Approved: 2-22-95
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Chair Sandy Praeger at 10:00 a.m. on February 17, 1995 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Emalene Correll, Legislative Research Department
Norman Furse, Revisor of Statutes
Jo Ann Bunten, Committee Secretary

Conferees appearing before the committee:

Richard J. Morrissey, Bureau of Local and Rural Health, KDHE
Steven R. Potsic, M.D., M.P.H., Director of Health, KDHE
Gary Robbins, Executive Director, Kansas Optometric Association
Harold E. Riehm, Executive Director, Kansas Association of Osteopathic Medicine
Jerry Slaughter, Executive Director, Kansas Medical Society
Patsy L. Johnson, Executive Administrator, Kansas State Board of Nursing
Myron Dunavan, Long Term Care Ombudsman, Kansas Department on Aging

Others attending: See attached list

Hearing on: SB 285-Tort claims fund payments for charitable health care providers, local health departments and indigent health care clinics

Dick Morrissey, KDHE, testified before the Committee in support of **SB 285** and outlined the history of the Charitable Health Care Provider Program. Mr. Morrissey noted that since the inception of the program in 1991, there have been no claims against the Tort Claims Fund arising from the rendering or failure to render professional services by a charitable health care provider. (Attachment 1) In answer to a member's question, Mr. Morrissey noted that access to clinics is spread across the state but the number of clients and providers follow the population.

The Chair called the Committee's attention to written testimony from Chip Wheelen, KMS, who was unable to appear in person in support of **SB 285**. (Attachment 2)

Action on SB 285

Senator Hardenburger made a motion the Committee recommend **SB 285** favorably for passage, seconded by Senator Harrington. After Committee discussion regarding stricken language in reference to legislative review of claims, the motion carried.

Hearing on: SB 268 - Credentialing of health care personnel definition

Dr. Steve Potsic, KDHE, testified in support of **SB 268** and offered three amendments for the Committee to consider. (Attachment 3)

During Committee discussion Dr. Potsic noted that if the cost of the review is borne by the applicant, a fiscal note would still technical be needed but it wouldn't be state general funds. He personally felt there would be some benefits from the licensing body looking at credentialing, but he also felt there would be some pit falls as well. Dr. Potsic felt that expanding the scope of practice would be curtailed if the bill becomes law.

Gary Robbins, KOA, appeared in support of **SB 268** and suggested an amendment that would allow the appropriate licensing board of the profession to conduct thorough hearings, research the issue, apply the appropriate criterion from the credentialing process, and prepare a report for the legislature which in turn would provide legislative committees with the needed information to make pubic policy decisions. Mr.

Robbins also noted that one of the real problems is finding volunteers to serve on the committees. (Attachment 4)

During Committee discussion Mr. Robbins noted there are certain criterion that are not applicable to a scope situation for someone that is already licensed and would have to be modified. Dr. Potsic noted that the statute has a number of sections that are specific in detail, and the statute does allow the secretary to develop appropriate rules and regulations that could modify some of the operational procedures to be more in line with scope of practice issues rather than first line credentialing. No statute change would be needed to allow for that modification.

Lesa Bray, KDHE, commented that the process is set up to review initial applications. The language in the statue is very specific and goes through step by step how the technical committee is selected by the secretary and the parameters of that technical body's authority. As far as the authority within the statute, she noted that under K.S.A. 65-5009 (b), the secretary shall adopt rules and regulations necessary to implement the provisions of this act including, but not limited to, rules and regulations to establish polices which would cover any kind of amendment needed to allow them to look at scope of practice. A member commented that a special committee within licensing could be created to review the scope of practice issue instead of the legislative committee. Ms. Bray noted that one of the biggest problems regarding broadening scope of practice was getting clarification and technical information to the legislative committees.

Harold Riehm, KAOM, appeared in support of **SB 268** and noted that the credentialed provisions should be expanded to include not just review of new credentialing requests, but changes of practice acts by presently credentialed provider groups. (Attachment 5) During Committee discussion Mr. Riehm noted that the Committee will have another question to respond to and that is the extent of the scope of change and whether it would warrant sending to the credentialing committee. He also brought attention to K.S.A. 65-5008 -- "periodic reviews of credentialing staff and health care personnel, the secretary shall periodically schedule for review the credentialing status of health care personnel who are credentialed pursuant to existing law" -- and if that has ever been done.

Jerry Slaughter, KMS, testified in support of the bill and noted that leaving a scope of practice review in the Department of Health and Environment along with the credentialing process would be the best way of dealing with this issue, and if left up to the licensing board, concern was expressed about the objectivity of those involved (Attachment 6)

Tom Bell, Kansas Hospital Association, submitted written testimony in support of **SB 268**. (Attachment 7)

Patsy Johnson, Kansas State Board of Nursing, noted that one of the concerns with the bill is the reference to "customary" scope of practice. She noted however that when they do look at a change in statutory requirements, they would support the technical committee being the unbiased review committee. (Attachment 8)

The Chair requested staff review the recommended amendments by the Department of Health and Environment for the Committee's consideration when working the bill.

Hearing on: SB 263 - Long-term care ombudsman access to records

Myron Dunavan, Kansas Department on Aging, testified in support of **SB 263** as noted in his written testimony. (Attachment 9)

During Committee discussion concern was expressed regarding expansion to all ombudsman, and the Chair appointed a subcommittee to review and make recommendations. Members of the subcommittee are Senator Hardenburger, Chair, with Senators Lee and Harrington.

