This document is made available electronically by the Minnesota Legislative Reference Library
as part of an ongoing digital archiving project. http://www.leg.state.mn.us/lrl/lrl.asp

**Senate Counsel, Research,
and Fiscal Analysis**
Minnesota Senate Building
95 University Ave. W. Suite 3300
St. Paul, MN 55155-1800
(651) 296-4791
Thomas S. Bottern
Director

Senate

State of Minnesota

TO: Human Services Reform Policy and Finance Committee

FROM: Liam Monahan, Legislative Analyst (296-1791)

DATE: January 29, 2019

SUBJECT: DWRS, the 7% cut, and future options

This memo is a not-so-brief summary of: (1) the Disability Waiver Rate System (DWRS), (2) how the 7% after-framework adjustment came to be, (3) why CMS rejected the application of the 7% after-framework adjustment effective, July 1, 2017, (4) the effect of the 7% cut on service recipients and service providers, and (5) the 2018 vetoed legislation that sought to maintain the value of the 7% increase in a way that would be acceptable to CMS.

As you know, DWRS is very complex, with multiple pieces of the rate calculation changing every year as the legislature tries to perfect the methodology. I have included some of the recent modifications in the summary below. These recent modifications result in a very volatile environment, making it very difficult to estimate exactly what will happen to rates over the next three to four years. DHS is required to conduct semi -annual rate analyses; the most recent semi-annual report was released in December 2018.

The penultimate section of this memo is an attempt to illustrate how difficult it is to provide general conclusions about how service recipients and service providers will be effected when DWRS is fully implemented in 2020 or 2021.

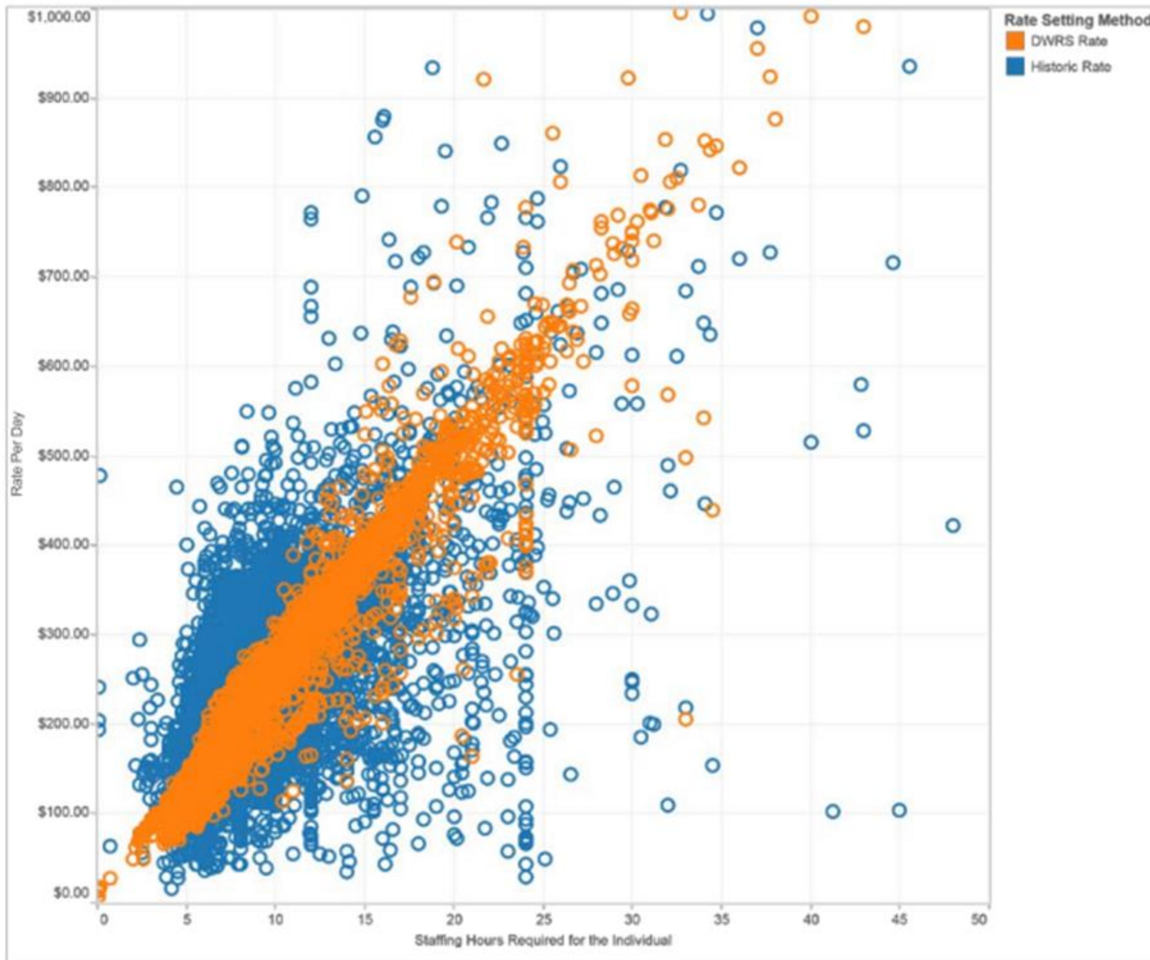
The final section lists some policy levers that are available to the legislature to modify the way in which providers are reimbursed for the services they provide.

