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I N   S E N A T E

January 13, 2012

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Introduced by Sens. HANNON, GOLDEN, JOHNSON, LARKIN, MARTINS, McDONALD, RANZENHOFER -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public health law, in relation to accountable care organizations

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Article 29-E of the public health law, as added by section  
2     66 of part H of chapter 59 of the laws of 2011, is amended to read as  
3     follows:

4                     ARTICLE 29-E

5             ACCOUNTABLE CARE ORGANIZATIONS [DEMONSTRATION PROGRAM]  
6     Section 2999-n. Accountable care organizations; findings; purpose.  
7             2999-o. Definitions.  
8             2999-p. Establishment of [ACO demonstration program] ACOS.  
9             2999-q. Accountable care organizations; requirements.  
10            2999-r. Other laws.

11     S 2999-n. Accountable care organizations; findings; purpose. [The  
12     legislature intends to test the ability of accountable care organiza-  
13     tions to assume a role in delivering an array of health care services,  
14     from primary and preventive care through acute inpatient hospital and  
15     post-hospital care.] The legislature finds that the formation and opera-  
16     tion of accountable care organizations under this article, and subject  
17     to appropriate regulation, can be consistent with the purposes of feder-  
18     al and state anti-trust, anti-referral, and other statutes, including  
19     reducing over-utilization and expenditures. The legislature finds that  
20     the development of accountable care organizations under this article  
21     will reduce health care costs, promote effective allocation of health  
22     care resources, and enhance the quality and accessibility of health  
23     care. The legislature finds that this article is necessary to promote

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 the formation of accountable care organizations and protect the public  
2 interest and the interests of patients and health care providers.

3 S 2999-o. Definitions. As used in this article, the following terms  
4 shall have the following meanings, unless the context clearly requires  
5 otherwise:

6 1. "Accountable care organization" or "ACO" means an organization of  
7 clinically integrated health care providers certified by the commission-  
8 er under this article.

9 2. "ACO PARTICIPANT" OR "PARTICIPANT" MEANS A HEALTH CARE PROVIDER  
10 THAT IS ONE OF THE HEALTH CARE PROVIDERS THAT COMPRISE THE ACO.

11 3. Certificate of authority" or "certificate" means a certificate of  
12 authority issued by the commissioner under this article.

13 [3.] 4. "CMS" MEANS THE FEDERAL CENTERS FOR MEDICARE AND MEDICAID  
14 SERVICES.

15 5. "CMS REGULATIONS" MEANS APPLICABLE FEDERAL LAWS AND CMS REGULATIONS  
16 AND POLICIES.

17 6. "Health care provider" includes but is not limited to an entity  
18 licensed or certified under article twenty-eight or thirty-six of this  
19 chapter; an entity licensed or certified under article sixteen, thirty-  
20 one or thirty-two of the mental hygiene law; or a health care practi-  
21 tioner licensed or certified under title eight of the education law or a  
22 lawful combination of such health care practitioners; and may also  
23 include, to the extent provided by regulation of the commissioner, other  
24 entities that provide technical assistance, information systems and  
25 services, care coordination and other services to health care providers  
26 and patients participating in an ACO.

27 [4.] 7. "MEDICARE-ONLY ACO" MEANS AN ACO ISSUED A CERTIFICATE OF  
28 AUTHORITY UNDER SUBDIVISION FOUR OF SECTION TWENTY-NINE HUNDRED NINETY-  
29 NINE-P OF THIS ARTICLE.

30 8. "Primary care" means the health care fields of family practice,  
31 general pediatrics, primary care internal medicine, primary care obstet-  
32 rics, or primary care gynecology, without regard to board certification,  
33 provided by a health care provider acting within his, her, or its lawful  
34 scope of practice.

35 [5.] 9. "Third-party health care payer" has its ordinary meanings and  
36 may include any entities provided for by regulation of the commissioner,  
37 which may include an entity such as a pharmacy benefits manager, fiscal  
38 administrator, or administrative services provider that participates in  
39 the administration of a third-party health care payer system.

40 [6. Any references to the "department of financial services" and the  
41 "superintendent of financial services" in this article shall mean, prior  
42 to October third, two thousand eleven, respectively, the "department of  
43 insurance" and the "superintendent of insurance."]

