

*Top 10 percent policy*

## Higher Education Diversity After Hopwood

The 1996 federal court ruling in *Hopwood v. Texas* struck down the use of race-based affirmative-action policies in higher education admissions. In response, Texas lawmakers created new criteria for admissions policies designed to increase diversity at state colleges and universities without directly basing admissions on the applicant's race and ethnicity. One prominent example, HB 588 by Rangel, et al., enacted in 1997, guarantees admission to any public college or university for students who graduate in the top 10 percent of their high school classes, regardless of their scores on standardized tests.

Supporters say the "top 10 percent law" has helped to restore diversity at selective public universities to pre-*Hopwood* levels and has increased the numbers of enrollees at the University of Texas at Austin (UT-Austin) from public schools that traditionally had sent few students there. UT-Austin and Texas A&M University (TAMU) officials told Senate Education Committee members on June 17 that the law has expanded higher education opportunities for educationally and economically

disadvantaged students and that students admitted under the law have been academically successful and are being retained at high rates.

In and of itself, supporters say, the top 10 percent policy probably will not be as effective as affirmative-action programs in increasing diversity, so higher education institutions must find additional ways to encourage minority students to enroll. Since

enactment of HB 588, Texas' public universities and colleges have enhanced their recruitment and retention programs and have created scholarships targeted at minority and low-income students. Detractors maintain that these programs amount to a "backdoor" version of the race-conscious policies struck down by the federal court. Higher education

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## HHSC Explores "Clinical Pathways" to Save on Medicaid Vendor Drug Costs

As prescription drug expenditures rise rapidly in Texas' Medicaid program, policymakers are investigating ways to ensure that these drugs are used appropriately and in a cost-effective manner. Medicaid, like private health insurance programs, has experienced growth in the number of newer and more expensive drugs prescribed, both because some newer drugs are medically better and because manufacturers market their new drugs aggressively.

Texas offers prescription drug coverage to all Medicaid recipients, though it restricts the number of prescriptions for some groups. Prescriptions account for 11 percent

(\$1.5 billion) of the Medicaid budget for fiscal 2002, but actual expenditures are expected to be even higher, as the number of prescriptions filled in the current biennium is projected to be 6.2 million higher than the number budgeted. The federal government matches state contributions for Medicaid at a 3:1 ratio.

Other states have tried to rein in prescription costs in Medicaid by requiring prior authorization or a preferred drug list. Texas' Health and Human Services Commission (HHSC), in contrast, has teamed up with stakeholders to develop an

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institutions await a definitive ruling from the U.S. Supreme Court on the constitutionality of raced-based policies.

**Hopwood and other opinions**

In 1996, the 5th U.S. Circuit Court of Appeals ruling in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), struck down an admissions policy of the University of Texas Law School that featured preferential selection of minority applicants. The court found such racial preferences unconstitutional, even for the purpose of creating a more diverse student body, and prohibited the law school from considering race as a factor in admissions. (For more background on the issues raised in *Hopwood*, see HRO Focus Reports 74-19, *Affirmative Action Issues Face Texas*, March 6, 1996, and 75-14, *Texas After Hopwood: Revisiting Affirmative Action*, April 22, 1997.)

A 1997 opinion by Attorney General Dan Morales, LO 97-001, applied this standard to all public higher education institutions in the state and concluded that *Hopwood* barred the institutions from considering race in any aspect of measuring or awarding benefits, including admissions, financial aid and scholarship programs, and recruiting and retention. In a 1999 opinion (JC-0107), Attorney General John Cornyn rescinded the portion of Morales' opinion regarding matters other than admissions and advised state universities to wait for the federal appellate court or the U.S. Supreme Court to resolve the issues raised in *Hopwood* before restructuring or adopting new procedures for their financial aid programs. In November 2001, UT-Austin dropped all further appeals of the *Hopwood* ruling.

