Approved Thomas F. Walker 1-19-88
Date

MINUTES OF THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION.

The meeting was called to order by REPRESENTATIVE THOMAS F. WALKER at
Chairperson

9:00 a.m./~~p.m.~~ on WEDNESDAY, JANUARY 13, 1988 in room 522-S of the Capitol.

All members were present except:

Representative Schauf - Excused

Representative Peterson

Committee staff present:

Carolyn Rampey - Legislative Research Department
Mary Galligan - Legislative Research Department
Avis Swartman - Revisor of Statute's Office
Jackie Breymeyer - Committee Secretary

Conferees appearing before the committee:

Emalene Correll - Legislative Research Department

Representative Walker called the meeting to order and welcomed back the committee and staff. The committee has the same membership as last year. The two major bills up for review by the committee this year will be SRS and Department of Commerce. The Senate will introduce SRS and the House will introduce the Department of Commerce. The entire committee will work on both bills with subcommittees looking into the various aspects of each. The Chairman has asked the SRS Commissioner to provide the committee with a list of those things which he thinks should be looked into.

One of the committee members commented that the collection mechanism of the child support area be looked into.

The chairman went over the bills retained in committee from the previous session and also referred to reports due from the State Board of Nursing and the Department of Revenue. He asked for a motion to introduce the bill on the Department of Commerce.

Representative Sprague moved to introduce the bill dealing with the Department of Commerce. Representative Barr gave a second to the motion. The motion carried.

The Chairman introduced Emalene Correll, Legislative Research Department, who was present to speak on mandatory reporting and peer assistance for health related professionals. (ATTACHMENT 1) She began with background on the report and worked through to the conclusions reached after an in-depth study had been made. The two bills that relate to this study are HB 2642 and HB 2643.

The Chairman thanked Ms. Correll for her report and adjourned the committee at 9:58 a.m.

GUEST LIST

COMMITTEE: GOVERNMENTAL ORGANIZATION DATE: JANUARY 13, 1988

NAME	ADDRESS	COMPANY/ORGANIZATION
Nancy Davis	820 Quincy	Ks State Hum. Assoc.
Dr Lou Leibetta	900 SW Jackson	Ks " Col of Nursing.

RE: PROPOSAL NO. 29 -- MANDATORY REPORTING AND PEER ASSISTANCE FOR HEALTH-RELATED PROFESSIONALS*

Proposal No. 29 directed the Special Committee on Public Health and Welfare to determine the necessity for and the feasibility of mandating and standardizing reporting requirements concerning health-related professionals; to review existing treatment programs for impaired health-related professionals, including peer assistance; and to consider whether the state should participate in providing financial support for any such program.

Background

During the 1986 Session of the Kansas Legislature, a comprehensive act developed during the previous interim by the Special Committee on Medical Malpractice was enacted. The new act, which now appears as K.S.A. 1987 Supp. 65-4921 through 65-4930, creates mandatory reporting of certain acts and incidents relating to the treatment of patients of specified health care providers, requires the establishment of risk management programs by medical care facilities, and authorizes certain health care provider agencies to enter into agreements with the impaired provider committee of an appropriate state or county professional society or organization to carry out agreed to responsibilities relating to impaired providers.

Applicability

The 1986 act applies only to persons or entities defined as health care providers in K.S.A. 40-3401, i.e., (1) persons licensed to practice medicine and surgery and persons licensed to practice chiropractic, including those holding a temporary permit and persons engaged in an approved postgraduate training program; (2) health maintenance organizations; (3) medical care facilities as defined in K.S.A. 65-425; (4) optometrists; (5) podiatrists; (6) pharmacists; (7) licensed

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* H.B. 2642 and H.B. 2643 accompany this report.

professional nurses authorized to practice as registered nurse anesthetists; (8) professional corporations of health care providers; (9) partnerships of persons who are health care providers; (10) Kansas not-for-profit corporations organized to render professional services by persons who are health care providers; (11) dentists who are certified to administer anesthetics in medical settings under K.S.A. 65-2899; (12) physical therapists; (13) psychiatric hospitals; and (14) mental health centers or clinics. The term currently does not apply to licensed nurses, dentists, dental hygienists, mental health technicians, physical therapist assistants, occupational therapists and occupational therapy assistants, respiratory therapists, and persons having an exempt license issued by the Board of Healing Arts. The latter groups are not included under the provisions of K.S.A. 1987 Supp. 65-4921 et seq., because they are not providers under the Health Care Provider Insurance Availability Act. There are alternative reporting requirements applicable to licensees of the healing arts and to mental health technicians.

