

Approved 2/23/87
Date

MINUTES OF THE House COMMITTEE ON Appropriations

The meeting was called to order by Bill Bunten at
Chairperson

1:30 ~~xm~~/p.m. on Monday, February 16, 1987 in room 514-S of the Capitol.

All members were present except: Representatives Wisdom, Duncan and Dyck (all excused)

Committee staff present: Gloria Timmer, Legislative Research
Diane Duffy, Legislative Research
Jim Wilson, Revisors Office
Sharon Schwartz, Administrative Aide
Nadine Young, Committee Secretary

Conferees appearing before the committee:

Dr. Robert Harder, SRS
David S. Rosenthal, SRS Commission for the Deaf and
Hearing Impaired
Ray Petty, Advisory Committee on Employment of the
Handicapped, Department of Human Resources
Martha J. Hodgesmith, Kansas Legal Services
Others present (Attachment 1)

Representative Chronister presented the subcommittee reports for the Legislature and Related Agencies. The revised FY 1987 budget estimate for the Legislature is \$588,512 above the amount authorized by the 1986 Legislature (Attachment 2). Subcommittee concurs with the Governor's recommendation for the FY 1987 revised budget. Representative Chronister moved that the subcommittee report be adopted. Representative Hamm seconded. The motion carried.

HB 2126 - Legislature and Related Agencies for FY 1988 The combined FY 1988 budget requests for the Legislature and related agencies total \$12,415,256. One additional position is requested, a new Assistant Revisor of Statutes. Governor concurs with the request. Subcommittee made some adjustment (see subcommittee report Attachment 3). Representative Chronister moved that the subcommittee report be adopted. Representative Heinemann seconded. Motion carried.

On the bill, Representative Chronister moved that HB 2126, as amended, be recommended favorable for passage. Representative Mainey seconded. The motion carried.

Chairman turned to HB 2137 -- an act concerning interpreter services; relating to proceedings in which appointment required, concerning qualifications and duties of interpreters; amending K.S.A. 75-4351, 75-4352, 75-4353 and 75-4354 and repealing the existing sections.

Dr. Robert Harder introduced David Rosenthal who presented testimony in support of the bill. He appeared on behalf of Kansas Commission for the Hearing Impaired (Attachment 4). He said that judges and lawyers feel there is a real need for improvement in the interpreter law in order that they might communicate more effectively in preparing cases when dealing with clients who are hearing impaired. A recommended fee schedule would avoid discrepancies in fees and would aid the courts in preparing a budget. He said that determining the responsibility for payment of interpreter services is also a problem. This proposed bill would make the courts responsible for payment. Estimated cost is \$5,000 per year. However, committee members expressed concern that the cost could go much higher.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Appropriations,
room 514-S, Statehouse, at 1:30 axx/p.m. on Monday, February 16, 1987

Ray Petty testified in support of HB 2137. He represents the Advisory Committee on Employment of the Handicapped (Attachment 5). He feels this measure is needed in order to protect the state from possible lawsuits. He suggests the costs for the state to provide these services should be built into each agency's budget. The KACEH intends to provide a list of qualified interpreters and a recommended fee schedule.

Dr. Harder told the committee that each agency has a provision in his budget for contractual services and he views this as a service to be contracted on an as-needed basis.

Martha Hotchsmith of Kansas Legal Services appeared before the committee at the request of the Commission for Hearing Impaired. She was asked to present her views regarding this matter (Attachment 6). She said that passage of this bill would continue the efforts of the State of Kansas to be sensitive to the needs of persons with disabilities in allowing those persons to present their own case in their own words.

Fred Murphy, President of the Kansas Association of the Deaf testified in support of the measure. His testimony was conveyed to the committee through the services of an interpreter. Mr. Murphy was involved with the passage of the first interpreter law back in the early 60's. At that time people gave of their services free of charge, out of love, but now interpreting has become a profession and requires extensive training as any other profession. Passage of this bill would grant the deaf their equal right in court.

