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**FP 2024-17, Plc 500 Professionals' Health Program**  
**Summary of Comments on Initial Proposal with OPLC Responses**  
April 25, 2024

Background

The Executive Director of the Office of Professional Licensure and Certification (OPLC) is proposing to adopt rules to govern the Professionals' Health Program (PHP) authorized by RSA 310:5, III and RSA 310:6, IV. The proposed rules are designed to provide a uniform framework for the PHP, and are described in more detail in the Rulemaking Notice published in the *NH Rulemaking Register* on February 8, 2024.

Five staff members of the New Hampshire Professionals Health Program (<https://nhphp.org/>), which currently provides services under the PHP, attended the public hearing held on March 12, 2024. Written comments were received from that organization, from the NH Association of Naturopathic Doctors, and from the Advisory Board of Respiratory Care Practitioners. The oral and written public comments and the OPLC's responses follow the explanation of changes the OPLC made on its own initiative. Comments in the form of edits were received from OLS/Administrative Rules. Most of those edits were already addressed by changes made by the OPLC on its own initiative or in response to comments from the public; edits that had not already been addressed are included in the Final Proposal.

The OPLC made the following revisions on its own initiative:

Plc 501.02 (applicability): in (b), replaced "agrees to a monitoring ... pursuant to Plc 503.09" with "seeks assistance from an approved provider without the knowledge of the applicable board" to be easier to understand without having to read the referenced section.

Plc 502.0605 (definition of "impairment"): replaced "his or her" with "the licensee's" at the end of the first line.

Plc 502.13 and Plc 502.15: inserted definitions of "personal identifiable information (PII)" and "protected health information (PHI)", as the terms have been added to the substantive rules.

Plc 502.4214 (definition of "program agreement"): revised generally to clarify that the program agreement can include requirements that are not specifically tied to a treatment/monitoring plan.

Plc 502.4316 (definition of "program director"): inserted "as defined in Plc 502.08" after "licensed health care provider" in the first line and restructured the definition as an intro and paragraphs (a)-(b) for clarity.

Plc 502.4718 (definition of "treatment/ ~~and~~ monitoring plan"): replaced the "and" with a slash because not all plans include treatment, added the acronym "T/M", and added "A T/M plan is a component of a program agreement for participants having a treatable or modifiable condition." for clarity; replaced "treatment and monitoring" with "T/M" throughout the rules.

Plc 502.4920 (definition of "workplace monitor"): inserted "identified in a program agreement" in the first line for clarity.

Plc 503.03 (approval of other providers): in (b), replaced “after consultation if required pursuant to (a)(2)” with “after the consultation(s) required by (a)(2) or (3)”.

Plc 503.04 (standards for approved providers): in (d), inserted “, or derive any material financial benefit from,” after “Not have any material financial interest in” for clarity; in (h), replaced “standards” with “criteria” to align with referenced section heading.

Plc 503.05 (program-related standards for approved providers): in (a), replaced “OPLC” with “executive director” to be more specific about who receives the reports.

Plc 503.06 (standards for program agreements): in (c)(2), replaced “when he or she verifies that the participant has failed to meet ...” with “of receiving verification of a participant’s failure to meet ...” so as to not use “he or she” and to clarify that the program director does not independently verify what happened; at end of same subparagraph, replace “his or her” with “the participant’s”.

Plc 503.07 (necessary elements ...): restructured (c) into an intro and two subparagraphs for clarity; in (e), inserted “refusing to engage in testing or of” prior to “positive test results”.

Plc 503.08 (personnel-related criteria ...): restructure intro, (a)-(b) as (a) intro, (1)-(2) so could add a new paragraph (b) to clarify that the specified standards are minimum standards, and that an approved provider may adopt more restrictive requirements; in (a) intro, replaced “approved organization” with “approved provider” to align with language in other sections; in (a)(1)b., replaced “him or her” with “the individual” in the second line; at the end of (a)(1)e., inserted “and” after the semi-colon.

