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SENATE BILL NO. 1177

Offered January 8, 2025

Prefiled January 7, 2025

A BILL to amend and reenact §§ 32.1-102.1:3, 32.1-122.07, and 32.1-132 of the Code of Virginia, relating to certificate of public need; exception; critical access hospitals; swing beds.

Patron—Suetterlein

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-102.1:3, 32.1-122.07, and 32.1-132 of the Code of Virginia are amended and reenacted as follows:

§ 32.1-102.1:3. Medical care facilities and projects for which a certificate is required.

A. The following medical care facilities shall be subject to the provisions of this article:

- 1. Any facility licensed as a hospital, as defined in § 32.1-123;
- 2. Any hospital licensed as a provider by the Department of Behavioral Health and Developmental Services in accordance with Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2;
- 3. Any facility licensed as a nursing home, as defined in § 32.1-123;
- 4. Any intermediate care facility established primarily for the medical, psychiatric, or psychological treatment and rehabilitation of individuals with substance abuse licensed by the Department of Behavioral Health and Developmental Services in accordance with Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2;

5. Any intermediate care facility for individuals with developmental disabilities other than an intermediate care facility established for individuals with intellectual disability (ICF/IID) that has not more than 12 beds and is in an area identified as in need of residential services for individuals with intellectual disability in any plan of the Department of Behavioral Health and Developmental Services; and

6. Any specialized center or clinic or that portion of a physician's office developed for the provision of outpatient or ambulatory surgery, cardiac catheterization, computed tomographic (CT) scanning, magnetic resonance imaging (MRI), positron emission tomographic (PET) scanning, radiation therapy, stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy, or proton beam therapy.

B. The following actions undertaken by or on behalf of a medical care facility described in subsection A shall constitute a project for which a certificate of public need is required pursuant to subsection A of § 32.1-102.1:2:

- 1. Establishment of a medical care facility described in subsection A;
- 2. An increase in the total number of beds or operating rooms in an existing medical care facility described in subsection A;
- 3. Relocation of beds from an existing medical care facility described in subsection A to another existing medical care facility described in subsection A;
- 4. Addition of any new nursing home service at an existing medical care facility described in subsection A;

5. Introduction into an existing medical care facility described in subsection A of any cardiac catheterization, computed tomographic (CT) scanning, magnetic resonance imaging (MRI), medical rehabilitation, neonatal special care, open heart surgery, positron emission tomographic (PET) scanning, psychiatric, organ or tissue transplant service, radiation therapy, stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy, proton beam therapy, or substance abuse treatment when such medical care facility has not provided such service in the previous 12 months;

6. Conversion of beds in an existing medical care facility described in subsection A to medical rehabilitation beds or psychiatric beds;

7. The addition by an existing medical care facility described in subsection A of any new medical equipment for the provision of cardiac catheterization, computed tomographic (CT) scanning, magnetic resonance imaging (MRI), open heart surgery, positron emission tomographic (PET) scanning, radiation therapy, stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy, or proton beam therapy, other than new medical equipment for the provision of such service added to replace existing medical equipment for the provision of such service;

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59 8. Any capital expenditure of \$15 million or more, not defined as reviewable in subdivisions 1 through 7,
 60 by or on behalf of a medical care facility described in subsection A other than a general hospital. The
 61 amounts specified in this subdivision shall be revised annually to reflect inflation using appropriate measures
 62 incorporating construction costs and medical inflation. Nothing in this subdivision shall be construed to
 63 modify or eliminate the reviewability of any project described in subdivisions 1 through 7 when undertaken
 64 by or on behalf of a general hospital; and

65 9. Conversion in an existing medical care facility described in subsection A of psychiatric inpatient beds
 66 approved pursuant to a Request for Applications (RFA) to nonpsychiatric inpatient beds.

