HOUSE RESEARCH ORGANIZATION • TEXAS HOUSE OF REPRESENTATIVES
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HOUSE RESEARCH ORGANIZATION

daily floor report

Saturday, August 12, 2017
85th Legislature, First Called Session, Number 19
The House convenes at 3 p.m.

Four bills are on the daily calendar for second-reading consideration today:

HB 367 by Capriglione	Separating federal funds from the general revenue fund	1
HB 208 by Parker	Limiting growth of certain appropriations, calculating growth rate	4
SB 1 by Bettencourt	Reducing the property tax rollback rate	11
SB 11 by Perry	Creating procedures for in-hospital do-not-resuscitate orders	16

The House also is scheduled to consider one bill on third reading.

The Senate State Affairs Committee was scheduled to hold a public hearing today in Room 2E.20 (Betty King Committee Room) at 4 p.m. The Senate Health and Human Services Committee was scheduled to hold a public hearing in Room E1.016 at 4:30 p.m.

Dwayne Bohac
Chairman
85(1) - 19

SUBJECT: Separating federal funds from the general revenue fund

COMMITTEE: Appropriations — favorable, without amendment

VOTE: 17 ayes — Zerwas, Longoria, Ashby, G. Bonnen, Capriglione, Dukes, Giddings, Gonzales, Howard, Koop, Muñoz, Phelan, Roberts, Rose, Simmons, VanDeaver, Wu

0 nays

10 absent — Cosper, S. Davis, Dean, González, Miller, Perez, Raney, J. Rodriguez, Sheffield, Walle

WITNESSES: For — Dale Craymer, Texas Taxpayers and Research Association; Timothy Lee, Texas Retired Teachers Association; (*Registered, but did not testify*: Thomas Canby, Texas Association of School Business Officials; Ann Fickel, Texas Classroom Teachers Association; Mark Terry)

Against — Michael Openshaw

BACKGROUND: Art. 3, sec. 49-g of the Texas Constitution, ratified by voters in 1988, created the Economic Stabilization Fund (ESF), also known as the "rainy day fund." The Constitution requires that a portion of certain oil and gas taxes be deposited in the fund and specifies how appropriations from the fund may be made. The ESF is capped at 10 percent of general revenue funds deposited during the previous biennium, excluding investment income, interest income, and amounts in general revenue borrowed from special funds. The comptroller would suspend transfers to the ESF if it were to reach its cap, and interest on the money in the ESF would be deposited in the general revenue fund.

In 1995, the 74th Legislature enacted HB 3050 by Junell, which consolidated certain funds into the general revenue fund. As a result, certain federal funds that previously were excluded from general revenue now are included.

In January 2017, the comptroller estimated that if no money was appropriated from the ESF, its balance would be $11.9 billion at the end of fiscal 2018-19, below the estimated cap of $16.9 billion.

DIGEST:

HB 367 would prohibit the comptroller from depositing funds received from the federal government to the credit of the general revenue fund. Federal money would be required to be accounted for and administered separately from general revenue in a way that would ensure federal money was used for the purpose for which it was received. Interest and other earnings on money from the federal government would be deposited to the general revenue fund. The comptroller could designate, create, and adjust funds or accounts or money deposited to them to administer federal money under this bill or other laws.

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 on the 91st day after the last day of the special session. To the extent of any conflict, HB 367 would prevail over other law providing for money received from the federal government, or earnings on such money, to be deposited to the credit of the general revenue fund.

SUPPORTERS SAY:

HB 367 would improve transparency in the state budgeting process by eliminating the comingling of federal and state dollars in the general revenue fund. The current practice of labeling federal money as "general revenue" is misleading because Texas receives those funds from the federal government for a specific purpose, and the state is not free to reallocate them. Having a mixture of state and federal money in the same fund can make it difficult to track whether dollars were spent for their intended purpose and to identify the amount of money that the Legislature has discretion in spending.

