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MEMORANDUM

To: Robert Stivers, President of the Senate
David Osborne, Speaker of the House
Members of the Legislative Research Commission

From: Senator Donald Douglas, Co-Chair
Representative Russell Webber, Co-Chair

Subject: Findings and Recommendations of the Certificate of Need Task Force

Date: December 14, 2023

In a memorandum dated April 26, 2023, the Legislative Research Commission (LRC) established the Certificate of Need Task Force and directed it to:

1. Review Kentucky's certificate of need program, including the state health plan and related statutes.
2. Review the need for maintaining or modifying certificate of need for each health service currently covered.
3. Submit findings and recommendations regarding certificate of need to the LRC for referral to appropriate committee of jurisdiction.

The April 26, 2023, memorandum references 2023 RS SCR 165 and 2023 RS HCR 85.

The ten-member task force began meeting in June 2023 and convened seven times during the 2023 Interim. The task force heard testimony from several individual stakeholders and agencies and received numerous written public comments.

In accordance with the April 26, 2023, memorandum, the task force submits the following finding and recommendation to LRC for consideration and referral to the appropriate committee or committees. The recommendation is based on the testimony and information provided to the

task force during the 2023 Interim. The finding does not include independent research by LRC staff. This memorandum serves as the final work product of the task force.

Finding:

There are two general positions on Kentucky's existing certificate of need requirements.

- One position is that certificate of need laws limit competition by protecting incumbent providers and creating a burdensome approval process for establishing new or expanding health services and facilities, and that there is little evidence that certificate of need laws control costs, improve quality, or ensure access to healthcare.
- A second position is that healthcare service delivery does not operate in a free market, thus certificate of need laws are necessary to control costs, improve quality, and ensure access to healthcare for all people in all geographic areas. The existing certificate of need program may be improved with modifications for some healthcare facilities and services.

Recommendation:

The task force recommends that further study may provide additional information to guide statutory and regulatory changes in Kentucky's certificate of need program.

Testimony:

A summary of the testimony provided to the task force during the 2023 Interim is below. Task force meetings may be viewed on LRC YouTube Live and task force materials, including written public comments submitted at the request of the task force co-chairs, are available on the LRC website.

Representatives from National Conference of State Legislatures (NCSL) presented an overview of certificate of need laws in other states.

Certificate of need laws require proposals for healthcare services and facilities to demonstrate to state regulators that there is an unmet need in the geographical area for the proposed service or facility. The intent of certificate of need laws is to control healthcare costs by avoiding unnecessary expansion or duplicative services and ensure access to services in all geographic areas. Several states are reforming or repealing their certificate of need laws.

There is great variation in the healthcare services and facilities that are required to meet certificate of need requirements among the 35 states that have certificate of need laws. For example, according to NCSL, all 35 states include nursing facilities while 14 include home health agencies, 4 include freestanding birthing centers, and 2 include ambulance services.

Representatives from the Office of Inspector General (OIG) presented an overview of Kentucky's certificate of need program.

The certificate of need program was enacted by the Kentucky General Assembly in 1980. KRS Chapter 216B authorizes the Cabinet for Health and Family Services to perform any certificate

of need function to improve quality, increase access, create cost efficiency of healthcare facilities and services for the citizens of the Commonwealth.

The definitions and the review criteria for evaluating certificate of need applications are established in KRS 216B.040 and include consistency with the state health plan. The state health plan contains the specific requirements for each healthcare facility and service included. The state health plan is incorporated by reference in 900 KAR 5:020, updated at least annually by the cabinet, and subject to a period for public comments.

The OIG oversees the certificate of need application process and applications are reviewed by administrative hearing officers in accordance with KRS Chapter 13B.

There are two types of reviews of a proposal for a certificate of need under KRS Chapter 216B. A formal review of a proposal requires that the applicant bear the burden of demonstrating the proposed healthcare service or facility is needed and is consistent with the state health plan. A nonsubstantive review presumes the need for the healthcare service or facility proposed unless that need is rebutted by clear and convincing evidence by an affected party.

Select healthcare facilities and services are exempt from any certificate of need requirement under KRS 216B.020.

Betsy Johnson, president and executive director of Kentucky Association of Health Care Facilities and Tim Veno, president of LeadingAge Kentucky testified that a certificate of need is important for nursing facilities because they do not operate in a free market system. Nursing facilities do not set the price of care or the services they provide. Most residents in Kentucky's nursing facilities are covered by government payors such as Medicare or Medicaid.

Evan Reinhardt, executive director of the Kentucky Home Care Association, testified that home health agencies do not operate in a free market because the rates for most individuals are set by the Medicare or Medicaid. Certificate of need serves as a formal and detailed vetting process for agencies ensuring that agencies are accountable and fraud and abuse is minimized.

David Cook, chief executive officer of Hosparus, testified that a certificate of need for hospice care helps to keep costs low by maintaining a high standard of quality and integrity. A lower quality of hospice care is found in states when the certificate of need laws are removed.

Liz Fowler, Chief Executive Officer, Bluegrass Care Navigators, discussed how certificate of need laws help prevent fraud, abuse, and profiteering in hospice care.

