HOUSE RESEARCH ORGANIZATION • TEXAS HOUSE OF REPRESENTATIVES
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HOUSE RESEARCH ORGANIZATION

daily floor report

Monday, May 13, 2013
83rd Legislature, Number 72
The House convenes at 2 p.m.

Seven bills have been set on the Major State and General State calendars for second-reading consideration today:

SB 201 by Birdwell	Continuation and functions of the State Preservation Board	1
SB 15 by Seliger	Governing boards, system administrators of higher education institutions	4
SB 346 by Seliger	Political contribution reporting requirements of certain persons	9
SB 329 by Huffman	Prohibiting the use of a tanning facility by a minor	14
SB 566 by Eltife	Establishing a pharmacy school at The University of Texas at Tyler	18
SB 1611 by Ellis	Requiring disclosure of certain information in a criminal case	21
SB 825 by Whitmire	State Bar disciplinary process for certain prosecutor disclosure violations	26

Bill Callegari
Chairman
83(R) – 72

SUBJECT: Continuation and functions of the State Preservation Board

COMMITTEE: Culture, Recreation and Tourism — committee substitute recommended

VOTE: 6 ayes — Guillen, Aycock, Kuempel, Larson, Nevárez, Smith

0 nays

1 absent — Dukes

SENATE VOTE: On final passage, April 4 — 30 - 0

WITNESSES: *(On House companion bill, HB 1665)*
For — None

Against — None

On — John Sneed, State Preservation Board; (*Registered, but did not testify*: Faye Rencher, Sunset staff)

BACKGROUND: The State Preservation Board was created in 1983 and is responsible for preserving and maintaining the Capitol, General Land Office Building, Capitol Visitors Parking Garage, and Governor's Mansion, as well as operating the Bob Bullock Texas State History Museum. The six-member board includes the governor, lieutenant governor, and speaker of the House, and each of these members appoints one member. The governor's appointee must be a representative of the general public. The board meets at the call of the governor.

DIGEST: CSSB 201 would continue the State Preservation Board until September 1, 2025. The bill would allow the governor, lieutenant governor, and speaker to designate a representative to act, including the ability to vote, on their behalf during a State Preservation Board meeting. The Board would be required to meet at least twice each year.

The bill would establish the Governor's Mansion renewal trust fund outside of the Treasury with the comptroller for the purposes of preserving and maintaining the Governor's Mansion. The fund would consist of

money transferred at the discretion of the Legislature and donated money. It would be administered by the board.

The bill would require the executive director of the board to employ a museum director for the Texas State History Museum. The board would also be required to adopt reasonable policies for naming areas within the museum in honor of benefactors.

The bill would take effect September 1, 2013.

SUPPORTERS SAY:

CSSB 201 would improve the State Preservation Board's administration of the agency. Because the board is made up of some of the state's highest ranking and busiest leaders, it rarely meets and instead uses informal and less transparent decision-making processes. Allowing the three board members with greatest need for scheduling flexibility to designate a representative to meetings would allow the board to focus more closely on the agency operations. Additionally, requiring the board to meet at least twice per year would allow for more oversight of agency operations, particularly related to rulemaking, planning, and budgeting, and would provide more transparency.

The bill would clarify responsibility for the management and operation of the state history museum by establishing the museum director position in statute. The bill also would provide clear authority to adopt reasonable policies for naming areas within the museum after benefactors, which would help the museum raise funds. Additionally, establishing the Governor's Mansion Renewal Trust Fund would help raise funds for the long-term maintenance and preservation the Governor's Mansion.

OPPONENTS SAY:

No apparent opposition.

NOTES:

CSSB 201 differs from the Senate engrossed version in that the Senate version would have made possessing a burning tobacco product or smoking tobacco on the state Capitol grounds a class C misdemeanor (maximum fine of $500).

The Senate engrossed version would have required proposals to new constructions in the Capitol Complex to be consistent with Capitol complex design guidelines or standards adopted as part of a 1989 planning process or a subsequently adopted plan. The State Preservation Board

could have disapproved of a project by a public vote not later than the 60th day after the final proposal was received if the proposal did not meet these requirements. The project would have been considered approved by the board if the board did not disapprove before 60 days.

The Senate engrossed version also would have required the board to develop and conduct a study to evaluate the feasibility of establishing lactation suites in the Capitol Complex for breastfeeding mothers.

The House companion bill, HB 1665, was left pending in the Culture, Recreation, and Tourism committee.

SUBJECT: Governing boards, system administrators of higher education institutions

COMMITTEE: Higher Education — favorable, without amendment

VOTE: 7 ayes — Branch, Patrick, Alonzo, Clardy, Howard, Martinez, Raney

0 nays

2 absent — Darby, Murphy

SENATE VOTE: On final passage, April 11 — 29 - 2 (Birdwell, Paxton)

WITNESSES: No public hearing

BACKGROUND: Education Code, sec. 51.352 establishes responsibilities for governing boards of institutions of higher education.

