

MAINE STATE LEGISLATURE

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STATE OF MAINE
SENATE
115TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A " to S.P. 882, L.D. 2254, Bill, "An Act to Facilitate Cooperative Agreements among Maine Hospitals"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

'Sec. 1. 22 MRSA c. 405-D is enacted to read:

CHAPTER 405-D

HOSPITAL COOPERATION ACT

§1881. Short title

This chapter may be known and cited as the "Hospital Cooperation Act of 1992."

§1882. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Cooperative agreement. "Cooperative agreement" means an agreement among 2 or more hospitals for the sharing, allocation or referral of patients, personnel, instructional programs, support services and facilities or medical, diagnostic or laboratory facilities or procedures or other services traditionally offered by hospitals.

2. Hospital. "Hospital" means:

A. Any acute care institution required to be licensed as a hospital under section 1811; or

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2 B. Any nonprofit parent of a hospital, hospital subsidiary
3 or hospital affiliate that provides medical or medically
4 related diagnostic and laboratory services or engages in
5 ancillary activities supporting those services.

6 **§1883. Certification for cooperative agreements**

8 1. Authority. A hospital may negotiate and enter into
9 cooperative agreements with other hospitals in the State if the
10 likely benefits resulting from the agreements outweigh any
11 disadvantages attributable to a reduction in competition that may
12 result from the agreements.

14 2. Application for certificate. Parties to a cooperative
15 agreement may apply to the department for a certificate of public
16 advantage governing that cooperative agreement. The application
17 must include an executed written copy of the cooperative
18 agreement and describe the nature and scope of the cooperation in
19 the agreement and any consideration passing to any party under
20 the agreement. A copy of the application and copies of all
21 additional related materials must be submitted to the Attorney
22 General and to the department at the same time.

24 3. Procedure for department review. The department shall
25 review the application in accordance with the standards set forth
26 in subsection 4 and may hold a public hearing in accordance with
27 rules adopted by the department. The department shall grant or
28 deny the application within 90 days of the date of filing of the
29 application and that decision must be in writing and set forth
30 the basis for the decision. The department shall furnish a copy
31 of the decision to the applicants, the Attorney General and any
32 intervenor.

34 4. Standards for certification. The department shall issue
35 a certificate of public advantage for a cooperative agreement if
36 it determines that the applicants have demonstrated by clear and
37 convincing evidence that the likely benefits resulting from the
38 agreement outweigh any disadvantages attributable to a reduction
39 in competition that may result from the agreement.

40 A. In evaluating the potential benefits of a cooperative
41 agreement, the department shall consider whether one or more
42 of the following benefits may result from the cooperative
43 agreement:

46 (1) Enhancement of the quality of hospital and
47 hospital-related care provided to Maine citizens;

48 (2) Preservation of hospital facilities in
49 geographical proximity to the communities traditionally
50 served by those facilities;

- 2 (3) Gains in the cost efficiency of services provided
- 4 by the hospitals involved;
- 6 (4) Improvements in the utilization of hospital
- 8 resources and equipment; and
- (5) Avoidance of duplication of hospital resources.

10 B. The department's evaluation of any disadvantages
 12 attributable to any reduction in competition likely to
 14 result from the agreement may include, but need not be
 limited to, the following factors:

16 (1) The extent of any likely adverse impact on the
 18 ability of health maintenance organizations, preferred
 20 provider organizations, managed health care service
 22 agents or other health care payors to negotiate optimal
 payment and service arrangements with hospitals,
 physicians, allied health care professionals or other
 health care providers;

24 (2) The extent of any reduction in competition among
 26 physicians, allied health professionals, other health
 28 care providers or other persons furnishing goods or
 services to, or in competition with, hospitals that is
 likely to result directly or indirectly from the
 hospital cooperative agreement;

30 (3) The extent of any likely adverse impact on
 32 patients in the quality, availability and price of
 health care services; and

34 (4) The availability of arrangements that are less
 36 restrictive to competition and achieve the same
 38 benefits or a more favorable balance of benefits over
 disadvantages attributable to any reduction in
 competition likely to result from the agreement.

40 5. Review by Attorney General. The department shall
 42 consult with the Attorney General regarding its evaluation of any
 44 potential reduction in competition resulting from a cooperative
 agreement.

46 6. Certificate termination. If the department determines
 48 that the likely benefits resulting from a certified agreement no
 50 longer outweigh any disadvantages attributable to any potential
 reduction in competition resulting from the agreement, the
 department may initiate proceedings to terminate the certificate
 of public advantage in accordance with Title 5, chapter 375,
 subchapter IV.

COMMITTEE AMENDMENT

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2 7. Recordkeeping. The department shall maintain on file
4 all cooperative agreements for which certificates of public
6 advantage remain in effect. Any party to a cooperative agreement
 who terminates the agreement shall file a notice of termination
 with the department within 30 days after termination.

8 **§1884. Judicial review of department action**

10 Any applicant or intervenor aggrieved by a decision of the
12 department in granting or denying an application, refusing to act
14 on an application or terminating a certificate is entitled to
 judicial review of the decision in accordance with the Maine
 Administrative Procedure Act.

