Approved February 9, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~a.m.~~/p.m. on January 26, 1987 in room 313-S of the Capitol.

All members were present except:
Representatives Peterson and Crowell who were excused

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Secretary

Conferees appearing before the committee:

Representative Dale Sprague
Jerry Slaughter, Kansas Medical Society
Michael C. Germann, Kansas Railroad Association
David Litwin, KCCI and Kansas Coalition on Tort Reform
George Barbee, Kansas Consulting Engineers
Janet Stubbs, Home Builders Association of Kansas
Representative Mike O'Neal
Dick Croaker, Vice-President and Associate General Counsel, United Telecommunications, Inc.
Ron Smith, Kansas Bar Association
John Wine, Secretary of State's Office
Judge Robert L. Morrison, Wichita

The Chairman announced the Committee would hear bill requests.

Representative Dale Sprague informed the Committee of the November 21, 1986 meeting of the Special Committee on Judiciary at which Attorney General Robert T. Stephan offered his opinion No. 86-163, addressed to Representative Ron Fox, in which the Attorney General stated that a portion of K.S.A. 65-516 was being unconstitutionally applied in that due process is not provided in the statute or in rules and regulations. The Attorney General recommended this could be corrected through remedial legislation or by rules and regulations, (see Attachment I).

Representative Sprague explained the question involves the validation process by Social and Rehabilitation Services and how a name gets on the central registry as a child abuser. He requested the Committee introduce a bill to provide for due process in the validation process.

The Chairman requested Representative Sprague confer with staff on the drafting of the bill and after the bill is drafted the Committee will consider it for introduction.

Jerry Slaughter requested legislation which would amend 1986 H.B. 2661. He submitted a summary of clarification amendments, section 1 through section 11. The bill relates to health care providers, risk management, peer review and public records, (see Attachment II).

Representative Solbach moved the Committee introduce the bill proposed by the Kansas Medical Society, by request. Representative Douville seconded and the motion passed.

Michael C. Germann requested the Committee introduce legislation changing the places at which personal injury suits can be brought. He requested local stations at the residence of the plaintiff or where the injury occurred. He stated there are difficulties being involved in litigation at a point far removed from the location of the incident.

A motion was made by Representative Douville and seconded by Representative Walker to introduce the legislation requested by the Kansas Railroad Association, by request. The motion passed.

David Litwin requested the Committee introduce a bill addressing jury instruction on taxability of awards in civil actions.

Representative Douville moved and Representative Buehler seconded that the Committee introduce the bill proposed by KCCI, by request. The motion passed.

George Barbee requested the Committee introduce a bill that would contain expert witness qualifications for design professionals (engineers, architects, land surveyors and landscape architects).

A motion was made by Representative Snowbarger that the Committee introduce, by request, legislation proposed by the Kansas Consulting Engineers. The motion was seconded by Representative Bideau and the motion passed.

George Barbee also requested the Committee introduce a bill for pretrail screening panels in actions for property loss, personal injury or death against professionals allowed to form professional corporations under K.S.A. 17-2502.

Representative Walker moved the Committee introduce the bill on pretrial screening panels proposed by the Consulting Engineers, by request. Representative Douville seconded and the motion passed.

Janet Stubbs requested the Committee introduce a bill limiting the liability of a contractor to 10 years after the construction of a building.

A motion was made by Representative Duncan to introduce the bill proposed by the Kansas Home Builders Association, by request. The motion was seconded by Representative Walker. The motion passed.

Representative Mike O'Neal requested the Committee introduce two bills. One bill would address caps on noneconomic damages in civil actions. The other bill would address collateral source based on Professor Concannon's interim suggestions.

Representative Snowbarger moved to introduce the two bills requested by Representative O'Neal. Representative Walker seconded and the motion passed.

Hearing on S.B. 26-Allow shareholders to amend their corporate charters to cap or eliminate awards against directors or officers in shareholders derivative suits-Proposal No. 29.

Dick Croaker testified in support of S.B. 26. The bill conforms the Kansas Corporate Code to the Delaware Corporation Law and permits Kansas corporations to obtain and retain the best possible independent directors without such directors putting their personal assets totally at risk and places the decision in the hands of the stockholders, (see Attachment III).

Ron Smith stated the Kansas Bar Association does support this bill. They do have some recommendations for technical changes that they will handle later in the session with another bill so passage of S.B. 26 can be expedited.

John Wine testified the Secretary of State's office supports passage of S.B. 26 by the Committee today.

David Litwin stated the Kansas Chamber of Commerce and Industry and the Kansas Coalition on Tort Reform also support passage of S.B. 26.

The Chairman reported receiving a letter from William Sneed, Kansas Association of Defense Counsel, recommending passage of S.B. 26.

The hearing on S.B. 26 was closed.

A motion was made by Representative Roy to recommend favorably S.B. 26 for passage. Representative Snowbarger seconded the motion. The motion passed.

Hearing on H.B. 2007-Crimes involving aiding runaways-Proposal No. 20
H.B. 2008-Furnishing alcohol or drugs to minors, penalties-Proposal No. 20
H.B. 2009-Prosecution of crimes by attorney general-Proposal No. 20

Judge Robert L. Morrison testified in support of H.B. 2007, H.B. 2008 and H.B. 2009. He explained that he had been the Chairman of the Attorney General's Task Force on Missing and Exploited Children and the bills were recommended by the Task Force.

On H.B. 2040-Traffic offenses committed by juveniles, application of juvenile codes, Judge Morrison commented that on page 4 the reference to violation of a city ordinance should be under the definition of a juvenile offender instead of being in the exceptions.

The Chairman announced the Committee will resume hearings on H.B. 2007, H.B. 2008, H.B. 2009 and H.B. 2040 Tuesday, and also hear H.B. 2024 and H.B. 2025 that are scheduled for hearing on Tuesday.

The meeting was adjourned at 5:00 p.m. by the Chairman.

The next meeting will be Tuesday, January 27, 1987, at 3:30 p.m. in Room 313-S.

GUEST REGISTER

DATE Jan. 26, 1987

HOUSE JUDICIARY

| NAME | ORGANIZATION | ADDRESS |
|---|---|---|
| Mike Germann | Kansas Railroad Association | Topeka |
| Bob Aikenhead | KTLA | Topeka |
| Richard Mason | KTLA | Topeka |
| Denise Schwerdt | Ameritel | " |
| Wally Beggs | KBI | Topeka |
| Robert Morrison | DISTRICT COURT - [redacted] | WICHITA |
| Brenda Braden | AG | Topeka |
| Jolene Miller | A.G. | " |
| Bill Henry | KS Engineering Society | Topeka |
| Gary Reser | Kansas Telephone Assn. | Topeka |
| Bob Williams | Kansas Committee For Prevention of Child Abuse | " |
| Lisa Hall | KS Bankers Assoc. | " |
| Tom Slattery | AGC of KS | TOP |
| D. WAYNE ZIMMERMAN | KANSAS CONTRACTORS ASSOC. | TOPEKA |
| Jack Stubbs | KBAK | " |
| Shirley E. Mahon | Wichita Area Builders Assn. | Wichita |
| M.S. MITCHELL | " " " " | WICHITA |
| Rick Kready | KPL Gas Service | Topeka |
| Tom Taylor | KPL Gas Service | Topeka |
| Dennis Tietze | Visitor - Dr for Dairy | Topeka |
| Lori Callahan | Am. Lens. Assoc. | Topeka |

STATEMENT OF

ATTORNEY GENERAL ROBERT T. STEPHAN

Special Committee on Judiciary

Room 519-S, Capitol

9:45 a.m.

Friday, November 21, 1986

I have been asked to address Attorney General Opinion No. 86-163. The opinion states that a portion of K.S.A. 65-516 is being unconstitutionally applied in that due process is not provided in the statute or in rules and regulations. In the opinion, I also advise that through remedial legislation or rules and regulations, this defect can be corrected.

