

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 600

BY SENATORS GAUNCH, PALUMBO, STOLLINGS AND

TAKUBO

[Introduced March 14, 2017; Referred
to the Committee on Health and Human Resources]

1 A BILL to amend and reenact §16-29B-28 of the Code of West Virginia, 1931, as amended,
 2 relating to expanding the applicability of the provisions of said section to accredited
 3 academic hospitals.

Be it enacted by the Legislature of West Virginia:

1 That §16-29B-28 of the Code of West Virginia, 1931, as amended, be amended and
 2 reenacted to read as follows:

ARTICLE 29B. HEALTH CARE AUTHORITY.

§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) “Accredited academic hospital” means a hospital or health system that sponsors four
 6 or more approved medical education programs.

7 ~~(2)~~ (3) “Cooperative agreement” means an agreement between a qualified hospital ~~which~~
 8 ~~is a member of an academic medical center~~ and one or more other hospitals or other health care
 9 providers. The agreement shall provide for the sharing, allocation, consolidation by merger or
 10 other combination of assets, or referral of patients, personnel, instructional programs, support
 11 services and facilities or medical, diagnostic, or laboratory facilities or procedures or other
 12 services traditionally offered by hospitals or other health care providers.

13 ~~(3)~~ (4) “Commercial health plan” means a plan offered by any third party payor that
 14 negotiates with a party to a cooperative agreement with respect to patient care services rendered
 15 by health care providers.

16 ~~(4)~~ (5) “Health care provider” means the same as that term is defined in section three of
 17 this article.

18 ~~(5)~~ (6) “Teaching hospital” means a hospital or medical center that provides clinical

19 education and training to future and current health professionals whose main building or campus
20 is located in the same county as the a main campus of a medical school operated by a state
21 university.

22 ~~(6)~~ (7) "Qualified hospital" means a an academic medical center or teaching accredited
23 academic hospital, which ~~meets the requirements of 42 C. F. R. 411.355(e) and which~~ has entered
24 into a cooperative agreement with one or more hospitals or other health care providers but is not
25 a critical access hospital for purposes of this section.

26 (b) *Findings.* —

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

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

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

45 conditions imposed by the Health Care Authority.

46 (d) *Cooperative Agreements.* —

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

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

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

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

55 (A) Improve access to care;

56 (B) Advance health status;

57 (C) Target regional health issues;

58 (D) Promote technological advancement;

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

60 (F) Enhance academic engagement in regional health;

61 (G) Preserve and improve medical education opportunities;

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

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

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

67 (A) Population health improvement;

68 (B) Improved access to health care services;

69 (C) Improved quality;

70 (D) Cost efficiencies;

71 (E) Ensuring affordability of care;

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

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

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

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

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

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

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

96 (F) The complete record in the certificate of need proceeding shall be part of the record in

97 the proceedings under this section and information submitted by an applicant in the certificate of
98 need proceeding need not be duplicated in proceedings under this section.

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

100 (1) Upon receipt of an application, the authority shall determine whether the application is
101 complete. If the authority determines the application is incomplete, it shall notify the applicant in
102 writing of additional items required to complete the application. A copy of the complete application
103 shall be provided by the parties to the Office of the Attorney General simultaneous with the
104 submission to the authority. If an applicant believes the materials submitted contain proprietary
105 information that is required to remain confidential, such information must be clearly identified and
106 the applicant shall submit duplicate applications, one with full information for the authority's use
107 and one redacted application available for release to the public.

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

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

116 (ii) Deny the application; or

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

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

123 (4) Notice of any hearing shall be sent by certified mail to the applicants and all persons,
124 groups or organizations who have submitted written comments on the proposed cooperative
125 agreement as well as to all persons, groups or organizations designated as affected parties in the
126 certificate of need proceeding. Any individual, group or organization who submitted written
127 comments regarding the application and wishes to present evidence at the public hearing shall
128 request to be recognized as an affected party as set forth in article two-d of this chapter. The
129 hearing shall be held no later than forty-five days after receipt of the application. The authority
130 shall publish notice of the hearing on the authority's website fifteen days prior to the hearing. The
131 authority shall additionally provide timely notice of such hearing in the State Register.

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

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

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

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

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

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

147 (A) Enhancement and preservation of existing academic and clinical educational
148 programs;

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

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

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

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

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

157 (G) Avoidance of duplication of hospital resources;

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

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

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

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

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

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

174 (D) The availability of arrangements that are less restrictive to competition and achieve

175 the same benefits or a more favorable balance of benefits over disadvantages attributable to any
176 reduction in competition likely to result from the proposed cooperative agreement.

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

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

184 (i) Achieving improvements in population health;

185 (ii) Access to health care services;

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

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

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

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

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

199 (1) The authority is authorized to promulgate legislative rules in furtherance of this section.
200 Additionally, the authority shall promulgate emergency rules pursuant to the provisions of section

201 fifteen, article three, chapter twenty-nine-a of this code to accomplish the goals of this section.

202 These rules shall include, at a minimum:

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

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

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

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

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

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

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

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

230 The corrective action plan is required to:

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

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

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

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

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

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

252 (ii) The authority's approval was obtained as a result of an intentional material

253 misrepresentation;

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

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

257 (G) If the authority determines the parties to an approved cooperative agreement have
258 engaged in conduct that is contrary to state policy or the public interest, including the failure to
259 take action required by state policy or the public interest, the authority may initiate a proceeding
260 to determine whether to require the parties to refrain from taking such action or requiring the
261 parties to take such action, regardless of whether or not the benefits of the cooperative agreement
262 continue to outweigh its disadvantages. Any determination by the authority shall be final. The
263 authority is specifically authorized to enforce its determination in the circuit court of Kanawha
264 County or the circuit court where the principal place of business of a party to the cooperative
265 agreement is located.

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

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

271 (h) *Fees.* — The authority may set fees for the approval of a cooperative agreement.
272 These fees shall be for all reasonable and actual costs incurred by the authority in its review and
273 approval of any cooperative agreement pursuant to this section. These fees shall not exceed
274 \$75,000. Additionally, the authority may assess an annual fee not to exceed \$75,000 for the
275 supervision of any cooperative agreement approved pursuant to this section and to support the
276 implementation and administration of the provisions of this section.

277 (i) *Miscellaneous provisions.* —

278 (1) (A) An agreement entered into by a hospital party to a cooperative agreement and any

279 state official or state agency imposing certain restrictions on rate increases shall be enforceable
280 in accordance with its terms and may be considered by the authority in determining whether to
281 approve or deny the application. Nothing in this chapter shall undermine the validity of any such
282 agreement between a hospital party and the Attorney General entered before the effective date
283 of this legislation.

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

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

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

308 (4) No hospital which is a party to a cooperative agreement for which approval is required
309 pursuant to this section may knowingly bill or charge for health services resulting from, or
310 associated with, such cooperative agreement until approved by the authority. Additionally, no
311 hospital which is a party to a cooperative agreement may knowingly bill or charge for health
312 services resulting from, or associated with, such cooperative agreement for which approval has
313 been revoked or terminated.

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

NOTE: The purpose of this bill is to expand the applicability of §16-29B-28 to accredited academic hospitals.

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