DIGEST: SB 15 would add to the management responsibilities of boards of regents of institutions of higher education and would expand the training requirements of individual regents.

Board oversight of institutional units and presidents. Under SB 15, to the extent practicable, communication between the board of regents of a university system or between members of the board and the employees of an institution under its governance would be conducted through the system.

The governing board of a university system could terminate the employment of an institution's president only after receiving a recommendation to that effect from the system's administration. A board would not be required to act on such a recommendation. SB 15 would remove the board's responsibility to evaluate the chief executive officer of each component institution and the responsibility to assist the officer in the achievement of performance goals.

Other responsibilities of governing boards. SB 15 would charge governing boards with responsibility to:

- preserve institutional independence and defend each institution's right to manage its own affairs through its chosen administrators and employees;
- develop a balanced governing structure designed to promote institutional integrity, autonomy, and flexibility of operations while maintaining maximum operating efficiency and academic excellence;
- govern institutions with the spirit of integrity in all matters, including operating in a relationship with all parties in an open and honest manner;
- ensure that the powers and duties of the board are not controlled by a minority of its members or by organizations or interest that are separate from the board in any manner;
- protect each institution under its governance from undue external influence;
- establish and publish, for each institution under its governance, long-term goals consistent with the role and mission and of the institution, after coordinating with the institution's president and consulting with the institution's faculty; and
- not unreasonably or unduly interfere with the day-to-day operations of the institutions under its governance.

Under SB 15, each report, recommendation, or vote of the governing board or of a committee, subcommittee, task force, or similar entity reporting to the governing board would be made available to the public on the board's website by the end of the next business day after the report, recommendation, or vote.

Individual board members. SB 15 would require individual board members to receive training before voting on issues before the board and would impose further rules against conflicts of interest.

Board member training. A member of a governing board of a university system appointed when the Legislature was not in session would be prohibited from voting on issues before the board until the appointee had appeared before the Senate Committee on Nominations. If the Nominations Committee failed to hold a hearing within 45 days of the date the chair of the committee was notified of the appointment by the governor's office, the appointee would not be prohibited from voting if the appointee had otherwise met the requirements to be eligible to vote.

Under the bill the Texas Higher Education Coordinating Board would

provide training to newly appointed board members during their first year on the board. SB 15 would make certain topics covered in board member training mandatory, including auditing procedures, governance, and disciplinary and investigative authority. The bill would add ethics and federal laws on student privacy to the topics to be covered in training.

Conflict of interest. The governing boards would remain free from any contractual, employment, or personal or familial financial interest in the institution or institutions under its governance. This requirement would not affect other applicable conflict of interest laws.

Responsibility of system administrators. SB 15 would move oversight of university presidents from governing boards to system administrators. In consultation with the governing board of the system, system administrators would evaluate the president or other chief executive officer of a component institution in the development of each institution and assist the officer in the development and achievement of performance goals. If necessary, the system administrators would recommend, based on the president's performance, termination of employment.

Effective date. This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013.

SUPPORTERS SAY:

SB 15 would create a more formal structure for university governance, with authority and accountability more properly placed.

With the growing size of Texas' university systems, disagreements on protocols, command structure, and reporting duties have affected and are affecting several institutions, not just UT-Austin. SB 15 would address a need for clarity by requiring that communication between various parts of a university system occur in a formalized manner. The bill would require various components of a system to move up or down the formalized institutional chain of command. Board of regents' communications to constituent institutions would take place through system administrators and vice versa. Reinforcing a clear chain of reporting would create better systems of communication, coordination, and accountability.

Regents would not lose power under the bill. The bill would not change the actors involved in the governance of institutions of higher education. Instead, it would apply accepted management practices and organization

to this system of governance. If a regent had questions about a constituent institution, the bill simply would require inquiry to take place through the system administration. Under SB 15, a governing board would be able to fire the presidents of constituent institutions on the recommendation of the system's administration. Governing boards would maintain full oversight powers over system administrators, ensuring continued accountability. This would allow regents, as appointees of the elected governor and those confirmed by the elected Senate, to continue to represent the public interest.

SB 15 would improve the system already in place for training regents. Current law already requires the Texas Higher Education Coordinating Board to provide training to newly appointed regents. SB 15 would improve this by requiring that the program include training on ethics and federal laws on student privacy, such as the Family Educational Rights and Privacy Act of 1974.

The bill also would not allow newly appointed regents to vote on matters before the board unless they had completed required training in order to ensure educated votes. This also would encourage regents to complete required training quickly. The training would be designed to provide the regents with the tools needed to examine budgets, interpret statutes and other laws, understand audits and other investigations, and to provide the independent and effective oversight required.

OPPONENTS SAY:

SB 15 would be too big a fix for the problems it purports to solve. It is an attempt to address conflicts between the UT-System regents and the president and administration of UT-Austin. However, the bill would change the governance of all Texas institutions of higher education, including the ones where no conflict exists.