Written testimony was also received from Joseph F. Kroll, KDHE, (Attachment 10) and Sandra Stand, Kansans for Improvement of Nursing Homes, Inc., (Attachment 11)

The meeting was adjourned at 11:00 a.m.

The next meeting is scheduled for February 20, 1995.

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE
GUEST LIST

DATE: 2-17-95

NAME	REPRESENTING
TREVA POTTER	OPHALMOLOGISTS
Myron Dunavan	KDOA - LTCO
KEITH R LANDIS	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
Sandy Strand	KINH
Charles Moore	SRS - DMS
Pat Johnson	Board of Nsg
[illegible]	KDHE / HOC
Joseph F Kroll	KDHE / BACC
Stacey Empson	Hein Ebert & Weir
[illegible] E. Rieda	KAHA
Marilyn Pflaum	KPNHAA
Mike Meacham	Cosmetologists

State of Kansas

Bill Graves Governor

Department of Health and Environment

James J. O'Connell, Secretary

Testimony presented to

Senate Committee on Public Health and Welfare

by

The Kansas Department of Health and Environment

Senate Bill 285

Senate Bill 285 repeals sections of the Tort Claims Act that would sunset the Charitable Health Care Provider Program on July 1, 1995.

Though originally conceived as a means to allow retired physicians to donate their professional services to the medically indigent, the Charitable Health Care Provider Program has become a larger and more dynamic force in the delivery of primary care services to the medically underserved. The final wording of the original legislation in 1991 allowed for any Kansas physician with an active or exempt license and several other types of health care providers to participate. In four years that has come to mean a Charitable Health Care Provider registry of 636 physicians, 45 dentists and 227 nurses.

Amendments to the Act allowing providers participating in Operation Immunize weekends to get coverage under the Act resulted in approximately 1,163 nurses attaining Charitable Health Care Provider status and providing volunteer services in the statewide immunization program.

There are 68 points of entry into the program for potential clients, representing health departments and indigent health care clinics distributed across the state. A total of 15,782 clients were reported in 1993; this grew 77% to a total of 27,981 clients in 1994.

Several of the indigent health care clinics that have opened their doors since 1991 were able to do so partly because of the provider liability protection afforded by the Act - notably Salina Cares Health Clinic in Salina and Harvey county Health Ministries in Newton, to name only two. Several existing clinics have been able to expand their services because of the coverage.

Since the inception of the program there have been no claims against the Tort Claims Fund arising from the rendering or failure to render professional services by a charitable health care provider.

The Charitable Health Care Provider program has proven to be an effective and low cost approach to increasing primary health care services for the medically indigent.

The Department of Health and Environment recommends that Senate Bill No. 285 be recommended favorably for passage.

Testimony presented by:

Richard J. Morrissey
Director
Bureau of Local and Rural Health Systems
February 17, 1995

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 1

Office of Local and Rural Health Systems
900 SW Jackson, Rm 665, Topeka, KS 66612-1290

Department of Health and Environment
Office of Local and Rural Health Systems

Charitable Health Care Provider Program
Fact Sheet

CY 1994

- Number of Providers
    - 636 physicians
    - 45 dentists
    - 227 nurses
    - 3 chiropractors
    - 3 optometrists
    - 1 pharmacist
    - 4 physical therapists
    - 4 physician assistants
    - 3 podiatrists
    - 23 registered dental hygienists.

- 68 points of entry into the program.

- 1,163 nurses registered as Charitable Health Care Providers for Operation Immunize.

- 27,981 clients reported in 1994 - a 77% increase over the 1993 total.

- 89 % of the clients met indigency requirements.

- 11% were receiving medical assistance.

- No claims against the Tort Claims Fund.

KANSAS MEDICAL SOCIETY
623 SW 10th Ave. • Topeka, Kansas 66612 • (913) 235-2383
WATS 800-332-0156 FAX 913-235-5114

February 17, 1995

To: Senate Public Health and Welfare Committee

From: C. L. Wheelen, KMS Director of Public Affairs

Subject: Senate Bill 285; Charitable Health Care Providers

Thank you for introducing SB285 and for the opportunity to express our support for this important bill. I am sorry that I could not be present for the hearing.

Some of you may recall that in 1990 the Kansas Medical Society asked the Legislature to help us encourage physicians and other health care providers to provide more charity care to indigent patients. We requested a bill that defined charitable health care providers as state employees so long as they were providing gratuitous services to persons deemed medically indigent. This means that if the patient should sue the physician for malpractice, the Attorney General's office would defend the physician and if there was ever a judgment or settlement, the state would pay the claim.

The Kansas Department of Health and Environment supported the bill and enthusiastically volunteered to administer the program, if enacted. The 1990 Legislature passed the bill unanimously.

The program was so successful at the outset that in 1992 the Legislature decided to broaden application of the concept to cover other situations. Although the KMS did not request the expansion, we did support the bill. The Governor, however, did not, and vetoed the bill.

During the 1992 interim we met with representatives of the Governor's office and with the help of KDHE addressed some of the questions that precipitated the veto. The Governor agreed to sign a similar expansion bill but only if a sunset date were attached so that the program could be evaluated prior to any long-term commitment by the State to assume liability for a bad medical outcome as a result of charity care provided a needy person.

We are here today asking you to remove the sunset date. That's all that SB285 does. Representatives of KDHE will tell you that the program is a success, resulting in substantial health care services to Kansans who lack insurance or other resources; including many children. Please **recommend passage of SB285**. Thank you.