After brief discussion, there appeared to be some concern about some of the language of this bill, what the actual cost would be and also what agency the funds should be appropriated to. Chairman Bunten asked Representatives Vancrum, Heinemann and Solbach to confer concerning this matter and report back to the committee at a later date.

Meeting adjourned at 2:35 p.m.

SUBCOMMITTEE REPORT

Agency: Legislature

Bill No. 2395

Bill Sec. 7

Analyst: Ahrens

Analysis Pg. No. 7

Budget Pg. No. 1-41

<u>Expenditure Summary</u>	<u>FY 1987 Req. Supp. Approp.</u>	<u>Governor's Rec. FY 87</u>	<u>Subcommittee Adjustments</u>
Legislature	\$ 588,512	\$ 588,512	\$ --

Agency Request/Governor's Recommendation

The revised FY 1987 budget estimate for the Legislature is \$588,512 above the amount authorized by the 1986 Legislature, including the reappropriated amount which was \$97,500 below the level anticipated. Included in the revised estimate for FY 1987 is \$422,886 to finance increases in the legislative subsistence allowance which have occurred and for which no financing has been provided, \$33,887 for postage, and a net of \$34,239 for other items of expenditure (including a reduction of \$548 for salaries and wages).

The Governor recommends expenditures of \$7,113,069 for FY 1987, or \$257,727 less than the revised agency estimate. This \$256,727, 3.8 percent of appropriations made by the 1986 Legislature, was lapsed by H.B. 2049. The Governor concurred with reductions proposed by the LCC in response to the Governor's request for budget reductions totaling \$257,727. Reductions include \$68,805 of salaries and wages, \$111,229 of contractual services, and \$77,693 of capital outlay. The salary and wage and contractual services reductions include \$101,970 for per diem and subsistence allowances which would come about through legislation proposed by the LCC to reduce both the per diem and subsistence allowance by \$3 per day for the last six months of FY 1987.

In addition to the lapses reflected in the Governor's recommendation for FY 1987, H.B. 2049 was amended to lapse an additional \$1,389.

Subcommittee Recommendation

The Subcommittee concurs with the Governor's recommendation for the FY 1987 revised budget of the Legislature, as further adjusted by H.B. 2049.

Rochelle Chronister
Representative Rochelle Chronister
Subcommittee Chairperson

Bill Buntin
Representative Bill Buntin

David Heinemann
Representative David Heinemann

Don Mainey
Representative Don Mainey

Lee Hamm
Representative Lee Hamm

428.87

SUBCOMMITTEE REPORT

Agency: Legislature and Related Agencies Bill No. 2126 Bill Sec. All

Analyst: Ahrens Analysis Pg. No. 1 Budget Pg. No. 1-31

<u>Expenditure Summary</u>	<u>Agency Req. FY 88</u>	<u>Governor's Rec. FY 88</u>	<u>House Subcommittee Adjustments</u>
State Operations - All Funds:			
Commission on Interstate Cooperation	\$ 170,040	\$ 170,040	\$ (15,941)
Legislative Coordinating Council:			
Council Expenses	245,543	245,543	--
Legislative Research Department	1,460,076	1,460,076	--
Revisor of Statutes	1,741,186	1,741,186	4,082
Educational Planning Committee	61,579	61,579	--
Legislature	7,423,849	7,423,849	--
Division of Post Audit	<u>1,312,983</u>	<u>1,312,983</u>	<u>(47,700)</u>
TOTAL	<u>\$12,415,256</u>	<u>\$12,415,256</u>	<u>\$ (59,559)</u>
State Operations:			
State General Fund	<u>\$12,346,517</u>	<u>\$12,346,517</u>	<u>\$ (51,534)</u>
FTE Positions	114.5	114.5	--

Agency Requests/Governor's Recommendations

The combined FY 1988 budget requests for the Legislature and related agencies total \$12,415,256. As directed by the Legislative Coordinating Council, the FY 1988 requests do not include any amounts for changes in salary rates but do include step increases for those employees who are paid in accordance with the state pay plan. One additional position is requested, a new Assistant Revisor of Statutes.

