

MAINE STATE LEGISLATURE

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1 (New Draft of S.P. 781, L.D. 1965)
2 SECOND REGULAR SESSION
3

4 ONE HUNDRED AND TWELFTH LEGISLATURE
5

6 Legislative Document

No. 2372

8 S.P. 946

In Senate, April 11, 1986

9 Reported by Senator Gauvreau of Androscoggin from the Committee on
10 Human Resources and printed under Joint Rule 2. Original bill sponsored by
11 Senator Twitchell of Oxford. Cosponsored by Representative Crowley of
Hancock. Representative Taylor of Camden and Senator Perkins of

JOY J. O'BRIEN, Secretary of the Senate

12
13 STATE OF MAINE
14

15 IN THE YEAR OF OUR LORD
16 NINETEEN HUNDRED AND EIGHTY-SIX
17

18 AN ACT to Amend the Maine Health Care Finance
19 Commission Laws with Respect to the
20 Certificate of Need Development
21 Account, Recognition of Certain
22 Operating Costs, Repeal of Provisions
23 Governing Reorganizations and
24 Affiliated Interests, Streamlining of
25 Procedure and for Other Purposes.
26

27 Be it enacted by the People of the State of Maine as
28 follows:

29 Sec. 1. 22 MRSA §388, sub-§1, as enacted by PL
30 1983, c. 579, §10, is repealed and the following en-
31 acted to read:

32 1. Annual reports. The commission shall prepare
33 the following annual reports.

34 A. Prior to January 1st, the commission shall
35 prepare and transmit to the Governor and to the

1 Legislature a report of its operations and activ-
2 ities during the previous year. This report shall
3 include such facts, suggestions and policy recom-
4 mendations as the commission considers necessary.

5 B. The commission shall prepare a report of the
6 annual savings to the payors as a result of this
7 chapter and shall submit this report annually to
8 the Bureau of Insurance. The Bureau of Insurance
9 shall take this savings into account in approving
10 health insurance rates. A copy of this report
11 shall be submitted to the joint standing commit-
12 tee of the Legislature having jurisdiction over
13 human resources.

14 Sec. 2. 22 MRSA §388, sub-§2, as enacted by PL
15 1983, c. 579, §10, is amended to read:

16 2. Reports to legislative committee. While the
17 Legislature is in session, the commission or its
18 staff shall, upon request of the joint standing com-
19 mittee of the Legislature having jurisdiction over
20 health and institutional services human resources,
21 appear before the committee to discuss its annual
22 report reports and any other items requested by the
23 committee.

24 Sec. 3. 22 MRSA §396-D, sub-§8, ¶D, as enacted
25 by PL 1983, c. 579, §10, is amended to read:

26 D. A reorganization hospital restructuring, as
27 defined pursuant to section 396-L.

28 Sec. 4. 22 MRSA §396-D, sub-§9, ¶D is enacted to
29 read:

30 D. In determining payment year financial re-
31 quirements, the commission shall include an ad-
32 justment to reflect the reasonable costs, includ-
33 ing reasonable attorneys' fees, incurred by a
34 hospital to prosecute an appeal of a commission
35 decision pursuant to section 397, subsection 4,
36 provided that the adjustment shall reflect only
37 those reasonable costs that are associated with
38 the issues on which the hospital has prevailed in
39 court, including costs associated with presenting
40 those issues to the commission in the case from

1 which the appeal was taken. The commission shall
2 make an adjustment under this paragraph only to
3 the extent that the costs found to be reasonable
4 are not otherwise included in financial require-
5 ments.

6 Sec. 5. 22 MRSA §396-L, as enacted by PL 1983,
7 c. 579, §10, is repealed and the following enacted to
8 read:

9 §396-L. Affiliated interests

10 1. Definitions. As used in this section, unless
11 the context otherwise indicates, the following terms
12 have the following meanings.

13 A. "Affiliated interest" means:

14 (1) Any person who is a subsidiary of a
15 hospital;

16 (2) Any person who is a parent entity of a
17 hospital;

18 (3) Any person who is a subsidiary of a
19 hospital's parent entity;

20 (4) Any person, other than an individual,
21 who:

22 (a) Controls a hospital or which a
23 hospital, or any of its affiliates as
24 defined in subparagraphs (1) to (3),
25 controls; and

26 (b) Which is engaged directly or indi-
27 rectly in the provision of a health
28 care service or services, the costs of
29 which would be considered elements of
30 financial requirements if performed by
31 a hospital.

