Testimony of Katie Fullam Harris
MaineHealth
In Opposition to LD 97, “An Act to Repeal the Hospital and Health Care Provider Cooperation Act”
January 31, 2023

Senator Bailey, Representative Perry and Members of the Joint Standing Committee on Health Coverage, Insurance and Financial Services, I am Katie Fullam Harris of MaineHealth, and I am here to testify in opposition to this legislation.

MaineHealth was disappointed and a bit confounded when we saw this bill to repeal the Hospital and Health Care Provider Cooperation Act. This Act was reviewed as part of an extensive study of hospitals in 2005, and the Commission determined that more hospital collaboration and cooperation was needed to improve access to and cost of health care in Maine.

We are told that the genesis of LD 97 was a policy paper issued by the Federal Trade Commission, and which used as its source a paper written by a Graduate Fellow at the Federal Trade Commission in June of 2020. That paper concluded that Certificate of Public Advantage (COPA) laws, of which Maine’s Hospital and Health Care Provider Cooperation Act is one, can lead to higher prices and reduced quality. The paper cited three hospital mergers that used COPA laws, including one in Maine, as evidence that Certificate of Public Advantage (COPA) laws are not effective. The economists based their conclusions on Medicare cost reports, and they did not reach out to anyone at MaineHealth to confirm their conclusions. MaineHealth strongly disagrees with the Maine data used to support this paper, and subsequently provided a letter to its authors and the Federal Trade Commission outlining the errors in their assumptions and therefore their conclusions (see attached). We ask that this Committee carefully review our letter in the context of this bill before coming to conclusions about the efficacy of Maine’s Hospital and Health Care Cooperation Act.

Background

Maine is one of 19 states that currently have Certificate of Public Advantage laws, known in our statutes as the Hospital and Health Care Provider Cooperation Act. These laws are designed to give the State the power to determine that the benefits of certain hospital and health care provider transactions, such as mergers, outweigh the potential anti-trust concerns that would otherwise govern the legal transaction.

Maine’s Hospital and Health Care Cooperation Act was enacted in 2005, and it has been used just twice: when Southern Maine Health Care merged with MaineHealth in 2009,
and again when Penobscot Bay Medical Center joined the MaineHealth System in 2010. In both cases, the merging hospitals, SMMC and Pen Bay, faced significant financial challenges. While the transactions may have appeared to represent loss of competition on paper, in fact they represented important opportunities to improve access to high quality care closer to home, as well as to create financial and clinical efficiencies that have served their communities well. For examples, as part of its agreement with the State, Southern Maine Medical Center connected every person who came to its Emergency Department who did not have a primary care physician with primary care. And MaineHealth was required to provide over $2 million in subsidies to implement Epic, its electronic health record. Thus, in addition to providing approval authority for health care provider transactions, the Hospital and Health Care Provider Cooperation Act also provides the State with the opportunity to impose requirements on the hospitals to ensure that they meet their obligations to improve public benefit.

**What the Law Does**

Maine’s Hospital and Health Care Cooperation Act allows the State’s Department of Health and Human Services to use specific criteria to override federal antitrust review when it determines that a transaction meets certain criteria. The statute does not compel the Department to use this law, and, like the Certificate of Need law, the Department maintains the power of the ultimate decision. In other words, it simply provides an avenue that the Department may use under certain circumstances, but it in no way requires the Department to do so.

The criteria required for consideration include such things as:

1. Enhancement of the quality of care provided to citizens of the State;
2. Preservation of hospitals or health care providers and related facilities in geographical proximity to the communities traditionally served by those facilities;
3. Gains in the cost efficiency of services provided by the hospitals or others;
4. Improvements in the utilization of hospital or other health care resources and equipment;
5. Avoidance of duplication of hospital or other health care resources; and
6. Continuation or establishment of needed educational programs for health care providers.

At the same time, the law requires that the Department evaluate potential disadvantages, including:

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 or health care providers.
(2) The extent of any disadvantages attributable to reduction in competition among covered entities or other persons furnishing goods or services to, or in competition with, covered entities that is likely to result directly or indirectly from the cooperative agreement;

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

(4) The extent of any likely adverse impact on the access of persons enrolled in in-state educational programs for health professions to existing or future clinical training programs; and

(5) 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. [PL 2005, c. 670, §1 (NEW); PL 2005, c. 670, §4 (AFF).]

The law further provides the State’s Attorney General’s Office with the authority to intervene in such cases, including court action if it deems it appropriate and necessary.

Finally, the law provides a public comment process and a requirement that the Department supervise the impact of the transaction to ensure that it met the specified criteria.

For example, in the Southern Maine Medical Center merger, Charles River Associates was employed to review the impact of the transaction and determine if all obligations had been met. In that case, it was determined that expense savings and cost avoidances was $5.7 million as a result of SMMC joining MaineHealth.

Thus, this law provides the State with control that it would otherwise cede to the federal government for certain cases in which the State has reason to believe that the benefits of a merger or transaction outweigh the risk of reduced competition among health care providers.

**How It Is Paid For**

This law costs the taxpayers nothing. In fact, all hospitals in Maine are assessed an annual fee that is intended to cover the costs of COPA transactions when they occur. The law requires that the account be a carrying account, so there should be a reasonable sum of money in that account today. This bill is silent on how those funds will be used, but should you determine that you wish to repeal the Hospital and Health Care Cooperation statute, we ask that you return the fees that have been collected to Maine’s hospitals that have paid them.

**Conclusion**

Repealing this law will simply eliminate a regulatory option that may prove very beneficial in the future design of Maine’s health care system. The delivery of health care
is constantly evolving, and, as we learned during the Covid pandemic, it is important to have flexibility and tools to meet unforeseen needs and circumstances. This statute provides such flexibility by providing the State with the authority to make its own determinations about the design of its health care system. Eliminating such flexibility and local control could have unintended negative consequences in our future, and we urge this Committee to vote Ought Not to Pass on LD 97.