HOUSE BILL REPORT
HB 2128

As Reported by House Committee On:
Health Care & Wellness
Appropriations

Title: An act relating to the modernization of the certificate of need program.

Brief Description: Modernizing the certificate of need program.

Sponsors: Representatives Schmick, Graham, Macri, Harris, Jacobsen and Hutchins.

Brief History:

Committee Activity:

Health Care & Wellness: 1/10/24, 1/30/24 [DPS];
Appropriations: 2/3/24, 2/5/24 [DP2S(w/o sub HCW)].

Brief Summary of Second Substitute Bill

- Establishes the Certificate of Need Modernization Advisory Committee (Advisory Committee).
- Requires the Office of Financial Management to contract with a contractor to perform a review of certificate of need (CON) programs in other states and other research on the impact of CON to inform the Advisory Committee.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Riccelli, Chair; Bateman, Vice Chair; Schmick, Ranking Minority Member; Hutchins, Assistant Ranking Minority Member; Bronoske, Caldier, Davis, Graham, Harris, Macri, Maycumber, Mosbrucker, Orwall, Simmons, Stonier, Thai and Tharinger.

Staff: Kim Weidenaar (786-7120).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Background:

The Certificate of Need (CON) Program (Program) is operated by the Department of Health (DOH) and is a regulatory process that requires certain health care facilities and providers to get state approval before building certain types of facilities or offering new or expanded services. A CON is required before a health care facility can be constructed, sold, purchased, or leased, or before a health care provider can offer certain new or expanded services, such as a hospital seeking to increase their licensed beds. When the DOH receives a CON application, the DOH reviews the potential impact of the proposed construction or expansion on a community's need for the service. Health care facility CON applications are reviewed subject, but not limited, to the following criteria: the need for such services; the availability of less costly or more effective alternative methods of providing such services; financial feasibility; the impact on health care costs in the community, quality assurance, and cost-effectiveness; the use of existing services and facilities; and—for hospitals—whether the hospital meets or exceeds the regional average level of charity care as well as other factors.

Summary of Substitute Bill:

The Certificate of Need Modernization Advisory Committee (Advisory Committee) is established with the following members:

- one member from each of the two largest caucuses of the House of Representatives appointed by the Speaker of the House of Representatives;
- one member from each of the two largest caucuses of the Senate appointed by the President of the Senate;
- the Secretary of the Department of Health (Secretary of Health) or designee;
- the Director of the Health Care Authority or designee;
- the Insurance Commissioner or designee; and
- the following individuals appointed by the Governor:
  - a representative of the Governor's Office;
  - a representative of the Office of Financial Management (OFM);
  - a representative of a large and small private employer-sponsored health benefits purchaser;
  - a representative of health maintenance organizations;
  - a representative of labor organizations;
  - a representative of health carriers;
  - a tribal representative;
  - two health care consumers;
  - a representative of an organization that represents health care consumers or a patient coalition; and
  - one representative from each of the following types of health care facilities: hospices, hospice care centers, hospitals, psychiatric hospitals, nursing homes, kidney disease treatment centers, ambulatory surgical facilities, and a home

health agency.

The Governor must appoint the Chair of the Advisory Committee (Chair) and the Chair is responsible for convening meetings every two months. The OFM must provide staff support to the Advisory Committee. The OFM must contract with a contractor with relevant expertise to complete a review of the following items to inform the Advisory Committee's deliberations:

- research on the role and impact of CON programs in other states, including the scope of each reviewed state's CON program; any reports or studies regarding the function or outcome of the state's CON program; and for states that have repealed their CON programs, the state's experience with the expansion or contraction of supply of the services and facilities no longer subject to CON;
- recent research related to the impacts of CON programs on access, quality, and cost of health care services; and
- to the extent research is available, the review should include any topics the Advisory Committee must consider and review, which are listed below.

Prior to beginning the review, the contractor must interview every Advisory Committee member for their input. The contractor must provide regular progress reports to the Advisory Committee. The contract is exempt from the competitive procurement requirements.

