



**Testimony of the New Hampshire Hospital Association on
He-M 614 Process for Involuntary Emergency Admission Rules**

Joint Legislative Committee on Administrative Rules (JLCAR)

September 16, 2022

On behalf of our New Hampshire Hospital Association (NHHA) membership which represents all 26 of our community hospitals and all of our specialty hospitals, I am Kathy Bizarro-Thunberg, Executive Vice President. I am presenting written testimony relative to He-M 614 Process for Involuntary Emergency Admission administrative rules dated 7/26/22 titled as “Final Proposal - Annotated Text”.

Our testimony is centered around the universal fact that any patient that is deemed to be a harm to oneself or others should be afforded the protections of the State’s mental health system through an Involuntary Emergency Admission (IEA) to a Designated Receiving Facility (DRF) or New Hampshire Hospital (NHH). Having clear and transparent rules that define an IEA, the process for certifying a petition for an IEA and describing the court’s involvement in ensuring an individual’s right to a probable cause hearing are all of utmost importance.

It is beyond dispute, however, that the He-M 614 emergency rules and the “Final Proposal – Annotated Text” version that is the subject of today’s JLCAR proceeding are at times ignored, at times are inconsistent with and at times are contrary to state law, specifically RSA 135-C:29 I – which states “Upon completion of an involuntary emergency admission certificate under RSA 135-C:28, a law enforcement officer shall, except as provided in paragraph II, take custody of the person to be admitted and *shall immediately deliver such person to the receiving facility identified in the certificate.*” (emphasis added).

And, it is no longer a matter of dispute because in the last two years the New Hampshire Supreme Court and the United States District Court for the District of New Hampshire have held that “involuntary emergency admission into the mental health services system . . . occurs when an [involuntary emergency admission] certificate is completed. Following certification, the statutory procedures require *immediate delivery of the certified person to a designated receiving facility* and a probable cause hearing within three days after certification.” (emphasis added). And, in fact, He-M 614.09 states “Delivery to a DRF *shall* be in accordance with RSA 135-C:29” which should bind all actions throughout the rule accordingly. **Unfortunately, neither the draft rules (dated 5/2/22 “Initial Proposal”) that were heard on June 30, 2022, nor the version you have before you (dated 7/26/22 “Final Proposal – Annotated Text”) comply with the plain language of the state statute nor comply with the legal interpretation of both the NH Supreme Court and the US District Court for the District of NH.**

In fact, several of the annotations authored by JLCAR's counsel to He-M 614 also indicate that the Final Proposal administrative rules are flawed, including:

- The terms “petition” and “certificate” need to be clarified throughout the rule and has major implications on how the rule is implemented, especially since “...the NH Supreme court indicated that the 3 day clock for the probable cause hearing begins at the completion of the Certificate pursuant to RSA 135-C:28, I.”
- References in the rule to when an individual is admitted to the state's mental health system is incorrect and JLCAR's counsel rightfully says “This rule goes against the plain reading of the statute, and against the findings of the NH Supreme court which held that admission to the mental health system begins as soon as the Certificate is complete. NOT the petition.”
- References to physical examination to be completed within 3 days and mental health examination to be completed within 3 days cannot possibly be completed since a completed certificate must include the results of those examinations.
- Counsel for JLCAR also notes that if a certificate is considered invalid (He-M 614.08 (g)), the individual is not part of the state's mental health system, but there is nothing stated about what happens to the patient – which is very concerning.

While we generally agree with counsel for JLCAR's notations, we would like to clarify one of the comments on page 9 of their notations. They state: “The statute is clear that the probable cause hearing must take place within 3 days of the completed certificate and that the person must be immediately transferred.” This is not accurate. The statute, RSA 135-C:28, states that the person must be immediately transferred upon the *completion of the certificate*. The statute does not reference transfers upon the completion of the probable cause hearing. Those are two separate and distinct actions that are not related to one another. In a perfect world, patients would be immediately transferred out of a hospital emergency department upon the completion of an IEA certificate to NHH or a DRF. The probable cause hearing would then be held in NHH or a DRF where the patient was receiving treatment.

