

Summary of Request:

The Texas Board of Nursing (BON) will be required to complete a Legislative Appropriations Request (LAR) by August 23, 2010. Staff is presenting the list of exceptional items presented to the Board at the April, 2010 meeting through the strategic plan. Staff have added the cost within each exceptional item and included additional items to the list for discussion regarding staffing.

Historical Perspective:

The legislative items have been prioritized by the Board and have cost associated with each item. If the item is granted by the Texas Legislature, they will require the agency to raise sufficient funds to cover the cost of the item and overhead.

Pros and Cons:

Pros - Receiving additional funding and resources will allow the BON to investigate cases, review school proposals and license applicants in a more efficient and effective manner.

Cons - The cost of the exceptional items will most likely increase licensure fees.

Staff Recommendation:

Board Action: Move to accept the staff recommendations for the list of LAR prioritized issues with costs associated for the 2012 and 2013 Legislative Appropriations Request which include the current 2010/2011 base funding and revised exceptional items as presented by staff.

**Exceptional items
Texas Board of Nursing**

1. **Restoration of the 5% reduction in the baseline funding from fiscal year 2010 and 2011.**

The effect of the 5% reduction has been a delay in hiring staff in open positions, reduction in funding for TPAPN, Texas Online, Texas Nursing Workforce Data Center and thus the time frames to investigate a case, license an applicant and review a new school proposal have increased.

Total cost to restore 5% reduction to baseline funds: \$672,705 for Biennium

2. **Request not to reduce the agency by an additional 10%.**

To meet the additional 10% reduction for the next biennium, the Texas BON will have to do the following:

a.	reduce criminal background checks -	\$180,000 for the biennium
b.	reduce TPAPN funding -	\$140,000 for the biennium
c.	reduce Texas Online funding -	\$ 65,000 for the biennium
d.	reduce Texas Nursing Workforce Data Center funding -	\$ 73,000 for the biennium
e.	reduce postage funding -	\$100,000 for the biennium
f.	eliminate temporary workforce funding -	\$ 50,000 for the biennium
g.	eliminate merit increases -	\$227,034 for the biennium
h.	eliminate 9 staff positions -	\$783,769 for the biennium

The majority of new staff that the Texas BON has been allocated in the past two bienniums have been legal and investigative staff to process the increase in complaints emanating from criminal background checks. Due to the volume of new nurses by examination and renewal and the increase in the number of new nursing school proposals, the Texas BON could not reduce administrative staff and would have to reduce the number of legal and enforcement staff to meet the 10% reduction. This would mean increasing the time line to investigate a case. We currently have 39 legal and enforcement positions. If we decreased this group by 9, then the average caseload would increase and thus the average time for complaint resolution would increase.

Total cost to restore the 10% reduction to baseline funds: \$1,618,803 for Biennium

3. **Litigation Funds -**

Formal contested case proceedings have become more complex and SOAH practices tend to lengthen the time it takes to resolve disciplinary matters. Historically, administrative proceedings have utilized more informal evidence rules. The Administrative Procedure Act requires that rules of evidence be applied but allows for admission of relevant evidence if necessary to ascertain facts not reasonably susceptible of proof under those rules; not precluded by statute; and of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs (TEX.

GOV'T CODE ANN. Sec. 2001.081.) SOAH makes few or no exceptions over evidentiary objections under section 2001.081. Similarly, based on enabling legislation, SOAH will not recognize procedural rules or practices of the Board which would force cooperation with investigations before matters are set at SOAH. The Board is therefore unable to require admissions for uncontested facts prior to requesting a hearing at SOAH. SOAH's practices have resulted in proceedings becoming more like District Court litigation. It is well documented that being subject to District Court style discovery practices are extremely expensive and time consuming. The defense lawyers recognize the limitations of the agency in terms of man power and money and routinely force cases to the "court house steps" with the expectation that the agency cannot sustain the cost or time in pursuing disciplinary cases.

