

HOUSE No. 4262

House bill No. 4253, as amended and passed to be engrossed by the House. November 17, 2021.

The Commonwealth of Massachusetts

**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 Section 16T of chapter 6A of the General Laws is hereby repealed.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 based on the needs of particular demographic
105 factors, including, but not limited to, race, ethnicity, immigration status, sexual orientation,
106 gender identity, geographic location, age, language spoken, ability and socioeconomic status;
107 (vi) to support efforts to integrate oral health, mental health, behavioral and substance use
108 disorder treatment services with overall medical care; (vii) to reflect the latest trends in
109 utilization and support the best standards of care; and (viii) to rationally and equitably distribute
110 health care resources across geographic regions of the commonwealth based on the needs of the
111 population on a statewide basis, as well as the needs of particular demographic factors,
112 including, but not limited to, race, ethnicity, immigration status, sexual orientation, gender
113 identity, geographic location, age, language spoken, ability and socioeconomic status.

114 (c) The council shall provide direction to the department of public health to establish and
115 maintain on a current basis an inventory of all such health care resources together with all other
116 reasonably pertinent information concerning such resources. Agencies of the commonwealth that
117 license, register, regulate or otherwise collect cost, quality or other data concerning health care
118 resources shall cooperate with the council and the department of public health in coordinating
119 such data and information collected pursuant to this section and section 25A of chapter 111. The
120 inventory compiled pursuant to this section and said section 25A of said chapter 111 and all
121 related information shall be maintained in a form usable by the general public and shall
122 constitute a public record; provided, however, that any item of information which is confidential

123 or privileged in nature under any other law shall not be regarded as a public record pursuant to
124 this section.

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

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

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

142 (g) The council shall file annually an interim report by July 1 and annually a final report
143 by January 1 with the joint committee on health care financing concerning the activities of the

144 council in general and, in particular, describing the progress to date in developing the state health
145 plan and recommending such further legislative action as it considers appropriate.

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

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

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

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

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

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

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

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

187 (i) Except in the case of an emergency situation determined by the department as
188 requiring immediate action to prevent further damage to the public health or to a health care
189 facility, the department shall not act upon an application for such determination unless: (i) the
190 application has been on file with the department for at least 30 days; (ii) the center for health
191 information and analysis, the health policy commission, the state and appropriate regional
192 comprehensive health planning agencies and, in the case of long-term care facilities only, the
193 department of elder affairs, or in the case of any facility providing inpatient services for the
194 mentally ill or developmentally disabled, the departments of mental health or developmental
195 services, respectively, have been provided copies of such application and supporting documents
196 and given reasonable opportunity to supply required information and comment on such
197 application; and (iii) a public hearing has been held on such application when requested by the
198 applicant, the state or appropriate regional comprehensive health planning agency, any 10
199 taxpayers of the commonwealth and any other party of record as defined in section 25C¼. If, in
200 any filing period, an individual application is filed, which would implicitly decide any other
201 application filed during such period, the department shall not act only upon an individual.

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

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

206 “Independent community hospital”, any hospital that has been: (i) designated by the
207 health policy commission as an independent community hospital for the year in which an

208 application for a determination of need is filed; or (ii) qualified in the year 2021 as an eligible
209 hospital as defined in subsection (d) of section 63 of chapter 260 of the acts of 2020.

210 “Party of record”, an applicant for a determination of need; the attorney general; the
211 center for health information and analysis; the health policy commission; any government
212 agency with relevant oversight or licensure authority over the proposed project or components
213 therein; any 10 taxpayers of the commonwealth; or an independent community hospital whose
214 primary service area overlaps with the primary service area of the applicant’s proposed project.
215 A party of record may review an application for determination of need as well as provide written
216 comment for consideration by the department.

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

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

225 (b) For any application for a determination of need for which the primary service area of
226 the proposed project overlaps with the primary service area of an existing independent
227 community hospital, the applicant shall obtain and include in such application a letter of support
228 from the independent community hospital’s chief executive officer and board chair; provided,
229 however, that a proposed project that constitutes a joint venture between the applicant and the

230 independent community hospital shall be exempt from this subsection. The department shall
231 conduct a preliminary review of each application to determine compliance with this subsection.
232 If the department determines that an application is not in compliance, the department shall
233 identify to the applicant any independent community hospital whose support is required by this
234 subsection, and dismiss said application without prejudice. If the department fails to conduct a
235 preliminary review of an application or fails to dismiss an application that does not satisfy the
236 requirements of this subsection, the independent community hospital whose primary service area
237 overlaps with the primary service area of the proposed project may, within a reasonable period of
238 time, bring a civil action in the nature of mandamus in the superior court to require the
239 department to act in accordance with this subsection.

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

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

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

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

255 SECTION 18. Notwithstanding any general or special law, rule or regulation to the
256 contrary, the health planning council established in section 13 of chapter 16D of the General
257 Laws shall submit a state health plan to the governor and the general court, as required by section
258 20 of chapter 6D of the General Laws, on or before January 1, 2023.

259 SECTION 19. Notwithstanding any general or special law to the contrary, there shall be a
260 task force to study and provide recommendations regarding the financing of the health policy
261 commission, established in section 2 of chapter 6D of the General Laws.

262 The task force shall examine the funding sources and assessment algorithm to ensure a
263 sustainable and equitable funding stream for the work of the health policy commission. The
264 study shall include, but not be limited to, reviewing the existing funding mechanisms, identifying
265 additional funding needs, considering additional healthcare stakeholders for whom it may be
266 appropriate to assess and exploring other funding streams. The task force shall engage relevant
267 stakeholders, including, but not limited to, acute hospitals, ambulatory surgical centers and
268 surcharge payors.

269 The task force shall consist of 5 members: the chairs of the joint committee on health care
270 financing, who shall serve as co-chairs; the secretary of health and human services or a designee;
271 the executive director of the health policy commission or a designee; and the executive director
272 of the center for health information and analysis or a designee.

273 The task force shall report its findings, along with any recommendations, to the clerks of
274 the house of representatives and senate no later than June 1, 2022.