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 2

State of Kansas

Bill Graves Governor

Department of Health and Environment

James J. O'Connell, Secretary

TESTIMONY PRESENTED TO

SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE

BY

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

SENATE BILL 268

The credentialing review program was enacted in 1980 as a means of reviewing requests from health care professionals or occupations to be credentialed by the state. The program was designed to provide a mechanism to review all pertinent information in order to determine whether the benefits to society outweighed the societal costs of credentialing a certain group. The program is an extensive review process involving a technical committee, public meetings and public hearings with recommendations being evaluated and a final recommendation being drafted by the Secretary to the legislature for consideration. Any credentialing must ultimately be funneled through the legislative process.

This bill seeks to expand the definition of "credentialing" or "credentialed" within the credentialing review program statutes so that it applies to changes in level of credentialing or changes in scope of practice. Nationally, requests for expansions of scope of practices and levels of credentialing is evident. Nearly twenty years ago when the credentialing review was conceptualized, health care practice differed considerably. What is considered "customary" practice is variable, especially over time and geographically.

Often legislators, upon due consideration of law changes relative to health care practice, are provided with highly technical information and subtle or obvious biases. The concept of providing a mechanism for technical advice to the legislature is justifiable considering the quality assurance and socioeconomic impact of decisions made in this regard.

The Department supports the intent of Senate Bill 268 with the recommendation that the review process include revisions in the fees to reflect the enhanced economic benefits relative to requested changes in scope of practice. The Department believes that the constituency requesting the changes should bear the cost of the process rather than the general taxpayers.

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 3

Office of the Director of Health
900 SW Jackson, Rm 620, Topeka, KS 66612-1290

The following amendments to the Credentialing Act should be considered:

1. KSA 65-5002. The application process should include a letter of intent for changes in level of credentialing or scope of practice with an initial application fee of $1,000 borne by the applicant. In addition, the applicant should be obligated to pay for the full cost of the requested review. Further, the applicant should be a member or representative of the credentialed profession seeking changes in either level of credentialing or scope of practice.

2. KSA 65-5003. The section regarding members of the technical committee's economic or personal interest in the scope of practice should not be applicable to scope of practice reviews. In addition, a change should be made so that the technical committee reviewing the changes in level of credentialing or scope of practice should not include a member of the applicant group.

3. KSA 65-5007(a)(3) would not be applicable to changes in scope of practice. The legal consideration of evaluating and determining the specific acts for which health care practitioners may charge fees and perhaps bill insurers has legal and public policy ramifications. Careful legal consideration would be necessary to make these determinations and recommendations. Outside resources would be required to meet the highly technical and legal review requirements and limited the need for additional specialized professional staff. The fiscal note for the proposal would result in an approximate average application fee of $20,000 to fully cover the costs (estimating seven (7) reviews per year) of the detailed and deliberate technical reviews with the required public process and hearings. The fiscal note of $138,313 is not included in the Governor's Budget Report.

In addition to the above items, I am sure the legislature will give due deliberation for scope of practice reviews to be done by the pertinent credentialing body(ies).

The Kansas Department of Health and Environment respectfully requests the Committee's consideration of the items set forth in this testimony. With such consideration, KDHE would support SB 268.

Testimony presented by: Steven R. Potsic, M.D., M.P.H.
Director of Health
February 17, 1995

Kansas Optometric Association

1266 SW Topeka Blvd., Topeka, KS 66612
913-232-0225

TESTIMONY ON SENATE BILL 268
BEFORE THE SENATE PUBLIC HEALTH & WELFARE COMMITTEE
FEBRUARY 17, 1995

I am Gary Robbins, Executive Director of the Kansas Optometric Association. I appreciate the opportunity to appear in support of Senate Bill 268. This bill addresses the need for legislators to have the technical expertise necessary to make recommendations concerning the various licensing and scope issues brought before this committee. I would like to suggest adding an additional option to Senate Bill 268 to accomplish this same objective in a more cost effective and timely manner. Legislative committees require expert technical knowledge and recommendations on a wide variety of issues. Adding language will allow the appropriate licensing board of the profession to conduct thorough hearings, research the issue, apply the appropriate criterion from the credentialing process and prepare a report for the legislature which in turn will provide legislative committees with the needed information to make public policy decisions. Since the health care delivery system is undergoing rapid changes, our concern is that the credentialing process might delay innovations necessary to maintain our quality health care delivery system.

The alternative option to using regulatory licensing boards to address scope and licensure issues could have several advantages over relying solely on the credentialing process.

- These regulatory boards would already have the technical knowledge needed to address these issues. If specialty information were needed, they would have knowledge of whom to contact to receive additional information.
- These boards are already functioning, and therefore could in a timely manner organize the public hearings and studies needed to submit accurate complete reports.
- This would be more cost effective since existing staff and professionals in the appropriate fields would already be available. In addition, these boards would be able to identify additional issues which need to be addressed but may not be specifically covered in the credentialing act.

In conclusion, we believe that this conceptual amendment would provide the legislature with flexibility to deal with the rapidly changing health care system and further strengthen this legislation.

Affiliated with
American Optometric Association ™

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 4

Kansas Association of Osteopathic Medicine

Harold E. Riehm, Executive Director

1260 S.W. Topeka Blvd.
Topeka, Kansas 66612
(913) 234-5563
(913) 234-5564 Fax

February 17, 1995

To: Chairperson Praeger and Members, Senate Public Health Committee

From: Harold E. Riehm, Executive Director, KAOM

Subject: Testimony in Support of S.B. 268

Thank you for this opportunity to express our support of S. B. 268.