The 1978 U.S. Supreme Court ruling in *Regents of the University of California v. Bakke* (438 U.S. 265) held that a college admissions program could not seek to admit a predetermined number of applicants from specific ethnic and racial groups, but the court did not clarify

whether an institution could consider race as a factor in admissions. Since then, different lower courts have interpreted the *Bakke* ruling either to permit or to prohibit racial preferences in admissions. In 2001, the Supreme Court declined to hear UT-Austin's appeal of the *Hopwood* ruling. It was the second time in five years that the high court declined to review the case.

Even though *Hopwood* applies only to colleges and universities in Texas, Louisiana, and Mississippi, the states within the jurisdiction of the 5th Circuit, the decision has spurred challenges to admissions policies at institutions in other states, with varying results. In the most recent ruling, issued in May 2002, the 6th U.S. Circuit Court of Appeals narrowly upheld the University of Michigan Law School's affirmative-action admissions policies in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), finding that the law school had a compelling interest in achieving a diverse student body. However, experts on both sides of the debate say this judgment only adds to the confusion over race-based admissions policies. If, as expected, the case is appealed to the U.S. Supreme Court, observers believe that the high court may take up the case because of conflicting rulings among the circuits and reexamine the constitutionality of affirmative action in admissions.

**Top 10 percent law**

In the wake of the *Hopwood* decision, UT-Austin, UT-Dallas, TAMU, and Texas Tech University reported sharp declines in the number of minority students enrolling as freshmen. Minority enrollment at state law schools and medical schools also dropped. The fall 1997 entering class at the UT Law School included significantly fewer minority students than before; African-American enrollment dropped by 87 percent and Hispanic enrollment by 46 percent. Texas Tech's law school reported comparable declines.

State lawmakers faced the challenge of redefining admissions criteria to encourage diversity and equal educational opportunities at Texas institutions without

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*In May, a federal court of appeals narrowly upheld the University of Michigan Law School's affirmative-action admissions policies.*

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## UT-Austin Freshman Enrollment and HB 588

(Summer and fall enrollment combined)

Ethnicity	1996		1998		1999		2000		2001	
	No.	%	No.	%	No.	%	No.	%	No.	%
White	4,159	65	4,399	65	4,447	63	4,801	63	4,447	61
Native American	34	<1	37	<1	28	<1	32	<1	34	<1
African American	266	4	199	3	286	4	296	4	242	3
Asian American	942	15	1,133	17	1,221	17	1,325	17	1,413	19
Hispanic	932	14	891	13	976	14	1,011	13	1,024	14
Foreign/Unknown	97	2	85	1	82	1	221	3	177	2
Total	6,430		6,744		7,040		7,686		7,337	

Source: University of Texas at Austin.

running afoul of the *Hopwood* limitations. The 75th Legislature in 1997 enacted HB 588 by Rangel, et al., which guarantees admission to any public college or university for students who graduate in the top 10 percent of their high school classes, regardless of their scores on the standardized Scholastic Aptitude Test or American College Test. The law guarantees these students admission but not necessarily their first choice of major subjects.

After admitting the top 10 percent, universities may consider other applicants on the basis of 18 socioeconomic factors, including several that may affect the diversity of the student body — such as family poverty level, parents' education level, first generation to attend college, bilingual proficiency, the school district's financial status, residency in a rural area or central city, and attendance at a school under a court-ordered desegregation plan.

Supporters said the law would enable enough minority students from predominantly black and Hispanic high schools to enroll in higher education programs to offset the declines resulting from *Hopwood*. They argued that the plan would benefit the entire state by enabling the very best students of each high school in Texas to attend the flagship universities. Opponents said that this type of percentage-based admissions plan is unfair to many qualified students below the top 10 percent at higher-ranked high schools and would result in Texas colleges admitting many students who were unprepared for the rigors of higher education and unlikely to succeed.

To ensure that enough high school students would be aware of the top 10 percent law to take advantage of its provisions, the 76th Legislature in 1999 enacted SB 510 by Shapleigh, which requires public high schools to post notices about the law outside every administrative and guidance office on campus.

