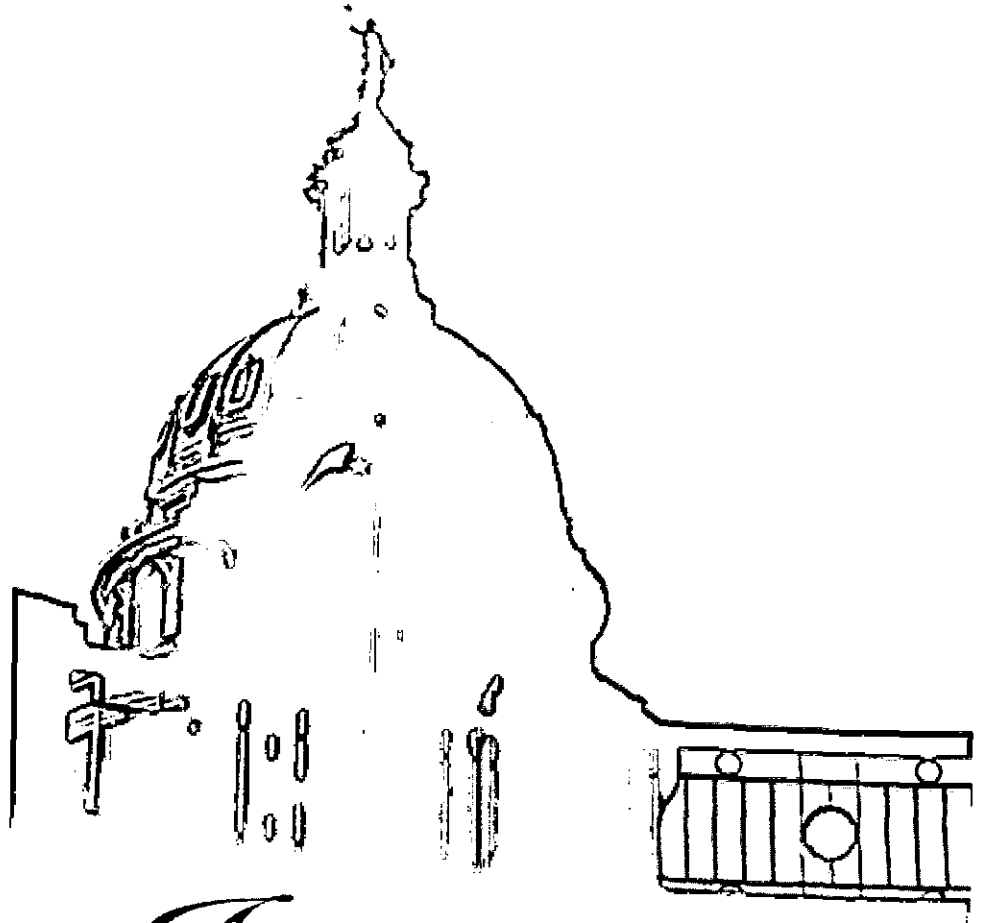


*January 2008*



*Senate  
Research  
Center*



*Issues  
Issues  
Issues  
Facing*

*The  
78<sup>th</sup>  
Texas Legislature*

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*Prepared by Senate Research Center*

***ISSUES FACING THE***  
***78<sup>th</sup>***  
***TEXAS LEGISLATURE***

**A briefing report prepared by the  
Senate Research Center**

**January 2003**

The following information is intended to serve as a reference guide to issues facing the 78<sup>th</sup> Legislature. It is not a comprehensive list of issues, but rather an outline of broad categories and topics of concern that have arisen during the interim. This list is not intended to function as an endorsement of any issue by the Senate Research Center.



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◆  
**Budget**

***The 2004-2005 Biennial Revenue Outlook***

In accordance with Article III, Section 29a, of the Texas Constitution, in January 2003, the Comptroller of Public Accounts (comptroller) will issue the *Biennial Revenue Estimate (BRE) Report (78<sup>th</sup> Texas Legislature, 2004-2005)* that presents the revenue estimate for the remainder of fiscal year (FY) 2003 and projects the anticipated revenue available for the 2004-2005 biennium.

The vast majority of revenue will come from the sales tax. Other major sources of revenue are: motor vehicle sales taxes, franchise tax, natural gas tax, insurance premium taxes, tobacco settlement proceeds, and lottery proceeds.

The 77<sup>th</sup> Legislature appropriated \$61.5 billion for the FY 2002-2003 budget. This budgeted amount contains expenditures of \$5.1 billion funded from “one-time” or non-recurring sources of revenue that will not be available for the FY 2004-2005 biennium. The chart (see page 2) entitled *Potential Fiscal Imbalances Affecting the 2004-2005 Biennium* delineates the non-recurring sources of revenue and spending not covering the full two years. In order to maintain current services due to the natural growth of the economy combined with unexpected increased costs, the 78<sup>th</sup> Legislature, for the first time in more than a decade, will be faced with a revenue shortfall.

***Rainy Day Fund***

The Texas Constitution requires half of the undedicated and unencumbered balance in the General Revenue Fund at the end of the biennium to be transferred to the Economic Stabilization Fund, more commonly known as the Rainy Day Fund. The fund is designed to provide the state with a mechanism to save money when economic times are good by putting away revenue that may be needed when a fiscal emergency arises or the economy suffers a downturn.

The Rainy Day Fund receives revenue from four sources: the oil production tax, the natural gas severance tax, the unencumbered General Revenue Fund balance, and legislative appropriations. To date, there have been nine natural gas severance tax transfers, one oil production tax transfer, and one unencumbered balance transfer. The legislature has never appropriated money to the Rainy Day Fund. Since its inception in 1987, \$993 million has been transferred to the Rainy Day Fund. The comptroller has estimated that the Rainy Day Fund balance, including interest earnings, will be more than \$1 billion by the end of FY 2003. The legislature may appropriate amounts from the Rainy Day Fund at any time for any purpose by a two-thirds vote of the members present in each house.

## Potential Fiscal Imbalances Affecting the 2004-2005 Biennium (\$ millions)

### *Non-recurring Sources of Revenue*

Estimated Ending Fiscal 2001 Certification Balance	\$	2,934
Inclusion of TIF Balance in GR-Dedicated		458
Deposit of Protest Interest in GR		99
Lottery Speed-up		65
Permanent School Fund Investment Rider		150
Additional Tobacco Settlement Proceeds		<u>47</u>
<b>Total Non-recurring Sources of Revenue</b>	<b>\$</b>	<b>3,753</b>

### *Spending Not Covering Full Two Years*

Teacher Health Insurance	\$	1,250
Non-payment of 25 <sup>th</sup> Month of Medicaid*		<u>161</u>
<b>Total Spending Not Covering Full Biennium</b>	<b>\$</b>	<b>1,411</b>
<b>Total Imbalance</b>	<b>\$</b>	<b>5,164</b>

*\*This arguably is not a one-time measure, but by not making budget cuts elsewhere and funding 25 months of Medicaid during 2002-2003, the Legislature removes an option for a one-time gain in 2004-2005 by delaying a month of Medicaid.*

The \$5 billion imbalance is not for the 2002-2003 biennium. The budget for the current fiscal biennium is still balanced.

The \$5 billion imbalance is relevant to the 2004-2005 biennium. That is, the current budget is financed with \$5 billion in one-time measures—which will be unavailable to finance the 2004-2005 budget—most of it coming from the spend-down of surplus that was left over from fiscal 2001.

The \$5 billion imbalance can be thought of as the size of the beginning speed bump that the 78<sup>th</sup> Legislature must climb over to get back on relatively level ground; once surmounted, the legislature can start looking at whatever additional revenue there might be in 2004-2005, and what additional demands there might be in 2004-2005.

Source: Comptroller of Public Accounts

### ***Tobacco Settlement Proceeds***

Pursuant to the 1998 Comprehensive Tobacco Settlement, Texas will receive an estimated \$1.16 billion, before adjustments, in receipts for appropriation during the 2004-2005 biennium. The legislature appropriated \$945 million in direct Tobacco Settlement proceeds for the 2002-2003 biennium, which funded such programs as the Children's Health Insurance Program (CHIP), Medicaid simplification, Medicaid provider rate increases, other health care services, and bond debt service payment.

In addition to the direct appropriation of receipts collected in conjunction with the 1998 Tobacco Settlement, estimated earnings from funds and endowments created with Tobacco Settlement receipts will be available for legislative appropriation for the 2004-2005 biennium. During the 2002-2003 biennium, \$134.3 million of these funds were appropriated to various agencies and institutions of higher education for use as specified by statute. The base amount of tobacco settlement receipts will reach \$580 million per year beginning in FY 2004 and continue at that amount thereafter, subject to various adjustments, for 25 years.

### ***Constitutional Spending Limits***

The Texas Constitution contains four limits on spending. They are the "pay-as-you-go," or balanced budget, limit; the limit on welfare spending; the limit on the rate of growth of appropriations from certain state taxes; and the limit on debt service.

#### ***Pay-As-You-Go Limit***

Article III, Section 49a, of the Texas Constitution prohibits the legislature from appropriating more revenue than will be collected unless approved by a four-fifths vote of each house. Under the Tax Relief Amendment of 1978, the growth of appropriations from state tax revenues not dedicated by the constitution is limited to the estimated growth of the state's economy.

Once an appropriations bill is passed by the legislature, the comptroller must determine if anticipated revenue will be sufficient to cover appropriations. If the comptroller determines the appropriations bill is within the constitutional limit, the bill is certified and goes to the governor for approval. If the comptroller determines the bill appropriates more than the amount of anticipated revenue exceeding the constitutional limit, then the bill returns to the house in which it originated, where steps may be taken to bring appropriations within the amount of anticipated revenue.

### ***Welfare Spending Limit***

Article III, Section 51-a, of the Texas Constitution provides that the amount that may be paid out of state funds for assistance grants to or on behalf of needy dependent children and their caretakers (Temporary Assistance for Needy Families, or TANF) shall not exceed one percent of the state budget in any biennium.

### ***Limit on the Growth of Certain Appropriations (Spending Limits)***

The Texas Constitution limits the biennial rate of growth of appropriations from state tax revenue not dedicated by the constitution to the estimated rate of growth of the state's economy under Article VIII, Section 22. The Legislative Budget Board (LBB) adopts items of information, which include: the estimated rate of growth of the Texas economy as measured by personal income, the 2002-2003 level of appropriations supported by the state tax revenue not dedicated by the constitution (the base biennium), and the limit on appropriations or the constitutional spending limit for the 2004-2005 biennium. The limit on appropriations for the 2004-2005 biennium is determined by multiplying the 2002-2003 base biennium by the growth of Texas personal income from the 2002-2003 biennium to the 2004-2005 biennium.

On November 25, 2002, the LBB established the following elements of the Article VIII spending limit:

- ❖ An 11.83 percent rate of growth of personal income from the 2002-2003 to the 2004-2005 biennium.
- ❖ A base level of total appropriations of \$49.171 billion, supported by tax revenue not dedicated by the constitution, for FY 2004-2005.
- ❖ A limit of \$54.988 billion of appropriations supported by tax revenue not dedicated by the constitution for the 2004-2005 biennium.

The appropriation levels are subject to adjustment resulting from actual expenditures for the current biennium and the Comptroller's *Biennial Revenue Estimate*.

### ***State Indebtedness***

Article III, Section 49-j, of the Texas Constitution provides that maximum annual debt service in any fiscal year on state debt payable from the General Revenue Fund may not exceed five percent of an amount equal to the average of the amount of General Revenue Fund revenues, excluding revenues constitutionally dedicated for purposes other than payment of state debt, for the three immediately preceding fiscal years. Bonds and agreements initially required to be repaid from General Revenue would be subject to the debt ceiling provision if General Revenue was subsequently needed to repay the obligations.

## **Revenue/Budget Considerations for the 78<sup>th</sup> Legislature**

Due to the potential fiscal imbalance facing the 78<sup>th</sup> Legislature, there has been public discussion of various revenue alternatives to help alleviate the budget gap. The ultimate fiscal implications of these possible alternatives would be dependent on the final language of the legislation passed.

### ***Increase the Cigarette Tax***

Texas' current cigarette tax rate is 41 cents per pack, ranking it 28<sup>th</sup> among the 50 states. The national average is 60 cents per pack. Texas cigarette tax revenues in the FY 2002-2003 biennium were approximately \$1.02 billion, with 100 percent of the cigarette tax allocated to the General Revenue Fund. The last increase to the cigarette tax was in 1990.