The bill also would restore the original purpose of the cap on the Economic Stabilization Fund (ESF). The fund is capped at 10 percent of general revenue from the previous biennium, but the definition of general revenue has broadened since the creation of the ESF, especially with the addition of federal funds. In fiscal 1990, federal funds were about 1.5 percent of deposits in the general revenue fund, and in fiscal 2016 they were about 30 percent. This has resulted in raising the base amount used

to calculate the cap on the ESF, leading to a higher cap than originally was intended.

If federal money were removed from the general revenue fund, the base for calculating the cap and the cap itself would be reduced. According to the fiscal note, under current law the cap for fiscal 2020-21 would be $16.7 billion, whereas under HB 367 it would be $11.9 billion. If the bill were enacted, any funds earmarked for the ESF that exceeded the cap would then go to the general revenue fund. The fiscal note estimates that the bill would result in an increase of $213.7 million in general revenue in fiscal 2018-19 and $1.4 billion in fiscal 2020-21.

Additional revenue made available by reducing the ESF cap would be available for any purpose the Legislature deemed necessary. This could include meeting the state's obligations or paying for underfunded commitments of the state such as the Teacher Retirement System and TRS-Care. HB 367 could position the Legislature to consider dedicating money in excess of the cap for a specific purpose.

OPPONENTS SAY:

The Legislature should be deliberate about how it plans to spend any additional available general revenue that would result from HB 367. Returning dollars to taxpayers and the private sector, rather than increasing the size of state government, should receive a high priority. The Legislature also should consider dedicating excess funds to a specific purpose.

NOTES:

The Legislative Budget Board’s fiscal note estimates that the bill would have a positive impact of about $213.7 million on general revenue related funds through fiscal 2018-19. It also reports that health and human services agencies would need to reconfigure their internal accounting system, although a cost could not be estimated.

SUBJECT: Limiting growth of certain appropriations, calculating growth rate

COMMITTEE: Appropriations — committee substitute recommended

VOTE: 14 ayes — Zerwas, Ashby, G. Bonnen, Capriglione, Cosper, Dean, Gonzales, Koop, Miller, Phelan, Raney, Roberts, Simmons, VanDeaver

9 nays — Giddings, González, Howard, Muñoz, Perez, J. Rodriguez, Rose, Walle, Wu

4 absent — Longoria, S. Davis, Dukes, Sheffield

WITNESSES: For — Adam Cahn, Cahnman's Musings; Vance Ginn, Texas Public Policy Foundation; (*Registered, but did not testify*: Salvador Ayala and Michael Sullivan, Empower Texans)

Against — Eva DeLuna, Center for Public Policy Priorities; (*Registered, but did not testify*: Dwight Harris, Texas American Federation of Teachers; Dax Gonzalez, Texas Association of School Boards)

On — Ursula Parks, Legislative Budget Board; Stephen Minick, Texas Association of Business; Monty Exter, The Association of Texas Professional Educators; (*Registered, but did not testify*: Dale Craymer, Texas Taxpayers and Research Association)

BACKGROUND: The Texas Constitution has four limits on state spending: a limit on the growth of the budget, sometimes called the "spending limit," in Art. 8, sec. 22; a prohibition on deficit spending, often called the pay-as-you-go limit, in Art. 3, sec. 49a; a limit on state debt in Art. 3, sec. 49; and a limit on welfare spending, in Art. 3., sec. 51-a(b).

Texas Constitution, Art. 8, sec. 22 restricts how much state spending that is not constitutionally dedicated to particular purposes may increase from one fiscal biennium to the next. The spending may not increase more than the estimated rate of growth of the state's economy unless the cap is waived by a majority vote of both houses of the Legislature. Examples of revenue streams subject to this spending cap include sales, motor vehicle

sales, franchise, alcoholic beverage, and cigarette and tobacco taxes. Excluded are tax revenues dedicated by the Constitution, including state highway funds and mobility funds, and non-tax revenues such as fees, fines, and lottery proceeds.

