HOUSE . . . . . No. 4248

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES**,** November 15, 2021.

The committee on Health Care Financing to whom were referred the petition (accompanied by bill, Senate, No. 778) of John F. Keenan for legislation relative to hospital closures and health planning, the petition (accompanied by bill, Senate, No. 812) of Michael F. Rush for legislation to improve health care cost accountability, the petition (accompanied by bill, House, No. 1247) of Christine P. Barber and others relative to cost and access of health insurance, the petition (accompanied by bill, House, No. 1253) of Edward F. Coppinger and others relative to the closing of hospital essential services, the petition (accompanied by bill, House, No. 1259) of Paul J. Donato relative to market oversight in health care, the petition (accompanied by bill, House, No. 1260) of Paul J. Donato for legislation to enhance the health care marketing review process, the petition (accompanied by bill, House, No. 1262) of Patricia A. Duffy and others relative to the closing of hospital essential services, the petition (accompanied by bill, House, No. 1275) of Kevin G. Honan and Vanna Howard for legislation to improve health care cost accountability, the petition (accompanied by bill, House, No. 1282) of Bradley H. Jones, Jr., and others for legislation to establish a special commission (including members of the General Court) to study the costs and benefits that existing certificate of need laws impose on the Commonwealth's healthcare system, the petition (accompanied by bill, House, No. 1285) of Meghan Kilcoyne and Lindsay N. Sabadosa relative to determination of need of new health care related technology, and the petition (accompanied by bill, House, No. 1294) of Paul W. Mark relative to hospital billing and licensure, reports recommending that the accompanying bill (House, No. 4248) ought to pass [Cost: Greater than $100,000.00].

For the committee,

JOHN J. LAWN, JR.

FILED ON: 11/12/2021

HOUSE . . . . . No. 4248

The Commonwealth of Massachusetts

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

An Act enhancing the market review process.

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

SECTION 1. Section 16T of chapter 6A of the General Laws, as appearing in the 2020 Official Edition, is hereby repealed.

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

(a) Every provider or provider organization shall, before making any material change to its operations or governance structure, submit notice to the commission, the center and the attorney general of such change, not fewer than 60 days before the date of the proposed change. Material changes shall include, but not be limited to: (i) the application for issuance of a new freestanding ambulatory surgery center license or a clinic license, or a new satellite facility under an existing license; (ii) a corporate merger, acquisition or affiliation of a provider or provider organization and a carrier; (iii) mergers or acquisitions of hospitals or hospital systems; (iv) acquisition of insolvent provider organizations; and (v) mergers or acquisitions of provider

organizations which will result in a provider organization having a near-majority of market share in a given service or region.

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

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

(xii) the inventory of health care resources maintained by the department of public health, pursuant to section 25A of chapter 111 and any related data or reports from the health planning council, as established by section 19 of chapter 6D; and (xiii).

SECTION 4. Said section 13 of said chapter 6D of the General Laws, as so appearing, is hereby further amended by striking out subsections (e) to (h), inclusive, and inserting in place thereof the following 4 paragraphs:-

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

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

(f) Within 30 days after issuance of a preliminary report, the provider or provider organization may respond in writing to the findings in the report. The commission shall then issue its final report. The commission shall refer to the attorney general its report on any provider organization that meets all 3 criteria under subsection (e). The commission shall issue its final report on the cost and market impact review within 185 days from the date that the provider or provider organization has submitted notice to the commission; provided that the provider or provider organization has certified substantial compliance with the commission's requests for data and information pursuant to subsection (c) within 21 days of the commission's notice, or by a later date set by mutual agreement of the provider or provider organization and the commission.

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

(h) A provider or provider organization that meets the criteria in subsection (e) shall be presumed to have engaged, or through a material change will engage, in an unfair method of competition or unfair and deceptive trade practice subject to challenge pursuant to section 4 of chapter 93A; provided, however, that a provider or provider organization that meets the criteria of subsection (e) shall not be subject to challenge pursuant to section 9 or 11 of chapter 93A. When the commission, under subsection (f), refers a report on a provider or provider organization to the attorney general, the attorney general may take action under chapter 93A or any other law to protect consumers in the health care market. The commission's final report may be evidence in any such action.

SECTION 5. Said section 13 of chapter 6D is hereby amended by inserting the following new paragraph:-

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

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

Section 19. (a) There is hereby established within the commission a health planning council, consisting of the executive director of the health policy commission who shall serve as chair, the secretary of health and human services or a designee, the commissioner of public health or a designee, the director of the office of Medicaid or a designee, the commissioner of mental health or a designee, the commissioner of insurance or a designee, the secretary of elder affairs or a designee, the executive director of the center for health information and analysis or a

designee, and 3 members appointed by the governor, 1 of whom shall be a health economist, 1 of whom shall have experience in health policy and planning and 1 of whom shall have experience in health care market planning and service line analysis.