44 S 2999-p. Establishment of [ACO demonstration program] ACOS. 1. An  
45 accountable care organization: (a) is an organization of clinically  
46 integrated health care providers that work together to provide, manage,  
47 and coordinate health care (including primary care) for a defined popu-  
48 lation; with a mechanism for shared governance; the ability to negoti-  
49 ate, receive, and distribute payments; and accountability for the quali-  
50 ty, cost, and delivery of health care to the ACO's patients; in  
51 accordance with this article; and (b) has been issued a certificate of  
52 authority by the commissioner under this article.

53 2. The commissioner shall establish a [demonstration] program within  
54 the department to [test the ability] PROMOTE AND REGULATE THE USE of  
55 ACOs to deliver an array of health care services for the purpose of

1 improving the quality, coordination and accountability of services  
2 provided to patients in New York.

3 3. The commissioner may issue a certificate of authority to an entity  
4 that meets conditions for ACO certification as set forth in regulations  
5 [promulgated] MADE by the commissioner pursuant to section twenty-nine  
6 hundred ninety-nine-q of this article. The commissioner shall not [issue  
7 more than seven certificates under this article, and shall not] issue  
8 any new certificate under this article after December thirty-first, two  
9 thousand [fifteen] SIXTEEN.

10 4. (A) NOTWITHSTANDING SUBDIVISION THREE OF THIS SECTION, THE COMMIS-  
11 SIONER SHALL ISSUE A CERTIFICATE OF AUTHORITY AS A MEDICARE-ONLY ACO TO  
12 AN ENTITY AUTHORIZED BY CMS TO BE AN ACCOUNTABLE CARE ORGANIZATION UNDER  
13 THE MEDICARE PROGRAM, UPON RECEIVING AN APPLICATION TO BE A  
14 MEDICARE-ONLY ACO FROM THE ENTITY DOCUMENTING ITS STATUS UNDER THIS  
15 SUBDIVISION. A CERTIFICATE OF AUTHORITY UNDER THIS SUBDIVISION SHALL  
16 ONLY APPLY TO THE MEDICARE-ONLY ACO'S ACTIONS IN RELATION TO MEDICARE  
17 BENEFICIARIES UNDER ITS AUTHORIZATION FROM CMS.

18 (B) TO THE EXTENT CONSISTENT WITH CMS REGULATIONS, A MEDICARE-ONLY ACO  
19 SHALL BE SUBJECT TO:

20 (I) SUBDIVISION SEVEN OF SECTION TWENTY-NINE HUNDRED NINETY-NINE-Q AND  
21 SUBDIVISIONS ONE, TWO AND THREE OF SECTION TWENTY-NINE HUNDRED  
22 NINETY-NINE-R OF THIS ARTICLE, WITHOUT REGARD TO WHETHER THE COMMISSION-  
23 ER HAS MADE REGULATIONS UNDER THIS ARTICLE; AND

24 (II) OTHER PROVISIONS OF THIS ARTICLE TO THE EXTENT SPECIFICALLY  
25 PROVIDED BY THE COMMISSIONER IN REGULATIONS CONSISTENT WITH THIS ARTI-  
26 CLE.

27 5. The commissioner may limit, suspend, or terminate a certificate of  
28 authority if an ACO is not operating in accordance with this article.

29 [5.] 6. The commissioner is authorized to seek federal approvals and  
30 waivers to implement this article, including but not limited to those  
31 approvals or waivers necessary to obtain federal financial partic-  
32 ipation.

33 S 2999-q. Accountable care organizations; requirements. 1. The commis-  
34 sioner shall [promulgate] MAKE regulations establishing criteria for  
35 certificates of authority, quality standards for ACOs, reporting  
36 requirements and other matters deemed to be appropriate and necessary in  
37 the operation and evaluation of [the demonstration program] ACOS UNDER  
38 THIS ARTICLE. In [promulgating] MAKING such regulations, the commission-  
39 er shall consult with the superintendent of financial services, health  
40 care providers, third-party health care payers, advocates representing  
41 patients, and other appropriate parties. SUCH REGULATIONS SHALL BE  
42 CONSISTENT, TO THE EXTENT PRACTICAL AND CONSISTENT WITH THIS ARTICLE,  
43 WITH CMS REGULATIONS FOR ACCOUNTABLE CARE ORGANIZATIONS UNDER THE MEDI-  
44 CARE PROGRAM.