National statistics indicate that 21 states implemented higher cigarette tax rates in 2002. Legislation to increase the cigarette tax in Texas has been filed.

### ***Delaware Sub-Structure Issue***

The Delaware Sub-Structure is a complicated corporate structure which includes limited partnerships that is being used by companies in Texas to avoid paying the state franchise tax. This structure provides for the routing of income out of state and then back into Texas, tax-free. Companies, such as Southwestern Bell, have converted to a limited partnership to avoid franchise tax, but the routing of income through a limited partnership is not limited to telecommunication companies. The comptroller's office estimates that the Delaware Sub-Structure cost the state approximately \$143 million for FY 2003 and has estimated a minimum loss of \$246 million for the 2004-2005 biennium.

### ***Catalog/Internet Sales Tax***

The comptroller's office has estimated that Texas lost approximately \$200 million in catalog sales tax and an additional \$192 million in Internet sales tax for FY 2003. Due to federal restrictions, these funds are not accessible by the states. The estimates above were provided for informational purposes only.

### ***Use of Rainy Day Funds***

The Economic Stabilization Fund, commonly referred to as the Rainy Day Fund, is a funding source available for appropriation by the legislature. Several provisions dictate the amounts available for appropriation; however, the legislature may appropriate amounts from the fund at any time and for any purpose by a two-thirds vote of the members present in each house.

The legislature has appropriated money from the Rainy Day Fund for three purposes. The 72<sup>nd</sup> Legislature appropriated \$28.9 million in 1991 for the Foundation School Fund to aid public schools. The 73<sup>rd</sup> Legislature appropriated \$119 million in 1993 to the Texas Department of Criminal Justice for prison construction and an additional \$78 million to fund a state jail system.

The comptroller has estimated that the Rainy Day Fund will have more than \$1 billion dollars at the end of the 2002-2003 biennium.

### ***Securitization of Tobacco Settlement Revenues***

Pursuant to the 1998 Comprehensive Tobacco Settlement, Texas is scheduled to receive \$15 billion in settlement proceeds over 25 years. In lieu of receiving funds in a steady revenue stream, some states are moving to securitization to obtain lump-sum, up-front payments. Securitization refers to replacing cash flows with negotiable securities, such as bonds, issued in public capital markets. It should be noted that by using securitization as a method for generating revenue, some states have had their bond rating lowered by credit rating agencies. This phenomenon is due, primarily, to credit rating agencies viewing tobacco securitization as a non-recurring revenue option and the perception that the state lacks a longer-term solution for its funding needs.

To date, 15 states have securitized all or part of tobacco settlement revenues to help fund budget needs.

### ***Budget Cost Drivers***

#### **Legislative Appropriation Requests**

The Legislative Budget Board (LBB) has indicated that agency baseline budget requests total \$8.1 billion above the 2002-2003 baseline budget, which includes \$3.8 billion in additional general revenue funds. An additional \$9 billion in exceptional items (all funds) has been requested, of which \$5 billion is additional general revenue funds.

This budget data (both base and request) is subject to change as the staffs of the LBB and the Governor's Office of Budget, Planning, and Policy (GOBPP) continue to review agency Legislative Appropriation Requests (LARs). Agency LARs are reopened from time to time at the request of the LBB or GOBPP staff.

#### **Major Baseline Increases**

Increases in the baseline budget requests have been seen in almost all large agencies' LARs. While the amounts vary considerably from agency to agency, three significant requests for additional baseline funding are listed below.

- ❖ The Health and Human Services Commission (HHSC) has an increased baseline request of \$1.292 billion. This rise is primarily due to increases in caseloads for Medicaid and the increased cost and utilization of prescriptions in the Medicaid program.
- ❖ The Teacher Retirement System (TRS) general revenue baseline increase is \$1.82 billion. This rise is primarily due to payroll growth in retirement, a significant increase in the TRS-Care shortfall, and two years of funding in the TRS Active Care program.
- ❖ The Texas Higher Education Coordinating Board has included a baseline increase of \$179 million. The major component of this increase is due to anticipated growth in the Texas Grants program.

◆  
**Business and Commerce**

***Economic Development***

Texas, like many other states, faces a projected state revenue shortfall, an elevated unemployment rate, and a weakened economic market. Given a two-year extension after its Sunset Advisory Commission (Sunset) review bill was not passed by the 77<sup>th</sup> Legislature, the Texas Department of Economic Development (TDED) will be reviewed again by the 78<sup>th</sup> Legislature. TDED had drawn scrutiny during its 2001 review for management and oversight concerns in the agency. Although the TDED 2003 Sunset review cites improvements in these areas, the legislature will likely consider a reorganization to better utilize agency resources to promote Texas business and tourism.

At the time TDED was continued for further Sunset review, the legislature chose not to continue the Smart Jobs Program (SJP), a program that had been one of the areas of concern over mismanagement. After the SJP expired December 31, 2001, legislators reviewed the state's workforce programs and will probably address their funding and function during the 78<sup>th</sup> legislative session. Several state officials have indicated the need for a program like SJP, explaining that many businesses think of such a program as a safety-net, a program not likely to be used but a valuable incentive to locating in Texas.

***Lending Practices***

The legislature will presumably also review Texans' access to capital and banking institutions' lending practices to both public and private entities. Some concern has been raised about the out-of-state migration of Texas capital, leaving Texans with less in the way of available funds for borrowing. The legislature may consider measures to

give public institutions more information about banks and more freedom in selecting a banking institution, including consideration of where the deposits are retained and how each bank plans to serve its borrowing community. The legislature might also consider the state's regulation of small and short-term lending from community banks and from nontraditional lenders such as pay day establishments and pawnshops. Testimony presented this interim to the legislature by community bankers expressed an inability to provide such lending without changes to the regulation of that practice and that small, short-term, fee-based loans are something their customers want and need.

The legislature may also review several mortgage lending issues, including predatory lending and marketing practices. Some have expressed concern regarding marketing strategies that target low-income areas with sub-prime lending advertisements. Although the sub-prime market serves many who would not otherwise be able to finance a home purchase, some question the practice of targeting certain areas, preying on those in need with the offer of loans that in some cases should not be made or could be made on more favorable terms. The legislature may continue its work to clarify the differences between the sub-prime market and the practice of predatory lending.

### ***Homeowners and Automobile Insurance***

The business of insurance is one of the most prominent issues facing the 78<sup>th</sup> Legislature. Texas' homeowners insurance market, in particular, has garnered a great deal of attention over the past two years. Texas regulators and legislators this interim have been dealing with an insurance crisis that included rapidly rising rates and the threat of limited product availability, which largely resulted from the recent rise in the number and cost of mold-related homeowners claims. Areas for legislative action, however, are not limited to dealing with the mold problem.

At the end of 2001, Texas' homeowners insurance market included over 3.3 million policies with aggregate written premiums of approximately \$3.7 billion, while Texas' auto insurance market included over 11.7 million private passenger auto-liability policies and total written premiums of approximately \$9.4 billion. Ninety-five percent of the homeowners market in Texas is carried by companies that are free from rate regulation and are not required to report rate information to the Texas Department of Insurance (TDI). Approximately one-third of the automobile insurance market is carried by county mutual insurance companies, which are also free from rate regulation.

Here are a few of the pertinent insurance issues upon which the legislature will focus its attention:

- ❖ **Rates and Forms.** The legislature will review Texas' benchmark rating system and make changes to foster affordable rates for Texas consumers and ensure the availability of homeowner and automobile insurance products by maintaining a competitive and profitable environment for insurers. Options suggested by TDI include bringing those companies which are currently non-

Rate-regulated into the current benchmark system, requiring all insurers doing business in Texas to follow the same rules; moving completely to deregulation with no oversight of rates, relying solely on marketplace controls; changing the rating and form approval system to file-and-use, thus providing insurers moderate flexibility and TDI more information about market activity; or making no changes to the rating system, leaving the market virtually unregulated and, instead, addressing areas that have exacerbated current market conditions.

- ❖ **Use of Credit Information.** The 78<sup>th</sup> Legislature will review insurers' use of credit information in making various insurance determinations such as risk classification, underwriting, and rating. Some regulations governing privacy issues and the disclosure of credit determinations are currently in place, but the legislature may consider further restrictions to the use of consumers' credit information in relation to obtaining insurance.
- ❖ **Public Adjuster Licensing and Claims Processing.** The legislature will consider requiring the licensure of public insurance adjusters. Many attribute some part of the sudden rise in mold-related and water-related losses to improper claims assessment and handling. In that vein, the legislature may also establish statutory guidelines for proper claims processing. Damages caused by mold-related or water-related events can often be limited by swift and knowledgeable action addressing the cause.
- ❖ **Building Practices and Mold Remediation.** The legislature may also consider options for the regulation of building practices that have an impact on the presence and growth of mold in indoor environments and the regulation of health and cleaning professionals who provide remediation services, such as providing statewide guidelines for mold prevention and remediation and creating a process for the state certification of mold remediators.

### ***Electric Deregulation***

Eighty-five percent of Texas' electrical power, over 70,000 megawatts, is now in a single operational area under the control of the Electric Reliability Council of Texas, or ERCOT. ERCOT is responsible for maintaining the reliable transmission of power across the 37,000-mile power grid within the ERCOT region and providing the platform for wholesale and retail competition by serving as an independent system operator. The ERCOT service area does not include the El Paso region, the northern Panhandle, and small areas around Texarkana and Beaumont. The testing and implementation of Texas' newly restructured electric utility market, created by S.B. 7 during the 76<sup>th</sup> Legislature, commenced this interim under observation by the joint Electric Utility Restructuring Legislative Oversight Committee, also created by S.B. 7 and charged with overseeing Texas' transition to a competitive electricity market and monitoring its effectiveness.

This new market allows retail electric customers to choose which company will provide their electric service. It also gives companies other than investor-owned utilities the

opportunity to generate and sell electricity. The restructured market created by S.B. 7 required investor-owned utilities to unbundle their services into three separate entities: power generation, power transmission, and retail functions. Other market participants are also allowed to offer retail power generation and customer services in competition with the original investor-owned companies. The transmission of electricity will continue to be regulated by the state.

Here are a few milestones and highlights:

- ❖ July 31, 2001 - After technical delays, ERCOT began operation of the transformed single control area and initiated a gradual ramp-up in retail participation in the pilot program designed to test new market systems.
- ❖ January 1, 2002 - After steady improvements through the pilot program, full implementation of the newly restructured market began on this date, as set in statute, throughout ERCOT's service region, covering 75 percent of Texas' land area.
- ❖ Residential customers have paid approximately \$740 million less under the new market's price-to-beat rates through September 2002 than they did the previous year through September 2001, \$175 million from a statutorily mandated six percent reduction and \$565 million from reduced fuel costs and the expiration of fuel surcharges.
- ❖ As of September 27, 2002, nearly 430,000 switch requests have been submitted to ERCOT.
- ❖ As of November 2002, while Texas' 76 cooperatives and 85 municipally owned utilities now participate in the competitive wholesale market, none of them have opted to open their systems to retail competition.

Although much work has been done, more is likely ahead in areas such as ERCOT board governance, consumer complaint handling, market oversight, and Texas' transmission lines. Over the past year, some concerns were raised regarding the composition and size of ERCOT's stakeholder board as currently provided for in law. Some expressed interest in adding independent board members. Although the ERCOT board's governance working group has begun evaluating and implementing changes to ERCOT's board governance structure that would reduce its overall size while adding three independent board members, the legislature may revisit the provisions governing board structure.

The Public Utility Commission of Texas (PUC) is responsible for educating consumers on Texas' new competitive electricity market and handling consumer complaints when consumers have difficulty with their electric service. Some have expressed concern regarding the period for complaint processing and have asked for consideration in that area as well as the number of staff and resources allocated to that division. The PUC's market oversight division has worked to prevent market gaming in Texas and

believes for the most part that the trading strategies used to inappropriately manipulate California's market for independent gain cannot be used in the ERCOT system. The PUC contends, however, that gaming cannot be completely eliminated and that constant surveillance is necessary to minimize gaming opportunities. The PUC has requested an additional \$1.5 million a year for market oversight enhancements.

Finally, one area that would significantly improve Texas' energy grid is the growth of its transmission infrastructure. Transmission constraints increase electricity costs to consumers, reduce system reliability, and increase the risk of equipment damage. Reducing Texas' transmission constraints by encouraging the continued planning and development of this segment of the electricity market through the installation of new transmission lines is essential to maintaining reliable and affordable electricity.

