

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2789

FISCAL
NOTE

By Delegates Crouse, Espinosa, McGeehan, Mallow,
Longanacre, Kump, Forsht, Heckert, Worrell, Kirby,
and Tully

[Introduced January 18, 2023; Referred to the
Committee on Health and Human Resources]

1 A BILL to amend and reenact §16-2D-8, §16-2D-10, and §16-2D-11 of the Code of West Virginia,
 2 1931, as amended, all relating to certificate of need; providing which health services
 3 require a certificate of need; and exempting certain health services from certificate of need.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2D. CERTIFICATE OF NEED.

§16-2D-8. Proposed health services that require a certificate of need.

1 (a) Except as provided in §16-2D-9, §16-2D-10, and §16-2D-11 of this code, the following
 2 proposed health services may not be acquired, offered, or developed within this state except upon
 3 approval of and receipt of a certificate of need as provided by this article:

4 (1) The construction, development, acquisition, or other establishment of a health care
 5 facility;

6 (2) The partial or total closure of a health care facility with which a capital expenditure is
 7 associated;

8 (3) (A) An obligation for a capital expenditure incurred by or on behalf of a health care
 9 facility in excess of the expenditure minimum; or

10 (B) An obligation for a capital expenditure incurred by a person to acquire a health care
 11 facility.

12 (4) An obligation for a capital expenditure is considered to be incurred by or on behalf of a
 13 health care facility:

14 (A) When a valid contract is entered into by or on behalf of the health care facility for the
 15 construction, acquisition, lease, or financing of a capital asset;

16 (B) When the health care facility takes formal action to commit its own funds for a
 17 construction project undertaken by the health care facility as its own contractor; or

18 (C) In the case of donated property, on the date on which the gift is completed under state
 19 law.

20 (5) A substantial change to the bed capacity of a health care facility with which a capital
21 expenditure is associated;

22 (6) The addition of ventilator services by a hospital;

23 (7) The elimination of health services previously offered on a regular basis by or on behalf
24 of a health care facility which is associated with a capital expenditure;

25 (8) (A) A substantial change to the bed capacity or health services offered by or on behalf
26 of a health care facility, whether or not the change is associated with a proposed capital
27 expenditure;

28 (B) If the change is associated with a previous capital expenditure for which a certificate of
29 need was issued; and

30 (C) If the change will occur within two years after the date the activity which was associated
31 with the previously approved capital expenditure was undertaken.

32 (9) The acquisition of major medical equipment;

33 (10) A substantial change in an approved health service for which a certificate of need is in
34 effect;

35 (11) An expansion of the service area for hospice or home health agency regardless of the
36 time period in which the expansion is contemplated or made; and

37 (12) The addition of health services offered by or on behalf of a health care facility which
38 were not offered on a regular basis by or on behalf of the health care facility within the 12-month
39 period prior to the time the services would be offered.

40 (b) The following health services are required to obtain a certificate of need regardless of
41 the minimum expenditure:

42 ~~(1) Constructing, developing, acquiring, or establishing a birthing center~~

43 ~~(2)~~ (1) Providing radiation therapy;

44 ~~(3)~~ (2) Providing computed tomography;

45 ~~(4)~~ (3) Providing positron emission tomography;

46 ~~(5)~~ (4) Providing cardiac surgery;

47 ~~(6)~~ (5) Providing fixed magnetic resonance imaging;

48 ~~(7)~~ (6) Providing comprehensive medical rehabilitation;

49 ~~(8)~~ (7) Establishing an ambulatory care center;

50 ~~(9)~~ (8) Establishing an ambulatory surgical center;

51 ~~(10)~~ (9) Providing diagnostic imaging;

52 ~~(11)~~ (10) Providing cardiac catheterization services;

53 ~~(12)~~ (11) Constructing, developing, acquiring, or establishing kidney disease treatment

54 centers, including freestanding hemodialysis units;

55 ~~(13)~~ (12) Providing megavoltage radiation therapy;

56 ~~(14)~~ (13) Providing surgical services;

57 ~~(15)~~ (14) Establishing operating rooms;

58 ~~(16)~~ (15) Adding acute care beds;

59 ~~(17)~~ (16) Providing intellectual developmental disabilities services;

60 ~~(18)~~ (17) Providing organ and tissue transplants;

61 ~~(19)~~ (18) Establishing an intermediate care facility for individuals with intellectual

62 disabilities;

63 ~~(20)~~ (19) Providing inpatient services;

64 ~~(21)~~ (20) Providing hospice services;

65 ~~(22)~~ (21) Establishing a home health agency;

66 ~~(23)~~ (22) Providing personal care services; and

67 ~~(24)~~ (23) (A) Establishing no more than six four-bed transitional intermediate care facilities:

68 *Provided*, That none of the four-bed sites shall be within five miles of another or adjacent to

69 another behavioral health facility. This subdivision terminates upon the approval of the sixth four-

70 bed intermediate care facility.

