

Approved

3/31/92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative John Solbach at
Chairperson

3:30 a.m./p.m. on February 25, 1992 in room 313-S of the Capitol.

All members were present except:

Representative Everhart who was excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

Chip Wheelen, Kansas Medical Society & Kansas Psychiatric Society
Bob Frey, Kansas Trial Lawyers Association
Paul Klotz, Association of Community Mental Health Centers of Kansas
Robert Epps, S.R.S.
John Badger, S.R.S.
State Representative David Heinemann
Robert J. Robel, Manhattan, Kansas

The Chairman called the meeting to order.

Hearing was opened on HB 2795, effect of determination that payment not be made for covered services under state medical assistance program.

Chip Wheelen, Kansas Medical Society & Kansas Psychiatric Society, testified in favor of HB 2795. (Attachment #1) He suggested in lieu of passing HB 2795 that the committee might consider passing a bill that says any physician shall be considered a charitable health care provider under the tort claims act. He answered committee members questions.

Bob Frey, Kansas Trial Lawyers Association, testified in opposition to HB 2795. (Attachment #2) In answer to a committee member's question he said the language could be narrowed for admission to mental health care hospitals only.

Paul Klotz, Executive Director of Association of Community Mental Health Centers of Kansas, testified in opposition to HB 2795. (Attachment #3) He said for him to support the bill, all Medicaid providers would need to be included. In answer to a member's question he said "gatekeeping" is being phased in across the state.

Robert Epps testified on behalf of Donna Whiteman, Secretary of S.R.S., in opposition to HB 2795. He answered committee members questions and concerns. (Attachment #4)

John Badger, Acting General Counsel for S.R.S., testified in opposition to HB 2795. (Attachment #5) He said he felt the language was much too broad in the bill.

Hearing on HB 2795 was closed.

Hearings were opened on HB 2870, personal service for execution orders, and HB 2948, unlawful for minor to purchase/possess a firearm unless completed hunter safety course.

State Representative David Heineman briefly explained why he introduced HB 2870. Rep. O'Neal moved to report HB 2870 favorably for passage. Rep. Heinemann seconded the motion. Motion carried.

Representative Heinemann explained why he introduced HB 2902, creating the crime of reckless endangerment. Chairman Solbach announced he would appoint a subcommittee to work on HB 2902.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 313-S, Statehouse, at 3:30 ~~am~~/p.m. on February 25, 1992.

Robert Robel, Manhattan, testified in opposition to HB 2948. (Attachment #6) He thought a city could provide an ordinance to do what HB 2948 does. Rep. Heineman said he would like to exclude special programs such as 4-H and Jr. Olympics from this bill. The Chairman appointed the following subcommittee to study HB 2948:

Rep. Rock, Chairman
Rep. Hamilton
Rep. Lawrence
Rep. Heinemann

Hearing on HB 2948 was closed.

The chairman appointed the following subcommittee to study auto theft:

Rep. Gomez, chairman
Rep. Rock
Rep. O'Neal
Rep. Heinemann

The meeting adjourned at 4:50 P.M.

JOINT STATEMENT
to the
House Judiciary Committee
from the
Kansas Medical Society and the Kansas Psychiatric Society
February 25, 1992
House Bill 2795

HB 2795 was requested by the Kansas Psychiatric Society to address a problem that exists as a result of a new policy adopted by the Department of Social and Rehabilitation Services. The policy requires pre-certification of any admission of a Medicaid patient into an acute care hospital for psychiatric treatment.

In spite of months of negotiations and attempts to avert this policy, physicians are confronted with a situation which could result in non-admission of a patient who might then proceed to do harm to self or others. KMS legal counsel advises us that even though the admission would be avoided because of an assessment conducted by a so-called mental health professional from the community mental health center, that the physician would remain liable in the event that the non-admitted patient caused harm to self or others that might have been prevented by admission into the hospital.

While most physician concerns were addressed in the final version of the SRS policy statement, the one unresolved issue is the question of liability. It is extremely unfair to the physician and the hospital to retain liability when the patient has been diverted to outpatient treatment in spite of the physician's diagnosis and recommendation.

