



A Two-Year Retrospective on New Hampshire's Therapeutic Use of Cannabis Law

Delays, Confusion, and Continued Arrests: A Two-Year Retrospective on New Hampshire's "Therapeutic Use of Cannabis" Law

Overview

On July 23, 2013, New Hampshire Gov. Maggie Hassan signed HB 573 into law. This bill created a very limited and restrictive "Therapeutic Use of Cannabis" program to be administered by the state's Department of Health and Human Services.[\[1\]](#)

Two years later, patients in the "Live Free or Die" state are still suffering without legal protections or safe, state-legal access to cannabis. Some, including well-known patient-advocate Clayton Holton,[\[2\]](#) have passed away while waiting for the law to take effect. Others, such as Ron Mitchell,[\[3\]](#) have had no choice but to leave their families behind and move to another state in search of relief.

Why, from the patients' perspective, has this law been such a failure in its first two years on the books? Several contributing reasons can be identified, including an unfavorable advisory opinion from the attorney general's office[\[4\]](#) and the department's inability to comply with an important deadline for approving dispensary applications. However, the most important reason for this program's failure is the fact that the bill itself was heavily compromised before it passed the Senate and was signed into law. A careful review of the bill and its legislative history indicates that the law ultimately was not designed to benefit patients in a timely fashion. Accordingly, its failure to do so, while disappointing, should come as no great surprise to those who are familiar with the details.

The department took a big step forward in June 2015 when it finally approved three applicants to move forward with plans to open a total of four dispensaries in the state.[\[5\]](#) However, the state cannot guarantee that these dispensaries will be able to open and begin serving patients in a timely fashion. And, since the success of the program depends entirely on the success of these three dispensary applicants, patients are still left with more questions than answers with regard to the program's future.

What Makes a Medical Marijuana Law Effective?

In order to properly evaluate the success of New Hampshire's program, it is important to consider the patients' perspective on what constitutes an effective medical marijuana law. Any such evaluation begins by asking two basic questions:

(1) Are seriously ill patients who could benefit from using cannabis protected from arrest and prosecution?

(2) Do these patients have a form of safe, state-legal access to cannabis?

Two years after the so-called “effective date” of this legislation, the law has thus far been a total failure on both counts. The Marijuana Policy Project has heard from several patients who have been arrested since the law’s passage. In one shocking case, Thomas Orkney, a 58-year-old Navy veteran suffering with a traumatic brain injury, was arrested by Lebanon police and charged with a misdemeanor for possessing less than one-half ounce of cannabis in his apartment.[\[6\]](#) This man was charged with a crime despite the fact that he showed police his medical marijuana certificate from another state and told them he had obtained the cannabis from a state-legal dispensary.

Mr. Orkney’s arrest plainly contradicted the assurances legislators have continually received from the New Hampshire Association of Chiefs of Police. “We’re not arresting patients in their homes,” the association’s president, Enfield Chief Richard Crate, told the *Associated Press* in 2013.[\[7\]](#)

While the arrests continue, the process of getting a dispensary up and running has been beset by delays. The lack of progress on dispensaries highlights a principal concern that was expressed by many patients in 2013, which was that they could not afford to wait years for safe, state-legal access.

Patients who are desperately waiting for relief understand that all three neighboring states allow limited home cultivation in addition to having dispensaries. In all three neighboring states, desperate patients and their caregivers were able to begin cultivating soon after the laws were passed. Home cultivation has been legal since 1999 in Maine and since 2004 in Vermont; the first dispensary did not open until 2011 in Maine and 2013 in Vermont.[\[8\]](#) Similarly, Massachusetts, which passed a medical marijuana law in late 2012, allowed home cultivation from the outset and did not see its first dispensary open until June 2015. As a result, dispensaries in neighboring states were hailed as improvements in access for patients, but they were never expected to meet all the needs of every single patient.

At this point, two years after the signing of HB 573, patients still do not know when they and their caregivers will finally be able to apply for legal protections. They don’t know where dispensaries will be located or when they will finally open. And for those who choose not to wait for state-legal access, New Hampshire’s penalties for marijuana cultivation and possession remain quite severe:

- Possession of one ounce or less of marijuana is a Class A misdemeanor punishable by a fine of up to \$2,000 and up to a year in jail.
- Possession of more than one ounce or cultivation of one or more plants is a felony punishable by a fine of up to \$25,000 and up to a year in jail.
- Providing or selling small amounts of marijuana to a patient is also a felony.

Legislative Rewind: Why Did New Hampshire Pass Such a Flawed, Limited Law?

In 2012, when Democratic Gov. John Lynch was governor and the New Hampshire House and Senate were controlled by Republican supermajorities, many political observers were surprised when both chambers passed a medical marijuana bill, SB 409. Unlike the bill that ultimately became law in 2013, SB 409 would have given desperate patients the freedom to cultivate up to three mature cannabis

plants for their own use. Patients would have also had the option of designating a personal caregiver to cultivate on their behalf.

Unfortunately for patients who were suffering, Lynch vetoed SB 409. Lynch had previously vetoed a medical marijuana bill in 2009 (the House voted to override, but the effort fell two votes short in the Senate), so this rejection did not come as a great surprise.

