

SHORT TITLE: Health; creating the Oklahoma Health Care Cooperation Act; immunizing certain activities from challenge and scrutiny under antitrust and restraint-of-trade laws; codification; emergency.

STATE OF OKLAHOMA

1st Session of the 45th Legislature (1995)

SENATE BILL NO. 42

By: Hendrick

AS INTRODUCED

An Act relating to public health; providing short title; stating legislative findings and intent; creating Oklahoma Health Care Cooperation Act; defining terms; providing immunity from antitrust and restraint-of-trade laws for health care providers which enter into certain cooperative agreements; permitting parties to cooperative agreement apply to State Department of Health for certificate of public advantage; requiring application include certain information; requiring Department review application in accordance with certain standards; providing for hearing, comments and related procedures; stating standards for evaluating benefits and disadvantages of cooperative agreement; granting powers and duties; providing for issuance of certificate under certain condition and for conditions of operation; requiring certain consideration; requiring Department publish decision; providing for objection by Attorney General and for certain courses of action by Department; requiring Department maintain certain records; requiring notice of termination be filed with Department; authorizing Department to request certain information under certain conditions; requiring parties to agreement to file annual certification with Department for certain agreements; requiring

certification state certain information; requiring comprehensive report be filed biennially or if material change occurs; stating information to be included in report; requiring Department give certain notice and providing for comments; making certain reports, comments and information public records; making failure to file report grounds for revocation of certificate; requiring Department make certain review and determinations and take certain actions; providing for certain standards of proof; requiring notification and publication of decisions and conditions; providing for appeal; requiring the Department to establish schedule of fees and setting maximum fees; requiring payment of fees at certain times; requiring fee schedule generate revenue sufficient to offset costs of program; providing for certain powers, action and rules; providing for construction of act; immunizing certain activities from challenge and scrutiny under antitrust and restraint-of-trade laws; stating that certain actions do not create certain presumptions; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-651 of Title 63, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Oklahoma Health Care Cooperation Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-652 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The Oklahoma State Legislature makes the following findings:

1. Technological and scientific developments have enhanced the prospects for further improvement in the quality of health care available to the citizens of this state;

2. The cost of improved technology and scientific methods for the provision of health care contributes substantially to the increasing cost of providing care. Cost increases make it increasingly difficult for health care providers, particularly those in rural areas of this state, to provide care;

3. Changes in federal and state laws and regulations affecting health care services and reimbursement to health care providers have constrained the ability of hospitals and other health care facilities to acquire and develop new and improved equipment and methods for the provision of health care;

4. Cooperative agreements among hospitals and other health care providers for the provision of health care services may foster improvements in the quality of health care for the citizens of this state, moderate increases in cost, improve access to needed services, and enhance the likelihood that hospitals in rural communities of this state will remain open to provide service to their communities;

5. Hospitals and other health care providers are often in the best position to identify and structure cooperative arrangements

that enhance quality of care, improve access and achieve cost efficiency in the provision of care;

6. Federal and state antitrust and restraint-of-trade laws may prohibit, impede or discourage cooperative arrangements that are beneficial to the citizens of this state despite their potential for or actual reduction in competition and such agreements should be permitted and encouraged when beneficial;

7. Competition as currently mandated by federal and state laws concerning restraint-of-trade should be supplanted by a regulatory program to permit and encourage cooperative agreements, among hospitals and other health care providers, when the benefits of cooperative agreements outweigh the disadvantages; and

8. Regulatory as well as judicial oversight of cooperative agreements should be provided to ensure that the benefits of cooperative agreements permitted and encouraged in this state outweigh the disadvantages.

B. It is, therefore, the intent of the Oklahoma State Legislature to provide a regulatory program to permit and encourage cooperative agreements among health care providers by the establishment of the Oklahoma Health Care Cooperation Act.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-653 of Title 63, unless there is created a duplication in numbering, reads as follows:

As used in the Oklahoma Health Care Cooperation Act:

1. "Attorney General" means the Attorney General of the State of Oklahoma;

2. "Board" means the State Board of Health;

3. "Cooperative agreement" means an agreement or transaction between or among two or more health care providers, at least one of which is a hospital or a health care provider organization, where such agreement relates to any one or more of the following activities:

- a. the sharing or development of health care facilities or services, including but not limited to medical, diagnostic, laboratory, testing, treatment or other ancillary facilities and services,
- b. the purchasing of technological equipment,
- c. collaborative research,
- d. the sharing of instructional activities, facilities or programs,
- e. the sharing, allocation or referral of patients,
- f. the sharing of personnel,
- g. the sharing of support services, or
- h. a merger of two or more health care providers, or a consolidation of two or more health care providers, or an acquisition of all or substantially all of the assets or business of one or more health care provider by another health care provider.