By requiring boards to channel their communications to component systems through system administrations, the bill would lessen the investigatory powers of boards. This would make them less effective at oversight, the primary charge of governing boards. It also would further remove universities and colleges from oversight by elected officials. Regents are selected by the governor and confirmed by the Senate. Requiring regents to go through system officials, rather than straight to component universities and colleges, would remove these institutions further from oversight by the voters.

SB 15 would create two classes of regents. One class would be able to vote on issues before the board, while the other could not until they had completed mandatory training. There is no need for this voting restriction. The traditional vetting of regents — appointment of able candidates by the governor and a confirmation process by the Senate — is sufficient to ensure quality board members.

SUBJECT: Political contribution reporting requirements of certain persons

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 12 ayes — Cook, Giddings, Craddick, Farrar, Frullo, Geren, Harless, Huberty, Menéndez, Oliveira, Smithee, Sylvester Turner

0 nays

1 absent — Hilderbran

SENATE VOTE: On final passage, April 16 — 23 - 6 (Birdwell, Campbell, Estes, Fraser, Nelson, Paxton)

WITNESSES: For — Steve Bresnen; Fred Lewis; Craig McDonald, Texas for Public Justice; (*Registered, but did not testify:* Trigg Edwards and Tom Smith, Public Citizen; Jack Gullahorn, Professional Advocacy Organization of Texas)

Against — (*Registered, but did not testify:* Veronica Arnold, James Graham, and John Seago, Texas Right to Life; Bob Bagley, Montgomery County Eagle Forum; Tama Chunn and Margaret Hotze, Life Advocates; Elizabeth Davidson and Carol Everett, Women's Wellness Coalition of Texas; Julie Drenner, R Street Institute; Martha Foerster, Francis Morrison, Patricia Schulze, Siedhoff, and Teresa Strack, Montgomery County Right to Life; Paul Hastings, Texas Home School Coalition; John Horton, Young Conservatives of Texas; Annie Mahoney, Texas Conservative Coalition; Dustin Matocha, Texans for Fiscal Responsibility; Jonathan Saenz, Texas Values; Dennis Scharp and Ronald Woodruff, North Texas Citizen's Lobby; Peggy Venable, Americans for Prosperity; and 7 individuals)

On — Natalia Luna Ashley, Texas Ethics Commission

BACKGROUND: Title 15 of the Election Code governs the regulation of political funds and campaigns, including requirements for financial reports by campaigns, candidates, officeholders, and political committees. These campaign financial reports must be filed with the Texas Ethics Commission.

Under Election Code, sec. 251.001, a political committee means a group of persons that has as a principal purpose accepting political contributions or making political expenditures.

DIGEST:

SB 346 would create political contribution reporting requirements for a person or group of persons that:

- did not meet the definition of a political committee;
- accepted political contributions; and
- made one or more political expenditures, with certain exceptions, that exceeded $25,000 during a calendar year.

The bill would not apply to labor organizations or their subordinate entities.

Under the bill, a person or group would be considered to have accepted political contributions if its members or donors made payments, including dues, that the members or donors had a reason to know at the time of payment could be used or commingled with other funds used to make political contributions or political expenditures.

A person or group of persons to whom the bill applied would be required to report as if they were a general purpose committee that did not file monthly reports. A person or group of persons to whom the bill applied would not be required to file a campaign treasurer appointment unless they were otherwise required to do so.

A person or group of persons would not be required to file a report under the bill if:

- they were required to disclose the expenditures or contributions in another report required under Title 15 within the same time frame; or
- no reportable activity occurred during the reporting period.

Itemization of contributions required under the existing reporting provisions would be required only if the contribution exceeded $1,000 during the reporting period.

The first report required to be filed in a calendar year in which the $25,000

threshold was exceeded would need to include all political contributions accepted and all political expenditures made in that year.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013.

SUPPORTERS SAY:

SB 346 would close a loophole in existing political contribution reporting requirements and ensure that all entities spending money to influence elections were treated the same. Currently, certain nonprofit 501(c)(4) organizations that spend more than $25,000 in political expenditures every year, but don't qualify as a PAC, don't have to report their political expenditures. These organizations have become increasingly powerful and have begun spending more since the decision in *Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).* They should be subject to the same reporting requirements as other political organizations.

The bill would provide transparency. The organizations that would be affected by the bill make large campaign contributions and have no provisions for transparency. Disclosing funding sources of major campaign efforts would create a more informed electorate and help voters weigh the importance of the source and discern the validity of information.

The decision in *Citizens United v. Federal Election Commission* upheld certain requirements for public disclosure and made it clear that disclosure of campaign contributions was important. The pro-disclosure decision in *Citizens United* could not reasonably be interpreted to have held that these organizations have a constitutional right to anonymous political speech. Concerns that the bill would infringe on the speech rights upheld by *McIntyre v. Ohio Election Commission, 514 U.S. 334* are misguided.