## ◆ Border Affairs

The past decade has reflected an increasing awareness of the impact that Texas-Mexico border issues have on the state as a whole. Many believe that the health of the State of Texas depends on the health of its border region. Issues that have become chronic areas of concern for Texas' border citizens were the subject of interim hearing discussions: health care needs, water issues, environmental quality, educational opportunities, transportation, and cross-border commerce. Addressing the increasing critical needs of the border region in light of the projected revenue shortfall will probably be among the issues facing the legislature.

One measure passed by the 77<sup>th</sup> Legislature and approved by voters on November 6, 2001, was the Border Colonia Access Program, a program to fund road improvements in 21 border counties through the issuance of up to \$175 million in general obligation bonds. Issues that may garner further attention in relation to improvements to border region transportation infrastructure include:

- ❖ Official designation and assessment of colonias and the collection and maintenance of colonia information; and
- ❖ New limited ordinance-making authorities for county officials to ensure the quality of improvements to their communities, such as ensuring that new roads are emergency-vehicle accessible and include proper drainage and pedestrian safety measures.

Some have expressed concern regarding the standards for improvements in border colonias, stressing the importance of ensuring that investments made in the region to homes and infrastructure meet code requirements and are made with foresight so that

community members may improve their living conditions by building home equity and safe, fully accessible communities.

Both public and private entities will likely seek to strengthen the region's economic development by establishing greater "one-stop-shop" opportunities; that is, establishments that bring together, in one location, resources for small businesses such as supplier lists, borrowing assistance, and other business guidance. Particular interest has been expressed in increasing access to and use of more technologically advanced business development tools and networks. The border region's continued lack of the complete spectrum of health care services has spurred many to advocate for more health care education opportunities in those regions, bolstering border health care with an infusion of educated practitioners who have a personal investment in improving the health conditions of the region. Lacking schools with advanced training opportunities, hospitals in the region struggle to find and retain specialists to provide needed services. The establishment of a new medical school in the region will possibly be considered by the legislature; El Paso has renewed its long-standing request for such an institution. Equity in funding for health and human services programs in the region also remains an issue that the legislature may consider.

Two issues facing the border region and the 78<sup>th</sup> Legislature have significant national and international components: water rights and border ports-of-entry. Government officials at all levels have struggled to make progress in securing the 1.5 million acre-feet of accrued water debt owed by Mexico and in maintaining the tenuous relationship established by the 1944 United States-Mexico water treaty. State officials will continue to consider possible actions to secure the water that border farmers badly need. As the federal government works to strengthen the security of our national borders, border communities will continue to work, along with state officials, to ensure that the needs of Texans are considered and that the implementation of those security measures does not come at the cost of border Texans' quality of life and community health, viability, and livability.

### ***Binational Health Benefit Plan Coverage***

The Texas-Mexico border region is one of the most poverty-stricken areas in the state and nation, with health care practitioners experiencing the lowest insurance and Medicaid reimbursement rates in the state. The border area is also home to many families with members living in both Texas and Mexico; these families often travel in both directions across the border for health care services. In the interest of finding a "medical home" for such families, the Interim Committee on Binational Health Benefit Plan Coverage considered the prospect of formulating an appropriate plan.

The committee's charges were to consider the need for binational health benefit plan coverage; assess the health care needs of the border area and how those needs can be served by various types of providers; and assess the affordability, cost-effectiveness, economic impact, and improved health status achievable through binational health benefit plan coverage. The committee was particularly concerned with preventive and prenatal care.

The committee held three hearings and received testimony from a number of insurance providers, health care providers, citizens, and groups, including Consumers Union. Of particular concern is the quality of care for patients traveling to Mexico for health services, given that Mexico's medical system has different standards, techniques, and accountability mechanisms. Doctors on the U.S. side expressed concern that they would be required to deal with medical situations arising from faulty or substandard treatment received on the Mexico side, further taxing an already overburdened border area health care system.



## Health and Human Services

### *Children's Mental Health*

Texas is facing a crisis in mental health services for children and adolescents. Children with mental health needs often suffer as a result of missed opportunities for prevention and early intervention, poorly coordinated treatment systems, and a lack of resources necessary to respond to their unique needs.

Five areas have been identified as essential in addressing the unmet mental health needs of children, including:

- ❖ A multifaceted system to improve the identification, diagnosis, and treatment of children with potential mental health problems;
- ❖ A simple set of warning signs indicating potential problems with children that can be distributed easily to parents, the general public, and professional groups;
- ❖ The consideration of social and emotional issues as well as academic skills in evaluating children;
- ❖ The need for primary care medical providers to develop and distribute educational materials that educate parents and providers about children's mental health issues; and
- ❖ Additional funding for children's mental health services that is tied to the needs of the individual child.

The Senate Health and Human Services Committee has made recommendations that may be considered by the legislature. The committee recommended expansion of the

systems of care model and creation of an integrated funding mechanism. In a well-defined system of care model, schools, community mental health centers, psychiatric treatment programs, social service organizations, juvenile justice programs, and primary health care organizations coordinate services to address the needs of children in the community.

In Texas, during FY 2001, a significant number of parents relinquished custody of their children to the Department of Protective and Regulatory Services (DPRS), many in order to access residential treatment services for their child's mental health needs. Many of these children could be maintained in the community if therapeutic foster care and intensive treatment and support were available either to prevent residential placement or to shorten the length of stay. The legislature may consider additional funding to increase the capacity of therapeutic foster care so that parents would not have to relinquish custody in order to gain access to services.

Research indicates that early intervention leads to improved outcomes and reduced costs for services. The legislature will likely consider directing the Texas Department of Mental Health and Mental Retardation (TDMHMR) and the Interagency Council for Early Childhood Intervention (ECI) to continue working to develop a continuum of care for children under the age of seven with mental health disorders. In addition, the legislature may consider directing TDMHMR to continuously develop, implement, and disseminate treatment guidelines for children's mental health and facilitate continuing education for primary care physicians regarding children's mental health.

The coordination of all publicly funded children's mental health programs is considered an essential part of improving the delivery of services. The legislature may consider legislation that will require the Texas Education Agency (TEA), TDMHMR, Texas Department of Health (TDH), and the Texas Commission on Alcohol and Drug Abuse (TCADA) to assess current programs relating to school-based mental health and substance abuse programs and make recommendations about further development of this type of program. The legislature may also consider legislation that would allow state agencies to utilize psychological assessments conducted by other state agencies rather than paying for additional, duplicative assessments.

Currently, many private insurance policies do not provide coverage for mental illness that is comparable to the coverage provided for a physical illness. To address this problem, the legislature may consider legislation that would mandate that all state-regulated health insurance policies provide coverage for mental, emotional, and behavioral disorders in children equal to coverage provided for other medical conditions, without discrimination against this category of illness.

### ***Welfare Reauthorization and the Food Stamp Program***

Texas faces several challenges with the Temporary Aid to Needy Families (TANF) reauthorization. Congress is considering significant changes to the welfare system including TANF funding issues, work-related requirements, child care, reauthorization of the Social Services Block Grant, marriage and child support issues, immigrant

requirements, and other provisions that will impact the state. In order to keep TANF programs at the state level in operation beyond the September 30, 2002, expiration date, Congress approved a three-month extension of the 1996 law at FY 2002 funding levels. On November 14, 2002, the House passed a bill further extending the existing welfare law to March 31, 2003.

Texas will face a \$78.3 million TANF deficit by 2007 unless the federal government authorizes an inflationary increase or the state reduces program expenditures. During the FY 2002-2003 biennium, federal TANF funds have been used to support cash assistance programs, the Choices Program, which provides employment services for adult recipients, foster care and adoption programs, Child Protective Services (CPS) investigations and related services, eligibility determination for cash assistance, at-risk prevention programs, and other programs at state agencies.

Reauthorization issues of importance to Texas include funding levels for TANF and child care, work requirements, allowable work activities, marriage promotion strategies, child support, and benefits to legal immigrants. Texas receives funds under the TANF block grant program to operate state-designed programs and, as a high-population-growth, high-poverty state, also receives a supplemental grant.

The legislature will likely be faced with developing an overall strategy for TANF spending to combat poverty in Texas. Ensuring the safety and well-being of children while parents work is crucial in helping families enter and maintain employment. Accessibility, affordability, and quality of child care services as a necessary support in workforce participation will be a critical issue during the next phase of welfare reform. Texas has approximately 40,000 children on waiting lists for child care and currently serves 107,000 of the 1.2 million potentially eligible low-income children.

In 2000, total child-care spending in Texas was \$398.4 million, with state funds accounting for \$68.4 million of the total, or 17 percent. The Child Care Development Block Grant is the primary source of subsidized child care in Texas. Proposed increases are not expected to fully address the child-care crisis for low-income children eligible for subsidies, thus the state may have to consider reducing child-care assistance to low-income families, which could force some to turn to or re-enter the TANF program.

All states can receive bonuses for various areas of performance, such as reducing out-of-wedlock births and achieving high levels of employment among recipients. The reauthorization bills being considered by Congress eliminate the nonmarital birth reduction bonus and reduce or eliminate the high-performance bonus. Texas received \$24.3 million through the high performance bonus and \$19.8 million for reducing out-of-wedlock births in 2002.

Work requirements or work participation rates imposed on states in order for a state to receive credit toward its participation rate is also an issue for Texas policymakers. Currently, states must meet a 50 percent work participation rate for single-parent

families and a 90 percent rate for two-parent families. Reauthorization proposals before Congress require states to increase the work participation rate from 50 percent to 70 percent over five years and eliminate the separate two-parent rate. States are given a caseload reduction credit, a one percentage point credit for every percent of its caseload reduced since the inception of TANF. Texas currently has roughly a 50 percent credit, making the federal participation rate easy to meet. Proposals before Congress replace the caseload reduction credit with an employment credit, based on the number of families employed after leaving TANF and their level of earnings, and a credit for states that use TANF funds directly for child care and transportation subsidies to working families.

Congress' final decision on the employment credit will impact Texas' ability to meet work participation rates. The caseload reduction credit has been vital in helping Texas meet current participation rate requirements. An employment credit, on the other hand, more appropriately emphasizes work placement over caseload reduction. Cost implications for Texas are also significant.

Under the current welfare law, states may not use TANF funds, cash assistance, or work supports and services for legal immigrants until they have been in the U.S. for at least five years. After five years, eligibility may be granted by the state. The U.S. Senate reauthorization bill includes a state option to provide TANF benefits to legal immigrants and Medicaid and CHIP benefits to pregnant women and children who are legal immigrants. Legal immigrants' access to nutritional assistance is also a major issue for Texas, which is home to more than two million legal immigrants, 22 percent of whom are below the federal poverty level.

The Farm Security and Rural Investment Act of 2002 (Farm Bill) includes provisions for reauthorizing and strengthening the Food Stamp Program. Certain provisions in the nutrition title of the Farm Bill are mandatory changes that states must implement, while others are optional.

The Food Stamp Program is an entitlement program; if an individual is eligible, he or she is guaranteed the benefit. The final Farm Bill authorized an increase of \$6.4 billion over the next 10 years. The new Food Stamp Program resource limit disregards all nonliquid resources excepting excess vehicle value. Applicants will be allowed to have up to \$5,000 in liquid resources, and \$15,000 of the fair market value of the applicant's first car is exempt. The Farm Bill includes mandated benefit improvements, quality-control reforms, and legal immigrant benefit restoration. In the quality-control area, the bill allows states time to address problems before being subject to automatic fiscal sanctions, ensuring that only states with serious, persistent problems will be subject to sanctions. The United States Department of Agriculture (USDA) will issue guidance for new performance measures for federal FY 2003-2004 and subsequent years.

Texas is home to about 47,000 of the 390,000 legal immigrants nationwide who will be eligible for restored benefits. The Congressional Budget Office estimates that Texas' legal immigrants may receive more than \$300 million in benefits over a 10-year period.

## ***Immunizations***

Immunizations have been identified as one of the most important health inventions of the past century and vaccines as one of the greatest achievements of public health. At the turn of the 20th century, thousands of citizens became ill or died from a wide range of highly infectious diseases, such as smallpox, measles, diphtheria, and pertussis.

Vaccines prepare a body to fight illnesses and create immunity. There are 12 serious diseases with vaccines. Fully immunized children provide a barrier between illness and children who are not fully immunized or who are unable to be vaccinated due to medical or other reasons, thus preventing the spread of the illness. Herd immunity, the immunity of the population as a whole, is more effective as the number of vaccinated persons increases.