SOAH costs for the agency have steadily risen. Witnesses are seldom allowed to testify by phone when any objection is made by Respondents. Respondents through their attorneys routinely object to Staff's motion to submit testimony by phone. As a result, nearly all witnesses must be subpoenaed and reimbursed for travel to Austin for testimony. Staff's experts must now be paid for travel time, expenses and testimony, when before the costs for telephonic testimony was minimal. Delays in contested case proceedings also increase when witnesses, experts, attorneys and the judges must coordinate to be in Austin at the same time. Staff estimates that each contested case proceeding litigated at SOAH averages about \$1200 to \$2500 in costs. Based on the unresolved Formal Charges, Staff anticipates an increase of approximately 125 new cases a year at SOAH.

The Board needs approximately \$150,000 in appropriations to handle the increase costs of prosecuting the increase in the number of cases litigated at the State Office of Administrative Hearings. However, these costs may be assessed against the licensee through assessment of costs and fines against those who violate the Nurse Practice Act.

The total costs for litigation and witness funds: \$300,000 for the Biennium

4. **Executive Director Salary Increase -**

As our agency works within budget and legislative constraints, we continue to struggle with limitations that, if eased, would enhance our agency's ability to recruit and retain staff. A main priority of the Board is to request that the salary of the Executive Director be set by the Board itself within the salary group set by the Legislature. The Executive Director is accountable to the Board within a governance policy and the Board has no means to reward the Executive Director based on performance. With a nursing shortage, the retention and recruitment of nurse executive such as the executive director is becoming acute. The reason for a salary increase for the agency executive director is twofold: 1) to reward excellent job performance of the current executive director. The current salary is not competitive with like size regulatory agencies and not competitive at the low end of salaries of chief nursing executives in the central Texas area; and 2) the incumbent in this position is required to be a registered nurse with a master's degree in nursing and have nursing knowledge in education, nursing practice along with general knowledge of information technology, human resources and finance. The current executive director has reached her retirement eligibility and if for any reason, we lost the current executive director, we would be required to compete with the private sector for a chief nursing officer in order to have a qualified pool of applicants. The low to high salary range for this group in the central Texas area is from \$100,626 to \$143,332 per year.

In the study of exempt positions by the State Auditor's Office in August, 2008, the report indicates that the salary for the executive director was almost 25% below the market. She received 3.2% increase in fiscal year 2009 which is 28% below nursing salaries in the private sector, where we would have to compete to find a like caliber person. Our compensation analysis shows that the market rate for a comparable position in the private section would be \$128,524. Furthermore, from a comparable state perspective, the Texas Board of Nursing's budget and FTE's are comparable to the Texas Board of Pharmacy and the Texas Real Estate Commission of which both executive director's are placed in the Group 4 category.

The Total Cost to increase the Executive Director Salary is: \$54,800 for Biennium

5. **Staffing**

A. New Staff Positions for Examination and Licensing Processes-

The Texas Board of Nursing (BON) has been experiencing exponential growth in the number of licensees by exam, endorsement and renewals and at the same time the nursing practice act has changed significantly by adding additional requirements such as criminal background checks, verification of all licenses prior to endorsement and a mandatory jurisprudence exam. All during these changes the Texas Board of Nursing has not received additional staff in these areas to address the growth and changes.

The following are examination and licensing statistics over the past four fiscal years:

	<u>FY 2006</u>	<u>FY 2007</u>	<u>FY 2008</u>	<u>FY2009</u>
Number of renewals:	126,075	132,447	137,126	143,953
Number of licenses issued by exam:	11,834	11,707	12,706	13,886
Number of students taking the nursing exam:	13,733	14,526	15,824	16,666
Number of completed criminal background checks:	28,195	42,995	41,795	57,175

As evidenced above, the volume of applicants for all phases of the examination and endorsement process continue to grow. In fact, in fiscal year 2003, the Texas Board of Nursing could issue a license by examination and endorsement within 45 days. In fiscal year 2009 that time frame grew to an average of 115 days. We, and our constituents, find this time frame unacceptable. In addition to this growth, the BON images all documents for board staff to have immediate access for licensing and investigative purposes and by imaging files, we are able to dispose of paper according to our records retention plan and eliminate the need for file storage. Currently, the Texas Board of Nursing has been using five full time temporary staff to assist with these processes but due to our FTE cap, must use them sporadically to stay under our FTE cap. The Texas Board of Nursing will request two additional license and permit specialists to process criminal background checks and examination, endorsement and renewal applications for fiscal years 2012 and 2013.

