

**Consideration of Proposed Amendments to 22 Texas Administrative Code §213.28, relating to Licensure of Individuals with Criminal History, including the Texas Board of Nursing Disciplinary Guidelines for Criminal Conduct**

**Background:** Two bills were enacted during the 87<sup>th</sup> Legislative Session that affect Board Rule 213.28 and the Board’s Disciplinary Guidelines for Criminal Conduct (Guidelines). First, House Bill (HB) 375, effective September 1, 2021, creates a new criminal offense, *Continuous Sexual Abuse of Young Child or Disabled Individual*. This offense is included in the enumerated list of crimes in the Nursing Practice Act mandating licensure revocation and/or denial, as applicable (Tex. Occ. Code §301.4535). The proposed amendments are necessary for consistency with this statutory change.

Second, HB 757, effective September 1, 2021, prohibits a licensing agency from denying, suspending, or revoking a license based upon a deferred adjudication that has been successfully completed and dismissed, except in specific circumstances. A successfully completed deferred adjudication may be considered by a licensing agency if the offense is listed in Article 42A.054(a) (most serious felonies; several are listed in §301.4535); described by Article 62.001(5) or (6); committed under Chapter 21 (sexual offenses) or 43 (public indecency offenses); or is related to the activity or conduct for which the person seeks or holds the license. A successfully completed and dismissed deferred adjudication may also be considered if the profession for which the individual holds or seeks licensure involves direct contact with children in the normal course of official duties for which the license is required or if the individual is an applicant for, or the holder of, a license issued under Chapter 1701 (law enforcement officers). The proposed amendments are necessary for consistency with this statutory change.

**Board Action:** Move to approve the proposed amendments to 22 Texas Administrative Code §213.28, relating to *Licensure of Individuals with Criminal History*, including the Board’s Criminal Guidelines, as set out in Attachment “A”, with authority for the 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 Texas Administrative Code §213.28, relating to *Licensure of Individuals with Criminal History*, including the Board’s Criminal Guidelines, as proposed.

## **Attachment “A”**

### §213.28. Licensure of Individuals with Criminal History.

(a) Purpose and Applicability. This section establishes the criteria utilized by the Board in determining the effect of criminal history on nursing licensure and eligibility for nursing licensure and implements the requirements of Texas Occupations Code §53.025 and Code of Criminal Procedure 42A.111. This section applies to all individuals seeking to obtain or retain a license or multistate licensure privilege to practice nursing in Texas.

(b) (No change.)

(c) The Board considers the crimes listed in the attached Criminal Guidelines (Guidelines) to be directly related to the practice of nursing. The Guidelines reflect the most common or well known crimes. The vast majority of an individual’s criminal history that is reviewed by the Board will fall within the Guidelines. However, the Guidelines are not intended to be an exhaustive listing, and they do not prohibit the Board from considering an offense not specifically listed in the Guidelines. In matters involving an offense that is not specifically listed in the Guidelines, such as a violation of another state’s law, federal law, or the Uniform Code of Military Justice, a determination shall be made by comparing that offense to the crime listed in the Guidelines that contains substantially similar elements. The offense must meet the requirements of subsection (b) of this section to be actionable. Further, because the practice of nursing may involve direct contact with children in the normal course of official nursing duties, the Board may consider an individual’s prior deferred adjudication community supervision, even if successfully completed, in its licensure decisions.

(d) - (f) (No change.)

(g) Sanction. Not all criminal conduct will result in a sanction. The Board recognizes that an individual may make a mistake, learn from it, and not repeat it in the nursing practice setting. As such, each case will be evaluated on its own merits to determine if a sanction is warranted. If multiple crimes are present in a single case, a more severe sanction may be considered by the Board pursuant to Texas Occupations Code §301.4531. If a sanction is warranted, the Board will utilize the schedule of sanctions set forth in §213.33(e) (relating to Factors Considered for Imposition of Penalties/Sanctions) of this chapter. At a minimum, an individual will be required to successfully complete the terms of his/her criminal probation and provide evidence of successful completion to the Board. If an individual's criminal behavior is due to, or associated with, a substance use disorder or a mental health condition, evidence of ongoing sobriety, effective clinical management, and/or appropriate ongoing treatment may be required. Further, if an individual's [~~individuals'~~] criminal history implicates his/her current fitness to practice, the individual may also be required to meet the requirements of §213.29 to ensure he/she is safe to practice nursing.

