

CERTIFICATE OF NEED TASK FORCE

Minutes of the 3rd Meeting of the 2023 Interim

August 21, 2023

Call to Order and Roll Call

The third meeting of the Certificate of Need Task Force was held on August 21, 2023, at 10:30 AM in Room 171 of the Capitol Annex. Senator Donald Douglas, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Donald Douglas, Co-Chair; Representative Russell Webber, Co-Chair; Senators Karen Berg, David P. Givens, Stephen Meredith, and John Schickel, Representatives Lindsey Burke, Daniel Elliott, Marianne Proctor, and Susan Witten.

Guests: Melissa Fausz, State Government Affairs Director, Americans for Prosperity; Dr. John Garen, BB&T Professor Emeritus of Economics, University of Kentucky, Board of Scholars, Bluegrass Institute; Sarah Giolando, Senior Vice President, Chief Strategy Officer, St. Elizabeth Healthcare; Mark Guilfoyle, Partner, DBL Law; Matt Klein, DBL Law; and Rosanne Nields, St. Elizabeth Healthcare.

LRC Staff: Ben Payne, Logan Bush, and Becky Lancaster.

Approval of Minutes

A motion to approve the minutes of the July 17, 2023, meeting was made by Senator Schickel, seconded by Senator Berg, and approved by voice vote.

Issues Relating to the Certificate of Need

Melissa Fausz, State Government Affairs Director, Americans for Prosperity (AFP), discussed the history of anticompetitive certificate of need measures, paying for indigent care, states without certificate of need, states

that have higher healthcare capital investments, negative effects caused by certificate of need on access to care, outcomes for elective surgeries at dedicated surgery centers versus hospital facilities, and the lack of hospital closures in rural states without a certificate of need.

In response to questions and comments from Senator Berg, Ms. Fausz stated that AFP is in conversations with the Kentucky Medical Association. AFP has talked to healthcare facilities, individual providers, and community advocates. She stated that hospital facilities will often object to individual nonhospital facilities and there can be lower rates of infection in stand-alone ambulatory facilities.

In response to questions and comments from Senator Meredith, Ms. Fausz stated that the certificate of need solution to helping a hospital be viable is to not allow other competing health facilities in the same regional area as the hospital. The literature and experiences of other states show that the scale and scope of the impact on hospital viability is less than sometimes stated, and the cost of care is lower in states that do not have a certificate of need.

In response to questions and comments from Representative Proctor, Ms. Fausz stated that several states have repealed or significantly reformed their certificate of need laws. AFP has not seen cherry-picking in the healthcare industry, and cost-shifting is not the only avenue to offset the cost of treating underinsured patients.

In response to questions and comments from Representative Burke, Ms. Fausz stated that the literature review she referenced was conducted by the Institute for Justice for a paper created specifically on Kentucky certificate of need. With Medicaid eligibility redetermination, there should be an increase in reimbursements for care for individuals who have moved from Medicaid to a subsidized plan.

Dr. John Garen, BB&T Professor Emeritus of Economics, University of Kentucky, Board of Scholars, Bluegrass Institute, discussed the economic benefits of competition in markets, the harm of anticompetitive of certificate of need laws, government and private institutions that support market competition in healthcare, the evidence regarding the negative effects of a certificate of need, the overall and specific findings of two reports on certificate of need, addressing market imperfections for quality, and conclusions regarding the evidence for the removal of Kentucky's certificate of need laws.

In response to questions and comments from Senator Berg, Dr. Garen stated that there is evidence showing total costs incurred by hospitals are higher in states with certificate of need.

In response to questions and comments from Senator Meredith, Dr. Garen stated that certificate of need impacts access to rural healthcare, but the evidence shows that there is no systematic reduction to access to rural healthcare in states without certificate of need.

In response to questions and comments from Representative Witten, Dr. Garen stated that studies have reviewed many different aspects of healthcare, and the studies show that certificate of need does not deliver what is claimed by proponents.

In response to questions and comments from Senator Givens, Dr. Garen stated that the original publication date of his paper was in 2018 with updates in 2019. Dr. Garen was asked to review and write about certificate of need, and he has interests in the role of government in an economy. Dr. Garen thinks the role of government in an economy can be positive. Legal, governmental, and private institutions that work together to support a market place is critical to a modern economy.

Sarah Giolando, Senior Vice President, Chief Strategy Officer, St. Elizabeth Healthcare, discussed the history, goals, and awards for St. Elizabeth Healthcare, the benefits of merger with St. Luke hospitals, and the number, distance, and choices of hospitals in Northern Kentucky. She discussed the reasons there is not a free market in healthcare, the unintended consequences of a repeal of certificate of need, and the commercial payor percentages in downtown Cincinnati hospitals versus Northern Kentucky suburban hospitals.

Mark Guilfoyle, Partner, DBL Law, discussed the benefits of access to healthcare provided by certificate of need, lower healthcare costs to payors, supporting the modernization of Kentucky's certificate of need laws, two federal court cases that upheld Kentucky's certificate of need law,

St. Elizabeth Healthcare's support for certificate of need applications filed by other providers, St. Elizabeth Healthcare's heart program, the consequences of cherry-picking private pay patients from safety net hospitals, and the comparison of various costs in states with certificate of need versus those without certificate of need.

In response to questions and comments from Representative Proctor, Mr. Guilfoyle stated that St. Elizabeth Healthcare receives some tax payor funds, but there is another safety net hospital in the Greater Cincinnati market that has a large annual subsidy that St. Elizabeth does not receive. He addressed St. Elizabeth Healthcare's presence and support for others seeking a certificate of need in Owen County, Kentucky. Ms. Giolando stated that there is not a freestanding birthing center in Dearborn County, Indiana but there is a rural hospital that is partnering with St. Elizabeth Healthcare to continue operations in that area.

In response to questions and comments from Senator Schickel, Mr. Guilfoyle stated that healthcare services do not operate in a free market, and St. Elizabeth's is not anticompetition but opposes unfair competition.

In response to questions and comments from Senator Meredith, Mr. Guilfoyle stated that the 43 counties in Kentucky do not have a hospital, because it is not financially viable.

In response to questions and comments from Senator Givens, Ms. Giolando stated that St. Elizabeth merged with St. Luke in 2008. Mr. Guilfoyle has worked on approximately 15-20 cases involving certificate of need. The process of certificate of need could be streamlined to help providers, and continual review of the criteria for various services on the State Health Plan would benefit the certificate of need.

Adjournment

There being no further business, the meeting was adjourned at 12:34 PM.