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F I S C A L I M P A C T R E P O R T

SPONSOR SPAC **ORIGINAL DATE** 1/31/19 **LAST UPDATED** 2/26/19 **HB**

SHORT TITLE Health Care Quality Surcharge Act **SB** 246/SPACS

ANALYST Graeser

APPROPRIATION (dollars in thousands)

Appropriation						Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21	FY22	FY23	FY24		
$0.0	*	47,000.0	48,160.0	49,380.0		Recurring	Health Care Facility Fund
$0.0	*	5,220.0	5,350.0	5,490.0		Recurring	Disability Health Care Facility Fund
$0.0	*	8,290.0	8,500.0	8,710.0		Recurring	Human Services Other Medicaid expenses, including administration

Parenthesis ( ) indicate expenditure decreases

Note: FY20 revenues might be delayed if the Centers for Medicare and Medicaid Services delays in approving the authorization. Also, the funds are earmarked, subject to appropriation by the Legislature. Fiscal Year 2020 distributions will be zero. This table assumes the FY21 distribution amounts would be levelized and only the amount collected in a 12-month period will be distributed. This will leave a small amount of balances to be distributed in FY24.

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21	FY22	FY23		
	35,250.0	48,160.0	49,380.0	25,310.0	Recurring	Health Care Facility Fund
	3,920.0	5,350.0	5,490.0	2,810.0	Recurring	Disability Health Care Facility Fund
	6,220.0	8,500.0	8,710.0	4,470.0	Recurring	Medicaid Match

Parenthesis ( ) indicate revenue decreases

* Because of the relatively brief existence of this limited provider tax, it should be considered a pilot project and the revenue and corresponding earmarked expenditures classified as nonrecurring.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	FY23	Recurring or Nonrecurring	Fund Affected
	Impacts are shown in the appropriation table above				Nonrecurring	20% retention
	Impacts are shown in the appropriation table above				Nonrecurring	Medicaid Match -- HCFF
	Impacts are shown in the appropriation table above				Nonrecurring	Medicaid Match -- DHCF

Parenthesis ( ) indicate expenditure decreases

SOURCES OF INFORMATION
LFC Files
2017 SB400/a
2018 SB192/a

Responses Received From
Human Services Department (HSD) revised analysis 1/29/19
New Mexico Department of Health (DOH)
Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

Senate Public Affairs Committee substitute for Senate Bill 246 increases Medicaid provider reimbursements for certain types of health care facilities and support quality improvement efforts of those facilities. The facilities affected are skilled nursing facilities (SNF) of any size, intermediate care facilities (ICF) with 60 beds or more and facilities licensed to provide food, shelter, and other healthcare treatment to individuals with intellectual disabilities (ICFIID) without limit on size.

SB246 imposes a daily surcharge on these facilities, calculated annually, for each day a facility bed is used but the primary payer is not Medicare Part A, Medicare Advantage, or a Medicare Special Needs Plan. The annual surcharge calculations would be done by the Human Services Department, which would be responsible for (1) calculating the surcharge to be paid by each facility (2) notifying the Tax and Revenue Department and (3) notifying each facility.

The Human Services Department would additionally be required to set a uniform daily rate not exceeding the federal maximums and structure the rates so the total estimated revenue will equal 6 percent of the facility's previous year's net revenue. However, if that calculated amount should exceed the federal maximums, the rate shall be reduced to a percentage that equals the maximum percentage allowed by the federal Social Security Act. The purpose of the surcharge is to increase each facility's Medicaid fee-for-service and Medicaid managed care reimbursement rates by at least the rate of nursing home inflation and to provide bonus payments to particular nursing homes based on performance data.

Within 30 days of the legislation taking effect (and quarterly thereafter), the affected facilities would be required to report to the Human Services Department the number of resident days provided by payers and their net revenue earned for the four most recent quarters.

Facilities whose approval or renewal of a state plan amendment or federal authorization would be jeopardized by the surcharge would not be subject to the surcharge. The substitute provides an exemption for 65 percent of the surcharge for facilities with over 90 thousand annual Medicaid-financed bed days.

