

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 528

By Senators Barrett, Hunt, Maynard, Rucker, and

Karnes

[Introduced January 31, 2023; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §16-2D-1, §16-2D-3, §16-2D-4, §16-2D-6, §16-2D-12, and §16-2D-
 2 15, all relating to certificate of need, requiring that the certificate of need standards be
 3 subject to legislative rule-making review procedures by requiring the certificate of need
 4 standards be filed as legislative rules; and providing that the certificate of need standards
 5 shall be repealed upon the approval by the Legislature of the legislative rule.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2D. CERTIFICATE OF NEED.
§16-2D-1. Legislative findings.

1 It is declared to be the public policy of this state:

2 (1) That the offering or development of all health services shall be accomplished in a
 3 manner which is orderly, economical and consistent with the effective development of necessary
 4 and adequate means of providing for the health services of the people of this state and to avoid
 5 unnecessary duplication of health services, and to contain or reduce increases in the cost of
 6 delivering health services.

7 (2) That the general welfare and protection of the lives, health and property of the people of
 8 this state require that the type, level and quality of care, the feasibility of providing such care and
 9 other criteria as provided for in this article, including certificate of need ~~standards~~ rules and criteria
 10 developed by the authority pursuant to provisions of this article, pertaining to health services within
 11 this state, be subject to review and evaluation before any health services are offered or developed
 12 in order that appropriate and needed health services are made available for persons in the area to
 13 be served.

§16-2D-3. Powers and duties of the authority.

1 (a) The authority shall:

2 (1) Administer the certificate of need program;

3 (2) Review the state health plan, the certificate of need ~~standards~~ rules, and the cost
 4 effectiveness of the certificate of need program and make any amendments and modifications to

5 each that it may deem necessary, no later than September 1, 2017, and biennially thereafter.

6 (3) Shall adjust the expenditure minimum annually and publish to its website the updated
7 amount on or before December 31, of each year. The expenditure minimum adjustment shall be
8 based on the DRI inflation index.

9 (4) Create a standing advisory committee to advise and assist in amending the state health
10 plan, the certificate of need ~~standards~~ rules, and performing the state agencies' responsibilities.

11 (b) The authority may:

12 (1) (A) Order a moratorium upon the offering or development of a health service when
13 criteria and guidelines for evaluating the need for the health service have not yet been adopted or
14 are obsolete or when it determines that the proliferation of the health service may cause an
15 adverse impact on the cost of health services or the health status of the public.

16 (B) A moratorium shall be declared by a written order which shall detail the circumstances
17 requiring the moratorium. Upon the adoption of criteria for evaluating the need for the health
18 service affected by the moratorium, or 180 days from the declaration of a moratorium, whichever is
19 less, the moratorium shall be declared to be over and applications for certificates of need are
20 processed pursuant to §16-2D-8 of this code.

21 (2) Approve an emerging health service or technology for one year.

22 (3) Exempt from certificate of need or annual assessment requirements to financially
23 vulnerable health care facilities located in underserved areas that the state agency and the Office
24 of Community and Rural Health Services determine are collaborating with other providers in the
25 service area to provide cost effective health services.

§16-2D-4.

Rulemaking.

1 (a) The authority shall propose rules for legislative approval in accordance with the
2 provisions of §29A-3-1 *et seq.* of this code, to implement the following:

3 (1) Information a person shall provide when applying for a certificate of need;

4 (2) Information a person shall provide when applying for an exemption;

5 (3) Process for the issuance of grants and loans to financially vulnerable health care
6 facilities located in underserved areas;

7 (4) Information a person shall provide in a letter of intent;

8 (5) Process for an expedited certificate of need;

9 (6) Determine medically underserved population. The authority may consider unusual local
10 conditions that are a barrier to accessibility or availability of health services. The authority may
11 consider when making its determination of a medically underserved population designated by the
12 federal Secretary of Health and Human Services under Section 330(b)(3) of the Public Health
13 Service Act, as amended, Title 42 U.S.C. §254;

14 (7) Process to review an approved certificate of need; and

15 (8) Process to review approved proposed health services for which the expenditure
16 maximum is exceeded or is expected to be exceeded.

