Bill as Introduced

HB 482-FN-A-LOCAL – AS INTRODUCED

2011 SESSION

11-0585
10/01

HOUSE BILL *482-FN-A-LOCAL*

AN ACT relative to county reimbursements for nursing home services.

SPONSORS: Rep. Bowers, Sull 3

COMMITTEE: Finance

ANALYSIS

This bill extends the limitation on county reimbursements to the state for nursing home services through June 30, 2014. The bill also extends the prospective repeal of RSA 167:18-a, the county reimbursement provision, until July 1, 2014.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 482-FN-A-LOCAL – AS INTRODUCED

11-0585
10/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eleven

AN ACT relative to county reimbursements for nursing home services.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Nursing Home Care; County Reimbursement of Funds; Limitations on Payments. Amend
2 RSA 167:18-a, II to read as follows:
3 II.(a) The total billings to all counties made pursuant to this section shall not exceed the
4 amounts set forth below for state fiscal years 2009-[~~2012~~] ***2014***:
5 (1) State fiscal year 2009, $103,000,000.
6 (2) State fiscal year 2010, $105,000,000.
7 (3) State fiscal year 2011, $105,000,000.
8 (4) State fiscal year 2012, $105,000,000.
9 ***(5) State fiscal year 2013, $105,000,000.***
10 ***(6) State fiscal year 2014, $105,000,000.***
11 (b) The caps on total billings for fiscal years after fiscal year [~~2012~~] ***2014*** shall be
12 established by the legislature at least on a biennial basis.
13 2 Prospective Repeal Extended; RSA 167:18-a; County Reimbursement of Funds. Amend 2007,
14 263:176, XV to read as follows:
15 XV. Section 26 of this act shall take effect July 1, [~~2013~~] ***2014***.
16 3 Effective Date. This act shall take effect 60 days after its passage.

LBAO
11-0585
01/19/11

HB 482-FN-A-LOCAL - FISCAL NOTE

AN ACT relative to county reimbursements for nursing home services.

FISCAL IMPACT:

The Office of Legislative Budget Assistant is unable to complete a fiscal note for this bill as it is awaiting information from the Department of Health and Human Services. When completed, the fiscal note will be forwarded to the House Clerk's Office.

LBAO
11-0585
Revised 02/04/11

HB 482 FISCAL NOTE

AN ACT relative to county reimbursements for nursing home services.

FISCAL IMPACT:

The Department of Health and Human Services and New Hampshire Association of Counties state this bill will have an indeterminable fiscal impact on state and county revenue and expenditures in FY 2013, FY 2014 and FY 2015. There will be no fiscal impact on local revenue or expenditures.

METHODOLOGY:

The Department of Health and Human Services states this bill extends the current FY 2012 cap on county billings of $105,000,000 through FY 2015, and extends the current FY 2012 county credit of $5,000,000 (which is applied against the cap) through FY 2015. The Department assumes incremental costs above the cap will be borne by the state. The Department states that acuity based reimbursement rates are set twice each year on July 1st and January 1st. The budget neutrality factor is determined after the rate setting process is completed. As a result, the Department is not able to project what the acuity level of residents will be in FY 2013, and cannot determine the exact fiscal impact at this time. There will be no fiscal impact in FY 2011 and FY 2012 since under current law the proposed cap and credit amounts already apply for these years.

The New Hampshire Association of Counties states this bill maintains the cap on the county obligation for long-term care at $105 million for FY 2013 and 2014 causing the county costs for the Medicaid program to remain stable for two more years. The Association stated further that if nursing home reimbursement rates and state budget appropriations decrease the county percentage share of the non-federal Medicaid costs will increase and the state percentage share of non-federal Medicaid costs will decrease.

Committee Minutes

HOUSE FINANCE COMMITTEE
Legislative Office Building, Rooms 210-211
Concord, NH
Thursday, February 10, 2011

HOUSE BILL 482-FN-A-L, AN ACT relative to county reimbursements for nursing home services.

TESTIMONY OF:

Rep. Spec Bowers. . . . . Pg. 1
Betsy Miller. . . . . Pg. 2
Bronwyn Asplund-Walsh . . . . Pg. 7

VICE-CHAIRWOMAN OBER: I'm going to open the hearing on House Bill 482 and recognize the prime sponsor, Representative Bowers.

SPEC BOWERS, State Representative, Sullivan County, District #3: Thank you, Madam Chairman, and I will be very brief. For the record, I am Spec Bowers representing Sullivan, District 3, the Town of Sunapee. My County Administrator informed me that there is currently a collar on -- I mean, each County has to pay for nursing home services. And he informed me that if this collar expires, it will cost our County one and a half million dollars which would require a tax increase of 11 to 12%. So that's the entire motivation for this bill extending the status quo for two more years. And if there are any questions, I'd be happy to take them.

VICE-CHAIRWOMAN OBER: I would note for the Committee we do have a new Fiscal Note that was on the table in front of you for this bill. Are there any questions for the Representative? Seeing none, thank you very much. Pleasure to have you with us this morning. The Chair would call Betsy Miller.

Betsy has written testimony for us?

BETSY MILLER, Executive Director, NH Association of Counties: It's not written testimony. It's a copy of a Supreme Court decision.

VICE-CHAIRWOMAN OBER: Copy of a Supreme Court decision. I stand corrected. Thank you very much.

MS. MILLER: Thank you, Madam Chair, and Members of the Committee. For the record, I'm Betsy Miller, Executive Director of the New Hampshire Association of Counties here in full support of Representative Bowers' bill.

I don't know how many of you know the history, but I'll give you a little history of the cap. The Counties, I'm sure as you know, are responsible for payment for Medicaid long-term care costs. You'll know this and you'll be aware of this when you work on your County budgets because the costs are immense. In 1998 -- the Counties have historically been responsible for long-term care. In 1998, Senate Bill 409, which I'm sure you'll hear about at some point, came into effect and that required the Counties to take on not only the costs of the nursing homes as they historically had been responsible for, but also the costs of Medicaid recipients in home and community-based care. And the concept at that point was, of course, it's less expensive for people to be taken care of and to stay in their homes than it is for them to be in nursing homes.

At that time the Counties agreed to pay 25% of the entire Medicaid cost so half the non-Federal share and the State had the other half of the non-Federal share for Medicaid nursing home recipients and Medicaid recipients eligible for nursing homes but being taken care in home and community based care. At that time it was called HCBC. It's now called Choices for Independence, CFI.

In 2000 -- and at the time it was the first time the Counties agreed to this because, in other words, it would have been an unfunded mandate under the Constitution under 28-a unless the Counties agreed to take on that

responsibility. The Counties did agree in 1998 to take on the responsibility. There was a vote in every County to agree to take on those costs. But at the same time, the agreement was made based on a cap on the obligation. And the first cap was established in 1999. It was -- I have it actually. It was $54 million in 1999.

In 2007, the law was changed again. The Counties had been historically responsible for other costs besides long-term care. Juvenile placement costs, other old-age assistance payments, some other provider payments. There was a proposal to swap -- I call it a swap -- the Counties would take on the entire long-term care costs and the State would absorb the juvenile costs and the other costs. And at the time we argued that's not a swap because as we know, long-term care costs are increasing at a much more dramatic rate than costs for juvenile services and the other services and you, I believe, have some documentation to that effect or Division III has, showing the long-term care costs have increased over the last ten years and the juvenile placement costs have decreased.