Development of DWRS

Prior to the initial implementation of the Disability Waiver Rate System (DWRS) on January 1, 2014, each county and service provider negotiated reimbursement rates for waiver services provided to people with disabilities. These negotiations between each county and each service provider resulted in wide variations in the rates counties paid for the same services provided to similar clients.

Figure 1, which is taken from DHS's January 15, 2017 report "Disability Waiver Rate System," shows that the county-negotiated daily rates for individuals were not highly correlated with staff time required by those individuals.

Figure 1: Correlation between the rate per day and staff time required for the individual, by historic negotiated rate setting method and the DWRS rate setting method



NOTE: DWRS rates in this graph reflect rates calculated by DWRS prior to BLS and CPI inflation adjustments in July 2017

In 2007, the federal Centers for Medicare and Medicaid Services (CMS) found these variations unacceptable and required Minnesota to institute a consistent and transparent statewide rate setting methodology "consistent with efficiency, economy, and quality of care and […] sufficient to enlist enough providers so that care and services are available under the plan …." (1902(a)30(A) of the Social Security Act)

Planning for a consistent and transparent statewide rate setting methodology began in 2009, and DHS presented its recommendations to the legislature in a mandated report dated February 15, 2013. During the 2013 legislative session, the legislature passed a modified version of DHS's DWRS recommendations.

Even before the final DWRS bill was negotiated during the 2013 session, stakeholders recognized that the implementation of any consistent statewide rate methodology would have disparate effects on providers relative to the rates a provider had been able to negotiate with its county. Some providers would see quite large decreases in their rates while other providers would see large increases in their rates. In an effort to mitigate the effect of rate decreases for some providers, stakeholders initially agreed that the DHS recommendation to the legislature would include a phase-in period.

Historical rates and "Banding"

Prior to the 2013 session, DHS recommended a 3-year phase-in period to smooth the transition to the full implementation of its recommended rate methodology. During the legislative negotiations in 2013, the phase-in period (known as "the banding periods") was increased to 5 years. "Banding" limits the annual decrease in rates relative to the "historic" county-negotiated rates paid to a provider. Banding, however, also limits the annual increase in rates for other providers.

As initially enacted, DWRS included a 5-year banding period, but two more periods were added subsequently, the last of which is still waiting for federal approval. During the first banding period, an individualized DWRS "framework rate" for providing each service to each service recipient was determined, compared to the historic county-negotiated rate being paid for the provision of those same services to that same individual, and the historic rate was adjusted toward the framework rate (either up or down), but the adjustment toward the framework rate was limited by the band in effect that year. The band in the first year was +/- 0.5%, meaning that each provider's 2014 rate was increased or decreased no more than 0.5% from its 2013 county-negotiated rate. Below is a summary of the banding periods:

- 2014: 2013 rate adjusted toward framework rate, but within 0.5% of 2013 rate
- 2015: 2014 rate adjusted toward framework rate, but within 0.5% of 2014 rate
- 2016: 2015 rate adjusted toward framework rate, but within 0.5% of 2015 rate
- 2017: 2016 rate adjusted toward framework rate, but within 1% of 2016 rate
- 2018: 2017 rate adjusted toward framework rate, but within 1% of 2017 rate
- 2019: rate equal to 2018 rate
- ➢ 2020: 2019 rate adjusted toward framework rate, but within 1% of 2019 rate (with federal approval), or full DWRS framework rate.
- 2021: Full DWRS rate.