David Montejano, associate professor of history and sociology at UT-Austin, who led research efforts that were instrumental in creating the top 10 percent policy, said the law has helped ensure that UT-Austin enrollment reflects the state's diversity and has done so in a way that benefits all regions of Texas. He said the law has increased access for the best high school students, regardless of race, economic standing, or residence, to the state universities of their choice. Also, he said, the plan has helped focus more attention on the pre-collegiate education system by encouraging university systems to work with high schools that traditionally have not sent many students on to higher education.

The law has broadened the number of UT's "feeder" or "sender" high schools, Montejano said. Between 1996 and 2000, his study found, new feeder schools came from 71 counties and included clusters of inner-city, mostly minority schools in Dallas-Fort Worth, Houston, and San Antonio and rural high schools in East and Northeast Texas.

The Texas Higher Education Coordinating Board (THECB) cites greater diversity as a major benefit of

the top 10 percent law. Low-income, first-generation, and female students have benefitted regardless of their race or ethnicity, according to the THECB.

In 1998, the first year of the top 10 percent law, the UT-Austin admissions office reported that the freshman class had a slightly higher percentage of Hispanic and African-American students than the entering class of 1997 (16 percent vs. 15 percent), but not as high a percentage as the class that entered in 1996 (before *Hopwood*), which was 18 percent Hispanic and African-American. By 1999, admissions had returned to the diversity level of the 1996 entering class. Since then, diversity levels of entering classes have remained stable, although in fall 2001, the percentages of white and African-American enrollees declined slightly while the percentages of Asian-American and Hispanic enrollees increased.

TAMU, meanwhile, continues to struggle with low minority enrollment. Recently, TAMU officials withdrew a proposal to offer automatic enrollment to the top 20 percent of students at selected low-income high schools with large minority populations. The TAMU Board of Regents is awaiting legal advice from the attorney general on whether the proposal violates the *Hopwood* ruling.

The top 10 percent law does not apply to graduate or professional schools. The 77th Legislature in 2001 enacted HB 1641 by Rangel, which prohibits graduate and professional schools from using standardized tests as the sole basis for excluding applicants for admission or scholarships. Institutions can consider standardized tests alongside other factors, such as socioeconomic status and region of residence.

The 77th Legislature also enacted HB 400 by Giddings, which requires the THECB and the Texas Education Agency to identify school districts with low college attendance rates and to create partnerships between these districts and area colleges and universities to develop plans to increase higher education enrollment. It also established the Higher Education Assistant Pilot Program to provide prospective students with assistance and information on admissions, enrollment, and financial aid. The pilot project targets three regions of the state and provides half-day workshops on college enrollment.

## Percentage-based admissions

California and Florida, which both prohibit affirmative action (California by voter initiative in 1996, Florida by executive order of Gov. Jeb Bush in 2000) have implemented percentage-based admissions plans similar to the Texas plan. The University of California admits the top 4 percent of high school graduates, and Florida higher education institutions admit the top 20 percent. Both states guarantee these graduates admission to one of the state's public universities, in contrast to the Texas law, which promises that these graduates will be admitted to the institutions of their choice.

Some say the California plan is more farsighted than the Texas plan in allowing administrators to decide which students will be admitted to particular campuses, a measure seen as preventing overenrollment at certain institutions. Supporters say the plan will spread the state's top high school graduates throughout the university system according to their academic interests and abilities. The plan's detractors, however, contend that turning qualified minority applicants away from the state's flagship institutions is discriminatory.

Opponents argue that broad-based class-rank plans are unconstitutional in being designed specifically to ensure that minority students account for a certain percentage of the student population. They maintain that such programs ultimately will force selective public universities to lower their academic requirements for entering freshmen and will make admissions to public universities less competitive. Ignoring standardized test scores, they say, leads to admitting students who later drop out because they are unprepared for the rigors of difficult college programs at selective institutions.

Other critics of percentage-based plans, including the Texas plan, say they cause many qualified applicants to be denied admission while requiring admission of some students with lower standardized test scores. They claim that students who rank high in mediocre schools are winning out over academically strong students who are not in the top 10 percent of their higher-ranked schools, including some minority students whom the policies are supposed to aid. According to Sylvia Hurtado, associate professor of education at the University of Michigan-Ann

Arbor, class-rank plans also ignore the fact that some low-performing high schools do not produce students who can succeed in college.

