

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 597

BY SENATORS FERNS AND PLYMALE, *original sponsors*

[Passed March 12, 2016; in effect from passage]

1 AN ACT to amend and reenact §16-29B-26 of the Code of West Virginia, 1931, as amended; and
2 to amend said code by adding thereto two new sections, designated §16-29B-28 and §16-
3 29B-29, all relating generally to the Health Care Authority; exempting certain actions of
4 the Health Care Authority from state and federal antitrust laws; setting forth intent to
5 immunize cooperative agreements approved and subject to supervision by the Health
6 Care Authority; establishing that a cooperative agreement that is not approved and subject
7 to supervision by the Health Care Authority shall not have immunity; defining terms; setting
8 out legislative findings and purpose; allowing cooperative agreements between certain
9 hospitals and other hospitals or health care providers in the state; setting forth goals of a
10 cooperative agreement; granting authority to the Health Care Authority to review proposed
11 cooperative agreements; establishing a review process for cooperative agreements;
12 requiring notification of application and public hearing to be published on Health Care
13 Authority's website and the State Register; providing for public comment period; requiring
14 notice of public hearing to be provided to all persons, groups or organizations who have
15 submitted written comments to proposed cooperative agreements and to individuals,
16 groups or organizations designated as affected parties in certificate of need proceeding;
17 requiring copy of application to be provided to the Attorney General; setting forth standards
18 for review of cooperative agreements; requiring the Health Care Authority to consult with
19 the Attorney General regarding assessment of approval of proposed cooperative
20 agreement; requiring approval of Health Care Authority to have written concurrence of the
21 Attorney General; providing that the Health Care Authority evaluate the benefits and
22 disadvantages of the proposed cooperative agreement; providing that the Health Care
23 Authority make a determination whether the benefits likely to result from the proposed
24 cooperative agreement outweigh the disadvantages likely to result from a reduction in
25 competition from the proposed cooperative agreement; providing for approval with
26 conditions; providing that the Health Care Authority's decision to approve or deny an

27 application is a final order; granting enforcement powers over cooperative agreements to
28 the Health Care Authority; providing for rulemaking; requiring reporting to the Health Care
29 Authority; setting forth reporting requirements; providing for establishment and
30 assessment of fees; providing that these new provisions shall not undermine the validity
31 of an agreement between a hospital and the Attorney General entered into before the
32 effective date of this legislation; requiring submission of certain proposed rate increases
33 to be provided to the Attorney General for review; authorizing the Attorney General to
34 approve, reject or modify certain proposed rate increases; providing that certain proposed
35 rate increases may only be implemented with the approval of the Attorney General;
36 providing the Health Care Authority maintain on file all approved cooperative agreements,
37 including conditions imposed; requiring notification of termination of cooperative
38 agreement be filed with the Health Care Authority; prohibiting billing or charging for health
39 services resulting from or related to a cooperative agreement until approved by the Health
40 Care Authority; providing that submission of application constitutes agreement to certain
41 regulation and supervision of the Health Care Authority; and providing for severability.

Be it enacted by the Legislature of West Virginia:

1 That §16-29B-26 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted; and that said code be amended by adding thereto a two new sections, designated
3 §16-29B-28 and §16-29B-29, all to read as follows:

ARTICLE 29B. HEALTH CARE AUTHORITY.

§16-29B-26. Exemptions from antitrust laws.

1 Actions of the board shall be exempt from antitrust action under state and federal antitrust
2 laws. Any actions of hospitals and health care providers under the board's jurisdiction, when made
3 in compliance with orders, directives, rules, approvals or regulations issued or promulgated by
4 the board, shall likewise be exempt.

5 It is the intention of the Legislature that this chapter shall also immunize cooperative
6 agreements approved and subject to supervision by the authority and activities conducted
7 pursuant thereto from challenge or scrutiny under both state and federal antitrust law: *Provided*,
8 That a cooperative agreement that is not approved and subject to supervision by the authority
9 shall not have such immunity.

§16-29B-28. Review of Cooperative agreements.

