

ENFORCEMENT REPORT ON THE BOARD OF REGISTERED NURSING

July 27, 2009

Introduction

This report has been prepared in response to a request from the Acting Chief Deputy Director of the Department of Consumer Affairs (Department) for an informational hearing on July 27, 2009. This report includes a summary of the enforcement program of the Board of Registered Nursing (BRN), current data on the performance of the enforcement program, a description of obstacles facing the enforcement program, the status of current efforts to improve effectiveness, and recommendations from BRN staff for further action.

California law establishes the Nursing Practice Act, which creates the BRN within the Department for the purpose of licensing and regulating registered nurses (RNs). The Nursing Practice Act establishes standards that all RNs must meet, which are intended to ensure that all RNs are at least minimally competent to practice in California. The BRN protects consumers by ensuring RNs meet the minimum standards prescribed in law through its two core functions: licensing and enforcement. The BRN's licensing program is the initial consumer protection area that verifies that all RNs are properly educated and trained, fingerprinted, and have successfully passed the national licensing examination. The BRN's enforcement program responds to complaints regarding unprofessional conduct by RNs, which includes but is not limited to incompetence, gross negligence, convictions, out of state discipline or discipline that has been taken on any other healthcare license.

Licensing

While regulatory boards' licensing functions are typically considered to be separate from their enforcement functions, licensing is the first enforcement tool that ensures that all applicants meet the minimum requirements for licensure and have a demonstrated ability to comply with all applicable laws. In this sense, licensing is a preventative measure that seeks to avoid threats to the public health and safety from incompetent or dangerous nurses by keeping them out of practice in the first place.

The Nursing Practice Act establishes minimum educational requirements for all RN applicants, and the BRN has set forth by regulation a mandatory nursing school curriculum. Candidates for RN licensure may qualify through an associate, baccalaureate, or entry level masters nursing program. All RN applicants must have graduated from a nursing school approved by the BRN or determined by the BRN to meet California requirements. These requirements ensure that prior to taking the national licensure examination, applicants have been concurrently educated in both theory and clinical practice coursework necessary to competently practice as an RN.

Applicants who meet the BRN's educational requirements are eligible to take the national licensure examination. The BRN utilizes the National Council State Boards of

Nursing Licensure Examination, know as NCLEX-RN. The examination is intended to verify that nursing school graduates are knowledgeable in the areas they have been educated in.

The last major component of the BRN's licensing requirements is the criminal background check. Each applicant must submit their fingerprints electronically (LiveScan) for a state and federal level criminal background check. Applicants who have been convicted of crimes that are substantially related to the practice of nursing, as determined by the BRN, may be denied licensure. The criminal background checks are intended to prevent individuals with convictions that are substantially related to the practice of nursing, such as violence, dishonesty, or drug abuse from becoming an RN.

Enforcement Process

While the BRN's licensing program is designed to keep individuals who are likely to be unable to comply with the Nursing Practice Act out of the nursing profession, it is impossible to prevent the licensure of all individuals who will break the law. The BRN's enforcement program is designed to respond to reports of RNs who are no longer competently practicing within the standard of care or who violate the Nursing Practice Act.

An enforcement case begins with a complaint, received from any person who believes an RN has acted in an unsafe or unprofessional manner (or that an unlicensed person is illegally practicing as an RN). Complaints often come from patients, coworkers, employers, or other governmental agencies. The two most common complaints the BRN receives involve patient care and chemical dependency. The BRN also receives notice of violations of law through subsequent arrest reports sent to the BRN from the Department of Justice or the FBI.

After a complaint is received, it is reviewed and a determination is made by the BRN's staff whether or not the complaint merits an investigation. If a complaint is found to be unsubstantiated or is not a violation of the Nursing Practice Act (i.e., billing disputes or personality conflicts), the investigation is closed.

If further investigation is warranted, additional information is gathered and the complaint is forwarded to the Department of Consumer Affairs' Division of Investigations (DOI) for a comprehensive investigation. DOI investigators are sworn peace officers who conduct interviews and gather evidence.

If it is determined by the Division of Investigation that the licensee's conduct was criminal (i.e., drug diversion or unlicensed practice), the case is forwarded to the District Attorney's office of the county in which the alleged act occurred.

When an investigation is completed, the investigator submits a written report of the findings to the BRN for review. If a violation can not be substantiated, the case is closed and the complainant is notified.

If the investigation finds evidence that the licensee has committed a minor violation and the violation does not warrant formal disciplinary action, the case is handled through the BRN's Citation and Fine Program. Under this program, the Executive Officer is authorized to issue citations and fines for minor violations of the Nursing Practice Act. An RN may contest the citation and fine through an informal or formal appeal process.