Defenders of percentage-based plans say those claims are exaggerated. UT-Austin officials say that since 1996, about half of all entering freshmen have *not* been among the top 10 percent of their high school classes and have been admitted under traditional criteria. Strong students from any school, they say, are likely to be admitted to a public college. Top 10 percent students are motivated and focused and probably will succeed in college regardless of where they went to high school. These observers also argue that strong academic performance in high school is a better predictor of college success than are standardized test scores.

The UT-Austin admissions office examined the grades of entering freshmen in 1996, 1998, and 2000 in the schools of business, engineering, and natural sciences, which have reputations for being both selective and rigorous. The results showed that grade-point averages earned by these freshmen remained stable or, in some cases, increased slightly, suggesting that the admission of large numbers of students with lower standardized test scores has not had a measurable negative effect on student performance. Bruce Walker, director of admissions and associate vice president for student affairs at UT-Austin, told the Senate Education Committee that a higher proportion of “top 10 percenters” than of other students earn grade-point averages of at least 3.0.

Some critics say that percentage-based admissions plans fail to address the problem of persistent segregation in secondary education, which results in large proportions of minority students attending schools that lack the resources available in mostly white-majority schools. According to these critics, percentage-based higher education admissions plans exploit educational segregation while doing nothing to improve public education. In response, Rep. Rangel noted that the automatic admissions law was not designed to address disparities in Texas public schools, but to give the best students an opportunity for admission to higher

education, regardless of their region, economic class, and social background.

## Recruitment and scholarships

The *Hopwood* ruling and subsequent attorney general opinions have deterred Texas universities from offering race-based scholarships. However, institutions still may use their resources to recruit minority students and to inform them about privately funded race-based scholarships. University administrators claim that Texas’ most selective institutions are at a disadvantage in competing for high-quality minority applicants because most other states can offer race-based admissions and scholarships. They say that *Hopwood* has forced educators to become more and more innovative in finding ways to encourage minority students to enroll.

Examples of innovative programs include alumni-sponsored minority scholarships offered by UT-Austin, TAMU, and Rice University. The schools also accept scholarship money from private corporations to be awarded exclusively to minority students. Since 1998, the UT-Austin Ex-Students’ Association has awarded more than \$4.8 million in “Leader” scholarships to students from traditionally underrepresented groups who have demonstrated leadership or who have leadership potential.

In 1998, UT-Austin began offering \$4,000 “Longhorn” scholarships targeted at certain high schools where standardized-test scores and family incomes are below the state average. The scholarships are awarded to seniors in the top 10 percent of their class, and recipients must take part in a program that provides academic support and guidance. This school year, the program awarded scholarships to more than 600 students from 70 high schools. TAMU offers a similar support program called “Aggie Access” for which freshmen from small public high schools or those who may be low-performing or have other special needs are encouraged to apply. Students are selected for the program on the basis of

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leadership involvement, work experience, potential academic performance, extreme financial need, and previously demonstrated strengths. The program serves about 150 students each year.

UT-Austin has created a “Keep Texans in Texas” scholarship that will be available only to graduates of 130 mostly-minority high schools. The scholarships will match offers made by institutions in other states that can offer minority-based scholarships. TAMU offers “Century” scholarships targeted at top 10 percenters at specific high schools in Houston and Dallas. The scholarships serve about 40 students per year with a \$5,000 grant each year for four years. Recipients must agree to act as “Aggie Ambassadors” and return to their high schools to inform students about TAMU.

In addition to targeting recruitment at certain high schools, UT-Austin and TAMU have opened freshman admissions centers in Dallas and Houston. The schools mail details of the top 10 percent law to every junior in the state and invite the students and their parents to informational meetings. Both schools also offer workshops for high school counselors in Dallas-Fort Worth, Houston, San Antonio, and El Paso.

