

127. Jonathan Rike is a fulltime practical nursing student at Miami Jacobs Career College in the night program, who will graduate in December 2010. He is also a licensed Emergency Medical Technician [EMT], and he works on a "PRN" basis at Carriage Inn Nursing Home in Dayton. He testified that when he entered the program, the admissions staff was very helpful to him in arranging financial aid, and he has been pleased with the program. He attends classes in a classroom two days a week, and he spends two days a week in his clinical experiences. Mr. Rike described the faculty at Miami Jacobs as very responsive to any questions or concerns he has raised, and he said that all instructors have an "open door" policy. He said that he has been informed of any changes to the program, such as changes to attendance policies, by his instructors well in advance of their effective date. Mr. Rike said that he respects Ms. Cottrell, who was one of his instructors, and he described her as a very competent instructor who is knowledgeable and helpful, and who listens to her students. (Tr. at 478-490)
128. Carla Antwi attends Miami Jacobs fulltime, while also working as an STNA [State Tested Nurse's Aide] for Heartland of Urbana, and raising her three children. Ms. Antwi will also graduate in December 2010. She said that she used to work in accounting, but with the changing job market, she decided to pursue licensure as an STNA, and later as an LPN. She said that she chose to start a career in nursing because she likes to help people, and because nursing offers her better career opportunities. Ms. Antwi is the student body president and a student ambassador at Miami Jacobs, charged with taking questions or concerns from students to faculty members. She reported that the program has been responsive to any questions or concerns she has raised. She plans to pursue licensure as an RN after she completes her program, and she would eventually like to be the Director of Nursing at a nursing home, because she finds it rewarding to work with geriatric patients, especially Alzheimer's patients. Ms. Antwi believes her classroom and clinical experiences have prepared her well for the ATI exams. She said that she has had an "excellent experience" with the program, and that her time there has been "time well spent." (Tr. at 491-501)
129. Steve Van Winkle, LPN, is a charge nurse at Wood Glen Alzheimer's Community. He received his nursing education from Miami Jacobs Career College at the Springboro campus, and was licensed in March 2010. Mr. Van Winkle testified that he started a nursing program when he was in his twenties, but did not finish. He then had a family, and began working as a truck driver. When he was awarded custody of his children, he realized that he could not raise his children while working as a long-distance truck driver, so he decided to go back into nursing. He chose Miami Jacobs because he had heard good things about its program, and because it was conveniently located near his house. He said that Miami Jacobs provided him with the skills he needed to be successful on the NCLEX and in his job as a nurse. He described the program as "absolutely grueling," and he said that he had to study "hours and hours" outside of class. Mr.

Van Winkle said that the faculty members have an open-door policy, and he related a situation where faculty members voluntarily teamed up to help a student that he knew who was falling behind. (Tr. at 535-541)

Testimony of R. Wynne Simpkins, RN

130. Wynne Simpkins has been licensed as a registered nurse in Ohio since 1977. She has a long history in nursing, including being employed by the Ohio Board of Nursing for ten years, five of those years as the manager of the Nurse Education and Practice unit. She currently works as a consultant through her own business, RWS Education, LLC. In that position, she presents continuing education programs for nurses to educate them about the laws and rules that apply to nursing, and she consults with pre-licensure nurse education programs. Ms. Simpkins was retained as a consultant by Miami Jacobs in April 2010 to review its program. (Tr. at 629-634, Resp. Ex. T-3)
131. Ms. Simpkins testified that she reviewed all faculty files and found that all of the instructors were qualified to hold the positions they currently hold, adding that the college had transcripts in the faculty files to verify the instructors' qualifications. She maintained her opinion that Eva Villamor-Goubeaux met the qualifications of the Rule to be an associate Program Administrator, as discussed earlier in this report. She has also reviewed the student handbook and has gone through every policy and procedure with faculty to make sure they understand them. Ms. Simpkins noted that there is a new faculty handbook that has been reviewed and is ready to be implemented, which includes everything a faculty member would need to know, with a section specific to the nursing program. In addition, the college hired Linda Kimble, MSN, a consultant, to review its entire practical nursing curriculum. Ms. Kimble has written nurse education programs, and has been the Program Administrator for a practical nursing program and a registered nursing program. Ms. Simpkins stated that she believes the program is currently in full compliance with all of the provisions cited in the March and July Notices. (Tr. at 637-638, 642-644, 650-652, Resp. Ex. T-9)
132. Ms. Simpkins prepared a report that analyzed each alleged violation from the March Notice and the July Notice. In the "Comments" section of that report, she summarized the school's progress to correct any deficiencies. She stated her opinion that the program has now corrected all deficiencies that were "correctable," explaining that while it is not possible to correct the fact that a report was filed late, there are now procedures in place to prevent it from happening in the future. Ms. Simpkins said that she believes the previous Program Administrator missed deadlines because she had little oversight. Now, there is a "check" in place; if Ms. Cottrell did not fulfill her responsibilities, it would be noticed by Darlene Waite, who is now her direct supervisor. She described Darlene Waite as "very, very involved" in the program, and stated that Ms. Waite now meets with Brenda Cottrell regularly. Ms. Waite also attends nursing administration team meetings, so she has input from all faculty and does not rely on the Program Administrator alone for information. (Tr. at 644, 645-647, 652-653, Resp. Ex. R)
133. Ms. Simpkins said that she believes Brenda Cottrell is performing admirably in her new role as the Program Administrator:

