

## **BILL ANALYSIS**

Senate Research Center

S.B. 1438  
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Health & Human Services  
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Enrolled

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

The purpose of S.B. 1438 is to improve efficiency in the disciplinary process for impaired pharmacists in Chapter 564 (Program to Aid Impaired Pharmacists and Pharmacy Students; Pharmacy Peer Review), Occupations Code. Disciplinary proceedings are initiated by the Texas State Board of Pharmacy (TSBP) and formally adjudicated by hearing in the State Office of Administrative Hearings (SOAH). Currently, any information that is disclosed during a SOAH disciplinary hearing, including some types of information relating to impaired pharmacists, may be subject to public disclosure. This may deter impaired pharmacists from seeking treatment for personal health issues and reduce future career advances.

Current law is unclear as to the purpose of the required SOAH hearing following the temporary suspension.

Additionally, the current disciplinary process requires improvements in efficiency, responsiveness, and flexibility given the significant increase in the number of pharmacies, pharmacists, and pharmacy interns and technicians in recent years. Moreover, these improvements are necessary to ensure effective disciplinary oversight as the need for pharmacies increases with the aging of the baby boom generation and sustained population growth.

Current law already provides that some information relating to disciplinary reports on impaired pharmacists is confidential and not public information. However, the current statutory language may present ambiguity depending on particular factual circumstances. It is not clear whether such information may be subject to disclosure requirements, subpoena, or discovery.

When initiating a temporary suspension, TSBP is currently limited to complete suspension of a license. In addition, the current law is ambiguous as to the purpose of a SOAH hearing that is required to be held after a temporary suspension is ordered by TSBP.

The proposed changes to S.B. 1438 provide clarity as to any possible ambiguity in existing statutory language by making all types of records related to the impaired pharmacist program confidential and not subject to disclosure, subpoena, or discovery. S.B. 1438 also stipulates that a pharmacist refusing a TSBP-ordered health examination will have a hearing before a TSBP panel and has the burden of proof at this hearing.

S.B. 1438 increases efficiency by authorizing a smaller TSBP panel to handle temporary suspension/restriction hearings; increases responsiveness by permitting temporary suspension/restriction hearings by telephone conference call; and increases flexibility by allowing TSBP to render a temporary initial decision and issue license restrictions instead of full suspensions. Further, it clarifies that SOAH hearings will be to issue a proposal for decision on final disciplinary actions.

S.B. 1438 amends current law relating to the program for impaired pharmacists and disciplinary proceedings conducted by the Texas State Board of Pharmacy.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

## **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Sections 564.001(a) and (b), Occupations Code, as follows:

(a) Authorizes an individual or entity, rather than a person, including a pharmaceutical peer review committee, who has knowledge relating to an action or omission of a pharmacist in this state or a pharmacy student who is enrolled in the professional sequence of an accredited pharmacy degree program approved by the Texas State Board of Pharmacy (TSBP) that might provide grounds for disciplinary action under Section 565.001(a)(4) (relating to authorizing TSBP discipline under circumstances involving developing an incapacity) or (7) (relating to authorizing TSBP discipline under circumstances involving alcohol and drugs in an intemperate manner) to report relevant facts to TSBP.

(b) Authorizes a committee of a professional society composed primarily of pharmacists, the staff of the committee, or a district or local intervenor participating in a program established to aid pharmacists or pharmacy students, rather than pharmacists or eligible pharmacy students, impaired by chemical abuse or mental or physical illness to report in writing to TSBP the name of the impaired pharmacist or pharmacy student and the relevant information relating to the impairment.

SECTION 2. Amends Section 564.002, Occupations Code, as follows:

Sec. 564.002. CONFIDENTIALITY. (a) Provides that all records, rather than the records, and proceedings of TSBP, an authorized agent of TSBP, or a pharmaceutical organization committee relating to the administration of this chapter, rather than described under Section 564.001(a) or (b) (relating to authorizing a professional society to report to TSBP), in connection with a report under Section 564.001(a) or (b), are confidential and are not considered public information for purposes of Chapter 552 (Public Information), Government Code. Provides that records considered confidential under this section include:

(1) information relating to a report made under Section 564.001 (Reports), including the identity of the individual or entity making the report;

(2) the identity of an impaired pharmacist or pharmacy student participating in a program administered under this chapter, except as provided by Section 564.003 (Disclosure of Certain Information);

(3) a report, interview, statement, memorandum, evaluation, communication, or other information possessed by TSBP, an authorized agent of TSBP, or a pharmaceutical organization committee, related to a potentially impaired pharmacist or pharmacy student;

(4) a policy or procedure of an entity that contracts with TSBP relating to personnel selection; and

(5) a record relating to the operation of TSBP, an authorized agent of TSBP, or a pharmaceutical organization committee, as the record relates to a potentially impaired pharmacist or pharmacy student.

