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ATTORNEY GENERAL OPINION NO. 2020-01

April 22, 2020

Lori A. Shibinette, Commissioner
Department of Health and Human Services
129 Pleasant Street
Concord, New Hampshire 03301

RE: Request for Attorney General's Opinion

Dear Commissioner Shibinette:

You requested this office provide an official Attorney General opinion concerning the following questions.

QUESTIONS PRESENTED

Are acute care hospitals, assisted living facilities, long-term care facilities, nursing facilities, residential care facilities, as those terms are defined in RSA 151 - 151-H, or any other similar facilities providing residential care to elderly or infirm patients ("health facilities") that take reasonable steps to implement specific orders set out in Executive Order 2020-04, and subsequent Emergency Orders of the Governor, and orders or regulations of the Department of Health and Human Services and other state agencies issued pursuant to Executive Order 2020-04, performing emergency management activities as defined in RSA 21-P:35?

If so, does the immunity provided in RSA 21-P:41 apply to these emergency management activities?

CONCLUSION

Yes, the Governor, in exercising his emergency management powers, issued orders so that the State may prepare for and respond to the outbreak of the Novel Coronavirus 2019 Disease ("COVID-19"). The health facilities, and their employees and volunteers, engaged in emergency management activities, as defined in RSA 21-P:35, V, when they, in turn, took reasonable steps to implement state of emergency orders, rules, and waivers that prepared the State to adequately treat patients and to prevent the overburdening of existing resources.

Yes, the immunity provisions of RSA 21-P:41 apply to health facilities, and their employees and volunteers, that engage in emergency management activities so long as the health facility and its employee or volunteer was complying with or reasonably attempting to comply with applicable state of emergency orders or rules.

BACKGROUND

The outbreak of COVID-19 has created a public health crisis without any modern precedent. On Friday, March 13, 2020, the President of the United States declared a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. That same day, Governor Sununu issued Executive Order 2020-04, an order declaring a state of emergency due to the Novel Coronavirus (COVID-19).

In declaring the state of emergency, the Governor activated the Emergency Operations Center at the Incident Planning and Operations Center in Concord and ordered certain actions to prepare for and carry out the State's response to the COVID-19 state of emergency. The Governor ordered:

- 1) All state agencies perform any and all activities consistent with the direction of the Governor's Office, the Division of Homeland Security and Emergency Management, and the Division of Public Health;
- 2) Facilities that care for elderly or infirm patients prohibit visitor access;
- 3) State agencies to procure materials, goods, and services needed for the protection of the public health;
- 4) The authorization of out-of-state medical personnel and other personnel to provide services in New Hampshire;
- 5) The Division of Homeland Security and Emergency Management to provide assistance to local governments; and
- 6) The Commissioner of Health and Human Services to waive requirements that interfere with hospitals' and other health facilities' ability to adequately treat patients and to prevent the overburdening of existing resources, including requirements related to clinical care spaces, medical supplies, medical equipment, and available trained staff.

In the following weeks, the President issued a major disaster declaration for New Hampshire and the Governor continued to prepare for and respond to the COVID-19 public health crisis by extending the state of emergency, *see* Executive Order 2020-05, and issuing, to date, 33 Emergency Orders. In addition, state agencies implemented the Governor's orders through further agency orders and emergency rulemaking. The Governor, through Emergency Orders or through state agency actions, ordered the following relevant actions: Emergency

Orders 8 and 15 authorizing the temporary expansion of telehealth services by both in-state and out-of-state providers; Emergency Orders 13 and 14 expanding roles of pharmacies; the Department of Health and Human Services ordering the control, restriction and rationing of certain medications; the Office of Professional Licensure and Certification authorizing the emergency licensure of certain health providers; and health professional licensing boards adopting emergency rules to increase the number of providers necessary to adequately treat patients and to prevent the overburdening of existing resources.

In addition, the Department of Health and Human Services sought approximately 20 waivers from the Centers for Medicare and Medicaid Services (“CMS”) for items such as waiving certification requirements for additional bed capacity and allowing for provision of services in alternative non-traditional settings, waiving the requirement for completion of pre-admission screening and annual resident review for nursing homes, and temporarily suspend application of the Emergency Medical Treatment and Active Labor Act (EMTALA) sanctions. CMS itself provided multiple, comprehensive blanket waivers for care provided by long-term care facilities, skilled nursing facilities, and critical access hospitals, as well as for psychiatric treatment and authorized services to be performed by out of state licensed providers. All of these waivers assisted the healthcare facilities in more flexibly delivering services to patients.

In furtherance of the above Executive Orders, Emergency Orders, and other orders, waivers and emergency rules issued by state agencies pursuant to the Governor’s order, health facilities took necessary steps to prepare for and respond to the COVID-19 state of emergency. These steps include increased bed capacity, streamlined care standards to minimize patient and healthcare worker exposure to COVID-19 as well as meet the anticipated volume of cases during a surge period, prepared triage protocols, established fourteen alternative care sites for triage and patient care on and off health facilities’ campuses, procured personal protective and other equipment and supplies, expanded telehealth options and modalities, ceased performing elective procedures, stayed certain preventative medicine activities. These actions were taken to increase the capacity to adequately treat patients, to prevent the overburdening of existing resources, to preserve the very limited supply of personal protective equipment, and to slow the spread of COVID-19.