Q: In your workings with Ms. Cottrell in the past six months how would you describe how she's doing in that job and -- just basically how is she doing in that job?

A: I think she's doing remarkably well in that job. She's strong. She's intelligent. She came in facing a lot of issues that needed to be repaired. She has been able to undertake that job and turn the program around. She came into a staff that was at three different campuses and had allegiance to that campus and she has made them a cohesive group that's now a nursing staff.

(Tr. at 636)

134. Ms. Simpkins testified that she believes Miami Jacobs should be permitted to continue its practical nursing program. (Tr. at 653) On cross-examination, she was asked if she would recommend this program to a prospective nursing student. She said that she would recommend Miami Jacobs to a prospective student, and explained her reasons:

A: Because this program has taken itself apart and put itself back together in the past six months, and I cannot say that every program in the State of Ohio has done as thorough of a self-examination as this program has, and so they now know that their program meets these rules. And every faculty member knows what those rules are now.

(Tr. at 660)

FINDINGS OF FACT

1. Miami Jacobs violated the terms of its March 2008 Consent Agreement, the terms of its March 2009 Addendum, and Rule 4723-5-09(D)(1) by failing to give the Board written notice, within 10 business days, of a change in its Program Administrator. Although Brenda Cottrell replaced Diane Cook as the Program Administrator on January 11, 2010, the Board did not receive written notice of that change until March 10, 2010.
2. Miami Jacobs violated the terms of the March 2008 Consent Agreement and the terms of the March 2009 Addendum by submitting false, deceptive or misleading statements to the Board. In the March 2009 Addendum, Miami Jacobs represented that it had replaced two instructors who were found to be unqualified. However, the only minutes that exist for the April 1, 2009 faculty meeting show that one of those instructors remained employed in her position, and the minutes reflected that it was the college's intent to continue to employ her despite the concerns of the Board of Nursing. Testimony at the hearing established that the unqualified instructor continued to teach through the end of April 2009.
3. Miami Jacobs violated OAC Rule 4723-5-06(C) and Rule 4723-5-05 by failing to submit a Pre-Survey Visit Report to the Board, at least three weeks prior to the Survey Visit that

was scheduled for October 28-29, 2009. When no report was submitted, the Survey Visit was rescheduled for December 2-3, 2009. Although the Pre-Survey Visit Report was due on November 12, 2009, the program again failed to submit a timely report. The Pre-Survey Visit Report was not received by the Board in a format that could be opened until November 20, 2009.