Plc 503.09 (establishment of ~~confidential track~~ *NKTB path*): at the end of (c), replaced “public health and safety” with “the health and safety of the public”.

Plc 504.01 (advertising allowed): in the intro, removed the “s” from “licensee” so it is in the singular; in (a) and (b), replaced “treatment and monitoring program” with “professionals’ health program”; converted the verb to the singular form in (a), (b), and (c).

Plc 504.02 (use of approved providers): in (a), replaced “providing a treatment and monitoring program to” with “coordinating rehabilitation and monitoring services for” as part of the clarification of the role of the approved provider.

Plc 504.03 (participation ... by licensees): changed section heading to “Licensee Participation in a Professionals’ Health Program”; in (a)(2)a., replaced “his or her” with “the”; in (b), replaced “kept confidential” with “maintained as confidential”; in (d), corrected the number of the cross-referenced section.

Plc 504.04 (obligations ...; termination of approval): in (a), replaced “treatment and monitoring programs” with “services”; restructured (c)(3) by moving “commence an adjudicative proceeding...” to be the intro and made the two sets of circumstances clauses a. and b.; clarified that the first circumstance is that the opportunity to cure was not required to be provided, not just was not provided, and the second is that an opportunity was provided but the deficiencies were not cured; replaced the period at the end of (d)(1)c. with “; or”.

### **Board-Related Comments**

*Comment 1: “As it is now, the Naturopathic Board of Examiners is not a Board included in these rules, but they are going to request to be added to this program. The NH Association of Naturopathic Doctors would be supportive of the Naturopathic Board of Examiners being added to this program.”*

Response 1: The OPLC is happy to work with the Naturopathic Board of Examiners on this issue.

*Comment 2*: [Submission provided multiple statistics on the need for mental health care, the level of vacant Respiratory Therapy positions in NH, and the number of individuals in health care and social assistance

who have quit their jobs.] *“We are in a healthcare crisis, which involves closing of hospitals, loss of jobs, lack of affordable housing, lack of mental health access causing the perfect storm for mental health crisis, substance abuse and suicide. As a state we need to provide support to all licensed professionals at this time so that we are successful as we go through this crisis.”*

Response 2: The OPLC agrees that the U.S. health care system is under duress, and is hopeful that additional organizations will apply to be approved providers for additional professions.

### **NHPHP Comments at Hearing**

*Hearing Comment 1: The NHPHP only provides services for health care providers.*

Response 1: The OPLC understands this, but notes that the statutory directive is not limited to health care providers, since professionals in any number of professions have the potential to inflict a great deal of harm if they engage in professional activities while impaired. For instance, if an architect or engineer miscalculates when designing a public structure, the harm to property and human life could be catastrophic if the structure collapses; if an electrician works on residential wiring while impaired, a house could burn down. All professions should be able to access services such as are provided for health care professionals.

*Hearing Comment 2: NHPHP does not provide any treatment, but the rules use the term “treatment and monitoring program” as something offered by an approved provider. This is not allowed under the Federation’s<sup>1</sup> guidelines. We do identify general conditions such as “substance use disorder”, but we do not make a specific diagnosis using a DSM diagnostic code or anything like that.*

Response 2: The OPLC did not intend to suggest that an approved provider provided treatment, and realizes that the terms “professionals’ health program”, “program agreement”, and “treatment and monitoring plan” had been conflated in the Initial Proposal. These terms have been separated by revisions throughout the rules.

*Hearing Comment 3: Terms like “success” and “failure” [in the definition of “evaluative report” and generally] are not well defined and can have negative connotations, so are not used.*

Response 3: The definition of “evaluative report” has been revised to address this comment. Also, revisions have been made throughout the rules to replace words like “success” and “failure” with language that should be more acceptable.

*Hearing Comment 4: Confidentiality is extremely important, as individuals who need assistance may not seek it if they think their records will be turned over to the boards. Using “confidential track” to mean what we call “not known to the board” suggests that the records of anyone who isn’t on a confidential track won’t be held confidential.*

Response 4: The term “confidential track” was originally suggested by the NHPHP in earlier discussions and written comments submitted when the OPLC requested input for purposes of drafting the rules. However, the term has been replaced with “not known to the board (NKTB)”, which can be applied to a path or a participant. Also, since services can be sought without necessarily becoming a participant, the sentence “The term includes full participation in a program agreement without the knowledge of the applicable board.” has been added.

