

MAINE STATE LEGISLATURE

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115th MAINE LEGISLATURE

SECOND REGULAR SESSION-1992

Legislative Document

No. 2254

S.P. 882

In Senate, January 28, 1992

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.
Reference to the Committee on Human Resources suggested and ordered printed.

A handwritten signature in cursive script, reading "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator CLARK of Cumberland

Cosponsored by Representative MANNING of Portland and Senator CONLEY of
Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-TWO

An Act to Facilitate Cooperative Agreements among Maine Hospitals.



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

2
4 Sec. 1. 22 MRSA c. 405-D is enacted to read:

6
8 CHAPTER 405-D

10 HOSPITAL COOPERATION ACT

12 §1881. Short title

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

18 §1882. Definitions

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

24 1. Bureau. "Bureau" means the Bureau of Health Planning
26 within the Department of Human Services.

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

40 3. Hospital. "Hospital" means an acute care institution
42 required to be licensed as a hospital under section 1811 and any
44 not-for-profit parent, subsidiary or affiliate of a hospital
46 providing medical or medically related diagnostic and laboratory
48 services or engaged in ancillary activities supporting these
50 services.

52 §1883. Certification for cooperative agreements

1. Authority. A hospital may negotiate and enter into
voluntary cooperative agreements with other hospitals in the
State.

2. Application for certificate. Parties to a cooperative
agreement must apply to the bureau for a certificate of public
advantage governing their cooperative agreement. The application
must include an executed written copy of the cooperative
agreement and describe the nature and scope of the cooperation
contemplated by the agreement and any consideration passing to
any party under the agreement.

3. Procedure for bureau review. The bureau shall review
the application in accordance with the standards set forth in
subsection 4. The bureau, in its discretion, may hold a public

2 hearing in accordance with such procedures as it prescribes by
4 rule. The bureau shall grant or deny the application within 90
6 days of the date of filing of the application. The bureau's
8 decision must be in writing and set forth the basis for the
10 decision. The bureau shall furnish a copy of its decision to the
12 applicants, the Attorney General and any intervenor.

14 4. Standards for certification. The bureau shall issue a
16 certificate of public advantage for a cooperative agreement if it
18 determines that the applicants have demonstrated by clear and
20 convincing evidence that the likely benefits resulting from the
22 agreement outweigh any disadvantages attributable to any
24 reduction in competition likely to result from the agreement.

26 A. In evaluating the potential benefits of a cooperative
28 agreement, the bureau shall consider whether one or more of
30 the following benefits are likely to result from the
32 cooperative agreement:

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

38 (2) Preservation of hospital facilities in
40 geographical proximity to the communities traditionally
42 served by such facilities;

44 (3) Gains in the cost efficiency of services provided
46 by the hospitals involved;

48 (4) Improvements in the utilization of hospital
50 resources and equipment; and

(5) Avoidance of duplication of hospital resources.

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

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

(2) The extent of any reduction in competition among
physicians, allied health professionals, other health
care providers or other persons furnishing goods or
services to or in competition with hospitals that is

2 likely to result directly or indirectly from the
3 hospital cooperative agreement;

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

7 (4) Whether feasible and competitively less
8 restrictive arrangements could achieve substantially
9 the same benefits or a more favorable balance of
10 benefits over disadvantages attributable to any
11 reduction in competition likely to result from the
12 agreement.

13 5. Review by Attorney General. The bureau shall solicit
14 the views of the Attorney General in connection with its
15 evaluation of any potential reduction in competition resulting
16 from a cooperative agreement. In exercising authority under this
17 chapter, the Attorney General is empowered to require by subpoena
18 the attendance and testimony of witnesses and the production of
19 documents in Kennebec County or the county in which the
20 applicants are located for the purpose of investigating whether
21 the cooperative agreement satisfies the standards set forth in
22 subsection 4. All documents produced and testimony given to the
23 Attorney General must be treated by the Attorney General as
24 investigative records subject to Title 5, section 200-D. The
25 Attorney General may apply to the Superior Court for an order
26 compelling compliance with a subpoena issued under this section.
27

