Approved 3/28/88
Date

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Marvin L. Littlejohn Chairperson at

1:30 ~~a.m./p.m.~~ on March 23, 1988 in room 423-S of the Capitol.

All members were present except:
Representative Elaine Wells, excused

Committee staff present:
Bill Wolff, Research
Norman Furse, Revisor
Sue Hill, Committee Secretary

Conferees appearing before the committee:
Charlott Abbott, Board of Healing Arts, (Printed testimony only)
Dick Morrissey, Department of Health and Environment
Dick Hummel, Kansas Health Care Association
Marilyn Bradt, Kansans for Improvement of Nursing Homes
Dr. Stanley Grant, Secretary Department of Health/Environment
Reuben Krizatall, Attorney

Chairman called meeting to order drawing attention to action taken yesterday on HR 6047. Chair read technical information from the Resolution in reference to seed funding. Chair noted seed funding cannot be done through a Resolution. Chair asked wishes of committee in regard to HR 6047.

Rep. Buehler made a motion to reconsider action taken on HR 6047 on March 22, seconded by Rep. Amos. It was noted the sponsor of the bill had been contacted, (Rep. Sebelius), and she has no problem with amending out unnecessary language.

Chairman called attention to (Attachment 1), a statement from Board of Healing Arts in regard to their position on SB 656.

Rep. Blumenthal made a motion to strike words in line 48, "and seed funding; and", and to insert the word "and", before the word, "consultation". Discussion held on the merits of HR 6047. It was determined this will allow persons to do volunteer work for mentally retarded facilities.

Vote taken, motion carried.

On the bill as a whole, Rep. Blumenthal moved to pass HR 6047 out favorably as amended, seconded by Rep. Whiteman, motion carried.

Chair invited Mr. Furse to give briefing on SB 658.

SB 658 as amended by Senate Committee relates to situations in adult care homes using restraints. Statutes require medical re-evaluation be given every 3 hours during certain hours. (8:00 a.m. to midnight). He explained the rationale, cited exemptions.

Dick Morrissey, Department of Health and Environment, (Attachment No. 2), stated their Department supports SB 658. The question of whether adult care homes must obtain medical reevaluation orders for restraints and seculusion every three hours should have a legislative determination to avoid further uncertainty. Similar concerns were resolved by the 1986 legislature. In that session, exceptions for the general requirement for medical reevaluation every three hours was set. (He detailed these). SB 658 in its current wording seems to clarify the issue of whether and to what degree licensed adult care homes must comply with the medical reevaluation requirements.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Dick Morrissey continues:--

He answered questions, i.e., there aren't enouch physicians on the premises generally to give a medical re-evaluation every three hours; monitoring continues however, every hour; yes, one of the most common correction orders we issue to facilities is in regard to the use of restraints.

Dick Hummel, Kansas Hospital Care Association, (Attachment No. 3), noted for the record, part of his hand-out contains Adult Care Home licensure standards in regard to restraints. He spoke in support of SB 658. By passing this legislation, you will not harm nor jeapardize any Adult Care Home Resident by removing the standard. The sticky-wicket was an informal reading by the Attorney General's office, (letter included in attachment). The regulation adopted by Kansas Department of Health and Environment, prompted by the Attorney General's informal opinion of the statute governing the care and treatment of the mentally ill, is not appropriate or necessary for the adult care home sector. We are asking you make this clear by adopting SB 658. He then introduced Ms. Nancy Kirk, of Countryside Health Care Center in Topeka.

Nancy Kirk, Administrator of Countryside Health Care Center offered hand-out, (Attachment No. 4). She spoke in support of SB 658. The purpose of this legislation is to remove the adult care homes, i.e., nursing homes, from the three hour restraint re-evaluation requirement. Treatment institutions are required to have a medical re-evaluation of restraints every three hours. In state institutions where physicians are on staff and patients are acutely mentally ill, this is a necessary requirement for protection of patients. In ICF-MH facilities, where residents are not acutely ill, and physicians are not on staff, the requirement becomes impossible to meet. They use restraints in her facility the same way that geriatric facilities use restraints. She cited a specific case in which a female patient could no longer walk without help and it became necessary to restrain her in a soft vest because the patient could not remember she needed assistance to move about. She strongly urged members to support SB 658 and to reduce the discrimination experienced by those who are elderly and mentally ill. She answered questions, i.e., yes, persons with Department of Health and Environment when checking our facilities make a mark on the straps of the restraint and re-check it in an appropriate amount of time to make sure we are in compliance about removing the restraint and exercising the patient; yes, there are persons who at times need to be checked even more often than every hour.

Marilyn Bradt, Kansans for Improvement of Nursing Homes stated their Association is in support of SB 658 as amended by the Senate.

Hearing closed on SB 658.

Hearing began on SB 585.

Dr. Stanley Grant, Secretary of Department of Health and Environment, (Attachment No. 5), spoke to standards set to preserve the quality of life for elderly, infirmed, ill populus of Kansas. Most care givers are meeting the standards set, and many go well beyond the minimum, to provide quality care. There are a few providers who are chronically out of compliance. These chronic violators require an in-ordinate amount of time and resources with respect to inspections. These violators are tying up resources constantly in the state programs. We must be able to create a more positive enforcement which will be strict enough to be an adequate incentive for a provider to get into compliance and to stay in compliance. He called attention to graphs and statistics in Attachment No. 5 that indicated civil

Hearings continued on SB 585:--
Dr. Grant continues: -- Action penalties issued; citations and correction orders issued; correction orders process; civil penalty process. It is the goal of their Department to create compliance, not to create fines. He answered questions, i.e., yes, our office is available to talk with Administrators who have been cited; perhaps a $500 fine isn't effective enough to be a deterrent for non-compliance.

Mr. Morrissey also answered questions at this point, i.e., yes, whenever possible, the same surveyor returns to inspect after a citation order has been issued.

Ester Wolf, Secretary of Department on Aging stated more stringent sanctions have been recommended for those homes not meeting compliance in a report made available in 1986. We are getting more frail and more vulnerable people. We need to look ahead 3 to 5 years so that we will be able to meet good care for our citizens. If SB 585 is passed, it will provide a more effective tool for our State in which to help control infractions and provide for quality care for our population in adult care homes, and state facilities. The Department of Health and Environment needs tighter constraints for violators. We feel it is important that no new admissions be accepted in certain cases. If current residents are not being given appropriate care, it is unlikely new residents will be either. We also feel the penalty of $500 a day is not high enough. She urged for favorable passage.

Dick Hummel, Ks. Health Care Association, (Attachment No. 6), stated they have no problems with the proposal to move quicker/swifter/harder on a small minority of providers which may not be providing the caliber of care they should be. We do not have problems however, he said with the process and the administration of the system which has overly broad-brushed providers. He spoke of the correction order process. We in the industry have made an effort to draw a parallel of punishment (higher fines) to a more clear-cut specific definition of violations. He offered amendments that would perhaps offer solutions, i.e., line 40, to state specific deficiency violation on the correction order, and line 43, add a new section that would ask the Secretary to consider the significance of the violation; give a good faith effort exercised by the facility to correct the violation; consider the history of compliance of the ownership with rules and regulations. (Attachment No. 6 gives a detailed rationale of these suggested amentments). He answered numerous questions.

