

Approved 2-18-86
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE

The meeting was called to order by SENATOR ROY M. EHRLICH at
Chairperson

10:00 a.m./~~p.m.~~ on February 12, 1986 in room 526-S of the Capitol.

All members were present except:

Committee staff present:
Bill Wolff, Clarene Wilms

Conferees appearing before the committee:
Senator Gerald Karr
Dr. John Randolph, Assn. of Community Mental Health Centers of Kansas
Richard Maxfield, Kansas Psychological Assn.
Dr. Gerald T. Hannah, Commissioner of Mental Health and Retardation Services

Others attending: See attached list

Senator Karr, sponsor of SB-549 appeared supporting this bill and stated that the heart of the bill centered in Section 3. Senator Karr further stated that there appeared to be some concern about line 102.

Dr. John Randolph testified and presented written testimony stating that SB-549 provides significant benefits. Several changes were suggested, changing psychotherapist, line 056 to employee and also deleting lines 30,31. Attachment I

Richard Maxfield testified and presented written testimony, also a balloon bill. Recommended revisions were covered in Attachment II and the balloon bill displayed recommended changes. Attachment III

Dr. Gerald Hannah testified and presented written testimony in support of SB-549 stating that the bill would protect the facilities and patients should be able to go for help and know confidentiality is protected. Attachment IV

Due to the numerous questions and concerns over the wording and content of SB-549 Chairman Ehrlich requested that those involved meet with Senator Walker sometime today in order that these problems could be addressed prior to final action on this bill tomorrow, February 13, 1986. Senators Hayden and Anderson were also requested to sit in on this meeting.

Meeting adjourned at 10:35 a.m.

SENATE
PUBLIC HEALTH AND WELFARE COMMITTEE

DATE 2-12-86

(PLEASE PRINT)
NAME AND ADDRESS

ORGANIZATION

Paul M. Klotz

Assoc. of CMHC's of Ks

John Randolph, Ph.D

" " " " " " Emporia, Ks.

Orlando T. Hannah

MHRS/SRS

RICHARD B. MAYFIELD, PhD

Ks Psychological Assoc

John Peterson

Tom Bell

Ks. Hosp. Assoc.

Katharine Clark CRWA

Intern

Barb Keimert

Planned Parenthood



Association of Community

Mental Health Centers of Kansas

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Paul M. Klotz, Executive Director

Testimony to the Senate Public Health and

Welfare Committee

February 12, 1986

Senator Roy M. Ehrlich, Chairman

by John G. Randolph, Ph.D.

As a psychologist of some 17+ years of experience in mental health center work, and as spokesman for the Association of Community Mental Health Centers of Kansas, I appreciate the protection Senate Bill 549 provides to patients of public treatment facilities. At present, there is no privileged communication for mental health center patients receiving direct services from a masters level psychologist, pastoral counselor, or other counselors not currently licensed in Kansas. Such patients have no assurance that their private, personal communications could not be ordered divulged for any number of purposes in some possible future courtroom proceedings. For instance, adversary parties in civil litigation occasionally seek to use records of mental health evaluation and treatment to attempt to impeach the credibility of a patient or a former patient. Such vulnerability to unwanted exposure is hardly conducive to the open, honest expression of concerns and conflicts so critical to successful psychotherapy.

It is my understanding that some objection was made to the definition of the term "psychotherapist" (line 0025, page 1). We would suggest substituting the word "employed" for "psychotherapist" on line 25 and everywhere else the term "psychotherapist" occurs, inserting a period at the end of line 0029, and deleting "but does not include the following: Physicians, licensed social workers and certified psychologists" (lines 0030 and 0031). In our view, the patient of a community mental health center should enjoy the same privileged communication in receiving services, regardless of the discipline of the provider. We would hope that privileged communication would be

2/12/86 Attachment I S. PH&W

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Past President

Michael L. Taylor
Treasurer

Steven J. Solomon
Secretary

Harriet Griffith
Bd. Mem. at Large

Attachment I

associated with the treatment facility, not with a range of professional disciplines with or without varied statutory protection of privacy of patient communications.