So in 2007, without agreement of the Counties, the costs were swapped and the Counties were required to take on the statute reads 50% of the cost. So it would be the entire non-Federal share but up to a cap. And there was a cap enacted again, every year since 1999, but it grew dramatically in 2009 to $103 million. And presumably that included the payments the Counties had been making for the juvenile placement costs to around $30 million. So add the $70 million cap in 2006, 30 million of the cost that the State would absorb, so now the Counties were around the hundred million where they sort of are now. The cap has increased. 2009 it was 103 million. 2010 it was established at 105 million and it's been maintained that way ever since. And I believe part of the reason it was maintained at 105 over the last few State Fiscal Years is because in 2007 and 2008 the Association representing all ten Counties actually sued the State of New Hampshire alleging that the requirement of the Counties to take on

the increased responsibility for a larger portion of the costs of long-term care was an unfunded mandate in violation of the Constitution. You have the case. That's the decision of the court which was released in 2009 which stated no, it's not an unfunded mandate because you have -- still have the protection of the cap. So okay. We lost the case, but the golden lining was that the court said you still have the protection of the cap. If that stays in place then and there isn't any increased required County spending, then you're okay and there's no unfunded mandate, no constitutional violation.

So we are here today to argue to maintain the cap in its place, not increase any County spending. Of course, as you know, County spending increases anyway because long-term care costs that are not reimbursed by Medicaid are increasing at a rapid rate so there are deficits in the County nursing homes, but at least in terms of these Medicaid costs for nursing home reimbursements and the rest of the long-term care continuum. We fully support maintaining the $105 million cap which will protect the property taxpayer from any increased costs in this particular area.

VICE-CHAIRWOMAN OBER: Thank you for your testimony. Questions from the Committee? Represent Vaillancourt, followed by Representative McGuire.

REP. MCGUIRE: Thank you.

REP. VAILLANCOURT: Thank you, Madam Chair. We heard from Representative Bowers about his County which is, I guess, a very small county, Sullivan. Can you tell us what the impact of the State entirely would be or on the ten Counties combined if this were not to be capped at 105 million?

MS. MILLER: If there wasn't?

REP. VAILLANCOURT: If the impact was removed, what

would the impact to the Counties be?

MS. MILLER: In the future I can't tell you because I don't know what the appropriation will be yet next year. The total -- for instance, the total -- the total long-term care costs in the 2010 and 2011 budgets were $236,792,000 in 2010. $238,803,000 in 2011. I don't know what you will all appropriate for the next few years, so.

REP. VAILLANCOURT: So if I might follow-up. So do I subtract the 238, subtract 105 from that, get the amount --

MS. MILLER: That's total funds. So there is a Federal share in there. There's a Federal match in there. That's a total fund amount. So it's County 105, then there's some state and then there's 50% that's a Federal match to the actual billing. This is the appropriation so there might be some difference there.

REP. VAILLANCOURT: If I could just get the number. If this didn't happen how much the Counties would be -- have to bear?

VICE-CHAIRWOMAN OBER: Do you have that number?

MS. MILLER: I can try to figure out that number.

VICE-CHAIRWOMAN OBER: Would you get it back to the Committee?

MS. MILLER: Yes.

VICE-CHAIRWOMAN OBER: Thank you so much. Representative McGuire and then Representative Worsman.

REP. MCGUIRE: Thank you very much, Madam Chair, and thank you, Mrs. Miller. Is it appropriate that this cap be this fixed dollar amount and not somehow change over time due to inflation, change in population size and other kind of factors like that?

MS. MILLER: Well, I mean, I think we have argued in the past that it's a proportional. It's a proportional share program. So the Counties and the State have certain proportional shares. Right now the Counties are paying about 85 or 86% of the non-Federal portion. So I suppose you can argue that it should be the same percentage ongoing. However, the numbers in the lines, for instance, the nursing home line has been decreasing over time quite dramatically. And the other lines, the home support, home health, and mid-level care lines have been increasing dramatically. And Counties have no control over that. Those are costs that, you know, obviously you can control your nursing home cost to a certain degree, but we have no control over the rate setting for nursing homes or any of the rate setting for the rest of the continuum of care. And there have been dramatic increases over time and I can work up those numbers and show you those numbers. But over the last few years, there have been dramatic increases in the non-nursing home lines.

REP. MCGUIRE: Thank you.

MS. MILLER: You know, the Counties didn't agree to those kinds of exponential increases and it's a direct hit on property tax. Direct hit. Unlike other cost shifts, this is a direct hit.

VICE-CHAIRWOMAN OBER: Representative.

REP. WORSMAN: Thank you, Madam Chair. And thank you for coming before us. Forgive my ignorance, but I am one of the new representatives. Is this the cap that you're speaking was this in House Bill 2 and is it -- when is it due to expire?

MS. MILLER: It expires at the end of Fiscal Year '12. And it is -- well, it's in the law. In previous years it's been included in various pieces of legislation. It's most prominently been in House Bill 2.

REP. WORSMAN: Follow-up.

VICE-CHAIRWOMAN OBER: Follow-up.

REP. WORSMAN: As a Representative or delegate for our County, we've budgeted an increase of a million four in our County budget for 2011. If this -

MS. MILLER: Calendar, yes.

REP. WORSMAN: If this doesn't expire until 2012 what am I missing?

MS. MILLER: Well, your county commissioners probably presumed, and correct me, so the $105 million and whatever portion is attributable to Carroll County.

REP. WORSMAN: No, Belknap.

MS. MILLER: Whatever is attributable to your county, they can figure that out the percentage of the cap that you will have to pay up to. But there are other costs that are increasing that aren't reimbursable. And you know, these are only Medicaid reimbursements, allowable Medicaid reimbursements.

REP. WORSMAN: Thank you.

VICE-CHAIRWOMAN OBER: The Chair would call the last speaker from Merrimack County, County Commissioner -- I believe the last name is Walsh. Sorry, a little difficulty reading that. If I mispronounce --

BRONWYN ASPLUND-WALSH, Chair, Merrimack County Commissioners: No, it's understandable. Many people have problems with my name.

VICE-CHAIRWOMAN OBER: I called Representative Rosenwald by the wrong name. I won't be at all offended.

MS. ASPLUND-WALSH: I'm Merrimack County Commissioner Bronwyn Asplund-Walsh. I'm Chair of the Merrimack County Commissioners. Very pleased to be here today and in total support of this bill.

As most of you know and you probably know, Representative, we are going through our budget negotiations right now at the County level. This is an extremely important bill. The only thing that we are asking that we maintain the status quo. Costs to County we're asking that they remain stable for the next two years. If -- if this bill is not passed, nursing home reimbursement rates decrease, County percent share of non-Federal Medicaid costs could increase and you know this is a direct hit on the taxpayer as Betsy Miller just stated. So this is a very important bill. And I am in total support of the bill. And as Chair of the County Commissioners for Merrimack County, I'm also speaking for Peter Spaulding and Liz Blanchard.

VICE-CHAIRWOMAN OBER: Thank you. Questions? Representative Kurk.

REP. KURK: Thank you.

VICE-CHAIRWOMAN OBER: I was surprised you were quiet so long, actually. 'Cause I know this is a topic near and dear to your heart.

REP. KURK: Welcome back.

MS. ASPLUND-WALSH: Thank you. Thank you very much.

REP. KURK: Let's -- in order to understand how this works, let's project this out 10, 20, 30, 40, 50 years. If each two-year period you folks come back and say keep the cap at 105 because you don't want it downshift to the Counties, and if costs increase as they do, at some point the cap will be meaningless. That is to say, the State will be picking up the entire cost of elderly care. And so isn't

there some way that for purpose of House Bill 2 which put this into effect, plus 409, could be incorporated along the lines that Representative McGuire was suggesting, if this number were inflated each year by medical inflation, as an example, we -- the deal -- we understand that when the deal was made in 2008 to swap certain costs for other costs Miss Miller alluded to, the Counties were getting the raw end of the stick because they were getting the faster growing costs and the State was assuming the responsibility for the more slowly-growing costs.

