[Mass. Gen. Laws ch. 111, §§ 25B through 25H.]

§§ 25B through 25H: Public Health-- Determination of Need

Section 25B: Definitions applicable to Secs. 25B to 25G

Section 25B. In this section and sections twenty-five C to twenty-five G, inclusive, the following words shall have the following meanings:

''Appropriate regional comprehensive health planning agency,'' the regional agency designated pursuant to the provisions of section three hundred and fourteen (b) the Federal Public Health Service Act, or its successor agency.

''Construction'', construction of a new health care facility; the alteration of, expansion of, making of major repairs to, remodeling of, renovation of or replacement of an existing health care facility; the initial, additional or replacement equipping of any such facility; the acquisition of consulting, architectural, and engineering services, and of site, when such acquisition is directed toward an undertaking sufficiently specific to constitute part of the subject matter of an application for determination of need under section twenty-five C.

''Department'', the department of public health; provided, however, that no member of the public health council who is an owner, in whole or in part, an officer or an employee of a health care facility, or who bears any other fiduciary relationship to such a facility, shall participate in any decision which would substantially affect the facility to which he is related.

''Expenditure minimum with respect to substantial capital expenditures'', with respect to expenditures and acquisitions made by or for: (1) hospitals and comprehensive cancer centers as defined in section 8A of chapter 118E, only, $7,500,000, except that expenditures for, or the acquisition of, major movable equipment not otherwise defined by the department as new technology or innovative services shall not require a determination of need and shall not be included in the calculation of the expenditure minimum; and (2) health care facilities, other than hospitals, and facilities subject to licensing under chapter 111B, with respect to: (a) expenditures for, or the acquisition of, medical, diagnostic or therapeutic equipment, $400,000; and (b) all other expenditures and acquisitions, $800,000; provided, however, that expenditures for, or the acquisition of, any replacement of medical, diagnostic or therapeutic equipment defined as new technology or innovative services for which a determination of need has been issued or which was exempt from determination of need, shall not require a determination of need and shall not be included in the calculation of the expenditure minimum; provided further, that expenditures and acquisitions concerned solely with outpatient services other than ambulatory surgery, not otherwise defined as new technology or innovative services by the department, shall not require a determination of need and shall not be included in the calculation of the expenditure minimum, unless the expenditures and acquisitions are at least $25,000,000, in which case a determination of need shall be required. Notwithstanding the above limitations, hospitals only may elect at their option to apply for determination of need for expenditures and acquisitions less than the expenditure minimum.

''Health care facility'', a hospital or clinic, as defined in section fifty-two; a long-term care facility, a convalescent or nursing home, a rest home or a charitable home for the aged, as defined in section seventy-one; a clinical laboratory subject to licensing under chapter one hundred and eleven D, a public medical institution, which is any medical institution, and, after December first, nineteen hundred and seventy-two, any institution for the developmentally disabled or mentally ill, supported in whole or in part by public funds, staffed by professional, medical and nursing personnel and providing medical care, in accordance with standards established through licensing, approval or certification for participation in the programs administered under Titles 18 and 19 of the Federal Social Security Act, by the department; and any part of such facilities; provided, however, that ''health care facility'' shall not include a facility operated by and for persons who rely exclusively upon treatment by spiritual means through prayer for healing, in accordance with the creed or tenets of a church or religious denomination and in which health care by or under the supervision of doctors of medicine, osteopathy, or dentistry is not provided.

''Health maintenance organization'' or ''HMO'', a public or private organization as defined in section one of chapter one hundred and seventy-six G.

''State comprehensive health planning agency'', the agency designated pursuant to the provisions of section three hundred fourteen (a) of the Federal Public Health Service Act.

''Acute-care hospital'', any hospital licensed under section fifty-one of chapter one hundred and eleven, and the teaching hospital of the University of Massachusetts Medical School, which contains a majority of medical-surgical, pediatric, obstetric, and maternity beds, as defined by the department.

''Acute psychiatric service'', a service for inpatients in need of intensive, twenty-four hour per day, psychiatric and nursing care and supervision, not including persons hospitalized for alcohol problems, and which includes a staff of mental health specialists who provide psychiatric, psychological and social evaluation, treatment and aftercare planning.

