

E N R O L L E D

H. B. 2595

(BY DELEGATE(S) MCGEEHAN
AND CANTERBURY)

[Passed March 12, 2015;
in effect ninety days from passage.]

AN ACT to amend and reenact §16-2D-2 and §16-2D-6 of the Code of West Virginia, 1931, as amended, relating to certificates of need for the development of health facilities in this state; eliminating out-of-state health care facilities or providers from the definition of “affected persons” and from consideration in the state agency’s evaluation process.

Be it enacted by the Legislature of West Virginia:

That §16-2D-2 and §16-2D-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2D. CERTIFICATE OF NEED.

§16-2D-2. Definitions.

- 1 Definitions of words and terms defined in articles five-f and
- 2 twenty-nine-b of this chapter are incorporated in this section
- 3 unless this section has different definitions.

4 As used in this article, unless otherwise indicated by the
5 context:

6 (a) “Affected person” means:

7 (1) The applicant;

8 (2) An agency or organization representing consumers;

9 (3) Any individual residing within the geographic area
10 served or to be served by the applicant;

11 (4) Any individual who regularly uses the health care
12 facilities within that geographic area;

13 (5) The health care facilities located within this state which
14 provide services similar to the services of the facility under
15 review and which will be significantly affected by the proposed
16 project;

17 (6) The health care facilities located within this state which,
18 before receipt by the state agency of the proposal being
19 reviewed, have formally indicated an intention to provide similar
20 services within this state in the future;

21 (7) Third-party payors who reimburse health care facilities
22 within this state similar to those proposed for services;

23 (8) Any agency that establishes rates for health care facilities
24 within this state similar to those proposed; or

25 (9) Organizations representing health care providers.

26 (b) “Ambulatory health care facility” means a free-standing
27 facility that provides health care to noninstitutionalized and
28 nonhomebound persons on an outpatient basis. For purposes of
29 this definition, a free-standing facility is not located on the

30 campus of an existing health care facility. This definition does
31 not include any facility engaged solely in the provision of
32 lithotripsy services or the private office practice of any one or
33 more health professionals licensed to practice in this state
34 pursuant to the provisions of chapter thirty of this code:
35 *Provided*, That this exemption from review may not be construed
36 to include practices where major medical equipment otherwise
37 subject to review under the provisions of this article is acquired,
38 offered or developed: *Provided, however*, That this exemption
39 from review may not be construed to include certain health
40 services otherwise subject to review under the provisions of
41 subdivision (1), subsection (a), section four of this article.

42 (c) “Ambulatory surgical facility” means a free-standing
43 facility that provides surgical treatment to patients not requiring
44 hospitalization. For purposes of this definition, a free-standing
45 facility is not physically attached to a health care facility. This
46 definition does not include the private office practice of any one
47 or more health professionals licensed to practice surgery in this
48 state pursuant to the provisions of chapter thirty of this code:
49 *Provided*, That this exemption from review may not be construed
50 to include practices where major medical equipment otherwise
51 subject to review under the provisions of this article is acquired,
52 offered or developed: *Provided, however*, That this exemption
53 from review may not be construed to include health services
54 otherwise subject to review under the provisions of subdivision
55 (1), subsection (a), section four of this article.

56 (d) “Applicant” means: (1) The governing body or the
57 person proposing a new institutional health service who is, or
58 will be, the health care facility licensee wherein the new
59 institutional health service is proposed to be located; and (2) in
60 the case of a proposed new institutional health service not to be
61 located in a licensed health care facility, the governing body or
62 the person proposing to provide the new institutional health
63 service. Incorporators or promoters who will not constitute the

64 governing body or persons responsible for the new institutional
65 health service may not be an applicant.

66 (e) "Bed capacity" means the number of beds licensed to a
67 health care facility or the number of adult and pediatric beds
68 permanently staffed and maintained for immediate use by
69 inpatients in patient rooms or wards in an unlicensed facility.

70 (f) "Campus" means the adjacent grounds and buildings, or
71 grounds and buildings not separated by more than a public right-
72 of-way, of a health care facility.

