

Review of SB 1415, Enacted by the 81st Legislature, Regular Session, effective September 1, 2009, and Pilot Program on Deferral of Final Disciplinary Actions, Including Recommendations Regarding the Feasibility of Conducting a Pilot Program to Determine the Efficacy of Deferring Disciplinary Actions

Summary of Request: Consider the feasibility of conducting a pilot program designed to evaluate the efficacy and effect of deferring Board disciplinary actions, as required by Senate Bill (SB) 1415, enacted by the 81st Texas Legislature, Regular Session, effective September 1, 2009.

Background: SB 1415 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. If the Board determines that a pilot program is feasible, the Board is required to develop and implement the program no later than February 1, 2011. The Board's feasibility study is due no later than February 1, 2010.

During the time the pilot program is implemented, the Board may (i) defer a final disciplinary action against an individual; and (ii) if the individual successfully meets the imposed conditions of the deferred action, dismiss the complaint.

Attached hereto as Attachment "A" is Staff's proposed Feasibility Study on Deferral of Final Disciplinary Actions. The Study summarizes the factors to be 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. Staff discussed the feasibility of conducting the pilot program with the Eligibility and Disciplinary Advisory Committee (Committee) on September 17, 2009, and December 7, 2009. The Committee's recommendations are reflected in Attachment "A". Preliminarily, Staff is recommending that the pilot program is feasible.

Staff's Recommendation: Move to approve the proposed Feasibility Study on Deferral of Final Disciplinary Actions attached hereto as Attachment "A". Further, move to recommend that the Board find the pilot program contemplated by SB 1415 to be feasible. Further, move to charge Board Staff with developing the pilot program to be implemented no later than February 1, 2011.

Attachment "A"

February 1, 2010

The Honorable Rick Perry, Governor
The Honorable David Dewhurst, Lieutenant Governor
The Honorable Joe Straus, Speaker
The Honorable Representative Jim McReynolds
The Honorable Senator Glenn Hegar

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 512-305-6888 with any questions you may have or if you need additional information.

Respectfully submitted,

Katherine A. Thomas, MN, RN
Executive Director of the Board

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 Act¹ 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 Medicine². 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 Act³.

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

¹ Chapter 301, Texas Occupations Code.

² 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).

³ 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 violation⁴.

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.⁵ 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.⁶

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 jurisdictions⁷ 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

⁴ See 22 Tex. Admin. Code §213.33(g).

⁵ 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.

⁶ 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.

⁷ 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 program⁸. Kentucky reported the implementation of an expungement program, which is authorized under Kentucky state law and board rule⁹. Kentucky implemented its expungement program in stages, adding additional types of disciplinary actions that were eligible for expungement in 2003, and again in 2008¹⁰. 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.¹¹

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.

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

⁹ 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.

¹⁰ 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.

¹¹ 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 Compact¹². 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 Code¹³. 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 NCSBN¹⁴. 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

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

¹³ 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.

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

order for the Board to withdraw information related to completed 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 delivery¹⁵. Federal and state licensing and certification agencies are required to report final adverse actions¹⁶ 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

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

¹⁶ 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.

concerns regarding the feasibility of conducting such a program, including issues relating 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 statute¹⁷. 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.

¹⁷ Section 301.469, Texas Occupations Code, and section 301.466(c), Texas Occupations Code.

Conclusion

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 Matrix¹⁸.
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 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.

¹⁸ 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>.