*Hearing Comment 5: Confidentiality also applies to the records we maintain. There may be a lot of information shared by a participant that ends up in the records that are not relevant to a board’s oversight and that might not be shared with a treatment provider if a participant thought the board would see it. We do not share all of the records, just the records relative to monitoring compliance. There should be a strong level of protection for the confidential health information of participants.*

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<sup>1</sup> Federation of State Physician Health Programs (FSPHP), Inc.

Response 5: Plc 503.06(c)(4) has been revised to address this, by requiring the program director to maintain the confidentiality of records concerning a participant's involvement in a program agreement, and if a participant is reported for noncompliance with the program agreement, to allow only the confirmation of noncompliance documentation to be released to the board if the board requests it.

Hearing Comment 6: *There needs to be a safe haven or safe harbor provision so that licensees who are participating without a board's knowledge would not be forced to disclose anything on a renewal application.*

Response 6: Plc 504.03(c), which in the IP did not relieve a participant from disclosing participation, has been revised to allow any participant licensee who is not known to the board and who is in compliance with the participant's program agreement to answer any question relating to physical or mental illness or substance abuse, or treatment therefor, in the negative on any license renewal application without repercussions.

Hearing Comment 7: *To answer one of the questions I saw earlier, a facilitated meeting is one conducted by the approved program to check in with people; a support group is a community-based support group such as AA.*

Response 7: Thank you; this has been clarified in Plc 503.07(h) and (j).

Hearing Comment 8: *The boards should have an opportunity to talk to providers who apply to be approved providers.*

Response 8: Plc 503.03 requires consultation with the specific board(s) if an entity specifically identifies one or more professions to be served, and an opportunity for all boards to review and comment if an applicant does not identify specific professions. A new paragraph (b) has been added to require the Executive Director to arrange for meetings with entity representatives if a board requests such a meeting.

### **NHPHP Written Comments**

Written Comment 1: *“Understanding of Confidentiality within a Professionals Health Program: A cornerstone of a PHP is to be a confidential resource. Many potentially impairing conditions fall into categories of illnesses that carry shame and stigma. They are often denied and seeking care for these is delayed due to fear of judgement and lack of knowledge of where to ask for help. A PHP can be a safe harbor where professionals can be encouraged to refer themselves or colleagues for this reason. The Plc 500 rules seem to label a voluntary referral as “confidential” and a regulatory referral as “standard”. This clearly misrepresents how the PHP functions, even in the setting of a regulatory referral. While some information is known by the regulatory board, health and other confidential components to one's story and history must still be protected and held as confidential. Without this assurance, trust is eroded, care is forgone and our healthcare professionals are not evaluated and treated appropriately. Not to mention, our state is at risk of losing very talented healthcare professionals.”*

Response 1: As noted above, the term “confidential track” was originally suggested by the NHPHP in earlier discussions and written comments submitted when the OPLC requested input for purposes of drafting the rules. It is not clear how a term suggested directly by the NHPHP could “clearly misrepresent[] how the PHP functions”. However, to accommodate the apparent change in thinking on this issue, the term “standard track” has been deleted and the term “known to the board” has been added.

Written Comment 2: *Relative to Plc 503.03, we recommend there be a statement that the particular board be allowed to approve the provider asking to monitor its licensees.*

Response 2: See Response 8 to Hearing Comment 8, above, for changes being made to Plc 503.03 relative to boards being able to meet with representatives of the entity applying for approval. In response to this comment, a new paragraph (d) has been added to specify that the approval applies to the professions

as specified in the approval request, subject to one or more exclusions if a board has legitimate objective concerns about the entity providing services to licensees in its profession. However, the ultimate authority to approve or not approve must remain with the Executive Director; boards cannot have veto power over the decision.