Several times in recent years, KAOM has suggested to Committees on both the House and Senate sides, that the credentialing provisions of KSA 65-5001 should be expanded to include not just review of new credentialing requests but changes (most often expansion) of practice acts by presently credentialed provider groups. We are pleased to express our support of such provisions in S.B. 268.

Credentialing is an important function of the Legislature in protecting the health consuming public. Recently there has been an increase in provider groups seeking changes in their respective practice acts. Because of present KSA provisions when a group sought change rather than new credentialing, the process was closed and the Legislature had to both conduct investigations (hearings) and decide.

Many of these requests precipitated what are commonly, and not too affectionately, referred to as "turf battles". In addition to widely and emotionally held differing views, the respective Legislative Committees had only extremely limited time and resources to conduct review of such issues.

KAOM views the extension of the credentialing process in Health and Environment as a long needed step to assist the Legislature in making such determinations. It should be noted, though, that the "buck" will still stop in the Legislative process, to whom findings of credentialing hearings will be directed. Yet such a review conducted by Health and Environment should be of considerable assistance in this process.

A possible problem may be defining what constitutes a major enough change to trigger the credentialing process review. This, however, remains an easier decision for legislative entities to make than the substance of the change requested.

We urge your support of S.B. 268. I will be pleased to respond to questions.

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 5

KANSAS MEDICAL SOCIETY
623 SW 10th Ave. • Topeka, Kansas 66612 • (913) 235-2383
WATS 800-332-0156 FAX 913-235-5114

February 17, 1995

TO: Senate Public Health & Welfare Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: SB 268; concerning credentialing of health care personnel

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 268, which would amend the existing credentialing law. The amendments contained in the bill would have the effect of requiring a credentialing review when an existing credentialed group sought either a different level of credentialing, or a change in their scope of practice. We support this legislation.

The concept of requiring a credentialing review of groups seeking to change their scope of practice has been discussed as a means to help the Legislature sort out the difficult issues which invariably surround such requests. For years we have heard legislators express their frustration over having to arbitrate "turf" disputes, when they often feel they do not have sufficient time to really study the issue. Just as with the initial credentialing process, the changes in this bill would provide an objective, deliberate method of evaluating requests for changes in credentialing status.

In the summer of 1992 the Joint Committee on Health Care Decisions for the 90's noted that the issue was raised and needed further consideration. In its report to the 1993 Legislature, the Joint Committee wrote "decisions either to grant initial credentialing to a health care provider group or *to change or expand a practice definition* should be subject to careful review since credentialing decisions can affect the mobility of health care personnel, the cost of health care, the efficient utilization of trained individuals, and the level of health services available in the state" (emphasis added).

One suggestion we have to promote clarity in the bill would be to either add some credentialing criteria, such as that found at K.S.A. 65-5006 for *new* applications; or to authorize the Secretary of KDHE to promulgate rules and regulations to accomplish the same thing. We have a vague recollection of some suggested amendments prepared by committee staff during the Joint Committee's consideration of this issue in 1992, that might possibly be a good start.

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It should be noted that even if SB 268 is enacted, the final decision will rest with the Legislature, as it should. The benefit of a credentialing review for scope of practice issues is that it will give the Legislature a very useful tool to help evaluate requests for credentialing changes. We urge you to give favorable consideration to SB 268 . Thank you for the opportunity to appear in support of this legislation.

KAN[illegible]OSPITAL ASSOCIATION

Memorandum

Donald A. Wilson
President

February 17, 1995

TO: Senate Public Health and Welfare Committee

FROM: Thomas L. Bell,
Senior Vice President/Legal Counsel

RE: **SB 268-CREDENTIALING OF HEALTH CARE PERSONNEL**

Thank you for the opportunity to present comments in favor of Senate Bill 268. This bill would enhance the state credentialing process by requiring that groups seeking to expand their scope of practice would have to first go through that process.

As this committee is painfully aware, every year more health care personnel groups approach the Legislature with proposals to broaden their particular scope of practice. With the increase in managed care in our health care system and the emphasis it places on cost, this activity will only continue. As the entire system is squeezed, so are those individuals who labor within it to provide quality health care. For the Legislature, the result will only be more debates over whether one group's proposed scope of practice impinges on another.

As the employers of individuals in many different health care professions, hospitals are in a somewhat similar circumstance with the Legislature. Each side wants the hospital to support its efforts. Each side has good arguments related to quality, access and cost of medical care. The problem, however, is compounded for legislators because these debates often turn on technical discussions involving complex clinical issues. In addition, legislators are asked to resolve such issues in a relatively short time frame with abbreviated hearings. Our experience has been that few legislators feel comfortable making these types of decisions.

Senate Bill 268 would help solve this dilemma by utilizing the current state credentialing process to make recommendations to the Legislature. By taking advantage of this process, legislators ensure that a thorough examination of the issue is made in a deliberate way. This will allow the Legislature to deal with the particular issue efficiently.

Thank you for your consideration of our comments.

TLB / pc

1263 Topeka Avenue • P.O. Box 2308 • Topeka, Kansas 66601 • (913) 2

Senate Public Health and Welfare
Date: 2-17-95
Attachment No. 7

Kansas State Board of Nursing

Landon State Office Building
900 S.W. Jackson, Rm. 551
Topeka, Kansas 66612-1230
913-296-4929
FAX 913-296-3929

Patsy L. Johnson, R.N., M.N.
Executive Administrator
913-296-5752

To: The Honorable Senator Sandy Praeger, Chairperson
and Members of the Public Health & Welfare Committee

From: Patsy L. Johnson, M.N., R.N., A.R.N.P.
Executive Administrator
Kansas State Board of Nursing

Date: February 17, 1995

Re: SB 268

Thank you for allowing me to testify on SB 268 for the Board of Nursing.