32 B. "Available assets" means the sum of
33 board-designated funds and current assets less
34 inventories and net receivables.

35 C. For purposes of paragraph A, to "control"
36 means both:

1 (1) To have power, alone or in concert with
2 other hospitals or affiliated interests, to
3 direct the management and policies of another
4 person, other than an individual; and

5 (2) To have that power by means of any one
6 of the following or any combination of the
7 following:

8 (a) Common governing board members;

9 (b) Articles of incorporation, by-
10 laws, partnership agreements, con-
11 tracts, deeds, trust documents, assign-
12 ments, leases or other legal documents;
13 or

14 (c) In the case of a for-profit corpo-
15 ration, ownership of 10% or more of the
16 corporation's voting securities, di-
17 rectly, indirectly or by a chain of
18 successive ownership.

19 "Control" does not include the power to determine
20 terms, conditions and prices only through an
21 arms-length contract for the purchase of goods or
22 services, such as a contract for professional
23 services or the power to direct management and
24 policies only through canonical or similar reli-
25 gious control.

26 D. "Hospital-capitalized affiliate" means any
27 affiliated interest that was capitalized, in
28 whole or in part, by transfers of assets from a
29 hospital or another hospital-capitalized affili-
30 ate, unless one of the following applies:

31 (1) The affiliated interest has returned to
32 the hospital, with interest at a market
33 rate, all assets transferred to it by the
34 hospital or another hospital-capitalized af-
35 filiate;

36 (2) All of the assets transferred to the
37 affiliated interest by the hospital or
38 hospital-capitalized affiliate were exempt
39 under subsection 4, paragraph F; or

1 (3) The total assets received by the affil-
2 iated interest from the hospital or any
3 hospital-capitalized affiliate do not exceed
4 \$10,000.

5 E. "Hospital restructuring" means any one of the
6 following:

7 (1) Transfer of any assets of a hospital or
8 hospital-capitalized affiliate to any per-
9 son, provided that the transfer of assets to
10 a title-holding company within the meaning
11 of the United States Internal Revenue Code,
12 Section 501, paragraph C, subparagraph (2),
13 that holds property on behalf of the trans-
14 fer or shall not be considered a hospital
15 restructuring;

16 (2) Pledge of a hospital's assets or credit
17 or pledge of the assets or credit of a
18 hospital-capitalized affiliate, to secure
19 the financial obligation of another person;

20 (3) Transfer of an existing service or
21 function, directly or indirectly, by a hos-
22 pital to an affiliated interest or an entity
23 which, as a result of the transfer would be-
24 come an affiliated interest;

25 (4) Undertaking by an affiliated interest
26 or an entity which as a result of the under-
27 taking would become an affiliated interest
28 of any health care service whose associated
29 costs would be considered elements of finan-
30 cial requirements if performed by a hospi-
31 tal;

32 (5) Entry of a hospital or
33 hospital-capitalized affiliate into a part-
34 nership as a general partner or any similar
35 act by means of which a hospital or
36 hospital-capitalized affiliate assumes or
37 acquires general liability or responsibility
38 for the obligations, acts or omissions of a
39 business venture other than one undertaken
40 solely by the hospital;

1 (6) Creation, organization, acquisition or
2 transfer, directly or indirectly, of a sub-
3 subsidiary of a hospital;

4 (7) Creation or organization, directly or
5 indirectly, of a parent entity of a hospital
6 by any means, including without limitation,
7 the acquisition by any person of ownership
8 or control of a hospital or its existing
9 parent entity; and

10 (8) Merger of a hospital or its parent en-
11 tity with any person or any transaction
12 functionally equivalent to a merger.

13 F. "Related party" means any person, other than
14 an affiliated interest as defined in paragraph A,
15 that would be considered related to the hospital,
16 as defined under the Medicare program established
17 pursuant to the United States Social Security
18 Act, Title XVIII.

