

SENATE No. 649

The Commonwealth of Massachusetts

PRESENTED BY:

Daniel A. Wolf

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to promote the accessibility, quality and continuity of care for consumers of behavioral health, substance use disorder and mental health services.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Daniel A. Wolf</i>	<i>Cape and Islands</i>
<i>Kathleen O'Connor Ives</i>	<i>First Essex</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>
<i>Jonathan Hecht</i>	<i>29th Middlesex</i>
<i>David Paul Linsky</i>	<i>5th Middlesex</i>
<i>Denise Provost</i>	<i>27th Middlesex</i>
<i>Diana DiZoglio</i>	<i>14th Essex</i>
<i>John V. Fernandes</i>	<i>10th Worcester</i>
<i>Colleen M. Garry</i>	<i>36th Middlesex</i>
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>
<i>Michelle M. DuBois</i>	<i>10th Plymouth</i>
<i>Daniel M. Donahue</i>	<i>16th Worcester</i>
<i>Frank A. Moran</i>	<i>17th Essex</i>
<i>Barbara A. L'Italien</i>	<i>Second Essex and Middlesex</i>
<i>Brian A. Joyce</i>	<i>Norfolk, Bristol and Plymouth</i>
<i>Angelo J. Puppolo, Jr.</i>	<i>12th Hampden</i>

<i>Christine P. Barber</i>	<i>34th Middlesex</i>	
<i>Timothy J. Toomey, Jr.</i>	<i>26th Middlesex</i>	
<i>Carmine L. Gentile</i>	<i>13th Middlesex</i>	
<i>Brian M. Ashe</i>	<i>2nd Hampden</i>	
<i>Peter V. Kocot</i>	<i>1st Hampshire</i>	
<i>Marcos A. Devers</i>	<i>16th Essex</i>	
<i>James R. Miceli</i>	<i>19th Middlesex</i>	
<i>Ruth B. Balsler</i>	<i>12th Middlesex</i>	
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>	
<i>Michael D. Brady</i>	<i>Second Plymouth and Bristol</i>	
<i>Sal N. DiDomenico</i>	<i>Middlesex and Suffolk</i>	
<i>Stephen Kulik</i>	<i>1st Franklin</i>	
<i>Mark J. Cusack</i>	<i>5th Norfolk</i>	
<i>Carlos Gonzalez</i>	<i>10th Hampden</i>	
<i>Walter F. Timilty</i>	<i>7th Norfolk</i>	
<i>Sean Garballey</i>	<i>23rd Middlesex</i>	<i>7/7/2015</i>
<i>Elizabeth A. Malia</i>	<i>11th Suffolk</i>	<i>11/2/2015</i>

SENATE No. 649

By Mr. Wolf, a petition (accompanied by bill, Senate, No. 649) of Daniel A. Wolf, Kathleen O'Connor Ives, Michael O. Moore, Marjorie C. Decker and other members of the General Court for legislation to promote the accessibility, quality and continuity of care for consumers of behavioral health, substance use disorder and mental health services. Health Care Financing.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act to promote the accessibility, quality and continuity of care for consumers of behavioral health, substance use disorder and mental health services.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 WHEREAS, A substantial amount of behavioral health, substance use disorder and
2 mental health services provided in the Commonwealth of Massachusetts is purchased for the
3 benefit of patients by carriers and behavioral health managers engaged in the provision of health
4 care financing services, or is otherwise delivered subject to the terms of agreements between
5 carriers, behavioral health managers and health care professionals and providers;

6 WHEREAS, Carriers and behavioral health managers are able to control patient access to
7 health care professionals and providers by restricting patient utilization of services of health care
8 professionals or providers to those with whom the carriers have contracted and through
9 utilization review programs and other managed care tools and associated coverage and payment
10 policies;

11 WHEREAS, The asymmetrical power of carriers and behavioral health managers in
12 markets for behavioral health, substance use disorder and mental health services in the
13 Commonwealth of Massachusetts has led to a market failure that threatens the availability of
14 high quality, cost effective behavioral health, substance use disorder and mental health services;

15 WHEREAS, The power of carriers and behavioral health managers to unilaterally impose
16 contract terms that providers must either accept or reject without negotiation jeopardizes the
17 ability of providers to deliver the superior quality behavioral health, substance use disorder and
18 mental health services that have been traditionally available in this commonwealth;

19 WHEREAS, Providers do not have sufficient market power to reject unfair provider
20 contract terms that impede their ability to deliver appropriate care;

