Approved 2-27-9
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 February 22, 1989 in room 423-S of the Capitol.

All members were present except:

Representative Weimer, excused

Committee staff present:

Emalene Correll, Research
Bill Wolff, Research
Norman Furse, Revisor
Sue Hill, Committee Secretary

Conferees appearing before the committee:

Representative Hensley
Richard Morrissey, Department of Health/Environment/Bureau Adult/Child Care
Dick Hummel, Kansas Health Care Assocaition
Jeff Chanay, Homes for Aging
Marilyn Bradt, Kansans for Improvement of Nursing Homes

Chair called meeting to order, making announcements in regard to fiscal notes, and agenda. (Fiscal notes are recorded at end of minutes this date.) Chair then began hearings.

HEARINGS BEGAN ON HB 2254.

Rep. Hensley spoke as sponsor of HB 2254, noting it would amend current law, beginning in line 116 of the bill. This language would add a sub-section (g). He outlined this section. He detailed procedures taken of two Adult Care Homes as they were closing. Residents had to be transferred to other facilities, and these transfers were traumatic for patients, and to many it was de-humanizing. These people were loaded in vans and transported causing anquish and trauma for them. He would like to see this never occur again. He is asking the posting of notice be extended to 30 days, and noted since the bill was authored, he neglected to indicate the posting should be done in writing. He did commend the State Agency staff who were involved in these particular situations he highlighted, (and are indicated in Attachment No.1), did a commendable job. He answered numerous questions.

Dick Morrissey, (Attachment NO.2), supports HB 2254, and their Department asks for two amendments on the bill, i.e., to delete, "as defined by rules and regulation of the licensing agency", as it appears in line 116-117, and to insert the words, "in writing", after the word, "notified", as it appears in line 119. He spoke to concerns about emergency conditions and even if there was a long laundry list of examples, it might not be enouch to fit all emergency conditions and situations. He detailed how the monitoring was done, how in the Wichita facility the situation became deplorable in the last two days. Defined how Federal money can cease, but State funding can continue until the facility is completely closed. He answered numerous questions, i.e., de-certification is not considered an emergency, but no funds to pay the staff is because there would be no staff to care for patients; how can a facility operate with no funds; no medicare of medicaid being paid by the Federal and/or State Governments; we see this as a significant policy question, he said.

Dick Hummel, Kansas Health Care Association, (Attachment No.3) stated their Association, if this bill is to be enacted, would encourage the adoption of the Federal provision pertaining to transfer/discharge in order to avoid conflict and eliminate misunderstanding. He noted they support the bill basically, and feel as much reasonable notice as possible is good.

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.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE,

room 423-S Statehouse, at 1:30 a.m./p.m. on February 22, 1989

HEARINGS CONTINUED ON HB 2254:--

Dick Hummel continued:

The issue needing clarification is the issue that it will have an effective date of October, 1989, or October, 1990. He also cited the right to appeal transfer or discharge by the patient of an Adult Care Home.

Jeff Chanay, Homes for Aging, (Attachment No.4), noted some observations, i.e., in order to be consistent with Federal law, the 30 day notice for transfer or discharge needs to be made in writing; he asked that the emergency situations be referred to on a case-by-case basis, rather than have a long laundry list. He asked amendments be drawn to these concerns. With said amendments addressing these concerns, their Association could support the bill.

Marilyn Bradt, Kansans for Improvement of Nursing Homes, (Attachment No.5), spoke to concerns that the 30 day notice should be in writing and that would be a great improvement over the 15 day notice. It is their hope this requirement could be put into effect as soon as possible. With this change, she asked for support of HB 2254.

Chair asked wishes of members in regard to minutes of meeting on February 20th.

Rep. Amos moved the minutes of February 20, be approved as written, seconded by Rep. Buehler, motion carried.

Chair called attention to agenda for tomorrow. There will be action taken on several bills.

It is noted here, fiscal notes are recorded as Attachments as follows:

Attachment No.6 is a cover letter from Mr. Alderson along with Mr. Ely's testimony presented verbally on February 21, 1989.

Attachment No. 7 - fiscal note on HB 2012
Attachment No. 8 - fiscal note on HB 2161
Attachment No. 9 - fiscal note on HB 2206
Attachment No.10 - fiscal note on HB 2254
Attachment No.11 - fiscal note on HB 2317

Meeting adjourned 2:30 p.m.

GUEST REGISTER

HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

Date 2/22/9

Name	Organization	Address
[illegible]	S.R.S.	Topeka
Keith R. Landis	Christian Science Committee on Publication for Kansas	"
[illegible]	KDHE	Topeka
Marilyn Bradt	KINH	Lawrence
Richard Morrissey	KDHE	Topeka
Maggie Boleski	citizen	Topeka
Lewis Allen	KHCA	Topeka
Jack Gumb	SRS	Topeka
Dick Hummel	KHCA	Topeka
Linda [illegible]	KDOA	Topeka
Jeff Chanay	KAHA	Topeka
Andrea Olness	Rep. Turnquist's office	
Jennifer Rutter	Rep. Wagnon's office	

Nursing home evictions postponed

Highland Villa won't regain Medicaid for at least 60 days

By the Capital-Journal staff 12-7-88

Residents of Highland Villa Nursing Center and their families have gained a temporary reprieve from a 48-hour eviction notice they received Monday, but they learned Tuesday night that they almost certainly will have to leave the home by Dec. 16.