28 6. Certificate termination. If the bureau determines that
29 the likely benefits resulting from a certified agreement no
30 longer outweigh any disadvantages attributable to any potential
31 reduction in competition resulting from the agreement, the bureau
32 may initiate proceedings to terminate its certificate of public
33 advantage governing the agreement. Any such termination
34 proceeding is governed by the Maine Administrative Procedure Act,
35 Title 5, chapter 375, subchapter IV.
36

37 7. Recordkeeping. The bureau shall maintain on file all
38 cooperative agreements for which such certificates have been
39 issued and that remain in effect. Any party to a cooperative
40 agreement terminating such agreement shall file a notice of
41 termination with the bureau within 30 days of termination.
42

43 §1884. Judicial review of bureau action under Maine
44 Administrative Procedure Act

45 Any applicant or intervenor aggrieved by a decision of the
46 bureau in granting or denying an application, refusing to act on
47 an application or terminating a certificate is entitled to
48 judicial review of the agreement in accordance with the
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2 procedures and standards specified in the Maine Administrative
3 Procedure Act.

4 **§1885. Attorney General challenge**

6 **1. Authority; time limits.** The Attorney General may seek
7 to enjoin the operation of a cooperative agreement for which an
8 application for certificate of public advantage has been filed by
9 filing suit against the parties to the cooperative agreement in
10 Superior Court. The Attorney General may file an action before
11 or after the bureau acts on the application for a certificate
12 but, except as provided in subsection 4, such an action must be
13 brought no later than 40 days following the bureau's approval of
14 an application for a certificate of public advantage.

16 **2. Automatic stay.** Upon the filing of the complaint in an
17 action under subsection 1, the bureau's certification, if
18 previously issued, must be stayed and the cooperative agreement
19 is of no further force unless the court orders otherwise or until
20 the action is concluded. The Attorney General may apply to the
21 court for any ancillary temporary or preliminary relief necessary
22 to preserve the status quo pendent lite.

24 **3. Standard for adjudication.** In any action brought under
25 subsection 1, the applicants for a certificate bear the burden of
26 establishing by clear and convincing evidence that, in accordance
27 with section 1883, subsection 4, the likely benefits resulting
28 from the cooperative agreement outweigh any disadvantages
29 attributable to any reduction in competition likely to result
30 from the agreement. In assessing any disadvantages attributable
31 to any reduction in competition likely to result from the
32 agreement, the court may draw upon the determinations of federal
33 and Maine courts concerning unreasonable restraint of trade under
34 15 United States Code, Sections 1 and 2 and Title 10, sections
35 1101 and 1102.

36 **4. Change of circumstances.** If at any time following the
37 40-day period specified in subsection 1 the Attorney General
38 determines that as a result of changed circumstances the benefits
39 resulting from a certified agreement no longer outweigh any
40 disadvantages attributable to any reduction in competition
41 resulting from the agreement, the Attorney General may file suit
42 in the Superior Court seeking to cancel the certificate of public
43 advantage. The standard for adjudication for an action brought
44 under this subsection is as follows.

45 **A.** Except as provided in paragraph B, in any action brought
46 under this subsection the Attorney General has the burden of
47 establishing by a preponderance of the evidence that as a
48 result of changed circumstances the benefits resulting from
49 the agreement and the unavoidable costs of canceling the
50 agreement and the unavoidable costs of canceling the

2 agreement are outweighed by disadvantages attributable to
any reduction in competition resulting from the agreement.

4 B. In any action under this subsection, if the Attorney
General first establishes by a preponderance of evidence
6 that the bureau's certification was obtained as a result of
material misrepresentation to the bureau or the Attorney
8 General or as the result of coercion, threats or
intimidation practiced upon any party to the cooperative
10 agreement, then the parties to the agreement bear the burden
of establishing by clear and convincing evidence that the
12 benefits resulting from the agreement and the unavoidable
costs of canceling the agreement are outweighed by
14 disadvantages attributable to any reduction in competition
resulting from the agreement.