The Governor concurs with the FY 1988 budget requests for the Legislature and its related agencies. This concurrence includes an assumption that a 16 percent increase in the projected rate for health insurance, announced subsequent to submission of agency budget requests, can be absorbed.

House Subcommittee Recommendations

The Subcommittee concurs with the Governor's recommendations with the following adjustments.

1. The Subcommittee recommends the deletion of the requested travel and subsistence increase of \$15,941 included in the budget for the Commission on Interstate Cooperation. This reduction would leave \$30,459 for travel and subsistence, or 7 percent more than was spent in FY 1986.
2. The Subcommittee generally concurs with the assumption that the projected increase in the health insurance rate for FY 1988, estimated to total \$40,689, can be absorbed. However, the Subcommittee recommends that an exception be made for the Revisors Office because a revised estimate of printing costs would exhaust the printing contingency customarily included in that budget. Therefore, the Subcommittee recommends the addition of \$4,082 to the budget of the Revisor's Office for health insurance premiums.
3. The Subcommittee concurs with the request of the Chairman of the Legislative Post Audit Committee that the Division's budget request for contracted financial audits be reduced by \$47,700 (\$39,675 General Fund, \$8,025 Federal Audit Services fund).

Rochelle Chronister

Representative Rochelle Chronister
Subcommittee Chairperson

Bill Buntin

Representative Bill Buntin

David Heinemann

Representative David Heinemann

Don Mainey

Representative Don Mainey

Lee Hamm

Representative Lee Hamm

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Statement regarding House Bill 2137

1. Title An act concerning the Interpreters for Deaf, Mute, and other than English Speaking Persons; related to Interpreting services for the Deaf; amending K.S.A. 75-4351, 75-4352, 75-4353, and 75-4354.

2. Purpose The purpose of this bill is to strengthen certain aspects of the law as related to deaf and hearing impaired persons by:
substituting a new word for the term, "mute"; clarifying who is responsible to pay interpreting services in court proceedings;
defining criteria for qualified interpreters; and adding the protection of privileged communications for all interpreters.

3. Background Deaf and hearing impaired persons who use the court system lack the accessibility needed to protect and assure their participation in proceedings which have a significant impact on their lives. There is evidence that compliance with the present law is not consistent across the state. Some courts comply with this law. Most of the courts do not provide for or pay for interpreter services.

Judges and lawyers who have worked with the hearing impaired point out that areas of improvement are needed in the interpreter law in order to provide efficient services to this specific population. They have difficulties determining qualifications needed for sign language interpreters who are used in proceedings. This lack of information about the needed qualification has resulted in persons who have had only one semester of beginning sign language class being used in the courtroom.

Lawyers feel handicapped by their inability to communicate, and efficiently prepare cases for the courts, with the deaf clients. Whenever interpreters are used, they are often available only in the courtroom and not during preparations for such proceedings. Having an interpreter during preparations for the proceedings will greatly aid the lawyer and the deaf person in a more effective preparation of the case. To aid in the preparation of the case, privileged communications is extended to the interpreter to protect the privileged communications between client and lawyer.

Standards for sign language interpreters are now available through the Kansas Commission for the Deaf and Hearing Impaired. The Quality Assurance Screening Test (QAST) for sign language interpreters will certify interpreters by a series of steps which screen the interpreter's skills and grades them by levels. This procedure assures that top

certification (level 5) is of the highest quality and competence possible. The steps include a written test, an interview, and a series of videotapes designed to evaluate the candidate's competency in various areas such as expressive/receptive skills, terminology, sign concepts, communication mode used, etc.. Candidates are screened by their peers, and consumers, who are experts in the field of sign language interpreting. Besides QAST, the Registry of Interpreters for the Deaf (RID) national certification will also meet the certification/qualification requirements in K.S.A. 75-4351(b).

The Kansas Commission for the Deaf and Hearing Impaired is charged with identifying qualified interpreters by K.S.A. 75-5393(b)(6). The Quality Assurance Screening Test (QAST), established by the Kansas Commission for the Deaf and Hearing Impaired will aid in provision of a list of qualified interpreters to all the courts in the state. To avoid discrepancies in fees and aid the courts in preparing a budget, a recommended fee schedule will be maintained by the Commission to insure a standard rate across the state.

