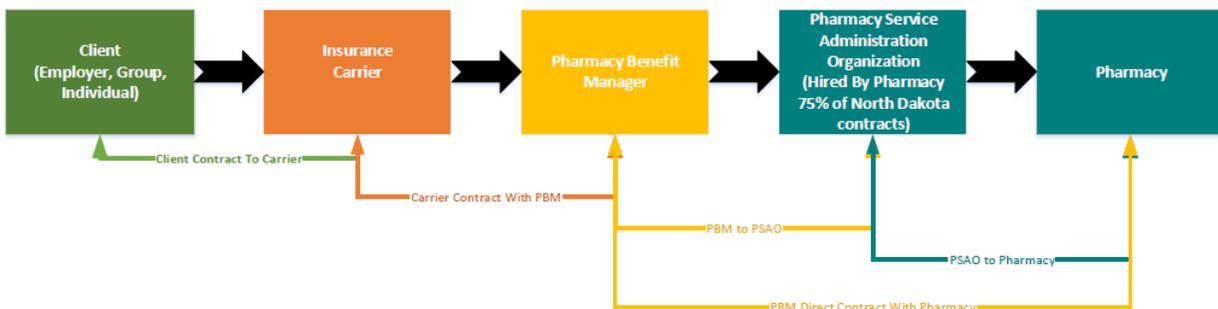


# TESTIMONY OF SCOTT MILLER

## House Bill 1233 – Pharmacy Benefit Manager Audit Requirement

Good Morning, my name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. I am here to testify in opposition to House Bill 1233.

In a nutshell, House Bill 1233 requires the NDPERS Board to conduct audits that will be difficult if not impossible to perform, and require contractual provisions with future Pharmacy Benefits Managers, or PBMs, that may result in increased premiums for pharmacy benefits. The bill requires NDPERS to perform audits of the performance of contractual responsibilities for contracts to which we are not parties and will most likely not be able to gain access. The below graph will help me explain the problems, and the impossibilities, this bill presents.



In this graph, NDPERS is in the green box to the left – we are the client. We contract with Sanford Health Plan (SHP) for both our medical benefits and our pharmacy benefits – SHP is in the orange box above, second from the left. SHP does not directly provide the pharmacy benefits. Instead, SHP contracts with a PBM, OptumRx, to provide those services. The PBM is in the middle yellow box above. From a practical perspective, since we have a fully-insured plan, these are the only contracts we are concerned with. We have a vested interest that SHP is providing prescription benefits in the manner to which they have committed in our contract with them, and so the performance of the PBM in regard to its contract with SHP is something into which we can arguably inquire.

However, we are not as interested in how the PBM contracts with either pharmacies or pharmacy service administration organizations (PSAOs), and we have no interest in any contracts between PSAOs and pharmacies. PSAOs are in the second box from the

right, and pharmacies are in the far right box. For your information, a PSAO is an entity that contracts with a pharmacy to assist with third-party payer interactions and administrative services related to third-party payer interactions. Basically they help pharmacies contract with PBMs, or serve as an intermediary between a pharmacy and a PBM. Approximately 75% of pharmacies in North Dakota use PSAOs.

The biggest problem with HB 1233 is that even though we have little interest in auditing any performance under the contracts between our PBM and any PSAOs or pharmacies, and no interest in the contract between the pharmacies and the PSAOs, this bill requires us to audit certain performance under those contracts. Remember, we are not parties to those contracts. And we have no right to even see those contracts. With about 75% of North Dakota pharmacies using PSAOs, that is about 75% of the transactions that we will not be able to look at. The below list of new audit requirements shows which requirement applies to which contract:

Page 1, lines 22-24: NDPERS and SHP; SHP and OptumRx

Page 2, lines 1-3: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 4-6: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 7-8: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 9-13: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 14-17: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 18-23: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 24-27: OptumRx and PSAOs/pharmacies; PSAOs and pharmacies

Page 2, lines 28-29: SHP and OptumRx

Page 2, lines 30-31: SHP and OptumRx

Page 3, lines 2-6: NDPERS and SHP

Page 3, lines 7-16: NDPERS and SHP; SHP and OptumRx

Page 3, lines 17-22: SHP and OptumRx

Page 3, lines 23-25: NDPERS and SHP

The underlined sections above are the contracts to which we have no legal right to require access, much less audit. The activities HB 1233 seeks to have NDPERS audit are far down the transaction chain, in an area we do not have any right to impose any requirements. As an example, I just bought a bed over Amazon. The seller of that bed was not Amazon, but a company out of Wyoming called Murphy Wall Beds Warehouse (Murphy). They are the ones that shipped me the bed. But they are not the maker of the bed – the maker is a company called Night & Day Furniture.

As with the contract between NDPERS and SHP, I had a direct contract with Amazon. As with the contract between SHP and OptumRx, Amazon had a contract with Murphy. I had a relationship with Murphy because we had to coordinate shipping and delivery. Same with NDPERS and OptumRx – even though NDPERS does not have a direct contract with OptumRx, we still have significant requirements that they have to follow.