45 2. Such regulations may, and shall as necessary for purposes of this  
46 article, address matters including but not limited to:

47 (a) The governance, leadership and management structure of the ACO  
48 THAT REASONABLY AND EQUITABLY REPRESENTS THE ACO'S PARTICIPANTS AND THE  
49 ACO'S PATIENTS, including the manner in which clinical and administra-  
50 tive systems and clinical participation will be managed;

51 (b) Definition of the population proposed to be served by the ACO,  
52 which may include reference to a geographical area and patient charac-  
53 teristics;

54 (c) The character, competence and fiscal responsibility and soundness  
55 of an ACO and its principals, if and to the extent deemed appropriate by  
56 the commissioner;

1 (d) The adequacy of an ACO's network of participating health care  
2 providers, including primary care health care providers;

3 (e) Mechanisms by which an ACO will provide, manage, and coordinate  
4 quality health care for its patients [and provide] INCLUDING WHERE PRAC-  
5 TICABLE ELEVATING THE SERVICES OF PRIMARY CARE HEALTH CARE PROVIDERS TO  
6 MEET PATIENT-CENTERED MEDICAL HOME STANDARDS, COORDINATING SERVICES FOR  
7 COMPLEX HIGH-NEED PATIENTS, AND PROVIDING access to health care provid-  
8 ers that are not participants in the ACO;

9 (f) Mechanisms by which the ACO shall receive and distribute payments  
10 to its participating health care providers, which may include incentive  
11 payments (WHICH MAY INCLUDE MEDICAL HOME PAYMENTS) or mechanisms for  
12 pooling payments received by participating health care providers from  
13 third-party payers and patients;

14 (g) Mechanisms and criteria for accepting health care providers to  
15 participate in the ACO that are related to the needs of the patient  
16 population to be served and needs and purposes of the ACO, and prevent-  
17 ing unreasonable discrimination;

18 (h) Mechanisms for quality assurance and grievance procedures for  
19 patients or health care providers where appropriate, AND PROCEDURES FOR  
20 REVIEWING AND APPEALING PATIENT CARE DECISIONS;

21 (i) Mechanisms that promote evidence-based health care, patient  
22 engagement, coordination of care, electronic health records, including  
23 participation in health information exchanges, [and] other enabling  
24 technologies AND INTEGRATED, EFFICIENT AND EFFECTIVE HEALTH CARE  
25 SERVICES;

26 (j) Performance standards for, and measures to assess, the quality and  
27 utilization of care provided by an ACO;

28 (k) Appropriate requirements for ACOs to promote compliance with the  
29 purposes of this article;

30 (l) Posting on the department's website information about ACOs that  
31 would be useful to health care providers and patients, INCLUDING SIMILAR  
32 METRICS AS THE COMMISSIONER PUBLISHES FOR OTHER ORGANIZATIONS SUCH AS  
33 MEDICAID MANAGED CARE PROVIDERS UNDER SECTION THREE HUNDRED SIXTY-FOUR-J  
34 OF THE SOCIAL SERVICES LAW AND HEALTH HOMES UNDER SECTION THREE HUNDRED  
35 SIXTY-FIVE-L OF THE SOCIAL SERVICES LAW;

36 (m) Requirements for the submission of information and data by ACOs  
37 and their participating and affiliated health care providers as neces-  
38 sary for the evaluation of the success of [the demonstration program]  
39 ACOS;

40 (n) Protection of patient rights as appropriate;

41 (o) The impact of the establishment and operation of an ACO [on],  
42 INCLUDING PROVIDING THAT IT SHALL NOT DIMINISH access to any health care  
43 service FOR THE POPULATION SERVED AND in the area served; and

44 (p) Establishment of standards, as appropriate, to promote the ability  
45 of an ACO to participate in applicable federal programs for ACOs.