73 (g) "Capital expenditure" means:

74 (1) An expenditure made by or on behalf of a health care
75 facility, which:

76 (A) (i) Under generally accepted accounting principles is not
77 properly chargeable as an expense of operation and maintenance;
78 or (ii) is made to obtain either by lease or comparable
79 arrangement any facility or part thereof or any equipment for a
80 facility or part; and

81 (B) (i) Exceeds the expenditure minimum; (ii) is a substan-
82 tial change to the bed capacity of the facility with respect to
83 which the expenditure is made; or (iii) is a substantial change to
84 the services of such facility;

85 (2) The donation of equipment or facilities to a health care
86 facility, which if acquired directly by that facility would be
87 subject to review;

88 (3) The transfer of equipment or facilities for less than fair
89 market value if the transfer of the equipment or facilities at fair
90 market value would be subject to review; or

91 (4) A series of expenditures, if the sum total exceeds the
92 expenditure minimum and if determined by the state agency to

93 be a single capital expenditure subject to review. In making this
94 determination, the state agency shall consider: Whether the
95 expenditures are for components of a system which is required
96 to accomplish a single purpose; whether the expenditures are to
97 be made over a two-year period and are directed towards the
98 accomplishment of a single goal within the health care facility's
99 long-range plan; or whether the expenditures are to be made
100 within a two-year period within a single department such that
101 they will constitute a significant modernization of the
102 department.

103 (h) "Expenditure minimum" means \$2,700,000 for the
104 calendar year 2009. The state agency shall adjust the expenditure
105 minimum annually and publish an update of the amount on or
106 before December 31, of each year. The expenditure minimum
107 adjustment shall be based on the DRI inflation index published
108 in the *Global Insight DRI/WEFA Health Care Cost Review*, or its
109 successor or appropriate replacement index. This amount shall
110 include the cost of any studies, surveys, designs, plans, working
111 drawings, specifications and other activities, including staff
112 effort and consulting and other services essential to the
113 acquisition, improvement, expansion or replacement of any plant
114 or equipment.

115 (i) "Health", used as a term, includes physical and mental
116 health.

117 (j) "Health care facility" means a publicly or privately
118 owned facility, agency or entity that offers or provides health
119 care services, whether a for-profit or nonprofit entity and
120 whether or not licensed, or required to be licensed, in whole or
121 in part, and includes, but is not limited to, hospitals; skilled
122 nursing facilities; kidney disease treatment centers, including
123 free-standing hemodialysis units; intermediate care facilities;
124 ambulatory health care facilities; ambulatory surgical facilities;
125 home health agencies; hospice agencies; rehabilitation facilities;

126 health maintenance organizations; and community mental health
127 and intellectual disability facilities. For purposes of this
128 definition, “community mental health and intellectual disability
129 facility” means a private facility which provides such
130 comprehensive services and continuity of care as emergency,
131 outpatient, partial hospitalization, inpatient or consultation and
132 education for individuals with mental illness, intellectual
133 disability or drug or alcohol addiction.

134 (k) “Health care provider” means a person, partnership,
135 corporation, facility, hospital or institution licensed or certified
136 or authorized by law to provide professional health care service
137 in this state to an individual during that individual’s medical,
138 remedial or behavioral health care, treatment or confinement.

139 (l) “Health maintenance organization” means a public or
140 private organization which:

141 (1) Is required to have a certificate of authority to operate in
142 this state pursuant to section three, article twenty-five-a, chapter
143 thirty-three of this code; or

144 (2) (A) Provides or otherwise makes available to enrolled
145 participants health care services, including substantially the
146 following basic health care services: Usual physician services,
147 hospitalization, laboratory, X ray, emergency and preventive
148 services and out-of-area coverage;

149 (B) Is compensated except for copayments for the provision
150 of the basic health care services listed in paragraph (A) of this
151 subdivision to enrolled participants on a predetermined periodic
152 rate basis without regard to the date the health care services are
153 provided and which is fixed without regard to the frequency,
154 extent or kind of health service actually provided; and

155 (C) Provides physicians’ services: (i) Directly through
156 physicians who are either employees or partners of the

157 organization; or (ii) through arrangements with individual
158 physicians or one or more groups of physicians organized on a
159 group practice or individual practice basis.