If the investigation finds evidence that the nurse has violated the Nursing Practice Act and the violation warrants formal disciplinary action (including probation, suspension, or revocation of the license), the case is forwarded to the Attorney General's Office (AG) for review. If there is sufficient evidence, an accusation, which is a legal document that lists the charges, is prepared and sent to the licensee. The licensee is given an opportunity to dispute the charges at a formal hearing before an Administrative Law Judge. This hearing is an administrative proceeding that closely resembles a court trial. After the hearing, the Administrative Law Judge writes a proposed decision, based on the BRN's Recommended Guidelines for Disciplinary Orders and Conditions of Probation. The proposed decision is then sent to the BRN for final consideration. The members of the board make the final decision on disciplinary matters and can either adopt, modify, or reject the proposed decision.

In most cases, the BRN may negotiate a stipulated agreement to resolve the case in lieu of a hearing (much like a plea agreement in criminal court or a settlement in civil court). Under such an agreement, the licensee admits specific charges and agrees to the proposed disciplinary action. Regardless of the disciplinary taken, the decisions rendered by the BRN become a permanent part of the licensee's record and remain on the BRN's Web site indefinitely.

Probation and Probation Monitoring

As a consequence of disciplinary action, a licensee may be placed on probation. RNs placed on probation will be required to comply with the specific conditions of their probation. Compliance with the conditions is monitored by a BRN probation monitor. When the RN successfully meets the conditions of probation, the license is restored without restrictions. However, should the licensee violate the terms of probation or commit a new offense, the BRN is required to investigate and determine if further action is necessary.

Diversion Program

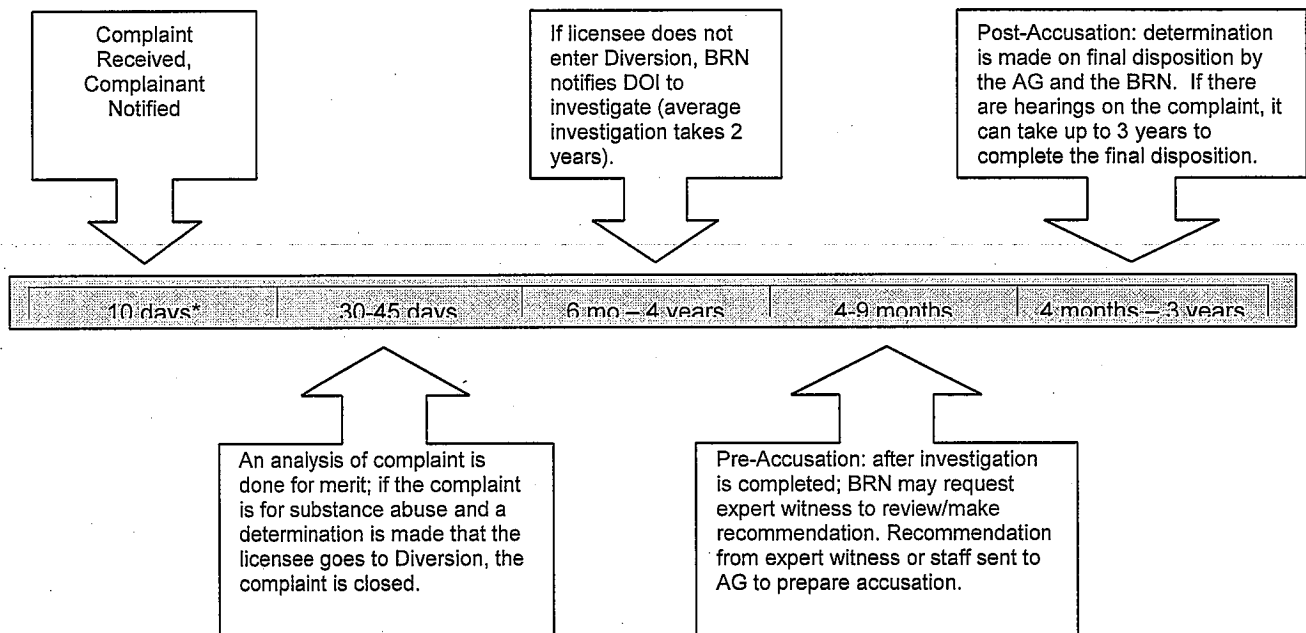
For cases involving substance abuse or mental illness, the licensee may be referred to the BRN's diversion program, which is a voluntary, confidential rehabilitation program established by the Nursing Practice Act. If a licensee under investigation enters the diversion program, the investigation is closed. While in the diversion program, which is administered by a vendor under contract with the Department, licensees undergo regular monitoring and random body fluid testing to ensure compliance. If a licensee fails to comply with the requirements of diversion program, the investigation is re-opened; the diversion program provides documentation to the BRN's enforcement unit for any participant terminated as a Public Safety Risk for possible disciplinary action.