67 C. Notwithstanding the provisions of subsection A, any nursing home affiliated with a facility that, on
 68 January 1, 1982, and thereafter, (i) is operated as a nonprofit institution, (ii) is licensed jointly by the
 69 Department as a nursing home and by the Department of Social Services as an assisted living facility, and
 70 (iii) restricts admissions such that (a) admissions to the facility are only allowed pursuant to the terms of a
 71 "life care contract" guaranteeing that the full complement of services offered by the facility is available to the
 72 resident as and when needed, (b) admissions to the assisted living facility unit of the facility are restricted to
 73 individuals defined as ambulatory by the Department of Social Services, and (c) admissions to the nursing
 74 home unit of the facility are restricted to those individuals who are residents of the assisted living facility unit
 75 of the facility shall not be subject to the requirements of this article.

76 D. Notwithstanding the provisions of subsection B, a certificate of public need shall not be required for
 77 the following actions undertaken by or on behalf of a medical care facility described in subsection A:

78 1. Relocation of up to 10 beds or 10 percent of the beds, whichever is less, (i) from one existing medical
 79 care facility described in subsection A to another existing medical care facility described in subsection A at
 80 the same site in any two-year period or (ii) in any three-year period, from one existing medical care facility
 81 described in subsection A licensed as a nursing home to any other existing medical care facility described in
 82 subsection A licensed as a nursing home that is owned or controlled by the same person and located either
 83 within the same planning district or within another planning district out of which, during or prior to that
 84 three-year period, at least 10 times that number of beds have been authorized by statute to be relocated from
 85 one or more medical care facilities described in subsection A located in that other planning district, and at
 86 least half of those beds have not been replaced; ~~or~~

87 2. Use of up to 10 percent of beds as nursing home beds by a medical care facility described in subsection
 88 ~~A licensed as a hospital, as provided in § 32.1-132; or~~

89 3. *Use of up to 10 beds per day among its inpatient hospital beds as swing beds for the furnishing of*
 90 *services of the type that, if furnished by a nursing home or certified nursing facility, would constitute skilled*
 91 *care services, by a medical care facility described in subdivision A 1 that is certified as a critical access*
 92 *hospital by the Centers for Medicare and Medicaid Services pursuant to Title XVIII of the Social Security Act*
 93 *(42 U.S.C. § 1395 et seq.). For purposes of this subdivision, a critical access hospital may calculate the 10-*
 94 *swing-bed per day limitation as an average over the fiscal year of the hospital. In the event the calculation*
 95 *exceeds an average of 10 swing beds in any fiscal year, the critical access hospital shall have the following*
 96 *fiscal year to reduce the fiscal year average to 10 swing beds or below. Any critical access hospital that fails*
 97 *to reduce the fiscal year average to 10 swing beds or below during the second fiscal year shall no longer be*
 98 *able to calculate the 10-swing-bed limitation by averaging on a fiscal year basis and shall calculate the*
 99 *limitation on a daily basis until such time as it has met the 10-swing-bed per day limit for two consecutive*
 100 *fiscal years, at which time averaging may resume. However, no critical access hospital shall have more than*
 101 *15 swing beds per day for more than five consecutive days. A critical access hospital shall make a good faith*
 102 *effort and so document the efforts made to place each additional patient in a certified nursing facility prior to*
 103 *exceeding the 10-swing-bed per day limit.*

104 E. The Department shall regularly review the types of medical care facilities subject to the provisions of
 105 this article and projects for which a certificate is required and provide to the Governor and the General
 106 Assembly, at least once every five years, a recommendation related to the continued appropriateness of
 107 requiring such types of medical care facilities to be subject to the provisions of this article and such types of
 108 projects to be subject to the requirement of a certificate. In developing such recommendations, the
 109 Department shall consider, for each type of medical care facility and project, the following criteria:

110 1. The current and projected future availability of the specific type of medical care facility or project;

111 2. The current and projected future demand for the specific type of medical care facility or project;

112 3. The current and projected future rate of utilization of the specific type of medical care facility or
 113 project;

114 4. The current and projected future capacity of existing medical care facilities or projects of that specific
 115 type;

116 5. The anticipated impact of changes in population and demographics, reimbursement structures and rates,
 117 and technology on demand for and availability, utilization, and capacity of existing medical care facilities or
 118 projects of that specific type;

119 6. Existing quality, utilization, and other controls applicable to the specific type of medical care facility or

120 project; and

121 7. Any risk to the health or well-being of the public resulting from inclusion of the specific type of
122 medical care facility or project on such list.

