



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

EXECUTIVE OFFICE

September 20, 2016

The Honorable Alphonso David
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

RE: S.6778 (Hannon)/A.9334 (Gottfried)
S.6779-B (Hannon)/A.9335-B (Gottfried)

Dear Mr. David:

The Office of the Attorney General (“OAG”) writes to express its opposition to the above-referenced bills, which we believe would open up significant loopholes to the nationally-acclaimed system that the State only recently created to crack-down on the scourge of prescription opioid abuse.

The unanimous passage of the Internet System for Tracking Over Prescribing (“ISTOP”) in 2012 established a national model that has been praised for reducing opioid overprescribing, improving health outcomes, and, most relevantly for today, reducing the risks associated with traditional paper prescriptions. ISTOP represented the culmination of years of efforts by advocates in communities across the state and by state elected officials—including both of our offices—to develop a critical solution to a growing problem. ISTOP has been an overwhelming success. According to the New York State Heroin and Opioids Task Force’s June 2016 report, as a result of ISTOP, “doctor shopping” dropped by 90% as of the end of 2015. Moreover, we commend Governor Cuomo’s other efforts to combat opioid addiction including, among other things, his sponsorship and signing of legislation that will remove unnecessary insurance barriers for those seeking treatment and prohibiting practitioners from prescribing more than a seven-day supply of certain opioids.

Unfortunately, however, the need for such further initiatives only highlights the fact that opioid addiction remains a very significant problem for many New Yorkers. In fact, since ISTOP was enacted, there has been an increase in the number of New Yorkers addicted to opioids and, even more sadly, an increase in the number of deaths attributable to opioid addiction.

Clearly now is not the time to scale back ISTOP. Yet, read together, the above-referenced bills have the combined negative effects of removing millions of prescriptions from the Electronic Prescribing (“E-Prescribing”) requirements of ISTOP and eliminating any obligation to make a meaningful record of good faith invocation of the existing lawful exceptions to E-Prescribing. For these reasons, discussed more fully below, we urge the Governor to veto both bills.

S.6778/A.9334

Senate Bill No. 6778 and Assembly Bill No. 9334, which amend Public Health Law § 281 and Education Law § 6810, would allow nursing home physicians to be permanently exempted from E-Prescribing.

The sponsor’s memo in support of the bill states that this amendment is needed to assure that the physician’s order is “timely filled to protect the health and well-being for each resident in a safe and secure method” because nursing home physicians are typically not present at the nursing home 24 hours per day. We agree that protecting each resident is the overriding goal; however, existing emergency oral prescribing rules would be sufficient to bridge the gap between truly exigent circumstances and “traditional” practices. Specifically, PHL § 281 already accounts for situations in which a doctor must orally prescribe emergency medication. *See* PHL § 281 (d) (exempting prescriptions “issued by a practitioner under circumstances where, notwithstanding the practitioner’s present ability to make an electronic prescription as required by this subdivision, such practitioner reasonably determines that it would be impractical for the patient to obtain substances prescribed by electronic prescription in a timely manner, and such delay would adversely impact the patient’s medical condition...”). This further exception is therefore unnecessary, and serves only to weaken ISTOP.¹

Healthcare errors are a major concern in the nursing home field, and our Medicaid Fraud Control Unit regularly receives reports of, and investigates, numerous incidents of such errors. Many such incidents result from ordinary errors or negligence, but are compounded and indeed may rise to criminal conduct when records are omitted, altered or destroyed. Electronic records remove many of these concerns and, in any event, facilitate a determination of the facts. Electronic prescriptions are also shown to reduce error and drug diversion, which is a particular problem in nursing homes. A permanent exemption for the nursing home industry would fail to incentivize the industry to move to modern technology and practices. The increase in quality information provided by E-Prescribing, as well as a trail of accountability, is the better way to improve healthcare for our vulnerable nursing home residents.

S.6779-B/A.9335-B

There are three statutory exemptions to ISTOP’s E-Prescribing requirement: in the event of a temporary electrical or technical failure; if E-Prescribing would result in a delay that would adversely impact a patient’s health; or when the prescription is to be filled out-of-state. Under current law, when a provider utilizes one of these exemptions and writes a paper prescription, the

¹ In addition, since many nursing home physicians only work part-time for the nursing home, these physicians should already be utilizing E-Prescribing in their other practice settings. This bill encourages them to revert to a less-effective form of prescribing for their nursing home patients.

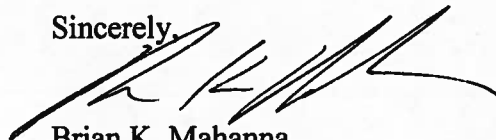
provider must file a report "as soon as practicable" with the Department of Health ("DOH") containing detailed information outlined in DOH regulations. Senate Bill No. 6779 and Assembly Bill No. 9335 include a "No Report Clause" that would eliminate the requirement that a provider utilizing a statutory exemption notify DOH and merely requires the prescriber to make a conclusory notation in the patient's record tracking the statutory exemption.

This bill would create a gaping loophole in ISTOP's universal E-Prescribing reporting requirements. It would allow physicians who are unwilling to invest in E-Prescribing technology or simply believe that E-Prescribing is per se "impractical" to avoid compliance with ISTOP's requirements. What's more, bad faith or ill-informed prescribers could accept a "doctor-shopper's" false promise that the paper prescription would be filled out of state. As discussed during the development of ISTOP, paper prescriptions raise investigative hurdles and promote bad faith defenses. Reporting of paper prescription exceptions, in the detail currently required by DOH under ISTOP, clarifies accountability and enhances compliance while reducing the amount of paper.

ISTOP is a national model, widely emulated and being actively considered for adoption by other states. We believe ISTOP's existing timelines, exemptions and reporting requirements give practitioners sufficient opportunity to come into compliance without undermining the larger goals of the statute. Most importantly, we believe ISTOP is already helping curb overprescribing of prescription drugs, and their abuse.

For all of these reasons, the Office of the Attorney General opposes these bills. We would welcome the opportunity to meet with you or your staff to further discuss our concerns.

Sincerely,



Brian K. Mahanna
Chief of Staff
Deputy Attorney General