Fiscal Impact Review
2018 General Assembly Session

Date: February 2, 2018

Bill number: SB 310 (Introduced); Department of Medical Assistance Services; eligibility for services under waiver

Review requested by: Chairman Newman, Senate Committee on Education and Health

JLARC Staff Fiscal Estimates

JLARC staff concur with the fiscal impact statement prepared by the Department of Planning and Budget that the fiscal impact cannot be determined. SB 310 could have a fiscal impact, but the impact depends on several unknown factors. The impact depends on the number of Medicaid waiver recipients who would choose to live in settings that do not meet the new federal requirements of a community-based setting. In addition, SB 310 could place the state at risk of violating the settlement agreement with DOJ to provide services for individuals with disabilities in the most integrated setting. Any fiscal impact resulting from such a violation would be determined by the federal court system.

An explanation of the JLARC staff review is included on the pages that follow.

Authorized for release:

Hal E Greer

Hal E. Greer, Director

Bill summary

SB 310 would prohibit the Department of Medical Assistance Services (DMAS) from reducing, terminating, suspending, or denying services for an individual who is enrolled in a Medicaid home and community based services (HCBS) waiver on the basis of the individual's informed choice of place of residence in the state.

Fiscal implications

SB 310, if adopted, could have a fiscal impact but, as indicated by the Department of Planning and Budget in its fiscal impact statement, it is difficult to determine because it depends on several unknown factors.

SB 310 could have a fiscal impact for two reasons:

(1) Medicaid waiver recipients could choose to live in settings that do not meet the new federal requirements of a community-based setting. In this situation, the state would have to cover 100 percent of the cost, because the services would not qualify for federal matching funds. Whether these settings exist and waiver recipients would choose them is unknown.

(2) The bill or its implementation may violate a settlement agreement with the federal Department of Justice. If so, the state may have to pay legal costs and penalties.

Potential costs if residential settings do not meet new federal requirements

The HCBS waiver program allows states to "waive" certain federal Medicaid service requirements to meet the needs of individuals who prefer to get long-term care services and supports in their home or community, rather than in an institutional setting. In 2014, the federal Centers for Medicare and Medicaid Services (CMS) issued regulations governing the waiver program, including requirements that residential settings have certain community-based characteristics. As with other Medicaid services, the federal government currently covers half the cost for waiver services for Virginia recipients and state general funds cover the other half.

The regulations specify that residential settings with institutional characteristics (such as nursing homes and intermediate care facilities) are not considered community-based settings and do not qualify for federal reimbursement under the waiver. Services in these settings, however, are covered through the state's standard Medicaid program.

Federal regulations describe settings that are presumed to have institutional qualities:

- a setting located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;

- a setting that is located in a building on the grounds of, or immediately adjacent to, a public institution; or
- a setting that has the effect of isolating individuals receiving Medicaid HCBS waiver services from the broader community of individuals not receiving waiver services.

Residential settings with these qualities must face further review, known as heightened scrutiny, by CMS and the federal Secretary of Health and Human Services (secretary) to determine whether they meet the requirements of community-based settings and qualify for federal funds under the waiver.

Potential fiscal impact from new settings

Only new provider-owned or -controlled settings established since 2014 must comply immediately with the new federal HCBS setting requirements. A determination of whether the setting complies cannot be made until the provider is operational and the setting is occupied by beneficiaries receiving services. According to DMAS, there are currently no new facilities that are presumed to have institutional qualities.

There are plans for at least one new residential setting that may warrant further review to ensure it meets the HCBS setting requirements. This setting would serve 185 residents with intellectual and other disabilities on a 75-acre campus. The fiscal impact to the state could be substantial under the following conditions: (1) the setting did not meet the federal standard for community-based characteristics; (2) the setting accepted Medicaid enrollees eligible for waiver services; and (3) the setting reached a high occupancy of residents who are eligible to receive Medicaid waiver services.

Medicaid reimbursement to a setting that served 185 residents with Medicaid waivers would be between $6.4 million and $12.9 million annually (assuming the setting provided most of the waiver services). The lower estimate is based on the average cost of waiver services for individuals with developmental disabilities ($34,366) in FY16, and the higher estimate is based on the average cost for individuals with intellectual disabilities ($69,305). If the secretary determined the setting did not meet the HCBS requirements, the fiscal impact to the state would be between $3.2 million and $6.5 million because the state would have to pay for the portion that would have been covered by federal matching funds.

Potential fiscal impact from existing settings

HCBS residential settings in existence prior to 2014 have until 2022 to comply with the new requirements. DMAS staff indicated that existing provider-owned or -controlled residential settings are working toward becoming compliant by 2022. A fiscal impact will

occur only if settings do not conform to the requirements and waiver recipients choose to live there.

SB 310 could have an unintended consequence: some providers may choose not to comply with the federal requirements if they are aware that costs will be covered by the state regardless of compliance status.

Potential cost if the state violates the settlement agreement with DOJ

SB 310 or its implementation could conflict with the state's settlement agreement with the federal Department of Justice. If so, legal action and costs that the settlement agreement was intended to avoid could result. These costs would be determined by the federal court system and are currently not known.

The settlement was established in 2012 after an investigation of one of the state-run intermediate care facilities for individuals with intellectual disabilities. The federal government found that Virginia failed to comply with provisions of the Americans with Disabilities Act and the U.S. Supreme Court's Olmstead ruling. The state and DOJ reached a settlement agreement under which the state agreed to develop a system of services that supports individuals' participation in the community in the most integrated setting consistent with their informed choice and needs.

It is not known whether the adoption of SB 310 alone would violate the settlement agreement. However, if SB 310 resulted in directing substantial state funds to settings that were not deemed sufficiently integrated rather than toward ensuring sufficient integrated settings are available, it is possible that the court could rule the state is in violation of the terms of the agreement.

An independent reviewer, who was chosen under the agreement by the state and DOJ to monitor compliance with the agreement, recently indicated some concern about the lack of integrated settings:

> "the continuing most frequent reason larger congregate settings are chosen by individuals and their authorized representatives is the absence of more integrated settings that include needed supports and services, especially for individuals with intense medical and behavioral needs, that are in the geographic area of the individual's family/AR. Only a clear plan for development and needed expansion in services can begin to redress this core problem." (Report to the United States District Court for Eastern District of Virginia, December 2017)

Budget amendment necessary? Yes, but timing and amount of appropriations are unknown.

Agencies affected: Department of Medical Assistance Services; Department of Behavioral Health and Developmental Services

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