authorities to regain his medical license, including at least three months of practice under a preceptorship and the completion of forty hours of continuing medical education. *See* Response to the OSC, Ex. 12, 13. However, it is difficult to determine the amount of deterrence these consequences will have on Respondent due to the fact that he deflected responsibility for the underlying conduct.

Finally, Respondent submitted dozens of letters from former patients, colleagues, and community members regarding his aptitude as a physician and compassionate nature. Response to the OSC, Ex. 14. While these character references do not diminish Respondent's bad acts, I find the letters to be personal and sincere in their written form. They can be of limited weight in this proceeding, however, because I have limited ability to assess the actual credibility of the references given their written form. *See Michael S. Moore, M.D.,* 76 FR 45,867, 45,873 (2011) (evaluating the weight to be attached to letters provided by the respondent's hospital administrators and peers in light of the fact that the authors were not subjected to the rigors of cross examination). They also were not written for the purposes of recommending that Respondent be granted a controlled substances registration, and, therefore, they offer little value in assessing the Respondent's suitability to discharge the duties of a DEA registrant. Further, absent Respondent's unequivocal acceptance of responsibility, what little value the letters might have offered me in evaluating my ability to trust Respondent is nullified by the fact that he himself has not shown me that he can be so entrusted.

As discussed above, to receive a registration when grounds for denial exist, a respondent must convince the Administrator that his acceptance of responsibility and remorse are sufficiently credible to demonstrate that the misconduct will not recur and that he can be entrusted with a registration. Having reviewed the record in its entirety, I find that Respondent has not met this burden. Although Respondent did take some responsibility for his actions through his guilty plea and settlement agreement with the United States and the State of Tennessee, his acceptance of responsibility was not unequivocal. Respondent's minimization and deflection of responsibility for his criminal conduct raises concern that he would perhaps also be willing to circumvent CSA requirements that he deemed ''technical'' to the detriment of its effective implementation. I am also concerned that granting his registration absent a full acceptance of responsibility for his criminal actions would send the message to the registered community that they could violate so-called ''technical'' provisions of the CSA or its regulations without serious consequence. Unless and until Respondent is willing to credibly accept full responsibility for his unlawful conduct, I find that I cannot entrust him with a controlled substances registration. Accordingly, I will order the Agency to deny Respondent's application for a certificate of registration.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823, I hereby order that the pending application for a Certificate of Registration, Control Number W18085586C, submitted by William Ralph Kincaid, M.D., is denied. This Order is effective August 27, 2021.

Anne Milgram,

Administrator.

[FR Doc. 2021–16004 Filed 7–27–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Erica N. Grant, M.D.; Decision and Order

I. Introduction

On August 24, 2018, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Erica N. Grant, M.D. (hereinafter, Respondent) of Irving, Texas. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. FG2374053 for three reasons. *Id.* First, it alleged that Respondent was ''convicted of a felony under State law relating to a controlled substance.'' *Id.* (citing 21 U.S.C. 824(a)(2)). Second, it alleged that it was ''inconsistent with the public interest'' for Respondent to maintain her registration. OSC, at 1 (citing 21 U.S.C. 824(a)(4) in conjunction with 21 U.S.C. 823(f)). Third, the OSC alleged that Respondent ''materially falsified the application'' for renewal of her registration. OSC, at 1 (citing 21 U.S.C. 824(a)(1)).

Specifically, the OSC alleged that Respondent's ''no contest'' plea to a second-degree felony in Texas, ''Attempting to Possess a Controlled Substance by Fraud in violation of Texas Health and Safety Code § 481.129,'' ''is a conviction providing a sufficient basis for the revocation'' of her registration. OSC, at 2, 3. Further, the OSC alleged that, ''[t]o determine what is in the 'public interest,' DEA considers, among other things, the registrant's 'conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.' '' *Id.* at 2. Finally, according to the OSC, ''DEA may revoke a registrant's DEA . . . [registration] upon a finding that the registrant materially falsified any application filed pursuant to, or required by, the Controlled Substances Act'' (hereinafter, CSA), such as by a ''failure to report . . . [an] arrest for a controlled substance felony.'' *Id.* at 2, 3.

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 3 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. OSC, at 3–4 (citing 21 U.S.C. 824(c)(2)(C)).

By transmittal dated September 21, 2018, Respondent waived her right to a hearing and filed a written statement and a proposed Corrective Action Plan. Request for Final Agency Action (hereinafter, RFAA) Exhibit (hereinafter, collectively, RFAAX) 10 (Respondent's Hearing Waiver and Written Statement in Response to the OSC (hereinafter, Written Statement)) and RFAAX 11 (Respondent's Request for Corrective Action Plan (hereinafter, CAP)).[1] Respondent's written statement explicitly references her receipt of the OSC.[2] RFAAX 10, at 1.

Based on all of the evidence in the record, I find that the Government's service of the OSC was legally sufficient. In addition, also based on all of the evidence in the record, I find that Respondent timely filed her Written Statement and proposed CAP.[3]

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[1] RFAAX 12 is the DEA Assistant Administrator's letter to Respondent, dated January 29, 2019, rejecting her proposed CAP.

[2] In addition, the RFAA represents that ''Respondent acknowledged service of a copy of the . . . [OSC] in a telephone conversation with [a] DEA Diversion Investigator.'' RFAA, at 3 (citing RFAAX 9 (Declaration of Diversion Investigator (hereinafter, DI), dated October 1, 2018), at 2).

[3] Respondent's Written Statement is dated September 21, 2018. It appears that Respondent transmitted her proposed CAP along with her Written Statement. The OSC is dated August 24, 2018; therefore, Respondent's submissions are

Continued

The Government forwarded its RFAA, along with the evidentiary record, to this office on August 27, 2019.

I issue this Decision and Order based on the Government's submission, which includes Respondent's Written Statement and proposed CAP, and is the entire record before me. 21 CFR 1301.43(e).

II. Findings of Fact

A. Respondent's DEA Controlled Substance Registration

Respondent is the holder of DEA Certificate of Registration No. FG2374053 at the registered address of 665 W LBJ Freeway, Suite 217, Irving, TX 75063 and a separate ''mail-to'' address. RFAAX 2 (Certification of Registration History, dated November 23, 2018), at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Respondent's registration expired on September 30, 2019, and is in an ''active pending status.'' *Id.*

B. The Investigation of Respondent

According to the DI assigned to this matter, the Texas Medical Board (hereinafter, TMB) notified him that Respondent was the subject of an Agreed Order Upon Formal Filing, In the Matter of the License of Erica Nicole Grant, M.D., License No. N–4438 (Before the TMB) dated March 2, 2018 (hereinafter, Agreed Order). RFAAX 9, at 1 (referencing RFAAX 3).[4] His investigation ensued and included obtaining copies of the Agreed Order and documents from the 195th Judicial District Court of Dallas County, Texas related to Respondent's *nolo contendere* plea. RFAAX 9, at 2.

C. The Government's Case

The Government's case includes nine exhibits. The content of some of those exhibits is also attached to Respondent's Written Statement. RFAA, at 6–7; *infra* Section II.D.