46 3. (A) THE ACO SHALL PROVIDE FOR MEANINGFUL PARTICIPATION IN THE  
47 COMPOSITION AND CONTROL OF THE ACO'S GOVERNING BODY FOR ACO PARTICIPANTS  
48 OR THEIR DESIGNATED REPRESENTATIVES.

49 (B) THE ACO GOVERNING BODY SHALL INCLUDE AT LEAST ONE REPRESENTATIVE  
50 OF EACH OF THE FOLLOWING GROUPS: (I) RECIPIENTS OF MEDICAID, FAMILY  
51 HEALTH PLUS, OR CHILD HEALTH PLUS; (II) PERSONS WITH OTHER HEALTH COVER-  
52 AGE; AND (III) PERSONS WHO DO NOT HAVE HEALTH COVERAGE. SUCH REPRESEN-  
53 TATIVES SHALL HAVE NO CONFLICT OF INTEREST WITH THE ACO AND NO IMMEDIATE  
54 FAMILY MEMBER WITH A CONFLICT OF INTEREST WITH THE ACO.

55 (C) AT LEAST SEVENTY-FIVE PERCENT CONTROL OF THE ACO'S GOVERNING BODY  
56 SHALL BE HELD BY ACO PARTICIPANTS.

(D) MEMBERS OF THE ACO GOVERNING BODY SHALL HAVE A FIDUCIARY RELATIONSHIP WITH THE ACO AND SHALL BE SUBJECT TO CONFLICT OF INTEREST REQUIREMENTS ADOPTED BY THE ACO AND IN REGULATIONS OF THE COMMISSIONER.

(E) THE ACO'S FINANCES, INCLUDING DIVIDENDS AND OTHER RETURN ON CAPITAL, DEBT STRUCTURE, EXECUTIVE COMPENSATION, AND ACO PARTICIPANT COMPENSATION, SHALL BE ARRANGED AND CONDUCTED TO MAXIMIZE THE ACHIEVEMENT OF THE PURPOSES OF THIS ARTICLE.

4. (A) AN ACO SHALL USE ITS BEST EFFORTS TO INCLUDE AMONG ITS PARTICIPANTS, ON REASONABLE TERMS AND CONDITIONS, ANY FEDERALLY-QUALIFIED HEALTH CENTER THAT IS WILLING TO BE A PARTICIPANT AND THAT SERVES THE AREA AND POPULATION SERVED BY THE ACO.

(B) AN ACO MAY SEEK TO FOCUS ON PROVIDING HEALTH CARE SERVICES TO PATIENTS WITH ONE OR MORE CHRONIC CONDITIONS OR SPECIAL NEEDS. HOWEVER, AN ACO MAY NOT OTHERWISE, ON THE BASIS OF A PERSON'S MEDICAL OR DEMOGRAPHIC CHARACTERISTICS, DISCRIMINATE FOR OR AGAINST OR DISCOURAGE OR ENCOURAGE ANY PERSON OR PERSON WITH RESPECT TO ENROLLING OR PARTICIPATING IN THE ACO.

(C) AN ACO SHALL NOT, BY INCENTIVES OR OTHERWISE, DISCOURAGE A HEALTH CARE PROVIDER FROM PROVIDING OR AN ENROLLEE OR PATIENT FROM SEEKING APPROPRIATE HEALTH CARE SERVICES.

(D) AN ACO SHALL NOT DISCRIMINATE AGAINST OR DISADVANTAGE A PATIENT OR PATIENT'S REPRESENTATIVE FOR THE EXERCISE OF PATIENT AUTONOMY.

(E) AN ACO MAY NOT LIMIT OR RESTRICT BENEFICIARIES TO USE OF PROVIDERS CONTRACTED OR AFFILIATED WITH THE ACO. AN ACO MAY NOT REQUIRE A PATIENT TO OBTAIN THE PRIOR APPROVAL, FROM A PRIMARY CARE GATEKEEPER OR OTHERWISE, BEFORE UTILIZING THE SERVICES OF OTHER PROVIDERS. AN ACO MAY NOT MAKE ADVERSE DETERMINATIONS AS DEFINED IN ARTICLE FORTY-NINE OF THIS CHAPTER.

