

MINUTES OF THE HOUSE COMMITTEE ON HEALTH AND HUMAN SERVICES

The meeting was called to order by Chairperson Carlos Mayans at 1:30 p.m. on January 22, 1997 in Room 423-S of the State Capitol.

All members were present except: Representative Tony Powell

Committee staff present: Emalene Correll, Legislative Research Department
Norman Furse, Revisor of Statutes
Lois Hedrick, Committee Secretary

Conferees appearing before the committee:
Sandra Strand, Executive Director, Kansas Advocates for Better Care, Lawrence
Cindy Lash, Legislative Post Audit Supervisor

Others attending: See Guest List (Exhibit 1)

Chairperson Mayans welcomed everyone to the meeting and introduced Representative Sue Storm, who spoke briefly to introduce herself and distinguish health and human services issues that are important to her.

The minutes of the January 21, 1997 meeting were distributed and members were advised to notify the Chairperson's office by 5:00 p.m. if there are any changes.

Chairperson Mayans asked if there was any bill to be considered for introduction. There was none.

Chairperson Mayans introduced Sandra Strand, representing Kansas Advocates for Better Care. Ms. Strand presented testimony on issues of substandard care and abuse to patients in long-term care nursing facilities (see Exhibit 2). She also offered her organization's legislative positions on several issues relating to regulation and funding, especially that the Kansas Department of Health and Environment be required to directly investigate all complaints of abuse, neglect and exploitation of nursing care residents (see Exhibit 3).

Questions were raised regarding confidentiality of complaints made by or on behalf of care home patients and the availability of inspection reports to the public. Representative Morrison asked about the patients/complaints ratio; and Ms. Strand reported that about 2,600 complaints were filed, of which KDHE substantiated about 30/35%. Chairperson Mayans reminded members that Health Secretary James O'Connell will appear before the committee tomorrow where questions on these issues can be further addressed. He then thanked Ms. Strand for appearing.

Cindy Lash, Legislative Post Audit Supervisor, presented comments on Post Audit's Performance Audit Report reviewing the Department of Health and Environment's regulation of Nursing Homes. (The "Performance Audit Report Reviewing the Department of Health and Environment's Regulation of Nursing Homes," dated August 1, 1996, is available from the Legislative Division of Post Audit, Mercantile Bank Tower, Topeka, Kansas 66612-2212.) She highlighted the deficiencies enumerated in that report and also distributed a copy of the Attorney General's Opinion No. 97-6, which identified the department's responsibilities regarding investigation of abuse, neglect and exploitation (see Exhibit 4). Vice-Chairperson Morrison assumed the chair as Chairperson Mayans was excused. After some discussion of the report and the department's responses, Vice-Chairperson Morrison expressed appreciation to Ms. Lash for her presentation.

The meeting was adjourned at 2:48 p.m.

The next meeting is scheduled for January 23, 1997.

HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST

DATE: JANUARY 22, 1997

[Please Print]

NAME	REPRESENTING
HAROLD PITTIS	KCOA
Darion M Conklin	KPHA
Jandra Strand	Ks Advocates for Better Care
John Kiehuber	Ks Health Care Assn.
CAROLEE STEPHENS	KDOA - OMBUDSMAN PROGRAM
Judy Bagby	Ks. Health Care Assn.
Patricia Maben	KDH+E
Joseph Kroll	KDHE
Gerald Block	KDHE
DW Zehn	KAHSA
TK Shively	KANSAS LEGAL SERVICES
Lucy M Connick	SRS/AMS
Rochelle Chronister	SRS
Mula Myers	AG
Dave Canney	Wichita Eagle
Bob Williams	Ks Pharmacists Assoc
Bob Swafford	AG.
Cindy Lash	Post Audit
Don Brown	Ks Dept on Aging

HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
 GUEST LIST
 DATE: JANUARY 22, 1997

[Please Print]

NAME	REPRESENTING
Jo. McNamee	Ks. Council - TROA
Susan M. Baker	Helm + Weir
Rich Pittman	Health Midwest
Vicki Allen	Ks Health Care Assn.
Jean Kraker	Ks Guardianship Prog.
Colleen Jell Denton	Bottenberg's Assoc
Michelle Peterson	Peterson Public Affairs
Mark G. Smith	ATTORNEY GENERAL'S OFFICE
Joe Comull	KDHE
Paul Garvin	KDHE
Sherry Diehl	KAPS
David Hanzlick	KDA
Danielle Nee	Gov Office
Myrtle Ryan	Johnson + Johnson
John Federico	Pete Mcbill + Assoc

TESTIMONY PRESENTED TO: The House Committee on Health and Human Services

FROM: Sandra Strand, Executive Director

DATE: January 22, 1997

SUBJECT: Quality Long Term Care: What Does it Mean to Consumers?

