Testimony of David Fidanque, Executive Director
on SB 626
Senate Committee on Health Care
March 11, 2015

Chair Monnes Anderson and Members of the Committee:

I am David Fidanque, Executive Director of the ACLU of Oregon, appearing today to express concerns regarding many of the provisions of SB 626. We strongly oppose passage of the bill unless significant amendments are adopted.

As those of you familiar with the Oregon Prescription Drug Monitoring Program are aware, the ACLU opposed the implementation of this program when it was first approved in 2009, but many of the safeguards contained in the Act were proposed by us and have our strong support.

We support the public health goals which are the justification for the program and have worked diligently to help ensure the use of the program is limited to public health, rather than being used for law enforcement purposes that would undermine those goals. Our other major concern has been to ensure that the use of this very sensitive health information is not abused by persons authorized to access the system or compromised as a result of a data breach.

We continue to have serious concerns about both issues for the following reasons:

Ongoing DEA Lawsuit

The federal Drug Enforcement Administration continues to maintain that it should be allowed access to PDMP data without complying with the warrant requirement contained in ORS 431.966(2)(a)(D). That subsection requires that any law enforcement agency seeking access to program data, including a federal agency, must have a valid court order based on probable cause of a violation by a specific person.

You may recall that the Oregon Department of Justice filed suit in federal court in 2012 seeking a ruling on whether the Oregon law was pre-empted by a federal statute that authorized the DEA to gain access to records based on an administrative request which requires neither probable cause nor court review. The ACLU intervened in that case on behalf of several patients and a physician, arguing that the federal law violates the Fourth Amendment protections against unreasonable search and seizure because of the paramount importance of protecting medical records.

U.S. District Judge Ancer Haggerty agreed with the ACLU in his ruling last February, but the federal government has appealed that ruling to the 9th Circuit Court of Appeals. Briefs have been filed in the case, but no date has been set for oral argument. While we are optimistic about the ultimate outcome of the case, Judge Haggerty's ruling is the first of its kind and the U.S. Justice Department is aggressively arguing that it should be overturned.

Every Expansion of PDMP Increases the Risk of Abuse and Misuse

Since the passage of SB 470 two years ago, which authorized health care providers and pharmacists to designate staff members to access the database on their behalf, 1,275 delegate accounts have been established. As of this past December, the total number of individuals who have real-time access to the system is approaching 10,000.[1]

The privacy interest in the records contained in the PDMP database is extremely high. Prescription information often indicates the underlying medical condition which the drug is designed to address. One of the primary reasons that the ACLU first opposed creation of the program and has consistently argued that the state strictly control who can access these medical records is the danger that some would inevitably access the records of individuals with whom the practitioner has no patient relationship.

As far as we are aware, the Oregon Health Authority has no auditing process in place designed to protect against such "insider" abuse. Despite the requirement in PDMP administrative rules for health care providers and pharmacists to notify the program if there is any change in their status that would impact their authority to utilize the system, it appears that requirement may be largely ignored. PDMP program staff reported to the PDMP Advisory Commission last October that a review for the purpose of re-verifying account holders to ensure current licensure identified 372 accounts that had to be deactivated.[2]

With the expansion to add "delegate" accounts, the program also now requires practitioners and pharmacists to audit the use of the system by their delegate on at least a monthly basis. They are also required to notify the program if a delegated user is no longer authorized to use the system by their employer. As far as we are aware, program staff have not yet carried out any oversight to see if these requirements are also being ignored.

No further expansion of authority for access to the program should be approved by the Legislature until the Oregon Health Authority can demonstrate that it has adequate – and effective – oversight procedures in place to uncover unauthorized use – or abuse – of the system.

[1] Oregon Prescription Drug Monitoring Program 2014 Annual Report, p. 3, published January 2015.
[2] Minutes of October 17, 2014 meeting of the Oregon Prescription Drug Monitoring Program Advisory Commission, p.2 (approved 1/16/2015.

Every Expansion of PDMP Also Increases the Risk of a Major Data Breach

Hardly a month goes by without news reports of massive data breaches of both private and public databases that contain confidential personal information. The announcement last month of the online attack against Anthem disclosed that the health and financial records of 60 to 70 million Americans in more than 25 states, including California where more than 13 million individuals may be affected.

While Oregon is not one of those states affected by Anthem, we are far from immune to such breaches in either the public sector or the private market. The expansion of PDMP authorized users, coupled with adoption of coordinated electronic medical records greatly increases those risks.

Unauthorized electronic entry to a database like the PDMP is most likely to occur either directly through the portal of an authorized user or by someone masquerading as an authorized user.

Specific Concerns Regarding SB 626

1. **Proposal to implement an automatic system notification to practitioners and pharmacists (p. 2, lines 2-6 of SB 626):** The ACLU opposes this provision once again because we believe such a system, especially one that is not very carefully crafted and shown to be effective, will lead to both over-reporting and under-reporting of potentially dangerous drug interactions. The Committee should note that the program is currently in the process of creating a voluntary notification report which is expected to be implemented this year. We do not oppose that project as long as its use is just one option made available to providers and if, after implementation, the efficacy of the report is shown to minimize both over-inclusiveness and under-inclusiveness. There is no adequate substitute for health care providers reviewing their patient's record. Medical judgments should be made by those who are qualified, not by a computer program.

2. **Proposal to permit local health officers to access data disclosing the identities of individual patients, practitioners and pharmacies (p. 2, lines 10-11 of SB 626):** We strongly oppose providing individual patient or practitioner identifying information because local public health officers are not health care providers to the individuals involved. As you know, local public health officers are currently authorized to receive de-identified data for any purpose related to the program. We can think of no legitimate interest that local public health officers would have to get such private information about their neighbors with whom they have no health care relationship.

3. **Proposal to permit research projects to access patient, provider and pharmacy personal identifying information (p.2, lines 25-29 of SB 626):** This provision

would appear to grant the Oregon Health Authority and other research entities authority to gain broad access to private patient records without requiring oversight by the Institutional Review Boards of all entities involved. The ACLU opposes this provision because granting such broad access to individual patient information would greatly increase the likelihood of unauthorized access to the data as well as a data breach.

4. **Proposal to mandate use of the PDMP system by health care providers and pharmacists (p. 4, Section 3 of SB 626):** This section would mandate review of a patient's records by a health care provider prior to prescribing, as well as require a pharmacist to do so prior to filling a prescription. We believe that such a mandate would greatly increase the likelihood of unauthorized use of the system and a data breach. The 2014 PDMP Annual Report shows that great strides have been made in getting health care providers to register as authorized users. The data shows that a high proportion of those providers who write the most prescriptions are utilizing the system. As of December, 57% of all prescriptions subject to the program were written by 2,000 practitioners. Of those, 74% have PDMP accounts. Of the next 2,000 prescribers, who are responsible for 19% of prescriptions, 66% have PDMP accounts. Imposing a mandate, rather than allowing the program to continue to sign up practitioners incrementally would make it more likely that users would not be properly trained in the use of the program, greatly increasing the likelihood of unauthorized use and a data breach.

Again, we strongly urge you to reject SB 626, at least in its current form. Thank you for considering our views.