MS. ASPLUND-WALSH: Definitely, definitely.

REP. KURK: But the idea wasn't that costs would never increase, it was the differential was the problem. So shouldn't this cap by some measure increase over time and isn't it unfair to everybody if it stays at 205 and doesn't go up?

MS. ASPLUND-WALSH: Well, that is a hypothetical. As Betsy stated so appropriately in her presentation, it's an unfunded mandate. And as you have before you the Court's decision, when we are looking at this Court's decision which plays, I think, an integral part here with what we're here presenting you today, as long as, you know, the Counties, 'cause Counties didn't agree on this, as long as we still have the protection of the cap, then there's no unfunded mandate. So, you know, you've got Court's decision and I think I leave it at that.

REP. KURK: Thank you. Thank you, Madam Chairman.

VICE-CHAIRWOMAN OBER: Any other questions?

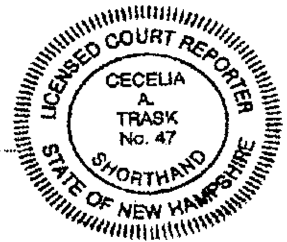
MS. ASPLUND-WALSH: Thank you.

VICE-CHAIRWOMAN OBER: If not, then I'm going to close the hearing on House Bill 482. We are recessing the hearing on House Bill 618.

(Hearing concluded at 11:58 p.m.)

CERTIFICATION

I, Cecelia A. Trask, a Licensed Court Reporter-Shorthand, do hereby certify that the foregoing transcript is a true and accurate transcript from my shorthand notes taken on said date to the best of my ability, skill, knowledge and judgment.



Cecelia A. Trask, LSR, RMR, CRR
State of New Hampshire
License No. 47

HOUSE COMMITTEE ON FINANCE

DIVISION III WORK SESSION ON HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE: February 25, 2011

LOB ROOM: 209 Time Work Session Called to Order: 1:05

Time Adjourned: 2:40

(please circle if present)

Committee Members: Reps. Kurk, Rodeschin, Emerton, R. Barry, Cebrowski, Keane, Nordgren, Rosenwald and Simard.

Bill Sponsors: Rep. Bowers, Sull 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Kurk gave some background. State used to split costs with counties of non-federal share. In 2008 we split differently. State took juvenile; counties took long term care, but State added a cap, so counties wouldn't be hit with huge increase. Suggests we look at historical growth rate and use that increase as a tax cap.

* **Ms. Betsy Miller**, representing NH Association of Counties, gave out a historical cap chart.

Associate Commissioner John Wallace, DHHS, gave history. Counties always had to pay for long term care. This changed somewhat with Medicaid (65) plus Social Security Income (SSI) (73). Towns had to pay for children until the 80's when State and counties picked that up. 1998 (SB 409) went back to 50/50 split of both nursing home and Home and Community Based Care (HCBC) for non-federal share. Counties sued in '08 when we gave them all of non-federal share but lost because of no harm with cap. Old Age Assistance/Aid to the Permanently and Totally Disabled (OAA/APTD) removed from county responsibility. He believes counties understood that cap would rise. They disagree. Governor's budget proposes to take 25% of bed tax = ($8.5 million annual) loss to counties.

Rep. Kurk: Why isn't it reasonable for the counties to absorb a proportional share of cost growth?

Rep. Rosenwald suggested maybe counties should have responsibility for eligibility. Since they have to pay for long term care.

Ms. Miller thinks counties may be interested.

Assoc. Comm. Wallace says reaction has historically been mixed.

Mr. John Poirier, President/CEO, NH Health Care Association (NHHCA): Nursing home census is +/- 91% (6900 total per day). But Medicaid bed average days are up (+200). Starting to come down.

Mid-level growing but still low (380). HCBC is +/- 2500. HCBC costs/cases are up (personal care services).

Mr. Brendan Perry says average HCBC costs are about $13,000/year. But some statistics show $25,000.

Mr. Poirier: We should also include transportation, meals & wheels and higher income allowances.

Rep. Kurk asked again for pros and cons of raising cap?

Ms. Miller: Counties didn't agree to 2007 change. Counties would not agree to higher cap or its attendant cost.

Assoc. Comm. Wallace thinks we'll need more beds. CON board wants more beds.

Rep. Barry suggests we should deliver the right care at the right price.

Rep. Rosenwald suggested that would be a HCBC entitlement.

Rep. Kurk said this would lead to woodwork.

Discussion that change in visiting nurse services reimbursement has not necessarily lowered cost. **Assoc. Comm. Wallace** will re-look.

Rep. Cebrowski: Why do we have to decide on FY 13 and 14 now? Why not study it. Statute requires that we do it. We could ITL HB 482 and take this up in HB 2. We probably have more flexibility if we ITL HB 482 and take it up in HB 2.

Respectfully submitted

Rep. Cindy Rosenwald
Acting Clerk, Division III

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

HOUSE COMMITTEE ON FINANCE

DIVISION III WORK SESSION ON HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE: 2/25

LOB ROOM: 209 Time Work Session Called to Order: 1:05

Time Adjourned: 2:40

(please circle if present)

Committee Members: Reps. Kurk, Rodeschin, Emerton, R. Barry Cebrowski, Keane, Nordgren, Rosenwald and Simard.

Bill Sponsors: Rep. Bowers, Sull 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

HB 482 Work session

2/25 Kurk Keane Cebrowski Barry Rosenwo[illegible]

Rep Kurk gave background
State used to split costs w/ counties of non-federal share. In 2008 we split differently. State took juvenile; counties took long term care, but State added a cap, so counties wouldn't be hit with huge increase.
Suggests we look at historical growth rate and use that increase at a tax cap.

Betsy Miller gave out a historical cap chart.

John Wallace gave history. Counties always had to pay for long term care. This changed somewhat w/ Medicaid (65) + SSI (73). Towns had to pay for children until the 80's when State + counties picked that up. 198 (SB409) went back to 50/50 split of both nursing home + HCBC for non-federal share. Counties sued in '08 when we gave them all of non-fed. share but lost because of no harm w/ cap. OAA/APTD removed from county responsibility. He believes counties understood that cap would rise. They disagree. Gov. budget proposes to take 25% of bed tax = ($8.5MM annual) loss to counties.

Kurk - why isn't it reasonable for the counties to absorb a proportional share of cost growth.

Rosenwald suggested maybe counties should have responsibility for eligib. since they have to pay for long term care

Betsy Miller thinks counties may be interested, John Wallace says reaction has historically been mixed.

John Poirier (NHHCA). Nursing home census is ± 91% (6900 total per day). But Medicaid bed average days are up (+200). Starting to come down. Mid level growing but still low. (380). HCBC is ± 2500. HCBC costs/case are up (personal care services).

Brendan Perry says avg. HCBC costs are about $13,000/yr. But some statistics show $25,000.

John Poirier - we should also include transport. + meals + wheels + higher income allowances.

Rep. Kurk asked again for pros + cons of raising cap?

Betsy Miller - counties didn't agree to 2007 change. Counties would not agree to higher cap or its attendent cost.

John Wallace thinks we'll need more beds. CON board wants more beds.

Rep. Barry suggests we should deliver the

right care at the right price - Rep Rosenwald suggested that would be a HCBC entitlement. Rep. Kurk said this would lead to woodwork.

Discussion that change in visiting nurse services reimbursement has not necessarily lowered cost. John Wallace will re-look.

John Cebrowski - why do we have to decide on FY 13 + 14 now? why not study it. Statute requires that we do it. ~~unless we di~~ We could ITL HB 482 & take this up in HB2.

We probably have more flexibility if we ITL HB 482 & take it up in HB2.