Although 87 percent of parent respondents to a national survey believe that immunizations are “extremely important” for their child’s health, 23 percent believed that children receive more immunizations than are necessary. Incidents of unusual or serious reactions, while rare, have contributed to vaccine-related fears.

Results from the National Immunization Survey (NIS) show that, nationally, immunization rates have experienced a slight decline; Texas ranks 43<sup>rd</sup>. The problem of low immunization rates remains and continues to pose a threat to public health. Compounding the problem has been the recent vaccine shortage. Since 2000, the United States has experienced a shortage of five vaccines that provide protection against eight of the eleven vaccine-preventable childhood diseases.

The Senate Health and Human Services Committee made a number of recommendations to improve awareness of the public health benefits of immunizations. Legislation is being proposed that will direct the TDH to institute a continuous statewide immunization education campaign and increase coordination between local, regional, and state stakeholders on immunization issues through a statewide coalition. The legislature may also consider expanding the Educating Physicians in your Community (EPIC) Program, if the pilot proves to be successful and cost effective. EPIC is a physician-to-physician, community-based immunization education pilot program in the Houston area.

In 1994, TDH established an immunization tracking system, ImmTrac, to monitor the immunization rates for children across Texas. The current ImmTrac system lacks data from most of the commercial insurance sector; thus, it does not provide a complete picture of immunization rates or status in Texas or accurate immunization records for individual children. Fewer than half of Texas children are included in the registry. Poor data quality is attributable to several factors including consent issues, confidentiality concerns, and underpopulation of data.

Parents must consent or “opt in” before providers can submit immunization information to ImmTrac. This places a burden on hospital registrars, nurses, and other health professionals who must obtain parental consent for each child each time a vaccine is given. An “opt out” system would include all children automatically unless a parent chose to remove his or her child from the system. This type of system typically has higher participation rates and reduces the administrative burden for providers.

Proponents of an “opt out” system suggest that a strict “firewall” could be developed that would automatically delete information on those who have opted out of the system which would address confidentiality and medical privacy concerns. The modified system could support a recall and reminder campaign, provide centralized record-keeping, and identify particular areas of the state with low immunization rates, thus enabling TDH to develop targeted responses. The legislature may also consider modifying the ImmTrac system to increase provider participation by providing protection from liability for reporting entities and parent participation by enhancing medical privacy protections.

The rising cost of vaccines has also been a concern. Federal sources pay for the majority of total public vaccine expenditures through two programs, Vaccines for Children (VFC) and Section 317 of the Public Health Service Act (317 Program). In Texas, state immunization programs are funded through five different sources; general revenue accounts for 20 percent of the costs. There has been much debate on the use of universal vaccine purchase (UVP) programs as a means of controlling costs. In order to assess the feasibility of utilizing a UVP program in Texas, the legislature may consider asking the comptroller’s office to conduct a study to determine the fiscal impact on the state, the administrative feasibility of such a program, and the potential impact on the vaccine industry.

To address concerns related to the quality of immunization provider practices, the legislature may consider expanding the AFIX/CASA Program to include providers outside the VFC program. AFIX/CASA is an evidence-based strategy proven to be an effective way to improve immunization coverage. It is a methodology that provides for assessment of immunization records, provider feedback, incentives, and exchange of information for improving practice. CASA is the Clinic Assessment Software Application developed by the Center for Disease Control (CDC) through which a provider’s practice is assessed. Other methods to increase participation include provider education, administrative simplification, and increased vaccine administration reimbursement rates.

The legislature may also consider a requirement that all vaccines recommended by the state Advisory Committee on Immunization Practices (ACIP) be covered by state-regulated health plans. At present, only those vaccines mandated by law must be covered by health plans. As a result, Hepatitis A, pneumococcal, and influenza may not be covered.

Currently, participation in the VFC program is limited by federal law. Children in the Children's Health Insurance Program (CHIP) are ineligible for VFC, which significantly increases the cost to the state. The legislature may consider asking Congress to eliminate the policy that makes CHIP children ineligible for the VFC program and require coverage for ACIP-recommended vaccines under Employee Retirement Income Security Act (ERISA) health plans. The legislature may also encourage Congress to move forward with recommendations designed to improve access to and the availability of vaccines.

### ***Long-Term Care***

Decreasing revenues and rising Medicaid costs are placing an increased burden on the ability of states to provide long-term care services. Nursing home costs are one of the largest expenditures in the Texas Medicaid long-term care category. Texas policymakers, like other legislators across the nation, will likely consider a variety of cost-containment options, many of which affect long-term care programs and services.

In addition to expenditures for nursing facility care and intermediate care facilities for the mentally impaired, Texas also has a large personal care program which is funded with both Medicaid funds and state general revenue. The number of Medicaid-eligible people receiving services under the personal care program is also increasing substantially.

Strategies that have been considered in other states and that may be considered by the 78<sup>th</sup> Legislature to control costs in long-term care programs include: reducing or freezing rate reimbursement for nursing homes; revising income eligibility requirements for nursing homes to tighten admissions; imposing provider taxes; transforming reimbursement systems from cost-based methods to prospective payment systems; enhancing estate recovery and asset transfer recoupment from Medicaid beneficiaries; capping the enrollment of some waiver programs; placing tighter limits on personal care services; and capping long-term care per diem costs.

Texas has been engaged in a major long-term care planning process since 1999 to expand home and community-based services for people with disabilities. Although the state has an array of community services, there are long waiting lists for those services. The U.S. Supreme Court's 1999 *L.C. and E.W. v. Olmstead* decision, which requires states to provide community-based programs for persons with disabilities, and funding through the Systems Change Grant Program (SCGP) from the Centers for Medicare and Medicaid Services (CMMS) have resulted in increased efforts to assist nursing home residents who wish to do so to make the transition to community settings. In 2001, Texas received a grant of \$308,000 through the federal SCGP to expand outreach efforts to identify people with disabilities in nursing homes who want to make the transition into the community and, in 2002, received a second SCGP grant for \$1,385,000. The legislature may also consider additional enhancements to personal attendant care options and other community supports, including housing and transportation issues.

Assessing the quality of care in nursing homes and assisted living facilities and working to improve quality through more appropriate regulation and inspection will likely continue to be issues. Finding ways to increase the numbers of direct care workers in long-term care and provide incentives to nursing homes, home care agencies, and other long-term care providers to recruit and retain these workers also remain issues of concern. Efforts to stimulate the purchase of long-term care insurance policies will also continue to be of interest.

### **Medicaid/CHIP**

S.B. 43, 77<sup>th</sup> Legislature, directed the Texas Department of Human Services (DHS) to develop a single application form and set of procedures for Medicaid and the Children's Health Insurance Program (CHIP), including a mail-in option. The bill also required DHS to ensure that Medicaid documentation and verification processes are the same as those for CHIP. S.B. 43 also provided for recertification of eligibility by telephone or mail. By June 1, 2003, DHS is required to adopt rules to provide for 12 months of continuous eligibility.

The legislation also directed the Health and Human Services Commission (HHSC) to develop procedures to help families who may lose Medicaid coverage either to recertify or to enroll their children in CHIP. Families are required to attend an orientation session when they initially enroll in Medicaid and follow the regimen of preventive care and early detection used in Texas Health Steps. Enrollees in Medicaid managed care may not change managed-care organizations during the period of continuous eligibility.

Although the changes enacted in S.B. 43 have simplified the process of enrolling in Medicaid, many issues relating to the uninsured and underinsured remain. The 78<sup>th</sup> Legislature may consider several additional changes to the Medicaid and CHIP programs including:

- ❖ Implementing cost sharing for Medicaid clients;
- ❖ Expanding the Health Insurance Premium Payment System (HIPPS) program that allows the state to pay a Medicaid-eligible employee's share of the premium for employer-based health insurance and extends coverage to the entire family;
- ❖ Exploring statewide rollout of enhanced Primary Care Case Management (PCCM) for all Medicaid recipients enrolled in Temporary Assistance for Needy Families (TANF);
- ❖ Strengthening the oversight and enforcement of nonpayment and underpayment of providers for services rendered to Medicaid clients by certain Medicaid managed care and CHIP plans;

- ❖ Creating a mechanism to evaluate the amount of the premiums paid to CHIP and Medicaid managed care plans annually to ensure that premiums are adequate;
- ❖ Increasing reimbursement rates for providers or creating targeted increases to certain underserved areas;
- ❖ Reducing the administrative complexity of the Medicaid and CHIP programs;
- ❖ Expanding the provider pool through tax incentives for physicians who have at least 10 percent of their practice open to Medicaid and CHIP;
- ❖ Indemnifying physicians up to a certain amount on malpractice claims for Medicaid and CHIP patients; and
- ❖ Providing family coverage under CHIP.

### **Olmstead Compliance Efforts**

The U.S. Supreme Court in *L.C. and E.W. v. Olmstead* (June 22, 1999) held that states must provide community-based services for people with disabilities. Such community-based services must be appropriate to the individual's level of need and not objectionable to the individual, and the placement must be able to be reasonably accommodated, taking into account the resources available to the state and the needs of others with disabilities.

Under the Americans with Disabilities Act (ADA), states are obligated to adjust policies, practices, or procedures to avoid discrimination on the basis of disability, unless there is demonstrable evidence that the modifications would fundamentally alter the nature of the service, program, or activity. Under *Olmstead*, these modifications must be evaluated on the basis of three factors: the cost of providing services in an appropriate integrated setting; available state resources; and the effect on a state's ability to meet the needs of others with disabilities. The ruling also requires that states have a comprehensive plan for transitioning qualified individuals to less restrictive settings and off of waiting lists for community-based programs. ADA does not require termination of institutional placement for persons unable to successfully function in, or benefit from, community settings. State responsibility for community-based services to qualified persons with disabilities is not unlimited.

Following the *Olmstead* decision, HHSC was directed to review all of the services and support systems available to the disabled in Texas in the context of the ruling. HHSC began the Promoting Independence Initiative in response to *Olmstead*. A number of bills were passed during the 77<sup>th</sup> Legislature that addressed issues in *Olmstead* and altered the provision of long-term care services in Texas. The 77<sup>th</sup> Legislature also provided enhanced funding, an estimated \$627.1 million, to address the Promoting Independence Initiative and to respond to the *Olmstead* ruling.

A revised Promoting Independence Plan will be submitted to the 78th Legislature. Based on the plan changes and various studies conducted during the interim, the legislature will likely address additional *Olmstead* issues. A key issue that may be addressed concerns the need for funds to follow an individual from an institutional setting to the community. Another issue relates to the cost-effectiveness and feasibility of allowing Home and Community Services/Mental Health Local Authority (HCS/MRLA) consumers to receive services in a five-bed residence at the current applicable per consumer level of need rate. A voucher payment program as an alternative to the traditional provider agency option for various home and community-based services is also likely to come before the legislature for consideration. This would allow program participants or guardians to be the employers of record and to hire, train, and supervise personal assistants and respite providers.

On September 7, 2002, the Arc of Texas and Advocacy, Inc. filed a class action lawsuit in federal court against TDMHMR and DHS seeking to obtain services for persons on waiting lists for home and community-based services (HCS) and community living assistance and support services (CLASS). The lawsuit claims that the state is in violation of the federal Medicaid law that grants options to allow people with disabilities to remain in the community. The lawsuit has serious budget implications for Texas. The average cost per client per year for HCS is approximately \$42,000; the average cost per client per year for CLASS is approximately \$8,000. There are currently over 18,000 people on the waiting list for HCS and over 7,000 people on the waiting list for CLASS services.

While the state has developed a full array of community-based waiver programs and other supports, funding for these options has failed to keep pace with the need. Sustainable funding for promoting independence initiatives presents a serious problem in meeting the *Olmstead* requirements.

The state has taken positive steps to identify individuals and assess the appropriateness of community placement; however, barriers remain that need to be addressed. Little progress has been made in reducing the number of institutionalized children. Many of these children have complex medical and behavioral needs that complicate placement efforts, and a lack of attention to the housing needs of this population remains a concern.

Employment for persons with disabilities continues to be an issue. Exploring expansion of a Medicaid buy-in option is one approach to increasing employment that the legislature may consider. By increasing work opportunities, an individual's chance of long-term success in the community is enhanced and the state's continued financial contribution may be reduced. In 1999, Congress authorized a Medicaid buy-in option to allow states to permit individuals with disabilities who would lose their Supplemental Security Income-associated Medicaid coverage by returning to work, to maintain Medicaid coverage by sharing in the costs on a sliding scale. Texas received a federal Medicaid Infrastructure Grant to develop and implement a pilot program but was not granted the federal waiver necessary to proceed. The project is currently on hold.