(b) The council shall develop a state health plan to identify: (i) the anticipated needs of the commonwealth for health care services, providers, programs and facilities; (ii) the existing health care resources available to meet those needs; (iii) the projected resources necessary to meet those anticipated needs; and (iii) the priorities for addressing those needs.

The state health plan developed by the council shall include the location, distribution and nature of all health care resources in the commonwealth and shall identify certain categories of health care resources, including: (i) acute care units; (ii) non-acute care units; (iii) specialty care units, including, but not limited to, burn, coronary care, cancer care, neonatal care, post-obstetric and post-operative recovery care, pulmonary care, renal dialysis and surgical, including trauma and intensive care units; (iv) skilled nursing facilities; (v) assisted living facilities; (vi) long-term care facilities; (vii) ambulatory surgical centers; (viii) office-based surgical centers; (ix) urgent care centers; (x) home health, (xi) adult and pediatric behavioral health and mental health services and supports; (xii) substance use treatment and recovery services; (xiii) emergency care; (xiv) ambulatory care services; (xv) primary care resources; (xvi) pediatric care services; (xvii) pharmacy and pharmacological services; (xviii) family planning services; (xix) obstetrics and gynecology and maternal health services; (xx) allied health services including, but not limited to, optometric care, chiropractic services, oral health care and midwifery services; (xxi) federally qualified health centers and free clinics; (xxii) numbers of technologies or equipment defined as innovative services or new technologies by the department of public health pursuant to section

25C of chapter 111; (xxiii) hospice and palliative care service; and (xxiv) health screening and early intervention services.

The state health plan shall also make recommendations for the appropriate supply and distribution of resources, programs, capacities, technologies and services identified in the second paragraph of this subsection on a state-wide or regional basis based on an assessment of need for the next 5 years and options for implementing such recommendations. The recommendations shall reflect, at a minimum, the following goals: (i) to maintain and improve the quality of health care services; (ii) to support the commonwealth's efforts to meet the health care cost growth benchmark established pursuant to section 9; (iii) to support innovative health care delivery and alternative payment models as identified by the commission; (iv) to reduce unnecessary duplication; (v) to address disparities in the health care system for underserved or underrepresented cultural, racial, ethnic and linguistic populations and people with disabilities; (vi) to support efforts to integrate oral health, mental health, behavioral and substance use disorder services with overall medical care; (vii) to reflect the latest trends in utilization and support the best standards of care; and (viii) to rationally and equitably distribute health care resources across geographic regions of commonwealth based on the needs of the population on a statewide basis, as well as, the needs of particular demographic factors, including, but not limited to, gender, race and ethnicity, geographic location, age, and English as a second language.

(c) The council shall provide direction to the department of public health to establish and maintain on a current basis an inventory of all such health care resources together with all other reasonably pertinent information concerning such resources. Agencies of the commonwealth that license, register, regulate or otherwise collect cost, quality or other data concerning health care resources shall cooperate with the council and the department in coordinating such data with

information collected pursuant to this section and said section 25A of said chapter 111. The inventory compiled pursuant to this section and said section 25A of said chapter 111 and all related information shall be maintained in a form usable by the general public and shall constitute a public record; provided, however, that any item of information which is confidential or privileged in nature under any other law shall not be regarded as a public record pursuant to this section.

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

(e) The council, in consultation with the commission and the department of public health, shall conduct at least 4 annual public hearings, in geographically diverse areas, during the development of the plan as proposed and shall give interested persons an opportunity to submit their views orally and in writing. In addition, the commission may create and maintain a website to allow members of the public to submit comments electronically and review comments submitted by others.

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

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

SECTION 7. Section 11N of chapter 12 of the General Laws is hereby amended by striking out subsection (b) and inserting in place thereof the following new subsection:-

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

SECTION 8. Section 25A of said chapter 111, as appearing in the 2020 Official Edition, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:-

Under the direction of the health planning council established under section 19 of chapter 6D, the department shall establish and maintain, on a current basis, an inventory of all health care resources together with all other reasonably pertinent information concerning such resources, in order to identify the location, distribution and nature of all such resources in the commonwealth.

SECTION 9. Said section 25A of said chapter 111, as so appearing, is hereby further amended by striking out, in lines 17 and 18, the words “in a designated office of the department” and inserting in place thereof the following words:- as determined by the health planning council established under section 19 of chapter 6D.

SECTION 10. Said section 25A of said chapter 111, as so appearing, is hereby further amended by striking out the fourth paragraph.