The total cost for two additional Licensing Staff: \$152,656 for the Biennium

B. New Staff Positions for Enforcement and Legal Processes -

The agency's enforcement workload continues to steadily and rapidly increase and must be addressed in order for the Board to maintain its mission to protect the public and timely resolve its complaints. There are several reasons why the Board's enforcement cases will require more resources for the agency to meet its mission effectively and timely:

(1) Complaints are increasing over 20% annually

During FY 2007, the Board was receiving approximately 8,800 complaints [BON Statistical Report for FY 2007 (8812 RN jurisdictional complaints, 4832 LVN jurisdictional complaints)]. By FY 2009 the number of jurisdictional complaints received had grown to approximately 13,300 [BON Statistical Report for FY 2009 (7307 RN jurisdictional complaints, 6058 LVN jurisdictional complaints)]. In FY 2009, the Board issued approximately 2,200 disciplinary actions.

Should the current trend continue, the Board will receive approximately 15,000 complaints in FY 2010 [BON Statistical Report for FY 2010 (4,259 jurisdictional complaints in first half of FY 2008, 3,353 LVN jurisdictional complaints in first half of FY 2010)]. However, the number of disciplinary actions appears to remain constant with a projection of approximately 2,200 disciplinary actions for FY 2010.

(2) Investigations per Investigator is Significantly Increasing

As the number of new complaints received per year continues to rise, so does the average caseload per investigator. Even with the additional staff resources the Legislature granted in 2007, the average caseload per investigator continues to rise at a halting rate. For example in 1997, an investigator for the Texas Board of Nurse Examiners averaged approximately 160 cases under investigations. By 2002, the average number of investigations per investigator had increase to an average of 242. From FY 2007 to FY 2009, the average caseload per investigator increased from 222 to 340 (or 35%). [27 investigators and approximately 7,500 open investigations]. In doing a comparative analysis of other State Boards of Nursing Nationally, the average caseload per investigator is approximately 105. In FY 2009, Texas had the highest caseload per investigator at 340. The Kansas Board of Nursing was the second highest with 325 followed by Maryland and Nevada at 250 and New Mexico at 222. The remaining State Boards of Nursing had an average caseload per investigator ranging from as low as 25 (Alaska) to no more than 147 (North Carolina). The current number of investigations being handled by investigators is creating a significant backlog of cases. As the number of investigations assigned to an investigator increases, the less time can be allocated to each case.

While the Board has an effective system of prioritizing its cases based on public safety concerns, the lower priority cases, though important, may be neglected. In order to reverse the trend of increases in case resolution time, the Board should request an increase in investigators to handle the added workload.

(3) Formal charges statistics and unresolved complaints statistics are increasing

Unless there is an agreed disposition of a complaint, the Board is authorized to file formal charges against a nurse if probable cause is found to continue [TEX. OCC. CODE. ANN. Sec. 301.458(a)]. The Formal Charges form the basis for formal proceedings before the State Office of Administrative Proceedings (SOAH). In FY 2006, the Board had filed 490 Formal Charges. In FY 2007, the Board averaged approximately 750 Formal Charges annually. From FY 2009, until now, the Board is averaging approximately 1000 Formal Charges filed annually. This increase in formal charges is directly attributable to the staff increases of the 2009 Legislative Session, but appears to be near a plateau.