Government Code, ch. 316, subch. A., establishes how the Legislative Budget Board (LBB) determines the growth rate of the state's economy that is used to calculate the spending cap. The growth rate is determined by a formula based on the estimated Texas total personal income. The LBB can calculate the limit on appropriations using a more comprehensive definition of the rate of growth of the economy if approved by a committee composed of the governor, lieutenant governor, House speaker, and comptroller.

Under Government Code, sec. 316.008(a), the Legislature may not make appropriations in excess of the limit unless it adopts a resolution to do so. Art. 8, sec. 22(b) of the Texas Constitution requires that the resolution be adopted by majority vote in each house and that it find that an emergency exists and specify the amount authorized in excess of the limit.

DIGEST:

CSHB 208 would establish an additional limit on appropriations that, like the current constitutional limit on appropriations of non-dedicated state tax revenue, would be based on the growth rate of the Texas economy. The bill also would redefine how the Legislative Budget Board (LBB) calculated the growth rate of the economy to determine the current constitutional limit on appropriations applied to non-dedicated state tax revenue and the new limit that the bill would apply to all non-federal sources of revenue.

New spending limit on all sources of revenue. CSHB 208 would apply a new limit on appropriations to all sources of revenue, other than federal revenue. The bill would prohibit the rate of growth of appropriations of all non-federal sources of revenue from exceeding the estimated growth rate of the Texas economy. Appropriations to pay rebates of state taxes would be excluded from calculations made to determine whether appropriations exceeded the limit.

CSHB 208 would allow the Legislature to authorize appropriations that

exceeded the limit on all state revenue by adopting a resolution approved by a three-fifths vote of the members of each chamber. The resolution would have to find that an emergency existed, identify the nature of the emergency, and specify the amount authorized in excess of the limit. Any excess amount authorized could not exceed the amount specified in the resolution.

Rate of growth of state economy. The bill would repeal the current method, based on personal income, that LBB is required to use to determine the growth rate of the Texas economy and replace it with a calculation based on average population growth and inflation. The estimated rate of growth of the Texas economy would be the estimated average biennial rate of growth of the population during the biennium for which the appropriations were made, adjusted by the average biennial rate of monetary inflation during the same period.

The LBB would determine the population growth rate and inflation rate by using the most recent information from sources it considered reliable, including the U.S. Bureau of Labor Statistics and the Texas Demographic Center.

The bill would establish as a legislative finding for the current constitutional spending limit that the estimated average biennial rate of growth of the population during the state fiscal biennium for which appropriations were made, adjusted by the estimated average biennial rate of inflation in Texas during the same time, was an appropriate measure of the rate of growth of the economy.

Determining limit on appropriations. The LBB would be required to establish the two limits on the rate of growth of appropriations before it transmitted an estimated budget to the governor and the Legislature. To establish the amounts that could be appropriated for an upcoming biennium under the current spending limit and the limit established by CSHB 208, the LBB would use a formula derived from the product of numbers based on the estimated average biennial rate of population growth during the fiscal biennium and the estimated average rate of monetary inflation for the same period. The LBB would then use those limits to determine the amount of appropriations allowed under the limit.

If the rate of growth of the economy from one biennium to the next was negative, the amount of appropriations of non-dedicated state tax revenue and of consolidated general revenue could not grow.

The bill would eliminate authorization for the LBB to use a more comprehensive definition of the rate of growth of the state's economy if one were developed.

Revenue dedicated by the Constitution. The bill states that it would be the intent of the Legislature, to the extent practicable, that revenue dedicated by the Texas Constitution for a particular purpose be appropriated in each fiscal biennium for that purpose.

The bill would take effect December 1, 2017, and would apply only to appropriations made beginning with the fiscal 2020-21 biennium.