Enforcement Performance

The enforcement procedures outlined above represent a complex process with a large number of steps. Each step along the enforcement timeline takes time: a complaint must first be processed and reviewed, then investigated, forwarded to the AG, returned to the BRN for approval, returned to the AG to serve on the licensee, referred by the AG to the Office of Administrative Hearings (OAH), and then forwarded back to the BRN for final disposition by the BRN board members. From the initial receipt of a complaint to final disposition, the average timeline in 2008-09 was 3.4 years.

Timeframes for Enforcement

The following diagram illustrates a rough outline for the timeline of an average enforcement case. Below, a number of tables show historical data for the BRN's enforcement timeframes.



* - Statutory Requirement (B&P Code Section 129(b))

Average Number of Months to Process Complaints							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
4.4	3.9	3.2	3.6	3.5	4.3	4.9	3.8

Average Number of Months for DOI to Investigate Merited Complaints (Cases)							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
14.5	16	14.7	16.8	18.2	21.5	21.2	13.4

Average Number of Months for AG to Process Pre-Accusation							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09

7.4	8.3	6.3	7.9	6.1	11.2	7.5	5.3
-----	-----	-----	-----	-----	------	-----	-----

Average Number of Months for AG to Process Post-Accusation							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
11.8	10.3	9.2	11.1	8.9	8.2	9.1	8.8

Total Average Number of Years to Process Complaints from Receipt to Post-Accusation							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
3.5	3.5	3.4	3.2	3.4	3.1	3.4	3.4

Number of DOI Investigations Closed Within:								
	2001-202	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
90 Days	64	33	47	27	23	10	58	128
180 Days	72	60	89	37	8	8	46	222
1 Year	193	162	224	163	99	64	93	324
2 Years	314	248	321	361	431	168	266	317
3 Years	112	74	163	195	225	114	229	219
> 3 Years	65	29	99	109	142	123	201	134
Total Closed	820	606	943	892	928	487	893	1,344

Number of AG Cases Closed Within:								
	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
1 Year	90	66	131	123	107	153	124	153
2 Years	171	75	194	182	169	182	218	163
3 Years	69	37	78	39	51	51	76	90
4 Years	23	21	21	14	13	13	17	25
> 4 Years	14	6	10	12	8	11	9	10
Total Closed	308	205	434	370	348	410	444	441
Cases Pending	464	577	503	446	670	604	599	692

Enforcement Numbers

Each year, the BRN receives, processes, and investigates thousands of complaints. The following tables show historical data for the number of complaints received and the number of complaints that reach various dispositions.

Number of Complaints Received							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
1,541	2,172	2,993	3,148	3,384	3,361	3,900	5,794

Number of Complaints Closed – No Investigation Needed							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
405	852	1,764	2,484	2,871	2,793	2,907	1,808

Number of Diversion Cases								
	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Referred by Enforcement	265	342	225	256	311	367	332	400
Accepted into Diversion	----	124	81	138	73	91	120	218
Total Participants	402	429	426	450	425	448	445	502
Successful	49	68	67	49	70	71	93	74
Unsuccessful	59	71	80	134	74	97	96	55

Complaints Referred for Investigation to Division of Investigation (DOI)							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
1,250	1,314	1,132	807	842	563	1,204	932

Number of Accusations Filed							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
204	343	368	237	306	380	478	418

Number of Disciplinary Actions Taken by BRN							
2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
235	130	329	299	244	306	339	368

Interim Suspension Orders Issued by Administrative Law Judge					
2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
3	4	2	3	1	2

Interim Suspension Orders Issued by Criminal Courts					
2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
4	3	4	2	4	8

Number of Disciplinary (Probation) Actions taken by BRN								
	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Probation w/ Suspension	0	1	2	0	3	6	10	6
Probation	122	75	168	147	110	135	141	143
Probationary License Issued	19	18	19	15	10	15	10	4

Impediments

The BRN has identified a number of possible causes of its unacceptably long enforcement timeframes. These include obstacles that the BRN has faced related to its administration, to its processes, and to the statutory framework within which it must operate.

