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FISCAL IMPACT REPORT

ORIGINAL DATE 02/13/13

SPONSOR Ingle LAST UPDATED _____ HB _____

SHORT TITLE Assisted Living Facility Contract Refunds SB 335

ANALYST Trowbridge

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY13 | FY14 | FY15 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---------------|---------------|----------------------|------------------------------|------------------|
| Total | | Undetermined* | Undetermined* | Undetermined* | N/A | N/A |

(Parenthesis () Indicate Expenditure Decreases)

*See "Fiscal Implications" below.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Aging and Long Term Services Department (ALTSD)

Department of Health (DOH)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 335 (SB 335) would require assisted living facilities (for adults) to modify contracts between the facility and its residents to allow for a prorated refund to the resident's estate after a resident dies. The prorated refund would be based on the calculated daily rate for any unused portion of payment beyond the termination date (defined in the bill as the date the unit is vacated by the resident due to the resident's death and cleared of all personal belongings and after all charges have been paid to the licensee).

SB 335 would also allow the facility to remove the deceased resident's belongings after one week of the resident's death, store the belongings and charge the resident's estate for moving and storing the items, if the belongings are not removed. The facility would be required to give notice to the responsible party at least one week before the belongings are removed and be allowed to clear the belongings and charge the resident's estate at a rate equal to the actual cost, not to exceed ten percent of the regular rate for the unit. If the belongings are not claimed within forty-five (45) days after notification, the facility would be allowed to dispose of them.

SB 335 applies to any “assisted living facility” that is required to be licensed as an assisted living facility by the Department of Health (DOH). SB 335 contains an emergency clause.

FISCAL IMPLICATIONS

DOH notes that the proposed legislation contains no appropriation for staff or other activities that will be required to carry out its provisions and requirements, which will increase the workload and time required.

SIGNIFICANT ISSUES

The Attorney General’s Office (AGO) indicates that SB 335 requires assisted living facility contracts to include a refund policy that is implemented upon the resident’s death. However, SB 335 contains no penalty provision for the violation of any applicable sections e.g. no penalty provision for the failure to include a refund policy in the assisted living facility contract; and, no penalty provision for the assisted living facility’s failure to implement the refund policy.

The AGO states that in addition, SB 335 contains no specific enforcement delegation to the “department” as that term is defined under the NMSA 1978, Section 24-1-2(A). Although under the Public Health Act, the “department” has statutory authority under the provisions of NMSA 1978, Section 24-1-3. The department’s authority includes: maintain and enforce rules for the licensure of health facilities. Under SB 335, an “assisted living facility” is a facility if the Department of Health (DOH) requires licensure. If licensure is required, then the DOH could maintain and enforce any rule that required an assisted living facility to include and implement a refund policy in its contracts. This may require the DOH to promulgate such a licensure rule.

In the absence of such a rule – requiring assisted living facility to include a refund policy in its contracts and requiring assisted living facility to implement its refund policy – the DOH may have authority to bring an action in court for the enforcement of health laws and rules and orders issued by the department. If SB 335 becomes a “health law” or the DOH issues orders to an assisted living facility to implement and include a refund policy in its contracts, then DOH would have authority to enforce under Section 24-1-3(J). The DOH also has authority to sue under Section 24-1-3(Q).

Additionally, AGO states that under the Public Health Act, DOH has authority to maintain and enforce such rules as may be necessary to carry out its provisions and to publish the rules. (*See* Section 24-1-3(O)). SB 335 would require the DOH to publish any licensure rule or other rule that required assisted living facilities to include a refund policy in its contracts and requiring assisted living facilities to implement its refund policy. The DOH may be required to publish such a rule to carry out the new provisions SB 335 creates.

The DOH has the power to create such a rule if it is necessary to carry out its duties. (*See* Section 24-1-3(V)). The Public Health Act requires DOH to maintain and enforce its rules (for example rules for the licensure of health facilities) and the DOH has a duty to publish its rules.

