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.

The first question I would like to address is this: "What will House Bill 1233 ***NOT*** do?"

HB 1233 will NOT affect whether Pharmacy Benefit Managers (PBMs) pay pharmacies below Medicaid rates – there is nothing in this bill that requires any level of reimbursement. Further, the Medicaid rates do not take into account incentives and rebates offered to the pharmacy, and as a result, this reimbursement is higher than traditional commercial rates. Sanford Health Plan did a re-pricing of our pharmacy benefits using Medicaid rates, and if that were required, our pharmacy spend would go up $8 million per year. But this bill does not require that.

HB 1233 will NOT put an end to "spread pricing" – there is nothing in this bill that affects whether spread pricing is taking place anywhere in the state. While spread pricing may indeed be onerous or insidious, spread pricing is a legal practice that takes place in many fully insured plans. It is NOT permitted in some Medicaid plans, and that is from where many of the examples you heard of hundreds of millions of dollars of recoveries through audits come. We are not a Medicaid plan.

HB 1233 will NOT affect whether a PBM encourages a participant to acquire their drugs through mail order – there is nothing in this bill that addresses that issue at all.

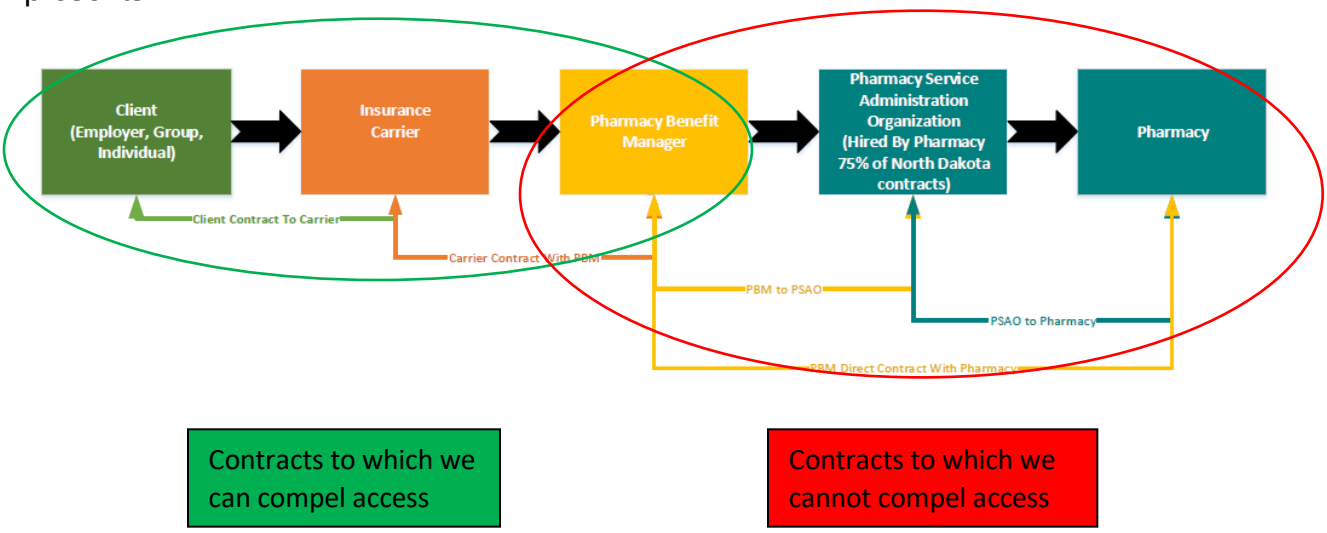
HB 1233 will NOT affect whether a local pharmacy can deliver specialty drugs – there is nothing in this bill that addresses that issue at all. In fact, NDCC section 19-02.1-16.2(5) states, "A licensed pharmacy or pharmacist may dispense any and all drugs allowed under that license." State law already clearly states that local pharmacies can deliver specialty drugs.

HB 1233 will NOT affect the contractual rights and responsibilities between our PBM, OptumRx, and the underlying pharmacies or PSAOs, or the contracts between the pharmacies and their PSAOs – the terms of

those agreements are the responsibility of the contracting parties, not NDPERS. If they agreed to audits or clawbacks or a certain level of reimbursement, this bill will not affect those contractual provisions. This is not a "fairness" bill, this is a forced audit bill.