Mr. Reuben Krizstal, member of Kansas Trial Lawyers Association spoke to the support of SB 585. The last three years the majority of his practice is dealing with Nursing Home litigation. He noted by the time family members of Nursing Home clients come to him for help, to address tragic wrong doings to their loved ones, they are looking at matters that could have been avoided had the State had the authority to act more effectively against homes that are not in compliance. He stated the fine is much too low, and many of the regulations are not strict enough. If he were to draw up the legislation he would make restrictions tighter. The elderly have become the forgotten. He cited specific cases of clients who have been mistreated. He spoke of the Owners of these large Corporations who operate Homes are committing the same violations as those violations committed at the facility. There are some Corporations that have a history of infractions throughout the state

Hearings continue on SB 585: (Mr. Krizstal)

and the entire country. To argue this legislation is punitive is ridiculous, he said. The profit realized by some of these Corporations, certainly would not be seriously hurt by a little $500 fine. Punitive fines are too low in this bill. The threat of not being able to accept new admissions will however perhaps be a deterrent. He thanked members for the opportunity to speak and asked for support of SB 585.

Chair noted time would not allow for any more testimony this date and he invited those conferees who did not get to speak to return tomorrow. Printed testimony of those who cannot return would be made available for each committee member to evaluate.

Meeting adjourned 3:16 p.m.

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TO: House Committee on Public Health & Welfare

FROM: Charlene K. Abbott, Administrative Assistant
Kansas State Board of Healing Arts

DATE: March 22, 1988

RE: SB-656

The changes to the law regarding Exempt Licenses at lines 88-90 of SB-656 are due to questions which have been raised about the Board's authority to restrict the practice of licensees who hold an exempt license. The specific regulation in question is K.A.R. 100-10a-4, a copy of which is attached.

In adopting the various rules and regulations regarding exempt licenses, the Board relied upon K.S.A. 65-2865 for its authority. That statute allows the adoption of regulations to carryout sections within the Healing Arts Act and to supplement any sections. The Board and its General Counsel felt that the original statute creating exempt licenses did not setout clear standards as to whom the Board could issue an exempt license. The Board felt that it had within its authority the ability to determine "who is no longer regularly engaged in such practice and who does not hold oneself out to the public as being professional engaged in such practice". It was felt by the Board that the five specific restrictions setout in K.A.R. 100-10a-4(c) were activities that constituted evidence an individual was continuing to regularly engage in practice or was holding oneself out as being professional engaged and, therefore, would not be entitled to an exempt license and the privileges such license affords to individuals.

Much of the concern expressed to the Board regarding its regulations pertain specifically to K.A.R. 100-10a-4(c)(5). There appears to have been little concern that the Board had the authority to state that a person maintaining an office or place to regularly meet patients was regularly engaged or holding oneself out as being professionally engaged and not entitled to an exempt license. Likewise, there have been no other objections raised as to the specific prohibitions contained in K.A.R. 100-10a-4(c)(2) through (4).

There have been several physicians who have expressed their support for the Board's regulation which prohibits an exempt license holder from utilizing controlled substances. However, if the Board did exceed its authority in adopting this regulation and defining this as being an activity for which an exempt license holder should not be engaged, there appears to be several alternatives in lieu of the

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present proposed amendment to the Bill.

One possible solution would be reinserting the language in K.S.A. 65-2836(r) which was amended during the last session of the legislature. The 1986 legislature made it a specific violation of the Healing Arts Act for a licensee to prescribe, sell, administer, distribute or give a controlled substance for any one of three reasons as follows: For other than medically accepted therapeutic purposes, to the licensees self, to a member of the licensees family, or except as permitted by law, to a habitual user or addict. See chapter 229, section 41 of the 1986 Session Laws. However, last session, the legislature amended this particular section and deleted any prohibition from prescribing to self or family members. See chapter 176, section 5 of the 1987 Session Laws. The Board would submit that if SB-656 is adopted as it presently reads that K.S.A. 65-2836 should be amended to return to the language as adopted by the legislature during the 1986 session.

A second alternative would be to specifically state in K.S.A. 65-2809 that exempt license holders would be allowed to utilize prescription drugs, including controlled substances. This would satisfy most of the objections to the rules and regulations adopted by the Board but would not have the broad nature of the sentence which is being inserted at lines 88-90.

Finally, another alternative would be the adoption of a concurrent resolution expressing legislative intent and urging the Board to modify its regulations in any manner which might be felt by the legislature to be more appropriate.

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Attachment - 1

ARTICLE 10a-- EXEMPT LICENSE

100-10a-4. Criteria. (a) Exempt licenses may be issued to qualified applicants if the professional activities of the applicant will be limited to the following:

(1) Administrative functions, including peer review utilization review and expert opinions, which have no impact on the care and treatment provided to the patients whose records or charts are reviewed; and

(2) providing direct patient care services relating to the healing arts on an irregular or infrequent basis to persons who are not charged or liable for the costs of the services.

(b) Applications describing professional activities not included in subsection (a) shall be reviewed by the board on a case-by-case basis to determine the eligibility for an exempt license.

(c) Exempt licenses may not be issued to applicants if the professional activities of the applicant include any of the following:

(1) Maintaining an office or place to regularly meet patients in this state;

(2) providing direct patient care services relating to the healing arts, to persons who are charged or liable for the costs of the services.

ATTORNEY GENERAL
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(3) providing direct patient care services of such regularity and frequency as to reasonably constitute the regular practice of the healing arts;

(4) supervising individuals who provide direct patient care services relating to the healing arts or other health care professions; and

(5) prescribing, administering or dispensing any controlled substances as defined in K.S.A. 65-4101(e) and amendments thereto. (Authorized by K.S.A. 65-2865; and implementing K.S.A. 1986 Supp. 65-2809, as amended by L. 1987, Ch. 242, Sec. 2; effective, T-88-52, 12-16-87; effective May 1, 1988.)

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STATE OF KANSAS

DEPARTMENT OF HEALTH AND ENVIRONMENT
Forbes Field
Topeka, Kansas 66620-0001
Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

TESTIMONY PRESENTED TO

HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

BY

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Senate Bill 658

Background

Senate Bill 658 would exempt licensed adult care homes from medical reevaluations of restraint and seclusion orders every three hours, as required by KSA (1987 Supp.) 59-2928. The use of restraint and seclusion in licensed adult care homes would be authorized at a frequency ordered by a physician or psychologist.

The precise issue presented by Senate Bill 658 is whether adult care homes licensed by the Department of Health and Environment should be required to obtain medical reevaluations of restraint and seclusion orders every three hours as is done in psychiatric hospitals. Since at least 1976, the treatment act for mentally ill persons placed specific limitations upon health care providers when providing psychiatric treatment in Kansas facilities. For example, even court-committed patients could refuse certain types of treatment, such as psychosurgery, electroshock therapy, experimental medication, aversion therapy, and hazardous treatment procedures. In addition, all patients were guaranteed certain rights, such as the right to wear personal clothing of their choice, to receive confidential telephone calls, to refuse involuntary labor, to have explained the nature of all medications and treatments prescribed, to be visited by personal physicians or attorneys, and to receive written notice of treatment rights under Kansas law. Moreover, the treatment act limited the use of restraints and seclusion to those situations when they were required to prevent substantial bodily

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injury to the patient others. No restraint could be applied to a patient unless it had been ordered by a physician and reapproved by a physician no less than every three hours.

