

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act 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.

[H 1552]

Approved

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;

8. Any capital expenditure of \$15 million or more, not defined as reviewable in subdivisions 1 through 7, by or on behalf of a medical care facility described in subsection A other than a general hospital. The

amounts specified in this subdivision shall be revised annually to reflect inflation using appropriate measures incorporating construction costs and medical inflation. Nothing in this subdivision shall be construed to modify or eliminate the reviewability of any project described in subdivisions 1 through 7 when undertaken by or on behalf of a general hospital; and

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

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

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

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

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

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

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

1. The current and projected future availability of the specific type of medical care facility or project;
2. The current and projected future demand for the specific type of medical care facility or project;
3. The current and projected future rate of utilization of the specific type of medical care facility or project;
4. The current and projected future capacity of existing medical care facilities or projects of that specific type;
5. The anticipated impact of changes in population and demographics, reimbursement structures and rates, and technology on demand for and availability, utilization, and capacity of existing medical care facilities or projects of that specific type;
6. Existing quality, utilization, and other controls applicable to the specific type of medical care facility or project; and
7. Any risk to the health or well-being of the public resulting from inclusion of the specific type of

medical care facility or project on such list.

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

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

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

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

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

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

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

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

§ 32.1-132. Alterations or additions to hospitals and nursing homes; when new license required; use of inpatient hospital beds for furnishing skilled care services.

A. Any person who desires to make any substantial alteration or addition to or any material change in any

hospital or nursing home shall, before making such change, alteration, or addition, submit the proposal therefor to the Commissioner for his approval. The Commissioner shall review the proposal to determine compliance with applicable statutes and regulations of the Board and as soon thereafter as reasonably practicable notify the person that the proposal is or is not approved.

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

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

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

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