The legislature may also review budgeting practices including dedicated funds and performance measures that are not flexible with respect to promoting independence initiatives. Wage disparity between institutional workers and those in the community is also an ongoing budgetary concern.

A major barrier to people with disabilities remaining in the community is the ability to pay for prescriptions. The Frail and Elderly Program at DHS only provides attendant services. High prescription drug costs can force individuals to access more costly full Medicaid coverage through the nursing facility program or the Community-Based Alternatives Program. Providing some level of prescription drug coverage may allow people with disabilities to remain in the community, thereby reducing reliance on more expensive programs.

### ***Organ Donation and Allocation***

Medical advances in organ and tissue transplantation have enabled many people suffering from life-threatening or debilitating diseases to lead productive lives. Despite the advances, however, many people who could benefit from an organ or tissue transplant never receive one because a donor organ or tissue is not available.

The need for organs significantly outweighs the number available. Over 300 people in Texas die each year waiting for an organ transplant. Currently, in Texas, there are more than 5,000 people on donor waiting lists. The number has doubled in the last five years and grows annually by 10 percent.

Due to the limited supply of organs and the growing demand, less than half of the people on the waiting list today will receive an organ. Currently, organs that can be donated include: kidney, liver, pancreas, heart, lung, heart and lung, kidney and pancreas, and pancreas islet cell. Tissues that can be transplanted include: bone, corneas, eyes, heart valves, skin, tendons, pericardium, veins, fascia, and dura mater.

Following issuance of final organ distribution rules by the U.S. Department of Health and Human Services in March of 2000, states began re-evaluating existing organ allocation policies in an effort to meet new national goals.

Texas law provides that organ donor cards are a legal statement of gift for an organ donation. The donor card is carried as evidence of the individual's intent regarding organ, tissue, or eye donation. Texas has also established an Anatomical Gift Educational Program (AGEP) to educate persons about making anatomical gifts that is supported through voluntary contributions made at the time of driver's license issuance or renewal.

Efforts have also been made to develop a more equitable organ allocation system and identify methods to increase organ donation. Some organ diseases, such as end stage renal disease, occur more frequently in certain racial and ethnic populations than in the general population. Transplantation is the most effective treatment for some of these diseases; however, studies suggest that disparities exist in actual transplantation

rates for these populations. Minorities account for more than half of the kidney transplant waiting lists.

Nationally, there are 59 organ procurement organizations (three are in Texas) that are responsible for carrying out the organ procurement process and allocating organs in accordance with current national policy. A TDH task force identified several defects in the current Texas organ allocation system. Patients in Texas lack access to donor organs due to the current geographic boundaries, the lack of uniform and consistent listing criteria used by the transplant centers to prioritize patients on waiting lists, the failure of hospitals to adhere to the required referral law, and the difficulty in matching donor organs with patients who have a higher probability of rejecting a donor organ.

The Senate Health and Human Services Committee made several recommendations likely to be considered by the legislature. In general, it is agreed that the problem of organ donation and allocation in Texas needs to be addressed through a multifaceted approach that includes increased public awareness, collection of vital data by TDH, development of a more equitable allocation system, and enhanced instruction of medical professionals regarding donor education.

Although funds have been collected by DPS for the AGEP, they have not been transferred to TDH and used for that purpose. The legislature may consider clarification of the statutory language for AGEP to ensure that the funds are transferred and used for organ donation education.

The legislature may also consider legislation to require TDH to assist organ procurement organizations (OPOs), hospitals, and medical communities to: develop best practices relating to organ donation, assess the donor potential in acute care hospitals, establish proper notification systems so that OPOs are notified by hospital staff when a potential donor is available, and enhance collaboration between OPOs and hospitals in dealing with donor families. Other potential issues include making first-person consent legally binding and revising the procedures by which terms of an anatomical gift may be amended or revoked. A variance that would allow statewide distribution of organs for individuals who are highly sensitized to rejecting an organ may also be considered. The legislature may also consider a study to identify barriers to transplantation in Texas for minority populations.

### ***Prescription Drug Abuse***

Although prescription drug misuse is not a new problem, the number of persons abusing prescription drugs has been increasing since the mid-1980s, according to the Substance Abuse and Mental Health Services Administration. From 1990 to 1998, the number of new users of pain relievers increased by 181 percent. One of the most commonly misused medications is hydrocodone, which is available only by prescription and is usually found in combination with another medication. Due to the effectiveness and safety of these products, they are more frequently prescribed than other drugs within the same class of drugs.

Pure hydrocodone is a Schedule II narcotic on both the federal and state controlled substances schedules. Hydrocodone combination products are in Schedule III. In 1982, Texas established a prescription monitoring program that required the use of an official prescription form for Schedule II drugs to prevent the diversion of controlled substances from licit to illicit use. Hydrocodone combination products do not require an official prescription form, thus are more readily available and more often prescribed by physicians.

Hydrocodone abuse in Texas occurs primarily through diversion from legal sources into the illicit market. When addressing misuse and diversion, ensuring availability and adequate pain management for individuals with chronic conditions remains an important public health objective.

The legislature will likely address the issue of the misuse of prescription drugs. Among the possible solutions that may be considered is the creation of an advisory committee comprised of representatives from the Board of Pharmacy, the Board of Medical Examiners, the Board of Dental Examiners, DPS, and appropriate medical professional associations to examine the need for a paper prescription form that minimizes the potential for forgery. Prescription fraud, alteration, forgery, and counterfeiting are sources of prescription drug diversion. This study would assess whether the revised paper prescription form is a cost-effective means to reduce theft and diversion.

The legislature may also consider requirements that would enhance awareness of the appropriate use of pain medication, as well as the misuse and diversion of such medication. In a similar vein, the legislature may direct regulatory boards to review the need to require additional instruction for practitioners in pain management and drug abuse.

In order to identify unusual amounts of controlled substances being delivered to a practitioner, the legislature may consider a requirement for registered distributors or manufacturers to report to DPS each delivery or distribution of all materials in specific categories made to a provider. In the event of unusual amounts, DPS could notify the proper regulatory agency for appropriate action.

### ***Rising Medical Costs***

National health expenditures are accelerating again after nearly 20 years of declining growth; overall health expenditures are projected to nearly double by 2011, with drug expenditures comprising a growing portion of total costs. Rising health care costs are not only a threat to the fiscal well-being of states, employers, health plans, and consumers, but also could reduce access to care for millions of Americans.

Hospital inpatient costs represent the largest component of health care spending. Inpatient costs grew by 5.9 percent annually over the period 1998-2001, almost twice the rate of inflation. While smaller than the rates of growth in prescription drugs and

outpatient spending, the overall increase in inpatient costs contributed the largest amount to the rise in hospital spending -- 34 percent -- during that period.

Public safety net hospitals and health systems provide inpatient and outpatient care for low-income individuals, community-wide services such as trauma care, burn units, and neonatal intensive care, and medical education. They also provide care for the uninsured and the underinsured and serve as initial responders to natural disasters.

Despite the critical role of public safety net hospitals in preserving community health, the financial situation of such hospitals remains precarious. The combined effect of federal, state, and local budget cuts, rising health care costs, increasing numbers of uninsured, and the costs associated with homeland security and natural disaster preparedness is exacerbating the problem. Personnel shortages and the rising costs of pharmaceuticals and other medical/surgical supplies have also contributed to the problems facing safety net providers.

The number of uninsured people has increased significantly since the early 1990s due to a combination of factors, including fluctuating enrollment in the Medicaid program and welfare reform. The burden of caring for the uninsured has fallen on safety net institutions that serve all patients regardless of ability to pay. The share of unreimbursed costs covered by Medicare and Medicaid supplemental payments like disproportionate share hospital (DSH) payments has continued to decline. Between 1993 and 2000, ambulatory care volume at public hospitals increased by over 20 percent; a sizeable portion of this care is uncompensated.

Prescription drug costs are also escalating. According to a recent report by the Department of Health and Human Services (DHHS), national spending on prescriptions tripled from 1990 to 2000. Some states report that spending on prescription drugs is rising by 20 percent annually. In Texas, drug costs are projected to increase approximately 11 percent each year for FY 2004-2005.

The 78<sup>th</sup> Legislature will probably face issues relating to reimbursement for safety net providers. The elimination of the federal upper payment limit provision (UPL) will reduce Medicaid payments to hospitals and Medicaid DSH payments will also be cut, in FY03, unless Congress intervenes. Medicare cuts to hospitals are also being considered. Legislators may also have to address reimbursement issues related to providing outpatient primary and specialty care to the uninsured and include support for these services in direct funding for outpatient care.

The baseline budget request for Texas health and human services agencies is \$16.4 billion in general revenue for FY 2004-2005, an increase of \$1.4 billion over the FY 2002-2003 budget. Medicaid and CHIP caseload growth, inflation, and changes in utilization account for \$840.4 million of the increase. The continuation of community care services at FY 2003 levels accounts for \$41.9 million. Increasing costs associated with higher acuity levels of nursing home residents and foster children accounts for \$56.0 million. Inflation adjustments account for \$206 million in general revenue funds.

### ***Prompt Payment of Health Care Providers***

Issues relating to prompt payment of health care providers stem from difficulties experienced by physicians and other health care providers in receiving timely and accurate payment for services. Disagreement over issues relating to payment of claims has grown more pronounced in recent years. Providers contend that insurers fail to pay claims in a timely or accurate manner, and insurers assert that they pay nearly all *clean claims* promptly.

Legislation was passed by the Texas Legislature in 1995, 1997, 1999, and 2001 to address problems relating to managed care and to claims payment issues. H.B. 1862, 77<sup>th</sup> Legislature, provided for comprehensive reforms related to prompt payment, but the bill was vetoed due to concerns that some provisions would generate more lawsuits.

The Senate Special Committee on Prompt Payment of Health Care Providers was established to evaluate the effectiveness of current state law. The 78<sup>th</sup> Legislature will consider this committee's recommendations and associated legislation to address the prompt payment issue. Among the recommendations are the establishment of clearly defined deadlines and time-frames for the filing and payment of claims, descriptions of fee schedules, disclosure of coding descriptions and reimbursement methods used by carriers, and continued monitoring of the claims process.

### ***Medical Malpractice Liability System***

The Senate Special Committee on Prompt Payment of Health Care Providers was also charged with evaluating the effectiveness of existing state law and agency rules relating to the current medical professional liability system. The committee was to assess the causes of rising malpractice insurance rates in Texas, including the impact of medical malpractice lawsuits on access to health care.

In reviewing the committee's recommendations, the 78<sup>th</sup> Legislature will likely consider legislation that will include a \$250,000 cap on noneconomic damages, limits on attorney contingency fees, periodic payment of damages, and adequate resources for the Texas State Board of Medical Examiners (TSBME) to address patient complaints and provider disciplinary actions, including immediate temporary license suspension in cases where a provider represents an immediate threat or has a criminal conviction. The legislature may also consider the following recommendations:

- ❖ Placing restrictions on certain attorney advertising;
- ❖ Expanding lawsuit immunity to protect charitable and indigent health care providers;
- ❖ Allowing the Joint Underwriting Authority to offer temporary malpractice policies to health care providers whose insurance is terminated for economic but not practice-related circumstances;

- ❖ Prohibiting any person whose medical license has been revoked in another jurisdiction from practicing in Texas; and
- ❖ Directing the TSBME to develop a program to identify and intervene in cases where doctors are at risk of committing medical errors.

◆  
**Criminal Justice**

***Capital Punishment***

On June 20, 2002, the United States Supreme Court, in *Atkins v. Virginia*, ruled that the execution of mentally retarded persons is cruel and unusual punishment prohibited by the United States Constitution. In its analysis, the court noted that since 1989 at least 15 states have expressly barred such executions. This trend, the majority held, was evidence of a national consensus against the execution of mentally retarded offenders. The majority also concluded that, because mentally retarded persons have diminished cognitive and behavioral capacities, they should be categorically excluded from execution. However, the majority declined to define mental retardation, leaving it to the states to develop ways to enforce the constitutional restriction against the execution of mentally retarded persons.

Texas law does not bar execution of mentally retarded persons. To comply with this court decision, state law must be revised to bar such executions and define mental retardation. Eighteen states have statutes barring the execution of persons with mental retardation. All these states generally define mental retardation as significantly subaverage intellectual function concurrent with impairments in adaptive behaviors or functions. Sixteen states require that there be manifestation of these traits during the developmental period or before the person reaches a set age, and 13 states further define significantly subaverage intellectual function by a person's intelligence quotient. Also, in its decision, the court cited definitions of mental retardation by the American Association of Mental Retardation and American Psychiatric Association.