New Hampshire Association of Counties

The caps on county long-term care Medicaid obligation each state fiscal year since 1999

1999 - $ 54,000,000

2000 - 57,000,000

2001 - 60,000,000

2002 - 63,000,000

2003 - 66,000,000

HB 663 (2003):

2004 - $ 60,000,000

2005 - 64,000,000

HB 2 (2005):

2006 - $ 68,000,000

2007 - 70,000,000

HB 2 (2007):

2008 - $ 71,500,000

2009 - 103,000,000

2010 - 105,000,000

HB 2 (2009)

2011 - $ 105,000,000

2012 - 105,000,000

RSA 167:18-a,II(b) – The caps on total billings for fiscal years after fiscal year 2012 shall be established by the legislature at least on a biennial basis.

2/25 From Betsy Miller

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 482-FN-A-L Date 2-10-11

Committee FINANCE

**** Please Print All Information ****

Name	Address	Phone	Representing	Pro	Con
Commissioner Bronwyn Asplund-Walsh		(603) 934-3375	Merrimack County	X	

Hearing Minutes

HOUSE COMMITTEE ON FINANCE

PUBLIC HEARING ON HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE: February 10, 2011

LOB ROOM: 210-211 Time Public Hearing Called to Order: 11:40

Time Adjourned: 11:55

(please circle if present)

Committee Members: Reps. Weyler, L. Ober, Kurk, Emerton, Rodeschin, Belvin, Elliott, Vaillancourt, Allen, Marshall Quandt, R. Barry, Cebrowski, Wm. Smith, Sova, Umberger, Keane, Simard, Twombly, Worsman, Foose, Nordgren, Baroody, Benn, Lerandeau and Rosenwald

Bill Sponsors: Rep. Bowers, Sull 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Bowers introduced his bill and spoke in support.

* **Ms. Betsy Miller**, representing NH Association of Counties: Agreement to fund as long as a cap was there. 50% of Medicaid – long term care. Decision of Court; opinion issued January 16, 2009 provided.

Want to continue $105 million cap.

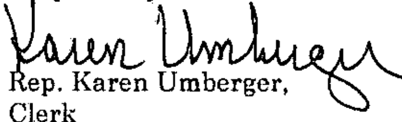
Will provide dollars for state obligation. Can work up numbers for home care and nursing home.

Commissioner Bronwyn Asplund Walsh, Merrimack County, supports.

Rep. Kurk: Is there a way for the county to absorb some of the future increases in costs.

Commissioner Walsh: The cap is the cap.

Respectfully submitted,



Rep. Karen Umberger,
Clerk

HOUSE COMMITTEE ON FINANCE

PUBLIC HEARING ON HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE: February 10, 2011

LOB ROOM: 210-211 Time Public Hearing Called to Order: 11:40

Time Adjourned: 11:55

(please circle if present)

Committee Members: Reps. Weyler, L. Ober, Kurk, Emerton, Rodeschin, Belvin, ~~Elliott~~, Vaillancourt, Allen, Marshall, Quandt, R. Barry, Cebrowski, Wm. Smith, Sova, Umberger, Keane, Simard, Twombly, Worsman, Foose, Nordgren, Baroody, Benn, Lerandeau and Rosenwald.

Bill Sponsors: Rep. Bowers, Sull 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

HB 482

Rep Bowers - Introduced bill

Betsy Miller - NH Assoc. of Counties

agreement to fund as long a cap was there
50% of medicade - long term care
Decision of Court - Opinion Jan 16, 2009
provided

Want to continue $ 105 million cap

→ Will provide dollars for state obligation
can work up numbers for home care +
nursing home

County Commissioner Chairman Bronwyn Walsh
supports

Rep Kurk - is there a way for the County to absorb
some of the future increases in costs

Mrs. Walsh - the cap is the cap

Testimony

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2008-390

NEW HAMPSHIRE ASSOCIATION OF COUNTIES & a.

v.

STATE OF NEW HAMPSHIRE & a.

Argued: November 12, 2008
Opinion Issued: January 16, 2009

Devine, Millimet & Branch, P.A., of Concord (Robert E. Dunn, Jr. on the brief and orally), for the plaintiffs.

Ransmeier & Spellman, P.C., of Concord (Andrew B. Livernois on the brief and orally), for the defendants.

New Hampshire Municipal Association, of Concord (Cordell A. Johnston on the joint brief), as amicus curiae.

New Hampshire School Boards Association, of Concord (Theodore E. Comstock on the joint brief), as amicus curiae.

GALWAY, J. The plaintiffs, the New Hampshire Association of Counties and Belknap, Carroll, Cheshire, Coos, Grafton, Hillsborough, Merrimack, Rockingham, Strafford and Sullivan Counties, individually, appeal from the

Trial Court's (Conboy, J.) order granting summary judgment in favor of the defendants, the State of New Hampshire and the Commissioner of the New Hampshire Department of Health and Human Services (collectively, the State). We affirm.

The record supports the following. In 1998, the legislature passed what is referred to by the parties as SB 409, which was aimed at reforming the system for delivering and paying for long-term care for the indigent elderly and disabled. See Laws 1998, ch. 388. Prior to the enactment of SB 409, the counties had been responsible for paying for certain portions of Old Age Assistance (OAA) and Aid to the Permanently and Totally Disabled (APTD) for those in nursing homes, as well as for making a Local Medical Assistance Contribution (LMAC) relating to the same people. See RSA 167:18-a, :18-b, :18-f (1994). Under SB 409, in addition to these and other required payments, the counties became liable for paying a share of the cost of medical care for those persons eligible for nursing home care, but who receive care under a Home and Community Based Care (HCBC) waiver. See Laws 1998, 388:8. SB 409 contained a "sunset" provision stating that RSA 167:18-b and RSA 167:18-f, which defined the OAA, APTD and LMAC payments, would be repealed on June 30, 2003. Laws 1998, 388:16, I, II, :17, II. In order for the relevant portions of SB 409 to take effect, SB 409 expressly provided that county approval was required. Laws 1998, 388:10. The counties approved SB 409. Since that time, the State has extended the sunset provision, most recently from 2007 to 2013. See Laws 2007, 263:17, :25, :26. There is no dispute about the State having delayed the sunset from 2003 to 2007.

In 2005, the legislature passed Laws 2005, chapter 177, which increased the amount of the counties' LMAC payments. Laws 2005, 177:13. In 2007, the legislature passed Laws 2007, chapter 263 (chapter 263), which realigned and consolidated the statutory scheme governing the relationship between the counties and the State as regards financial support for the indigent elderly and disabled. See Laws 2007, ch. 263. As a result of the passage of chapter 263, RSA 167:18-b was repealed, but nearly all of its provisions were incorporated into RSA 167:18-a. See RSA 167:18-a (Supp. 2008). As to the financial impact of the changes under chapter 263, for fiscal year 2008, little changed between the counties and the State. Laws 2007, 263:17. For fiscal years 2009 through 2013, however, the county share for nursing home and HCBC care for OAA and APTD recipients was raised from fifty to one hundred percent of the share not covered by federal Medicaid payments. Id. For fiscal years 2009 and 2010, chapter 263 contains a "hold harmless" provision ensuring that the counties will not be required to pay more than they paid under the prior statutory funding scheme established by RSA 167:18-b prior to its repeal. Id. For fiscal years 2011 through 2013, there is no "hold harmless" provision, but the statute provides that caps on billings to the counties "shall be established" by

the legislature for those years. Id. Chapter 263 also repealed RSA 167:18-f effective July 1, 2008. Laws 2007, 263:24.

