SUBJECT: Continuing the Texas Department of Human Services

COMMITTEE: Human Services — committee substitute recommended

VOTE: 9 ayes — Naishtat, Maxey, Chavez, Christian, J. Davis, Truitt, Wohlgemuth

0 nays

2 absent — Noriega, Telford

SENATE VOTE: On final passage, April 30 — voice vote

WITNESSES: *(On House companion bill, HB 2073:)*
For — Bruce Bower; Susan Murphree, Disability Policy Consortium; Tim Graves, Texas Health Care Association; Jonas Schwartz, United Cerebral Palsy of Texas; Bob Kafka, ADAPT; Bree Buchanan, Texas Council on Family Violence; Frank Genco, Texas Planning Council for Developmental Disabilities; Pat Cole, National Training Center on Domestic and Sexual Violence; Marie Wisdom, Advocates for Nursing Home Reform

Against — Rosalie Millsap; Nell Lyssy, Parent Child, Inc.

On — Lee Redmond, Coalition of Texans with Disabilities; Celia Hagert and Patrick Bresette, Center for Public Policy Priorities; Sara Speights, Texas Association for Home Care; Mark Foster, Texas Association of Licensed Facility Administrators; Kale Martin; John Hawkins, Sunset Advisory Committee

BACKGROUND: The Texas Department of Human Services (DHS) administers financial assistance, health care, and social services programs for families, children and the aged and disabled. The programs include nursing home care through the Medicaid program; state and federally funded community-based health and personal assistance services; cash assistance through the federal Temporary Assistance for Needy Families (TANF) program; food programs, such as the federal Food Stamp program; and emergency services such as family violence services and disaster assistance.

DHS also regulates nursing homes, personal care homes, intermediate care facilities for the mentally retarded, and adult day-care centers. It determines eligibility for Medicaid services, which also may be provided through other agencies. For example, acute-care medical services are provided through programs administered by the Texas Department of Health (TDH).

Community care services are services provided to low-income elderly, chronically ill, or disabled individuals in their homes or communities and can include attendant services, nursing care, medications, respite care, and home modifications through:

- Medicaid entitlement programs, such as the Frail Elderly program and Primary Home Care programs;
- Medicaid-waiver programs, Community-Based Alternatives (CBA) and Community Living Assistance and Support Services (CLASS), which provide community services to Medicaid recipients who are eligible for nursing facility or institutional care but who choose to remain at home or in the community and whose services are capped at appropriated budget amounts; and
- non-Medicaid-funded community care services for individuals not eligible for Medicaid.

For fiscal 1998-99, DHS has operated with a budget of about $ 7 billion and within an employment cap of 15,690 employees. It is governed by a six-member board appointed by the governor with the consent of the Senate. Members must represent all geographic areas of the state and each member must have an interest in and knowledge of human services.

DHS is subject to the Sunset Act and underwent Sunset Advisory Commission review during the past interim. The agency will be abolished September 1, 1999, unless continued by the Legislature.

DIGEST:

CSSB 369 would continue DHS until September 1, 2011, change the board's composition, and impose new requirements related to administration of the TANF program, community care services, nursing home regulation, adult and child food programs, and family violence services and training.

CSSB 369 also would require the central office to enter into contract agreements with local offices and would move contested case hearings to the

State Office of Administrative Hearings (SOAH), but would allow the DHS commissioner to make the final decisions in some cases.

The bill would take effect September 1, 1999, except for electronic reporting requirements for the food program, which would take effect January 1, 2001.

DHS board. The board would remain a six-member board, but it would have to include members representing a geriatric specialist physician, a health professional, and a consumer advocate. The governor, instead of the board, would designate the presiding officer, and standard sunset provisions on board training would be required.

Local performance. The DHS commissioner and the administrator of each local administrative unit would have to enter into a regional performance agreement that included goals, objectives, and performance criteria. In developing the agreement, the commissioner would have to seek input from local providers of health and human services, recipients of DHS services, and local consumers and advocacy groups. The contents of the performance agreement would have to be made available to the general public and to health and human services agencies in each region.

Community care. DHS would have to institute a system of community care contracting that would give providers equal and periodic opportunities to contract, ensure competition among providers, ensure adequate choice of providers and quality of care for clients, and meet the demand for services. The contracts would have to have clearly defined goals and outcomes, sanctions or penalties for noncompliance, and reporting and auditing requirements. The system would have to be developed by January 1, 2000, and implemented by May 1, 2000.

DHS also would have to:

- inform applicants for Medicaid nursing home care of any community care services that might be available as an alternative;
- implement a process of presumptive eligibility determination for community care services;

- design a plan of care for a community care applicant based on the applicant's needs and adjust it according to any changes in the client's condition; and
- collect specified information from clients on waiting lists for services.

