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SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1993



ENROLLED

Com. Sub. for
HOUSE BILL NO. 2272

(By Delegates *P. White, H. White + Z. White*)



Passed *April 10,* 1993

In Effect *From* Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 2272
(By DELEGATES P. WHITE, H. WHITE AND L. WHITE)

[Passed April 10, 1993; in effect from passage.]

AN ACT to amend and reenact sections three and six, article two-d, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to certificates of need; defining new institutional health services; designating additional ventilator services as a new institutional health service; setting minimum criteria for certificate of need reviews; and setting criteria for certificate of need review for additional ventilator beds in health care facilities.

Be it enacted by the Legislature of West Virginia:

That sections three and six, article two-d, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2D. CERTIFICATE OF NEED.

§16-2D-3. Certificate of need.

1 Except as provided in section four of this article, any
2 new institutional health service may not be acquired,
3 offered or developed within this state except upon
4 application for and receipt of a certificate of need as
5 provided by this article. Whenever a new institutional
6 health service for which a certificate of need is required

7 by this article is proposed for a health care facility for
8 which, pursuant to section four of this article, no
9 certificate of need is or was required, a certificate of
10 need shall be issued before the new institutional health
11 service is offered or developed. No person may know-
12 ingly charge or bill for any health services associated
13 with any new institutional health service that is
14 knowingly acquired, offered or developed in violation of
15 this article, and any bill made in violation of this section
16 is legally unenforceable. For purposes of this article, a
17 proposed "new institutional health service" includes:

18 (a) The construction, development, acquisition or other
19 establishment of a new health care facility or health
20 maintenance organization;

21 (b) The partial or total closure of a health care facility
22 or health maintenance organization with which a capital
23 expenditure is associated;

24 (c) Any obligation for a capital expenditure incurred
25 by or on behalf of a health care facility, except as
26 exempted in section four of this article, or health
27 maintenance organization in excess of the expenditure
28 minimum or any obligation for a capital expenditure
29 incurred by any person to acquire a health care facility.
30 An obligation for a capital expenditure is considered to
31 be incurred by or on behalf of a health care facility:

32 (1) When a contract, enforceable under state law, is
33 entered into by or on behalf of the health care facility
34 for the construction, acquisition, lease or financing of a
35 capital asset;

36 (2) When the governing board of the health care
37 facility takes formal action to commit its own funds for
38 a construction project undertaken by the health care
39 facility as its own contractor; or

40 (3) In the case of donated property, on the date on
41 which the gift is completed under state law;

42 (d) A substantial change to the bed capacity of a
43 health care facility with which a capital expenditure is
44 associated;

45 (e) (1) The addition of health services which are
46 offered by or on behalf of a health care facility or health
47 maintenance organization and which were not offered
48 on a regular basis by or on behalf of the health care
49 facility or health maintenance organization within the
50 twelve-month period prior to the time the services would
51 be offered; and

52 (2) The addition of ventilator services for any nursing
53 facility bed by any health care facility or health
54 maintenance organization.

55 (f) The deletion of one or more health services,
56 previously offered on a regular basis by or on behalf of
57 a health care facility or health maintenance organiza-
58 tion which is associated with a capital expenditure;

59 (g) A substantial change to the bed capacity or health
60 services offered by or on behalf of a health care facility,
61 whether or not the change is associated with a proposed
62 capital expenditure, if the change is associated with a
63 previous capital expenditure for which a certificate of
64 need was issued and if the change will occur within two
65 years after the date the activity which was associated
66 with the previously approved capital expenditure was
67 undertaken;

68 (h) The acquisition of major medical equipment;

69 (i) A substantial change in an approved new institu-
70 tional health service for which a certificate of need is
71 in effect. For purposes of this subsection "substantial
72 change" shall be defined by the state agency in
73 regulations adopted pursuant to section eight of this
74 article.

**§16-2D-6. Minimum criteria for certificate of need
reviews.**

1 (a) Except as provided in subsections (f) and (g) of
2 section nine of this article, in making its determination
3 as to whether a certificate of need shall be issued, the
4 state agency shall, at a minimum, consider all of the
5 following criteria that are applicable: *Provided*, That in
6 the case of a health maintenance organization or an
7 ambulatory care facility or health care facility con-

8 trolled, directly or indirectly, by a health maintenance
9 organization or combination of health maintenance
10 organizations, the criteria considered shall be only those
11 set forth in subdivision (12) of this subsection: *Provided,*
12 *however,* That the criteria set forth in subsection (f) of
13 this section applies to all hospitals, nursing homes and
14 health care facilities when ventilator services are to be
15 provided for any nursing facility bed.