The DI Declaration certifies the authenticity of RFAA Exhibits 2 through 8. RFAAX 9, at 2. The DI Declaration, signed and attested to be ''true and correct'' under penalty of perjury, further states that DI interviewed Respondent ''at her offices in Irving, Texas'' on June 1, 2018. *Id.* at 2. According to the DI Declaration, ''In that interview, . . . [Respondent] admitted that she had diverted multiple controlled substances from numerous patients at Parkland Hospital in Dallas, Texas.'' *Id.* The DI Declaration also states that Respondent ''admitted she diverted Dilaudid, Morphine, Versed, and Fentanyl.'' *Id.*

The Government submitted a two-page document entitled, ''Affidavit for Arrest Warrant or Capias,'' of the Dallas County Hospital District Police Department, dated April 5, 2016 (hereinafter, Arrest Warrant Affidavit).[5] RFAAX 6. According to the Arrest Warrant Affidavit, the Parkland Health and Hospital System Director of Pharmacy contacted the Drug Diversion Control Officer about ''an issue developed in Anesthesia at Parkland Hospital . . . in which . . . [Respondent] . . . was drug screened . . . and sent to a rehabilitation facility at an unidentified location.'' *Id.* at 1. Subsequently, according to the Arrest Warrant Affidavit, relevant records about ''all controlled substances removed from any Pyxis within the hospital'' by Respondent between November 23, 2015, and February 18, 2016, were reviewed and compared with Respondent's documented entries. *Id.* This review led to the discovery of one ''discrepancy/diversion.'' *Id.*

According to the Arrest Warrant Affidavit, Respondent removed one hydromorphone 1 mg/1 mL syringe from a Pyxis located in the Labor & Delivery Alcove for a patient. *Id.* According to the patient's anesthesia records, however, the hydromorphone was not administered to the patient, ''nor was a procedure opened requiring the Hydromorphone'' for that patient. *Id.* Further, ''[a]n additional review of the Pyxis in Anesthesia and Labor & Delivery, between . . . [February 6, 2016, and February 17, 2016,] disclosed that no employee in Anesthesia, to include . . . [Respondent,] returned or wasted through Pyxis Hydromorphone removed from the Pyxis in Anesthesia and Labor and Delivery'' for that patient. *Id.* at 1–2. The Arrest Warrant Affidavit states that ''there was no Anesthesia event for this patient'' on February 6, 2016. *Id.* at 2. The Arrest Warrant Affidavit concludes that, ''[b]ased upon the documentation,'' Respondent ''did not administer the Hydromorphone to . . . [the patient], but fraudulently obtained the controlled substance, by stating that the controlled substance would be administered to . . . [the patient].'' *Id.* The Arrest Warrant Affidavit shows that a Dallas County, Texas Magistrate determined, based on her examination of the Arrest Warrant Affidavit, that probable cause existed for the issuance of an arrest warrant for Respondent. *Id.*

The Government submitted Respondent's Arraignment Sheet dated April 7, 2016. RFAAX 7, at 1. According to this document, Respondent was arraigned on two charges of ''Fraud Del CS/Prescription Sch II.'' *Id.* It also shows that bond was set at $2,500 for each charge. *Id.*

The Government also submitted Respondent's Judicial Confession, The State of Texas v. Erica Nicole Grant, No. F1644784 (195th Judicial District Court, Dallas County, Texas May 26, 2017) (hereinafter, Judicial Confession). RFAAX 4. The Judicial Confession memorializes Respondent's admission that, ''on or about the 6th day of February, 2016, in Dallas County, Texas,'' she ''did intentionally and knowingly possess and attempt to possess a controlled substance, namely: Hydromorphone, by misrepresentation, fraud, forgery, deception and subterfuge.'' *Id.* at 1. Respondent's signed statement concludes with these words: ''I further judicially confess that I committed the offense with which I stand charged exactly as alleged in the indictment in this cause.'' *Id.* In addition to Respondent, her attorney, the Assistant District attorney, the Deputy District Clerk, and the Presiding Judge signed this document. *Id.*

The Government submitted the Order of Deferred Adjudication, The State of Texas v. Erica Nicole Grant, No. F–1644784–N (195th Judicial District Court, Dallas County, Texas May 26, 2017) (hereinafter, Deferred Adjudication Order), RFAAX 5, at 1. According to this seven-page exhibit, the Deferred Adjudication Order was entered for a second-degree felony, ''Obstruction Controlled Substance Fraud Drug 1/2,'' on May 26, 2017.[6] *Id.* It shows that Respondent pled *nolo contendere* to an Information, that adjudication of guilt was deferred, and that Respondent was placed on community supervision for two years. *Id.* According to the document, Respondent ''appeared in person with Counsel.'' *Id.* The other pages of this exhibit are the ''Conditions of Community Supervision'' (three pages), the ''Court's Admonishment on Right to Order of Nondisclosure'' (one page), and

clearly timely regardless of when Respondent received service of the OSC. 21 CFR 1301.43.

[4] Respondent also submitted the Agreed Order for the record. RFAAX 11.

[5] The RFAA cites Factor Three in support of the OSC allegation that Respondent's continued registration is inconsistent with the public interest. RFAA, at 5; 21 U.S.C. 824(a)(4) in conjunction with 21 U.S.C. 823(f)(3).

[6] The Deferred Adjudication Order lists the offense as ''Obstruction Controlled Substance Fraud Drug 1/2.'' RFAAX 5, at 1. Under ''Statute for Offense,'' the document shows ''481.29 Penal Code.'' *Id.* The latter entry appears to be a scrivener's error for section 481.129 of the Texas Health and Safety Code. *See* RFAA, at 3.

the ''Judgment/Certificate of Thumbprint'' (one page). *Id.* at 3–7.

The Government put into the record the registration renewal application that Respondent submitted on August 11, 2016.[7] RFAAX 8, at 1. According to RFAAX 8, Respondent answered ''N'' (meaning ''no'') to whether she had ''ever been convicted of a crime in connection with controlled substance(s) under state or federal law . . ., or any such action pending.'' RFAAX 8, at 1. According to the Government, the fact that DEA did not rely on Respondent's ''N'' response does not make that response ''immaterial'' under past Agency decisions' interpretations of 21 U.S.C. 824(a)(1) and the Supreme Court's definition of ''material'' in *Kungys* v. *United States,* 485 U.S. 759, 770 (1988). RFAA, at 5–6.

The Government also submitted a copy of the Agreed Order. RFAAX 3; *see also infra* Section II.D. According to the RFAA's ''Statement of Undisputed Material Facts,'' the Government argues that, ''[b]etween November 2015 and February 2016, Respondent withdrew medications, including controlled substances[,] from at least 80 patients from the Parkland Hospital Pyxis System'' and ''[d]uring that time, Respondent diverted controlled substances, including Dilaudid, Morphine, Versed, and Fentanyl for her own use.'' RFAA, at 2 (citing RFAAX 3 and RFAAX 9). The Government does not provide a page cite to RFAAX 3 for this citation in its RFAA and I do not see all of the asserted statements in RFAAX 3. The RFAA contains no other reference to RFAAX 3 and includes no other document from the TMB. The DI Declaration, RFAAX 9, states that Respondent ''admitted that she had diverted multiple controlled substances from numerous patents at Parkland Hospital in Dallas, Texas'' and that Respondent ''admitted she diverted Dilaudid, Morphine, Versed, and Fentanyl.'' RFAAX 9, at 2. Accordingly, I find that two portions of the Government-proposed statements of undisputed material facts, that Respondent withdrew controlled substances ''from at least 80 patients'' and ''for her own use,'' are not supported by the evidence the RFAA cites, or by substantial record evidence.[8]

D. Respondent's Case

As already discussed, Respondent submitted a timely Written Statement and proposed CAP. *Supra* section I. In her Written Statement, Respondent stated that she is an anesthesiologist whose ''entire practice and . . . ability to make a living . . . as a single parent with a son in college and caregiver for . . . [her] 79 year-old mother and disabled sister is dependent on . . . [her] ability to provide a balanced anesthetic to patients which is not limited to, but includes controlled substances.'' RFAAX 10, at 1. She admitted that ''diversion of controlled substances occurred as stated from November 2015 through February 11, 2016'' and characterized it as a ''complete lack of judgment.'' *Id.* Her Written Statement places the diversion in the context of her contemporaneous personal life experiences ''never . . . as an excuse'' but ''rather [as] an explanation for which I have always taken 100% responsibility.'' *Id.* Respondent, ''[i]n accepting responsibility,'' has ''done everything in . . . [her] power to correct . . . [her] actions and 31 months later, . . . continue[s] to work hard at maintaining sobriety and gain the trust of those . . . lost, including the public.'' *Id.* She wrote, ''I accept sole responsibility and I have taken actions to become sober and healthy and continue to do such.'' *Id.* at 2. Stating that this is her ''first offense,'' she added that she is ''working diligently for it to never occur again'' and asked for the opportunity ''to continue to demonstrate'' that she ''ha[s] been rehabilitated and will always put the trust of the public first and foremost.'' *Id.* at 2–3.

