# 114th MAINE LEGISLATURE

## SECOND REGULAR SESSION - 1990

**Legislative Document** **No. 2435**

H.P. 1767 House of Representatives, March 15, 1990

Reported by Representative CLARK for the Commission to Study the Certificate of Need Law and the Impact of Competitive Market Forces on Ambulatory Health Services pursuant to Public Law 1989, chapter 588, Part A, section 56.

Reference to the Joint Standing Committee on Human Resources suggested and printing ordered under Joint Rule 18.

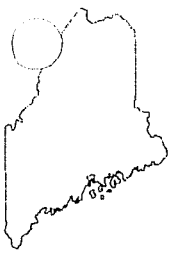
Ed Pert

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

**An Act to Modify the Applicability of the Certificate of Need Program to Hospitals and to Exempt Certain Hospital Restructuring Activities from the Requirement of Approval by the Maine Health Care Finance Commission.**



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

**Sec. 1. 22 MRSA §304-A, first ¶,** as enacted by PL 1981, c. 705, Pt. V, §16, is amended to read:

No person may enter into any commitment for financing a project ~~which~~ that requires a certificate of need or incur an obligation for the project without having sought and received a certificate of need, except that this prohibition ~~shall~~ does not apply to commitments for financing conditioned upon the receipt of a certificate of need or to obligations for predevelopment activities of less than $150,000 for health care facilities other than hospitals or $250,000 for hospitals.

**Sec. 2. 22 MRSA §304-A, sub-§2,** as amended by PL 1987, c. 363, §§1 and 2, is further amended to read:

**2. Acquisitions of major medical equipment.** The following acquisitions:

A. The acquisition by any person other than a hospital of major medical equipment that will be owned by or located in a health care facility; ~~or~~

B. The acquisition by any person of major medical equipment not owned by or located in a health care facility if:

(1) The equipment will not be used to provide services for inpatients of a hospital, but the person fails to file a written notice of intent to acquire the equipment at least 60 days prior to entering into a contract to acquire the equipment; or

(2) The department finds, within 30 business days after the date it receives a written notice of intent to acquire the equipment, that the equipment will be used to provide services for inpatients of a hospital~~.~~ ; or

C. The acquisition by a hospital of major medical equipment with a cost of $1,000,000 or more that will be owned by or located in a health care facility and:

(1) Will be used to provide services for inpatients in at least 20% of the cases for which the equipment is utilized; or

(2) Will be used to provide services for inpatients in less than 20% of the cases for which the equipment is utilized and the hospital seeks recognition of additional financial requirements associated with such equipment.

This paragraph is repealed on October 1, 1995; or

D. Effective October 1, 1995, the acquisition by a hospital of major medical equipment with a cost of $1,000,000 or more.

There ~~shall be~~ is a waiver for the use of major medical equipment on a temporary basis as provided in section 308, subsection 4;

**Sec. 3. 22 MRSA §304-A, sub-§3,** as amended by PL 1987, c. 436, §1, is further amended to read:

**3. Capital expenditures.** The obligation by or on behalf of a health care facility, except a skilled or intermediate care facility or hospital, of any capital expenditure of $350,000 or more. Intermediate care and skilled nursing care facilities ~~shall~~ have a threshold of $500,000, except that any transfer of ownership ~~shall be~~ is reviewable;

**Sec. 4. 22 MRSA §304-A, sub-§3-A** is enacted to read:

**3-A. Hospital capital expenditures.** The obligation, by or on behalf of a hospital, of any capital expenditure of $1,000,000 or more related to the acquisition, construction or improvement of buildings or fixed equipment, except that any transfer of ownership of a hospital is reviewable;

**Sec. 5. 22 MRSA §304-A, sub-§§5 and 6,** as enacted by PL 1981, c. 705, Pt. V, §16, are amended to read:

**5. Termination of a health service.** The obligation of any capital expenditure by or on behalf of a health care facility ~~which~~ other than a hospital that is associated with the termination of a health service ~~which~~ that was previously offered by or on behalf of the health care facility;

**6. Changes in bed complement.** Any change in the existing bed complement of a health care facility other than a hospital, in any 2-year period, ~~which~~ that:

A. Increases or decreases the licensed or certified bed capacity of the health care facility by more than 10% or more than 5 beds, whichever is less;

B. Increases or decreases the number of beds licensed or certified by the department to provide a particular level of care by more than 10% of that number or more than 5 beds, whichever is less; or

