

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

M
R of S

L.D. 1644

2
4
6
8
10
12
14
16
18
20
22
24
26
28
30
32
34
36
38
40
42
44
46
48
50
52

DATE: March 27, 1996 (Filing No. S- 533)

HUMAN RESOURCES

Reported by: Senator PENDEXTER of Cumberland for the Committee.

Reproduced and distributed under the direction of the Secretary of the Senate.

**STATE OF MAINE
SENATE
117TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT "A " to S.P. 636, L.D. 1644, Bill, "An Act to Amend the Hospital Cooperation Act of 1992 to Facilitate Integrated Health Care Delivery Systems by Authorizing and Supervising Certain Hospital Mergers"

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

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the merger of certain hospitals or their parent organizations in this State can provide opportunities for measurable and substantial improvements in the quality, accessibility and cost-effectiveness of health care delivered to citizens of this State; and

Whereas, hospital mergers may provide a foundation for future development of integrated health care delivery systems, which can further improve the quality, accessibility and cost-effectiveness of health care; and

Whereas, some mergers of hospitals in this State may involve a substantial percentage of available hospital providers in particular regions of the State and result in undue anticompetitive effects. These mergers should be permitted only if the likely public benefits of the transaction outweigh their likely disadvantages, and governmental supervision of the merging hospitals ensures that any likely benefits to the public from the merger outweigh any likely disadvantages attributable to a reduction in competition from the merger; and

COMMITTEE AMENDMENT

R. O. S.

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 **Whereas,** it is in the public interest to establish an
effective system of governmental review of such hospital mergers
when proposed and supervision of approved mergers; and

4
6 **Whereas,** in the judgment of the Legislature the procedures
established by this measure will provide sufficient government
review and supervision so as to ensure that only those hospital
8 mergers whose likely benefits will outweigh their likely
disadvantages will receive favorable consideration under this
10 Act; and

12 **Whereas,** certain hospitals operating in the State or their
parent organizations are in the process of planning a merger to
14 provide coordinated hospital care. These hospitals desire to
complete all necessary steps to provide hospital services on an
16 integrated basis by January 1, 1997; and

18 **Whereas,** the process of an initial administrative review
established by this Act must begin in mid-1996 in order to be
20 completed in sufficient time to allow a determination whether and
under what circumstances such hospital mergers should be approved
22 under the authority of this measure; and

24 **Whereas,** in the judgment of the Legislature, these facts
create an emergency within the meaning of the Constitution of
26 Maine and require the following legislation as immediately
necessary for the preservation of the public peace, health and
28 safety; now, therefore,

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

32 **Sec. 1. 22 MRSA §1882, sub-§1,** as amended by PL 1995, c. 232,
§1, is further amended to read:

34
36 **1. Cooperative agreement.** "Cooperative agreement" means an
agreement among 2 or more hospitals or nonprofit mental health
care providers for the sharing, allocation or referral of
38 patients, personnel, instructional programs, mental health
services, support services and facilities or medical, diagnostic
40 or laboratory facilities or procedures or other services
traditionally offered by hospitals or nonprofit mental health
42 care providers, or for the coordinated negotiation and
contracting with payors or employers or for the merger of 2 or
44 more hospitals.

46 **Sec. 2. 22 MRSA §1882, sub-§2-A** is enacted to read:

48 **2-A. Merger.** "Merger" means a transaction by which
ownership or control over substantially all of the stock, assets
50 or activities of one or more licensed and operating hospitals is

RWS

2
4
6
8
10
12
14
16
18
20
22
24
26
28
30
32
34
36
38
40
42
44
46
48
50

placed under the control of another licensed hospital or hospitals or the parent organization of that hospital or hospitals.

Sec. 3. 22 MRSA §1883, sub-§2-A is enacted to read:

2-A. Letter of intent. Parties to a hospital merger agreement who intend to file an application for a certificate of public advantage for the merger transaction shall file a letter of intent describing the proposed merger with the department and the Attorney General at least 45 days prior to the filing of the application for a certificate of public advantage.