19 G. "Significant transaction" means a transaction
20 if it has an actual or imputed value or worth in
21 excess of \$10,000 or more for a fiscal year or if
22 the total amount of the contract price, consider-
23 ation and other advances by the institution on
24 account of the transactions is \$10,000 or more
25 for the fiscal year.

26 H. "Subsidiary" means a person over which another
27 person exercises majority control by virtue of
28 voting stock of a for-profit corporation or vot-
29 ing members of a not-for-profit corporation.

30 I. "Transfer of assets," for purposes of para-
31 graphs D and E, means any transaction if, and to
32 the extent that, the fair market value of any as-
33 sets conveyed by the hospital or
34 hospital-capitalized affiliate in that transac-
35 tion exceeds the value of any consideration re-
36 ceived by the hospital or hospital-capitalized
37 affiliate. Transfers of assets under this defi-
38 nition include loans at interest rates below mar-
39 ket levels.

1 2. Reporting and consideration of significant
2 transactions; corporate plans. Statements of signifi-
3 cant transactions and corporate plans shall be sub-
4 mitted and considered as follows.

5 A. Each hospital shall annually submit to the
6 commission a written statement of significant
7 transactions, as defined in subsection 1, between
8 itself and any person in which an officer, trust-
9 ee or director of a hospital is an employee,
10 partner, director, officer or beneficial owner of
11 3% or more of the capital stock, between itself
12 and any affiliated interest, between itself and
13 any auxiliary, or between itself and any related
14 party.

15 B. In determining base year financial require-
16 ments pursuant to section 396-B or in establish-
17 ing adjustments for productivity or other factors
18 pursuant to section 396-D, the commission may
19 disregard unreasonable or unnecessary costs under
20 significant transactions between a hospital and
21 the persons specified in paragraph A.

22 C. Each hospital which has or will have affili-
23 ated interests, and which has not elected to de-
24 termine the resources available from those affil-
25 iates under subsection 5, paragraph C, shall
26 file, at such time as may be reasonably estab-
27 lished by the commission, a 5-year corporate
28 plan containing information as specified by the
29 commission. At a minimum, the plan shall set
30 forth the manner in which financial resources of
31 the affiliated interests will be applied to off-
32 set financial requirements of the hospital in ac-
33 cordance with subsection 5 and section 396-E,
34 subsection 1, paragraph G. The commission shall
35 review and approve or disapprove each corporate
36 plan taking into account, at a minimum, the fol-
37 lowing factors as the commission deems appropri-
38 ate in the interests of the people of the State:

39 (1) Long-term capital and operating needs
40 of the affiliated interests to meet market
41 conditions and achieve reasonable growth;

42 (2) Federal reimbursement and burdens im-
43 posed on other payors;

1 (3) The effect which the services of the
2 affiliated interests would have on the qual-
3 ity and efficiency of health services; and

4 (4) Requirements associated with maintain-
5 ing tax-exempt status.

6 The hospital shall submit annual updates of its
7 corporate plan which shall not require approval
8 unless significant modifications are made to the
9 plan. Notwithstanding the provisions of section
10 387, confidential commercial information submit-
11 ted by a hospital or its affiliates under this
12 paragraph or under subsection 4 shall not be sub-
13 ject to public disclosure. The commission shall
14 adopt rules establishing criteria for determining
15 the confidentiality of such information and es-
16 ablishing procedures to afford hospitals and af-
17 filiated interests notice and opportunity to com-
18 ment in response to requests for information
19 which may be considered confidential.

20 3. Access to accounts and records. The commis-
21 sion may require the production of books, accounts,
22 records, papers and memoranda of an auxiliary which
23 is engaged in commercial activities or of an affili-
24 ated interest or related party which relate, directly
25 or indirectly, to any of its dealings with a hospital
26 which affect the hospital's costs or charges. The
27 commission may, in determining financial requirements
28 of a hospital, disallow all or a portion of the pay-
29 ments under such dealings, the account or record of
30 which is not made available to the commission.

31 4. Hospital restructuring. Unless exempt by
32 rule or order of the commission or by paragraph F, no
33 hospital restructuring may take place without the ap-
34 proval of the commission. No hospital restructuring
35 may be approved by the commission unless it is estab-
36 lished by the applicant for approval that the hospi-
37 tal restructuring is consistent with the interests of
38 the people of the State.