Initially, Pennsylvania-based American Health Corporation announced it would be closing the center at 5 p.m. today. Meanwhile, the original owners of Highland Villa, Joe and Sheila Florence, are seeking to regain ownership of the business and keep the nursing home at 1821 S.E. 21st open.

However, they first must regain Medicaid funding, a process that could take 60 to 90 days, Sheila Florence said. Because about 90 percent of the residents at the home are Medicaid recipients, it cannot operate without Medicaid to help pay for patient care, she said.

"Most of the patients can't afford to stay here (without Medicaid), and we don't know if there is enough private-pay business to make the operation stable," she said.

And Joe Florence added that if, during that time, the nursing home loses too many of its residents to other centers, he and his wife may not have enough residents to be able reopen the home. About a dozen residents already have left.

Rosemary Mong, regional representative for Sen. Bob Dole, R-Kan., urged people at the meeting to write letters to Dole at 444 S.E. Quincy, Topeka, 66683. She also promised that she would hand-deliver the Florences' application letter to federal authorities, the Health Care Financing Administration, if the Florences decided to reapply for Medicaid funding.

Highland Park High School teacher Dixie Barb, whose mother has been a resident at Highland Villa for "quite some time," joined the Florences in their efforts to keep the home open, and helped to organize a meeting of friends and relatives of the nursing home's

Continued on page 8-A, column 1

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2-22-9

Nursing home

Continued from page 1-a

residents Tuesday evening in her classroom.

At the meeting, many people who had relatives at Highland Villa complained bitterly about the decision by HCFA to deny Medicaid funding. Several said that they had not seen any cockroaches — the main complaint — and many praised the center, saying their relatives got good care.

Joe Florence said he believes that HCFA, concerned about the poor quality of sanitation at nursing homes across the country, singled out Highland Villa from other nursing homes to make an example of it by closing it down.

Most residents and their families were caught off guard by news of the possible closing. They were informed Monday evening that the 14-year-old, 63-resident, intensive-care center would be closing today and that all residents must vacate the premises by 5 p.m. But Jack Gumb, director of adult-care programs for Social Rehabilitation Services, said that agency has negotiated an extension of the closing until Dec. 16. That closing date still falls a few days short of the 15-day notice required by state law.

Although some of the people at the meeting expressed the hope that their relatives would be able to remain at the nursing home, Richard J. Morrissey, director of the bureau of adult and child care for the state Department of Health and Environment, told them they should try to find other homes for their relatives before the deadline. He added that staff members from the Department of Health and Environment would be at the home today to assist residents and their families in finding other nursing homes.

But Emma Ray, whose 72-year-old father lives at Highland Villa, questioned whether other Topeka nursing homes would be able or willing to take all of the residents. She said her father, because both of his legs have been amputated, is not considered a desirable patient by some homes, and that those she has talked to who are willing to accept him want more money than she can afford to pay.

One of the nursing homes taking in some Highland Villa residents is Eventide Convalescent Center, 2015 E. 10th. Eventide staff members spent most of the day Tuesday at Highland Villa reviewing patient charts and visiting with prospective new clients.

Eventide owner/administrator Mac Austin said his center recently remodeled a wing to be used for specialty patients. Those plans may be put on hold while Eventide uses that vacant wing to accommodate Highland Villa transfers.

The Florences built Highland Villa in 1974 and operated it for about 2½ years, Sheila Florence said. After moving to Florida, they sold the nursing home operation, but retained the building. The business was then sold two years ago to Pennsylvania-based American Health Corporation. The Florences have continued to lease the building to American.

—Staff/Paul Beaver

Joe and Sheila Florence, owners of the building housing Highland Villa Nursing Center, 1821 S.E. 21st, listened to friends and relatives of the nursing home's residents at a special meeting Tuesday night. Medicaid funding to Highland Villa recently was cut off, forcing the American Health Corporation, which runs the facility, to announce that the home would close.

Sheila Florence said they were not pleased with the way the home had been run by American and informed the company they were terminating its lease. The Florences moved back to Topeka and planned on reclaiming control of Highland Villa on Dec. 1. However, the Medicaid problems incurred under American forced them to abandon those plans.

Highland Villa's annual Health and Environment surprise inspection occurred June 6-9 this year. The center was declared out of compliance with regulations regarding patient care. They applied for a new license in August, but were denied licensure and certification.

Highland Villa was recertified Oct. 1 and has remained in compliance with state regulators. However, a follow-up inspection by HCFA, prompted Highland Villa's Medicaid funding to be withdrawn.

