

# STATE OF NEW YORK

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3327

2021-2022 Regular Sessions

## IN ASSEMBLY

January 22, 2021

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Introduced by M. of A. PRETLOW, GOTTFRIED, CAHILL, COLTON, WEPRIN, MAGNARELLI, PERRY, BRONSON, L. ROSENTHAL, LAVINE, THIELE, BENEDETTO, PEOPLES-STOKES, ABINANTI, ENGLEBRIGHT -- Multi-Sponsored by -- M. of A. ABBATE, AUBRY, COOK, CYMBROWITZ, DINOWITZ, GLICK, LUPARDO, MONTESANO, RA -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to requirements for collective negotiations by health care providers with certain health benefit plans in certain counties, and providing for the repeal of such provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Statement of legislative intent. The legislature finds that  
2 collective negotiation by competing health care providers for the terms  
3 and conditions of contracts with health plans can result in beneficial  
4 results for health care consumers. The legislature further finds  
5 instances where health plans dominate the market to such a degree that  
6 fair and adequate negotiations between health care providers and the  
7 plans are adversely affected, so that it is necessary and appropriate to  
8 provide for a demonstration to examine the risks and benefits associated  
9 with a system of collective action on behalf of health care providers.  
10 Consequently, the legislature finds it appropriate and necessary in the  
11 demonstration service area to displace competition with regulation of  
12 health plan-provider agreements and authorize collective negotiations on  
13 the terms and conditions of the relationship between health care plans  
14 and health care providers so the imbalances between the two will not  
15 result in adverse conditions of health care. This act is not intended to  
16 apply to or affect in any respect collective bargaining relationships  
17 involving health care providers as defined in section 4920 of the public  
18 health law or rights relating to collective bargaining arising under  
19 applicable federal or state collective bargaining statutes.

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

LBD00835-01-1

§ 2. This act shall be known and may be cited as the "health care consumer and provider protection act".

§ 3. Article 49 of the public health law is amended by adding a new title III to read as follows:

TITLE III

COLLECTIVE NEGOTIATIONS BY HEALTH CARE

PROVIDERS WITH HEALTH CARE PLANS

Section 4920. Definitions.

4921. Non-fee related collective negotiation authorized.

4922. Fee related collective negotiation.

4923. Collective negotiation requirements.

4924. Requirements for health care providers' representative.

4925. Certain collective action prohibited.

4926. Fees.

4927. Monitoring of agreements.

4928. Confidentiality.

4929. Severability and construction.

§ 4920. Definitions. For purposes of this title:

1. "Health care plan" means an entity (other than a health care provider) that approves, provides, arranges for, or pays for health care services in the demonstration service area, including but not limited to:

(a) a health maintenance organization licensed pursuant to article forty-three of the insurance law or certified pursuant to article forty-four of this chapter;

(b) any other organization certified pursuant to article forty-four of this chapter; or

(c) an insurer or corporation subject to the insurance law.

2. "Person" means an individual, association, corporation, or any other legal entity.

3. "Health care providers' representative" means a third party who is authorized by health care providers to negotiate on their behalf with health care plans over contractual terms and conditions affecting those health care providers.

4. "Strike" means a work stoppage in part or in whole, direct or indirect, by a body of workers to gain compliance with demands made on an employer.

5. "Substantial market share in a business line" exists if a health care plan's market share of a business line within the demonstration service area as approved by the commissioner, in consultation with the superintendent of financial services, alone or in combination with the market shares of affiliates, exceeds either ten percent of the total number of covered lives in that service area for such business line or twenty-five thousand lives, or if the commissioner, in consultation with the superintendent of financial services, determines the market share of the insurer in the relevant insurance product and geographic markets for the services of the providers seeking to collectively negotiate significantly exceeds the countervailing market share of the providers acting individually.

6. "Health care provider" means a person who is licensed, certified, or registered pursuant to title eight of the education law and who practices as a health care provider as an independent contractor and/or who is an owner, officer, shareholder, or proprietor of a health care provider in the demonstration service area. A health care provider under title eight of the education law who practices as an employee of a

1 health care provider shall not be deemed a health care provider for  
2 purposes of this title.

3 7. "Demonstration service area" shall include the counties of Albany,  
4 Columbia, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie,  
5 Ulster, Warren and Washington.

