

RENNY CUSHING
NH HOUSE MINORITY LEADER

Via email: sherman.packard@leg.state.nh.us

Sherman Packard
Speaker of the House of Representatives

February 9, 2021

Dear Speaker Packard:

Thanks to you, Deputy Speaker Steve Smith, and Chief of Staff Aaron Goulette for meeting with me, Deputy Democratic Leader David Cote, and Democratic Leader Pro Tempore Karen Ebel on February 1, 2021 to discuss the Democratic membership's public health concerns related to the pandemic in advance of the House of Representatives' next meeting, currently scheduled for February 24, 2021. In light of our conversation, I am writing to summarize our accommodation requests as well as the factual and legal context for those requests. We hope to work with you to ensure a safe environment where all representatives are able to fully engage in the legislative process without imperiling their health, including through the use of remote technology for access and participation in the session.

COVID-19 Is a Threat to Public Health

As you well know, we are in the midst of a global pandemic, and COVID-19 infection and fatality rates have continued to surge across the country. In the United States, "more than 26.5 million people . . . have been diagnosed with COVID-19, making up a quarter of the 104.5 million cases reported worldwide."¹ The national death toll has surpassed 450,000 and is projected to reach up to 534,000 by the end of the month.² As of February 3, over 66,700 Granite Staters have contracted the virus and more than 1,000 people have died.³ Recently, "New Hampshire was the only state with an increase for newly confirmed cases," recording "a hike of 4 percent."⁴ Accordingly, Governor Christopher Sununu has issued emergency orders to curtail the spread of the virus and the extraordinary danger it poses to our state.⁵

COVID-19 spreads easily from person to person through respiratory droplets, close personal contact, and contaminated surfaces and objects. The average infected person spreads the disease to

¹ Carolyn Crist, *U.S. COVID-19 Death Toll Passes 450,000*, WebMD (Feb. 4, 2021), <https://www.webmd.com/lung/news/20210204/us-covid-19-death-toll-passes-450000>.

² Madeline Holcombe, *US coronavirus death toll could hit 530,000 this month. That would be 1 death per minute over the last year*, CNN (Feb. 4, 2021), <https://www.cnn.com/2021/02/04/health/us-coronavirus-thursday/index.html>.

³ New Hampshire Dep't of Health & Human Services, *New Hampshire 2019 Novel Coronavirus (COVID-19) Summary Report*, <https://www.nh.gov/covid19/> (last updated Feb. 3, 2021).

⁴ David Mills, *Here Are the States Where COVID-19 Is Increasing*, Healthline (Jan. 26, 2021), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing#Where-cases-are-the-highest>.

⁵ See, e.g., Exec. Order No. 2021-1, *Fifteenth Extension of State of Emergency Declares in Executive Order 2020-04* (Jan. 22, 2021), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2021-01.pdf>.

between two and four others,⁶ in large part due to transmission by individuals who do not appear sick. Because 40 to 45 percent of all those infected and contagious are asymptomatic or pre-symptomatic, individuals may go to work, school, or other public facilities feeling perfectly well.⁷ Thus, simply avoiding people who are coughing or visibly ill is an insufficient measure to avoid infection.⁸ For the same reasons, screening questions, temperature checks, and other similar measures do not entirely mitigate the risk of infection.

Because of the airborne nature of the disease, the risk of transmission is highest in heavily trafficked public locations—especially indoors, where there is prolonged exposure, or when protective measures like mask-wearing and social distancing are absent.⁹ The risk of contagion is greater than ever as more infectious variants of the coronavirus have begun to spread in the U.S. and abroad.¹⁰ These risks are further compounded for individuals with a disability who are more likely to develop serious illness or death if they contract the coronavirus.¹¹

The New Hampshire House Must Take Steps to Protect Its Members

Legislative bodies across the country have experienced outbreaks of COVID-19.¹² The New Hampshire General Court has not been immune from COVID-19’s devastation. The loss of our colleague, Speaker Dick Hinch, has left us acutely aware of the threat the coronavirus poses to legislators who are meeting face-to-face.¹³ We remain concerned for all members who have been ill or continue to suffer from severe complications as a result of their COVID-19 diagnosis. We seek consensus to implement plans for the upcoming session to eliminate the risk of infections going forward.

⁶ Jenny Gross and Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glossary*, N.Y. Times (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-terms-glossary.html>.

⁷ Oran D P and Topol E J, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, *Annals of Internal Medicine* (Sept. 1, 2020).