16 (1) The recommendation of the designated health
17 systems agency for the health service area in which the
18 proposed new institutional health service is to be
19 located;

20 (2) The relationship of the health services being
21 reviewed to the state health plan and to the applicable
22 health systems plan and annual implementation plan
23 adopted by the designated health systems agency for the
24 health service area in which the proposed new institu-
25 tional health service is to be located;

26 (3) The relationship of services reviewed to the long-
27 range development plan of the person providing or
28 proposing the services;

29 (4) The need that the population served or to be served
30 by the services has for the services proposed to be
31 offered or expanded, and the extent to which all
32 residents of the area, and in particular low income
33 persons, racial and ethnic minorities, women, handi-
34 capped persons, other medically underserved popula-
35 tion, and the elderly, are likely to have access to those
36 services;

37 (5) The availability of less costly or more effective
38 alternative methods of providing the services to be
39 offered, expanded, reduced, relocated or eliminated;

40 (6) The immediate and long-term financial feasibility
41 of the proposal as well as the probable impact of the
42 proposal on the costs of and charges for providing health
43 services by the person proposing the new institutional
44 health service;

45 (7) The relationship of the services proposed to the
46 existing health care system of the area in which the

47 services are proposed to be provided;

48 (8) In the case of health services proposed to be
49 provided, the availability of resources, including health
50 care providers, management personnel, and funds for
51 capital and operating needs, for the provision of the
52 services proposed to be provided and the need for
53 alternative uses of these resources as identified by the
54 state health plan, applicable health systems plan and
55 annual implementation plan;

56 (9) The appropriate and nondiscriminatory utilization
57 of existing and available health care providers;

58 (10) The relationship, including the organizational
59 relationship, of the health services proposed to be
60 provided to ancillary or support services;

61 (11) Special needs and circumstances of those entities
62 which provide a substantial portion of their services or
63 resources, or both, to individuals not residing in the
64 health service areas in which the entities are located or
65 in adjacent health service areas. The entities may
66 include medical and other health professional schools,
67 multidisciplinary clinics and specialty centers;

68 (12) To the extent not precluded by subdivision (1),
69 subsection (f), section nine of this article, the special
70 needs and circumstances of health maintenance organ-
71 izations. These needs and circumstances are limited to:

72 (A) The needs of enrolled members and reasonably
73 anticipated new members of the health maintenance
74 organization for the health services proposed to be
75 provided by the organization; and

76 (B) The availability of the new health services from
77 nonhealth maintenance organization providers or other
78 health maintenance organizations in a reasonable and
79 cost-effective manner which is consistent with the basic
80 method of operation of the health maintenance organ-
81 ization. In assessing the availability of these health
82 services from these providers, the agency shall consider
83 only whether the services from these providers:

84 (i) Would be available under a contract of at least five

85 years duration;

86 (ii) Would be available and conveniently accessible
87 through physicians and other health professionals
88 associated with the health maintenance organization;

89 (iii) Would cost no more than if the services were
90 provided by the health maintenance organization; and

91 (iv) Would be available in a manner which is admin-
92 istratively feasible to the health maintenance
93 organization;

94 (13) The special needs and circumstances of biomed-
95 ical and behavioral research projects which are de-
96 signed to meet a national need and for which local
97 conditions offer special advantages;

98 (14) In the case of a reduction or elimination of a
99 service, including the relocation of a facility or a service,
100 the need that the population presently served has for the
101 service, the extent to which that need will be met
102 adequately by the proposed relocation or by alternative
103 arrangements, and the effect of the reduction, elimina-
104 tion or relocation of the service on the ability of low
105 income persons, racial and ethnic minorities, women,
106 handicapped persons, other medically underserved
107 population, and the elderly, to obtain needed health care;

108 (15) In the case of a construction project: (A) The cost
109 and methods of the proposed construction, including the
110 costs and methods of energy provision and (B) the
111 probable impact of the construction project reviewed on
112 the costs of providing health services by the person
113 proposing the construction project and on the costs and
114 charges to the public of providing health services by
115 other persons;

116 (16) In the case of health services proposed to be
117 provided, the effect of the means proposed for the
118 delivery of proposed health services on the clinical needs
119 of health professional training programs in the area in
120 which the services are to be provided;

121 (17) In the case of health services proposed to be
122 provided, if the services are to be available in a limited

123 number of facilities, the extent to which the schools in
124 the area for health professions will have access to the
125 services for training purposes;

126 (18) In the case of health services proposed to be
127 provided, the extent to which the proposed services will
128 be accessible to all the residents of the area to be served
129 by the services;

130 (19) In accordance with section five of this article, the
131 factors influencing the effect of competition on the
132 supply of the health services being reviewed;

133 (20) Improvements or innovations in the financing and
134 delivery of health services which foster competition, in
135 accordance with section five of this article, and serve to
136 promote quality assurance and cost effectiveness;

137 (21) In the case of health services or facilities proposed
138 to be provided, the efficiency and appropriateness of the
139 use of existing services and facilities similar to those
140 proposed;