21 WHEREAS, When providers of behavioral health, substance use disorder or mental
22 health services do reject unfair contract terms and terminate their contracts with certain carriers,
23 the patients whose services are covered by those carriers are often unable to continue treatment
24 with such providers , to the detriment of patients in need of these services;

25 WHEREAS, Inequitable reimbursement, unduly time-consuming administrative
26 requirements, and other unfair payment terms adversely affect access to and the quality of
27 patient care by reducing the number of behavioral health, substance use disorder and mental
28 health providers willing to accept insurance carrier reimbursement for their services;

29 WHEREAS, Empowering providers of behavioral health, substance use disorder and
30 mental health services to jointly negotiate with carriers and behavioral health managers as
31 provided in this act will help restore the competitive balance and increase access to behavioral

32 health, substance use disorder and mental health services in this commonwealth, thereby
33 providing benefits for patients and consumers;

34 WHEREAS, Empowering providers of behavioral health, substance use disorder and
35 mental health services to jointly negotiate with carriers and behavioral health managers is
36 necessary to provide access to quality behavioral health, substance use disorder and mental
37 health services for the citizens of this commonwealth;

38 NOW, THEREFORE, This bill is necessary, proper and constitutes an appropriate
39 exercise of the authority to regulate the business of insurance and the delivery of behavioral
40 health substance use disorder and mental health services in the Commonwealth of
41 Massachusetts.

42 SECTION 1. Section 1 of Chapter 176O of the General Laws, as appearing in the 2014
43 Official Edition, is hereby amended by inserting in the definition of Behavioral Health Manager,
44 after the word “carrier” the words “, division of medical assistance, or a self-insured health
45 benefit plan”

46 SECTION 2. Chapter 176O of the General Laws, as appearing in the 2014 Official
47 Edition, is hereby amended by inserting after section 27 the following new sections:

48 Section 28. Joint Negotiations Between Carriers and Providers of Behavioral Health
49 Substance Use Disorder and Mental Health Services.

50 (1) Health care professionals who provide behavioral health, substance use disorder and
51 mental health services in the Commonwealth of Massachusetts are hereby authorized to jointly
52 negotiate with carriers and behavioral health managers and these joint negotiations and related

53 joint communications and activities shall be immune from challenge under the antitrust laws
54 pursuant to the State Action Doctrine through the articulated State policy displacing competition
55 with a joint negotiation process, and the active state supervision of that process, provided in this
56 act. Providers of behavioral health, substance use disorder and mental health services may jointly
57 negotiate with a carriers and behavioral health managers and engage in related joint activity
58 regarding fee, fee-related matters and non-fee-related matters which may affect patient care,
59 including but not limited to any of the following:

60 (a)The amount of payment or the methodology for determining the payment for a
61 behavioral health, substance use disorder or mental health service;

62 (b)The procedure code and description of service or services which are reimbursed and
63 covered by a payment;

64 (c)The amount of any other component and associated costs of providing services of the
65 reimbursement methodology for a behavioral health, substance use disorder or mental health
66 service;

67 (d)The determination, both substantive and procedural, of medical necessity and other
68 conditions of coverage, including prior authorization

69 (e)Utilization review criteria and procedures;

70 (f)Clinical practice guidelines;

71 (g)Preventive care and other clinical management policies;

72 (h)Patient referral standards and procedures, including, but not limited to, those
73 applicable to out-of-network referrals;

- 74 (i) Drug formularies and standards and procedures for prescribing off-formulary drugs;
- 75 (j) Quality assurance programs;
- 76 (k) Respective provider and carrier liability for the treatment or lack of treatment of plan
77 enrollees;
- 78 (l) The method and timing of claims filings and payments, including but not limited to ,
79 interest and penalties for late payments;
- 80 (m) The terms and conditions for amending any agreement between providers and a health
81 insurer, including the amendment of payment methodologies, fee schedules, and payment and
82 claims policies and procedures;
- 83 (n) Other administrative procedures, including, but not limited to , enrollee eligibility
84 verification systems , claim documentation requirements, and auditing procedures ;
- 85 (o) Credentialing standards and procedures for the selection , retention and termination of
86 participating providers;
- 87 (p) Mechanisms for resolving disputes between the carrier and providers of behavioral
88 health, substance use disorder and mental health services, including but not limited to , claims
89 payment, and the appeals process for utilization review and credentialing;
- 90 (q) The carrier plans sold or administered by the insurer in which the providers are
91 required to participate.