HCFA gave the center five days, over the Thanksgiving holiday, to get rid of the roaches, Sheila Florence said, but the exterminator told the Florences that it would take about three weeks to eliminate the bugs completely, because the chemicals would kill the adult roaches but not the eggs.

Sheila Florence said the main complaint by the federal inspectors was that the nursing home was infested with cockroaches.

Attmt #1
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2-22-9

Highland Villa residents moved to other homes

By LISA M. SODDERS
Capital-Journal staff writer

At least 40 of the 63 residents of Highland Villa Nursing Center, 1821 S.E. 21st, have been moved to other nursing homes, Ann Rollins, public information director for the Kansas Department of Social and Rehabilitation Services, said Wednesday.

"It's been a smooth move," Rollins said. "We have two social workers, two nurses here meeting with family members and residents. We know where the vacancies are, and nobody has gone anywhere they haven't wanted to go."

With the exception of a few residents who asked that they be placed in a Burlingame nursing home, all of the placements have been made in Topeka, she said.

Highland Villa residents were told Monday by Pennsylvania-based American Health Corporation, which runs the facility, that the nursing home would be closed down and residents would have to leave by 5 p.m. Wednesday. However, SRS officials negotiated an extension until Dec. 16.

The main reason HCFA gave for withdrawing the funding was that the home was infested with cockroaches. Because most of the Highland Villa residents are on Medicaid, the home cannot operate financially without Medicaid funds.

Joe and Sheila Florence, who own the building housing the nursing home, formerly ran the home and are seeking to regain ownership of the business from American Health, who leased the building. The Florences want to keep the home open.

They said they felt the patients were being moved out too quickly.

"We've had family members sitting out here crying," Sheila Florence said. "It's just inhumane."

Rollins said SRS officials were not seeking out residents, but that residents and family members were coming to them for information on other homes. Many family members wanted to get their relatives placed before rooms at other area nursing homes were filled, she said.

The Florences said they went to the office of Sen. Bob Dole, R-Kan., on Wednesday and were told by officials that the HCFA office in Washington, D.C., would be contacted to see if anything can be done. Sheila Florence said it could take 60 to 90 days to regain Medicaid funding, and in the meantime, their former residents might decide they prefer their new nursing homes.

"The families say they'd rather be here, but whether they'd actually transfer them back here is another thing," she said.

Family members of Highland Villa residents who have questions should call SRS at 295-9621, and ask for the Adult Care Home Division.

Attach #1 093 2-22-9

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

The Kansas Department of Health and Environment

House Bill No. 2254

Background

Federal and state regulations have long recognized the need to require a minimum notice prior to involuntary transfer or discharge of nursing home residents. State regulation effective since 1977 has required 15 days written notice except in emergencies. This notice must be in writing to the resident or their legal guardian. Federal regulation is currently less demanding but will require, as mandated by the Nursing Home Reform Act, a 30 day written notice, effective October 1, 1989. It is our intention to amend state regulation to require 30 day written notice consistent with federal law at that time.

Although KDHE recognizes and supports the need for such notice, we also recognize that certain situations do arise that precludes such notice. Accordingly, we exempt emergencies from the notice requirement, and apply the term "emergency" to mean an facility's <u>inability</u> to meet resident need due to an abrupt change in facility capacity or resident condition. In such cases, it is incumbent upon the facility to document and justify in the record the reasons supporting the emergency. Generally, this regulatory approach has worked well, although some problems arise. For example, in an recent case, a facility's medicaid reimbursement was terminated by the Health Care Financing Administration, under what is called an "immediate and serious threat" authority. The facility's response was to close the facility and begin discharge of residents immediately. The question arose, "Was this an emergency?" Thus, allowing no minimum notice requirement. Our agency held that this was <u>not</u> an emergency and required 15 days notice prior to discharge and facility closing.

Issues

The bill addresses two problems. One, to assure by statutory law a minimum notice of 30 days and secondly, to define by regulation emergency situations which would preclude such notice.

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Passage of the bill will support our regulatory intent to require a 30 day notice. We do have some concern regarding the requirement proposed in the bill that emergency situations not subject to the notice requirement be defined by regulation. We submit that it is impractical to define those emergency situations that do not require notice without developing a "laundry list" approach that, in fact, might exclude unforseen situations that should or should not be included. Consequently, our agency is faced with adopting a regulation that would be as open ended and subject to interpretation as using the term "emergency".

It is noted that the bill does not require written notice, an element we feel is essential.

Department Position

In order to address the concerns noted above, we propose the following amendments. Delete, "as defined by rules and regulation of the licensing agency," as it appears in line 116 and 117, insert the words "in writing" after the word "notified" as it appears in line 119.

We believe that statutorily requiring such notice enhances this basic right for nursing home residents and ask that the bill, as amended, be favorably passed.