141 (22) In the case of existing services or facilities, the
142 quality of care provided by the services or facilities in
143 the past;

144 (23) In the case where an application is made by an
145 osteopathic or allopathic facility for a certificate of need
146 to construct, expand, or modernize a health care facility,
147 acquire major medical equipment, or add services, the
148 need for that construction, expansion, modernization,
149 acquisition of equipment, or addition of services shall be
150 considered on the basis of the need for and the avail-
151 ability in the community of services and facilities for
152 osteopathic and allopathic physicians and their patients.
153 The state agency shall consider the application in terms
154 of its impact on existing and proposed institutional
155 training programs for doctors of osteopathy and
156 medicine at the student, internship, and residency
157 training levels;

158 (24) The special circumstances of health care facilities
159 with respect to the need for conserving energy;

160 (25) The contribution of the proposed service in

161 meeting the health related needs of members of
162 medically underserved populations which have tradi-
163 tionally experienced difficulties in obtaining equal
164 access to health services, particularly those needs
165 identified in the state health plan, applicable health
166 systems plan and annual implementation plan, as
167 deserving of priority. For the purpose of determining
168 the extent to which the proposed service will be
169 accessible, the state agency shall consider:

170 (A) The extent to which medically underserved
171 populations currently use the applicant's services in
172 comparison to the percentage of the population in the
173 applicant's service area which is medically underserved,
174 and the extent to which medically underserved popula-
175 tions are expected to use the proposed services if
176 approved;

177 (B) The performance of the applicant in meeting its
178 obligation, if any, under any applicable federal regula-
179 tions requiring provision of uncompensated care,
180 community service, or access by minorities and handi-
181 capped persons to programs receiving federal financial
182 assistance, including the existence of any civil rights
183 access complaints against the applicant;

184 (C) The extent to which medicare, medicaid and
185 medically indigent patients are served by the applicant;
186 and

187 (D) The extent to which the applicant offers a range
188 of means by which a person will have access to its
189 services, including, but not limited to, outpatient
190 services, admission by a house staff and admission by
191 personal physician.

192 (26) The existence of a mechanism for soliciting
193 consumer input into the health care facility's decision
194 making process.

195 (b) The state agency may include additional criteria
196 which it prescribes by regulations adopted pursuant to
197 section eight of this article.

198 (c) Criteria for reviews may vary according to the
199 purpose for which a particular review is being con-

200 ducted or the types of health services being reviewed.

201 (d) An application for a certificate of need may not
202 be made subject to any criterion not contained in this
203 article or not contained in regulations adopted pursuant
204 to section eight of this article.

205 (e) In the case of any proposed new institutional health
206 service, the state agency may not grant a certificate of
207 need under its certificate of need program unless, after
208 consideration of the appropriateness of the use of
209 existing facilities providing services similar to those
210 being proposed, the state agency makes, in addition to
211 findings required in section nine of this article, each of
212 the following findings in writing: (1) That superior
213 alternatives to the services in terms of cost, efficiency
214 and appropriateness do not exist and the development
215 of alternatives is not practicable; (2) that existing
216 facilities providing services similar to those proposed
217 are being used in an appropriate and efficient manner;
218 (3) that in the case of new construction, alternatives to
219 new construction, such as modernization or sharing
220 arrangements, have been considered and have been
221 implemented to the maximum extent practicable; (4)
222 that patients will experience serious problems in
223 obtaining care of the type proposed in the absence of the
224 proposed new service; and (5) that in the case of a
225 proposal for the addition of beds for the provision of
226 skilled nursing or intermediate care services, the
227 addition will be consistent with the plans of other
228 agencies of the state responsible for the provision and
229 financing of long-term care facilities or services
230 including home health services.

231 (f) In the case where an application is made by a
232 hospital, nursing home or other health care facility to
233 provide ventilator services which have not previously
234 been provided for a nursing facility bed, the state
235 agency shall consider the application in terms of the
236 need for the service and whether the cost exceeds the
237 level of current medicaid services. No facility may, by
238 providing ventilator services, provide a higher level of
239 service for a nursing facility bed without demonstrating
240 that the change in level of service by provision of the

Enr. Com. Sub. for H. B. 2272] 10

241 additional ventilator services will result in no additional
242 fiscal burden to the state.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Handwritten Signature]
Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect from passage.

[Handwritten Signature]
Clerk of the Senate

[Handwritten Signature]
Clerk of the House of Delegates

[Handwritten Signature]
President of the Senate

[Handwritten Signature]
Speaker of the House of Delegates

The within *is* approved this the *12th* day of *May*, 1993.

[Handwritten Signature]
Governor

PRESENTED TO THE

GOVERNOR

Date 4/30/93

Time 2:30 PM