TANF-related requirements. DHS would have to assess the needs of recipients to attain self-sufficiency in addition to their employment-related needs and would have to refer the recipients to appropriate preventive and support services, such as substance abuse treatment, domestic violence services, and parenting skills training.

The Health and Human Services Commission (HHSC) would be the designated state agency for coordinating DHS and the Texas Workforce Commission's (TWC) services for TANF recipients. TWC would have to comply with HHSC planning and reporting requirements for service coordination.

By October 1, 1999, HHSC, DHS, and TWC would have to adopt a plan to increase the number of TANF recipients in the Job Training and Partnership Act program.

Each January 15 of each odd-numbered year, HHSC would have to report to the governor, the lieutenant governor, and the speaker on the effectiveness of the coordination effort, the TANF program, and the job training program.

DHS would have to process sanctions promptly against TANF recipients who failed to live up to their personal responsibility statements.

Food programs. DHS would have to implement an outreach program to increase participation in the Summer Food Service Program if federal or state funds became available. The outreach would have to target communities and schools that had the highest number of eligible children, and DHS would have to administer a grant program to encourage eligible organizations to serve as local sponsors or meal preparation sites.

The department would have to submit any proposed changes to the Child and Adult Care Food program to its advisory committee on that program and to notify in writing all sponsoring organizations of any modification.

Unless prohibited by federal law, DHS would have to allow a sponsoring organization or another participant to submit applications and other information electronically.

Family violence services. DHS, TWC, the Attorney General's Office, and each local workforce development board and subcontractor would have to provide at least four hours of annual training on family violence issues to specified types of employees who interact with applicants or recipients of services. The training would have to include information on the potential impact of family violence on recipients' ability to achieve independence, on state laws and rules, and on community services for family violence victims.

DHS could contract for services from nonprofit nonresidential family violence centers in addition to its current authorization to contract with nonprofit residential family violence shelters. A nonresidential center would have to provide, at a minimum, shelter referral, safety planning, counseling, and legal support services.

Nursing homes. DHS would have to develop minimum performance standards for Medicaid-certified nursing homes and to include the standards in nursing home contracts. DHS also would have to develop a quality assessment process to evaluate a nursing home's contract performance and would have to promptly address failures to meet minimum standards by imposing penalties and sanctions.

The bill would make changes to the issuance and renewal of nursing home administrator licenses and provisional licenses.

DHS would have to compile and periodically update regulatory and service-quality information on nursing homes for public review. The information would have to cover specified areas, including complaints, violations, or deficiencies, staff turnover rates, staff-to-resident ratios, and direct patient care budgeting. The information would have to be available through a toll-free number and on the Internet.

SUPPORTERS SAY:

CSSB 369 would continue and refine DHS operations to meet more effectively the expectations of the Legislature, program clients, and the general public.

Requiring DHS to assess the service needs of at-risk welfare families and to divert those families into support services would help give those families a better chance to overcome their problems that get in the way of successful employment and self-sufficiency. Such problems can include drug and alcohol abuse, domestic violence, mental health care, and juvenile crime. Families with the most complex, chronic problems have the most trouble in meeting work requirements and will become an increasing percentage of the caseload as time limits on welfare benefits come into effect. These provisions also would help Texas meet federal work participation requirements and would reflect similar recommendations made by the joint interim legislative committee studying welfare-to-work issues.

Family violence training, as required by this bill, would make an important stride in helping individuals, mostly women, gain self-sufficiency and leave welfare. Spouses, partners, or family members can become jealously enraged when a person gains greater financial resources and employment skills and can commit violent and demeaning acts to thwart such progress. Victims of family violence are often too ashamed or afraid to report the abuse they receive at home, and state staff are often uncomfortable or unskilled at asking recipients about these problems and do not know what to do with the information once they receive it.

Allowing nonresidential family violence centers to contract with DHS also would provide abused individuals with more alternatives and services than simply those of finding shelter. Many women and children do not need shelter, but they do need legal services and other assistance to free themselves from abusive situations.

By allowing presumptive eligibility for CBA and Frail Elderly programs, individuals could obtain needed services more quickly and prevent further deterioration of their conditions, which could require emergency room care or more comprehensive or institutional care. Procedures for using presumptive eligibility, such as the development of client profiles, would decrease the number of individuals subsequently determined to be ineligible. Savings would result from early provision of less costly community services to those who otherwise would enter nursing homes, and any costs associated with services provided to individuals who were later determined to be ineligible could be covered through other federal funding sources, such as Title 3 dollars available to serve individuals 60 years of age and older. Costs for

presumptive eligibility in community care services have been included in the "wish list" of the House-passed version of the fiscal 2000-01 budget.

