

## **SB 1415 and Pilot Program on Deferral of Final Disciplinary Actions**

**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. Further, the pilot program must conclude no later than January 1, 2014. 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.

Pursuant to SB 1415, a deferred disciplinary action will not be confidential. Thus, while a deferred action is pending (while an individual is working off the conditions/stipulations of the deferred action), the findings and required stipulations/conditions will be made available to the public. If an individual successfully meets the conditions imposed by the Board under the deferred action, the Board dismisses the complaint, and the deferred disciplinary action will become confidential.

SB 1415 permits the Board to contract with a third party to evaluate the pilot program. Further, the Board is required to appoint an advisory committee to assist the Board in overseeing the pilot program and its evaluation. The committee must include representatives of public advocacy organizations.

### **Feasibility Study - Factors for Consideration**

#### **1. Other Jurisdictions**

Board staff surveyed other jurisdictions to determine if any other boards of nursing have implemented a program similar to the deferred disciplinary action program under SB 1415. Kentucky, Ohio, North Carolina, Massachusetts, Minnesota, Mississippi, Vermont, Louisiana, and North Dakota responded to the survey. While a few states reported having expungement programs, no state reported having a deferred disciplinary action program.

Several states reported variations of confidential programs for nurses with chemical dependency or substance abuse issues and/or mental health issues. Some states even allow practice issues to be handled confidentially, as well.<sup>1</sup>

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<sup>1</sup> For example, **Ohio** has a confidential alternative to discipline program called the practice intervention and improvement program.

## Summary of State Responses

a. Kentucky has an expungement program, which is established by statute and rule<sup>2</sup>. Kentucky defined “expungement” to mean that all affected records have been sealed and that the proceedings to which they refer are deemed never to have occurred. Kentucky does not report cases that have been expunged to other state agencies, other boards of nursing, or other organizations. Further, Kentucky advises nurses whose records have been expunged to reply that disciplinary records do not exist when asked.

Kentucky implemented its expunction program in stages, adding additional types of disciplinary actions that were eligible for expungement in 2003 and again in 2008. The types of records that may be expunged include: (i) consent decrees that are at least 5 years old; (ii) agreed orders and decisions at least 10 years old that involve the following (and assuming no subsequent disciplinary action has been taken): failure to timely obtain CE or AIDS CE hours; payment of fees which were returned unpaid by the bank; practice as a nurse or APN w/o a current license; (iii) agreed orders and decisions that are 10 years old which resulted in a reprimand, provided no subsequent action and all of the terms of the order have been met; (iv) agreed orders and decisions that are 20 years old provided no subsequent orders and all conditions have been met.

b. Massachusetts conducted an informal survey in 2006 regarding other states’ ability to expunge/seal disciplinary records. The results are as follows:

- Alabama - does not expunge/seal
- Arizona -does not expunge/seal
- Arkansas - does not expunge, but is looking into it
- California - does not expunge or seal. In only one case has a Superior Court ordered the Board to remove all public information in relation to any prior legal proceedings.
- Connecticut - seals portions of medical/behavioral/treatment records, but not disciplinary actions or records
- Delaware - does not expunge/seal
- Florida - has vacated orders, but Florida law is very clear that “once disciplined, always disciplined”; it’s for the life of the licensee
- Georgia - No expungement or sealing. The Board does allow for instances in which an action is “private” and has no public records, but those records can be accessed by government and quasi-government agencies
- Hawaii -state law precludes the Board from expunging or sealing disciplinary action once approved by the Board
- Idaho - no instances of expungement or sealing of disciplinary records and no statutory basis for same
- Iowa - no instances of expungement or sealing
- Kansas - does not expunge/seal
- Louisiana - no sealing; the Board does rescind orders and then both the previous action and the rescission are public
- Maine - does not expunge/seal
- Massachusetts - does not expunge/seal

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<sup>2</sup> The administrative regulation is 201 KAR 20:410. Expungement of Records; the statute is KRS 314.131(1), (9).

- Minnesota - did not expunge/seal in 2006, but a subcommittee of the Minnesota Board prepared a report shortly thereafter relating to the expungement of certain disciplinary records. The report resulted from the receipt of complaints that published disciplinary actions appeared the same, regardless of whether the action was for practicing without a current registration or something more serious. The Committee members determined that violations referred to as "status offenses", such as the revocation of a license due to tax delinquency, suspension of a license due to failure to pay child support/ student loans; actions for practicing without current registration or license; and actions for failure to meet CE requirements were most appropriate for expunction because the offenses are not related to the individual's competence or safe nursing practice. Committee members also decided not to consider an action against a licensee due to a single, isolated practice incident, e.g., medication error, failure to document, as appropriate for expunction.