1 (a) *Definitions.* — As used in this section the following terms have the following meanings:

2 (1) “Academic medical center” means an accredited medical school, one or more faculty
3 practice plans affiliated with the medical school or one or more affiliated hospitals which meet the
4 requirements set forth in 42 C. F. R. 411.355(e).

5 (2) “Cooperative agreement” means an agreement between a qualified hospital which is
6 a member of an academic medical center and one or more other hospitals or other health care
7 providers. The agreement shall provide for the sharing, allocation, consolidation by merger or
8 other combination of assets, or referral of patients, personnel, instructional programs, support
9 services and facilities or medical, diagnostic, or laboratory facilities or procedures or other
10 services traditionally offered by hospitals or other health care providers.

11 (3) “Commercial health plan” means a plan offered by any third party payor that negotiates
12 with a party to a cooperative agreement with respect to patient care services rendered by health
13 care providers.

14 (4) “Health care provider” means the same as that term is defined in section three of this
15 article.

16 (5) “Teaching hospital” means a hospital or medical center that provides clinical education
17 and training to future and current health professionals whose main building or campus is located
18 in the same county as the main campus of a medical school operated by a state university.

19 (6) “Qualified hospital” means a teaching hospital, which meets the requirements of 42 C.
20 F. R. 411.355(e) and which has entered into a cooperative agreement with one or more hospitals
21 or other health care providers but is not a critical access hospital for purposes of this section.

22 (b) *Findings.* —

23 (1) The Legislature finds that the state’s schools of medicine, affiliated universities and
24 teaching hospitals are critically important in the training of physicians and other healthcare
25 providers who practice health care in this state. They provide access to healthcare and enhance
26 quality healthcare for the citizens of this state.

27 (2) A medical education is enhanced when medical students, residents and fellows have
28 access to modern facilities, state of the art equipment and a full range of clinical services and that,
29 in many instances, the accessibility to facilities, equipment and clinical services can be achieved
30 more economically and efficiently through a cooperative agreement among a teaching hospital
31 and one or more hospitals or other health care providers.

32 (c) *Legislative purpose.* — The Legislature encourages cooperative agreements if the
33 likely benefits of such agreements outweigh any disadvantages attributable to a reduction in
34 competition. When a cooperative agreement, and the planning and negotiations of cooperative
35 agreements, might be anticompetitive within the meaning and intent of state and federal antitrust
36 laws the Legislature believes it is in the state’s best interest to supplant such laws with regulatory
37 approval and oversight by the Health Care Authority as set out in this article. The authority has
38 the power to review, approve or deny cooperative agreements, ascertain that they are beneficial
39 to citizens of the state and to medical education, to ensure compliance with the provisions of the
40 cooperative agreements relative to the commitments made by the qualified hospital and
41 conditions imposed by the Health Care Authority.

42 (d) *Cooperative Agreements.* —

43 (1) A hospital which is a member of an academic medical center may negotiate and enter
44 into a cooperative agreement with other hospitals or health care providers in the state:

45 (A) In order to enhance or preserve medical education opportunities through collaborative
46 efforts and to ensure and maintain the economic viability of medical education in this state and to
47 achieve the goals hereinafter set forth; and

48 (B) When the likely benefits outweigh any disadvantages attributable to a reduction in
49 competition that may result from the proposed cooperative agreement.

50 (2) The goal of any cooperative agreement would be to:

51 (A) Improve access to care;

52 (B) Advance health status;

53 (C) Target regional health issues;

54 (D) Promote technological advancement;

55 (E) Ensure accountability of the cost of care;

56 (F) Enhance academic engagement in regional health;

57 (G) Preserve and improve medical education opportunities;

58 (H) Strengthen the workforce for health-related careers; and

59 (I) Improve health entity collaboration and regional integration, where appropriate.

60 (3) A qualified hospital located in this state may submit an application for approval of a
61 proposed cooperative agreement to the authority. The application shall state in detail the nature
62 of the proposed arrangement including the goals and methods for achieving:

63 (A) Population health improvement;

64 (B) Improved access to health care services;

65 (C) Improved quality;

66 (D) Cost efficiencies;

67 (E) Ensuring affordability of care;

68 (F) Enhancing and preserving medical education programs; and

69 (G) Supporting the authority's goals and strategic mission, as applicable.

