

New Hampshire Board of Medicine
Order on Petition for Declaratory Ruling

Petitioner: Office of Professional Licensure and Certification

The Office of Professional Licensure and Certification ("OPLC") filed a Petition for Declaratory Ruling requesting the Board of Medicine ("Board") find that Senate Bill 238 (2023) is not preempted by federal law and thus enforceable in evaluating potential claims of misconduct.

The Board considered this matter at its February 7, 2024 meeting. The Board hereby finds that SB 238 is not preempted by federal law and is enforceable in evaluating potential claims of misconduct.

I. BACKGROUND

Petitioner OPLC is the state agency responsible for processing and approving or denying applications for licensure, certification, or registration for all license types governed by OPLC or a board. N.H. Rev. Stat. Ann. 310:4. OPLC is further responsible to provide administrative support to boards, including "investigation of all complaints of professional misconduct..." N.H. Rev. Stat. Ann 310:4.

The Petitioner seeks guidance as to whether SB 238, New Hampshire's recently passed law, is preempted by the Drug Enforcement Administration's ("DEA") new temporary rule, 88 FR 69879. Petitioner contends that SB 238 is not preempted by federal law and is enforceable when investigating and evaluating potential claims of professional misconduct.

II. STANDARD OF REVIEW

A declaratory ruling is "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA 541-A:1, *See* N.H. Admin. R. Pt. Ph ("Ph") 201.02(c). A declaratory ruling is a statement by the Board regarding whether a particular statute or rule applies to the specific situation presented in the petition. *Id.* Therefore, they do not have precedential value; nor do they apply to anyone other than the petitioner.

III. ANALYSIS

SB 238 provides that, "A physician licensed... may prescribe non-opioid and opioid controlled drugs classified in scheduled II through IV by means of telemedicine after establishing

a physician-patient relationship with the patient. When prescribing a non-opioid or opioid controlled drug... by means of telemedicine a subsequent in-person exam shall be conducted by a practitioner licensed to prescribe the drug at intervals appropriate for the patient, medical condition, and drug, but not less than annually.” 88 FR 69879 provides that a DEA registered practitioner “is authorized to prescribe schedule II-V controlled substances via telemedicine, as defined in 21 CFR 1300.04(i), to a patient without having conducted an in-person medical evaluation of the patient.”

The doctrine of federal preemption is based upon the Supremacy Clause within Article VI of the United States Constitution. State v. Exxon Mobil Corp., 168 N.H. 211, 229 (2015). Federal law is the supreme law of the land. “Accordingly, it has long been settled that state laws that conflict with federal law are without effect.” Id.

“Broadly speaking there are three different types of federal preemption: ‘express,’ ‘field,’ and ‘conflict.’” Appeal of Panaggio, 174 N.H. 89, 94 (2021). Express preemption occurs when Congress preempts state authority by doing so in express terms. Pacific Gas & Elec. Co.v. Energy Resources Comm’n, 461 U.S. 190, 203 (1983). “Congress’s intent to preempt state law may also be inferred, either when the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation (“field preemption”), or when state law actually conflicts with federal law (“conflict preemption”). Hardy v. Chester Arms, LLC, No. 2022-0348, 2024 WL 332134, at *5 (N.H. Jan. 20, 2024); *see also* Exxon Mobil, 186 N.H. at 229.

The DEA temporary rule contains no statement expressly preempting state law and there is thus no express conflict between SB 238 and the temporary rule. Similarly, there is no field preemption between SB 238 and the temporary rule. The DEA’s rule enabling statute, 21 U.S.C.A. § 903, provides in relevant part:

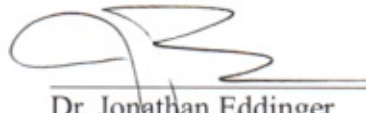
“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”

21 U.S.C. 903 makes clear that there is no intended field preemption with respect to the DEA temporary rule.

SB 236 and the DEA temporary rule can exist without conflict. SB 238 authorizes a physician to prescribe controlled drugs via telehealth if the physician has a relationship with the patient, which could be established through telehealth examination. N.H. RSA 329:1-c. The DEA temporary rule provides a physician may prescribe controlled drugs via a telehealth platform without conducting a prior in-person patient examination. There is no conflict preemption between SB 236 and 88 FR 69879.

IV. CONCLUSION

For the foregoing reasons, the Board concludes that SB 238 is not preempted by 88 FR 69879. The Board further concludes that SB 238 is enforceable in evaluating potential claims of misconduct.



Dr. Jonathan Eddinger
President of the Board of Medicine