Administrative Barriers

The BRN has experienced a number of difficulties related to its administration. For a number of years, the BRN's enforcement unit has been understaffed. The enforcement staff consists of 18 employees; the probation staff consists of eight employees. Of these, eight positions are new since January 1, 2009, and four are two-year limited-term positions. Of the BRN's main enforcement staff, five case analysts (AGPA) each carry 400 to 600 cases. Additionally, the DOI—which handles the BRN's more complex enforcement cases—has 40 investigators, with 100 assigned cases each. BRN statistics show it is difficult for investigations to be completed within reasonable time frames.

When cases are referred to the AG to prepare an accusation, petition to revoke probation, or statement of issues, it generally takes the AG an average of 7.5 months to prepare before sending the case back to the BRN for approval. Once the pleading is returned to the AG, it is served on the respondent by the assigned Deputy Attorney General (DAG). A respondent then has 15 days to notify the AG that he/she is contesting the charges that have been filed by the BRN. However, AG staff often allow respondents to file a notice of defense long after the 15-day time limit has passed, unnecessarily lengthening the amount of time a case is in process at the AG.

Enforcement cases have also been delayed due to the practice of AG staff requesting a hearing date before an Administrative Law Judge with the intention of settling the case prior to a hearing. In the event that the case does not settle, the AG will request a hearing date, which can result in a four to eight month delay waiting for the actual hearing to take place.

Investigation timeframes could be reduced if more information sharing took place. For example, the BRN cannot access the licensing or disciplinary records of the BRN of Vocational Nursing and Psychiatric Technicians.

The Department's current standardized method of tracking cases does not allow staff to adequately manage inflated caseloads. Therefore, duplicative systems have been created, which do not interact together and require multiple entries in order to monitor the status of each case. The Department has been unsuccessful on two occasions to update the obsolete system that is currently being used.

Additionally, the BRN does not have sufficient space to house required case files on-site, which requires many files to be stored off-site and transferred when needed, adding delays to the process.

Procedural Barriers

Enforcement staff also experiences delays due to procedural barriers. For example, due process rights of the accused cause significant delays throughout the enforcement process.

Additionally, when a substance abuse case is referred to the diversion program, the investigation of that case is placed on hold while the licensee makes a decision. If the licensee decides not to enter diversion, the licensee has successfully delayed the investigation for a month or longer.

Legal Barriers

Some of the difficulties faced by the BRN's enforcement staff stem from the legal framework within which the BRN must operate. For example, obtaining medical records is a necessary component of investigating complaints, yet investigators often have difficulties acquiring these documents because there is no penalty for a licensee or health care facility that does not provide them. Additionally, legal barriers limiting communication between the diversion program and the enforcement program can delay the investigation of licensees who are terminated from diversion unsuccessfully.

The BRN lacks a number of enforcement tools that are available to other state agencies, including automatic suspensions pending a hearing. The enforcement program would benefit from other state agencies cross reporting RNs who violate the law. Lastly, there is no mandatory reporting by employers of potential violations of the Nursing Practice Act.

Efforts to Improve Enforcement

The BRN has already begun to take steps to improve its enforcement program. These steps have brought changes to both the complaint and investigation process and the disciplinary process. Changes have focused on administrative, procedural, and legal impediments faced by the BRN.

Administrative

Since February 2009, the BRN has received over 80,000 fingerprints from current licensees who had not previously been fingerprinted. The BRN has received over 1,000 records of criminal conviction, has been investigating these cases, and has forwarded some cases to the AG to draft accusations.

Beginning in December 2008, the BRN began holding ongoing meetings with the DOI and the AG to discuss backlogs and implement corrective measures.

In April 2009, the BRN began to audit, prioritize, and resolve complaint backlogs with a goal of working towards "daily in-basket" workflow to eliminate further backlogs.

Procedural

In April 2009, the BRN began efforts to standardize case tracking tools and to manage complaint and disciplinary case turnaround times for case milestones.

In May 2009, the BRN began working with complainants to identify unknown RNs prior to referring a case to investigation. This eliminates un-actionable "John/Jane Doe" cases, which are a waste of time and resources for the BRN and the DOI.

In June 2009, the BRN began the practice of checking all new complaints against "Nursys" (a National Council database) to check for out-of-state disciplinary records.

In the near future (target start date of August 2009), BRN staff anticipates implementation of electronic transmission of fingerprint records from the Department of Justice to the BRN's licensing and applicant data base systems. This should speed up the process of investigating positive criminal records, as the data will be available in a more timely manner.

Legal

The BRN implemented emergency regulations in February 2009 (and received permanent approval in May 2009) to require fingerprint submission of all licensees who had not been fingerprinted for a criminal background check.

BRN staff is also working to obtain authority to review licensed vocational nursing enforcement data for discipline.