Shortly after *Atkins*, the Supreme Court declined to review a death penalty case concerning the constitutionality of executing juvenile offenders. However, four of the justices dissented, arguing that the reasoning in *Atkins* applies "with equal or greater force to the executions of juveniles." The dissent noted that 28 states prohibit the execution of juvenile offenders. According to Amnesty International, only five other countries – Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen – execute persons who committed offenses while under the age of 18. Some analysts feel that the dissent signals that the court may reconsider this issue, in light of *Atkins*, in the future, and

they suggest that states which currently allow the execution of persons who committed offenses while juveniles may want to reconsider such statutes. Texas law currently permits the execution of juvenile offenders.

### ***DNA Evidence***

Advances in technology have resulted in the wide acceptance of DNA (deoxyribonucleic acid) evidence throughout the criminal justice system. Such evidence can be used not only to identify and convict offenders, but also to exonerate innocent persons. Recognizing the potential of such evidence, the 77<sup>th</sup> Legislature amended the Texas Code of Criminal Procedure, authorizing a convicted felon to petition for the forensic DNA testing of evidence in certain circumstances. Since the law became effective, a number of issues have arisen:

- ❖ Can a felon be executed while a motion for a DNA test is pending? Four persons have been executed while their requests for DNA testing were pending.
- ❖ A recent ruling by the Texas Court of Criminal Appeals held that a felon seeking a DNA test must establish that there is a reasonable probability that the test would prove that he or she is innocent. However, the actual statute requires that the person establish that he would not have been prosecuted or convicted had the testing been done. There is some question whether the court ruling imposes a tougher standard than does the statute.
- ❖ Should a convicted felon be able to arrange for a private DNA test when the state refuses to provide a state-funded test under the statute?

The legislature may need to examine Texas' DNA testing law to clarify some or all of these issues.

### ***Indigent Defense***

S.B. 7, enacted by the 77<sup>th</sup> Legislature, provides guidelines and standards for the implementation of an indigent defense system. Known as the "Texas Fair Defense Act," S.B. 7:

- ❖ Requires that indigent defendants be given prompt access to counsel;
- ❖ Establishes an appointment system under which judges appoint attorneys for indigent defendants from a public list through a fixed rotation system;
- ❖ Requires counties to set objective standards for determining whether a defendant is indigent and entitled to appointed counsel; and
- ❖ Requires that appointed counsel be paid a reasonable attorney's fee and reimbursed for reasonable and necessary expenses.

While the law has created a formal structure through which indigent defendants' are provided access to counsel, some counties are struggling to find the money to pay higher fees for appointed counsel. The law has not been in place long enough for counties to estimate the expense of compliance, and unpredictable fluctuations in the economy, the population, and the crime rate mean that counties cannot accurately forecast what compliance may cost in the future. Although state grants will cover some of the costs, the counties still bear the major share of the financial costs of providing indigent defense. According to a report by the Equal Justice Center and Texas Appleseed regarding the implementation of S.B. 7, Texas still ranks near the bottom of per capita indigent defense expenditures in the United States. Some have recommended that the state cover more of these costs.

### ***Hiring and Retention of Correctional and Police Officers***

The current shortage of correctional officers is not a new phenomenon; the issue was present and severe enough to warrant state intervention in 2001. Root-cause analyses of the problem identified career growth - i.e., officers' salaries quickly reach a plateau, creating a disincentive to stay - as a contributing factor. In response, the 77<sup>th</sup> Legislature appropriated \$35 million in emergency funds to the Texas Department of Criminal Justice (TDCJ) for career ladder salary adjustments. While the legislation helped alleviate the problem, the personnel shortage continues; as of October 31, 2002, the number of correctional officer vacancies is 2,653. For the upcoming biennium, TDCJ has requested a \$79.5 million exceptional item to provide salary increases for correctional officers and other targeted positions. The Texas Youth Commission is currently facing the same issue.

The Department of Public Safety (DPS) is not impervious to personnel shortages either. A DPS Officers Association representative testified before the Senate Special Committee on State Employee Compensation and Benefits on issues of retention and recruitment of DPS officers.

Remedies to address the aforementioned shortages include:

- ❖ Indexing salaries to the average of the highest paid police and sheriff's departments in Texas;
- ❖ Issuing stipends for specialized skills; and
- ❖ Providing compensatory time for working holidays that fall on weekends.

### ***Mental Health Services for Adult and Juvenile Offenders***

In 2001, 104,340 of the 626,285 offenders under community supervision had contact with Texas Department of Mental Health and Mental Retardation; this group represents the potential population of mentally ill offenders under supervision. Of those, 8.2 percent (or 8,594) received specialized treatment through the justice system. The

77<sup>th</sup> Legislature allocated \$35 million for specialized mental health services and specialized community supervision with the goal of reducing recidivism among this population. It was predicted that an additional 3,000 offenders would be treated by the additional funding.

A representative of the Texas Council on Offenders with Mental Impairments testified before the Senate Committee on Criminal Justice that not all people with mental illness are served with the appropriated funds and that only the most severely ill are treated. Furthermore, a survey among people involved in the criminal justice system indicated that their primary concern was not having the resources to deal with the mentally ill.

The legislature might consider appropriating additional funds for mental health services for adult and juvenile offenders.



## Education

### *School Vouchers*

One argument against the use of school vouchers that authorize the expenditure of public funds to attend private schools, including religious institutions, is that the First Amendment to the United States Constitution bars federal and state governments from enacting laws that have the purpose of either advancing or inhibiting religion. However, on June 27, 2002, in Zelman v. Simmons-Harris, et al, the United States Supreme Court, in a five-to-four decision, upheld the constitutionality of Ohio's Pilot Project Scholarship Program, which, in part, provided vouchers to certain public school students that could be used as tuition for private religious schools. The majority ruled that any governmental aid program that is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct the government aid to religious schools wholly as a result of their own genuine and independent private choice does not violate the constitution. The Ohio program, declared the majority, was constitutional because the educational assistance was conferred directly to a broad class of persons without reference to religion and the program permitted a wide variety of schools to participate.

The majority also found that:

- ❖ There was no financial incentive skewing the program toward private religious schools;
- ❖ Parents were not coerced into sending their children to religious schools, because the program provided genuine opportunities to select secular educational options; and

- ❖ The program did not create the perception of any endorsement of religion, because it was part of a broader undertaking to assist poor children in failed schools.

Supporters of school vouchers assert that this decision removes a major impediment and expect to see legislation proposing such programs in a number of states, including Texas. Those opposing such programs assert that:

- ❖ The majority of the public still oppose such programs;
- ❖ Legislatures facing budgetary shortfalls cannot afford to divert money away from struggling public schools;
- ❖ The vast majority of private schools will not accept vouchers; and
- ❖ Such programs will ultimately undermine public education.

It is not clear how broadly the decision, which concerned one specific program, can be applied in drafting school-voucher legislation:

- ❖ Is a school voucher program only constitutional when implemented in a failing public school system?
- ❖ How many secular education options must be offered in order for such a program not to be seen as an endorsement of religious education?
- ❖ What safeguards must be in effect to ensure that there is no financial incentive favoring religious schools?

Another issue is whether the state constitution bars the transfer of public funds to private religious schools. Article 1, Section 7, of the Texas Constitution provides that no public money or state property may be appropriated for the benefit of any sect, religious society, or theological or religious seminary. Similar constitutional provisions in other states have been the subject of legal challenges asserting that such provisions violate the First Amendment, which protects freedom of religion and speech.

### ***Public Education***

Public education will have expended \$56.9 billion of state, local, and federal funds by the end of FY 2002-2003. Excluding \$5.4 billion in federal funds, \$26 billion of local and state revenue is distributed to every area of the state, and local school districts pay 53 percent of that total. While many legislators over the last decade have promised to increase the state share to 50 percent or more – it is now 41 percent – rapid appreciation of property values and changes in state funding and property owners' exemptions have impeded efforts to reach that goal.

While many states have declining school enrollment, Texas' school population grew by 68,000 in 2001 and is expected to grow by 70,000 students per year in the next biennium. Growth alone will add nearly \$1 billion dollars to the biennial bill. Independent school districts (ISDs) serve nearly four million students, approximately half of whom live in low-income families and 1.6 million of whom are identified as at risk of dropping out of school. With student characteristics such as bilingual, compensatory, and special education, plus gifted and talented and career and technology programs, called program weights, the count grows to 5.24 million weighted students. Even though state enrollment is growing, many rural and mid-sized ISDs have experienced declining enrollment and falling state allocations, which requires local property tax increases to offset the loss.

### ***School Finance***

School funding must include equalization efforts to limit the variance of tax revenues between property-poor and property-rich school districts, under Texas Supreme Court decisions in the *Edgewood Independent School District et al. v. Kirby et al.* (1989) school finance litigation. Currently, state law defines property-wealthy districts, also called Chapter 41 districts, as districts with \$305,000 or higher property value per weighted student (PWS). Recapture from the 118 Chapter 41 districts reduces the gap in tax revenue to \$600 per student. Total recapture is expected to provide nearly \$1 billion each year of the biennium, and all but \$150 million is paid directly to lower-wealth partner districts chosen by each Chapter 41 district. Recapture does not increase revenue for the partner (Chapter 42) districts; recapture offsets state general revenue.

Equity standards will require an increase in guaranteed yield (GY) from \$1.25 to \$1.36 PWS per penny of tax rate. While the Texas Education Agency's (TEA) legislative appropriation request increased \$2.2 billion over the current biennium, nearly all of it will be paid by federal funds, recapture, and other revenue sources, leaving the demand for general revenue close to its current level. The Legislative Budget Board report *Financing Public Education in Texas* provides a detailed look at school finance ([http://www.lbb.state.tx.us/Public\\_Education/Finance\\_PublicEd\\_3dEd\\_1001.pdf](http://www.lbb.state.tx.us/Public_Education/Finance_PublicEd_3dEd_1001.pdf)).

As a result of a decade of state policy requiring school districts to raise property taxes to increase their state funding, most districts are closing in on the maintenance and operation (M&O) tax limit of \$1.50 PWS effective rate. Under the *Edgewood* court decisions, when the majority of districts reach a \$1.50 effective M&O tax rate, the local property tax becomes an unconstitutional state property tax because districts have no discretionary spending authority. Approximately 30 percent of school districts have reached the tax cap.

The Joint Interim Committee on Public School Funding (CPSF) discussed issues related to equity, tax rates, state funding options, and accountability. Alternatives identified included:

- ❖ Increasing the property tax cap limitation above \$1.50;

- ❖ Expanding the local property tax base by improving the accuracy of business and real property appraisals;
- ❖ Limiting tax abatements;
- ❖ Passing a constitutional amendment legitimizing any appropriation for public schools; and
- ❖ Simplifying funding formulas by guaranteeing all districts the same tax revenue up to a property tax limit.

Other ideas included:

- ❖ Eliminating 12<sup>th</sup> grade and using the funds for prekindergarten;
- ❖ Removing state requirements on school districts; and
- ❖ Allowing school boards to set class size and teacher pay including differentials based on performance or high-demand fields.

To illuminate state law and regulations required of school districts, the Texas Association of School Boards (TASB) publishes its *Report on School District Mandates*, posted at <http://www.tasb.org/advocacy/mandates02.pdf>. In the report, TASB quantifies the costs to districts of compliance with state regulations.

### ***Adequacy***

Many state constitutions require an adequate education, in contrast to the Texas constitutional requirement for a general diffusion of knowledge (GDK). Some states have hired consultants to determine adequacy and have received studies that identified adequate curriculum based on state requirements, but none have determined what level of funding provides an adequate education.

The legislature may consider commissioning an adequacy study to determine the cost of GDK, although some CPSF members expressed concern that such a study could be used as evidence in future litigation against the state should the legislature appropriate less than the GDK level. Some school administrators have estimated that \$6,500 to \$6,700 per student would meet the requirement.

### ***Teachers***

Teacher salaries account for about 50 percent of school district budgets. The legislature sets a minimum salary schedule based on experience, though most ISDs pay more than the state minimum. The minimum salary schedule requires districts to pay \$24,240 to a first year teacher. The average teacher's salary in Texas is \$38,361 for 2001. TEA reports that districts employ 290,000 teachers. While the state faces a shortage of classroom teachers, 420,000 certified teachers have chosen not to teach.

