HOUSE JUDICIARY COMMITTEE

Re: Senate Bill 149 – Testimony - Opponent

March 17, 2015

Senate Bill 149 would no longer permit Residents housed at the Larned facility to appeal, to the Kansas Courts, the Secretary's annual written notice of their right to petition for release, instead requiring them to appeal to the State agency, Office of Administrative Hearings.

In the Matter of Care and Treatment of Jimmy Miles, 2009, the Kansas Supreme Court held that the essential element of Due Process was guaranteed by the Kansas Sexual Violent Predator Act by providing for basic protections including a jury trial. There are multiple court decisions, State and Federal that can be reviewed that state individuals held under civil commitment are constitutionally protected of their right to a jury trial. The Kansas Bill of Rights provides the right to a trial by jury.

The rights guaranteed by the statutory scheme to the committed person are critical to the constitutionality of the entire statutory scheme. Our Supreme Court has held that the essential elements of due process were guaranteed by the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 et seq., noting:

"These requirements are clearly satisfied by this Act, which provides for all necessary basic protections, including appointed counsel, a probable cause hearing, appointment of qualified experts for examinations, a jury trial requiring a unanimous decision, appeals, annual examinations, discharge petitions, hearings, and the strictest possible burden of proof on the State." (Emphasis added.) In re Care & Treatment of Hay, 263 Kan. 822, 831, 953 P.2d 666 (1998).

At my son's court hearing in July 2014, a program director from Larned testified that no one will ever be recommended to bypass a phase or move to transitional placement until they complete every phase of the Kansas treatment program. When asked if all annual review recommendations for residents are always "no" when documenting if the resident is ready for the transitional or conditional phase, she testified "yes," it is always "no," again, as their policy is that no one is ever ready for transitional or conditional placement until they have completed every phase of the program. Based upon the program administrators' testimony at my son's trial, if Senate Bill 149 is passed, the Office of Administrative Hearings will never be allowed to approve an independent evaluation. My son was provided the independent evaluation, has been placed in transitional and continues to progress well, without issues. This single issue has the potential to end resident's participation in the treatment program. Many have stated if this Bill becomes law, they will simply give up and quit the treatment program. There are convinced they will never return to open society if they lose the opportunity to have their case heard

before a court, which can approve independent evaluations, regardless of the fact that program staff adheres to their current policy of always saying "no" on annual reviews.

Senate Bill 149 states the Office of Administrative Hearing officer's decision is final regarding independent examinations and cannot be appealed. In its Lynn versus Anstaett decision (September 27, 2013), the Kansas Court of Appeals, found that restrictions prohibiting a litigant from submitting any further filings, unless filed by an attorney, resulted in a blanket prohibition against access to the courts and was contrary to Kansas Supreme Court decisions.

When discussing the bill before you, give consideration to what will likely be the impact of one resident currently at Larned who was 18 years old when he telephoned a minor to have a sexual encounter. The call was reported to the police, he was arrested, sent to prison for just short of two years, then was held for civil commitment. He was told by his court appointed attorney it would be best for him to plea bargain, and go to the treatment program as he would be out in two years. It is now nine years later and he is still at Larned, once told by a staff member that he will never leave the place other than in a coffin. Here is an 18 year old male, never having had a physical sexual relationship with anyone and has now been confined for almost twelve years. There is no doubt that Larned program staff will abide by their policy of saying "no," to this individual's readiness for transitional or conditional placement simply because he has not completed each treatment phase. Again, under this bill, the Office of Administrative Hearings would not be permitted to allow an independent evaluation. This individual was planning, this year, to request an independent evaluation and have his case heard before a jury. At the current annual cost of approximately $87,000.00, this individual, never having had a physical sexual relationship with anyone in his lifetime, is now tagged a violent sexual predator. Total program costs to confine him are approaching one million dollars. He is one example of many who likely should be returned to open society. Passing of this bill likely will stop that from occurring.

Legislators I have spoken with tell me they continue to be concerned about the treatment program. Before any changes to the sexual predator treatment program are made, I encourage everyone on this committee to become informed about current practices on this program. Review information beyond that which is provided by only program administrators. The group I am a member of strives to learn more about the Kansas and other States' treatment programs. We visit with individuals and organizations throughout the United States who have for many years studied sex offending, treatment programs, recidivism rates, etc. We have visited with some of the thirty states who do not have civil commitment, inquired how they deal with individuals charged with sex offences. We are not naive to the fact that some individuals should never leave state confinement. We accept that fact, while at the same time support fair and reasonable treatment of those individuals who should never be returned to open society.

The Division of Legislative Post Audit is conducting an audit of the Sexual Predator Treatment Program. LPA staff has stated they expect the report to be available during the month of March. The House Ways and Means sub-committee will be holding a hearing to discuss

concerns of the Sexual Predator Treatment Program, that hearing pending receipt of the audit report from Legislative Post Audit. KDADS spoke, during the Senate Judiciary Committee hearings that the audit report findings & recommendations will not impact Senate Bill 149, due to its scope. I suspect KDADS may not be accurate in that comment as LPA auditors are in fact looking at the current treatment program and other state programs, and may be making observations and recommendations that would be contrary to Senate Bill 149.

The residents of this treatment program, already suffering from a program that needs serious legislative attention should not be forced to endure the consequences of this bill. Before Senate Bill 149 advances, I encourage you to study the impact it would have on the treatment program and its purpose. I am confident that passing this bill will result in legal action and believe the bill will not stand up to a legal challenge, in the courts. Testimony at the Senate hearing included the comment that passing of this bill would be a "win-win" for everyone. That is not the case.

Eldon Dillingham