The portion of the statute in question provides that boarding homes for children and family day care homes may not employ, have as residents or volunteers anyone who has been validated by the Department of Social and Rehabilitation Services as a child abuser. The question raised involves how an individual comes to be validated by SRS as a child abuser -- whether that procedure meets the requirements of due process. I believe it does not.

I applaud the intent of the legislature in adopting this particular portion of K.S.A. 65-516. Indeed, my position in regard to child abusers is quite clear. They should be locked up. Certainly they should not be allowed to work with

children. The point, however, is that we must take these steps properly under the law, both to avoid probable state liability if an error is made and to protect someone unjustly accused from being denied the right to earn their livlihood.

When we first discussed this issue with counsel to SRS, there were no policies and procedures, rules and regulations or statutory language which adequately provided an individual with notice and a right to a hearing before their name was placed on a list of child abusers -- a list against which licensed providers check names of current and prospective employees. Although we suggested that the validation procedure could be brought into compliance with due process requirements by adopting rules and regulations establishing notice and hearing, no such rules and regulations have been forthcoming. Instead we are told notice is now provided for in the Kansas Manual of Youth Services. That simply is not good enough under the law. The law mandates that due process procedures be codified. We suggest this can be done by amending the statutes in question or by enacting rules and regulations, and I speak generally in the opinion as to how this may be accomplished.

Before concluding, I want to make it clear that we're not talking here about individuals who have been convicted of any crime regarding child abuse. Those convicted of abuse are excluded from employment separately from this SRS validation procedure and no further due process need be accorded those who have been convicted. They had their opportunity for a

hearing in a court of law. Here we are talking about individuals who in the opinion of an SRS social worker should be listed as child abusers, and it is conceivable that this could occur without the individual ever knowing he or she had been so listed. Given the potential for error and abuse in such a validation system, I have no problem whatsoever reconciling my strong advocacy of tough sanctions against child abusers with my belief that this opinion is not only legally correct but, is correct as a matter of good public policy, as well.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 21, 1986

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 86-163

The Honorable Ron Fox
State Representative, 21st District
4216 W. 73rd Terr.
Prairie Village, Kansas 66208

Re: Public Health -- Maternity Hospitals, Homes for Children -- Constitutionality of K.S.A. 65-516(a)(3); Child Abuse Validation by the Department of the Social and Rehabilitation Services

Synopsis: K.S.A. 65-516(a)(3) provides that no person may be licensed to operate a child day care home or child boarding home if said person has a resident, employee or regular volunteer who has been validated as a child abuser by the Department of Social and Rehabilitation Services (SRS) pursuant to K.S.A. 1985 Supp. 38-1523. In our opinion, validating an individual as a child abuser without affording that individual sufficient notice and an opportunity to be heard violates the individual's constitutional right to due process. Since the statute does not provide for notice and hearing and there are not rules and regulations to supplement it, K.S.A. 65-516(a)(3) as applied does not meet the constitutional requirement of due process. To insure that due process requirements are met, those procedures must be codified by statute or agency rules and regulations. Cited herein: K.S.A. 1985 Supp. 38-1523; K.S.A. 65-128; 65-501; 65-504; 65-516; 77-415; 75-3306; K.A.R. 30-7-26 et seq.; L. 1980, ch. 184, §2; L. 1982, ch. 259, §2; L. 1983, ch. 140, §46; L. 1984, ch. 225, §1; L. 1985, ch. 210, §1; U.S. Const., 14th Amendment.

* * *

Dear Representative Fox:

You have requested our opinion regarding the constitutionality of a quasi-judicial power in a state agency, and whether due process is met as a result thereof. Specifically, you question K.S.A. 65-516(a)(3), which reads in part:

> "No person shall knowingly maintain a boarding home for children or maintain a family day care home if, in such boarding home or family day care home, there resides, works or regularly volunteers any person who:
>
> . . . .
>
> "(3) has committed an act of physical, mental or emotional abuse or neglect or sexual abuse as validated by the department of social and rehabilitation services pursuant to K.S.A. [1985] Supp. 38-1523 and amendments thereto;" (Emphasis added.)

I. History of the Statute

K.S.A. 65-516 originated in 1980, barring convicted child abusers, convicted sex offenders and carriers of infectious or contagious diseases from residence in a day care facility. L. 1980, ch. 184, §2. It has been amended four times. L. 1982, ch. 259, §2; L. 1983, ch. 140, §46; L. 1984, ch. 225, §1; L. 1985, ch. 210, §1. The 1982 amendment increased the list of persons affected by including persons who had 1) children declared deprived or removed from the home pursuant to the Kansas juvenile code, 2) signed a diversion agreement involving abuse, 3) been found to be incapacitated, or 4) been found unfit to have custody of a minor. L. 1982, ch. 259, §2. L. 1983, ch. 140, §46 clarified the earlier years' language. In the above situations, due process was afforded the barred party.

In 1984, the Legislature added to the K.S.A. 65-516 list those validated as child abusers by SRS. See K.S.A. 65-516(a)(3), L. 1984, ch. 225, §1. Interestingly, the 1985 Legislature added the word "knowingly" to "[n]o person shall maintain a boarding home . . ." in reference to licensing restrictions upon day care providers. L. 1985, ch. 210, §1. The validation procedure, however, remained in the

hands of the SRS, and no court review procedure was mentioned.

II. Constitutional Requirement of Due Process

A. Statutory law requires licensing for private child day care and child boarding home providers. K.S.A. 65-501 states:

> "It shall be unlawful for any person, firm, corporation or association to conduct or maintain a maternity hospital or home, or a boarding, receiving or detention home for children under 16 years of age without having a license or temporary permit therefor from the secretary of health and environment. Nothing in this act shall apply to any state institution maintained and operated by the state."

Case law discusses the state's interests in protecting both an individual's due process rights and the children involved. O'Sullivan v. Heart Ministries, Inc., 227 Kan. 244 (1980) held the State of Kansas has a legitimate and compelling interest to protect children and therefore may require private providers to be licensed. Rydd v. St. Board of Health, 202 Kan. 721 (1969) [cited with approval in Elkins v. Showcase, Inc., 237 Kan. 728 (1985)], sets out the powers of an administrative agency issuing or denying licenses to child care providers. Rydd formulates a three-pronged test for procedural due process in denying a license, holding (1) notice, (2) an opportunity to be heard, and (3) an opportunity to defend are constitutionally required. See also Attorney General Opinion No. 86-156, p. 2.

Statutory law provides the above due process requirements of notice and hearing for the license applicant. K.S.A. 65-504 states in part:

> "(a) The secretary of health and environment shall have the power to grant a license to a person, firm, corporation or association to maintain a maternity hospital or home, or a boarding home for children under 16 years of age.
>
> . . . .

> "(c) Whenever the secretary of health and environment refuses to grant a license to an applicant, the secretary shall issue an order to that effect stating the reasons for such denial and within five days after the issuance of such order shall notify the applicant of the refusal. Upon application not more than 20 days after the date of its issuance a hearing on the order shall be held in accordance with the provisions of the Kansas administrative procedure act.
>
> "(d) When the secretary of health and environment finds upon investigation or is advised by the secretary of social and rehabilitation services that any of the provisions of this act are being violated . . . the secretary of health and environment shall, after giving notice and conducting a hearing in accordance with the provisions of the Kansas administrative procedure act, issue an order revoking such license and such order shall clearly state the reason for such revocation.
>
> "(e) Any applicant or licensee aggrieved by a final order of the secretary of health and environment denying or revoking a license under this act may appeal the order in accordance with the act for judicial review and civil enforcement of agency actions. (Emphasis added.)

As K.S.A. 65-504(d) mandates, state action commences only after notice and hearing are afforded. The licensee or applicant is not aggrieved until after notice and hearing or final determination. After notice and hearing, an appeal is available. K.S.A. 65-504(e).