SUPPORTERS SAY:

CSHB 208 would establish an additional statutory spending limit to maintain fiscally responsible spending of taxpayer dollars by future legislatures. While the Legislature has been fiscally conservative with taxpayer dollars, the additional limit in the bill would ensure the long-term financial well-being of the state by limiting spending and tax increases to what the state can afford, thereby supporting economic growth. CSHB 208 would address problems with the current spending cap by limiting a bigger pool of funds and improving the way the limit on the growth of appropriation is calculated.

CSHB 208 would give a more transparent and accurate picture of state budgeting by expanding the types of revenue that fall under a limit in the growth of spending. The current constitutional limit on spending growth applies to state tax revenue not dedicated by the Constitution, which covers only about 60 percent the budget. A cap limited to revenue not dedicated by the Constitution also can provide an incentive to constitutionally dedicate funds so they are not under the limit. Another limit, the pay-as-you-go limit, also leaves a portion of the budget not subject to a cap. CSHB 208 would address these issues by bringing all funds that are subject to state oversight under a limit. It would not bring federal funds under the limit because they are given to the state for a

specific purpose.

Because the current calculation method is flawed, CSHB 208 would establish a new way to calculate the growth rate of the economy to determine both the existing spending limit and the new limit that would be established by the bill. Under current statute, the limit on growth of appropriations is based on personal income growth, which is volatile, unreliable, and tends to grow faster than the overall economy. This results in a limit that may inaccurately portray economic growth and may not adequately curb spending. CSHB 208 would replace this measure with a more appropriate one, based on population growth and inflation. The new measure would reflect more accurately what was happening with the state's economy, which would limit spending to what the state could afford.

The bill would give the Legislative Budget Board the flexibility to determine the population and inflation growth rates using information it considered reliable. While the bill mentions two sources of data, it would not mandate their use or the use of any other specific measures.

CSHB 208 would ensure that the Legislature had adequate flexibility in budgeting by establishing a process for spending above the new limit. To exceed the limit, the Legislature simply would have to identify the reason for the spending and pass a resolution to exceed the cap. To ensure fiscal discipline, the threshold to exceed the new spending limit would be set at three-fifths instead of a simple majority.

While the Legislature could impose additional spending limits without legislation, placing the cap in statute would protect Texans by ensuring that future legislatures adhered to it.

OPPONENTS SAY:

It is unnecessary for the Legislature to enact additional restrictions on state spending. Current limits work well to keep a check on state spending, and an additional limit would unnecessarily complicate budgeting. Texas has a history of passing conservative budgets that are within the state's means, and there is no compelling reason to add to the state's four spending restrictions.

Establishing additional spending limits would reduce flexibility in budgeting. Reduced flexibility could make the state less able to respond to changing conditions, meet the need for a service, or make large investments in one area of the budget. Budget writers should be able to respond to needs for schools, health care, roads, and public safety without having their hands tied. Reduced flexibility could result in cuts to existing programs if growth were needed in another area or new state spending was warranted. Another cap restricting the growth of spending could make it even more difficult to recover and make investments after the state was required by an existing cap to reduce spending. An additional spending limit also could provide an incentive to push spending to local governments.

While the current constitutional limit is restricted to tax revenue not dedicated by the Constitution, CSHB 208 would place under a new limit other types of revenue, such as fees and lottery revenue, which are intended for specific purposes. By pulling such revenue under a spending cap, the bill could unfairly result in a limit on spending funds that were collected for a specific purpose and the need for which might not be related to economic indicators.

While there might be a benefit in the state taking population and inflation into account when budgeting, these factors should not be built into another limit that could tie the hands of lawmakers. The Legislature could impose such limits without a statutory restriction.

OTHER OPPONENTS SAY:

To ensure full budget transparency, the Legislature should apply limits to all spending, including federal funds. Any new cap using inflation should require the use of the consumer price index so that the costs of goods and services for taxpayers were considered.

NOTES:

According to the fiscal note, CSHB 208 would have no fiscal implication in fiscal 2018-19. Starting with fiscal 2020-21, the implications of the bill would depend on the actions of the Legislative Budget Board and the Legislature's future appropriations decisions.

