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FISCAL IMPACT REPORT

ORIGINAL DATE 2/8/17

SPONSOR Papen LAST UPDATED _____ HB _____

SHORT TITLE Protection of Vulnerable Adults SB 187

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	\$0- \$2,420.8	\$0-\$2,420.8	Recurring	General Fund
Total		Minimal	\$0-\$537.0	\$0-\$537.0	Recurring	Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

Except for the Short Title Duplicates House Bill 85

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)
 Office of the Attorney General (OAG)
 Regulation and Licensing Department (RLD)
 Aging and Long-Term Services Department (ALTSD)
 Human Services Department (HSD)

SUMMARY

Synopsis of Bill

Senate Bill 187 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 and may assist residents with one or more activities of daily living. DOH would be required to promulgate rules for board and care facility licensure and set health, safety, and comfort standards. Counties and municipalities may require board and care facilities to obtain operator's permits with fees, adopt model standards set by DOH rules, and impose fines for

noncompliance. The bill would allow municipalities and counties to inspect board and care facilities, enter into joint powers agreements, and establishes reporting criteria.

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 promulgate rules requiring board and care facility licensure and to promulgate model standards to ensure health, safety, and comfort. The department already licenses many types of health facilities and licensure requirements are rigorous.

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 it does not set out a timeline for implementation. Under the bill, most of the day-to-day regulatory work would likely be carried out by counties and municipalities, at their option, paid for in part through fines and fees.

The Department of Health provided the following:

It is estimated that NMDOH 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.

General Fund PSEB Costs				
Number of FTE	Pay Grade	Salary	Benefits	Total
27	65	\$ 43.5	\$ 16.1	\$ 1,609.1
3	75	\$ 54.3	\$ 20.1	\$ 223.2
1.5	45	\$ 29.0	\$ 10.7	\$ 59.6
1	60	\$ 39.4	\$ 14.6	\$ 54.0
Total General Fund				\$ 1,945.8
Other state Funds Costs				
4.5	65	\$ 43.5	\$ 16.1	\$ 268.2
4.5	45	\$ 29.0	\$ 10.7	\$ 178.8
Total Other State Funds				\$ 447.0
Grand Total				\$ 2,392.8

Source: DOH

- Total costs for rent, supplies, equipment, communication, travel, cars, copying and Information Technology needs \$415 thousand including \$325 thousand general fund and \$90 thousand other state funds.

- Total costs for contracts \$150,000.
- Current staffing of the Division of Health Improvement is 78 percent.

The OAG 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.

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 difference between state licensure and local permits is unclear. DOH licensure would include basic health and safety requirements for the physical structure and its maintenance, and for services provided by the facilities. Similar requirements are listed in the bill for the proposed model standards. Licensure would include DOH on-site reviews and investigations of complaints including allegations of abuse, neglect and exploitation, and sanctioning and penalizing the facility. The permits and oversight by counties and municipalities proposed by the bill appears to duplicate the licensure of DOH including the investigations, surveys and sanctions/penalties.

The definition of board and care facilities is broad and licensure requirements in Section 1 could include hotels, bed and breakfast establishments, domestic violence shelters, higher education dormitories, boarding homes with landlord/tenant relationships, and others. However, Section 3 F. of the bill would specifically exclude some of these types of residential establishments from county and municipality permits.

The bill does not clearly differentiate Board and Care facilities from Assisted Living Facilities. DOH currently licenses Assisted Living Facilities, which are defined as facilities operated for the care or maintenance of two or more adults who need or desire assistance with one or more activities of daily living. The bill allows that a Board and Care facility may provide assistance with activities of daily living, and defines "personal care services" to include "personal hygiene and body care," which may be interpreted to meaning "bathing." As "bathing" is included in the definition of activities of daily living, the two definitions are indistinct. This lack of differentiation may require a facility to be licensed as, and meet regulatory requirements, of both an Assisted Living Facility and a Board and Care facility.

The definitions of “activities of daily living” and “personal care services” proposed by the bill are inconsistent with nationally accepted standard definitions. Typically, an activity of daily living requires the person providing it to be specially trained to safely assist, and would include mobility, grooming, and personal hygiene. The bill would exclude grooming and personal hygiene and limit the mobility services. Grooming and hygiene would be added to personal care services that typically do not require a specially trained person to assist.

The definition of “assistance with self-medication” is broad and may be subject to interpretation that may result in significant harm to the resident:

- Self-medication typically means that a person treats an illness or condition with over-the-counter medication without professional supervision.
- It appears that the bill would use the term self-medication differently as assisting someone to take their own medication, often referred to as “assistance with the self-administration of medication”.
- The bill would allow employees of the board and care facility to fill a “medication reminder box” for the resident. No licensed healthcare facility may currently allow this type of assistance by an unlicensed person. Rather, this task is reserved for nurses or pharmacists.
- The bill’s definition would make no provision for training the person that assists with the medication delivery to ensure the assistance is safely provided.
- The bill would not require the resident to have a physician’s order to self-administer medication, or to specify whether the resident has the cognitive awareness to safely self-administer medication.

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.

The OAG 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.

TECHNICAL ISSUES

The bill short title should be changed to reflect the title of duplicate House Bill 85.

EC/al