Reporting

K.S.A. 1987 Supp. 65-4923 requires a health care provider (as defined above) and any medical care facility employee or agent who is directly involved in the delivery of health care to report any reportable incident involving another health care provider, agent, or employee if the provider having a duty to report has knowledge of the incident. A reportable incident is any act of a health care provider that (1) is or may be below the applicable standard of care and that has a reasonable probability of causing injury to a patient, or (2) may be grounds for disciplinary action by the appropriate health care provider regulatory agency.

A reportable incident is to be reported to the appropriate state or county professional society or organization if the incident did not occur in a medical care facility; to the chief of the medical staff, chief administrative officer, or risk manager for referral to the appropriate executive or professional practices peer review committee if the incident occurred in a medical care facility; and, if the reportable incident involves a medical care facility as the health care provider to be reported, to the chief of the medical staff, chief administrative officer, or the risk manager for referral to the appropriate executive committee established pursuant to the facility bylaws. In each case the

reviewing committee, whether of a professional society or organization or a medical care facility, has a duty to report to the appropriate state regulatory agency any finding that a health care provider acted below the applicable standard of care and the action had a reasonable probability of causing injury to a patient, or acted in a manner which may be grounds for disciplinary action by the appropriate regulatory agency in order that the latter may take appropriate disciplinary action.

If a reportable incident is reported directly to a state agency that regulates health care providers, the agency may investigate the report or refer it to a peer review or executive committee which could have made the investigation initially under the law. Each peer review and executive committee must submit a report summarizing the reports of incidents received at least once each three months to the appropriate regulatory agency, including whether an investigation was conducted and any action taken. If a state agency determines that local committees are not fulfilling their duties, it may require that all reportable incidents be reported directly to the agency.

No person or entity is subject to civil liability for failure to report or investigate as required by the 1986 act, except on the basis of clear and convincing evidence that a report was based on evidence known to be false. However, the license of such person or entity may be revoked, suspended, or limited, or the provider may be subject to public or private censure by the appropriate health care provider regulatory agency if a provider is found to have willfully and knowingly failed to make a report. Failure to report also constitutes a class C misdemeanor. A medical care facility or a professional society or organization is not liable for damages for alleged failure to investigate or act upon a report made pursuant to the act. No employer may discharge or otherwise discriminate against an employee for making a report required by law.

Risk Management

K.S.A. 1987 Supp. 65-4922 requires each medical care facility (general or special hospital, ambulatory surgical center, or recuperation center) to establish and maintain an internal risk management program, which must include measures set out in the statute. A risk management plan had to be submitted to the Department of Health and Environment at least 60 days before the time for renewal of the facility license in

1987, and failure to submit a plan resulted in denial of the license renewal. No medical care facility may be licensed in 1988 unless its risk management plan has been approved by the Department.

Impaired Providers

If a report to a state agency made pursuant to K.S.A. 1987 Supp. 65-4921 et seq., or any other report or complaint filed with the agency relates to a health care provider's inability to practice with reasonable skill and safety due to physical or mental disability, including loss of motor skill or abuse of drugs or alcohol, or deterioration through aging, the regulatory agency may refer the matter to an impaired provider committee of the appropriate state or county professional society or organization.

Pursuant to K.S.A. 65-4924, a state agency that regulates health care providers (as currently defined in K.S.A. 1987 Supp. 65-4921) is authorized to enter into an agreement with the impaired provider committee of an appropriate state or county professional society or organization to undertake responsibilities relating to impaired providers specified in the agreement. The state agency may, pursuant to any agreement, provide for payment to the state or county professional society or organization from state money appropriated to the agency for purposes of the agreement. K.S.A. 65-4929 sets out functions and responsibilities which may be covered by the agreement.

Under the statutory authority, a professional society or organization, if agreed to by the regulatory agency, may contract with treatment programs; receive and evaluate reports of suspected impairment; intervene in instances of verified impairment; refer impaired providers to treatment programs; monitor the treatment and rehabilitation of impaired providers; and provide post-treatment monitoring and support of rehabilitated providers. The organization must make periodic reports to the state agency; must periodically disclose and review information as considered appropriate by the agency, including immediate reporting of the name of an impaired provider who is believed to constitute an imminent danger to the public and any impaired provider who refuses to cooperate with an investigation or treatment or who exhibits professional incompetence. The statute also sets out authority which may be exercised by a regulatory agency that has entered into an agreement for services relating to impaired providers.

Confidentiality

K.S.A. 1987 Supp. 65-4925 makes certain reports and records of executive or review committees and professional societies or organizations confidential and privileged if such reports and records arise from K.S.A. 1987 Supp. 65-4923 or 65-4924.