The committee substitute made several changes to the original bill, including removing provisions that would have applied a limit to

"consolidated general revenue.” Consolidated general revenue would have included the general revenue fund, dedicated accounts in the general revenue fund, and general revenue-related funds. The committee substitute also added language stating the intent of the Legislature relating to appropriations of revenue dedicated by the Constitution.

SUBJECT: Reducing the property tax rollback rate

COMMITTEE: Ways and Means — committee substitute recommended

VOTE: 8 ayes — D. Bonnen, Bohac, Darby, Murphy, Murr, Raymond, Shine, Springer

2 nays — Y. Davis, Stephenson

1 absent — E. Johnson

SENATE VOTE: On final passage, July 25 — 19-12 (Garcia, Hinojosa, Lucio, Menéndez, Miles, Rodríguez, Seliger, Uresti, Watson, West, Whitmire, Zaffirini)

WITNESSES: No public hearing

BACKGROUND: Tax Code, sec. 26.04 requires a taxing unit to calculate a rollback tax rate, defined as 1.08 times the maintenance and operations rate that would raise the same amount of revenue as the previous year, plus the current debt rate.

Sec. 26.08 requires school districts that adopt tax rates exceeding the rollback rate to hold a tax rate ratification election. Under sec. 26.07, taxing units other than school districts can be required to hold such an election by a valid petition signed by a certain percentage of the unit's registered voters — at least 7 percent for a district in which the proposed rate would generate at least $5 million, and at least 10 percent for one in which the proposed rate would generate a smaller amount of revenue.

DIGEST: CSSB 1 would reduce to 6 percent from 8 percent the rollback tax rate multiplier for taxing units other than small taxing units. The bill would define a "small taxing unit" as a junior college district or a taxing unit other than a school district for which the proposed tax rate:

- was 2 cents or less per $100 of taxable value; or
- would raise $25 million or less in property tax revenue.

The bill also would require any taxing unit that was not a small taxing unit to hold an automatic rollback election upon the adoption of a rate higher than the rollback rate. This would expand the requirement in Tax Code, sec. 26.08, which currently applies only to school districts.

Small taxing units would continue to be subject to the 8 percent rollback multiplier. An election for such units to adopt a tax rate greater than the rollback rate would be triggered only by petition, as in current law.

The bill would allow a taxing unit located in an area declared a disaster area to be treated as a small taxing unit for up to three years after the disaster occurred, depending on appraisal values of property taxable by the unit.

CSSB 1 would establish similar provisions for calculating rollback rates and holding rollback elections for water districts that were classified as small taxing units and for those that were not.

The bill would take effect January 1, 2018.

SUPPORTERS SAY:

CSSB 1 would ensure that large cities and counties effectively communicated the reasons for a drastic increase in the tax burden to voters, potentially reducing dissatisfaction with property taxes, as voters would better understand how their tax dollars helped their community.

Under current law, rollback elections for city and county tax rates are possible but happen only by a petition of a certain percentage of the voters. In high-population areas, this makes rollback elections effectively impossible as they may require tens of thousands of signatures to be gathered on a tight deadline. Requiring automatic rollback elections would ensure that taxpayers had a direct say in their government's budget process and would avoid a petition process that puts the burden on the residents.

The current 8 percent limit was enacted when inflation was very high, meaning the current limit has become effectively higher over the years and no longer provides taxpayers the intended protections. Even with an 8 percent limit, a locality's tax burden could double in nine years. The bill

would be a step toward re-empowering the voice of the voters.

The bill would not result in less efficient budgeting, as taxing units must make the same calculations now with an 8 percent rollback rate. The bill merely would compress those calculations and compel cities to be more conservative with taxpayer dollars. Few taxing units would regularly exceed the 6 percent limit, and those that do should have the responsibility of making their case to taxpayers.