5. AN ACO MAY PROVIDE CARE COORDINATION FOR ITS PARTICIPATING PATIENTS, WHICH (A) SHALL INCLUDE BUT NOT BE LIMITED TO MANAGING, REFERRING TO, LOCATING, COORDINATING, AND MONITORING HEALTH CARE SERVICES FOR THE MEMBER TO ASSURE THAT ALL MEDICALLY NECESSARY HEALTH CARE SERVICES ARE MADE AVAILABLE TO AND ARE EFFECTIVELY USED BY THE MEMBER IN A TIMELY MANNER, CONSISTENT WITH PATIENT AUTONOMY; AND (B) IS NOT A REQUIREMENT FOR PRIOR AUTHORIZATION FOR HEALTH CARE SERVICES, AND REFERRAL SHALL NOT BE REQUIRED FOR A MEMBER TO RECEIVE A HEALTH CARE SERVICE.

6. (a) Subject to regulations of the commissioner: (i) an ACO may enter into arrangements with one or more third-party health care payers to establish payment methodologies for health care services for the third-party health care payer's enrollees provided by the ACO or for which the ACO is responsible, such as full or partial capitation or other arrangements; (ii) such arrangements may include provision for the ACO to receive and distribute payments to the ACO's participating health care providers, including incentive payments and payments for health care services from third-party health care payers and patients; and (iii) an ACO may include mechanisms for pooling payments received by participating health care providers from third-party payers and patients.

(b) Subject to regulations of the commissioner, the commissioner, in consultation with the superintendent of financial services, may authorize a third-party health care payer to participate in payment methodologies with an ACO under this subdivision, notwithstanding any contrary provision of this chapter, the insurance law, the social services law, or the elder law, on finding that the payment methodology is consistent with the purposes of this article.

[4.] (C) AN ACO MAY CONTRACT WITH A THIRD-PARTY HEALTH CARE PAYER TO SERVE AS ALL OR PART OF THE THIRD-PARTY HEALTH CARE PAYER'S PROVIDER NETWORK OR CARE COORDINATION AGENT, PROVIDED IN THAT CASE THE ACO SHALL BE SUBJECT TO ALL PROVISIONS OF THIS CHAPTER OR THE INSURANCE LAW WHICH ARE APPLICABLE TO THE PROVIDER NETWORK OF THE THIRD-PARTY HEALTH CARE PAYER.

7. The provision of health care services directly or indirectly by an ACO through health care providers shall not be considered the practice of a profession under title eight of the education law by the ACO.

S 2999-r. Other laws. 1. (a) It is the policy of the state to permit and encourage cooperative, collaborative and integrative arrangements among third-party health care payers and health care providers who might otherwise be competitors under the active supervision of the commissioner. To the extent that it is necessary to accomplish the purposes of this article, competition may be supplanted and the state may provide state action immunity under state and federal antitrust laws to payors and health care providers.

(b) The commissioner [may] SHALL engage in state supervision to promote state action immunity under state and federal antitrust laws and may inspect, require, or request additional documentation and take other actions under this article to verify and make sure that this article is implemented in accordance with its intent and purpose.

2. With respect to the planning, implementation, and operation of ACOs, the commissioner, by regulation, [may] SHALL specifically delineate safe harbors that exempt ACOs from the application of the following statutes:

(a) article twenty-two of the general business law relating to arrangements and agreements in restraint of trade;

(b) article one hundred thirty-one-A of the education law relating to fee-splitting arrangements; and

(c) title two-D of article two of this chapter relating to health care practitioner referrals.

3. For the purposes of this article, an ACO shall be deemed to be a hospital for purposes of sections twenty-eight hundred five-j, twenty-eight hundred five-k, twenty-eight hundred five-l and twenty-eight hundred five-m of this chapter and subdivisions three and five of section sixty-five hundred twenty-seven of the education law.

