

**Consideration of Proposed Amendments to 22 Tex. Admin. Code §211.6,  
Pertaining to Committees of the Board and Proposed New §213.34, Pertaining to  
Deferred Disciplinary Action Pilot Program**

**Summary of Request:** Consider proposal of amendments to §211.6, Pertaining to *Committees of the Board* and Proposed New §213.34, Pertaining to *Deferred Disciplinary Action Pilot Program*.

**Background:** SB 1415, which was enacted by the 81st Texas Legislature and effective September 1, 2009, requires the Board to determine the feasibility of conducting a pilot program designed to evaluate the efficacy and effect of deferring disciplinary actions against individuals. SB 1415 also requires the Board to appoint an advisory committee to assist the Board in overseeing the pilot program and its evaluation. SB 1415 further requires the committee to include representatives of public advocacy organizations. A copy of SB 1415 is attached hereto as Attachment "A" for reference.

Staff presented information to the Board at its October 2009 and January 2010, meetings regarding the potential feasibility of a deferred disciplinary action pilot program (pilot program). At its January 2010 meeting, the Board reviewed Staff's proposed feasibility study, determined that a pilot program was preliminarily feasible, approved the proposed feasibility study, and charged Board Staff with developing the pilot program to be implemented no later than February 1, 2011, in accordance with the requirements of SB 1415. A copy of the final, approved feasibility study is attached hereto as Attachment "B" for reference<sup>1</sup>.

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<sup>1</sup> The Board determined that a pilot program would be feasible under certain preliminary criteria:

- The pilot program will be available as a disciplinary alternative only to those individuals with no prior disciplinary history.
- The pilot program will be available only for a disciplinary action consisting of a Warning or less, such sanction being properly established utilizing the Board's Disciplinary Sanction Policies and Disciplinary Matrix.
- The pilot program will be available only as a condition of settlement by agreement prior to initiating proceedings before the State Office of Administrative Hearings.
- The pilot program will only be available where a program of remediation, outlined in probationary stipulations, is designed to address a practice deficit, a knowledge deficit, or situational awareness.
- Deferred disciplinary actions will not be available for violations involving sexual misconduct, criminal conduct, intentional acts, falsification, deception, chemical dependency, or substance abuse.
- A deferred disciplinary order will be available to the public for at least five years.
- The Board may treat a deferred disciplinary action as a prior disciplinary action when considering the imposition of a sanction for a subsequent violation of the Nursing Practice Act or a rule or order adopted under the Nursing Practice Act.

Attached hereto as Attachment "C" is proposed new Board rule §213.34, which implements the requirements for the pilot program under SB 1415, and proposed amended Board rule §211.6, which establishes the Deferred Disciplinary Action Pilot Program Advisory Committee (DDAPPAC), as required by SB 1415.

Proposed new §213.34 establishes the general parameters for the pilot program, including specifying the individuals that may be eligible to participate in the program and the types of violations that may be subject to the program and addressing the confidentiality of the program and the consequences of failing to successfully complete the program. Further, proposed new §213.34 implements all of the Board's preliminary criteria approved at its January 2010 meeting.

Proposed amended §211.6 establishes a new advisory committee designed to assist the Board in overseeing and evaluating the pilot program. The proposed amendment specifies the members of the committee, specifically including members of public advocacy organizations, as required by SB 1415.

**Staff's Recommendation:** Move to approve the proposed amendments to 22 Tex. Admin. Code §211.6, pertaining to *Committees of the Board* and proposed new §213.34, pertaining to *Deferred Disciplinary Action Pilot Program* and authorize Staff to publish the proposals 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 §211.6, pertaining to *Committees of the Board* and proposed new §213.34, pertaining to *Deferred Disciplinary Action Pilot Program*, as proposed.

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- If a probationary condition of a deferred disciplinary order is violated during the term of the order, the action will no longer be treated as a deferred disciplinary action under the pilot program, and the matter will be resolved as a disciplinary action under Subchapter J, Texas Occupations Code.

1 AN ACT

2 relating to certain corrective actions by the Texas Board of  
3 Nursing, including a pilot program on deferred disciplinary action;  
4 providing corrective actions.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Subchapter D, Chapter 301, Occupations Code, is  
7 amended by adding Section 301.1607 to read as follows:

8 Sec. 301.1607. PILOT PROGRAM ON DEFERRAL OF FINAL  
9 DISCIPLINARY ACTION. (a) In this section, "deferred disciplinary  
10 action" means a final disciplinary action against a person licensed  
11 or regulated under this chapter that is deferred by the board as  
12 provided by this section.