Reducing the limit to 6 percent would be reasonable and would not prohibit large tax increases; it merely would require localities to seek voter approval before such an increase. Most local taxing units do not regularly need to exceed the 6 percent limit. Bond ratings would not necessarily be threatened because this bill would only tangentially affect one factor among many in bond ratings.

CSSB 1 should be seen more as a bill to increase transparency and improve truth in taxation than as a bill that is intended to provide tax relief. While the state alternatively could increase its share of education funding, as some have suggested, it still should not pass up the opportunity to ensure that taxpayers have an effective voice in their local governments.

While reducing the rollback rate further would empower more taxpayers, a 6 percent multiplier represents a balanced position. CSSB 1 represents a drastic step forward because the rollback elections in high-population areas would be automatic. This alone would ensure the bill was successful in increasing transparency and communication between taxing units and taxpayers.

OPPONENTS SAY:

CSSB 1 would impair the ability of localities to budget and plan for growth, while providing little savings to taxpayers. Many fast-growth cities may need to increase beyond the 6 percent rollback rate regularly, and this bill would make their budget process essentially dependent on voter approval every year, jeopardizing their ability to provide essential services. While it is true that voters might approve the higher tax rate, there is no guarantee they would choose to do so even if it were desperately needed.

Contrary to its intent, this bill would incentivize higher tax rates and greater tax burdens, as localities may choose to levy the highest possible tax rate in the current tax year to avoid a rollback election in the next tax year or to build up cash reserves against the possibility of a future emergency. It also could incentivize inefficient multi-year budgeting, instead of a pay-as-you-go system where the locality imposes a tax burden only when it is necessary.

Requiring automatic elections could put excellent bond ratings for Texas cities at risk. Credit rating agencies seriously consider the flexibility that cities have to adjust their budgets year to year. The bill could reduce those ratings, costing taxpayers more in interest on bonds.

CSSB 1 also is unnecessary, as local government officials can be held responsible directly by voters for decisions to increase the tax burden. A specific rollback election is not needed when elected officials themselves can be held responsible. This bill merely would increase the costs associated with elections.

The bill would not result in significant savings to homeowners because it would not affect the main source of the property tax burden in the state. Most property taxes are levied by school districts and already are subject to automatic rollback elections. Property tax reform instead should start by increasing state spending on education, which accounts for the majority of property tax revenue in Texas and is the most direct way to address high property taxes. Texas relies heavily on local revenue because of spending austerity at the state level, and it should not restrict the ability of localities to ensure residents receive the services they need.

OTHER OPPONENTS SAY:

CSSB 1 would not go far enough and should further reduce the rollback rate. It is important for taxpayers to know and have a voice in their local taxing units' budget process, and a 6 percent rollback rate would not trigger an election for many tax increases.

NOTES:

The committee substitute differs in several ways from the bill as passed by the Senate. The bill as passed by the Senate contains provisions similar to those in HB 32 by D. Bonnen, which passed the House on August 4, in

addition to the provisions in this committee substitute. The Senate-passed version also would implement a 4 percent rollback multiplier.

SUBJECT: Creating procedures for in-hospital do-not-resuscitate orders

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Cook, Geren, Guillen, K. King, Kuempel, Meyer, Oliveira, Paddie, E. Rodriguez

0 nays

4 absent — Giddings, Craddick, Farrar, Smithee

SENATE VOTE: On final passage, July 25 — 21-10 (Garcia, Hinojosa, Menéndez, Miles, Rodríguez, Uresti, Watson, West, Whitmire, Zaffirini)

WITNESSES: No public hearing

DIGEST: CSSB 11 would establish a definition for "DNR order," specify when a do-not-resuscitate (DNR) order could be considered valid, add notification requirements related to DNR orders, provide a procedure for revoking a DNR order, specify when a physician or other entity would not be criminally or civilly liable, and create a criminal offense.

CSSB 11 would define the term "DNR order" to mean an order instructing a health care professional not to attempt cardiopulmonary resuscitation (CPR) on a patient whose circulatory or respiratory function ceased. The bill would apply to DNR orders that were issued in a health care facility or hospital, not to an out-of-hospital DNR order as defined by Health and Safety Code, sec. 166.081.