The bill would not discourage honest political spending. In the case of *Buckley v. Valeo, 421 U.S. 1 (1976),* the Supreme Court explained that disclosure was an essential means of gathering data to detect violations in campaign finance regulations and deter corruption. Persons who are in compliance with the law should have no reason to stop contributing merely because they would be required to disclose their political donations.

The bill would not violate the Equal Protection Clause. Labor unions and other 501(c)(5) organizations accept contributions only from their

members and thus do not have the same transparency concerns as the organizations affected by the bill. The exception for labor unions would be a natural extension of the bill's purpose and a reasonable and fair exception.

Claims that involved and charitable citizens may not have a reason to know their donations could go toward political activity are unfounded. People who make charitable contributions to political organizations generally make those contributions with knowledge and understanding of what the organization does and the kinds of activities their contributions could fund. The bill's language would cover the organizations that most need to report their political contributions.

OPPONENTS SAY:

SB 346, in trying to provide transparency, could have a detrimental effect on anonymous political speech and implicate the First Amendment. The Supreme Court held in *McIntyre v. Ohio Election Commission* that citizens have a right to engage in anonymous political speech and, in *Citizens United v. Federal Election Commission,* it upheld the First Amendment Rights of corporations as associations of individuals. Accordingly, this bill could violate a right to engage in anonymous political speech for some organizations.

SB 346 could discourage political giving. By requiring reporting of any donation more than $1,000, the bill would open up to disclosure donors who were well below the $2,600 federal limit. Donors who did not want to be scrutinized or harassed or who feared an effect on their personal or professional business would have to be more circumspect with their political donations.

The bill would require reporting from several types of entities, but would carve out exemptions for labor unions. There is no reason for labor organizations to be treated differently under the bill. The bill should apply to both corporations and labor unions or to neither, but to treat the two differently would not ensure the equal protection of the law and could be a violation of the Equal Protection Clause.

SB 346 is unclear and could leave some individuals and groups uncertain of their status under the law. The requirement that donors to affected entities "have reason to know" what their funds would be used for is vague. This could not reasonably be understood in the case of every entity to whom the bill could reasonably apply. Some of the qualifiers in the law

could require reporting from groups that actually had little connection to the political process.

SUBJECT: Prohibiting the use of a tanning facility by a minor

COMMITTEE: Public Health — favorable, without amendment

VOTE: 9 ayes — Kolkhorst, Naishtat, Coleman, Collier, Cortez, S. Davis, Guerra, S. King, Sheffield

2 nays — Laubenberg, Zedler

SENATE VOTE: On final passage, April 17 — 25-6 (Birdwell, Estes, Hancock, Hegar, Nichols, Paxton)

WITNESSES: (*On House companion bill, HB 598*)
For — Susanna Holt Cutrone; Sabrina Nelson, American Cancer Society Cancer Action Network; Donna Regen; Claudia Rodas, American Cancer Society Cancer Action Network; Michael Wilkerson, Texas Dermatological Society; (*Registered, but did not testify:* Troy Alexander, Texas Medical Association; Teresa Devine, Blue Cross and Blue Shield of Texas; Kathy Eckstein, Children's Hospital Association of Texas; Marisa Finley, Scott and White Center for Healthcare Policy; Marshall Kenderdine, Texas Pediatric Society; Larry Regen)

Against — David Hoel and Allen Miller, Palm Beach Tan; Joseph Levy, American Suntanning Association, International Smart Tan Network;

On — Jeffrey Gershenwald, UT MD Anderson Cancer Center; (*Registered, but did not testify:* Tom Brinck, Department of State Health Services)

BACKGROUND: Health and Safety Code, sec. 145.002, defines a tanning device as any equipment, including a sunlamp, tanning booth, and tanning bed, that emits electromagnetic radiation with wavelengths in the air between 200 and 400 nanometers and is used for the tanning of human skin. The term does not refer to spray tanning.

The following persons are prohibited from using a tanning device at a tanning facility:

- a person younger than 16 and-one-half years old; and
- a person younger than 18 years old unless their parent or legal guardian consents in person and in writing that the person younger than 18 years old could use the device. Consent can be revoked at any time.

Under Health and Safety Code, sec. 145.008(g), before a person under the age of 18 can use a tanning facility device for the first time, the person must give the operator a written informed consent statement, signed and dated by the person and the person's parent or legal guardian, stating that the person and the parent or legal guardian have read and understood the Texas Medical Board advisory statement warning of the dangers of tanning and agree that the minor will use protective eyewear at all times while using the tanning device.

Under Health and Safety Code, sec. 145.008(i), a tanning facility must maintain a record for each customer until the third year after he or she last used a facility's tanning device. For customers younger than age 18, the record includes the signed consent statement.

DIGEST:

SB 329 would raise the age at which a person could legally use a tanning facility's tanning device from 16 and-one-half years old to 18 years old.