70 (4) (A) If the cooperative agreement involves a combination of hospitals through merger,
71 consolidation or acquisition, the qualified hospital must have been awarded a certificate of need
72 for the project by the authority, as set forth in article two-d of this chapter prior to submitting an
73 application for review of a cooperative agreement.

74 (B) In addition to a certificate of need, the authority may also require that an application
75 for review of a cooperative agreement as provided in this section be submitted and approved prior
76 to the finalization of the cooperative agreement, if the cooperative agreement involves the merger,
77 consolidation or acquisition of a hospital located within a distance of twenty highway miles of the
78 main campus of the qualified hospital, and the authority shall have determined that combination
79 is likely to produce anti-competitive effects due to a reduction of competition. Any such
80 determination shall be communicated to the parties to the cooperative agreement within seven
81 days from approval of a certificate of need for the project.

82 (C) In reviewing an application for cooperative agreement, the authority shall give
83 deference to the policy statements of the Federal Trade Commission.

84 (D) If an application for a review of a cooperative agreement is not required by the
85 authority, the parties to the agreement may then complete the transaction following a final order
86 by the authority on the certificate of need as set forth in article two-d of this code. The qualified
87 hospital may apply to the authority for approval of the cooperative agreement either before or
88 after the finalization of the cooperative agreement.

89 (E) A party who has received a certificate of need prior to the enactment of this provision
90 during the 2016 regular session of the Legislature may apply for approval of a cooperative
91 agreement whether or not the transaction contemplated thereby has been completed.

92 (F) The complete record in the certificate of need proceeding shall be part of the record
93 in the proceedings under this section and information submitted by an applicant in the certificate
94 of need proceeding need not be duplicated in proceedings under this section.

95 (e) *Procedure for review of cooperative agreements.* —

96 (1) Upon receipt of an application, the authority shall determine whether the application is
97 complete. If the authority determines the application is incomplete, it shall notify the applicant in
98 writing of additional items required to complete the application. A copy of the complete application
99 shall be provided by the parties to the Office of the Attorney General simultaneous with the

100 submission to the authority. If an applicant believes the materials submitted contain proprietary
101 information that is required to remain confidential, such information must be clearly identified and
102 the applicant shall submit duplicate applications, one with full information for the authority's use
103 and one redacted application available for release to the public.

104 (2) The authority shall upon receipt of a completed application, publish notification of the
105 application on its website as well as provide notice of such application placed in the State
106 Register. The public may submit written comments regarding the application within ten days
107 following publication. Following the close of the written comment period, the authority shall review
108 the application as set forth in this section. Within thirty days of the receipt of a complete application
109 the authority may:

110 (i) Issue a certificate of approval which shall contain any conditions the authority finds
111 necessary for the approval;

112 (ii) Deny the application; or

113 (iii) Order a public hearing if the authority finds it necessary to make an informed decision
114 on the application.

115 (3) The authority shall issue a written decision within seventy-five days from receipt of the
116 completed application. The authority may request additional information in which case they shall
117 have an additional fifteen days following receipt of the supplemental information to approve or
118 deny the proposed cooperative agreement.

119 (4) Notice of any hearing shall be sent by certified mail to the applicants and all persons,
120 groups or organizations who have submitted written comments on the proposed cooperative
121 agreement as well as to all persons, groups or organizations designated as affected parties in the
122 certificate of need proceeding. Any individual, group or organization who submitted written
123 comments regarding the application and wishes to present evidence at the public hearing shall
124 request to be recognized as an affected party as set forth in article two-d of this chapter. The
125 hearing shall be held no later than forty-five days after receipt of the application. The authority

126 shall publish notice of the hearing on the authority's website fifteen days prior to the hearing. The
127 authority shall additionally provide timely notice of such hearing in the State Register.

128 (5) Parties may file a motion for an expedited decision.