*Written Comment 3: Relative to Plc 503.04(c)(2), we recommend that the program [be required to] have licensed professionals from at least one regulated NH board present in New Hampshire.*

**Response 3:** The proposed rule requires an entity to have a physical presence in New Hampshire that is “[s]taffed with individuals who, if practicing in a regulated profession, are licensed to practice in [NH]”. A “program director” is defined as a licensed health care provider as defined in Plc 502.08; “licensed health care provider” is defined “as a New Hampshire licensee in a profession regulated by any of the following boards: ...” (emphasis added). On its face, the rule requires a NH-licensed professional to work at the NH facility. No change has been made to the rule in response to this comment.

*Written Comment 4: Relative to Plc 503.05(c), this could be broken down into sections:*

*I: policy and practice for evaluation of:*

*1) Services it offers (not sure this requires a policy or practice)*

*2) Review of treatment programs we refer to (we could develop a tool or metric for this)*

*II: Goals and Objectives of Facilitated Meetings (we feel is not appropriate as this goes against FSPHP guidelines citing PHP as non-treatment providers; but we could produce this)*

*III: Report list of services being requested*

**Response 4:** The rule as proposed requires policies and procedures for the review of, and modifications to as necessary, the services offered, and then lists specific items. The language proposed by NHPHP does not require evaluating goals and objectives or services being required, and generally is less specific and so potentially less helpful to approved providers. Further, the NHPHP itself suggested adding “strategic review of ‘services’ look at facilitated meetings and goals and objectives of these” in its original comments on an earlier draft of the rules. It is not clear why PHPs can have facilitated meetings without moving into “provider” territory, but cross the line into “provider” territory if they have goals and objectives for the meetings. Numerous sources emphasize the importance of having goals and objectives for meetings in order to have efficient, productive meetings. However, due to our understanding that the phrase “goals and objectives” may have a treatment-focused meaning when used in the context of professionals’ health programs, the modifier “non-therapeutic” has been inserted before “goals and objectives”.

*Written Comment 5: Relative to Plc 503.05(e)(2), an approved provider should not have all medical records of the participant; no reason to and it puts the information at risk of being released to regulatory boards and others including public based on further rules.*

**Response 5:** The rule does not require access to all of a participant’s medical records, but only those records that “are relevant to the condition or conduct being addressed by the program agreement,” excluding records relating to the participant’s clients or patients that contain PHI. The language has been revised to make this clearer.

*Written Comment 6: Relative to Plc 503.05(g)(2), we disagree [with not including certain information in advertising or other information] in some cases ~ A PHP per FSPHP acts as an alternative to discipline and this includes actions potentially taken by boards. We want to limit as much as possible any discipline including public notation/notice or attachment to license. Hence, it is important for our website or a letter of information or presentation to cite our services as “alternative to discipline”.*

**Response 6:** The rule prohibits representing that “Participation ... will determine whether disciplinary action is taken ... or the severity of such discipline”. A statement that participation can serve as an alternative to discipline does not represent that participation will determine whether discipline is imposed, and so is not prohibited by the rule. However, the rule has been revised to clarify that

approved providers are prohibited from representing that participation will shield the participant from disciplinary action.

*Written Comment 7: Relative to Plc 503.06(c)(2), confidential track is confusing. While we recognize that it is referring to a voluntary participant, the 'standard' or 'referred' participant should also expect to have aspects of their assessment and treatment confidential. Recommend changing the labeling of 'known to the board'; 'not known to the board' or some such language.*

Response 7: As noted above, the term “confidential track” was originally suggested by the NHPHP in earlier discussions and written comments submitted when the OPLC requested input for purposes of drafting the rules. However, changes have been made as noted above.