Minnesota also has a corrective action, similar to Texas', which provides for the dismissal of a complaint upon successful completion by the regulated person of the corrective action. In Minnesota, a corrective action is intended to address practice concerns with elements of at-risk behavior (no impaired practice, no events of human error; not practice which suggests a need for on-going monitoring by the Board). In Minnesota, a corrective action is not a disciplinary action, is a public document, is not reported to Nursys, is not displayed as an action on the Board's website, and results in a dismissal of the complaint upon successful completion of the Agreement. Texas' corrective action is not a public document.

- Mississippi - does not expunge/seal, but is looking into authority
- Missouri - only with regard to inmate complaints
- Montana - no sealed records; has withdrawn matters reported to the National Data Bank (before entry of a final order) when matter was subsequently dismissed.
- Nevada - does not expunge/seal
- New Hampshire - does not expunge/seal; records are kept forever
- New Jersey - no expungement; would only seal patient records or patient identification information in connection with a complaint.
- New York - does not expunge/seal
- North Carolina - no sealing. Expungement is only done with regard to Reprimands relating to practicing without a license or employing unlicensed individuals after a certain period of time. The nurse is advised, however, to report the Reprimand as prior discipline if the nurse wishes to be endorsed into another state.
- North Dakota - If the Board determines that the facts alleged in a violation report are without merit, the Board may expunge the report and the investigative file. Disciplinary action for practicing without a license or registration may be expunged if there are no further violations within 5 years.
- Ohio - does seal records
- Oklahoma - does not expunge/seal
- South Dakota -has rescinded letters of Reprimand for lapsed licenses, but no expunction. Even in those cases, the action is kept on file.
- Tennessee - does not expunge/seal
- Utah - does not expunge/seal
- Vermont - does not expunge/seal
- West Virginia - the LVN Board has never expunged or sealed a record; the

RN Board does have rule permitting the expunction of dismissed complaints 3 years after the dismissal if no other complaints have been filed; 2 instances where records were sealed because frivolous complaints were filed.

- Wyoming - does not expunge/seal
- Washington, DC - does not expunge/seal

## 2. Nurse Licensure Compact

Texas is a member (party state) of the Nurse Licensure Compact (Compact). When determining the feasibility of implementing a deferred disciplinary pilot program, the Board must consider the reporting requirements of the Compact and whether it is feasible for the Board to comply with the provisions of SB 1415 and the reporting requirements of the Compact.<sup>3</sup>

The Compact was formed to: (i) facilitate the states' responsibilities to protect the public's health and safety; (ii) ensure and encourage the cooperation of party states in the areas of nurse licensing and regulation; (iii) facilitate the exchange of information between party states in the areas of nurse regulation, investigation, and adverse action; (iv) promote compliance with the laws governing the practice of nursing in each jurisdiction; and (v) invest all party states with the authority to hold a nurse accountable for meeting all state practice laws in the state in which the patient is located at the time care is provided through the mutual recognition of party state licenses.

As a member of the Compact, the Board is required to promptly report to party states 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.

Further, all party states are required to participate in a cooperative effort to create a coordinated database of all licensed registered nurses, licensed practical nurses, and licensed vocational nurses. *This system will include information on the licensing and disciplinary history of each nurse to assist in the coordination of nurse licensing and enforcement efforts.*

Notwithstanding any other provision of law, all party states' licensing boards are required to promptly report adverse actions against multistate licensing privileges, any current significant investigative information yet to result in adverse action, and denials of applications and the reasons for the denials. Further, information that is contributed by a party state but is subsequently required to be expunged by the laws of the party state contributing that information shall be expunged from the coordinated licensure information system.

Each compact administrator is required to furnish information and documents to the other party states, including a uniform data set of investigations, identifying information, licensing data, and disclosable alternative program participation information to facilitate the

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<sup>3</sup> The statutes and rules regarding membership in the Compact are located in the Occupations Code Chapter 304 and 22 Tex. Admin. Code Chapter 220.

administration of the Compact. However, a board is not obligated to provide information not available to the board or information that is not available to the nurse under the laws of the state contributing the information to the coordinated licensure information system.