The bill's contracting provisions would give DHS some authority to limit provider participation within boundaries that would ensure competitive contracting and adequate choice for consumers. Tightening contracting requirements even further — for example, by strictly imposing selective contracting — would run against federal requirements that recipients be given a choice of providers and could defeat competitive incentives that encourage providers to provide high-quality care to attract clients.

Requiring the central office to enter into performance agreements with the local administrative units would make both entities more accountable to the public. Regional administrators possess considerable decision-making autonomy in determining how to deliver services. This gives them flexibility to meet local needs, but there is no formal mechanism to hold them accountable for performance. Requiring input from local providers, consumers, and other interested parties in developing the performance objectives would ensure that local needs were being considered adequately in light of state resources and goals.

CSHB 369 would require the agency to assemble existing data into a format for use by the public, which would assist consumers in selecting nursing homes that meet their needs and expectations of care. The bill calls only for the compilation of existing data and therefore would not authorize a grading system or other process that would interject subjective judgments not backed by official reports. Information about the good qualities of a nursing home would not be excluded from the format and could be inferred from a facility's low number of complaints or violations, but it should not include information reported by the nursing homes themselves. This bill would give DHS more specific directions on the development of the quality index, as required last session in SB 190, and would give the public a source of information while the quality index is being developed.

Transferring administrative hearings to the SOAH would provide more independence and a level of quality equal to that now provided at DHS and would improve cost-effectiveness. DHS set 245 administrative hearings in 1997 and probably will hear an increasing number due to increasing responsibilities in long-term care regulation. The Legislature clearly has

expressed its intent to consolidate the hearings functions of state agencies, and the transfer of administrative hearings to SOAH could reduce state costs by as much as 39 percent.

The commissioner should retain the ability to make a final decision over cases heard by SOAH, just as other agency heads do. The commissioner's decision would be limited to the findings of fact and therefore linked to the objective viewpoint of the administrative law judge. To authorize SOAH to make the final decisions would remove the state's right to appeal to an accountable authority, because SOAH operates without a board. Nursing homes always can appeal any adverse decision to a district court, but the state does not have that option.

The bill would not include provisions requiring DHS to publish rules stating the specific criteria by which administrative remedies are imposed because such an inflexible provision would hamper the agency's ability to use common sense and tailor penalties to fit the infractions. Should a nursing facility operator challenge the violations, it is very likely that the disputes would revolve around whether regulators followed bureaucratic requirements instead of around the potential dangers posed to the residents. Since violations represent varying degrees of harm, administrative remedies and penalties should be flexible enough to meet the degree of harm in every circumstance. Nursing homes would be protected from arbitrary or unduly harsh remedies and penalties through due process procedures and their right to appeal.

The state is a regulator, not a consultant, and tax dollars should not be spent on playing a consultant role with nursing homes, as some suggest. By now, public and state expectations are very clear about what kind of care is expected in nursing homes, and nursing homes should live up to those expectations or get out of the business.

Requiring some of the board members to represent geriatric medical specialists, nursing facility administrators, or other licensed or certified health professionals and consumers would ensure that the board had sufficient expertise in the areas that it regulates. Medicaid has been twisted and stretched to cover many valid needs. Current law requires the board members only to have an interest in human services, but an interest alone does not mean that the person would be qualified to regulate effectively and make good decisions in difficult or complex medical situations.

The proposed requirements concerning food programs conform with recent Texas Performance Review recommendations in *Challenging the Status Quo*. The Child and Adult Care Food Program provides nutritional meals and snacks to children and adults in day-care facilities and works with sponsoring organizations to provide food in more than 9,500 home-based child-care facilities, 1,800 child-care centers, and 189 adult day-care centers. The sponsoring organization must submit an application on a DHS-provided form for each facility it serves. This has been found to increase administrative costs and delays that could be reduced through the use of electronic media. The Summer Food Service Program provides free nutritious meals to low-income children during school vacations. Across the state and the country, this program has been underused, and many children would benefit from DHS' assistance with outreach.

Placing TWC under the coordination of HHSC would be consistent with other changes proposed this session that would give the HHSC commissioner better control and accountability over health and human services. The provisions are designed to protect against changing other TWC programs and services that are not welfare-related, and they would have to comply with specific federal laws and requirements.