4. Miami-Jacobs violated OAC Rule 4723-5-06(B)(1) by failing to give students notice of the correct dates of the Board's Survey Visit, scheduled for December 2-3, 2009. Instead, students were notified that the Survey Visit would take place on December 1-2, 2009.
5. Miami Jacobs violated OAC Rule 4723-5-17(A) by failing to have on file at the program office current copies of all cooperative agreements with clinical agencies, signed by both parties to the agreement. At the Survey Visit on December 2-3, 2009, Miami Jacobs did not produce an affiliation agreement for its contract with Harborside Healthcare that was signed by both parties to the agreement. The only copy made available to the Board's surveyor during the Survey Visit was signed by Harborside Healthcare, but not by Miami Jacobs.
6. At the Survey Visit on June 8, 2010, Miami Jacobs was not in compliance with OAC Rule 4723-5-09(B)(4) because its Program Administrator had not implemented an orientation program for new faculty. Although the college had a plan for faculty orientation described in its Nursing Faculty Orientation Manual, the files of those employees hired in 2010 had no evidence that they had received any kind of orientation. At the hearing, several instructors testified that they performed some kind of orientation for newly-hired nursing faculty members, but they used various different plans and guidelines. Eva Villamor-Goubeaux used the class syllabi and the portfolios kept by previous instructors to conduct orientations; Jacqueline Ferguson used a powerpoint presentation along with a "shadow" experience of another faculty member; Cynthia Hasseman used her own checklist. None of the instructors who said they conducted orientations used the plan in the Nursing Faculty Orientation Manual that Miami Jacobs represented to the Board that it was using.
7. Miami Jacobs violated OAC Rules 4723-5-09((B)(5) and 4723-5-11 by appointing Eva Villamor-Goubeaux to the position of Associate Program Administrator on May 1, 2010, when she did not have the required two years of experience as a faculty member in a nursing program. For the reasons explained in the Discussion section of this report, I find that under the "plain meaning" of the term "year," Ms. Villamor-Goubeaux fell short of the two years of experience required by the Rule, and therefore, was not qualified to hold that position.
8. Miami Jacobs violated OAC Rules 4723-5-12(A) by failing to consistently implement its own written policies for student progression and the satisfactory completion of each course in the practical nursing program. This is evidenced by the college's failure to implement consistent policies concerning student attendance at clinical experiences, and its failure to implement consistent policies concerning when a student must take the ATI

exams, what level of achievement would be required on each test, and whether there would be any opportunities for retakes or remediation.

9. At the Survey Visit on June 8, 2010, Miami Jacobs was not in compliance with OAC Rule 4723-5-17(B) because the college's contracts with two affiliates, Adolescent and Pediatric Care, and United Rehabilitation Services, did not set forth the expectations that the preceptors used at those locations were expected to fulfill, as required by the administrative rule.

CONCLUSIONS OF LAW

1. The Board has met its burden of proving, by a preponderance of the evidence, that the Miami Jacobs Career College Practical Nursing Program was not in compliance with several rules contained in OAC Chapter 4723-5 at the time of the December 2009 Survey Visit, and that it was also in violation of several rules at the time of the June 8, 2010 Survey Visit. Further, Miami Jacobs has violated the terms of its March 2008 Consent Agreement and its March 2009 Addendum with the Board. Therefore, pursuant to R.C. 4723.06(A)(6), the Board has the authority to deny full approval status to this program, and continue its conditional approval. In the Board's discretion, it also has the authority to withdraw conditional approval.

DISCUSSION

It is very difficult to reach a recommendation in this case, because there are as many reasons to support withdrawal of conditional approval as there are reasons to support an extension of conditional approval. As I considered the evidence following the hearing, I vacillated in my opinion of the appropriate recommendation, and I find that I still have very mixed thoughts about what the outcome of this case should be. For those reasons, although I am making a reluctant recommendation that the program remain on conditional approval for an additional year, I must defer to the Board's expertise to evaluate whether the deficiencies in this program have been adequately corrected and remediated, or whether the violations are serious enough that they compromise the program's ability to graduate well-trained, well-prepared students who will become competent nurses.

This is the third time that the Board has brought charges against this practical nursing program. By entering into a Consent Agreement in 2008 and an Addendum to the Consent Agreement in 2009, the Board has already offered Miami Jacobs a second chance, and even a third chance to correct deficiencies in the program; yet some of those same problems have continued to recur. In reviewing this program's history with the Ohio Board of Nursing, several pervasive problems are apparent, including problems with the continuity of its Program Administrator, and with its hiring of underqualified instructors or administrators. In 2007, Miami Jacobs was found to have hired an unqualified Program Administrator (A. Shilling), which was addressed in the Consent Agreement. In 2009, it was found to have two unqualified instructors teaching nursing. Although the college represented that it no longer employed those instructors in the March 2009 Addendum to the

Consent Agreement, it was later discovered that one of those instructors in fact remained employed through April 2009, even after the college was aware that she was not qualified to teach a nursing course.