39 A. The following procedures shall apply to an
40 application for approval of a hospital
41 restructuring.

1 (1) Except as provided in subparagraph (2),
2 the commission shall rule upon all requests
3 for approval of a hospital restructuring
4 within 90 days of the filing date. The fil-
5 ing date shall be the date when the commis-
6 sion notifies the applicant that the filing
7 is complete.

8 (2) If the commission deems that the neces-
9 sary investigation cannot be concluded with-
10 in 90 days after the filing date, the com-
11 mission may extend the period for a further
12 period of no more than 90 days. If the com-
13 mission fails to make a final ruling on or
14 before the end of the 2nd 90-day period or
15 such later date as may be fixed by agreement
16 of all parties, the application shall be
17 deemed disapproved.

18 (3) Review of hospital restructurings that
19 are also subject to review under the Maine
20 Certificate of Need Act shall, to the maxi-
21 imum extent practicable, be conducted simul-
22 taneously with the department's review under
23 the Act.

24 B. In granting its approval, the commission
25 shall impose such terms, considerations or re-
26 quirements as, in its judgment, are necessary to
27 protect the interests of payors and purchasers.
28 These conditions shall include provisions which
29 assure the following.

30 (1) The commission has reasonable access to
31 books, records, documents and other informa-
32 tion relating to the hospital or any of its
33 affiliates.

34 (2) The commission has all reasonable pow-
35 ers to detect, identify, review and approve
36 or disapprove, costs associated with trans-
37 actions between affiliated interests.

38 (3) The hospital's ability to attract capi-
39 tal on reasonable terms, including the main-
40 tenance of a reasonable capital structure,
41 is not impaired.

1 (4) The ability of the hospital to provide
2 reasonable and adequate care is not im-
3 paired.

4 (5) The hospital continues to be subject to
5 applicable laws, principles and rules gov-
6 erning the regulation of hospitals.

7 (6) The hospital's credit is not impaired
8 or adversely affected.

9 (7) The requirements of subsection 5 will
10 be met.

11 C. The commission may adopt rules providing for
12 the filing by hospitals of information by means
13 of which the commission may verify that acts or
14 events that require approval under this subsec-
15 tion are not occurring without such approval.
16 This rule-making authority shall not be construed
17 to permit general review of the prudence of ordi-
18 nary hospital investments of endowments.

19 D. For purposes of this subsection, the commis-
20 sion shall review a filing and, if additional in-
21 formation is necessary to determine the filing
22 complete, shall make its initial request for such
23 additional information within 30 days of its re-
24 ceipt of the filing and shall make any subsequent
25 requests within 15 days of its receipt of the
26 previously requested information.

27 E. Any hospital or affiliated interest of a hos-
28 pital may apply to the commission for an advance
29 determination as to the applicability of this
30 subsection to a particular set of facts. The
31 commission shall issue such an advance determina-
32 tion within 30 days of the filing of a complete
33 request. A completed request is one containing
34 such information as the commission may specify by
35 rule and with respect to which the requesting
36 party has given such reasonable notice to other
37 affected persons as may be required by commission
38 rule.

39 F. A hospital or hospital-capitalized affiliate
40 may engage in a hospital restructuring without
41 commission approval if:

1 (1) The hospital restructuring is a trans-
2 fer or pledge that falls solely within sub-
3 section 1, paragraph E, subparagraph (1) or
4 (2); and

5 (2) The aggregate value of all such trans-
6 fers and pledges, as of the time immediately
7 following the hospital restructuring, does
8 not exceed 10% of the lesser of the net
9 worth or the available assets of the hospi-
10 tal or hospital-capitalized affiliate, as
11 determined as of the end of the most recent
12 fiscal year for which a complete financial
13 statement is available prior to the
14 restructuring.

15 5. Determination of available resources; exemp-
16 tion from corporate plan requirement. Unless a hos-
17 pital has elected to have available resources deter-
18 mined under paragraph C, such resources shall be de-
19 termined under paragraph B.

20 A. For purposes of this subsection, the
21 "hospital's portion" shall be the proportion of
22 the total capitalization of the affiliated inter-
23 est that is owned by or was provided by the hos-
24 pital and any hospital-capitalized affiliate.