''Ambulatory surgery'', health care services restricted to those defined by the department as surgical services, not requiring overnight stay, typically provided to ambulatory patients on an elective, urgent, or emergency basis whether provided in a free standing ambulatory surgical center licensed as a clinic pursuant to section 51 or by a hospital.

''Innovative service'', a service or procedure, which for reasons of quality, access, or cost is determined to be innovative by the department.

''Inpatient services'', health care services requiring at least one overnight stay, provided to patients on an elective, urgent, or emergency basis.

''Major movable equipment'', equipment that is not permanently attached to the building and that has a depreciable life of three or more years.

''New technology'', equipment such as magnetic resonance imagers and linear accelerators, as defined by the department, or a service, as defined by the department, which for reasons of quality, access or cost is determined to be new technology by the department.

''Outpatient services'', health care services, not requiring overnight stay, typically provided to ambulatory patients on an elective basis.

''Substantial capital expenditures'', (1) the expenditure, or obligation of a sum of money for construction of a health care facility (a) which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance, or is made by lease or comparable arrangement, and (b) which exceeds, or may reasonably be regarded as leading to an expenditure for construction in excess of, the expenditure minimum determined pursuant to this section for an undertaking sufficiently specific to constitute the subject matter of an application for a determination of need under section twenty-five C; or (2) the obtaining by lease or comparable arrangement, by donation, or by transfer for less than fair market value in excess of the expenditure minimum.

''Substantial change in services'', shall mean: (1)(a) with regard to acute-care hospitals only, the addition or expansion of, or conversion to, a new technology or innovative service regardless of whether an expenditure minimum is exceeded; (b) for any acute-care hospital, the addition or expansion of, or conversion to any services which may be provided by facilities which are not acute-care hospitals; except that conversions of acute-care services to skilled nursing, rehabilitation, acute psychiatric, and substance abuse services located in an underbedded areas shall be determined by criteria developed by the department in consultation with the department of elder affairs, department of mental health, the Massachusetts federation of nursing homes, the Massachusetts hospital association and other interested parties, and that no such conversion shall occur until the department has certified in writing the conversions meet the criteria established. The department shall promulgate regulations to implement the provisions of said criteria for underbedded areas including, but not limited to medicaid access, and regulations to define criteria for reconversion; and (2) for any health care facility other than an acute-care hospital (a) the addition of a service which entails annual operating costs in excess of the expenditure minimum determined pursuant to this section; (b) any increase in bed capacity of more than twelve beds; (c) the addition or expansion of, or conversion to, A new technology or innovative service regardless of whether an expenditure minimum is exceeded; (d) provided, however, that no decrease in the level of a service that, pursuant to department regulations, may be offered by a nursing, convalescent, or rest home which does not involve a capital expenditure in excess of eight hundred thousand dollars shall be subject to the provisions of sections twenty-five C to twenty-five G, inclusive; (e) provided, further, that an increase in staff by itself shall not be defined by the department to constitute a substantial change in service unless said increase in staff will result in an addition to annual operating costs which exceeds the expenditure minimum determined pursuant to this section. Notwithstanding any other provisions to the contrary, a change of service concerned solely with outpatient services other than ambulatory surgery, not otherwise defined as a new technology or innovative services, shall not be defined by the department to constitute a substantial change of service.

''Expenditure minimum with respect to expenditures for a change in service or increase in staff'', shall mean three hundred and fifty thousand dollars in annual operating costs.

Section 25B1/2: Expenditure minimums; annual adjustments

Section 25B1/2. Expenditure minimums established pursuant to section twenty-five B shall be adjusted annually by the department after consideration of any inflation index set by the Secretary of the United States Department of Health and Human Services.

