

# Senate Health and Human Services Committee

*Kirsten Koch 271-3266*

**SB 149-FN**, adopting omnibus legislation on health and human services.

**Hearing Date:** February 18, 2021

**Time Opened:** 4:03 p.m.

**Time Closed:** 5:34 p.m.

**Members of the Committee Present:** Senators Bradley, Gray, Sherman and Whitley

**Members of the Committee Absent :** Senator Avard

**Bill Analysis:** This bill adopts legislation relative to:

I. Nursing home standards.

II. Clarifying Medicaid spend-down requirements and requiring a report to the oversight committee on health and human services.

III. Establishing a harm reduction and overdose prevention program in the department of health and human services.

IV. Automated pharmacy systems.

V. Establishing a rehabilitation bed pilot program.

VI. Health facilities providing care in the declared emergency.

VII. Confidential sharing of information under the controlled drug prescription health and safety program.

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## **Sponsors:**

Sen. Sherman

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**Who supports the bill:** There are 128 names signed in support of this bill. If you would like to view the sign in sheet, please contact the Legislative Aide for the Senate Health and Human Services Committee, Kirsten Koch, at [kirsten.koch@leg.state.nh.us](mailto:kirsten.koch@leg.state.nh.us)

**Who opposes the bill:** Robert Stout, NH Pharmacists Association; Charles Champagne, Northeast Rehabilitation Hospital Network; David Ross, Paul Worsowicz, Northeast Rehabilitation Hospital Network; Lisa Shapiro, Northeast Rehabilitation Hospital Network; John Prochilo, Northeast Rehabilitation Hospital Network; Mark Taylor, Northeast Rehabilitation Hospital Network; Elizabeth Sargent, NH Association of Chiefs of Police.

**Who is neutral on the bill:** Nick Abramson; Melissa St. Cyr, DHHS; Marissa Chase, NH Association for Justice; Jennifer O'Higgins, DHHS; David Creer, BIA.

### **Summary of testimony presented in support:**

#### **Senator Ward, District 8**

- Part 1. Nursing home standards.
- Individuals on Medicaid that needs nursing home care can potentially be sent to another state to receive care. Individuals sent out of state for care should get the care they expect to receive in NH.
- Part I enforces NH standards of care on out-of-state nursing homes that receive Medicare patients that are NH residents.
- Senator Bradley asked, is this the same bill you submitted two years ago?
  - Senator Ward said yes.

#### **Senator Rosenwald, District 13**

- Part 2. Clarifying Medicaid spend-down requirements and requiring a report to the oversight committee on health and human services.
- Behavioral health services are covered. This does not expand the benefit. This just makes it clear that mental health care is health care and there should be no cost to Medicaid. This bill is necessary because is ongoing confusion in district offices. This part also requires reporting to DHHS for this year, and the next, to ensure fair application.
- This provision was a bill last session that was tabled last year.
- Also, as a note, Part 7 language is entirely incorporated in SB 45, which passed last week.
  - Senator Bradley recommended that Senator Rosenwald work with Senator Giuda on what to do about the language in Part 7 already appearing in SB 45.

#### **Senator Watters, District 4**

- Part 3. Establishing a harm reduction and overdose prevention program in the department of health and human services.
- This bill is meant to add harm reduction programs to the efforts in NH.
- We reduced stigma and supported recovery programs.
- We have seen a great increase in overdose deaths; 16.6% increase nationwide.
- We have yet to look at harm reduction as a strategy for helping substance abusers. Prevention programs are evidence based. Individuals can consume drugs in a hygienic environment with trained staff that can intervene for safety. These programs prevent other diseases as well, such as HIV.
- The program is modeled on the needle-exchange program. There needs to be disposal services and health care services. People there want help, treatment, and information about health risks. The harm reduction program would be for ages 18 years and older. This would be a good place to provide Oxone to prevent overdoses at these locations. There should also be health screening services for HIV, Hepatitis, and other disease here too.
- Page 3 details that harm reduction programs would save municipalities and the state substantial funds.