Banded rates are tied to a particular service contract for each recipient of waivered service. As of March 28, 2018, approximately 73% of all waiver services dollars are subject to banding. A non-banded rate, or "framework rate," is used only when a service recipient changes services, changes providers, or becomes a new waiver participant.

Framework Modifications

A benefit of the banding period is that it has provided DHS time to attempt to gather data and analyze DWRS so that the rate setting methodology can be fine-tuned to more accurately reflect the cost of providing covered services.

Statute requires the Department to conduct research on the costs of delivering particular types of services and to make evidence-based recommendations to the legislature to modify the framework rates to reflect those costs accurately. In addition, the providers have been conducting their own research of their own costs and have made recommendations for framework changes.

Below are examples of changes to the framework rates that have been recently enacted:

- Effective January 1, 2016, the legislature enacted a "regional variance factor" that slightly increases or decreases rates relative to the otherwise applicable DWRS framework rates in order to account for measurable variability in the cost of direct care labor across the state. These values were updated effective January 1, 2018.
- During the 2017 session, the legislature enacted various modifications to the framework based on DHS research and recommendations as well as recommendations from providers based of the providers' own research. Some of these changes are already effective, while others will be effective January 1, 2019.
- In 2017, the legislature removed the "budget neutrality" adjustment at the insistence of CMS. The removal of the budget neutrality factor was effective January 1, 2018. This adjustment was initially enacted to help control the cost of providing waiver services by modifying the otherwise applicable framework rates by increasing the rate for some categories of services and lowering the rate for other categories of services.
- The 2017 legislature modified the data source used to determine the base wage for some types of direct care workers.
- The 2017 legislature created three new employment services. Since these services were not available in 2013, they do not have a historic rate. As service recipients and service providers begin to replace current services with these new employment services, the mix of rates paid to provide services to a particular service recipient may change. Recipients may change service providers in order to access these new employment services, resulting in some providers losing revenue to other service providers.

Inflation Adjustments

In addition to the framework modifications enacted by the legislature, DWRS has a built-in set of updates to the rate calculation inputs, which act as inflation adjustments. The first of these inflation adjustments was implemented on July 1, 2017, three years after the implementation of DWRS. The initial base wage update was based on the change in median wages between implementation of DWRS on January 1, 2014 and the most recently available data set available as of December 31, 2016. (The wage data DHS used to populate the 2014 rates was the most recently available data set available prior to January 1, 2014.) The 2017 inflation adjustments also updated non-wage components of the framework rate.

Cumulative Change in Rates, 2013 - 2021

According to a DHS report from December 2018, the cumulative effect of (1) the framework modifications enacted to date, (2) the 2017 inflation adjustments, (3) the removal of banding in 2021, and (4) the removal of the 7% after-model adjustment (see next section) is a projected 14.1% increase in the average rate per unit of service between 2013 and 2021, which is

equivalent to about 1.8% a year. This estimate already includes the removal of the 7% after-model adjustment.

After-Model Adjustments and the 7% Cut
In addition to the framework modifications, the automatic inflation adjustments, and banding, the Eighty-eighth legislature (2013-2014) passed additional rate increases for all home and community-based services (HCBS), including services provided under the waivers. (Not all HCBS are provided under the waivers; DWRS only effects the rates for services provided under the authority of the four medical assistance disability waivers – the BI, CAC, CADI and DD waivers. DWRS does not affect the rates for other HCBS services, such as PCA services or services offered under the authority of the Elderly Waiver).

2013 Legislative Session

- 1% increase for HCBS effective April 1, 2014
- DWRS enacted effective January 1, 2014

2014 Legislative Session

- 1% "quality add-on" for HCBS, effective July 1, 2015
- 5% rate increase for HCBS, effective July 1, 2014
- The "stacking" amendment

The recent controversy involving the removal of the 7% after-model increase from non-banded waiver services is the result of the "stacking amendment" that was added to the HHS budget bill during the 2014 conference committee. The amendment states that DHS must add the aggregate 7% HCBS increase (from the 2013 and 2014 sessions) to the framework rate.