(h)- (i) (No change.)

(j) Youthful Indiscretions. Some criminal behavior that is otherwise actionable may be deemed a youthful indiscretion under this paragraph. In that event, a sanction will not be imposed. The following criteria will be considered in making such a determination:

(1) – (12) (No change.)

(k) – (n) (No change.)

## Disciplinary Guidelines for Criminal Conduct

Figure 22 TAC §213.28(c)

OFFENSE	PENALTY <u>F = Felony</u> <u>M=Misdemeanor</u>	PENAL CODE SECTION <u>(or Crim. Pro. ch. 62)</u>	<u>NOTES</u>
*Abandonment/ Endangerment of a Child	F	<a href="#">22.041</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Agree to Abduct Child for Remuneration: Younger than 18	F	<a href="#">25.031</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Aiding Suicide: Serious Bodily Injury/Death	F	<a href="#">22.08</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Assault, Aggravated	F	<a href="#">22.02</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Attempt, Conspiracy, or Solicitation of ch. 62 offense	F, M	<a href="#">ch. 62</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Burglary (if punishable under Penal Code §30.02(d) and ch. 62 offense)	F	<a href="#">ch. 62 (§62.001(5)(D))</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Capital Murder	F	<a href="#">19.03</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Child Pornography, Possession or Promotion	F	<a href="#">43.26(a),(e) (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Continuous Sexual Abuse of Young Child or Disabled Individual [ <del>Children</del> ]	F	<a href="#">21.02</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Indecency w/Child	F	<a href="#">21.11 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Indecent exposure x 2, if meets ch. 62 requirements	M	<a href="#">21.08 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Injury to Child/Elderly/Disabled	F	<a href="#">22.04</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Kidnapping	F	<a href="#">20.03, 20.04 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.

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*Manslaughter	F	<a href="#">19.04</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Murder	F	<a href="#">19.02</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Offenses for Which Registration as a Sex Offender is Required Under Ch. 62	F, M	<a href="#">§62.001(5)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Online Solicitation of a Minor	F	<a href="#">33.021(b),(c), (f); (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Prostitution, Compelling	F	<a href="#">43.05 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Protective Order, Violation	F	<a href="#">25.07, 25.071</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Robbery	F	<a href="#">29.02</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Robbery, Aggravated	F	<a href="#">29.03</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Sale or Purchase of a Child	F	<a href="#">25.08</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Sexual Assault	F	<a href="#">22.011 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Sexual Assault, Aggravated	F	<a href="#">22.021 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Sexual Conduct, Prohibited	F	<a href="#">25.02 (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Sexual Performance by Child	F	<a href="#">43.24(d), 43.25(b), (ch. 62)</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.
*Unlawful Restraint	F	<a href="#">20.02</a>	If on or after September 1, 2005, revocation/denial of licensure is required by Tex. Occ. Code §301.4535.