129 (f) *Standards for review of cooperative agreements.* —

130 (1) In its review of an application for approval of a cooperative agreement submitted
131 pursuant to this section, the authority may consider the proposed cooperative agreement and any
132 supporting documents submitted by the applicant, any written comments submitted by any person
133 and any written or oral comments submitted, or evidence presented, at any public hearing.

134 (2) The authority shall consult with the Attorney General of this state regarding his or her
135 assessment of whether or not to approve the proposed cooperative agreement.

136 (3) The authority shall approve a proposed cooperative agreement and issue a certificate
137 of approval if it determines, with the written concurrence of the Attorney General, that the benefits
138 likely to result from the proposed cooperative agreement outweigh the disadvantages likely to
139 result from a reduction in competition from the proposed cooperative agreement.

140 (4) In evaluating the potential benefits of a proposed cooperative agreement, the authority
141 shall consider whether one or more of the following benefits may result from the proposed
142 cooperative agreement:

143 (A) Enhancement and preservation of existing academic and clinical educational
144 programs;

145 (B) Enhancement of the quality of hospital and hospital-related care, including mental
146 health services and treatment of substance abuse provided to citizens served by the authority;

147 (C) Enhancement of population health status consistent with the health goals established
148 by the authority;

149 (D) Preservation of hospital facilities in geographical proximity to the communities
150 traditionally served by those facilities to ensure access to care;

151 (E) Gains in the cost-efficiency of services provided by the hospitals involved;

152 (F) Improvements in the utilization of hospital resources and equipment;

153 (G) Avoidance of duplication of hospital resources;

154 (H) Participation in the state Medicaid program; and

155 (I) Constraints on increases in the total cost of care.

156 (5) The authority's evaluation of any disadvantages attributable to any reduction in
157 competition likely to result from the proposed cooperative agreement shall include, but need not
158 be limited to, the following factors:

159 (A) The extent of any likely adverse impact of the proposed cooperative agreement on the
160 ability of health maintenance organizations, preferred provider organizations, managed health
161 care organizations or other health care payors to negotiate reasonable payment and service
162 arrangements with hospitals, physicians, allied health care professionals or other health care
163 providers;

164 (B) The extent of any reduction in competition among physicians, allied health
165 professionals, other health care providers or other persons furnishing goods or services to, or in
166 competition with, hospitals that is likely to result directly or indirectly from the proposed
167 cooperative agreement;

168 (C) The extent of any likely adverse impact on patients in the quality, availability and price
169 of health care services; and

170 (D) The availability of arrangements that are less restrictive to competition and achieve
171 the same benefits or a more favorable balance of benefits over disadvantages attributable to any
172 reduction in competition likely to result from the proposed cooperative agreement.

173 (6) (A) After a complete review of the record, including, but not limited to, the factors set
174 out in subsection (e) of this section, any commitments made by the applicant or applicants and
175 any conditions imposed by the authority, if the authority determines that the benefits likely to result
176 from the proposed cooperative agreement outweigh the disadvantages likely to result from a
177 reduction in competition from the proposed cooperative agreement, the authority shall approve
178 the proposed cooperative agreement.

179 (B) The authority may reasonably condition approval upon the parties' commitments to:

180 (i) Achieving improvements in population health;

181 (ii) Access to health care services;

182 (iii) Quality and cost efficiencies identified by the parties in support of their application for
183 approval of the proposed cooperative agreement; and

184 (iv) Any additional commitments made by the parties to the cooperative agreement.

185 Any conditions set by the authority shall be fully enforceable by the authority. No condition
186 imposed by the authority, however, shall limit or interfere with the right of a hospital to adhere to
187 religious or ethical directives established by its governing board.

188 (7) The authority's decision to approve or deny an application shall constitute a final order
189 or decision pursuant to the West Virginia Administrative Procedure Act (§ 29A-1-1, *et seq.*). The
190 authority may enforce commitments and conditions imposed by the authority in the circuit court
191 of Kanawha County or the circuit court where the principal place of business of a party to the
192 cooperative agreement is located.