Determining the responsibility for payment of interpreter services is a continued problem for the courts, lawyers, and parties involved in the proceedings. This bill proposes to make the courts responsible for the payment of interpreters. Minor terminology change include striking out the term

"mute", and substituting "speech impaired", to reflect federal terminology, and to eliminate stigma.

4. Effect of Passage Passage of this bill will promote equal communications access for persons who are deaf or hearing impaired in the court and legislative system; it will assist these persons to participate effectively in matters directly affecting them. Certified/qualified interpreters will be provided for deaf and hearing impaired persons appearing in the court proceedings. The courts will be provided a listing of certified/qualified interpreters and a fee schedule by the Kansas Commission for the Deaf and Hearing Impaired. The procedure of requesting and scheduling the interpreter through the Commission will be an option to the Courts statewide. Court cases will be processed faster, more efficiently, and there will be a better understanding of the issues/results by all parties concerned. The payment issue will not continue to be a problem. It is estimated that the total cost for these interpreting services in court cases will not exceed \$5000.00 per fiscal year. This estimate is based on 250 interpreting hours at \$20.00 per hour. This act will also bring the state law into compliance with the federal mandate that prohibits discrimination of the handicapped by agencies receiving federal funds (Rehabilitation Act of 1973).

5. SRS Recommendation The Department of Social and Rehabilitation Services
urges favorable consideration of this Bill.

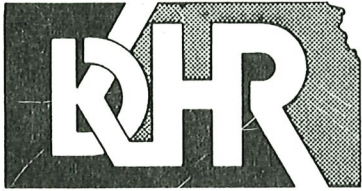
Robert C. Harder

Secretary

Social and Rehabilitation Services

296-3271

Date February 16, 1987

**ADVISORY COMMITTEE ON EMPLOYMENT
OF THE HANDICAPPED**1430 S.W. Topeka Avenue, Topeka, Kansas 66612-1877
913-232-7828 (V/TDD) 567-0828 KANS-A-N

John Carlin, Governor

Larry E. Wolgast, Secretary

Testimony in support of House Bill No. 2137
regarding provision of interpreters

presented to

House Appropriations Committee

by Ray Petty, Legislative Liaison, KACEH

February 16, 1987

Thank you for this opportunity to discuss the need to change Kansas law regarding the provision of interpreters. KACEH supports House Bill 2137 and believes that it takes a significant step in the direction of guaranteeing deaf and hearing impaired persons their due process and equal protection rights. It encourages the development and use of qualified interpreters. And it insures that privileged communications shall not be abrogated because of a communication handicap. Overall, the bill recognizes the right of deaf persons in Kansas to participate in the functions of government as first-class citizens.

KACEH has made this one of our top priority legislative issues since 1985 and we continue to believe that it is time to open the democratic process to voices which have been muted too long. You may be aware of the interpreter bill (H.B. 2221) which was introduced during the 1985 session, considered in a 1985 interim study, and then brought up for hearings again last session. That bill would have required governmental units including courts, at state and local levels, to provide qualified sign language interpretation for deaf and hearing-impaired citizens. Although there was a complex issue contained in that bill - the right of deaf persons to serve on juries - the remainder of the bill was rather straightforward. Other than the jury issue, the bill did not break ground that had not already been broken in a substantial number of other states. Despite ample and articulate testimony in favor of the bill, it did not make it out of committee.

This year's bill is narrower. Local governments are not covered. Jury duty is not included. The issues are simple and the requested remedies are modest. There is ample flexibility granted to deal with local conditions. But the major thrust is still there - that communication access is a right, not a governmental nicety which may or may not be provided. No deaf person in our state should be asked to provide their own interpreter in order to have access to our state government and certainly not to our courts.

In order to make an educated decision about this issue, one must be aware of certain existing laws. First and foremost is Section 504 of the Rehabilitation Act of 1973, as amended. According to the implementing regulations pursuant to that law, any program which receives federal financial assistance may not discriminate against handicapped persons in the provision of its services or in the employment of such persons in its workforce. This mandate includes the removal of communication barriers and specifically includes the provision of interpreters for the deaf. The cost of insuring program accessibility is to be paid by the program in question.