The bill would eliminate all language that currently allows a person younger than age 18 to use a tanning device with parental consent, except that a tanning facility still would be required to keep records for customers younger than age 18 who used a tanning device before the bill took effect until three years after the date the customer last used the device.

The bill would take effect September 1, 2013.

SUPPORTERS SAY:

SB 329 would protect a vulnerable population, children younger than age 18, from increasing their risk of skin cancer by using tanning devices at a tanning facility. The bill also would reduce health care costs by helping to lower the incidence of skin cancer linked to use of tanning devices in Texas.

Overwhelming scientific evidence links indoor tanning with an increased risk of melanoma, basal cell carcinoma, and squamous cell carcinoma. The bill is in line with the International Agency for Research on Cancer (IARC), part of the World Health Organization (WHO), which classified

as carcinogenic ultraviolet-emitting tanning devices, such as tanning beds and sunlamps. The U.S. Department of Health and Human Services also considers UV radiation a carcinogen. There is no adequate medical justification for the need for full-body indoor tanning, and research shows those younger than age 35 are at the highest risk of developing skin cancer from UV exposure.

Any skin condition for which a doctor recommends light tanning treatment should be addressed in a controlled and localized way through medical instruments in a doctor's office. SB 329 would not adversely impact the business of small tanning salon owners, because minors still could use alternative tanning products offered by tanning facilities, such as spray tans. The state has not seen a shift to increased outdoor tanning after limiting minor access to indoor tanning facilities in 2009, and there is no reason to believe that SB 329 would have this effect.

Minors younger than age 18 cannot buy cigarettes, another well-known carcinogen, even with their parents' permission. Texas should limit minors' access to indoor tanning as well. The risk of a minor illegally using fake identification to tan indoors should not prevent the Legislature from sending a message that tanning carries a public health risk. The requirement to provide identification as proof of age would pose a significant barrier against minors illegally using tanning beds, just as it does for minors seeking to illegally use alcohol or cigarettes.

OPPONENTS SAY:

SB 329 would impose unnecessary further restrictions on tanning by minors. The tanning industry already has adequate oversight by the state and federal government. The bill would restrict personal freedom without improving public health. Minors older than16 and-one-half years old already are required to obtain parental consent to use a tanning facility tanning device. The bill would interfere with the ability of parents to make decisions about the health of their children.

There are some skin conditions, including psoriasis or eczema, for which a doctor would prescribe light tanning treatment. While such a procedure often would be performed in a dermatologist's office, SB 329 should not prevent children in rural areas that may not have convenient access to treatment in a doctor's office to tan for medical conditions under the supervision of their parents. This bill unnecessarily would take away customers from small-business owners who operate tanning facilities.

SB 329 would not change teen behavior but would make teens shift from using indoor tanning to outdoor tanning, which some studies show is more dangerous. Teenagers also are susceptible to peer pressure regarding tanning. Making indoor tanning illegal for minors would increase its desirability for those younger than age18, leading to a possible rise in the use of tanning devices by minors showing fake identification.

NOTES:

SB 329 is identical to the House companion bill, HB 589 by Zerwas, which was left pending following public testimony in the House Public Health Committee on April 17.

SUBJECT: Establishing a pharmacy school at The University of Texas at Tyler

COMMITTEE: Higher Education — favorable, without amendment

VOTE: 8 ayes — Branch, Patrick, Alonzo, Clardy, Darby, Howard, Murphy, Raney

0 nays

1 absent — Martinez

SENATE VOTE: On final passage, April 11 — 31 - 0

WITNESSES: (*On House companion bill, HB 1610*)
For — Rick Rayford, Brookshire Grocery Co.; (*Registered, but did not testify:* John Hawkins, Texas Hospital Association; Gardner Pate, Methodist Hospital System; Paul Troiano, Trinity Mother Frances; Ronnie Volkening, Texas Retailers Association)

Against — None

On — Kirk Calhoun, UT Health Science Center at Tyler; Rodney Mabry, University of Texas at Tyler; (*Registered, but did not testify:* Paul Davis and Emory Martin, Texas Society of Health System Pharmacists; David A. Marwitz, Texas Pharmacy Association; Stacey Silverman, Texas Higher Education Coordinating Board)

BACKGROUND: Currently, there are five established public pharmacy schools in Texas, as well as one private institution. An additional public pharmacy school is expected to enroll its first students this fall.

DIGEST: SB 566 would allow The University of Texas System Board of Regents to establish a pharmacy school at The University of Texas at Tyler.

The Board of Regents would support the operations and capital expenses through tuition, gifts, grants, and other institutional or system funds.

The pharmacy school would not be eligible for state funding under the

formula funding system.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013.

SUPPORTERS SAY:

SB 566 would create a self-supporting pharmacy school at UT Tyler in partnership with UT Health Science Center at Tyler. The school would be modeled after a pharmacy school created by East Tennessee State University in 2005. SB 566 specifically provides that the pharmacy school would not be eligible for state formula funding. Instead, the school would be supported by donations and tuition.