As it stands, Senate Bill 549 provides significant benefit to patients of community mental health centers. I have been chairman of an ad hoc Association Committee which has studied privileged communication and confidentiality issues for over two years, and am familiar with the rationale underlying the elements of this legislation. Since I am told that you have reviewed this bill in detailed fashion, I will make no further comments, but appreciate the opportunity to address any questions you may have.

Thank you.



KANSAS PSYCHOLOGICAL ASSOCIATION

February 12, 1986

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TESTIMONY OF RICHARD B. MAXFIELD, Ph.D. REGARDING SENATE BILL 549

Mr. Chairman, Members of the Committee,

Thank you for the opportunity to testify on Senate Bill 549. I am Dr. Richard Maxfield. I am the Chief Psychologist of the Adult Diagnostic and Consultation Service of the Menninger Foundation and I am here today representing the Kansas Psychological Association.

The Kansas Psychological Association believes that confidentiality is essential to conduct meaningful treatment as we believe it is a necessary prerequisite for the patient's ability to form a trusting and open therapeutic relationship. From that point of view we are very much in favor of this Bill as it extends the patient's right to privacy and confidentiality to treatment personnel who currently have no legal restriction against breaching confidentiality.

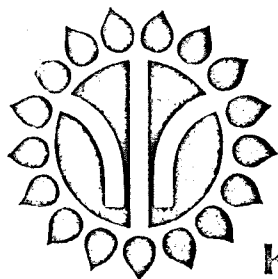
We do, however, have a number of suggestions in regard to amending the language of the Bill which we hope the Committee will take into consideration in your deliberations. I have distributed a balloon copy of this Bill with those suggested revisions. With your permission I will quickly go through those revisions to explain our thinking on each of them:

Page 1 - line 0030 — It is my understanding from psychiatric and social work colleagues that the protections of patients' privacy and confidentiality contained in this Bill are stronger than their patients currently enjoy. Thus, by including them within this measure their patients will benefit by better protection under the law.

Page 1 - lines 0036-0038 — The proposed changes in this section reflect the current reality that there are non-physician heads of treatment programs who are currently

Attachment II
2/12/86 S. PH&W

Attachment II



KANSAS PSYCHOLOGICAL ASSOCIATION

Page 2

February 12, 1986

entitled by law to make decisions similar to those contained in Senate Bill 549. Additionally, this language parallels language in a similar section contained in the substitute for House Bill 2050, "The Treatment Act for Mentally Ill Persons," which was recently endorsed by a subcommittee of the Senate Judiciary Committee.

Page 3 - lines 0102-0106 — Although we are mindful of the benefits which patients may accrue from better continuity of care, we do believe that a patient who has completed inpatient treatment does have the right to decide to who, if any one, his or her records should be sent. Further, if the patient agrees to see someone in the community following inpatient care, but refuses to sign a waiver of confidentiality that is a treatment issue to be understood rather than an opposition to be acted upon unilaterally.

Page 3 - lines 0112-0113 — We do not believe that relatives of the patient have a right to see the patient's treatment record. To allow access to the patient's record by a relative might severely compromise the patient's ability to openly and honestly discuss his or her family relationships, no less information which the patient knows the relative might find out about and might disapprove of.

Page 4 - line 0132 — We believe that psychotherapists, as defined by this Bill, should pay a penalty for violating the patient's confidentiality. We are suggesting a Class C misdemeanor as the appropriate penalty as that is the penalty contained in "The Act for Obtaining Treatment for A Mentally Ill Person" for violations of patients' rights. The penalty for breaching confidentiality by a certified psychologist is suspension or revocation of one's certificate to practice.

