

**Consideration of Changing Board Policy Permitting Individuals to Appear Before the Board Prior to a Decision on a Proposal for Decision and Consideration of Related Proposed Amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decisions of the Board***

**Summary of Request:** Consider changing current Board policy allowing individuals to appear before the Board regarding a Proposal for Decision (PFD). Further, consider related proposed amendments to 22 Tex. Admin. Code §213.23(d), pertaining to *Decisions of the Board*.

**Background:** During its Board Development Session in July, 2011, Board members requested Staff to include an agenda item on the October, 2011, Board agenda addressing individual appearances before the Board regarding PFDs.

The Board is not required by the Administrative Procedure Act (APA) or the Nursing Practice Act to allow Respondents to address the Board once the individual has been afforded a hearing at the State Office of Administrative Hearings (SOAH). On the contrary, the APA contemplates the exchange of written briefs and exceptions only. Respondents appearing before the Board consistently argue facts outside of the record and introduce evidence that was not considered by the Administrative Law Judge. The receipt of such information is problematic for the Board and may inject error into Board decisions. Written argument and briefing provides Respondents an opportunity to present their legal arguments to the Board and facilitates fair and consistent consideration of PFDs in accordance with the APA. Further, it allows the Board time to review and fully consider the Respondent's arguments.

The proposed amendments, attached hereto as "Attachment A", permit Respondents to provide written briefs and exceptions to the Board, as contemplated by the APA. Under the proposed amendments, Respondents would no longer be permitted to provide live testimony outside of the contested case proceeding at SOAH.

**Option 1:** Make no changes to the Board's current policy and continue to permit Respondents to make oral presentations regarding PFDs to the Board at its quarterly meetings, in accordance with the Board's rules.

**Option 2:** Amend the Board's rules to prohibit oral presentations by Respondents. All PFDs will continue to be considered by the Board at its quarterly meetings, and written materials may be submitted for Board consideration, provided they are timely filed in accordance with the Board's rules. See Attachment "A" for related proposed rule amendments.

**Board action:**

**Option 1:** No action required.

**Option 2:** Move to approve the proposed amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decision of the Board*, and authorize Staff to publish the proposal in the *Texas Register* for a 30-day comment period, with authority for General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the proposed amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decision of the Board*, as proposed.

## **Attachment "A"**

§213.23. Decision of the Board.

(d) Parties shall have an opportunity to file written exceptions and briefs with the Board concerning a proposal for decision. An opportunity shall be given to file a response to written exceptions and briefs. In order to be considered by the Board, all written exceptions and briefs and responses to written exceptions and briefs must be filed with the Board at least 10 days prior to the date of the regularly scheduled Board meeting where the Board will deliberate on the proposal for decision. [~~However, a Respondent shall not be permitted to make an oral presentation to the Board concerning a proposal for decision unless the Respondent has first filed written exceptions or briefs with the Board at least 21 days prior to the date of the next regularly scheduled Board meeting where the Board will deliberate on the proposal for decision. A Respondent shall not be permitted to make an oral presentation to the Board concerning a proposed modification to a proposal for decision unless the Respondent has first filed a written response to the proposed modification with the Board at least 10 days prior to the date of the regularly scheduled Board meeting where the Board will deliberate on the proposal for decision.~~]