13 (b) Not later than February 1, 2010, the board shall  
14 determine the feasibility of conducting a pilot program designed to  
15 evaluate the efficacy and effect on the public's protection of  
16 board deferral of disciplinary action against a person licensed or  
17 regulated under this chapter in cases in which the board proposes to  
18 impose a sanction other than a reprimand or a denial, suspension, or  
19 revocation of a license. If the board determines the pilot program  
20 is feasible, the board shall develop and implement the pilot  
21 program not later than February 1, 2011. The pilot program must  
22 conclude not later than January 1, 2014.

23 (c) The pilot program may not include cases in which the  
24 board proposes to issue a reprimand or to deny, suspend, or revoke a

1 license.

2 (d) During the time the pilot program is implemented and for  
3 any action or complaint for which the board proposes to impose a  
4 sanction other than a reprimand or a denial, suspension, or  
5 revocation of a license, the board may:

6 (1) defer final disciplinary action the board has  
7 proposed against a person licensed or regulated under this chapter  
8 if the person conforms to conditions imposed by the board,  
9 including any condition the board could impose as a condition of  
10 probation under Section 301.468; and

11 (2) if the person successfully meets the imposed  
12 conditions, dismiss the complaint.

13 (e) Except as otherwise provided by this subsection, a  
14 deferred disciplinary action by the board under the pilot program  
15 is not confidential and is subject to disclosure in accordance with  
16 Chapter 552, Government Code. If the person successfully meets the  
17 conditions imposed by the board in deferring final disciplinary  
18 action and the board dismisses the action or complaint, the  
19 deferred disciplinary action of the board is confidential to the  
20 same extent as a complaint filed under Section 301.466.

21 (f) The board may treat a deferred disciplinary action taken  
22 against a nurse under this section as a prior disciplinary action  
23 against the nurse when considering the imposition of a sanction for  
24 a subsequent violation of this chapter or a rule or order adopted  
25 under this chapter.

26 (g) The board may contract with a third party to evaluate  
27 the pilot program established under this section.

1       (h) The board shall appoint an advisory committee to assist  
2 the board in overseeing the pilot program and its evaluation. The  
3 committee must include representatives of public advocacy  
4 organizations.

5       (i) This section expires September 1, 2014.

6       SECTION 2. Chapter 301, Occupations Code, is amended by  
7 adding Subchapter N to read as follows:

8               SUBCHAPTER N. CORRECTIVE ACTION PROCEEDING

9       Sec. 301.651. DEFINITION. In this subchapter, "corrective  
10 action" means a fine or remedial education imposed under Section  
11 301.652.

12       Sec. 301.652. IMPOSITION OF CORRECTIVE ACTION. (a) The  
13 board may impose a corrective action on a person licensed or  
14 regulated under this chapter who violates this chapter or a rule or  
15 order adopted under this chapter. The corrective action:

16               (1) may be a fine, remedial education, or any  
17 combination of a fine or remedial education;

18               (2) is not a disciplinary action under Subchapter J;  
19 and

20               (3) is subject to disclosure only to the extent a  
21 complaint is subject to disclosure under Section 301.466.

22       (b) The board by rule shall adopt guidelines for the types  
23 of violations for which a corrective action may be imposed.

24       Sec. 301.653. REPORT AND NOTICE OF VIOLATION AND CORRECTIVE  
25 ACTION. If the executive director determines that a person has  
26 committed a violation for which a corrective action may be imposed  
27 under the guidelines adopted under Section 301.652(b), the

1 executive director may give written notice of the determination and  
2 recommendation for corrective action to the person subject to the  
3 corrective action. The notice may be given by certified mail. The  
4 notice must:

- 5 (1) include a brief summary of the alleged violation;  
6 (2) state the recommended corrective action; and  
7 (3) inform the person of the person's options in  
8 responding to the notice.

9 Sec. 301.654. RESPONSE. Not later than the 20th day after  
10 the date the person receives the notice under Section 301.653, the  
11 person may:

- 12 (1) accept in writing the executive director's  
13 determination and recommended corrective action; or  
14 (2) reject the executive director's determination and  
15 recommended corrective action.

16 Sec. 301.655. ACTION FOLLOWING RESPONSE. (a) If the  
17 person accepts the executive director's determination and  
18 satisfies the recommended corrective action, the case is closed.

19 (b) If the person does not accept the executive director's  
20 determination and recommended corrective action as originally  
21 proposed or as modified by the board or fails to respond in a timely  
22 manner to the executive director's notice as provided by Section  
23 301.654, the executive director shall:

- 24 (1) terminate proceedings under this subchapter; and  
25 (2) dispose of the matter as a complaint under  
26 Subchapter J.