Presented by: Richard J. Morrissey, Director
Bureau of Adult and Child Care
February 22, 1989

Attm #2
992,
2-22-9

Member of ahca

Kansas Health Care Association
221 SOUTHWEST 33rd STREET
TOPEKA, KANSAS 66611 • 913-267-6003

February 22, 1989

POSITION OF THE KANSAS HEALTH CARE ASSOCIATION

ON

HOUSE BILL NO. 2254, 30 DAY NOTICE OF TRANSFER

FOR ADULT CARE HOME RESIDENTS

TO: House Committee on Public Health and Welfare

The Kansas Health Care Association (KHCA) supports H.B. 2254 which requires that adult care home residents receive 30 days notice of an involuntary transfer or discharge.

Nursing homes become the residences of frail and elderly individuals. Transfer and relocation can be traumatic not only for them but also for their families. As much advance notice of a transfer or discharge as possible is certainly reasonable.

This requirement is covered currently under adult care home regulations pertaining to resident rights (K.A.R. 28-39-78):

> (3) Transfer and Discharge. The resident shall be transferred or discharged from the facility involuntarily only for medical reasons or for the welfare of the resident or others, or for the nonpayment of the rates and charges imposed by the adult care home. Except in emergencies, the resident or legal guardian shall be given written notice at least 15 days in advance of a transfer or discharge of the resident.

OBRA 1987 IMPLICATIONS: 1987 Omnibus Budget Reconciliation Act, Nursing Home Reform. The Act requires, effective October 1989, that residents be given 30 days advance notice of an involuntary transfer or discharge. Thirty days is not required if: (1) the transfer is done for safety or welfare reasons of other individuals, (2) the health improves for the resident justifying transfer or discharge, or (3) the resident has been in the facility for less than 30 days. The federal Act also establishes the right of residents to appeal transfer or discharge decisions to the state agency.

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2-22-9

If H.B. 2254 is to be enacted we'd encourage the adoption of the federal provisions pertaining to transfer and discharge in order to avoid conflict and eliminate misunderstanding.

Thank you.

CONTACT: Dick Hummel, Executive Vice President

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KANSAS ASSOCIATION OF HOMES FOR THE AGING

February 22, 1989

TO: House Public Health and Welfare Committee

Re: HB 2254 - Adult Care Homes Resident Transfer and Discharge

The Kansas Association of Homes for the Aging represents 120 not-for-profit nursing and retirement homes in rural and urban areas across our state. On behalf of KAHA, I wish to state our association's support of HB 2254, and would offer a few general observations concerning this bill.

Section 1919(c)(2) of the federal Social Security Act mandates that effective October 1, 1989, 30-day written notice be given before a resident of a nursing facility can be transferred or discharged. We believe that with the exception of the written notice requirement, HB 2254 is consistent with federal law.

Federal law also provides for exceptions to the 30-day notice requirement in instances where the safety or health of individuals in a nursing facility are endangered. HB 2254's "emergency" exception to the 30-day notice requirement, as would be defined by the Department of Health and Environment, is again consistent with federal law. We believe, however, that a "laundry list" approach to defining emergency situations is impractical and would doubtless lead to the exclusion of certain justifiable reasons for transfer or discharge without 30-day written notice. We would suggest that "emergency" situations be reviewed on a case-by-case basis.

Accordingly, KAHA joins the Department of Health and Environment in suggesting that the phrase "as defined by rules and regulations of the licensing agency" be deleted from lines 116 and 117 and that the words "in writing" be added after the word "notified" on line 119.

With these amendments, KAHA asks that HB 2254 be reported favorably.

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Attm. #4
2-22-9

Jeffrey A. Chanay
Vice President for Government
and Legislative Affairs

THE ORGANIZATION OF NONPROFIT HOMES AND SERVICES FOR THE ELDERLY

641 S.W. Harrison, Topeka, Kansas 66603 913-233-7443

KINH Kansans for Improvement of Nursing Homes, Inc.

913 Tennessee, suite 2 Lawrence, Kansas 66044 (913) 842 3088

TESTIMONY PRESENTED TO
THE HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE
CONCERNING HB 2254

February 22, 1989

Mr. Chairman and Members of the Committee:

The problem focused upon by HB 2254 is one which has come sharply to our attention twice within the past year in the closings of North Towne Manor of Wichita, and Highland Villa of Topeka. While it has not involved a great many people, the effect upon those persons was devastating. And in those instances the system wholly failed to protect the safety and well being of some very fragile, helpless, vulnerable Kansans.

KINH was a participant in a group assembled to review the events at North Towne and to consider what could be done to see that such a thing did not happen again. It seemed clear that the state had no adequate mechanism for closely monitoring homes in imminent danger of closing, or for communication among state agencies having responsibility for safeguarding the welfare of nursing home residents. Though an effort was made at that time to put such a mechanism in place, the whole unfortunate scene was repeated in Highland Villa only a few months later.

We are not sure how the state can best guard against a recurrence of this unconscionable action, nor just how much HB 2254 will help. A nursing home operator with no greater conscience than the adminstrators and owners involved in North Towne Manor and Highland Villa may find it just as easy to ignore a statute requiring a 30-day notice of transfer or discharge as apparently they did to ignore a regulation requiring a 15-day notice.