Many non-disability waiver HCBS services are reimbursed using a rate-on-rate methodology, which means that the rate for a service is whatever it was last year plus whatever percent increase is enacted. These rates are not directly tied to cost, to data supporting a particular rate, or to increases in costs of providing services over time. Banded historic rates are similar. Given that rates for these services had not increased in the years leading up to 2014, the legislature was persuaded that a 7% increase was justified.

The non-banded, framework rates, however, were based on wage data from 2012 or 2013 and provider surveys about non-wage costs. These rates were not directly based on prior rates, but were newly created rates based on data related to providing the waiver services. For this reason, it could be argued that the 7% increase to framework rates was never justified. Nonetheless, the "stacking amendment" very explicitly states that the 7% adjustment must be added to the framework rate.

A reply to this objection to the 7% after-model adjustment is that the wage data used to create the framework rates was artificially low exactly because the rates for HCBS services had not increased in the years prior to 2014. If the percentage of direct care workers reimbursed by medical assistance is sufficiently high, the relatively low rates paid by medical assistance to providers might depress the median wages paid by providers to employees, and that relatively low median wage would show up in the data used to set the initial 2014 rates.

Regardless of whether the 7% after-model adjustment was initially justifiable, CMS did not object to the adjustment during fiscal years 2015 and 2017. CMS objected only when the July 1, 2017 automatic inflation adjustment was implemented. CMS concluded that the applying both the 7% after-model adjustment and the automatic inflation adjustment resulted in duplicative adjustments – i.e., two adjustments to account for the same growth in costs.

In DWRS, rates are supposed to be based on the cost of providing services, and an automatic inflation adjustments account for changes in these costs over time. If the 7% additional increase is always added after the DWRS calculation, even in a year in which an inflation adjustment is implemented, then it could be argued that the rates are no longer based on the cost of providing services, and thus Minnesota's rates violate the requirements of the Social Security Act that rates be "consistent with efficiency, economy, and quality of care."

In February of 2018, CMS informed DHS that it would not provide federal participation for the 7% after-model increase for non-banded service rates beginning July 1, 2017 because the after-model adjustment was duplicative of increases in costs already captured by the automatic inflation adjustment, and that the state would need to reimburse the federal government for the value of the federal share of the 7% increase already paid during fiscal year 2018. DHS initially responded to this action by reimbursing the federal government and by using state only money to continue to pay the full cost of the 7% after model increase for non-banded rates until June 30, 2018.

CMS told DHS that the 7% after model increase violated federal law. DHS interpreted CMS's statement and existing state statute to mean that DHS had no authority to continue to supplement DWRS rates with state-only money. DHS, therefore, stated its intention to cease including the 7% after-model increase in rates beginning July 1, 2018, and MMB adjusted the February 2018 forecast to remove the value of the state share of the 7% after-model increase.

With respect to the effect of the removal of the 7% increase to framework rates, it is important to note that **the removal immediately effected only non-banded service rates.** Because banded rates did not receive the July 1, 2017 inflation adjustment, CMS did not find the continued 7% increase to banded rates to be problematic. Also recall that about 75% of waiver service dollars are currently subject to banding.

The table below illustrates how the removal of the 7% increase would effect a 2016 framework rate of $100.

	2016	**2017**	**2018**
Framework	100.00	100.00	100.00
Inflation	0.00	8.50	8.50
After model	7.00	7.00	0.00
Total	107.00	115.50	108.50

(This example does not include the effect of the other framework modifications enacted in 2017.)

Approximately 27% of waiver service dollars are paid as a non-banded, framework rate. The vast majority of wavier services were not immediately effected by the removal of the 7%

increase to framework rates. However, beginning in 2020 or 2021, when currently banded rates convert to non-banded framework rates, the average service rates will not increase over the 2013 historic rates as much as some service recipients and service providers might have been anticipating. Rather than 2021 framework rates increasing over the 2013 historic rates by an average of 21.1%, they will instead increase by an average of 14.1%.

2018 Legislation

The 2018 Supplemental Budget bill that was vetoed by the Governor included a proposal to mitigate the effect of the removal of the 7% increase to framework rates. The fix was expensive, however, because the value of the state share of the 7% increase had been removed from the forecast. As a result of removing the value of the increase from the forecast, the proposed fix appeared on the spreadsheet as new spending and was difficult to fit into the targets established for the committee, particularly the "tails" targets.

The strategy for the proposal was to use data about wage disparities among classes of workers to add a new "factor" to the DWRS calculation that would compensate for these labor market disparities.