After years of frustration with Gov. Lynch, many patients became hopeful when former Senate Majority Leader Maggie Hassan announced she was running for governor. In 2009, Hassan had voted for both a limited home cultivation policy and a state-regulated dispensary system, so many patients believed her election in November 2012 would ensure that New Hampshire would finally pass an effective medical marijuana law.

2013 got off to what seemed to be a great start for patients when HB 573 passed the House in March by an overwhelming 286-64 vote. This bill would have given qualifying patients immediate legal protection in the form of an affirmative defense, and it would have allowed both limited home cultivation and a limited system of state-regulated dispensaries.

As approved by over 80% of the House, HB 573 would have provided a real set of answers to patients' prayers. Sadly, while the Senate was considering the bill, Gov. Hassan shocked patients by insisting that the bill be gutted of several key provisions. Gov. Hassan told senators she would veto the bill unless they made the following changes:

- (1) Deleting the home cultivation provision, maintaining felony penalties against any patient or caregiver who cultivates cannabis
- (2) Changing the affirmative defense so it would not protect patients from being convicted of a crime until they received state-issued ID cards
- (3) Removing post-traumatic stress disorder (PTSD) from the list of qualifying conditions

The Senate had little choice but to make these changes, leaving patients with many questions and no immediate answers. Patients were disappointed, but they at least expected that they would soon be able to apply for ID cards and begin receiving legal protections. The law, as its legislative champions understood it, required that the department begin issuing ID cards to patients within one year.

The Attorney General's Advisory Opinion

On February 13, 2014, the attorney general's office issued an advisory opinion that resulted in the department indefinitely postponing its implementation of the patient registry process. Since patients must possess a state-issued ID card in order to be protected from arrest, this delay — which was unforeseen by patients and advocates — had the practical effect of giving police officers the green light to continue arresting patients until shortly before the first dispensary opens.

Former Rep. Donna Schlachman, who served as the primary sponsor of HB 573 in 2013, explained very clearly that the attorney general's office was wrong about the bill's intent:[\[9\]](#)

“The intention of the cards was to protect patients so if for some reason they get stopped and there’s a question about whether marijuana is on them or in them, they will be protected,” she said. “It’s just to make sure we are identifying those patients who are legally possessing marijuana. The card issue date is prior to the opening of the dispensaries, so our intention was to completely protect patients.”

— former Rep. Donna Schlachman, sponsor of HB 573

For example, in Connecticut, temporary ID cards were issued within five months of the law being passed in 2012, but the first dispensary did not open for another two years. In Delaware, ID cards were made available in July 2012, but the first dispensary did not open until June 2015. In these states, patients who were already treating their conditions with cannabis were able to receive protection from arrest far in advance of the first dispensary opening. This should have been the case in New Hampshire, but the executive branch has prevented it from happening.

An additional consequence of the attorney general’s advisory opinion will be the exclusion of patients who suffer from rare medical conditions. For example, two of the four patients who receive medical marijuana directly from the federal government have conditions that are not covered under New Hampshire’s law (nail patella syndrome and multiple congenital cartilaginous exostoses).[\[10\]](#)

In most states that allow medical use of marijuana, it would be easy for such patients to qualify on the basis of symptoms alone. Patients in Vermont, Maine, Massachusetts, Rhode Island, and other states can qualify by having either a qualifying condition — such as cancer — **or** a qualifying symptom — such as intractable pain. However, New Hampshire’s law is uniquely restrictive in that it requires patients to have both a specific symptom and a specific condition that are listed in RSA 126-X:1.

Legislators understood that patients with severe symptoms could be excluded by this restrictive approach, so they included a provision that would allow medical providers to certify patients on a case by case basis if their conditions are severely debilitating.

RSA 126-X:1 (IX)(b) provides: “The department may include a medical condition that is not listed in subparagraph (a) [the list of qualifying conditions] that the department determines, on **a case by case basis**, is severely debilitating or terminal, **based upon the written request of a provider who furnishes written certification to the department**” (emphasis added).

As a result of the advisory opinion from the attorney general’s office, it will not be possible for a medical provider — or, for that matter, ten providers — to qualify a patient with an unlisted condition for the program. If, for example, the patient suffers from multiple congenital cartilaginous exostoses, the provider would be expected to petition the department to add this rare condition to the list of qualifying conditions. The department intends to accept such petitions only twice per year, in January and July, and it intends to hold a public hearing as part of each petition process, as described in rule He-C 401.09.[\[11\]](#)

This is not a “case by case” process, and it is not at all what legislators intended. The sponsors of HB 573 understood that marijuana is often effective in relieving symptoms, including pain, nausea, and wasting, regardless of the condition that is associated with those symptoms. Most importantly, they understood that each patient is unique, and that in some cases prescription drugs either do not work or cause intolerable side effects. Medical providers need to be able to certify such patients for the Therapeutic Use of Cannabis program without going through an onerous petitioning process for every

rare condition.

