

Date: April 19, 2006
Time: 2:10 p.m.
Room: LOB, Room 102

The Senate Committee on Executive Departments and Administration held a hearing on the following:

HB 1346 requiring certain persons to keep the contents of prescriptions confidential.

Members of Committee present:

- Senator Kenney
- Senator Flanders
- Senator Barnes
- Senator Fuller Clark
- Senator Larsen

The Chair, Senator Joseph D. Kenney, opened the hearing on HB 1346.

Senator Joseph D. Kenney, D. 3: Now, I understand we've got about fourteen or fifteen people that want to speak. I will just reiterate if you could not duplicate the efforts of people that have gone before you when it comes to some of the substantive elements of the bill and try to provide fresh new testimony, that would be very helpful. So, I would ask Representative Rosenwald if you would testify. Good afternoon.

Representative Rosenwald: Good afternoon, Chairman Kenney, members of the Committee. I am really pleased to introduce HB 1346.

This legislation has two goals. It will protect privacy and it will save money for the state, for consumers and for businesses. It will accomplish these goals by prohibiting the sale or use of individual patient or prescriber identity for marketing brand name prescription drugs. These two aspects of identity protection are equally important to accomplish these goals. I would like to give you an overview of the bill. This bill will add state protections to patient privacy. The federal HIPAA law is supposed to do this, but it has loopholes, it doesn't always work, and it has only a federal enforcement mechanism. So, as I say now, there are loopholes.

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Sometimes patients will get a coupon or an advertising in the mail for a medication that treats a private medical condition and they wonder how the drug company knows who they are. I have two examples of this. I was hoping that the state rep from Manchester who received these in the mail would come, but she is recovering from surgery and wasn't feeling up to it. This is a letter addressed to her by name for the prescription nasal steroid flonase and this is another one addressed to her by name for a product called immitrex. I think maybe it treats migraine headaches, but I'm not sure. They are both prescription brands. So, I will leave those with you.

The Pharmacy Board's Compliance Division does get complaints from consumers about this kind of direct mail marketing and advertising. At the public hearing in the House, we learned that not every pharmacy actually removes the patient's name from the data, the pure data, before they are released to other vendors. So, the result is that there is incomplete patient privacy protection even though HIPAA is supposed to ensure it. There is little that we can do about it either. The Pharmacy Board gets complaints from consumers, but HIPAA is a federal law and enforcement has to be through federal agencies. In addition, the civil fine for a HIPAA violation is a maximum of \$100. That is less than the value of many prescriptions and it is probably not worth federal investigation unless it is part of a broader criminal effort where the fines would be really major.

If we enact HB 1346 we will better protect the privacy of patients in New Hampshire from having their identity sold when they fill prescriptions. It makes the use of their identity for marketing prescription drugs a violation of our Unfair Trade Practices Act, which is enforceable by the New Hampshire Attorney General's Office.

Now, not only is patient identity inappropriately used for pharmaceutical marketing, but the identity of the prescribers – doctors, nurse practitioners, optometrists and physician assistants – is routinely bought and sold for marketing. Large data mining corporations produce very sophisticated reports that track the individual behavior of our health care professionals. The use of personal identity is both an unwarranted intrusion into professional privacy and, more to the point, it adds to the financial burden of New Hampshire's health care system by increased pharmaceutical costs for the state, our consumers, and our businesses.

In New Hampshire, I believe that we place a high value on privacy. When I do my grocery shopping at Shaw's and I give them that little rewards card with the unique identifier bar code, they know exactly what I'm buying. They have a complete record and I'm sure that they sell it to their vendors. But, I don't have any basis for complaints because I have signed up for that

program. I voluntarily gave my permission and I get something out of it in terms of special sales. Further, if on a particular day I don't want them to see the six pack of beer I have in my cart, I just keep that little bar code card in my wallet and I'm more anonymous for Shaw's that day. But, our health care providers don't have that choice. With data mining, doctors lose their privacy involuntarily and, without any permission, drug companies know how doctors and nurses think and how they behave. I believe our health care providers deserve the privacy of their own intellectual activity and professional practice. But, even more important than this, protection of their privacy will save us money in the health care system.

It is a truism in marketing that you spend your money more efficiently by investing in the customers you already have rather than trying to gain new customers. That is why it is so important to drug companies to identify who their biggest volume prescribers are. The pharmaceutical industry spends on average \$13,000 per doctor per year on marketing. They want to focus their marketing dollars and sales force time to convince high buyer prescribers to write more prescriptions for their drug brands. The more they know about an individual doctor's actual prescribing behavior, how it is influenced by a specified marketing approach, and how many times the doctor prescribes each product in a drug class week by week, the more prescriptions they can get and the more sales revenue they will generate. Over the past decade, drug companies have come to rely on these reports simply because they work.

Now, I said at the beginning that HB 1346 will save money for the state, consumers and businesses and another speaker, Representative Price, is going to speak more about this. But, I want to make it clear to you that high prescription drug utilization in New Hampshire leads to a significant burden on our health care system. You are going to hear opposition to this from the pharmaceutical industry and those companies, but I want to reassure you that the drug companies will still be able to purchase aggregated data by zip code and/or by medical specialty that will enable them to know how their brand and their sales forces are performing.

IMS, who is also here today, the world's largest health care data mining company, has also objected to this legislation. They have said that its unintended consequences will undermine law enforcement and fraud investigation and health care research. According to IMS, this work is funded by the profits generated by selling information to the pharmaceutical industry, but that they will stop collecting physicians' names if they can't make a profit selling this data to the drug companies. Please understand that the prescriber identity information is already included in the data when it is sold by the pharmacies to IMS. It would be work to take the names out. In addition, they will generate profits by selling aggregated reports to the

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drug companies. Further, on the subject of fraud and law enforcement investigation, data from this company is not actually necessary to investigate either medicaid fraud, drug diversion or any kind of drug abuse. Health care researchers generally have grant money to obtain their data. And, importantly, Dartmouth Medical School has expressed no opposition to this legislation.

I have an amendment with me today that clarifies in more detail what can and cannot be done with patient and prescriber identity and reinforces that law enforcement, research, and care management functions are all protected. The amendment also addresses issues raised by the pharmacies. It makes it clear that identity data included in electronic prescribing, parents picking up medications for their children or for anybody else, patients transferring prescriptions between pharmacies, and records transferred when a pharmacy is sold, are all acceptable uses.

We were also asked by companies that produce patient compliance educational materials to protect this kind of communication. Since these materials do not try to influence what drug is prescribed, we agreed to not prohibit these uses.

Members of the Committee, I understand that there is often reluctance to regulate business. But, we must also consider the public policy goals of protecting privacy and saving money on prescription drugs here in New Hampshire because really, when you consider it, the effect of selling somewhat fewer marketing reports on individual prescribers in a small state like New Hampshire would have a very limited impact on large multi-national corporations with revenues in the billions. Yet, for our small state, the positive financial impact on our consumers, businesses, and our state budget would be significant. I urge you to support this bill.

I thank you for your consideration and I would be happy to answer questions.

Please see Representative Rosenwald's prepared testimony, together with attachments, attached hereto and referred to collectively as Attachment #1.

Please see also Amendment to HB 1346 #2006-1887s, attached hereto and referred to as Attachment #2.

Senator Joseph D. Kenney, D. 3: Are there any questions from the Committee? Senator Fuller Clark?