Currently, the wage factors in DWRS are based on U.S. Bureau of Labor Statistics data showing what workers in the direct care fields *are actually paid*. DHS purports to have data showing that direct care workers are paid less than workers in other industries who have similar education and experience. According to a recent analysis by DHS, the weighted average wage for non-direct care workers with the same levels of experience, education and training as the relevant direct care workers is about 17% higher than the weighted average wage for direct care workers.[1] The 2018 proposal included a "competitive wage factor" to account for the difference between what direct care workers are actually paid and what those same individuals could make if they worked in a different industry. An effort was made to make the value of the first year of the competitive workforce factor at least equal to the value of the 7% after model increase.

Historic Rate Variability and the Difficulty of Generalizations

Although a lot has changed since DHS's January 15, 2017 legislative report on the implementation of DWRS, the data and analysis in that report helps illustrate an important concept that is worth bearing in mind when thinking about the implications of DWRS on particular service recipients or particular service providers. Most of the actual numbers in that report, however, are no longer valid because the January 2017 report does not include the framework modifications from the 2017 sessions. (The most recent report from December 2018 does include these modifications, but it is not as fine-grained an analysis as the January 2017 report, and it does not distinguish between the median change and the average change in rates.)

The discussion in this section is intended to illustrate that the wide variation in the county-negotiated historic rates, when coupled with a rate setting methodology that is premised on the idea that rates should be based on the cost of providing services, results in some providers seeing big changes, both positive and negative, in the framework rates relative to the historic rates. Recall Figure 1 above. It shows that there was little correlation between the county-negotiated

[1] Olmstead Subcabinet, Cross-Agency Direct Care and Support Workforce Shortage Working Group, "Recommendations to Expand, Diversify, and Improve Minnesota's Direct Care and Support Workforce; Appendix B," p. 34. (July 16, 2018)

rates paid for providing services to a particular individual and the number of hours of staff time that individual required. If service rates across the state had been clustered in a smaller range, the differences between the averages and the median rate changes described below would not be as large.

Aggregate rates for service recipients

In its January 15, 2017 legislative report on the implementation of DWRS, DHS predicted that upon full implementation of DWRS, service recipients would see an **average** increase of 4% in their aggregate framework rates over the aggregate historic rates they received on December 31, 2013. The aggregate rate is the sum of each rate for each service a client receives from all providers. DHS projects that the **median** change in aggregate rates would be -1%.

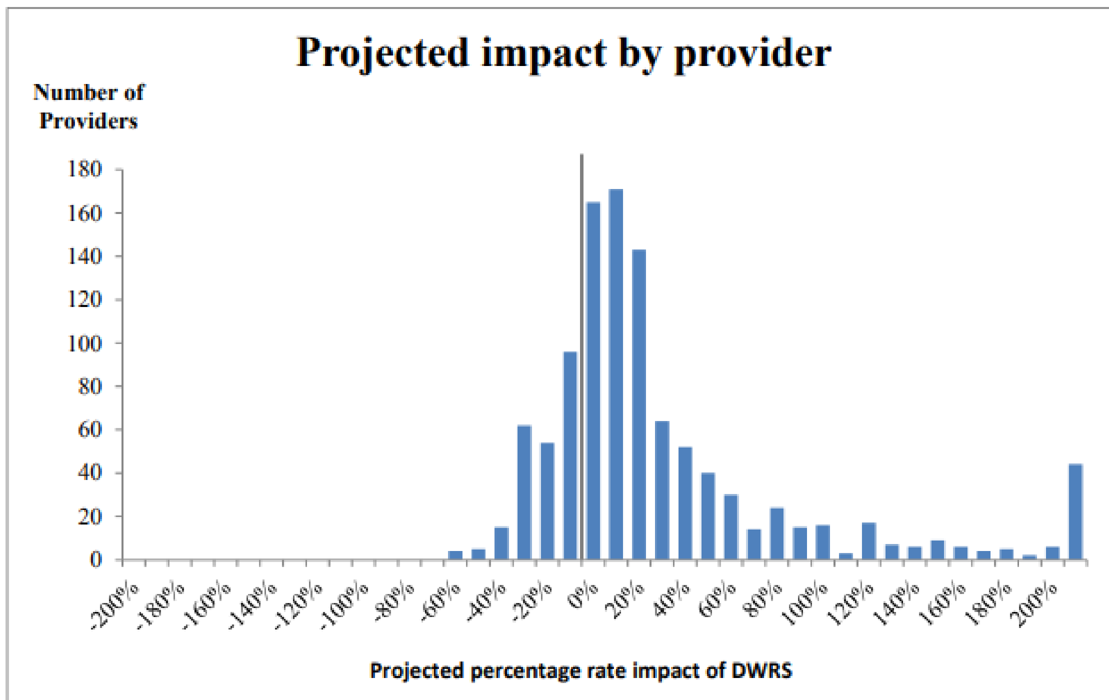
The difference between the average and the median illustrates that while most service recipients (based on the framework as it existed after the 2016 legislative session) were predicted to experience a rate decrease, a minority of service recipients were going to see a large increase. There are various causes of this result, but at its root is the fact that some county-negotiated rates for an individual were set at a level above the DWRS-predicted cost of providing services to that individual while other county-negotiated rates were set at levels far below that predicted cost of providing those same services to similarly situated service recipients.