As for due process for the resident, worker or regular volunteer affected by K.S.A. 65-516, research indicates that due process requirements have not been codified for the person validated as an abuser by the Department of Social and Rehabilitation Services (SRS). It is our opinion, therefore, that such codification must be accomplished, either by statute or agency rules and regulations or both.

B. Section 1 of the Fourteenth Amendment to the United States Constitution states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Procedural due process is the manner in which a governmental entity may act. The courts have consistently held that procedural due process requires notice and an opportunity to be heard.

The portion of the 14th Amendment stating "nor shall any State deprive any person of life, liberty, or property, without due process of law" has been construed by the United States Supreme Court to include "a person's good name, reputation, honor or integrity" as a liberty interest which must be afforded due process. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), a state statute provided certain persons could forbid in writing the sale or gift of intoxicants to problem drinkers. The ban was enforced by a police chief listing names of problem drinkers with local liquor stores. Those people listed were not given notice or an opportunity to contest. The Court held labeling a person as a problem drinker was, to some people, a badge of disgrace, and thus required notice and hearing. The procedural due process of notice and hearing afforded Ms. Constantineau was not for any crime she allegedly committed, it was for having her name listed as a drunkard. Whether or not she was a drunkard was not the issue. Her right to be notified of the listing of her name and her right to contest the listing at a hearing was the procedural due process issue.

K.S.A. 65-516 allows validation of an alleged abuser and the subsequent listing of his or her name with various governmental agencies throughout Kansas, the fifty states and the federal government. Abuse, unlike drunkenness, may be considered a crime, thus requiring as much protection for an alleged abuser, if not more, as afforded an alleged drunkard. (See, e.g., Owen v. City of Independence, 445 U.S. 622

(1979), where the city council impugned an individual's name without notice or opportunity to be heard. The Court held, regardless of the truth of the statement, that an individual's good name is sufficient reason for the mechanism of notice and hearing; see also Board of Regents v. Roth 408 U.S. 564 (1972), where the Court held that when a public employer, in discharging an employee, makes charges that injure the employee's reputation or impose a stigma that forecloses the employee's freedom to take advantage of other employment opportunities, due process requires that the employee receive an opportunity to clear his or her name.)

More recent United States Supreme Court cases have fashioned a "stigma plus" test which an aggrieved party must pass before constitutional protections are afforded. In Paul v. Davis, 424 U.S. 693, 701 (1976), the Court stated specifically that "reputation alone, apart from some more tangible interests such as employment [is not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Rather, the injury to reputation must occur together with some other "alteration of status." Id. at 706-10. (Emphasis added.) Jungels v. Pierce, 638 F. Supp. 317 (N.D. Ill. 1986), citing Roth, supra with approval, stated that for purposes of procedural due process, an employer's own rules or mutually explicit understandings may support a protected property interest of an employee. See also Perry v. Sinderman, 408 U.S. 593 (1972).

III. Application of Due Process Standards to the Situation in Question

As the chief legal counsel of SRS has stated, a day care facility, upon receiving an application for employment, contacts SRS. SRS then checks its Central Registry and informally advises the day care provider whether the applicant appears on the list. The advice is given with the understanding that should a day care provider employ someone on the list, the day care provider's license may be in jeopardy. A similar situation arises when someone already employed by a day care provider is validated by the SRS as being an abuser. The day care provider must discharge or suspend the employee or face the possibility of losing its license.

When a name is listed, a stigma attaches. The alleged abuser is "screened out" of employment, residence or volunteer work in a boarding home or family day care home for children. (See K.S.A. 65-516, supra.) Loss of domicile and employment

opportunity are ascertainable results of validation. This "stigma plus" test triggers the requirement of procedural due process.

K.S.A. 75-3306(a) states:

> "The secretary of social and rehabilitation services shall provide a fair hearing for any person who is an applicant, client, inmate, other interested person or taxpayer who appeals from the decision or final action of any agent or employee of the secretary. The hearing shall be conducted by an employee or employees of the secretary of social and rehabilitation services to be designated by the secretary as an appeals referee or committee. The secretary of social and rehabilitation services shall prescribe the procedure for hearing all appeals.
>
> "It shall be the duty of the secretary of social and rehabilitation services to have available in all intake offices, during all office hours, forms for filing complaints for hearings, and appeal forms with which to appeal from the decision of the agent or employee of the secretary. The forms shall be prescribed by the secretary of social and rehabilitation services and shall have printed on or as a part of them the basic rules and regulations for hearings and appeals prescribed by state law and the secretary of social and rehabilitation services." (Emphasis added.)

Presuming that "other interested person" includes those validated by the SRS as being an abuser, the Kansas Administrative Regulations regarding "Complaints, Appeals and Fair Hearings" and which implement K.S.A. 75-3306, grant only a right to appeal an action by the state. K.A.R. 30-7-26 et seq. This fact has been confirmed by the chief legal counsel of the SRS.

It is our opinion that due process (which includes notice, an opportunity to be heard and an opportunity to defend) must be granted to the resident, worker or regular volunteer affected

by K.S.A. 65-516 before he or she is listed and validated as an abuser by a state agency, before he or she needs to appeal. In other words, before validation of an individual can occur, a fair hearing, akin to the due process afforded the licensee or applicant of K.S.A. 65-504, must be offered. Validating an individual as an abuser, which results in the stigma to name, coupled with a loss of employment opportunity is an action by the state "sufficient to invoke the procedural protection of the Due Process Clause." Paul v. Davis, supra at 706-10. K.S.A. 75-3306 and K.A.R. 30-7-26 et seq. are not sufficient to meet the necessary notice and hearing requirements.

IV. Conclusion

A. In our opinion, due process provisions for persons to be listed in the central registry must be codified. Adequate notice must be defined. Regulations unclear as to application and definition must be clarified to afford minimal due process. Statutory rights must be clarified and strengthened.

There is no statute akin to K.S.A. 65-504 which would give the resident, regular volunteer or employee the notice, hearing and right to defend required by law. Likewise, there is no rule and regulation similar to K.S.A. 65-504 for the resident, regular volunteer or employee. The law requiring rules and regulations, K.S.A. 77-415, states in part:

> "As used in K.S.A. 77-415 to 77-437, inclusive, and amendments thereto, unless the context clearly requires otherwise:
>
> "(1) 'State Agency' means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state.
>
> . . . .
>
> "(4) 'Rule and regulation,' 'rule,' 'regulation' and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having

> the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency. Every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in a state agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render the same a rule or regulation within the meaning of the foregoing definition, nor shall it constitute specific adoption thereof by the state agency so as to be required to be filed." (Emphasis added.)

Thus, due process must either be adopted by the agency in rules and regulations, or by the legislature, or both.

Volume I, Section 2000 et seq. of the Kansas Manual of Youth Services (the Department of Social and Rehabilitation Services workers' manual) does reveal some notice to the alleged abuser. Section 2520 states that the worker, in consultation with the supervisor, shall make a decision as to the result of an investigation of abuse. The result of the investigation shall either be confirmed, unconfirmed, unfounded or unknown. (An opinion regarding the standards of proof and the degree of investigation used by the social worker is omitted due to the narrow scope of the opinion request.) Prior to closing the file, the worker is to notify the alleged abuser. The notice may be made verbally and confirmed in writing on Youth Services form number 3102. The date of verbal notice is to be noted on form number AS-0505. (See Vol. I, Section 2530 of the KMYS.)

A reading of YS-3102 reveals a form used to notify a recipient of state benefits and services that the recipients' benefits may be discontinued. A reading of AS-0505 reveals an activity sheet used to log in the times and dates a social worker contacted a person or agency.