16 5. Fees and costs. If the Attorney General prevails in any
18 action under this section, the Department of the Attorney General
is entitled to an award of the reasonable costs of deposition
20 transcripts incurred in the course of its investigation or
litigation and reasonable attorney's fees, expert witness fees
22 and court costs incurred in the course of litigation.

24 6. Resolution by consent decree. The Superior Court is
empowered to resolve any action brought by the Attorney General
26 by entering an order with the consent of the parties modifying
the cooperative agreement. Upon the entry of such an order, the
28 parties to the cooperative agreement have the protection and the
cooperative agreement has the effectiveness specified in section
30 1886.

32 **§1886. Effect of certification; applicability**

34 1. Validity of certified cooperative agreements.
36 Notwithstanding Title 10, section 1101 or any other provision of
law, a cooperative agreement for which a certificate of public
38 advantage has been issued is a lawful agreement. Notwithstanding
Title 10, section 1102 or any other provision of law, if the
40 parties to a cooperative agreement file an application for a
certificate of public advantage governing the agreement with the
42 bureau, the conduct of the parties in negotiating and entering
into a cooperative agreement is lawful conduct. Nothing in this
44 subsection immunizes any person for conduct in negotiating and
entering into a cooperative agreement for which an application
46 for a certificate of public advantage is not filed.

48 2. Validity of cooperative agreements determined not to be
in the public interest. If the bureau or, in any action by the
50 Attorney General, the Superior Court determines that the
applicants have not established by clear and convincing evidence
52 that the likely benefits resulting from a cooperative agreement
outweigh any disadvantages attributable to any potential

2 reduction in competition likely to result from the agreement,
3 such agreement is invalid and has no further force or effect.

4 3. Other laws specifically regulating hospitals. Nothing
5 in this chapter exempts hospitals or other health care providers
6 from compliance with statutory provisions governing certificates
7 of need or hospital cost reimbursement.

8 4. Mergers and consolidations involving licensed
9 hospitals. The provisions of this chapter do not apply to any
10 agreement among hospitals by which ownership or control over
11 substantially all of the stock, assets or activities of one or
12 more licensed hospitals is placed under the control of another
13 licensed hospital or hospitals.

14 5. Contract disputes. Any dispute among the parties to a
15 cooperative agreement concerning its meaning or terms is governed
16 by normal principles of contract law.

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

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

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

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

31 4. Cooperative agreements among hospitals in the provision
32 of hospital and hospital-related services may foster further
33 improvements in the quality of health care for Maine citizens,
34 moderate increases in cost, improve access to needed services in
35 rural parts of Maine and enhance the likelihood that smaller
36 hospitals in Maine will remain open in service to their
37 communities.

38 5. Hospitals are in the best position to identify and
39 structure voluntary cooperative arrangements that enhance quality
40 of care, improve access and achieve cost efficiency in the
41 provision of care.

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2 6. Because competition is of importance to the health care
4 sector and some cooperative agreements may have anticompetitive
6 effects that would operate to the detriment of the public,
8 regulatory and judicial oversight of such arrangements is
necessary to ensure that the benefits of such an agreement
outweigh any disadvantages attributable to any reduction in
competition likely to result from the agreement.

10 **Sec. 3. Legislative intent.** The Legislature intends that a
12 cooperative agreement for which a certificate of advantage has
14 been issued does not violate of the Maine Revised Statutes, Title
16 10, section 1101 or 1102 or any other law governing restraint of
trade. The Legislature further intends that a cooperative
agreement for which a certificate of advantage has been issued
receive the full benefit of state action immunity under federal
antitrust laws.

18
20 **STATEMENT OF FACT**

22 The purpose of this bill is to permit hospitals to negotiate
24 and enter into agreements to share facilities and resources
26 without violating antitrust laws. The bill establishes a
regulatory process for the review of cooperative agreements among
28 hospitals and establishes standards for certification to ensure
that such agreements serve the public interest. Under the bill,
30 state-certified agreements are not subject to attack under state
antitrust laws and the Legislature intends that such agreements
32 receive the full benefit of the "state action" immunity under
federal antitrust laws.