

HOUSE No. 4253

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, November 15, 2021.

The committee on Ways and Means, to whom was referred the Bill enhancing the market review process (House, No. 4248), reports recommending that the same ought to pass with an amendment substituting therefor the accompanying bill (House, No. 4253).

For the committee,

AARON MICHLEWITZ.

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**In the One Hundred and Ninety-Second General Court
(2021-2022)**

An Act enhancing the market review process.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to protect independent community hospitals from unfair competition, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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

1 SECTION 1. Section 16T of chapter 6A of the General Laws is hereby repealed.

2 SECTION 2. Section 13 of chapter 6D, as appearing in the 2020 Official Edition, is
3 hereby amended by striking out subsection (a) and inserting in place thereof the following
4 subsection:-

5 (a) Every provider or provider organization shall, before making any material change to
6 its operations or governance structure, submit notice to the commission, the center and the
7 attorney general of such change, not fewer than 60 days before the date of the proposed change.

8 Material changes shall include, but not be limited to: (i) the submission of an application for
9 issuance of a new freestanding ambulatory surgery center license or a clinic license, or a new
10 satellite facility under an existing license; (ii) a corporate merger, acquisition or affiliation of a
11 provider or provider organization and a carrier; (iii) mergers or acquisitions of hospitals or

12 hospital systems; (iv) acquisition of insolvent provider organizations; and (v) mergers or
13 acquisitions of provider organizations which will result in a provider organization having a near-
14 majority of market share in a given service or region.

15 Within 30 days of receipt of a notice filed under the commission’s regulations, the
16 commission shall conduct a preliminary review to determine whether the material change is
17 likely to result in a significant impact on the commonwealth’s ability to meet the health care cost
18 growth benchmark, established in section 9, or on the competitive market. If the commission
19 finds that the material change is likely to have a significant impact on the commonwealth’s
20 ability to meet the health care cost growth benchmark, or on the competitive market, the
21 commission may conduct a cost and market impact review under this section.

22 SECTION 3. Subsection (d) of said section 13 of said chapter 6D, as so appearing, is
23 hereby amended by striking out, in line 85, the words “and (xii)” and inserting in place thereof
24 the following words:-

25 (xii) the inventory of health care resources maintained by the department of public health,
26 pursuant to section 25A of chapter 111, and any related data or reports from the health planning
27 council, as established by section 20; and (xiii).

28 SECTION 4. Said section 13 of said chapter 6D, as so appearing, is hereby further
29 amended by striking out subsection (e) and inserting in place thereof the following subsection:-

30 (e) The commission shall make factual findings and issue a preliminary report on the cost
31 and market impact review. In the report, the commission shall identify any provider or provider
32 organization that meets all of the following criteria: (i) the provider or provider organization has,
33 or likely will have, a dominant market share for the services it provides as a result of the

34 proposed material change; (ii) the provider or provider organization charges, or likely will
35 charge, prices for services that are materially higher than the median prices charged by all other
36 providers for the same services in the same market, as a result of the proposed material change;
37 and (iii) the provider or provider organization has, or likely will have, a health status adjusted
38 total medical expense that is materially higher than the median total medical expense for all other
39 providers for the same service in the same market, as a result of the proposed material change.

40 SECTION 5. Said section 13 of said chapter 6D, as so appearing, is hereby further
41 amended by striking out subsections (g) and (h) and inserting in place thereof the following 2
42 subsections:-

43 (g) Nothing in this section shall prohibit a proposed material change under subsection (a);
44 provided, however, that any proposed material change shall not be completed: (i) until at least 30
45 days after the commission has issued its final report; and (ii) if the attorney general brings an
46 action as described in subsection (h), while such action is pending and prior to a final judgment
47 being issued by a court of competent jurisdiction.

48 (h) A provider or provider organization that meets the criteria in subsection (e) shall be
49 presumed to have engaged, or through a material change will engage, in an unfair method of
50 competition or unfair and deceptive trade practice subject to an action brought by the attorney
51 general pursuant to section 4 of chapter 93A; provided, however, a provider or provider
52 organization that meets the criteria of subsection (e) shall not be subject to an action brought
53 pursuant to sections 9 or 11 of said chapter 93A if the sole basis of the action is the fact that the
54 provider meets the criteria in subsection (e). When the commission, under subsection (f), refers a
55 report on a provider or provider organization to the attorney general, the attorney general may

56 take action under said chapter 93A or any other law to protect consumers in the health care
57 market. The commission's final report may be evidence in any such action.