Committee Activity

The Special Committee on Public Health and Welfare considered Proposal No. 29 on two separate occasions and held hearings on the subject matter of the proposal. Additionally, the Committee reviewed the applicable Kansas statutes in depth, reviewed the agreement entered into pursuant to K.S.A. 65-4921 and 1987 H.B. 2224 between the Board of Healing Arts and the Kansas Medical Society, heard reports on disciplinary actions by health care provider licensing agencies, reviewed written testimony supplied to the Committee, and reviewed the provisions of the federal Health Care Quality Improvement Act of 1986.

The Committee heard representatives of the Board of Healing Arts, the State Board of Optometry Examiners, the Kansas Optometric Association, the Kansas Hospital Association, the State Board of Nursing, the Kansas Medical Society, the Kansas Pharmacists Association, the Kansas Podiatric Medical Association, the Kansas State Nurses Association, the Kansas Chiropractic Association, the Kansas Dental Association, and the Kansas Association of Osteopathic Physicians. In general, conferees expressed support for peer intervention in the case of an impaired health care provider, noted the need for programs to be established and funded, and expressed concern about mandating reporting if a system of intervention is not in place. There was disagreement on the role of the state regulatory agency in the conduct of peer assistance programs. Under K.S.A. 1987 Supp. 65-4924, licensing agencies may refer impaired providers to appropriate professional committees for assistance. Some conferees suggested referral should be made prior to any formal disciplinary proceedings by the regulatory agency, others suggested a diversionary program commencing after a complaint or report is filed with the licensing agency.

Questions were raised by conferees about the procedure set out in K.S.A. 1987 Supp. 65-4923 under which reports are made directly to the appropriate state or county professional society or organization rather than to the state regulatory agency. In these instances, the regulatory agency will learn of the report only if the local component group finds, on investigation, that the reportable incident has a reasonable probability of causing injury to a patient or that the provider acted in a manner that may be grounds for disciplinary action under the appropriate health care provider regulatory act. Concerns were raised about the uniform quality of local review and whether peer review groups conduct their review on the basis of ethical and practice considerations rather than on the basis of legal issues arising from violations of the appropriate practice act. It was further noted that many reports will never reach the regulatory agency, thus making it impossible for the agency to maintain appropriate records indicating a pattern of reports or complaints against a specific provider. There may be a reduction in the number of formal investigations and actions filed against licensees by the regulatory agencies, since reports that previously reached the agency will no longer do so. It was emphasized that the Legislature and the public hold the regulatory agency responsible for the continued practice of incompetent or impaired providers rather than holding a professional society responsible.

Several conferees representing health care provider boards suggested they sought assistance from the Committee in clarifying issues before proceeding to enter into agreements as authorized by law.

Conclusions

The Committee concluded that a number of issues were not adequately addressed by the 1986 legislation that mandated reporting of certain acts or incidents involving the treatment of patients of certain health care providers, that mandated certain risk management programs by medical care facilities, that authorized the development of peer assistance procedures, and that authorized the financial support of certain activities carried out by private organizations from state funds.

Definition of Provider

Among the issues which the 1986 legislation failed to address is the extension of mandatory reporting of incidents involving the treatment of patients to providers who are not required to have insurance in compliance with the Health Care Stabilization Fund. For this reason there is no mandatory reporting for several of the ancillary health groups registered by the Board of Healing Arts, i.e., occupational therapists, respiratory therapists, and occupational therapy and physical therapy assistants. Licensed nurses and mental health technicians regulated by the Board of Nursing are not included within the definition of health care provider, except for those registered professional nurses who are authorized to practice as nurse anesthetists. Dentists and dental hygienists licensed by the Kansas Dental Board are omitted from the reporting requirements.

While the Committee understands that concern for the protection of the Health Care Stabilization Fund and the focus of the 1985 special committee on malpractice insurance availability and affordability led to the limited applicability of K.S.A. 1987 Supp. 65-4921 et seq., as introduced, the members believe that reporting of incidents of patient treatment that are below the applicable standard of care should be viewed in light of the welfare of the patients of providers who are licensed by the state to practice or whose professional titles are protected by state registration. For this reason, the Committee concludes that those health care providers now omitted from the definition should be brought under the authority of K.S.A. 1987 Supp. 65-4921 through 65-4930.