- This legislation enables municipalities to establish these programs and collect data. This is entirely enabling legislation. Part III of this bill gives municipalities the authority.
- Page 4 establishes entities that could operate this program, under rules that should be defined by DHHS.
- Page 5 has a system for reporting so NH can collect data and better understand the needs of individuals.
- The legal standing of these programs has gone back and forth between being challenged and accepted by the courts.
- Section 5 covers criminal liability.
- Part 6 of this bill has raised a couple of issues about civil liability. We do not want to exempt civil liability from someone who commits egregious behavior. We may need to amend this section, or have it removed.
- This program will not use any general funds, only grant funds.
- Senator Bradley asked, where is the section on civil liability?
  - Senator Gray said, it is on page 10.

#### **Senator Carson, District 14**

- Part 4. Automated pharmacy systems.
- Representatives of these systems are looking for legislative approval.
- Representatives of these systems will be testifying later during this hearing.

#### **Senator Bradley, District 3**

- Part 5. Establishing a rehabilitation bed pilot program.
- It would establish a pilot and authorize it to enable new licensing for new rehab beds for where there is a need for beds.
- There is a need to lift the moratorium on the needs for new beds. It has been in place for 25 years.
- Representatives of hospitals will speak to the need.

#### **Senator Gray, District 6**

- Part 6. Health facilities providing care in the declared emergency.
- We are adding a subparagraph to 42(a) to define COVID. We needed to be more specific.
- Senator Gray said he is opposed to deleting the section on civil liability that was mentioned by Senator Watters. We need volunteers and all the help we can get. We need to provide them legal protection.

#### **Senator Giuda, District 2**

- Part 7. Confidential sharing of information under the controlled drug prescription health and safety program.
- Senator Giuda said, if we do not pass this section of the bill, we will lose Medicaid.

#### **Hon. Nancy Murphy**

- Ms. Murphy testified in support of Part 2 of this bill.
- Eligible citizens are required to show medical bills equal to the amount before the spend down coverage begins. If the spend down amount is not met, or if the coverage for

mental/behavioral services is not properly applied by DHHS, then the Medicaid recipient is denied medical coverage.

- Being denied coverage would not happen for other services (ex. gastroenterology) instead of mental health services.
- We need a compliance section for DHHS staff to ensure Medicaid coverage is applied for mental health care.
- This section does not expand coverage. It clarifies what expenses can be applied to the spend down.
- Ms. Murphy shared an anecdote about a similar bill, HB 739, that she worked on in the NH House in the past.
- Senator Bradley asked, do you recall the vote in the House committee on this bill?
  - Ms. Murphy said, I do. It was 15 to 3.

### **Hon. Joe Hannon, NH Harm Reduction Coalition**

- Mr. Hannon testified in support of Part 3 of this bill.
- Mr. Hannon said, there are operating harm reduction programs in Manchester and Nashua. They saw overdose death drops in the last year. The Manchester program successfully reversed 3,000 overdoses last year on Sundays alone during a 2-hour period. These programs have also reported that they reduced preventable infections, skin infections, that lead to other disease. This also reduces medical costs and frees up more of medical providers' time, especially during the pandemic.
- Mr. Hannon said, we are concerned with municipalities responsibility of these programs because it can be prohibitive to human right to seek resources near them. If individuals have to travel to access these services, because it is not available in the municipality, there is a danger of DUI, spread of disease, and there will be a general lack of access to services in some areas. Most of these services are available in larger cities.
- Mr. Hannon shared anecdote about a facility in Canada that saw the benefits of a harm reduction program.
- Mr. Hannon recommended implementing mobile harm reduction facilities.

### **John Burns**

- Mr. Burns testified in support of Part 3 of this bill.
- Mr. Burns said municipal control is problematic.
- *Note: When Mr. Burns was testifying, he experienced connectivity issues. The committee members told Mr. Burns he could not be heard. Mr. Burns continued testifying while he was inaudible during some sections.*
- Mr. Burns said he supports Part III and believes harm reduction is lifesaving. There is data to back that up.
- Senator Sherman asked Mr. Burns to submit the study to the committee that he mentioned in his testimony.
  - Mr. Burns agreed to do so.