123 **§ 32.1-122.07. Authority of Commissioner for certain health planning activities; rural health plan;**
124 **designation as a rural hospital.**

125 A. The Commissioner, with the approval of the Board, is authorized to make application for federal
126 funding and to receive and expend such funds in accordance with state and federal regulations.

127 B. The Commissioner shall administer ~~section~~ § 1122 of the ~~United States~~ Social Security Act if the
128 Commonwealth has made an agreement with the ~~United States~~ U.S. Secretary of Health and Human Services
129 pursuant to such section.

130 C. In compliance with the provisions of the Balanced Budget Act of 1997, P.L. 105-33, and any
131 amendments to such provisions, the Commissioner shall submit to the appropriate regional administrator of
132 the Centers for Medicare & Medicaid Services (CMS) an application to establish a Medicare Rural
133 Hospital Flexibility Program in Virginia.

134 D. The Commissioner shall develop and the Board of Health shall approve a rural health care plan for the
135 Commonwealth to be included with the application to establish a Medicare Rural Hospital Flexibility
136 Program. In cooperation and consultation with the Virginia Hospital and ~~Health Care~~ *Healthcare* Association,
137 the Medical Society of Virginia, representatives of rural hospitals, and experts within the Department of
138 Health on rural health programs, the plan shall be developed and revised as necessary or as required by the
139 provisions of the Balanced Budget Act of 1997, P.L. 105-33, and any amendments to such provisions. In the
140 development of the plan, the Commissioner may also seek the assistance of the regional health planning
141 agencies. The plan shall verify that the Commonwealth is in the process of designating facilities located in
142 Virginia as critical access hospitals, shall note that the Commonwealth wishes to certify facilities as
143 "necessary providers" of health care in rural areas, and shall describe the process, methodology, and
144 eligibility criteria to be used for such designations or certifications. Virginia's rural health care plan shall
145 reflect local needs and resources and shall, at minimum, include, but need not be limited to, a mechanism for
146 creating one or more rural health networks, ways to encourage rural health service regionalization, and
147 initiatives to improve access to health services, including hospital services, for rural Virginians.

148 E. Notwithstanding any provisions of this chapter or the Board's regulations to the contrary, the
149 Commissioner shall, in the rural health care plan, (i) use as minimum standards for critical access hospitals,
150 the certification regulations for critical access hospitals promulgated by the Centers for Medicare & Medicaid
151 Services (CMS) pursuant to Title XVIII of the Social Security Act, as amended, and (ii) authorize
152 critical access hospitals to utilize *per day* a maximum of ~~ten~~ 10 beds among their inpatient hospital beds as
153 swing beds for the furnishing of services of the type ~~which that~~, if furnished by a nursing home or certified
154 nursing facility, would constitute skilled care services without complying with nursing home licensure
155 requirements or retaining the services of a licensed nursing home administrator. Such hospital shall include,
156 within its plan of care, assurances for the overall well-being of patients occupying such beds. *For purposes of*
157 *this subsection, a critical access hospital may calculate the 10-swing-bed per day limitation as an average*
158 *over the fiscal year of the hospital. In the event the calculation exceeds an average of 10 swing beds in any*
159 *fiscal year, the critical access hospital shall have the following fiscal year to reduce the fiscal year average*
160 *to 10 swing beds or below. Any critical access hospital that fails to reduce the fiscal year average to 10 swing*
161 *beds or below during the second fiscal year shall no longer be able to calculate the 10-swing-bed limitation*
162 *by averaging on a fiscal year basis and shall calculate the limitation on a daily basis until such time as it has*
163 *met the 10-swing-bed per day limit for two consecutive fiscal years, at which time averaging may resume.*
164 *However, no critical access hospital shall have more than 15 swing beds per day for more than five*
165 *consecutive days. A critical access hospital shall make a good faith effort and so document the efforts made*
166 *to place each additional patient in a certified nursing facility prior to exceeding the 10-swing-bed per day*
167 *limit.*

168 F. Nothing herein or set forth in Virginia's rural health care plan shall prohibit any hospital designated as a
169 critical access hospital from leasing the unused portion of its facilities to other health care organizations or
170 reorganizing its corporate structure to facilitate the continuation of the nursing home beds that were licensed
171 to such hospital prior to the designation as a critical access hospital. The health care services delivered by
172 such other health care organizations shall not be construed as part of the critical access hospital's services or
173 license to operate.