Of course, that leaves the question about what House Bill 1233 actually does. 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 PBMs that may result in increased premiums for pharmacy benefits, if not the complete elimination of our pharmacy plan. This bill requires NDPERS to perform audits of the performance of contractual responsibilities for contracts to which we are not parties and to which we cannot require access. This bill also requires any contract with a PBM to include the PBM's agreement to allow a performance audit that includes an audit of the performance of contracts that the PBM does not have the unilateral authority to disclose.

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.

Pharmacy service administration organizations (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.

Contracts between PBMs and PSAOs have strict confidentiality requirements built into them – both parties must consent before either party can share those contracts. Similarly, contracts between PBMs and pharmacies have strict confidentiality requirements – both parties must consent before either party can share those contracts. Finally, contracts between PSAOs and pharmacies have strict confidentiality requirements – again, both parties must consent before either party can share those contracts. You can see that in the red oval to the right – we cannot compel the parties to share those contracts, for an audit or any other purpose.

How can we force those entities to share their contracts with us in order for us to audit the performance of those contracts? How can we require a PBM to commit to getting us access to those contracts before we contract with them, when that PBM cannot share those contracts without the PSAO's or the pharmacy's consent?

That's the biggest problem with HB 1233 – even though we have no legal right to require the parties to provide us with the contracts between our PBM and any PSAOs or pharmacies, or between the pharmacies and the PSAOs, this bill requires us to audit certain performance under those contracts. Further, and equally problematic, this bill requires us to put in any contract with a PBM that we must have the right to audit the performance of these contracts. Contracts we do not have a right to see.

How can we do that? How can we force a PBM to provide us access to contracts that the PBM does not control? What will that do to competition for our business?

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

Page 4, lines 1-4: SHP and OptumRx

The underlined sections above require us to audit contracts to which we have no legal right to require access, much less audit.

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. 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. 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.

And remember, since this is a modified fully insured plan, we have none of the risk – Sanford Health Plan has all of the risk. But we get part of the gain – we get 50% of the gain up to $3 million, and all of the gain above that. SHP has a vested, monetary interest in ensuring our PBM is performing according to contract. SHP is currently spending their own money to regularly audit the PBM. HB 1233 will require us to use the State's money, our insurance reserves, to conduct audits that SHP is already conducting (other than the broader contract issues I have mentioned), and which will most likely benefit SHP well before it benefits NDPERS and the state.

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". Spread pricing is common 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. With most fully-insured plans, 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. 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 vendor 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, the requirements of 54-52.1-04.16 will necessitate that all bids are transparent in nature. 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 other 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.

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? Could you imagine what that would do to the state's ability to recruit and retain employees? 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 2021-23 contract with SHP right now; the expanded audit requirements in HB 1233 are <u>not</u>, 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."
>
> An alternative subsection 2 could be:
>
> 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."

Alternatively, NDPERS would strongly suggest adding a requirement into this statute that downstream parties to these contracts must share both the contracts and the relevant data with our auditors, under condition of maintaining the confidentiality. I have drafted a proposed amendment with this language, which is on the final page.

Summary

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

1. Clearly specify if it is the intent for NDPERS to audit the performance of a contract to which we are not a party and cannot require access.
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 plan. Do we move forward without a pharmacy plan for our employees?
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, or extending the existing arrangement until a new bid can be completed, since there would be insufficient time do a full bid. 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.
5. Or, if this bill is approved, add on the amendment I have provided on the last page.

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.

And remember, this bill will address none of the evils you heard about PBMs. This bill does not address spread pricing. This bill does not address reimbursement rates. This bill does not address specialty drugs or mail order drugs. This is an audit bill. This bill does none of those things.

In conclusion, I would have you ask yourself what do you think is the answer to the question: “How can a Pharmacy Benefit Manager commit to allowing audits of contracts that it is prohibited from sharing without someone else’s permission?” The answer is, it can’t. This bill requires an impossibility, and in so doing puts employee pharmacy coverage in jeopardy. The NDPERS Board urges this Committee to adopt a “do not pass” recommendation.

PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL 1233

Page 4, after line 22, insert the following:

5. Pharmacies and pharmacy service administrative organizations that work with the pharmacy benefit manager subject to audit under this section shall share the relevant contracts and data with the board's contracted auditor for completion of this audit. If the contracts or data shared under this subsection contain confidential trade secret information, the contracts or data shared under this subsection retain their confidential status as provided in subdivision (3)(g), above.

Renumber accordingly.