We agree, however, that a 30-day notice period would be an improvement over the 15-day notice in current regulation, and that the requirement should be put into effect as soon as possible. Under the best of circumstances, it is not easy to find an appropriate placement in a hurry. Often the families, if there are any, who would take the responsibility for finding a suitable home and moving their relative, live far away; they need time to make arrangements. And it takes time to prepare the residents for a move in such a way as to minimize the trauma to fragile minds and bodies. If the state can put the 30-day notice into effect earlier than the similar provision to be reqired by federal law, that would be all to the good. We would suggest, however, that written notice be specified by inserting the words "in writing" following "notified" on line 119.

No matter what kind of regulatory or statutory change may be called for, it is certain that it will take great watchfulness on the part of the state agencies -- H&E, SRS, and KDOA -- to assure that resident transfers are in all instances made in a safe, reasonable, orderly manner. That watchfulness should commence at any time it becomes apparent that a nursing home has serious deficiencies that could lead to actions against the home's license.

KINH supports HB 2254, with the minor amendment suggested above.

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attm. # 5
2-22-9

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C. DAVID NEWBERY

February 22, 1989

HAND-DELIVERED

Honorable Marvin Littlejohn
Chairman, House Public Health &
Welfare Committee
Room 426-S, Statehouse
Topeka, Kansas 66612

Re: House Bill No. 2317

Dear Representative Littlejohn:

Inasmuch as action will be taken on this bill on Thursday, February 23, 1989, and there is insufficient time for the preparation and mailing of Clauson Ely's prepared testimony on the above-referenced bill, I wanted to make a copy of his testimony on last year's similar bill available to the committee members prior to the action being taken by your committee.

Enclosed, please find 20 copies of Mr. Ely's testimony presented last year on House Bill No. 2830. Mr. Ely assures me that the same considerations presented in this testimony apply to the provisions of House Bill No. 2317.

Would you please distribute copies to your members at the meeting on Wednesday, February 22, 1989. Thank you for your consideration in this matter.

Sincerely,

Alan F. Alderson
ALDERSON, ALDERSON & MONTGOMERY

AFA:bjb

Enclosures

PH&W
Attm #6
2-22-9

February 19, 1988

MEMORANDUM CONCERNING THE PROPOSED
KANSAS CIGARETTE SAMPLING BAN - HB 2830

The bill currently under consideration, HB 2830, would, if passed and approved, amend Kansas state law so as to ban all promotional distribution of cigarette samples without charge or at a nominal cost "to members of the general public." State law now prohibits the sale or distribution of cigarettes to persons under 18. See Kan. Stat. Ann. § 79-3390 (1984). HB 2830 would repeal this law in favor of a more expansive prohibition that would forbid cigarette sampling to adults as well as to youths in Kansas.

Insofar as it applies to cigarettes, the proposed sampling ban is prohibited by the Federal Cigarette Labeling and Advertising Act. This is the federal statute that, as amended by the Public Health Cigarette Smoking Act of 1969, banned cigarette advertising in the broadcast media. 15 U.S.C. § 1335. As amended in 1969, the federal law contains a "preemption" provision that provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any [properly packaged] cigarettes." 15 U.S.C. § 1334 (emphasis added).

The Federal Cigarette Labeling and Advertising Act represents "a carefully drawn balance" between providing the

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public with information about smoking and health -- through mandated health warnings and otherwise -- "and protecting the interests of the national economy." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 107 S. Ct. 906 (1987).[1/] Congress adopted the preemption provision so that "commerce and the national economy" would not be "impeded by diverse [and] nonuniform * * * advertising regulations" (See 15 U.S.C. § 1331(2)) based on smoking and health.

That cigarette "advertising or promotion" includes sampling is clear both from the interpretation of the statutory language given by the Federal Trade Commission and from the legislative history of the statute itself. In the federal statute, Congress directed the Federal Trade Commission to report annually to Congress on "current practices and methods of cigarette advertising and promotion," and to make appropriate legislative recommendations. 15 U.S.C. § 1337(b). Sampling consistently has been treated as a form of "advertising or promotion" by the FTC.

In 1978, for example, the FTC discussed "the use of other forms of current cigarette advertising and promotion," including "advertising of special events [and] free samples."

1/ Two other federal Courts of Appeal have reached the same conclusion. Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (per curiam); Palmer v. Liggett Group, Inc., 825 F.2d 620, 622, 626, 629 (1st Cir. 1987).

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FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1978, p. 4. In 1977, the FTC noted that, in addition to promotion through the print media and outdoor advertising, "the cigarette companies in 1977 increased the distribution of free samples to encourage smokers to try a particular brand." FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1977, p. 7. A 1981 FTC staff report referred to sampling as a "promotional technique" and a "form of advertising." An FTC Staff Report in 1981 on the Cigarette Advertising Investigation, p. 2-6.