In October 1987 the Department of Health and Environment proposed certain amendments to administrative regulations concerning adult care homes. Upon review of these amendments by the State Attorney General, the regulation dealing with restraints (KAR 28-39-87) was found to be in conflict with requirements of KSA 59-2928 discussed earlier. Specifically, in a letter to Secretary Stanley C. Grant, Department of Health and Environment, the Honorable Robert T. Stephen, Attorney General of Kansas, stated that:

> The regulatory requirements are less stringent than those stated in KSA 59-2928. While an argument may be made that the code for care and treatment of mentally ill persons does not apply to adult care homes, I believe a review of KSA 59-2902 and 59-2928 reveals that in some, if not all cases that code does apply. I, therefore, respectfully request that KAR 28-39-87(e) be amended to reflect the statutory requirements of KSA 59-2928.

As a result of this ruling, the Department of Health and Environment amended its proposed regulation to conform with the provisions of the treatment act for mentally ill persons in intermediate care facilities for mental health.

After the conforming amendment was made to the restraint regulation, the department received a number of letters from ICF/MH facilities objecting to the new medical reevaluation requirement. The primary concerns raised by the ICF/MH facilities were: (1) adult care homes did not have on-duty physicians as did psychiatric hospitals and it was extremely difficult to obtain physician services on short notice, (2) the unavailability of physicians would lead to underuse of restraints but a corresponding overuse of psychotropic medication to the detriment of patients, and (3) underutilization of physical restraints would cause unnecessary hospitalization since adult care homes could not prevent some patients from harming themselves or others through the use of such restraints. However, after a public hearing on November 23, 1987, the proposed amendments to KAR 28-39-87 were approved as permanent regulations effective May 1, 1988.

Recommendations

The question of whether adult care homes must obtain medical reevaluation orders for restraints and seclusion every three hours should have a legislative determination to avoid further uncertainty. However, similar concerns with the restraint and seclusion statute (KSA 59-2928) were resolved by the 1986 legislature. In that session, a Subsection (b) was added which established three exceptions to the general requirement for a medical reevaluation every three hours. An exception was made for Larned State Security Hospital, when restraints were needed to prevent a patient from causing injury to self or others, and when restraints were needed

primarily for examination or treatment of a physical illness or injury. The current wording of Senate Bill 658 seems to clarify the issue of whether and to what degree licensed adult care homes must comply with the medical revaluation requirements of KSA (1987 Supp.) 59-2928.

Presented by: Richard J. Morrisey, Director
Bureau of Adult and Child Care
Department of Health and Environment

March 23, 1988

Kansas Health Care Association
Member of ahca

DATE: Wednesday, March 23, 1988

TO: House Public Health & Welfare Committee

FROM: Dick Hummel, Executive Vice President
Kansas Health Care Association

RE: **Testimony in Support of S.B. 658 -- Adult Care Homes Excluded from Three-Hour Medical Reevaluation Requirement for Restraint Use**

Chairman Littlejohn and Committee Members:

The Kansas Health Care Association (KHCA) is a voluntary, non-profit organization which represents all categories of adult care homes in Kansas -- skilled and intermediate care nursing facilities, intermediate care homes for the mentally retarded and mentally ill, and personal care homes. Our membership encompasses the entire state and is composed of both proprietary and non-profit homes.

The purpose of this bill is to remedy a problem caused by the Attorney General's informal reading and opinion that adult care homes should fall under a portion of the law relating to the care and treatment of the mentally ill, i.e., K.S.A. 59-2902 et. seq., and that adult care homes are "treatment facilities."

Specifically, the Department of Health and Environment was advised that all adult care homes should meet the standard of K.S.A.59-2928 dealing with the use of restraints. KDH&E disagreed and was able to negotiate the applicability of this requirement to only a portion of the adult care home community, the category of Intermediate Care Facilities for Mental Health (ICF-MH), of which there are 23 homes caring for 1,148 residents.

The Problem: K.S.A. 59-2928 requires that a physician medically reevaluate the continued use of a physical restraint every three hours. Adult care homes, ICF-MHs included, are not treatment facilities, and this requirement is not necessary and would be impractical for the small number of residents in the ICF-MH who require the limited use of physical restraints. We will later cite examples of the types of restraints we're talking about.

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At this point I wish to state that in discussions with KDH&E about this, they too agreed that the requirement wasn't necessary.

The question arises will the mentally ill in ICF-MHs be at peril by the non-application of this statute and the exemption? The answer is no, because federal and state laws and regulations for adult care homes clearly, and more rigidly, stipulate the requirements for not only the use of restraints but also the protection and rights of residents in our facilities. (A copy of the pertinent adult care home K.A.R. is attached.)

Type of Restraints: We are talking about mittens to protect a resident from harming himself, bed rails to prevent a resident from falling from the bed, and protective belts to prevent residents from falling from a wheelchair.

3-Hour Reevaluation: Means that a physician must reauthorize the use of such devices as these every three hours. Contacting primary care physicians or psychiatrists every three hours will be extremely difficult for the nursing staff of ICF-MH homes. Understand that these facilities are simply not designed like psychiatric units in which physicians are readily available 24-hours a day.

Consequences: If this requirement remains in effect it could lead to the use or over-use of chemical restraints or medications in some facilities for the management of at-risk individuals. It also could result in the transfer and institutionalization of persons to state psychiatric hospitals. It further could place physicians at risk and increase their liability and exposure for non-compliance with the requirement.

In conclusion, the regulation adopted by KDH&E, prompted by the Attorney General's informal opinion of the statute governing the care and treatment of the mentally ill, is not appropriate or necessary for the adult care home sector. We are asking that you make this clear by adopting S.B. 658.

I have asked that Nancy Kirk, administrator of the Countryside Health Care Center, an ICF-MH facility here in Topeka, appear to discuss her facility's programs and services.

Thank you for this opportunity and I would be happy to try to answer any questions.

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SECRETARY OF
DEPT. of HEALTH & ENVIRONMENT

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN

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

October 21, 1987

Stanley C. Grant, Ph.D.
Secretary, Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Dear Secretary Grant:

Your office is in the process of amending K.A.R. 28-39-87 which regulates certain adult care homes. The regulation has been forwarded to my office for approval as to its legality. Two subsections of the regulation appear to conflict with current legislation.

First, subsection (6) would extend the expiration date of waivers from staffing requirements. The effect of this proposed amendment is to allow facilities to delay compliance with the staffing requirement until July 1, 1989. This conflicts with K.S.A. 39-932, which states that the Secretary may allow facilities up to twelve months to comply with new regulations. If it is impossible for some operators of intermediate nursing care facilities to comply with the regulation at this time, and if it is expected that they will not be able to comply within twelve months from the initial date of the regulation, then I believe that the remedy lies somewhere other than extending waivers for another twenty months. One suggested solution is to delay the effective date of the requirement. This would avoid disparate treatment between those who are now spending funds to be in compliance and those who are now unable to comply.