6 § 4921. Non-fee related collective negotiation authorized. 1. Health  
7 care providers practicing within the demonstration service area may meet  
8 and communicate for the purpose of collectively negotiating with a  
9 health care plan the following terms and conditions of provider  
10 contracts with the health care plan:

11 (a) the details of the utilization review plan as defined pursuant to  
12 subdivision ten of section forty-nine hundred of this article and  
13 subsection (j) of section four thousand nine hundred of the insurance  
14 law;

15 (b) coverage provisions; health care benefits; benefit maximums,  
16 including benefit limitations; and exclusions of coverage;

17 (c) the definition of medical necessity;

18 (d) the clinical practice guidelines used to make medical necessity  
19 and utilization review determinations;

20 (e) preventive care and other medical management practices;

21 (f) drug formularies and standards and procedures for prescribing  
22 off-formulary drugs;

23 (g) respective physician liability for the treatment or lack of treat-  
24 ment of covered persons;

25 (h) the details of health care plan risk transfer arrangements with  
26 providers;

27 (i) plan administrative procedures, including methods and timing of  
28 health care provider payment for services;

29 (j) procedures to be utilized to resolve disputes between the health  
30 care plan and health care providers;

31 (k) patient referral procedures including, but not limited to, those  
32 applicable to out-of-pocket network referrals;

33 (l) the formulation and application of health care provider reimburse-  
34 ment procedures;

35 (m) quality assurance programs;

36 (n) the process for rendering utilization review determinations  
37 including: establishment of a process for rendering utilization review  
38 determinations which shall, at a minimum, include: written procedures to  
39 assure that utilization reviews and determinations are conducted within  
40 the timeframes established in this article; procedures to notify an  
41 enrollee, an enrollee's designee and/or an enrollee's health care  
42 provider of adverse determinations; and procedures for appeal of adverse  
43 determinations, including the establishment of an expedited appeals  
44 process for denials of continued inpatient care or where there is immi-  
45 nent or serious threat to the health of the enrollee; and

46 (o) health care provider selection and termination criteria used by  
47 the health care plan.

48 2. Nothing in this section shall be construed to allow or authorize an  
49 alteration of the terms of the internal and external review procedures  
50 set forth in law.

51 3. Nothing in this section shall be construed to allow a strike of a  
52 health care plan by health care providers or plans as otherwise set  
53 forth in the laws of this state.

54 4. Nothing in this section shall be construed to allow or authorize  
55 terms or conditions which would impede the ability of a health care plan

1 to obtain or retain accreditation by the national committee for quality  
2 assurance or a similar body.

3 § 4922. Fee related collective negotiation. 1. If the health care plan  
4 has substantial market share in a business line in the demonstration  
5 service area, health care providers practicing within the demonstration  
6 service area may collectively negotiate the following terms and condi-  
7 tions relating to that business line with the health care plan:

8 (a) the fees assessed by the health care plan for services, including  
9 fees established through the application of reimbursement procedures;

10 (b) the conversion factors used by the health care plan in a  
11 resource-based relative value scale reimbursement methodology or other  
12 similar methodology; provided the same are not otherwise established by  
13 state or federal law or regulation;

14 (c) the amount of any discount granted by the health care plan on the  
15 fee of health care services to be rendered by health care providers;

16 (d) the dollar amount of capitation or fixed payment for health  
17 services rendered by health care providers to health care plan enrol-  
18 lees;

19 (e) the procedure code or other description of a health care service  
20 covered by a payment and the appropriate grouping of the procedure  
21 codes; or

22 (f) the amount of any other component of the reimbursement methodology  
23 for a health care service.

24 2. Nothing herein shall be deemed to affect or limit the right of a  
25 health care provider or group of health care providers to collectively  
26 petition a government entity for a change in a law, rule, or regulation.

27 § 4923. Collective negotiation requirements. 1. Collective negotiation  
28 rights granted by this title must conform to the following requirements:

29 (a) health care providers may communicate with other health care  
30 providers regarding the contractual terms and conditions to be negoti-  
31 ated with a health care plan;

32 (b) health care providers may communicate with health care providers'  
33 representatives;

34 (c) a health care providers' representative is the only party author-  
35 ized to negotiate with health care plans on behalf of the health care  
36 providers as a group;

37 (d) a health care provider can be bound by the terms and conditions  
38 negotiated by the health care providers' representatives; and

39 (e) in communicating or negotiating with the health care providers'  
40 representative, a health care plan is entitled to contract with or offer  
41 different contract terms and conditions to individual competing health  
42 care providers.