Courts would likely give considerable weight to the FTC view that sampling is a form of cigarette advertising and promotion. Apart from the strong deference normally given to an administrative agency's interpretation of a statute that it is directed to implement, the courts frequently have characterized brand sampling as a form of advertising or promotion. See, e.g., Indian Coffee Corp. v. Proctor & Gamble Co., 482 F. Supp. 1104, 1106 (W.D. Pa. 1980) ("Consumer promotions were aimed directly at the consumer, and included free samples, refunds, premium offers, and * * * consumer coupons.").

The FTC's interpretation of the statutory language is firmly supported by the legislative history of the statute. That sampling is a form of cigarette advertising or promotion was taken for granted during the hearings on the 1969 legisla-

tion. For example, in opposing a broadcast advertising ban, the President of the National Association of Broadcasters observed that sampling was a form of "promotion" to which the broadcast advertising ban would not apply.[2/] Congressman Harvey stressed that the tobacco companies "advertise[d] not only in the communications field, on radio and on television, but they do extensive advertising in newspapers, on billboards, by direct mail, [and] by other media of all kinds."[3/]

At the same time, others recommended that Congress not limit itself to banning broadcast advertising but impose restrictions on all cigarette advertising, including sampling. Arthur De Moss, President, National Liberty Life Insurance Company, urged "[e]ffective legislation to restrict all cigarette advertising * * *. This would include written as well as visual advertising, and would prohibit as well the giving of free samples of cigarettes to anyone, regardless of age."[4/] Congress, of course, rejected this advice.

2/ Cigarette Advertising and Labeling: Hearing on H. R. 6543 before the Consumer Subcommittee of the Senate Commerce Committee, 91st Cong., 1st Sess. 146 (1969) ("Senate Subcommittee Hearing") (letter of Oct. 8, 1969, from Vincent T. Wasilewski to Chairman Moss). See also 115 Cong. Rec. 38,738 (1969) (remarks of Sen. Goodell).

3/ Cigarette Labeling and Advertising: Hearings before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 209 (1969) (emphasis added). See also id. at 343 (remarks of Rep. Kuykendall).

4/ Id. at 1351 (emphasis added).

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pg5
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The cigarette industry resisted more severe advertising restrictions by pointing to its voluntary Cigarette Advertising Code. Under Article IV, concerning "Advertising Standards," Section 1 provides:

> "All cigarette advertising and promotional activities shall be subject to the following:
>
> * * *
>
> (b) Sample cigarettes shall not be distributed to persons under twenty-one years of age.
>
> (c) No sample cigarettes shall be distributed or promotional efforts conducted on school, college, or university campuses * * *."5/

The cigarette industry repeatedly represented that schools and colleges were to be "put absolutely off limits to cigarette advertising and other promotions like the distribution of free samples. Sampling to persons under 21 was ruled out in any event."6/ Industry representatives repeatedly cited the distribution of sample cigarettes as one type of

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5/ Id. at 1313.

6/ Id. at 1285 (statement of Robert B. Meyner, Administrator of the Cigarette Advertising Code) (emphasis added).

"cigarette advertising in other media."[7/] The Senate report on the 1969 legislation noted the industry's position that,

> "with respect to all other advertising [than broadcast advertising], they would avoid advertising directed to young persons, and would continue to abstain from advertising in school and college publications, would continue not to distribute sample cigarettes or engage in promotional activities on school and college campuses * * *."[8/]

Some sampling ban proponents have nevertheless asserted that the preemption provision in the 1969 law was intended only to prohibit state requirements concerning the content of cigarette advertising. However, Congress in 1969 considered and rejected a version of Section 1334(b) that might have supported this interpretation of the provision. H.R. 6543, as passed by the House, provided in Section 5(b):

> "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 115 Cong. Rec. 16,275 (1969) (emphasis added).

7/ Senate Subcommittee Hearing at 79 (statement of Joseph F. Cullman III, Chairman, Philip Morris, Inc.).

8/ S. Rep. No. 566, 91st Cong., 1st Sess. 9 (1969). See also Senate Subcommittee Hearing at 121 (statement of Senator Goodell characterizing distribution of sample cigarettes as a type of cigarette advertising); id. at 87 (letter of July 28, 1969, from Mr. Cullman to Chairman Moss, to the same effect); id. at 144 (letter of Sept. 2, 1969, from Mr. Cullman to Chairman Moss, to the same effect).

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As passed by the Senate and approved by the Conference Committee, however, Section 5(b) provided:

> "No other requirement or prohibition based on smoking and health shall be imposed by any state statute or regulation with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." H.R. Rep. No. 897, 91st Cong., 2d Sess. 1, 5 (1970) (emphasis added).

It was this broadened version of the preemption provision that Congress enacted in 1969, replacing a narrower version that had been enacted in 1965. Moreover, when Congress subsequently considered the legislation ultimately enacted as the Comprehensive Smoking Education Act of 1984, it squarely rejected an attempt to narrow the reach of Section 1334(b) to prohibit only state or local labeling requirements.[9/] The Supreme Court has stated that it would be "improper * * * to give a reading to [a statute] that Congress considered and rejected." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 194 (1983).