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Aggravated Perjury: Offense Against Public Administration that involves knowingly engaging in deceptive and dishonest conduct by making a false statement in connection with an official proceeding.	F	<a href="#">37.03</a>	
Arson: Offense Against Property that involves intent to destroy or damage property and involves knowledge that financial or personal harm may result and/or includes the reckless endangerment of a person's life or safety.	F	<a href="#">28.02(d)</a>	
Assault: Offense Against the Person that involves intentionally, knowingly, or recklessly causing bodily injury to another person.	F	<a href="#">22.01</a>	
Bribery: Offense Against Public Administration that involves intentionally or knowingly conferring, agreeing to confer, soliciting, or accepting benefits as consideration for a person's vote, decision, or recommendation.	F	<a href="#">36.02</a>	
Burglary: Offense Against Property that involves entering another's property with intent to commit theft or harm to another person.	F	<a href="#">30.02</a>	
Burglary of Vehicles: Offense Against Property that involves breaking into a vehicle with the intent to commit a felony or theft.	F	<a href="#">30.04</a>	
Credit Card or Debit Card Abuse: Offense Against Property that involves an intent to obtain a benefit fraudulently through the use of a credit or debit card that is expired or revoked, has not been issued to him/her, and/or without the consent of the cardholder.	F	<a href="#">32.31</a>	
Criminal Attempt or Conspiracy: Inchoate (Preparatory) Offense for an offense listed in Guidelines.	F	<a href="#">15.01, 15.02</a>	

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Criminally Negligent Homicide: Offense Against the Person that involves behavior where the offender engages in conduct that falls below the standard required of ordinary people and a death results.	F	<a href="#">19.05</a>	
Cruelty to Animals: Offense Against Public Order and Decency that involves the intentional or knowing infliction of torture on, neglect of, or unreasonable abandonment of a domesticated or captured animal.	F	<a href="#">42.09</a>	
Driving While Intoxicated Offenses. Offenses Against Public Health, Safety, and Morals that by the repetitiveness of the conduct indicates a possible issue with substance abuse or chemical dependency which may affect the nurse's ability to safely perform his/her duties and/or threaten public safety.	F	<a href="#">49.09</a>	
Driving While Intoxicated With Child Passenger: Offense Against Public Health, Safety, and Morals that involves operating a motor vehicle while intoxicated when the vehicle is occupied by a passenger under the age of 15.	F	<a href="#">49.045</a>	
Drug Violations: Crimes involving drugs that include the possession, misappropriation and misuse of controlled substances as regulated by Chs. 481, 482 and 483, Health & Safety Code.	F	<a href="#">Health &amp; Safety Code Chs. 481, 482, 483</a>	
Evading Arrest or Detention: Offense Against Public Administration that involves intentionally fleeing from a known police officer or federal investigator who is lawfully attempting to detain or arrest him/her.	F	<a href="#">38.04</a>	
False Report or Statement: Offense Against Property that involves intentionally or knowingly making a false material representation to obtain money or property.	F, M	<a href="#">32.32, 42.06</a>	
Forgery: Offense Against Property that involves an intent to defraud or harm another.	F, M	<a href="#">32.21</a>	

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Fraudulent Destruction, Removal, or Concealment of Writing: Offense Against Property that involves an intent to defraud or harm another through the destruction, removal, concealment, substitution, or alteration of a writing that impairs the use of the writing.	F, M	<a href="#">32.47</a>	
Fraudulent Use of Possession of Identifying Information: Offense Against Property that involves an intent to defraud or harm another through the possession, transfer, or use of another person's identifying information without consent.	F	<a href="#">32.51</a>	
Hindering Apprehension or Prosecution: Offense Against Public Administration that involves intentionally hindering the arrest, prosecution, conviction, or punishment of another person by harboring, concealing, aiding, or warning the other person.	F	<a href="#">38.05</a>	
Improper Photography or Visual Recording: Offense Against the Person that involves engaging in the secret photography of another person for purposes of sexual gratification.	F	<a href="#">21.15</a>	
Improper Relationship between Educator and Student: Offense Against the Person that involves a teacher engaging in sexual contact with a primary or secondary school student.	F	<a href="#">21.12</a>	
Insurance Fraud: Claim > \$500: Offense Against Property that involves the intent to defraud or deceive another of at least \$500 by using information known to contain false or misleading material information.	F	<a href="#">35.02(c)</a>	
Insurance Fraud: Claim ≤ \$500: Offense Against Property that involves an intent to defraud or deceive another by using information known to contain false or misleading material information, which by its own definition is deemed unprofessional or dishonorable conduct as defined in TOC §301.452(b)(10).	M	<a href="#">35.02 (c)(1)-(3)</a>	