The need for pharmacists in Texas far outweighs the number of seats available at Texas schools, which has resulted in many job vacancies being filled by graduates from other states and countries. This has led to a high turnover rate because many of those pharmacists want to return home after a few years.

Also, the lack of pharmacy slots means some Texas pharmacy students must attend school out of state to pursue pharmacy as a career. Texas pharmacy schools currently receive roughly 3,400 applications per year for a total of around 800 seats. As of this academic year, 571 Texas residents are attending pharmacy school out of state.

UT Tyler expects to enroll roughly 100 students per year with tuition below the average out-of-state tuition of states bordering Texas. Establishing a self-supporting pharmacy school at the University of Texas at Tyler would save students money and keep them in the state.

OPPONENTS SAY:

Establishing a self-supporting pharmacy school within the University of Texas System would essentially be creating a private institution within a public institution. While the program would be modeled after a successful program in another state, it still would bring many unknowns. Given the tremendous need in the state for a variety of professional programs, this model could become the expectation when developing future programs, rather than expanding the state's public schools.

While the intent would be to keep tuition below the cost of out-of-state tuition so that students remained in Texas to get their education, tuition costs likely would be higher than at schools supported by state formula

funding. This could become another barrier to students interested in entering professional programs.

The pharmacy school would not be receiving any state formula funding, but instead would be supported by tuition and gifts, much like a private institution. Although the pharmacy school would be under the umbrella of the University of Texas System, the Higher Education Coordinating Board could have limited oversight over a program independent of the state.

NOTES:

The House companion bill, HB 1610 by Schaefer, was left pending in the House Higher Education Committee on March 27.

The bill states that the pharmacy school would not be eligible for formula funding and that the board of regents would support the operations and capital expenses through institutional funds. According to the LBB's fiscal note, the bill would not prohibit the use of the Available University Fund for capital expenses or general revenue for special items or debt service for future tuition revenue bonds.

SUBJECT: Requiring disclosure of certain information in a criminal case

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Lewis, Farrar, Farney, Gooden, Hernandez Luna, Hunter, K. King, Raymond, S. Thompson

0 nays

SENATE VOTE: On final passage, April 11, 2013 — 31 - 0

WITNESSES: For — Patricia Cummings; Staley Heatly; Michael Morton; Vikrant Reddy, Texas Public Policy Foundation; (*Registered, but did not testify*: Rebecca Bernhardt, Texas Defender Service; Victor Cornell, American Civil Liberties Union of Texas; Brian Eppes, Tarrant County District Attorney's Office; David Gonzalez, Texas Criminal Defense Lawyers Association; Susybelle Gosslee League of Women Voters TX; Annie Mahoney, Texas Conservative Coalition; Carlos Salinas, Alliance for Texas Families; Michael Vitris, Texas Appleseed; Justin Wood, Harris County District Attorney's Office; Ana Yanez Correa, Texas Criminal Justice Coalition)

Against — Terry Breen, 24th DA Office; Robert Clopton, Fort Bend County District Attorney's Office

On — Robert Kepple, Texas District and County Attorneys Association

BACKGROUND: Code of Criminal Procedure, sec. 39.14, requires a court to order the state to produce and permit the inspection, copying, or photographing of certain documents and information that are in the possession, custody, or control of the state or its agencies. The defendant, or an agent of the defendant, must be allowed to inspect, copy, or photograph tangible things that are not privileged and contain evidence material to any matter involved in the action, including designated documents, papers, written statement of the defendant (except written statements of witnesses and privileged work product), books, accounts, letters, photographs, or objects. There are some limitations on the disclosure of information involving children.

The court order must specify the time, place, and manner of the inspection. These rights do not extend to written communications between the state and any of its agents, representatives, or employees. Evidence cannot be removed from the state's possession, and any inspections must be in the presence of a representative of the state.

Government Code, ch. 552, subch. F, governs the charges for providing copies of public information.

DIGEST:

SB 1611 would change discovery procedures and require the disclosure of certain information in a criminal case.

Discovery. SB 1611 would require the state to permit the electronic duplication of offense reports and recorded statements of witnesses, including statements by law enforcement officers, which contained evidence material to any matter involved in the action and were in the possession, custody, or control of the state or under a state contract. This requirement would exclude privileged work product. The state could provide electronic duplicates of documents or information, but it would not authorize the removal of documents, items, or information from the state's possession.

The state would have to electronically record or document any information provided to the defendant under these rules. Before accepting a guilty or nolo contendere plea, both the prosecution and the defense would have to officially acknowledge the disclosure, receipt, and list of all information provided to the defendant. If at any point the state discovered additional information, the state would have to disclose it to the defendant or the court.

The parties still could agree to discovery and documentation requirements equal to or greater than those required by the bill. Subject to some limitations, the court could order the defendant to pay costs related to discovery. The provisions in the bill would control over provisions in the Public Information Act governing charges for providing copies of public information, if they conflicted.