The second conflict between the regulation and a statute appears in subsection (e), which outlines the procedure for restraining patients. The Regulatory requirements are less stringent than those stated in K.S.A. 59-2928. While an argument may be made that the code for care and treatment of mentally ill persons does not apply to adult care homes, I believe a review of K.S.A. 59-2902 and 59-2928 reveals that in some, if not all cases that code does apply. I therefore

RESTRAINTS

respectfully request that K.A.R. 28-39-87(e) be amended to reflect the statutory requirements of K.S.A. 59-2928.

If my office may be of assistance in making any of these changes, please feel free to contact us.

Very truly yours.

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

RTS:MWS:ma

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(e) Restraints. There shall be a signed physician's order for any restraint, including justification, type of restraint, and duration of application. A resident shall not be restrained unless, in the written opinion of the attending physician, it is required to prevent injury to the resident or to others and alternative measures have failed. Physical restraints shall be released and the resident exercised and toileted at least every two hours. [In facilities certified only as intermediate care facilities for mental health, the use of a restraint shall not exceed three hours without medical reevaluation, except that such medical reevaluation shall not be required, unless necessary, between the hours of 12:00 a.m. and 8:00 a.m.] Restraints shall be monitored no less than once per hour. *

(f) Resident care and hygiene. The facility shall provide supportive services to maintain the residents' comfort and hygiene as follows:

(1) Residents confined to bed shall receive a complete bath every other day or more often as needed.

(2) Incontinent residents shall be checked at least every two hours and shall be given partial baths and clean linens promptly when the bed or clothing is soiled.

(3) Pads shall be used to keep the resident dry and comfortable.

(4) Rubber, plastic, or other types of protectors shall be kept clean, completely covered, and not in direct contact with the resident.

ATTORNEY GENERAL
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APPROVED BY FDL

MIDWEST HEALTH SERVICES

COUNTRYSIDE HEALTH CENTER
3401 Seward Avenue
Topeka, Kansas 66616-1697
913-234-6147

House Public Health and Welfare Committe

Testimony in support of Senate Bill 658

3-23-88

My name is Nancy A. Kirk and I wish to speak to you today in support of Senate Bill 658. I am here out of a personal and professional commitment to the long term mentally ill. I am a licensed master degree social worker and I have spent the past 20 years in various human service capacities. Currently I am the administrator of Countryside Health Center an intermediate care facility for the long term mentally ill, an ICF-MH.

The recent Attorney General's opinion which defined the ICF-MHs as treatment institutions places the ICF-MH in an unfortunate situation which the legislation under discussion seeks to correct. The purpose of Senate Bill 658 is to remove the adult care homes (i.e. nursing homes) from the three hour restraint re-evaluation requirement. Treatment institutions are required to have a medical re-evaluation of restraints every three hours. In state institutions where physicians are on staff and patients are acutely mentally ill, this requirement is a necessary and reasonable protection for patients. In ICF-MH facilities,where residents are not acutely ill, and physicians are not on staff, the requirement becomes impossible to meet.

The ICF-MH program was established in 1982 to serve the most vulnerable of the long term mentally ill; primarily those persons who were elderly, who had received maximum benefit from the active treatment programs in the state hospitals, and who had a history of failures in less structured group or apartment living programs. ICF-MH programs are community based services that offer a wide range of opportunities within a consistent environment; adult living skills,medication supervision and management, leisure time activities, pre-vocational programs, and continual opportunity for contact and interaction with the larger community. ICF-MH programs are not designed to provide services for those who are in the acute phases of mental illness nor those who have frequent acute episodes.

We are licensed and surveyed in the same way as geriatric ICFs and are therefore governed by the same rules and regulations. The regulations governing restraints have just been discussed and I will not repeat them, except to emphasize that our use of restraints is for the protection of our residents in the same way that geriatric facilities use restraints.

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restraint orders - include monitoring requirements

Q 1 H ?

pulse?

To illustrate what I am saying it may help if I describe one individual that we serve at Countryside. Mary B. has a diagnosis of schizophrenia, mental retardation, and a seizure disorder. Mary used to walk about the facility, but on occassion her seizure activity would become pronounced and she would begin to stumble and fall resulting in numerous cuts and brusies. Eventually her ability to walk without assistance was sufficiently impaired to require a physician's order to place her in a wheelchair. At first Mary was not restrained in the chair, however it quickly became apparent that she was unable to remember that she could no longer walk without our help and the physician ordered a vest restraint. A vest restraint is also used when Mary is in bed. Even though we use bed rails for her safety, she will climb out of bed, again forgetting that she is unable to walk. Mary B. has a long history of unsuccessful placements in facilities for the mentally retarded and those for geriatiric residents. Although she is 70 years old and mentally retarded, her primary problem is her schizophrenia which results in behaviors that are most problematic for her caretakers. Mary B. has been successfully cared for at Countryside since the establishment of the ICF-MH program, but the 3 hour re-evaluation of restraint orders will result in a transfer for this lady.

Mary B. is typical of the residents that we serve at Countryside who are restrained. They are restrained because they are unable to walk safely and cannot remember this reality. We do not place residents in physical restraints for punishment, nor to control psychotic behavior. We do not have time out rooms nor seclusion rooms. ICF-MH programs use vest and waist restraints to protect residents from falls, geriatiric chairs with trays for those who are unable to use wheelchairs, gloves and wrist restraints to prevent the scratching of sores or wounds, and bed rails to prevent falls. Each and everyone of these restraints requires a physicians's order. The restraint regulations currently in the rules and regulations for adult care homes are sufficient to guarantee the safety of residents in a manner that is manageable and enforceable.

Physicians who were told of the recent opinion made it clear there was no way they would be able to provide a medical re-evaluation every three hours and such a requirement would then become a liability issue. We would anticipate the re-emergence of physician recruitment and retention problems for adult care homes. As a result facilities who serve the long term mentally ill would not be able to admit those who require restraints for safety and would have to transfer those individuals who are currently being served. For the most part, the long term mentally ill who are elderly have lost contact with their families. The successful ICF-MH placement has provided them with stability and a sense of belonging; their only remaining home and family. To move these persons simply because they have become frail is cruel and uncaring.

The exemption of adult care homes from the 3 hour medical re-evaluation requirement for the use of restraints will permit the ICF-MH program to continue to serve the long term mentally ill elderly without regard to their physical status. I strongly urge you to support this legislation and to reduce the discrimination experienced by those who are elderly and mentally ill.

Respectfully,
Nancy A. Kirk, LMSW
Administrator
Countryside Health Center

STATE OF KANSAS

DEPARTMENT OF HEALTH AND ENVIRONMENT
Forbes Field
Topeka, Kansas 66620-0001
Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

TESTIMONY PRESENTED TO

HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

BY

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Senate Bill 585

Background Information

Authority for civil penalties to be assessed against adult care homes was established by 1978 legislation as recommended by a special task force appointed by Governor Robert Bennett. The task force conceived of civil penalties as an intermediate sanction; that is, a level between routine deficiencies and severe or life-threatening problems for which a license would be revoked. The same task force recommended the present receivership statutes to protect residents from severe or life-threatening problems.

