

likely be difficult for a hospital board to distinguish policy-formulating discussions and action, which would be subject to OMA, from other discussions and action that are not covered by OMA given the language of the amendment. It is also likely that members of the public attending a board meeting would disagree with the board's characterization of its discussions and actions, which would make the board vulnerable to claims that it had violated OMA.

DOH comments that the amendment addresses many concerns about patient privacy because hospitals should be able to avoid discussing patient specific issues in meetings held to formulate public policy. However, DOH also points out that private hospitals may argue that they do not and cannot formulate public policy and thus do not have to comply with OMA, while the intent of the bill may be that discussions about utilization of public funds received for services rendered should be conducted in properly noticed meetings open to the public.

Synopsis of Original Bill

The Senate Rules Committee Substitute for Senate Bill 719 enacts a new section to the Public Health Act requiring all meetings of a quorum of members of a board, decision-making body or policymaking body of a hospital held for the purpose of formulating public policy or taking any action within its authority that receives or is supported by public funds comply with the Open Meetings Act.

Hospital in this bill means a facility that is licensed by the Department of Health that provides emergency or urgent care, inpatient medical care and nursing care for acute illness, injury, surgery or obstetrics, including a facility licensed by DOH as a critical access hospital, general hospital, long-term acute care hospital, psychiatric hospital, rehabilitation hospital, limited services hospital and special hospital that receives or is supported by public funds.

FISCAL IMPLICATIONS

No fiscal impact on the state is anticipated.

SIGNIFICANT ISSUES

The Open Meetings Act contains an exception for those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed. See Section 10-15-1(H)(9), NMSA 1978.

DOH comments that it appears the intent of the bill is to create transparency in hospital administration for hospitals receiving or are supported by public funds so the public may be better informed about how those funds are being used, and the bill makes certain meetings of private, for profit and nonprofit hospitals subject to the provisions of OMA, since many private hospitals receive or are supported by public funds. DOH addresses the bill's language that OMA applies not only to hospital board meetings, but also to meetings of decision-making and policy-making bodies, and points out:

Many hospital decisions that are made in a group setting concern patient care (e.g. treatment team meetings convened for the purpose of making decisions about the course of a particular patient's care) and opening these meetings to the public would violate federal patient privacy laws such as the *Health Insurance Portability and Accountability*

Act of 1996 (HIPAA). The bill does not contain provisions that would allow for a hospital to close meetings in order to safeguard the privacy of its patients.

In light of this inclusionary language, DOH notes the bill may violate other federal patient privacy laws such as 42 C.F.R. Part 2. It also reports that Kansas and Mississippi specifically exempt public and private hospitals from their open meetings laws.

UNM comments that it is not clear whether the “public funds” at issue are meant to include federal, state, county or other funds. Specifically, it is not clear whether that language refers only to legislatively appropriated funds or rather to something like the receipt of funds from a county’s indigent hospital fund. Finally, it is also unclear whether the receipt of Medicaid and Medicare funding would qualify as a receipt of “public funds.” UNM also suggests that there may be conflicts between this new section of the Public Health Act and the Research Park Act.

NMHA asserts that, to the extent that this bill requires any hospital that receives Medicare or Medicaid payments to comply with OMA, that would go beyond the general intent of that act, which it notes is aimed at public bodies and public funds. It reports that the federal Centers for Medicaid and Medicare Services and HSD do not impose open meeting requirements simply for receiving public program reimbursements. Further, NMHA suggests that since the bulk of Medicaid funding goes to hospitals through the private contracting process of managed care organizations, those monies may not be public funds at that stage. NMHA reports it conducted a quick survey of other state hospital associations, and found that of the 20 respondents, their states apply OMA only to governmental hospitals, while several exempt a portion of even those hospitals’ proceedings, as does New Mexico. Further, Alabama exempts governmental hospitals entirely from their open meetings requirements.

ADMINISTRATIVE IMPLICATIONS

DOH reports that since it is responsible for licensing and regulating some of the facilities that fall under this proposed bill, and it has enforcement duties regarding the public health act, it appears that it would be responsible for assuring that hospitals are in compliance with the requirements of SB0719RUS. DOH anticipates that rules may need to be promulgated in conjunction with the law, if it were to be passed, but it is unclear how it would effectively enforce the broad and inclusive types of meetings described in the bill.

MD/bb/je