### **Nikki Fordey, Social Worker**

- Ms. Fordey testified in support of Part 3 of this bill.
- Ms. Fordey shared an anecdote about losing clients to substance abuse.

- Ms. Fordey said her clients need all the tools they can get to get better. The obsession with abstinence of drug use needs to end. We need to accept people where they are and ask them what they need to survive and thrive. People who use drugs do not deserve to die. This bill will save lives.
- Ms. Fordey does support giving municipalities authority over these programs; this should be a community effort.
- Providing harm reduction services saves lives, reduces harm, and provides people with dignity and worth.

#### **Asma Elhuni, Rights and Democracy**

- Ms. Elhuni testified in support of Part III.
- Ms. Elhuni shared an anecdote about her work and a story of a substance abuser.
- Ms. Elhuni said, NH has the sixth highest rate of overdose deaths in the country.
- This bill would increase public safety and reduce disorder.

#### **Jody Fenelon and Derek Corriveau, Partners Pharmacy**

- Ms. Fenelon and Mr. Corriveau testified in support of Part 4.
- Mr. Corriveau provided background on the Partners Pharmacy remote automated medication dispensing system known as Passport.
- This service offers an impact on patient safety, especially during the pandemic, and does not make mistakes.
- This service provides a cost savings for carriers. You only pay for what you use. This eliminates waste on medications.
- The medication in machine is double locked and on camera monitored by security 24/7.
- Remote automated dispensing is safe and decreases pharmacy costs.

#### **John Skevington and Dean Carucci, Portsmouth Hospital**

- Mr. Skevington and Mr. Carucci both testified in support of Part 5 of this bill.
- Mr. Carucci said there are some interpretations that we need to iron out with DHHS. Please hold this section until we can do this.
- Mr. Carucci said, we introduced this bill due to the issues we are having. Our patients are at 192% due to access issues.
- Senator Bradley asked, do you believe on the seacoast there is an absolute need for more rehab beds?
  - Mr. Skevington said, that is correct.

#### **Dean Carucci later testified again in response to Mr. Champagne's testimony.**

- Mr. Carucci said, I think it is easy for Northeast Rehab, who owns 70% of the beds in NH, to want to restrict the addition of beds.
- Our average length of stay is double the length of stay defined by Medicare.
- For an acute facility, every bed that we cannot discharge timely, means there is a patient that has to leave the state for care. It takes on average six referrals to get a patient placed in a facility for care. That drives up the length of state.