160 (m) “Health services” means clinically related preventive,
161 diagnostic, treatment or rehabilitative services, including
162 alcohol, drug abuse and mental health services.

163 (n) “Home health agency” means an organization primarily
164 engaged in providing professional nursing services either
165 directly or through contract arrangements and at least one of the
166 following services: Home health aide services, other therapeutic
167 services, physical therapy, speech therapy, occupational therapy,
168 nutritional services or medical social services to persons in their
169 place of residence on a part-time or intermittent basis.

170 (o) “Hospice agency” means a private or public agency or
171 organization licensed in West Virginia for the administration or
172 provision of hospice care services to terminally ill persons in the
173 persons’ temporary or permanent residences by using an
174 interdisciplinary team, including, at a minimum, persons
175 qualified to perform nursing services; social work services; the
176 general practice of medicine or osteopathy; and pastoral or
177 spiritual counseling.

178 (p) “Hospital” means a facility licensed as such pursuant to
179 the provisions of article five-b of this chapter, and any acute care
180 facility operated by the state government, that primarily provides
181 inpatient diagnostic, treatment or rehabilitative services to
182 injured, disabled or sick persons under the supervision of
183 physicians and includes psychiatric and tuberculosis hospitals.

184 (q) “Intermediate care facility” means an institution that
185 provides health-related services to individuals with mental or
186 physical conditions that require services above the level of room
187 and board, but do not require the degree of services provided in
188 a hospital or skilled-nursing facility.

189 (r) “Long-range plan” means a document formally adopted
190 by the legally constituted governing body of an existing health
191 care facility or by a person proposing a new institutional health
192 service which contains the information required by the state
193 agency in rules adopted pursuant to section eight of this article.

194 (s) “Major medical equipment” means a single unit of
195 medical equipment or a single system of components with
196 related functions which is used for the provision of medical and
197 other health services and costs in excess of \$2,700,000 in the
198 calendar year 2009. The state agency shall adjust the dollar
199 amount specified in this subsection annually and publish an
200 update of the amount on or before December 31, of each year.
201 The adjustment of the dollar amount shall be based on the DRI
202 inflation index published in the *Global Insight DRI/WEFA*
203 *Health Care Cost Review* or its successor or appropriate
204 replacement index. This term does not include medical
205 equipment acquired by or on behalf of a clinical laboratory to
206 provide clinical laboratory services if the clinical laboratory is
207 independent of a physician’s office and a hospital and it has been
208 determined under Title XVIII of the Social Security Act to meet
209 the requirements of paragraphs ten and eleven, Section 1861(s)
210 of such act, Title 42 U.S.C. §1395x. In determining whether
211 medical equipment is major medical equipment, the cost of
212 studies, surveys, designs, plans, working drawings,
213 specifications and other activities essential to the acquisition of
214 such equipment shall be included. If the equipment is acquired
215 for less than fair market value, the term “cost” includes the fair
216 market value.

217 (t) “Medically underserved population” means the
218 population of an area designated by the state agency as having a
219 shortage of personal health services. The state agency may
220 consider unusual local conditions that are a barrier to
221 accessibility or availability of health services. The designation
222 shall be in rules adopted by the state agency pursuant to section

223 eight of this article, and the population so designated may
224 include the state's medically underserved population designated
225 by the federal Secretary of Health and Human Services under
226 Section 330(b)(3) of the Public Health Service Act, as amended,
227 Title 42 U.S.C. §254.

228 (u) "New institutional health service" means any service as
229 described in section three of this article.