UT-El Paso’s Law School Preparation Institute trains UTEP undergraduates — more than 75 percent of whom are Hispanic — in how to apply to law school and to study for entrance exams. Faculty and staff from several law schools, including UT-Austin, Texas Tech, and Southern Methodist University, assist the program. Created in 1998, the program operates on a \$100,000 state-funded budget but also receives donations and grants from entities such as the Texas Bar Foundation. Ninety-nine of the 105 students who have completed the program have been admitted to law school. UT-Pan American and UT-San Antonio offer similar programs.

Recruitment efforts have boosted minority admissions to the UT Law School, but African-American and Hispanic enrollment remains lower than before the *Hopwood* ruling. In February 2002, the dean of the law school guaranteed admissions to at least 15 graduates of five South Texas public universities. The law school has notified its minority students about race-based clerkships and internships offered by judges, law firms, and the American Bar Association.

— by Rita Barr

## High Court Strikes Down Execution of Mentally Retarded

On June 20, the U.S. Supreme Court ruling in *Atkins v. Virginia* banned the execution of mentally retarded offenders, holding that such executions constitute cruel and unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution. The court's 6-3 decision, written by Justice John Paul Stevens, said that mentally retarded offenders "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" and that their disabilities can jeopardize the reliability and fairness of legal proceedings against them.

Eighteen of the 38 states that allow the death penalty already exempt mentally retarded people from execution. The remaining 20 states, including Texas, will have to develop appropriate ways to enforce the court's ruling.

Texas has no explicit ban on executing the mentally retarded. The 77th Legislature in 2001 enacted HB 236 by Hinojosa (Ellis), which would have prohibited a death sentence for any defendant found to be mentally retarded and would have established procedures for a jury to determine whether a defendant was mentally retarded. Gov. Rick Perry vetoed the bill.

Currently, a jury may consider evidence of mental retardation as mitigating evidence in determining whether to impose a life sentence on a defendant found guilty of capital murder. HB 236 would have allowed a convicted defendant during the sentencing phase to request the submission of a special issue for the jury to determine whether the defendant was mentally retarded. If the jury found that the defendant was *not* mentally retarded and

sentenced the defendant to death, the defendant could have petitioned the court to appoint two disinterested experts to examine the defendant. If the judge, after considering the findings of these experts and of experts offered by the prosecution, found the defendant to be mentally retarded, he or she would have had to sentence the defendant to life imprisonment.

Gov. Perry's veto message stated that Texas' criminal justice system already has many safeguards to prevent execution of the mentally retarded and that the state does not execute mentally retarded murderers. The key issue raised by HB 236, the governor said, is who determines whether a defendant is mentally retarded. He said that by giving judges the power to overturn a jury's determination of whether a murderer is mentally retarded, HB 236 would undermine confidence in the jury system and "could trigger innumerable retrials."

In response, Rep. Juan Hinojosa and Sen. Rodney Ellis reiterated the charge that Texas is executing mentally retarded people. Sen. Ellis said that HB 236 would have ensured that "the ultimate punishment is reserved for those who deserve it most." He argued that mental retardation should not be just a mitigating factor in determining sentences but should be "the defining issue."

HRO Focus Report 77-8, *Should Texas Ban Execution of Mentally Retarded Offenders?*, March 19, 2001, examined issues related to this topic during the 77th legislative session.

— by **Kellie Dworaczyk**

**(Drugs, from page 1)**

education program called “clinical pathways,” intended to help physicians make the best medical and financial decisions in prescribing drugs for their patients.

Earlier this year, HHSC asked the Texas Medical Association (TMA) and the Pharmaceutical Research and Manufacturers of America (PhRMA) to convene a work group to review cost-containment strategies for the Medicaid vendor drug program. The group looked at possible strategies that lawmakers had included in the general appropriations act for fiscal 2002-03 and discussed additional recommendations by stakeholders. So far, the group has made four recommendations concerning the vendor drug program:

- reduce the number of days’ supply a Medicaid client can receive at one time while removing limits on the number of generic drug prescriptions;
- expand generic substitution by making more low-cost generic drugs suitable for substitution under Texas law, while allowing physicians to override generic substitution when necessary;
- save money as branded drugs go off patent and their cost drops from the branded rate to a generic rate; and
- educate physicians in “clinical pathways” to encourage more appropriate and cost-conscious prescription practices.