Some surveys indicate that sufficient numbers of teachers could be lured back to classrooms for a salary of \$45,000 per year. The 76<sup>th</sup> Legislature provided a \$300 per month pay raise for full-time teachers, librarians, nurses, and counselors; a similar raise for 2004 would cost \$1 billion per year.

School employee health insurance will require at least a doubling of last biennium's appropriation of \$750 million because the insurance program operated only one year, 2003. In addition, the retirees' health plan will need an emergency infusion of a sizeable amount of funding to remain actuarially sound.

### ***Accountability***

The Student Success Initiative, which bans social promotion, will be initiated in fall 2003. Under this policy, Texas' 320,000 third graders must pass the Texas Assessment of Knowledge and Skills (TAKS) reading section before being promoted to fourth grade. Even with additional instruction and two retests, estimates are that as many as 30,000 third graders could be retained. The third-grade reading performance rates will be available in March 2003, and the legislature may consider responses other than retention.

Because of the new TAKS, campus and district accountability ratings will not be issued for 2003 and the accountability system will be revised for 2004, primarily under the rulemaking authority of the commissioner of education.

Legislation that may be considered this session to improve student performance includes:

- ❖ **Universal access to prekindergarten.** Districts could be required to offer prekindergarten (pre-k) but not require attendance by three-year-olds or four-year-olds. If the legislature required districts to offer pre-k without compulsory attendance, the cost to the state would be about \$600 million per year based on the assumption that only 70 percent of students would attend. Mandating pre-k for all four-year-olds would cost the state nearly \$850 million per year plus approximately \$20 million for textbooks, and local districts would need approximately \$850 million for facilities, with recurring debt service payments of \$70 million a year.
- ❖ **Compulsory kindergarten attendance.** Similar legislation last session would have cost \$146.5 million for the FY 2002-2003 biennium.
- ❖ **Flexible school year.** This would allow districts, with commissioner of education approval, to shorten the school year by up to 10 class days and five teacher-training days to provide additional instruction to students unlikely to be promoted.

### ***Dropouts***

Statutes regarding dropout rates and dropout prevention may be revised. Districts are required to account for dropouts as part of the accountability system, and districts and campuses have had their ratings reduced when dropout rates of any subgroup exceed five percent. TEA has improved its ability to track students as they transfer among districts and requires districts to follow up on those transfer students whose records have not been requested by another school. The latest TEA yearly dropout report calculates the state rate at 1.5 percent a year, but under the National Center for Education Statistics definition the yearly dropout rate is five percent. Legislation may be filed to require districts to provide early assistance to low-performing secondary students to increase their chances of graduating.

### ***Higher Education***

The legislature will be asked to continue policies to reach the four goals of the state's higher education plan, *Closing the Gaps by 2015*, which are to increase enrollment and success in higher education and to reduce the disparity within Texas and between Texas and other states in educational excellence and research. An important component of meeting the goals is creating linkages from pre-k through college education, called P-16.

Institutions of higher education (IHEs) have increased their teacher preparation programs and alternative certification to put more teachers in the classroom, but more students apply for teaching certification programs than IHEs can enroll.

Legislation to reduce the gaps may include:

- ❖ Continuing the statewide public awareness and motivational campaign through ISD-IHE partnerships to increase college enrollment and workshops for high school students to complete the application process;
- ❖ Addressing educator preparation, recruitment, and retention;
- ❖ Strengthening other aspects of the P-16 system and consolidating the Texas Higher Education Coordinating Board (THECB)-TEA joint responsibility for P-16 into one chapter or title in the Education Code;
- ❖ Keeping higher education affordable for students through a proper balance of appropriations, tuition and fees, and student financial aid (TEXAS Grant);
- ❖ Creating the Lone Star College, for students who have attended multiple colleges, to review transcripts and direct students to courses needed to earn a degree and award a degree upon completion of the requirements;
- ❖ Continuing and strengthening the Advanced Research Program and Advanced Technology Program; and

- ❖ Establishing a means to raise quality in accord with the missions of IHEs.

State IHEs experienced enrollment growth of more than 70,000 in the fall 2002 semester. Community colleges gained nearly nine percent, and health-related institutions grew some six percent. Calculating the revenue requirements for such growth on higher education appropriations is much more difficult than in public education. Higher education funding is based on semester credit hours and programs in academic institutions and contact hours in community and technical colleges. Higher education appropriations have a two-year lag between an increase in enrollment and a corresponding increase in state funding, so institutions will not receive funding for this historic increase until FY 2005.

Significant changes will be proposed in the P-16 system. The legislature may consider bills to abolish THECB and TEA and create one P-16 agency; to improve access to IHEs by rural students; and to provide for post-tenure review of faculty performance at IHEs.

## ◆ Jurisprudence

### *Court Costs and Fees*

Texas law imposes a variety of state and local court costs, fees, and fines in the civil and criminal courts. Each legislature may impose further costs, fees, and fines or change existing ones. Collecting and administering these various costs, fees, and fines can be burdensome for municipalities and counties. Consolidation would simplify collection and reporting, ensure that amounts are properly allocated, and could result in saving time and resources. The 77th Legislature considered legislation creating a program to consolidate and standardize civil and criminal fees, but it did not pass. Following the session, voters approved a constitutional amendment providing that the implementation date of any new court costs and fees would be January 1, giving cities, counties, and the comptroller additional time to implement such changes following a legislative session. However, this amendment also provides that it will apply only if the legislature enacts a program to consolidate and standardize the collection, deposit, reporting, and remitting of fees.

### *Judicial Redistricting*

There has not been a comprehensive redistricting of judicial districts since 1883. Article V, Section 7a, of the Texas Constitution, adopted in 1985, requires statewide reapportionment of judicial districts following each federal decennial census. There are now many noncontiguous or overlapping districts throughout the

state. Some districts have extremely heavy caseloads, resulting in severe backlogs and adversely affecting Texas citizens' access to the courts. Redistricting could address these problems. However, one problem with redrawing judicial districts is that there is no precise way to compare caseloads among the courts because the difficulty of a case, such as a class action or a multiparty suit, must also be considered. The Senate Jurisprudence Committee has asked the Texas Legislative Council, the Office of Court Administration, Texas Supreme Court Chief Justice Tom Phillips, and others to compile a list of quantitative factors the committee should consider in judicial reapportionment.

### ***Judicial Selection***

Texas is one of four states that still elects judges by partisan elections, from the state's highest courts to county and district courts. This system has resulted in controversy in a number of areas:

- ❖ **Campaign Contributions.** Opponents of the current system assert that requiring judges to seek contributions and run campaigns makes it difficult to maintain an image of judicial impartiality and may discourage otherwise qualified persons from seeking office. Supporters respond that such issues can be addressed through campaign reform.
- ❖ **Judicial Accountability.** Unlike other elected officials, judges are expected to act impartially, unaffected by political or popular influence. Detractors of the current system assert that forcing judges to campaign undermines judicial impartiality. Supporters reply that judges need to be sensitive to social, economic, and moral issues in the community.
- ❖ **Political Affiliation.** Opponents of the electoral system claim that a judicial candidate's ability to win or remain in office may be based more on party affiliation than qualifications, particularly when voters know little about the candidates or vote a straight party ticket. Those supporting the current system believe that party affiliation provides voters with useful information about judicial candidates and that depriving judges of the ability to depend on party support for fund raising could make judicial campaigns even more expensive and difficult for judges struggling to get their names before the voters.
- ❖ **Voter Apathy.** Many voters lack knowledge about the Texas court system and judicial candidates and may depend on factors other than a judge's qualifications, such as gender or name, in making their decision. In more populous counties, the large number of judicial races makes it difficult for voters to familiarize themselves with all the candidates.
- ❖ **Minority Representation.** Some argue that the current system makes it harder for qualified minority candidates to be elected to the bench, pointing to the low number of minority judges throughout the state. Supporters of the

system assert that the low number of minority judges can be attributed to other factors and that there is no guarantee that appointing judges would result in a more diverse bench.

In recent legislative sessions, various bills were introduced to address these issues. Proposals included the nonpartisan election of judges, having a separate judicial ballot to prevent straight ticket voting, or implementing an appointive system for the judiciary. All such proposals have failed.

A recent United States Supreme Court decision will certainly impact this debate. On June 27, 2002, the United States Supreme Court, in *Republican Party of Minnesota, et al. v. White, et al.*, overturned a Minnesota canon of judicial conduct prohibiting a judicial candidate from announcing his or her views on disputed legal or political issues. The majority held that the canon violated free speech and expression protections in the First Amendment to the United States Constitution. In response to this decision, the Texas Supreme Court amended the Texas Code of Judicial Conduct, striking the prohibition barring judges or judicial candidates from making statements indicating an opinion on any issue that may be subject to judicial interpretation and amending other restrictions; now, in Texas, a judge or judicial candidate is barred from making public comments, pledges, or promises only regarding issues pending or impending before that court or which would suggest that the judge is predisposed to a probable decision. A comment by the court noted that a statement during a campaign for judicial office might be ground for recusal.



## Intergovernmental Relations

### *Special Districts*

Special districts are a financing tool utilized by developers, cities, and counties for the purpose of providing certain services. These districts include water districts, county and municipal development districts, and public improvement districts, among others. Due to growing concern about alleged illegitimate formation of some special districts, the Senate Interim Committee on Intergovernmental Relations was charged with examining current state law regarding the purposes, authority, and duties of special districts. The 78<sup>th</sup> Legislature may consider legislation designed to more strictly regulate the creation of special districts and better inform the public about the functions and authority of these districts.

### ***Property Owners' Associations***

In an effort to address concerns about the foreclosure power of property owners' associations (POAs), the 78<sup>th</sup> Legislature may consider alternative measures available to POAs to enforce mandatory assessments and consider legislation that would prohibit nonjudicial foreclosures by POAs. Attorneys' fees, mediation, payment plans, and improved communications between homeowners and associations will also probably be included in any POA discussion and in possible proposed legislation designed to give homeowners more protection.

### ***County Authority***

There are several counties, including Harris County, that are experiencing both rapid growth and growth in unincorporated areas. The legislature may consider legislation that would grant limited authority or power to counties - for example, ordinance-making authority to regulate fireworks - to enable them to manage such growth.



## **Natural Resources**

### ***Air***

The 78<sup>th</sup> Legislature will continue efforts to comply with the federal air quality standards established by the Federal Clean Air Act (FCAA). The Texas Emissions Reduction Plan (TERP) was established by the 77<sup>th</sup> Legislature in S.B. 5, but the constitutionality of the statewide fee contained in the legislation was challenged in court, and the TERP annual budget was reduced considerably because those fees could not be collected. The legislature will likely consider the restoration of funding to fully implement TERP.

### ***Water***

S.B. 312, 77<sup>th</sup> Legislature, was designed to address many state water issues. The Joint Interim Committee on Water Resources charged with studying this issue focused on the regions of the Texas-Mexico border and looked for innovative solutions to the water needs of *colonias*, residential communities on the border that lack basic water and sewer systems, electricity, paved roads, and sanitary housing. The 78<sup>th</sup> Legislature may look at ways to directly fund the Colonia Self-Help Program (CSHP) created by S.B. 312. Increased public awareness will also be a key issue, especially among nonprofit organizations whose participation in CSHP is considered essential. Legislation and incentives encouraging public/private partnerships will be addressed along with increased funding for engineering services and skilled professional work.

The 78<sup>th</sup> Legislature will continue to review and build a comprehensive water policy that could include incentives to increase the conservation and efficiency of existing water resources, improvement of existing water conveyance systems, water marketing, and the protection of the natural condition of beds and banks of the state-owned watercourses. The development of sufficient long-term water financing strategies will also be an issue.

### ***Natural Disasters***

There are many issues involving natural disasters that overlap with the priorities and resources relating to homeland security. These issues include:

- ❖ Cell phone towers that can be used in the event of man-made and natural disasters; and
- ❖ Increased funding for the Division of Emergency Medicine (DEM) for additional full-time employees (FTEs) to respond to disasters and train other responders.

Other natural disaster issues facing the 78<sup>th</sup> Legislature include mutual aid contracts to allow local governments to share resources; a state disaster contingency fund for responding to disasters that do not meet the criteria for federal relief funds; and increased use of Spanish in public awareness campaigns and publications. Updated and technologically improved floodplain maps, management, and reporting are also key issues along with coordination with the Texas Department of Transportation (TXDOT) in utilizing lane reversals to expedite evacuations.