Additionally, we do have some concerns with the language contained in Section 3 (1) (Page 2). It is my reading of that language that the intent of that section is to waive confidentiality when commitment for mental illness, alcoholism, or drug dependency is being considered. However, as written that section might be interpreted to apply to situations other than commitment proceedings.

Thank you again for the opportunity to testify in behalf of this measure. I would be pleased to attempt to answer any questions the Committee might have.

SENATE BILL No. 549

By Senators Karr, Anderson, Daniels, Ehrlich, Gannon, Hayden,
Johnston, F. Kerr, Martin, Norvell, Parrish and Winter

2-3

0018 AN ACT concerning communications between a patient and
0019 psychotherapist; providing that certain communications are
0020 privileged and confidential; creating exceptions.

0021 *Be it enacted by the Legislature of the State of Kansas:*

0022 Section 1. As used in this act:

0023 (a) "Patient" means a person who consults or is examined or
0024 interviewed by a psychotherapist.

0025 (b) "Psychotherapist" means any employee of a treatment
0026 facility who receives a confidential communication from a pa-
0027 tient while engaged in the diagnosis or treatment of a mental,
0028 alcoholic, drug dependency or emotional condition, if such
0029 communication was not intended to be disclosed to third persons
0030 but does not include the following: ~~Physicians, licensed social~~
0031 ~~workers and~~ certified psychologists.

0032 (c) "Treatment facility" means a community mental health
0033 center, state psychiatric hospital and state institution for the
0034 mentally retarded.

0035 (d) "Head of the treatment facility" means the administrative
0036 ~~director if the administrative director is a physician or, if the~~
0037 ~~administrative director is not a physician, the chief medical~~
0038 ~~officer or a physician designated by the chief medical officer.~~

0039 (e) "Physician" means a person licensed to practice medi-
0040 cine and surgery.

0041 (f) "Community mental health center" means a mental health
0042 clinic or community mental health center licensed under K.S.A.
0043 75-3307b and amendments thereto.

0044 (g) "State psychiatric hospital" means Larned state hospital,
0045 Osawatomie state hospital, Rainbow mental health facility and

of a treatment facility or designee.

Attachment III
2/12/86

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Attachment III

0046 Topeka state hospital.

0047 (h) "State institution for the mentally retarded" means Nor-
0048 ton state hospital, Winfield state hospital and training center,
0049 Parsons state hospital and training center and the Kansas neuro-
0050 logical institute.

0051 Sec. 2. (a) A patient has a privilege to refuse to disclose, and
0052 to prevent any other person from disclosing, that the patient has
0053 been or is currently receiving treatment and to disclose any
0054 confidential communications made for the purposes of diagnosis
0055 or treatment of the patient's mental, alcoholic, drug dependency
0056 or emotional condition, between the patient's psychotherapist or
0057 persons who are participating in the diagnosis or treatment. The
0058 privilege extends to individual, family or group therapy under
0059 the direction of the psychotherapist and includes members of the
0060 patient's family. The privilege may be claimed by the patient, by
0061 the patient's guardian or conservator or by the personal repre-
0062 sentative of a deceased patient. The psychotherapist shall claim
0063 the privilege on behalf of the patient unless the patient has made
0064 a written waiver of the privilege and provided the psychothera-
0065 pist with a copy of such waiver or unless one of the exceptions
0066 provided by section 3 is applicable.

0067 (b) Confidential communications shall extend to those per-
0068 sons present to further the interests of the patient in the consul-
0069 tation, examination or interview; persons reasonably necessary
0070 for the transmission of the communication; persons who are
0071 participating in the diagnosis and treatment under the direction
0072 of the psychotherapist, including members of the patient's fam-
0073 ily; and any other persons who the patient reasonably believes
0074 needs the communication to assist in the patient's diagnosis or
0075 treatment.