Stakeholders estimate that these four recommendations could save the state more than \$51 million each biennium, including about \$8 million from the clinical pathways component. TMA has organized physician review teams to develop clinical pathways for five classes of drugs. The association has finalized those pathways and plans to begin an educational campaign this summer.

**Getting the best price**

Texas has several agreements in place that help the state pay the least for drugs under the Medicaid program,

including limits on pharmacy reimbursement, mandatory rebates, and generic substitution.

Prescription drugs fall into two broad categories: branded and generic. Branded drugs are governed by patents held by manufacturers, which generally convey market exclusivity for 20 years. They tend to be newer drugs with novel therapeutic value or with safety or side-effect profiles that are superior to those of older drugs on the market. In the absence of competition, branded drugs are more profitable and tend to be marketed more heavily, including through direct-to-consumer marketing campaigns. When a patent expires on a branded drug, the drug “goes generic,” and companies other than the manufacturer can make and sell the drug. Competition typically results in multiple sources and lower prices.

From a therapeutic perspective, little difference exists between branded and generic drugs. Some drugs are said to be “therapeutic equivalents,” meaning that they can be used to treat the same diagnosis, but they are not the same drug.

Texas requires pharmacists to substitute a generic drug for a branded one if a suitable generic is available and if the prescribing physician does not instruct the pharmacist to prescribe as written. A generic drug can be substituted for a branded one if the generic is A-rated in the federal Food and Drug Administration’s Orange Book list of drugs. Generic drugs that are B- or C-rated cannot be used as substitutes. HHSC has estimated that a generic drug is dispensed 99 percent of the time when it is available and that physicians override the substitution less than 1 percent of the time. Texas does not have a mechanism in place for automatic substitution of therapeutic equivalents, leaving that decision in the hands of the prescribing physician.

Texas sets a maximum allowable cost, which is the median available cost for multiple-source drugs that meet certain requirements. If a generic drug is available from at least five wholesalers, the state will pay no more than the median cost for the drug. For all other drugs, including

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*HHSC has chosen an education-based approach to ensuring cost-conscious spending on prescription drugs for Medicaid.*

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branded drugs when specified by the physician, the state pays the estimated acquisition cost, determined by the state to be what the wholesaler paid or the regular retail price, whichever is less.

The state also receives mandatory rebates from pharmaceutical manufacturers. Federal law requires manufacturers to enter into rebate agreements for their products to be eligible for coverage by Medicaid programs. Rebates can be as high as 25 percent of the drug's cost. In effect, manufacturers must charge less in order for their drugs to be included in the Medicaid program.

All pharmaceuticals dispensed under the state Medicaid program must be listed on the Texas Drug Code Index, generated by the Texas Department of Health and HHSC. The index excludes certain drug categories such as amphetamines, first-aid supplies, and prescriptions for which there is no federal rebate.

## What other states have done

In response to rapid growth in the prescription drug portion of their Medicaid budgets, some states have restricted access to certain prescriptions by requiring prior authorization — that is, requiring physicians to obtain permission from the state Medicaid agency before prescribing or dispensing certain medications. Prior authorization is intended to ensure that physicians do not prescribe a costly drug when it is not needed. This system is expensive for a state to administer, as the Medicaid program must respond to many queries about authorization that require staff and resources dedicated only to prior authorization. Critics say that prior authorization takes prescribing decisions away from qualified physicians and is a burden on patients.

Some states have established preferred drug lists to elicit state supplemental rebates from drug manufacturers, a practice first put in place by California. Manufacturers pay the state a rebate in addition to the federal rebate, and in return, the state places the manufacturers' products on the preferred drug list. Drugs not on the preferred list require prior authorization. This system encourages manufacturers to pay the supplemental rebate or be shut out of the Medicaid market.