174 G. Any medical care facility licensed as a hospital shall be considered a rural hospital on and after
175 September 30, 2004, pursuant to 42 U.S.C. § 1395ww(d)(8)(E)(ii)(II), if (i) the hospital is located in an area
176 defined as rural by federal statute or regulation; (ii) the Board of Health defines, in regulation, the area in
177 which the hospital is located as a rural health area or the hospital as a rural hospital; or (iii) the hospital was
178 designated, prior to October 1, 2004, as a Medicare-dependent small rural health hospital, as defined in 42
179 U.S.C. § 1395ww(d)(5)(G)(iv).

180 **§ 32.1-132. Alterations or additions to hospitals and nursing homes; when new license required; use**

181 of inpatient hospital beds for furnishing skilled care services.

182 A. Any person who desires to make any substantial alteration or addition to or any material change in any
183 hospital or nursing home shall, before making such change, alteration, or addition, submit the proposal
184 therefor to the Commissioner for his approval. The Commissioner shall review the proposal to determine
185 compliance with applicable statutes and regulations of the Board and as soon thereafter as reasonably
186 practicable notify the person that the proposal is or is not approved.

187 B. If any such alteration, addition, or change has the effect of changing the bed capacity or classification
188 of the hospital or nursing home, the licensee shall obtain a new license for the remainder of the license year
189 before beginning operation of additional beds or in the new classification.

190 C. Notwithstanding any provision of state law to the contrary, any hospital, after sending such written
191 notice as may be required by the Commissioner, may utilize, for a period not to exceed ~~thirty~~ 30 days for any
192 one patient, a maximum of ~~ten~~ 10 percent of its inpatient hospital beds as swing beds for the furnishing of
193 services of the type ~~which~~ that, if furnished by a nursing home or certified nursing facility, would constitute
194 skilled care services without complying with nursing home licensure requirements or retaining the services of
195 a licensed nursing home administrator. *If the hospital is certified as a critical access hospital by the Centers
196 for Medicare and Medicaid Services pursuant to Title XVIII of the Social Security Act (42 U.S.C. § 1395 et
197 seq.), the hospital may utilize up to 10 beds per day among its inpatient hospital beds as swing beds for the
198 furnishing of services of the type that, if furnished by a nursing home or certified nursing facility, would
199 constitute skilled care services without complying with nursing home licensure requirements or retaining the
200 services of a licensed nursing home administrator.* Such hospital shall amend its plan of care and implement
201 its plan as amended to ensure the overall well-being of patients occupying such beds. *For purposes of this
202 subsection, a critical access hospital may calculate the 10-swing-bed per day limitation as an average over
203 the fiscal year of the hospital. In the event the calculation exceeds an average of 10 swing beds in any fiscal
204 year, the critical access hospital shall have the following fiscal year to reduce the fiscal year average to 10
205 swing beds or below. Any critical access hospital that fails to reduce the fiscal year average to 10 swing beds
206 or below during the second fiscal year shall no longer be able to calculate the 10-swing-bed limitation by
207 averaging on a fiscal year basis and shall calculate the limitation on a daily basis until such time as it has
208 met the 10-swing-bed per day limit for two consecutive fiscal years, at which time averaging may resume.
209 However, no critical access hospital shall have more than 15 swing beds per day for more than five
210 consecutive days. A critical access hospital shall make a good faith effort and so document the efforts made
211 to place each additional patient in a certified nursing facility prior to exceeding the 10-swing-bed per day
212 limit.* Only those hospitals ~~which~~ that qualify under § 1883 of Title XVIII and § 1913 of Title XIX of the
213 Social Security Act and are certified as skilled nursing facilities may be reimbursed for such services for
214 Medicare and Medicaid patients.

215 **2. That the State Commissioner of Health shall collect data annually from critical access hospitals that**
216 **elect to use fiscal year averaging as permitted by the first enactment of this act and make it publicly**
217 **available.**

218 **3. That the provisions of this bill shall expire on July 1, 2028.**