The Failure of the Advisory Council

After the Senate had gutted and passed HB 573 in 2013, the bill went back to the House, which voted against accepting the Senate's amendment. This led to a "committee of conference," in which House and Senate negotiators attempted to agree on a compromise. Since Gov. Hassan had clearly threatened to veto the bill if it included home cultivation or immediate legal protections, the House negotiators were not in a position to insist on these provisions. However, since they were concerned about the potential for implementation to be delayed, these representatives insisted that the Therapeutic Use of Cannabis Advisory Council — which was already a feature of the bill — should be convened immediately to oversee the law's timely and effective implementation.

Unfortunately, for a number of reasons, the advisory council has failed to advocate for the needs of patients, and it has done more to prolong the law's effective implementation than to encourage it. The membership of the council has been stacked against patients from the beginning, in part because Gov. Hassan failed in her most basic duty under the law, which was to appoint two council members: "a member of the public" and "a qualifying patient."

First, instead of appointing "a member of the public," Hassan appointed Tuftonboro Police Chief Andrew Shagoury, who had been one of the bill's most vigorous opponents throughout the legislative process. And instead of appointing a patient who had been involved with HB 573, Hassan appointed a person who was completely unknown to the patients who had supported the bill. This individual has failed to attend a single meeting, but Hassan has thus far refused to replace her on the council, effectively denying patients a voice in the implementation process.

In 2014, the legislature passed a bill giving the New Hampshire Association of Police Chiefs its own permanent spot on the council. The council became even less patient-friendly when House Speaker Shawn Jasper appointed Rep. Bill Nelson — one of the few representatives who voted against HB 573 — to represent the House on the council. The council has not bothered to hold a meeting since January 9, 2015.

Is State-Legal Access Right Around the Corner?

The legislature intended for the department to preliminarily approve at least two dispensary applicants by January 23, 2015, but it did not do so until May 29, when it selected three applicants to operate a total of four alternative treatment centers (ATCs). These applicants now have until August 27 to submit completed applications to the department, which must include local zoning approvals. If approved by the department, they will then be able to begin cultivating cannabis.

In May, the department said it was hopeful that dispensaries will be up and running within eight or nine months. However, the department has no ability to guarantee that this will happen. In several states, the process of getting a dispensary open has been beset by delays — and when a dispensary has finally been able to open, patients have reported paying high prices, being rationed small amounts of cannabis, and having to wait weeks or even months for an appointment.

The executive branch's refusal to issue ID cards has created an additional obstacle for dispensaries. The number of plants allowed for each dispensary is tied to the number of registered patients who have designated that dispensary. If patients are not able to register until the first dispensary is nearly ready to open, the dispensary will only be able to cultivate a maximum of 80 plants, in accordance with RSA 126-X:8, XV(a).^[12] Since it takes three to four months to cultivate cannabis plants, this issue — if not resolved very soon — will increase the likelihood of high prices, product shortages, and patient dissatisfaction when the first dispensary finally opens.

How Can Legislators Make This Law More Comprehensive and Workable in 2016?

The legislature can, and should, take action in 2016 to improve RSA 126-X and make it more comprehensive and workable for patients and medical providers. There should be no lack of urgency to make this law effective, especially if policymakers are familiar with research published by the *Journal of the American Medical Association* showing that “Medical cannabis laws are associated with significantly lower state-level opioid overdose mortality rates.”^[13]

The Marijuana Policy Project strongly encourages legislators to do the following:

- (1) Pass HB 593, which would finally allow limited home cultivation. This bill, which already passed the House in 2015, would allow two mature plants per patient and only until a dispensary opens within 30 miles of the patient's residence. The Senate should consider and approve this bill when it reconvenes in January.
- (2) Introduce and pass a bill fixing the case by case provision so patients with severely debilitating medical conditions — such as two of the four federally-recognized patients — will not be excluded.
- (3) Introduce and pass a bill reforming the advisory council to ensure that patients have a voice and that they are not outnumbered by council members who oppose their interests.

Additionally, we urge the department to begin issuing ID cards immediately so patients can finally be protected from arrest, and so ATCs will be able to grow enough cannabis to serve patients when they first open their doors.

Finally, we urge Gov. Hassan to fulfill her duty by appointing a patient who will actually participate in the advisory council rather than simply being a name on a placard in front of an empty chair at the meetings.

^[1] The law, administrative rules, and other information about the program can be found at the department's website: <http://www.dhhs.state.nh.us/oos/tcp/index.htm>

^[2] Cote, Joseph. “Advocate for NH medical marijuana died before ever taking a legal puff, law's implementation still a year away.” *Nashua Telegraph*, Oct. 17, 2014. <http://www.nashuatelegraph.com/news/1049155-469/advocate-for-nh-medical-marijuana-died-before.html>

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- [4] <https://www.mpp.org/states/new-hampshire/new-hampshire-attorney-general-memo/>
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- [7] Love, Norma. "Medical pot has better shot in Granite State."
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- [11] <http://www.dhhs.state.nh.us/oos/tcp/documents/hec401approved.pdf>
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- [13] Bachhuber, Marcus, et al. "Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010," *JAMA Internal Medicine* 2014;174(10):1668-1673.
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