230 (v) "Nonhealth-related project" means a capital expenditure
231 for the benefit of patients, visitors, staff or employees of a health
232 care facility and not directly related to preventive, diagnostic,
233 treatment or rehabilitative services offered by the health care
234 facility. This includes, but is not limited to, chapels, gift shops,
235 news stands, computer and information technology systems,
236 educational, conference and meeting facilities, but excluding
237 medical school facilities, student housing, dining areas,
238 administration and volunteer offices, modernization of structural
239 components, boiler repair or replacement, vehicle maintenance
240 and storage facilities, parking facilities, mechanical systems for
241 heating, ventilation systems, air conditioning systems and
242 loading docks.

243 (w) "Offer", when used in connection with health services,
244 means that the health care facility or health maintenance
245 organization holds itself out as capable of providing, or as
246 having the means to provide, specified health services.

247 (x) "Person" means an individual, trust, estate, partnership,
248 committee, corporation, association and other organizations such
249 as joint-stock companies and insurance companies, a state or a
250 political subdivision or instrumentality thereof or any legal entity
251 recognized by the state.

252 (y) "Physician" means a doctor of medicine or osteopathy
253 legally authorized to practice by the state.

254 (z) “Proposed new institutional health service” means any
255 service as described in section three of this article.

256 (aa) “Psychiatric hospital” means an institution that
257 primarily provides to inpatients, by or under the supervision of
258 a physician, specialized services for the diagnosis, treatment and
259 rehabilitation of mentally ill and emotionally disturbed persons.

260 (bb) “Rehabilitation facility” means an inpatient facility
261 operated for the primary purpose of assisting in the rehabilitation
262 of disabled persons through an integrated program of medical
263 and other services which are provided under competent
264 professional supervision.

265 (cc) “Review agency” means an agency of the state,
266 designated by the Governor as the agency for the review of state
267 agency decisions.

268 (dd) “Skilled nursing facility” means an institution, or a
269 distinct part of an institution, that primarily provides inpatient
270 skilled nursing care and related services, or rehabilitation
271 services, to injured, disabled or sick persons.

272 (ee) “State agency” means the Health Care Authority
273 created, established and continued pursuant to article twenty-
274 nine-b of this chapter.

275 (ff) “State health plan” means the document approved by the
276 Governor after preparation by the former statewide health
277 coordinating council or that document as approved by the
278 Governor after amendment by the former health care planning
279 council or the state agency.

280 (gg) “Substantial change to the bed capacity” of a health care
281 facility means any change, associated with a capital expenditure,
282 that increases or decreases the bed capacity or relocates beds
283 from one physical facility or site to another, but does not include

284 a change by which a health care facility reassigns existing beds
285 as swing beds between acute care and long-term care categories:
286 *Provided*, That a decrease in bed capacity in response to federal
287 rural health initiatives is excluded from this definition.

288 (hh) “Substantial change to the health services” of a health
289 care facility means: (1) The addition of a health service offered
290 by or on behalf of the health care facility which was not offered
291 by or on behalf of the facility within the twelve-month period
292 before the month in which the service is first offered; or (2) the
293 termination of a health service offered by or on behalf of the
294 facility: *Provided*, That “substantial change to the health
295 services” does not include the providing of ambulance service,
296 wellness centers or programs, adult day care or respite care by
297 acute care facilities.

298 (ii) “To develop”, when used in connection with health
299 services, means to undertake those activities which upon their
300 completion will result in the offer of a new institutional health
301 service or the incurring of a financial obligation in relation to the
302 offering of such a service.

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

1 (a) Except as provided in subsection (f), section nine of this
2 article, in making its determination as to whether a certificate of
3 need shall be issued, the state agency shall, at a minimum,
4 consider all of the following criteria that are applicable:
5 *Provided*, That the criteria set forth in subsection (f) of this
6 section apply to all hospitals, nursing homes and health care
7 facilities when ventilator services are to be provided for any
8 nursing facility bed:

9 (1) The relationship of the health services being reviewed to
10 the state health plan;

11 (2) The relationship of services reviewed to the long-range
12 development plan of the person providing or proposing the
13 services;

14 (3) The need that the population served or to be served by
15 the services has for the services proposed to be offered or
16 expanded, and the extent to which all residents of the area, and
17 in particular low income persons, racial and ethnic minorities,
18 women, handicapped persons, other medically underserved
19 population and the elderly, are likely to have access to those
20 services;

