H. B. 2595

(BY DELEGATE(S) MCGEEHAN
AND CANTERBURY)

[Introduced February 4, 2015; referred to the
Committee on Health and Human Resources; and then to
the Committee on the Judiciary.]

A BILL 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.

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

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

(a) "Affected person" means:

(1) The applicant;

(2) An agency or organization representing consumers;

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

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

(5) The health care facilities <u>located within this state</u> which provide services similar to the services of the facility under review and which will be significantly affected by the proposed project;

(6) The health care facilities <u>located within this state</u> which, before receipt by the state agency of the proposal being

reviewed, have formally indicated an intention to provide similar services within this state in the future;

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

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

(9) Organizations representing health care providers.

(b) "Ambulatory health care facility" means a free-standing facility that provides health care to noninstitutionalized and nonhomebound persons on an outpatient basis. For purposes of this definition, a free-standing facility is not located on the campus of an existing health care facility. This definition does not include any facility engaged solely in the provision of lithotripsy services or the private office practice of any one or more health professionals licensed to practice in this state pursuant to the provisions of chapter thirty of this code: *Provided,* That this exemption from review may not be construed to include practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: *Provided, however,* That this exemption

from review may not be construed to include certain health services otherwise subject to review under the provisions of subdivision (1), subsection (a), section four of this article.

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

(d) "Applicant" means: (1) The governing body or the person proposing a new institutional health service who is, or will be, the health care facility licensee wherein the new

institutional health service is proposed to be located; and (2) in the case of a proposed new institutional health service not to be located in a licensed health care facility, the governing body or the person proposing to provide the new institutional health service. Incorporators or promoters who will not constitute the governing body or persons responsible for the new institutional health service may not be an applicant.

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

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

(g) "Capital expenditure" means:

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

(A) (i) Under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance; or (ii) is made to obtain either by lease or comparable

arrangement any facility or part thereof or any equipment for a facility or part; and

(B)(i) Exceeds the expenditure minimum; (ii) is a substantial change to the bed capacity of the facility with respect to which the expenditure is made; or (iii) is a substantial change to the services of such facility;

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

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

(4) A series of expenditures, if the sum total exceeds the expenditure minimum and if determined by the state agency to be a single capital expenditure subject to review. In making this determination, the state agency shall consider: Whether the expenditures are for components of a system which is required to accomplish a single purpose; whether the expenditures are to be made over a two-year period and are directed towards the accomplishment of a single goal within the health care facility's

long-range plan; or whether the expenditures are to be made within a two-year period within a single department such that they will constitute a significant modernization of the department.

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

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

(j) "Health care facility" means a publicly or privately owned facility, agency or entity that offers or provides health

care services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part, and includes, but is not limited to, hospitals; skilled nursing facilities; kidney disease treatment centers, including free-standing hemodialysis units; intermediate care facilities; ambulatory health care facilities; ambulatory surgical facilities; home health agencies; hospice agencies; rehabilitation facilities; health maintenance organizations; and community mental health and intellectual disability facilities. For purposes of this definition, "community mental health and intellectual disability facility" means a private facility which provides such comprehensive services and continuity of care as emergency, outpatient, partial hospitalization, inpatient or consultation and education for individuals with mental illness, intellectual disability or drug or alcohol addiction.

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

(l) "Health maintenance organization" means a public or private organization which:

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

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

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

(C) Provides physicians' services: (i) Directly through physicians who are either employees or partners of the organization; or (ii) through arrangements with individual

physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(m) "Health services" means clinically related preventive, diagnostic, treatment or rehabilitative services, including alcohol, drug abuse and mental health services.

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

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

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

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

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

(s) "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions which is used for the provision of medical and other health services and costs in excess of $2,700,000 in the

calendar year 2009. The state agency shall adjust the dollar amount specified in this subsection annually and publish an update of the amount on or before December 31, of each year. The adjustment of the dollar amount shall be based on the DRI inflation index published in the *Global Insight DRI/WEFA Health Care Cost Review* or its successor or appropriate replacement index. This term does not include medical equipment acquired by or on behalf of a clinical laboratory to provide clinical laboratory services if the clinical laboratory is independent of a physician's office and a hospital and it has been determined under Title XVIII of the Social Security Act to meet the requirements of paragraphs ten and eleven, Section 1861(s) of such act, Title 42 U.S.C. §1395x. In determining whether medical equipment is major medical equipment, the cost of studies, surveys, designs, plans, working drawings, specifications and other activities essential to the acquisition of such equipment shall be included. If the equipment is acquired for less than fair market value, the term "cost" includes the fair market value.