In August 2007, the plaintiffs brought suit in superior court seeking an injunction barring the enforcement of some of the above-referenced statutes, and a declaratory judgment that the statutes violated Part I, Article 28-a of the New Hampshire Constitution. The trial court denied the injunction and, on cross-motions for summary judgment, ruled in favor of the State, concluding that the statutes did not violate the constitution. The plaintiffs now appeal, arguing that the extensions of the sunset provision contained in SB 409, the increase in the counties' share of nursing home and HCBC care costs pursuant to chapter 263, and the 2005 increase in their LMAC obligations, all violate Article 28-a.

"In reviewing the trial court's summary judgment rulings, we consider the evidence in the light most favorable to each party in its capacity as the non-moving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." N.H. Assoc. of Counties v. Comm'r., N.H. Dep't of Health & Human Servs., 156 N.H. 10, 14 (2007). The sole issue on appeal is whether the challenged legislative enactments violate Part I, Article 28-a of the New Hampshire Constitution. We review the constitutionality of the statutes de novo. See Baines v. N.H. Senate President, 152 N.H. 124, 133 (2005).

In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds. N. Country Envtl. Servs. v. State of N.H., 157 N.H. 15, 18 (2008). In other words, we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. Id. When we are required to interpret a provision of the constitution, we view the language used in light of the circumstances surrounding its formulation. N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r, 133 N.H. 17, 21 (1990). We give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast. Id.

Adopted in 1984, Article 28-a provides:

> The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

N.H. CONST. pt. I, art. 28-a. We have stated that this amendment "was designed to provide a safety net to save cities and towns from the burden of coping with new financial responsibilities, not of their own creation, and to permit them a stronger grasp of their fiscal affairs." Flynn, 133 N.H. at 27. To that end, the amendment "was designed to prohibit the State from placing additional obligations on local government without either obtaining their consent or providing the necessary funding." Id. at 22; see also Opinion of the Justices (Voting Age in Primaries), 157 N.H. 265, 273 (2008). The "constitutionality of a particular State mandate under article 28-a does not hinge solely on whether or not it may be categorized as a new, expanded or modified program, but also on whether or not the mandate imposes upon local government an additional fiscal obligation." Flynn, 133 N.H. at 23. "Increased expenditures alone are not dispositive of whether a program or responsibility has been expanded." Town of Nelson v. N.H. Dep't of Transportation, 146 N.H. 75, 78 (2001). "The primary consideration is the net effect of the program." Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543, 545 (1992). In the end, the invocation of this provision "requires both a mandate of responsibility to the political subdivision and a requirement of additional local political subdivision expenditures by virtue of the mandate." Nelson, 146 N.H. at 78.

In reviewing the net effect of the enactments at issue, we conclude that no new, expanded or modified program or responsibility has been enacted, or, to the extent it has, there is no requirement of additional local expenditures and thus no violation of Article 28-a. Prior to the adoption of Article 28-a in 1984, the counties were required to pay for fifty percent of the share of providing the relevant programs that was not paid by the federal government through the Medicaid program. See RSA 167:18, :18-a, :18-b (1977). Though the percentages varied at times, see, e.g., RSA 167:18-b (1994), the obligation to pay fifty percent was continued in 1998 with the passage of SB 409, see Laws 1998, 388:8, and again continued through the passage of chapter 263. See Laws 2007, 263:17. Thus, at the dates most significant to the legislation at issue, the net effect has been merely to continue an obligation in existence prior to the adoption of Article 28-a.

The counties contend, however, that Laws 2007, 263:25, which extended the sunset provisions contained in SB 409, violates Article 28-a because it mandated a new obligation for county payments after the obligation was to cease. According to the counties, the sunset provision was intended to end their obligation to pay for these programs in 2007, and thus the extension created a new obligation to make payments beyond 2007. Alternatively, the counties contend that if the payment requirement did not create a new obligation, it is at least an expansion or modification of the prior payment obligation. The State counters that this is a long-standing obligation which is not defined by reference to a particular date. The State also contends there

was no intent to end the obligation and that a change in the repeal date does not create a new, or alter the old, obligation.

While the mere existence of a historical obligation does not automatically render the counties liable for continued payments, we note that the counties have had some obligation to pay for these services for more than 200 years. See, e.g., Act of January 22, 1790 reprinted in 5 Laws of New Hampshire 502 (1916). It might, therefore, seem unreasonable to interpret the sunset provision as having been intended to terminate such a long-standing obligation. Nevertheless, the counties contend that with the passage of the sunset provision in SB 409, their obligation was to terminate. We reject this argument for two reasons. First, as a technical matter, SB 409 provided that RSA 167:18-b would be repealed on a particular date, and, in fact, RSA 167:18-b has been repealed. See Laws 2007, 263:24. Thus, the statute's repeal provision has been given effect, and shifting of the obligation to RSA 167:18-a does not somehow undo the sunset.

Second, nothing in the language of SB 409 indicates that the repeal of RSA 167:18-b would end the counties' financial obligation. Essentially, the effect of the sunset provision, if it had not been extended, would have been to reset the amount of the obligation, not eliminate it. The counties contend that "under the law as it stood prior to the enactment of Chapter 263, there was no statute which required the counties to pay these costs." However, RSA 166:1-a (2002), which is unchallenged by the counties, states that the counties will be required to reimburse the State for these services at an amount determined by the legislature. RSA 167:18-b then set the amount and timing of the payments. The repeal of RSA 167:18-b thus would not end the obligation. Because the extension of the repeal date is merely a continuation of an obligation predating the enactment of Article 28-a, chapter 263's extension of the sunset does not violate Article 28-a. See Town of Nelson, 146 N.H. at 79.

The counties argue that this logic cannot be used to defend the HCBC payments because such payments did not exist until the passage of SB 409 in 1998, and thus do not predate Article 28-a. HCBC payments, however, are made for those eligible for nursing home care but who do not receive care in an actual nursing home. Laws 1998, 388:8. The counties do not dispute that they have had an existing obligation to pay for those eligible for nursing home care. The HCBC payments are thus little more than a redirection of payments already owed.

The counties also contend that because SB 409 required their approval, after they approved it the State was bound by its repeal language and could not unilaterally alter the obligation. The legislature, however, has authority to amend any statute, consistent with the constitution. The counties' agreement, while a statutory precondition for SB 409 to become fully effective, did not

prevent the legislature from later amending the statutes to continue the counties' pre-existing obligation past a time the counties may have believed it would end. In other words, the counties' belief did not dictate State action.

The counties next argue that the State violated Article 28-a when, pursuant to Laws 2007, 263:17, it expanded the counties' payment obligations of OAA, APTD and HCBC from fifty to one hundred percent of the non-federal share through at least 2013. We conclude that Article 28-a has not been violated because even presuming that the change in the county obligation from fifty to one hundred percent of the non-federal share is a new, expanded or modified obligation, we agree with the State that the alteration does not impose a greater cost upon the counties. As stated previously, the "constitutionality of a particular State mandate under article 28-a does not hinge solely on whether or not it may be categorized as a new, expanded or modified program, but also on whether or not the mandate imposes upon local government an additional fiscal obligation." Flynn, 133 N.H. at 23. Under chapter 263, for fiscal years 2009 and 2010, "no county shall be liable for total billings . . . in an amount which would be greater than the amount of liability projected for that fiscal year using the methodology for determining county payments in former RSA 167:18-b prior to its repeal." Laws 2007, 263:17. Thus, regardless of the obligation, for those fiscal years there is no additional fiscal requirement upon the counties and no violation of Article 28-a. Indeed, the counties appear to concede as much.

As regards fiscal years 2011 through 2013, the remaining operative years of chapter 263, the law states that caps on total billings shall be established by the legislature. Laws 2007, 263:17. Thus, we assume that pursuant to chapter 263, the legislature intends to establish caps on county spending, at a later date. We agree with the trial court that in light of this provision, the fiscal obligation of the counties in 2011 through 2013 is speculative. Because there must be a clear and substantial conflict with the constitution to declare a legislative act unconstitutional, N. Country Envtl. Servs., 157 N.H. at 18, we cannot say at this time that chapter 263 violates Article 28-a.