Section 25C: Determination of need for construction of health care facility or change in service of facility

Section 25C. (a) Notwithstanding any general or special law to the contrary, except as provided in section 25C1/2, a person or agency of the commonwealth or any political subdivision thereof shall not make substantial capital expenditures for construction of a health care facility or substantially change the service of the facility unless there is a determination by the department that there is need for the construction or change. A determination of need shall not be required for any substantial capital expenditure for construction or any substantial change in service which shall be related solely to the conduct of research in the basic biomedical or applied medical research areas and shall at no time result in any increase in the clinical bed capacity or outpatient load capacity of a health care facility and shall not be included within or cause an increase in the gross patient service revenue of a facility for health care services, supplies and accommodations, as such revenue shall be defined under section 31 of chapter 6A. Any person undertaking an expenditure related solely to that research which shall exceed or may reasonably be regarded as likely to exceed $150,000 or any change in service solely related to the research, shall give written notice of the expenditure or change in service to the department the center for health information and analysis and the health policy commission, and the health policy commission at least 60 days before undertaking the expenditure or change in service. The notice shall state that the expenditure or change shall be related solely to the conduct of research in the basic biomedical or applied medical research areas and shall not be included within or result in any increase in the clinical bed capacity or outpatient load capacity of a facility and shall not cause an increase in the gross patient service revenue, as defined in under said section 31 of said chapter 6A, of a facility for health care services, supplies and accommodations; provided, however, that if it is subsequently determined that there was a violation of this section, the applicant may be punished by a fine of not more than 3 times the amount of the expenditure or value of the change of service.

(b) Notwithstanding subsection (a), a determination of need shall be required for any such expenditure or change if the notice required by this section is not filed in accordance with the requirements of this section or if the department finds, after receipt of the notice, that the expenditure or change will not be related solely to research in the basic biomedical or applied medical research areas, will result in an increase in the clinical bed capacity or outpatient load capacity of a facility or will be included within or cause an increase in the gross patient service revenues of a facility. A research exemption granted under this section shall not be deemed to be evidence of need in any determination of need proceeding.

(c) A person or agency of the commonwealth or any political subdivision thereof shall not provide an innovative service or use a new technology in any location other than in a health care facility, unless the person or agency first is issued a determination of need for the innovative service or new technology by the department.

(d) A person or agency of the commonwealth or any political subdivision thereof shall not acquire for location in other than a health care facility a unit of medical, diagnostic, or therapeutic equipment, other than equipment used to provide an innovative service or which is a new technology, as such terms are defined in section 25B, with a fair market value in excess of $250,000, to be adjusted in a similar fashion as section 25B1/2, unless the person or agency notifies the department of the person's or agency's intent to acquire the equipment and of the use that will be made of the equipment; provided, however, that maintenance or replacement of existing equipment defined as new technology shall not require a review. The notice shall be made in writing and shall be received by the department at least 30 days before contractual arrangements are entered into to acquire the equipment with respect to which notice is given. A determination by the department of need shall be required for any the acquisition (1) if the notice required by this paragraph is not filed in accordance with the requirements of this paragraph, and (2) if the requirements for exemption under subsection (a) of section 25C1/2 are not met; provided, however, that in no event shall any person who acquires a unit of new technology for location other than in a health care facility refer or influence any referrals of patients to the equipment, unless the person is a physician directly providing services with that equipment; provided, however, that for the purposes of this section, a public advertisement shall not be deemed a referral or an influence of referrals; and provided, further, that any person who has an ownership interest in the equipment, whether direct or indirect, shall disclose the interest to patients utilizing said equipment in a conspicuous manner.

(e) Each person or agency operating a unit of equipment described in this section shall submit annually to the department information and data in connection with utilization and volume rates of said equipment on a form or forms prescribed by the department.

(f) Except as provided in section 25C1/2, a person or agency of the commonwealth or any political subdivision thereof shall not acquire an existing health care facility unless the person or agency notifies the department of the person's or agency's intent to acquire the facility and of the services to be offered in the facility and its bed capacity. The notice shall be made in writing and shall be received by the department at least 30 days before contractual arrangements are entered into to acquire the facility with respect to which the notice is given. A determination of need shall be required for any such acquisition if the notice required by this subsection is not filed in accordance with the requirements of this subsection or if the department finds, within 30 days after receipt of notice under this subsection, that the services or bed capacity of the facility will be changed in being acquired.