However, I had zero interest in the relationship between Murphy and Night & Day Furniture. If something went wrong with the order, I had every right to beat on Amazon and potentially even Murphy to make it right. I did not have any right to go past Murphy and take on Night & Day Furniture. I also had no right to ask Murphy about the contract between them and Night & Day Furniture; I presume Murphy made some money on our transaction, but I did not have any right to demand to know what that amount was or under what contractual requirements it was made.

Similarly, NDPERS has little interest in the relationship between OptumRx and the PSAOs or the pharmacies, and no interest whatsoever in the relationship between the PSAOs and the pharmacies. NDPERS does, of course, have a significant interest in how OptumRx provides benefits to our participants. If NDPERS has a problem with our pharmacy benefits, we go directly to SHP, and may even involve OptumRx – in fact, we required OptumRx to appear before the Board some time ago to explain some issues we were having.

But NDPERS has no right to get involved in the relationship between OptumRX and the PSAOs or pharmacies. And certainly no right to get involved in the relationship between the PSAOs and the pharmacies. Whether OptumRx or the PSAOs or the pharmacies have questions or concerns about the performance of the contracts between them is not something about which NDPERS has a right to intervene. We will not be able to force the PSAOs and pharmacies to disclose those contracts, and have no right to audit the performance of those contracts. However, House Bill 1233 would require us to audit many aspects of the performance of those contracts. NDPERS believes that is requiring us to do something that is neither our concern nor something that is possible for us to do. Because of that, we have to oppose House Bill 1233.

If our health plan was self-funded, we may be more interested – and we may have more rights – in looking farther into the stream of pharmaceutical commerce. Many of the new provisions would more directly apply if we were self-funded. But we are not self-funded – we have a modified fully insured health and pharmacy benefits plan. We are concerned about claims made to and claims paid by SHP and OptumRx. HB 1233 would require us to reach much further into the stream of commerce, into places we arguably have no right to go.

One of the arguments made on the House Floor in favor of HB 1233 is that there is a threat that our contract with SHP and their contract with OptumRx may involve what is called “spread pricing”. The Centers for Medicare and Medicaid Services (CMS) describe “spread pricing” as follows:

Spread pricing occurs when health plans contract with [PBMs] to manage their prescription drug benefits, and PBMs keep a portion of the amount paid to them by the health plans for prescription drugs instead of passing the full payments on to pharmacies. Thus, there is a spread between the amount that the health plan pays the PBM and the amount that the PBM reimburses the pharmacy for a beneficiary’s prescription.

Spread pricing is common, if not universal, in “traditional” PBM contracts that are part of fully-insured plans. The alternative is a “transparent” PBM contract, which is typically found in self-insured plans. The agreement with OptumRx is, in fact, a transparent PBM contract, and is part of our modified fully-insured plan. NDCC section 54-52.1-04.16 already provides us the audit authority we need in order to be assured that spread pricing is not taking place.

The potential cost is another significant concern about House Bill 1233. I do not mean just the minimum \$375,000 we will spend on the audits (or attempt to spend, since we most likely will not be successful in auditing all of what HB 1233 requires). If House Bill 1233 were to pass, we have concerns that we will not receive bids for our pharmacy benefit plan in the future, and, if we do, what the cost of that plan would be.

NDCC section 54-52.1-04.16 was originally created just last session – it is the codification of House Bill 1374 from the 2019 Legislative Assembly. When enacted, section 54-52.1-04.16 greatly expanded the audit requirements that NDPERS had to put in any contract for PBM services, including if we obtained those PBM services through a health insurance carrier like SHP.

The audit requirements imposed by section 54-52.1-04.16 are much more broad than are typically found in a fully-insured arrangement. As I stated above, usually fully-insured health plans use a “traditional” or “spread” PBM, which does not allow an in-

depth analysis of the claims paid. Instead, you pay a given amount for coverage, and they cover it, regardless of the cost.

Section 54-52.1-04.16 imposes audit requirements that go far beyond that. In fact, in our RFP process just last year for our health and pharmacy benefits, the “transparent” PBMs that responded to our RFP indicated that the audit requirements are more broad than even they tend to see. Those expanded audit requirements have already had an impact on competition for our plan; in their initial proposal, one of the vendors responded that it could not commit to complying with section 54-52.1-04.16. That entity only changed its response when we reminded them that it was a minimum qualification, and that their proposal would be deemed non-responsive if they could not commit to complying with that statute.

House Bill 1233 expands the breadth of auditing requirements well beyond that currently found in statute. If we had problems with that statute as it currently reads, we are seriously concerned about the problems we will have obtaining pharmacy benefits for our employees under the greatly expanded requirements from House Bill 1233.

Even if we do receive bids for the plan, those bids would most likely only be from “transparent” PBMs. During our bid process last year, we received bids from three “transparent” PBMs (other than OptumRx through the SHP contract). If we were required to use the least expensive of those PBMs, the state’s premiums would have gone up another 5%, or nearly \$32 million. Given that our total prescription drug spend for a biennium is just over \$100 million, that is a 32% increase in our pharmacy cost. One has to question whether any information we might receive from an audit under HB 1233 is worth that increase in cost.