After review of K.S.A. 65-5001 through 65-5011, there is some concern about SB 268 with regard to scope of practice. There is a great deal of change in health care at this time. The Board's does not take a position on major changes in scope of practice but reviews the change as to how it affects public safety. Changes in scope of practice usually mean expanded scope, so are nurses educationally prepared for that expanded scope?

The Board of Nursing is constantly being questioned on the changing scope of practice for nurses, advanced registered nurse practitioners, and registered nurse anesthetists. In most cases, these changes do not require legislative action and are reflective of national standards. SB 268 refers to "customary" scope of practice. Being required to go before a technical committee each time a change in customary scope of practice could present problems due to volume. Also, there could be a major time and cost factor if "customary" scope of practice changes must all be reviewed. If the change in scope of practice requires a statutory change, then it is understandable that the technical committee might provide an avenue for a thorough review to establish need.

Janette Pucci, R.N., M.S.N.
Education Specialist
296-3782

Patricia McKillip, R.N., Ph.D.
Education Specialist
296-3782

Diane Glynn
Practice S
296-4325

Disciplinary Counsel
296-4325

Senate Public Health & Welfare
Date: 2-17-95
Attachment No. 8

In summary, the Board of Nursing is not totally opposed to SB 268, but does suggest that "customary" be stricken. What is customary today might not be tomorrow with the rapid and multiple changes that are occurring in nursing. If expanded scope of practice requires a statutory change, it would probably be helpful to the legislature to have a committee review it first.

I hope the committee will consider the Board's proposed amendment to SB 268.

Thank you. I am available for questions.

Session of 1995

SENATE BILL No. 268

By Committee on Public Health and Welfare

2-9

AN ACT concerning credentialing of health care personnel; amending K.S.A. 65-5001 and repealing the existing section.

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

Section 1. K.S.A. 65-5001 is hereby amended to read as follows: 65-5001. As used in this act unless the context requires otherwise, the following words and phrases shall have the meanings respectively ascribed to them herein:

(a) "Credentialing" or "credentialed" means *(1)* the formal recognition of professional or technical competence through the process of registration, licensure or other statutory regulation*; or (2) the formal change in the level of credentialing of a currently credentialed group whether certification, registration, licensure or other statutory regulation; or (3) the formal change in* ~~*the customary or*~~ *statutory scope of practice of a currently credentialed group*.

(b) "Certification" means the process by which a nongovernmental agency or association or the federal government grants recognition to an individual who has met certain predetermined qualifications specified by the nongovernmental agency or association or the federal government.

(c) "Registration" means the process by which the state identifies and lists on an official roster those persons who meet predetermined qualifications and who will be the only persons permitted to use a designated title.

(d) "Licensure" means a method of regulation by which the state grants permission to persons who meet predetermined qualifications to engage in an occupation or profession, and that to engage in such occupation or profession without a license is unlawful.

(e) "Health care personnel" means those persons whose principal functions, customarily performed for remuneration, are to render services, directly or indirectly, to individuals for the purpose of:

(1) Preventing physical, mental or emotional illness;

(2) detecting, diagnosing and treating illness;

(3) facilitating recovery from illness; or

(4) providing rehabilitative or continuing care following illness; and who are qualified by training, education or experience to do so.

Testimony for Senate Bill 263
February 17, 1995
Senate Committee on Health and Welfare
Myron Dunavan - Kansas Department on Aging

Senator Praeger and members of the Senate Committee on Health and Welfare, I am Myron Dunavan, State Long Term Care Ombudsman, here on behalf of the Secretary on Aging, Thelma Hunter Gordon.

It is a privilege to request your review and passage of Senate Bill 263, An Act concerning long term care ombudsman access to records.

Problem: Lack of access to ombudsman services is a real problem for Kansas long term care consumers. Over the past five years during my tenure as State Long Term Care Ombudsman, I have observed long term care facilities refuse ombudsmen access to resident records, because the resident was not able to give written consent, as required in KSA 75-5920. In these cases the resident was confused and clearly unable to grant permission, lacked mental capacity to grant authority, or did not have the physical capacity to sign a consent form though they had verbally given their permission. It is estimated that as many as 60% of nursing facility residents may suffer from various types of dementia. These persons along with residents having legal representatives and the physically incapacitated may be barred from access to LTC ombudsman services when the ombudsman is unable to intervene upon their behalf.

Often, there are allegations of legal representative misconduct, and facilities feel they must request the legal representatives permission, before the ombudsman is permitted investigatory to access the records. This substantially hampers with the ombudsman's ability to investigate, determine the facts relative to the allegation and finally, the ability to resolve the complaint. It certainly permits the legal representative time to hide critical information.

There had already been 51 complaints about legal decision makers and incompetent residents so far in thes federal reporting year.

Reasonableness:

Title VII, Chapter two of the Older American's Act specifically gives the LTC Ombudsman access to resident records when the ombudsman has resident permission, when the resident lacks capacity and

Senate Public Health and Welfare
Date: 2-17-95
Attachment No. 9

there is no legal representative, and when there is reason to believe that a legal representative is not acting in the best interest of the resident. A Kansas Attorney General's opinion, 94-87 concludes that compliance with both the state and the federal law is physically impossible and that always requiring written consent is an obstacle to the accomplishment and execution to the full objective of Congress.

Current limits to access as stated in KSA 75-5920 unnecessarily limits access to records and permits facilities to delay or block investigations and complaint resolution process.