Sec. 4. 22 MRSA §1883, sub-§3, as enacted by PL 1991, c. 814, §1, is repealed and the following enacted in its place:

3. Procedure for department review. The following procedures apply to the review of the application by the department.

A. The department shall review and evaluate the application in accordance with the standards set forth in subsection 4.

B. The department shall furnish copies of any letter of intent, application or decision to a person who requests copies and to a person who registers annually with the department for that purpose. A person may provide the department with written comments concerning the application within 30 days after the application is filed. The department shall provide the Attorney General with copies of all comments.

C. The department may hold a public hearing in accordance with rules adopted by the department. Intervention is governed by the provisions of Title 5, section 9054.

D. The parties to a cooperative agreement may withdraw their application and thereby terminate all proceedings under this chapter as follows:

(1) Without the approval of the department, the Attorney General or the Superior Court anytime prior to the filing of an answer or responsive pleading in a court action under section 1885, subsection 2 or prior to entry of a consent decree under section 1885, subsection 7; or

(2) Without the approval of the department, anytime prior to the issuance of a final decision under

RWS

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 paragraph E if a court action has not been filed under
section 1885, subsection 2.

4 E. The department shall grant or deny finally the
application no less than 40 days nor more than 90 days after
6 the filing of the application. The department shall issue a
recommended decision at least 5 days prior to issuing a
8 final decision granting or denying the application. The
recommended and final decisions must be in writing and set
10 forth the basis for the decision.

12 **Sec. 5. 22 MRSA §1883, sub-§4, ¶¶A and B,** as amended by PL
14 1995, c. 232, §4, are further amended to read:

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

20 (1) Enhancement of the quality of hospital or
22 nonprofit mental health care or related care provided
to Maine citizens;

24 (2) Preservation of hospital or nonprofit mental
26 health care provider and related facilities in
geographical proximity to the communities traditionally
served by those facilities;

28 (3) Gains in the cost efficiency of services provided
30 by the hospitals or nonprofit mental health care
providers involved;

32 (4) Improvements in the utilization of hospital or
34 nonprofit mental health care provider resources and
equipment; and

36 (5) Avoidance of duplication of hospital or nonprofit
38 mental health care resources; and

40 (6) Continuation or establishment of needed
educational programs for health care professionals and
42 providers.

44 In any certificate for a merger issued under this chapter,
the department shall make specific findings as to the nature
46 and extent of any likely benefit found under this paragraph.

48 B. The department's evaluation of any disadvantages
attributable to any reduction in competition likely to

R 4/8

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 result from the agreement may include, but need not be limited to, the following factors:

4 (1) The extent of any likely adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service 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;

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

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

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

30 (5) The extent of any likely adverse impact on the access of persons in in-state educational programs for health professions to existing or future clinical training programs.

34 Sec. 6. 22 MRSA §1883, sub-§4, ¶C is enacted to read:

36 C. In evaluating the cooperative agreement under the standards in paragraphs A and B, the department shall consider the extent to which any likely disadvantages may be ameliorated by any reasonably enforceable conditions and the extent to which the likely benefits or favorable balance of benefits over disadvantages may be enhanced by any reasonably enforceable conditions under subparagraph (2).

44 (1) In any certificate issued under this subsection, the department may include conditions reasonably necessary to ameliorate any likely disadvantages of the type specified in paragraph B, subparagraphs (1) to (3).

PL 918

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 (2) In any certificate issued under this subsection,
3 the department may include additional conditions, if
4 proposed by the applicants, designed to achieve public
5 benefits, which may include but are not limited to the
6 benefits listed in paragraph A.