Respondent's Written Statement includes a list, consisting of about half of a single-spaced page, describing the ''course of action'' she has taken ''since February 11, 2016,'' to ''maintain[ ] sobriety and a healthy lifestyle.'' *Id.* at 3. She stated that her ''course of action'' includes inpatient and outpatient rehabilitation, participation in Alcoholics Anonymous or Caduceus meetings three times a week, bimonthly sessions with a therapist, weekly random drug testing beginning in October 2016, as-needed sessions with an Addiction Specialist, and a personal spirituality program. *Id.* I find a matter of concern about Respondent's candor based on my review of this section of Respondent's Written Statement and the Agreed Order. In her Written Statement, Respondent wrote ''[NO incidents]'' after stating that her course of action includes ''[w]eekly random drug testing beginning October 2016 under voluntary agreement with . . . [TMB] with continuation under final order March, 2018.'' *Id.* The Agreed Order states, in the section entitled ''Specific Panel Findings,'' that ''Respondent voluntarily submitted to interim drug testing with the . . . [TMB]; however, she has had four missed calls and one late drug screen. She has not tested positive for any substances.'' RFAAX 3, at 3 and RFAAX 11, at 11. It appears that Respondent's ''[NO incidents]'' representation is addressing the situation after the Agreed Order went into effect and that the ''Specific Panel Findings'' of the Agreed Order is describing the situation leading up to creation of the ''Agreed Order.'' The matter of concern to me, thus, is Respondent's candor in this proceeding because she presented facts showing herself in a positive light and did not present related facts showing herself in an unfavorable light. Had Respondent requested and participated in a hearing, she would have been able to address my concern about her candor. She chose, as she is entitled under the regulations, to waive her opportunity for a hearing and to submit the Written Statement instead. RFAAX 10, at 1, 2; 21 CFR 1301.43. As the regulation notes, ''Such statement, if admissible, shall be made a part of the record and shall be considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to matters of fact asserted therein.'' 21 CFR 1301.43(c).

About another half page, single spaced, of the Written Statement lists conditions to which the Agreed Order subjects Respondent.[9] RFAAX 10, at 3. I interpret Respondent's intent for including those conditions after the ''course of action'' list was to highlight

[7] RFAAX 8 is a more legible version of the first page of the attachment to RFAAX 2. According to RFAAX 2 and RFAAX 8, the registration renewal application ''Submission Date'' is August 11, 2016. RFAAX 2, at 2; RFAAX 8, at 1. According to the Certification of Registration History, the ''last approved renewal of this DEA registration was on August 15, 2016.'' RFAAX 2, at 1.

[8] *See also,* regarding ''from at least 80 patients,'' RFAAX 6, at 1 (''Based on . . . [the Parkland Health & Hospital System Director of Pharmacy's] information, the Pyxis (CareFusion) Records in reference to all controlled substances removed from any Pyxis within the hospital by . . . [Respondent], between 11/23/2015 and 02/18/2016, were reviewed, and all removals were compared to the entries . . . [Respondent] documented in each patient's Anesthesia Record. The following discrepancies/diversions were discovered: Drug—Hydromorphone 1 mg/1 mL: (Schedule II).'') and, regarding ''for her own use,'' RFAAX 3, at 3–4 and RFAAX 11, at 11–12 (specifying TMB's Conclusions of Law that the Board is authorized to take disciplinary action against Respondent ''based on Respondent's inability to practice medicine with reasonable skill and safety to patients because of . . . (C) excessive use of drugs, narcotics, chemicals, or another substance, or (D) a mental or physical condition'' and ''Respondent's use of alcohol or drugs in an intemperate manner that, in the opinion of the Board, could endanger the lives of patients,'' while not including a finding specifying that Respondent ingested any of the controlled substances she admitted diverting). RFAAX 3, at 2–3 and RFAAX 11, at 10–11.

[9] Respondent attached the Agreed Order to her proposed CAP. RFAAX 11, at 9–23; *infra.*

additional steps she agreed to follow for up to ten years. *Id.*

In her CAP, Respondent proposed that ''the requirements outlined in the Texas Medical Board Public Order #18–270 [the Agreed Order] . . . be accepted as an action plan and proceedings to revoke her DEA . . . [registration] be discontinued effective immediately.'' RFAAX 11, at 1, citing *id.* at 9–23.[10] Respondent represented that she has been ''compliant with the actions'' required by the Agreed Order and that she will report ''immediately'' to DEA the suspension of her medical license resulting from a violation of the Agreed Order.

Attached to Respondent's proposed CAP are (1) one page from the 2006 Edition of the DEA ''Practitioner's Manual'' entitled ''Form–224a Renewal Application for Registration,'' *id.* at 3; (2) the Deferred Adjudication Order, *id.* at 4–5; (3) Conditions of Community Supervision, *The State of Texas* v. *Erica Nicole Grant*, No. F–1644784–N (195th Judicial District Court, Dallas County, Texas May 26, 2017), *id.* at 6–7; (4) Order Dismissing Proceedings and Granting Early Discharge From Community Supervision Following Deferred Adjudication, The State of Texas v. Erica Nicole Grant, No. F1644784N (195th JDC, Dallas County, Texas May 29, 2018) (hereinafter, Order Dismissing Proceedings and Granting Early Discharge), *id.* at 8; and (5) the Agreed Order, *id.* at 9–23. The Deferred Adjudication Order, the Conditions of Community Supervision, and the Agreed Order are also part of the Government's case.[11] *Supra* section II.C.

The Order Dismissing Proceedings and Granting Early Discharge states that Respondent ''satisfactorily fulfilled'' all conditions of community supervision and that ''the best interests of society and . . . [Respondent] will be served by granting the early discharge from community supervision and dismissing the proceedings.'' RFAAX 11, at 8. The Order Dismissing Proceedings and Granting Early Discharge terminates the ''period of supervision'' about a year early, discharges Respondent from community supervision, and dismisses ''all proceedings in this cause'' against Respondent. *Id.*

The Agreed Order between Respondent and the TMB was signed and entered by the TMB presiding officer on March 2, 2018. RFAAX 3, at 15 and RFAAX 11, at 23. According to the Agreed Order's ''Mitigating Factor'' section, ''Respondent neither admits nor denies the information given above.'' RFAAX 3, at 3 and RFAAX 11, at 11. The ''Specific Panel Findings'' section is ''above'' the ''Mitigating Factor'' section and, thus, I find that Respondent neither admitted nor denied the TMB's General and Specific Panel Findings. RFAAX 3, at 3 and RFAAX 11, at 11. I also find, though, that Respondent ''agree[d] to the entry of th[e] Agreed Order,'' and agreed ''to comply with its terms and conditions'' to ''avoid further investigation, hearings, and the expense and inconvenience of litigation.'' RFAAX 3, at 3 and RFAAX 11, at 11.

