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SFA BILL ANALYSIS

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Senate Bills 743 through 746 (Substitutes S-1, Drafts 1)
Sponsor: Senator Dale L. Shugars
Committee: Health Policy and Senior Citizens

Date Completed: 10-14-97

CONTENT

The bills would add Part 220 (the "Nonprofit Hospital Sale Act") to the Public Health Code to regulate the acquisition of a nonprofit hospital by a for-profit entity. The bills would include a requirement that the for-profit entity submit an application to and receive the approval of the Department of Community Health (DCH) and the Attorney General; specify the contents of the application; prescribe what the Attorney General and DCH would have to consider before approving or disapproving an application; prohibit the DCH from approving a sale unless the proceeds from the sale were deposited with a community foundation; and forbid certain individuals involved in the selling or purchasing of a nonprofit hospital from profiting from the sale. All the bills are tie-barred to each other. Following is a complete description of each bill.

Senate Bill 743 (S-1, Draft 1)

The bill would prohibit a "person" from acquiring a nonprofit hospital without first applying for and receiving the approval of the DCH and the Attorney General. ("Person" would be an individual or a partnership, corporation, limited liability company, or other legal entity; however, a person could not be a nonprofit hospital, nonprofit hospital corporation, municipal hospital corporation, or a subsidiary of one of those entities.)

An application to receive approval to acquire a nonprofit hospital would have to be submitted by an applicant to the DCH and the Attorney General on forms provided by the DCH. The DCH would have to require at least all of the following information in the application: the name of the transferring nonprofit hospital; the name of the purchaser or other parties to an acquisition; the name of the community foundation into which the proceeds of the sale or acquisition would be deposited; the terms of the proposed sale or acquisition agreement; the sale or acquisition price; and a copy of the sale or acquisition agreement and all other related documents. An applicant would have to submit simultaneously a copy of the application and copies of all additional related materials to the DCH and the Attorney General. The application and all related documents would be confidential, would not be public documents, and would not be subject to the Freedom of Information Act.

Within 10 working days after receipt of an application, the DCH would have to publish notice of the application through means reasonably calculated to give notice to the public, and notify by first-class mail each person who had requested notice of the filing of such applications in advance. The notice would have to state that an application had been received, the names of the parties to the proposed sale or acquisition agreement, and the date by which a person could submit written comments about the application to the DCH.

Within 30 days after the date an application was received, the DCH, and the Attorney General if his

or her review were requested by the DCH, would have to determine if the application was complete for the purposes of review. The DCH or the Attorney General could find that an application was incomplete, if a question on the application form had not been answered in whole or in part; if a question had been answered in a manner that did not fairly meet the question addressed; or if the application did not include attachments of supporting documents necessary to complete the answer. If the DCH or the Attorney General determined that an application was incomplete, it would have to notify the applicant within 30 days after the date the application was received, stating the reasons for its determination of incompleteness with reference to the particular questions for which a deficiency was noted.

Within 90 days after receiving a completed application, the DCH and the Attorney General would have to review the application in accordance with the standards prescribed in the bills. Within 120 days after receiving a completed application, the DCH and the Attorney General would have to approve or disapprove the sale. The DCH or the Attorney General, or a party to the sale, could request in writing and would have to be granted an extension of up to 90 days beyond the 120-day period.

Senate Bill 744 (S-1, Draft 1)

The bill would require the Attorney General to consider all of the following in reviewing a hospital acquisition application:

-- Whether the sale and purchase were permitted under the Nonprofit Corporation Act, and other State laws governing nonprofit entities or charitable trusts, including but not limited to, the Supervision of Trustees for Charitable Purposes Act.
-- Whether the governing body of the nonprofit corporation exercised due diligence in deciding to dispose of hospital assets, selecting the acquiring entity, and negotiating the terms and conditions of the disposition; and the procedures used by the nonprofit hospital in making its decision, including whether expert assistance was used.
-- Whether conflict of interest was avoided. This would include, but not be limited to, conflicts of interest related to board members of, key executives of, legal counsel for, and experts retained by the nonprofit hospital or the acquirer including, but not limited to, whether the acquisition would result in inurement to a private person or private entity.
-- Whether the nonprofit hospital would receive fair market value for its assets. The Attorney General could employ, at the purchaser's expense, necessary independent expert assistance in making this determination if the application incompletely addressed the criteria above regarding whether the nonprofit corporation exercised due diligence.
-- Whether charitable funds were placed at risk, if the acquisition were financed in part by the transferring nonprofit corporation hospital.
-- Whether a management contract under the sale was for fair market value.
-- Whether the proceeds of the sale would be used for appropriate charitable purposes consistent with the transferring nonprofit hospital's original purpose in the affected community, and whether the proceeds would be controlled by a community foundation as charitable funds independently of the acquirer.
-- Whether a community foundation established to hold the proceeds of the sale would be broadly based in and be representative of the affected community, exclusive of the board of management of the acquiring entity.
-- Other elements of the sale that the Attorney General was required or allowed to consider by law.