25 B. After review of corporate plans submitted in
26 accordance with subsection 2, the commission
27 shall, consistent with the following provisions,
28 determine the amount of financial resources of an
29 affiliated interest to be applied to hospital fi-
30 nanical requirements pursuant to section 396-E.

31 (1) Gifts, grants and income from invest-
32 ments received by affiliated interests shall
33 not be considered available resources.

34 (2) The hospital's portion of excess reve-
35 nuues of nonprofit affiliated interests and
36 the hospital's portion of profits of
37 for-profit affiliated interests shall be
38 offset, except to the extent that the reten-
39 tion of such funds by the affiliated inter-
40 est is required to meet its capital and op-
41 erating needs as defined in the plan submit-

1 ted to and approved by the commission pursu-
2 ant to subsection 2. The amount of the ex-
3 cess revenues or profits shall be determined
4 without regard to any gifts, grants or other
5 transfers of funds by the affiliated inter-
6 est to the hospital or to other affiliates
7 but shall otherwise be determined on a con-
8 solidated after-tax basis.

9 (3) Of the amounts determined under subpar-
10 agraph (2), 50% shall be offset generally
11 against hospital financial requirements.

12 C. A hospital may elect not to file corporatē
13 plans and updates under subsection 2. A hospital
14 that makes such an election shall annually file
15 complete financial statements of each of its af-
16 filiated interests and, if available, audited,
17 consolidated financial statements with the com-
18 mission. Available resources from the affiliated
19 interests of a hospital that makes an election
20 under this paragraph shall be determined as fol-
21 lows: Fifty percent of the hospital's portion of
22 all excess revenues of nonprofit affiliated in-
23 terests and 50% of the hospital's portion of all
24 profits of for-profit affiliated interests shall
25 be applied to hospital financial requirements.
26 In determining total profits or excess revenues,
27 the commission may consider the reasonableness of
28 reported expenses. The amount of excess revenues
29 or profits shall be determined without regard to
30 any gifts, grants or other transfers of funds by
31 the affiliated interest to the hospital or to
32 other affiliates but shall otherwise be deter-
33 mined on a consolidated after-tax basis. Gifts,
34 grants, and income from investments received by
35 affiliated interests shall not be considered
36 available resources.

37 6. By November 1, 1986, the commission shall
38 adopt rules governing hospital restructuring and sig-
39 nificant transactions as defined in this chapter, in-
40 cluding, but not limited to, rules addressing the
41 following subjects:

42 A. The nature and format of applications for
43 hospital restructuring;

- 1 B. The content of requests for advance determi-
2 nations under subsection 4, paragraph E, and the
3 procedure governing such determinations;
- 4 C. A mechanism for providing and updating a list
5 of entities or corporations to which the signifi-
6 cant transactions reporting requirements in sub-
7 section 2, paragraph A, apply;
- 8 D. The information filings referred to in sub-
9 section 4, paragraph C; and
- 10 E. The filing of corporate plans under subsec-
11 tion 2, paragraph C.

12 Sec. 6. 22 MRSA §396-P, sub-§5 is enacted to
13 read:

14 5. Participation in rulemaking. The chairman of
15 each of the 3 advisory committees or another commit-
16 tee member designated by the chairman shall be enti-
17 tled to participate, in the manner of an ex officio
18 nonvoting member, solely with respect to delibera-
19 tions and actions of the commission directly related
20 to the formulation and adoption of rules, but includ-
21 ing neither deliberations and actions which are prop-
22 erly conducted in executive session nor deliberations
23 and actions with respect to which the commission de-
24 termines that one or more of the advisory committee
25 chairmen has a conflict of interest. This section
26 may not be construed to authorize participation in
27 deliberations and actions of the commission related
28 to the application or enforcement of rules.

29 Sec. 7. 22 MRSA §398, sub-§4 is enacted to read:

30 4. Informal participation in commission deliber-
31 ations on rulemaking. The commission, in its discre-
32 tion, shall permit informal participation of members
33 of the public and representatives of affected groups
34 in its deliberations relating to rulemaking. This
35 participation is limited solely to matters which
36 clarify the deliberations.