The Advisory Committee must consider and review:

- the role that the Program has in the current health care system to contain health care costs associated with the health care system, as a whole, and for each category of health care facility, health service, or activity subject to the Program;
- whether the Program promotes and facilitates patient care in urban, suburban, and rural areas for each category of health care facility, health service, or activity subject to the Program;
- whether the Program increases the quality of health care services;
- whether patients have more health care choices because of the Program;
- whether the Program facilitates the adoption of innovative and cost-effective health care technologies;
- whether the Program reduces the overutilization of health care services;
- whether the Program assists in the establishment of an adequate health care workforce;
- whether the Program creates an unnecessary barrier to the establishment of needed health care facilities and services;
- whether the Program facilitates or creates barriers for new forms of providing care;
- whether and how the Program addresses equitable access to care for consumers who are uninsured or receiving coverage through the Medicaid and Medicare programs;
- whether and how the Program impacts a health care facility's payor mix; and
- ways to modernize the Program to improve its performance, including:
    - consideration of the need to continue to require the coverage of each category

of health care facility, health service, or other activity subject to the Program and consideration of the elimination of any categories from CON coverage or elimination of the Program, as a whole;
- whether the Program needs to include other health care facilities, health services, or other activities; and
- ways to improve the Program through modernizing its goals, criteria, and processes.

By December 15, 2024, the contractor must submit a preliminary report summarizing the findings based on their review, which must be submitted to the Governor and relevant committees of the Legislature as well as presented to the Advisory Committee. By October 15, 2025, the contractor must formally present their findings based on the review and their recommendations to the Advisory Committee. The recommendations must focus on whether to modernize, expand, reduce, eliminate, or maintain the Program based on access to care, quality of care, and total health care expenditures. The Advisory Committee must have an opportunity to provide feedback to the consultant on all recommendations. The final report must include the contractor's findings, recommendations, and any feedback from the Advisory Committee on the recommendation and be submitted to the Advisory Committee, the Governor, and relevant committees of the Legislature.

Members of the Advisory Committee that are compensated or reimbursed for participating on behalf of an employer, governmental entity, or other organization are not entitled to reimbursement for travel expenses. The Advisory Committee is subject to the Open Public Meetings Act and the Public Disclosure Act.

Substitute Bill Compared to Original Bill:

The substitute bill:
- changes the name to the Certificate of Need Modernization Advisory Committee and makes the following changes to the composition of the Advisory Committee: adds the Insurance Commissioner or Commissioner's designee; adds the following members appointed by the Governor, a representative from the Governor's Office, a representative from the OFM, a large and small private employer-sponsored health benefits purchaser, a representative of health maintenance organizations, a tribal representative, two health care consumers, a representative of an association representing physicians in Washington; and removes the Secretary of the Department of Social and Health Services;
- authorizes the Governor to choose the Chair rather than specifying the Secretary of Health as the Chair and requires the Chair to convene Advisory Committee meetings every two months;
- moves the staffing and contracting responsibility from the DOH to the OFM and requires the OFM to contract with a contractor to complete a review of the role and impact of CON programs in other states as well as any research related to the impacts of CON programs on access, quality, and cost of health care services. The contractor

must interview every member of the Advisory Committee for their input and provide regular progress reports to the Advisory Committee;
- makes the following changes to what the Advisory Committee must consider and review:
  - adds whether the Program facilitates or creates barriers for new forms of providing care, whether and how the Program addresses equitable access to care for consumers who are uninsured or receiving coverage through the Medicaid and Medicare programs, and whether and how the Program impacts a health care facility's payor mix; and
  - removes strategic health planning activities as the basis of the Program;
- modifies the report and final recommendations by requiring the contractor to complete the reports and recommendations rather than the Advisory Committee. Specifically, the contractor must submit a preliminary report of the findings related to the items the contractor is required to review to the Governor and the Legislature by December 15, 2024, and to present the findings to the Advisory Committee. By October 15, 2025, the contractor must formally present their findings and recommendations on whether to modernize, expand, reduce, eliminate, or maintain the Program based on access and quality of care and total health care expenditures to the Advisory Committee. The Advisory Committee must be given an opportunity to provide feedback on the recommendations, which must be included in the contractor's final report submitted to the Legislature and the Governor;
- specifies that the Advisory Committee is subject to the Open Public Meetings Act and Public Disclosure Act; and
- exempts the contract with the contractor from competitive procurement requirements.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on January 30, 2024.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) It is time that we look at the CON process. Does CON help with patient safety and does it reduce costs? Is it a barrier and is it helping or not? This review has not been taken on since 1989 and the health care system has changed dramatically. Anyone who has been around for awhile has heard a lot of discussion about CON and it is time we take a look.