Senate Bill 745 (S-1, Draft 1)

The bill would require the DCH to hold a public hearing on the sale of a nonprofit hospital; and

require the DCH and the Attorney General to make a decision on an application based only upon the criteria the DCH and the Attorney General would be required to consider.

The bill provides that the DCH, after the required review of an application but before the sale of a nonprofit hospital was complete, would have to hold a public hearing regarding the sale. The DCH could conduct the public hearing at the expense of the purchaser and in the manner provided for a public hearing under the Administrative Procedures Act. The DCH would have to hold the hearing in the county in which the nonprofit hospital being sold was located.

Further, the bill would forbid the DCH and the Attorney General from making a decision to approve or disapprove an application subject to a condition or modification that was not directly related to the criteria the Attorney General would have to consider in reviewing an application (under Senate Bill 744), or the DCH would have to consider in reviewing an application (under Senate Bill 746); a condition or modification would have to bear a direct relationship to the application under review.

An applicant could seek judicial review of a decision of the DCH or the Attorney General, in a court of competent jurisdiction.

Senate Bill 746 (S-1, Draft 1)

The bill would require the DCH to consider various criteria in deciding to approve or disapprove an acquisition; prohibit the DCH from approving a sale unless the proceeds were deposited with a community foundation; forbid certain individuals involved in the selling or purchasing of a nonprofit hospital from profiting from the sale, and provide penalties for violating the prohibition; allow the Department of Consumer and Industry Services (DCIS) to fine a hospital that violated certain licensing requirements; and specify that the provisions in Senate Bill 746 and the other bills would not diminish or otherwise modify the powers, duties, or responsibilities of the Attorney General, as prescribed by law.

The bill would require the DCH, in making a decision whether to approve or disapprove an acquisition, to consider all of the following:

-- Whether sufficient procedures and safeguards were included to assure the affected community continued access to needed health services.
-- Whether the acquiring entity had made a commitment to provide care to the disadvantaged, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care, independently of the community foundation.
-- Whether procedures or safeguards were in place to identify conflict of interest in patient referral by health care providers who invested in the acquiring entity, and the nature of those procedures or safeguards.

The DCH could not approve a sale unless the proceeds of the sale were deposited into a community foundation and controlled as charitable funds independent of the acquiring entity. The establishment of the community foundation would have to assure that the services provided by the community foundation did not duplicate, augment, or replace services provided by the acquiring entity.

Except for an employment contract that was in existence at the time an application was filed, an officer, director, board member, or other fiduciary of a nonprofit hospital that was sold, or of an entity that acquired a nonprofit hospital, could not receive anything of value that related to the sale of the nonprofit hospital. A person who violated this provision would be guilty of a felony, punishable by imprisonment for up to four years or a fine of up to $10,000, or both. In addition, the sentencing court could require the person to forfeit the money or other valuable consideration received as a result of the violation.

A hospital that was acquired under Part 220 would have to apply for a new license under Article 17 of the Code (which governs health facilities and agencies). The bill provides that the DCIS could deny, suspend, limit, or revoke a license for failure to fulfill a commitment made or failure to follow a procedure or safeguard required under Part 220. Further, the DCIS could impose an administrative fine of $25,000, up to $250,000, against a health facility or agency that failed to fulfill a commitment made or follow a procedure or safeguard required under Part 220.

The bill specifies that Part 220 would apply only to the acquisition of a hospital that took place after the effective date of Senate Bill 746.

Proposed MCL 333.22001-333.2204 (S.B. 743) Legislative Analyst: G. Towne
Proposed MCL 333.22007 (S. B. 744)
Proposed MCL 333.22005 & 333.22006 (S.B. 745)
MCL 333.20165 et al. (S.B. 746)

FISCAL IMPACT

The bills would have no fiscal impact on State or local units of government. Given that, to date, there has been only one formal attempt to acquire a nonprofit hospital by a private, for-profit concern, it is likely that the new administrative functions of he Department of Community Health and Attorney General required under the bills would be absorbed within existing staff and resources.

Fiscal Analyst: P. Graham

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