37

FISCAL NOTE

1 L.D. 1965 will have no immediate fiscal impact on
2 the General Fund. It narrows the definition of af-
3 filiated hospital interests and provides for future
4 state reimbursement of attorney fees incurred during
5 hospital-favored appeals of the Health Care Finance
6 Commission decisions. This in effect would raise the
7 hospital revenue ceiling in the following year's bud-
8 get and increase the state Medicaid reimbursement
9 costs. However, an estimated fiscal impact of this
10 legislation is as yet indeterminable as no appeal de-
11 cisions have yet been rendered.

12 STATEMENT OF FACT

13 This new draft replaces the original bill. It
14 amends the provisions of the original bill as fol-
15 lows.

16 1. It allows an adjustment to a hospital's fi-
17 nancial requirements for reasonable costs associated
18 with a successful appeal of a commission decision.
19 The costs allowed are limited to those associated
20 with the issues on which the hospital has prevailed
21 in court but include the costs associated with pre-
22 senting those same issues to the commission in the
23 case from which the appeal was taken.

24 2. Instead of repealing section 396-L of the
25 Health Care Finance Act, concerning affiliated inter-
26 ests, as the original bill proposed, amends that sec-
27 tion to provide hospitals with greater flexibility in
28 developing new ventures that are not related to the
29 hospital and to improve the ability of hospitals to
30 predict the extent to which the affiliated interests'
31 regulations will apply to particular ventures that
32 they may be planning. This is accomplished by amend-
33 ments that:

34 A. Narrow the definition of "affiliated inter-
35 ests" to exclude entities that are not
36 subsidiaries and do not perform hospital services;

37 B. Define "control" to limit the number of enti-
38 ties that may be considered affiliated interests
39 by imposing a 2-part test that must be met before

1 the commission can find that a hospital controls
2 another organization;

3 C. Replace the broad definition of reorganiza-
4 tion, which included both the creation and the
5 extension of any affiliated interests, with a
6 narrower definition of "hospital restructuring"
7 that limits the scope of the commission's prior
8 approval authority to those transactions and cor-
9 porate changes that have a significant effect on
10 the interests protected by the Health Care Fi-
11 nance Act. This change clarifies the commis-
12 sion's authority in areas of greatest importance
13 while eliminating the overbreadth of the earlier
14 definition and the uncertainty of hospitals with
15 respect to how it might be interpreted;

16 D. Exempt from the prior approval requirement
17 the transfer of assets by a hospital, so long as
18 it either receives fair value in return or, if it
19 does not, that the transfer is within certain
20 dollar limits that protect financial integrity
21 and viability of the hospital;

22 E. Establish procedures for hospitals to obtain
23 an early determination of the applicability of
24 the affiliated interests' statute to contem-
25 plated, new ventures;

26 F. Add constraints on the time that the commis-
27 sion may consume in gathering the information
28 necessary to process an application for approval
29 of a hospital restructuring;

30 G. Allow hospitals to elect not to file the cor-
31 porate plan required under existing law, if they
32 choose a simplified method of determining the
33 available resources from their affiliated inter-
34 ests; and

35 H. Require the commission to adopt rules, by No-
36 vember 1, 1986, that will assist affected persons
37 in complying with and predicting the applicabili-
38 ty of the affiliated interest provisions of the
39 statutes.

1 3. It retains the provisions authorizing the
2 chairs of the 3 advisory committees, or their desig-
3 nees, to participate informally in rulemaking; but
4 amends that provision to exclude circumstances when
5 one or more of the chairmen has a conflict of inter-
6 est.

7 4. It retains the provision allowing the partic-
8 ipation by members of the public and representatives
9 of affected groups to informally participate in rule-
10 making deliberations of the commission, but amends
11 that provision to limit that participation to matters
12 which clarify the deliberations.

13 5. It deletes all the other provisions of the
14 original bill; and

15 6. It adds a new provision to require the Health
16 Care Finance Commission to report annually to the Bu-
17 reau of Insurance regarding the savings to the payors
18 as a result of the Health Care Finance Commission
19 Act. This report shall be considered by the Bureau
20 of Insurance in approving health insurance rates.
21 The Joint Standing Committee of the Legislature on
22 Human Resources will receive a copy of this report.

23 7154040986