A cooperative agreement shall not include any agreement that would permit self-referrals of patients by a health care provider that is otherwise prohibited by law;

4. "Department" means the State Department of Health;

5. "Federal or state antitrust laws" means any and all federal laws or laws of this state prohibiting monopolies and attempts to monopolize, or agreements and combinations in restraint of trade including, but not limited to, the federal Sherman Anti-Trust Act, 15 U.S.C. Section 1 et seq., Clayton Anti-Trust Act, 15 U.S.C. Section 12 et seq., Federal Trade Commission Act, 15 U.S.C. Section 41 et seq., and Oklahoma laws that prohibit, restrict or limit restraints on trade or competition;

6. "Health care provider" means:

- a. any person licensed, registered or certified by the Department or pursuant to Title 59 of the Oklahoma

Statutes to provide health or mental health care services, or

- b. a health care facility, as that term is defined herein;

7. "Health care facility" means a health care facility licensed by the Department pursuant to Title 63 of the Oklahoma Statutes;

8. "Health care provider organization" means an organization of health care providers which is:

- a. sponsored by a statewide professional association of health care providers exempt from federal income taxation pursuant to Section 501(c)(6) of the Internal Revenue Code of 1986, as amended, and
- b. designed to provide health care services pursuant to a plan or relationship for the benefit of a defined patient population;

9. "Hospital" means any hospital licensed pursuant to Section 1-701 et seq. of Title 63 of the Oklahoma Statutes; and

10. "Person" means any individual, partnership, limited liability company, corporation, association, or other entity, public or private institution, political subdivision or government agency.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-654 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Parties to a cooperative agreement may enter into, and conduct business pursuant to, a cooperative agreement without being subject to damages, equitable relief, liability, or scrutiny under any state antitrust law if a certificate of public advantage is issued for a cooperative agreement, or in the case of activities to enter into a cooperative agreement, if an application for certificate of public advantage is approved. It is the intention of the Legislature that immunity from federal antitrust laws shall also

be conferred by this statute and the state regulatory program that it establishes.

B. Parties to a cooperative agreement may apply to the State Department of Health for a certificate of public advantage with respect to that agreement. The application must include an executed written copy of the cooperative agreement or letter of intent with respect thereto, a summary of the nature and scope of the activities and cooperation in the agreement, and any additional materials necessary to fully explain the agreement. The Department shall submit a copy of the application to the Attorney General for review.

C. Parties filing an application pursuant to this act may make a written objection to public disclosure of information contained in such application, which objection shall be acted upon by the Department. Pending a determination as to the objection, the material for which confidential treatment has been applied will not be made available to the public.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-655 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The State Department of Health shall review an application in accordance with the standards set forth in subsection B of this section and shall hold a public hearing with the opportunity for the submission of oral and written public comments in accordance with Article II of the Administrative Procedures Act, Section 308a et seq. of Title 75 of the Oklahoma Statutes. The Department shall, within forty-five (45) days of the date the application is filed, determine whether the application should be granted or denied. The Department may for good cause shown extend the review period for a specified period of time upon notice to the parties, but in no event shall the review period extend beyond sixty (60) days from the date the application was filed.

B. 1. The Department shall determine that a certificate of public advantage should be issued for a cooperative agreement if it determines that the applicants demonstrate that the benefits likely to result from the agreement outweigh the disadvantages likely to result from the agreement. In making such determination, the Department shall not impose any conditions which materially affect the substance of the cooperative agreement.

2. In evaluating the benefits or likely benefits of a cooperative agreement, the Department shall consider whether one or more of the following benefits may result:

- a. enhancement of the quality of health care provided to the citizens of this state,
- b. preservation of health care facilities in geographical proximity to the communities historically served by those facilities,
- c. increased efficiency in the delivery of health care services,
- d. improvements in the utilization of health care facilities, resources or equipment, or
- e. avoidance of duplication of health care facilities, resources or equipment.

3. In evaluating the disadvantages or likely disadvantages of a cooperative agreement, the Department shall consider, among other factors, whether one or more of the following may result:

- a. increased costs of health care services,
- b. an adverse impact on the quality or availability of health care services, or
- c. an adverse impact on the ability of persons who pay for health care services to negotiate optimal payment and service arrangements with health care providers.

