TESTIMONY OF SCOTT MILLER

House Bill 1539 – Employee Benefits Programs Committee Powers and Pharmacy Benefit Manager Audits

My name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. On behalf of the NDPERS Board, I am here to testify in opposition to House Bill 1539.

HB 1539 does two primary things. First, it alters the powers and duties of the Employee Benefits Programs Committee (EBPC). Originally, HB 1539 eliminated the EBPC. The engrossed version retains the EBPC, although some of the processes are different. We do not have an objection to section 1 of HB 1539.

However, the second and third sections of HB 1539, which have nothing to do with the EBPC, are problematic. Section 2 introduces far reaching requirements for any contract the NDPERS Board could enter for pharmacy benefit manager (PBM) services. Those provisions seemingly require the PBM to allow the NDPERS Board access to any document that might contain any information even remotely related to its provision of services to the State. These new requirements are similar to the requirements proposed last session in HB 1233. Notably, the Senate defeated HB 1233 no fewer than three times last session, first in HB 1233, and then in two additional bills into which these same requirements were amended. We urge the Senate to again defeat these requirements, now in HB 1539.

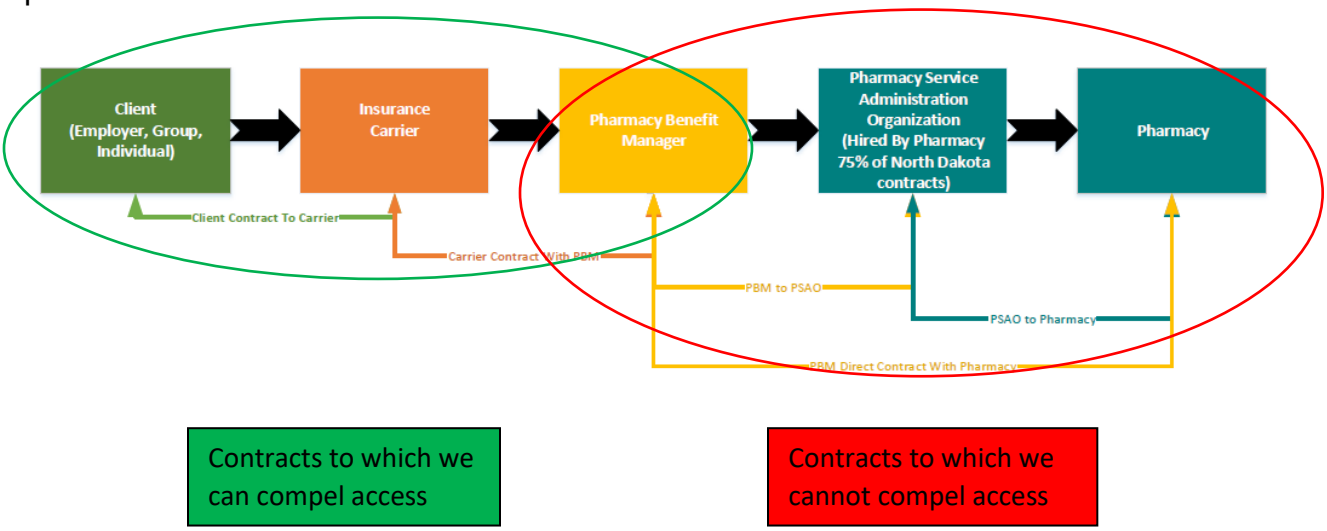
Page 4, lines 23-24 and 30-31, introduce problems with the Health Insurance Portability and Accounting Act of 1996 (HIPAA). Lines 23 and 24 require the Board to have access to “all documents necessary” to conduct a performance audit. Lines 30-31 state that the documents provided “may not be redacted or altered by the” PBM.

The problems come about because certain of the documents that were requested by the auditing firm for the recently-conducted audit of OptumRx, the PBM used by Sanford Health Plan (SHP) for the state’s health insurance plan, contained information unrelated to the State’s coverage or participants, and which was information on non-state covered individuals and their prescription information. HIPAA confidentiality requirements prohibit the sharing of unnecessary health data. That is the reason the auditing firm and OptumRx agreed to OptumRx’s submission of 30 “recreated” documents – that eliminated the non-related information from the documents, thereby complying with HIPAA confidentiality requirements.

Unfortunately, HB 1539 would now require the sharing of non-participant information, and the resulting violation of HIPAA confidentiality requirements. The North Dakota Legislative Assembly should not condone violations of federal confidentiality requirements.

Additionally, 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. Page 4, lines 20-22.

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. Somewhere between 50% and 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 is a significant problem with this bill – 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?

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 – which we have done in the past.

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 1539 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 we can do.

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 1539 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 1539 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 in the past 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 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.

NDCC section 54-52.1-04.16 was originally created just two sessions ago – 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; when we went out to bid three years ago, we receive a proposal in which 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 requirement, and that their proposal would be deemed non-responsive if they could not commit to complying with that statute. Had they not done so, we would have had only one proposal for our health plan – and zero competition.

House Bill 1539 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 1539.

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 three years ago, 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 at that time was just over $100 million, that would have been 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, 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 1539.

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 4: 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 4 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.

Finally, I would also point out that as amended, HB 1539 now runs afoul of the single topic rule – section 1 relates to the EBPC, and sections 2 and 3 relate to PBM audit requirements. I respectfully suggest that sections 2 and 3 be removed from the bill.

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, or the renewal for 2023-25, consideration should be given to making it applicable beginning with the 2025-27 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 23-25, and since it was not a part of the renewal process, 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 (and lose our grandfathered status), or subsidize the premium from 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.

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 1539

Page 5, after line 19, 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.