58 SECTION 6. Said section 13 of said chapter 6D is hereby further amended by adding the
59 following subsection:-

60 (l) Upon issuance of its final report pursuant to subsection (f), the commission shall
61 provide a copy of said final report to the department of public health, which shall be included in
62 the written record and considered by the department of public health during its review of an
63 application for determination of need.

64 SECTION 7. Said chapter 6D is hereby further amended by adding the following
65 section:-

66 Section 20. (a) There is hereby established within the commission a health planning
67 council, consisting of the executive director of the health policy commission who shall serve as
68 chair, the secretary of health and human services or a designee, the commissioner of public
69 health or a designee, the director of the office of Medicaid or a designee, the commissioner of
70 mental health or a designee, the commissioner of insurance or a designee, the secretary of elder
71 affairs or a designee, the executive director of the center for health information and analysis or a
72 designee, and 3 members appointed by the governor, 1 of whom shall be a health economist, 1 of
73 whom shall have experience in health policy and planning and 1 of whom shall have experience
74 in health care market planning and service line analysis.

75 (b)(1) The council shall develop a state health plan to identify: (i) the anticipated needs of
76 the commonwealth for health care services, providers, programs and facilities; (ii) the existing

77 health care resources available to meet those needs; (iii) the projected resources necessary to
78 meet those anticipated needs; and (iv) the priorities for addressing those needs.

79 (2) The state health plan developed by the council shall include the location, distribution
80 and nature of all health care resources in the commonwealth and shall identify certain categories
81 of health care resources, including: (i) acute care units; (ii) non-acute care units; (iii) specialty
82 care units, including, but not limited to, burn, coronary care, cancer care, neonatal care, post-
83 obstetric and post-operative recovery care, pulmonary care, renal dialysis and surgical, including
84 trauma and intensive care units; (iv) skilled nursing facilities; (v) assisted living facilities; (vi)
85 long-term care facilities; (vii) ambulatory surgical centers; (viii) office-based surgical centers;
86 (ix) urgent care centers; (x) home health; (xi) adult and pediatric behavioral health and mental
87 health services and supports; (xii) substance use disorder treatment and recovery services; (xiii)
88 emergency care; (xiv) ambulatory care services; (xv) primary care resources; (xvi) pediatric care
89 services; (xvii) pharmacy and pharmacological services; (xviii) family planning services; (xix)
90 obstetrics and gynecology and maternal health services; (xx) allied health services including, but
91 not limited to, optometric care, chiropractic services, oral health care and midwifery services;
92 (xxi) federally qualified health centers and free clinics; (xxii) numbers of technologies or
93 equipment defined as innovative services or new technologies by the department of public health
94 pursuant to section 25C of chapter 111; (xxiii) hospice and palliative care service; and (xxiv)
95 health screening and early intervention services.

96 (3) The state health plan shall also make recommendations for the appropriate supply and
97 distribution of resources, programs, capacities, technologies and services identified in paragraph
98 (2) on a state-wide or regional basis based on an assessment of need for the next 5 years and
99 options for implementing such recommendations. The recommendations shall reflect, at a

100 minimum, the following goals: (i) to maintain and improve the quality of health care services;
101 (ii) to support the commonwealth's efforts to meet the health care cost growth benchmark
102 established pursuant to section 9; (iii) to support innovative health care delivery and alternative
103 payment models as identified by the commission; (iv) to reduce unnecessary duplication; (v) to
104 address disparities in the health care system for underserved or underrepresented cultural, racial,
105 ethnic and linguistic populations and people with disabilities; (vi) to support efforts to integrate
106 oral health, mental health, behavioral and substance use disorder treatment services with overall
107 medical care; (vii) to reflect the latest trends in utilization and support the best standards of care;
108 and (viii) to rationally and equitably distribute health care resources across geographic regions of
109 the commonwealth based on the needs of the population on a statewide basis, as well as the
110 needs of particular demographic factors, including, but not limited to, gender, race, ethnicity,
111 geographic location, age and English as a second language.

112 (c) The council shall provide direction to the department of public health to establish and
113 maintain on a current basis an inventory of all such health care resources together with all other
114 reasonably pertinent information concerning such resources. Agencies of the commonwealth that
115 license, register, regulate or otherwise collect cost, quality or other data concerning health care
116 resources shall cooperate with the council and the department of public health in coordinating
117 such data and information collected pursuant to this section and section 25A of chapter 111. The
118 inventory compiled pursuant to this section and said section 25A of said chapter 111 and all
119 related information shall be maintained in a form usable by the general public and shall
120 constitute a public record; provided, however, that any item of information which is confidential
121 or privileged in nature under any other law shall not be regarded as a public record pursuant to
122 this section.