17 (9) Development of criteria, formula, and standards for the review of health services
18 previously set forth in the certificate of need standards to be submitted during the 2024 Session of
19 the Legislature.

20 (b) All of the authority’s rules in effect and not in conflict with the provisions of this article,
21 shall remain in effect until they are amended or rescinded.

**§16-2D-6. Changes to certificate of need standards Repeal of standards upon approval of
legislative rule.**

1 ~~(a) When the authority proposes a change to the certificate of need standards, it shall file~~
2 ~~with the Secretary of State, for publication in the State Register, a notice of proposed action,~~
3 ~~including the text of all proposed changes, and a date, time and place for receipt of general public~~
4 ~~comment. To comply with the public comment requirement of this section, the authority may hold a~~
5 ~~public hearing or schedule a public comment period for the receipt of written statements or~~
6 ~~documents.~~

7 ~~(b) When changing the certificate of need standards, the authority shall identify relevant~~

8 ~~criteria contained in section twelve and apply those relevant criteria to the proposed health service~~
9 ~~in a manner that promotes the public policy goals and legislative findings contained in section one.~~

10 ~~(c) The authority shall form task forces to assist it in satisfying its review and reporting~~
11 ~~requirements. The task forces shall be comprised of representatives of consumers, business,~~
12 ~~providers, payers and state agencies.~~

13 ~~(d) The authority shall coordinate the collection of information needed to allow the authority~~
14 ~~to develop recommended modifications to certificate of need standards.~~

15 ~~(e) The authority may consult with or rely upon learned treatises in health planning,~~
16 ~~recommendations and practices of other health planning agencies and organizations,~~
17 ~~recommendations from consumers, recommendations from health care providers,~~
18 ~~recommendations from third-party payors, materials reflecting the standard of care, the authority's~~
19 ~~own developed expertise in health planning, data accumulated by the authority or other local, state~~
20 ~~or federal agency or organization and any other source deemed relevant to the certificate of need~~
21 ~~standards proposed for change.~~

22 ~~(f) All proposed changes to the certificate of need standards, with a record of the public~~
23 ~~hearing or written statements and documents received pursuant to a public comment period, shall~~
24 ~~be presented to the Governor. Within thirty days of receiving the proposed amendments or~~
25 ~~modifications, the Governor shall either approve or disapprove all or part of the amendments and~~
26 ~~modifications and, for any portion of amendments or modifications not approved, shall specify the~~
27 ~~reason or reasons for disapproval. Any portions of the amendments or modifications not approved~~
28 ~~by the Governor may be revised and resubmitted.~~

29 ~~(g) The certificate of need standards adopted pursuant to this section which are applicable~~
30 ~~to the provisions of this article are not subject to article three, chapter twenty-nine-a of this code.~~
31 ~~The authority shall follow the provisions set forth in this section for giving notice to the public of its~~
32 ~~actions, holding hearings or receiving comments on the certificate of need standards. The~~
33 ~~certificate of need standards in effect on July 1, 2016, and all prior versions promulgated and~~

34 ~~adopted in accordance with the provisions of this section are and have been in full force and effect~~
35 ~~from each of their respective dates of approval by the Governor.~~

36 ~~(h) After approval from the Governor, the authority shall prepare a report detailing its~~
37 ~~review findings and submit the report to the Legislative Oversight Commission on Health and~~
38 ~~Human Resources Accountability with its annual report before January 1, each year~~

39 The certificate of need standards shall remain in effect until the companion legislative rule
40 is approved by the Legislature.

§16-2D-12. Minimum criteria for certificate of need reviews.

1 (a) A certificate of need may only be issued if the proposed health service is:
2 (1) Found to be needed; and
3 (2) Consistent with the state health plan, unless there are emergency circumstances that
4 pose a threat to public health.