SECTION 11. Section 25C of chapter 111, as so appearing, is hereby amended by striking out subsection (g) and inserting in place thereof the following subsection:-

(g) The department, in making any determination of need, shall be guided by the state health plans and the state health resource inventory established in section 19 of chapter 6D, and shall encourage appropriate allocation of private and public health care resources and the development of alternative or substitute methods of delivering health care services so that adequate health care services will be made reasonably available to every person within the commonwealth at the lowest reasonable aggregate cost. The department shall use data from the center for health information and analysis and information and the report on the cost and market impact review delivered by the health policy commission pursuant to paragraph (l) of section 13 of chapter 6D, and shall take into account any comments from any other state agency or entity, and may impose reasonable terms and conditions as the department determines are necessary to achieve the purposes and intent of this section. The department may also recognize the special needs and circumstances of projects that: (1) are essential to the conduct of research in basic biomedical or health care delivery areas or to the training of health care personnel; (2) are unlikely to result in any increase in the clinical bed capacity or outpatient load capacity of the facility; and (3) are unlikely to cause an increase in the total patient care charges of the facility to the public for health care services, supplies, and accommodations, as such charges shall be defined from time to time in accordance with section 5 of chapter 409 of the acts of 1976.

SECTION 12. Said section 25C of said chapter 111, as so appearing, is hereby further amended by striking out subsection (i) and inserting in place thereof the following subsection:-

(i) Except in the case of an emergency situation determined by the department as requiring immediate action to prevent further damage to the public health or to a health care facility, the department shall not act upon an application for such determination unless: (1) the application has been on file with the department for at least 30 days; (2) the center for health care information and analysis, the health policy commission, the state and appropriate regional comprehensive health planning agencies and, in the case of long-term care facilities only, the department of elder affairs, or in the case of any facility providing inpatient services for the mentally ill or developmentally disabled, the departments of mental health or developmental services, respectively, have been provided copies of such application and supporting documents and given reasonable opportunity to supply required information and comment on such application; and (3) a public hearing has been held on such application when requested by the applicant, the state or appropriate regional comprehensive health planning agency, any 10 taxpayers of the commonwealth, and any other party of record as defined in section 25C¼. If, in any filing period, an individual application is filed which would implicitly decide any other application filed during such period, the department shall not act only upon an individual.

SECTION 13. Chapter 111 of the General Laws, as so appearing, is hereby amended by inserting after section 25C, the following new section.

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

"Independent community hospital," any hospital that has been designated by the health policy commission as an independent community hospital for the year in which an application for a determination of need is filed.

"Party of record", an applicant for a determination of need; the attorney general; the center for health information and analysis; the health policy commission; all government agencies with relevant oversight or licensure authority over the proposed project or components therein; any ten taxpayer groups duly registered; and an independent community hospital whose primary service area overlaps with the primary service area of the applicant's proposed project. A party of record may review the application for determination of need as well as provide written comment for consideration by the department.

"Primary service area", a primary service area shall be the contiguous geographic area from which a health care facility draws 75% of its commercial discharges, as measured by zip codes closest to the facility by drive time, and for which the facility represents a minimum proportion of the total discharges in a zip code, as determined by the department in consultation with the health policy commission and based on best available data in a methodology determined by the department in consultation with the health policy commission.

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

(b) For any application for a determination of need for which the primary service area of the proposed project overlaps with the primary service area of an existing independent community hospital, the applicant shall obtain and include in such application a letter of support from the independent community hospital's chief executive officer and board chair, provided,

however, that a proposed project that constitutes a joint venture between the applicant and the independent community hospital shall be exempt from the requirement of this subsection. The department shall conduct a preliminary review of applications to determine compliance with this subsection. If the department determines that an application is not in compliance, the department shall identify to the applicant any independent community hospital whose support is required by this subsection, and dismiss said application without prejudice. If the department fails to conduct a preliminary review of an application or fails to dismiss an application that does not satisfy the requirements of this subsection, the independent community hospital whose primary service area overlaps with the primary service area of the proposed project may, within a reasonable period of time, bring an action in the nature of mandamus in the superior court to require the department to act in accordance with this subsection.

SECTION 14. Section 25F of chapter 111, as so appearing, is hereby amended by inserting after the word “care”, in line 7, the following word:- financing.

SECTION 15. Section 25G of chapter 111, as so appearing, is hereby amended by inserting after the word “agency”, in line 3, the following words:- , an independent community hospital whose primary service area overlaps with the primary service area of a proposed project under section 25C¼.

SECTION 16. (a) Notwithstanding any general or special law, rule or regulation to the contrary, an applicant for a determination of need whose filing date of such application precedes the effective date of this act shall be required to submit a notice of a material change pursuant to section 13 of chapter 6D if the holder of the determination of need is subject to the requirements of said section 13 of said chapter 6D as amended by this act.

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

SECTION 17. Notwithstanding any general or special law to the contrary, the health planning council shall submit a state health plan to the governor and the general court, as required by section 20 of chapter 6D of the General Laws, on or before January 1, 2023.