The counties argue that, "The State provided no evidence below to dispute the county affidavits which said that, as Chapter 263 stands, the new law will cost the counties more money in [fiscal years] 2011-2013 than would have been the case had Chapter 263 not been enacted." Therefore, they argue the trial court "should have effectuated the purpose of the declaratory judgment statute and afforded the parties relief from uncertainty and insecurity created by doubt as to rights, status or legal relations."

Although the affidavits submitted by the counties state that the costs of the items for which the counties must pay will increase, they do not account for the caps called for by the statute which may eliminate any potential

constitutional violation. Until it is known whether there will, in fact, be an increase in required county spending, a judgment as to the statute's constitutionality is unwarranted. While the declaratory judgment statute, RSA 491:22 (1997), is meant to relieve parties of uncertainty about their rights, see Werme's Case, 150 N.H. 351, 353 (2003), we conclude that the uncertainty surrounding potential cost increases does not create a clear and substantial conflict with the constitution. Accordingly, the issue is not ripe for review.

Lastly, the counties contend that Laws 2005, chapter 177, which increased the counties' obligations under the LMAC, violates Article 28-a. We conclude that the issue is moot. The LMAC was required by RSA 167:18-f, which was repealed effective July 1, 2008. See Laws 2007, 263:24. It does not appear to have been reenacted in any other form. Generally a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead. Londonderry Sch. Dist. v. State, 157 N.H. 734, 736 (2008). A challenge seeking only prospective or declaratory relief is generally mooted where intervening legislative activity renders the prior law inapplicable. Id. Because the law challenged by the counties has been repealed and not reenacted elsewhere, and because the counties sought only declaratory relief relative to that law, we conclude that this issue is moot.

Affirmed.

BRODERICK, C.J., and DALIANIS and HICKS, JJ., concurred; DUGGAN, J., concurred specially in part and dissented in part.

DUGGAN, J., concurring specially in part and dissenting in part. I agree with the majority that the increase in the county share for nursing home and HCBC care for OAA and APTD recipients does not violate Article 28-a. I also agree with the majority that the issue as to the 2005 increase in LMAC payments is moot. I write separately, however, because I would have reached this conclusion applying a different analysis. I also write separately because I disagree with the majority's conclusion that the sunset provision does not violate Article 28-a.

Part I, Article 28-a, adopted in 1984, provides:

> The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

"When our inquiry requires us to interpret a provision of the constitution, we view the language used in light of the circumstances surrounding its formulation." N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r, 133 N.H. 17, 21 (1990). "We will look to its purpose and intent, bearing in mind that we will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." Id. (quotation omitted). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself . . . ." Lake County v. Rollins, 130 U.S. 662, 670 (1889). "To get at the thought or meaning expressed in . . . a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." Id. When the words convey a definite meaning, we will not add language to the instrument. Flynn, 133 N.H. at 21. The United States Supreme Court explained the reasoning for this in Lake County:

> [W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements.

Lake County, 130 U.S. at 670-71 (citations omitted).

Based upon our prior cases interpreting Article 28-a, any violation of this constitutional provision requires both (1) a new, expanded or modified program or responsibility, and (2) increased expenditures by the local political subdivision. Town of Nelson v. N.H. Dep't of Transportation, 146 N.H. 75, 78 (2001); Flynn, 133 N.H. at 22.

In Flynn, we interpreted the first part of this test. Flynn, 133 N.H. at 22. At issue in Flynn was a statutory provision, RSA 281-A:17, II (Supp. 1989), that created a prima facie presumption in workers' compensation cases that a fire fighter suffering from cancer incurred the disease while employed. Flynn, 133 N.H. at 23. The presumption was a modification of the workers' compensation scheme enacted in 1947. Id. at 19. The trial court ruled that the presumption violated Article 28-a. On appeal, the department of labor

argued that RSA 281-A:17, II "does not mandate or assign a new, expanded or modified program or responsibility . . . because it merely requires a procedural change in establishing eligibility for benefits under pre-existing workers' compensation laws." Id. at 20-21. We rejected this argument and held that the new presumption violated Article 28-a by imposing a new fiscal obligation on local government. Id. at 24. Relying upon the reasoning of Lake County, we stated: "A plain reading of the language contained within article 28-a fails to disclose any indication that the amendment was designed to exclude all regulatory acts conducted under pre-existing authority." Id. at 25.

In our analysis of Article 28-a, we focused on the term "responsibility" because this term "is susceptible to a more expansive reading than the term 'program.'" Id. at 22. We looked to the Journal of the Constitutional Convention in support of our conclusion that, based upon the definition of "responsibility," "the amendment was designed to prohibit the State from placing additional obligations on local government without either obtaining their consent or providing the necessary funding." Id. (emphasis added). We quoted Delegate Pepino: "If [Article 28-a] were adopted, this would prevent the State Legislature from mandating new programs, services, or expenses to local cities and towns without also providing the necessary funding . . . ." Id. (emphasis in original). We stated, "[I]t is logical that the delegates understood the term 'responsibility' to act as a sweeping prohibition against all State mandates that, for one reason or another, may not be categorized as a program." Id. at 23 (emphasis added). Thus, we held that "the constitutionality of a particular State mandate under article 28-a does not hinge solely on whether or not it may be categorized as a new, expanded or modified program, but also on whether or not the mandate imposes upon local government an additional fiscal obligation." Id.

Based upon our holding in Flynn, the language "any new, expanded or modified program or responsibility" in Article 28-a includes all additional obligations on local government. Article 28-a is a broad and "sweeping prohibition." Flynn, 133 N.H. at 23. Indeed, our analysis in Flynn addressed only a "new" responsibility on the local government created by a prima facie burden in a statute. Flynn did not address the scope of a "modified" or "expanded" responsibility. Thus, the "sweeping prohibition" created by the term "responsibility" within Article 28-a is even broader in scope than we addressed in Flynn, and includes not only new responsibilities but also modified and expanded responsibilities. Thus, Article 28-a, by its plain language, prohibits creating any additional obligations to already existing responsibilities.

As to the second part of the test, the mandate must require increased expenditures by the local governing body. "Invoking this constitutional prohibition requires both a mandate of responsibility to the political

subdivision and a requirement of additional local political subdivision expenditures by virtue of the mandate." Town of Nelson, 146 N.H. at 78 (quotation omitted).

Article 28-a provides for two express exceptions: (1) "programs or responsibilities [that] are fully funded by the state"; and (2) those programs or responsibilities that are "approved for funding by a vote of the local legislative body of the political subdivision." Our case law provides for a third exception where the program or responsibility is a pre-existing obligation.

Pre-existing obligations are those the local governments funded prior to adoption of Article 28-a, and are therefore required to continue funding. Our sparse case law since Flynn has developed the pre-existing obligation exception. The facts of those cases, however, differ from the facts currently before us.

In Nashua School District v. State, 140 N.H. 457 (1995), we determined that, where the local government was responsible for an entire program prior to enactment of Article 28-a, it was a pre-existing obligation. The case concerned the pre-existing obligation on local districts for special education costs. Nashua School Dist., 140 N.H. at 458. At issue was a 1985 amendment to RSA 193:27, I, which defined the term "home for children" to include "any residential school." Id. at 459. A "residential school" is a private school. Id. When a child is placed in a "home for children," the sending district (where the child resides) reimburses the receiving district (the school district where the child is placed). Id. The amendment "ha[d] the effect of making the sending district liable for all special education costs of a child placed in a 'residential school.'" Id. at 460. We noted that the State did not assume any part of the cost of a court-ordered placement in a residential school until 1986 and affirmed the trial court's conclusion that the 1985 amendment did not violate Article 28-a because it was not a new, expanded, or modified program or responsibility. Id. at 461. As we later explained in Nelson: "Article 28-a does not preclude municipalities from reassuming financial responsibility for services for which they had been liable prior to its adoption in 1984." Nelson, 146 N.H. at 78-79.