The substitute creates a "health care facility fund" and "disability health care facility fund" in the state treasury to be administered by the Human Services Department, with excess annual funds not reverting to the general fund. The proposed legislation provides details of how the funds are required to be spent. Basically, the "health care facility fund" is available for appropriation to skilled nursing facilities or intermediate care facilities and the "disability health care facility fund" is available for appropriations to intermediate care facilities for individuals with intellectual disabilities. The substitute would also add language at 7-1-6.xx to distribute the surcharge derived from skilled nursing facilities and intermediate care facilities to the health care facility fund and the surcharge derived from intermediate care facilities for individuals with intellectual disabilities to the disability health care fund. The bill also seeks to amend Section 7-1-2 NMSA 1978, to add the "Health Care Quality Surcharge Act" to the list of tax acts administered and enforced by the Tax Administration Act.

HSD would be permitted to retain 20 percent of the amount in the health care facilities fund for other purposes, including administration, but 100 percent of the amount in the disability health care facility fund must be distributed to the intermediate care for the intellectually.

The fees would be required to be paid to TRD by the 25th of the month following the end of the month when a non-Medicare bed was occupied.

Section 12 of the bill repeals this surcharge effective January 1, 2023, so the FY23 surcharge total would be half of a full fiscal year amount.

Section 13 provides an effective date of July 1, 2019.

The initial supplemental payments to the facilities would only begin after the federal centers for Medicare and Medicaid approve the authorization.

FISCAL IMPLICATIONS

This bill should be considered a pilot project in increasing the Medicaid match to a limited population. The bill may be counter to the LFC tax policy principles of adequacy, efficiency, and equity. This bill imposes a calculated surcharge and then requires 80 percent or more of the collected fees to be remitted back to the nursing facilities. The collected fees are matched about 3-to-1 by the state's Medicaid match so the state gains substantial revenue in the exchange. LFC discourages earmarking of revenues, and this is clear example of earmarking.

HSD has provided the following information:

> Based on the Annual Report for the Year Ended June 30, 2018 "Nursing Facilities and Intermediate Care Facilities for Individuals with Intellectual Disabilities", total cost of $452.1 million for public and private nursing facilities and intermediate care facility for the individuals with intellectual disabilities were identified. Of that amount HSD identified actual Medicaid payments in FY2018 of $269.6 million.

The provider tax on SNFs, ICFs, and ICFIIDs constitutes an expense to these facilities creating tax revenue to the state in the amount of $16.2 million per year. Providers would be reimbursed for the tax and, in the process, receive increased Medicaid payments of $50.9 million. Consequently, providers would receive a net revenue increase in the amount of $34.8 million per year ($50.9 million – $16.2 million).

FY 2020 Fiscal Impact of SB 246CS ($000s)

Description	General Fund	Federal Financial Participation	Total Computable*
Administration/Other (20%)	3,235	4,853	8,088
Program (80%)	12,940	38,006	50,946
Total	**16,175**	**42,859**	**59,034**

* Based on a 6% rate for health care quality surcharge.

LFC staff has recast this information as shown in a detailed table attached at the end of this report.

This analysis assumes the first month of collection is September 1, 2019. It further assumes that gross revenues will increase by 2.5 percent per year. The continuing appropriation for supplemental payments to the facilities will be delayed until the Centers for Medicare and Medicaid Services (CMS) approves the authorization and the legislature appropriates the funds in the 2020 Legislative session.

This bill contains a continuing appropriation, although the funds may not be used by HSD until appropriated by the Legislature in the General Appropriation Acts of 2020, 2021, 2022, and 2023 (if there are any fund balances expected).

Based on the dashboard mentioned above, the ICIID revenue in FY 2018 was about $30 million compared with about $215 million for the nursing homes and intermediate care facilities. This ratio was used to allocate collections between the two funds.

An interesting side note was derived from the HSD revisions to their initial FIR. Although the Medicaid match rate is 74.6% for program reimbursements, it is only 60 percent when funds are used for administrative purposes.

TRD indicates substantial administrative impact if the program is to be included in the GenTax processing system. See more information in the administrative section of this review.

SIGNIFICANT ISSUES

As specified in Section 11, the imposition of a provider tax on SNFs, IFCs and ICFIIDs will require an approved state plan amendment or waiver from the CMS. The approval of a state plan amendment or waiver of this type will be scrutinized by CMS.