Thus, it is clear that sampling is a form of cigarette "advertising or promotion" shielded from state and local

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9/ Compare H.R. 3979, § 6(c), as introduced, with H.R. 3979, as reported by the House Energy and Commerce Committee. H.R. Rep. No. 805, 98th Cong., 2d Sess. 27 (1984).

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regulation by Section 1334(b) of the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969. As Professor Edward T. Popper, an antitobacco advocate, acknowledged in recent testimony in Congress, "[t]he tradition of free cigarette sampling is deeply rooted in our society."[10/] Congress intended Section 1334(b) to reach state and local restrictions on this and all other forms of cigarette "advertising or promotion." The sampling ban proposed for Kansas would be invalid under that preemption provision.

COVINGTON & BURLING

10/ Advertising of Tobacco Products: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. 136 (1986).

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2-22-9

Fiscal Note HB 2012

House Bill 2012
19 Session
February 6, 1989

The Honorable Marvin Littlejohn, Chairperson
House Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

Dear Representative Littlejohn:

SUBJECT: Fiscal Note for HB 2012 by Special Committee on Public Health and Welfare

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2012 is respectfully submitted to your committee.

HB 2012 would amend existing state law pertaining to attendant care services provided by the Department of Social and Rehabilitation Services. The bill would create new definitions for terms utilized in the Attendant Care Program and the Home and Community Based Services Program operated by the Department of Social and Rehabilitation Services. The definitions define practices that are exempt from the exclusive practice of licensed nursing. The definitions are also used in establishing guidelines to be followed in the operation of the Home and Community Based Services Program. The bill would require the Secretary of the Department of Social and Rehabilitation Services to submit a written report to the Governor and the Legislature prior to December 31, 1989. The report would include a summary of attendant care services provided under the Home and Community Based Services Program, a description of the services models utilized as part of the program, the cost of service provided per client, client demographics, and such other information as the Secretary would deem appropriate.

The Department of Social and Rehabilitation Services estimates that the provisions of this bill would require additional expenditures of $353,274 in FY 1990. Of this amount, the State General Fund expenditures would be $215,321. These expenditures would be in addition to amounts contained in the FY 1990 Governor's Report on the Budget. The Department estimates that FY 1991 costs would be $596,714 and that the FY 1992 costs would be $617,174.

The fiscal impact is based on 50 current attendant care clients requiring additional expenditures of $202,500. The Department estimates that recruitment and training of attendants would require expenditures of $50,000. In order to provide payments under the provisions of this bill through the medical assistance payment system, modifications to the existing computer systems would require expenditures of $45,000. In addition to the above costs, the Department estimates that 2.0 additional positions (one Social Service Administrator III and one Office Assistant II) will be required for a cost of $55,774.

M F O'Keefe
Michael F. O'Keefe
Director of the Budget

MFO:REK:sm

cc: Sandy Duncan
Social and Rehabilitation Services

attm #7
2-22-9
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House Bill 2161
1989 Session
February 21, 1989

The Honorable Marvin Littlejohn, Chairperson
House Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

Dear Representative Littlejohn:

SUBJECT: Fiscal Note for HB 2161 by Committee on Public Health and Welfare

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2161 is respectfully submitted to your committee.

HB 2161, as introduced, amends the maximum statutory fees for physical therapist examinations, endorsements and renewals; and renewals for physical therapist assistants. Physical therapist assistants will be registered rather than certified. Temporary licenses for qualified applicants may also be granted pending board action on the application. Professional liability insurance is required by the act. The bill includes a process of license renewal and reinstatement of a lapsed license. In addition, licenses will be renewed on a biennial basis. The board will establish rules and regulations on the above licensure actions and will establish fees up to the maximum allowed in this bill.

This bill, as introduced, can be accomplished with existing staff. It would, however, have the following fiscal impact on the Board of Healing Arts Fee Fund if all fees were increased to the statutory maximum authorized. An amount of 20 percent of collected fees is deposited in the State General Fund.

In FY 1988 there were 45 physical therapist examination fees collected totaling $4,500 at $100 per examination. Under the provisions of the act, in FY 1990 and subsequent years, with the collection of the $150 maximum examination fee, the total collection at 45 examinations would equal $6,750, an increase of $2,250. In FY 1988 there were 46 physical therapist endorsement fees collected totaling $3,910 at $85 per endorsement. In FY 1990, with the $150 maximum registration fee, the total collection from endorsement fees at 46 endorsements could equal $6,900 for an increase of $2,990. During FY 1988, the Board renewal registration count was 711 physical therapists for a total collection of $21,330 at $30 per renewal. If the same number physical therapists renewals occur in FY 1990 a total collection of $53,325 would result at a maximum fee of $75 per renewal for an increase of $31,995.

During the 1988 calendar year the Board renewal registration count for physical therapist assistants was 270 for a total collection of $8,100 at $30 per renewal. The estimated physical therapist assistant renewals for FY 1990 are expected to be 380 for a total collection of $28,500 if the maximum of $75 per renewal was adopted for an increase of $20,400 over 1988. Therefore, if the Board increased all fees to the statutory maximum authorized by the bill, the total estimated increase for FY 1990 and subsequent years will be $57,635. An amount of $11,527 would be deposited in the State General Fund and $46,108 in the Healing Arts Fee Fund.