JLCAR counsel's comments also mention in several notations that there will likely be legislative changes being proposed during this upcoming legislative session that will impact He-M 614. We ask that DHHS be transparent in sharing those legislative changes that are being considered and how that language will support a patient, who is in a behavioral health crisis, with the ability to obtain the care they need and deserve, when and where they need it.

We do not believe that He-M 614 meets the overarching needs of patients that need protection under the State's mental health system. We also do not believe that these rules present clear and transparent language that define an IEA, the process for certifying a petition for an IEA nor the court's involvement in ensuring an individual's right to a probable cause hearing. We urge this Committee to object to these rules and require DHHS to follow state law and court decisions in their rulemaking process.

Thank you for the opportunity to testify on He-M 614.

The following pages are the New Hampshire Hospital Association’s testimony from DHHS public hearing held on 6/30/22 highlighting specific sections of He-M 614 and our notes in the boxes that compares the 5/2/22 version with the 7/26/22 version:

- **Red** – we disapprove of changes or no changes were made based on our testimony that compare changes from the 5/2/22 version to the 7/26/22 version.
- **Blue** – we approve of the changes made from the 5/2/22 version to the 7/26/22 version.

There are several sections in the administrative rule that are inconsistent with or contradicts RSA 135-C:28 and He-M 614.09, including:

- **He-M 614.05 (d)**: “the physical examination shall be conducted *within 3 days* of the date of the petitioner’s statement...” This provision appears to create a type of “medical hold” that does not exist in the RSAs. In fact, it contradicts page 6 of an IEA certificate that requires the inclusion of the results of a physical examination. Because the IEA petition must be "complete" before sending to a DRF, the physical exam must be completed as part of the admission process. It cannot wait up to three days.

Wording changed from “petitioner’s statement” to “completion of the petition”. Not sure why this wording change was made. It does not appear to change our concern about allowing a physical exam to be conducted within 3 days.

- **He-M 614.05 (e)**: “the mental examination shall be conducted *within 3 days* of the date of the petitioner’s statement...” We have the same concern here as we stated above for physical examination.

Wording changed from “petitioner’s statement” to “completion of the petition”. Not sure why this wording change was made. It does not appear to change our concern about allowing a mental health exam to be conducted within 3 days.

- **He-M 614.05 (e)(2)**: “the licensed practitioner or designee *shall not perform the mental examination of the person sought to be admitted until after the individual has been determined medically stable* for admission to the DRF or NHH”. Most IEAs are prepared and certified while an individual is a patient in a hospital emergency department. The intent of RSA 135-C:29 is to ensure that the patient is sent to the most appropriate location for treatment as quickly as possible. In addition, by stating that the mental health exam **shall not be performed** until the individual is medically stable is an unrealistic standard. Sound clinical judgement needs to be part of the equation for both the physical and mental health examinations. This is not a linear endeavor, rather the choice between knowing if the physical condition created the mental health condition or

if the mental health condition caused a physical condition is nuanced and the decisions about needing to IEA an individual, even if they are still being treated for a physical condition, must be considered.

He-M 614.05 (e)(2) has been deleted.

- **He-M 614.07 (a) (1):** “*within 3 days* of completion of the petition, a certifying practitioner shall state the following on page 8 of the petition and certificate...” All of the items in this section are already on the **completed** certificate in order for the certificate to be deemed “completed”, so it’s impossible to allow for a timeframe of “within 3 days”.

“within 3 days” is still in the rules language.

- **He-M 614.07 (a)(1)(i):** “That the certifying practitioner informed the person of the DRF to which the person will be *or will likely be* transported...” (emphasis added) is contrary to RSA 135-C:29 - the person shall be immediately transported upon a completed IEA petition and certificate.

“or will likely be” is still in the rules language.

- **He-M 614.08 (a)-(b):** these items only make clear that a *completed petition and certificate* should be immediately transmitted to a DRF or NHH. RSA 135-C:29 says that the *patient* should be immediately transported upon completion of a petition and certificate.

No changes made to this item. Still only speaks to the completed petition and certificate. Nothing about the patient.

- **He-M 614.08 (h):** this item states that the DRF is responsible for immediately filing the petition with the applicable district court “*even if the individual has yet to be transferred to the DRF*”. We know that unfortunately this continues to happen that patients are not transferred immediately, but something that is contrary to law should not be permanently codified into administrative rules.