16 **§1885. Attorney General authority**

18 1. Investigative powers. The Attorney General, at any time
20 after an application is filed under section 1883, subsection 2,
22 may require by subpoena the attendance and testimony of witnesses
24 and the production of documents in Kennebec County or the county
26 in which the applicants are located for the purpose of
28 investigating whether the cooperative agreement satisfies the
 standards set forth in section 1883, subsection 4. All documents
 produced and testimony given to the Attorney General are
 investigative records under Title 5, section 200-D. The Attorney
 General may seek an order from the Superior Court compelling
 compliance with a subpoena issued under this section.

30 2. Court action; time limits. The Attorney General may
32 seek to enjoin the operation of a cooperative agreement for which
34 an application for certificate of public advantage has been filed
36 by filing suit against the parties to the cooperative agreement
38 in Superior Court. The Attorney General may file an action
 before or after the department acts on the application for a
 certificate but, except as provided in subsection 5, the action
 must be brought no later than 40 days following the department's
 approval of an application for a certificate of public advantage.

40 3. Automatic stay. Upon the filing of the complaint in an
42 action under subsection 2, the department's certification, if
44 previously issued, must be stayed and the cooperative agreement
46 is of no further force unless the court orders otherwise or until
48 the action is concluded. The Attorney General may apply to the
 court for any ancillary temporary or preliminary relief necessary
 to stay the cooperative agreement pending final disposition of
 the case.

50 4. Standard for adjudication. In any action brought under
 subsection 2, the applicants for a certificate bear the burden of

2 establishing by clear and convincing evidence that, in accordance
4 with section 1883, subsection 4, the likely benefits resulting
6 from the cooperative agreement outweigh any disadvantages
8 attributable to a reduction in competition that may result from
10 the agreement. In assessing disadvantages attributable to a
12 reduction in competition likely to result from the agreement, the
14 court may draw upon the determinations of federal and Maine
16 courts concerning unreasonable restraint of trade under 15 United
18 States Code, Sections 1 and 2 and Title 10, sections 1101 and
20 1102.

12 5. Change of circumstances. If, at any time following the
14 40-day period specified in subsection 2, the Attorney General
16 determines that as a result of changed circumstances the benefits
18 resulting from a certified agreement no longer outweigh any
20 disadvantages attributable to a reduction in competition
22 resulting from the agreement, the Attorney General may file suit
24 in the Superior Court seeking to cancel the certificate of public
26 advantage. The standard for adjudication for an action brought
28 under this subsection is as follows.

22 A. Except as provided in paragraph B, in any action brought
24 under this subsection the Attorney General has the burden of
26 establishing by a preponderance of the evidence that, as a
28 result of changed circumstances, the benefits resulting from
30 the agreement and the unavoidable costs of canceling the
32 agreement are outweighed by disadvantages attributable to a
34 reduction in competition resulting from the agreement.

30 B. In any action under this subsection, if the Attorney
32 General first establishes by a preponderance of evidence
34 that the department's certification was obtained as a result
36 of material misrepresentation to the department or the
38 Attorney General or as the result of coercion, threats or
40 intimidation toward any party to the cooperative agreement,
42 then the parties to the agreement bear the burden of
44 establishing by clear and convincing evidence that the
46 benefits resulting from the agreement and the unavoidable
48 costs of canceling the agreement are outweighed by
disadvantages attributable to any reduction in competition
resulting from the agreement.

44 6. Fees and costs. If the Attorney General prevails in an
46 action under this section, the Department of the Attorney General
48 is entitled to an award of the reasonable costs of deposition
transcripts incurred in the course of the investigation or
litigation and reasonable attorney's fees, expert witness fees
and court costs incurred in litigation.

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2 7. Resolution by consent decree. The Superior Court may
3 resolve any action brought by the Attorney General under this
4 chapter by entering an order that with the consent of the
5 parties, modifies the cooperative agreement. Upon the entry of
6 such an order, the parties to the cooperative agreement have the
7 protection specified in section 1886 and the cooperative
8 agreement has the effectiveness specified in section 1886.

9 **§1886. Effect of certification; applicability**

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11 **1. Validity of certified cooperative agreements.**
12 Notwithstanding Title 10, section 1101 or any other provision of
13 law, a cooperative agreement for which a certificate of public
14 advantage has been issued is a lawful agreement. Notwithstanding
15 Title 10, section 1102 or any other provision of law, if the
16 parties to a cooperative agreement file an application for a
17 certificate of public advantage governing the agreement with the
18 department, the conduct of the parties in negotiating and
19 entering into a cooperative agreement is lawful conduct. Nothing
20 in this subsection immunizes any person for conduct in
21 negotiating and entering into a cooperative agreement for which
22 an application for a certificate of public advantage is not filed.

23
24 **2. Validity of cooperative agreements determined not in**
25 **public interest.** If the department or, in any action by the
26 Attorney General, the Superior Court determines that the
27 applicants have not established by clear and convincing evidence
28 that the likely benefits resulting from a cooperative agreement
29 outweigh any disadvantages attributable to any potential
30 reduction in competition resulting from the agreement, the
31 agreement is invalid and has no further force or effect.