Further, the bill provides no alternatives for NDPERS if no party is willing to add these provisions. If NDPERS is not able to add this to its fully insured contract with SHP, which was just bid this last fall, does NDPERS need to rebid? If so, since there is not time to do a full rebid before the beginning of the next biennium, should NDPERS extend the existing contract until a new bid can be completed with the new minimum requirements? If NDPERS is not able to contract for these services with these minimum requirements with a PBM, then is it the intent of the bill that NDPERS would not provide prescription drug services to our members? Or would NDPERS have the authority to sign a contract with a PBM that met “most” of the requirements? We previously asked for this guidance, and have not yet received it. Accordingly, NDPERS must oppose House Bill 1233.

I would also again point out that the audit provisions in the current version of NDCC section 54-52.1-04.16 were just added last session – it became effective on August 1, 2019. The PBM we use, OptumRx, just began providing us services on January 1,

2019. There would have been almost nothing to audit once the statute became effective.

In January of 2020, we began the RFP process for our health and pharmacy benefits plan. With the potential of changing carriers as a result of the RFP, there was little reason to spend the money to audit a PBM that had only been providing us services for one calendar year and that we may replace for the next biennium. However, now that OptumRx has been providing PBM services to us for over two years, and we have awarded the new contract to SHP, which includes the required statutory language passed last session in HB 1374, this is a reasonable time to engage in an audit under the current parameters of NDCC 54-52.1-04.16. Those audit requirements are in the contract with SHP right now; the expanded audit requirements in HB 1233 are not, and may be difficult, if not impossible, to add. We would propose doing an audit under the current statute over the upcoming interim and presenting that information to the Employee Benefits Programs Committee. If the Legislative Assembly believes that audit is incomplete for any reason, it could easily add what it wants during the next session.

At the end of the day, the Legislative Assembly needs to make the policy decision regarding whether it intends to change the NDPERS RFP award process requirement of selecting the lowest cost, most beneficial bid, with the least financial risk to the state, that best meets the overall requirements. If the Legislative Assembly would like the NDPERS Board to continue with that methodology, then this bill needs to fail. Alternatively, additional wording is needed in the bill. The following wording is one way to provide this clarification in the bill:

At the end of the bill add:

“Section 2: A new section is added to chapter 54-52.1

The requirements in 54-52.1-04.16 do not apply if:

1. No bidder offers a proposal that complies with 54-52.1-04.16; or
2. The bid or bids that comply with 54-52.1-04.16 are more costly than those that do not comply.”

Alternatively, if the intent is to pursue the audit based on the assumption that it will net a return that will offset the cost of a higher bid, then the following language expresses this assumption:

At the end of the bill add:

“Section 2: A new Section is added to chapter 54-52.1

The requirements in 54-52.1-04.16 do not apply if:

1. No bidder offers a proposal that complies with 54-52.1-04.16; or
2. The bid or bids that comply with 54-52.1-04.16 are more than 1% higher than the lower cost proposal meeting the requirements.”

Also, additional wording should be added to the above if it is intended that these provisions would apply to 2021-23 contract.

### **Summary**

In recognition of the above, NDPERS would suggest the following:

1. Clearly specify if it is the intent for NDPERS to audit an entity with which we do not have a contract.
2. Since the bill establishes minimum requirements that were not a part of the bid specification for 2021-23, consideration should be given to making it applicable beginning with the 2023-25 contract period so it can become a part of the minimum requirement for that contract or, if necessary, a new bid process. If this is to be effective for 21-23, and since it was not a part of the scope of work in that bid, we will need to renegotiate the arrangement with the new specifications.
3. Provide direction in the bill on what NDPERS should do if it is unable to get a contract with these provisions for the active and retiree plans.
4. If NDPERS is unable to get these provisions added to our existing fully insured contracts, should NDPERS have to rebid the plan before the beginning of the next biennium? If so, then consideration should be given to allowing NDPERS to offer a no bid contract since there would be insufficient time do a full bid or extending the existing arrangement until a new bid can be completed. It should also be noted that if a new bid is done, rates could change, and if they go up, NDPERS would need to cut benefits so they match the premium, or subsidize the premium from reserves. Notably, if the premiums go up the \$32 million I mentioned above, we will nearly wipe out our reserves. If the Legislature would like to provide guidance to the Board on this it could be added to this bill.

We would also point out, again, that we already have very broad audit requirements in NDCC section 54-52.1-04.16 that the Legislative Assembly just passed last session. Last session, these broad audit requirements were apparently exactly what the Legislative Assembly wanted. We would suggest not passing this bill, giving NDPERS the opportunity to conduct an audit under the current requirements, and reviewing the results. If the Legislative Assembly does not see what it would like to see, it could address those deficiencies in the next session. There is no hurry. And haste may result in tens of millions of dollars of additional expenses, wiping out our reserves. The NDPERS Board urges this Committee to adopt a “do not pass” recommendation.