

SUBJECT: Revising nursing practice regulation

COMMITTEE: Public Health — committee substitute recommended

VOTE: 9 ayes — Kolkhorst, Naishtat, Coleman, Davis, Hopson, S. King, McReynolds, Truitt, Zerwas

0 nays

2 absent — Gonzales, Laubenberg

WITNESSES: For — James Willmann, Texas Nurses Association; (*Registered, but did not testify*: Elizabeth Sjoberg, Texas Hospital Association)

Against — None

On — (*Registered, but did not testify*: James “Dusty” Johnston, Texas Board of Nursing)

BACKGROUND: The Nursing Practice Act, under Occupations Code, ch. 301 governs the practice of nursing. It also governs the reporting of nurses to the Board of Nursing when there are reports of conduct that could affect patient safety.

In 2003, the 78th Legislature enacted HB 1483 by Allen, which combined the boards of registered nurses and licensed vocational nurses into the Board of Nurse Examiners. The Sunset act for the Board of Nurse Examiners, HB 2426 by Truitt, changed the agency name to the Texas Board of Nursing, as of September 1, 2007.

DIGEST: HB 3961 would amend Occupations Code, ch. 301 by adding provisions on confidentiality and evaluations of nurses or nursing candidates.

The bill would make personal contact information of nurses, including e-mail addresses and telephone numbers, collected for use by an emergency relief program confidential and not subject to disclosure under the Public Information Act or any other means of legal compulsion.

An exception to use of confidential information would be allowed to contact a nurse to assist in an emergency relief program sponsored by the

federal government, the state, or a non-profit organization to help in providing health care to victims of a disaster or of a state or local emergency.

HB 3961 also would make confidential information submitted to the Board of Nursing regarding an individual's diagnosis or treatment for a physical condition, mental condition, or chemical dependency when submitted in relation to:

- a petition for a declaratory order of eligibility for a license;
- an application for an initial license; or
- a license renewal.

The bill would allow the board to require a nurse or applicant to submit to a physical or psychological evaluation to determine the individual's fitness to practice nursing only if the board had probable cause to believe that the individual was unable to practice nursing with reasonable skill and safety to patients because of mental impairment, physical impairment, or chemical dependency or abuse of drugs or alcohol.

A written demand for an evaluation would be required and would state the reasons probable cause existed to require the evaluation. If a nurse or applicant refused to submit to the evaluation, a hearing would be conducted by the State Office of Administrative Hearings to determine whether probable cause for the evaluation existed. The nurse or applicant would be notified of the hearing by certified mail or personal service, and the individual would be allowed to present evidence or testimony as to why the individual should not be required to submit to the evaluation. The board would have the burden of proving that probable cause existed. The hearing officer would enter an order either requiring the individual to submit to the evaluation or rescinding the board's demand for an evaluation.

If a nurse or applicant refused to submit to an evaluation after an order requiring the evaluation was entered, the board could:

- refuse to issue or renew a license;
- suspend a license; or
- issue an order limiting the license.

If the board requested a nurse or applicant to consent to an evaluation for reasons other than mental or physical impairment or chemical dependency, the request would be in writing and would state the reasons for the evaluation, the type of evaluation, how the board could use it, and the procedures for submitting an evaluation as evidence in a hearing on issuance or renewal of the individual's license. The right of the nurse or applicant to refuse to submit to the evaluation also would be included. If a nurse or applicant refused to consent to an evaluation, the individual could not introduce another evaluation into evidence at a licensure hearing unless the individual:

- within 30 days of the hearing, notified the board that an evaluation would be introduced into evidence at the hearing;
- provided the board the results of the evaluation;
- informed the board of any other evaluations by other practitioners; and
- consented to an evaluation by a practitioner that met board standards.

The results of an evaluation would be confidential and not subject to disclosure unless introduced as evidence in a proceeding before the board or an administrative hearing, or included in the findings of fact and conclusions of law in a final board order. If the board determined insufficient evidence existed against an individual based on the results of an evaluation, the evaluation would be expunged from the board's records.