In a 1985 letter regarding validation and statutory compliance received by SRS Area Managers, Chiefs of Social Services and Social Service Supervisors from the Youth Services State Commissioner, it was stated that the action of the Validation Committee (established in an effort to comply with child care facilities licensing) "does not change the finding of the social services worker who conducted the investigation nor the information in the Central Registry. It does review the available material . . . to determine if there is sufficient documentation to sustain a recommendation to revoke or deny a license or registration [of the applicant]." (Emphasis added.) The finding of the social worker regarding an alleged abuser does not change.

We have recently been advised that the SRS procedural manual has been revised to afford more adequate notice. We have not been provided a copy of the revised draft, and therefore cannot comment on its adequacy. In any event, K.S.A. 77-415(4) clearly provides that a rule of an agency, adopted by that agency to govern its enforcement or administration of legislation shall be adopted by that agency and filed as a rule and regulation. The manual, therefore, would not be sufficient for purposes of establishing the administration and regulation of this validation procedure.

B. Recommended Procedures. It is recommended, given the gravity of such a listing, that the notice form include: notification to the alleged abuser that he or she has been accused, that a right to a hearing exists, that if 30 days lapse without a response the hearing will be conducted with only the proponent's evidence, and that a right to appeal a hearing decision exists. It is further recommended that the notice be sent in a fashion similar to a subpoena or summons. In all of the above, the concept that a fair hearing be given prior to listing/validation is of paramount concern.

K.A.R. 30-7-26 currently defines only "client," "appellant," "respondent," and "impartial." Inclusion of a definition of "abuse" or "alleged abuser" subject to validation is recommended. The term "other interested person" as it appears in K.S.A. 75-3306(a) seems insufficient in light of the weight of the allegations. The appropriate social workers' manuals and letters should also be redrafted to reflect this policy. Finally, as indicated above, due process requirements of adequate notice and an opportunity to be heard must be adopted in statutory or regulatory form or both.

All of the above actions would have the dual effect of granting the required due process to an alleged abuser, as

well as furthering the state's interest in protecting children, in that a truer and more manageable list of alleged abusers would be circulated to the appropriate agencies. (Note: the validation list is used for other purposes by other agencies of the fifty states and the federal government. Given the narrow scope of the opinion request, further substantive due process analysis of validation is omitted.)

C. The due process afforded the licensee or applicant in K.S.A. 65-504 is the minimum the state must grant to the alleged abuser as well as the licensee. Current legislation and rules and regulations do not insure the constitutional right of the alleged abuser to be notified before the state lists that individual in the "Central Registry" as a child abuser.

The position of Kansas and of the United States in statutory and case law is clear: when a liberty and property interest is affected by state action, notice and hearing must be afforded. Furthermore, this state action must be enacted through legislation or adopted by the state agency in rules and regulations. K.S.A. 77-415.

In conclusion, K.S.A. 65-516(a)(3) provides that no person may be licensed to operate a child day care home or child boarding home if said person has a resident, employee or regular volunteer who has been validated an abuser by the Department of Social and Rehabilitation Services pursuant to K.S.A. 1985 Supp. 38-1523. In our opinion, this validation procedure does not meet constitutional requirements of due process unless and until legislation and/or agency rules and regulations are drafted providing for due process to the alleged perpetrator.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Thomas Lietz

Thomas Lietz
Assistant Attorney General

RTS:JLM:TL:crw

SUMMARY OF 87 CLARIFICATION AMENDMENTS TO 86 HB 2661

Prepared by the Kansas Medical Society and the Kansas Hospital Association

SECTION 1

Section 1 defines the appropriate licensing agency for reporting purposes, and more clearly defines "reportable incident" as contained in 1986 HB 2661.

SECTION 2

Section 2 allows a hospital to relate its risk management plan under 1986 HB 2661 to existing hospital risk management procedures.

SECTION 3

Section 3 makes minor changes in the definition of reportable incident to clarify 1986 HB 2661, and relates such incidents to patient care. This section also defines the term "knowledge" for reporting purposes and exempts knowledge gained in the course of treatment by a helping professional from the reporting requirement. Section 3 also requires the licensing agencies to promulgate reporting forms, for the purpose of uniformity.

SECTION 4

Section 4 clarifies the confidentiality of reports, exempting reports from discovery and making persons and committees required to report or investigate peer review committees.

SECTION 5

Section 5 clarifies coverage by the HCSF for nonresident and inactive health care providers when such providers were residents engaged in postgraduate training programs and when payments were made into the Fund under certain time limits set forth in the section.

SECTIONS 6

Section 6 amends K.S.A. 65-2836 (grounds for revocation of a physician's license) at (r), concerning the prescribing of drugs.

SECTION 7

Section 7 amends K.S.A. 65-2837 (definition of "unprofessional conduct") at: (b)(15) and (b)(16) to correct technical inconsistencies; and (b)(24) to clarify the requirements for keeping written medical records.

SECTION 8

Section 8 redefines peer review committees to include committees designated by professional societies to investigate complaints under 1986 HB 2661; eliminates the hospital bylaw requirement, and provides added protection for the confidentiality of records. This section also allows for sharing of information among various peer review committees without a waiver of confidentiality.

SECTION 9

Section 9 amends the public records act to exclude risk management records when those records are in the hands of a licensing agency, and excludes insurance rating information compiled by the Fund.

SECTION 10

Section 10 repeals amended statutes.

SECTION 11

Section 11 provides an effective date.

Attachment II
House Judiciary 1/26/87

BILL NO.

An act related to health care providers, risk management, peer review, and public records amending 1986 Kan. Sess. Laws Chapter 229 Sections 2, 3, 4 and 6; K.S.A. 40-3403 and amendments thereto; K.S.A. 65-2836 and amendments thereto; K.S.A. 65-2837 and amendments thereto; K.S.A. 65-4915 and amendments thereto, K.S.A. 45-221, and repealing the existing sections.

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

Section 1. 1986 Kan. Sess. Laws Ch. 229 section 2 is hereby amended to read as follows: (a) "Appropriate licensing agency" means the agency that issued the license to the individual or health care provider who is the subject of a report under this act.

(b) ~~(a)~~ "Department" means the department of health and environment.

(c) ~~(b)~~ "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.

(d) ~~(c)~~ "License," "licensee" and "licensing" include comparable terms which relate to regulation similar to licensure, such as certification or registration.

(e) ~~(d)~~ "Medical care facility" has the meaning provided by K.S.A. 65-425 and amendments thereto.

(f) ~~(e)~~ "Reportable incident" means an act by a health care provider which is or may be below the applicable standard of care, or which may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and has a reasonable probability of causing injury to a patient.

(g) ~~(f)~~ "Risk manager" means the individual designated by a medical care facility to administer its internal risk management program and to receive reports of reportable incidents within the facility.

(h) ~~(g)~~ "Secretary" means the secretary of health and environment.

Section 2. (a) Each medical care facility shall establish and maintain an internal risk management program which shall consist of:

(1) A system for investigation and analysis of the frequency and causes for reportable incidents within the facility;

(2) measures to minimize the occurrence of reportable incidents and the resulting injuries within the facility; and

(3) a reporting system based upon the duty of all health care providers staffing the facility and all agents and employees of the facility directly involved in the delivery of health care services to report reportable incidents to the chief of the medical staff, chief administrative officer or risk manager of the facility.

(b) Not less than 60 days before the time for renewal of its license in 1987, each medical care facility shall submit to the department its plan for establishing and implementing an internal risk management program. Such plan may rely upon policies and procedures adopted by the hospital, its departments and committees. Failure to submit such a plan shall result in denial of the renewal of the facility's license.

(c) Upon review of a plan submitted pursuant to subsection (b), the department shall determine whether the plan meets criteria of this section. If the plan does not meet such criteria, the department shall disapprove the plan and return it to the facility, along with the reasons for disapproval. Within 60 days, the facility shall submit to the department a revised plan which meets the requirements of this section and any rules and regulations adopted hereunder. No medical care facility shall be granted renewal of its license in 1988 unless its plan has been approved by the department.