This language was changed from “As soon as the completed petition and certificate has been received by the DRF, the DRF shall immediately file it with the applicable district court to allow the court to schedule a probable cause hearing, even if the individual has yet to be transferred to a DRF”.... to read “The completed petition and certificate shall be filed with the circuit court that shall schedule a probable cause hearing, even if the individual has yet to be transferred to the DRF.”

Unfortunately, this remains contrary to state law because the patient should be transferred immediately. Another note about the changed language: it is now not clear who actually files the petition with the court because that direction was removed.

- **He-M 614.08 (i)**: this item describes that the district court with jurisdiction is the intended “...DRF that has, *or will have*, custody of the person...”. Another indication that status quo is being implemented into administrative rules.

This item was deleted.

We would like to also provide the following detailed comments on the remainder of the initial proposed administrative rules:

He-M 614.03 Criteria for Involuntary Emergency Admissions: It should be made clearer that all subsections (a)-(g) are options for someone to be eligible for an IEA. Only (a) explicitly states “a person should be eligible for an IEA if...”

No changes were made to make this section clearer.

He-M 614.03 (d)-(g): These are new items that were not in the emergency rules. These are important additions, especially allowing for someone on a conditional discharge to receive an IEA if needed.

These items remained in the updated version.

He-M 614.04 (b)(4): there are two (4)s. The item “Notice of rights of person sought to be admitted” should be labeled as “(5)”.

Numbering change made.

He-M 614.05 (b): We believe that the reference to “(a)(2)” should be “(a)(1)”.

Change made.

He-M 614.05 (c): We recommend adding a reference to (a)(2) to this item to read as follows: “If a witness is available to testify, the witness’s statement *in (a)(2) above* shall be completed by a witness...”

Change made.

He-M 614.05 (d)(1)(d): “and” at the end of the sentence should be deleted.

Change was not made.

He-M 614.05 (d)(2): RSA 328 is the wrong statutory reference. RSA 328 is for Physical Therapists. The right statute citation should be RSA 328-D for Physician Assistants.

Change made.

He-M 614.05 (e)(1)(c): typo needs to be fixed: “detained” should be “detailed”.

Change made.

He-M 614.05 (e)(2): This item indicates that there is a sequence of events that must be followed (physical exam first, then mental exam) which also means that an IEA cannot be considered "complete", thus a contradiction exists. This should be made clearer. Also see our comments to this section He-M 614.05 (e)(2) above.

This item was deleted.

He-M 614.05 (e)(3): RSA 328 is the wrong statutory reference. RSA 328 is for Physical Therapists. The right statute citation should be RSA 328-D for Physician Assistants.

Change made.

He-M 614.05 (g)(2): This item states that “The certifying practitioner shall not sign the certificate if... the person has medical ailments that cannot be safely treated by the medical services at the DRF”. But, if the mental health evaluation shows that an IEA is warranted, what happens to this individual while (s)he is being medically treated and (s)he should be held due to concerns about danger to oneself or others when a certificate cannot be signed according to this rule? This situation should not be an exclusion from an IEA petition and certificate because there is no other statutory authorization for holding a person who remains a danger to himself, herself, or others.

No changes were made to this item to address our concerns.

He-M 614.06 (a): “the commissioner or designee shall maintain a list of certifying practitioners...” How often will this list be updated? Will the courts have access to this list to compare against the petitioner signatures? Who else will be checking these lists?

No changes were made to address these questions.

He-M 614.06 (b)(1): how will “have experience with laws and rules governing the mental health services system” be documented and evaluated?

No changes were made to address this question.

He-M 614.06 (b)(2): who is responsible for conducting “annual training on involuntary emergency admissions, non-emergency involuntary admissions, and voluntary admissions”? And, if only run annually, what does that mean for practitioners that need to be certified if the

training is not readily available? Do they have to wait for the training to be conducted? And, once someone is certified, do they still have to attend an annual training? Requiring annual training for a practitioner already certified could be an administrative burden when no new information or processes were being discussed.

No changes were made to address these questions.

He-M 614.06 (d): how will DRFs and CMHPs “provide the names of all certifying practitioners they have approved to the department”? How will locum tenens practitioners be handled? How quickly can someone be certified?

No changes were made to address these questions.