71 (B) Only individuals living in more restrictive institutional settings, in similar settings
72 covered by state-only dollars, or at risk of being institutionalized will be given the choice to move,
73 and they will be placed on the Individuals with Intellectual and Developmental Disabilities (IDD)
74 Waiver Managed Enrollment List. Individuals already on the IDD Waiver Managed Enrollment List
75 who live in a hospital or are in an out-of-state placement will continue to progress toward home-
76 and community-based waiver status and will also be considered for all other community-based
77 options, including, but not limited to, specialized family care and personal care.

78 (C) The department shall work to find the most integrated placement based upon an
79 individualized assessment. Individuals already on the IDD waiver will not be considered for
80 placement in the 24 new intermediate care beds.

81 (D) A monitoring committee of not more than 10 members, including a designee of
82 Mountain State Justice, a designee of Disability Rights of West Virginia, a designee of the
83 Statewide Independent Living Council, two members or family of members of the IDD waiver, the
84 Developmental Disabilities Council, the Commissioner of the Bureau of Health and Health
85 Facilities, the Commissioner of the Bureau for Medical Services, and the Commissioner of the
86 Bureau for Children and Families. The secretary of the department shall chair the first meeting of
87 the committee at which time the members shall elect a chairperson. The monitoring committee
88 shall provide guidance on the department's transitional plans for residents in the 24 intermediate
89 care facility beds and monitor progress toward home- and community-based waiver status and/or
90 utilizing other community-based options and securing the most integrated setting for each
91 individual.

92 (E) Any savings resulting from individuals moving from more expensive institutional care or
93 out-of-state placements shall be reinvested into home- and community-based services for
94 individuals with intellectual developmental disabilities.

95 (c) A certificate of need previously approved under this article remains in effect unless
96 revoked by the authority.

§16-2D-10. Exemptions from certificate of need.

1 Notwithstanding §16-2D-8 of this code, a person may provide the following health services
2 without obtaining a certificate of need or applying to the authority for approval:

3 (1) The creation of a private office of one or more licensed health professionals to practice
4 in this state pursuant to chapter 30 of this code;

5 (2) Dispensaries and first-aid stations located within business or industrial establishments
6 maintained solely for the use of employees that does not contain inpatient or resident beds for
7 patients or employees who generally remain in the facility for more than 24 hours;

8 (3) A place that provides remedial care or treatment of residents or patients conducted only
9 for those who rely solely upon treatment by prayer or spiritual means in accordance with the creed
10 or tenets of any recognized church or religious denomination;

11 (4) Telehealth;

12 (5) A facility owned or operated by one or more health professionals authorized or
13 organized pursuant to chapter thirty or ambulatory health care facility which offers laboratory
14 services or diagnostic imaging to patients regardless of the cost associated with the proposal. To
15 qualify for this exemption 75 percent of the laboratory services are for the patients of the practice
16 or ambulatory health care facility of the total laboratory services performed and 75 percent of
17 diagnostic imaging services are for the patients of the practice or ambulatory health care facility of
18 the total imaging services performed. The authority may, at any time, request from the entity
19 information concerning the number of patients who have been provided laboratory services or
20 diagnostic imaging;

21 (6)(A) Notwithstanding the provisions of §16-2D-17 of this code, any hospital that holds a
22 valid certificate of need issued pursuant to this article, may transfer that certificate of need to a
23 person purchasing that hospital, or all or substantially all of its assets, if the hospital is financially
24 distressed. A hospital is financially distressed if, at the time of its purchase:

25 (i) It has filed a petition for voluntary bankruptcy;

