

Re: H. 4101 aka SAPHE 2.0

Attorney Peter Vickery recorded an educational video to go along with the following letter that is 8 minutes long.

<https://healthrightsma.org/vote-against-saphe-2-0/>

Dear Senators and Representatives:

The bill before you would, if enacted, violate the separation of powers by granting to another body the power to make law. Accordingly, I respectfully request that you vote against it.

As you know, Article 30 of the Declaration of Rights expressly prohibits the Legislature from delegating its law-making power to anyone else so as to ensure that lawmakers are accountable to the voters. Accountability via the ballot box is essential to a self-governing republic of free people. The Supreme Judicial Court has construed Article 30 as meaning that the Legislature may not delegate the task of making “fundamental policy questions.”

No formula exists for determining whether a delegation of legislative authority is proper... but three considerations are relevant:

- (1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy;
- (2) does the act provide adequate direction for implementation, either in the form of statutory standards or ... sufficient guidance to enable it to do so; and
- (3) does the act provide safeguards such that abuses of discretion can be controlled?

*Robinhood Fin. LLC v. Sec’y of Commonwealth*, 492 Mass. 696, 714 (2023) (internal citations and quotation marks omitted). There are two

ways in which this bill, if enacted, would impermissibly delegate the making of fundamental policy decisions.

Section 1 of the bill would amend G.L. c. 111, § 27D so as to add a new sub-paragraph (b)(iii) that would require the Department of Public Health to “develop a set of standards for foundational public health services across the commonwealth.” Section 1 of the bill defines the term “foundational public health services” as “a nationally recognized framework for a minimum set of public health services, including, but not limited to, public health programs and foundational capabilities.”

To begin with, establishing “a minimum set of public health services, including, but not limited to, public health programs and foundational capabilities” is more than merely implementing policy; rather, it is the *making* of policy.

Second, the bill does not identify either the “nationally recognized framework” itself nor the entity or entities that created it. Presumably, somebody has written (or is writing, or will write) the framework, but the bill does not say who, exactly, that might be. Delegating the making of fundamental policy questions to an executive branch agency or to some non-governmental body would be bad enough, but it would be much worse to delegate the power to nobody in particular.

If the meaning of “foundational public health services” coincides with the way the Public Health Accreditation Board (PHAB) uses that term, then the bill should say so. The PHAB is a nonprofit corporation founded and funded by the federal Centers for Disease Control (CDC) and the Robert Wood Johnson Foundation (RWJF). As the RWJF reported in 2015 regarding the genesis of the PHAB:

Partnering with RWJF was crucial to CDC in bringing public health stakeholders together. **“If it were just CDC, there would be suspicion about us trying to control the public health enterprise,”** said Dennis Lenaway, PhD, MPH,

who was director of CDC's Office of Public Health Systems Performance at that time.

Putting to one side the matter of whether the CDC is, in fact, using the RWJF as cover and the PHAB as a cut-out in order to control the public health enterprise, the bill would empower the PHAB, a private corporation, to decide the "minimum set of public health services" for Massachusetts. This is the very antithesis of the accountability that the separation of powers established in Article 30 is designed to promote.

In addition to its constitutional shortcomings, there are problems with the bill's internal coherence. For example, the bill would amend section 27D so as to include the following:

- (c) The standards for local foundational public health services developed pursuant to clause (iii) of subsection (b) shall include, but not be limited to, the standards for: (i) inspections, epidemiology and communicable disease investigation and reporting, permitting and other local public health responsibilities as required by law or under regulations of the department or the department of environmental protection; (ii) workforce education, training and credentialing standards; and (iii) contributing required data. **The standards shall consider national standards** and shall be developed in consultation with local boards of health, public health organizations, academic experts in the field of public health and members of the special commission on local and regional public health established in chapter 3 of the resolves of 2016.

(emphasis added). As a matter of language, the term "the standards shall consider national standards" makes no sense. Human beings make standards, and people can consider things. But standards lack agency, so they cannot consider anything.

Perhaps this is a scrivener's error and the sentence is supposed to begin "the *department* shall consider." But even so, the provision makes no sense as a matter of drafting because based on the definitions in Section 1 of the bill, "national standards" are not merely something for the department to "consider" when developing the "local standards for local foundational public health services." On the contrary, as set forth in the bill, the term "foundational public health services" means "**a nationally recognized framework for a minimum set of public health services**, including, but not limited to, public health programs and foundational capabilities." Definitionally then, the national framework (whatever that may be, and whoever devised it, possibly the CDC via the PHAB but possibly somebody else) is already baked into the term "foundational public health services." If the department were to come up with a set of local standards that did *not* embody the national standards, those local standards would not be "foundational public health services" within the meaning of the bill. Accordingly, the requirement that the department "consider national standards" is, at best, redundant.

There are several other defects in this bill that I leave it to others to describe. But the fact that the bill would unconstitutionally delegate the lawmaking power to a private corporation is reason enough to vote against it.

Faithfully,

-- Peter

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