(b) Provides that a record or proceeding described by this section is not subject to disclosure, subpoena, or discovery, except to a member of TSBP or an authorized agent of TSBP involved in the discipline of an applicant or license holder.

SECTION 3. Amends Section 564.003, Occupations Code, by amending Subsection (a) and adding Subsections (a-1) and (a-2), as follows:

(a) Authorizes TSBP to disclose information confidential under Section 564.002 (Confidentiality) only:

- (1) during a proceeding conducted by, rather than in a disciplinary hearing before, the State Office of Administrative Hearings (SOAH), TSBP, or a panel of TSBP, or in a subsequent trial or appeal of a TSBP action or order;
- (2) to a pharmacist licensing or disciplinary authority of another jurisdiction;
- (3) under a court order;
- (4) to a person providing a service to TSBP, including an expert witness, investigator, or employee of an entity that contracts with TSBP, related to a disciplinary proceeding against an applicant or license holder, if the information is necessary for preparation for, or a presentation in, the proceeding; or
- (5) as provided by Subsection (b) (relating to authorizing TSBP to disclose the status of a license of a pharmacist).

Makes nonsubstantive changes.

(a-1) Provides that information that is disclosed under Subsection (a) remains confidential and is not subject to discovery or subpoena in a civil suit and may not be introduced as evidence in any action other than an appeal of a TSBP action.

(a-2) Provides that information that is confidential under Section 564.002 and that is admitted under seal in a proceeding conducted by SOAH is confidential information for the purpose of a subsequent trial or appeal.

SECTION 4. Amends Section 564.004(a), Occupations Code, to provide that any person, including a TSBP employee or member, peer review committee member, pharmaceutical organization committee member, or pharmaceutical organization district or local intervenor, who provides information, reports, or records under Section 564.001, rather than Section 564.001(a) or (b), to aid an impaired pharmacist or pharmacy student is immune from civil liability if the person provides the information in good faith.

SECTION 5. Amends Section 565.052, Occupations Code, as follows:

Sec. 565.052. SUBMISSION TO MENTAL OR PHYSICAL EXAMINATION. (a) Requires TSBP or an authorized agent of TSBP on probable cause, as determined by TSBP or agent, in enforcing Section 565.001(a)(4) or (7), to request a pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant to submit to a mental or physical examination by a physician or other health care professional designated by TSBP.

(b) Requires TSBP or the executive director of TSBP (executive director), if the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant refuses to submit to the examination, to issue an order requiring the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant to show cause why the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant will not submit to the examination and to schedule a hearing before a panel of three members of TSBP appointed by the president of TSBP on the order not later than the 30th day after the date notice is served on the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant. Requires the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant to be notified by either personal service or certified mail with return receipt requested.

(c) Entitles the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant and an attorney, at the hearing, to present testimony

or other evidence to show why the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant should not be required to submit to the examination. Provides that the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant has the burden of proof to show why the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant should not be required to submit to the examination. Makes a nonsubstantive change.

(d) Requires the panel, rather than TSBP, after the hearing, to by order require the pharmacist, pharmacist applicant, pharmacist-intern, or pharmacist-intern applicant to submit to the examination not later than the 60th day after the date of the order or withdraw the request for examination, as applicable.

SECTION 6. Amends Section 565.055(c), Occupations Code, as follows:

(c) Authorizes information or material compiled by TSBP in connection with an investigation, notwithstanding Subsection (b) (relating to circumstances under which information supplied to TSBP can be disclosed), to be disclosed:

(1) during any proceeding conducted by SOAH, TSBP, or a panel of TSBP, or in a subsequent trial or appeal of a TSBP action or order;

(2) to a person providing a service to TSBP, including an expert witness, investigator, or employee of an entity that contracts with TSBP, related to a disciplinary proceeding against an applicant or license holder, or a subsequent trial or appeal, if the information is necessary for preparation for, or a presentation in, the proceeding, rather than to a person involved with TSBP in a disciplinary action against the license holder;

(3) to an entity in another jurisdiction that licenses or disciplines pharmacists or pharmacies;

(4) to a pharmaceutical or pharmacy peer review committee as described under Chapter 564 (Program to Aid Impaired Pharmacists and Pharmacy Students; Pharmacy Peer Review);

(5) to a law enforcement agency;

(6) to a person engaged in bona fide research, if all information identifying a specific individual has been deleted; or

(7) under a court order.

Makes nonsubstantive changes.