Rates for service providers

Since each service has its own rate, and providers specialize in particular services, the projected impact of DWRS on providers is much more variable. DHS projected that providers (based on the framework as it existed after the 2016 legislative session) would experience an **average** increase in framework rates of 31% over their historic rates, and that the **median** percent increase would be 8%.

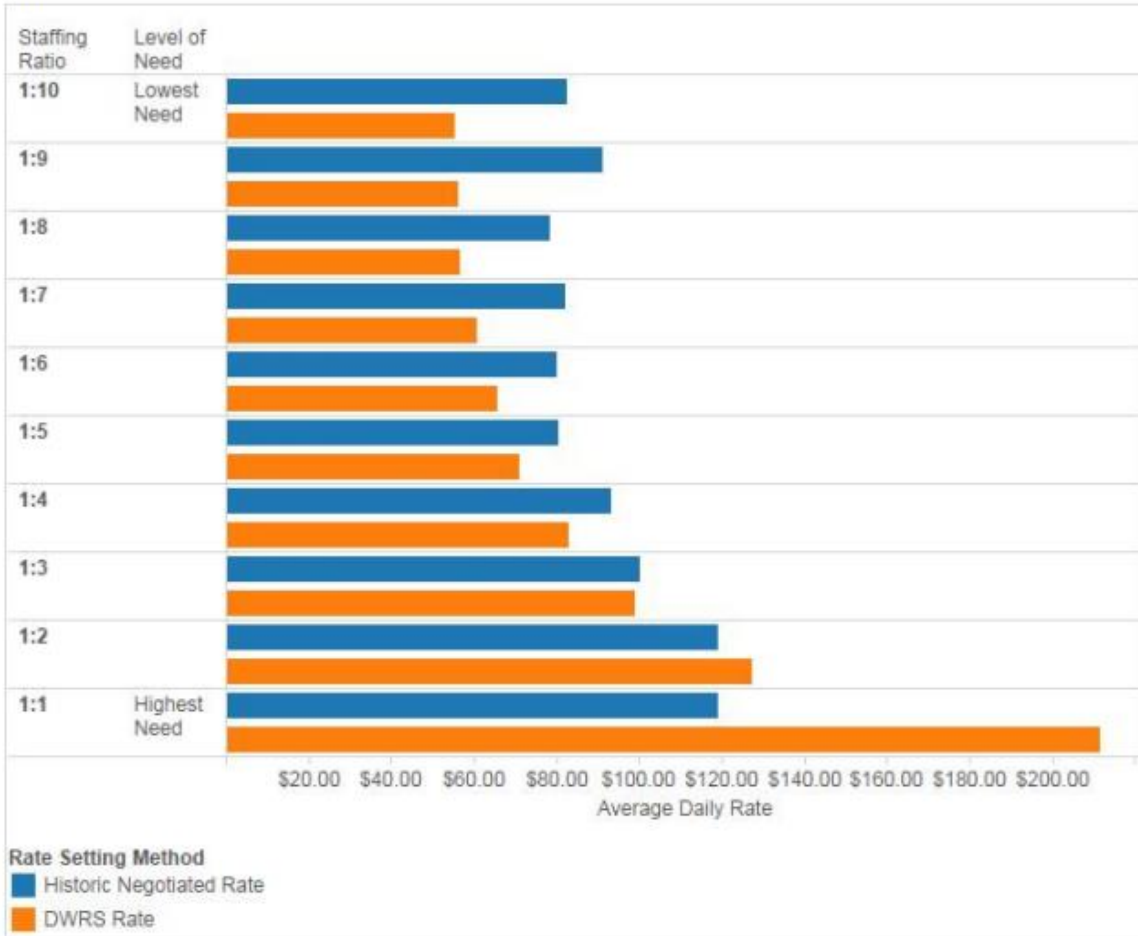
Again, the discrepancy between the average increase and the median increase shows that a minority of providers would get large increases – or, that a minority of service providers had been substantially underpaid relative to what DWRS determined was the cost of providing the same services to similarity situated service recipients. Figure 5, which is taken from DHS's January 15, 2017 report "Disability Waiver Rate System," visualizes this phenomenon.