Request: Therefore, the Kansas Department on Aging respectfully requests that Senate Bill 263 be passed into law as a technical update for purposes of compliance with federal law assuring LTC ombudsmen access to resident records.

Supporters: We have planned with individuals representing Kansan's for the Improvement in Nursing homes, Kansas Legal Services, the Washburn School of Lawm and nursing home industry representatives regarding the proposed legislation. You may hear testimony or receive written testimony from others who would suggest an amendment to line 28 inserting the text "*office of the*" in front of the word "state". Such an amendment would be an agreeable amendment to KDOA.

Attached are materials you may wish to review regarding the background of the bill.

Attachments: copy of the July 5, 1994 Attorney General's Opinion 94-87,
copy of the federal statutes from Title VII, Chapter II of the Older American's Act,

Case examples:

a. Dodge City DON calls from nursing home, POA for health Care Decisions of confused resident is making bad decisions about care what can she do. Resident has no GC to grant access to records

b. local facility refused to let omb have access to resident records of a mentally competent resident to investigate resident statements about financial exploitation by the facility

c. Great bend, POA refused access to resident records to investigate allegations of misuse of resident funds. (60,000 estate down to Medicaid eligibility). OMB investigate, locate a petitioner, and then referrable to KLS of provate attorney.

d. KC resident cannot move, asked for assistance to resolve a family problem requiring advocacy and mediation, but resident could not sign and had not legal rep to sign release form.

e. local facility allegedly was not providing services which indicated a failure to assess and identify a care planning strategy, The ombudsman was asked by the resident to follow-up with the physician, but the resident was having difficulty remembering the name of the physician. The facility would not let the ombudsman have access to the information.

f. a Lawrence operator refused to let ombudsmen have access to identifying information about the resident's family members to resolve a complaint issue.

g. in Wichita a facility refused information necessary to let the ombudsman help the resident with the filing of an appeal of an involuntary discharge decision made by the facility.

Testimony for Senate Bill 263
February 17, 1995
Senate Committee on Health and Welfare
Myron Dunavan - Kansas Department on Aging

Senator Praeger and members of the Senate Committee on Health and Welfare, I am Myron Dunavan, State Long Term Care Ombudsman, here on behalf of the Secretary on Aging, Thelma Hunter Gordon.

It is a privilege to request your review and passage of Senate Bill 263, An Act concerning long term care ombudsman access to records.

Problem: Lack of access to ombudsman services is a real problem for Kansas long term care consumers. Over the past five years during my tenure as State Long Term Care Ombudsman, I have observed long term care facilities refuse ombudsmen access to resident records, because the resident was not able to give written consent, as required in KSA 75-5920. In these cases the resident was confused and clearly unable to grant permission, lacked mental capacity to grant authority, or did not have the physical capacity to sign a consent form though they had verbally given their permission. It is estimated that as many as 60% of nursing facility residents may suffer from various types of dementia. These persons along with residents having legal representatives and the physically incapacitated may be barred from access to LTC ombudsman services when the ombudsman is unable to intervene upon their behalf.

Often, there are allegations of legal representative misconduct, and facilities feel they must request the legal representatives permission, before the ombudsman is permitted investigatory to access the records. This substantially hampers with the ombudsman's ability to investigate, determine the facts relative to the allegation and finally, the ability to resolve the complaint. It certainly permits the legal representative time to hide critical information.

There had already been 51 complaints about legal decision makers and incompetent residents so far in thes federal reporting year.

Reasonableness:

Title VII, Chapter two of the Older American's Act specifically gives the LTC Ombudsman access to resident records when the ombudsman has resident permission, when the resident lacks capacity and

there is no legal representative, and when there is reason to believe that a legal representative is not acting in the best interest of the resident. A Kansas Attorney General's opinion, 94-87 concludes that compliance with both the state and the federal law is physically impossible and that always requiring written consent is an obstacle to the accomplishment and execution to the full objective of Congress.

Current limits to access as stated in KSA 75-5920 unnecessarily limits access to records and permits facilities to delay or block investigations and complaint resolution process.

Request: Therefore, the Kansas Department on Aging respectfully requests that Senate Bill 263 be passed into law as a technical update for purposes of compliance with federal law assuring LTC ombudsmen access to resident records.

Supporters: We have planned with individuals representing Kansan's for the Improvement in Nursing homes, Kansas Legal Services, the Washburn School of Lawm and nursing home industry representatives regarding the proposed legislation. You may hear testimony or receive written testimony from others who would suggest an amendment to line 28 inserting the text "*office of the*" in front of the word "state". Such an amendment would be an agreeable amendment to KDOA.

Attached are materials you may wish to review regarding the background of the bill.

Attachments: copy of the July 5, 1994 Attorney General's Opinion 94-87,
copy of the federal statutes from Title VII, Chapter II of the Older American's Act,

Case examples:

a. Dodge City DON calls from nursing home, POA for health Care Decisions of confused resident is making bad decisions about care what can she do. Resident has no GC to grant access to records

b. local facility refused to let omb have access to resident records of a mentally competent resident to investigate resident statements about financial exploitation by the facility

c. Great bend, POA refused access to resident records to investigate allegations of misuse of resident funds. (60,000 estate down to Medicaid eligibility). OMB investigate, locate a petitioner, and then referrable to KLS of provate attorney.

d. KC resident cannot move, asked for assistance to resolve a family problem requiring advocacy and mediation, but resident could not sign and had not legal rep to sign release form.

e. local facility allegedly was not providing services which indicated a failure to assess and identify a care planning strategy, The ombudsman was asked by the resident to follow-up with the physician, but the resident was having difficulty remembering the name of the physician. The facility would not let the ombudsman have access to the information.

f. a Lawrence operator refused to let ombudsmen have access to identifying information about the resident's family members to resolve a complaint issue.

g. in Wichita a facility refused information necessary to let the ombudsman help the resident with the filing of an appeal of an involuntary discharge decision made by the facility.

