Enrolled
Committee Substitute
for
Senate Bill 597

BY SENATORS FERNS AND PLYMALE, original sponsors

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

2016 REGULAR SESSION

Enrolled

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for

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[Passed March 12, 2016; in effect from passage]
AN ACT to amend and reenact §16-29B-26 of the Code of West Virginia, 1931, as amended; and
to amend said code by adding thereto two new sections, designated §16-29B-28 and §16-29B-29, all relating generally to the Health Care Authority; exempting certain actions of the Health Care Authority from state and federal antitrust laws; setting forth intent to immunize cooperative agreements approved and subject to supervision by the Health Care Authority; establishing that a cooperative agreement that is not approved and subject to supervision by the Health Care Authority shall not have immunity; defining terms; setting out legislative findings and purpose; allowing cooperative agreements between certain hospitals and other hospitals or health care providers in the state; setting forth goals of a cooperative agreement; granting authority to the Health Care Authority to review proposed cooperative agreements; establishing a review process for cooperative agreements; requiring notification of application and public hearing to be published on Health Care Authority's website and the State Register; providing for public comment period; requiring notice of public hearing to be provided to all persons, groups or organizations who have submitted written comments to proposed cooperative agreements and to individuals, groups or organizations designated as affected parties in certificate of need proceeding; requiring copy of application to be provided to the Attorney General; setting forth standards for review of cooperative agreements; requiring the Health Care Authority to consult with the Attorney General regarding assessment of approval of proposed cooperative agreement; requiring approval of Health Care Authority to have written concurrence of the Attorney General; providing that the Health Care Authority evaluate the benefits and disadvantages of the proposed cooperative agreement; providing that the Health Care Authority make a determination whether the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement; providing for approval with conditions; providing that the Health Care Authority's decision to approve or deny an
application is a final order; granting enforcement powers over cooperative agreements to
the Health Care Authority; providing for rulemaking; requiring reporting to the Health Care
Authority; setting forth reporting requirements; providing for establishment and
assessment of fees; providing that these new provisions shall not undermine the validity
of an agreement between a hospital and the Attorney General entered into before the
effective date of this legislation; requiring submission of certain proposed rate increases
to be provided to the Attorney General for review; authorizing the Attorney General to
approve, reject or modify certain proposed rate increases; providing that certain proposed
rate increases may only be implemented with the approval of the Attorney General;
providing the Health Care Authority maintain on file all approved cooperative agreements,
including conditions imposed; requiring notification of termination of cooperative
agreement be filed with the Health Care Authority; prohibiting billing or charging for health
services resulting from or related to a cooperative agreement until approved by the Health
Care Authority; providing that submission of application constitutes agreement to certain
regulation and supervision of the Health Care Authority; and providing for severability.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 29B. HEALTH CARE AUTHORITY.

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

Actions of the board shall be exempt from antitrust action under state and federal antitrust
laws. Any actions of hospitals and health care providers under the board’s jurisdiction, when made
in compliance with orders, directives, rules, approvals or regulations issued or promulgated by
the board, shall likewise be exempt.
It is the intention of the Legislature that this chapter shall also immunize cooperative agreements approved and subject to supervision by the authority and activities conducted pursuant thereto from challenge or scrutiny under both state and federal antitrust law: Provided, That a cooperative agreement that is not approved and subject to supervision by the authority shall not have such immunity.


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

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

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

3. "Commercial health plan" means a plan offered by any third party payor that negotiates with a party to a cooperative agreement with respect to patient care services rendered by health care providers.

4. "Health care provider" means the same as that term is defined in section three of this article.

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

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

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

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

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

(d) **Cooperative Agreements. —**

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

   A. In order to enhance or preserve medical education opportunities through collaborative efforts and to ensure and maintain the economic viability of medical education in this state and to achieve the goals hereinafter set forth; and
(B) When the likely benefits outweigh any disadvantages attributable to a reduction in competition that may result from the proposed cooperative agreement.

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

(A) Improve access to care;
(B) Advance health status;
(C) Target regional health issues;
(D) Promote technological advancement;
(E) Ensure accountability of the cost of care;
(F) Enhance academic engagement in regional health;
(G) Preserve and improve medical education opportunities;
(H) Strengthen the workforce for health-related careers; and
(I) Improve health entity collaboration and regional integration, where appropriate.

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

(A) Population health improvement;
(B) Improved access to health care services;
(C) Improved quality;
(D) Cost efficiencies;
(E) Ensuring affordability of care;
(F) Enhancing and preserving medical education programs; and
(G) Supporting the authority’s goals and strategic mission, as applicable.