92 (2) The following requirements shall apply to the exercise of joint negotiation rights and
93 related activity by providers of behavioral health, substance use disorder and mental health
94 services under this section:

95 Providers shall select the members of their joint negotiation group by mutual agreement
96 and may communicate with each other for purposes of forming or considering forming a joint
97 negotiation group about any subject of negotiation permitted by this act;

98 (a) Providers shall designate a joint negotiation representative as the sole party authorized
99 to negotiate with the carrier on behalf of the providers as a group;

100 (b) Providers may communicate with each other and their joint negotiation representative
101 with respect to the matters to be negotiated with the carrier or behavioral health manager;

102 (c) Providers may agree upon proposals to be presented by their joint negotiation
103 representative to the carrier or behavioral health manager;

104 (d) Providers may agree to be bound by the terms and conditions negotiated by their joint
105 negotiation representative;

106 (e) The joint negotiation representative may provide the providers with the results of
107 negotiations with the carrier and an evaluation of any offer made by the carrier or behavioral
108 health manager, and Providers may communicate with each other and their joint negotiation
109 representative regarding the results of such negotiations or terms of such offer, including the
110 acceptance, rejection, and any counterproposal regarding such offer or any part thereof;

111 (f) The joint negotiation representative may reject a contract proposed by a carrier or
112 behavioral health manager on behalf of the providers so long as the providers remain free to
113 individually contract with the carrier.

114 (g) Provided, nothing herein shall be construed to mean that discussions among and
115 between providers, whether or not in the context of forming or working with a joint negotiation
116 group, violates this statute or the antitrust laws, provided such discussions do not constitute a
117 contract, combination or conspiracy in restraint of trade.

118 (3) A joint negotiation representative shall notify a carrier or behavioral health manager
119 of the intent of a joint negotiation group to enter into joint negotiations and shall inform the
120 carrier or behavioral health manager of the members of the joint negotiation group. It shall be
121 unlawful for either party to a negotiation to refuse or fail to meet and negotiate in good faith.
122 Upon a petition by either party, if the attorney general determines that either party to the
123 negotiation has failed to meet or negotiate in good faith, or if the attorney general determines that
124 the parties are at impasse, the attorney general shall appoint an impartial mediator and arbitrator
125 who shall be empowered to engage in fact finding regarding the issues and terms under
126 negotiation and, in the event efforts to mediate an agreed upon resolution are not successful, to
127 render a determination on the disputed terms which shall be final and binding upon the parties,
128 subject to the approval process provided in section five. The parties to the negotiations shall
129 share equally in the cost of the services of the impartial mediator and arbitrator. The individual
130 serving as the impartial mediator and arbitrator shall have a background in issues related to the
131 provision of behavioral health, substance use disorder and mental health services as well as
132 dispute resolution.

133 (4) No terms of a jointly negotiated contract or terms determined by an arbitrator
134 pursuant to section 4 shall be effective until the terms are approved by the Behavioral Health
135 Insurance Contracts Review Board, established by section 29 of this chapter . The Behavioral
136 Health Insurance Contract Review Board shall determine whether a proposed contract promotes
137 the availability of quality behavioral health, substance abuse, and mental health services and
138 approval or disapproval shall be based on this determination. A petition seeking approval shall
139 include the names and business addresses of the joint negotiation representative, the members of
140 the joint negotiating group, and the carrier or behavioral health manager, the negotiated provider
141 contract terms or contract terms determined by the Arbitrator, and such other data, information
142 and documents that the providers or carrier desire to submit in support of their petition or in
143 opposition to a petition which is based on an Arbitrator's determination pursuant to section four.
144 The Behavioral Health Insurance Contract Review Board shall either approve or disapprove a
145 petition within 30 days after the petition is filed. If any petition is disapproved, the Behavioral
146 Health Insurance Contract Review Board shall furnish a written explanation of any deficiencies
147 with such petition along with a statement of specific remedial measures as to how such
148 deficiencies may be corrected. It shall be unlawful for a party to refuse to negotiate in good
149 faith concerning any deficiencies identified by the Behavioral Health Review Board and the
150 impasse and arbitration provisions of section four shall apply to negotiations regarding
151 modifications of a disapproved provider contract or provider contract terms. Any revised petition
152 for approval shall be submitted to the Behavioral Health Review Board in accordance with these
153 same procedures.

154 (5) Any petition and related documents submitted under section 5 shall be considered
155 confidential, not a public record under section 7 of chapter 4 and not subject to disclosure under
156 section 10 of chapter 66.

