

2/17/23 JLCAR Meeting - Discussion of PDAB

<https://www.youtube.com/watch?v=6V6m8alr9hA>, Minute Markers 43:42 - 50:02

Ten Members of JLCAR were present:

Rep. Carol McGuire, Chair

Sen. Tim Lang, Vice Chair

Sen. James Gray

Sen. Ruth Ward

Sen. Shannon Chandley

Rep. Bill Hatch

Rep. Robert Lynn

Rep. Peter Schmidt

Rep. Jaci Grote

Rep. Mary Hakken-Phillips (D)

JLCAR Staff Kim Reeve: Okay, so the next discussion item is on the Prescription Drug Affordability Board. Back in November the Committee conditionally approved new rules which implemented RSA 126:BB which establishes the Prescription Drug Affordability Board, and it included a request that the board report back to the Committee on the benefits of, benefits associated with the fees being assessed by the board pursuant to the statute. The Committee requested this because it received a copy of a 2013 memorandum written by UNH law professor Marcus Hurn, written to House Ways and Means on the limits of the General Court's power under the New Hampshire Constitution to raise revenue. Concern was expressed at the meeting that the annual assessment fees have no benefit to the entities and could possibly be unconstitutional. Just to be clear, what we're talking about is not the administrative fees for supplies or copying and stuff like that. What we're talking about is two different annual assessment fees. One is no less than one hundred dollars for insurers, HMOs, and third-party administrators. The second one is no less than five hundred dollars on PBMs, drug manufacturers and wholesalers. So in looking at the statute and the legislative history and the rule, the fees might be unconstitutional because they appear not to have a benefit associated with them to the entities paying the fees. They're not fees for licenses, they're not user fees, they aren't tax on property or income, they don't qualify as cost recovery. They appear to be a fee for doing business in New Hampshire, but the legislative history does not talk about the purpose of the fees at all. It's completely silent. That said, the Board has filed a memo which is in the packet, and it lays out some potential benefits to the payers which includes things like increased transparency which could possibly lead to a reduction in cost, more cost-effective alternatives available, and potentially an increase in market share which may outweigh the assessment fees. The memo also points out that a statute is presumed constitutional and that parties challenging them have the burden of proof. So, it, I don't think anybody from the Board is present today to join in on the discussion or to talk about their memo, but that is the the item and if anybody has any questions we can, we can try to answer those.

Chair Carol McGuire: Representative Hatch has a question or a comment.

Representative Bill Hatch: Thank you. And if you stated it I apologize for missing it but also, and part of this, in in, I think most of the staff is aware of my concern over fees as they come in and that they're appropriate because a fee has to be directly related to the cost of providing a service. If it's not, it's a tax. And with this, I, I, my head exploded about nine times when I saw what was being assessed, no ten, excuse me. I was in the hospital, so it was okay. But, has there been any attention paid to that because this whole thing is just upside down, in my mind.

JLCAR Staff Kim Reeve: Right, no, I'm I, in their memo they talk a lot about, you know, in the memo by stating that the statute is presumed constitutional until it isn't. It's up to the parties to challenge it. They just talk about these theoretical potential benefits associated with the fees but there appears to be no concrete, you know, benefit to the entities.

Representative Bill Hatch: Well, benefit, that's that's separate than actual cost.

JLCAR Staff Kim Reeve: Correct.

Representative Bill Hatch: A fee has to be directly related to the cost and the service being provided. If it's not, it's a tax.

JLCAR Staff Kim Reeve: You are correct.

Representative Bill Hatch: Plain and simple and and I think this needs a lot of ... review.

Chair Carol McGuire: I believe, I, I would agree with you but when I looked through that, the statute specifically says not less than a hundred dollars for these people and not less than five hundred for these people. They are following the statute, which they are also required to do. So I would say the Board is at a bind.

JLCAR Staff Kim Reeve: Yes.

Chair Carol McGuire: And what we should be doing is looking at the statute and saying does this make sense.

Representative Bill Hatch: Right

Chair Carol McGuire: Okay, thank you, I agree. Senator...

Senator Tim Lang: Okay, thank you. So again, the other thing that is interesting about this is that we already charge these entities fees over in the insurance department in order to do business in the state. So we're charging them not only at the insurance department to get a license so they can do business, we are now charging them at this Board so they can do business in the state. So I guess what I'd ask, I guess **I'll try to make this in the form of a motion, is that we recommend to the Legislature that they review and make possible legislative changes on that statute.**

Representative Bob Lynn: Yeah, I'll second that. That that seems to me to make a lot ... I tend to agree with representative McGuire, that if it's in the law then, you know, it's not our role to to to give the the agency that's that's drafting regulations consistent with the law a hard time about doing that, but I do think for the reasons everyone has stated that maybe the law ought to be changed. So I second Senator Lang's motion.

Chair Carol McGuire: And it's and it's pretty clear from the Board's response that there is no clear obvious benefit to the people who are paying the fees, because if there was they would have stated it. Right, okay.

Senator Tim Lang: Madam Chair, one more thing. There's two bills pending on this agen... on this Board, so there's a place for the Legislature to act this year if they choose to.

Chair Carol McGuire: Excellent. We will draft up such a letter immediately. Okay, we have a motion. Is there any further discussion? Those in favor? [aye] Opposed? [no voices heard]. All right, so...

Senator Tim Lang: Motion to adjourn? ...