193 (g) *Enforcement and supervision of cooperative agreements.* — The authority shall
194 enforce and supervise any approved cooperative agreement for compliance.

195 (1) The authority is authorized to promulgate legislative rules in furtherance of this section.
196 Additionally, the authority shall promulgate emergency rules pursuant to the provisions of section
197 fifteen, article three, chapter twenty-nine-a of this code to accomplish the goals of this section.
198 These rules shall include, at a minimum:

199 (A) An annual report by the parties to a cooperative agreement. This report is required to
200 include:

201 (i) Information about the extent of the benefits realized and compliance with other terms
202 and conditions of the approval;

203 (ii) A description of the activities conducted pursuant to the cooperative agreement,
204 including any actions taken in furtherance of commitments made by the parties or terms imposed
205 by the authority as a condition for approval of the cooperative agreement;

206 (iii) Information relating to price, cost, quality, access to care and population health
207 improvement;

208 (iv) Disclosure of any reimbursement contract between a party to a cooperative agreement
209 approved pursuant to this section and a commercial health plan or insurer entered into
210 subsequent to the finalization of the cooperative agreement. This shall include the amount, if any,
211 by which an increase in the average rate of reimbursement exceeds, with respect to inpatient
212 services for such year, the increase in the Consumer Price Index for all Urban Consumers for
213 hospital inpatient services as published by the Bureau of Labor Statistics for such year and, with
214 respect to outpatient services, the increase in the Consumer Price Index for all Urban Consumers
215 for hospital outpatient services for such year; and

216 (v) Any additional information required by the authority to ensure compliance with the
217 cooperative agreement.

218 (B) If an approved application involves the combination of hospitals, disclosure of the
219 performance of each hospital with respect to a representative sample of quality metrics selected
220 annually by the authority from the most recent quality metrics published by the Centers for
221 Medicare and Medicaid Services. The representative sample shall be published by the authority
222 on its website.

223 (C) A procedure for a corrective action plan where the average performance score of the
224 parties to the cooperative agreement in any calendar year is below the fiftieth percentile for all
225 United States hospitals with respect to the quality metrics as set forth in (B) of this subsection.
226 The corrective action plan is required to:

227 (i) Be submitted one hundred twenty days from the commencement of the next calendar
228 year; and

229 (ii) Provide for a rebate to each commercial health plan or insurer with which they have
230 contracted an amount not in excess of one percent of the amount paid to them by such
231 commercial health plan or insurer for hospital services during such two-year period if in any two
232 consecutive-year period the average performance score is below the fiftieth percentile for all
233 United States hospitals. The amount to be rebated shall be reduced by the amount of any
234 reduction in reimbursement which may be imposed by a commercial health plan or insurer under
235 a quality incentive or awards program in which the hospital is a participant.

236 (D) A procedure where if the excess above the increase in the Consumer Price Index for
237 all Urban Consumers for hospital inpatient services or hospital outpatient services is two percent
238 or greater the authority may order the rebate of the amount which exceeds the respective indices
239 by two percent or more to all health plans or insurers which paid such excess unless the party
240 provides written justification of such increase satisfactory to the authority taking into account case
241 mix index, outliers and extraordinarily high cost outpatient procedure utilizations.

242 (E) The ability of the authority to investigate, as needed, to ensure compliance with the
243 cooperative agreement.

244 (F) The ability of the authority to take appropriate action, including revocation of a
245 certificate of approval, if it determines that:

246 (i) The parties to the agreement are not complying with the terms of the agreement or the
247 terms and conditions of approval;

248 (ii) The authority's approval was obtained as a result of an intentional material
249 misrepresentation;

250 (iii) The parties to the agreement have failed to pay any required fee; or

251 (iv) The benefits resulting from the approved agreement no longer outweigh the
252 disadvantages attributable to the reduction in competition resulting from the agreement.