ANALYSIS

As noted above, on March 13, 2020, Governor Sununu declared a state of emergency pursuant to the authority vested in him by Part II, Article 41 of the New Hampshire Constitution and RSA 4:45. In making the declaration, the Governor assumed operational control over all or any part of the emergency management functions within the state related to COVID-19 as set forth in RSA 4:45, 4:47, and RSA 21-P:35.

The Governor’s emergency management powers are broad and include, in relevant part, the power to: 1) enforce all laws, rules, and regulations relating to emergency management and to assume control of any or all emergency management forces and helpers in the state, 2) perform services for emergency management purposes on such terms and conditions as the

governor shall prescribe, 3) perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population, 4) make, amend, suspend and rescind necessary orders, rules and regulations to carry out the provisions of this subdivision in the event of a disaster beyond local control, and 5) exercise emergency management authority as defined in RSA 21-P:35, V. *See* RSA 4:45 & 47. “Emergency management” is defined as

the preparation for and the carrying out of all emergency functions, including but not limited to emergency response and training functions, to prevent, minimize, and repair injury or damage resulting from the occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or human cause, including but not limited to fire, flood, earthquake, windstorm, wave actions, technological incidents, oil or chemical spill, or water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, drought, infestation, explosion, terrorist act, or riot.

RSA 21-P:35, V.

Emergency Management Activities

The purpose of exercising the above emergency management powers is to ensure the State is adequately prepared for and can respond to disasters in order to preserve the lives and the property of the people of the state. RSA 21-P:34. This office previously opined on whether certain activities fell within the definition of “emergency management” in RSA 21-P:35, V, and the applicability of RSA 21-P:41 to those activities. *N.H. Atty. Gen. Op. No. 2004-01* (March 10, 2004). This opinion recognized that both the training and exercise for disasters and the disaster response are within the definition of emergency management activities in RSA 21-P:35, V. The opinion further recognized that Community Emergency Response Teams (CERTs) may perform these emergency management activities within their local jurisdiction or, if the disaster is so severe, under the state’s control. *Id.*; RSA 21-P:37.

Here, a key component to the Governor’s preparation and response to COVID-19 was to ensure that resources within the State, including health facilities, were able to adequately treat patients and to prevent the overburdening of existing resources. The steps taken to prepare for this specific challenge included ordering the suspension or waiver of statutes and rules, including requirements related to clinical care spaces, medical supplies, medical equipment, and available trained staff. Health facilities, in turn, implemented these orders in cooperation with the State by taking steps such as increasing bed capacity, streamlining care standards, postponing elective procedures and preventative medicine visits, preparing triage protocols, establishing fourteen alternative sites for triage and patient care on and off their campuses, procuring personal protective and other equipment and supplies, and expanding telehealth options and modalities. The Governor’s orders and the orders and actions of state agencies to prepare and respond to COVID-19, and the health facilities implementation of these orders, all constitute emergency

management activities ordered by the Governor pursuant to RSA 4:45, RSA 4:47, and RSA 21-P:35.

Immunity for Emergency Management Activities

In New Hampshire, the State is immune from suit unless there is an applicable statute waiving the State's sovereign immunity. *See, e.g., XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 170 N.H. 653, 656 (2018). "Any statutory waiver is limited to that which is articulated by the legislature." *Id.* With regard to emergency management activities, the legislature has not waived sovereign immunity. RSA 21-P:41. In addition, the legislature recognizes that all emergency management activities are governmental functions. RSA 21-P:41, I. As a result, these functions are cloaked with sovereign immunity. *XTL-NH, Inc.*, 170 N.H. at 656.

The legislature also recognized that, during an emergency, private actors may be required to also engage in emergency management activities and likewise recognized that those actions were also governmental functions. RSA 21-P:41, I; *see also N.H. Atty. Gen. Op. No. 2004-01* (recognizing that RSA 21-P:41 is very clear that all emergency management workers are entitled to immunity for any liability due to injury, death, or property damage while performing emergency management activities). This statute, however, must be read consistent with Part I, Article 14 of the New Hampshire Constitution, which provides every person a right to a legal remedy. Thus, while a private actor may be entitled to assert immunity under RSA 21-P: 41, it is limited to the performance of emergency management activities at the direction of the Governor. RSA 21-P:41, I (providing that "any private corporations, organizations, or agencies, or any emergency management worker complying with or reasonably attempting to comply with any order issued by an authorized government emergency management authority" is not "liable for the death of or injury to persons, or for damage to property, as a result of any such activity.>").

For the reasons set forth above, in my opinion, for purposes of RSA 21-P:41, health facilities, and their employees and volunteers, are performing emergency management activities at the Governor's direction or request, as defined in RSA 21-P:35, V, by taking reasonable steps to implement state of emergency orders, rules, and waivers that prepared the state to adequately treat patients and to prevent the overburdening of existing resources. Accordingly, the immunity provisions of RSA 21-P:41 apply to health facilities, and their employees and volunteers, that engage in emergency management activities so long as the health facility complies with or reasonably attempts to comply with applicable state of emergency orders or rules.

Sincerely,



Gordon J. MacDonald
Attorney General