(t) "Medically underserved population" means the population of an area designated by the state agency as having a shortage of personal health services. The state agency may consider unusual local conditions that are a barrier to accessibility or availability of health services. The designation shall be in rules adopted by the state agency pursuant to section eight of this article, and the population so designated may include the state's medically underserved population designated by the federal Secretary of Health and Human Services under Section 330(b)(3) of the Public Health Service Act, as amended, Title 42 U.S.C. §254.

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

(v) "Nonhealth-related project" means a capital expenditure for the benefit of patients, visitors, staff or employees of a health care facility and not directly related to preventive, diagnostic, treatment or rehabilitative services offered by the health care facility. This includes, but is not limited to, chapels, gift shops, news stands, computer and information technology systems, educational, conference and meeting facilities, but excluding

medical school facilities, student housing, dining areas, administration and volunteer offices, modernization of structural components, boiler repair or replacement, vehicle maintenance and storage facilities, parking facilities, mechanical systems for heating, ventilation systems, air conditioning systems and loading docks.

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

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

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

(z) "Proposed new institutional health service" means any service as described in section three of this article.

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

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

(cc) "Review agency" means an agency of the state, designated by the Governor as the agency for the review of state agency decisions.

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

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

(ff) "State health plan" means the document approved by the Governor after preparation by the former statewide health coordinating council or that document as approved by the Governor after amendment by the former health care planning council or the state agency.

(gg) "Substantial change to the bed capacity" of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds as swing beds between acute care and long-term care categories: *Provided,* That a decrease in bed capacity in response to federal rural health initiatives is excluded from this definition.

(hh) "Substantial change to the health services" of a health care facility means: (1) The addition of a health service offered by or on behalf of the health care facility which was not offered by or on behalf of the facility within the twelve-month period before the month in which the service is first offered; or (2) the termination of a health service offered by or on behalf of the facility: *Provided,* That "substantial change to the health

services" does not include the providing of ambulance service, wellness centers or programs, adult day care or respite care by acute care facilities.

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

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

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

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

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

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

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

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

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

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

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

(9) The relationship, including the organizational relationship, of the health services proposed to be provided to ancillary or support services;

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

(11) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the need that

the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, other medically underserved population and the elderly, to obtain needed health care;

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

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

(14) In the case of health services proposed to be provided, if the services are to be available in a limited number of facilities, the extent to which the schools in the area within this state for health professions will have access to the services for training purposes;

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

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

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

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

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

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

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

(22) The contribution of the proposed service in meeting the health-related needs of members of medically underserved populations which have traditionally experienced difficulties in

obtaining equal access to health services, particularly those needs identified in the state health plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the state agency shall consider:

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

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

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

(D) The extent to which the applicant offers a range of means by which a person will have access to its services,

including, but not limited to, outpatient services, admission by a house staff and admission by personal physician;

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

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

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

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

(e) In the case of any proposed new institutional health service, the state agency may not grant a certificate of need under its certificate of need program unless, after consideration

of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the state agency makes, in addition to findings required in section nine of this article, each of the following findings in writing: (1) That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable; (2) that existing facilities providing services within this state similar to those proposed are being used in an appropriate and efficient manner; (3) that in the case of new construction, alternatives to new construction, such as modernization or sharing arrangements, have been considered and have been implemented to the maximum extent practicable; (4) that patients will experience serious problems in obtaining care within this state of the type proposed in the absence of the proposed new service; and (5) that in the case of a proposal for the addition of beds for the provision of skilled nursing or intermediate care services, the addition will be consistent with the plans of other agencies of the state responsible for the provision and financing of long-term care facilities or services including home health services.

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

(g) In the case where application is made by any person or entity to provide personal care services which are to be billed for Medicaid reimbursement, the state agency shall consider the application in terms of the need for the service and whether the cost exceeds the level of the cost of current Medicaid services. No person or entity may provide personal care services to be billed for Medicaid reimbursement without demonstrating that the provision of the personal care service will result in no additional fiscal burden to the state: *Provided,* That a certificate of need is not required for a person providing specialized foster

care personal care services to one individual and those services are delivered in the provider's home. The state agency shall also consider the total fiscal liability to the state for all applications which have been submitted.

NOTE: The purpose of this bill is to eliminate out-of-state health care facilities and providers from the definition of "affected persons" and from consideration by the state agency in determining whether to issue a certificate of need for development of a healthcare facility within this state.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.