### ***Alternate Fuels and Additives / Waste Conversion***

Alternative fuels and the conversion of existing waste into fuel continue to be an issue in state government. Alternative fuels have been discussed as a potential solution to problems with air quality, water quality, waste disposal, rural development, and national security.

#### **Ethanol**

Discussion of alternative fuels will likely involve the production of ethanol and the State Energy Conservation Office study on the feasibility of creating an ethanol industry in Texas. Ethanol does not compete directly with gasoline because its energy content is lower than that of gasoline, and it takes approximately 1.5 gallons of ethanol to deliver the same mileage as one gallon of gasoline. Oil companies began to market ethanol as a gasoline volume extender and octane booster in an attempt to decrease dependence on Middle East oil supplies and to phase out lead from gasoline. Congress mandated the use of oxygenated fuels in some regions with the Clean Air Act amendments, and ethanol is the most cost-effective way to increase the oxygen level in gasoline.

The ethanol industry relies heavily on federal and state subsidies to remain viable as a gasoline blending component, and corn prices are the dominant cost factor in ethanol production. Reductions in ethanol production costs may be made possible by replacing corn with less expensive cellulose-based feedstock.

Legislators may be following the progress of the Energy Policy Act of 2002 and the State Energy Conservation Office report in considering the future course of the ethanol industry.

### **Anaerobic Digesters**

There has been some renewed interest in anaerobic digesters that can help control animal waste odor and aid in disposal. The digested material can be used as a soil treatment, and the biogas can be used as a fuel. There is one operational anaerobic digester project in the Texas Panhandle and two are currently being contemplated in Central Texas.

### **Biomass**

Although wood is the most commonly used biomass fuel for heat and power, biomass is any kind of vegetation, including trees, grasses, and plant parts. Agricultural wastes are the primary consideration for biomass technology. The success of these projects will determine the future of others.

Biomass technology includes:

- ❖ **Combustion** - biomass burned to produce steam;
- ❖ **Cofiring** - replacing a portion of the coal with biomass at an existing power plant boiler; and
- ❖ **Gasification** - a thermochemical process that converts solid biomass raw materials to a clean fuel gas form.

Biomass presents an opportunity for waste-to-energy projects but will be dependent upon harvesting, collection, and processing technologies becoming more cost-effective.

Legislators may also be surveying existing landfills relating to potential gas recovery projects with the U.S. Environmental Protection Agency's Landfill Methane Recovery Program and the potential benefits of coordinating methane-powered electric infrastructure with established composting projects.

◆  
**Native American Affairs**

According to the U.S. Census Bureau, Native Americans, have a lower median income, a higher poverty rate than non-Hispanic whites and are less likely to have health insurance. In addition, Native Americans have a greater susceptibility to certain diseases such as diabetes and alcoholism. Education, land, burial grounds, and water conflicts are also issues that are in some way unique to the Native American population.

According to the 2000 census, 188,000 Native Americans live in Texas, giving Texas the fourth-largest Native American population in the U.S. Although there are numerous public and private programs and resources specifically targeted to assist Native Americans, there is no coordinated state effort to identify these resources and utilize them for Native American Texans.

In order to address the issues that uniquely affect the Native American population in Texas, the 78<sup>th</sup> Legislature may consider legislation to create a Native American liaison within an existing state agency or office to act as an advocate for these Texans in national forums or at the federal level of government.

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**Homeland Security**

Following the September 11<sup>th</sup> terrorist attacks, federal, state, and local governments made it a priority to create mechanisms to address future transgressions. In Texas, the Governor's Task Force on Homeland Security (task force) was created with the mandate to provide recommendations on improving Texas' ability to detect, deter, and respond to potential terrorist threats. In January 2002, the task force submitted recommendations to the governor, and while some do not require action by the legislature (e.g., ensuring that federal funding for security and personnel along the Texas-Mexico border crossings is commensurate with that expended along the United States-Canada border), several proposals will require legislative action or support.

Various recommendations urge the governor to:

- ❖ Support legislation to expand the current Good Samaritan Law to protect industrial response teams responding to emergencies at neighboring facilities;
- ❖ Support additional funding for the Department of Public Safety (DPS) for law enforcement efforts to address terrorism;

- ❖ Coordinate with the legislature to revise statutes to reinstate the requirement that a fingerprint or other physical document be maintained for those who seek and obtain a change to their legal name; and
- ❖ Encourage the legislature to maintain funding for vital infrastructure associated with the Health Alert Network.

During the interim, the Senate Committee on Health and Human Services also addressed changes necessary to upgrade the state's public health infrastructure -- upgrades crucial for enhancing Texas' capacity to address bioterrorism.

Included in the committee's recommendations are:

- ❖ Increasing the budget of the Texas Department of Health (TDH) to provide funds which will, among others things, help increase TDH's ability to collect and analyze data, train health care workers to respond to bioterrorism, and augment microbiological laboratory capacity.
- ❖ Updating the Health and Safety Code, including the modification of definitions and authorities afforded to health agencies defined in the Texas Disaster Act of 1975 and the Communicable Disease Prevention and Control Act. Other amendments would allow TDH or a local health authority to go directly to a court to obtain a protective custody order in a public health emergency and provide additional flexibility on information sharing between the DPS and TDH.
- ❖ Updating the exceptions to autopsy and cremation requirements in the Code of Criminal Procedure to account for additional diseases.

The recent passage of the Homeland Security Act of 2002 does not stipulate state requirements nor contain funding opportunities for state homeland security measures; however, Congress will be revisiting the bill during its next session.



## Veterans Affairs and Military Installations

With more than 1.7 million veterans in Texas (comprising 8.25 percent of the total state population), 15 military installations employing 110,000 active duty military personnel and 40,000 U.S. Department of Defense (DOD) civilian personnel, and annual DOD expenditures of more than \$18 billion in the state, veterans and military affairs are of importance to Texas policymakers.

The primary military issue facing the 78<sup>th</sup> Legislature is the need to prepare for the next round of federal military realignment, scheduled for 2005. Texas is particularly vulnerable in the ongoing review of military installations, known as BRAC (Base

Realignment and Closures), given the large military presence in the state. Past BRAC actions resulted in the closure of seven military installations in Texas, including bases in Fort Worth, San Antonio, and Austin, with a loss in the latter two cities alone of 16,000 DOD jobs and an estimated \$8 billion in DOD spending between 1995 and 2001.

Among suggestions made to the Senate Committee on Veterans Affairs and Military Installations as Texas positions itself for the 2005 BRAC process are:

- ❖ Establishing new or enhanced legislative committees to address the needs of the defense community in Texas;
- ❖ Changing the charter of the Texas Office of Defense Affairs (ODA) to establish it as the single state coordinating point for defense issues;
- ❖ Merging ODA and the Texas Military Strategic Planning Commission, along with aerospace and aviation entities, into a new Texas Military Preparedness Commission;
- ❖ Encouraging the state's 45 defense-dependent communities to form a single organization to address defense issues in their localities; and
- ❖ Hiring a consultant or group or designating an entity to speak in Washington for all Texas cities on defense-related issues.

Another issue the 78<sup>th</sup> Legislature may address concerns the impact of mobilization and activation of Texas military forces on the reserve force members, their families, and their employers. National Guard members ordered to state military duty do not receive the same benefit entitlements as full-time active duty members, and the type of duty status also has an impact on their entitlements under the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA). The Senate Committee on Veterans Affairs and Military Installations recommended that the legislature consider enacting legislation to financially protect military personnel who are mobilized under state status similar to that which protects those who are active duty personnel under Title 10 of the United States Code. The issue of providing state benefits, such as reduced college tuition, to military dependents may also be considered.

◆  
**State Affairs**

***Transportation***

In the last decade, Texas' population growth has been greater than 20 percent, while that of the nation as a whole was at 13 percent. The passage of the North American

Free Trade Act (NAFTA) resulted in a high volume of truck traffic at Texas' two international ports of entry —El Paso and Laredo— which handle 68 percent of all traffic from Mexico; this carries a parallel cost burden. Yet the state faces potential cuts in federal highway aid of \$4.4 billion that could cost Texas \$600 million in FY 2003.

Networks of transportation are essential due to the vast size of the state, including both rural and urban areas; yet the state ranks 48<sup>th</sup> in the nation in per capita transportation spending, an amount further diluted by the amount of transportation user fees diverted to nontransportation purposes. Nonattainment status could include potential losses for transportation projects if Texas does not act rapidly regarding air quality.

Currently, the Texas Department of Transportation (TxDOT) funds only a third of "needed projects" from the primary source of revenue, the State Highway Fund (known as Fund 006) comprised of taxes on motor fuels (41 percent) and certain fees and taxes (15 percent from vehicle registration and 3 percent from sales tax on lubricants, title fees, and interest). The bulk of the remainder (37 percent) is from federal reimbursements.

The issue facing legislators may be to review whether fees currently flowing to the Department of Public Safety (DPS) might be modified to increase revenue for transportation projects (potentially over \$238 million).

The legislature may consider other possibilities to increase funding of Fund 006, including clarification on "the point of first use," i.e., taxes are collected when fuel is delivered to gas stations. Legislation enacted during the 76<sup>th</sup> Legislature tightened fuel tax reporting provisions and improved fuel tracking, resulting in additional revenues. Revenues could be increased an additional \$50-75 million if the point of collection were changed and taxes were collected at the point of purchase, as they are for federal taxes.

A major step toward innovation and flexibility in funding transportation projects was taken last session with the creation of the Texas Mobility Fund (TMF). TMF resulted from recognition that even if dollars from both federal and state sources were readily available, funding of transportation projects cannot keep pace with unprecedented growth. Efforts to channel funding to the TMF from other sources will likely be addressed by the 78<sup>th</sup> Legislature.

Governor Perry's Texas Corridor project may also be considered. The project carries an estimated price tag of \$183.5 billion, the largest engineering project ever proposed in the state. While the corridor plan portrays an ambitious effort to move people and products around the state, from port to rail to automobile, finding the money will be a challenge.

The 78<sup>th</sup> Legislature will likely consider sending a resolution to all Texas' congressional delegates and relevant congressional committees to support continuation of the Transportation Authorization Act in order to both protect and increase the state's share of federal transportation dollars.

### ***Private Activity Bonds***

The Joint Interim Committee on Private Activity Bonds (PAB) was charged with examining the procedures relating to the allocation and use of private activity bonds and determining the effectiveness of the current program in meeting public policy objectives. The types of projects that the Tax Reform Act of 1986 made possible include single-family mortgage revenue bonds, state-voted bond issues, small-issue industrial development bonds, multifamily mortgage revenue bonds, student loan bonds, and certain exempt facilities.

Since 1992, the private activity bond program has been administered by the Texas Bond Review Board. Texas uses a lottery system to determine reservations, or the opportunity to issue tax-exempt PABs. Once this "reservation" is received, the issuer has 120–180 days to close the bonds; otherwise the reservation is closed. The legislature may consider recommendations made by the committee to improve operational efficiency and service to Texas consumers.

Among the proposals is Governor Perry's desalination plan, which would use PAB financing to build a Seawater Desalination Demonstration Project along the Texas Gulf Coast. It is estimated that in order to be feasible, the project would require approximately \$200 million in low-cost financing per biennium (\$100 million per year).

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**Sunset Review**

The Sunset Advisory Commission reviewed 29 agencies for consideration by the 78<sup>th</sup> Legislature. This process provides for the examination of state boards, agencies, and commissions in order to determine their efficacy in carrying out their missions. Sunset legislation for the following agencies will be considered:

Texas Ethics Commission  
Lottery Commission  
Texas Council on Purchasing from People with Disabilities  
Department of Health  
Department of Human Services  
State Board for Educator Certification  
Texas Higher Education Coordinating Board  
State Bar of Texas  
Court Reporters Certification Board  
Board of Law Examiners  
Correctional or Rehabilitation Facility Subchapter  
Texas Aerospace Commission  
Department of Economic Development  
Department of Housing and Community Affairs  
Texas State Affordable Housing Corporation  
Texas Workforce Commission  
Texas Council on Workforce and Economic Competitiveness  
Texas State Board of Public Accountancy  
State Office of Administrative Hearings  
Texas Board of Architectural Examiners  
State Board of Dental Examiners  
Texas Board of Professional Engineers  
Texas Funeral Commission  
Texas Board of Professional Land Surveying  
Texas Department of Licensing and Regulation  
Texas State Board of Plumbing Examiners  
Riding Stables Chapter  
Licensing Agency Pilot Project  
Board of Tax Professional Examiners