Current Law

KSA 39-945 authorizes the Secretary to issue a correction order to an adult care home when noncompliance exists which "affects significantly and adversely the health, safety, nutrition, or sanitation of the adult care home residents." The statute also requires that the correction order state the deficiency, cite the specific statutory provision or rule and regulation alleged to have been violated, and specify the time allowed for correction.

The department reinspects following the specified time allowed for correction to determine if the corrections have been made. If the adult care home has not made the corrections, KSA 39-946 requires the department to issue a citation listing the uncorrected deficiency or deficiencies. The department then reinspects again and makes a determination as to whether or not the corrections have been made following the issuance of a citation.

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If the corrections have still not been made, the Secretary may assess a civil penalty in an amount not to exceed $100 per day per deficiency but the maximum assessment may not exceed $500.

Attachment C shows the number of correction orders, citations, and assessments issued each calendar year since 1982. The results in 1987 reflect the department's efforts to focus more on significant deficiencies and problem facilities.

Issues Addressed

The bill is proposed to enhance the use of intermediate sanctions in lieu of revocation or denial of licensure. The current procedure to assess civil penalties remains cumbersome to implement and not as effective as desired in dealing with chronic noncompliance by some facilities. The proposed bill would address these concerns by:

1 Eliminating the citation step prior to assessment of a financial penalty;

2 Increasing the possible assessment from $500 to $2,500;

3 Providing for a doubling of the assessment for repeat significant and adverse violations within 18 months; and

4 Authorizing the Secretary to ban admissions whenever a violation exists that significantly and adversely affects the health, safety, welfare, and nutrition of residents or the facility is in substantial noncompliance.

The goal of these changes is to make intermediate sanctions immediate and meaningful to the degree that they need to be used only sparingly. The most effective deterrent is one that is used infrequently.

Benefits

1 Eliminating the citation from the three procedural steps prior to assessment of the civil penalty.

The civil penalty process can only be initiated for violations that significantly and adversely affect the health, safety, welfare, nutrition, or sanitation of residents. A common problem cited is restraining an individual for periods in excess of two hours without opportunity to stretch, exercise, or perform bathroom activities. The time delay caused by implementation of the second procedural step is not consistent with the need to protect individuals from the adverse effect of such violations. It is fair to the facility to provide one warning; it is unfair to residents to give more than one warning. Attachment B compares the current process to the proposed process.

2 Increase the maximum assessment from $500 to $2,500.

As shown in Attachment C, the number of facilities assessed a financial penalty has historically been a small percentage of facilities cited for significant and adverse violations. Attachment D shows the reason a penalty was assessed 11 times in 1987. This indicates that $500 is not an effective enough deterrent to assure all individuals in adult care homes are protected from significant and adverse violations. Given today's rates and reimbursements, even a small 60-bed facility will have an operating budget approaching $1,000,000. Five hundred dollars simply is not a deterrent.

3 Double the assessment for repeat violations within an 18-month period.

Attachment D also shows the number of facilities within a period of 18 months that were assessed for repeated violations that significantly and adversely affected the health, safety, welfare, and nutrition of individuals in adult care homes.

This pattern of correcting serious violations to avoid immediate sanction only to repeat that violation when the department is not observing is unacceptable in the interests of residents. A facility that violates a statute or regulation that significantly and adversely affects a resident and then does so again ought to be subject to double the penalty of the first-time violator.

4 Ban on admissions.

A facility that has violations that significantly and adversely affect residents or that is in substantial failure to comply with all requirements or that is subject to an order revoking its license has demonstrated an inability to provide acceptable care to the persons who reside there. Such a situation demands that no new person be placed at risk in such an environment and that the facility's resources be applied to protecting its current residents.

There is no more effective deterrent that so clearly and directly relates to protection of the public than a ban on admissions.

These proposals are not intended as a punitive hammer to be wielded by the agency but rather as a deterrent to recurrent conditions that threaten the dignity and safety of our most frail citizens. Attachment E compares current Kansas civil penalty authority to other states. A 1986 survey of 30 states showed 25 states have civil penalty authority up to $25,000 per violation. The median civil penalty was $1,000 per violation. Few states place a ceiling on fines per facility as does Kansas.

Twenty-two of the 25 states having authority to fine did so in 1985. Twenty of the 25 states provide for a maximum fine per violation greater than Kansas. Fourteen of 25 states have a maximum fine per violation

greater than the maximum total fine in Kansas. According to the 1986 Institute of Medicine Report on Improving the Quality of Care in Nursing Homes, 32 states have authority to suspend all admissions.

In order to attract and retain the best society has to offer, Kansas must be a leader in quality nursing home care. Having in place effective sanctions for the purpose of deterring unacceptable behavior and, if necessary, penalizing such behavior, is an important ingredient to a progressive and attractive community.