⁸ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How it Spreads* (Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>; Lissette Voytko, *Fauci says coronavirus temperature checks ‘notoriously inaccurate’*, *Forbes* (Aug. 14, 2020), <https://www.forbes.com/sites/lissettevoytko/2020/08/13/fauci-says-coronavirus-temperature-checks-notoriously-inaccurate/?sh=476516f633f0>.

⁹ Harvard Medical School, *5 factors to help you gauge where COVID-19 risk is highest* (Nov. 2020), <https://www.health.harvard.edu/staying-healthy/5-factors-to-help-you-gauge-where-covid-19-risk-is-highest>.

¹⁰ See, e.g., Matthew S. Schwartz, *New COVID-19 Variant Spreads To Dozens Of Countries*, NPR (Jan. 2, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/01/02/952842631/new-covid-19-variant-spreads-to-dozens-of-countries?utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_source=facebook.com&fbclid=IwAR1vJevkBypgmeswGLpD25D-HIZ44fDIgUZwiLKsgR5WxEjJj8kJBY5HC8 (reporting the new variant “could be 50% more transmissible than the original strain”).

¹¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.

¹² See, e.g., John Keefe, *Which Members of Congress Have Tested Positive for the Coronavirus*, N.Y. Times (Feb. 2, 2021), <https://www.nytimes.com/interactive/2021/01/13/us/congressional-members-with-coronavirus.html>; Emily Wagster Pettus, *Mississippi seeing big virus outbreak in state legislature*, AP (July 10, 2020), <https://apnews.com/article/11198fc30f1cc29c29c27f62f6a23644>; Andrew DeMillo, *Coronavirus outbreak among Arkansas lawmakers grows to 11 total cases*, AP (Oct. 27, 2020), <https://www.thv11.com/article/news/health/coronavirus/coronavirus-outbreak-in-arkansas-legislature/91-da6056b8-27ff-40cb-b2b3-9f1be1efd354>.

¹³ Dan Barrick, Todd Bookman & Josh Rogers, *Newly Sworn-In GOP N.H. House Speaker Dies Of COVID-19, Autopsy Shows*, NPR (Dec. 10, 2020), <https://www.npr.org/2020/12/10/945137222/newly-sworn-in-n-h-gop-house-speaker-dies-of-covid-19-autopsy-shows>.

Although dangerous for any individual, requiring in-person attendance also poses a unique risk to members of the House with disabilities, myself included. As I shared with you, I was diagnosed with Stage 4 prostate cancer and am currently receiving treatment. The medication I take as part of this regimen has left me with a compromised immune system, placing me at particular risk of severe complications or death if I contract COVID-19. Indeed, I have recently been hospitalized due to infections. Since the governor’s emergency declaration, I have only left home for non-medical reasons three times, all related to House sessions.

I am not the only legislator who will face a life-or-death choice when deciding whether to attend the upcoming February 24 session. Because of the imminent risks posed by in-person participation, many legislators feel they are forced to choose between their jobs and their lives. For example, House Minority Deputy Leader Cote suffers from coronary artery disease and received stent implantations after suffering a heart attack in 2018. He also has cerebral palsy, so must use leg braces for stability and crutches to walk; Deputy Cote also suffers from epilepsy and high blood pressure. Due to all of this, Deputy Cote does not drive. Representative Kenneth Snow suffers from Guillain-Barre Syndrome, which has previously required him to seek emergency care. On one occasion when suffering from partial paralysis, he was hospitalized for three months—spending eighteen days in intensive care and eight days on a ventilator. Because of restrictions at the Birch Hill senior citizen facility where Representative Snow lives, he is also prohibited from attending any gathering with more than ten people.

Although these stories are notable, regrettably, they are not unique. Other legislators grapple with this fear and face the same impossible choice: representing their constituents or imperiling their health. During the last session, several legislators were deterred from participating because of the risk presented by COVID-19. For these reasons, the minority caucus has made multiple requests for accommodation and has repeatedly attempted to further measures that will protect all legislators, but especially those who are entitled to such protections under disability law. You stated to the Union Leader in an article dated January 15, 2021 regarding hybrid Committee meetings in the Legislative Office Building, “We fully understand there are some with pre-existing conditions or health risks that make it sensible for them to take part via Zoom.”¹⁴ The same is true with regard to House sessions.