He-M 614.07 (a)(1): (a)–(l) are premised on a contradiction with RSA 135-C:29, I. (a)(1) states that a certifying physician is required to state (a)-(l) on the petition and certificate “*within 3 days* of completion of the petition...” However, all of the statements are necessary for completion of the certificate and upon completion of the certificate the IEA patient is to be transported to a DRF immediately.

No changes made to address our concerns.

He-M 614.07 (a)(1)(c): this item includes the phrase “*if indicated and circumstances permit*”. (emphasis added). This phrase is contrary to the requirement outlined in He-M 614.05 (d) that says that a physical exam “shall” be conducted.

Phrase “if indicated and circumstances permit” was deleted.

He-M 614.07 (a)(1)(j): what does “pending” mean for this item: “That the certifying practitioner has contacted the selected DRF and conveyed that this IEA is *pending*” (emphasis added). There is no “pending” status for an IEA certificate. If the certifying practitioner executes the certificate, it is complete.

This item was deleted.

He-M 614.07 (a)(2)(f): what does “...has reviewed and considered a less restrictive voluntary option for treatment...” mean? Does the certifying practitioner have to document this analysis?

No changes were made to address these questions.

He-M 614.07 (c)-(d): both of these items are new in the initial proposal and are important additions as they both affirm the role of the state’s mental health system relative to the individual’s status as well as the healthcare practitioner and facilities. For example, “if treatment . . . shall be administered in accordance with all applicable federal and state laws[,]” then IEA patients must be transported to a DRF immediately upon completion of an IEA certificate in accordance with RSA 135-C:29.

No changes made.

He-M 614.08 (d): The DRFs and NHH should have an obligation to identify any deficiencies immediately upon receipt of an IEA petition and certificate so that the certifying practitioner may fix the issues and not have to re-do all IEA paperwork and processes - which also have a direct impact on the patient. There is no timeframe mentioned here regarding when the feedback should be given to the petitioner.

This item was changed from “If the DRF receives the petition and certificate and it is determined that the petition and certificate is not completed in accordance with the requirements of this rule, the petition and certificate shall be considered invalid” to.... “If NHH determines prior to filing with the court that the petition and certificate is not completed in accordance with the requirements of this rule, then petition and certificate should be considered invalid.”

The wording was changed so that only NHH has jurisdiction to determine if an IEA petition and certificate are valid. They also did not address our concerns about communicating back with practitioners about fixing any errors or omissions so that the IEA is not adversely impacted and there is no timeframe given on how long NHH has to review petitions and certificates for completeness. Lack of clarity on the timing could have a direct and material impact on the timing for probable cause hearings.

He-M 614.08 (f): we believe that this wording “to the department” should actually say “to the DRF or NHH”.

The language was changed to “NHH”.

Also noted that He-M 614.08 (i) was deleted. “The applicable district court shall be the court that has jurisdiction over the location of the DRF that has, or will have, custody of the person sought to be involuntarily admitted at the time of the probable cause hearing.” It is unclear why this item was deleted because it is now uncertain which court will have jurisdiction.

He-M 614.10 (a)-(b): we acknowledge that the details that were in the emergency rule in this section have been appropriately placed in item (b).

No changes made.

He-M 614.10 (b)(5): we agree with this new addition to this section.

No changes made.

He-M 614.10 (d): we believe that “(a) above” should be “(a) or (b) above”.

Change made.

He-M 614.12 (a): this section is silent on the rights of the certifying practitioner to appeal the decision of the court if, in their clinical judgement, the individual should remain as an IEA. We believe that there should be consideration for the petitioner to request an appeal or reconsideration if they believe it is in the best interest of their patient.

No changes made to address this concern.

He-M 614.12 (c): there is a reference to a “Medication Form”. Instead of the petitioner sending the form to the court, the medication form should be sent to the DRF which, in turn, is responsible for submitting the certificate and petition to the court.

An item (d) has been added that addresses this concern. “The medication form identified in (c) above shall be sent to NHH or DRF identified on the certificate so that it be can be sent to the court for its review.”

He-M 614.13: we recognize and support that this section has been expanded to include more detail about the 10-day period and includes an opportunity to file a subsequent IEA, if applicable, is an important addition to the administrative rules.

No changes made.

Submitted by:



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