7 (3) In any certificate issued under this subsection
8 the department shall require the applicants to report
9 periodically the extent of their compliance with any
10 conditions issued under this paragraph. The department
11 shall review the applicant's submission and compliance
12 and report the results of its review to the Attorney
13 General. Reviews are required as follows:

14 (a) For transactions not involving mergers, at
15 least once in the first 39 months after issuance
16 of the certificate; and

17 (b) For transactions involving mergers, between
18 27 and 39 months after issuance of the
19 certificate. In this review the department also
20 shall analyze the extent to which benefits have
21 been achieved by the merger.

22
23
24 **Sec. 7. 22 MRSA §1883, sub-§6, as enacted by PL 1991, c. 814,**
25 **§1, is amended to read:**

26
27 **6. Certificate termination and enforcement.** If the
28 department determines that the likely benefits resulting from a
29 certified agreement no longer outweigh any disadvantages
30 attributable to any potential reduction in competition resulting
31 from the agreement, the department may initiate proceedings to
32 terminate the certificate of public advantage ~~in accordance with~~
33 ~~Title 5, chapter 375, subchapter IV.~~ The department may
34 institute proceedings to enforce any conditions included in the
35 certificate if it determines that the applicants are not in
36 substantial compliance with such conditions. All proceedings
37 under this subsection must be conducted under Title 5, chapter
38 375, subchapter IV.

39
40
41 **Sec. 8. 22 MRSA §1885, sub-§1, as amended by PL 1993, c. 719,**
42 **§10 and affected by §12, is further amended to read:**

43 **1. Investigative powers.** The Attorney General, at any time
44 after an application is filed under section 1883, subsection 2,
45 or a letter of intent is filed under section 1883, subsection
46 2-A, may require by subpoena the attendance and testimony of
47 witnesses and the production of documents in Kennebec County or
48 the county in which the applicants are located for the purpose of
49 investigating whether the cooperative agreement satisfies the
50

R 43

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

standards set forth in section 1883, subsection 4. All documents produced and testimony given to the Attorney General are confidential. The Attorney General may seek an order from the Superior Court compelling compliance with a subpoena issued under this section.

Sec. 9. 22 MRSA §1885, sub-§§2 and 3, as enacted by PL 1991, c. 814, §1, are amended to read:

2. Court action; time limits. The Attorney General may seek to enjoin the operation of a cooperative agreement for which an application for certificate of public advantage has been filed by filing suit against the parties to the cooperative agreement 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~~ ; however, the action must be brought no later than 40 days following the department's approval of an application for a certificate of public advantage. After the filing of a court action under this subsection, the department may not take any further action under this chapter and the time periods specified for departmental action under section 1883, subsection 3 are tolled until the court action is dismissed by the Attorney General or the Superior Court orders the department to take further action.

3. Automatic stay. Upon the filing of the complaint in an action under subsection 2, the department's certification, if previously issued, must be stayed and the cooperative agreement is of no further force unless the court orders otherwise or until the action is concluded. The applicants for certificate of public advantage may apply to the Superior Court for relief from that stay; the relief may be granted only upon showing of compelling justification. 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.

Sec. 10. 22 MRSA §1885, sub-§5, ¶B, as enacted by PL 1991, c. 814, §1, is amended to read:

B. In any action under this subsection, if the Attorney General first establishes by a preponderance of evidence that the department's certification was obtained as a result of material misrepresentation to the department or the Attorney General or as the result of coercion, threats or intimidation toward any party to the cooperative agreement, then the parties to the agreement bear the burden of establishing by clear and convincing evidence that the benefits resulting from the agreement and the unavoidable costs of canceling the agreement are ~~outweighed by~~ outweigh

R. W. S.

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

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

4 **Sec. 11. 22 MRSA §1885, sub-§5-A** is enacted to read:

6 **5-A. Enforcement of conditions.** Conditions included in a
certificate may be enforced according to this subsection.