C. Relocates more than 10% of the health care facility's licensed or certified beds or more than 5 beds, whichever is less, from one physical plant to another;

**Sec. 6. 22 MRSA §304-A, sub-§6-A** is enacted to read:

**6-A. Increases in licensed bed capacity of a hospital.** Any change in the existing bed complement of a hospital, in any 2-year period, that:

A. Increases the licensed or certified bed capacity of the hospital by more than 10% or more than 5 beds, whichever is less; or

B. Increases the number of beds licensed or certified by the department to provide a particular level of care by more than 10% of that number or more than 5 beds, whichever is less;

**Sec. 7. 22 MRSA §304-A, sub-§7,** as enacted by PL 1981, c. 705, Pt. B, §16, is amended to read:

**7. Predevelopment activities.** Any appropriately capitalized expenditure of $150,000 or more or, in the case of hospitals, $250,000 or more for predevelopment activities proposed to be undertaken in preparation for any project ~~which~~ that would itself require a certificate of need;

**Sec. 8. 22 MRSA §382, sub-§9-A** is enacted to read:

**9-A. Outpatient services.** "Outpatient services" means all therapeutic or diagnostic health care services rendered to a person who has not been admitted to a hospital as an inpatient.

**Sec. 9. 22 MRSA §3396-L, sub-§2, ¶B-1** is enacted to read:

B-1. As a result of its review of significant transactions reported pursuant to paragraph A, or its examination of significant transactions in the course of any proceeding to determine hospital financial requirements, the commission may, with respect to the significant transactions between hospitals and affiliated interests, establish reasonable limits on the actual prices paid by hospitals or charged by hospitals. The commission may not exercise this authority with respect to transfers and pledges that are exempt from commission review under subsection 4, paragraph F.

**Sec. 10. 22 MRSA §396-L, sub-§4, ¶H** is enacted to read:

H. A hospital participating in the rate per case payment system or a hospital-capitalized affiliate of a hospital participating in the rate per case payment system may engage in a hospital restructuring without commission approval unless:

(1) The hospital restructuring involves the transfer of an existing hospital patient care service, or the undertaking by an affiliated interest of a hospital patient care service that is not an outpatient service; or

(2) The hospital restructuring involves a transfer or pledge of assets that is not exempt from approval under paragraph F.

As a condition to the transfer of any hospital assets under this paragraph, and without regard to whether prior approval is necessary, the commission shall require that provision be made for a fair return on the hospital's investment. In cases of transfers where prior commission approval is not required, the hospital shall file a notice setting forth the nature of the transfer and documentation of the provision of a fair return to the hospital.

In cases where a hospital previously participating in the rate per case payment system seeks entry into the total revenue system, the commission has the authority to review those hospital restructurings carried out pursuant to this paragraph that have not been reviewed and approved previously by the commission. As a consequence of that review, the commission may attach conditions to the transfer of the hospital to the total revenue system that it determines consistent with the interest of the people of the State. These conditions may include a condition requiring divestiture of affiliated interests created in accordance with this paragraph, or reinclusion of services provided by those affiliated interests into the hospital corporation.

**Sec. 11. 22 MRSA §396-L, sub-§7** is enacted to read:

**7. Cross-subsidy prohibited.** Subsidy of affiliated interests by hospitals is limited in accordance with the following provisions.

A. No hospital or hospital-capitalized affiliate may transfer assets to or otherwise subsidize the operation of any affiliated interest, except to the extent that:

(1) The activities of the affiliated interest and any subsidies of them have been expressly approved by the commission in the course of a proceeding to approve an application for restructuring under subsection 4; or

(2) The transfer or pledge, as applicable, is exempt from commission review subject to subsection 4, paragraph F.

B. For purposes of this subsection, the term "otherwise subsidize" means:

(1) In the case of goods or services, leasehold interest, other property interests or other consideration provided by the affiliate to the hospital, that the payment or the consideration from the hospital to the affiliate exceeds the least of:

(a) The prices charged by the affiliate to other customers in arms-length transactions;

(b) The cost to the hospital of providing such goods or services directly; or

(c) The cost to the hospital of purchasing the goods, services, property interests or consideration from another entity; or

(2) In the case of goods or services, leasehold interests, other property interests or other consideration provided by the hospital to the affiliate, that the payment or other consideration from the affiliate to the hospital is less than the greater of:

(a) The prices charged by the hospital to other customers in arms-length transactions; or

(b) The cost to the hospital of providing such goods or services.