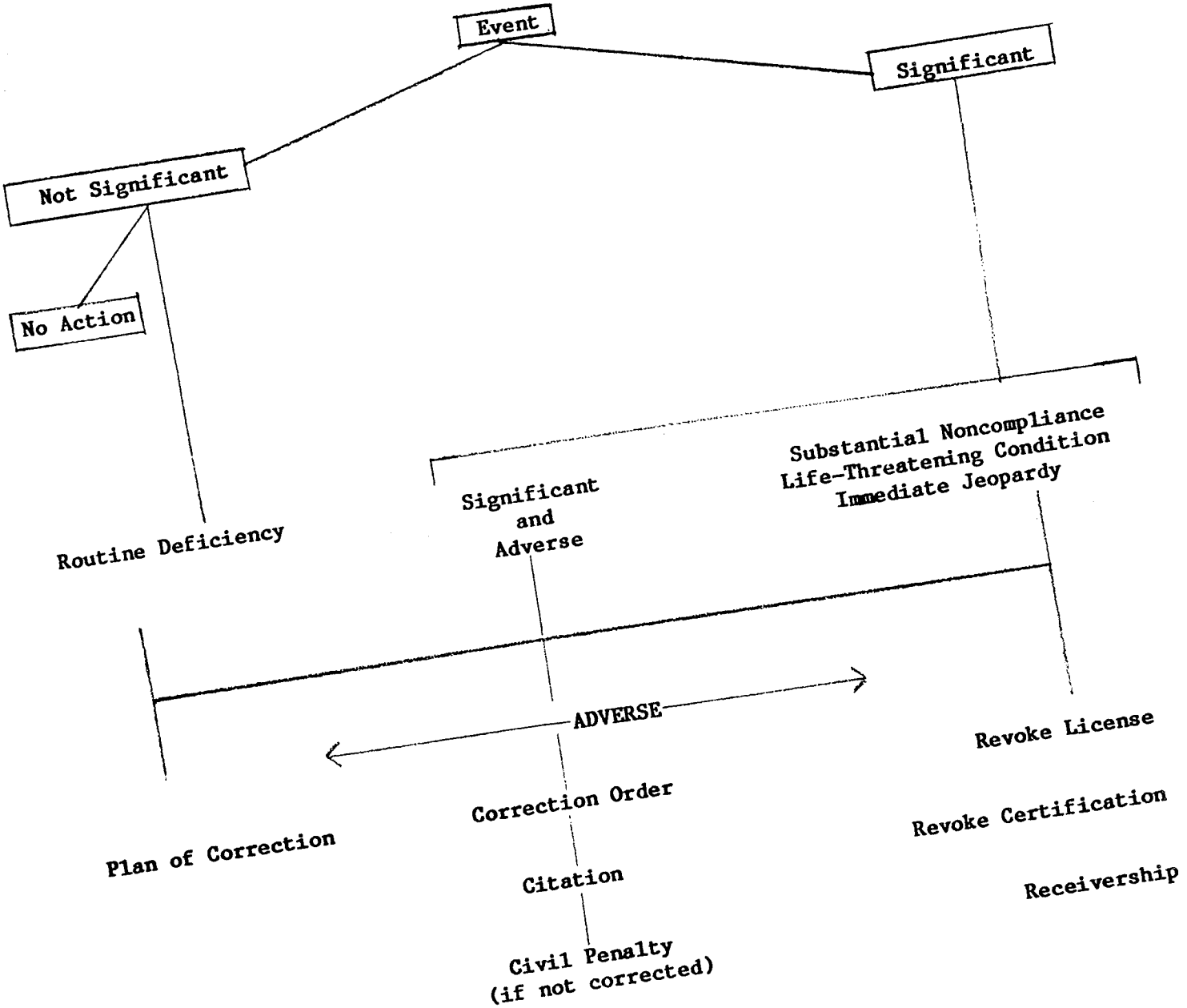
Recommendations

We recommend that the committee report Senate Bill 585 favorably for passage.

Presented by: Stanley C. Grant, PhD, Secretary
Department of Health and Environment
March 23, 1988

Attachment A

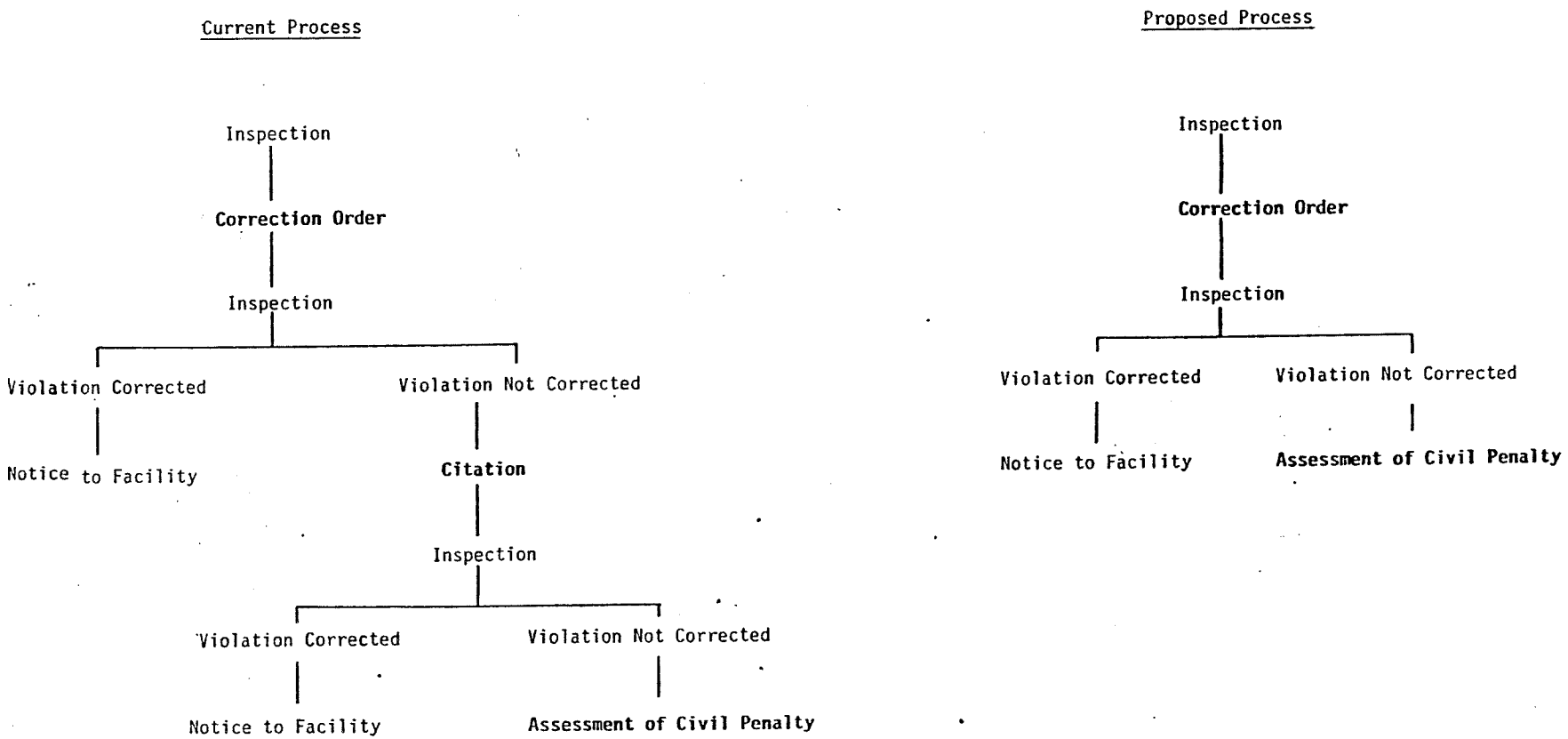
Correction Order Decision Process



In assessing a particular event or situation in an adult care home, the Secretary must first determine whether or not it is significant - does it have influence or effect on the resident or residents. The Secretary must also determine that the significance of this event was adverse or unfavorable to the resident. Routine even if adverse, are excluded by the term "significant."