Unresolved complaints continue to grow even though the resolution of those complaints per investigator is at an all time high. The number of cases opened in FY 2007 was 13,482, while the number of open cases in FY 2005 was 9,057. The number of investigations conducted FY 2009 was 20,346, while the number in FY 2007 was 13,482. The Board continues to resolve more investigations per year with the increase in the number of investigators. It appears based on historic data that an investigator can resolve between 350 to 450 cases a year. In FY 2009, the average number of cases resolved per investigator was 475, the largest average based on statistics dating back to 1997. By comparison, the investigators for the Board of Nurse Examiners resolved an average of approximately 200 cases in FY 2001 while reducing the agency's backlog.

Although the disciplinary case load continues to grow and the number of cases resolved continues to grow, the ability of the current enforcement FTE's to handle the number of cases appears to be nearing a plateau. Without more investigators, the case resolution times will continue to grow or the agency will need to reduce regulatory oversight on lower priority cases.

(4) Attorney representation continues to increase significantly

Although recognized several years ago as a trend, the number of attorneys representing nurses continues to increase dramatically with more and more respondents represented by counsel. Tort reform and its reduction of medical malpractice litigation has increase the number of lawyers representing nurses in administrative proceedings. Additionally, lawyers specializing in administrative law have utilized the power of the internet and websites to increase marketing of legal services to nurses. While nurses have always been informed of their right to legal representation, historically few nurses have hired lawyers.

The increase in lawyer representation has resulted in increases in case resolution time based primarily on what the Board views as dilatory practices. One of the main marketing strategies of the lawyers as expressed on their websites seems to advise non cooperation with Board investigations. The legal bloggers routinely accuse the Board or its staff of unlawful or illegal investigation tactics. Naturally, the ability to resolve legitimate violations through agreed resolution is damaged and often forces the Board to resolve cases through the contested case proceedings at the State Office of Administrative Hearings.

(5) The Board's Monitoring of Probation has increase dramatically

Currently, the Board has approximately 1700 nurses under probation that Board investigators monitor for compliance. The current investigators are assigned to monitor approximately 800 files each. Because a violation of a Board monitoring order, particularly one that monitors for suspected drug violations, is given high priority by the Board, efficient and timely processing is needed. It should be noted that recidivism statistics indicate approximately 10 percent of disciplined nurses recidivate annually. New staff is needed to reduce the case loads for the monitoring investigators and bolster the enforcement process by adding a new attorney position for those who violate their order while under probation.

The Board will request eight (8) additional FTE's for FY 2012 and FY 2013 for its Enforcement and Legal Departments in order to meet the growing demands. This number includes five (5) investigators; one (1) litigation attorney; one (1) legal assistant and one (1) administrative assistant. These staff are needed for the increased workload due to growing complaints and litigation.

Although this number appears to be significant, the rise in the number of investigations, plus the complexity of the Board's disciplinary cases more than support the need to add enforcement and legal staff in order to meet the agencies mission and timely resolve and monitor cases.

The total cost to add 8 additional enforcement and legal staff: \$713,236 for the Biennium

C. New Staff Position for APRN Licensure Support and Nursing Practice Processes

In the past few years, the agency has experienced a consistently high number of applications for initial approval, creating a backlog and a delay in processing applications. These applications require a high level of understanding of APRN practice and education in the State of Texas and within the United States. Along with the consistently high number of applications, the review of the applications has become more complex due to the new rules implemented by the board in the past few years that are consistent with the *National Standards established by Consensus Model for APRN Regulation: Licensure, Accreditation, Certification and Education* (2008). With new requirements, there has been an increased volume of correspondence and telephone calls. It is anticipated that this trend will continue to increase with the implementation of the APRN compact in December, 2011. In FY 2008, 1401 APRN applications were received followed by 1502 applications in FY 2009. The average days to approve APRN applications went from 37.51 days in FY 2008 to 49.26 days in FY 2009. First quarter data for FY 2010 reflects an average of 70.25 days for approval. One APRN who possesses the professional expertise regarding APRN practice and education is requested to assist in this area.

The total cost of one APRN staff: \$178,556 for the Biennium

6. **Merit Increase Funds** - Removed.