SECTION 7. Amends the heading to Section 565.059, Occupations Code, to read as follows:

Sec. 565.059. TEMPORARY SUSPENSION OR RESTRICTION OF LICENSE.

SECTION 8. Amends Sections 565.059(a), (b), and (c), Occupations Code, as follows:

(a) Requires the president of TSBP to appoint a three-member disciplinary panel consisting of TSBP members to determine whether a license, rather than a license or registration, under this subtitle should be temporarily suspended or restricted. Requires the panel, if a majority of the disciplinary panel determines from evidence or information presented to the panel that the holder of a license by continuation in the practice of pharmacy or in the operation of a pharmacy would constitute a continuing threat to the public welfare, to temporarily suspend or restrict the license as provided by Subsection (b). Makes conforming changes.

(b) Authorizes the disciplinary panel to temporarily suspend or restrict the license after a hearing conducted by the panel after the 10th day after the date notice of the hearing is provided to the license holder, or without notice or hearing if, at the time the suspension or restriction is ordered, a hearing before the panel is scheduled to be held not later than the 14th day after the date of the temporary suspension or restriction to determine whether the suspension or restriction should be continued. Deletes existing text relating to a hearing on whether disciplinary proceedings under this chapter should be initiated against the holder of a license or registration. Makes a conforming change.

(c) Requires TSBP, not later than the 90th day after the date of the temporary suspension or restriction, to initiate a disciplinary action against the license holder, and a contested case hearing, rather than a second hearing on the suspended license or registration not later than the 60th day after the date of the suspension, to be held by SOAH. Provides that if SOAH does not hold the hearing in the time required by this subsection, the suspended or restricted license is automatically reinstated. Makes nonsubstantive and conforming changes.

SECTION 9. Amends Sections 568.0036(b), (c), (e), and (f), Occupations Code, as follows:

(b) Authorizes TSBP or an authorized agent of TSBP on probable cause, as determined by TSBP or agent, in enforcing Section 568.003(a)(5) (relating to authorizing TSBP to take disciplinary action for developing an incapacity) or (7) (relating to authorizing TSBP to take disciplinary action for performing duties in a pharmacy that only a pharmacist may perform), to request a person subject to this section to submit to a mental or physical examination by a physician or other health care professional designated by TSBP. Makes a nonsubstantive change.

(c) Requires TSBP or the executive director, if the person refuses to submit to the examination, to issue an order requiring the person to show cause why the person will not submit to the examination, and schedule a hearing before a panel of three members of TSBP by the president of TSBP on the order not later than the 30th day after the date notice of the order is served on the person under Subsection (d) (relating to requiring the person be served with notice).

(e) Authorizes the person and the person's counsel, at the hearing, to present testimony or other evidence to show why the person should not be required to submit to the examination. Provides that the person has the burden of proof to show why the person should not be required to submit to the examination.

(f) Requires the panel by order, rather than TSBP, after the hearing, as applicable, to require the person to submit to the examination not later than the 60th day after the date of the order, or withdraw the request for examination.

SECTION 10. Amends Chapter 568, Occupations Code, by adding Section 568.0037, as follows:

Sec. 568.0037. TEMPORARY SUSPENSION OR RESTRICTION OF REGISTRATION. (a) Requires the president of TSBP to appoint a disciplinary panel consisting of three TSBP members to determine whether a registration under this chapter should be temporarily suspended or restricted. Requires the panel, if a majority of the panel determines from evidence or information presented to the panel that the registrant by continuation in practice as a pharmacy technician would constitute a continuing threat to the public welfare, to temporarily suspend or restrict the registration as provided by Subsection (b).

(b) Authorizes a disciplinary panel to temporarily suspend or restrict the registration after a hearing conducted by the panel after the 10th day after the date notice of the hearing is provided to the registrant, or without notice or hearing if, at the time the suspension or restriction is ordered, a hearing before the panel is scheduled to be held not later than the 14th day after the date of the temporary

suspension or restriction to determine whether the suspension or restriction should be continued.

(c) Requires TSBP, not later than the 90th day after the date of the temporary suspension or restriction, to initiate a disciplinary action under this chapter, and a requires a contested case hearing to be held by SOAH. Provides that if SOAH does not hold the hearing in the time required by this subsection, the suspended or restricted registration is automatically reinstated.

(d) Authorizes the disciplinary panel, notwithstanding Chapter 551 (Open Meetings), Government Code, to hold a meeting by telephone conference call if immediate action is required and convening the panel at one location is inconvenient for any member of the disciplinary panel.

SECTION 11. Makes application of this Act prospective.

SECTION 12. Effective date: upon passage or September 1, 2011.