This federal law covers our departments of Education, Human Resources, Social and Rehabilitation Services, Transportation, Health and Environment, state universities, as well as county and municipal governments which receive over \$25,000 in federal funds, among others. Failure of any of these covered programs to provide access to disabled persons places that program in violation of federal law. One remedy for non-compliance is the discontinuation of federal funds.

Furthermore, the Rehab Act Amendments of 1986 make it clear that a state is not immune under the Eleventh Amendment for a violation of section 504 or any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. The same remedies which are available for such a violation by any public or private entity are also available in a suit against the state, including remedies both at law and in equity. This then is no trivial issue.

Mr. Rosenthal of the Kansas Commission for the Deaf and Hearing Impaired (KCDHI) has or will bring to your attention the rejection of a statement for reimbursement of interpreter services provided by KCDHI to a court in Hays in the case of a deaf person charged with DUI. The judge indicated that he would have "made do" had he known a fee was involved. What "making do" means is taking out a pad of paper and a pencil and scribbling notes back and forth, perhaps mixed with some elementary gesticulation. Such treatment is totally unacceptable, particularly in a court of law. And so is bringing in Aunt Mabel, who has a deaf second-cousin she spent several summers with in her youth, to act as an interpreter.

Let me now address the specifics of House Bill 2137. Mr. Rosenthal and I spent considerable time and energy meeting with deaf persons, interpreters, other service providers, and in reviewing state laws pertaining to communication access as we prepared this bill. The changes we are suggesting here have been approved by KCDHI and by SRS as well. Briefly, the requested changes are:

1. a change to preferred terminology in lines 25-26
2. coverage of preparation for trial in lines 28-29 and 32-33; having an interpreter in court is obviously necessary but so is assistance in preparation for trial; these fees would be covered as costs in the proceeding (see line 57).

3. the legislature is being asked to provide interpreters to enable a deaf citizen to provide testimony to a committee, subcommittee, or commission created by the legislature; although no language has been included here to provide for adequate notice - say 48 hours or two business days in advance - I think there would be no objection to such a provision.

4. the major change is in line 54 where "shall" is substituted for "may"; in the settings listed in K.S.A. 75-4351, there should be no option as to whether or not the service is both provided and paid for.

5. language in lines 70-78 encourages the utilization of a qualified interpreter and requires an appointing authority to make a reasonable effort to obtain such an interpreter. In the event that such an interpreter cannot be located, an interpreter whose qualifications are otherwise determined may be appointed.

6. lines 79-82 provide that KCDHI shall make efforts to provide a list of qualified interpreters and help make referrals; the inclusion of a recommended fee schedule is intended to educate the appointing authorities about reasonable charges for services.

7. lines 99-103 provide that privileged communications between a deaf person and third party cannot be violated simply because an interpreter is present; the "s" on the end of communications in line 102 should probably be dropped.

In 1983 and again in 1985 KACEH surveyed disabled persons across the state concerning issues important to them. 405 persons responded to both survey administrations; of these, 74 persons or 18% had some hearing impairment. The item "Qualified interpreters are available to deaf persons to permit use of public services (e.g. hospitals, welfare offices)" ranked as the 12th and 7th most important issues (out of 30) on the two surveys, respectively. It is significant that even with fewer than one fifth of the respondents having any kind of hearing impairment, this issue was widely recognized as a problem in Kansas. Obviously, the deaf community has the support of a wide range of persons with disabilities on this issue.

We ask for your support on House Bill 2137 and encourage you to recommend it favorable for passage. I will be glad to provide further information or answer any questions. Thank you.

a:terphous

TESTIMONY OF MARTHA J. HODGESMITH
Kansas Legal Services

BEFORE THE HOUSE APPROPRIATIONS COMMITTEE
Re: HB 2137 - February 16, 1987

My name is Martha J. Hodgesmith. I am an attorney with Kansas Legal Services. I am appearing here today at the request of the Kansas Commission for the Deaf and Hearing Impaired to give you my observations and comments regarding the need for establishing an effective and efficient system for the provision of interpreters within the Kansas court system and other governmental bodies.