Reporting

Some members of the Committee have reservations about the desirability of allowing reports of incidents involving health care professional practice that is or may be below the standard of care and that has a reasonable probability of causing injury to a patient or that may be grounds for disciplinary action as set out in state statutes to be reported to and investigated by a peer review group set up by a professional society or organization without being reported to the agency created by the Legislature to regulate the practice of the profession. However, given the short time the reporting requirements have been in effect, the Committee concluded that no changes should

be recommended in K.S.A. 1987 Supp. 65-4923 at this time. The Committee further concludes that the Legislature should monitor the number and type of disciplinary actions taken by health care provider licensing agencies in comparison with previous years; should monitor the type and quality of investigations and actions taken by peer review committees operating through professional societies or organizations; and should solicit the experience and advice of the licensing agencies in evaluating the procedure created by K.S.A. 1987 Supp. 65-4923.

Medical Care Facilities

K.S.A. 1987 Supp. 65-28,121 requires medical care facilities, subject to the provisions of subsection (c) of K.S.A. 1987 Supp. 65-4923, to report to the Board of Healing Arts any information the facility may have that appears to show that a person licensed to practice the healing arts has committed an act which may be a grounds for disciplinary action. A medical care facility must also inform the Board whenever the practice privileges of a licensee in the healing arts are terminated, suspended, or restricted, or are voluntarily surrendered or limited for reasons relating to the licensee's professional competence. Any medical care facility which fails to report to the Board within 30 days of receipt of the information required to be reported is subject to a civil fine of up to $1,000 per day for each day following the 30-day reporting period. Currently the statute, while requiring the Board of Healing Arts to notify the Secretary of Health and Environment who licenses medical care facilities of any failure to report as required by law, authorizes the Board of Healing Arts to assess the civil fine. The Committee concluded that it is inappropriate for an agency that has no regulatory authority over a health care provider to be vested with authority to assess a civil fine against such provider. Accordingly, the Committee concluded that K.S.A. 1987 Supp. 65-28,121 should be amended to authorize the Secretary of Health and Environment to assess a fine against any medical care facility which fails to report when such failure is referred to the Secretary by the Board of Healing Arts. The Committee also notes the constitutionality of the statute has been challenged and was being litigated at the time of the Committee study.

Although a private psychiatric hospital is defined as a "health care provider," private psychiatric hospitals, Social and Rehabilitation institutions, and Department of Corrections institutions are not "medical

care facilities" and, therefore, no quarterly reports or risk management plans must be made or maintained by such facilities pursuant to K.S.A. 1987 Supp. 65-4921 et seq. Although not included under the definition of "medical care facility," by agreement between the Departments of Health and Environment and Social and Rehabilitation Services, hospitals operated by the later agency are being licensed as medical care facilities. The Secretary of Health and Environment has concluded that such licensure makes the Social and Rehabilitation hospitals subject to the requirements of K.S.A. 1987 Supp. 65-4921 et seq. The Committee concurs with this interpretation of the law. At the present, the Department of Corrections does not operate a hospital and thus is not subject to the requirements relating to reporting and risk management. The Committee concluded that private psychiatric hospitals licensed under K.S.A. 75-3307b should be subject to the reporting and risk management requirements of the 1986 laws.

Impaired Providers

While some of the Committee members believe that the authority which may be granted by a licensing agency to an impaired provider committee of a state or county professional association through entering into an agreement is overly broad, the majority note that only one such agreement is currently in effect and that it has been in effect for only a short period of time. Thus, a majority of the Committee concluded that no statutory amendments should be proposed at this time.

The Committee did agree that any agreement entered into between a health care provider regulatory board and an impaired provider committee of a private professional society or association should not authorize the use of state funds for the purpose of treatment of impaired providers. The cost of treatment should be the responsibility of the individual impaired provider.

Further, the Committee concluded that an impaired provider should be reported to the appropriate licensing agency prior to being diverted to a treatment program. The Committee acknowledges the arguments of those conferees who believe that voluntary referral for treatment may result in the identification of and intervention with individuals who would not otherwise come to the attention of the appropriate regulatory agency. However, the Committee concluded that the protection of the

public is an overriding state concern, and that such protection is better served by requiring in any agreement entered into between a state agency and an impaired provider committee that the impaired providers be referred to the appropriate board for referral to treatment programs. Under such agreement, the regulatory agency will have a record of the investigation and finding of the peer assistance committee which can be correlated with any additional reports or complaints the agency may have about the provider, the agency will have on record that diversion to treatment was ordered, and the regulatory agency will be in the position of taking prompt action against a regulated provider who fails to complete treatment or who constitutes an immediate threat to the public because of refusal to cooperate with a treatment program. The Committee notes that the current agreement between the Board of Healing Arts and the Kansas Medical Society authorizes the Society's peer assistance committee to refer impaired providers to treatment programs without Board approval or referral. No such agreement should be entered into in the future.