27 Sec. 301.656. REPORT TO BOARD. The executive director

1 shall report periodically to the board on the corrective actions  
2 imposed under this subchapter, including:

- 3           (1) the number of corrective actions imposed;  
4           (2) the types of violations for which corrective  
5 actions were imposed; and  
6           (3) whether affected nurses accepted the corrective  
7 actions.

8           Sec. 301.657. EFFECT ON ACCEPTANCE OF CORRECTIVE ACTION.

9 (a) Except to the extent provided by this section, a person's  
10 acceptance of a corrective action under this subchapter does not  
11 constitute an admission of a violation but does constitute a plea of  
12 nolo contendere.

13           (b) The board may treat a person's acceptance of corrective  
14 action as an admission of a violation if the board imposes a  
15 sanction on the person for a subsequent violation of this chapter or  
16 a rule or order adopted under this chapter.

17           SECTION 3. The changes in law made by this Act to Chapter  
18 301, Occupations Code, apply to actions for violations under  
19 Chapter 301 pending on the effective date of this Act or commenced  
20 on or after the effective date of this Act.

21           SECTION 4. This Act takes effect September 1, 2009.

S.B. No. 1415

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 1415 passed the Senate on April 30, 2009, by the following vote: Yeas 31, Nays 0.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 1415 passed the House on May 14, 2009, by the following vote: Yeas 144, Nays 0, one present not voting.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor



## Texas Board of Nursing

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701  
Phone: (512) 305-7400 Fax: (512) 305-7401 www.bon.state.tx.us

**Katherine A. Thomas, MN, RN**  
*Executive Director*

January 27, 2010

The Honorable Rick Perry, Governor  
P.O. Box 12428  
Austin, Texas 78711

The Honorable David Dewhurst, Lieutenant Governor  
P.O. Box 12068  
Capitol Station  
Austin, Texas 78711

The Honorable Joe Straus, Speaker  
P.O. Box 2910  
Austin, Texas 78768

The Honorable Glenn Hegar, Jr.  
P.O. Box 12068  
Capitol Station  
Austin, Texas 78711

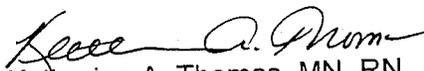
The Honorable Jim McReynolds  
P.O. Box 2910  
Austin, Texas 78768

Dear Governors, Speaker, Senator, and Representative:

In accordance with Section 301.1607, Texas Occupations Code, I am pleased to submit the Feasibility Study on Deferral of Final Disciplinary Actions of the Texas Board of Nursing (Board). The Study summarizes the factors considered by the Board in determining the feasibility of conducting a pilot program designed to evaluate the efficacy and effect of Board deferral of final disciplinary actions. Preliminarily, the Board has determined that the pilot program is feasible.

Board Staff is available to discuss any of the issues outlined in the Study and to provide technical assistance. Please contact me at 512-305-6811 with any questions you may have or if you need additional information.

Respectfully submitted,

  
Katherine A. Thomas, MN, RN  
Executive Director

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### Members of the Board

Linda Rounds, PhD, FNP, RN  
Galveston, *President*

Deborah Bell, CLU, ChFC

Kristin Benton, MSN, RN  
Austin

Patricia Clapp, BA  
Dallas

Tamara Cowen, MN, RN  
Harlingen

Sheri Crosby, JD, SPHR  
Dallas

Marilyn Davis, BSN, RN, MPA  
Sugar Land



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333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701  
Phone: (512) 305-7400 Fax: (512) 305-7401 www.bon.state.tx.us

**Katherine A. Thomas, MN, RN**  
*Executive Director*

Tony Gilman, Executive Officer  
Health Policy Council  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

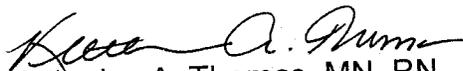
Re: Texas Board of Nursing Feasibility Study on Deferral of Final Disciplinary  
Actions

Dear Mr. Gilman,

Enclosed please find a copy of the Texas Board of Nursing Feasibility Study on Deferral  
of Final Disciplinary Actions.

Please feel free to contact me at 305-6811 with any questions and/or concerns.