(g) The department, in making any determination of need, shall be guided by the state health plan, shall encourage appropriate allocation of private and public health care resources and the development of alternative or substitute methods of delivering health care services so that adequate health care services will be made reasonably available to every person within the commonwealth at the lowest reasonable aggregate cost, shall take into account any comments from the center for health information and analysis, the health policy commission, and any other state agency or entity, and may impose reasonable terms and conditions as the department determines are necessary to achieve the purposes and intent of this section. The department may also recognize the special needs and circumstances of projects that: (1) are essential to the conduct of research in basic biomedical or health care delivery areas or to the training of health care personnel; (2) are unlikely to result in any increase in the clinical bed capacity or outpatient load capacity of the facility; and (3) are unlikely to cause an increase in the total patient care charges of the facility to the public for health care

services, supplies, and accommodations, as such charges shall be defined from time to time in accordance with section 5 of chapter 409 of the acts of 1976.

(h) Applications for such determination shall be filed with the department, together with other forms and information as shall be prescribed by, or acceptable to, the department. A duplicate copy of any application together with supporting documentation for such application, shall be a public record and kept on file in the department. The department may require a public hearing on any application at its discretion or at the request of the attorney general. The attorney general may intervene in any hearing under this section. A reasonable fee, established by the department, shall be paid upon the filing of such application; provided, however, that in no event shall such fee exceed 0.2 per cent of the capital expenditures, if any, proposed by the applicant. The department may also require the applicant to provide an independent cost-analysis, conducted at the expense of the applicant, to demonstrate that the application is consistent with the commonwealth's efforts to meet the health care cost-containment goals established by the commission.

(i) Except in the case of an emergency situation determined by the department as requiring immediate action to prevent further damage to the public health or to a health care facility, the department shall not act upon an application for such determination unless: (1) the application has been on file with the department for at least 30 days; (2) the center for health care information and analysis, the health policy commission, the state and appropriate regional comprehensive health planning agencies and, in the case of long-term care facilities only, the department of elder affairs, or in the case of any facility providing inpatient services for the mentally ill or developmentally disabled, the departments of mental health or developmental services, respectively, have been provided copies of such application and supporting documents and given reasonable opportunity to comment on such application; and (3) a public hearing has been held on such application when requested by the applicant, the state or appropriate regional comprehensive health planning agency or any 10 taxpayers of the commonwealth. If, in any filing period, an individual application is filed which would implicitly decide any other application filed during such period, the department shall not act only upon an individual.

(j) The department shall so approve or disapprove in whole or in part each such application for a determination of need within 4 months after filing with the department; provided, however, that the department may, on 1 occasion only, delay the action for up to 2 months after the applicant has provided information which the department reasonably has requested during the 8 month period. Applications remanded to the department by the health facilities appeals board under section 25E shall be acted upon by the department within the same time limits provided in this section for the department to approve or disapprove applications for a determination of need. If an application has not been acted upon by the department within such time limits, the applicant may, within a reasonable period of time, bring an action in the nature of mandamus in the superior court to require the department to act upon the application.

(k) Determinations of need shall be based on the written record compiled by the department during its review of the application and on such criteria consistent with sections 25B to 25G, inclusive, as were in effect on the date of filing of the application. In compiling such record the department shall confine its requests for information from the applicant to matters which shall be within the normal capacity of the applicant to provide. In each case the action by the department on the application shall be in writing and shall set forth the reasons for such action; and every such action and the reasons for such action shall constitute a public record and be filed in the department.

(l) The department shall stipulate the period during which a determination of need shall remain in effect, which in no event shall originally be longer than 3 years but which may be extended by the department for cause shown. Any such determination shall continue to be effective only upon the applicant: (1) making reasonable progress toward completing the construction or substantial change in services for which need was determined to exist; (2) complying with all other laws relating to the construction, licensure and operation of health care facilities; and (3) complying with such further terms and conditions as the department reasonably shall require.

(m) The department shall notify the secretary of elder affairs forthwith of the pendency of any proceeding, of any public hearing and of any action to be taken under this section on any application submitted by or on behalf of any long-term care facility. In instances involving applications submitted on behalf of any facility providing inpatient services for the mentally ill or developmentally disabled, the department shall notify the appropriate commissioner.

(n) A long-term care facility located in an under-bedded urban area shall not be replaced or the license for said facility transferred outside an under-bedded urban area. For the purposes of this subsection, an under-bedded urban area shall mean a city or town in which: (1) the per capita income is below the state average; (2) the percentage of the population below 100 per cent of the federal poverty level is above the state average; or (3) the percentage of the population below 200 per cent of the federal poverty level is above the state average.