Although it would appear that this concern should be reserved to the psychiatric specialty, it is actually more of a problem for physicians who staff hospital emergency rooms throughout Kansas. Unless this problem is addressed, we fear that it will provide one more reason for physicians to not participate in the state medical assistance program.

For the sake of fairness, and encouraging physicians to provide care to Medicaid patients, we urge you to recommend passage of HB 2795. Thank you for considering our position.

Chip Weelen

*HJC
2-25-92
Attachment #1*



KANSAS TRIAL LAWYERS ASSOCIATION

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TESTIMONY

of the

KANSAS TRIAL LAWYERS ASSOCIATION

before the

HOUSE JUDICIARY COMMITTEE

regarding HB 2795

February 25, 1992

This is a technical bill which is directed toward a specific issue that has developed out of the Mental Health Act of 1990. A major part of that Act was the establishment of the "gatekeeper" provision which placed authority in the hands of local mental health providers to determine who would be admitted to state mental hospitals.

The right of the "gatekeeper" includes the right to deny a recommendation, made by a physician, to admit a patient to a state hospital for mental treatment. This denial can result in the patient not being admitted to the state hospital regardless of the treating private physician's recommendation.

This bill would provide that all liability for civil damages which might be suffered as a result of the denial would be the sole responsibility of the Secretary of Social and Rehabilitation Services. The physician would be completely removed from liability if his or her referral were denied by SRS through the "gatekeeper".

HJC-92
2-25-92
AHC n #2
183

HB 2795, however, goes far beyond the issue of admissions to state hospitals for mental patients. It also applies whenever any method of treatment is controlled by SRS for persons who are eligible for medical assistance. If, for instance, a certain series of tests are ordered by a physician and they are denied because the SRS regulations prohibit the tests, will the physician then be granted total immunity? What if there are other tests that are just as effective and acceptable to SRS for payment? Is it not possible that the doctor who wants one kind of test, is refused and then refuses to do other tests, would be free from liability if damage occurs to the patient?

We think it is possible and we believe that the right to immunity under these circumstances should not be granted. By transferring liability to SRS, it is possible that there is no one responsible at all, since the immunity of the Tort Claims Act might also protect the Secretary and the State of Kansas against a claim for damages.

The decision to not approve of, or pay for, a particular medical procedure or an admission to a state hospital may be a "discretionary function" as defined in the Kansas Tort Claims Act. As such, it clearly falls within the protection of the act and could possibly mean that the treating physician, the gatekeeper, and the Secretary would all be given immunity from liability for damages caused to the patient.

HJC-92
25-12
2 Attach #2
2 of 3

In the meantime the patient, who is a truly innocent bystander in these proceedings, gets hurt and has nowhere to turn for help. A change in the law as provided by HB 2795, would make the innocent patient a casualty of what is, by all standards, a turf battle between private physicians and the Department of Social and Rehabilitation Services.

There has not been enough consideration given to the consequences of HB 2795 and how it will impact the person who is a qualified recipient of medical services. We suggest that this bill is not one in which the good intentions of the medical community outweigh the bad results which the bill will produce. We recommend that HB 2795 be not passed.

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-25-92
Attach #2
383



**Association of Community
Mental Health Centers of Kansas, Inc.**

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**TESTIMONY TO:
THE HOUSE COMMITTEE ON PUBLIC HEALTH
AND WELFARE
Regarding H.B. 2795**

Paul M. Klotz, Executive Director
February 25, 1992

John G. Randolph
President
Emporia

Eunice Ruttinger
President Elect
Topeka

Ronald G. Denney
Vice President
Independence

Donald J. Fort
Secretary
Garden City

Don Schreiner
Treasurer
Manhattan

Mary E. McCoy
Member at Large
Hutchinson

Kermit George
Past President
Hays

Paul M. Klotz
Executive Director
Topeka

Thank you for the opportunity to comment on H.B. 2795. This Association opposes this bill. In order for us to support this bill, all medicaid providers would need to be included. Not only are physician recommendations being rerouted in the health care system, other professional opinions are likewise being subjected to scrutiny and being directed to less costly alternative services.