Sincerely,

  
Katherine A. Thomas, MN, RN  
Executive Director

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### Members of the Board

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Dallas

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Harlingen

Sheri Crosby, JD, SPHR  
Dallas

Marilyn Davis, BSN, RN, MPA  
Sugar Land

Beverly Jean Nutall, LVN

Mary Jane Salgado, MEd

Josefina Luian, PhD, RN



## Texas Board of Nursing

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333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701  
Phone: (512) 305-7400 Fax: (512) 305-7401 www.bon.state.tx.us

**Katherine A. Thomas, MN, RN**  
*Executive Director*

Jim Willmann  
Texas Nurses Association  
7600 Burnet Road, Suite 440  
Austin, Texas 78757

Re: Texas Board of Nursing Feasibility Study on Deferral of Final Disciplinary Actions

Dear Jim,

Enclosed please find a copy of the Texas Board of Nursing Feasibility Study on Deferral of Final Disciplinary Actions.

Please feel free to contact me at 305-6811 with any questions and/or concerns.

Sincerely,

  
Katherine A. Thomas, MN, RN  
Executive Director

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Bianca Ross Garcia, PhD, RN	Richard Gibbs, LVN	Kathy Leader-Horn, LVN	Josefina Lujan, PhD, RN	Beverley Jean Nutall, LVN	Mary Jane Salgado, MED

Texas Board of Nursing  
Feasibility Study on Deferral of Final Disciplinary Actions



January 2010

## Introduction

The mission of the Texas Board of Nursing (Board) is to protect the health, safety, and welfare of the public through the effective regulation of professional and vocational nursing in Texas. The Board seeks to accomplish this mission, in part, by investigating and taking disciplinary action to enforce the Nursing Practice Act<sup>1</sup> and Board rules and policies.

Senate Bill (SB) 993, which was enacted by the 80th Texas Legislature, Regular Session, was intended to promote a less punitive regulatory environment for nurses committing minor violations in Texas. SB 993 also re-focused the Board's disciplinary efforts and resources on nurses whose continuing practice would pose a risk of harm to patients. This legislation was based upon two publications issued by the Institute of Medicine<sup>2</sup>. These publications concluded that patient safety is better served when regulatory environments focus on system issues instead of assigning individual blame for minor infractions. SB 1415, which was enacted by the 81st Texas Legislature, Regular Session, was designed to build on the principles established in SB 993 by authorizing the Board to determine the feasibility of conducting a pilot program to evaluate deferred disciplinary action for minor violations of the Nursing Practice Act<sup>3</sup>.

## SB 1415

SB 1415 adds section 301.1607 to the Nursing Practice Act. Section 301.1607 requires the Board to determine the feasibility of conducting a pilot program designed to evaluate the efficacy and effect of Board deferral of final disciplinary actions no later than February 1, 2010. If the Board determines that a such a pilot program is feasible, SB 1415 requires the Board to develop and implement the pilot program no later than February 1, 2011.

In keeping with its obligation to protect the consumer of nursing services from the unsafe, incompetent, or unprofessional nurse, the Board has developed a range of disciplinary penalties that may be imposed for violations of the Nursing Practice Act. Further, the Board has adopted recommended guidelines for disciplinary orders and conditions of probation for violations of the Nursing Practice Act. As set forth in these guidelines, the Board may, upon the finding of a violation, enter a disciplinary order

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<sup>1</sup> Chapter 301, Texas Occupations Code.

<sup>2</sup> Linda T. Kohn, Janet M. Corrigan, and Molla S. Donaldson, eds., *To Err is Human, Building a Safer Health System*, Committee on Quality of Health Care in America, Institute of Medicine (Washington, DC: National Academy Press, 2000); Ann Page, ed., *Keeping Patients Safe: Transforming the Work Environment of Nurses*, Committee on the Work Environment for Nurses and Patient Safety, Institute of Medicine (Washington, DC: National Academies Press, 2004).

<sup>3</sup> See SB 993, Bill Analysis, enrolled version, 9/28/07 and SB 1415, Bill Analysis, enrolled version, 10/8/09.

imposing a disciplinary action, depending upon the nature and circumstances of the violation<sup>4</sup>.

The types of disciplinary actions available to the Board range from less serious disciplinary actions, such as remedial education orders, to more serious disciplinary actions, such as the suspension or revocation of an individual's nursing license. SB 1415 essentially limits the types of disciplinary actions that may be part of the pilot program to those in which the Board proposes to issue a remedial education order or a warning with stipulations.<sup>5</sup> Typically, these types of disciplinary actions are less serious in nature and are issued for violations of the Nursing Practice Act that involve a low risk of harm to the public.