**Sec. 12. 22 MRSA §1715** is enacted to read:

**§1715. Access requirements applicable to certain health care providers**

**1. Access requirements.** Any person, including, but not limited to an affiliated interest as defined in section 396-L, that is subject to the requirements of this subsection, shall provide services to individuals who are eligible for charity care in accordance with a charity care policy adopted by the affiliate or provider that is consistent with regulations applicable to hospitals under section 396-F. A person is subject to this subsection if that person:

A. Is either a direct provider of major ambulatory service, as defined in section 382, subsection 8-A, or is or has been required to obtain a certificate of need under the former section 304 or 304-A;

B. Provides outpatient services as defined in section 382, subsection 9-A; and

C. Provides one or more of the following services:

(1) Imaging services, including, but not limited to, magnetic resonance imaging, computerized tomography, mammography and radiology. For purposes of this section, imaging services do not include those where:

(a) The services are owned by a community health center, a physician or group of physicians;

(b) The services are offered solely to the patients of the center, the physician or group of physicians; and

(c) Referrals for the purpose of performing such services are not accepted from other physicians;

(2) Laboratory services performed by a hospital or by a medical laboratory licensed in accordance with the Maine Medical Laboratory Commission, or licensed by an equivalent out-of-state licensing authority, excluding those licensed laboratories owned by community health centers, a physician or group of physicians where the laboratory services are offered solely to the patients of the center, the physician or group of physicians;

(3) Cardiac diagnostic services, including cardiac catheterization and angiography but excluding electrocardiograms and electrocardiograph stress testing;

(4) Lithotripsy services;

(5) Services provided by free-standing ambulatory surgery facilities certified to participate in the Medicare program; or

(6) Any other service performed in an outpatient setting requiring the purchase of new equipment costing $500,000 or more or for which the charge per unit of service in $250 or more.

**2. Enforcement.** The requirements of subsection 1 are enforced through the following mechanisms.

A. Any person who knowingly violates any provision of this section or any valid order or rule made or promulgated pursuant to section 396-F, or who willfully fails, neglects or refuses to perform any of the duties imposed under this

section, commits a civil violation for which a forfeiture of not less than $200 and not more than $500 per patient may be adjudged with respect to each patient denied access unless specific penalties are elsewhere provided. Any forfeiture imposed under this section may not exceed $5,000 in the case of the first judgment under this section against the provider, $7,500 in the case of a 2nd judgment against the provider or $10,000 in the case of the 3rd or subsequent judgment against the provider. The Attorney General is authorized to prosecute the civil violations.

B. Upon application of the Attorney General or any affected patient, the Superior Court or District Court has full jurisdiction to enforce the performance by providers of health care of all duties imposed upon them by this section and any valid regulations adopted pursuant to section 396-F.

C. In any civil action under this section, the court, in its discretion, may allow the prevailing party, other than the Attorney General, reasonable attorney's fees and costs and the Attorney General is liable for attorney's fees and costs in the same manner as a private person.

**Sec. 13. PL 1989, c. 588, Pt. A, §56, sub-§1, ¶B** is amended by inserting after the 2nd sentence a new sentence to read:

Its study must also include evaluation of methods of sizing the Hospital Development Account.

**Sec. 14. Study.** The Commission to Study Certain Provisions of the Certificate of Need Law is established to carry out certain activities from July 1, 1994, through January 15, 1995.

1. Beginning after July 1, 1994, the study commission shall review the provisions of law relating to the acquisition of major medical equipment on the part of hospitals, and the use of that equipment to provide services on an inpatient or outpatient basis. In particular, the study commission shall review the impact of certain changes to the Maine Revised Statutes, Title 22, section 304-A, subsection 2, which is effective October 1, 1991, with respect to the coverage of major medical equipment and the exemption from review of certain equipment utilized principally for the provision of outpatient services. Its study must include an evaluation of and recommendation regarding the merit of extending regulatory treatment of outpatient equipment beyond October 1, 1995, the date on which a sunset revision is scheduled to occur pursuant to section 2 of this Act. The study commission shall also review the provisions of law relating to health services planning, including those portions of the certificate of need laws and the health care finance laws relating to the Hospital Development Account. This study must consider data available regarding the experiences of hospitals under these provisions during the first 2 years of their

effectiveness. The study commission shall submit its recommendations, including any necessary implementing legislation, to the Joint Standing Committee on Human Resources by January 15, 1995.