Under current federal regulations, states may not use provider tax revenues for the state share of Medicaid spending unless the tax meets three requirements: (1) It must be broad-based (2) uniformly imposed (3) and cannot hold providers harmless from the burden of the tax. Federal regulations create a safe harbor from the hold harmless test for taxes where collections are 6 percent or less of net patient revenues. Section 5 of the Bill provides an exemption for facilities with more than 90 thousand annual Medicaid-financed bed days equal to 65 percent of the health care quality surcharge due in a reporting period. (Note: LFC had no data to adjust the fiscal impact tables for this exemption.) Additionally, other taxes in the Medicaid program are subject to the 6 percent threshold not solely this provider tax.

Further, SB246 references improved quality but does not specify the types of areas in which improvement are required.

- The following states currently have or have had provider fees on nursing facilities: AL, AR, CA, CO, CT, DC, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NH, MV, NJ, NY, NC, OH, OK, OR, PA, RI, TN, UT, VT, WA, WV, WI, and WY.

Other states have or are currently using similar legislation for hospitals, insurance agencies, or managed care organizations.

PERFORMANCE IMPLICATIONS

The LFC tax policy of accountability is <u>not</u> met because TRD is <u>not</u> required in the bill to report annually to an interim legislative committee regarding the data compiled from the reports from taxpayers paying the surcharge and subsequently receiving higher Medicaid reimbursement amounts. The legislature would have no means of determining whether the surcharge is meeting its purpose.

LFC notes any additions to staff or budget should be carefully considered. It would be inefficient to use any portion of this Health Care Quality surcharge revenue for administrative purposes, if such uses jeopardized the federal match – estimated at approximately 74 percent of total Medicaid expenditures.

ADMINISTRATIVE IMPLICATIONS

HSD is allowed to use up to 20 percent of the money in the health care facility fund to administer the Medicaid program for purposes other than specified in section 6 of the legislation. Additionally, the substitute requires HSD to administer the fee by collecting data, analyzing data, calculating fees, applying for federal approval, promulgating rules, tracking revenue and other functions. These activities would require additional staff to fulfill such functions.

TRD reports a significant impact:

> The bill proposes a new tax program to be administrated by TRD in cooperation with HSD and has significant impacts for TRD. As a new tax program, the surcharge will require implementation into GenTax, the tax system of record for New Mexico, by the Information Technology Division (ITD). The total estimated cost to implement into GenTax is $2.24 million. Given the joint implementation with HSD, ITD will need

sufficient business protocols to be established with HSD, including certification of rates, proper facility identification for revenue distribution, exemptions and testing. Further cooperation with HSD will be needed for TRD to create taxpayer forms, instructions and publications to support the new surcharge. TRD will need to develop new audit training and procedures in conjunction with HSD. Parallel work will be performed in the Financial Distribution Bureau to create new SHARE distribution accounts and work with the Department of Finance and Administration and HSD to establish new distributions. Considering the complexity and effort required to implement this bill, the effective date of July 1, 2019 is not feasible. Given the start date for surcharge collection is contingent on federal approval, TRD will work closely with HSD to implement on time together assuming approval is given.

TECHNICAL ISSUES

The New Mexico Attorney General points out two technical weaknesses.

Section 3(D), defining "intermediate care facility for individuals with intellectual disabilities," is unclear in two respects. Italics are added below to indicate the exact problem areas.

First, the intended meaning of ". . . to provide food, shelter, health or rehabilitative and active treatment. . ." is not completely understood.

Second, in the same definition, ". . . for individuals with intellectual disabilities or persons with related conditions," is both vague and broad, leaving the statute open to very broad interpretation and possible unintended interpretations. The exemption language in Section 5 may require adjustment to the payment amounts referenced in other sections. This could adjust the net revenue amounts identified in the fiscal implications section.

TRD reports a number of technical issues and reports the bill may be difficult to implement and has some budget risks:

Page 9, Section 6 (E): Section 6 of the bill describes the new funds to be set up for the revenue tied to the surcharge. Bill language in subsection (E) of Section 6 details when the initial surcharge payment is due. This language appears out of place and would more appropriately be placed in Section 4 which includes in the title "Date Payment Due." The language could be included in Section 4, subsection (F), pages 6 and 7, or listed in a new subsection following (F).