The terms of the Agreed Order subject Respondent to multiple conditions for ten years. RFAAX 3, at 5 and RFAAX 11, at 13. Respondent's noncompliance with, or violation of, specified Agreed Order conditions could lead to the immediate suspension of her medical license. RFAAX 3, at 5–6, 8 and RFAAX 11, at 13–14, 16. The Agreed Order affords Respondent the opportunity to seek amendment or termination of the conditions after two years following the date of the Agreed Order's entry and once a year thereafter. RFAAX 3, at 13 and RFAAX 11, at 21. There is no evidence in the record that Respondent availed herself of the opportunity to seek amendment or termination of the Agreed Order's conditions.[12]

The TMB's ''Specific Panel Findings,'' which are matters that Respondent ''neither admits nor denies,'' contain five paragraphs. RFAAX 3, at 2–3 and RFAAX 11, at 10–11; *see also supra.* The TMB's first specific panel finding is that ''Respondent admitted that she diverted drugs through the Pyxis system that should have gone to patients'' and that ''[t]hese violations impacted patient care and involved lying to patients and her employer.'' RFAAX 3, at 2 and RFAAX 11, at 10. The second TMB specific panel finding is that ''Respondent admitted that she has struggled with addiction and substance abuse.'' RFAAX 3, at 2 and RFAAX 11, at 10. The third TMB specific panel finding is that ''Respondent was suspended from her position at Parkland Hospital after a peer review action'' and that ''[t[his suspension was related to her diversion of controlled substances and her substance abuse issues.'' RFAAX 3, at 2 and RFAAX 11, at 10. The fourth TMB specific panel finding is that ''Respondent admitted that she treated herself with controlled substances.''[13] RFAAX 3, at 2 and RFAAX 11, at 10. The last TMB specific panel finding is that ''Respondent voluntarily submitted to interim drug testing with the Board,'' that ''she has had four missed calls and one late drug screen,'' and that ''[s]he has not tested positive for any substances.'' RFAAX 3, at 3 and RFAAX 11, at 11.

The Agreed Order's ''Conclusions of Law'' suggest that the TMB concluded that it had nine bases for disciplining Respondent ''[b]ased on the above [General and Specific Panel] Findings.'' RFAAX 3, at 3 and RFAAX 11, at 11. First, the TMB concluded that Respondent committed an act prohibited under Texas statute, Texas Occupations Code Annotated § 164.052 (2018). RFAAX 3, at 3 and RFAAX 11, at 11. Second, the TMB concluded that Respondent violated TMB rules requiring the maintenance of adequate medical records. RFAAX 3, at 3 and RFAAX 11, at 11. Third, the TMB concluded that Respondent was unable to practice medicine with reasonable skill and safety to patients because of excessive use of drugs, narcotics, chemicals, or other substance, or a mental or physical condition. RFAAX 3, at 3 and RFAAX 11, at 11. Fourth, the TMB concluded that Respondent failed to practice medicine in an acceptable professional manner consistent with public health and welfare due to negligence in performing medical services, failing to use proper diligence in her professional practice, failing to safeguard against potential complications, and inappropriate prescription of dangerous drugs or controlled substances to herself, family members, or others in which there is a close personal relationship. RFAAX 3, at 3–4 and RFAAX 11, at 11–12.

Fifth, the TMB concluded that Respondent's use of alcohol or drugs in an intemperate manner could endanger the lives of patients. RFAAX 3, at 4 and RFAAX 11, at 12. Sixth, the TMB concluded that Respondent's unprofessional or dishonorable conduct likely to deceive or defraud the public

[10] RFAAX 11, at 9–23 is the same document that the Government submitted at RFAAX 3.

[11] The page from the 2006 Edition of the DEA ''Practitioner's Manual'' includes the text of the first Liability question. RFAAX 11, at 3. According to the 2006 Edition, that question asks ''Has the applicant ever been convicted of a crime in connection with controlled substances under state or federal law''? *Id.* Based on this version of the first Liability question, Respondent ''disputes'' the OSC allegations that she was ''convicted'' of a crime in connection with controlled substances. *Id.* at 1–2 (citing *id.* at 3). Instead, she stated, she pled *nolo contendere,* ''received deferred adjudication probation,'' ''was released a year early from probation'' on May 29, 2018, and, therefore, ''the case is dismissed as a non-conviction.'' RFAAX 10, at 2.

[12] This is not surprising given that the Government submitted its RFAA less than two years after the date the Agreed Order was entered. RFAA, at 6.

[13] I find that Respondent's admission that she treated herself with controlled substances does not necessarily mean that she admitted to ingesting the controlled substances she diverted. RFAAX 3, at 2 and RFAAX 11, at 10.

or injure the public included providing medically unnecessary services, submitting a billing statement to a patient or a third-party payor that she should have known was improper, and violating state law concerning insurance fraud and concerning prescribing or administering without a valid medical purpose. RFAAX 3, at 4 and RFAAX 11, at 12. Seventh, the TMB concluded that Respondent prescribed or administered a drug or treatment that was nontherapeutic in nature, or that was nontherapeutic in the manner administered or prescribed. RFAAX 3, at 4 and RFAAX 11, at 12. Eighth, the TMB concluded that Respondent prescribed, administered, or dispensed dangerous drugs or controlled substances in a manner inconsistent with public health and welfare. RFAAX 3, at 4 and RFAAX 11, at 12. Ninth, the TMB concluded that Respondent's improper billing practices violated Texas law. RFAAX 3, at 4 and RFAAX 11, at 12.

There is substantial congruity between the evidence submitted by the Government and Respondent's evidence. I now address the OSC's allegations in the order in which they appear in the OSC.

E. Allegation That Respondent Has Been Convicted of a Felony Related to a Controlled Substance (21 U.S.C. 824(a)(2))

Based on substantial record evidence, including the evidence that both the Government and Respondent submitted, I find that Respondent pled *nolo contendere* to a second-degree Texas felony relating to a controlled substance, hydromorphone, and that adjudication of her guilt was deferred. *See, e.g.,* RFAAX 4, at 1 (hydromorphone); RFAAX 5, at 1 (controlled substance); RFAAX 11, at 4 (controlled substance); *id.* at 8 (''CS'' and ''Sch II'').

F. Allegation That Respondent's Registration Is Inconsistent With the Public Interest (21 U.S.C. 824(a)(4) and 823(f))

The section of the Government's RFAA addressing the 21 U.S.C. 824(a)(4) public interest basis for revocation of Respondent's registration focuses exclusively on Factor Three, 21 U.S.C. 823(f)(3): Respondent's ''conviction record under Federal or State laws relating to the . . . dispensing of controlled substances.'' [14] RFAA, at 5. The Government argues that Respondent's *nolo contendere* plea to a second-degree controlled substance felony under Texas law justifies revocation of Respondent's registration. *Id.*

As already discussed, I find that Respondent pled *nolo contendere* to a second-degree Texas felony relating to a controlled substance, hydromorphone, and that adjudication of her guilt was deferred. *Supra* section II.E. More specifically, I find substantial record evidence that Respondent pled as follows: ''on or about the 6th day of February, 2016, in Dallas County, Texas, I did intentionally and knowingly possess and attempt to possess a controlled substance, namely, HYDROMORPHONE, by misrepresentation, fraud, forgery, deception and subterfuge.'' RFAAX 4, at 1. Further, I find substantial record evidence based on the above findings and the unrefuted Affidavit for Arrest Warrant or Capias that Respondent did not return or waste the hydromorphone. RFAAX 6, at 1–2. I do not find substantial record evidence about what Respondent did with the hydromorphone that she pled to fraudulently possessing or attempting to possess.

While the Government focused exclusively on Factor Three, the OSC's allegations based on 21 U.S.C. 824(a)(4) and 823(f) are broader. Accordingly, I am analyzing, making findings of fact about, and drawing conclusions of law based on the entire text of 21 U.S.C. 823(f).

I find substantial record evidence that Respondent admitted that she engaged in the ''diversion of controlled substances'' ''from November 2015 through February 11, 2016.'' [15] RFAAX 11, at 1; RFAAX 10, at 1. I find substantial record evidence that Respondent, ''[w]hile making such an admission of diversion, . . . denie[d] all the above [OSC] charges against her as described in the Waiver of Hearing letter dated September 21, 2018.'' RFAAX 11, at 1. I find substantial record evidence that Respondent characterized as ''unfortunate'' the legal action taken by ''Parkland Hospital, the affiliate hospital where the diversion occurred,'' and stated that the legal action was taken ''unbeknownst and at the disapproval of the committee that led to a series of events as outlined in the facts.'' [16] RFAAX 10, at 1.