Each licensing board in a party state is required to ascertain, through the coordinated licensure information system, whether an applicant for a license has held or is the holder of a license issued by another state; whether a restriction exists on the multistate licensing privilege; and whether any other adverse action has been taken against the licensee by any other state.

Current Board rules also require the Board to report the following information to the Compact within 10 business days: (i) a disciplinary action, agreement, or order requiring participation in alternative programs or which limit practice or require monitoring (*except agreements and orders relating to participation in alternative programs required to remain non-public by contributing state authority*); (ii) a dismissal of a complaint; (iii) changes in the status of a disciplinary action; and (iv) licensure encumbrance. Further, current Board rules require significant investigative information to be deleted from the Information System within ten business days upon the report of a disciplinary action, agreement, or order requiring participation in alternative programs or agreements which limit practice or require monitoring or upon the dismissal of a complaint. All changes to licensure information in the Information System must be completed within ten business days upon notification by another party state.

Because of the manner in which data is reported to the Compact, there may also be technical issues that should be considered.

### **3. Healthcare Integrity and Protection Data Bank (HIPDB)**

Texas is required to report certain disciplinary actions to the Healthcare Integrity and Protection Data Bank (HIPDB). When determining the feasibility of implementing a deferred disciplinary pilot program, the Board must consider the reporting requirements of HIPDB and whether it is feasible for the Board to comply with the provisions of SB 1415 and the reporting requirements of HIPDB.

The Secretary of the U.S. Department of Health and Human Services, acting through the Office of Inspector General (OIG), was directed by the Health Insurance Portability and Accountability Act of 1996 to create the Healthcare Integrity and Protection Data Bank (HIPDB) to combat fraud and abuse in health insurance and health care delivery. HIPDB is primarily a flagging system that alerts users that a comprehensive review of a practitioner's, provider's, or supplier's past actions may be prudent. HIPDB is intended to augment traditional forms of review and investigation of a practitioner's, provider's, or supplier's past actions. HIPDB information is not available to the general public. Information reported to HIPDB is considered confidential and will not be disclosed, except as specified in HIPDB regulations.

Federal and state licensing and certification agencies must report the following actions to HIPDB: (i) final adverse actions taken against health care practitioners, providers, or suppliers, such as a revocation, suspension, censure, reprimand, or probation; (ii) 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; (iii) any negative action or finding by a federal or state licensing and certification agency that is publicly available information; (iv) health care practitioners, providers, and suppliers who have been excluded from participating in federal or state health care programs; (v) civil judgments that are health care related; (vi) criminal convictions that are health care related; (vii) exclusions from federal or state health care programs; and (viii) other adjudicated actions or decisions (formal or official actions, availability of due process mechanism, and based on acts or omissions that affect or could affect the payment, provision, or delivery of a health care item or service).

Reports must be submitted to HIPDB within the latest of: (i) 30 days of the date that the final adverse action was taken; (ii) 30 days of the date when the reporting entity became aware of the final adverse action; or (iii) by the close of the entity's next monthly reporting cycle. Settlements in which no findings or admissions of liability have been made are not required to be reported to HIPDB.

#### **4. Applicability and Implementation**

SB 1415 provides that a deferred disciplinary action pilot program may not include cases in which the Board proposes to issue a Reprimand or to deny, suspend, or revoke a license. Generally, then, the pilot program could include cases in which the Board proposes to issue a Remedial Education Order, which typically consists of educational stipulations and/or a fine, or a Warning, which typically consists of specified Board stipulations and/or a fine. Preliminarily, the Board should consider: (i) whether it is feasible for the pilot program to encompass all such cases; (ii) whether certain reported conduct/behavior, such as violations involving fraud, theft, or deception, should be excepted from the pilot program; (iii) whether the pilot program should apply to the identified offenses, tiers, and sanction levels contained within the Board's Disciplinary Matrix; (iv) which, if any, probationary conditions/stipulations should be included as part of a deferred disciplinary action; and (v) whether the pilot program should be implemented in stages or all at once.

**The Eligibility & Disciplinary Advisory Committee will be meeting on December 7, 2009, to discuss these issues in depth and provide recommendations to the Board regarding the feasibility of a deferred disciplinary action pilot program.**