Additionally, the Committee concluded that no agreement should be entered into unless the agreement provides for reimbursement of the peer assistance committee on a per case basis, subject to an agreed to maximum expenditure of state funds. The Committee noted that some provider associations appeared to believe that the fee funds of the regulatory agency having jurisdiction over them are not, in reality, state funds and should, therefore, be available to their associations or societies with little or no state intervention. Such is not the case, and the regulatory agency has the responsibility for prudent and efficient use of such funds whether they represent fee funds or State General Fund appropriations.

Confidentiality of Reports

It was brought to the Committee's attention that the provisions of K.S.A. 1987 Supp. 65-4915(d) relating to the confidentiality of peer review reports conflict with the provisions of K.S.A. 65-2898a and K.S.A. 1987 Supp. 65-4925, both of which provide that reports made to the Board of Healing Arts are confidential unless submitted into evidence in a disciplinary proceeding. Under K.S.A. 1987 Supp. 65-4915, reports of peer review committees are confidential until the Board files a formal disciplinary proceeding against a licensee. The Committee concluded that the latter statute should be amended to provide that

peer review records remain confidential unless submitted into evidence by the Board of Healing Arts or other health care provider licensing or disciplinary board.

Recommendations

The Special Committee on Public Health and Welfare recommends that the reporting requirements mandated by K.S.A. 1987 Supp. 65-4921 be extended to include licensed professional nurses, licensed practical nurses, mental health technicians, dentists, dental hygienists, physical therapist assistants, occupational therapists and occupational therapy assistants, and respiratory therapists. The Committee believes that this should be accomplished by amendment to K.S.A. 1987 Supp. 65-4921 and 65-4915, rather than through amending each of the professional practice acts. H.B. 2643 carries out these recommendations.

The Committee further recommends that the definition of medical care facility as it appears in K.S.A. 1987 Supp. 65-4921 be extended to include private psychiatric facilities licensed by the Secretary of Social and Rehabilitation Services. This amendment will subject such facilities to the quarterly reporting and risk management provisions of K.S.A. 1987 Supp. 65-4921 et seq., and to the penalties for failure to comply therewith. This recommendation is implemented by H.B. 2643.

The Committee recommends that K.S.A. 1987 Supp. 65-4915 be amended to conform with the provisions of K.S.A. 65-2898a and K.S.A. 1987 Supp. 65-4925 and to provide that all records of peer review committees supplied to a regulatory agency shall remain privileged and not subject to discovery, subpoena, or other means of legal compulsion unless they are submitted into evidence in a disciplinary proceeding. H.B. 2643 implements this recommendation.

The recommendation of the Committee is that K.S.A. 1987 Supp. 65-28,121 be amended to authorize the Secretary of Health and Environment rather than the Board of Healing Arts to assess a fine against a medical care facility that fails to report as required by law. This recommendation is implemented in a separate bill, H.B. 2642.

Since authorized peer assistance programs for impaired health professionals authorized by K.S.A. 1987 Supp. 65-4921 have not yet been implemented, except in the case of the Board of Healing Arts, the Committee recommends no changes in the statute at this time. However, the Committee does recommend that the Legislature review the program being operated pursuant to an agreement between the Board of Healing Arts and the Kansas Medical Society at a later time when more data is available.

Further, the Committee recommends that any agreements entered into between health care provider boards now authorized to enter into peer assistance agreements or those that would be so authorized under the amendments proposed in H.B. 2643 follow Committee recommendations, i.e., that impaired providers be reported to the appropriate board for referral to treatment rather than authorizing referral by a peer assistance committee; that agreements provide only for per case reimbursement with state funds, up to an agreed to cap; and that no state funds be expended for treatment.

The Committee also recommends that the appropriate regulatory agency monitor the effectiveness of peer assistance programs with great care to insure that equality of implementation exists; that legal definitions of grounds for disciplinary actions are identified and reported; and that the public is adequately protected from impaired or incompetent providers.

The Committee recommends that H.B. 2642 and H.B. 2643 be enacted by the 1988 Legislature.

Respectfully submitted,

November 24, 1987

Sen. Roy Ehrlich, Chairperson
Special Committee on Public
Health and Welfare

Rep. Marvin Littlejohn,
Vice-Chairperson
Rep. Eugene P. Amos
Rep. Jessie Branson
Rep. Frank Buehler
Rep. Theo Cribbs
Rep. Kenneth Green
Rep. Elaine Hassler
Rep. Tim Shallenburger
Rep. Franklin E. Weimer

Sen. Norma Daniels
Sen. Audrey Langworthy
Sen. Bill Morris
Sen. Joseph Norvell
Sen. Joe Warren