I find substantial record evidence that Respondent's Written Statement disputes the OSC's material falsification and felony conviction charges on the basis of the Texas ''deferred adjudication probation,'' and states that, ''[i]n summary, I do not deny nor have I ever in the past the unfortunate course of actions I decided to take by diverting controlled substances.'' *Id.* at 2. I find substantial record evidence that her Written Statement further states that, ''I accept sole responsibility and I have taken actions to become sober and healthy and continue to do such.'' *Id.* I find substantial record evidence that Respondent's Written Statement asks that she be ''allow[ed] . . . to continue to demonstrate that . . . [she has] been rehabilitated and will always put the trust of the public first and foremost.'' *Id.* at 2–3. I find substantial record evidence that the Written Statement represents that ''this is . . . [Respondent's] first offense and . . . [she] is working diligently for it to never occur again.'' *Id.* at 3.

I find there is substantial record evidence that Respondent admitted that she ''had diverted multiple controlled substances from numerous patients at Parkland Hospital in Dallas, Texas.'' RFAAX 9, at 2. I find there is substantial record evidence that Respondent admitted that she ''diverted Dilaudid, Morphine, Versed, and Fentanyl.'' *Id.*

I find there is substantial record evidence that Respondent and the TMB entered into an Agreed Order that was signed and entered by the TMB presiding officer on March 2, 2018. RFAAX 3, at 15 and RFAAX 11, at 23. I find substantial record evidence that Respondent neither admitted nor denied the TMB's General and Specific Panel Findings. RFAAX 3, at 3 and RFAAX 11, at 11. I find substantial record evidence that Respondent ''agree[d] to the entry of th[e] Agreed Order,'' and agreed ''to comply with its terms and conditions'' to ''avoid further investigation, hearings, and the expense and inconvenience of litigation.'' RFAAX 3, at 3 and RFAAX 11, at 11. I find substantial record evidence that the terms of the Agreed Order subject Respondent to multiple conditions for up to ten years, that Respondent's noncompliance with, or violation of, specified Agreed Order conditions could lead to the immediate suspension of her medical license, and that the Agreed Order affords Respondent the

[14] The CSA defines ''dispense'' to mean ''to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance.'' 21 U.S.C. 802(10).

[15] According to Respondent's Written Statement, ''The diversion of controlled substances occurred as stated from November 2015 through February 11, 2016.'' RFAAX 10, at 1. The meaning of ''as stated'' might refer to the allegations of the OSC, but since it is not clear, I am not making a finding about the meaning of the phrase.

[16] Respondent's reference to ''the facts'' appears to refer to the OSC's ''summary of the matters of fact and law at issue.'' OSC, at 1.

opportunity to seek amendment or termination of the conditions after two years following the date of the Agreed Order's entry and once a year thereafter. RFAAX 3, at 5–13 and RFAAX 11, at 13–21.

I find substantial record evidence that the TMB found that ''Respondent admitted that she diverted drugs through the Pyxis system that should have gone to patients'' and that ''[t]hese violations impacted patient care and involved lying to patients and her employer.'' RFAAX 3, at 2 and RFAAX 11, at 10. I find substantial record evidence that the TMB found that ''Respondent admitted that she has struggled with addiction and substance abuse.'' RFAAX 3, at 2 and RFAAX 11, at 10. I find substantial record evidence that the TMB found that ''Respondent was suspended from her position at Parkland Hospital after a peer review action'' and that ''[t[his suspension was related to her diversion of controlled substances and her substance abuse issues.'' RFAAX 3, at 2 and RFAAX 11, at 10. I find substantial record evidence that the TMB found that ''Respondent admitted that she treated herself with controlled substances.'' RFAAX 3, at 2 and RFAAX 11, at 10. I find substantial record evidence that the TMB found that ''Respondent voluntarily submitted to interim drug testing with the Board,'' that ''she has had four missed calls and one late drug screen,'' and that ''[s]he has not tested positive for any substances.'' RFAAX 3, at 3 and RFAAX 11, at 11.

I find substantial record evidence that the TMB concluded that it had multiple bases under Texas law for disciplining Respondent, including her failure to maintain adequate medical records; her inability to practice medicine with reasonable skill and safety to patients because of excessive substance use or a mental or physical condition; her failure to practice medicine in an acceptable professional manner consistent with public health and welfare due to, among other things, her negligence, improper diligence, not safeguarding against potential complications, and inappropriate prescription of dangerous drugs or controlled substances; her use of alcohol or drugs in an intemperate manner that could endanger the lives of patients; and her unprofessional or dishonorable conduct likely to deceive or defraud the public or injure the public including prescribing or administering a controlled substance without a valid medical purpose (Tex. Health & Safety Code § 481.071(a). RFAAX 3, at 3–4 and RFAAX 11, at 11–12.

G. Allegation That Respondent Materially Falsified a Renewal Application (21 U.S.C. 824(a)(1))

I find clear, unequivocal, and convincing record evidence that, on April 7, 2016, Respondent was arraigned on charges that she violated a second-degree Texas felony involving a controlled substance. RFAAX 7, at 1; *see also* RFAAX 6, at 1–2. I find clear, unequivocal, and convincing record evidence that Respondent answered ''N'' to the first Liability question on the registration renewal application that she submitted on or about August 11, 2016. RFAAX 2, at 2 and RFAAX 8, at 1. I find clear, unequivocal, and convincing record evidence that the text of the first Liability question on the registration renewal application that Respondent submitted on or about August 11, 2016, asked whether Respondent had ''ever been convicted of a crime in connection with controlled substance(s) under state or federal law . . . or any such action pending.'' [17] RFAAX 2, at 2 and RFAAX 8, at 1. I find clear, unequivocal, and convincing record evidence that the date of Respondent's Judicial Confession is May 26, 2017. RFAAX 4, at 1. Accordingly, I find clear, unequivocal, and convincing record evidence that Respondent's ''N'' response to the first Liability question on the registration renewal application that she submitted on or about August 11, 2016, was false because, on April 7, 2016, Respondent was arraigned on charges that she violated a second-degree Texas felony involving a controlled substance.

III. Discussion

A. The Controlled Substances Act

Under the CSA, ''[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant—(1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II; (2) has been convicted of a felony under . . . any . . . law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance; . . . [or] (4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a). The OSC alleges these three bases for revocation of Respondent's registration: violations of 21 U.S.C. 824(a)(1), (2), and (4).

B. Allegation That Respondent Materially Falsified an Application (21 U.S.C. 824(a)(1))

As already discussed, I find clear, unequivocal, and convincing evidence that Respondent submitted a registration renewal application containing a false answer to the first Liability question. *Supra* section II.G. My finding about Respondent's submission of a false answer involves Respondent's arraignment on charges that she violated a second-degree, controlled-substance related Texas felony about four months before her submission of the registration renewal application. *Id.* Respondent's false submission, therefore, implicates Factor Four, Respondent's ''[c]ompliance with applicable State, Federal, or local laws relating to controlled substances.'' 21 U.S.C. 823(f)(4). Respondent's false response to the first Liability question directly implicated my statutorily-mandated analysis and my decision by depriving me of legally relevant facts when I evaluated Respondent's registration renewal application. RFAAX 2, at 1; *see also Frank Joseph Stirlacci, M.D.,* 85 FR 45,229, 45,235 (2020). Accordingly, I find, based on the CSA and the analysis underlying multiple Supreme Court decisions explaining ''materiality,'' that the falsity Respondent submitted was material. *Frank Joseph Stirlacci, M.D.,* 85 FR at 45,235.

Respondent's Written Statement argues that her *nolo contendere* plea to a second-degree Texas felony is ''not a conviction,'' because ''it is a deferred adjudication probation that was completed May 29, 2018 and is therefore discharged as a non-conviction.'' RFAAX 10, at 2. She posited that, ''It is not considered a conviction under Texas law.'' *Id.* There are two reasons why I disagree with Respondent's arguments.