Immediate Next Steps

Administrative

In order to address staffing shortages in its enforcement unit, BRN staff will seek approval to increase enforcement staff by approximately 60 positions. These new positions will augment existing operations in the complaint unit, enhance probation and diversion participant monitoring, and manage disciplinary cases. This increase is necessary to process and manage complaints and reduce analyst case loads to 150 each and establish staff to initiate internal investigations that includes; obtaining records, conducting interviews and having nurse consultants perform initial review of quality of care cases. This increase will also support the improved monitoring of probationers, managing diversion program participants, preparing accusations, serving default decisions, managing DOI and AG cases and responding to Public Records Act requests. Some of the positions would be established administratively when resources are available.

Along with the increased positions, BRN staff is seeking changes to its organizational structure. BRN staff proposes to add enforcement managers, to more effectively oversee the completion of cases, and a large number of enforcement analysts.

It is recommended that the BRN seek to enter into a memorandum of understanding with the AG to establish performance goals with DAGs to assure the timely discipline of licensees. BRN staff believes that a timeline of nine months or less is ideal. Under this agreement, the AG should provide monthly statistical reports for public discussion at BRN meetings.

BRN staff recommends seeking office space to house all staff, including any new positions, in one location. Enforcement staff is currently spread over three different locations. Additionally, new office space should have sufficient file room space to

accommodate three years of records on-site (currently only one year of records is maintained on-site).

Procedural

It is recommended that the BRN have BRN staff serve accusations and notify the DAG working the case when the notice of defense is received. This change is designed to reduce time between the filing of an accusation and setting of a hearing date. BRN staff believes the AG should request a hearing date within one week of notice. BRN staff plans to implement this in August 2009.

Additionally, BRN staff recommends working with the AG to develop templates and train staff to serve accusations, prepare default decisions, out-of-state discipline and conviction pleadings, and less complex petitions to revoke probation. BRN staff plans to begin this in September 2009.

Legal

Consistent with the recommendation to increase staffing in its enforcement unit, it is recommended that the BRN consider seeking emergency regulations to increase licensing fees to an amount necessary to support the proposed staffing augmentations. Additionally, it is recommended that the BRN initiate licensure participation in "Nursys" through the National Council of State Board's of Nursing.

BRN staff recommends obtaining statutory authority to obtain any records relevant to a case, including, but not limited to, medical records, personnel records, controlled substance records, and internal investigations from health care facilities, without a patient release form or subpoena. This change would significantly reduce delays in investigations. Additionally, the BRN could seek authority to fine licensees and facilities for failure to comply with requests for records.

BRN staff also recommends changes to the diversion program to improve enforcement and protect consumers. First, the BRN should have authority for the automatic suspension of any diversion program participant who does not successfully complete the requirements of the program. Additionally, the BRN should have the authority to continue an investigation after a licensee is referred to the diversion program, rather than closing the investigation, and to disclose participation to the DOI for all complaints referred to diversion program.

BRN staff recommends that authority be obtained to require fingerprint submission for a FBI criminal record check prior to any probationers living out-of-state (tolled) to petition for early termination of probation.

Lastly, it is recommended that the BRN seek changes necessary for mandatory information sharing between the Department of Health Services, the Department of Justice Bureau of Medi-Cal Fraud & Elder Abuse, Child Protective Services, Adult Protective Services, and all law enforcement agencies. This should not only result in the BRN being better informed about violations of the Nursing Practice Act, but should

help investigators obtain necessary information in a more timely manner. In addition, the BRN could seek provisions that prevent law enforcement agencies and courts from requiring payment for records necessary for enforcement.

Other Possible Systemic Changes

In addition to changes that can be made immediately, there are a number of other possible changes that the BRN can make in the future to improve its enforcement program. The enforcement programs from other licensing boards' and other federal, state, and local agencies can be examined for improvement methods. For example, the BRN could seek immediate suspension authority (where a license can be suspended on the spot, pending a hearing), which is available to the Board of Behavioral Sciences and the State Athletic Commission. Some of the other changes recommended above have been made by other licensing programs within the Department.

Changes to the DOI that should be considered include hiring non-sworn investigators assigned only to the BRN to obtain records and conduct interviews, and requiring DOI to provide investigations of administrative cases to the BRN up front, rather than waiting until the investigator completes the criminal investigation.

Other specific recommendations include adding investigators directly to the BRN staff, and assigning a dedicated Administrative Law Judge and DAG to the BRN. Further, BRN staff recommends that the Department look into hiring its own prosecutors that could be utilized by all boards and bureaus within the Department.