For the past two years I have been the Public Benefits Specialist for Kansas Legal Services, an organization which provides legal services to eligible clients in every county of the state through a network of eleven direct service offices complimented by special advocacy projects located in Topeka. I personally assist our attorneys in the representation of a wide range of clients including the elderly, public assistance recipients, financially troubled farmers, and persons with disabilities among others. In addition, we provide training and consultation to attorneys in private practice on issues including representation of clients with disabilities. Those efforts have been assisted by grants from the Kansas Department of Education, Special Education Administration and the Client Assistance Program of Rehabilitation Services of SRS for whom we have developed advocacy manuals on Special Education and Rehabilitation Services law for use by attorneys, educators, lay advocates and persons with disabilities. We have made special efforts in those trainings to enlighten people in regard to the difficulties faced by deaf persons involved with the legal system and governmental entities.

Through direct efforts in representing clients with disabilities in a variety of legal settings, discussions with other advocates and service providers, we know that persons with disabilities face difficulty in such straightforward issues as physical access to courtrooms, provision and payment for interpreters, and accommodation for persons with cognitive and language dysfunctions when they become involved as parties, victims, and/or witnesses in legal proceedings, be they criminal, civil, or administrative.

Because communication is at the heart of the legal process, an inability to effectively communicate within the system results in de facto exclusion from the benefits and protections of our legal system. More than sixty years ago a court in the case of Terry v. State of Alabama, 105 So. 386 (1925) recognized that:

[I]n the absence of an interpreter, it would be a physical impossibility for the accused, a deaf [defendant], to know or understand the nature and cause of the accusation against him and ... he could only stand by helplessly ... without knowing or understand[ing], and all this in the teeth of the mandatory constitutional rights with apply. Mere confrontation would be useless.

According to the National Center for Law and the Deaf at Gallaudet University, today's courts still deny equal access and due process to hearing impaired people.

Kansas has made efforts through its enactment of K.S.A. 75-4351 et. seq. to set a threshold for the granting of access through the provision of interpreters. Yet despite these windows of opportunities, the realities of actual representation establish that the windows have been closed because of a lack of knowledge, understanding and direction. These realities have be countered against the requirements for such access established not only constitutionally but statutorily.

The Department of Justice has analyzed the impact of the regulations implementing Section 504 of the Rehabilitation Act of 1973 and its mandates in regard to nondiscrimination based on handicap in federally assisted programs. The conclusion the Department reaches as to the appointment of interpreters in both civil and criminal proceedings is that:

Court systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments ... Where a recipient has an obligation to provide qualified interpreters under this subpart, the recipient has the corresponding responsibility to pay for the service of the interpreters.

Legal Rights of Hearing-Impaired People - National Center for Law and the Deaf. Page 119 citing to 45 Federal Register 37,630 (1980)

Section 504 and its implementing regulations are likewise applicable to other functions and agencies of government outside the court system. P.L. 99-506, Rehabilitation Act Amendments of 1986, enacted October 21, 1986 in Section 1003 - Civil Rights Remedies Equalization effectively reversed the grant of immunity from lawsuits against a state for violations of Section 504. Such immunity had been interpreted to exist by the United States Supreme Court in its decision in the case of Atascadero State Hospital and California Department of Mental Health v. Douglas James Scanlon, 473 U.S. __, 87 L Ed 2d 171, 105 S Ct __ (June 28, 1985)

Therefore, Kansas is faced with the mandate to insure that its judicial administration and other governmental functions provide access in order that persons who are deaf obtain equal justice under the law. Judges, court administrators, law enforcement administrators and officers, and other governmental employees are all essential players in this function. The funding of interpreters must be provided by the state through the appropriate agency and the issue of the existance or lack of adequate funds to provide the service cannot, under federal law, be used as a basis for denying and/or limiting the use of professional certified interpreters.

