State of New Hampshire
Inter-Department Communication

DATE: February 13, 2014

FROM: Michael K. Brown Senior Assistant Attorney General
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SUBJECT: Request for Advice on Interpretation of Therapeutic Cannabis Law, RSA 126-X

TO: Mary P. Castelli, Department of Health and Human Services, Senior Director, Office of Operations Support

I. Introduction

On February 5, 2014, the New Hampshire Department of Health and Human Services ("the Department"), Office of Operation Support requested from the New Hampshire Office of the Attorney General advice on the interpretation of New Hampshire's Therapeutic Cannabis Law, RSA 126-X. Specifically, the Department requests advice on two issues of law:

1. Whether under RSA 126-X, the Department should issue qualifying patient and designated caregiver registry identification cards prior to the availability of a lawful source from which New Hampshire residents may obtain cannabis; and

2. How may the Department implement RSA 126-X:1, IX(b), which provides for the recognition of qualifying medical conditions that are not expressly enumerated in RSA 126-X:1, IX(a)'s list of medical conditions that qualify for the therapeutic cannabis use?

In response to question one, it is the opinion of the Office of the Attorney General that the Department should not issue qualifying patient and designated caregiver registry identification cards prior to the availability of a lawful source of cannabis in New Hampshire as RSA 126-X does not contemplate the purchase or sale of cannabis from any source other than an alternative treatment center ("ATC"), as defined by RSA 126-X:1, I. In response to question two, it is the opinion of the Office of the Attorney General that the Department should develop a procedure though which citizens whose medical conditions do not fall within the express terms RSA 126-X, IX(a) can formally request review of their condition and their need for therapeutic cannabis use.

II. Analysis

A. The Issuance of Qualifying Patient Registry Identification Cards

i. Timeframes Under RSA 126-X

RSA 126-X:6, I provides, in relevant part, that "Not later than one year after the effective date of this chapter, the department shall adopt rules pursuant to RSA 541-A governing:

> (a) The form and content of applications for the issuance and renewals of registry identification cards for qualifying patients and designated caregivers;
> (b) The form and content of providers' written certifications; [and]
> (c) Procedures for considering, approving, and denying applications for issuance and renewals of registry identification cards, and for revoking registry identification cards; . . .

RSA 126-X:6, I(a)-(c). Thus, while the above statutory mandate pertains to the development of the form and content of applications and procedures for considering applications by July 23, 2014, it does not establish a date by which the Department must begin to accept applications or issue registry identification cards.

Similarly, RSA 126-X:6, III(a) sets forth that "Not later than 18 months after the effective date of this section, the department shall adopt rules, pursuant to RSA 541-A, governing alternative treatment centers and the manner in which it shall consider applications for registration certificates for alternative treatment centers . . . ." Thus like RSA 126-X:6's establishment of a July 23, 2014 deadline by which the Department is to create rules regarding the application process for patient and caregiver registration identification cards, RSA 126-X:6, III provides for a January 23, 2015, deadline by which the Department must produce rules regarding the governing of ATCs and application process for obtaining ATC registration certificates. RSA 126-X:6, therefore, provides dates by which the Department must have certain evaluative procedures and processes in place, but does not establish a date by which the Department must issue the resultant qualifying patient and designated caregiver registry identification cards or ATC registration certificates.

RSA 126-X:7, I supplies such a deadline for the Department's issuance of ATC registration certificates stating that "Within 18 months of the effective date of this section, provided that at least 2 applications have been submitted that score sufficiently high to receive a certificate, the department shall issue alternative treatment center registration certificates to the 2 highest-scoring applicants." Therefore, while RSA 126-X:7 establishes a date by which the Department must issue two ATC registration certificates, there is no such temporal requirement regarding the Department's issuance of qualifying patient and designated caregiver registry identification cards.

ii. The Department is Not Required to Accept or Issue Patient and Caregiver Registry Identification Cards Until the ATCs are Operational