We have proposed several measures to protect members from COVID-19, which have failed because of opposition from members of your caucus. For instance, on June 11 of last year (before receiving the New Hampshire Supreme Court opinion described below), Speaker Shurtleff introduced a proposal that would have permitted the late drafting of an amendment to the New Hampshire Constitution “providing that the general court shall have the power and duty to adopt measures necessary for the continuity of government in periods of emergency.”¹⁵ The motion failed, with you and all current members of your leadership team voting against it. On September 16, 2020, Rep. Ebel made a motion to request an advisory opinion of the New Hampshire Supreme Court inquiring as to whether “holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be

¹⁴ Kevin Landrigan, “House soon to bring lawmakers back into committee rooms,” New Hampshire Union Leader, January 15, 2021 https://www.unionleader.com/news/health/coronavirus/house-soon-to-bring-lawmakers-back-into-committee-rooms/article_455b4fbb-6bdf-5baa-bbd9-96d102384b86.html

¹⁵ House Constitutional Amendment 21 (N.H. 2020), House Journal, Vol. 42, No. 9 (June 11, 2020) at pages 7-10. <http://gencourt.state.nh.us/house/caljournals/default.aspx>. See, also <https://legiscan.com/NH/bill/CACR21/2020> (introduced June 8, 2020).

determined electronically violate Part II, Article 20 of the New Hampshire Constitution.”¹⁶ The motion passed, but was strongly opposed by your caucus. The Supreme Court did ultimately opine that a quorum may be determined electronically, clearing the way for the remote sessions that would protect members from COVID-19. However, members of your caucus continued to claim that a House rule was required to allow remote participation. As such, a motion was introduced on Organization Day to permit the Speaker to pursue this option. However, it was voted down by your caucus, with you speaking in opposition. On December 16, 2020, the Rules Committee meeting considered, but the Republican members refused to support, our proposed Rule 110 explicitly permitting the Speaker to convene session remotely. A similar motion, introduced on January 6, 2021, Convening Day, also failed when opposed by your caucus. Most recently, in the Speaker’s Message in the February 5th House Calendar, despite consistently opposing such a rule, you said the House is obligated to meet in-person because there is no rule permitting it to do to meet remotely, in whole or in part.

The absence of such a rule, however, does not necessarily preclude remote participation. As the New Hampshire Supreme Court held in its recent advisory opinion, “it is within the competency of either house to prescribe any method which shall reasonably be certain to ascertain the presence of a quorum.”¹⁷ Given that current House rules do not preclude remote participation, the Speaker has authority to permit members to attend sessions virtually.

Past efforts to conduct safe and effective in-person sessions during the pandemic have also failed. The drive-in session held in the University of New Hampshire parking lot, for instance, presented both health risks and practical challenges.¹⁸ Participation in that session required members to have multiple contacts with staff and other members to receive the materials necessary to vote and speak. Flaws in the site logistics resulted in a bottleneck at the entrance, delaying admittance and the start of the session for over an hour. Poorly functioning equipment and the passage of freight and passenger trains on the adjoining railroad tracks caused frequent interruptions. The voting system also malfunctioned, ultimately failing to record the votes of multiple representatives. The extended time spent in vehicles itself burdened the health of some members, including Representative Katherine Rogers, who suffers from degenerative joint disease and requires the use of a walker, cane, or wheelchair as adaptive aids. Sitting for extended periods of time caused her to suffer extreme pain that day and for weeks after the drive-in session occurred.

The Current Lack of COVID-19 Protections for House Members May Violate Federal Law

All legislators have a right and an obligation to serve in the office entrusted to them by the citizens of New Hampshire, just as voters have a reciprocal right to be represented in the state’s legislature. Several House members suffer from serious medical conditions that make exposure to COVID-19 particularly dangerous and potentially fatal. For these representatives, reasonable accommodations are necessary to enable their participation and are required under federal anti-discrimination law.

State and local government entities are covered by both the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. At a minimum, Title II of the ADA requires public entities to

¹⁶ House Journal Vol. 42, No. 11, September 16, 2020, at pages 6-9.

¹⁷ Supreme Court of New Hampshire, Op. No. 2020-0414 (Nov. 17, 2020), <https://www.courts.state.nh.us/supreme/opinions/2020/20200630J.pdf>.