The PhRMA has filed lawsuits in Florida and Michigan challenging the legality of supplemental rebates under federal law. The association says that California's supplemental rebate program is "grandfathered" because it was in place before enactment of the federal rebate program, but that other states' supplemental rebate programs conflict with a federal law under which manufacturers that enter into a rebate agreement with the federal government are guaranteed inclusion in state Medicaid programs.

Some observers say that supplemental rebate programs fail to address the demand generated by manufacturers for new, higher-priced drugs. Even though states save some money by paying less for expensive drugs, consumers still may use these drugs when lower-cost alternatives are available. In the case of a \$100 retail price for a branded drug, a state could receive a 25 percent federal rebate and a 5 percent supplemental rebate and pay \$70 for the prescription, which would be higher than a \$60 therapeutically equivalent drug at retail.

In the past year, some states have enacted laws to restrict use of certain drugs through prior authorization or to elicit supplemental rebates. According to a report by the National Conference of State Legislatures, Maine, Mississippi, and Vermont implemented or expanded prior authorization, while Kentucky repealed a ban on it. Florida, Michigan, Minnesota, New Mexico, and West Virginia established supplemental rebate programs in conjunction with prior authorization. Indiana, however, enacted a law prohibiting the state Medicaid and Children's Health Insurance programs from requiring prior authorization for certain classes of drugs, including anti-anxiety, antidepressant, or antipsychotic drugs.

## Clinical pathways approach

In Texas, HHSC has chosen to pursue an education-based approach to ensuring that Medicaid expenditures for prescription drugs are cost-conscious and appropriate. The stakeholder group recommended that TMA and other stakeholders, including physicians and other health professionals, establish clinical pathways for five classes of drugs that are perceived to be among the most significant cost drivers:

### Top 10 Medicaid Drugs by Expenditure, Fiscal 2001

Brand ( <i>generic</i> )	Function	Amount paid (\$ million)	Number of claims (000)	Number of clients (000)
Zyprexa ( <i>olanzapine</i> )	antipsychotic	\$46.3	158	31
Risperdal ( <i>risperidone</i> )	antipsychotic	44.3	261	45
Prilosec ( <i>omeprazole</i> )	decreases amount of acid produced in the stomach	32.0	236	55
Celebrex ( <i>celecoxib</i> )	nonsteroidal anti-inflammatory	28.4	253	86
Prevacid ( <i>lansoprazole</i> )	decreases amount of acid produced in the stomach	24.0	207	50
Claritin ( <i>loratadine</i> )	antihistamine	20.2	288	159
Augmentin ( <i>amoxicillin</i> )	antibiotic	20.2	333	253
Lipitor ( <i>atorvastatin calcium</i> )	blocks production of cholesterol	18.1	163	42
Depakote ( <i>divalproex sodium</i> )	affects chemicals that may cause seizures, migraines, and mania	16.9	144	26
Zoloft ( <i>sertraline hydrochloride</i> )	treats depression	16.6	190	43

Sources: Texas Health and Human Services Commission, U.S. Food and Drug Administration, and WebMD.

- proton pump inhibitors, used to treat ulcers and acid-peptic disorders;
- Cox2 inhibitors, anti-inflammatories used to treat arthritis and other conditions;
- atypical antipsychotics, used to treat mood disorders and psychoses;
- non-sedating antihistamines, for allergies; and
- asthma medications.

Medical professional organizations are to educate their members about the clinical pathways in an effort to make prescribing physicians more aware of the price, efficacy, and side effects of certain drugs. Also, HHSC plans to obtain a software program that will enable it to help individual physicians compare their prescribing patterns with those of their peers. Stakeholders estimate that this education program can save the state \$8 million per biennium in vendor drug costs.

The term “clinical pathways” refers to steps in the decision-making process for diagnosis and treatment of a

patient’s condition. For diagnosis, clinical pathways may suggest tests that a physician would perform to determine the patient’s condition. For prescribing drugs, the clinical pathway indicates important considerations in prescribing one drug over another. This process differs from generic substitution because it encourages the physician to consider prescribing less expensive drugs that can have similar therapeutic value to the patient. In generic substitution, the dispensing pharmacy switches from a branded drug to the same drug in generic form.