*Written Comment 8: Relative to Plc 503.06(c)(3), re-word: participants who are voluntarily monitored will be advised that any non-adherence to the terms of the program agreement may be reported to the regulatory authority if the approved program determines that there is clear and convincing evidence....*

Response 8: The NHPHP itself has represented that all participants are “voluntary”, since they must agree to be bound by the terms of a program agreement -- although the motivation for agreeing may feel more like an agreement under duress if the alternative is license suspension. The introductory language of Plc 503.06(c) is “Each program agreement shall:” (emphasis added). Under the directives of the “New Hampshire Drafting and Procedure Manual for Administrative Rules” (*Manual*), the language of the subparagraphs must follow from the lead-in such that the lead-in and the subparagraph can be read as a single requirement, and all requirements must use the verb form “shall”. Subparagraph (c)(3) applies to program agreements for participants who are not known to the board, for whom the “program agreement shall [must] clearly inform the participant” that non-compliance shall [will] be reported to the board if there is clear and convincing evidence that not reporting the participant would jeopardize the health and safety ...”. However, based on the recognition that circumstances may arise in which only the participant's health or safety was jeopardized, and the preferred approach is to get the participant back into compliance rather than sending a report to the board, the phrase “or the participant” has been deleted in the FP so that reporting is required only if there is clear and convincing evidence that the public is at risk. Also, the word “only” has been inserted, to clarify that no other criteria apply to the decision to report. With the other language-related revisions made, the subparagraph reads as follows:

(3) For NKTB participants, clearly inform the participant that the approved program shall report noncompliance by the participant with the terms of a program agreement to the applicable board only if the approved program determines there is clear and convincing evidence that not reporting the participant would jeopardize the health and safety of the public;

We also note that this language applies to what the program agreement must contain. The actual reporting requirement is in Plc 503.09(c), and is consistent with the language as revised.

*Written Comment 9: Relative to Plc 503.06(c)(5)a., limit what is discoverable to the board (i.e., pertaining to the case but not all history/eval/and other aspects of a life that is not necessary for the Board to see/learn unless revealed by the participant themselves. Attending to confidential components of one's life).*

Response 9: Plc 503.06(c)(5)a. and Plc 503.06(c)(4) have been revised to limit the approved provider's disclosures to a board to information regarding compliance or noncompliance, or confirmation of noncompliance, with a program agreement.

*Written Comment 10: Relative to Plc 503.07(a), we currently have monitoring agreements that refer to assessments and treatment plans. We identify general conditions SUD, AUD, Mental health. The diagnosed conditions could have ICD-10 codes and we do not include this in program agreements.*

Response 10: Plc 503.07(a) requires a T/M plan to include “Identification of the assessment made and the condition diagnosed”, which does not require using International Classification of Diseases, Tenth Revision (ICD-10) codes (the codes used to classify and code all diagnoses, symptoms and procedures for claims processing). However, other approved providers might use the codes since the codes are used for processing claims, so the use of such codes is not prohibited.

Written Comment 11: *Relative to Plc 503.07(c), we don’t feel that we can add “circumstances for when restrictions are removed” as this is addressed by licensing through the board.*

Response 11: Plc 503.07(c) is intended to apply to any limitations a participant has agreed to observe as part of the program agreement, not license restrictions imposed by the applicable board. The language has been revised to clarify this.

Written Comment 12: *Relative to Plc 503.09(b), we are concerned that we cannot represent our program as confidential with this requirement and this may deter professionals from asking for our help. Generally reports should remain confidential with compliance documentation serving as the ‘report’ we can supply to the board.*

Response 12: The language of the IP said reports would not be provided, so it is not clear why this would deter participation. However, the language of paragraphs (b) and (c) have been revised to state this more directly.

Written Comment 13: *Relative to Plc 504.03(d), this is not consistent with the Lorna Breen foundation to reduce intrusive questions and improve chances that professionals will seek help. Safe haven language needs to be consistent and true. Hoping to make safe haven language for all applications and renewals in all boards covered.*

*\*\* at our recent meeting (3/12/24) we were informed that the 300 rules may have removed all questions which are intrusive and thus there should not be questions that can put someone in a situation where they are voluntary and then have to inform the board through a renewal process.*

Response 13: As noted above (ref. Response 6 to Hearing Comment 6), this paragraph has been revised to be “safe haven” language.