32
33 **3. Other laws specifically regulating hospitals.** Nothing
34 in this chapter exempts hospitals or other health care providers
35 from compliance with laws governing certificates of need or
36 hospital cost reimbursement.

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38 **4. Mergers and consolidations involving licensed**
39 **hospitals.** The provisions of this chapter do not apply to any
40 agreement among hospitals by which ownership or control over
41 substantially all of the stock, assets or activities of one or
42 more previously licensed and operating hospitals is placed under
43 the control of another licensed hospital or hospitals.

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45 **5. Contract disputes.** Any dispute among the parties to a
46 cooperative agreement concerning its meaning or terms is governed
47 by normal principles of contract law.

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§1887. Assessment

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Except for state-operated mental health hospitals, all hospitals licensed by the department are subject to an annual assessment under this chapter. The department shall establish the amount of the assessment. The amount established by the department must be based upon each hospital's gross patient service revenue. For any fiscal year, the aggregate amount raised by the assessment may not be greater than the amount allocated to carry out the purposes of this chapter in that fiscal year. The department shall deposit funds raised under this section into a dedicated revenue account. Funds remaining in the account at the end of each fiscal year do not lapse, but carry forward into subsequent years. Funds deposited into the account must be allocated to carry out the purposes of this chapter.

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§1888. Review

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The department may not accept any application under this chapter after June 30, 1995. By January 1, 1995, the Attorney General and the department shall submit recommendations, along with any necessary legislation, to the joint standing committee of the Legislature having jurisdiction over human resources matters regarding whether this chapter should be amended.

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Sec. 2. Legislative findings. The Legislature finds as follows.

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1. Technological and scientific developments in hospital care have enhanced the prospects for further improvement in the quality of care provided by Maine hospitals to Maine citizens.

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2. The cost of improved technology and improved scientific methods for the provision of hospital care is in significant part responsible for the increasing cost of hospital care. Cost increases make it increasingly difficult for hospitals in rural parts of Maine to offer care.

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3. Changes in federal and state regulations governing hospital operation and reimbursement have constrained the ability of hospitals to acquire and develop new and improved machinery and methods for the provision of hospital and hospital-related care.

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4. Cooperative agreements among hospitals in the provision of hospital and hospital-related services may foster further improvements in the quality of health care for Maine citizens, moderate increases in cost, improve access to needed services in

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2 rural parts of Maine and enhance the likelihood that smaller
3 hospitals in Maine will remain open in service to their
4 communities.

5 5. Hospitals are in the best position to identify and
6 structure voluntary cooperative arrangements that enhance quality
7 of care, improve access and achieve cost-efficiency in the
8 provision of care.

10 6. Because competition is important to the health care
11 sector and some cooperative agreements may have anticompetitive
12 effects that would operate to the detriment of the public,
13 regulatory and judicial oversight of cooperative agreements is
14 necessary to ensure that the benefits of agreements outweigh any
15 disadvantages attributable to any reduction in competition likely
16 to result from the agreements.

18 **Sec. 3. Allocation.** The following funds are allocated from
19 Other Special Revenue funds to carry out the purposes of this Act.

20 1992-93

22 **ATTORNEY GENERAL, DEPARTMENT OF THE**

24 **Administration - Attorney General**

26		
28	Positions - Other Count	(0.5)
	Personal Services	\$24,257
	All Other	2,000

30 Provides for the allocation of funds for one
32 part-time Assistant Attorney General
33 position and related costs to provide legal
34 services under the Hospital Cooperation Act
35 of 1992.

36 **DEPARTMENT OF THE ATTORNEY GENERAL**
38 **TOTAL** \$26,257

40 **HUMAN SERVICES, DEPARTMENT OF**

42 **Health Planning and Development**

44	Positions - Other Count	(1.0)
46	Personal Services	\$32,885
	All Other	1,000

48 Provides for the allocation of funds for one
49 part-time Comprehensive Health Planner II
50 position and one part-time Clerk Typist II

position to carry out responsibilities under the Hospital Cooperation Act of 1992.

4	DEPARTMENT OF HUMAN SERVICES	
4	TOTAL	<u>\$33,885</u>
6		
6	TOTAL ALLOCATIONS	<u>\$60,142</u>

FISCAL NOTE

1992-93

APPROPRIATIONS/ALLOCATIONS

Other Funds \$60,142

REVENUES

Other Funds \$60,142

This bill provides an allocation of dedicated revenue in fiscal year 1992-93 to the Department of Human Services in the amount of \$33,885 and to the Department of the Attorney General in the amount of \$26,257 for costs associated with certification for cooperative agreements.

The collection of a hospital assessment to pay for required services will increase dedicated revenue in an amount that may not be greater than the amount allocated. The assessment for fiscal year 1992-93 will be \$60,142.

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department.'

STATEMENT OF FACT

The amendment makes the following changes to the original bill.

1. "Bureau" is replaced with "department" throughout the bill to correct an erroneous reference to the Bureau of Health Planning.

2. Language is added to require the parties to cooperative agreement proposals to submit copies of their proposals to the Attorney General when submitting them to the Department of Human Services.

