

An Overdose of Unintended Consequences

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Governor John Lynch signed HB 1346 yesterday, promising that the bill would protect New Hampshire residents' personal privacy. This is a worthy goal. It is too bad the new law does not serve it.

HB 1346 restricts the commercial use of data about prescriptions if those data reveal information about the patient or the physician.

Federal law already protects prescription data about *patients*. It has done so for two years, through the privacy rules under the Health Insurance Portability and Accountability Act. Moreover, even prior to passage of the federal rules, companies that use prescription data to monitor physician prescribing habits have long required that information about patients be removed. The data those companies use are the physician's name, address or state-issued license number, and the name and dosage of drugs prescribed. These data reveal nothing about patients, but are very revealing about the professional competence and activities of physicians.

So HB 1346 not only adds nothing to existing federal protection for patient privacy, it seeks to address a practice that does not exist.

The only new privacy rights that HB 1346 creates are for *physicians*. This is novel and helps to explain why the bill is endorsed by the New Hampshire Medical Society. Unfortunately, this first-in-the-nation innovation brings many unintended and undesirable consequences. It threatens patient privacy. Licensed professionals historically have never before had a right to privacy for their behavior as professionals. Instead, the law gives protections to the individuals they serve—to patients. In fact, the law gives patients explicit rights against physicians who fail to protect patient privacy. HB 1346 works in exactly the opposite manner. It protects information about physicians' prescribing habits, irrespective of patient views.

HB 1346 also threatens public health. Information about physician's prescribing practices enables pharmaceutical manufacturers and the government to identify physicians who are over-prescribing certain drugs. It helps to target education to physicians about new, more effective treatments and lower-priced alternatives to higher cost brand drugs. And it is critical for research about prescribing practices and drug interactions.

By blocking commercial access to information about physicians' prescribing practices, HB 1346 threatens to increase medical costs and undermine the safety and quality of healthcare. It is no answer that HB 1346 exempts certain public safety uses of this information, because it prohibits the commercially viable uses that underwrite the costs of collecting and using the data.

Finally, the bill is an unjustified restriction on valuable speech. Its backers seek to protect physician privacy and control drug prices by blocking the use of accurate, lawfully obtained information. Things will be better, they seem to argue, if the public is kept in the dark.

This not only underestimates the intelligence of New Hampshire residents, it is unconstitutional. The U.S. Supreme Court has repeatedly held that “a State’s paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.”

To be sure, patients have and need legal rights to protect the privacy of their personal information. By contrast, professionals who hold themselves out to serve the public historically and for good reason do not have such rights with regard to their professional conduct.

HB 1346 advances the interests of only one group—physicians—and it does so at the cost of their patients and of the public. Patient privacy is simply too important for state leaders to play politics with it.

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