Under HB 3961, an applicant or nurse who was refused an initial license, renewal of a license, or whose license was suspended, would not be eligible for a probationary or stipulated license unless the board, by rule, established criteria to permit it.

The bill would require the board to temporarily suspend the license of a nurse if the nurse were under a board order prohibiting the use of alcohol or drugs and the nurse tested positive for alcohol or drugs, refused to submit to a drug or alcohol test, or failed to participate in a required drug or alcohol peer assistance program. The board could require drug or alcohol testing as a requirement of probation for a nurse with a temporarily suspended license and could hold a hearing to determine whether an individual violated the terms of probation and whether to continue, rescind or modify the probation, or deny, suspend or revoke the individual's license.

The bill would also make conforming changes and would repeal a provision that requires the Board of Nursing to enter into a memorandum of understanding with each state agency that licenses health care facilities to coordinate reporting requirements for contact information.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009. It would apply only to applications filed and violations occurring on or after the effective date.

**SUPPORTERS
SAY:**

HB 3961 would amend the Nursing Practice Act (NPA) to address important issues, such as confidentiality of nurses' private information and the process for requesting and conducting nurse evaluations in certain circumstances to maintain patient safety.

The bill would protect the contact information of nurses who were willing to help in disaster or emergency relief programs by prohibiting this information from being made public. The Board of Nursing has received open records requests for this information for commercial purposes. Allowing the information to be released would result in nurses being less willing to sign up voluntarily for this crisis duty, which would negatively affect disaster and emergency relief efforts.

Personal health information submitted by a nurse or applicant during the licensing process also would be confidential under HB 3961. While the Board of Nursing needs this information for making licensing decisions, there is no legitimate reason for the public to have access to it.

The Board of Nursing currently may request that nurses voluntarily submit to various types of evaluations. HB 3961 would clarify the board's authority to require physical and psychological evaluations as part of the licensure and disciplinary process when the board had probable cause to believe the nurse was suffering from a mental or physical impairment or chemical dependency that would make the nurse unable to practice safely. For example, if a nurse has had a stroke, an evaluation could be made to ensure that the nurse was still physically and mentally capable of caring for patients. If a nurse has suffered from depression or other mental illness, or struggled with a chemical dependency, an evaluation could be made to make certain that the individual was able to provide patients with the highest quality of professional care. Such evaluations are vital to ensuring the safety of patients.

The board also could continue to request evaluations in other circumstances, such as a past history of criminal behavior or behavior indicating an inability to manage anger under stress. These forensic investigations are more controversial because they deal with less defined criteria — such as anger management, rather than a clinical mental illness like depression —and may involve polygraphs when dealing with a criminal history.

The bill would protect a nurse's rights in evaluations. The forensic investigations would not be required — the board merely could ask an individual submit to an evaluation. The nurse or applicant could refuse, and the issue would go before an administrative law judge for a hearing. HB 3961 would place the burden clearly on the board to show probable cause, which would help to ensure that the board did not over-use the evaluations simply to obtain information about nurses or applicants for its own purposes. The board would have to show probable cause and if it did not, the entire proceeding would be expunged from the individual's and the board's records. The ruling of the administrative law judge would be final.

While protecting nurses' private information with confidentiality provisions and providing necessary technical clean-up to the NPA, HB 3961 also would strike a balance between the need of the Board of Nursing to conduct evaluations and the right of individual nurses to due process.

**OPPONENTS
SAY:**

Evaluations could be over-utilized by the board as a means of gathering unnecessary and inappropriate information about nurses. This would be unfair to nurses, cause undue stress, and waste valuable resources, both human and fiscal.

NOTES:

The committee substitute differs from the bill as filed by removing language that would have allowed results of an evaluation to be disclosed to the nurse or applicant; removing language requiring the board to adopt guidelines for requiring a nurse or applicant to submit to an evaluation; and adding that a written request for a nurse or applicant to submit to an evaluation would include procedures for submitting an evaluation as evidence in a hearing on issuance or renewal of the individual's license.

The companion bill, SB 1880 by Nelson, was reported favorably, as substituted, by the Senate Health and Human Services Committee on April 17 and recommended for the Local and Uncontested Calendar.