253 (G) If the authority determines the parties to an approved cooperative agreement have
254 engaged in conduct that is contrary to state policy or the public interest, including the failure to

255 take action required by state policy or the public interest, the authority may initiate a proceeding
256 to determine whether to require the parties to refrain from taking such action or requiring the
257 parties to take such action, regardless of whether or not the benefits of the cooperative agreement
258 continue to outweigh its disadvantages. Any determination by the authority shall be final. The
259 authority is specifically authorized to enforce its determination in the circuit court of Kanawha
260 County or the circuit court where the principal place of business of a party to the cooperative
261 agreement is located.

262 (H) Fees as set forth in subsection (h).

263 (2) Until the promulgation of the emergency rules, the authority shall monitor and regulate
264 cooperative agreements to ensure that their conduct is in the public interest and shall have the
265 powers set forth in subdivision (1) of this subsection, including the power of enforcement set forth
266 in paragraph (G), subdivision (1) of this subsection.

267 (h) *Fees.* — The authority may set fees for the approval of a cooperative agreement.
268 These fees shall be for all reasonable and actual costs incurred by the authority in its review and
269 approval of any cooperative agreement pursuant to this section. These fees shall not exceed
270 \$75,000. Additionally, the authority may assess an annual fee not to exceed \$75,000 for the
271 supervision of any cooperative agreement approved pursuant to this section and to support the
272 implementation and administration of the provisions of this section.

273 (i) *Miscellaneous provisions.* —

274 (1) (A) An agreement entered into by a hospital party to a cooperative agreement and any
275 state official or state agency imposing certain restrictions on rate increases shall be enforceable
276 in accordance with its terms and may be considered by the authority in determining whether to
277 approve or deny the application. Nothing in this chapter shall undermine the validity of any such
278 agreement between a hospital party and the Attorney General entered before the effective date
279 of this legislation.

280 (B) At least ninety days prior to the implementation of any increase in rates for inpatient
281 and outpatient hospital services and at least sixty days prior to the execution of any
282 reimbursement agreement with a third party payor, a hospital party to a cooperative agreement
283 involving the combination of two or more hospitals through merger, consolidation or acquisition
284 which has been approved by the authority shall submit any proposed increase in rates for inpatient
285 and outpatient hospital services and any such reimbursement agreement to the Office of the West
286 Virginia Attorney General together with such information concerning costs, patient volume, acuity,
287 payor mix and other data as the Attorney General may request. Should the Attorney General
288 determine that the proposed rates may inappropriately exceed competitive rates for comparable
289 services in the hospital's market area which would result in unwarranted consumer harm or impair
290 consumer access to health care, the Attorney General may request the authority to evaluate the
291 proposed rate increase and to provide its recommendations to the Office of the Attorney General.
292 The Attorney General may approve, reject or modify the proposed rate increase and shall
293 communicate his or her decision to the hospital no later than 30 days prior to the proposed
294 implementation date. The hospital may then only implement the increase approved by the
295 Attorney General. Should the Attorney General determine that a reimbursement agreement with
296 a third party payor includes pricing terms at anti-competitive levels, the Attorney General may
297 reject the reimbursement agreement and communicate such rejection to the parties thereto
298 together with the rationale therefor in a timely manner.

299 (2) The authority shall maintain on file all cooperative agreements the authority has
300 approved, including any conditions imposed by the authority.

301 (3) Any party to a cooperative agreement that terminates its participation in such
302 cooperative agreement shall file a notice of termination with the authority thirty days after
303 termination.

304 (4) No hospital which is a party to a cooperative agreement for which approval is required
305 pursuant to this section may knowingly bill or charge for health services resulting from, or

306 associated with, such cooperative agreement until approved by the authority. Additionally, no
307 hospital which is a party to a cooperative agreement may knowingly bill or charge for health
308 services resulting from, or associated with, such cooperative agreement for which approval has
309 been revoked or terminated.

310 (5) By submitting an application for review of a cooperative agreement pursuant to this
311 section, the hospitals or health care providers shall be deemed to have agreed to submit to the
312 regulation and supervision of the authority as provided in this section.

§16-29B-29. Severability.

1 If any provision of this article or the application thereof to any person or circumstance is
2 held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect, impair or
3 invalidate other provisions or applications of the article, and to this end the provisions of this article
4 are declared to be severable.

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

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2016.

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Governor