- 26 (ii) It has been the subject of an involuntary petition for bankruptcy;
- 27 (iii) It is in receivership;
- 28 (iv) It is operating under a forbearance agreement with one or more of its major creditors;
- 29 (v) It is in default of its obligations to pay one or more of its major creditors and is in violation
- 30 of the material, substantive terms of its debt instruments with one or more of its major creditors; or
- 31 (vi) It is insolvent: evidenced by balance sheet insolvency and/or the inability to pay its
- 32 debts as they come due in the ordinary course of business.
- 33 (B) A financially distressed hospital which is being purchased pursuant to the provisions of
- 34 this subsection shall give notice to the authority of the sale 30 days prior to the closing of the
- 35 transaction and shall file simultaneous with that notice evidence of its financial status. The
- 36 financial status or distressed condition of a hospital shall be evidenced by the filing of any of the
- 37 following:
- 38 (i) A copy of a forbearance agreement;
- 39 (ii) A copy of a petition for voluntary or involuntary bankruptcy;
- 40 (iii) Written evidence of receivership, or
- 41 (iv) Documentation establishing the requirements of subparagraph (v) or (vi), paragraph
- 42 (A) of this subdivision. The names of creditors may be redacted by the filing party.
- 43 (C) Any substantial change to the capacity of services offered in that hospital made
- 44 subsequent to that transaction would remain subject to the requirements for the issuance of a
- 45 certificate of need as otherwise set forth in this article.
- 46 (D) Any person purchasing a financially distressed hospital, or all or substantially all of its
- 47 assets, that has applied for a certificate of need after January 1, 2017, shall qualify for an
- 48 exemption from certificate of need;
- 49 (7) The acquisition by a qualified hospital which is party to an approved cooperative
- 50 agreement as provided in §16-29b-28 of this code, of a hospital located within a distance of 20
- 51 highway miles of the main campus of the qualified hospital; and

- 52 (8) The acquisition by a hospital of a physician practice group which owns an ambulatory
53 surgical center as defined in this article; and
54 (9) Constructing, developing, acquiring, or establishing a birthing center.

§16-2D-11. Exemptions from Certificate of Need which require the submission of information to the authority.

- 1 (a) To obtain an exemption under this section a person shall:
2 (1) File an exemption application; and
3 (2) Provide a statement detailing which exemption applies and the circumstances justifying
4 the exemption.
- 5 (b) Notwithstanding section eight and ten and except as provided in section nine of this
6 article, the Legislature finds that a need exists and these health services are exempt from the
7 certificate of need process:
- 8 (1) The acquisition and utilization of one computed tomography scanner with a purchase
9 price up to \$750,000 that is installed in a private office practice where at minimum 75 percent of the
10 scans are performed on the patients of the practice. The private office practice shall obtain and
11 maintain accreditation from the American College of Radiology prior to, and at all times during, the
12 offering of this service. The authority may at any time request from the private office practice
13 information relating to the number of patients who have been provided scans and proof of active
14 and continuous accreditation from the American College of Radiology. If a physician owns or
15 operates a private office practice in more than one location, this exemption shall only apply to the
16 physician's primary place of business and if a physician wants to expand the offering of this
17 service to include more than one computed topography scanner, he or she shall be required to
18 obtain a certificate of need prior to expanding this service. All current certificates of need issued for
19 computed tomography services, with a required percentage threshold of scans to be performed on
20 patients of the practice in excess of seventy-five percent, shall be reduced to 75 percent: *Provided,*
21 That these limitations on the exemption for a private office practice with more than one location

22 shall not apply to a private office practice with more than twenty locations in the state on April 8,
23 2017.

24 ~~(2) (A) A birthing center established by a nonprofit primary care center that has a~~
25 ~~community board and provides primary care services to people in their community without regard~~
26 ~~to ability to pay; or~~

27 ~~(B) A birthing center established by a nonprofit hospital with less than one hundred~~
28 ~~licensed acute care beds.~~

29 ~~(i) To qualify for this exemption, an applicant shall be located in an area that is underserved~~
30 ~~with respect to low-risk obstetrical services; and~~

31 ~~(ii) Provide a proposed health service area~~

32 ~~(3) (A) A health care facility acquiring major medical equipment, adding health services or~~
33 ~~obligating a capital expenditure to be used solely for research;~~

34 ~~(B) To qualify for this exemption, the health care facility shall show that the acquisition,~~
35 ~~offering or obligation will not:~~

36 ~~(i) Affect the charges of the facility for the provision of medical or other patient care~~
37 ~~services other than the services which are included in the research;~~

38 ~~(ii) Result in a substantial change to the bed capacity of the facility; or~~

39 ~~(iii) Result in a substantial change to the health services of the facility.~~

40 ~~(C) For purposes of this subdivision, the term "solely for research" includes patient care~~
41 ~~provided on an occasional and irregular basis and not as part of a research program;~~

42 ~~(4) (3) The obligation of a capital expenditure to acquire, either by purchase, lease or~~
43 ~~comparable arrangement, the real property, equipment or operations of a skilled nursing facility:~~

44 *Provided*, That a skilled nursing facility developed pursuant to subdivision (17) of this section and
45 subsequently acquired pursuant to this subdivision may not transfer or sell any of the skilled
46 nursing home beds of the acquired skilled nursing facility until the skilled nursing facility has been
47 in operation for at least ten years.