During the term of the pilot program, SB 1415 authorizes the Board to defer final disciplinary action against an individual if the individual conforms to the probationary conditions in the Board's deferred disciplinary order. Further, SB 1415 authorizes the Board to dismiss the originating complaint if the individual completes the probationary conditions imposed by the Board. SB 1415 provides that a deferred disciplinary action under the pilot program is subject to public disclosure. However, once an individual successfully completes a deferred disciplinary action, SB 1415 requires the deferred disciplinary order to become confidential.<sup>6</sup>

Finally, SB 1415 permits the Board to treat a deferred disciplinary action under the pilot program as prior disciplinary action when considering the imposition of sanctions for a subsequent violation of the Nursing Practice Act.

## Issues for Consideration

### Comparison to Other Jurisdictions

As a point of reference, Board Staff surveyed other jurisdictions<sup>7</sup> to determine if any other boards of nursing have implemented a program similar to the pilot program contemplated by SB 1415. No other state reported having a similar deferred disciplinary

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<sup>4</sup> See 22 Tex. Admin. Code §213.33(g).

<sup>5</sup> Section 301.1607(c), Texas Occupations Code, provides that the pilot program may not include cases in which the Board proposes to issue a reprimand or to deny, suspend, or revoke a license.

<sup>6</sup> Section 301.1607(e), Texas Occupations Code, provides that a completed deferred disciplinary action is confidential to the same extent as a complaint filed under section 301.466, Texas Occupations Code.

<sup>7</sup> Kentucky, Ohio, North Carolina, Massachusetts, Minnesota, Mississippi, Vermont, Louisiana, and North Dakota responded directly to Staff's survey. Further, Massachusetts conducted an informal survey in 2006 regarding states' ability to expunge/seal disciplinary records. These results are also incorporated in this report.

action program<sup>8</sup>. Kentucky reported the implementation of an expungement program, which is authorized under Kentucky state law and board rule<sup>9</sup>. Kentucky implemented its expungement program in stages, adding additional types of disciplinary actions that were eligible for expungement in 2003, and again in 2008<sup>10</sup>. Although Kentucky's expungement program is not synonymous with the deferred pilot program contemplated by SB 1415, several similarities exist, particularly regarding the confidential nature of the disciplinary actions.

SB 1415 requires a deferred disciplinary action to be made confidential once an individual completes the associated probationary stipulations of the disciplinary order. Similarly, Kentucky law provides that an expunged disciplinary action should also be made confidential. Once a disciplinary action has been expunged under Kentucky's expungement program, Kentucky does not report the disciplinary action to other state agencies, other boards of nursing, or other organizations. Further, Kentucky advises individuals who have received an expunged disciplinary action that they may properly deny the existence of the expunged disciplinary action if later asked. Kentucky is in a minority of states that have an expungement program. In fact, the majority of states surveyed by Board staff reported having no statutory authorization to expunge final disciplinary actions.<sup>11</sup>

State boards of nursing are required to report final disciplinary actions to the national Healthcare Integrity and Protection Data Bank (HIPDB), and states that are members of the Nurse Licensure Compact (Compact) are also required to report final disciplinary actions to the National Council of State Boards of Nursing (NCSBN). The confidentiality requirements of SB 1415 raise concerns regarding the ability of the Board to meet the mandatory reporting requirements of these organizations.

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<sup>8</sup> Several states reported variations of confidential programs for nurses with chemical dependency or substance abuse issues and/or mental health issues.

<sup>9</sup> The statute is located in the Kentucky Revised Statutes §314.131(1) and (9), and the administrative regulation is located in the Kentucky Administrative Regulations, Title 201, Chapter 20, §20:410.

<sup>10</sup> The types of records that may be expunged under Kentucky law include: (i) consent decrees that are at least 5 years old; (ii) agreed orders and decisions that are at least 10 years old and concern one of the following categories, provided that there has not been subsequent disciplinary action: failure to timely obtain continuing education or AIDS education hours; payment of fees which were returned unpaid by the bank; or practice as a nurse or advanced registered nurse practitioner without a current license; (iii) agreed orders and decisions that are at least 10 years old and which resulted in a reprimand, provided that there has not been subsequent disciplinary action and all of the terms of the order have been met; and (iv) agreed orders and decisions that are at least 20 years old, provided that there has not been subsequent disciplinary action and all of the terms of the agreed order or decision have been met.

<sup>11</sup> Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Tennessee, Utah, Vermont, Washington, D.C., and Wyoming do not have expungement programs. Georgia, Minnesota, North Carolina, North Dakota, Ohio, and West Virginia allow for some form of expungement of disciplinary actions.