8
10 A. If the parties to a cooperative agreement not involving
a merger are not in substantial compliance with any
conditions included in the certificate under section 1883,
subsection 4, or in a consent decree entered under
subsection 7, the Attorney General may seek an order from
the Superior Court compelling compliance with such
conditions or other appropriate equitable remedies. If the
Superior Court grants such relief and that relief is not
effective in securing compliance with the conditions, the
Superior Court may impose additional equitable remedies,
including the exercise of civil contempt powers, or may
cancel the certificate of public advantage upon a
determination that advantages to be gained by canceling the
certificate outweigh the unavoidable costs resulting from a
cancellation.

24 B. If the parties to a cooperative agreement involving a
merger are not in substantial compliance with any conditions
included in the certificate under section 1883, subsection
4, or in a consent decree entered under subsection 7, the
Attorney General may seek an order from the Superior Court
compelling compliance with such conditions. If the parties
to the merger fail to comply with any court order compelling
compliance with such conditions, the Superior Court may
impose additional equitable remedies to secure compliance
with its orders, including the exercise of civil contempt
powers or appointment of a receiver. If these additional
measures are not effective in securing compliance with the
conditions, and the Superior Court determines that the
advantages to be gained by divestiture outweigh the
unavoidable costs of requiring divestiture, the Superior
Court may cancel the certificate and order divestiture of
assets.

42 **Sec. 12. 22 MRSA §1885, sub-§7**, as enacted by PL 1991, c. 814,
44 §1, is amended to read:

46 7. Resolution by consent decree. The Superior Court may
48 resolve any action brought by the Attorney General under this
chapter by entering an order that with the consent of the
parties, ~~modifies the cooperative agreement.~~ The consent decree
50 may contain any conditions authorized by section 1883, subsection

R. of S.

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 4, paragraph C. A consent decree under this subsection may not
3 be filed with the Superior Court until 30 days after the filing
4 of the application under section 1883, subsection 2. Upon the
5 entry of such an order, the parties to the cooperative agreement
6 have the protection specified in section 1886 and the cooperative
7 agreement has the effectiveness specified in section 1886.

8 **Sec. 13. 22 MRSA §1886, sub-§§1 and 2,** as enacted by PL 1991,
9 c. 814, §1, are amended to read:

10

11 **1. Validity of certified cooperative agreements.**
12 Notwithstanding Title 5, chapter 10, Title 10, ~~section--1101~~
13 chapter 201 or any other provision of law, a cooperative
14 agreement for which a certificate of public advantage has been
15 issued is a lawful agreement. Notwithstanding Title 5, chapter
16 10, Title 10, ~~section--1102~~ chapter 201 or any other provision of
17 law, if the parties to a cooperative agreement file an
18 application for a certificate of public advantage governing the
19 agreement with the department, the conduct of the parties in
20 negotiating and entering into a cooperative agreement is lawful
21 conduct. Nothing in this subsection immunizes any person for
22 conduct in negotiating and entering into a cooperative agreement
23 for which an application for a certificate of public advantage is
24 not filed.

25 **2. Validity of cooperative agreements determined not in**
26 **public interest.** If the ~~department or,~~ in any action by the
27 Attorney General, the Superior Court determines that the
28 applicants have not established by clear and convincing evidence
29 that the likely benefits resulting from a cooperative agreement
30 outweigh any disadvantages attributable to any potential
31 reduction in competition resulting from the agreement, the
32 agreement is invalid and has no further force or effect when the
33 judgment becomes final after the time for appeal has expired or
34 the judgment of the Superior Court is affirmed on appeal.

35

36 **Sec. 14. 22 MRSA §1886, sub-§4,** as enacted by PL 1991, c. 814,
37 §1, is repealed.

38 **Sec. 15. 22 MRSA §1889** is enacted to read:

39 **§1889. Application fee**

40 Any application for a certificate of public advantage
41 involving a merger must be accompanied by an application fee of
42 \$10,000, unless the hospitals seeking to merge each have less
43 than 50 licensed beds, in which case the fee is \$2,500. The
44 department shall place these funds into a nonlapsing dedicated
45 revenue account and funds may be used only by the Attorney

R 0 8

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 General for the payment of the cost of experts and consultants in
3 connection with reviews conducted under this chapter.