Nancy Galvagni, president of the Kentucky Hospital Association, discussed the context and importance of certificate of need for healthcare access and safety. Medicaid's and Medicare's lack of federal payments to fully pay for the coverage of treatments result in cost shifting by hospitals. Certificate of need laws ensure continuity of care. The removal of the certificate of need laws would result in hospital closures, particularly in rural areas. She presented proposals for reform related to the application and appeals process, flexibility in the use of hospital beds, retention of formal reviews for certain hospital services including diagnostic and

therapeutic equipment and procedures, and specific criteria in the state health plan for free-standing birthing centers.

Melissa Fausz, state government affairs director for Americans for Prosperity, testified that there has been more capital investment in healthcare in states that have removed certificate of need. A review of research papers on certificate of need laws showed neutral to negative effects of certificate of need laws on healthcare services. States without certificate of need laws have more hospital beds per capita, including in rural areas, and patient care costs are lower. There are challenges to hospital financial viability but certificate of need laws are not the answer.

Dr. John Garen, professor emeritus of economics at the Bluegrass Institute, University of Kentucky, discussed the harm of anticompetitive certificate of need laws on healthcare services and facilities and evidence that removal of Kentucky's certificate of need laws would have positive effects on healthcare. Studies have found no clear pattern of greater access to healthcare in the underserved in states with certificate of need.

Sarah Giolando, senior vice president and chief strategy officer, St. Elizabeth Healthcare, testified that certificate of need ensures access to healthcare services and facilities. Kentucky has more hospitals per 100,000 population and over 1.5 times the number of physicians per 1,000 square miles than states with no certificate of need laws. Certificate of need protects rural healthcare access. Two federal courts have cited ensuring access in upholding Kentucky's certificate of need laws.

Mark Guilfoyle, partner at DBL Law, discussed the benefits of access to healthcare provided by certificate of need including lower healthcare costs to payors. He expressed support for the modernization of Kentucky's certificate of need laws and noted St. Elizabeth Healthcare's support for certificate of need applications filed by other providers. The repeal of certificate of need would result in health providers cherry-picking private pay patients from safety net hospitals threatening the survival of providers of Medicare, Medicaid, and indigent care.

Mary Kathryn DeLodder with the Kentucky Birth Coalition, testified that there is a demand for freestanding birthing centers as a delivery option, but the burden of the certificate of need requirement has made it impossible to establish them. She discussed the 2012 denial for a freestanding birth center certificate of need application.

Victoria Burslem, MSN, faculty at the Frontier Nursing University, discussed the birth center feasibility study she developed for the university and recent birth center litigation.

Senator Shelley Funke Frommeyer discussed the need for birthing centers. There are maternity care deserts.

Jaimie Cavanaugh, attorney at the Institute for Justice, testified that certificate of need laws do not prevent rural hospital closures and that there is a lack of evidence that hospitals rely on cost-shifting. She said that certificate of need laws increase healthcare costs and that there are negative consequences of artificially limiting the supply of healthcare. Patients in states with certificate of need laws wait longer and drive farther for healthcare. States with certificate of

need laws have fewer hospitals, fewer hospital beds, fewer psychiatric care facilities, fewer dialysis clinics, and fewer medical imaging devices.

Matthew D. Mitchell, Ph.D., senior research fellow and certificate of need coordinator for the Knee Center for the Study of Occupational Regulation, West Virginia University, discussed the anticompetitive features of certificate of need laws and the literature that examines how certificate of need limits healthcare spending, access to care, quality of care, and healthcare for underserved populations.

Representative Marianne Proctor testified that the goals of certificate of need laws are not attained. There are federal groups that support the repeal of certificate of need and several states have repealed their certificate of need laws. She discussed the negative impacts of certificate of need laws on establishing rural and urban hospitals even though there is a need for more healthcare facilities.

Dr. Mark Schroer testified that repealing certificate of need laws would create greater competition among healthcare providers, allow more data driven health policy, and help address the need for better healthcare in rural areas.

Carol Dwyer, RN, discussed her employment experience as a registered nurse working in hospitals and her personal experiences as a caregiver to her husband and mother and having to deal with multiple hospitals because of certificate of need laws that limit healthcare options.

Russ Ranallo, the chief financial officer of Owensboro Health, discussed the 2007 Pennsylvania Health Care Cost Containment Council study that found negative effects on healthcare after a repeal of certificate of need laws.

Dr. Aaron Crum, the chief marketing officer of Pikeville Regional Medical Center discussed the safeguards provided by the certificate of need laws for maternity care and the need for freestanding birthing centers to meet the same standards required of hospitals for delivery.

Dr. Allana Oak, the director of family medicine at the University of Kentucky, College of Medicine, Northern Kentucky Campus, discussed her difficult experiences with out-of-hospital delivery patients, and recommended that certificate of need be required for freestanding birthing centers.

Jeffrey A. Singer a senior fellow with the Cato Institute, discussed research on problems created by certificate of need laws including, a lack of competition in health systems, inability to respond to public health emergencies, higher costs for care, and limited options for healthcare services.

Laura D'Agostino, attorney with the Pacific Legal Foundation, discussed research that shows that there is less access to healthcare services in states with certificate of need laws, including the closure of rural hospitals. A possible reform would repeal the veto power over certificate of need applications for competing healthcare services.

Deborah Hayes, president and chief executive officer of the Christ Hospital Health Network, testified on the costs and resources involved in attempting to establish new healthcare services and facilities under the certificate of need process.