### Coordination Among Compact States

Texas is a member (party state) of the Compact<sup>12</sup>. The Compact was formed to facilitate cooperation among state nursing boards in the areas of nurse regulation, investigation, and disciplinary action. As a member of the Compact, the Board is required to promptly report any action against a licensee's nursing license, including the factual and legal basis for the action, and any significant investigative information yet to result in a state action to NCSBN. Party states utilize this investigatory and disciplinary information to make informed decisions about the licensure status of individuals in their states. Although the Compact requires such reporting by its party states, the Compact also recognizes state expungement statutes and permits information subject to such statutes to be removed from the database. While SB 1415 is not an expungement statute, its terms may require the removal of information related to a completed deferred disciplinary action from the Compact database in the same manner that expunged material is removed from the database.

SB 1415 makes a completed deferred disciplinary action confidential to the same extent as a complaint under section 301.466, Texas Occupations Code<sup>13</sup>. While the Board withholds information subject to section 301.466 from public disclosure, such information is routinely shared with other parties permitted by the statute, such as other nursing licensing or disciplinary boards. The Board typically shares this information with other nursing licensing or disciplinary boards through NCSBN. During the duration of the pilot program, if approved, and pursuant to section 301.1607(e), Texas Occupations Code, the Board will initially report a deferred disciplinary action to NCSBN<sup>14</sup>. Once completed, the Board may request the expungement or removal of the information regarding the deferred disciplinary order from the NCSBN database. The Board, however, is authorized to continue to share this information with other nursing licensing or disciplinary boards pursuant to section 301.1607(e), Texas Occupations Code, in conjunction with section 301.466, Texas Occupations Code. However, because the disciplinary information contained in the NCSBN database is available to other state nursing licensing and disciplinary boards, the Board may be unable to control the dissemination of the information beyond the NCSBN database. Thus, the information concerning the confidential deferred disciplinary action could be disseminated to the public by another nursing licensing or disciplinary board. Such disclosure, although inadvertent, may be inconsistent with the confidentiality provisions of SB 1415. Certain accommodations will need to be made in order for the Board to withdraw information related to completed

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<sup>12</sup> The statutes and rules regarding membership in the Compact are located in Chapter 304, Texas Occupations Code, and 22 Tex. Admin. Code Chapter 220.

<sup>13</sup> Section 301.466, Texas Occupations Code, relates to the confidentiality of complaints and information and material compiled by the Board in connection with a complaint and investigation.

<sup>14</sup> Section 301.1607(e), Texas Occupations Code, specifically provides that a deferred disciplinary action is not confidential and is subject to public disclosure.

deferred disciplinary actions from the NCSBN database. NCSBN, however, has preliminarily indicated that such accommodations could be made available to the Board during the duration of a pilot program.

### Coordination with the Healthcare Integrity and Protection Data Bank

Texas is also required to report certain disciplinary actions to HIPDB. HIPDB is a national database created by the Secretary of the U.S. Department of Health and Human Services to combat fraud and abuse in health insurance and health care delivery<sup>15</sup>. Federal and state licensing and certification agencies are required to report final adverse actions<sup>16</sup> taken against health care practitioners, providers, and suppliers to HIPDB. Although information reported to HIPDB is not available to the general public, it is viewable by federal and state agencies and certain employers. Once a disciplinary action has been reported to HIPDB, it may only be expunged under very limited circumstances, such as where an agency made an error when originally reporting a disciplinary action to HIPDB or where a disciplinary action against an individual has been successfully appealed and overturned. In preliminary discussions with HIPDB, HIPDB has indicated that a deferred disciplinary action would not be permitted to be expunged from the database upon the successful completion of the probationary conditions of the disciplinary order. Further, HIPDB has indicated that such expungement is inconsistent with the purposes of the national database. HIPDB also asserts that its federal enabling legislation pre-empts the requirements of SB 1415. Although the general public will not be able to view information related to completed deferred disciplinary actions entered in HIPDB, it appears unlikely that the Board will be able to prevent the disclosure of such information to other federal and state agencies and employers utilizing HIPDB. Such disclosure, although outside the Board's control, may be inconsistent with the confidentiality provisions of SB 1415.

### Recommendations

#### The Eligibility and Disciplinary Advisory Committee

The Eligibility and Disciplinary Advisory Committee (Committee) convened on September 17, 2009, and December 7, 2009, to consider the provisions of SB 1415 and the feasibility of a deferred disciplinary action pilot program. Board Staff outlined several concerns regarding the feasibility of conducting such a program, including issues relating

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<sup>15</sup> HIPDB was created pursuant to the Health Insurance Portability and Accountability Act of 1996.