(d) A medical care facility shall not be liable for compliance with or failure to comply with the provisions of this section or any rules and regulations adopted hereunder, except as provided in K.S.A. 65-430 and amendments thereto.

(e) The secretary shall adopt such rules and regulations as necessary to administer and enforce the provisions of this section.

Section 3. (a) If a health care provider, or a medical care facility agent or employee who is directly involved in the delivery of health care services, has knowledge that a health care provider has committed a reportable incident ~~an act which is or may be below the applicable standard of care or which is or may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto~~, such health care provider, agent or employee shall report such knowledge as follows:

(1) If the reportable incident did not occur in a medical care facility, the report shall be made to the appropriate state or county professional society or organization, which shall refer the matter to a professional practices review committee duly constituted pursuant to the society's or organization's bylaws. The committee shall investigate all such reports and take appropriate action. The committee shall have the duty to include with its quarterly report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standards of care or in a manner that may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and which has a reasonable probability of causing injury to a patient, so that the agency may take appropriate disciplinary measures.

(2) If the reportable incident occurred within a medical care facility, the report shall be made to the chief of the medical staff, chief administrative officer or risk manager of the facility. The chief of the medical staff, chief administrative officer or risk manager shall refer the report to the appropriate executive committee or professional practices peer review committee which is duly constitute pursuant to the

bylaws of the facility. The committee shall investigate all such reports and take appropriate action, including recommendation of a restriction of privileges at the appropriate medical care facility. In making its investigation, the committee may also consider treatment rendered by the health care provider outside the facility. The committee shall have the duty to include with its quarterly report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standards of care or in a manner that may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and which has a reasonable probability of causing injury to a patient, so that the agency may take appropriate disciplinary measures.

(3) If the health care provider involved in the reportable incidents is a medical care facility, the report shall be made to the chief of the medical staff, chief administrative officer or risk manager of the facility. The chief of the medical staff, chief administrative officer or risk manager shall refer the report to the appropriate executive committee which is duly constituted pursuant to the bylaws of the facility. The executive committee shall investigate all such reports and take appropriate action The committee shall have the duty to include with its quarterly report to the department of health and environment any finding that the facility acted below the applicable standard of care or in a manner that may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and which has a reasonable probability of causing injury to a patient, so that appropriate disciplinary measures may be taken.

(4) As used in this section, "knowledge" means familiarity because of direct involvement or observation of the incident.

(5) This section shall not be construed to modify or negate the physician-patient privilege, the psychologist-client privilege, or the social worker-client privilege as codified by Kansas statutes.

(b) If a reportable incident is reported to a state agency which licenses health care providers, the agency may investigate the report or may refer the report to a review or executive committee to which the report could have been made under subsection (a) for investigation by such committee.

(c) When a report is made under this section, the person making the report shall not be required to report the reportable incident pursuant to K.S.A. 65-28,122 and amendments thereto. When a report made under this section is investigated pursuant to the procedure set forth under this section, the person or entity to which the report is made shall not be required to report the reportable incident pursuant to K.S.A. 65-28,121 or 65-28,122, and amendments thereto.

(d) Each review and executive committee referred to in subsection (a) shall submit to the appropriate state licensing agency on a form promulgated by said agency, at least once every three months, a report summarizing the reports received by the

committee pursuant to this section. The report shall include the number of reportable incidents reported, whether an investigation was conducted and any action taken.

(e) If a state agency that licenses health care providers determines that a review or executive committee referred to in subsection (a) is not fulfilling its duties under this section, the agency, upon notice and an opportunity to be heard, may require all reports pursuant to this section to be made directly to the agency.

(f) The provisions of this section shall not apply to a health care provider acting solely as a consultant or providing review at the request of any person or party.

Section 4. Kan. Sess. Laws Ch. 229 Section 6 is hereby amended to read as follows: (a) The following reports and records made pursuant to section 4 or 5 shall be confidential and privileged and are shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and shall not be admissible in any civil or administrative action other than a disciplinary proceeding by the appropriate state licensing agency:

(1) Reports and records of executive or review committees of medical care facilities or of a professional society or organization;

(2) reports and records of the chief of the medical staff, chief administrative officer or risk manager of a medical care facility; and

(3) reports and records of any state licensing agency or impaired provider committee of a professional society or organization;

(4) reports made pursuant to this Act to or by a hospital risk manager, any committee, or any consultant.

(b) No person in attendance at any meeting of an executive or review committee of a medical care facility or of a professional society or organization while such committee is engaged in the duties imposed by Section 4 shall be compelled to testify in any civil criminal or administrative action, other than a disciplinary proceeding by the appropriate licensing agency, as to any committee discussions or proceedings.

(c) No person in attendance at any meeting of an impaired provider committee shall be required to testify nor shall any testimony be admitted into evidence in any civil, criminal or administrative action, other than a disciplinary proceeding by the appropriate state licensing agency, as to any committee discussions or proceedings.

(d) all persons and committees performing any duty under this Act shall be designated a peer review committee pursuant to K.S.A. 65-4915.

Section 5. K.S.A. 1986 Supp. 40-3403 is hereby amended to read as follows: 40-3403. (a) For the purpose of paying damages for personal injury to death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider

subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

(b) (1) There is hereby created a board of governors. The board of governors shall:

(A) Provide technical assistance with respect to administration of the fund;

(B) provide such expertise as the commissioner may reasonably request with respect to evaluation of claims or potential claims;

(C) provide advice, information and testimony to the appropriate licensing or disciplinary authority regarding the qualifications of a health care provider; and

(D) prepare and publish, on or before October 1 of each year, a summary of the fund's activity during the preceding fiscal year, including but not limited to the amount collected from surcharges, the highest and lowest surcharges assessed, the amount paid from the fund, the number of judgments paid from the fund, the number of settlements paid from the fund and the amount in the fund at the end of the fiscal year.

(2) The board shall consist of 14 persons appointed by the commissioner of insurance, as follows: (A) The commissioner of insurance, or the designee of the commissioner, who shall act as chairperson; (B) two members appointed from the public at large who are not affiliated with any health care provider; (C) three members licensed to practice medicine and surgery in Kansas who are doctors of medicine; (D) three members who are representatives of Kansas hospitals; (E) two members licensed to practice medicine and surgery in Kansas who are doctors of osteopathic medicine; (F) one member licensed to practice chiropractic in Kansas; (G) one member licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists; and (H) one member of another category of health care providers. Meetings shall be called by the chairperson or by a written notice signed by three members of the board. The board, in addition to other duties imposed by this act, shall study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund.

(3) The board shall be attached to the insurance department and shall be within the insurance department as a part thereof. All budgeting, purchasing and related management functions of the board shall be administered under the direction and supervision of the commissioner of insurance. All vouchers for expenditures of the board shall be approved by the commissioner of insurance or a person designated by the commissioner.