AG opinion

cc'd to Johnson

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 5, 1994

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 94- 87

Myron Dunavan
State Long Term Care Ombudsman
Department on Aging
Docking State Office Bldg., 150-S
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees -- Department on Aging; General Provisions -- Office of Long-Term Care Ombudsman; Access to Records and Documents

Synopsis: The state long-term care ombudsman shall have all powers of accessing long-term care resident's records pursuant to 42 USCS § 3058g. This includes access without the consent of the guardian when the resident is unable to consent and the ombudsman believes the guardian is not acting in the best interests of the resident. K.S.A. 1993 Supp. 75-5920 is in conflict with 42 USCS § 3058g and must yield to the provisions of the federal statute. Cited herein: K.S.A. 1993 Supp. 75-5903; 75-5920; U.S. Const., art. 6, § 2.

* * *

Dear Mr. Dunavan:

As the state long-term care ombudsman you request our opinion regarding whether the federal older Americans act and the Kansas long-term care ombudsman act conflict in relation to the access of records of residents of long-term care facilities. Specifically you inquire whether the ombudsman

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can ever gain access to resident records without the expressed permission of the resident or guardian.

The purpose of the state ombudsman program is to protect the rights of the resident and not those of the long-term care facility. Barbara J. Sabol from the Kansas department on aging testified in front of the house committee on public health and welfare:

> "People who need nursing home care are usually elderly, frail and vulnerable. . . . The ombudsman, as a neutral person, who can listen to the needs, problems, or complaints of residents and assist in resolving them, make referrals, or provide linkages to community organizations serves a needed role in providing a continuum of care for our older citizens who reside in nursing homes." Minutes, House Committee on Public Health and Welfare, February 19, 1980, Exhibit II.

Both the federal and state statutes regulate in the same area of the law. 42 USCS § 3058g provides: "[i]n order to be eligible to receive an allotment under section 703 [42 USCS § 3058b] from funds appropriated under section 702(a)[42 USCS § 3058a(a)] a State agency shall, in accordance with this section . . . establish and operate an Office of the State Long-Term Care Ombudsman; and . . . carry out through the Office a State Long-Term Care Ombudsman Program."

Further, K.S.A. 1993 Supp. 75-5903 provides: "[t]he department on aging shall be the single state agency for receiving and disbursing federal funds made available under the federal older Americans act (public law 89-73) and any amendments thereto or other federal programs for the aging." In addition to regulating the same activities, the state and federal statutes also reference each other.

The specific statutes at issue concern the powers of the state ombudsman to gain access to the records of long-term care facility residents. K.S.A. 1993 Supp. 75-5920 provides the following requirements regarding access to records by the state ombudsman:

> "With the written consent of the resident of the facility, guardian of the resident

> or next of kin of a deceased resident, an ombudsman shall have access to all records and documents kept for or concerning the resident. . . ."

42 USCA § 3058g provides that the state shall ensure the state ombudsman have:

> "(B)(i) appropriate access to review the medical and social records of a resident, if:
>
> "(I) the representative has the permission of the resident, or the legal representative of the resident; or
>
> "(II) the resident is unable to consent to the review and has no legal representative;
>
> "(ii) access to the records as is necessary to investigate a complaint if:
>
> "(I) a legal guardian of the resident refuses to give the permission;
>
> (II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and
>
> (III) the representative obtains the approval of the Ombudsman;"

The federal statute allows the state ombudsman access to the records when the resident is unable to give consent and the resident's guardian refuses to give consent. The state statute, however, provides no such authority and requires written consent of either the resident, guardian, or next of kin before the ombudsman's access to the records is allowed.

The doctrine of federal preemption arises from the supremacy clause of the United States constitution. U.S. Const., art. 6, § 2.

> "It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. [Citation omitted.]

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a '"scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because the Act "of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."' [Citation omitted]. Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation omitted], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Pacific Gas and Electric v. Energy Resources Comm'n, 461 US 190, 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983).

The department on aging is a single state agency for receiving and disbursing federal funds made available under the federal older Americans act (public law 89-73) and any amendments thereto or other federal programs for the aging. K.S.A. 1993 Supp. 75-5903. The federal government has given the state ombudsman greater authority to access the records of residents of long term facilities than K.S.A. 1993 Supp 75-5920 has provided. As a result, compliance with both the federal and state laws is in effect physically impossible. In addition, by requiring the state ombudsman to always have the written consent of the resident or guardian, K.S.A. 1993 Supp. 75-5920 is an obstacle to the accomplishment and execution to the full objective of congress.

Therefore, the state long-term care ombudsman shall have all powers of accessing long-term care residents' records pursuant to 42 USCS § 3058g. This includes access without the consent of the guardian, when the resident is unable to consent and

the ombudsman believes the guardian is not acting in the best interests of the resident. K.S.A. 1993 Supp. 75-5920 is in conflict with 42 USCS § 3058g and must yield to the provisions of the federal statute.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Nobuko K. Folmsbee

Nobuko K. Folmsbee
Assistant Attorney General

RTS:JLM:NKF:bas

9-11

Section

b) PROCEDURES FOR ACCESS -

(1) IN GENERAL - The State shall ensure that representatives of the Office shall have -

(A) access to long-term care facilities and residents;

(B)(i) appropriate access to review the medical and social records of a resident, if -

(I) the representative has the permission of the resident, or the legal representative of the resident; or

(II) the resident is unable to consent to the review and has no legal representative; or

(ii) access to the records as is necessary to investigate a complaint if -

(I) a legal guardian of the resident refuses to give the permission;

(II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and

(III) the representative obtains the approval of the Ombudsman;

(C) access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities; and

(D) access to and, on request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities.