In 1990, mental health centers, under the passage of the Mental Health Reform Act, also sought special protection from liability when we were asked to reroute certain mental patients from costly state hospitalization toward less costly and more effective community based treatment. We were told that this was merely another cost of doing business and that if we could demonstrate a cost increase in liability insurance premiums, we could bring such cost increases to the state for inclusion in our negotiations for increased rates or higher funding. So far we have not experienced higher premiums of liability coverage.

The centers are now screening for SRS, all medicaid clients as to the need for psychiatric hospitalization as well as diverting as many patients as appropriate and possible to community based treatment. This program should not only help to considerably reduce state medicaid costs, but should also provide more effective treatment in the community. The program provides for those in crisis or in a true emergency situation; allowing such cases to go directly to the hospital for such screening and evaluation. The program also encourages the expansion of community based services.

We believe the above described program will lead to both improved service and managed health care for medicaid clients. H.B. 2795, could remove the incentive for SRS to manage its expenditures in ways that are both more effective and help to reduce overall costs.

HJC
2-25-92
Attach #3
1 of 2

We have reached a point in health care where innovative and responsible steps must be taken to reduce unnecessary costs and services to the benefit of both the patient and the taxpayer.

Screening for medical necessity is not a new concept. This method has been used by both private and public payers for a number of years. This screening program set up by SRS even goes a step further by insisting that no "screening out" can occur unless a community alternative is available, not just because medical necessity has been determined, or not determined. We do not believe that this program will create any undue risk for physicians.

Thank you!

HJC
2-25-92
Attach #3
2 of 2

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
On Behalf of Donna L. Whiteman, Secretary

House Judiciary Committee
Testimony on Senate Bill 2795

February 25, 1992

Mr. Chairman, Members of the Committee, thank you for this opportunity to address you on House Bill 2795. The Department of Social and Rehabilitation Services (SRS) strongly opposes this bill which mandates the Secretary of SRS be held solely liable for injury to recipients resulting from cases where SRS does not grant prior approval for payment of a procedure or service.

Prior approval is required for a number of Medicaid services in an effort to control expenditures. Prior approval assures that SRS is paying for only those services which are medically necessary thereby improving quality of care for the recipients and lowering Medicaid costs. The criteria used to determine medical necessity is created after thorough review and approval from professional consultants. These consultants include the Drug Utilization Review Committee with the Kansas Pharmacy Foundation, The Kansas Foundation for Medical Care, physicians comprising the Medical Necessity Issues Committee and a variety of other professionals.

The implications of this bill will affect far more than the Psychiatric Pre-Admission Assessment recently implemented by SRS to determine the medical necessity of general hospital psychiatric admissions. There are a variety of Medicaid covered procedures which require prior approval. In every instance the prior approval relates only to the allowability of Medicaid payment. At no time does SRS tell a medical professional he or she cannot admit a patient or perform a procedure. An SRS denial simply means that the admission or procedure is not reimbursable under Medicaid. The medical professional is still free to utilize his or her medical judgment regarding appropriate treatment for the patient.

The new SRS Psychiatric Pre-Admission Assessment process attempts to divert persons to community services prior to hospitalization thus admitting only those who truly are in need of inpatient treatment. Many times recipients were admitted for psychiatric services simply because the alternative community based services were unknown. The Psychiatric Pre-Admission Assessment is working well. The assessment process began January 15, 1992 and as of February 15, 1992, there were 355 assessments completed of which 49 recipients were diverted to community care rather than hospitalized. This means 14% of these recipients were diverted from nonmedically necessary institutional care to more appropriate, less costly community services. As the gaps in community alternatives are identified, and filled through this process, even more diversions to more appropriate, less expensive care will occur.

There is never a time in which SRS prohibits a physician from admitting a recipient to the hospital. The prior approval results only in a determination as to whether the service meets medical necessity criteria for reimbursement. If the physician wanting to admit a patient disagrees with the alternative community treatment plan developed by the mental health assessment personnel, a psychiatrist is available thru the Mental Health Consortium to discuss the case

HJC
2-25-92
#4
1062

with the admitting physician. Additionally, every provider and recipient is afforded rights to appeal any decision they do not determine as appropriate.

Again, we strongly request the Committee to oppose House Bill 2795. To do otherwise would ultimately increase the cost of medical care and jeopardize quality. Thank you for the opportunity to comment on this bill.