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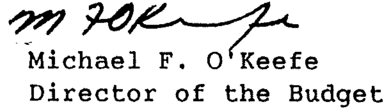
Any additional revenue resulting from the passage of this bill would be in addition to amounts contained in the FY 1990 Governor's Report on the Budget.



Michael F. O'Keefe
Director of the Budget

MFO:KW:dlf

cc: Richard Gannon, Board of Healing Arts

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2-22-9

House Bill 2206
1989 Session
February 21, 1989

The Honorable Marvin Littlejohn, Chairperson
House Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

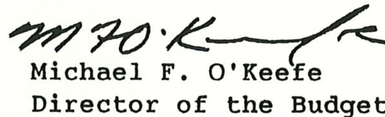
Dear Representative Littlejohn:

SUBJECT: Fiscal Note for HB 2206 by Representatives Blumenthal, Borum, Branson, Douville, Flottman and Reardon

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2206 is respectfully submitted to your committee.

HB 2206 would amend KSA 39-1401 to include individuals kept, cared for, treated, boarded or otherwise accommodated in a group home, sheltered workshop, rehabilitation facility or half-way house serving the mentally retarded in the definition of resident. The law requires certain health professionals who have reasonable cause to believe a resident has been abused or neglected or is in need of protective services to report the suspected abuse or neglect to the Department of Social and Rehabilitation Services. The Department then investigates the complaint and takes whatever action is necessary to protect the resident.

This bill has no fiscal impact.



Michael F. O'Keefe
Director of the Budget

MFO:MB:dlf

cc: Ben Coates, Department of Social and Rehabilitation Services

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attm #9
2-22-9

House Bill 2254
1989 Session
February 21, 1989

The Honorable Marvin Littlejohn, Chairperson
House Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

Dear Representative Littlejohn:

SUBJECT: Fiscal Note for HB 2254 by Representative Hensley

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2254 is respectfully submitted to your committee.

HB 2254 amends KSA 39-936 concerning the transfer or discharge of residents in adult care homes. The bill provides that except in emergency's as defined by the rules and regulations of the Department of Health and Environment, no resident of an adult care home could be transferred or discharged involuntarily unless the resident or legal guardian of the resident have been notified at least 30 days in advance of the transfer or discharge of the resident. In other words, this bill would amend existing state law to require an adult care home to notify a resident 30 days in advance before transfer or discharge of the resident. The bill does allow for an exception in the case of emergencies.

The bill has no fiscal impact.

Michael F. O'Keefe
Director of the Budget

MFO:RK:dlf

cc: Ben Coates, Department of Social and Rehabilitation Services

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Hou Bill 2317
1989 Session
February 21, 1989

The Honorable Marvin Littlejohn, Chairperson
House Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

Dear Representative Littlejohn:

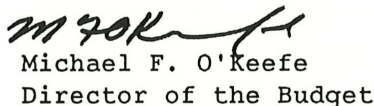
SUBJECT: Fiscal Note for HBB 2317 by Representatives Amos, Baker, et al.

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2317 is respectfully submitted to your committee.

HB 2317, as introduced, amends various cigarette and tobacco product statutes:

1. Section 1 amends KSA 79-3301g by removing gifts of cigarettes from the definition of "sale";
2. Sections 2, 3 and 4 amend KSA 79-3302, 79-3310, and 79-3313 by eliminating the provision which allows cigarettes to be given away within the state;
3. Section 5 amends KSA 79-3321 to make it illegal to sell or distribute, without charge or at minimal cost, cigarettes within Kansas, or to distribute cigarettes in connection with any coupon redemption or other marketing device;
4. Sections 6 and 7 contain technical language changes to make KSA 79-3322 and 79-3324a consistent with the remainder of this act;
5. Section 8 amends KSA 79-3370 to remove the giving of tobacco products for advertising purposes from the definition of "sale";
6. Section 9 amends KSA 79-3390 to specify violations of this act to be a misdemeanor --
   a Selling or distributing, without charge or at nominal cost, tobacco products to persons under 18 years of age shall be punishable by a fine of $500 to $2,500 or imprisonment of up to one year, or both,
   b. Selling or distributing, without charge or at nominal cost or in connection with the redemption of any coupon or similar marketing artifice any tobacco product to any person 18 or more years of age shall be punishable by a fine of not more than $1,000 or imprisonment of not more than one year, or both.

HB 2317, as introduced, would reduce revenues to the State General Fund by an indeterminable amount for FY 1990. The tax collected on cigarettes sold or distributed without charge or at nominal cost is not separately accounted for, so an estimate of the fiscal impact is not available. Any fines collected under this act would increase revenues to the State General Fund.



Michael F. O'Keefe
Director of the Budget

MFO:SH:dlf

cc: Ed Rolfs, Department of Revenue

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