21 (4) The availability within this state of less costly or more
22 effective alternative methods of providing the services to be
23 offered, expanded, reduced, relocated or eliminated;

24 (5) The immediate and long-term financial feasibility of the
25 proposal as well as the probable impact of the proposal on the
26 costs of and charges for providing health services by the person
27 proposing the new institutional health service;

28 (6) The relationship of the services proposed to the existing
29 health care system of the area within this state in which the
30 services are proposed to be provided;

31 (7) In the case of health services proposed to be provided,
32 the availability of resources within this state, including health
33 care providers, management personnel, and funds for capital and
34 operating needs, for the provision of the services proposed to be
35 provided and the need for alternative uses of these resources as
36 identified by the state health plan and other applicable plans;

37 (8) The appropriate and nondiscriminatory utilization of
38 existing and available health care providers within this state;

39 (9) The relationship, including the organizational relation-
40 ship, of the health services proposed to be provided to ancillary
41 or support services;

42 (10) Special needs and circumstances of those entities within
43 this state which provide a substantial portion of their services or
44 resources, or both, to individuals not residing in the health
45 service areas in which the entities are located or in adjacent
46 health service areas. The entities may include medical and other
47 health professional schools, multidisciplinary clinics and
48 specialty centers;

49 (11) In the case of a reduction or elimination of a service,
50 including the relocation of a facility or a service, the need that
51 the population presently served has for the service, the extent to
52 which that need will be met adequately by the proposed
53 relocation or by alternative arrangements, and the effect of the
54 reduction, elimination or relocation of the service on the ability
55 of low income persons, racial and ethnic minorities, women,
56 handicapped persons, other medically underserved population
57 and the elderly, to obtain needed health care;

58 (12) In the case of a construction project: (A) The cost and
59 methods of the proposed construction, including the costs and
60 methods of energy provision; and (B) the probable impact of the
61 construction project reviewed on the costs of providing health
62 services by the person proposing the construction project and on
63 the costs and charges to the public of providing health services
64 by other persons within this state;

65 (13) In the case of health services proposed to be provided,
66 the effect of the means proposed for the delivery of proposed
67 health services on the clinical needs of health professional
68 training programs in the area within this state in which the
69 services are to be provided;

70 (14) In the case of health services proposed to be provided,
71 if the services are to be available in a limited number of
72 facilities, the extent to which the schools in the area within this

73 state for health professions will have access to the services for
74 training purposes;

75 (15) In the case of health services proposed to be provided,
76 the extent to which the proposed services will be accessible to all
77 the residents of the area to be served by the services;

78 (16) In accordance with section five of this article, the
79 factors influencing the effect of competition on the supply of the
80 health services being reviewed;

81 (17) Improvements or innovations in the financing and
82 delivery of health services which foster competition , in
83 accordance with section five of this article, and serve to promote
84 quality assurance and cost effectiveness;

85 (18) In the case of health services or facilities proposed to be
86 provided, the efficiency and appropriateness of the use of
87 existing services and facilities within this state similar to those
88 proposed;

89 (19) In the case of existing services or facilities, the quality
90 of care provided by the services or facilities in the past;

91 (20) In the case where an application is made by an
92 osteopathic or allopathic facility for a certificate of need to
93 construct, expand or modernize a health care facility, acquire
94 major medical equipment or add services, the need for that
95 construction, expansion, modernization, acquisition of
96 equipment or addition of services shall be considered on the
97 basis of the need for and the availability in the community of
98 services and facilities within this state for osteopathic and
99 allopathic physicians and their patients. The state agency shall
100 consider the application in terms of its impact on existing and
101 proposed institutional training programs within this state for
102 doctors of osteopathy and medicine at the student, internship and
103 residency training levels;

104 (21) The special circumstances of health care facilities
105 within this state with respect to the need for conserving energy;