1. RSA 126-X Does Not Provide for Any Form of Cannabis Cultivation or Sale Other than By ATCs

RSA 126-X:1, I defines ATC as "a not-for-profit entity registered under RSA 126-X:7 that acquires, possesses, cultivates, manufacturers, delivers, sells, supplies, and dispenses cannabis, and related supplies and educational materials, to qualifying patients and alternative treatment centers." The statute does not grant any other person or entity the right to engage in cultivating, manufacturing, selling, supplying, or dispensing cannabis. *See generally* RSA 126-X. Without operational ATCs, there is no legal means for a qualifying patient or designated caregiver to obtain cannabis. Therefore, the Department's issuance of qualifying patient and designated caregiver registry identification cards prior to the opening of any ATC would have the effect of prematurely entitling persons to RSA 126-X:5's affirmative defense to cannabis-related crimes before the medication is made available through a lawful and accountable source.

2. RSA 126-X Provides for the Close Regulation of ATCs Further Indicating the Legislature's Intent that Only These Centers Are Permitted to Cultivate and Sell Cannabis Under the Law

An examination of RSA 126-X:8, I–XVIII demonstrates that the legislature aimed to subject ATCs to comprehensive regulation and significant state oversight in order to: carefully control distribution; prevent diversion; maintain quality control; and develop a database regarding the effectiveness of particular cannabis strains and methods of delivery. This extensive regulation of the cannabis produced and distributed in New Hampshire pursuant to RSA 126-X:8, further indicates that the legislature intended the state-sanctioned and Department-monitored ATCs to be the sole legal cultivators and dispensers of cannabis in this state.

For example, in regard to control of cannabis distribution, RSA 126-X: 8, IV(c) provides that in moving cannabis from a cultivation site to the ATC, the ATC agent must label the transported cannabis with the ATC's name, registry number as well as the time, date, origin, and destination of the cannabis and the amount and form of the cannabis. Additionally, in regard to prevention of diversion, RSA 126-X: 8, XV(c) requires that "All cultivation of cannabis shall take place in an enclosed, locked facility registered with the department . . . ." Further, in regard to quality control, RSA 126-X: 8, X, mandates that ATCs only use organic pesticides in cannabis. Finally, with regard to data collection, RSA 128-X:8, XVI(b) requires ATCs to "collect data on strains used and methods of delivery for qualifying conditions and symptoms, any side effects experienced and therapeutic effectiveness for each patient . . ."

Based on the examples provided above, which are merely a few of the numerous controls that ATCs must comply with under RSA 126-X, it is evident that the legislature did not intend for qualifying patients to receive cannabis from any source not held to these high standards.

Consequently, until ATCs are operational the Department should refrain from issuing qualifying patient and designated caregiver registry identification cards.

3. Therapeutic Use, as Defined by RSA 126-X:1, XIII, Does Not Extend to Beyond ATCs, Qualifying Patients, and Designated Caregivers

RSA chapter 126-X protects only the "therapeutic use" of cannabis. RSA 126-X:2, I(A). Under the statute, therapeutic use is defined as "the acquisition, possession, cultivation, preparation, use, delivery, transfer, or transportation of cannabis . . . relating to the administration of cannabis to treat or alleviate a qualifying patient's qualifying medical condition." RSA 126-X:1, XIII. RSA chapter 126-X, therefore, only envisions three therapeutic users of cannabis that may legally acquire cannabis in this state: 1) ATCs; 2) qualifying patients; and 3) designated caregivers.[1] RSA 126-X:1, I, VI, X. Cultivation of cannabis by qualifying patients and designated caregivers is expressly prohibited. RSA 126-X:1, XIII. Cultivation is, therefore, reserved entirely to ATCs. Similarly, the definition of ATC includes the phrase "sells, supplies, and dispenses cannabis" and the term "manufacture," while the definitions of qualifying patient, designated caregiver, and therapeutic use do not. RSA 126-X:1, I, VI, X. Thus, under RSA chapter 126-X, only ATCs can engage in the acts of cultivating, manufacturing, selling, supplying, and dispensing cannabis and, as a result, until the ATCs are operational, cannabis cannot be legally cultivated, sold, supplied or dispensed in New Hampshire. As stated above, until a legal source exists by which qualifying patients and designated caregivers can obtain cannabis, the Department need not issue registry identification cards.