An example of a clinical pathway is the decision process for prescribing Celebrex, a more expensive branded drug, versus ibuprofen, a cheaper generic drug. A physician may want to prescribe a nonsteroidal anti-inflammatory drug (NSAID) to treat a patient’s pain. Both Celebrex and ibuprofen are NSAIDs, but Celebrex is thought to cause less stomach irritation than ibuprofen. During clinical pathway education, the physician would receive information about the efficacy, side effects, and cost of each medication and would follow a decision tree to choose the most

appropriate drug for the patient. For example, if the patient had experienced ulcers in the past, the physician might choose to prescribe Celebrex. However, if the patient had no history of ulcers or other stomach ailments, the physician might choose to prescribe ibuprofen.

According to IMS Health, a national health research firm, the pharmaceutical industry spent \$15.7 billion on marketing in 2000, including \$5 billion on marketing to physicians and other health professionals. Also, the industry markets directly to consumers through television, magazine inserts, and other forms of advertising. This type of marketing focuses little on the cost of the medication, and both physicians and consumers often admit to not knowing the full cost of prescriptions. Educating physicians about the economic cost as well as the clinical benefits of a drug, advocates say, should help them make better decisions. It also should provide physicians with full knowledge of why one medication is preferable to another, and physicians could communicate this information to patients who ask for a drug by name.

Advocates of the clinical pathways approach to controlling growth in prescription drug expenditures say that this approach is better for patients because it allows their doctors to decide what drugs they receive. In contrast, prior authorization by the Medicaid program shifts the “gatekeeper” responsibility to the state, which, at that point, is unlikely to be as familiar with the patient’s medical history and current condition as is the patient’s own doctor. Patients who need a more expensive or newer drug might not fill their prescriptions, either because it was not authorized by the state and Medicaid would not cover the cost, or because it adds a layer of complexity to filling a prescription. The latter is of particular concern in the case of certain antipsychotics or other drugs designed to treat mental illness.

Advocates also say that the state may rein in the cost of Medicaid prescriptions more by educating doctors to use clinical pathways than by establishing supplemental rebates. The cost of a branded drug that is discounted by the federal rebate and state supplemental rebates still may be more expensive than a therapeutically equivalent drug. The therapeutic equivalent is not even necessarily a

generic drug but may be a cheaper branded drug. For example, if a drug costs \$100 and the state receives total rebates of 25 percent, the state pays \$75 for the drug. If the physician prescribed a \$60 therapeutically equivalent drug in the first place, the state would save 40 percent. This type of saving, however, is often difficult to measure because it is not possible to track changes in individual physicians’ decision making. Supplemental rebates, in contrast, make it easy for the state to account for savings in the Medicaid prescription drug program.

HHSC has issued a request for a proposal to buy software capable of compiling data on Medicaid physicians’ prescribing practices. Physicians say they receive little information from the state about how they compare to their peers in terms of prescribing patterns. With this information, they could align their prescribing patterns better with those of their peers. The knowledge that a physician’s peers prescribe the lower-cost alternative more often might influence a physician to do the same.

Professional organizations have stated that they will work with HHSC to ensure that the report to physicians includes important data such as the use of brands versus generics, the cost of different drugs, and peer comparison. This type of report could be used to identify “outliers” who could be contacted by their peers to discuss reasons for different prescribing patterns. HHSC expects to have the data collection system in place during the second half of 2002 and should begin disseminating reports of prescribing patterns to physicians by 2003.

Some providers caution that while clinical pathways may be a good educational tool for physicians, any attempt to sanction outliers would be bad medicine. Clinical pathways, they say, cannot encompass the entire range of human conditions and therefore must not preempt a physician’s judgment. Critics warn that the possibility of sanctioning physicians because they have not followed the clinical pathway or because their prescribing patterns are different from those of their peers could jeopardize the health of patients.

— by Kelli Soika

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