Non-disclosure. The state would have to produce only the portions of information subject to discovery and could redact or withhold the other parts, but would have to inform the defendant of the non-disclosure. The defendant could request a hearing to determine whether the non-disclosure

was legally justified.

Third-party disclosure. The defendant, the defendant's attorney, or an agent of the defendant or attorney, could not disclose to a third-party any documents, evidence, materials, or witness statements received from the state. This would be allowed only if the information was already publicly disclosed or after a hearing in which the court considered the security and privacy interests of victims and witnesses.

The defendant's attorney, or an agent of the attorney, could allow a defendant, witness, or prospective witness to view the information obtained through discovery. The defendant, witness, or prospective witness could not have copies of the information, unless it was of their own witness statement. The defendant's attorney or agent would have to redact any personal information before allowing another person to view the information. For the purposes of these rules, the defendant could not be considered an agent of the attorney.

These rules could not limit the communication of information allowed by the Texas Disciplinary Rules of Professional Conduct, except it could limit the communication of a witness or victim's personally identifying information. SB 1611 would not prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency when making a good faith complaint.

Other evidence. The state would have to disclose to the defendant any exculpatory, impeaching, or mitigating information within the state's control that could negate the defendant's guilt or reduce the punishment.

Pro se defendants. If a court ordered the state to produce and permit the inspection of information by a pro se defendant, the state would have to comply with the order, but would not have to allow electronic duplication.

The bill would be known as the Michael Morton Act. It would apply to the prosecution of offenses committed on or after January 1, 2014.

The bill would take effect January 1, 2014.

SUPPORTERS SAY:

SB 1611 would modernize the state's discovery process and align it with recommendations from the American Bar Association, which ultimately could prevent the conviction of innocent individuals. Questions about

Texas' discovery process came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife. Although the U.S. Supreme Court has ruled that prosecutors must disclose to the defense any potentially exculpatory evidence, this still puts the defense at a disadvantage. To ensure fairness and justice, the defense should have access to all items of evidence. By requiring the disclosure of any information relevant to the case, the bill would protect due process owed to all defendants and help ensure that innocent individuals were not convicted and imprisoned.

Although most offices already follow open-file policies, a statutory mandate would codify the right to any relevant information. This would promote uniformity and give the defense a legal basis for complaints about noncompliance.

OPPONENTS SAY:

SB 1611 would put significant procedural burdens on prosecutors, creating a multitude of opportunities for unintentional and innocuous rule violations. Defense attorneys could exploit these technical violations to force dismissal of a case or even the acquittal of a guilty defendant. The bill's requirements would tip the balance too far in favor of the defense.

The bill would be unnecessary because most prosecuting agencies have robust open-file policies that allow defendants and defense attorneys to have quick and easy access to information. There are more than 300 prosecuting offices Texas, and it is estimated that only two jurisdictions still maintain closed-file policies. Moreover, this bill would not protect against other instances of prosecutorial misconduct, including a bad actor who willfully decided to conceal evidence.

OTHER OPPONENTS SAY:

SB 1611 should go further to penalize prosecutors who fail to disclose evidence in accordance with the bill's requirements by establishing sanctions for violations. SB 1611 also should strengthen provisions related to victim and witness protection by allowing courts to issue protective orders to prevent defense attorneys from releasing any information obtained through discovery.

The bill should clarify provisions related to third-party disclosure. The extent to which a defense attorney can share information obtained through the discovery process with a third party, including members of the press, is ambiguous and could create considerable confusion if enacted as written.

The bill should require both the defense and the prosecution to turn over their evidence to the other party. A mandatory mutual discovery rule would be the best way to balance fairness with justice.

SUBJECT: State Bar disciplinary process for certain prosecutor disclosure violations

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendments

VOTE: 7 ayes — Lewis, Farrar, Farney, Hernandez Luna, K. King, Raymond, S. Thompson

0 nays

2 absent — Gooden, Hunter

SENATE VOTE: On final passage, (March 26) — 31-0

WITNESSES: For — Thomas Ratliff, representing Michael Morton (*Registered, but did not testify:* Rebecca Bernhardt, Texas Defender Service; Cindy Eigler, Texas Interfaith Center for Public Policy; Kristin Etter, Texas Criminal Defense Lawyers Association; Andrea Marsh, Texas Fair Defense Project; Matt Simpson, ACLU of Texas; Ana Yanez-Correa, Texas Criminal Justice Coalition)

Against — None

On — (*Registered, but did not testify:* Linda Acevedo, State Bar of Texas, Shannon Edmonds, Texas District and County Attorneys Association)

BACKGROUND: Under Government Code sec. 81.071, attorneys practicing in Texas are subject to the disciplinary and disability jurisdiction of the Texas Supreme Court and the Commission for Lawyer Discipline, a committee of the State Bar.

Under sec. 81.072(b) the Supreme Court is required to establish minimum standards and procedures for the attorney disciplinary and disability system. Those standards must include requiring the Commission for Lawyer Discipline to adopt rules governing the use of private reprimands by grievance committees.

Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct requires prosecutors to disclose to criminal defendants all evidence and

information that tends to negate the guilt of the accused or mitigate the offense. This is sometimes called the disclosure rule.

Government Code sec. 501.101 defines "wrongfully imprisoned" as someone who has:

- received a pardon for innocence after having served all or part of a sentence in the Texas Department of Criminal Justice system;
- been granted relief under a writ of habeas corpus based on a court finding or determination that the person was actually innocent; or
- been granted relief under a writ of habeas corpus and: 1) the state district court in which the charge was pending dismissed the charge; 2) the dismissal was based on a motion in which the prosecutor says no credible evidence exists against the defendant; and 3) the prosecutor believes the defendant is actually innocent.

DIGEST:

SB 825 would require the Texas Supreme Court to adopt rules requiring the Commission for Lawyer Discipline to prohibit a grievance committee from giving a private reprimand concerning a violation of a disciplinary rule that requires a prosecutor to disclose to the defense all evidence and information that tends to negate the guilt of the accused or mitigate the offense. This would include Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct.

The Supreme Court would have to ensure that the statute of limitations that applied to a grievance filed against a prosecutor alleging a violation of the disclosure rule did not begin to run until the date on which a wrongfully imprisoned person was released from prison.

The bill would take effect September 1, 2013. By December 1, 2013, the Supreme Court would have to amend the Texas Rules of Disciplinary Procedure to conform with the bill.

SUPPORTERS SAY:

SB 825 would strengthen the process used by the State Bar to hold prosecutors accountable when it is alleged that they did not disclose required information in cases in which persons were wrongfully convicted. Questions about this came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife.

At issue is the statute of limitations for filing grievances with the state bar

in such cases and the appropriateness of keeping reprimands in these cases private. SB 825 would address these issues with a fair, limited response narrowly drawn to apply only to cases in which persons were wrongfully imprisoned and when an allegation of a violation of the disclosure rule was at stake.

Currently, allegations of attorney misconduct must be filed with the State Bar's grievance system within four years of the date the conduct occurred. An exception to this allows the limit in cases involving fraud and concealment to begin four years after the misconduct was discovered or should have been discovered. The interplay of these two sections and the different interpretations of the language in the exception have raised questions about whether the deadline should be changed in cases in which a person was wrongfully convicted.

SB 825 would clear up these questions by establishing a rule for cases in which someone was wrongfully convicted by allowing grievances to be filed for four years after release from prison. The wrongfully convicted should not have to overcome the barrier of proving fraud or concealment to file a grievance under the current exception to the deadline.

This change would strike a fair balance by maintaining the four-year statute of limitations but requiring that it begin to run only after a person had been released from prison. Exonerees should have a full four years to pursue a grievance in free society, where they would have access to resources and assistance.

The bill also would address accountability issues in the current system by requiring reprimands in these cases to be public. Currently, in most cases when a State Bar panel rules on a grievance, the panel decides whether to make any reprimand public or private. In all cases of persons wrongfully convicted and involving a prosecutor's violation of the disclosure rule, a private reprimand would be inappropriate because the case involves public officials acting in their public capacity. Making these reprimands public would enhance open government and public confidence in the criminal justice system.

Requiring public reprimands in these cases would be consistent with current law that prohibits certain private reprimands when it is in the public interest. Current law names two other situations in which private reprimands are prohibited: giving more than one private reprimand within

five years for a violation of the same rule and giving a reprimand for a violation that involves a failure to return a fee, a theft, or a misapplication of fiduciary property. The need for public accountability in the situation described by SB 825 is at least as great — if not much greater — than those in current law.

SB 825 bill would not infringe on the discretion of grievance committees to make decisions in these cases. The bill would apply only to the type of reprimand, not whether one should be given. As in the case of the other prohibitions on private reprimands, these decisions should continue to be based on the facts of an individual case. The seriousness of all violations of the disclosure rule in cases in which persons were wrongfully convicted warrants a consistent policy for these types of reprimands.

OPPONENTS SAY:

Requiring reprimands in these cases to be public would decrease the discretion of grievance committees to handle these cases as they saw fit. In some cases, for example, a grievance committee might want to make a private reprimand if it thought the misconduct was of a lower level and that a public reprimand would be inappropriate. This could lead to some cases being dismissed if a private reprimand was unavailable.

OTHER OPPONENTS SAY:

The provisions in SB 825 dealing with the statute of limitations could be unnecessary because the current rules allow for the deadline in cases involving fraud and concealment to begin when the conduct was discovered or should have been discovered, and most cases described by the bill could fall under this exception, allowing time to file a grievance.

It is unclear what limitation would apply if a wrongfully convicted person discovered disclosure rule misconduct involving fraud and concealment more than four years after being released from prison.

NOTES:

The companion bill, HB 1921 by S. Thompson, was referred to the House Judiciary and Civil Jurisprudence Committee on March 4.