B. Recognition of Qualifying Medical Conditions that are Not Expressly Enumerated in RSA 126-X:1, IX(a)'s List of Permitted Medical Conditions

i. Qualifying Medical Conditions

RSA 126-X:1, IX establishes a two-prong test to determine whether a patient's medical condition qualifies for the therapeutic use of cannabis. The first prong consists of a list of specified qualifying medical diagnoses. These include: cancer, glaucoma, muscular dystrophy and several other medical diagnoses. RSA 126-X:1, IX(a)(1). A patient satisfies the first prong if a physician has diagnosed the patient with one of these specific illnesses. *See id.* The second prong consists of a list of qualifying symptoms/conditions that are coincident with a diagnosis from prong one and is severely debilitating or terminal.[2] These include, for example, elevated intraocular pressure, wasting syndrome, and severe pain that has not responded to previously prescribed medication or surgical measures. RSA 126-X:1, IX(a)(2). Therefore, if the patient has a diagnosis from prong one and a symptom/condition from prong two that is severely

[1] RSA 126-X does permit some limited therapeutic use by visiting qualifying patients, however, this does not include the right to purchase or obtain cannabis in this state. *See* RSA 126-X:2, V ("A visiting qualifying patient shall not cultivate or purchase cannabis in New Hampshire or obtain cannabis from alternative treatment centers or from a qualifying New Hampshire patient.")

[2] The qualifying symptom/condition under the second prong may also result from the treatment of a diagnosed illness provided for under the first prong. RSA 126-X:1, IX(a)(2).

debilitating or terminal, the Department may approve the patient's application for therapeutic use of cannabis.

In addition to the two-prong test delineated above, RSA 126-X:1, IX(b) provides that "the department may include a medical condition that is not listed in subparagraph (a) that the department determines, on a case by case basis, is severely debilitating or terminal, based upon written request of the provider who furnishes written certification to the department." Therefore, the Department need not limit qualifying patients to those who suffer from the express list of diagnoses provided in RSA 126-X:1, IX(a)(1), but may expand the qualifying conditions on a case by case basis. *See* RSA 126-X:1, IX(b).

The Department requests guidance on how it should interpret and implement RSA 126-X:1, IX(b)'s elasticity in regard to qualifying medical conditions. When examining RSA 126-X, IX as a whole, two legislative considerations are apparent. First, the legislature's explicit enumeration of qualifying conditions in RSA 126-X:1, IX(a)(1) evidences an intent that the Department not take an all inclusive approach expanding the qualifying conditions under RSA 126-X:1, IX(b). If, for example, the Department accepted without further examination every physician certification averring that cannabis is required to treat a severely debilitating condition, the RSA 126-X:1, IX(b) exception would swallow RSA 126-X:1, IX(a)'s deliberate limitations on qualifying medical conditions. While this is the case, the existence of RSA 126-X:1, IX(b) as a means of permitting therapeutic use of cannabis for medical conditions not provided in RSA 126-X:1, IX(a) indicates that the legislature sought to ensure that those who could demonstrate a true medical need for cannabis are not foreclosed from obtaining the medication by an overly rigid interpretation of the law.

The Department should, therefore, create a procedure that strikes a balance between: 1) limiting the therapeutic use of cannabis to conditions that medical professionals have firmly established as treatable by cannabis; and 2) those circumstances where medical research is still developing or where medical professionals believe that the therapeutic use of cannabis will provide benefit in a specific case and have valid scientific evidence to support this conclusion.

ii. Connecticut Procedure

The procedure developed by the State of Connecticut is instructive. Similar to RSA 126-X:1, XI(a) discussed above, Connecticut's palliative use of marijuana statute defines its qualifying medical conditions by listing specific diagnoses and conditions that are approved for the therapeutic use of cannabis, and like RSA 126-X:1, XI(b) also includes language that permits expansion of the list with agency approval. More specifically, the statute reads:

> Debilitating medical condition means (A) cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, posttraumatic stress disorder, or (B) any medical condition, medical treatment or disease approved by the Department of Consumer Protection pursuant to regulations adopted under section 21a-408m.