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Insurance Fraud: Intent to Defraud: Offense Against Property that involves knowingly making a false material representation to an insurance company with the intent of defrauding the insurance company of at least \$1500.00.	F	<a href="#">35.02(a-1), (d)</a>	
Interference with Emergency Request for Assistance	F	<a href="#">42.062</a>	
Intoxication Assault: Offense Against Public Health, Safety, and Morals that causes serious bodily injury to another person due to the person's own intoxicated state while operating a vehicle, aircraft, or amusement ride.	F	<a href="#">49.07</a>	
Intoxication Manslaughter: Offense Against Public Health, Safety, and Morals that causes the death of another person due to the person's intoxicated state while operating a vehicle, aircraft, or amusement ride.	F	<a href="#">49.08</a>	
Medicaid Fraud > \$1500: Offense Against Property that involves knowingly making a false material representation with the intent of recovering Medicaid payments of at least \$1500.00. The offense may also involve seeking certification of a hospital, a nursing facility, skilled nursing facility, hospice, an intermediate care facility for the mentally retarded, assisted living facility, or a home health agency.  See Note At End of Document.	F	<a href="#">35A.02(b)(4)-(7)</a>	
Medicaid Fraud < \$1500: Offense Against Property that involves knowingly making a false material representation with the intent of recovering Medicaid payments of less than \$1500.00 which would not be authorized but for the misrepresentations. The	M	<a href="#">35A.02(b)(2)-(3)</a>	

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<p>offense may also involve seeking certification of a hospital; a nursing facility, skilled nursing facility; hospice; an intermediate care facility for the mentally retarded; assisted living facility; or a home health agency.</p> <p>See Note At End of Document.</p>			
<p>Misapplication of Fiduciary Property or Property of Financial Institution: Offense Against Property that involves an intentional, knowing, or reckless misapplication of property that he/she holds as a fiduciary for a financial institution.</p>	F, M	<a href="#">32.45</a>	
<p>Money Laundering ≥ \$1500: Offense Against Property that involves knowingly engaging in a criminal enterprise to conceal, invest or possess at least \$1500.00 known to be the proceeds of illegal activity.</p>	F	<a href="#">34.02(e)(1)-(4)</a>	
<p>Obscenity, Participates/Wholesale Promotion: Offense Against Public Order and Decency that involves the intent to wholesale promote any obscene material, obscene device, or activity.</p>	F	<a href="#">43.23</a>	
<p>Obstruction or Retaliation: Offense Against Public Administration that involves intentionally or knowingly harming or threatening to harm another in retaliation for that person's lawful report of a crime or status as a witness, informant, or public.</p>	F	<a href="#">36.06</a>	
<p>Perjury: Offense Against Public Administration that involves making a false statement under oath with the intent to deceive.</p>	M	<a href="#">37.02</a>	
<p>Prohibited Substances and Items in Correctional Facility: Offense Against Public Administration that involves possessing and/or providing prohibited substances to a person confined in a correctional facility.</p>	F	<a href="#">38.11</a>	

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Prohibited Weapon: Offense Against Public Health, Safety, and Morals that involves the intentional or knowing possession, manufacture, transport, repair, or sale of restricted weapons.	F	<a href="#">46.05</a>	
Prostitution, Prostitution or Promotion of, or Aggravated Promotion: Offense Against Public Order and Decency involving offering/repeatedly offering to engage in sexual conduct for a fee or promoting others to engage in sex for a fee.	F	<a href="#">43.02, 43.04</a>	
Resisting Arrest, Use of Deadly Weapon: Offense Against Public Administration that involves using a deadly weapon against another person.	F	<a href="#">38.03(d)</a>	
Securing Execution of Document by Deception: Offense Against Property that involves an intent to defraud or harm another by deception by causing another person to sign, execute, or file a document that affects the person's property or pecuniary interests.	F, M	<a href="#">32.46</a>	
Stalking: Offense Against Public Order and Decency that involves a person knowingly engaging in repetitive conduct that is intended to be threatening in nature and imposing a fear of bodily injury or death on another person.	F	<a href="#">42.072(b)</a>	
Tampering with Government Record: Offense Against Public Administration that requires an intent to defraud or harm another by destroying or falsifying a government record.	F, M	<a href="#">37.10</a>	