Section 25C1/2: Exemption from determination of need of projects related to inpatient services

Section 25C1/2. (a) Notwithstanding the provisions of section twenty-five C, no determination of need shall be required for any substantial capital expenditure for construction related to the provision of inpatient services or for any substantial change in inpatient services if, upon application pursuant to subsection (b), the department finds that such substantial capital expenditure or such substantial change in services will be made by or on behalf of one of the following:—

(1) An HMO or combination of HMOs if (A) the HMO or combination of HMOs has in the service area of the HMO or the service areas of the HMOs in combination an enrollment of at least fifty thousand individuals, (B) the facility in which the services will be provided is or will be geographically located so that the services will be reasonably accessible to such enrolled individuals; and (C) at least seventy-five per cent of the patients who can reasonably be expected to receive such inpatient services will be individuals enrolled with such HMO or HMOs in the combination;

(2) A health facility if (A) the facility primarily provides or will provide inpatient services, (B) the facility is or will be controlled, directly or indirectly, by an HMO or a combination of HMOs which has in the service area of the HMO or service areas of the HMOs in the combination an enrollment of at least fifty thousand individuals, (C) the facility is or will be geographically located so that the services will be reasonably accessible to such enrolled individuals, and (D) at least seventy-five per cent of the patients who can reasonably be expected to receive such inpatient services will be individuals enrolled with such HMO or HMOs in the combination; or

(3) A health care facility or portion thereof if (A) the facility is or will be leased by an HMO or combination of HMOs which has in the service area of the HMO or the service areas of the HMOs in the combination an

enrollment of at least fifty thousand individuals and on the date the application is submitted under subsection (b) at least fifteen years remain in the term of the lease, (B) the facility is or will be geographically located so that the services will be reasonably accessible to such enrolled individuals, and (C) at least seventy-five percent of the patients who can reasonably be expected to receive such inpatient services will be individuals enrolled with such HMO or HMOs in the combination.

(4) A health care facility if (a) the facility is or is going to be a long-term care facility, an infirmary maintained in a town, a convalescent or nursing home, a rest or charitable home for the aged as defined in section seventy-one, (b) the facility is, or will be located in an underbedded urban area as determined by criteria developed by the department in consultation with the Massachusetts federation of nursing homes and other interested parties, including the department of elder affairs, (c) the facility provides service, or will agree to provide service, to at least seventy per cent of its patients as enrollees in Title XIV of the Federal Social Security Act, (d) the facility presents an adequate quality assurance program plan meeting criteria established by the department subsequent to consultation with the Massachusetts federation of nursing homes and other interested parties, and (e) need for such facility has been established pursuant to an administrative review procedure shall be established by the department within ninety days of the effective date of this act.

(b) Any HMO or health care facility seeking an exemption under subsection (a) shall submit to the department an application for such exemption in such form and manner as the department shall prescribe. The application shall contain such information as the department may require to determine if the requirements of subsection (a) are met and may be subject to such public review and comment as the department deems appropriate. In the case of a proposed health care facility or portion thereof which has not begun to provide services on the date an application is submitted under this paragraph with respect to such facility or portion, the facility or portion shall meet the applicable requirements of subsection (a) when the facility first provides such services. The department shall approve an application submitted under this subsection if it determines that the applicable requirements of subsection (a) are met. Any exemption granted under subsection (a) shall be a valid authorization for use only by the applicant of the health care facility or portion or medical equipment with respect to which the exemption is granted.

(c) In the case of a health care facility which is controlled directly or indirectly by an HMO or combination of HMOs, no determination of need under section twenty-five C shall be required for a substantial capital expenditure solely related to the provision of outpatient services or for a substantial change in outpatient services; provided, however, that no such facility shall acquire a unit of medical, diagnostic, or therapeutic equipment with a fair market value in excess of one hundred and fifty thousand dollars which is intended to serve outpatients unless such facility notifies the department of the facility's intent to acquire such equipment and of the use that will be made of the equipment. Such notice shall be made in writing and shall be received by the department at least thirty days before contractual arrangements are entered into to acquire the equipment with respect to which notice is given. A determination by the department of need therefor shall be required for any such acquisition (i) if the notice required by this subsection is not filed in accordance with the requirements of this subsection, and (ii) if the requirements for exemption under subsection (a) are not met.