(c) Subject to subsections (d), (e), (f) and (i), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-

insurers for any such injury or death arising out of the rendering of or the failure to render professional services within or without this state; (2) any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable nonresident health care providers or nonresident self-insurers for any such injury or death arising out of the rendering of or the failure to render professional services within this state, but in no event shall the fund be obligated for claims against nonresident health care providers or nonresident self-insurers who have not complied with this act or for claims against nonresident health care providers or nonresident self-insurers that arose outside of this state; (3) any amount due from a judgment or settlement against a resident inactive health care provider for any such injury or death arising out of the rendering of or failure to render professional services prior to July 1, 1986; (4) any amount due from a judgment or settlement against a nonresident inactive health care provider for any injury or death arising out of the rendering of or failure to render professional services within this state, prior to July 1, 1986, but in no event shall the fund be obligated for claims against: (A) Nonresident inactive health care providers who have not complied with this act, or (B) nonresident inactive health care providers for claims that arose outside of this state, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (5) any amount due for a judgment or settlement against a resident inactive health care provider for any injury or death arising out of the rendering or failure to render professional services within or without this state on or after July 1, 1986, if such inactive health care provider was, for the period of time such health care provider was a resident health care provider, engaged in a postgraduate training program approved by the state board of healing arts, or has paid into the Fund either the following or a combination thereof for at least three consecutive years: (i) the applicable annual premium surcharge, or (ii) an amount equal to the annual premium surcharge paid by a health care provider in the rate classification which was applicable to such inactive health care provider for the most recent year professional services were rendered which payment shall be made within 90 days after this act becomes effective by those health care providers who have become inactive health care providers before the effective date of this act, or, in all other cases 90 days after the health care provider becomes an inactive health care provider; (6) Any amount duefor a judgment or settlement against a nonresident inactive health care provider for any injury or death arising out of the rendering or failure to render professional services within this State on or after July 1, 1986, if such nonresident inactive health care provider was, for the period of time such health care provider was a resident health care provider, engaged in a postgraduate training program approved by the state board of healing arts, or has paid into the Fund either of the following or a combination thereof for at least three consecutive years: (i) the applicable annual premium surcharge, or (ii) an amount

equal to the annual premium surcharge paid by a health care provider in the rate classification which was applicable to such nonresident inactive health care provider for the most recent year professional services were rendered which payment shall be made within 90 days after this act becomes effective by those health care providers who have become inactive health care providers before the effective date of this act, or, in all other cases 90 days after the health care provider becomes an inactive health care provider, but in no event shall the Fund be obligated for claims against: (A) nonresident inactive health care providers who have not complied with this Act, or (B) nonresident inactive health care providers for claims that arose outside of this State, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (7) reasonable and necessary expenses for attorney fees incurred in defending the fund against claims; (8) any amounts expended for reinsurance obtained to protect the best interests of the fund purchased by the commissioner, which purchase shall be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto, but shall not be subject to the provisions of K.S.A. 75-4101 and amendments thereto; (9) reasonable and necessary actuarial expenses incurred in administering the act, which expenditures shall not be subject to the provisions of K.S.A. 75-3738 through 75-3744, and amendments thereto; (10) annually to the plan or plans, any amount due pursuant to subsection (a)(3) or K.S.A. 40-3413, and amendments thereto; (11) reasonable and necessary expenses incurred by the insurance department and the court in the administration of the fund; (12) amounts authorized by the court pursuant to section 28; and (13) reasonable and necessary expenses for the development and promotion of risk management education programs.

(d) All amounts for which the fund is liable pursuant to subsection (c) shall be paid promptly and in full except that, in any case arising out of a cause of action which accrued before July 1, 1986, if the amount for which the fund is liable is $300,000 or more, it shall be paid by installment payments of $300,000 or 10% of the amount of the judgment including interest thereon, whichever is greater, per fiscal year, the first installment to be paid within 60 days after the fund becomes liable and each subsequent installment to be paid annually on the same date of the year the first installment was paid, until the claim has been paid in full and any attorney fees payable from such installment shall be similarly prorated.

(e) In no event shall the fund be liable to pay in excess of $3,000,000 pursuant to any one judgment or settlement against any one health care provider relating to any injury or death arising out of the rendering of or the failure to render professional services on and after July 1, 1984, and before July 1, 1986, subject to an aggregate limitation for all judgments or settlements arising from all claims made in any one fiscal year in the amount of $6,000,000 for each provider.

(f) Except as provided by section 28, the fund shall not be liable to pay in excess of $1,000,000 pursuant to any one judgment or settlement for any party against any one health care

provider relating to any injury or death arising out of the rendering of or the failure to render professional services on and after July 1, 1986, subject to an aggregate limitation for all judgments or settlements arising from all claims made in any one fiscal year in the amount of $3,000,000 for each provider.

(g) A health care provider shall be deemed to have qualified for coverage under the fund: (1) One and after the effective date of this act if basic coverage is then in effect; (2) subsequent to the effective date of this act, at such time as basic coverage becomes effective; or (3) upon qualifying as a self-insurer pursuant to K.S.A. 40-3414 and amendments thereto.

(h) A health care provider who is qualified for coverage under the fund shall have no vicarious liability or responsibility for any injury or death arising our of the rendering of or the failure to render professional services inside or outside this state by any other health care provider who is also qualified for coverage under the fund. The provisions of this subsection shall apply to all claims filed on or after the effective date of this act.

(i) Notwithstanding the provisions of K.S.A. 40-3402 and amendments thereto, if the board of governors determines due to the number of claims filed against a health care provider or the outcome of those claims that an individual health care provider presents a material risk of significant liability to the fund, the board of governors is authorized by a vote of a majority of the members thereof, after notice and an opportunity for hearing, to terminate the liability of the fund for all claims against the health care provider for damages for death or personal injury arising out of the rendering of or the failure to render professional services after the date of termination. The date of termination shall be 30 days after the date of the determination by the board of governors. The board of governors, upon termination of the liability of the fund under this subsection, shall notify the licensing or other disciplinary board having jurisdiction over the health care provider involved of the name of the health care provider and the reasons for the termination.

Section 6. K.S.A. 65-2836 is hereby amended to read as follows: K.S.A. 65-2836. A licensee's license may be revoked, suspended or limited or the licensee may be publicly or privately censured, upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original or renewal license.

(b) The licensee has committed an act of immoral, unprofessional or dishonorable conduct or professional incompetency.

(c) The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts.

(d) The licensee has used fraudulent or false advertisements.

(e) The licensee is addicted to or has distributed intoxicating liquors or drugs for any other than lawful purposes.

(f) The licensee has willfully or repeatedly violated this act, the pharmacy act of the state of Kansas or the uniform controlled substances act, or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

(g) The licensee has unlawfully invaded the field of practice of any branch of the healing arts in which the licensee is not licensed to practice.

(h) The licensee has failed to pay annual renewal fees specified in this act.

(i) The licensee has failed to take some form of postgraduate work each year or as required by the board.

(j) The licensee has engaged in the practice of the healing arts under a false or assumed name, or the impersonation of another practitioner. The provisions of this subsection relating to an assumed name shall not apply to licensees practicing under a professional corporation or other legal entity duly authorized to provide such professional services in the state of Kansas.

(k) The licensee has the inability to practice the branch of the healing arts for which the licensee is licensed with reasonable skill and safety to patients by reason of illness, alcoholism, excessive use of drugs, controlled substances, chemical or any other type of material or as a result of any mental or physical condition. In determining whether or not such inability exists, the board, upon probable cause, shall have authority to compel a licensee to submit to mental or physical examination by such persons as the board may designate. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination. Failure of any licensee to submit to such examination when directed shall constitute an admission of the allegations against the licensee, unless the failure was due to circumstances beyond the control of the licensee, and the board may enter a default and final order in any case of default without just cause being shown to the board without the taking of testimony or presentation of evidence. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of an annual renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination when directed in writing by the board and further to have waived all objections to the admissibility of the testimony or examination report of the person conducting such examination at any proceeding or hearing before the board on the ground that such testimony or examination report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the

record of such board proceedings involving the mental and physical examination shall not be used in any other administrative or judicial proceeding.

(l) The licensee has had a license to practice the healing arts revoked, suspended, or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

(m) The licensee has violated any lawful rule and regulation promulgated by the board of violated any lawful order or directive of the board previously entered by the board.

(n) The licensee has failed to report or reveal the knowledge required to be reported or revealed under K.S.A. 65-28,122 and amendments thereto.