Certificate of Need is an important issue and there has been a lot of interest in improving CON, but the question is how to do that. The physicians would like to be included in the Task Force but have questions about the timelines.

Certificate of Need laws were adopted in the 1970s in response to federal laws requiring states to do so to keep federal funds. The federal government wanted to keep down their own costs. Keeping down the supply of health care is harmful to patients and the problem that the federal government was trying to solve no longer exists and the federal requirement was repealed in 1986. Other federal entities have supported the repeal of these laws because of their anticompetitive impacts. Other states have repealed or examined their CON laws finding that CON prevents people from accessing care, particularly in rural areas. Economic evidence shows that these laws have failed to achieve any legislative purpose and instead increase costs and decrease access to care and health care quality.

(Opposed) None.

(Other) There is agreement that it is time to take a fresh look at CON and identify any necessary changes to meet the needs of Washington. Certificate of Need is an important lever to ensure the health and stability of the health care system. The Governor's supplemental budget calls on the Department of Health to do an analysis and take a look at the Program and its impact on access to care and cost, to look at what other states are doing, and how it might be done differently. There are concerns about the timeline in this bill.

Health care is a fast-changing field, and the CON process does not look at some of the ways that care is provided today, such as free-standing emergency rooms or virtual care. There is room for more voices on the Task Force to provide social determinants of health and health equity perspectives.

This is not an easy issue to review. Certificate of Need has been reviewed many times, but no was action taken. Reviewing and revising CON is extremely involved and the review must be careful not to lose sight of the community values and input. Health care is a big and competitive business. There should be more consumer and employer representation to balance out all of the industry representation. There should also be a state health plan that is central to the discussion. Finally, the reporting timeline does not give nearly enough time and the Governor's timeline is more reasonable.

Persons Testifying: (In support) Representative Joe Schmick, prime sponsor; Jaimie Cavanaugh, Institute for Justice; and Sean Graham, Washington State Medical Association.

(Other) Christie Spice, Department of Health; Janet Varon, Northwest Health Law Advocates; and Dane Austreng, Service Employees International Union 1199NW.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second

substitute bill do pass and do not pass the substitute bill by Committee on Health Care & Wellness. Signed by 30 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Corry, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Connors, Assistant Ranking Minority Member; Couture, Assistant Ranking Minority Member; Berg, Callan, Chopp, Davis, Dye, Fitzgibbon, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Sandlin, Schmick, Senn, Simmons, Slatter, Springer, Stokesbary, Stonier, Tharinger and Wilcox.

Staff: Emily Stephens (786-7157).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Health Care & Wellness:

The second substitute bill:

- modifies the timeline in which the contractor must interview every member of the Advisory Committee by removing the requirements that all interviews occur before beginning the review;
- requires the Office of Financial Management to contract or hire dedicated staff to facilitate and provide staff support to the nonlegislative members of the Advisory Committee;
- requires Senate Committee Services and the Office of Program Research to provide staff support to the legislative members of the Advisory Committee;
- requires the Department of Health to provide nonconfidential data and information needed to complete the review to the contractor through a data sharing agreement; and
- specifies that the contractor's review must include available information and research related to the Program; and
- adds a null and void clause, making the bill null and void unless it is funded in the budget.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) The Program has not been looked at since 1987. The landscape of how health care is delivered in Washington has changed since then. The bill will reexamine health care in delivery in the state.

(Opposed) None.

(Other) The Program affects for-profit and nonprofit dialysis providers differently. All financially impacted voices should be heard in the study required in the bill.

Persons Testifying: (In support) Representative Joe Schmick, prime sponsor.

(Other) Jessica Hostetler, Northwest Kidney Centers.

Persons Signed In To Testify But Not Testifying: None.