0076 Sec. 3. (a) The privilege established by section 2 shall not
0077 extend to:

0078 (1) Any communication relevant to an issue in proceedings to
0079 hospitalize a patient for mental illness, alcoholism or drug de-
0080 pendency if the psychotherapist in the course of diagnosis or
0081 treatment has determined that the patient is in need of hospital-
0082 ization;

0083 (2) an order for examination of the mental, alcoholic, drug
0084 dependency or emotional condition of the patient which is
0085 entered by a judge, with respect to the particular purpose for
0086 which the examination is ordered;

0087 (3) any proceeding in which the patient relies upon any of
0088 the aforementioned conditions as an element of the patient's
0089 claim or defense, or, after the patient's death, in any proceeding
0090 in which any party relies upon any of the patient's conditions as
0091 an element of a claim or defense;

0092 (4) any communication which forms the substance of infor-
0093 mation which the psychotherapist or the patient is required to
0094 report to a public official or to be recorded in a public office,
0095 unless the statute requiring the report or record specifically
0096 provides that the information shall not be disclosed;

0097 (5) any information necessary for the emergency treatment of
0098 a patient or former patient if the head of the treatment facility at
0099 which the patient is being treated or was treated states in writing
0100 the reasons for disclosure of the communication and makes such
0101 statement a part of the medical record of the patient;

0102 ~~(6) any information from a state psychiatric hospital or state~~
0103 ~~institution for the mentally retarded to appropriate administra-~~
0104 ~~tive or professional staff of any community mental health center~~
0105 ~~for purposes of promoting continuity of care in the community~~
0106 ~~following discharge or conditional release of the patient;~~

0107 (7) any information from a state psychiatric hospital to ap-
0108 propriate administrative staff of the department of corrections
0109 whenever patients have been administratively transferred to a
0110 state psychiatric hospital pursuant to the provisions of K.S.A.
0111 75-5209 and amendments thereto;

0112 (8) any information to the patient or former patient, ~~or the~~
0113 ~~patient's next of kin,~~ except that the head of the treatment facility
0114 at which the patient is being treated or was treated may refuse to
0115 disclose portions of such records if the head of the treatment
0116 facility states in writing that such disclosure will be injurious to
0117 the welfare of the patient or former patient; or

0118 (9) any information to any state or national accreditation,
0119 certification or licensing authority, or scholarly investigator, but

0120 the head of the treatment facility shall require, before such
0121 disclosure is made, a pledge that the name of any patient or
0122 former patient shall not be disclosed to any person not otherwise
0123 authorized by law to receive such information.

0124 (b) The psychotherapist shall not disclose any information
0125 subject to subsection (a)(3) unless a judge has entered an order
0126 finding that the patient has made such patient's condition an
0127 issue of the patient's claim or defense. The order shall indicate
0128 the parties to whom otherwise confidential information must be
0129 disclosed.

0130 Sec. 4. This act shall be interpreted to encourage psycho-
0131 therapy in a confidential setting and the rules of discovery shall
0132 not take precedence over the provisions of this act.

0133 Sec. 5. This act shall take effect and be in force from and
0134 after its publication in the statute book.

NEW Sec. 5. Any psychotherapist willfully violating
the patient's confidentiality as defined by this Act
shall be guilty of a Class C misdemeanor.

STATE DEPARTMENT OF SOCIAL & REHABILITATION SERVICES

Statement Regarding Senate Bill No. 549

1. Title - This Bill creates a uniform legal privilege for the treatment records of community mental health centers and state hospitals. Currently, the legal privilege for confidential information disclosed during psychiatric treatment is found at several different places in the law, and depends upon the profession of the provider.

2. Purpose - The resolution of disputes through testimony and reason depends upon open access to as many facts as possible. Witnesses of relevant facts are expected to testify, and learning the truth about any occurrence may be hindered if some witnesses are excused from testifying. However, even before laws were recorded in statute books, English judges recognized the need to protect confidential communications if certain relationships were to be effective.