First, the Agency established over thirty years ago, and reiterated as recently as about ten years ago, that a deferred adjudication is ''still a 'conviction' within the meaning of the . . . [CSA] even if the proceedings are later dismissed.'' *Kimberly Maloney, N.P.,* 76 FR 60,922, 60,922 (2011). In reaching this conclusion, the Agency explained that, ''[a]ny other interpretation would mean that the conviction could only be considered between its date and the date of its subsequent dismissal.'' *Id.,* citing *Edson*

[17] Respondent submitted evidence about the exact wording of the first Liability question. RFAAX 11, at 3. I find clear, unequivocal, and convincing record evidence that Respondent's proffered evidence, from 2006, is out-of-date and obsolete and, therefore, irrelevant to this adjudication. *Id., compare with* RFAAX 2, at 2; RFAAX 8, at 1.

W. Redard, M.D., 65 FR 30,616, 30,618 (2000).

Second, Respondent's Written Statement arguments do not account for the fact, as I already found, that the first Liability question on the registration renewal application that she submitted asked whether she had ''ever been convicted of a crime in connection with controlled substance(s) under state or federal law . . . *or any such action pending*'' [emphasis added]. RFAAX 2, at 2; RFAAX 8, at 1; *see also supra* section II.G. I already found that Respondent submitted her registration renewal application on or about August 11, 2016, that she was arraigned on charges that she violated a second-degree Texas felony involving a controlled substance on April 7, 2016, and that she pled guilty on May 26, 2017. *Supra* section II.G. As such, Respondent had already been arraigned, meaning there was an ''action pending,'' when she submitted her registration renewal application on or about August 11, 2016. Her ''N'' response to the first Liability question on that renewal application, therefore, was false, because there was already a second-degree Texas controlled-substance related felony action pending.

After considering, analyzing, and evaluating Respondent's arguments, I find clear, convincing, and unequivocal record evidence and conclude that Respondent materially falsified the registration renewal application she submitted on or about August 11, 2016. Accordingly, I find that there is clear, convincing, and unequivocal evidence in the record supporting revocation of Respondent's registration based on her having ''materially falsified any application filed pursuant to or required by this subchapter or subchapter II.'' 21 U.S.C. 824(a)(1).

C. Allegation That Respondent Has Been Convicted of a Felony Relating to Any Controlled Substance (21 U.S.C. 824(a)(2))

As already discussed, I find, based on substantial record evidence, including evidence that both the Government and Respondent submitted, that Respondent pled *nolo contendere* to a second-degree Texas felony relating to a controlled substance, hydromorphone, and that adjudication of her guilt was deferred. *Supra* section II.E.; *see also* section II.F.

I find substantial record evidence that the second-degree Texas felony to which Respondent pled is section 481.129 of the Texas Health and Safety Code. RFAAX 4, at 1; *see also* RFAA, at 2. Chapter 481 is the Texas Controlled Substances Act. Every offense in the version of subchapter 129 of the Texas Controlled Substances Act in effect when Respondent pled *nolo contendere* in which the word ''fraud'' appears concerns controlled substances. *See, e.g.,* Tex. Health and Safety Code §§ 481.129(a)(5)(A), (B), and (C). 481.129(a)(6), and 481.129(a-1) (2017). Respondent's ''Judicial Confession'' states that she ''did intentionally and knowingly possess and attempt to possess a controlled substance, namely: HYDROMORPHONE, by misrepresentation, fraud, forgery, deception and subterfuge.'' RFAAX 4, at 1. Texas Health and Safety Code § 481.129(a)(5)(A) states that a ''person commits an offense if the person knowingly . . . possesses, obtains, or attempts to possess or obtain a controlled substance or an increased quantity of a controlled substance . . . by misrepresentation, fraud, forgery, deception, or subterfuge.'' Tex. Health and Safety Code §§ 481.129(a)(5)(A) (2017). Accordingly, I find substantial record evidence that Respondent pled *nolo contendere* to a Texas felony relating to a controlled substance, Tex. Health and Safety Code §§ 481.129(a)(5)(A) (2017). 21 U.S.C. 824(a)(2).

I note the record evidence showing that, pursuant to deferred adjudication, the proceedings against Respondent were dismissed and Respondent was discharged early from community supervision. RFAAX 11, at 8. As already discussed, though, under prior Agency decisions, an Order dismissing proceedings following deferred adjudication does not change the fact that Respondent pled *nolo contendere* to a second-degree Texas felony. *Supra* section III.B. Accordingly, I find that there is substantial evidence in the record supporting revocation of Respondent's registration based on her Texas second-degree controlled substance-related felony conviction. 21 U.S.C. 824(a)(2).

D. Allegation That Respondent's Registration Is Inconsistent With the Public Interest (21 U.S.C. 824(a)(4) and 823(f))

As already discussed, the CSA provides for the revocation or suspension of a registration to distribute or dispense a controlled substance ''upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' which is defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed consideration of the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016)); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *U.S. Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Akhtar-Zaidi,* 841 F.3d at 711; *Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, as appellate courts have recognized, findings under a single factor are sufficient to support the revocation of a registration. *MacKay,* 664 F.3d at 821.

In this matter, the Government's RFAA addresses Factor Three. RFAA, at 5; *see also supra* section II.F.; *infra.* In addition to Factor Three, I consider all of the public interest factors that are relevant to the record evidence. 21 U.S.C. 823(f).

1. Factor One—Recommendation of the Appropriate State Licensing Board

Factor One calls for consideration of the ''recommendation of the appropriate state licensing board or professional

disciplinary authority'' in the public interest determination. 21 U.S.C. 823(f)(1). The record evidence does not include a direct recommendation to the Agency from the TMB about Respondent's continued registration.

As already discussed, both the Government and Respondent submitted the Agreed Order for the record. *Supra* sections II.C. and II.D. There is some congruence between the matters addressed in the Agreed Order and the OSC allegations, such as Respondent's diversion of controlled substances. *See, e.g.,* OSC, at 2; RFAAX 3, at 2–4; RFAAX 11, at 10–12. The Agreed Order states that the TMB found multiple bases under Texas law for disciplining Respondent. RFAAX 3, at 3–5 and RFAAX 11, at 11–13; *see also supra* section II.D. It subjects Respondent to multiple conditions for up to ten years. RFAAX 3, at 5–13 and RFAAX 11, at 13–21; *see also supra* section II.D.

While the Agreed Order is not a direct recommendation for purposes of Factor One, it does indicate a possible response to some of the allegations and evidence before me. *John O. Dimowo, M.D.,* 85 FR 15,800, 15,810 (2020).[18] I apply the same analysis and reach the same conclusion here given the differences between the allegations and evidence set out in the Agreed Order and the allegations and evidence before me. In sum, while the fact that the Agreed Order conditioned Respondent's medical license, as opposed to revoking or suspending it, is not dispositive of the public interest inquiry in this case and is minimized due to the differences in the charges underlying the Agreed Order and the OSC charges I am adjudicating, I consider the fact that the TMB conditioned Respondent's medical license, as opposed to revoking or suspending it, and I give that aspect of the Agreed Order minimal weight in Respondent's favor.