Conn. Gen. Stat. § 21a-408(2)(A)-(B).

The Connecticut regulation cited in the statute provides for the creation of a board designated to review written petitions to the commissioner of the Department of Consumer Protection and, following such review, to author a written recommendation as to whether the commissioner should add the condition at issue to the list of debilitating medical conditions under the Connecticut law. *See* Conn. Agencies Reg. § 21a-408-12(a)–(b). Under the Connecticut regulation the petition must include:

> (1) The extent to which the medical condition, medical treatment or disease is generally accepted by the medical community and other experts as a valid, existing medical condition, medical treatment or disease;
>
> (2) If one or more treatments for the condition, rather than the condition itself, are alleged to be the cause of a patient's suffering, the extent to which the treatments causing suffering are generally accepted by the medical community and other experts as valid treatments for the condition;
>
> (3) The extent to which the condition or the treatments thereof cause severe or chronic pain, severe nausea, spasticity or otherwise substantially limits one or more major life activities of the patient;
>
> (4) The availability of conventional medical therapies, other than those that cause suffering, to alleviate suffering caused by the condition or the treatment thereof;
>
> (5) The extent to which evidence that is generally accepted among the medical community and other experts supports a finding that the use of marijuana alleviates suffering caused by the condition or the treatment thereof;
>
> (6) Any information or studies known to the petitioner regarding any beneficial or adverse effects from the use of marijuana in patients with the medical condition, medical treatment or disease that is the subject of the petition; and
>
> (7) Letters of support from physicians or other licensed health care professionals knowledgeable about the condition, treatment or disease.

§ 21a-408-12(c)(1-7).

If a written petition satisfies the above requirements, "the commissioner shall refer the written petition to the board for a public hearing at the next board meeting." Conn. Agencies Reg. § 21a-408-12(e). Following the public hearing, "the board shall consider the public comments and any additional information or expertise made available to the board for each proposed debilitating medical condition considered at the hearing." § 21a-408-12(i). In its written recommendation to the commissioner the board includes:

> (1) Whether the medical condition, medical treatment or disease is debilitating;
>
> (2) Whether marijuana is more likely than not to have the potential to be beneficial to treat or alleviate the debilitation associated with the medical condition, medical treatment or disease; and
>
> (3) Other matters that the board considers relevant to the approval or the denial of the petition.

Id. Based on the recommendation of the board, the commissioner determines whether to accept the condition at issue as a debilitating medical condition for which the therapeutic use of cannabis is warranted and permitted. *See* § 21a-408-12(k).

The Department is not, pursuant to RSA 126-X, IX(b), required to utilize a procedure identical to the Connecticut system set out above when considering whether a medical condition not expressly provided for under RSA 126-X, IX(b) justifies the therapeutic use of cannabis. In fact, differences would likely be required as the New Hampshire statute refers to expansion on a case by case basis whereas the Connecticut law appears to refer to expansion on a condition or diagnosis basis.[3] The Connecticut regulation is merely an illustration of a procedure that balances the need for clinical support of the efficacy of the therapeutic use of cannabis as to particular condition with the need to maintain an avenue through which citizens whose conditions do not fall within the express terms RSA 126-X, IX(a) can formally request review of their condition and their need for therapeutic cannabis use.

[3] The case by case basis requirement will also likely require the Department to take steps to ensure that the patient-applicant's medical information is kept confidential throughout the process.

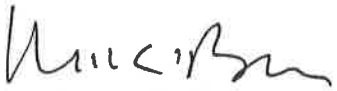
III. Conclusion

For the reasons provided above, it is the opinion of the Office of the Attorney General that:

1. The Department should not issue patient and caregiver registry identification cards prior to the availability of a lawful source of cannabis in New Hampshire as RSA 126-X does not contemplate the purchase of cannabis from any source other than an ATC, as defined by RSA 126-X:1, I; and

2. The Department should develop a procedure though which citizens whose medical conditions do not fall within the express terms RSA 126-X, IX(a) can formally request review of their condition and their need for therapeutic cannabis use.

Sincerely,



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