(o) The licensee, if licensed to practice medicine and surgery, has failed to inform a patient suffering from any form of abnormality of the breast tissue for which surgery is a recommended form of treatment, of alternative methods of treatment specified in the standardized summary supplied by the board. The standardized summary shall be given to each patient specified herein as soon as practicable and medically indicated following diagnosis, and this shall constitute compliance with the requirements of this subsection. The board shall develop and distribute to persons licensed to practice medicine and surgery a standardized summary of the alternative methods of treatment known to the board at the time of distribution of the standardized summary, including surgical, radiological or chemotherapeutic treatments or combinations of treatments and risks associated with each of these methods. Nothing in this subsection shall be construed or operate to empower or authorize the board to restrict in any manner the right of a person licensed to practice medicine and surgery to recommend a method of treatment or to restrict in any manner a patient's right to select a method of treatment. The standardized summary shall not be construed as a recommendation by the board of any method of treatment. The preceding sentence or words have the same meaning shall be printed as a part of the standardized summary. The provisions of this subsection shall not be effective until the standardized written summary provided for in this subsection is developed and printed and made available by the board to persons licensed by the board to practice medicine and surgery.

(p) The licensee has cheated on or attempted to subvert the validity of the examination for a license.

(q) The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity or incompetent to stand trial by a court of competent jurisdiction.

(r) The licensee has prescribed, sold, administered, distributed or given a controlled substance: ~~(1)~~ to any person for other than medically accepted or lawful purposes. ~~(2) to the licensee's self; (3) to a member of the licensee's family, or (4) except as permitted by law, to a habitual user or addict.~~

(s) The licensee has violated a federal law or regulation relating to controlled substances.

(t) The licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the board.

(u) Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(v) The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(w) The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction or has surrendered the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(x) The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(y) The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(z) The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(aa) The licensee has failed to maintain a policy of professional liability insurance as required by section 21 or by K.S.A. 40-3402 and amendments thereto.

(bb) The licensee has failed to pay the annual premium surcharge as required by K.S.A. 40-3404 and amendments thereto.

Section 7. K.S.A. 65-2837 is hereby amended to read as follows: 65-2837. As used in K.S.A. 65-2836 and amendments thereto and in this section:

(a) "Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

(b) "Unprofessional conduct" means:

(1) Solicitation of professional patronage through the use of fraudulent or false advertisements, or profiting by the acts of those representing themselves to be agents of the licensee.

(2) Representing to a patient that a manifestly incurable disease, condition or injury can be permanently cured.

(3) Assisting in the care or treatment of a patient without the consent of the patient, the attending physician or the patient's legal representative.

(4) The use of any letters, words, or terms, as an affix, on stationery, in advertisements, or otherwise indicating that such person is entitled to practice a branch of the healing arts for which such person is not licensed.

(5) Performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion.

(6) Willful betrayal of confidential information.

(7) Advertising professional superiority or the performance of professional services in a superior manner.

(8) Advertising to guarantee any professional service or to perform any operation painlessly.

(9) Participating in any action as a staff member of a medical care facility which is designed to exclude or which results in the exclusion of any person licensed to practice medicine and surgery from the medical staff of a nonprofit medical care facility licensed in this state because of the branch of the healing arts practiced by such person or without just cause.

(10) Failure to effectuate the declaration of a qualified patient as provided in subsection (a) of K.S.A. 65-28,107 and amendments thereto.

(11) Prescribing, ordering, dispensing, administering, selling, supplying or giving any amphetamines or sympathomimetic amines, except as authorized by K.S.A. 65-2837a and amendments thereto.

(12) Conduct likely to deceive, defraud or harm the public.

(13) Making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee or at the licensee's direction in the treatment of any disease or other condition of the body or mind.

(14) Aiding or abetting the practice of the healing arts by an unlicensed, incompetent or impaired person.

(15) Allowing another person or organization to use the licensee's license to practice ~~medicine~~ the healing arts.

(16) Commission of any act of sexual abuse, misconduct or exploitation related to the licensee's ~~practice of medicine~~ professional practice.

(17) The use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts.

(18) Obtaining any fee by fraud, deceit or misrepresentation.

(19) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations.

(20) Failure to transfer pertinent information contained in the medical record to another licensee when requested to do so upon a proper request by the subject patient or by such patient's legally designated representative.

(21) Performing unnecessary tests, examinations or services which have no legitimate medical purpose.

(22) Charging an excessive fee for services rendered.

(23) Prescribing, dispensing, administering, distributing a prescription drug or substance, including a controlled substance, in an excessive, improper or inappropriate manner or quantity or not in the course of the licensee's professional practice.

(24) Repeated failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

(25) Failure to keep written medical records ~~justifying the course of treatment of the patient~~ which describe the services rendered to the patient, including ~~but not limited to patient histories~~ pertinent findings, examination and test results.

(26) Delegating professional responsibilities to a person when the licensee knows or has reason to know that such person is not qualified by training, experience or licensure to perform them.

(27) Using experimental forms of therapy without proper informed patient consent, without conforming to generally accepted criteria or standard protocols, without keeping detailed legible records or without having periodic analysis of the study and results reviewed by a committee or peers.

(c) "False advertisement" means any advertisement which is false, misleading or deceptive in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations made.

(d) "Advertisement" means all representations disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of professional services.

Section 8. K.S.A. 65-4915 is hereby amended to read as follows: K.S.A. 65-4915 (a) As used in this section, "health care provider" has the same meaning as the definition of that term in K.S.A. 40-3401 and amendments thereto.

(b) As used in this section, "peer review committee" means an individual or a committee of, or employed, designated or appointed by: (1) A state or local association of health care providers; (2) the board of governors created under K.S.A. 40-3403; (3) an organization of health care providers formed pursuant to state or federal law and authorized to evaluate medical and health care services; (4) a review committee operating pursuant to K.S.A 65-2840b to 65-2840d, inclusive; or (5) an organized medical staff of a licensed medical care facility as defined in K.S.A. 65-425 and amendments thereto, or by a health care provider as defined in K.S.A. 40-3401 and amendments thereto, ~~which committee provides peer review pursuant to written bylaws that have been approved by the governing board of such medical care facility or health care provider as defined in K.S.A. 40-3401 and amendments thereto;~~ or (6) professional societies and committees thereof, if the committee so formed by organizations described in parts (1), (2), (3), (4), or (5) or (6) of this subsection (b) is authorized to perform any of the following functions:

(A) Evaluate and improve the quality of health care services rendered by health care providers;

(B) determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care;

(C) determine that the cost of health care rendered was considered reasonable by the providers of professional health services in this area;

(D) evaluate the qualifications, competence and performance of the providers of health care or to act upon matters relating to the discipline of any individual provider of health care;

(E) reduce morbidity or mortality;

(F) establish and enforce guidelines designed to keep within reasonable bounds the cost of health care;

(G) conduct of research;

(H) determine if a hospital's facilities are being properly utilized;

(I) supervise, discipline, admit, determine privileges or control members of a hospital's medical staff;

(J) review the professional qualifications or activities of health care providers;

(K) evaluate the quantity, quality and timeliness of health care services rendered to patients in the facility;

(L) evaluate, review or improve methods, procedures or treatments being utilized by the medical care facility or by health care providers in a facility rendering health care.

(c) Except as provided by K.S.A. 60-437 and amendments thereto and by subsections (d) and (e) of this section, the reports, statements, memoranda, proceedings, findings and records of peer review committees shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity or be admissible in evidence in any judicial or administrative proceeding. Information contained in such records shall not be discoverable or admissible at trial in the form of testimony by an individual who participated in the peer review process. This privilege may be claimed by the legal entity creating the peer review committee, or by the commissioner of insurance for any records or proceedings of the board of governors.

(d) Subsection (c) of this section shall not apply to proceedings in which a health care provider contests the revocation, denial, restriction or termination of staff privileges or the license, registration, certification or other authorization to practice of the health care provider.