4. In making its determination, the Department may consider other benefits or disadvantages consistent with those set forth in this section.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-656 of Title 63, unless there is created a duplication in numbering, reads as follows:

The State Department of Health shall have the power and duty to:

1. Issue, renew, deny, modify, suspend, cancel and revoke certificates of public advantage;
2. Establish and enforce standards and requirements for certificates of public advantage;
3. Require the submission of and review reports from any person requesting or obtaining a certificate of public advantage;
4. Employ or designate personnel necessary to implement the provisions of this act;
5. Advise, consult and cooperate with other agencies of this state, the federal government, other states and interstate agencies, and with affected groups and political subdivisions to further the purposes of this act;
6. Enforce rules promulgated by the Department to implement the provisions of this act;
7. Investigate, request or otherwise obtain information necessary to determine the qualifications, competence, credentials, capability and resources of applicants for a certificate of public advantage;
8. Institute or intervene in any action or proceeding deemed necessary by the Department pursuant to this act; and
9. Exercise all incidental powers as necessary and proper for the administration of this act.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-657 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. If the State Department of Health determines that the benefits or likely benefits of a cooperative agreement outweigh the disadvantages or the likely disadvantages as a result of the agreement, and the Attorney General has not stated any objection to issuance of a certificate during the review period, the Department shall issue a certificate of public advantage for the cooperative agreement at the conclusion of the review period.

B. The certificate shall include any conditions which do not materially affect the substance of the cooperative agreement under the agreement that the Department determines to be appropriate.

C. The Department shall publish its decisions on applications for certificates of public advantage.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-658 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The Attorney General may, within thirty (30) days of receipt of the application, file a written objection to the issuance of a certificate of public advantage, stating all of the reasons supporting the objection. Notice of such objection shall be provided in writing to the applicants, together with the reasons therefor. Failure of the Attorney General to advise the State Department of Health within thirty (30) days of receipt of the application shall indicate that the Attorney General has no objections to the application.

B. The Department shall consider the objection of the Attorney General, and may take any of the following courses of action:

1. Issue a certificate of public advantage notwithstanding the objection of the Attorney General;

2. Issue a certificate of public advantage with appropriate conditions which do not materially affect the substance of the cooperative agreement in light of the objections of the Attorney General; or

3. Refuse to issue a certificate of public advantage stating the reasons therefor.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-659 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The State Department of Health shall maintain on file all cooperative agreements for which certificates of public advantage are in effect and a copy of each certificate maintained.

B. Any party to a cooperative agreement who terminates an agreement shall file a notice of termination with the Department within thirty (30) days after such termination.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-660 of Title 63, unless there is created a duplication in numbering, reads as follows:

If at any time following the issuance of a certificate of public advantage, the State Department of Health has questions concerning whether the parties to the cooperative agreement have complied with any condition of the certificate or whether the benefits resulting from or the benefits likely to result from a cooperative agreement may no longer outweigh the disadvantages or the likely disadvantages resulting from the agreement, the Department shall notify the parties to the agreement and shall request any information necessary to complete its review of the matter.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-661 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. During the time that a certificate is in effect for any cooperative agreement other than a completed merger or acquisition, an annual certification must be filed each year by the parties to the agreement with the State Department of Health within thirty (30) days before the anniversary date on which the certificate was issued.

B. 1. If no material change has occurred in the activities pursuant to the cooperative agreement, then the annual certification shall state that the activity continues substantially as originally approved.

2. If, however, a substantial change has occurred in the activities pursuant to the cooperative agreement, then the annual certification shall so state and a comprehensive report, as further described in subsection D of this section, shall accompany the annual certification for notice and review pursuant to subsections E and G of this section.

C. So long as a certificate is in effect for any agreement other than a completed merger or acquisition, a comprehensive report of activities pursuant to the cooperative agreement must be filed every two (2) years with the Department within thirty (30) days before the anniversary date on which the certificate was issued.

D. A comprehensive report shall include all of the following:

1. A description of the activities conducted pursuant to the agreement;

2. The nature and scope of the activities pursuant to the agreement anticipated for the next two (2) years;

3. A signed certification by each party to the agreement that the benefits or likely benefits of the cooperative agreement continue to outweigh the disadvantages or likely disadvantages; and

4. Such additional information which the Department, by rule, may require.

E. The Department shall provide a copy of the comprehensive report to the Attorney General and shall give public notice that a report has been received. After notice is given, any person shall have thirty (30) days to file written comments on or objection to the report and on the benefits, or likely benefits, and disadvantages, or likely disadvantages, of continuing the certificate of public advantage. Periodic reports, public comments

and information submitted in response to a request shall be public records as set forth in the Oklahoma Open Records Act, Section 24A.1 et seq. of Title 51 of the Oklahoma Statutes.