4 **Sec. 16. Allocation.** The following funds are allocated from
5 Other Special Revenue to carry out the purposes of this Act.

6
7 **1995-96** **1996-97**

8 **ATTORNEY GENERAL,**
9 **DEPARTMENT OF THE**

10 **Administration - Attorney General**

11 All Other \$20,000 \$50,000

12 Provides funds for contractual services of
13 experts to review hospital merger
14 applications.

15 **Emergency clause.** In view of the emergency cited in the
16 preamble, this Act takes effect when approved.'

17 Further amend the bill by inserting at the end before the
18 statement of fact the following:

19 **FISCAL NOTE**

20 **1995-96** **1996-97**

21 **APPROPRIATIONS/ALLOCATIONS**

22 Other Funds \$20,000 \$50,000

23 **REVENUES**

24 Other Funds \$20,000 \$50,000

25 This bill includes Other Special Revenue allocations of
26 \$20,000 in fiscal year 1995-96 and \$50,000 in fiscal year 1996-97
27 to authorize expenditures from the additional dedicated revenue
28 generated by application fees. These amounts are based on the
29 assumption that there will be 2 applications during fiscal year
30 1995-96 and 5 applicants during fiscal year 1996-97. The revenue
31 generated by the application fee will be sufficient to cover the
32 costs incurred by the Department of the Attorney General for
33 contracting with experts to review each hospital merger
34 application.

A. of S.

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 The Department of Human Services will incur some minor
3 additional costs to respond to the changes in the procedure for
4 department review. These costs can be absorbed within the
5 department's existing budgeted resources.

6 This bill may increase the number of civil suits filed in
7 the court system. The additional workload and administrative
8 costs associated with the minimal number of new cases filed can
9 be absorbed within the budgeted resources of the Judicial
10 Department. The collection of additional filing fees may also
11 increase General Fund revenue by minor amounts.'

12

14

STATEMENT OF FACT

16

17 This amendment replaces the bill. It both authorizes and
18 provides for state review and supervision of certain hospital
19 mergers by allowing hospitals proposing to merge to file an
20 application for a certificate of public advantage under the
21 Hospital Cooperation Act of 1992. It authorizes the Department
22 of Human Services, in conjunction with the Department of the
23 Attorney General under certain circumstances to attach conditions
24 pertaining to quality, access and cost to any certificate granted
25 under the Hospital Cooperation Act of 1992 to ensure compliance
26 with the conditions attached to a certificate. It adds to the
27 list of potential benefits and disadvantages that the department
28 must consider in determining whether to grant or deny a
29 certificate of public advantage.

30

31 Through a system of state-prescribed and state-enforced
32 review and supervision, the Hospital Cooperation Act of 1992 is
33 intended to displace the State's antitrust laws for transactions
34 for which a certificate has been issued and also allows hospitals
35 that receive a certificate to qualify for the "state action"
36 exception to federal antitrust laws.

36

37 The authority of the Department of Human Services and the
38 Attorney General under the Maine Revised Statutes, Title 22,
39 section 1883, subsection 4, paragraphs A and B is not diminished
40 under the provisions of the amendment.

42

43 The changes in Title 22, section 1885, subsection 2 do not
44 affect the exercise of the power of the Attorney General
45 authorized under section 1885, subsection 5.

46

47 The enumeration of remedies in Title 22, section 1885,
48 subsection 5-A, paragraph B, is not intended by implication to
49 limit the availability of remedies in Title 22, section 1885,
50 subsection 5-A, paragraph A.

50

R/S

COMMITTEE AMENDMENT "A" to S.P. 636, L.D. 1644

2 The changes in Title 22, section 1886, subsection 2 do not
affect the automatic stay provision of Title 22, section 1885,
subsection 3.

4

6 The amendment also adds an allocation section and a fiscal
note to the bill.