At issue in Nelson was the State's reclassification of a road from a state highway to a local highway. Id. at 78. After the reclassification, the town was required to maintain the road. Id. at 76. The town argued that Flynn controlled. Id. at 79. We disagreed and held that the reclassification "does not violate Article 28-a because it is not a new or expanded responsibility or program." Id. at 78-79. "That the contested segments now serve only local traffic may be a new development; the town's responsibility for maintaining roads that serve only local traffic is not new." Id. at 79. "Adoption of the town's position would essentially limit the roads that a municipality must

maintain and require the State to maintain reclassified local roads or any newly constructed roadways." Id. at 79-80.

In Nelson, the State reclassified a road based upon use. Id. (State "simply decided that a road which now serves only local traffic will no longer be part of the State-maintained highway system."). The town, in turn, could change the use of the local road. Id. ("Similar review is authorized at the local level, where a town may review the need for a road and decide either to discontinue it or limit its maintenance."). The town's responsibilities did not change. Prior to the reclassification, the town was responsible for maintaining local roads, and after the reclassification, the town had the same responsibility. Thus, the reclassification did not create an unfunded mandate.

Similar to Nelson, in Opinion of the Justices (Voting Age in Primaries), 157 N.H. 265 (2008), we looked at municipal responsibility to determine whether there had been a change. At issue was whether allowing certain seventeen-year-olds to register and vote in primary elections would violate Article 28-a. Id. at 266. We looked at the local responsibilities associated with voting and voter registration and determined that "municipal responsibility for processing all voter registrations is not new." Id. at 275. Expanding the voting age group would not expand the municipal responsibility; local officials would participate in the same procedure whether or not seventeen-year-olds were permitted to vote. Id.

In the present case, unlike Nashua School District, the State assumed part of the cost of the programs and responsibilities at issue prior to the adoption of Article 28-a, and thus may not now delegate those responsibilities to the local government in violation of Article 28-a. Moreover, unlike Nelson and Opinion of the Justices (Voting Age in Primaries), the counties' responsibilities have changed. With the 2005 and 2007 legislation, the counties are responsible for increased contributions to OAA, APTD and LMAC for an extended period of time. Moreover, unlike Nelson and Opinion of the Justices (Voting Age in Primaries), where the State action influenced local road maintenance and voting registration, here, the legislation directly implicates local financial contributions. Requiring local governments to assume greater financial responsibility is precisely what Article 28-a aims to prevent.

The issue thus becomes whether the three provisions that are the subject of this appeal violate Article 28-a. Those provisions are: chapter 263 extending the sunset provision to 2013; chapter 263 increasing the counties' contribution to nursing home and HCBC care costs from fifty percent to 100 percent of the non-federal portion; and the 2005 legislation increasing the county LMAC payments to $27 per month for each OAA recipient and $52 per month for each APTD recipient.

With respect to the counties' argument concerning the 2005 legislation increasing the LMAC payments, the legislature repealed RSA 167:18-f, LMAC payments, effective July 1, 2008. See Laws 2007, 263:24. I therefore agree with the majority that, as to the declaratory relief sought, this issue is moot. The analysis that follows pertains to the remaining two provisions from the 2007 legislation.

The first determination is whether these provisions result in any additional obligations on the counties; to wit, whether they are "new, expanded or modified programs or responsibilities." Prior to 1937, the counties were responsible for providing care to the indigent elderly and disabled. In 1937, the State, through the Department of Public Welfare, began assisting the indigent and disabled. Laws 1937, ch. 202. In 1984, when Article 28-a was adopted, the counties were responsible for contributing fifty percent of the non-federal portion of OAA and APTD, see RSA 167:18-a, and LMAC payments of $6 per month for each OAA recipient and $23 per month for each APTD recipient, see RSA 167:18-f. In 1998, the program was modified to include reimbursement for HCBC. See RSA 167:18-b. As a result, the new legislation required the counties' approval by vote. Laws 1998, 388:10; see N.H. CONST. pt. I, art. 28-a ("unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision"). Thus, the counties have certain pre-existing responsibilities regarding OAA, APTD and LMAC.

The counties do not dispute the responsibilities that existed prior to adoption of Article 28-a. Instead, they dispute the validity of certain changes. Specifically, in 2007, the State extended the sunset provision, which would have repealed RSA 167:18-b (reimbursement for nursing and HCBC costs) and RSA 167:18-f (LMAC payments). The State also increased the counties' reimbursement obligations for nursing home and HCBC recipients from fifty percent to 100 percent. Based upon the plain language in Article 28-a, these are "modified . . . responsibilities." See Webster's Third New International Dictionary 1452 (unabridged ed. 2002) ("modified" includes making "minor changes in the form or structure of"). Article 28-a is a "sweeping prohibition" against any additional obligations on the counties, see Flynn, 133 N.H. at 23, and the extension of the sunset provision and the increase in the percentage of the county share are additional obligations on the counties.

The analysis does not end here. The next step is to determine whether these additional obligations result in increased expenditures. As to the sunset provision, the counties argue that RSA 167:18-b and RSA 167:18-f were set to expire as of June 30, 2007, and the county funding obligation with respect to the State's nursing and HCBC costs and the LMAC "would have disappeared entirely." Even if RSA 167:18-b and RSA 167:18-f were repealed, the counties would still be liable to reimburse the State for fifty percent of the payments

made for OAA and APTD recipients under RSA 167:18-a. The counties would not, however, have been responsible for nursing home or HCBC reimbursement, see RSA 167:18-b, or LMAC payments, see RSA 167:18-f. Extending the repeal provision resulted in the counties incurring an additional expense of contributing to LMAC, nursing home and HCBC care. Reimbursement for nursing home services and LMAC, however, were pre-existing obligations; thus, continuing the programs did not result in Article 28-a violations. HCBC, unlike nursing home care and LMAC, was a new obligation added in 1998, and as a result, required the counties' approval. The counties voted to approve this new obligation, which was included within the same statutory scheme that called for its repeal by a certain date. The State's decision to extend the sunset provision results in the counties contributing to HCBC beyond the time agreed to by the counties. This creates an increased expenditure on the counties that was not a pre-existing obligation and therefore violates Article 28-a.

As to the provision increasing the counties' share for nursing home and HCBC care for OAA and APTD recipients, I agree with the majority that this change did not result in an increased expenditure to the counties. In 2007, with chapter 263, the State substantially restructured the indigent elderly and disabled reimbursement scheme with the bulk of the changes to occur after fiscal year 2008. Chapter 263 includes a provision requiring the counties to reimburse the State for 100 percent of the non-federal share of nursing home and HCBC indigent elderly care. Laws 2007, 263:17. Chapter 263, however, also includes a number of reductions in county obligations as well as an increase in credit from $2,000,000 to $5,000,000 per fiscal year. Chapter 263 also sets caps preventing any billing to exceed set amounts. Moreover, the statute contains a provision that provides "no county shall be liable for total billings in fiscal year 2009 or fiscal year 2010 in an amount which would be greater than the amount of liability projected for that fiscal year using the methodology for determining county payments in former RSA 167:18-b prior to its repeal." Laws 2007, 263:17. Thus, as to fiscal years 2009-2010, there is no Article 28-a violation. Any increase in expense to the counties as a result of the percentage contribution increase is offset by reductions in obligations and increased credit. I agree with the majority that the "net effect" of the changes does not result in an increase in the counties' expenditure. See Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543, 545 (1992) ("The primary consideration is the net effect of the program.").