F. Failure to file an annual certification or a periodic report as required by this section after notice of default or failure to provide information requested pursuant to a review under Sections 4, 5 and 10 of this act shall be grounds for the suspension or revocation of the certificate by the Department.

G. 1. The Department shall:

- a. review each periodic report, public comment, and information submitted in response to a request under this act,
- b. consider the benefits and disadvantages set forth in Section 5 of this act,
- c. determine whether by clear and convincing evidence the disadvantages or likely disadvantages resulting from the cooperative agreement outweigh the benefits or the likely benefits resulting from the cooperative agreement and the unavoidable costs of terminating the agreement, and
- d. determine what, if any, changes in the conditions of the certificate should be made.

2. Within forty-five (45) days of the filing of a periodic report, the Department shall determine whether the certificate should be renewed and whether any changes to the conditions in the certificate should be made. The Department may extend the review period an additional fifteen (15) days for good cause shown.

3. If the Department determines that the parties to a cooperative agreement have not complied with any condition of the certificate, the Department shall have authority to revoke the certificate after notice and an opportunity for hearing has been given to the parties to the agreement.

4. If the Department determines that the certificate should be renewed, the certificate shall remain in effect subject to any changes in the conditions which do not materially affect the substance of the cooperative agreement imposed by the Department.

5. If, after notice and an opportunity for hearing, the Department determines by clear and convincing evidence that the disadvantages or likely disadvantages of the agreement outweigh the benefits or the likely benefits of the agreement and the unavoidable costs of terminating the agreement, the Department shall cancel the certificate.

6. The parties to an agreement shall be notified in writing of the Department's decision to renew, modify, suspend, cancel or revoke a certificate and of any changes in the conditions of the certificate. The Department shall also notify the Attorney General or any persons who objected originally or have filed a written request with the Department that they be notified of modifications of a particular certificate and shall publish its decision and any changes in the conditions which do not materially affect the substance of the cooperative agreement.

H. Any party seeking to modify, suspend, revoke or have canceled the certificate must establish by clear and convincing evidence that the disadvantages resulting from the agreement outweigh the benefits resulting from the agreement.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-662 of Title 63, unless there is created a duplication in numbering, reads as follows:

Any final determination by the State Department of Health under this act may be appealed by the applicant, or any other aggrieved party, pursuant to Article II of the Administrative Procedures Act, Section 308a et seq. of Title 75 of the Oklahoma Statutes. The decision of the Department shall be upheld unless it is arbitrary, capricious or not in accordance with this act.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-663 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The State Board of Health shall establish by rule a schedule of fees for filing an application for issuance of a certificate of public advantage and for filing a comprehensive report based on the direct cost of analyses of the project for which the application or comprehensive report is made. The fee for filing an application may not exceed Five Thousand Dollars (\$5,000.00). The fee for filing a comprehensive report may not exceed Two Thousand Dollars (\$2,000.00).

B. An application filing fee must be paid to the Department at the time an application for issuance of a certificate of public advantage is submitted to it pursuant to Section 4 of this act. A comprehensive report filing fee must be paid to the Department at the time a comprehensive report is submitted to it pursuant to Section 11 of this act.

C. The fee schedule should be established in an effort to generate sufficient revenue to offset the costs of the program.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-664 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The State Department of Health shall have the necessary powers to conduct a review of applications for certificates of public advantage and of annual certificates and comprehensive reports filed in connection therewith and to bring action in the district courts.

B. The State Board of Health shall promulgate rules necessary for the implementation of this act.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-665 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Activities conducted pursuant to a cooperative agreement for which a certificate of public advantage has been issued are immunized from challenge or scrutiny under state antitrust and restraint-of-trade laws. In addition, conduct in negotiating and entering into a cooperative agreement for which an application for a certificate of public advantage is filed in good faith shall be immune from challenge or scrutiny under state antitrust and restraint-of-trade laws, regardless of whether a certificate is issued. It is the intention of the Legislature that this act shall also immunize covered activities from challenge or scrutiny under federal antitrust law.

B. Nothing in this act shall be construed as exempting health care providers from compliance with state or federal laws governing certificate of need, licensure or other regulatory requirements.

C. If a certificate of public advantage is not sought or issued, there is no presumption of anticompetitiveness or other illegality or impropriety of the agreement, and neither the information submitted by applicants for whom a certificate is not granted nor the failure to submit an application shall be used as evidence of anticompetitiveness, illegality or impropriety of the agreement.

SECTION 16. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

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