123 (d) The council shall establish an advisory committee of not more than 15 members who
124 shall reflect a broad distribution of diverse perspectives on the health care system, including
125 health care providers and provider organizations, public and private third-party payers, consumer
126 representatives and labor organizations representing health care workers. Not fewer than 2
127 members of the advisory committee shall have expertise in rural health matters and rural health
128 needs in the commonwealth. The advisory committee shall review drafts and provide
129 recommendations to the council during the development of the state health plan described in
130 subsection (b).

131 (e) Annually, the council, in consultation with the commission and the department of
132 public health, shall conduct at least 4 public hearings, in geographically diverse areas throughout
133 the commonwealth, during the development of the state health plan and shall give interested
134 persons an opportunity to submit their views orally and in writing. In addition, the commission
135 may create and maintain a website to allow members of the public to submit comments
136 electronically and review comments submitted by others.

137 (f) The council shall publish analyses, reports and interpretations of information collected
138 pursuant to this section to promote awareness of the distribution and nature of health care
139 resources in the commonwealth.

140 (g) The council shall file annually an interim report by July 1 and annually a final report
141 by January 1 with the joint committee on health care financing concerning the activities of the
142 council in general and, in particular, describing the progress to date in developing the state health
143 plan and recommending such further legislative action as it considers appropriate.

144 SECTION 8. Section 11N of chapter 12 of the General Laws, as appearing in the 2020
145 Official Edition, is hereby amended by striking out subsection (b) and inserting in place thereof
146 the following new subsection:-

147 (b) The attorney general may, upon a referral by the health policy commission pursuant
148 to section 13 of chapter 6D, investigate and bring any appropriate action, including for injunctive
149 relief, as may be necessary pursuant to chapter 93A or any other law, to restrain unfair methods
150 of competition or unfair and deceptive trade practices by a provider or provider organization.

151 SECTION 9. The first paragraph of section 25A of chapter 111 of the General Laws, as
152 so appearing, is hereby amended by striking out the first sentence and inserting in place thereof
153 the following sentence:- Under the direction of the health planning council established in section
154 20 of chapter 6D, the department shall establish and maintain, on a current basis, an inventory of
155 all health care resources together with all other reasonably pertinent information concerning such
156 resources, in order to identify the location, distribution and nature of all such resources in the
157 commonwealth.

158 SECTION 10. Said section 25A of said chapter 111, as so appearing, is hereby further
159 amended by striking out, in lines 17 and 18, the words “in a designated office of the department”
160 and inserting in place thereof the following words:- as determined by the health planning council
161 established in section 20 of chapter 6D.

162 SECTION 11. Said section 25A of said chapter 111, as so appearing, is hereby further
163 amended by striking out the fourth paragraph.

164 SECTION 12. Section 25C of said chapter 111, as so appearing, is hereby amended by
165 striking out subsection (g) and inserting in place thereof the following subsection:-

166 (g) The department, in making any determination of need, shall be guided by the state
167 health plan and the state health resources inventory established in section 20 of chapter 6D, and
168 shall encourage appropriate allocation of private and public health care resources and the
169 development of alternative or substitute methods of delivering health care services so that
170 adequate health care services will be made reasonably available to every person within the
171 commonwealth at the lowest reasonable aggregate cost. The department shall use data from the
172 center for health information and analysis and information and the report on the cost and market
173 impact review delivered by the health policy commission pursuant to subsection (l) of section 13
174 of chapter 6D, and shall take into account any comments from any other state agency or entity,
175 and may impose reasonable terms and conditions as the department determines are necessary to
176 achieve the purposes and intent of this section. The department may also recognize the special
177 needs and circumstances of projects that: (i) are essential to the conduct of research in basic
178 biomedical or health care delivery areas or to the training of health care personnel; (ii) are
179 unlikely to result in any increase in the clinical bed capacity or outpatient load capacity of the
180 facility; and (iii) are unlikely to cause an increase in the total patient care charges of the facility
181 to the public for health care services, supplies and accommodations, as such charges shall be
182 defined from time to time in accordance with section 5 of chapter 409 of the acts of 1976.