Chapter 263 addresses fiscal years 2009-2013. It provides specific provisions for fiscal years 2009-2010, but leaves fiscal years 2011-2013 subject to further legislation and determination. As a result, any analysis as to whether or not the counties will face increased expenses with the changes in fiscal years 2011-2013 is purely speculative. "[W]e will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and

the constitution." N. Country Envtl. Servs. v. State of N.H., 157 N.H. 15, 18 (2008) (quotation omitted). Thus, I agree with the majority that the counties' claim as to this portion of chapter 263 is not yet ripe for review.

For the reasons stated, I concur specially in part, and respectfully dissent in part.

Voting Sheets

HOUSE COMMITTEE ON FINANCE

EXECUTIVE SESSION on HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE: March 01, 2011

LOB ROOM: 210-211

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep. Rosenwald

Seconded by Rep. Vaillancourt

Vote: 22-0 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

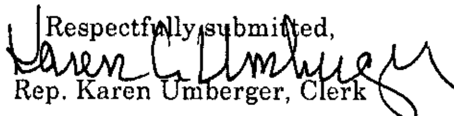
Seconded by Rep.

Vote: (Please attach record of roll call vote.)

REGULAR or CONSENT CALENDAR (please circle one)

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report



Respectfully submitted,

Rep. Karen Umberger, Clerk

HOUSE COMMITTEE ON FINANCE

EXECUTIVE SESSION on HB 482-FN-A-L

BILL TITLE: relative to county reimbursements for nursing home services.

DATE:

LOB ROOM: 210-211

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, (ITL) Retained (Please circle one.)

Moved by Rep. Rosenwald

Seconded by Rep. Vaillancourt

Vote: (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

REGULAR or CONSENT CALENDAR (please circle one)

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Karen Umberger, Clerk

FINANCE

Bill #: HB 482 Title: Relative to county reimbursement for nursing home services

PH Date: 2 / 10 / 11 Exec Session Date: 3 / 1 / 11

Motion: ITL Amendment #:

MEMBER	YEAS	NAYS
Weyler, Kenneth L, Chairman	X	
Ober, Lynne M, V Chairman	ah	
Kurk, Neal M	ah	
Emerton, Larry	ah	
Rodeschin, Beverly T	X	
Belvin, William S	X	
Elliott, Robert J	X	
Vaillancourt, Steve	X	
Allen, Mary M	X	
Quandt, Marshall E	~~ah~~ X	
Barry, Richard W	X	
Cebrowski, John W	X	
Smith, William B	X	
Sova, Charles E	X	
Umberger, Karen C, Clerk	X	
Keane, Thomas E	X	
McGuire, Dan	ah	
Simard, Paul H	X	
Twombly, Timothy L	X	
Worsman, Colette	X	
Foose, Robert A	X	
Nordgren, Sharon	X	
Baroody, Benjamin C	X	
Benn, Bernard L	X	
Lerandeau, Alfred C	X	
Rosenwald, Cindy	X	
TOTAL VOTE:	22	0

Printed: 1/7/2011

Committee Report

REGULAR CALENDAR

March 2, 2011

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on FINANCE to which was referred HB482-FN-A-L,

AN ACT relative to county reimbursements for nursing home services. Having considered the same, report the same with the following Resolution: RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. Cindy Rosenwald

FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	FINANCE
Bill Number:	HB482-FN-A-L
Title:	relative to county reimbursements for nursing home services.
Date:	March 2, 2011
Consent Calendar:	NO
Recommendation:	INEXPEDIENT TO LEGISLATE

STATEMENT OF INTENT

Several years ago, when the State transferred responsibility to the counties for Medicaid long-term costs, the State capped the county costs, starting at $71.5 million a year for 2008 and rising to $105 million a year for 2012. The counties sued the State on the grounds of it being an unfunded mandate but did not prevail because the cap prevented them from being harmed. RSA 167:18-a II requires the legislature to set the cap prospectively for the next biennium. The committee understands and agrees with the need to cap the costs. However, since the amount of the cap has been amended in the past, the committee wishes to retain the flexibility of setting the cap within the context of the entire budget. Therefore, the cap will be extended in HB 2.

Vote 22-0.

Rep. Cindy Rosenwald
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

FINANCE
HB482-FN-A-L, relative to county reimbursements for nursing home services. INEXPEDIENT TO LEGISLATE.
Rep. Cindy Rosenwald for FINANCE. Several years ago, when the State transferred responsibility to the counties for Medicaid long-term costs, the State capped the county costs, starting at $71.5 million a year for 2008 and rising to $105 million a year for 2012. The counties sued the State on the grounds of it being an unfunded mandate but did not prevail because the cap prevented them from being harmed. RSA 167:18-a II requires the legislature to set the cap prospectively for the next biennium. The committee understands and agrees with the need to cap the costs. However, since the amount of the cap has been amended in the past, the committee wishes to retain the flexibility of setting the cap within the context of the entire budget. Therefore, the cap will be extended in HB 2.
Vote 22-0.

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	FINANCE
Bill Number:	HB482-FN-A-L
Title:	relative to county reimbursements for nursing home services.
Date:	March 1, 2011
Consent Calendar:	NO
Recommendation:	INEXPEDIENT TO LEGISLATE

STATEMENT OF INTENT

Several years ago, when the State transferred responsibility to the counties for Medicaid long-term costs, the State capped the county costs, starting at ~~$103~~ 71.5 million a year for 2008 and rising to $105 million a year for 2012. The counties sued the State on the grounds of it being an unfunded mandate but did not prevail because the cap prevented them from being harmed. RSA 167:18-a II requires the legislature to set the cap prospectively for the next biennium. The committee understands and agrees with the need to cap the costs. However, since the amount of the cap has been amended in the past, the committee wishes to retain the flexibility of setting the cap within the context of the entire budget. Therefore, the cap will be extended in HB 2.

Vote 22-0.

Rep. Cindy Rosenwald
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

01

HB 482 ITL Cindy Rosenwald 22-0
Regular Calendar

Several years ago, when the state transferred responsibility to the counties for Medicaid long-term costs, the state capped the county costs, starting at $103 million a year for 2009 and rising to $105 million a year for 2012. The counties sued the state on the grounds of it being an unfunded mandate but did not prevail because the cap prevented them from being harmed. RSA 167:18-a II requires the legislature to set the cap prospectively for the next biennium. The committee understands and agrees with the need to cap the costs. However, since the amount of the cap has been amended in the past, the committee wishes to retain the flexibility of setting the cap within the context of the entire budget. Therefore, the cap will be extended in HB2.

KLW

Janet –

I found a mistake in my blurb. Ken is aware of the change.

Cindy

New Hampshire General Court - Bill Status System

Docket of HB482

Docket Abbreviations

Bill Title: relative to county reimbursements for nursing home services.

Official Docket of **HB482**:

Date	Body	Description
1/21/2011	H	Introduced 1/6/2011 and Referred to Finance; **HJ 11**, PG. 188
2/1/2011	H	==RESCHEDULED== Public Hearing: 2/10/2011 11:30 AM LOB 210-211 ==(Orig 11:00 AM)==
2/22/2011	H	Division III Work Session: 2/25/2011 1:00 PM LOB 209
2/23/2011	H	Executive Session: 3/1/2011 10:00 AM LOB 210-211
3/2/2011	H	Committee Report: Inexpedient to Legislate for Mar 15 (Vote 22-0; RC); **HC 22**, PG.555
3/16/2011	H	Inexpedient to Legislate: MA VV; **HJ 28**, PG.856-857