MONTANA LEGISLATIVE SERVICES DIVISION
Office of Research and Policy Analysis
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Children, Families, Health, and Human Services Interim Committee
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HJR 50: SENIOR/LONG-TERM CARE BILL DRAFT CONSIDERATIONS

BACKGROUND

The Children, Families, Health, and Human Services Interim Committee asked in May 2020 that four bills related to its senior and long-term care study be drafted for committee review in June. This briefing paper summarizes each bill, describes potential fiscal impacts, and poses questions for committee consideration.

HJR 50-1: MEDICAID SPEND-DOWN PROGRAM

Medicaid law allows people with incomes above the traditional eligibility standard to qualify for the program if the cost of their medical expenses reduces their income to the Medicaid standard. By law, they can qualify by either paying their medical costs until their income hits the Medicaid level, by making an equivalent cash payment, or by using a combination of the two methods.

HJR 50-1 revises the Medicaid eligibility and rulemaking statutes to make it clear that:

- a person may not be required to only make a cash payment or only incur medical expenses for the Medically Needy, or Medicaid "spend-down," program; and
- a participant in a home and community-based services waiver must be allowed to count any medical expense that a person in the traditional Medicaid program is able to count toward the spend-down amount.

The bill as drafted would be effective July 1, 2021.

POTENTIAL COSTS

Since late 2017, the Department of Public Health and Human Services has generally required Big Sky Waiver participants who receive assisted living as a waiver service to make a cash payment at the beginning of each month to qualify for the spend-down program.[i] DPHHS is now using the money from the payments to pay for a rate increase for assisted living providers. The agency also has determined that people who are using their medical expenses to qualify for the spend-down program may not count waiver-covered expenses toward the spend-down amount.

Because state and federal law already allow people to qualify for the Medically Needy program by incurring medical expenses, HJR 50-1 should not create additional costs for the department because that option has been available to Medicaid enrollees since 1989. However, the bill would require DPHHS to change its policy regarding cash payments for assisted living services and thus could decrease the amount of cash the agency is receiving.

DPHHS estimates it will receive $6.8 million in the current fiscal year from the cash payments from waiver participants in assisted living slots. Approximately 800 people receive assisted living services at any given time.[ii] That would average out to cash payments of about $8,500 per participant per year.

The table below shows the potential loss of cash that could occur, depending on the number of people in assisted living slots who choose to use their medical expenses to meet their spend-down instead of making a cash payment.

# of Participants	Annual Loss of Revenue
50	$425,000
100	$850,000
150	$1,2750
200	$1,700,000
250	$2,125,000
500	$4,250,00

HJR 50-2: NOTIFICATION BEFORE TERMINATION OF SERVICES

HJR 50-2 would require DPHHS to provide a 30-day notice before terminating a person's participation in a home and community-based services waiver and allow participants to provide the agency with information on the need for continued services. The department could terminate the person's waiver participation after 30 days if:

- the person does not respond to the notification; or
- after reviewing the information provided, DPHHS determines the person is no longer eligible for waiver services and notifies the participant before the 30-day period is up. The notification must:
    - include information about the participant's right to appeal the decision and request continued services during the appeal; and
    - state that DPHHS would not pursue reimbursement of services provided during the appeal except in cases of fraud or other circumstances making it apparent that services were not warranted.

The bill as drafted would be effective July 1, 2021.

POTENTIAL COSTS

State agencies must send mail through the state mailing system, and they receive a discounted mailing rate for doing so. First-class letters cost about 46 cents to mail.[iii]

DPHHS already notifies waiver participants by regular mail that it will be terminating waiver services in 10 days, so providing notice at an earlier time should not increase the cost of the initial notification. If the department needs to send a second letter confirming termination of services to some people, its costs will increase to some degree.

DPHHS said it notified 47 people that they would be discharged from the waiver in FY 2020. If all of those people received both a 30-day notice and a final termination letter, the additional costs would have amounted to $21.62.

HJR 50-3: RULEMAKING FOR SUBSTANTIVE CHANGES

Waiver eligibility and services are governed by federal and state laws and regulations and by DPHHS policies. HJR 50-3 would require DPHHS to adopt rules — rather than change internal policies — to make substantive changes to waiver services or eligibility standards. The rulemaking process requires agencies to:

- publish and provide public notice of a proposed new rule or change to an existing rule;
- include a written statement on why the rule is necessary; and
- take public comment on the proposed new or amended rule before adopting it.