48 ~~(5)~~ (4) Shared health services between two or more hospitals licensed in West Virginia
49 providing health services made available through existing technology that can reasonably be
50 mobile. This exemption does not include providing mobile cardiac catheterization;

51 ~~(6)~~ (5) The acquisition, development or establishment of a certified interoperable electronic
52 health record or electronic medical record system;

53 ~~(7)~~ (6) The addition of forensic beds in a health care facility;

54 ~~(8)~~ (7) A behavioral health service selected by the Department of Health and Human
55 Resources in response to its request for application for services intended to return children
56 currently placed in out-of-state facilities to the state or to prevent placement of children in out-of-
57 state facilities is not subject to a certificate of need;

58 ~~(9)~~ (8) The replacement of major medical equipment with like equipment, only if the
59 replacement major medical equipment cost is more than the expenditure minimum;

60 ~~(10)~~ (9) Renovations within a hospital, only if the renovation cost is more than the
61 expenditure minimum. The renovations may not expand the health care facility's current square
62 footage, incur a substantial change to the health services, or a substantial change to the bed
63 capacity;

64 ~~(11)~~ (10) Renovations to a skilled nursing facility;

65 ~~(12)~~ (11) The donation of major medical equipment to replace like equipment for which a
66 certificate of need has been issued and the replacement does not result in a substantial change to
67 health services. This exemption does not include the donation of major medical equipment made
68 to a health care facility by a related organization;

69 ~~(13)~~ (12) A person providing specialized foster care personal care services to one
70 individual and those services are delivered in the provider's home;

71 ~~(14)~~ (13) A hospital converting the use of beds except a hospital may not convert a bed to a
72 skilled nursing home bed and conversion of beds may not result in a substantial change to health
73 services provided by the hospital;

74 ~~(15)~~ (14) The construction, renovation, maintenance or operation of a state owned
75 veterans skilled nursing facilities established pursuant to the provisions of article one-b of this
76 chapter;

77 ~~(16)~~ (15) To develop and operate a skilled nursing facility with no more than 36 beds in a
78 county that currently is without a skilled nursing facility;

79 ~~(17)~~ (16) A critical access hospital, designated by the state as a critical access hospital,
80 after meeting all federal eligibility criteria, previously licensed as a hospital and subsequently
81 closed, if it reopens within 10 years of its closure;

82 ~~(18)~~ (17) The establishing of a health care facility or offering of health services for children
83 under one year of age suffering from Neonatal Abstinence Syndrome;

84 ~~(19)~~ (18) The construction, development, acquisition or other establishment of community
85 mental health and intellectual disability facility;

86 ~~(20)~~ (19) Providing behavioral health facilities and services;

87 ~~(21)~~ (20) The construction, development, acquisition or other establishment of kidney
88 disease treatment centers, including freestanding hemodialysis units but only to a medically
89 underserved population;

90 ~~(22)~~ (21) The transfer, purchase or sale of intermediate care or skilled nursing beds from a
91 skilled nursing facility or a skilled nursing unit of an acute care hospital to a skilled nursing facility
92 providing intermediate care and skilled nursing services. The Department of Health and Human
93 Resources may not create a policy which limits the transfer, purchase or sale of intermediate care
94 or skilled nursing beds from a skilled nursing facility or a skilled nursing unit of an acute care
95 hospital. The transferred beds shall retain the same certification status that existed at the nursing
96 home or hospital skilled nursing unit from which they were acquired. If construction is required to
97 place the transferred beds into the acquiring nursing home, the acquiring nursing home has one
98 year from the date of purchase to commence construction;

99 ~~(23)~~ (22) The construction, development, acquisition or other establishment by a health
100 care facility of a nonhealth related project, only if the nonhealth related project cost is more than
101 the expenditure minimum;

102 ~~(24)~~ (23) The construction, development, acquisition or other establishment of an alcohol
103 or drug treatment facility and drug and alcohol treatment services unless the construction,
104 development, acquisition or other establishment is an opioid treatment facility or programs as set
105 forth in subdivision (4) of section nine of this article;

106 ~~(25)~~ (24) Assisted living facilities and services;

107 ~~(26)~~ (25) The creation, construction, acquisition or expansion of a community-based
108 nonprofit organization with a community board that provides or will provide primary care services
109 to people without regard to ability to pay and receives approval from the Health Resources and
110 Services Administration; and

111 ~~(27)~~ (26) The acquisition and utilization of one computed tomography scanner and/or one
112 magnetic resonance imaging scanner with a purchase price of up to \$750,000 by a hospital.

NOTE: The purpose of this bill is to exempt certain services from the certificate of need.

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