43 2. A health care providers' representative may not represent more than  
44 thirty percent of the market of health care providers or of a particular  
45 health care provider type or specialty practicing in the demonstration  
46 service area or proposed service area of a health care plan that covers  
47 less than five percent of the actual number of covered lives of the  
48 health care plan in the demonstration service area, as determined by the  
49 department.

50 3. Nothing in this section shall be construed to prohibit collective  
51 action on the part of any health care provider who is a member of a  
52 collective bargaining unit recognized pursuant to the national labor  
53 relations act.

54 § 4924. Requirements for health care providers' representative. 1.  
55 Before engaging in collective negotiations with a health care plan on  
56 behalf of health care providers, a health care providers' representative

1 shall file with the commissioner, in the manner prescribed by the  
2 commissioner, information identifying the representative, the represen-  
3 tative's plan of operation, and the representative's procedures to  
4 ensure compliance with this title.

5 2. Before engaging in the collective negotiations, the health care  
6 providers' representative shall also submit to the commissioner for the  
7 commissioner's approval a report identifying the proposed subject matter  
8 of the negotiations or discussions with the health care plan and the  
9 efficiencies or benefits expected to be achieved through the negoti-  
10 ations for both the providers and consumers of health services. The  
11 commissioner shall not approve the report if the commissioner, in  
12 consultation with the superintendent of financial services, determines  
13 that the proposed negotiations would exceed the authority granted under  
14 this title.

15 3. The representative shall supplement the information in the report  
16 on a regular basis or as new information becomes available, indicating  
17 that the subject matter of the negotiations with the health care plan  
18 has changed or will change. In no event shall the report be less than  
19 every thirty days.

20 4. With the advice of the superintendent of financial services, the  
21 commissioner shall approve or disapprove the report not later than the  
22 twentieth day after the date on which the report is filed. If disap-  
23 proved, the commissioner shall furnish a written explanation of any  
24 deficiencies, along with a statement of specific proposals for remedial  
25 measures to cure the deficiencies. If the commissioner does not so act  
26 within the twenty days, the report shall be deemed approved.

27 5. A person who acts as a health care providers' representative with-  
28 out the approval of the commissioner under this section shall be deemed  
29 to be acting outside the authority granted under this title.

30 6. Before reporting the results of negotiations with a health care  
31 plan or providing to the affected health care providers an evaluation of  
32 any offer made by a health care plan, the health care providers' repre-  
33 sentative shall furnish for approval by the commissioner, before dissem-  
34 ination to the health care providers, a copy of all communications to be  
35 made to the health care providers related to negotiations, discussions,  
36 and offers made by the health care plan.

37 7. A health care providers' representative shall report the end of  
38 negotiations to the commissioner not later than the fourteenth day after  
39 the date of a health care plan decision declining negotiation, canceling  
40 negotiations, or failing to respond to a request for negotiation. In  
41 such instances, a health care providers' representative may request  
42 intervention from the commissioner to require the health care plan to  
43 participate in the negotiation pursuant to subdivision eight of this  
44 section.

45 8. (a) In the event the commissioner determines that an impasse exists  
46 in the negotiations, or in the event a health care plan declines to  
47 negotiate, cancels negotiations or fails to respond to a request for  
48 negotiation, the commissioner shall render assistance as follows:

49 (1) to assist the parties to effect a voluntary resolution of the  
50 negotiations, the commissioner shall appoint a mediator from a list of  
51 qualified persons maintained by the commissioner. If the mediator is  
52 successful in resolving the impasse, then the health care providers'  
53 representative shall proceed as set forth in this article;

54 (2) if an impasse continues, the commissioner shall appoint a fact-  
55 finding board of not more than three members from a list of qualified  
56 persons maintained by the commissioner, which fact-finding board shall

1 have, in addition to the powers delegated to it by the board, the power  
2 to make recommendations for the resolution of the dispute;

3 (b) The fact-finding board, acting by a majority of its members, shall  
4 transmit its findings of fact and recommendations for resolution of the  
5 dispute to the commissioner, and may thereafter assist the parties to  
6 effect a voluntary resolution of the dispute. The fact-finding board  
7 shall also share its findings of fact and recommendations with the  
8 health care providers' representative and the health care plan. If with-  
9 in twenty days after the submission of the findings of fact and recom-  
10 mendations, the impasse continues, the commissioner shall order a resol-  
11 ution to the negotiations based upon the findings of fact and  
12 recommendations submitted by the fact-finding board.