2. Factors Two and/or Four—The Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

As already discussed, there is substantial record evidence of Respondent's negative controlled substance dispensing and non-compliance with applicable laws related to controlled substances. *See, e.g., supra* section II.F. For example, I already found that Respondent, herself, admitted that she engaged in the ''diversion of controlled substances'' ''from November 2015 through February 11, 2016.'' *Id.; cf. id.* (referencing the Agreed Order and Respondent's decision not to admit or deny the TMB's General and Specific Panel Findings). I further found that Respondent, herself, admitted ''the unfortunate course of action . . . [she] decided to take by diverting controlled substances.'' *Id.*

I also found that the Government submitted substantial evidence that Respondent admitted, to the DI, diverting multiple controlled substances from numerous patients at Parkland Hospital. *Id.* I further found substantial record evidence that Respondent also admitted to the DI that she ''diverted Dilaudid, Morphine, Versed, and Fentanyl.'' *Id.*

In addition, I already found substantial record evidence that the TMB's findings included that ''Respondent admitted that she diverted drugs through the Pyxis system that should have gone to patients,'' ''Respondent admitted that she has struggled with addiction and substance abuse,'' ''Respondent was suspended from her position at Parkland Hospital after a peer review action'' and ''[t[his suspension was related to her diversion of controlled substances and her substance abuse issues,'' ''Respondent admitted that she treated herself with controlled substances,'' and ''Respondent voluntarily submitted to interim drug testing with the Board,'' that ''she has had four missed calls and one late drug screen,'' and that ''[s]he has not tested positive for any substances.'' *Id.*

I also found substantial record evidence that the TMB concluded that it had multiple bases under Texas law for disciplining Respondent. *Id.* The multiple bases for disciplining Respondent under Texas law included her prescribing or administering a controlled substance without a valid medical purpose. *Id.*

I find that these matters directly implicate Factors Two and/or Four and strongly weigh against Respondent.

3. Factor Three—The Respondent's Conviction Record Under State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

I already found that Respondent was convicted under Texas law of a second-degree felony relating to a controlled substance. *Supra* section II.E. and section III.C. (concerning 21 U.S.C. 824(a)(2)). Concerning Factor Three and the OSC charge under 21 U.S.C. 824(a)(4), in conjunction with 21 U.S.C. 823(f)(3), the Government's RFAA argues that ''revocation is justified by . . . [Respondent's] State conviction record relating to [the] manufacture, distribution, or dispensing of controlled substances as evidenced by her *nolo contendere* plea to a second-degree controlled substance felony in Texas.'' RFAA, at 5. The RFAA cites RFAAX 4 and RFAAX 5 to support this statement. *Id.* In its next sentence, the RFAA states that ''Respondent pled *nolo contendere* to intentionally and knowingly possessing and attempting to possess a controlled substance, hydromorphone, by misrepresentation, fraud, forgery, deception, and subterfuge.'' *Id.* Again, the RFAA cites RFAAX 4 and RFAAX 5 as support for this statement. *Id.* It also cites 21 U.S.C. 823(f)(3) and 21 U.S.C. 824(a)(4), reconfirming that this portion of the RFAA is addressing the public interest basis for revocation. After a ''*see also*'' signal, the Government cited generally to three Agency decisions. *Id.*

The first decision involves a *nolo contendere* plea, a deferred entry of judgment, and the subsequent dismissal of proceedings. *Edson W. Redard, M.D.,* 65 FR 30,616 (2000), cited *supra* section III.B. As already discussed, that decision states that the Agency ''has consistently held that a plea of *nolo contendere* constitutes a 'conviction' within the meaning of 21 U.S.C. 824(a)(2).'' *Id.* at 30,618. Concerning Factor Three, the decision has one sentence in a one-sentence paragraph: ''As previously discussed, factor three is relevant since the Deputy Administrator finds that Respondent was convicted of a felony offense relating to controlled substances.'' *Id.* at 30,619. The decision's ''previous discussion'' was that the doctor had pled *nolo contendere* to one count of obtaining and attempting to obtain hydrocodone by fraud. *Id.* at 30,617. The decision does not elaborate on its one-sentence Factor Three conclusion.

The second and third Agency decisions that the Government cited to support its argument that Factor Three is relevant are *Jana Marjenhoff, D.O.,* 80 FR 29,067 (2015) and *David D. Miller, M.D.,* 60 FR 54,511 (1995). RFAA, at 5. According to *Jana Marjenhoff, D.O.,* ''[r]egarding Factor Three, the record in this case does not contain evidence that the Respondent has been convicted of (or even charged with) a crime related to any of the controlled substance activities designated under this provision in the CSA.'' 80 FR at 29,089 [footnote omitted]. This sentence does

[18] The *John O. Dimowo, M.D.* Agency decision stands for the proposition that ''[a]lthough statutory analysis [of the CSA] may not definitively settle . . . [the breadth of the cognizable state 'recommendation' referenced in Factor One], the most impartial and reasonable course of action is to continue to take into consideration all actions indicating a recommendation from an appropriate state.'' 85 FR at 15,810.

not appear to support the Government's Factor Three argument.

Regarding *David D. Miller, M.D.,* the decision explains that the doctor pled *nolo contendere* in state court to the unlawful *distribution* of marijuana and concluded that this plea ''established a *prima facie* case under factor three.'' 60 FR at 54,512 [emphasis added]. I agree with this conclusion. 21 U.S.C. 823(f)(3). I note that, according to the record evidence before me in this matter, Respondent pled to a second-degree State felony ''possession'' charge, not to a charge about ''the manufacture, distribution, or dispensing of controlled substances.'' *Id.; see also* RFAAX 4, at 1 (memorializing Respondent's Judicial Confession that she ''did intentionally and knowingly possess and attempt to possess a controlled substance, namely: HYDROMORPHONE, by misrepresentation, fraud, forgery, deception and subterfuge'').

For all of these reasons, I conclude that the record before me contains no evidence, or contains insufficiently developed evidence, to support my crediting the Government's Factor Three-related argument. Accordingly, I do not find record evidence that fits the ''manufacture, distribution, or dispensing of controlled substances'' criteria of Factor Three.

4. Factor Five—Such Other Conduct Which May Threaten the Public Health and Safety

As already discussed, the record contains substantial evidence, submitted both by the Government and by Respondent, about Respondent's conduct which may threaten the public health and safety. *See, e.g., supra* section II.F. First, according to the ''Specific Panel Findings'' of the Agreed Order, the TMB found that Respondent's diversion of drugs through the Pyxis system ''impacted patient care and involved lying to patients and her employer.'' RFAAX 3, at 2 and RFAAX 11, at 10.

Second, based on all of its Findings and the correlation of its Findings with legal requirements, the TMB concluded that there were multiple ways that Respondent's conduct may threaten the public health and safety. RFAAX 3, at 3–4 and RFAAX 11, at 11–12. It concluded that Respondent was unable to ''practice medicine with reasonable skill and safety to patients,'' because of excessive substance use or a mental or physical condition. RFAAX 3, at 3 and RFAAX 11, at 11. The TMB concluded that Respondent had failed to ''practice medicine in an acceptable professional manner consistent with public health and welfare'' due to, among other things, her negligence in performing medical services, improper diligence in her professional practice, her failure to safeguard against potential complications, and her inappropriate prescription of dangerous drugs or controlled substances. RFAAX 3, at 3–4 and RFAAX 11, at 11–12. The TMB also concluded that ''Respondent's use of alcohol or drugs in an intemperate manner . . . could endanger the lives of patients.'' RFAAX 3, at 4 and RFAAX 11, at 12. Further, the TMB concluded that Respondent engaged in ''unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public.'' RFAAX 3, at 4 and RFAAX 11, at 12.

I find that these matters directly implicate Factor Five and strongly weigh against Respondent.

5. Summary of Factors One, Two, Three, Four, and Five

As I found above, the Agreed Order is not a direct recommendation for purposes of Factor One, but it does indicate a possible response to some of the allegations and evidence before me. *Supra* section III.D.1. While the fact that the Agreed Order conditioned Respondent's medical license, as opposed to revoking or suspending it, is not dispositive of the public interest inquiry in this case and is minimized due to the differences in the charges underlying the Agreed Order and the OSC charges, I consider the fact that the TMB conditioned Respondent's medical license, as opposed to revoking or suspending it, and I give that aspect of the Agreed Order minimal weight in Respondent's favor. *Id.*

Regarding Factors Two and Four, I find substantial record evidence, including from Respondent's admissions, of her negative controlled substance dispensing experience, her diversion of controlled substances, and her noncompliance with applicable laws relating to controlled substances. *See, e.g., supra* section II.F. and section III.D.2. I give this record evidence significant weight against Respondent.