#### **John Friberg, Solution Health**

- Mr. Friberg testified in support Part 6 of this bill.
- Mr. Friberg said, this proposed legislation will confirm the legislature's intent of the applicability of the emergency statute RSA 21(p), when providers have attempted to follow emergency orders/rules from federal or state order in response to COVID. This provides legal protection and makes these services immune to liability arising from, or in relation, to such activities.
- This is happening in numerous jurisdictions and has been resolved by either executive order or legislation. We ask NH to come in line with this policy action.
- March 13, 2020 was the day on which many federal disaster declarations were issued on COVID, followed by a flurry of unprecedented state and federal rules designed to slow the spread of COVID and prepare the health care system to respond to an overwhelming need due to COVID. Some of those directives and waivers resulted in cancellation of elective procedures. They also authorized tele-health visits. This also expanded places where we provided care (ex. conference centers, parking lots, etc.) on an emergency basis. They prohibited visits, cut down on documentation process, and how we triage ER patients. The sourcing and utilization of PPE was utilized and deployed in nontraditional ways by encouragement of the authorities. Some of which was to a facility's own detriment.
- A very real fear of these providers is falling responsible to civil liability for complying with these mandates and authorizations, that in many cases, took the standards and norms they have known, and turned them upside down. The delivery of care became very different. This caused health care to be delivered in nontraditional ways. We want to be very clear that these providers and organizations will not later be penalized for the very actions they were encouraged or mandated to take. These actions should not later be utilized in civil lawsuit.
- Emergency management compliance should never cause civil tort liability exposure.
- RSA 21(p) conveys immunity. The NH Attorney General confirmed these organizations and providers should be protected under that statute. However, the Attorney General's opinion does not make this point as indisputably clear as legislation would.
- Part 6 makes succinctly clear that actions by health care providers and institutions in compliance with such emergency orders and rules constitutes as emergency management activity and are subject to the necessary liability protections for those very actions.
- This is an important effort for ensuring medical providers are not later penalized for doing what they were required to do to protect their communities.
- Senator Bradley said, while you have based Part 6 on the Attorney General's interpretation of the emergency order, there was a key piece that was not in it that the immunity was limited to the performance of emergency activities at the direction of the Governor or another agency. My suggestion would be, if the comprehensiveness of the Attorney General's opinion is complete, then we could go forward with this easily.
  - Mr. Friberg said that is mutually agreeable and we are working to fine tune this part together with other proponents.
  - Senator Gray offered to handle the amendment for Part 6.

### **Paula Minnehan, NH Hospital Association**

- Ms. Minnehan testified in support of Part 6 and Part 7 of this bill.
- Part 6

- Ms. Minnehan said, we are supportive of Part 6. We agree with Mr. Friberg.
- Part 7
  - Ms. Minnehan said, I am fine with Part 7 being removed because the identical language is in SB 45. We are fine with whatever vehicle will get this bill passed.

### **Summary of testimony presented in opposition:**

#### **Robert Stout, NH Pharmacists Association**

- Mr. Stout testified in opposition of Part 4 of this bill.
- Mr. Stout says he has no issues with the accuracy and benefits of automated pharmacy systems.
- Mr. Stout said he is disappointed that the Board of Pharmacy would refer this to the legislature side for a fix. In 2010 we came before you to ask for authorization to manage these systems. Look at statute 318(5)(a)(12) procedures for automated pharmacies. This bill belongs in Rules. I have a lot of questions.
- The state currently has automated pharmacy dispensing systems already in use in long term care facilities. PH 70502 already relates to use in these facilities.
- We are worried about controlled substances in these machines. This bill establishes that if you have a controlled substance in the machine, you have to get a separate license from the DEA to have it. This could trump 70502. Currently we do not require a separate license for the machines because they are considered emergency use kits, because of the pandemic, so it would be referred to the Board of Pharmacy.
- If we write a law stricter than the federal guidelines, then the stricter law applies. We do not want to see these machines removed.
- Mr. Stout said, this bill limits to placing these machines only in long term care facilities. People are going to come back and ask to put these machines in more places.
- Senator Bradley said, I am told the Pharmacy Board told the proponents to come to the legislature.
  - Mr. Stout said he could not answer that because he was not there. My concern is that they eliminated the Executive Director at the Board of Pharmacy and now we are relying on the commissioners. There are internal problems.

#### **Jody Fenelon joined in to answer questions.**

- Ms. Fenelon said, after discussion with the Board of Pharmacy, they did ultimately direct us to the legislature.
- Senator Bradley asked, does this bill allow or require rulemaking by the Board of Pharmacy? Would it be a way of resolving the concept? There seems to be a tangle between the legislature and the board.
  - Ms. Fenelon said, I understand the DEA point of view and the registration for controlled substances in the machines. We do follow that guidance under what the state and DEA would require.

#### **Robert Stout later testified again.**

- Mr. Stout said, my only fear that this legislation may force the machines already out there to be pulled. One of the solutions to this would be to file a formal rule making petition.
- Senator Bradley said, please work that out with Senator Carson and the proponents of Part 4. If this all gets worked out, then we may not need this section of the bill.

