

## **New Hampshire Board of Pharmacy**

### **Declaratory Ruling**

Petitioner: New Hampshire Oncology-Hematology, PA

New Hampshire Oncology-Hematology, PA (“Petitioner”) by and through their attorneys, Rath, Young, and Pignatelli, PC filed a Petition for Declaratory Ruling requesting the Board of Pharmacy (“Board”) find (1) that physicians and physician assistants may dispense prescription drugs that are *not* controlled substances pursuant to RSA 318:42, II and/or VII<sup>1,2</sup> in order to meet patients’ immediate medical needs, without limitation on days’ supply or refills except for what is otherwise clinically appropriate and prescribed in the ordinary course (the “First Requested Ruling”); and (2) that for the purpose of RSA 318:42, II<sup>3</sup>, a patient’s “immediate medical needs” can include up to a 90 day supply of Schedule III-V controlled substances, where clinically necessary (the “Second Requested Ruling,” and together with the First, the “Requested Rulings”).

The Board considered these Requested Rulings at its May 17, 2023, meeting. The Board hereby denies both Petitioner’s Requested Rulings articulated under paragraph thirty-two, sections a and b of their petition.

#### **I. Background**

The Petitioner is a medical practice consisting of more than one hundred staff members including nine board-certified or board-eligible oncologists/hematologists, physician assistants and advanced nurse practitioners, certified oncology nurses, clinical pharmacists, and pharmacy technicians. The Petitioner seeks to advance the treatment available to its patients through a vigorous clinical research program at each of its three locations throughout central and southern New Hampshire. The Petitioner contends that prescribing and dispensing drugs through a specialty pharmacy is “complicated” and “wasteful.”

#### **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.”<sup>4</sup> 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.<sup>5</sup> Therefore,

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<sup>1</sup> N.H. Rev. Stat. Ann. § 318:42, II (2019).

<sup>2</sup> N.H. Rev. Stat. Ann. § 318:42, VII (2019).

<sup>3</sup> N.H. Rev. Stat. Ann. § 318:42, II (2019).

<sup>4</sup> N.H. Rev. Stat. Ann. § 541-A:1, V (2001); *See* N.H. Code Admin. R. Ann. Ph. 201.02(c) (2005).

<sup>5</sup> *Id.*

they do not have precedential value; nor do they apply to anyone other than the petitioner. The plain language of a statute is considered the legislative intent when it does not define a disputed term.<sup>6</sup>

### III. Analysis

The Petitioner's "First Requested Ruling" is denied. RSA 318:42, II<sup>7</sup> permits physicians and physician assistants to personally administer and distribute prescription drugs to meet the "immediate medical needs" of their patients. This statute<sup>8</sup> potentially permits the Petitioner to perform the proposed actions. However, there is no "specific" time restriction identified or further clarification on what constitutes an "immediate medical need". It is unclear if an "immediate medical need" is situation-based or is triggered by an impending event. The Board finds both may be applicable and would further evaluate those instances, if required, on a case-by-case basis in accordance with specific facts and circumstances. The Board finds that the determination of what constitutes an "immediate medical need" is best suited for the health care professional who is evaluating the patient. The Board also finds that "immediate medical needs" is not indefinite.

Furthermore, RSA 318:42, VII<sup>9</sup> permits a legally authorized health professional to dispense formulary-approved non-controlled prescription drugs to bona fide clients at "clinics of nonprofit family planning agencies under contract with the department of health and human services." This is given that the medications are for the client's personal needs, and that dispensation meets written and signed eligibility criteria and follows a written and signed protocol established by a licensed physician or physician assistant.<sup>10</sup> A "clinic" is defined as "an institution, building, or part of a building devoted to the diagnosis and care of outpatient ambulatory patients." It is unclear from the facts in the Petition whether the Petitioner meets the definition of "clinic." Here, the legislature clearly identified specific circumstances which permit the dispensation of non-controlled substances without a limitation on days' supply or refills in accordance with specific criteria.

The Board finds the relief requested in Petitioners First Requested Ruling to be outside the Board's jurisdiction. Petitioner's request does not solely request that the Board provide interpretation of current law, rather it seeks the Board augment and further define it. The Board does not currently have rulemaking authority pursuant to RSA 318:5-a<sup>11</sup> which would allow them to promulgate rules in

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<sup>6</sup> *Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 594-95 (2004).

<sup>7</sup> N.H. Rev. Stat. Ann. § 318:42, II (2019).

<sup>8</sup> *Id.*

<sup>9</sup> See N.H. Rev. Stat. Ann. § 318:42, VII(a) through (c) (2019).

<sup>10</sup> *Id.*

<sup>11</sup> N.H. Rev. Stat. Ann. § 318:5-a (2019).

accordance with Petitioner's First Requested Ruling. If the legislature intended to empower the Board with the authority to order the relief requested, it would have granted the Board the authority to do so in rule.


The Petitioner's Second Requested Ruling which asks the Board to declare that an "immediate medical need" allow for up to a ninety-day supply of Schedule III-V controlled substances to be prescribed is hereby denied. New Hampshire's Controlled Drug Act clearly states that a practitioner may dispense a controlled drug to a patient under his care during a bona fide emergency situation but only a seven-day supply of schedule III, IV, or V substances may be dispensed.<sup>12</sup>

The Petitioner's Second Requested Ruling is specifically restricted by the status of current law and therefore outside of the Board's jurisdiction. The Board has no statutory authority to alter, amend or conflict with the clearly defined restrictions set forth in law by the legislature.

#### IV. RULING

The Petitioner's Petition for Declaratory Ruling is hereby **DENIED**.

Date: 08/16/2023

  
Board President  
On behalf of the N.H. Board of Pharmacy

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<sup>12</sup> N.H. Rev. Stat. Ann. § 318-B:10, 1 (2017).