There have also been recurring problems with the program's progression of students through the clinical part of the program. In the March 2008 Consent Agreement, Miami Jacobs agreed to obtain clinical experiences for its students, and acknowledged that those experiences must be supervised by a faculty member or preceptor who meets the requirements of OAC Chapter 4723-5. A year later, in the March 2009 Addendum, Miami Jacobs admitted that it had no way to verify that 40 of its students had completed the necessary clinical experience portion of their program. As recently as the June 2010 Survey Visit, some students were found to have been permitted to miss clinical experiences, or to make them up by writing a paper that had nothing to do with the clinical competency aspects of nursing practice.

Miami Jacobs contends that many of the program's violations of the administrative rules occurred under the previous Program Administrator, Diane Cook. While Ms. Cook was clearly responsible for some of the violations that show a poorly-run program, such as the failure to submit timely Pre-Survey Visit Reports and notifying students of the incorrect date of the Board's Survey Visit, this cannot sufficiently excuse the fact that the college did not comply with the laws and rules that govern its nursing program. And, the fact that some of the same types of violations have persisted into the tenure of the current Program Administrator, Brenda Cottrell, is cause for concern.

One of those recurrent violations concerns the program's failure to notify the Board of the change in its Program Administrator. Because of earlier issues with numerous different Program Administrators, the Board and Miami Jacobs agreed in the 2008 Consent Agreement that the college would provide the Board with written notice of the appointment of a new Program Administrator within ten days of that person's appointment. Brenda Cottrell began serving as the Program Administrator on January 11, 2010, yet the school did not provide the written notice to the Board, as it promised to do in the Addendum to the Consent Agreement, until March 10, 2010, about two months later. Ms. Cottrell might have been aware of this requirement in time to comply with that requirement, if she had read the Consent Agreement promptly. However, she waited "a month or two" after her appointment as Program Administrator to read the Consent Agreement, even though she was aware that the Consent Agreement existed when she was a faculty member. It is disingenuous for anyone from this program to claim that the January 20, 2010 email in which Faith Mitchell referred to Ms. Cottrell as the "proposed administrator" was a sufficient notification that a new administrator had been appointed. To call her a "proposed administrator" when she had already been appointed to that position without the Board's knowledge or approval is a misrepresentation.

Another problem that persisted into Ms. Cottrell's tenure as Program Administrator concerns the college's failure to hire instructors and administrators who met the qualifications set forth in the Ohio Administrative Code. Eva Villamor-Goubeaux was hired to be an Associate Program Administrator when she had little more than one year of teaching experience, and not two years of experience as required by Rule 4723-5-11(A)(2). Miami Jacobs maintains that she was qualified, because if the definition of "academic year" in another section is used to define "year," then Ms.

Villamor-Goubeaux needed only 60 weeks to have the "two years" of experience needed under the Rule. For the following reasons, I am unpersuaded that this is a correct interpretation.

First, Rule 4723-5-11(A)(2) requires "two years" of experience as a faculty member; it does not require "two academic years." Although the term "year" is not defined in Chapter 4723-5, it is defined in the introductory sections of the Ohio Revised Code. R.C. 1.44(B) defines "year" as "twelve consecutive months." Moreover, it is a basic principle of statutory construction that rules are to be given their "plain meanings." R.C. 1.42 provides that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." Numerous Ohio Supreme Court decisions rely on the maxim that terms in a law or rule are to be interpreted according to their ordinary or common usage. In *State ex rel. Ohio Dept. of Health v. Sowald* (1992), 65 Ohio St. 3rd 338, 342, the Court noted, "The first rule of statutory interpretation is to give effect to the plain meaning of the words employed in the statute," and ruled that "an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." Likewise, in *State ex. rel. Burrows v. Industrial Commission* (1997), 78 Ohio St. 3rd. 78, 81, the Court said "We look to the plain language of the statute to determine the legislative intent." In *State ex. rel. Pennington v. Gundler* (1996) 75 Ohio St. 3rd 171, 173, the Court cited R.C. 1.42 in ruling that "Words used in a statute are to be taken in their usual, normal, and customary meaning." I find that to define "two years" as sixty months does not give that term its plain meaning.