Legislative interim committees also review proposed agency rules and may intervene in the rulemaking process if the agency has not followed the Montana Administrative Procedure Act (MAPA).

The bill as drafted would be effective immediately upon passage and approval.

POTENTIAL COSTS

During the 2019 legislative session, fiscal notes prepared by the Office of Budget and Program Planning estimated the costs of preparing and publishing administrative rules at $60 per page of published rules.

The costs of publishing rules would depend on how frequently DPHHS makes substantive changes to its home and community-based services waivers and the length of the rule notices that would be published.

DPHHS last revised rules related to the Big Sky Waiver in 2011. The last significant changes to the rules for the waivers for individuals with developmental disabilities or Severe Disabling Mental Illness (SDMI) were made in 2014 and 2012, respectively. The table below shows the number of pages involved in those rule changes and the costs of publishing them at the current rate of $60 a page.

Waiver	# of Pages	Cost
Big Sky Waiver — 2011	34	$2,040
Big Sky Waiver — 2000	65	$3,900
0208 Waiver — 2014	42	$2,520
SDMI Waiver — 2012	12	$720
Average	**38**	**$2,295**

As another point of comparison, HB 529 in 2019 required DPHHS to use the rulemaking process, rather than internal policy changes, when developing procedures for moving a person from a waiting list into a home and community-based services waiver program. The bill had a $5,500 fiscal note, broken down as follows:

- $600 for 10 pages of published rules;
- $1,650 for public meetings in Billings and Missoula to discuss proposed wait list procedures; and
- $3,300 in training costs for staff and case managers.

MAPA requires agencies to take public comment on proposed rules but does not require that multiple public meetings be held outside of Helena.

HJR 50-4: PURPOSE OF WAIVER SERVICES

HJR 50-4 would add a legislative findings and purpose section to the laws involving home and community-based services waivers. It would state that waiver services are intended to be viewed as a whole and to be approved if — taken together rather than individually — they would prevent a person's placement in an institutional level of care.

The bill as drafted would be effective July 1, 2021.

POTENTIAL COSTS

If DPHHS has been denying some services to waiver participants on the grounds that a service, in and of itself, would not prevent institutional care, HJR 50-4 could potentially increase the number of services that a waiver participant receives.

However, Medicaid waivers must be cost-neutral and cannot exceed the funding appropriated for waiver services. If some waiver participants receive more services than they otherwise might have, DPHHS may have to limit waiver enrollment or reduce the number or scope of waiver services to keep waiver costs within the appropriated funding.

POINTS FOR COMMITTEE CONSIDERATION

If the committee wants to pursue any of the draft bills, members may want to consider the following questions to develop a final version of the bill for consideration in August.

1. Should any or all of the bills be limited to the Big Sky Waiver?
    a. If so, language would have to be added to specify that the requirements of the bill apply only to the waiver for the elderly and persons with physical disabilities.
    b. If the bills are not narrowed, the provisions would apply to all home and community-based services waivers and potentially increase the fiscal impacts.

2. Do members want to include an appropriation in any bill draft?
    a. If so, the committee must decide:
        i. the amount of the appropriation; and
        ii. whether it should be a per-year or biennial appropriation.
    b. If no appropriation is included, a fiscal note may be attached to the bill and the costs would need to be included in House Bill 2, the general appropriations bill.

3. Do members want to change the effective date in any of the bills? HJR 50-3, requiring rulemaking for substantive changes, is drafted to be effective on passage and approval; the three other bills would be effective July 1, 2021, to coincide with the start of the next biennium. The committee could choose to:
    a. make a bill effective on a different date; or
    b. remove the effective date, meaning the bill would go into effect October 1, 2021.

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[i] E-mail from Barb Smith, DPHHS Senior and Long-Term Care Administrator. June 15, 2020.
[ii] E-mail from Barb Smith, DPHHS Senior and Long-Term Care Administrator. June 19, 2020.
[iii] Conversation with Marc Duncan, Shop Floor Supervisor, Print & Mail, General Services Division, Department of Administration. June 4, 2020.