The AGO states that SB 335 would not set forth a new, independent cause of action - for residents or their responsible party – to enforce the refund policy. A resident’s estate or resident’s representative would be required to assert any claims upon a theory of breach of contract. Please note that under NMSA 1978, Section 24-1-3(L) the department has the authority

to cooperate and enter into contracts or agreements with . . . or any other person to carry out the powers and duties of the department. This may mean that a person may seek the cooperation of DOH to carry out the powers and duties of DOH. The nature and extent of such cooperation is unclear.

The AGO also reports that SB 335 does not define “charges.” SB 335 uses the diminutive reference to “facility” from “assisted living facility.” SB 335 defines “termination date” as the date the unit is vacated by the resident due to the resident’s death and cleared of all personal belongings. Under the terms of Section A, a deceased resident failure to clear all his or her personal belonging means that there is no “termination date” until the unit is cleared of all the deceased resident’s belongings. This section obligates the deceased resident’s estate or the resident’s representative/responsible party, if any, to clear the unit of all personal belongings in order to create a “termination date.” Thus, the assisted living facility has no incentive to notify the deceased resident’s estate or the resident’s representative etc. that the deceased resident must clear all his or her personal belonging in order to create a “termination date.” Under SB 335 Section A, prorated refunds are based on the calculated daily basis rate of any unused portion of payment “beyond the termination date.”

This incentive is greater if the amount of the deceased resident’s belongings precludes the assisted living facility from renting the unit. Since “amount of belongings” is not quantified, what constitutes preclusion of the renting of a unit will be subjective.

The AGO states in sum, it is important to note that SB 335 does not provide penalty provisions for the failure to implement a refund policy and, further does not provide for the delegation of enforcement authority.

The Aging and Long Term Services Department (ALTSD) states that at present Assisted Living Facilities are not licensed or regulated under Centers for Medicare and Medicaid like nursing homes and therefore are not subject to the same level of regulatory oversight as nursing homes. Assisted Living Facilities are state-licensed-only. ALTSD also indicates that 7.8.2 NMAC “Requirements for Adult Residential Care Facilities” does not require that specific resident estate protections be detailed in an admission agreement.

SB 335 defines “assisted living facility” as a facility required to be licensed as an assisted living facility for adults by the DOH.

DOH’s Division of Health Improvement (DHI) regulations 7.8.2 NMAC Assisted Living Facilities for Adults, at 7.8.2.20.A Admissions and Discharge, requires assisted living facilities to complete an admission agreement for each resident which includes a refund provision in case of death, transfer, voluntary or involuntary discharge. At 7.8.2.30.B(5) Handling of Resident Funds specifies that upon the resident’s death, the facility must transfer all personal funds held by the facility to the resident’s estate in accordance with Section 45-3-709 NMSA 1978. Also, at 7.8.2.28.B Personal Possessions specifies that the facility will have policies and procedures for identifying and safeguarding resident possessions. The regulations do not, however, specify that the prorated unused portion of an advance payment must be refunded to a deceased resident’s estate.

PERFORMANCE IMPLICATIONS

SB 335 relates to the FY14 Strategic Plan Goal 2: Improve Health Care Quality.

ADMINISTRATIVE IMPLICATIONS

DOH states its DHI would be required to revise regulation 7.8.2 NMAC to reflect the changes included in SB 335. DHI would also have to revise the survey tools used to monitor Assisted Living facilities and train staff to utilize the new tools.

OTHER SUBSTANTIVE ISSUES

ALTSD states this issue may be a concern for residents/families in Assisted Living facilities and could be handled through a change in the DOH's regulatory authority.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

ALTSD reports the timing of disposition of an Assisted Living resident's fiscal and material belongings will be left to the discretion of the facility owner. DOH states that if SB 335 was not enacted, assisted living facilities would not be required to provide a prorated refund, remove and store belongings of deceased residents. The AGO notes that residents of assisted living facilities who die at the beginning of their contracts pay for a service they would no longer need. In addition, the assisted living facility would benefit from the residents death by simply re-contracting the decedent's unit to another resident. The assisted living facility is allowed to double dip without a refund policy.

TT/blm