2. The study commission is composed of 13 members. The President of the Senate shall appoint one Senator, one hospital official and one consumer member representing business. The Speaker of the House of Representatives shall appoint 2 members of the House of Representatives and one consumer member. The Governor shall appoint one representative of the Department of Human Services, one hospital official, one physician, one representative of a 3rd-party payor other than the Department of Human Services, one representative of the Maine Health Policy Advisory Council who is not a health care provider or representative of a health care provider and one consumer member representing labor. The chair of the Maine Health Care Finance Commission shall appoint one representative of the Maine Health Care Finance Commission. All appointments must be made on or before July 1, 1994. The chair of the Legislative Council shall call the first meeting of the commission. The members of the study commission shall elect a chair from among its members.

3. The Maine Health Care Finance Commission shall provide staff to the commission for the duration of the study.

4. The members of the commission who are Legislators are entitled to the legislative per diem as defined in the Maine Revised Statutes, Title 3, section 2, for each day's attendance at commission meetings. All members who do not represent state agencies are entitled to expenses for attending meetings upon application to the Executive Director of the Legislative Council.

5. This section is repealed June 15, 1995.

**Sec. 15. Effective date.** Sections 1 to 12 and 14 of this Act take effect on October 1, 1991.

## STATEMENT OF FACT

This bill reflects the following recommendations of a majority of the Commission to Study the Certificate of Need Law and the Impact of Competitive Market Forces on Ambulatory Health Services.

1. It enacts, effective October 1, 1991, several changes to the certificate of need coverage governing hospitals, as set forth in the Maine Revised Statutes, Title 22, section 304-A. It enacts a new subsection, requiring a certificate of need for the acquisition by a hospital of major medical equipment, costing $1,000,000 or more, where the equipment will be used to treat

inpatients in at least 20% of the cases in which it is utilized. It also provides an option permitting hospitals to apply for a certificate of need where the equipment is to be utilized for inpatients in less than 20% of the cases, where the hospital seeks recognition of additional financial requirements associated with such equipment, beyond the financial requirements that would otherwise be provided under the health care finance commission laws. The Maine Health Care Finance Commission structure provides recognition for capital costs and an adjustment for volume and case mix associated with additional cases treated. As of October 1, 1995, a certificate of need will be required by a hospital for all major medical equipment costing $1,000,000 or more. This has the effect of requiring a certificate of need for all major medical equipment in hospital settings, regardless of the percentage of use, for inpatients or outpatients.

Under Title 22, section 304-A, subsection 3-A, hospitals will also require a certificate of need for any capital expenditure related to the acquisition, construction or improvement of buildings or fixed equipment. Title 22, section 304-A, subsection 4, requiring a certificate of need for new health services, is retained in its current form, subject to further consideration on the part of the commission.

Under Title 22, section 304-A, subsection 6-A, hospitals will require certificates of need for any increase in licensed or certified beds by more than 10% or more than 5 beds, whichever is less, or for such an increase with respect to a particular level of care. Title 22, section 304-A, subsection 7, as amended, requires a certificate of need for hospital predevelopment costs in excess of $250,000.

2. The bill enacts a definition for outpatient services.

3. The bill amends certain sections of the affiliated interest provisions of the Maine Health Care Finance Commission laws to permit the commission to establish reasonable limits on the actual prices paid by hospitals or charged by hospitals in significant transactions between hospitals and affiliated interests. This regulatory authority does not extend to transfers and pledges that are otherwise exempt from commission review under the so-called 10% test set forth in Title 22, section 396-D, subsection 4, paragraph F.

4. The bill amends Title 22, section 396-L, subsection 4, by adding a new paragraph H. This defines the circumstances in which hospitals in the rate per case system may engage in a hospital restructuring without commission approval. This section permits these hospitals to carry out hospital restructuring, as defined in Title 22, section 396-L, subsection 1, paragraph E, without prior approval from the commission unless the restructuring involves the transfer of an existing hospital

patient care service or involves a transfer or pledge of assets not exempt under Title 22, section 396-L, subsection 4, paragraph F. In order for a hospital to carry out a restructuring under the authority set forth in that paragraph and without regard to whether prior approval is necessary, the commission shall require that a provision be made for a fair return on the hospital's investment. In cases where prior approval is not required, the hospital shall file with the commission a notice setting forth the nature of the transfer and documentation of the provision of fair return to the hospital.