157 (6) Nothing contained in this act shall be construed (a) to prohibit or restrict activity by
158 providers of behavioral health , substance use disorders or mental health services that is
159 sanctioned under the federal or state laws; (b) to prohibit or require governmental approval of or
160 otherwise restrict activity by providers that is not prohibited under the federal antitrust laws; (c)
161 to require approval of provider contract terms to the extent that the terms are exempt from state
162 regulation under section 514 of the Employee Retirement Income Security Act of 1974; or (d) to
163 expand a health care professional's scope of practice or to require a carrier or behavioral health
164 manager to contract with any type or specialty of health care professionals.

165 (7) If any provision of this act or the application thereof to any person or circumstance is
166 held invalid, such invalidity shall not affect other provisions or applications of the chapter, which
167 can be given effect without the invalid provision or application, and to this end the provisions of
168 this chapter are declared to be severable.

169 Section 29: Retaliation Against Providers; remedies

170 (1) A carrier or behavioral health manager shall not take retaliatory action against a
171 provider because the provider engages in joint negotiations and related activities permitted by
172 this act or because a provider chooses not to engage in joint negotiations and related activities.

173 (2) Any provider or former provider aggrieved by a violation of this section may, within
174 two years, institute a civil action in the superior court. Any party to said action shall be entitled
175 to claim a jury trial. All remedies available in common law tort actions shall be available to

176 prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided
177 herein. The court may: (1) issue temporary restraining orders or preliminary or permanent
178 injunctions to restrain continued violation of this section; (2) restore the provider to the status
179 held prior to the retaliatory action; (3) compensate the provider for three times the lost
180 remuneration, and interest thereon; and (5) order payment by the carrier or other purchaser of
181 behavioral health, substance use disorder and mental health services of reasonable costs, and
182 attorneys' fees.

183 (3) Actions for retaliation pursuant to this section shall not be subject to arbitration or
184 other dispute resolution provisions of agreements between providers and carriers or other
185 purchasers of behavioral health, substance use disorder , or mental health services unless the
186 parties to an action for retaliation brought or which may be brought pursuant to this section
187 specifically agree to submit the action to arbitration or other dispute resolution forum , and
188 provided further that all remedies available in a civil action are available in the arbitration or
189 other dispute resolution forum.

190 (4) Nothing in this section shall be deemed to diminish the rights, privileges or remedies
191 of any provider under any other federal or state law or regulation, or under any jointly negotiated
192 agreement or other contract.

193 (5) All carriers and behavioral health managers shall annually notify providers of their
194 protections under this section.

195 Section 30. Behavioral Health Insurance Review Board

196 (1) There shall be established a Behavioral Health Insurance Contract Review Board,
197 within but not subject to the authority of the Attorney General with the responsibility and

198 authority to review proposed jointly negotiated contracts or contracts determined by an arbitrator
199 pursuant to the joint negotiation provisions of section 28 of chapter 176O of the general laws in
200 order to determine whether the proposed contract promotes the availability of quality behavioral
201 health, substance abuse, and mental health services. The Board shall have 9 members: the
202 Secretary of EOHHS, or a designee, shall serve as chairperson; 3 members appointed by the
203 Governor, 1 of whom shall be a representative from the Massachusetts Division of Insurance, 1 of
204 whom shall be an organization advocating for access to behavioral health services for children
205 and 1 of whom shall be representative of the Mental Health Legal Advisors; 3 members
206 appointed by the Attorney General, 1 of whom shall be a health economist, 1 of whom shall be
207 an advocate for substance abuse treatment, 1 of whom shall be a representative of NASW; 3
208 members appointed by the Treasurer, 3 of whom shall be representatives from different
209 behavioral health advocacy organizations. No appointee shall be an employee of any licensed
210 carrier or behavioral health manager authorized to do business in the commonwealth. All
211 appointments shall serve a term of 3 years, but a person appointed to fill a vacancy shall serve
212 only for the unexpired term. An appointed member of the board shall be eligible for
213 reappointment. The board shall annually elect 1 of its members to serve as vice-chairperson.

214 (2) All carriers and behavioral health managers shall file annually with the Behavioral
215 Health Insurance Review Board a document setting forth, by plan or insurance product and
216 geographic region, the names, business addresses and emails of all providers of behavioral
217 health, substance use disorder and mental health services with whom it has contracts, and the
218 number of covered lives, by geographic region and age.

219 SECTION 5. This act shall take effect on October 1, 2016.