(e) Nothing in this section shall limit the authority, which may otherwise be provided by law, of the commissioner of insurance, the state board of healing arts or other health care provider licensing or disciplinary boards of this state to require a peer review committee to report to it any disciplinary action or recommendation of such committee, or to transfer to it records of such committee's proceedings or actions to restrict or revoke the license, registration, certification or other authorization to practice of a health care provider or to terminate the liability of the fund for all claims against a specific health care provider for damages for death or personal injury pursuant to subsection (g) of K.S.A. 40-3403 and amendments thereto. Prior to the filing of an action initiating a formal disciplinary proceeding against a health care provider by the state board of healing arts or other health care provider licensing or disciplinary boards of this state, reports and records so furnished shall not be subject to discovery, subpoena or other means of legal compulsion and their release to any persons or entity will not be admissible in evidence in any judicial or administrative proceeding. After such an action is filed, the reports and records dealing with the licensee and related to the action shall be deemed public records.

(f) Peer review committees may report their findings to another peer review committee without waiver of the privilege designated at section (c). In the event a peer review committee reports its findings to another peer review committee, the records have the same privilege set forth in section (c) by all such committees.

Section 9. K.S.A. 45-221 is hereby amended to read as follows: K.S.A. 45-221 (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or the disclosure of which is prohibited

or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court to restrict or prohibit disclosure.

(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.

(4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such.

(5) Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.

(6) Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual.

(7) Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.

(8) Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation.

(9) Testing and examination materials, before the test or examination is given or if it is to be given again, or records of individual test or examination scores, other than records which show only passage or failure and not specific scores.

(10) Criminal investigation records, except that the district court, in an action brought pursuant to K.S.A. 1984 Supp. 45-222, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:

(A) Is in the public interest;

(B) would not interfere with any prospective law enforcement action;

(C) would not reveal the identity of any confidential source or undercover agent;

(D) would not reveal confidential investigative techniques or procedures not known to the general public; and

(E) would not endanger the life or physical safety of any person.

(11) Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.

(12) Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used

for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

(13) The contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts therefor.

(14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.

(15) Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session under K.S.A. 75-4319 and amendments thereto.

(16) Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes:

(A) The information which the agency maintains on computer facilities; and

(B) the form in which the information can be made available using existing computer programs.

(17) Applications, financial statements and other information submitted in connection with applications for student financial assistance where financial need is a consideration for the award.

(18) Plans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.

(19) Well samples, logs or surveys which the state corporation commission requires to be filed by persons who have drilled or caused to be drilled, or are drilling or causing to be drilled, holes for the purpose of discovery or production of oil or gas, to the extent that disclosure is limited by rules and regulations of the state corporation commission.

(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(21) Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(23) Library patron and circulation records which pertain to identifiable individuals.

(24) Records which are compiled for census or research purposes and which pertain to identifiable individuals.

(25) Records which represent and constitute the work product of an attorney.

(26) Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service, except that information concerning billings for specific individual customers named by the requester shall be subject to disclosure as provided by this act.

(27) Specifications for competitive bidding, until the specifications are officially approved by the public agency.

(28) Sealed bids and related documents, until a bid is accepted or all bids rejected.

(29) Correctional records pertaining to an identifiable inmate, except that:

(A) The name, sentence data, parole eligibility date, disciplinary record, custody level and location of an inmate shall be subject to disclosure to any person other than another inmate; and

(B) the ombudsman of corrections, the corrections ombudsman board, the attorney general, law enforcement agencies, counsel for the inmate to whom the record pertains and any county or district attorney shall have access to correctional records to the extent otherwise permitted by law.

(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

(31) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

(32) The bidder's list of contractors who have requested bid proposals for construction projects from any public agency, until a bid is accepted or all bids rejected.

(33) Engineering and architectural estimates made by or for any public agency relative to public improvements.

(34) Financial information submitted by contractors in qualification statements to any public agency.

(35) Records involved in the obtaining and processing of intellectual property rights that are, or are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711 and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.

(36) Any report or record made pursuant to 1986 Kan. Sess. Laws Ch. 229 Sections 3, 4 and 5 and termed privileged under 1986 Kan. Sess. Laws Ch. 229 Section 6 and K.S.A. 65-4915 when the same is held by a public agency or used to determine licensure of a health care provider.

(37) Any information utilized by the Commissioner of Insurance to determine experience rating of health care providers by the Health Care Stabilization Fund pursuant to 1986 Kan. Sess. Laws Ch. 229 Sections 25, 27 and 29.

(b) As used in this section, the term "cited or identified" shall not include a request to an employee of a public agency that a document be prepared.

(c) If a public record contains material which is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requester that material in the public record which is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency, shall delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portion of the record which pertain to such individual or individuals.

(d) The provisions of this Section shall not be construed to exempt from public disclosure statistical information not descriptive of any identifiable person.

(e) Notwithstanding the provisions of subsection (a), any public record which has been in existence more than 70 years shall be open for inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or by a policy adopted pursuant to K.S.A. 72-6214 and amendments thereto.

Section 10. 1986 Kan. Sess. Laws Chapter 229 Sections 2, 3, 4 and 6, K.S.A. 40-3403, K.S.A. 65-2836, K.S.A. 65-2837, K.S.A. 65-4915 and K.S.A. 45-221 are hereby repealed.

Section 11. This statute shall take effect and be in force from its publication in the statute book.

KANSAS LEGISLATURE
1/26/87
HOUSE JUDICIARY COMMITTEE

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I APPRECIATE THIS OPPORTUNITY TO SPEAK IN FAVOR OF SENATE BILL 26.

MY NAME IS DICK CROKER AND I AM VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL OF UNITED TELECOMMUNICATIONS, INC.

UNITED, A KANSAS CORPORATION, SUPPORTS SENATE BILL 26 BECAUSE:

(1) IT CONFORMS THE KANSAS CORPORATION CODE TO THE DELAWARE CORPORATION LAW AS THE LEGISLATURE HAS WISELY DONE IN MAJOR RESPECTS OVER THE YEARS AND AS RECENTLY AS LAST YEAR.

(2) IT PERMITS KANSAS CORPORATIONS TO OBTAIN AND RETAIN THE BEST POSSIBLE INDEPENDENT DIRECTORS WITHOUT SUCH DIRECTORS PUTTING THEIR PERSONAL ASSETS TOTALLY AT RISK AND IT PLACES THE ENTIRE DECISION VERY PROPERLY IN THE HANDS OF THE STOCKHOLDERS.

(3) THIS BILL IS MERELY ONE MORE STEP TO ENCOURAGE KANSAS CORPORATIONS TO STAY IN KANSAS AND ATTRACT MORE

CORPORATIONS TO INCORPORATE AND MOVE TO KANSAS. UNITED IS AWARE OF AND SUPPORTS YOUR EFFORTS TO IMPROVE ECONOMIC DEVELOPMENT IN OUR STATE.

(4) UNITED RESPECTFULLY REQUESTS THE EARLIEST CONSIDERATION OF THE BILL TO PERMIT PREPARATION AND FILING OF OUR PROXY MATERIAL WITH THE S.E.C. ON FEBRUARY 3, IN CONNECTION WITH OUR ANNUAL STOCKHOLDERS' MEETING, PREPARATIONS FOR WHICH WERE SET IN THE FALL OF 1986.

A DELAY IN PASSAGE OF THE BILL WHEREBY UNITED WOULD HAVE TO CONDUCT A SECOND OR SPECIAL STOCKHOLDERS' MEETING WOULD COST THE CORPORATION APPROXIMATELY $175,000 TO $200,000.

MR. CHAIRMAN AND COMMITTEE MEMBERS, THANK YOU FOR THIS OPPORTUNITY. WE WISH YOU THE VERY BEST IN YOUR VERY IMPORTANT RESPONSIBILITIES. IF YOU HAVE ANY QUESTIONS, I WOULD BE HAPPY TO TRY TO ANSWER THEM.

RICHARD J. CROKER