

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF NURSING

In the Matter of the Proposed Rules of the
Minnesota Board of Nursing, Minnesota
Rules Chapters 6305 and 6310

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Board of Nursing is seeking review and approval of the above-entitled rules, which were adopted by the Board of Nursing without a hearing. Review and approval is governed by Minn. Stat. § 14.26 (2010).

On June 13, 2012, the Office of Administrative Hearings received the documents that must be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The following provisions of the adopted rules are **DISAPPROVED** as not meeting the notice requirements of Chapter 14 and the incorporation by reference requirements of Minn. Stat. § 14.07, subd. 4: rule parts 6305.0100, subp. 22; 6305.0800; 6310.2600, subp. 9d; and 6310.3800. All other parts of the rule are approved.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: June 27, 2012

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Administrative Rules, Chapter 6310, in part 6310.3800, as incorporated by reference in part 6310.3800.⁶

Proposed part 6305.0800 and part 6310.3800 provide, respectively, as follows:

6305.0800. INCORPORATION BY REFERENCE. Program Requirements: Appendices to Minnesota Administrative Rules, Chapter 6305, issued by the Minnesota Board of Nursing, 2012, are incorporated by reference. They are available through the Minnesota Board of Nursing Web site at <http://www.....> They are not subject to frequent change.

6310.3800. INCORPORATION BY REFERENCE. Program Requirements: Appendices to Minnesota Administrative Rules, Chapter 6310, issued by the Minnesota Board of Nursing, 2012, are incorporated by reference. They are available through the Minnesota Board of Nursing Web site at <http://www.....> They are not subject to frequent change.

In the Statement of Need and Reasonableness (SONAR), the Board of Nursing stated:

In generating this revision of rule, the Board developed refresher course criteria related to the structure and content of refresher courses. These were developed based on an analysis of the existing literature and review of the practices of other state boards of nursing regarding refresher courses. As developed, the criteria represent what is judged at this time to be adequate and appropriate. While not subject to frequent change, the evidence-base and practices regarding refresher courses may evolve.⁷

State agencies are permitted to incorporate by reference certain materials. The applicable requirements are as follows:

- (a) An agency may incorporate by reference into its rules the text from Minnesota Statutes, Minnesota Rules, United States Statutes at Large, United States Code, Laws of Minnesota, Code of Federal Regulations, the Federal Register, and other publications and documents which are determined by the revisor of statutes, to be conveniently available to the public. If the rule incorporates by reference other publications and documents, the rule must contain a statement of incorporation. The statement of incorporation by reference must include the words "incorporated by reference"; must identify by title, author, publisher, and date of publication the standard or material to be incorporated; must state whether the

⁶ Proposed Minn. R. 6310.2600, subp. 9d.

⁷ SONAR at 14 (6305.0800); SONAR at 21 (6310.3800).

material is subject to frequent change; and must contain a statement of availability. When presented with a rule for certification pursuant to subdivision 2 and this subdivision, the revisor of statutes should indicate in the certification that the rule incorporates by reference text from other publications or documents. If the revisor certifies that the form of a rule is approved, that approval constitutes the revisor's finding that the publication or other document other than the one listed by name in this subdivision, and which is incorporated by reference into the rules, is conveniently available to the public.

- (b) For the purposes of paragraph (a), "conveniently available to the public" means available for loan or inspection and copying to a person living anywhere in Minnesota through a statewide interlibrary loan system or in a public library without charge except for reasonable copying fees and mailing costs.

The Board of Nursing has not included the criteria for approving these refresher courses or a copy of the proposed Appendices in its rulemaking materials. The public has received no notice of what criteria the Board intends to apply in approving a refresher course or what may be involved in obtaining licensure or reregistration if a refresher course is required. Moreover, the Board cannot satisfy rulemaking requirements by "incorporating by reference" an undisclosed document that has received no scrutiny from the public or the Office of Administrative Hearings. In addition, posting an Appendix on its website does not comply with the requirement to make material that is incorporated by reference available through a public library without charge. Because the criteria are not available in the rulemaking materials, the Administrative Law Judge has insufficient information to make suggestions that might cure this defect. The defects could be corrected only by withdrawing these proposed amendments and leaving intact the existing rules.

E. L. L.

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality.

The existing rules of the Board of Nursing governing the requirements for licensure without examination provide that an applicant who has not engaged in acceptable nursing practice for ten years or more must successfully complete a refresher course or refresher course equivalent.¹ The existing rules contain a similar refresher course requirement for licensees seeking reregistration.² A refresher course or refresher course equivalent is defined as "an educational activity that includes a clinical component and can be used in lieu of a refresher course. These activities include a preceptorship, an orientation program, a program of study leading to a degree in nursing, or a clinical course to enhance nursing skills in a clinical area."³

The proposed amendments to the rules change the requirements for licensure and reregistration in that, if an applicant or licensee has not engaged in acceptable nursing practice for more than five years, the applicant must complete a refresher course that meets board criteria.⁴ The proposed rules define a refresher course as follows:

Refresher course. 'Refresher course' for the applicant for licensure by endorsement under Minnesota Statutes, section 148.211, subdivision 2, or for registration under Minnesota Statutes, section 148.231, subdivision 5, means a planned program of study with a clinical component that provides a review and evaluation of basic nursing knowledge and abilities to enhance clinical competency within the professional or practical scope of practice. The criteria for a refresher course is identified in Program Requirements: Appendices to Minnesota Administrative Rules, Chapter 6305, in part 6305.0800, as incorporated by reference in part 6305.0800.⁵

Refresher course. 'Refresher course' for the applicant for licensure by endorsement under Minnesota Statutes, section 148.211, subdivision 2, or for reregistration under Minnesota Statutes, section 148.231, subdivision 5, means a planned program of study with a clinical component that provides a review and evaluation of basic nursing knowledge and abilities to enhance clinical competency within the professional or practical scope of practice. The criteria for a refresher course is identified in program Requirements: Appendices to Minnesota

¹ Minn. R. 6505.0500, subp. 8 C.

² Minn. R. 6310.3100, subp. 6 C.

³ Minn. R. 6305.0100, subp. 22; Minn. R. 6310.2600, subp. 9d.

⁴ Proposed Minn. R. 6305.0500, subp. 8 D; 6310.3100, subp. 6 D.

⁵ Proposed Minn. R. 6305.0100, subp. 22.