<sup>16</sup> Final adverse actions include revocation, suspension, censure, reprimand, probation; any loss of license or right to apply for or renew a license of the provider, supplier, or practitioner, whether by voluntary surrender, non-renewal, or otherwise; any negative action or finding by a federal or state licensing and certification agency that is publicly available information; health care practitioners, providers, and suppliers who have been excluded from participating in federal or state health care programs; civil judgments that are health care related; criminal convictions that are health care related; exclusions from federal or state health care programs; and other adjudicated actions or decisions that affect or could affect the payment, provision, or delivery of a health care item or service.

to the confidential nature of a completed deferred disciplinary action. The Committee discussed these concerns prior to formulating its recommendations.

Final disciplinary actions imposed by the Board are available to the public pursuant to statute<sup>17</sup>. The dissemination of this information is important, as it alerts employers, potential employers, and consumers of nursing services of disciplinary actions taken against individuals for violations of the Nursing Practice Act. Often, such violations are serious in nature and involve a risk of harm to the public. Currently, all disciplinary actions imposed by the Board remain a permanent part of an individual's licensing history and are available to the public upon request.

SB 1415 requires a deferred disciplinary action to become confidential once an individual completes the probationary conditions associated with the disciplinary order. As such, the public would not be able to obtain information related to a deferred disciplinary order once it has been successfully completed. This causes some concerns. Final disciplinary orders contain findings of fact, conclusions of law, and probationary stipulations designed to remediate conduct, if possible, or monitor an individual's practice to ensure the safe delivery of nursing care. The findings of fact clearly outline the violations of the Nursing Practice Act and provide significant information regarding an individual's conduct. Such conduct could include practice errors, such as medication administration or nursing documentation errors or could relate to instances of fraud or theft or prior criminal history. Once a deferred disciplinary action is completed, the details surrounding the order, including the findings of fact, will no longer be available for public review. Therefore, it may be more difficult for employers to identify concerning patterns of conduct. It may also make it more difficult for consumers to make informed choices regarding their nursing care. This is especially true in the area of home health, where an individual's prior criminal convictions for fraud or theft, for example, are especially relevant.

In an effort to address these concerns, the Committee recommended that the following limitations apply to the pilot program:

- That an individual be eligible to participate in the pilot program only if the individual demonstrates that a program of remediation is designed to address a practice deficit, a knowledge deficit, or situational awareness;
- That the pilot program only include disciplinary actions consisting of a remedial education order or a Warning with stipulations;
- That a deferred disciplinary action order be available to the public for a minimum of five years;
- That the pilot program be limited to individuals with no prior disciplinary history; and
- That violations involving intentional acts, falsification, deception, chemical dependency or substance abuse not be included in the pilot program.

## **Conclusion**

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<sup>17</sup> Section 301.469, Texas Occupations Code, and section 301.466(c), Texas Occupations Code.

The Board has evaluated its authority, as well as the issues identified herein. Further, the Board has evaluated the recommendations of the Committee and believes its recommendations are appropriate. Based upon these factors, but reserving for further review should new information or further diligence reveal that the feasibility of a deferred disciplinary action pilot program is not appropriate, the Board finds that a pilot program is feasible under the following preliminary criteria:

1. The pilot program will be available as a disciplinary alternative only to those individuals with no prior disciplinary history.
2. The pilot program will be available only for a disciplinary action consisting of a Warning or less, such sanction being properly established utilizing the Board's Disciplinary Sanction Policies and Disciplinary Matrix<sup>18</sup>.
3. The pilot program will be available only as a condition of settlement by agreement prior to initiating proceedings before the State Office of Administrative Hearings.
4. The pilot program will only be available where a program of remediation, outlined in probationary stipulations, is designed to address a practice deficit, a knowledge deficit, or situational awareness.
5. Deferred disciplinary actions will not be available for violations involving sexual misconduct, criminal conduct, intentional acts, falsification, deception, chemical dependency, or substance abuse.
6. A deferred disciplinary order will be available to the public for at least five years.
7. The Board may treat a deferred disciplinary action as a prior disciplinary action when considering the imposition of a sanction for a subsequent violation of the Nursing Practice Act or a rule or order adopted under the Nursing Practice Act.
8. If a probationary condition of a deferred disciplinary order is violated during the term of the order, the action will no longer be treated as a deferred disciplinary action under the pilot program, and the matter will be resolved as a disciplinary action under Subchapter J, Texas Occupations Code.