In addition to these specialized laws, the Fifth and Fourteenth Amendments of the United States Constitution and the Kansas Constitution, Bill of Rights, Section 1 and 18 insure that persons are not to be deprived of life, liberty, or property without due process of law. Such due process has been tentatively established in the enactment of K.S.A. 75-4351 et.seq. which has established some criteria for insuring that those in need of communicative assistance actually have access to the pursuit of their rights.

HB 2137 creates the statutory accountability that will assure meaningful access in the pursuit of basic rights in all branches of government. It enhances the basic floor of accessibility initially created in K.S.A. 75-4351 et.seq. by requiring appointment of interpreters beginning at the preparation phase of a proceeding therefore insuring better understanding of and more effective involvement in the proceeding itself. HB 2137 recognizes the essence of citizen involvement in the enactment of laws by adding the right to interpreter services in the legislative forum. It clarifies the responsibility for payment of fees for the use of interpreters and it insures the viability of the use of interpreters by recognizing the process for use of qualified interpreters. Lastly it carries through the privilege of confidential communication to the process of using an interpreter.

I refer the members of the committee to the attached excerpt from a paper published by the National Center for Law and the Deaf of Gallaudet University which outlines the Legal Implications of Professional Sign Language Interpreting. The excerpt establishes the importance of legislation in which use of an interpreter is clearly stated to not affect the protection of privileged communications. By enactment of HB 2137 Kansas will join a number of other states in the provision of this vitally needed protection.

HB 2137 will continue the efforts of the State of Kansas to be sensitive to and cognizant of the needs of persons with disabilities. Ignorance, inconvenience, or apathy undermine the laws you have created to protect this group of citizens, HB 2137 will be a step in the direction of allowing those citizens to present their own case in their own words.

SIGN LANGUAGE INTERPRETING
(EXCERPTED FROM)

E. Elaine Gardner

Staff Attorney
National Center for Law
and the Deaf
7th Street and Florida Avenue, N.E.
Washington, D.C. 20002

THE PRIVILEGED COMMUNICATION

a. Introduction to privilege

An issue of great concern to the deaf community and professional interpreters is whether an interpreter can be forced to testify as to information obtained while interpreting. The fear that this information will be revealed by interpreters voluntarily, or involuntarily pursuant to court order, induces some deaf persons to withhold important information from the professional with whom they are meeting. It is important for all parties to such communication to understand which communications are protected by law, and which the interpreter can be forced to reveal.

The law has, for public policy reasons, chosen to protect certain communications from the court's power to compel disclosure. These communications, designated as "privileged", must meet the following criteria before attaining their special status: 1) they must be confidential in nature; 2) this privacy must be essential to promote a successful and honest relationship between the parties; 3) the relationship must be one which society wishes to foster; and 4) the injury the disclosure of this type of communication would cause to the protected relation-

ship must be greater than the benefit to the court of thereby gaining information. Simply put, there are certain important relationships in which the parties need to be sure that what they say is private and cannot be disclosed by force of court order. Examples of some of these protected relationships are wife/husband, attorney/client, doctor/patient, and clergy/parishioner. Additional privileges are sometimes also available, depending on the statutory law of the individual state. These can include psychologist/patient, therapist/patient, and reporter/source.

b. Protection of interpreters from compelled disclosure of privileged information

Not just any communication, even between two persons who share one of the relationships listed above, is protected as privileged communication. The communication must be made specifically in connection with this relationship, and without the presence of third parties to the relationship. Generally, the element of confidentiality essential to the establishment of the privilege is missing when a third party is present during the communication. Therefore, the presence of most third parties will destroy the privilege.

However, there are exceptions to this third party rule which have been established. In an otherwise privileged situation, a third party's presence will not destroy the privilege if that third party is acting as the agent for the professional, or client, or both, and the presence of that agent is necessary for the conduct of the legal business or professional counseling.

