

JAN 2003 *In Brief*

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This issue of *In Brief* features a discussion of important issues facing the 78th Legislature identified by the Senate Research Center staff. The paramount issue will be developing the state budget in light of the deficit and unpredictable economic climate. There are other important issues, however, that will be challenging and time-consuming for legislators. They include insurance reform, health and human services, cleaning up the air in nonattainment areas, transportation and highway infrastructure, and public school finance, to name just a few.

The information in this issue is intended to serve as a quick-reference guide to issues facing the 78th 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.



Revenue/Budget Outlook

The 77th Legislature appropriated \$61.5 billion in general revenue funding 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. In order to maintain current services due to the natural growth of the economy combined with unexpected increased costs, the legislature, for the first time in more than a decade, will be faced with a revenue shortfall.

Various revenue alternatives to help alleviate the budget gap have been discussed, including increasing the state cigarette tax rate; addressing the Delaware Sub-Structure, a corporate structure used by companies in Texas to avoid paying the state franchise tax; tapping into the Rainy Day Fund; and securitizing of tobacco settlement proceeds. Agency baseline budget requests total \$8.1 billion above the FY 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. Significant requests for additional baseline funding include: the Health and Human Services



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Commission (HHSC) has an increased baseline request of \$1.292 billion, 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, 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; and the Texas Higher Education Coordinating Board has included a baseline increase of \$179 million, due to anticipated growth in the Texas Grants program.

On January 13, 2003, the Comptroller of Public Accounts issued the Biennial Revenue Estimate (BRE). The BRE projections include \$54.1 billion available in general revenue funds. This amount represents a \$9.9 billion revenue shortfall scenario, including \$1.8 billion for the FY 2003, which will end August 31, 2003.

Business and Commerce

Lending Practices

The legislature will presumably 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. The legislature may also review several mortgage lending issues, including predatory lending and marketing practices.

Homeowners and Automobile Insurance

The business of insurance is one of the most prominent issues facing the 78th Legislature. 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. 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.

Some of the pertinent insurance issues facing the legislature include: the benchmark rating system; changes to foster affordable rates and ensure the availability of homeowner and automobile insurance products by maintaining a competitive and profitable environment for insurers; insurers' use of credit information in making insurance determinations such as risk classification, underwriting, and rating; licensure of public insurance adjusters; regulation of building practices related to mold in indoor environments; and regulation of professionals who provide mold remediation services.

Border Affairs

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 include: health care, water issues, environmental quality, educational opportunities, transportation, and cross-border commerce.

Strengthening the region's economic development by establishing greater "one-stop-shop" resources for small businesses will be a key issue, particularly increasing access to and use of more technologically advanced business development tools and networks. Equity in funding for health and human services programs in the region also remains an issue. Two other matters facing the border region and the 78th Legislature have significant national and international components: water rights and border ports-of-entry.



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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.

The Senate Health and Human Services Committee recommended expansion of the systems of care model and creation of an integrated funding mechanism. The coordination of all publicly funded children's mental health programs is considered an essential part of improving the delivery of services.

A significant number of Texas parents relinquished custody of their children to the Department of Protective and Regulatory Services (DPRS) in order to access residential treatment services for their children'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 also consider legislation that would mandate that all state-regulated health insurance policies provide mental health parity, coverage for mental, emotional, and behavioral disorders in children that is 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. 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. 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. 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.

Immunizations

Results from the National Immunization Survey (NIS) show that, nationally, immunization rates have experienced a slight decline; Texas ranks 43rd. The problem of low immunization rates continues to pose a threat to public health. Compounding the problem has been the recent vaccine shortage.

Legislation is being proposed that will direct the Texas Department of Health (TDH) to institute a continuous statewide immunization education campaign and increase coordination between local, regional, and state stakeholders. In 1994, TDH established an immunization tracking system, ImmTrac, to monitor the immunization rates for children across Texas. The legislature may consider an "opt out" system that would include all children automatically unless a parent chose to remove his or her child from the system. 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. There has been much debate on the use of universal vaccine purchase (UVP) programs as a means of controlling costs. 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.



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 program. Texas policymakers may consider a variety of cost-containment options, including: 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 limits on personal care services; reducing or freezing rate reimbursement for nursing homes; 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 legislature may also consider personal attendant care options and other community supports, including housing and transportation 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.

Medicaid/CHIP

Although the changes enacted in S.B. 43, 77th Legislature, have simplified the process of enrolling in Medicaid, many issues relating to the uninsured and underinsured remain. The 78th 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; statewide rollout of enhanced Primary Care

Case Management (PCCM) for all Medicaid recipients enrolled in TANF; ensuring that premiums are adequate to offset program costs; 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. The ruling also requires states to have a comprehensive plan for transitioning qualified individuals to less restrictive settings and off of waiting lists for community-based programs. However, state responsibility for community-based services to qualified persons with disabilities is not unlimited.