There is also precedent to establish that a licensing board should be given deference in the interpretation of the administrative rules that it has enacted. In *Ohio Optical Dispensers Board v. Star Beauty Supply, Inc.*, 2007-Ohio-3464⁸, the Court of Appeals for the Sixth Appellate District upheld the Optical Dispensers Board's interpretation of "contact lens" despite a beauty supply store's contention that the zero-powered cosmetic contact lenses that it sold were not "contact lenses" because they did not correct vision. The Court cited an earlier Ohio Supreme Court decision, *State ex. rel. Celebrezze v. Natl. Lime & Stone Co.* (1994) 68 Ohio St. 3rd 377, 382, in explaining its finding: "Driving our determination is the long-accepted principle that considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer." In R.C. 4723.06(A)(1), the General Assembly gave the Ohio Board of Nursing the power to administer and enforce its laws and any rules that it adopts, and the Board's Education Manager, Lisa Emrich, testified that two years means twenty-four months. For all of these reasons, and in deference to the Board's ability to interpret its own rules, I cannot accept Miami Jacobs's creative interpretation of the term "year" in a way that justifies hiring an underqualified instructor to be its Associate Program Administrator.

Once again, I find it disingenuous for Miami Jacobs to contend that it believed the Board had approved its hiring of Ms. Villamor-Goubeaux, based on Faith Mitchell's email (copied to Brenda Cottrell) that represented her to have "21 months" of experience as a faculty member. It is true that the Board sent a reply stating that Ms. Villamor-Goubeaux would be qualified once she completed an additional three months of teaching experience. However, that was based on the Board's understanding that this instructor did, in fact, have the "21 months" of experience that Ms. Mitchell represented her to have. Based on a review of this instructor's resume, it seems to be a

⁸ A copy of the Court's unreported opinion is attached to this Report and Recommendation.

blatant misrepresentation that she had "21 months" of faculty experience, as I cannot fathom any way that Ms. Mitchell could have reasonably counted 21 months of teaching experience as of February 2, 2010. And, it is important to note that Miami Jacobs itself used "months" in counting the instructor's experience when it made that representation to the Board, so it is inconsistent for the program to claim now that experience should be counted in weeks.

This program's occasional misrepresentations, and the fact that it continues to advance arguments based upon misrepresentations (eg., that it notified the Board of a new administrator in the email calling Ms. Cottrell the "proposed administrator;" and that Eva Villamor-Goubeaux fulfilled "two years" of experience by having sixty weeks of experience) prevent me from having a sense that this program has acted in a spirit of honest cooperation with the Board. Instead, it has seemed, at times, defiant of the Board's regulation of its program. This defiance was shown, for example, in the school's decision to continue to employ the instructor that it said it had replaced, and its statement in the faculty minutes that it knowingly chose to do so, even though this was not in compliance with the rules governing the nursing program.

The Board is made up of experts in nursing from throughout the State, appointed by the governor, upon the theory that the best people to license and regulate nurses and nursing schools are nurses themselves. While I did get a sense of professionalism and respect for this peer review system from some of the Miami Jacobs personnel, such as Darlene Waite and Cynthia Hasseman, several of those involved in advancing the misrepresentations are still employed in high positions with the college, causing concern about whether there will be continued conduct that evidences dishonesty or a lack of cooperation with the Board if the program continues.


Because of this program's troubling history and the fact that some significant deficiencies have reoccurred even after the replacement of the school's Program Administrator, there are very valid reasons for the Board to withdraw this program's conditional approval. However, some of the evidence presented at the hearing suggests that it may instead be appropriate to continue the program's conditional approval and allow one more opportunity for the college to demonstrate that it can comply with what is expected of it. Faculty members testified that the program has instituted new standards for student achievement, and that those standards have resulted in much-improved scores for its students taking the NCLEX, the licensing examination to become nurses. Although the most recent pass rates are still lower than the average Ohio pass rate, they are significantly better than the very low pass rates that this program's students have had in previous years. The students who testified at the hearing were nothing short of inspiring. They appeared bright and competent, and had positive professional attitudes that anyone would want to see in a nurse caring for them in a hospital or any medical facility. Finally, Wynne Simpkins testified that she has reviewed this program and that after "reinventing itself" by combing through every policy and procedure, every aspect of its program, the program now complies with all of the Board's rules governing a nursing program.