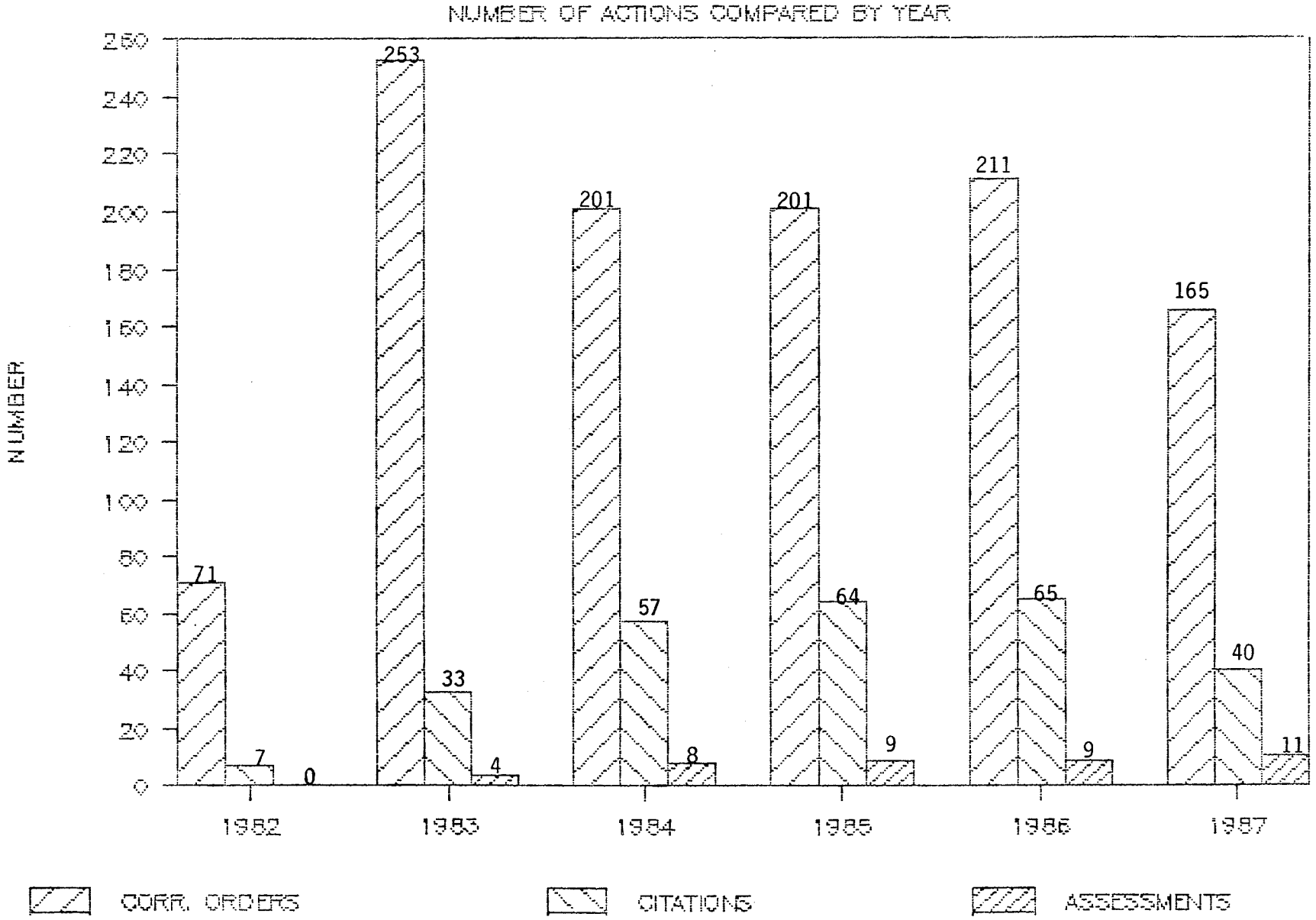
Attachment B

KANSAS ADULT CARE HOME CIVIL PENALTY PROCESS



Attachment C

CIVIL PENALTY ACTIONS 1982 TO 1987



tachment D

1987 Assessments

Facility #	Violation(s)
1	Restraints not released
2 *	medications not administered per physican orders
3	restraints not released, nursing needs not met, medications accessible to residents
4	treatments not given per physician's order
5 *	infection control, nursing needs not met, medications accessible to residents
6 *	asepsis technique on treatments, medications not administered per physician's order
7 *	restraints not released, medications and treatments not given per physician's order
8	medications accessible to residents, asepsis technique
9	unsafe medication administration, lack of bowel and bladder retraining, hazardous chemicals accessible
10 *	asepsis technique with medications
11	medications not adminstered per physician's order

* Five of ten of the above facilities were assessed a fine for a violation cited in a correction order in 1986. The eleventh facility was not operating in 1986.

Attachment E

1986 Survey of 30 states

Maximum Fine per Violation	Number of States
$25,000	1
15,000	1
10,000	2
5,000	5
1,500	1
1,000	4
Kansas facility cap..... 500	4
300	2
Kansas per violation cap..... 100	2
50	1
25	1
Other	1
TOTAL	25

MEDIAN: $1,000

MEAN: $3,891

Kansas Health Care Association
Member of ahca

DATE: WEDNESDAY, MARCH 23, 1988

TO: HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

FROM: DICK HUMMEL, KHCA EXECUTIVE VICE PRESIDENT

SUBJECT: **S.B. 585 AMENDED, NURSING HOME CIVIL PENALTY (FINING) PROCESS**

CHAIRMAN LITTLEJOHN AND COMMITTEE MEMBERS:

THE KANSAS HEALTH CARE ASSOCIATION (KHCA) IS A VOLUNTARY, NON-PROFIT ORGANIZATION WHICH REPRESENTS MORE THAN 200 LICENSED ADULT CARE HOMES, BOTH PROPRIETARY AND NON-PROFIT HOMES, AND ALL LEVELS OF NURSING HOME CARE.

WE SUPPORT S.B. 585 AS AMENDED BY THE SENATE, AND AS FURTHER AMENDED BY THE TWO SUGGESTIONS TO BE DISCUSSED WITH YOU TODAY.

TO RECAPITULATE: S.B. 585 PROPOSES MAJOR RESTRUCTURING OF THE ADULT CARE HOME, INTERMEDIATE SANCTION, CIVIL PENALTY PROCESS. IT GRANTS AUTHORITY FOR KDH&E TO LEVY PENALTIES QUICKER BY REMOVING A STEP FROM THE PROCESS, TO INCREASE THE AMOUNT OF THE FINE, TO DOUBLE THE ASSESSMENT IF A VIOLATION PREVIOUSLY OCCURRED WITHIN THE MOST RECENT 18 MONTHS, AND TO PUT A HOLD ON ALL NEW PATIENT ADMISSIONS.

WE DO NOT QUIBBLE WITH THE PROPOSAL TO MOVE QUICKER,

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phcw

"We Care"

221 SOUTHWEST 33rd ST. • TOPEKA, KANSAS 66611 • 913/267-6003

SWIFTER AND HARDER ON A SMALL MINORITY OF PROVIDERS (EMPHASIS ADDED) WHICH MAY NOT BE PROVIDING THE CALIBER OF CARE THEY SHOULD BE, AND ARE IN FACT PROVIDING SERVICES THAT PRESENT SOME RISK, DANGER, HARM, OR JEOPARDY TO PATIENTS.

WE DO, HOWEVER, HAVE PROBEMS WITH THE PROCESS AND THE ADMINISTRATION OF THE SYSTEM, WHICH IT CAN BE ALLEGED HAS OVERLY BROAD-BRUSHED PROVIDERS. WHAT TRIGGERS THIS PROCESS IS THE ISSUANCE OF A "CORRECTION ORDER" (PLEASE SEE ATTACHED EXHIBIT).

A CORRECTION ORDER MAY BE ISSUED FOR ANY RULE OR REGULATION VIOLATION WHICH THE AGENCY DETERMINES TO SIGNIFICANTLY AND ADVERSELY AFFECT THE HEALTH, SAFETY, NUTRITION OR SANITATION OF A RESIDENT. ANY LAW, RULE, REGULATION, OR SUB-ELEMENT OF A REGULATION CAN TRIGGER THE PROCESS. THIS AUTHORITY, NOW COUPLED WITH SANCTION AUTHORITY TO ISSUE FINES MORE QUICKLY AND IN A HIGHER AMOUNT, PLACES GREAT POWER IN THE HANDS OF AN ADMINISTRATIVE AGENCY, AND A GREAT DEAL OF SUBJECTIVITY IN DECIDING WHAT SHOULD OR SHOULDN'T BE A CORRECTION ORDER ITEM LISTED OFFENSE.