13 9. Any proposed agreement between health care providers and a health  
14 care plan negotiated pursuant to this title shall be submitted to the  
15 commissioner for final approval. The commissioner shall approve or  
16 disapprove the agreement within sixty days of such submission. The  
17 commissioner, after consultation with the superintendent of financial  
18 services shall disapprove the agreement if he or she finds that the  
19 agreement would result in a significant increase in costs to the Medi-  
20 caid managed care program pursuant to section three hundred sixty-four-j  
21 of the social services law, the family health plus program pursuant to  
22 section three hundred sixty-nine-gg of the social services law, or the  
23 child health plus program pursuant to section twenty-five hundred eleven  
24 of this chapter.

25 10. The commissioner may collect information from the department of  
26 financial services and other persons to assist in evaluating the impact  
27 of the proposed arrangement on the health care marketplace. The commis-  
28 sioner shall collect information from health plan companies and health  
29 care providers operating in the same geographic area as the health care  
30 cooperative.

31 § 4925. Certain collective action prohibited. 1. This title is not  
32 intended to authorize competing health care providers to act in concert  
33 in response to a report issued by the health care providers' represen-  
34 tative related to the representative's discussions or negotiations with  
35 health care plans.

36 2. No health care providers' representative shall negotiate any agree-  
37 ment that excludes, limits the participation or reimbursement of, or  
38 otherwise limits the scope of services to be provided by any health care  
39 provider or group of health care providers with respect to the perform-  
40 ance of services that are within the health care provider's scope of  
41 practice, license, registration, or certificate.

42 § 4926. Fees. Each person who acts as the representative or negotiat-  
43 ing parties under this title shall pay to the department a fee to act as  
44 a representative. The commissioner, by rule, shall set fees in amounts  
45 deemed reasonable and necessary to cover the costs incurred by the  
46 department in administering this title. Any fee collected under this  
47 section shall be deposited in the state treasury to the credit of the  
48 general fund/state operations for the New York state department of  
49 health fund.

50 § 4927. Monitoring of agreements. The commissioner shall actively  
51 monitor agreements approved under this title to ensure that the agree-  
52 ment remains in compliance with the conditions of approval. Upon  
53 request, a health care plan or health care provider shall provide infor-  
54 mation regarding compliance. The commissioner may revoke an approval  
55 upon a finding that the agreement is not in substantial compliance with  
56 the terms of the application or the conditions of approval.

1     § 4928. Confidentiality. All reports and other information required to  
2     be reported to the department under this title including information  
3     obtained by the commissioner pursuant to subdivision ten of section  
4     forty-nine hundred twenty-four of this title shall not be subject to  
5     disclosure under article six of the public officers law or article thir-  
6     ty-one of the civil practice law and rules.

7     § 4929. Severability and construction. The provisions of this title  
8     shall be severable, and if any court of competent jurisdiction declares  
9     any phrase, clause, sentence or provision of this title to be invalid,  
10    or its applicability to any government, agency, person or circumstance  
11    is declared invalid, the remainder of this title and its relevant appli-  
12    cability shall not be affected. The provisions of this title shall be  
13    liberally construed to give effect to the purposes thereof.

14    § 4. The department of health, in consultation with the department of  
15    financial services, shall prepare or shall arrange for the preparation  
16    of a report on the implementation of the demonstration program on  
17    collective negotiation. The report shall be submitted to the governor,  
18    the speaker of the assembly, the temporary president of the senate and  
19    the chairs of the senate and assembly health and insurance committees at  
20    least four months prior to the expiration of this act. The report shall  
21    review the extent to which collective negotiations were conducted in the  
22    demonstration service area and shall examine whether and the extent to  
23    which collective negotiation contributed to the improvement of quality  
24    of care for patients, enhanced access to medically necessary care,  
25    reduced unnecessary health care expenditures, and was otherwise in the  
26    public interest. The report may make recommendations regarding the  
27    extension, alteration and/or expansion of these provisions and make any  
28    other recommendations related to the implementation of collective nego-  
29    tiation pursuant to this act.

30    § 5. This act shall take effect on the one hundred twentieth day after  
31    it shall have become a law and shall expire and be deemed repealed three  
32    years after it shall take effect. Effective immediately, the commission-  
33    er of health is authorized to promulgate any and all rules and regu-  
34    lations and take any other measures necessary to implement this act on  
35    its effective date on or before such date.