In giving this program the benefit of the doubt that it has corrected its deficiencies, I am inclined to recommend that the Board extend its conditional approval for one more year, although I must ultimately defer to the Board for the appropriate disposition of this case. The Board is in a unique position in terms of its ability to evaluate the seriousness of the program's repeated violations, and their impact upon the school's ability to provide high-quality training to its students, enabling them

to become well-prepared, skilled nurses. If the Board finds that these deficiencies have been so egregious that this program's conditional approval should be withdrawn, then I recommend that the Board provide the program with a reasonable period of time in which its current students can finish out their programs before ending its approval. Finally, if the program is allowed to remain on conditional approval for an additional year, then I recommend that the Board examine its authority to require that Miami Jacobs take responsibility for the cost of the lengthy hearing. If it was this process that forced Miami Jacobs to make improvements to come into compliance with the rules governing its program, then some consideration should be given to whether that expense should be borne by the Ohio Board of Nursing, or by the program itself.

RECOMMENDATION

I recommend that the Board continue the conditional approval status of the Miami Jacobs Practical Nursing Program for at least one additional year, or such time as the Board determines is appropriate. I also recommend that the Board impose whatever conditions it deems appropriate upon this program to demonstrate that it is maintaining full compliance with all of the Rules governing pre-license nursing programs in Chapter 4723-5, including additional monitoring or survey visits by the Board.



Ronda Shamansky
Hearing Examiner

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

The Ohio Optical Dispensers Board

Court of Appeals No. L-06-1383

Appellee

Trial Court No. CI06-2784

v.

Star Beauty Supply, Inc.

DECISION AND JUDGMENT ENTRY

Appellant

Decided: July 6, 2007

* * * * *

Marc Dann, Attorney General, and Peter R. Casey, IV, Assistant Attorney General, for appellee.

Neil Stewart McElroy, for appellant.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} Defendant-appellant, Star Beauty Supply, Inc., appeals the July 17, and November 6, 2006 decisions of the Lucas County Court of Common Pleas which, respectively, denied its motion to dismiss and granted appellee Ohio Optical Dispensers Board's motion for summary judgment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} The relevant facts are as follows. On March 31, 2006, Ohio Optical Dispensers Board ("the Board") filed a complaint for a preliminary and permanent injunction against appellant Star Beauty Supply, Inc. The complaint alleged that Star Beauty violated R.C. 4725.40(A) by dispensing zero-powered or plano (cosmetic) contact lenses without a prescription. The complaint requested that Star Beauty be enjoined from selling the contact lenses. By motion, the Board also requested a temporary restraining order; following a hearing on April 12, 2006, the motion was granted.

{¶ 3} On April 14, 2006, Star Beauty filed a Civ.R. 12(B)(6) motion to dismiss arguing that R.C. 4725.40(A) applies only to contact lenses prescribed to correct human vision. In opposition, the Board argued that it has jurisdiction over all contact lenses and that all contact lenses are prescribed to correct vision.

{¶ 4} On July 17, 2006, the trial court denied the motion. The court found that zero-powered contact lenses are contact lenses and, according to R.C. 4725.40(A), may only be dispensed with a written prescription. In reaching its conclusion, the court looked to the statutory construction rules. Thereafter, on November 6, 2006, summary judgment was granted in favor of the Board. This appeal followed.

{¶ 5} Appellant now raises the following assignment of error:

{¶ 6} "1. The trial court erred when it denied Star Beauty's motion to dismiss."

{¶ 7} Appellant's sole assignment of error consists of two components. First, appellant contends that the Board's authority does not extend to the regulation of zero-powered contact lenses. Second, that appellant did not dispense contact lenses as prohibited under R.C. 4725.40(B); rather, it merely transacted a sale.

