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January 18, 2022

Senator Harold French, Chairman
Senate Commerce Committee
State House, Room 100
107 N. Main Street
Concord, NH 03301

RE: Senate Bill 347-FN relative to the use of protected health information by employers

Dear Chairman French and Members of the Senate Commerce Committee:

Bi-State Primary Care Association and our members respectfully request SB 347-FN relative to the use of protected health information by employers be recommended inexpedient to legislate. Bi-State staff and our members will not attend legislative hearings due to the risk of COVID-19, and we thank you for the opportunity to submit written testimony to your committee electronically. Bi-State and our members write to you in strong opposition of SB 347-FN.

Bi-State Primary Care Association (Bi-State) is a 501(c)3 nonprofit organization, formed by two health and social service leaders in 1986 to advance access to comprehensive primary care and preventive services for all, with special emphasis on those most in need in New Hampshire and Vermont. Today, Bi-State represents 28 member organizations across both states that provide comprehensive primary care services to over 300,000 patients at 146 locations. Our members include community health centers, federally qualified health centers, area health education center programs, and Planned Parenthood of Northern New England. New Hampshire's 13 health centers serve approximately 112,000 patients at locations across the state, including in those districts represented by the senators on the Commerce Committee.

Bi-State and our members, particularly New Hampshire's community health centers, oppose SB 347-FN because it will eliminate every employer's, including health care organizations', ability to maintain safe workplaces and needlessly endanger the health and welfare of patients. While we oppose SB 347-FN for many reasons, we will provide you with specific examples of why federally qualified health centers cannot comply with the SB 347-FN as introduced.

New Hampshire's federally qualified health centers (FQHCs) are part of a national network of health centers established in federal law and regulated by the Health Services and Resources Administration (HRSA). Our FQHCs serve more than 88,000 Granite Staters who made approximately 387,000 patient visits in 2020, including over 100,000 telehealth visits. These health centers must serve patients regardless of ability to pay or insurance status; however, approximately 35% of their patients are commercially insured. Federal statute establishes the array of services FQHCs must provide, including basic primary care services, voluntary family planning services, immunizations against vaccine-preventable diseases, appropriate cancer

screenings, pharmaceutical services, mental health services, substance use disorder treatment, translation services, and transportation services.¹

Federally qualified health centers are governed by patient-majority boards, meaning members of the communities served by the FQHCs approve the policies and procedures the FQHC must utilize. The HRSA conducts site visits at least every three years, to ensure the FQHCs comply with the federal rules and regulations governing FQHCs. Health centers are required to “provide services....so that such services are available and accessible promptly, as appropriate, and in a manner that will assure continuity of services to the residents of the center’s catchment area.”² In order to demonstrate compliance with the clinical staffing requirements of FQHCs, an FQHC must have procedures in place to grant and renew privileges for clinical staff members who are “health center employees, individual contractors, or volunteers.”³ The procedures for privileging clinicians include verifying immunization and communicable disease status. If SB 347-FN were to become law, the FQHCs in New Hampshire would be in violation of state statute. If the FQHCs were in violation of the RSA §275:37-e as written in SB 347-FN, would they be forced to shut the doors to the more than 88,000 Granite Staters who rely upon the FQHCs for their primary care, substance use disorder treatment, mental health services, and pediatric care?⁴ Where would their patients turn for health care needs? Where would the citizens of Berlin and Gorham find primary care if their local FQHC shut its doors? Coos County Family Health Services is the only primary care provider in their area and provides much needed oral health services to those communities as well.

Further, SB 347-FN uses *protected health information* as defined by the Health Insurance Portability and Accountability Act when it cross references 45 CFR § 160.103, and in turn, the definition of *covered entity*. A *covered entity* is defined as: “1) a health plan; 2) a health care clearinghouse; or 3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” The Health Insurance Portability and Accountability Act’s Privacy Rule (the HIPAA Privacy Rule) pertains to the disclosure of protected health information. It does not prohibit employers from asking employees health information because the Privacy Rule does not apply to an individual’s disclosures about their own health information. Instead, “the Privacy Rule regulates how and when covered entities and business associates are permitted to use and disclose protected health information.”⁵ The Privacy Rule cited in SB 347-FN does not prohibit an employer from inquiring about an employee’s health status because it does not apply to employment records.

For these reasons and more, Bi-State Primary Care Association and our members respectfully request the Committee recommend SB 347-FN be inexpedient to legislate.

Sincerely,

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¹ 42 USC §254b (2020).

² See Health Center Program Compliance Manual, Ch. 5: Clinical Staffing, 28 (2018)

³ *Id.* at 29.

⁴ S.B. 347-FN, 2022 Leg., 2nd Reg. Sess. (Nh. 2022)

⁵ HIPAA, COVID-19 Vaccination, and the Workplace (September 30, 2021), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html#footnote2_mri86be