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Tampering With or Fabricating Physical Evidence: Offense Against Public Administration that involves altering, destroying, concealing, or falsely presenting a record with the intent to impair its use or availability during an investigation or proceeding and/or alter the outcome of the investigation or proceeding.	F, M	<a href="#">37.09</a>	
Tampering with Witness: Offense Against Public Administration that involves coercing or offering, conferring, or agreeing to confer a benefit on a witness or potential witness with the intent to influence the witness to provide false testimony, to withhold testimony, or to elude the legal process.	F	<a href="#">36.05</a>	
Terroristic Threat: Offense Against Persons that involves threatening violence to persons or property.	F, M	<a href="#">22.07</a>	
Theft ≤ \$1499: Offense Against Property that involves an intent to deprive person of his/her property without his/her consent.	M	<a href="#">31.03(e)(1) - (3)</a>	
Theft ≥ \$1500: Offense Against Property that involves an intent to deprive person of his/her property without his/her consent.	F	<a href="#">31.03(e)(4)-(7)</a>	
Theft of Service: Offense Against Property that involves an intent to avoid payment for services and intentionally or knowingly secures the services by deception, threat, diversion, or false token.	F, M	<a href="#">31.04</a>	
Trafficking of Persons: Offense Against the Person that involves knowingly trafficking another person with the intent that the other person engage in forced labor or services and/or trafficking another person and causing the person to engage in certain criminal acts through fraud, coercion, or force.	F	<a href="#">20A.02</a>	
Vehicle, Unauthorized Use: Offense Against Property that involves an intentional or knowing act to deprive a person of his/her vehicle without his/her consent.	F	<a href="#">31.07</a>	

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Violation of Civil Rights of Person in Custody/Improper Sexual Acts With a Person In Custody: Offense Against Public Administration that involves intentionally denying or impeding a another person in custody at a correctional facility a lawful right, privilege, or immunity and/or engaging in sexual conduct with a person in custody at a correctional or youth facility.	F	<a href="#">39.04</a>	

\* In accordance with Texas Occupations Code §301.4535, licensees or applicants for licensure receiving judicial orders for these designated offenses on or after September 1, 2005, shall not be licensed, shall be revoked, and/or shall not be renewed and not considered for re-licensure until at least the fifth anniversary following release from probation or community service has occurred. This does not prevent a nurse or applicant for licensure from exercising any right or privilege to have a formal hearing as established by virtue of Texas Occupations Code §301.454(c).

Note: Licensees may be excluded from working in various federally-funded facilities for convictions for program-related fraud and patient abuse, licensing board actions and default on Health Education Assistance Loans. The Office of Inspector General states that “[n]o payment will be made by any Federal health care program for any items or services furnished, ordered, or prescribed by an excluded individual or entity. Federal health care programs include Medicare, Medicaid, and all other plans and programs that provide health benefits funded directly or indirectly by the United States (other than the Federal Employees Health Benefits Plan). For exclusions implemented prior to August 4, 1997, the exclusion covers the following Federal health care programs: Medicare (Title XVIII), Medicaid (Title XIX), Maternal and Child Health Services Block Grant (Title V), Block Grants to States for Social Services (Title XX) and State Children's Health Insurance (Title XXI) programs.” For more information, see <http://www.oig.hhs.gov/fraud/exclusions/aboutexclusions.html>, and 1 Tex. Admin. Code §§371.1655 & 371.1657 (mandatory and permissive exclusions from Medicaid and Title V, XIX, XX, and CHIP programs by the Texas Health and Human Services Commission, Office of Inspector General).

The Board's recommendation regarding licensure is independent of any decision by an employer or potential employer to hire a person with a criminal history.