{¶ 8} R.C. 4725.44(A) provides that "[t]he Ohio optical dispensers board shall be responsible for the administration of sections 4725.40 to 4725.59 of the Revised Code * * *." The disposition of the case rests on the interpretation of R.C. 4725.40(A) and (B), which provide:

{¶ 9} "(A) 'Optical aid' means an instrument or device prescribed by a physician or optometrist licensed by any state to correct human vision, including spectacles, eyeglasses, contact lenses, and accessories. Contact lenses shall be dispensed only in accordance with a written prescription designated for contact lenses."

{¶ 10} "(B) 'Optical dispensing' means interpreting but not altering a prescription of a licensed physician or optometrist and designing, adapting, fitting, or replacing the prescribed optical aids, pursuant to such prescription, to or for the intended wearer; duplicating lenses, other than contact lenses, accurately as to power without a prescription; and duplicating nonprescription eyewear and parts of eyewear. 'Optical dispensing' does not include selecting frames, transacting a sale, transferring an optical aid to the wearer after an optician has completed fitting it, or providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning."

{¶ 11} The interpretation of a statute is a question of law subject to de novo review. (Citation omitted.) *Columbus v. Breer*, 152 Ohio App.3d 701, 2003-Ohio-2479,

¶ 12. The main objective in construing a statute is to determine legislative intent. *Featzka v. Millcraft Paper Co.* (1980), 62 Ohio St.2d 245, 247. To determine the

legislative intent, a court must look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. Words used in a statute are to be taken in their usual, normal, and customary meaning. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 1996-Ohio-161, citing R.C. 1.42.

{¶ 12} Appellant contends that the statute is ambiguous based upon the first sentence of R.C. 4725.40(A), which defines "optical aid" as a device prescribed to correct human vision. Appellant argues that it is unclear whether the second sentence applies to all contact lenses or only those prescribed to correct human vision. The Board contends that the statute is clear on its face and requires no interpretation; that "[c]ontact lenses shall be dispensed only in accordance with a written prescription" simply means what it says.

{¶ 13} Upon careful review of the statute itself and the statutory construction rules, we must conclude that R.C. 4725.40(A) requires all contact lenses to be dispensed only with a written prescription. Driving our determination is "the long-accepted principle that considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer." *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382. Made a part of the trial record below is the affidavit of Susan Benes, M.D. Dr. Benes states that she is a member of the Board and that "[t]he Board interprets R.C. 4725.40(A) as all contact lenses, regardless of powered, plano or cosmetic lenses, must be dispensed pursuant to prescription." Dr. Benes explains that "[t]here is no difference in the physical effect of a lens plano or powered on the cornea.

All lenses require professional and proper patient screening, fitting, education, and follow up." Dr. Benes further states that plano lenses alter vision by the fact that they come into contact with the cornea; when the contact occurs the tear layers are altered as is the oxygen level. Finally, Dr. Benes explains that plano lenses are sometimes prescribed following eye surgery and are used by patients who have lost sensation to the eye.

{¶ 14} Alternatively, appellant argues that if, in fact, the Board had the authority to regulate the zero-powered contact lenses the Board still lacked authority to regulate appellant's sale of the lenses. Plainly stated, appellant argued that its sale of the lenses was not "dispensing" as is prohibited under R.C. 4725.40(A) and (B).

{¶ 15} R.C. 4725.40(B) defines "optical dispensing" as interpreting a prescription of a licensed physician or optometrist and "designing, adapting, fitting, or replacing the prescribed optical aids." The definition of dispensing does not include "transacting a sale." The Ohio Attorney General has interpreted the term "dispensing" to include: "reviewing a patient's prescription for replacement contact lenses and selecting from inventory * * *." 2002 Ohio Atty.Gen.Ops. No. 2-221. The opinion further clarified that transacting a sale is simply the act of exchanging the contact lenses for an agreed sum of money.

{¶ 16} In the present case, we must find that appellant dispensed contact lenses without a written prescription. The phrase "transacting a sale" as is used in the statute and interpreted by the Ohio Attorney General is merely the end step in the process of obtaining contact lenses pursuant to a prescription. Appellant's argument that it was

merely transacting a sale is a thinly veiled attempt to circumvent the requirements set forth by the Board.

{¶ 17} Based on the foregoing, we find that the trial court did not err when it denied appellant's motion to dismiss and granted the Board's motion for summary judgment. Appellant's assignment of error is not well-taken.

{¶ 18} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.