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The Board's adopted Disciplinary Sanction Policies are located at: <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>. The Board's Disciplinary Matrix, adopted October, 2009, is located at: <http://www.bon.state.tx.us/disciplinaryaction/pdfs/discp-matrix.pdf>.

## Attachment "C"

### §213.34. Deferred Disciplinary Action Pilot Program.

(a) This section implements the deferred disciplinary action pilot program authorized by the Occupations Code §301.1607. The pilot program will commence on February 1, 2011, and will conclude no later than January 1, 2014.

(b) The purpose of the pilot program is to evaluate the efficacy and effect of Board deferral of final disciplinary actions against individuals for violations of the Nursing Practice Act and/or Board rules.

(c) The opportunity to enter into a deferred disciplinary order under the pilot program is at the sole discretion of the Executive Director.

(d) A deferred disciplinary action under the pilot program will be available:

(1) for individuals with no prior disciplinary history with the Board;

(2) for violations of the Nursing Practice Act and/or Board rules that are proposed for resolution through the issuance of a Warning, a Warning with Stipulations, a Warning with Stipulations and a Fine, a Warning with a Fine, Remedial Education, Remedial Education with a Fine, or a Fine;

(3) only as a condition of settlement by agreement prior to the initiation of proceedings before the State Office of Administrative Hearings;

(4) only if the probationary stipulations outlined in the deferred disciplinary order are designed to address an individual's practice deficit, knowledge deficit, or lack of situational awareness; and

(5) for violations of the Nursing Practice Act and/or Board rules that were pending with the Board on September 1, 2009, or after.

(e) Violations involving sexual misconduct, criminal conduct, intentional acts,

falsification, deception, chemical dependency, or substance abuse will not be eligible for resolution through a deferred disciplinary action under the pilot program.

(f) A deferred disciplinary action under the pilot program will not be available to:

(1) an individual who files a petition for declaratory order under §213.30 of this title (relating to Declaratory Order of Eligibility for Licensure);

(2) an individual whose application under §217.2 (relating to Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions), §217.4 (relating to Requirements for Initial Licensure by Examination for Nurses Who Graduate From Nursing Education Programs Outside of United States' Jurisdiction), or §217.5 of this title (relating to Temporary License and Endorsement) is treated as a petition for declaratory order under §213.30 of this title; or

(3) an individual who is practicing nursing in Texas on a nurse licensure compact privilege.

(g) A deferred disciplinary order will be available to the public for a minimum of five years and until such time as an individual successfully completes all of the probationary stipulations required by the deferred disciplinary order and the originating complaint is dismissed by the Board. After such time, the deferred disciplinary order will not be available to the public.

(h) If an individual fails to comply with a probationary stipulation required by a deferred disciplinary order or if a subsequent complaint is filed against an individual during the pendency of the deferred disciplinary order, the Board will stay the dismissal of the originating complaint pending the resolution of the subsequent complaint. If the subsequent complaint is proposed for resolution through a disciplinary action under the Occupations Code Subchapter J, the Board will not dismiss the originating complaint, and

the Board may treat the deferred disciplinary action as prior disciplinary action when considering the imposition of a disciplinary sanction.

(j) The outcome and effectiveness of the pilot program will be evaluated by the Board on a regular basis.

#### **§211.6. Committees of the Board.**

(a) - (e) (No change).

(f) Advisory Committees. The president may appoint, with the authorization of the board, advisory committees for the performance of such activities as may be appropriate or required by law.

(1) The board has established the following committees that advise the board on a continuous basis or as charged by the Board:

(A) - (D) (No change).

(E) the Deferred Disciplinary Action Pilot Program Advisory Committee (DDAPPAC) assists the Board in overseeing and evaluating the deferred disciplinary action pilot program under §213.34 of this title (relating to Deferred Disciplinary Action Pilot Program). The DDAPPAC shall be abolished when the deferred disciplinary action pilot program under §213.34 of this title comes to an end, but in no event later than September 1, 2014. The DDAPPAC is comprised of representatives from the following:

(i) Texas Association of Vocational Nurse Educators (TAVNE);

(ii) Licensed Vocational Nurses Association of Texas (LVNAT);

(iii) Texas League of Vocational Nurses (TLVN);

(iv) Texas Organization of Associate Degree Nursing (TOADN);

(v) Texas Organization of Baccalaureate and Graduate Nurse

Educators (TOBGNE);

(vi) Texas Nurses Association (TNA);

(vii) Texas Organization of Nurse Executives (TONE);

(viii) Coalition for Nurses in Advanced Practice; and

(ix) other members approved by the Board, including members

of public advocacy organizations.

(2) - (12) (No change).