Confidential communications disclosed during psychiatric treatment are now covered under several inconsistent statutes; most notably K.S.A. 59-2931 (Care and Treatment Act for Mentally Ill Persons), K.S.A. 60-427 (Physician/Patient Privilege), K.S.A. 74-5323 (Certified Psychologist Privilege), and K.S.A. 75-5360 (Licensed Social Work Privilege). The

Attachment IV

purpose of this Bill is to create a uniform privilege for therapy provided by mental health centers and state hospitals, regardless of the profession to which a treating therapist belongs.

3. Background - One of the statutes dealing with a legal privilege for psychiatric treatment is contained in the Care and Treatment Act, K.S.A. 59-2931. That statute covers both mental health centers and state hospitals, as well as any "adult care home, physician or any other institution or individual authorized or licensed by law to give treatment to any patient." However, it is not a true privilege in that the court may compel testimony "after a determination...that...records are necessary for the conduct of proceedings before it and are otherwise admissible in evidence." Therefore, even though the privilege is recognized by the court, the standard for compelling testimony is merely that the information is relevant.

In addition to K.S.A. 59-2931, Kansas also has three individual provider statutes which relate to psychiatric treatment. Each of these privileges is different, even though the same type of service is usually being provided. This creates unnecessary confusion for both professionals and patients in a clinic or hospital setting. First of all, the specific privilege relied upon may specify those who are able to assert it; i.e. therapist, client, party to a lawsuit, or non-party to a lawsuit. Secondly, the type of information protected may be different; i.e. all information

acquired during therapy, only confidential information acquired, treatment records. In addition, the privilege may specify the type of action to which it applies; i.e. criminal (felony or misdemeanor), civil, or all legal actions. Finally, each privilege has its own unique exceptions to disclosure such as: disclosures to clients, disclosures to next of kin, disclosures to scholarly investigators, disclosures to licensing/ accreditation agencies, disclosures if necessary for further treatment of the client, upon court order, in commitment proceedings, where related to child welfare, where related to a claim of professional misconduct, or where the client has put his or her own mental condition into evidence.

As a general principle, the individual provider statutes provide better protection for clients than do the provisions of K.S.A. 59-2931. However, it is not clear which of the statutes apply to mental health centers and state hospitals, especially when treatment is often provided by an interdisciplinary team of professionals.

The nature of a legal privilege should depend upon the service being provided and not the discipline to which a professional belongs. This is especially true when services are provided at a clinic or hospital. In those settings, patients are assigned to therapists from a variety of professional disciplines. Every client is entitled to know the extent of protection he or she is receiving. Unfortunately, under current law, that protection may depend upon the discipline of the assigned therapist, which is largely beyond the client's control if services are sought at a mental health center.

Clients have the right to expect that confidentiality is "facility" based, and not dependent upon which therapist he or she is assigned to by the intake worker. As a result, it is extremely important that all employees of the mental health center or state hospital be included. Exceptions for physicians, certified psychologists, and licensed social workers should be deleted.

In addition to greater uniformity among the various privileges now affecting state and community mental health providers, it is generally understood that psychiatric treatment is one of the most private needs that an individual may have in his or her lifetime. Moreover, once a true privilege is recognized by a court, it cannot compel testimony regardless of its relevance to a lawsuit. K.S.A. 59-2931 is not a true privilege, and the individual provider statutes vary in strength without any reasonable basis for those variations.

4. Effect of Passage - Passage of this legislation would provide a true legal privilege for confidential communications disclosed during psychiatric treatment at mental health centers and state hospitals. The four statutes which now apply in various circumstances would also be made uniform for these providers.
5. SRS Recommendation - The Department of Social and Rehabilitation Services supports this legislation because it provides better protection for clients. However, all employees, or at least all professional therapists, must be included if the legislation is to fulfill its originally intended

purpose. The inclusion of state institutions for the mentally retarded is appropriate if it is specified that records of care and training, not psychiatric treatment, are the object of protection. Otherwise, only community mental health centers and state psychiatric hospitals should be included.

Robert C. Harder, Secretary
Social & Rehabilitation Services
(913) 296-3271