183 SECTION 13. Said section 25C of said chapter 111, as so appearing, is hereby further
184 amended by striking out subsection (i) and inserting in place thereof the following subsection:-

185 (i) Except in the case of an emergency situation determined by the department as
186 requiring immediate action to prevent further damage to the public health or to a health care
187 facility, the department shall not act upon an application for such determination unless: (i) the
188 application has been on file with the department for at least 30 days; (ii) the center for health

189 information and analysis, the health policy commission, the state and appropriate regional
190 comprehensive health planning agencies and, in the case of long-term care facilities only, the
191 department of elder affairs, or in the case of any facility providing inpatient services for the
192 mentally ill or developmentally disabled, the departments of mental health or developmental
193 services, respectively, have been provided copies of such application and supporting documents
194 and given reasonable opportunity to supply required information and comment on such
195 application; and (iii) a public hearing has been held on such application when requested by the
196 applicant, the state or appropriate regional comprehensive health planning agency, any 10
197 taxpayers of the commonwealth and any other party of record as defined in section 25C¼. If, in
198 any filing period, an individual application is filed, which would implicitly decide any other
199 application filed during such period, the department shall not act only upon an individual.

200 SECTION 14. Said chapter 111, as so appearing, is hereby further amended by inserting
201 after section 25C, the following new section:-

202 Section 25C¼. (a) For the purposes of this section, the following words shall, unless the
203 context clearly requires otherwise, have the following meanings:

204 “Independent community hospital”, any hospital that has been: (i) designated by the
205 health policy commission as an independent community hospital for the year in which an
206 application for a determination of need is filed; or (ii) qualified in the year 2021 as an eligible
207 hospital as defined in subsection (d) of section 63 of chapter 260 of the acts of 2020.

208 “Party of record”, an applicant for a determination of need; the attorney general; the
209 center for health information and analysis; the health policy commission; any government
210 agency with relevant oversight or licensure authority over the proposed project or components

211 therein; any 10 taxpayers of the commonwealth; or an independent community hospital whose
212 primary service area overlaps with the primary service area of the applicant’s proposed project.
213 A party of record may review an application for determination of need as well as provide written
214 comment for consideration by the department.

215 “Primary service area”, the contiguous geographic area from which a health care facility
216 draws 75 per cent of its commercial discharges, as measured by the zip codes closest to the
217 facility by drive time, and for which the facility represents a minimum proportion of the total
218 discharges in a zip code, as determined by the department in consultation with the health policy
219 commission and based on the best available data using a methodology determined by the
220 department in consultation with the health policy commission.

221 “Proposed project”, a project for the construction of a freestanding ambulatory surgery
222 center for which a notice of determination of need is a prerequisite of licensure.

223 (b) For any application for a determination of need for which the primary service area of
224 the proposed project overlaps with the primary service area of an existing independent
225 community hospital, the applicant shall obtain and include in such application a letter of support
226 from the independent community hospital’s chief executive officer and board chair; provided,
227 however, that a proposed project that constitutes a joint venture between the applicant and the
228 independent community hospital shall be exempt from this subsection. The department shall
229 conduct a preliminary review of each application to determine compliance with this subsection.
230 If the department determines that an application is not in compliance, the department shall
231 identify to the applicant any independent community hospital whose support is required by this
232 subsection, and dismiss said application without prejudice. If the department fails to conduct a

233 preliminary review of an application or fails to dismiss an application that does not satisfy the
234 requirements of this subsection, the independent community hospital whose primary service area
235 overlaps with the primary service area of the proposed project may, within a reasonable period of
236 time, bring a civil action in the nature of mandamus in the superior court to require the
237 department to act in accordance with this subsection.

238 SECTION 15. Section 25F of said chapter 111, as so appearing, is hereby amended by
239 inserting after the word “care”, in line 7, the following word:- financing.

240 SECTION 16. Section 25G of said chapter 111, as so appearing, is hereby amended by
241 inserting after the word “agency”, in line 3, the following words:- , an independent community
242 hospital, as defined by section 25C¹/₄, whose primary service area overlaps with the primary
243 service area of a proposed project under said section 25C¹/₄.

244 SECTION 17. (a) Notwithstanding any general or special law, rule or regulation to the
245 contrary, an applicant for a determination of need whose filing date of such application precedes
246 the effective date of this act shall be required to submit a notice of a material change pursuant to
247 section 13 of chapter 6D of the General Laws if the holder of the determination of need is subject
248 to the requirements of said section 13 of said chapter 6D as amended by this act.

249 (b) Notwithstanding any general or special law, rule or regulation to the contrary, any
250 determination of need issued to a holder that is subject to a cost and market impact review
251 pursuant to said section 13 of said chapter 6D shall not go into effect until 30 days following the
252 issuance of a final report on the cost and market impact review by the health policy commission.

253 SECTION 18. Notwithstanding any general or special law, rule or regulation to the
254 contrary, the health planning council established in section 13 of chapter 16D of the General

255 Lays shall submit a state health plan to the governor and the general court, as required by section
256 20 of chapter 6D of the General Laws, on or before January 1, 2023.