A revised Promoting Independence Plan will be submitted by the Health and Human Services Commission (HHSC) to the 78th Legislature. Based on the plan changes and various studies conducted during the interim, the legislature will likely address: the need for funds to follow an individual from an institutional setting to the community; the cost-effectiveness of allowing Home and Community Services/Mental Health Local Authority (HCS/MRLA) consumers to receive services in a five-bed residence at the applicable consumer level of need rate; and the use of a voucher payment program for various home and community-based services. Sustainable funding for promoting independence initiatives presents a serious problem in meeting the *Olmstead* requirements.



Organ Donation and Allocation

Efforts have been made to develop a more equitable organ allocation system and identify methods to increase organ donation. 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 legislature may consider legislation to require TDH to assist organ procurement organizations (OPOs), hospitals, and medical communities to develop best practices relating to organ donation and procurement. 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.

Rising Medical Costs

Overall, national 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.

The 78th Legislature will face issues relating to reimbursement for safety net providers, including: elimination of the federal upper payment limit provision (UPL) that would reduce Medicaid payments to hospitals; cuts in the Medicaid disproportionate share hospital (DSH) program; Medicare cuts to hospitals; and reimbursement issues related to providing outpatient primary and specialty care to the uninsured.

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. Providers contend that insurers fail to pay claims in a timely or accurate manner. Insurers assert that they pay nearly all clean claims promptly, but that many claims are submitted without the required data or the data necessary to process the claim.

The 78th Legislature will consider legislation to address the prompt payment issue, that may include provisions that require 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 78th 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: 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 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, 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.

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 77th Legislature amended the Texas Code of Criminal Procedure, authorizing a convicted felon to petition for the forensic DNA testing of evidence in certain circumstances. The legislature may need to examine Texas' DNA testing law to clarify issues that have arisen since the law became effective, including: whether a felon can be executed while a motion for a DNA test is pending; whether a felon seeking a DNA test must establish that there is a reasonable probability that the test would prove that he/she is innocent or he/she would not have been prosecuted or convicted had the testing been done; and whether a convicted felon should be able to arrange for a private DNA test when the state refuses to provide a state-funded test under the statute.

Indigent Defense

S.B. 7, enacted by the 77th Legislature, provides guidelines and standards for the implementation of an indigent defense system. 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. Although state grants cover some of the costs, the counties still bear the major share of the financial costs of providing indigent defense. 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.



Education

School Vouchers

The 78th Legislature will likely consider the issue of school vouchers. 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 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.

Public Education

Texas independent school districts serve nearly four million students. 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 cost of education.

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* school



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finance litigation. While the Texas Education Agency's 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. 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 rate limit. Approximately 30 percent of school districts have reached the tax cap.

School employee health insurance will require at least a doubling of last biennium's appropriation of \$750 million because the insurance program operated for 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.



Jurisprudence

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 access to the courts. Redistricting could address these problems. The Senate Jurisprudence Committee has asked stakeholders to compile a list of quantitative factors the committee should consider in judicial reapportionment.



Natural Resources

The 78th Legislature will continue efforts to comply with the federal air quality standards established by the Federal Clean Air Act (FCAA). The constitutionality of the Texas Emissions Reduction Plan (TERP) fee established by the 77th Legislature was challenged in court, resulting in a considerable reduction in the TERP budget. The legislature will likely consider the restoration of funding to fully implement TERP.

S.B. 312, 77th Legislature, was designed to address many state water issues. The 78th Legislature may look at ways to directly fund the Colonia Self-Help Program created by S.B. 312. Legislation and incentives encouraging public/private partnerships will be addressed along with increased funding for engineering services and skilled professional work.

The 78th 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.

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.



Homeland Security

Following the September 11, 2001, 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 to develop recommendations and advise the governor on improving Texas' ability to detect, deter, and respond to potential terrorist threats. The task force report was submitted to the governor on January 31, 2002, and is available at <http://www.governor.state.tx.us/homelandsecurity/January%20report%20final.pdf>.

During the interim, the Senate Committee on Health and Human Services also addressed changes necessary to upgrade the state's public health infrastructure, which is crucial for enhancing Texas' capacity to address bioterrorism. Included in the committee's recommendations are: providing funds to help increase TDH's ability to collect and analyze data, train health care workers to respond to



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State Affairs

Transportation

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 into the U.S.; yet Texas faces potential cuts in federal highway aid of \$600 million in FY2003. Texas could lose federal funds for transportation projects if it does not act rapidly to improve air quality in the nonattainment areas of the state, which includes Dallas/Fort Worth, Houston/Galveston, El Paso and Beaumont/Port Arthur. Five other metropolitan areas have been designated as “near nonattainment” areas: Austin, San Antonio, Corpus Christi, Victoria, and the Tyler-Longview-Marshall area.

The legislature may consider ways 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. Efforts to channel funding to the Texas Mobility Fund from other sources will likely be addressed by the 78th Legislature.



Veterans Affairs and Military Installations

The primary military issue facing the 78th 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. Another issue the 78th Legislature may address concerns the impact of mobilization and activation of Texas military forces on the reserve force members, their families, and their employers, including providing financial protection for 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.



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