Regarding Factor Three, I find no relevant record evidence.

Regarding Factor Five, I find substantial record evidence that Respondent engaged in conduct which may threaten the public health and safety. *Supra, e.g.,* section II.F. and section III.D.4. I give this record evidence significant weight against Respondent.

Accordingly, I conclude that it would be ''inconsistent with the public interest'' for Respondent to retain her registration due to the significant record evidence implicating Factor Two, Factor Four, and Factor Five, despite the record evidence implicating Factor One, and regardless of the lack of record evidence implicating Factor Three. 21 U.S.C. 824(a)(4) and 21 U.S.C. 823(f); *see Wesley Pope,* 82 FR 14,944, 14,985 (2017).

IV. Sanction

Where, as here, the Government presented three, independent bases for the revocation of Respondent's registration, and Respondent did not present evidence rebutting any of the three bases, it is then up to Respondent ''to assure the Administrator'' that she ''can be entrusted with the responsibilit[ies] that accompany registration.'' *White* v. *Drug Enf't Admin.,* 626 F. App'x 493, 496 (5th Cir. 2015); *see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (quoting *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016)); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011) (quoting *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009) quoting *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005)). As the Fifth Circuit also stated, ''[s]uch evidence includes acceptance of responsibility and a demonstration that the . . . [Respondent] 'will not engage in future misconduct.' '' *White* v. *Drug Enf't Admin.,* 626 F. App'x at 496; *see also Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x, 724, 733 (2019) (citing *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d at 831 (citing *MacKay* v. *Drug Enf't Admin.,* 664 F.3d at 820 (noting that past performance is the best predictor of future performance and, when a registrant has ''failed to comply with . . . [her] responsibilities in the past, it makes sense for the agency to consider whether . . . [she] will change . . . [her] behavior in the future'') and *Alra Labs., Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995) (''An agency rationally may conclude that past performance is the best predictor of future performance.'')).

The Agency has decided that the egregiousness and extent of misconduct are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases); *Samuel Mintlow, M.D.,* 80 FR at 3652 (''Obviously, the egregiousness and extent of a registrant's misconduct are significant factors in determining the appropriate sanction.''). The Agency has also considered the need to deter similar acts in the future by Respondent and by the community of registrants. *Garrett*

Howard Smith, M.D., 83 FR at 18,910; *Samuel Mintlow, M.D.,* 80 FR at 3652.

In terms of egregiousness, the violations that the substantial record evidence shows Respondent committed go to the heart of the CSA: Not complying with the closed regulatory system devised to ''prevent the diversion of drugs from legitimate to illicit channels'' and not prescribing controlled substances in compliance with the applicable standard of care and in the usual course of professional practice. *Gonzales* v. *Raich,* 545 U.S. at 13–14, 27.

Respondent's submissions address her acceptance of responsibility. RFAAX 10 and RFAAX 11. According to her Written Statement, she has ''always taken 100% responsibility'' for her diversion of controlled substances.'' RFAAX 10, at 1. It also states that she does ''not deny nor . . . [has she] ever in the past the unfortunate course of actions . . . [she] decided to take by diverting controlled substances.'' *Id.* at 2. Her Written Statement continues with her ''accept[ing] sole responsibility and . . . [stating that she has] taken actions to become sober and healthy and continue[s] to do such.'' *Id.*

Respondent's choice to submit a Written Statement, instead of taking advantage of her right to a hearing, means that she cannot answer questions about her acceptance of responsibility. The several areas of concern I have about her acceptance of responsibility, therefore, remain unresolved. First, Respondent's statements accepting responsibility are expressed only in the general terms of diverting controlled substances. *Id.* at 1, 2. Second, she does not accept responsibility for all of the OSC's founded allegations. Instead, she is explicit in her ''deni[al of] all the above charges against her,'' meaning, at least, the OSC charges that she was convicted of a felony relating to a controlled substance and that she materially falsified her registration renewal application. RFAAX 11, at 1. Third, she does not address, let alone accept responsibility for, the conduct the TMB found as a basis for disciplining Respondent. RFAAX 3, at 3–5 and RFAAX 11, at 11–13.

Consequently, Respondent's acceptance of responsibility is not broad enough to encompass all of the Agency's charges against her. RFAAX 3, at 3–5 and RFAAX 11, at 1, 11–13. As such, it is not unequivocal, as the Agency requires. *Jeffrey Stein, M.D.,* 84 FR 46,968, 46,972–73 (2019) (unequivocal acceptance of responsibility); *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009) (collecting cases). These deficiencies are concerning as they may mean that Respondent is not ready and/or willing to appreciate (1) the full extent of her misconduct and the (2) breadth of the harm her misconduct caused. I am also left wondering what Respondent learned from her misconduct, and whether Respondent has the resources to avoid committing the misconduct again.

For example, Respondent's statements accepting responsibility connect this acceptance with a violation of ''the oath . . . [she] took as a physician and trusted public figure.'' RFAAX 10, at 1. This, of course, is good and appropriate, and it ties into her statements that she has ''done everything in . . . [her] power to correct . . . [her] actions,'' and that ''she continue[s] to work hard at maintaining sobriety and gain[ing] the trust of those that . . . [she has] lost, including the public.'' *Id.* Her acceptance of responsibility does not appear to extend beyond the impact of her misconduct on herself, her sobriety, and the public's perception of her trustworthiness. For example, she focuses on herself as she characterizes as ''unfortunate'' Parkland Hospital's taking legal action concerning her diversion of controlled substances. RFAAX 10, at 1; *supra* section II.F. She does not mention, let alone unequivocally accept responsibility for, potentially endangering the lives of the Hospital's patients. RFAAX 3, at 3–4 and RFAAX 11, at 11–12. By way of further example, she does not acknowledge that her misconduct, not complying with the closed regulatory system devised to ''prevent the diversion of drugs from legitimate to illicit channels,'' goes to the heart of the CSA. *Gonzales* v. *Raich,* 545 U.S. at 13–14, 27. Her stated ''hard work'' goes to ''maintaining sobriety and gain[ing] the trust of those that . . . [she has] lost, including the public,'' but not, apparently, also to regaining the trust of the Agency whose statutory responsibilities include determining who may be entrusted with the responsibilities of a controlled substance registration.

For all of the above reasons, it is not reasonable for me, at this time, to trust that Respondent will comply with all controlled-substance related legal requirements in the future.[19] *Alra Labs., Inc.* v. *Drug Enf't Admin.,* 54 F.3d at 452 (''An agency rationally may conclude that past performance is the best predictor of future performance.'').

[19] I do not consider remedial measures when a Respondent does not unequivocally accept responsibility. As discussed, the scope of Respondent's presentation of remedial efforts was limited and, therefore, unpersuasive and not reassuring.

Accordingly, I shall order that Respondent's registration be revoked and that all pending applications to renew or modify Respondent's registration, and any pending application for a new registration in Texas, be denied.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I hereby revoke DEA Certificate of Registration No. FG2374053 issued to Erica N. Grant, M.D. Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I further hereby deny any pending application of Erica N. Grant, M.D., to renew or modify this registration, as well as any other pending application of Erica N. Grant, M.D. for registration in Texas. This Order is effective August 27, 2021.

Anne Milgram,

Administrator.

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DEPARTMENT OF JUSTICE

[OMB Number 1121–0277]

Agency Information Collection Activities; Proposed Collection and Comments Requested; Reinstatement With Change of Previously Approved Collection #1121–0277: OJJDP's National Training and Technical Assistance Center (NTTAC) Feedback Form Package

AGENCY: Office of Juvenile Justice and Delinquency Prevention (OJJDP), Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until September 27, 2021.

FOR FURTHER INFORMATION CONTACT: If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jill Molter, Web Content Manager, OJJDP's NTTAC COR at 202–514–8871, Office of Juvenile Justice and Delinquency Prevention, Office of