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FISCAL IMPACT REPORT

SPONSOR Armstrong, D. **ORIGINAL DATE** 1/24/2017
LAST UPDATED 3/16/2017 **HB** 85/aHJC/aSPAC

SHORT TITLE Investigation of Board and Care Facilities **SB** _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY17 | FY18 | FY19 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---------|---------|----------------------|------------------------------|------------------|
| Total | | Unknown | Unknown | Unknown | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

Except for the title this bill duplicates Senate Bill 187

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the Superintendent of Insurance (OSI)
- Department of Health (DOH)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Attorney General’s Office (AGO)
- Regulation and Licensing Department (RLD)
- Aging and Long-Term Services Department (ALTSD)
- Human Services Department (HSD)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to House Bill 85 would strike the House Judiciary Committee amendments defining assisted living facilities and defining DOH’s licensing responsibilities. The amendment also eliminates definitions for activities of daily living and assistance with self-medication; changes the definition of personal care services and board and care facilities; eliminates fees for board and care facility permitting; and changes references of “self-medication” to “self-administration of medication”. The SPAC amendment would replace section 2 with language requiring board and care facilities to register with DOH and requiring DOH to promulgate rules establishing board and care facility standards that local governments would get the option of adopting.

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 85 would replace language related to local government responsibilities with language clarifying that counties can elect to regulate board and care facilities and if they do they have to adopt rules established by DOH.

Synopsis of Bill

House Bill 85 would amend several sections of law and establish a regulatory framework for board and care facilities, defined in part, as a residential facility that provides personal care services. DOH would be required to promulgate rules for board and care facility licensure that local government would have the option of adopting.

The bill would also require board and care facilities to obtain a custodial drug permit from the board of pharmacy before providing assistance with self-medication and establishes board reporting requirements. The bill also allows the Medicaid Fraud Unit of the Attorney General's Office and district attorneys to investigate and bring actions against board and care facilities when violating the Medicaid Fraud Act. The bill also requires entities providing residential treatment services to plan for discharge, which includes taking reasonable steps to verify board and care facilities are licensed and in good standing.

FISCAL IMPLICATIONS

Below, DOH provided estimates which are likely on the upper boundary of projected costs. The bill requires the department to register board and care facilities and to promulgate model standards to ensure health, safety, and comfort that local government can chose to adopt.

The DOH analysis assumes that the department will have to implement a similar rigorous licensing scheme for board and care facilities. However, the bill does not require the department to conduct surveys and most of the day-to-day regulatory work would be carried out by counties and municipalities, at their option, paid for in part through fines and fees. The amended version of the bill more clearly defines the department's responsibilities.

The Department of Health provided the following:

It is estimated that DOH would require 13.5 FTE for every 150 board and care facilities licensed, and an additional 1.0 FTE for every 40 employees hired by these facilities. Assuming 450 facilities meet the definition of Board and Care facility, 41.5 new FTE would be required by DHI to implement the bill. Additional costs include rent, supplies, equipment, communication, travel, cars, copying and information technology needs for a total cost \$415 thousand which includes \$325 thousand general fund and \$90 thousand other state funds. Total costs for contracts are \$150,000.

The AGO stated that it is likely that additional funding will become necessary due to the resources required to properly investigate and prosecute a new industry. Whether additional positions will be necessary is currently unknown, but training and case resources will almost certainly be affected. The bill does not provide for an appropriation to fund the additional positions/resources that will likely be required.

Additionally, counties who adopt the provisions in this bill will increase revenue from fees and fines.

ALTERNATIVES

Instead of making registration of board and care facilities a Department of Health responsibility, make this an Aging and Long-Term Services Department responsibility.

SIGNIFICANT ISSUES

DOH provided the following:

While it is unknown how many facilities would meet the bill's definition of board and care facility there are many currently operating that would fit the bill. It is likely that many of these boarding homes would be unwilling or unable to meet licensure requirements and would close, leaving many New Mexicans without safe and affordable housing.

The State of Texas passed similar regulations that give local governments the option to license and regulate boarding homes using state standards. Texas's regulations do not require state licensure, exclude assistance with activities of daily living, and prohibit administering medication.

DOH would be required to investigate complaints of abuse, neglect or exploitation of a resident of a B&C when the employee was the alleged perpetrator. Since there would be no requirements for services provided, care plans, personnel or resident records, building and physical structure, fire safety, meal service, infection control, resident finance records, or any other requirements in a B&C under the authority of NMDOH, it would be difficult if not impossible to obtain sufficient information to substantiate most abuse, neglect or exploitation allegations under this bill. However, the Aging and Long Term Services Department, Adult Protective Services Division currently has the authority and responsibility of investigating such complaint allegations in a B&C. If abuse, neglect or exploitation by a B&C staff could be substantiated, a referral to the Employee Abuse Registry (EAR) would be made if it met EAR requirements.

The AGO provided the following:

In 2000, the Department of Health & Human Services issued Policy Transmittal No. 2000-1, Extended Investigative Authority for the State Medicaid Fraud Control Units. This transmittal expanded the authority of Medicaid Fraud Control Units (MFCU) to include investigations and prosecutions of (1) Medicaid or other Federal health care cases which are primarily related to Medicaid and (2) patient abuse and neglect in non-Medicaid board and care facilities. In relevant part, the Policy states the following:

The MFCUs have the option to investigate complaints of abuse or neglect of patients residing in board and care facilities (regardless of the source of payment), from or on behalf of two or more unrelated adults who reside in such facilities. Board and care facilities include residential settings where two or more unrelated adults reside and receive one or both of the following: (1) Nursing care services provided by, or under the

supervision of, a registered nurse, licensed practical nurse, or licensed nursing assistant. (2) A substantial amount of personal care services that assist residents with the activities of daily living, including personal hygiene, dressing, bathing, eating, personal sanitation, ambulation, transfer, positioning, self-medication, body care, travel to medical services, essential shopping, meal preparation, laundry, and housework.

There is an apparent conflict between the definition of “board and care facility” in the federal regulation and the proposed bill. The bill defines the facility to include any facility that provides personal care services and may assist residents with activities of daily living. This definition appears to be far broader than that included in the Code of Federal Regulations. The MFCU’s jurisdiction is granted and controlled by federal law. If federal Health and Human Services were to review the proposed bill, it may decide that the definition is too broad and that the MFCU should not have jurisdiction over such a wide range of providers. This result would render the New Mexico MFCU unable to act under the state law, if the proposed bill were to pass as written. The Office of the Attorney General may not be able to comply with the objectives of the bill due to the jurisdictional conflict outlined above.

ALTSD stated that The regulations to the federal Older Americans Act, from which the state Long-Term Care Ombudsman Act derives, state that the ombudsman program is not prohibited from providing “ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are used to serve residents of long-term care facilities, as authorized by the Act.” Boarding homes or “board and care facilities” are not included in the definition of long-term care facilities in the Older Americans Act and the ombudsman program may not use federal funds for this purpose and must rely on general funds, which makes it financially infeasible for the ombudsman program to advocate on behalf of residents of the expanded definition of “board and care facilities” without limiting its monitoring of facilities authorized by the Older Americans Act.

PERFORMANCE IMPLICATIONS

The bill is in alignment with the goals of ALTSD, including:

- Improving outcomes for vulnerable individuals and families by enforcing “zero tolerance” of abuse, neglect and exploitation;
- Improving outcomes for vulnerable individuals and families by providing or linking low income seniors, veterans and disabled individuals to health, long-term and other human services; and
- Improving outcomes for vulnerable individuals and families by promoting independence and quality of life for individuals with physical and behavioral disabilities.

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