106 (22) The contribution of the proposed service in meeting the
107 health-related needs of members of medically underserved
108 populations which have traditionally experienced difficulties in
109 obtaining equal access to health services, particularly those
110 needs identified in the state health plan as deserving of priority.
111 For the purpose of determining the extent to which the proposed
112 service will be accessible, the state agency shall consider:

113 (A) The extent to which medically underserved populations
114 currently use the applicant's services in comparison to the
115 percentage of the population in the applicant's service area
116 which is medically underserved, and the extent to which
117 medically underserved populations are expected to use the
118 proposed services if approved;

119 (B) The performance of the applicant in meeting its
120 obligation, if any, under any applicable federal regulations
121 requiring provision of uncompensated care, community service
122 or access by minorities and handicapped persons to programs
123 receiving federal financial assistance, including the existence of
124 any civil rights access complaints against the applicant;

125 (C) The extent to which Medicare, Medicaid and medically
126 indigent patients are served by the applicant; and

127 (D) The extent to which the applicant offers a range of
128 means by which a person will have access to its services,
129 including, but not limited to, outpatient services, admission by
130 a house staff and admission by personal physician;

131 (23) The existence of a mechanism for soliciting consumer
132 input into the health care facility's decision-making process.

133 (b) The state agency may include additional criteria which
134 it prescribes by rules adopted pursuant to section eight of this
135 article: *Provided*, That the state agency will not consider the
136 services or interests of out-of-state facilities or providers in
137 reviewing an application for a certificate of need.

138 (c) Criteria for reviews may vary according to the purpose
139 for which a particular review is being conducted or the types of
140 health services being reviewed.

141 (d) An application for a certificate of need may not be made
142 subject to any criterion not contained in this article, in rules
143 adopted pursuant to section eight of this article or in the
144 certificate of need standards approved pursuant to section five of
145 this article.

146 (e) In the case of any proposed new institutional health
147 service, the state agency may not grant a certificate of need
148 under its certificate of need program unless, after consideration
149 of the appropriateness of the use of existing facilities within this
150 state providing services similar to those being proposed, the state
151 agency makes, in addition to findings required in section nine of
152 this article, each of the following findings in writing: (1) That
153 superior alternatives to the services in terms of cost, efficiency
154 and appropriateness do not exist within this state and the
155 development of alternatives is not practicable; (2) that existing
156 facilities providing services within this state similar to those
157 proposed are being used in an appropriate and efficient manner;
158 (3) that in the case of new construction, alternatives to new
159 construction, such as modernization or sharing arrangements,
160 have been considered and have been implemented to the
161 maximum extent practicable; (4) that patients will experience
162 serious problems in obtaining care within this state of the type
163 proposed in the absence of the proposed new service; and (5)
164 that in the case of a proposal for the addition of beds for the
165 provision of skilled nursing or intermediate care services, the

166 addition will be consistent with the plans of other agencies of the
167 state responsible for the provision and financing of long-term
168 care facilities or services including home health services.

169 (f) In the case where an application is made by a hospital,
170 nursing home or other health care facility to provide ventilator
171 services which have not previously been provided for a nursing
172 facility bed, the state agency shall consider the application in
173 terms of the need for the service and whether the cost exceeds
174 the level of current Medicaid services. No facility may, by
175 providing ventilator services, provide a higher level of service
176 for a nursing facility bed without demonstrating that the change
177 in level of service by provision of the additional ventilator
178 services will result in no additional fiscal burden to the state.

179 (g) In the case where application is made by any person or
180 entity to provide personal care services which are to be billed for
181 Medicaid reimbursement, the state agency shall consider the
182 application in terms of the need for the service and whether the
183 cost exceeds the level of the cost of current Medicaid services.
184 No person or entity may provide personal care services to be
185 billed for Medicaid reimbursement without demonstrating that
186 the provision of the personal care service will result in no
187 additional fiscal burden to the state: *Provided*, That a certificate
188 of need is not required for a person providing specialized foster
189 care personal care services to one individual and those services
190 are delivered in the provider's home. The state agency shall also
191 consider the total fiscal liability to the state for all applications
192 which have been submitted.

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

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within _____ this the _____
day of _____, 2015.

Governor