Under the bill, a DNR order would take effect at the time the order was issued, provided it was placed in the patient’s medical record as soon as practicable.

Types, notice of DNR orders. A patient's DNR order would be valid if it was issued by a patient's attending physician, was dated, and complied with:

- a competent patient's written directions;
- a competent patient's oral directions delivered to or observed by two competent adult witnesses, at least one of whom was not the attending physician or certain other employees of the facility;
- the directions in a properly executed advance directive;
- the directions of a patient's legal guardian or agent with medical power of attorney; or
- a treatment decision that followed the procedure under state law for when a person has not executed or issued a directive and is incompetent or incapable of communication.

If a DNR order of this type conflicted with a treatment decision or valid advance directive, the one made later in time would control.

A DNR order also would be considered valid if it was not contrary to the directions of a patient who was competent when conveying them and if, according to the reasonable judgment of the attending physician, the order was medically appropriate and the patient's death was imminent. This type of valid DNR order could be revoked at any time by the patient's attending physician.

Before a DNR order of this type was placed in a patient's medical record, a patient would have to be informed of the order's issuance or, if the patient was incompetent, the physician or other person acting on behalf of a health care facility or hospital would have to make a diligent effort to contact and inform the patient's known agent under a medical power of attorney or legal guardian. If the patient did not have an agent or guardian, the patient's spouse, adult children, or parents, in that order, would have to be notified.

The physician, physician assistant, or nurse who provided direct care to a patient would have to disclose such a DNR order to the patient's known agent under a medical power of attorney or legal guardian if that individual arrived at the health care facility or hospital. If the patient did not have a known agent or legal guardian, the DNR order would have to be disclosed to the patient's spouse, adult children, or parents, in that order, if one of those individuals arrived. Notice would not need to be

given to additional people beyond the first person notified. Failure to give such notice would not affect the DNR order's validity.

If a person made a good faith effort to disclose the DNR order and recorded that effort in the patient's medical record, that person would not be civilly or criminally liable or subject to disciplinary licensure action.

Upon a patient's admission, CSSB 11 would require the facility or hospital to provide to the patient or an authorized agent notice of the facility's or hospital's policies on the rights of the patient and the agent authorized to make treatment decisions on the patient's behalf.

Revocation of DNR orders. CSSB 11 would provide a procedure for revoking a DNR order. A physician providing direct care to a patient with an issued DNR order would be required to revoke the order if the patient or, as applicable, the patient's agent under a medical power of attorney or the patient's legal guardian:

- effectively revoked an advance directive for which a DNR order was issued in accordance with the bill; or
- expressed to any person providing direct care to the patient a revocation of consent to or intent to revoke a DNR order.

A person providing direct care to a patient under a physician's supervision would have to notify the physician of the request to revoke a DNR order.

Except as otherwise provided by the bill, CSSB 11 would exempt from civil or criminal liability a person who failed to act on a revocation unless the person had actual knowledge of it.

Failure to execute DNR order. CSSB 11 would require an attending physician, health care facility, or hospital that did not wish to execute or comply with a DNR order or the patient's instructions regarding CPR to inform the patient, the patient's legal guardian, or certain others of the benefits and burdens of CPR. If the patient or person acting on the patient's behalf remained in disagreement with the physician, facility, or hospital, the bill would require that a reasonable effort be made to transfer the patient to another physician, facility, or hospital willing to execute or

comply with a DNR order or the patient's instructions regarding CPR.

Liability, offense. The bill would specify that a physician, health care professional, health care facility, hospital, or entity acting in good faith would not be civilly or criminally liable or subject to review or disciplinary action by a licensing agency for issuing a DNR order or causing CPR to be withheld or withdrawn from a patient in accordance with a DNR order. A physician, health care professional, health care facility, hospital, or entity that had no actual knowledge of a DNR order also would not be civilly or criminally liable or subject to review or disciplinary action for failing to act in accordance with the order.