4. THE COMMISSIONER IS AUTHORIZED TO SEEK FEDERAL GRANTS, APPROVALS, AND WAIVERS TO IMPLEMENT THIS ARTICLE, INCLUDING FEDERAL FINANCIAL PARTICIPATION UNDER PUBLIC HEALTH COVERAGE. THE COMMISSIONER SHALL PROVIDE COPIES OF APPLICATIONS AND OTHER DOCUMENTS, INCLUDING DRAFTS, SUBMITTED TO THE FEDERAL GOVERNMENT SEEKING SUCH FEDERAL GRANTS, APPROVALS, AND WAIVERS TO THE CHAIRS OF THE SENATE FINANCE COMMITTEE, THE ASSEMBLY WAYS AND MEANS COMMITTEE, AND THE SENATE AND ASSEMBLY HEALTH COMMITTEES SIMULTANEOUSLY WITH THEIR SUBMISSION TO THE FEDERAL GOVERNMENT.

5. THE COMMISSIONER MAY DIRECTLY, OR BY CONTRACT WITH NOT-FOR-PROFIT ORGANIZATIONS, PROVIDE:

(A) CONSUMER ASSISTANCE TO PATIENTS SERVED BY AN ACO AS TO MATTERS RELATING TO ACOS;

(B) TECHNICAL AND OTHER ASSISTANCE TO HEALTH CARE PROVIDERS PARTICIPATING IN AN ACO AS TO MATTERS RELATING TO THE ACO;

(C) ASSISTANCE TO ACOS TO PROMOTE THEIR FORMATION AND IMPROVE THEIR OPERATION, INCLUDING ASSISTANCE UNDER SECTION TWENTY-EIGHT HUNDRED EIGHTEEN OF THIS CHAPTER; AND

1 (D) INFORMATION SHARING AND OTHER ASSISTANCE AMONG ACOS TO IMPROVE THE  
2 OPERATION OF ACOS.

3 S 2. The commissioner of health shall convene a workgroup to develop a  
4 proposal whereby an ACO may serve, in place of a managed care plan: (a)  
5 Medicaid enrollees otherwise required to participate in managed care,  
6 care management, or care coordination under section 364-j of the social  
7 services law, section 4403-f of the public health law, or other law; and  
8 (b) enrollees in family health plus under section 369-ee or section  
9 369-ff of the social services law and the child health insurance plan  
10 under title 1-A of article 25 of the public health law. The workgroup  
11 shall include, but not be limited to, representatives of: accountable  
12 care organizations or entities seeking to form an accountable care  
13 organization under article 29-E of the public health law; health care  
14 providers serving Medicaid enrollees; Medicaid, family health plus, and  
15 child health insurance plan enrollees; and the senate and the assembly.  
16 The workgroup shall report its recommendations for regulatory or statu-  
17 tory actions to the governor, the commissioner of health, and the legis-  
18 lature.

19 S 3. Section 2818 of the public health law is amended by adding a new  
20 subdivision 7 to read as follows:

21 7. NOTWITHSTANDING SUBDIVISIONS ONE AND TWO OF THIS SECTION, SECTIONS  
22 ONE HUNDRED TWELVE AND ONE HUNDRED SIXTY-THREE OF THE STATE FINANCE LAW,  
23 OR ANY OTHER INCONSISTENT PROVISION OF LAW, OF THE FUNDS AVAILABLE FOR  
24 EXPENDITURE PURSUANT TO THIS SECTION, THE COMMISSIONER MAY ALLOCATE AND  
25 DISTRIBUTE, WITHOUT A COMPETITIVE BID OR REQUEST FOR PROPOSAL PROCESS,  
26 GRANTS TO ACCOUNTABLE CARE ORGANIZATIONS UNDER ARTICLE TWENTY-NINE-E OF  
27 THIS CHAPTER FOR THE PURPOSE OF PROMOTING THEIR FORMATION AND IMPROVING  
28 THEIR OPERATION. CONSIDERATION RELIED UPON BY THE COMMISSIONER IN  
29 DETERMINING THE ALLOCATION AND DISTRIBUTION OF THESE FUNDS SHALL  
30 INCLUDE, BUT NOT BE LIMITED TO, THE NEED FOR AND CAPACITY OF THE  
31 ACCOUNTABLE CARE ORGANIZATION TO ACCOMPLISH THE PURPOSES OF ARTICLE  
32 TWENTY-NINE-E OF THIS CHAPTER IN THE AREA TO BE SERVED.

33 S 4. This act shall take effect immediately.