SENATE DOCKET, NO. 879 FILED ON: 1/19/2017

SENATE . . . . . No. 614

The Commonwealth of Massachusetts

PRESENTED BY:

Kenneth J. Donnelly

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:	
Kenneth J. Donnelly	*Fourth Middlesex*	
Kenneth I. Gordon	*21st Middlesex*	*1/27/2017*
Daniel M. Donahue	*16th Worcester*	*1/27/2017*
Jonathan Hecht	*29th Middlesex*	*1/30/2017*
Ruth B. Balser	*12th Middlesex*	*2/1/2017*
Marjorie C. Decker	*25th Middlesex*	*2/1/2017*
Colleen M. Garry	*36th Middlesex*	*2/2/2017*
Sal N. DiDomenico	*Middlesex and Suffolk*	*2/3/2017*
Paul R. Heroux	*2nd Bristol*	*2/3/2017*
James B. Eldridge	*Middlesex and Worcester*	*2/3/2017*
Peter V. Kocot	*1st Hampshire*	*2/3/2017*

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SENATE . . . . . No. 614

By Mr. Donnelly, a petition (accompanied by bill, Senate, No. 614) of Kenneth J. Donnelly, Kenneth I. Gordon, Daniel M. Donahue, Jonathan Hecht 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 Ninetieth General Court
(2017-2018)

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:

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 2. Said chapter 176O of the General Laws, as so appearing, is hereby further amended by inserting after section 27 the following sections:-

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

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

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

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

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

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

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

(e) Utilization review criteria and procedures;

(f) Clinical practice guidelines;

(g) Preventive care and other clinical management policies;

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

(i) Drug formularies and standards and procedures for prescribing off-formulary drugs;

(j) Quality assurance programs;

(k) Respective provider and carrier liability for the treatment or lack of treatment of plan enrollees;

(l) The method and timing of claims filings and payments, including, but not limited to, interest and penalties for late payments;

(m) The terms and conditions for amending any agreement between providers and a health insurer, including the amendment of payment methodologies, fee schedules, and payment and claims policies and procedures;

(n) Other administrative procedures, including, but not limited to, enrollee eligibility verification systems, claim documentation requirements, and auditing procedures;

(o) Credentialing standards and procedures for the selection, retention and termination of participating providers;

(p) Mechanisms for resolving disputes between the carrier and providers of behavioral health, substance use disorder and mental health services, including, but not limited to, claims payment and the appeals process for utilization review and credentialing; and

(q) The carrier plans sold or administered by the insurer in which the providers are required to participate.

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

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

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

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

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

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

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

(g) The joint negotiation representative may reject a contract proposed by a carrier or behavioral health manager on behalf of the providers so long as the providers remain free to individually contract with the carrier; and

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

(3) A joint negotiation representative shall notify a carrier or behavioral health manager of the intent of a joint negotiation group to enter into joint negotiations and shall inform the carrier or behavioral health manager of the members of the joint negotiation group. It shall be unlawful for either party to a negotiation to refuse or fail to meet and negotiate in good faith. Upon a petition by either party, if the attorney general determines that either party to the negotiation has failed to meet or negotiate in good faith, or if the attorney general determines that the parties are at impasse, the attorney general shall appoint an impartial mediator and arbitrator who shall be empowered to engage in fact finding regarding the issues and terms under negotiation and, in the event efforts to mediate an agreed upon resolution are not successful, to render a determination on the disputed terms which shall be final and binding upon the parties, subject to the approval process provided in section 5 of chapter 251. The parties to the negotiations shall share equally in the cost of the services of the impartial mediator and arbitrator. The individual serving as the impartial mediator and arbitrator shall have a background in issues related to the provision of behavioral health, substance use disorder and mental health services as well as dispute resolution.