Page, Section 6 (E): The initial payment of the health care quality surcharge payment is contingent on the approval of the Federal Centers for Medicare and Medicaid Services (CMS), which oversees all state Medicaid programs It is not a guarantee that the state will receive approval for a health care-related tax that is used to supplement the state share of Medicaid as it must meet three qualifications: (1) The taxes are broad based, (2) The taxes are uniformly imposed throughout a jurisdiction, and (3) The tax program does not violate hold harmless provisions. Among other things, the exemption for large facilities mentioned in the policy issues section calls into question meeting these qualifications. The TRD will need to proceed with implementing the tax program to meet the unknown first payment date. If CMS fails to approve the state's plan, there is a budget

risk to the state investing in a new tax program implementation.

Page 10, Section 7: TRD is given authority to interpret the provisions of the new act, but under Section 8, both TRD and the HSD are instructed to promulgate rules "as appropriate for each department." There could be a problem identifying which provision each department is responsible for.

OTHER SUBSTANTIVE ISSUES

In testimony on SB192 (2018), one facility indicated it was in bankruptcy and a second provider indicated it was considering bankruptcy. This may have had a great deal to do with the decrease in Medicaid provider rates implemented in 2015 or 2016. However, Medicaid provider rates were increased effective 7/1/18. Testimony should be solicited as to whether the two facilities that testified are still in financial distress despite the increases.

One difficulty the Legislature and executive have in adjusting policy with regard to healthcare delivery and funding in the state is the lack of timely and accurate data regarding utilization and revenues. One feature of this bill is that HSD would receive comprehensive data on utilization and revenues by source for the entire nursing home sector.

If the bill is enacted, the state would take advantage of the federal Medicaid match. There is little downside risk. If CMS fails to grant the waiver, then the provider fee would still be collected but no enhanced Medicaid reimbursements would not be enhanced. In that case, HSD would still have the results of a utilization and revenue survey for use in healthcare planning efforts.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The state may lose the opportunity to take advantage of loophole in the federal Medicaid program.

LG/al/sb

Annual reimbursement increase	2.50%								
Increase in reimbursement rates 7/1/18	5%								
	FY18 amount	FY19 amount	FY20 amount	FY21 amount	FY22 amount	FY23 amount	FY24 amount		
Gross Revenue (Millions)	269.6	276.3	283.2	290.3	297.6	305.0	312.7		
Allowances and bad debt (0%)	0.0	0.0	0.0	0.0	0.0	0.0	0.0		
Net Revenue (Millions)	269.6	276.3	283.2	290.3	297.6	305.0	312.7		
6%									
Base Amount	16,176.0		16,580.0	16,990.0	17,420.0	17,860.0	18,300.0		
Federal Match	42,862.0		43,932.0	45,019.0	46,158.0	47,324.0	48,490.0		
Match % -- average	72.6%								
Total	59,038.0		60,512.0	62,009.0	63,578.0	32,592.0			
Effect of delays in implementation and delayed repeal ($ thousands)			12,440.0	0.0	0.0				
Federal Match ($ thousands)			32,962.0	45,019.0	46,158.0	23,662.0			
Amount available to HSD for increase in reimbursement rates (80%) ($ thousands)	50,949.1		39,166.2	53,513.0	54,867.3	28,126.6		173,917.2	
Amount available to HSD for administration and other purposes (20%) ($ thousands)	8,088.9		6,217.8	8,496.0	8,710.7	4,465.4		27,612.0	
		FY19 amount	FY20 amount	FY21 amount	FY22 amount	FY23 amount	FY24 amount		
		0.0	*	47,000.0	48,160.0	49,380.0	11,985.0	NR*	Health Care Facility Fund
		0.0	*	5,220.0	5,350.0	5,490.0	28,940.0	NR*	Disability Health Care Facility Fund
		0.0	*	8,290.0	8,500.0	8,710.0	2,110.0	NR*	Human Services Other Medicaid expenses, including administration