### **Charles Champagne, Northeast Rehabilitation Hospital (NRH) Network**

- Mr. Champagne testified in opposition of Part 5 of this bill.
- Mr. Champagne said, Northeast Rehab does not believe there is not a need for more rehab beds on the seacoast.
- NRH provides acute rehabilitation services in four NH locations. A typical patient requires an intensive course of rehabilitation therapy (ex. after a stroke, spinal injury, etc.). We are not a skilled nursing facility, a long-term care facility, or an inpatient psych facility.
- Mr. Champagne said, in Portsmouth, we opened a standalone, 33 bed facility to meet the community's needs. We heard from our partners that there was a need from acute hospitals for a place to omit COVID patients. NRH Salem has omitted over 200 patients in NH. Inpatient facilities require certification by CMS and must follow a high degree of standards of care. NH is best served by having acute hospitals to work collaboratively for their patients to have access to inpatient facilities.
- Senator Bradley asked, can you address the testimony that says you need more rehab beds?
  - Mr. Champagne, we operate 33 individual room facility. It has an occupancy of 90%. It may be full some days. We do not have a problem omitting patients that need the criteria. We have to maintain the 60% rule. Patients must maintain an acute level of medical necessity. Patients have to be able to sustain 3 hours of therapy a day to be in our facility. We are not aware of an additional need for beds.
- Senator Bradley asked, do you accept all Medicaid patients?
  - Mr. Champagne said, yes, we do. About 12% of our patients are Medicaid.

### **Neutral Information Presented:**

#### **Melissa St. Cyr, DHHS**

- Ms. St Cyr testified on Part 1 and Part 5 of this bill.
- Part 1
  - Ms. St. Cyr said, the concern that DHHS has is with the language. If you go to another state's nursing home, you get that state's Medicaid and you are under their standards. Being sent out of state for nursing home care is very, very rare and only done when the individual has specific needs that cannot be met in state. It is a contractual obligation.
  - We do not have the authority legally to force another state's nursing home to follow our law. We cannot execute this statute as written if passed.
  - The DHHS is happy to work with Senator Ward on this going forward.
- Part 5

- The way it is written acute care hospitals and critical care hospitals are allowed to apply for a license to operate rehab care services. The way our laws are set up right now, an acute care/rehab hospital is allowed to apply for hospital beds. There is no moratorium on new hospital beds. These hospital beds can be used any way the hospital sees fit, such as for psychiatric services, etc.
- This legislation permits these hospitals to do something they are already allowed to do. This legislation seems to have more to do with opening a rehab hospital, which has different licensure. If this is the goal is to allow a rehab hospital to be opened, then we need to change the language so that it does not say “acute care or critical access hospital” and instead says “a rehabilitation hospital shall be permitted to apply for a license.”
- Senator Sherman said, what would constitute opening a rehab hospital? Would it require separate licensure?
  - Ms. St. Cyr said, most hospitals would just apply for additional beds and then do with them as they see fit. It wouldn’t restrict them based on using them for any specific services. Specifically, rehabilitation hospitals have a specific component of rehabilitation to the beds they have. They have a special type of license because they cannot offer regular hospital services. There is nothing under statute right now that would stop them from increasing their capacity of their hospital, even at another location.
- Senator Sherman said, is there a benefit to not being under the hospital license? Is there a reimbursement difference?
  - Ms. St. Cyr said, there could be. Someone else can speak to that.

### **Marissa Chase, NH Association for Justice**

- Ms. Chase testified on Part 3 and Part 6 of this bill.
- Part 3
  - Ms. Chase said, there is another concern in Part 3 of the bill regarding the liability that Senator Watters suggested should be eliminated.
- Part 6
  - Ms. Chase said, we have been working with Mr. Friberg. We get nervous when we see any limitation of liability. We agree with Mr. Friberg in principle on the bill. The language we see now is just so broad. If there was a very complete opinion added in, then that would be agreeable. We do not want to make this any more difficult during the pandemic.
  - Ms. Chase said she is happy to work with Senator Gray on any amendments.