

Regarding, the Self-Direction Act (SB441/Hb318)
Responses to a letter of objection from Webster Ye of Maryland Department of
Health (MDH)
and to the

Fiscal and Policy Note provided by the Office of Legislative Services.

Note: These responses were originally composed for the House Health and Government Operations Committee, but since SB441 is identical to HB318 we are also submitting this response to the Senate Finance Committee

The Department states that HB318 “creates unreasonable operational challenges that are contrary to recommendations from the Office of Legislative Audits.”

Response:

OLA finds that HB318 is not contrary to its recommendations:

- See letter from Gregory Hook to Delegate Lewis-Young stating that the Department may have misunderstood its 2019 findings. Hook states that there is nothing in HB318 that is contrary to OLA’s recommendations.

SB441/HB318 does not present unreasonable operational challenges:

- It does not require the Council to create a new waiver; it merely allows that option.
- The Department has voluntarily created two brand new waivers in the last three years. It has also revised the Community Pathways Waiver three times in the last four years. None of these efforts was ever described as unreasonable.
- Including stakeholder input throughout the waiver revision process would eliminate the need for constant revisions and for time-consuming meetings with disappointed stakeholders. The Advisory Council will likely streamline administrative tasks by creating a genuine collaboration between state administrators and stakeholders.

The Fiscal Summary forecasts a \$3.3 million (86% federal funds, 14% general funds) in FY2022 for staff to establish and administer a new Self-Directed Services waiver and staff the advisory council as well as one-time only programming costs.

Response:

The Fiscal Note is both flawed and grossly inflated:

- The Council would first consider revising the current Community Pathways waiver before considering a return to the original New Directions waiver and would weigh the costs involved with each choice. However, since a recent version of the New Directions waiver already exists, neither the Department nor the Council would be starting from scratch if that is the Council's decision. All revisions could be completed by Council members and current Department staff.
- The fiscal note from HB 1171 in 2020, the first iteration of SB441/HB318, states that the advisory council could be staffed with existing resources. That aspect of this bill has not changed.
- SB441/HB318 requires no additional oversight for support brokers. Support brokers are already subject to a complex system of checks and balances which the Act does not alter.
- Reimbursement for the use of vehicles requires no additional funding. It simply allows individuals to dedicate a portion of their existing budget to mileage reimbursement for the use of a specially adapted vehicle.

The Department states that the Centers for Medicare & Medicaid Services (CMS) prohibits states from providing fiscal management services (FMS) under the waiver, as required in the Act and that they must be classified as an administrative service

Response:

The Department is incorrect.

- CMS does permit FMS services to be provided under the Waiver. However, it requires that participants have a choice of providers for this essential service if states choose it as a waiver option. Under New Directions FMS services were provided under the waiver—which is why Maryland has always had two FMS providers. The Act seeks to restore FMS services to the waiver to ensure choice of this vital service.

The Department states that the Act allows unlicensed individuals to provide services.

Response:

The Department is incorrect.

- As the analyst who summarized the bill correctly notes, SB441/HB318 just eliminates the need for professionals who are already licensed by the state to seek further credentials from the Department.

The Department states that the bill violates CMS guidelines and jeopardizes the federal match because it “enables support brokers to have a fiduciary duty to the individual to whom they provide services.”

Response:

The Act does not jeopardize the federal match.

- SB441/HB318 honors CMS Guidelines on participant choice and control of services. It does not intend to add new features to Maryland’s SD program—only to restore approved CMS options that have been retracted by the Department.
- The term *fiduciary duty* is not meant to imply decision-making authority. Instead it is meant to describe the support broker’s special obligation to work FOR and in the best interest of the participant, much as attorneys—who do not make decisions for their clients-- have a fiduciary duty to them.
- The Act clearly states that it is the support broker’s fiduciary duty to take direction from the person : *“A support broker means a person who has a fiduciary duty to advocate on behalf of and as directed by an individual who uses self-directed services....”* This definition is in complete alignment with CMS guidelines.
- CMS will not review Maryland statutes; it will only review the waiver which results from those statutes. It will be the duty of the Advisory Council to translate the statutes into waiver definitions.
- While the Department has strictly limited the role of the Support Broker (SB) to HR functions, CMS describes the SB as a consultant/counselor/agent who takes direction from the individual and provides the services and

supports to sustain them as they direct their own services. SB441/HB318 is intended to reflect CMS's description. So long as Maryland's waiver reflects the participants' decision-making authority, the federal match is not in jeopardy.

- CMS regulations do allow support brokers to sign timesheets for other employees if that is the participant's preference. However, support brokers have never signed their own payment requests and have always been subject to oversight.
- HB318 allows participants to choose the SB as a designated representative (DR) to spare family members from being disqualified as staff members in case the Department forced the choice of a DR. However, The DR role presents issues for anyone who assumes it. It might be wise to eliminate any reference to the Designated Representative from HB318 and to let the Advisory Council decide how to deal with the DR role that the Department has developed.