5 (b) The authority may not grant a certificate of need unless, after consideration of the
6 appropriateness of the use of existing facilities within this state providing services similar to those
7 being proposed, the authority makes each of the following findings in writing:

8 (1) That superior alternatives to the services in terms of cost, efficiency and
9 appropriateness do not exist within this state and the development of alternatives is not
10 practicable;

11 (2) That existing facilities providing services within this state similar to those proposed are
12 being used in an appropriate and efficient manner;

13 (3) That in the case of new construction, alternatives to new construction, such as
14 modernization or sharing arrangements, have been considered and have been implemented to
15 the maximum extent practicable; and

16 (4) That patients will experience serious problems in obtaining care within this state of the
17 type proposed in the absence of the proposed health service.

18 (c) In addition to the written findings required in this section, the authority shall make a

19 written finding regarding the extent to which the proposed health service meets the needs of the
20 medically underserved population, except in the following cases:

21 (1) Where the proposed health service is one described in subsection (d) of this section to
22 eliminate or prevent certain imminent safety hazards or to comply with certain licensure or
23 accreditation standards; or

24 (2) Where the proposed health service is a proposed capital expenditure not directly
25 related to the provision of health services or to beds or to major medical equipment.

26 (d) Notwithstanding the review criteria in subsection (b) of this section, an application for a
27 certificate of need shall be approved, if the authority finds that the facility or service with respect to
28 which such capital expenditure is proposed to be made is needed and that the obligation of such
29 capital expenditure is consistent with the state health plan, for a capital expenditure which is
30 required:

31 (1) To eliminate or prevent imminent safety hazards as defined by federal, state, or local
32 fire building or life safety codes, statutes or rules.

33 (2) To comply with state licensure standards; or

34 (3) To comply with accreditation or certification standards. Compliance with which is
35 required to receive reimbursement under Title XVIII of the Social Security Act or payments under
36 the state plan for medical assistance approved under Title XIX of such act.

37 (e) In the case where an application is made by a health care facility to provide ventilator
38 services which have not previously been provided for a nursing facility bed, the authority shall
39 consider the application in terms of the need for the service and whether the cost exceeds the level
40 of current Medicaid services. A facility providing ventilator services, may not provide a higher level
41 of services for a nursing facility bed without demonstrating that the change in level of service by
42 provision of the additional ventilator services will result in no additional fiscal burden to the state.

43 (f) The authority shall consider the total fiscal liability to the state for a submitted
44 application.

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

47 (h) An application for a certificate of need may not be made subject to any criterion not
48 contained in this article or in the certificate of need ~~standards~~ rules.

**§16-2D-15. Authority to render final decision; issue certificate of need; write findings;
specify capital expenditure maximum.**

1 (a) The authority shall render a final decision on an application for a certificate of need in
2 the form of an approval, a denial or an approval with conditions. The final decision with respect to
3 a certificate of need shall be based solely on:

4 (1) The authority’s review conducted in accordance with procedures and criteria in this
5 article and the certificate of need ~~standards~~ rules; and

6 (2) The record established in the administrative hearing held with respect to the certificate
7 of need.

8 (b) Approval with conditions does not give the authority the ability to mandate a health
9 service not proposed by the health care facility. Issuance of a certificate of need or exemption may
10 not be made subject to any condition unless the condition directly relates to criteria in this article,
11 or in the certificate of need ~~standards~~ rules. Conditions may be imposed upon the operations of
12 the health care facility for not longer than a three-year period.

13 (c) The authority shall send its decision along with written findings to the person proposing
14 the proposed health service or exemption and shall make it available to others upon request.

15 (d) In the case of a final decision to approve or approve with conditions a proposal for a
16 proposed health service, the authority shall issue a certificate of need to the person proposing the
17 proposed health service.

18 (e) The authority shall specify in the certificate of need the maximum amount of capital
19 expenditures which may be obligated. The authority shall adopt legislative rules pursuant to
20 section four to prescribe the method used to determine capital expenditure maximums and a

- 21 process to review the implementation of an approved certificate of need for a proposed health
- 22 service for which the capital expenditure maximum is exceeded or is expected to be exceeded.

NOTE: The purpose of this bill is to require the certificate of need standards be filed as legislative rules and providing that the companion certificate of need standard shall be repealed upon approval by the Legislature of the rule.

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