Section 25D: Financing for construction of health care facility or change in services of facility; notice of intent; necessity of application for determination of need; acceptance of gifts; governmental bodies as applicant; report

Section 25D. Every person, at least thirty days prior to making a public solicitation of funds or otherwise securing financing for construction of a health care facility or a substantial change in the services of a facility, shall file written notice of his intent to do so with the department. In the case of a solicitation of funds from the general public, the department may require such person to file an application for a determination of need for such construction or substantial change in services and to postpone any such public solicitation of funds until such application has been acted upon by the department and such need has been found to exist; provided, however, that failure of the department to comment upon a notice of intent shall not be construed to constitute a determination that such need exists. Nothing in this section shall be construed to prohibit any person or agency subject to sections twenty-five C to twenty-five G, inclusive, from accepting gifts, and the provisions of this section shall not apply to any such solicitation or securing of financing where the undertaking to be funded is not sufficiently specific to constitute the subject matter of an application for determination of need under section twenty-five C.

Each agency of the commonwealth and its political subdivisions desiring to make substantial capital expenditure for construction of a health care facility or to substantially change the services of such a facility shall make application for determination of need therefor pursuant to section twenty-five C, and the department shall transmit a report of its determination thereon to the agencies empowered to recommend and to make appropriations of money for the applicant agency.

Section 25E: Administrative appeal to health facilities appeals board; hearing; decision; judicial review

Section 25E. Any person or agency filing an application for determination of need or empowered to request a public hearing under the provisions of section twenty-five C, and aggrieved by the determination thereof may, within fourteen days after such determination, file an appeal to the health facilities appeals board established by section one hundred and sixty-six of chapter six. The appellant shall include with any such appeal a certificate stating that said appeal is not knowingly interposed for delay.

The board in considering any such appeal shall restrict itself to a review of materials on file with the department and to consideration of whether the determination appealed from was an abuse of discretion, without observance of procedure required by law or in violation of applicable provisions of law. In the event the board determines that the materials available to it are inadequate to allow the required consideration, it may order a hearing on the appeal. Such appeal shall be heard by the board or its designated hearing officer within thirty days after its filing. If the matter is heard by a hearing officer, such officer, within thirty days after hearing, shall submit a recommended decision, reasons therefor and a determination of each issue of fact or law incident to said recommended decision to the board. The board shall, within sixty days after filing of the appeal, issue a final decision, either denying the appeal, in which case said decision shall be subject to judicial review under the provisions of section fourteen of chapter thirty A to the extent they are not inconsistent with the provisions of this section, or order the matter remanded to the department for action consistent with the opinion of the board. All proceedings of the board shall be subject to the provisions of chapter thirty A to the extent they are not inconsistent with the provisions of this section. Failure of the board to issue a final decision within one hundred and twenty days after filing of the appeal shall constitute a final decision affirming the action of the department and denying the appeal.

Section 25F: Rules and regulations; effective date

Section 25F. The department and the health facilities appeals board are hereby authorized and directed to promulgate rules and regulations necessary for the implementation of sections twenty-five C to twenty-five G, inclusive; provided, however, that no new promulgated rule or regulation shall take effect before the thirtieth day next following the date which a copy of the rule or regulation shall have been filed with the joint committee on health care of the general court.

Section 25G: Enforcement of Secs. 25C to 25G

Section 25G. The superior and supreme judicial courts shall have jurisdiction, upon request of the department, the appropriate regional comprehensive health planning agency, or of any ten taxpayers in the commonwealth to enforce the provisions of sections twenty-five C to twenty-five G, inclusive. A violation of such provisions shall subject the violator to liability for a civil penalty of not more than five hundred dollars for each day of such violation, assessable by the superior court. Any violation of such provisions also shall constitute grounds for refusing to grant or renew, modifying or revoking the license of a health care facility or of any part thereof.

Section 25H: Severability of Secs. 25C to 25G; voidability of provisions in violation of federal law

Section 25H. The provisions of sections twenty-five B to twenty-five G, inclusive, are severable and if any provision shall be in violation of any federal rule or regulation established by the Department of Health, Education and Welfare as a condition for receiving federal funds in connection with any program administered by said department, such provision shall be null and void and such violation shall not affect or impair any of the remaining provisions.