Figure 5: Distribution of projected impact of DWRS to service provider rates



Among day training and habilitation (DT&H) providers, however, the projected **average** percent change in framework rates (based on the framework as it existed after the 2016 legislative session) was 18%, while the projected **median** change was 0%. A median change of 0% means half of DT&H providers would see a decrease in their rates between 2013 and full implementation of DWRS, and yet the average increase is 18%, which means some DT&H providers are going to see huge increases. Explaining why DT&H providers are particularly vulnerable to decreased rates relative to their historic rates is difficult to explain, but Figure 2, which is taken from DHS's January 15, 2017 report "Disability Waiver Rate System," might provide a clue.

Figure 2: Average rate according to rate setting method and recipient need, daily day training and habilitation services



NOTE: DWRS rates in this graph reflect rates calculated by DWRS prior to BLS and CPI inflation adjustments in July 2017.

The wide variance between the average and median change in rates for all providers and in particular among DT&H providers demonstrates just how variable the historical, county-negotiated rates were. Given that variability in rates, it is very difficult to make any general claims about providers being "harmed" by DWRS or "benefited" by it, because **the change in each provider's rate is relative to the rate the provider negotiated with its county in 2013**.

On the other hand, since DWRS is designed to provide a rate based on the cost of providing services, it should be possible to make general claims about whether DWRS is actually doing so. Historically is has been very difficult for DHS to collect non-wage cost data because it was relying on voluntary provider surveys that suffered from very low response rates and likely selection bias. Recent legislative changes will require providers to provide more complete cost data. The first results of a DHS study based on this more complete cost data is expected in January 2020.

Policy Levers for Modifying DWRS

Since Minnesota implemented DWRS, CMS has continued to offer other states guidance on how to develop a rate setting methodology for waiver services. CMS permits various methodologies, but the guidance strongly implies that certain methods are appropriate only for certain services. A brief survey of states that had a reimbursement system similar to Minnesota's county negotiated rates or that have recently implemented a new rate methodology reveals that for the most part these states have a methodology similar to Minnesota's. Nonetheless, there are avenues within the existing methodology to modify rates in ways that would meet the requirements of the Social Security Act and the CMS regulations. Below is a list of some options, some of which have been proposed in Minnesota before, been included in DHS reports or reports from research consultants hired by DHS, in CMS guidance, or implemented in other states.

1. Grants to providers who will experience large rate decreases to allow the provider to develop alternative business models and strategies to compete successfully in the new DWRS environment.
2. A new COLA with explicit language that it will offset the next automatic inflation adjustment (or expire)
    - Justifiable COLAs appear consistent with CMS guidance.
3. More frequent inflation adjustments
4. A different inflation index
5. A version of the 2018 proposed Competitive Wage Factor
6. A modified version of the Competitive Wage Factor that targets particular staff categories
7. Modify the existing wage index (as was done in 2017)
8. Modify the existing wage index to use only metro wage data (as was done with the EW rates in 2017)
9. A regional (wage) variance factor that is not budget neutral
10. Use metro only wage data for "metro" providers and statewide wage data for the others
11. A regional transportation variance factor
12. A regional insurance variance factor
13. A regional facility cost (property, maintenance, utilities) variance factor
14. Modify re-basing recommendations to coincide with a formal budget cycle (e.g., 2019 instead of 2020).
15. Enact pay-for-performance add-ons
16. Develop a managed care model for waivered services (EW uses managed care)
17. Modify the level of care criteria for the waivers
18. Limit enrollment
19. Limit available services
20. Over-time supplement
21. Profit factor