OPPONENTS SAY:

Changing the board membership is unnecessary and could lead to conflicts of interest that would dampen the enactment of good state policy. Allowing a health professional such as a nursing facility administrator, who is licensed or regulated by DHS, to be on the board could result in a situation in which "the fox is guarding the hen house." The inclusion of doctors is not necessary because doctors already exert a powerful voice in regulatory decision-making. Putting "experts" on a rulemaking board is unnecessary because of the public input provided during the rulemaking process and the ability of the board to consult with advisory groups and committees.

The bill would expand the authority of HHSC inappropriately by giving it control over TWC rulemaking and other activities. Both the commissioner and the TWC board are governor-appointed, so accountability would not be improved. In addition, TWC is a business-driven, employment-oriented agency, not a human services agency. Only about 3 percent of its clients are welfare recipients, and the rest are laborers and participating employers. Better coordination between DHS and TWC could be accomplished through memoranda of understanding, which could focus on particular problems and

leave alone the integrity of TWC programs that have nothing to do with welfare.

The family violence training requirements for DHS, TWC, local workforce boards, and board subcontractor employees are unnecessary and too expensive. Training, if required at all, should be limited to a few employees who have direct contact with recipients.

The presumptive eligibility provisions for CBA and Frail Elderly programs would increase state expenditures by about $2 million per year and would risk spending state funds on services to individuals who later would be determined to be ineligible for Medicaid. The state should pay for services only when an individual is deemed eligible for Medicaid.

To eliminate conflicts of interest when deciding contested cases, SOAH, not the department, should make the final decisions. DHS should be the policing agency and should be removed from making final judgments.

OTHER OPPONENTS SAY:

The bill should require the representation of disabled individuals on the DHS board. DHS increasingly is becoming the state's long-term care agency, and persons with disabilities are a major client of long-term care services and know the problems and the benefits inherent in state programs.

The bill should require the use of selective contracting to allow DHS to focus limited staff time and resources on providing higher-quality services to more clients. Discontinuing the use of open enrollment policies (in which all eligible providers may receive contracts) would help bring DHS into compliance with the best-value contracting principles required by the Legislature of all health and human services agencies. The Sunset Advisory Commission found that DHS, because of its open enrollment policy, often enters into multiple contracts with one provider as well as contracts for providers that have no clients. This expends considerable resources that could be used for direct care and case management.

DHS needs to do more than just sanction TANF clients quickly. Sanctioned clients very often are individuals facing multiple personal and familial problems that block their path to financial self-sufficiency. DHS sanction efforts should be made with a thorough case review to ensure the applicability and accuracy of the sanction. Clients also should be given reasonable opportunities to work together with agency staff to comply and avoid

sanctions. Historically, high percentages of sanctions have been found to have been mistakenly imposed, either because of system errors or failures to recognize legitimate barriers that provided good-cause exemptions for clients. Sanctions would not be used merely to kick people off of benefits but as a reasonable way to hold people accountable and to identify clients having the most difficulty in overcoming barriers.

This bill could do more to improve nursing home regulation. DHS should have to develop criteria in published rules regarding circumstances that would trigger the imposition of each remedy, so that nursing facilities are not subject to arbitrary, uneven, or uninformed imposition of penalties. The state is so big and varied that the 22 different enforcement remedies available to DHS often are imposed inconsistently. What warrants one kind of punishment in Dallas often is different from one imposed in Alpine. The Texas Natural Resource Conservation Commission has spent time developing a matrix of responses that is fair to all, and DHS could learn from that.

The bill also should require more opportunity for consultations between nursing home inspectors and nursing homes to foster quality of care and should include provisions for informal reviews and settlements before the imposition of sanctions. Regulators as consultants is not a new idea and is taking place to a certain extent in child-care licensing activities. The nursing home contracting and public information provisions would seem to require more rulemaking, which would detract from patient care.

NOTES:

Major changes made by the committee substitute to the Senate-passed version of the bill include:

- adding a consumer advocate to the board;
- changing the system by which DHS would contract for community care services from one that would limit the number of direct providers to one that would give providers equal and periodic opportunities to contract and that would ensure competition;
- adding family violence training requirements for DHS, TWC, local workforce boards, and board subcontractor employees;
- adding provisions relating to the Summer Food Program and the Child and Adult Care Food Program; and
- removing requirements that DHS develop criteria for the triggering of each remedy available to the department when regulating nursing homes.

SB 374 by Zaffirini, which would fold into DHS long-term care services and administrative functions from the Texas Department on Aging and TDH, passed the Senate on April 29 and was reported favorably, as amended, by the House Human Services Committee on May 4.

SB 369 by Madla, which would continue the functions and operations of the Texas Department of Mental Health and Mental Retardation, also is on today's House calendar.