The bill also includes provisions governing circumstances where a hospital participating in the rate per case system seeks entry into the total revenue system. In these cases, the commission has the authority to review those restructurings previously carried out, which were not reviewed and approved by the commission. As a consequence of the review, the commission may attach conditions to the transfer of a hospital to the total revenue system, which it deems consistent with the interests of the people of the State, including divestiture of affiliated interests created under these provisions or reinclusion into the hospital corporation of services provided through such affiliates.

The bill prohibits cross-subsidization with respect to activities between hospitals and affiliated interests. It bars transfers of assets or activities that otherwise subsidize the operation of affiliated interests, except to the extent that these activities or subsidies have been specifically approved by the commission or are exempt under the provisions of Title 22, section 396-L, subsection 4, paragraph F. This section defines the term "otherwise subsidize," setting forth standards whereby it can be determined whether a hospital has paid more than is appropriate or has been charged less than is appropriate.

The bill establishes access requirements applicable to hospital affiliates and certain other health care providers. Title 22, section 1715, subsection 1, defines the persons covered under these provisions to include those that provide major ambulatory services or have been required to obtain a certificate of need, provide outpatient services and provide certain specific services based on a list of procedures and services which were subject to the 50% differential under the preferred provider organization legislation enacted in the First Regular Session of the 114th Legislature, Title 24, section 2339, and Title 24-A, section 2677. In Title 22, section 382, subsection 8-A, as enacted by Public Law 1989, chapter 565, section 2, "major ambulatory service" is defined as follows:

> "Major ambulatory service" means surgical procedures, chiropractic methodologies or medical procedures, including diagnostic procedures and therapeutic radiological

procedures, which require special facilities such as operating rooms or suites, special equipment such as fluoroscopic equipment or computed tomographic scanners or special rooms such as a postprocedure recovery room or short-term convalescent room.

The intent of the preceding definition is to capture providers of significant outpatient services in facility settings, while not reaching individual providers which do not provide those services.

The requirements for access parallel those made applicable to hospitals through the health care finance commission laws, requiring charity care pursuant to Federal Hill-Burton standards. Together, these amendments are intended to result in an even playing field on the issue of access.

Title 22, section 1715, subsection 2, establishes enforcement provisions. Title 22, section 1715, subsection 2, paragraph A, defines as a civil violation the knowing or willful failure to meet the access standards set forth in this section. A fine of between $200 and $500 per patient denied access may be prosecuted by the Attorney General. A cap is placed upon forfeitures under this section raising from $5,000 in the case of first order against the provider, to $10,000 in the case of the 3rd or subsequent order. These provisions have been adapted from the enforcement provisions of the Maine Health Care Finance Commission, set forth in Title 22, sections 389 and 390, and the provisions governing fines imposed in actions of the Maine Human Rights Commission, set forth in Title 5, section 4613.

Title 22, section 1715, subsection 2, paragraph B, permits the Attorney General or any affected patient to seek enforcement of the requirements of this section in either Superior Court or District Court.

Title 22, section 1715, subsection 2, paragraph C, permits the court in its discretion to award attorney's fees to the prevailing party, other than the Attorney General. These provisions mirror the attorney's fees provisions set forth under the Human Rights Act, Title 5, section 4614.

The bill modifies the charge of the Commission to Study the Certificate of Need Law and the Impact of Competitive Market Forces on Ambulatory Health Services to include in its 1990 study an evaluation of methods of sizing the Hospital Development Account.

The bill establishes a the Study Commission to Review Certain Provisions of the Certificate of Need Law. This study will be carried out from July 1, 1994, through January 15, 1995. In particular, the study will review the impact of the

certificate of need changes governing coverage of major medical equipment and the exemption from review of equipment used principally to provide outpatient services. The study will determine whether or not to extend such treatment beyond October 1, 1995. The commission will also review provisions of Maine law relating to the Hospital Development Account. The composition and appointment mechanism for the commission will be identical to that in place for the current commission.

The provisions of the bill take effect October 1, 1991, with the exception of 2 provisions. The section of the bill relating to the charge of the Commission to Study the Certificate of Need Law and the Impact of Competitive Market Forces on Ambulatory Health Service takes effect 90 days after the adjournment of the Second Regular Session of the 114th Legislature. One provision relating to the acquisition by a hospital of certain major movable equipment takes effect on October 1, 1995.