(4) (A) If the cooperative agreement involves a combination of hospitals through merger, consolidation or acquisition, the qualified hospital must have been awarded a certificate of need for the project by the authority, as set forth in article two-d of this chapter prior to submitting an application for review of a cooperative agreement.
(B) In addition to a certificate of need, the authority may also require that an application for review of a cooperative agreement as provided in this section be submitted and approved prior to the finalization of the cooperative agreement, if the cooperative agreement involves the merger, consolidation or acquisition of a hospital located within a distance of twenty highway miles of the main campus of the qualified hospital, and the authority shall have determined that combination is likely to produce anti-competitive effects due to a reduction of competition. Any such determination shall be communicated to the parties to the cooperative agreement within seven days from approval of a certificate of need for the project.

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

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

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

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

(e) Procedure for review of cooperative agreements. —

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

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

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

(ii) Deny the application; or

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

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

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

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

(f) Standards for review of cooperative agreements. —

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

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

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

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

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

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

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

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

(E) Gains in the cost-efficiency of services provided by the hospitals involved;
(F) Improvements in the utilization of hospital resources and equipment;

(G) Avoidance of duplication of hospital resources;

(H) Participation in the state Medicaid program; and

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

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

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

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

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

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

(6) (A) After a complete review of the record, including, but not limited to, the factors set out in subsection (e) of this section, any commitments made by the applicant or applicants and any conditions imposed by the authority, if the authority determines that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement, the authority shall approve the proposed cooperative agreement.
(B) The authority may reasonably condition approval upon the parties’ commitments to:

(i) Achieving improvements in population health;

(ii) Access to health care services;

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

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

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

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

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

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

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

(i) Information about the extent of the benefits realized and compliance with other terms and conditions of the approval;
(ii) A description of the activities conducted pursuant to the cooperative agreement, including any actions taken in furtherance of commitments made by the parties or terms imposed by the authority as a condition for approval of the cooperative agreement;

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

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

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

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

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

(i) Be submitted one hundred twenty days from the commencement of the next calendar year; and
(ii) Provide for a rebate to each commercial health plan or insurer with which they have contracted an amount not in excess of one percent of the amount paid to them by such commercial health plan or insurer for hospital services during such two-year period if in any two consecutive-year period the average performance score is below the fiftieth percentile for all United States hospitals. The amount to be rebated shall be reduced by the amount of any reduction in reimbursement which may be imposed by a commercial health plan or insurer under a quality incentive or awards program in which the hospital is a participant.

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

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

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

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

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

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

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

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

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

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

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

(i) Miscellaneous provisions. —

(1) (A) An agreement entered into by a hospital party to a cooperative agreement and any
state official or state agency imposing certain restrictions on rate increases shall be enforceable
in accordance with its terms and may be considered by the authority in determining whether to
approve or deny the application. Nothing in this chapter shall undermine the validity of any such
agreement between a hospital party and the Attorney General entered before the effective date
of this legislation.
(B) At least ninety days prior to the implementation of any increase in rates for inpatient and outpatient hospital services and at least sixty days prior to the execution of any reimbursement agreement with a third party payor, a hospital party to a cooperative agreement involving the combination of two or more hospitals through merger, consolidation or acquisition which has been approved by the authority shall submit any proposed increase in rates for inpatient and outpatient hospital services and any such reimbursement agreement to the Office of the West Virginia Attorney General together with such information concerning costs, patient volume, acuity, payor mix and other data as the Attorney General may request. Should the Attorney General determine that the proposed rates may inappropriately exceed competitive rates for comparable services in the hospital’s market area which would result in unwarranted consumer harm or impair consumer access to health care, the Attorney General may request the authority to evaluate the proposed rate increase and to provide its recommendations to the Office of the Attorney General. The Attorney General may approve, reject or modify the proposed rate increase and shall communicate his or her decision to the hospital no later than 30 days prior to the proposed implementation date. The hospital may then only implement the increase approved by the Attorney General. Should the Attorney General determine that a reimbursement agreement with a third party payor includes pricing terms at anti-competitive levels, the Attorney General may reject the reimbursement agreement and communicate such rejection to the parties thereto together with the rationale therefor in a timely manner.

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

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

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

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

§16-29B-29. Severability.

If any provision of this article or the application thereof to any person or circumstance is
held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect, impair or
invalidate other provisions or applications of the article, and to this end the provisions of this article
are declared to be severable.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
Member, Chairman, Senate Committee

[Signature]
Chairman, House Committee

Originated in the Senate.

In effect from passage.

[Signature]
Clerk of the Senate

[Signature]
Clerk of the House of Delegates

[Signature]
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 18th Day of ... 2016.

[Signature]
Governor
PRESENTED TO THE GOVERNOR

MAR 18 2015

Time 3:20 pm