Interpreters, for deaf persons who rely on Sign Language to communicate, fit squarely into this third party exception. As agents of one or both of the individuals involved, they are unquestionably essential to the furtherance of the relationship. As a result, an interpreter's indispensibility in this area has been recognized by virtually every court reviewing this issue.²

When there is a need for a Sign Language interpreter, therefore, the presence of the interpreter should not dissolve the confidentiality of an otherwise privileged communication. However, circumstances do occur when deaf persons may desire the presence of family members, in addition to the interpreter, in a situation which would otherwise be privileged. Especially when a deaf person is facing serious legal or medical problems, the presence of relatives can help to provide background information and moral support to enhance free and accurate communication.

In a case before a Maryland court, an interpreter and close relatives were present during a jailhouse interview between a deaf defendant charged with murder and his attorney. The Registry of Interpreters for the Deaf (RID) certified interpreter was subpoenaed to testify before a grand jury as to the communica-

²Hawes v. State, 7 So. 302 (Sup. Ct. Ala., 1890); Mileski v. Locker, 178 N.Y.S. 2d 911 (1958); DuBarre v. Linette, Peake 108, 170 Eng. Rep. 96 (1791); Parker v. Carter, 18 Va. 273 (1814); Foster v. Hall, 29 Mass. 89 (1833); State v. Laponia, 85 N.J.L. 357, 83A 1045 (1913); Jackson ex dem Haverly v. French, 3 Wend (N.Y.) 337 (Sup. Ct. 1829); Hatton v. Robinson, 31 Mass. (14 Pick.) 416 (sup. Jud. Ct. 1833); Sibley v. Waffle, 16 N.Y. 180 (Ct. App. 1857); Sample v. Frost, 10 Iowa 266, 267 (Sup. Ct. Iowa 1859); Tyler v. Hall, 17 S.W. 319, 321 (Sup. Ct. Mo. 1891).

tion which took place at that time. The interpreter refused to testify, saying that she preferred to face jail than betray a confidence. In a major victory, the Maryland Circuit Court judge quashed (threw out) the subpoena on the grounds that a Sign Language interpreter is covered by the attorney/client privilege, stating:

When both attorney and client depend on the use of an interpreter for communicating to one another, the interpreter serves the vital link in the bond of the attorney/client relationship.

Touhey v. Duckett, 19 Crim. Law Rep. 2483, No. 23,331 Equity (Cir. Ct. Anne Arundel Co., November 30, 1976) slip op. at 3.

Moreover, the judge went a step further and found that the presence of close relatives during an attorney interview with a deaf person does not necessarily abrogate the attorney/client privilege. The judge, having been sensitized to the varying communication needs of deaf individuals, stated:

It is readily apparent that the success of communicating through the use of Sign Language varies with the expertise of the deaf mute (sic). It would be to the advantage of any attorney who seeks to diligently represent his client, as in this case, to have members of the immediate family present to aid in the interpretation process.

Touhey, supra, slip op. at 4.³

It should be noted at this point that, although an attorney, physician or member of the clergy must be duly licensed before a privileged communication with that professional can occur, there

³This case was reversed on other grounds on appeal. 36 Maryland Appeals 238 (1977).

is no similar license or certification requirement for the interpreters they use. As these interpreters are not the professionals whose relationships are encouraged by law, it need merely be shown that the interpreter was an agent of either of the parties, and necessary to the communication.

Although the use of an interpreter should never destroy an otherwise privileged communication, some states have taken the precaution of amending their interpreter statutes to specify this.⁴ These provisions, although often mistakenly titled as "interpreter privilege" legislation, do not create any new privilege; they simply ensure that existing privileges are not destroyed by an interpreter's presence.

⁴ See the interpreter laws of Kentucky, 22 KRS 70 (1976), Tennessee, 123 TCA 24-108(j) (1977), New Hampshire §521-A NHA 11 (1977), Montana, 245 MCA 11 (1979), Florida, 19 FSA 6063(7) (1980), Iowa, 622B ICA 6 (1980), North Carolina, 8A NCGS 5 (1981), Arkansas, 5 ASA 715.1(g) (1979), Texas, TCA Evidence Code, 3712a(c) (1979), Virginia, 37 VCA 8.01-400.1 (1979), and New Mexico, NMAS 38-9-1-1.