Robert L. Epps
Commissioner
Income Support/Medical Services
(913) 296-6750

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DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Before the House Committee on Judiciary
February 25, 1992

House Bill No. 2795

Mr. Chairman and members of the Committee, I thank you for the opportunity to appear and present testimony here today.

The purpose of my testimony is to express the Department of Social and Rehabilitation Services' concern for the language contained in subsection (s) of House Bill 2795. This language provides that any time the Secretary makes a determination that payment shall not be made for medical services otherwise covered by the state medical assistance program that have been recommended by a person licensed to practice medicine and surgery for a person who is eligible for medical assistance benefits, the Secretary shall become solely liable for any injury caused as a result of failure to render such recommended medical services.

Any language placed in the law itself which would make a state agency solely liable is of great concern. If this bill were to become law it could have a very significant adverse impact on the agency's ability to conduct utilization and medical necessity reviews in addition to pre-admission assessments. The potential liability may make these reviews and assessments no longer feasible.

In reviewing this area involving the potential liability of third-party payors it appears there may be some possible liability when the negligent design or implementation of cost containment mechanisms corrupt medical judgment and cause foreseeable injury. However, because it is the physician who bears the final responsibility for making medical decisions and for insuring their patients receive proper care it is respectfully urged that the language making the Secretary solely liable for injury not be allowed to stand.

SRS has an in-house hearing procedure under the Kansas Administrative Procedure Act that allows medical providers to challenge decisions with which they disagree. The hearing process affords them an opportunity to present testimony and other evidence to support their position that the hospital admission or stay was medically necessary and should be reimbursed. If they remain dissatisfied with the administrative decision they can proceed under the Act for Judicial Review and Civil Enforcement of Agency Actions through the judicial system. If a court reverses an agency decision payment would be made.

As an alternative it would seem a better approach might be to put language in the appropriate statutes relating to medical providers which would limit their liability in these situations. This may provide the desired protection without placing a statutory liability on a state agency.

The fiscal impact of House Bill 2795 is difficult to determine due to the wide ranging possible ramifications. Not only would it place a statutory liability

HJC
2-25-92
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1 of 2

on the Secretary of SRS and in turn the State of Kansas, but it would also have an adverse impact on the agency's ability to contain costs by conducting reviews and assessments. Additionally, it may cause scarce health care dollars to be channeled away from treatment into legal costs.

For these reasons it is respectfully requested that HB 2795 not be approved.

John Badger
Acting General Counsel
Social and Rehabilitation Services
296-3967

HJC
2-25-92
Attach #5
282

HOUSE JUDICIARY COMMITTEE
25 February 1992

Mr. Chairman and Committee members, ^{Wichita} my name is Robert J. Robel and I reside at 211 Cedar Drive in Manhattan, Kansas. I am an officer of the Manhattan-Old Trooper Rifle and Pistol Club, a Board Member of the National Rifle Association, the U. S. Shooting Team, and the Kansas Wildlife Federation. I am here today in opposition to House Bill No. 2948.

I have been told that this bill is designed to stop drive-by shootings by youths in Wichita. I do not believe the provisions of this bill will solve that problem. I also do not believe the purchase of a firearm, or the possession of a firearm, is the problem. The problem that should be addressed is the criminal misuse of a firearm.

Federal and state laws already prohibit individuals less than 18 years of age from purchasing a firearm. That portion of H.B. 2948 is not needed.

To require an individual under 18 years of age to complete an approved hunter education course before he/she can possess a firearm imposes an inconvenience on individuals living in sparsely populated areas of Kansas, and does not address the criminal misuse of firearms. A 12-year old on a ranch in western Kansas does not have the same access to hunter education courses as do youth in more populated areas. I certainly support the benefits of hunter education programs, but they were not designed to stop criminal misuse of firearms in cities. I do not believe a junior target shooter in the Kansas 4-H shooting program or the Kansas Junior Olympic program should be required to complete a hunter education course before he/she competes in these wholesome activities.

This proposed legislation focuses on the firearm rather than on the criminal misuse of the firearm. I believe that is a basic flaw.

Thank you.

HJC-92
25-92
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