The bill would create a class A misdemeanor offense (up to one year in jail and/or a maximum fine of $4,000) for a physician or other person who intentionally concealed, canceled, effectuated, or falsified another person's DNR order or who intentionally concealed or withheld personal knowledge of another person's revocation of a DNR order.

A physician, health care professional, health care facility, hospital, or entity would be subject to review and disciplinary action by the appropriate licensing authority for intentionally failing to effectuate a DNR order or issuing a DNR order in violation of the bill.

Rules and effective date. The executive commissioner of the Health and Human Services Commission would be required to adopt rules necessary to implement the bill's provisions as soon as practicable after the effective date.

The bill would take effect April 1, 2018, and would apply only to a DNR order issued on or after that date.

SUPPORTERS SAY:

CSSB 11 would give patients more input into the process of issuing a do-not-resuscitate (DNR) order and would help ensure that a patient's family or authorized representative received appropriate notification of the existence of a DNR order. Existing law does not provide adequate direction for the execution of a DNR order within a health care facility or hospital and could allow an order to be issued against a patient's will, possibly resulting in his or her death. CSSB 11 would help ensure that a

patient's wishes were followed in these facilities and that patients received resuscitation if they desired it. The bill also would implement one of the governor's priorities for the special legislative session.

The bill represents a compromise that would balance patient protections with other stakeholder concerns. It would provide civil, criminal, and licensure liability protections for a person, including a health care facility or hospital, who acted in good faith. The bill makes it clear that a failure to disclose a DNR order would not affect the order's validity. The patient protections in the bill that prevent a physician from issuing a DNR order without patient input also would help prevent a physician or other medical professional from making a value judgment about a patient's life.

CSSB 11 would provide important clarifications in statute regarding in-hospital DNR orders. It would specify that a physician could issue a DNR order for a patient if the patient's death was imminent and the order was medically appropriate and not contrary to the patient's wishes. This provision would allow physicians to make necessary spur-of-the-moment decisions while still following the patient's wishes.

The bill would protect patients who issued oral DNR orders by requiring that at least one of the two witnesses not be an employee of the attending physician or of the patient's health care facility. This requirement would help ensure that the order accurately reflected the patient's wishes, rather than the wishes of the health care facility.

The bill would apply existing law regarding decision-making surrogates to in-hospital DNR orders and, as in existing law, only would allow a family member to be involved in a patient's care if the patient was incapacitated and did not have a legal guardian or an agent under a medical power of attorney.

OPPONENTS SAY:

CSSB 11 could have unintended consequences and interfere in the ability of patients and physicians to make appropriate decisions regarding end-of-life care. Physicians sometimes need to make serious decisions on the spur of the moment, and the bill could make it more difficult for physicians to make ethically and medically appropriate decisions in the patient's best interest. Ambiguity in the bill language, such as a lack of certain

definitions, also could increase liability issues for physicians.

The bill also could make it difficult for patients to issue an oral DNR order by requiring a patient to have two witnesses, at least one of whom could not be the patient's physician or employed by the health care facility. Patients could have trouble meeting these requirements.

CSSB 11 also could allow for the invasion of a patient's privacy by requiring certain relatives to be notified of the patient's DNR order. While some patients may want their families involved in their end-of-life care, others may not. The bill should make it easier for patients to prohibit certain individuals from being involved in their care, especially if those individuals could have the power to change a DNR order if the patient became incapacitated.

NOTES:

CSSB 11 differs from the Senate-passed bill by revising the definition of a DNR order, adding certain notice requirements, specifying that the most recent valid DNR order or directive would control, adding provisions related to liability, specifying that a physician or facility could transfer a patient in the case of a disagreement, adding a provision related to the procedure for revoking a DNR order, and establishing a criminal penalty.

A companion bill, HB 12 by G. Bonnen, was left pending following a formal meeting of the House Committee on State Affairs on August 3.