ALTHOUGH A NUMBER OF DEFINITIONS OF THE TERM "SIGNIFICANTLY AND ADVERSELY" HAVE BEEN PRESENTED TO THE AGENCY, NONE HAVE BEEN ACCEPTABLE. THESE HAVE NOT BEEN SUBTLE ATTEMPTS TO TIE-UP THE BILL WITH OBTRUSIVE LANGUAGE, BUT RATHER AN EFFORT TO DRAW A PARALLEL OF THE PUNISHMENT (HIGHER FINES) TO A MORE CLEAR-CUT, SPECIFIC DEFINITION OF THE CRIME (REGULATION VIOLATIONS).

AN ARGUMENT OVER SUCH SEMANTICS COULD CONTINUE UNTIL FINAL ADJOURNMENT -- THE SAME AS IT COULD, FOR EXAMPLE, OVER THE DEFINITION OF WHAT CONSTITUTES REGULATION VIOLATIONS THAT "POSE SERIOUS HARM OR JEOPARDY" TO RESIDENTS, UNDER WHICH CONDITIONS THE AGENCY MUST TERMINATE A PROVIDER FROM THE MEDICAID PROGRAM IN 21 DAYS.

WE STILL BELIEVE, HOWEVER, THAT THE TERMS AND DEFINITIONS WHICH TRIGGER THIS PROCESS ARE BROADLY SUBJECTIVE, OPEN TO INTERPRETATION, AND AT SOME POINT MUST BE DEFINED -- IF NOT IN THIS ARENA, THEN PERHAPS BY THE JUDICIARY AT SOME POINT.

TO BRIEFLY REVIEW OUR TWO AMENDMENTS, YOUR ATTENTION IS NOW DRAWN TO THE ATTACHED ENLARGED VERSION OF PAGE ONE OF THE BILL:

1. AMENDMENT NO. 1, LINE 0040. TO STATE SPECIFIC DEFICIENCY VIOLATION ON THE CORRECTION ORDER.

2. AMENDMENT NO. 2, LINE 0043.

THE RATIONALE FOR EACH IS LISTED ON THE REVERSE SIDE OF THE ENLARGEMENT.

IN CONCLUSION, WE ALL HAVE THE SAME INTEREST AT HEART, PROVIDER, REGULATOR, CONSUMER, LAWMAKER -- TO PROVIDE THE BEST POSSIBLE LEVEL OF NURSING HOME CARE TO OUR AGED AND INFIRMED CITIZENS. IT IS NEITHER AN EASY NOR UNCOMPLICATED TASK, AND AT TIMES AS IN ANY PROFESSION OR TRADE, THERE ARE ALWAYS A FEW WHO DON'T LIVE UP TO STANDARDS OF ACCEPTABLE PRACTICE, AND REMEDIAL ACTION IS WARRANTED.

FOR THOSE SMALL NUMBER OF NURSING HOMES THAT MAY NOT BE ABIDING BY THE STANDARDS, WE SAY, LET THE POWER AND WEIGHT OF GOVERNMENT BEFALL UPON THEM.

FOR THOSE VAST MAJORITY OF PROVIDERS WHO ARE DAY-IN AND DAY-OUT STRIVING FOR THE BEST, WE SAY, RESTRUCTURE THE SYSTEM SO THEY ARE RECOGNIZED AND REWARDED AND NOT NEEDLESSLY BRANDISHED BY THE SYSTEM.

I WOULD BE HAPPY TO RESPOND TO YOUR QUESTIONS.

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1988

SENATE BILL No. 585

By Committee on Public Health and Welfare

2-8

AN ACT concerning the adult care home licensure act; relating to the issuance of correction orders, citations and assessments; prohibiting new admissions to adult care homes in certain cases; amending K.S.A. 39-945 and 39-946 and repealing the existing sections.

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

Section 1. K.S.A. 39-945 is hereby amended to read as follows: 39-945. A correction order may be issued by the secretary of health and environment or the secretary's designee to a person licensed to operate an adult care home whenever the state fire marshal or the marshal's representative or a duly authorized representative of the secretary of health and environment inspects or investigates an adult care home and determines that the adult care home is not in compliance with the provisions of article 9 of chapter 39 of the Kansas Statutes Annotated or ~~rule and regulation~~ *rules and regulations* promulgated thereunder which *individually or jointly* affects significantly and adversely the health, safety, nutrition or sanitation of the adult care home residents. The correction order shall be served upon the licensee either personally or by certified mail, return receipt requested. The correction order shall be in writing, shall state the deficiency, cite the specific statutory provision or rule and regulation alleged to have been violated, and shall specify the time allowed for correction.

Sec. 2. K.S.A. 39-946 is hereby amended to read as follows: 39-946. (a) If upon reinspection by the state fire marshal or the marshal's representative or a duly authorized representative of the secretary of health and environment, *which reinspection*

1. Amend to read: the specific deficiency and the factual basis for such deficiency...

(Rationale on reverse)

2. Add section (b); after Section 1, line 0026, add (a).

New Section (b): Before the issuance of a correction order, the secretary shall consider the following factors: (1) the significance of the violation; (2) the good faith effort exercised by the adult care home to correct the violation; and (3) the history of compliance of the ownership of the adult care home with the rules and regulations.

(Rationale on reverse)

1. RATIONALE: Current law (lines 0037-0040) establishes what must be contained in the content of the correction order -- it shall be in writing, shall state the deficiency, cite the specific statutory provision or rule and regulation alleged to have been violated, and shall specify the time allowed for correction.

A review of correction orders issued reflects that the specific deficiency is not listed on the correction order, but rather the deficiency is referenced in the survey report finding which is attached as an exhibit.

The correction order will state the rule or regulation violation, for example:

> KAR 28-39-89(f)--The facility shall ensure that all medications are administered to residents in a safe and accurate manner and in accordance with a physician order and requirements of law.

One must then go to the exhibit to determine what the specific deficiency, or sub-element of the regulation, was violated.

It could have been one resident, Jane Doe, who did not have her medications administered according to order.

Upon a follow-up inspection to ensure that Jane Doe is receiving her medication according to physician's orders, and even though this deficiency has been corrected, a surveyor may note another alleged infraction of the general regulation heading, for example, a medication not being administered in a sanitary manner (didn't wash hands between medication passes) to a different resident.

Although this latter alleged infraction has nothing to do with the original deficiency, it still falls under the general regulation heading of the initital correction order -- and the home is found out of compliance, the correction order is noted as uncorrected, and the home may be subject to a civil penalty.

We believe that the intent of the law is for the correction order, on its face, to list the specific deficiency.

2. RATIONALE: These threshholds appear on line 68 of the bill, and are to be used by the secretary when determining the amount of the civil penalty. We believe this criteria should also apply when a determination is made whether or not to issue a correction order; i.e., a test of comparability. Also, correction orders are now issued by the Bureau Chief. We believe it is good policy for the Secretary to have knowledge and an understanding of the correction orders being issued by the department.

CIVIL PENALTY PROCESS (S.B. 585)