(4) No terms of a jointly negotiated contract or terms determined by an arbitrator pursuant to section 4 of chapter 251 shall be effective until the terms are approved by the Behavioral Health Insurance Contracts Review Board, established by section 30 of this chapter. The Behavioral Health Insurance Contract Review Board shall determine whether a proposed contract promotes the availability of quality behavioral health, substance abuse, and mental health services and approval or disapproval shall be based on this determination. A petition seeking approval shall include the names and business addresses of the joint negotiation representative, the members of the joint negotiating group, and the carrier or behavioral health manager, the negotiated provider contract terms or contract terms determined by the arbitrator, and such other data, information and documents that the providers or carrier desire to submit in support of their petition or in opposition to a petition which is based on an arbitrator's determination pursuant to section 4 of chapter 251. The Behavioral Health Insurance Contract Review Board shall either approve or disapprove a petition within 30 days after the petition is filed. If any petition is disapproved, the Behavioral Health Insurance Contract Review Board shall furnish a written explanation of any deficiencies with such petition along with a statement of specific remedial measures as to how such deficiencies may be corrected. It shall be unlawful for a party to refuse to negotiate in good faith concerning any deficiencies identified by the Behavioral Health Review Board and the impasse and arbitration provisions of section 4 of chapter 251 shall apply to negotiations regarding modifications of a disapproved provider contract or provider contract terms. Any revised petition for approval shall be submitted to the Behavioral Health Review Board in accordance with these same procedures.

(5) Any petition and related documents submitted under section 5 of chapter 251 shall be considered confidential, not a public record under section 7 of chapter 4 and not subject to disclosure under section 10 of chapter 66.

(6) Nothing contained in this act shall be construed (a) to prohibit or restrict activity by providers of behavioral health, substance use disorders or mental health services that is sanctioned under federal or state laws; (b) to prohibit or require governmental approval of or otherwise restrict activity by providers that is not prohibited under federal antitrust laws; (c) to require approval of provider contract terms to the extent that the terms are exempt from state regulation under section 514 of the Employee Retirement Income Security Act of 1974, Public Law 93-406; or (d) to expand a health care professional's scope of practice or to require a carrier or behavioral health manager to contract with any type or specialty of health care professionals.

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

Section 29. Retaliation Against Providers; Remedies.

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

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

prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided herein. The court may:

(a) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violation of this section;

(b) restore the provider to the status held prior to the retaliatory action;

(c) compensate the provider for three times the lost remuneration, and interest thereon; and

(d) order payment by the carrier or other purchaser of behavioral health, substance use disorder and mental health services of reasonable costs and attorneys' fees.

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

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

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

Section 30. Behavioral Health Insurance Review Board.

(1) There shall be established a Behavioral Health Insurance Contract Review Board, within but not subject to the authority of the attorney general with the responsibility and authority to review proposed jointly negotiated contracts or contracts determined by an arbitrator pursuant to the joint negotiation provisions of section 28 of this chapter in order to determine whether the proposed contract promotes the availability of quality behavioral health, substance abuse, and mental health services. The Board shall have 9 members: the secretary of the executive office of health and human services, or a designee, who shall serve as chairperson; 3 members appointed by the governor, 1 of whom shall be a representative from the division of insurance, 1of whom shall be an organization advocating for access to behavioral health services for children and 1 of whom shall be a representative from the Mental Health Legal Advisors; 3 members appointed by the attorney general, 1 of whom shall be a health economist, 1 of whom shall be an advocate for substance abuse treatment, 1 of whom shall be a representative from the National Association of Social Workers; 3 members appointed by the treasurer, 3 of whom shall be representatives from different behavioral health advocacy organizations. No appointee shall be an employee of any licensed carrier or behavioral health manager authorized to do business in the commonwealth. All appointments shall serve a term of 3 years, but a person appointed to fill a vacancy shall serve only for the unexpired term. An appointed member of the board shall be eligible for reappointment. The board shall annually elect 1 of its members to serve as vice-chairperson.

(2) All carriers and behavioral health managers shall file annually with the Behavioral Health Insurance Review Board a document setting forth, by plan or insurance product and geographic region, the names, business addresses and emails of all providers of behavioral

health, substance use disorder and mental health services with whom it has contracts, and the number of covered lives, by geographic region and age.

SECTION 5. This act shall take effect on October 1, 2018.