¹⁸ Ellen Barry, *As State Legislatures Aim to Convene Amid Covid, One Tries a Drive-In*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/new-hampshire-drive-in-legislature.html>.

ensure that no qualified individual with a disability is excluded from participating in, denied the benefits of, or subjected to discrimination under any of its programs, services, or activities solely on the basis of the individual's disability. *See* 42 U.S.C. § 12102, *et seq.* Title II also requires that public entities make reasonable modifications to their policies, practices, and procedures where necessary to avoid discrimination unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

Similarly, Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs that receive federal financial assistance. 29 U.S.C. §§ 701, *et seq.* It is our understanding that the General Court has received federal CARES Act funds that it has used to respond to the COVID-19 pandemic by providing testing for members and staff and is thus subject to the requirements of the Rehabilitation Act.

Reasonable Accommodations Are Necessary to Protect the Health and Safety of All Members

In order of preference, we seek the following reasonable accommodations to ensure the health and safety of all House members while conducting legislative business.

1. We ask that any legislator who requests remote access be allowed to participate via remote technology.

During our conversation, although we did not reach an agreement regarding remote participation, you agreed to consider proposals made to implement a remote option. The House has successfully employed remote technology for committee meetings, and the Senate has been conducting all of its business remotely. The House's existing technology infrastructure can be adapted to allow for remote access and participation. Alternatively, one or more technology platforms can be used to enable legislative meetings. As proposed during our discussion, the use of a videoconferencing application (Zoom, GoToMeeting, Microsoft Teams, etc.) in conjunction with a voting tool (Election Buddy, eBallot, Election Runner, etc.) can enable all of the legislature's business to be conducted remotely. Legislatures across the country have adopted similar technology that has proven to be a practical and cost-effective method of holding their sessions remotely, either entirely or partially.¹⁹

2. We request that any legislator with a qualifying disability under the ADA or Rehabilitation Act be permitted to participate remotely.

If not granted to any legislator upon request, remote participation should nonetheless be allowed for members who are entitled to an accommodation under the federal disability laws described above. The U.S. Equal Employment Opportunity Commission has made clear that individuals with disabilities that place them at a higher risk of severe illness may be entitled to reasonable accommodations that "reduce chances of exposure."²⁰ Disability is broadly defined under the ADA and "shall be construed in favor of

¹⁹ National Conference of State Legislatures, COVID-19: State Actions Related to Legislative Operations, <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx> (last updated Jan. 26, 2021).

²⁰ U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Dec. 16, 2020).

broad coverage of individuals.” § 12102(4)(a). The Rehabilitation Act adopts the same standard and applies to “all of the operations of” federal funding recipients. *See* 29 U.S.C. § 794(b).

3. We request additional information regarding safety precautions for members who do attend session in-person

During our conversation, you indicated you were considering several potential sites for the upcoming legislative meeting, including the sports complex in Bedford or a similarly large facility in Epping. Moreover, although you shared that social distancing and ventilation precautions were being weighed, you did not provide details about what protocols would be implemented for those attending in-person. We require more information about what specific health precautions will be adopted, and we request that the information be provided as soon as possible.

To ensure the safety of those members who do participate in-person, we ask the majority to consider the following measures: keeping members at least ten feet apart; requiring mask-wearing for all members; using protective physical barriers, like plexiglass shields; implementing enhanced cleaning protocols; providing hand sanitizer and surface cleaners; securing supplemental ventilation or air circulation; and adopting other COVID-19 screening and safety protocols. We also request any rules be clearly publicized in advance of the meeting, with sufficient assurances that they will be enforced against members who do not comply.

Conclusion

We hope to continue our dialogue to achieve an amicable resolution to this matter. We also wish to avoid the time and expense of litigation so that we can all do the important work that the people of New Hampshire have elected us to do. Accordingly, we ask you to notify us in writing that members of the House, or, at a minimum, its disabled members, will have the option of attending all future session meetings remotely so that they can fully and safely participate. If this request is denied, we ask that you provide the reason(s) in writing for such a refusal. If in-person attendance will be required, we ask you to provide us with details about the plans for the event, including what public health precautions will be implemented and how they will be enforced. Although we are eager to continue discussions in the interim, please advise us in writing by end of the business day on Thursday, February 11, 2021, whether these accommodations will be in effect for the House meeting on February 24, so we can seek appropriate legal relief, if necessary.

Sincerely,



Robert Renny Cushing
House Minority Leader
(email)

cc via email:

Aaron Goulette
Chief of Staff to Speaker Packard

David Cote
Deputy Democratic Leader
(email)

Steve Smith
Deputy Speaker of the House of Representatives

James Cianci
House Legal Council

Paul Twomey
Minority Counsel