(2) PROCEDURES - The State agency shall establish procedures to ensure the access described in paragraph (1).

712(c) REPORTING SYSTEM - The State agency shall establish a statewide uniform reporting system to -

State of Kansas

Bill Graves *Governor*

Department of Health and Environment

James J. O'Connell, Secretary

TESTIMONY PRESENTED TO THE

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE

by

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

SENATE BILL 263

The purpose of Senate Bill 263 is to amend state law so that the long term care ombudsman's access to patient records is consistent with federal law.

Since enactment of our state laws regarding this issue, federal law has expanded access to records by making records accessible in those cases where the resident is unable to give consent and has no legal representative.

As the state regulatory agency for nursing homes, KDHE supports this change; recognizing that such situations develop, and it would be appropriate for the ombudsman to access certain records.

We have attached to our testimony a proposed balloon amendment clarifying line 28 to assure that any appropriately designated ombudsman has access to records for the purpose of investigating or resolving complaints.

The Kansas Department of Health and Environment respectfully asks favorable committee action on House Bill 263.

Presented by: Joseph F. Kroll, Director
Bureau of Adult and Child Care
Kansas Department of Health and Environment

Date: February 17, 1995

Senate Public Health and Welfare
Date: 2-17-95
Attachment No. 10

Bureau of Adult and Child Care, 900 SW Jackson, Suite 1001
Landon State Office Building, Topeka, Kansas 66612-1290

Session of 1995

SENATE BILL No. 263

By Committee on Public Health and Welfare

2-9

AN ACT concerning the long-term care ombudsman; access to records; amending K.S.A. 1994 Supp. 75-5920 and repealing the existing section.

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

Section 1. K.S.A. 1994 Supp. 75-5920 is hereby amended to read as follows: 75-5920. ~~With the written consent of the resident of the facility, guardian of the resident or next of kin of a deceased resident, an ombudsman shall have access to all records and documents kept for or concerning the resident. In addition, in assisting a resident of a facility, an ombudsman shall have access to all records and documents of the facility which are relevant to such assistance to the extent necessary to carry out the provisions of the long-term care ombudsman act.~~ *(a) The secretary shall ensure that the office of the long-term care ombudsman has access to all records and documents kept for or concerning residents, including medical and social records of a resident, if (1) the ombudsman has the permission of the resident, or the legal representative of the resident; or (2) the resident is unable to consent to access the records and has no legal representative.*

(b) The secretary shall assure that the state long-term care ombudsman has access to resident records to investigate or resolve a complaint, if (1) a guardian or other legal representative of a resident refuses to give permission; (2) an ombudsman has reasonable cause to believe that the legal representative is not acting in the best interests of the resident; and (3) the ombudsman obtains the approval of the state long-term care ombudsman.

(c) The secretary shall assure access to all records and documents which are relevant to assisting an applicant for admission to a facility or a resident of a facility to carry out the provisions of the long-term care ombudsman act.

(d) The ombudsman shall have access to and, on request, copies of all licensing and certification records maintained by the state with respect to long-term care facilities.

Sec. 2. K.S.A. 1994 Supp. 75-5920 is hereby repealed.

office of the

KINH Kansans for Improvement of Nursing Homes, Inc.

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

TESTIMONY PRESENTED TO
THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE
CONCERNING SB 263

February 17, 1995

Madam Chair and Members of the Committee:

KINH clearly supports the intent of this bill, which is to bring the Kansas Ombudsman statutes into compliance with the Ombudsman Provisions of the federal Older Americans Act.

The changes we suggest are primarily technical in nature, and bring the language closer to that in the federal law.

We suggest that the language on line 36 be deleted, because the definition of residents in the federal ombudsman provisions does not include applicants for admission to facilities.

With our suggested amendments, KINH supports this bill.

Respectfully submitted,

Sandy Strand

Sandra Strand
Legislative and Community Liaison

Senate Public Health and Welfare
Date: 2-17-95
Attachment No. 11

Session of 1995

SENATE BILL No. 263

By Committee on Public Health and Welfare

2-9

AN ACT concerning the long-term care ombudsman; access to records; amending K.S.A. 1994 Supp. 75-5920 and repealing the existing section.

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

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(b) The secretary shall assure that ~~the state long-term care~~ ombudsman has access to ~~resident records~~ to investigate or resolve a complaint, any all records and documents kept for or concerning residents, including medical and social records, *if (1) a guardian or other legal representative of a resident refuses to give permission; (2) an ombudsman has reasonable cause to believe that the* guardian or other *legal representative is not acting in the best interests of the resident; and (3) the ombudsman obtains the approval of the state long-term care ombudsman.*

(c) The secretary shall assure access to all records and documents which are relevant to assisting ~~an applicant for admission to a facility or~~ a resident of a facility to carry out the provisions of the long-term care ombudsman act.

(d) The ombudsman shall have access to and, on request, copies of all licensing and certification records maintained by the state with respect to ~~long-term care facilities.~~ adult care homes

Sec. 2. K.S.A. 1994 Supp. 75-5920 is hereby repealed.