It is a privilege to be given this opportunity to address the committee on the issues that are so dear to the hearts of so many who care about older and disabled Kansans: namely the health, safety, rights and dignity of nearly 31,000 people who live in our licensed adult care homes.

Kansas Advocates for Better Care was founded in 1975 as Kansans for Improvement of Nursing Homes. We are a private, non-profit, non-partisan membership organization whose only agenda it to enhance the quality of life and quality of care of long term care consumers.

I know that many of you have seen stories in newspapers and on television reporting alarming problems in some of our state's licensed nursing facilities, and many of you have received calls from constituents seeking help for their loved ones living in those homes.

Our organization hears from those constituents every day, and we base our legislative advocacy on measures we believe would help to correct the problems they describe. The majority of requests for help come from family members who are trying to choose a nursing home and from family members who are trying to resolve problems with care or to protect their loved ones from abuse, neglect, or exploitation.

I'd like to share a few ideas with you on steps the State of Kansas could take to make life better for residents and would address a few of the concerns of the tax-paying public. We have many more ideas and issues, but in the interests of time today, I will focus on two which are of great concern.

I. Choosing a Nursing Home.

Health care in general and nursing home care in particular is enormously complicated. The average consumer doesn't know where to begin or how to distinguish a good home from a poor one. According to a review of nursing homes in the August 1995 issue of Consumer Reports, "many facilities range from inadequate to scandalous, and the good ones are hard to find. . . . There's virtually no objective guidance for families pressed to make an emotionally charged decision fraught with serious health and financial consequences."

Our organization does what we can to help with our limited resources. Our publication, Consumer's Guide to Kansas Nursing Homes provides helpful information, and our FIND Fact

HOUSE HEALTH/HUMAN SERVICES

Attachment 2-1

Sheets summarize statistical information on individual nursing homes in 9 counties. We also maintain a list of the facilities that have received KDHE's Exemplary Care Award for having an exceptionally good survey and also having a creative program above the basic standard. We publish KDHE enforcement actions in our newsletter.

We encourage consumers to visit several homes at different times to observe care and living conditions, and also to review a home's inspection and enforcement history. Every home is required by law to make their most current inspection report readily available to the public. Unfortunately, the public is not generally aware of this requirement and some homes do not comply with it. Consumers can also purchase copies of inspection reports from KDHE for .25 a page.

It is difficult for anyone, including state government, to rate a nursing home, because a facility's condition is never static. It can provide high-quality care one day, but if it is sold or its staff changes significantly, its services and environment can deteriorate rapidly. Likewise, a troubled facility can turn around and provide good care.

However, KDHE could provide an enormous public service by providing an annual summary of each licensed facility's performance in at least the following categories:

1. Nursing staffing levels in a staff to resident ratio
 - by type of staff
 - by unit or wing of the facility (Medicare, Alzheimer's)
 - facility's average staffing
2. Nursing staff turnover rate
 - by facility
 - as compared to state-wide average
3. A summary of substantiated complaints, including:
 - the category of complaint (staffing, food, care, etc.)
 - a brief description of the complaint
 - action taken by KDHE
4. A summary of the facility's enforcement history, including
 - bans on admission, if any
 - fines assessed, if any
 - fines paid, if any
5. Exemplary Care Award(s), if any.

Of course we would not expect complaint information identifying residents or complainants to be made public.

Facilities are currently required to provide information on staffing levels to KDHE and on turnover rates to SRS. Records on adult care complaints and enforcement actions are already maintained by KDHE, but the agency would probably need additional computer programming and data entry resources to provide this information on each facility.

Why should nursing homes and KDHE provide this information?

1. Because the public expects this level of accountability. We want our government agencies that are responsible for protecting the safety and welfare of citizens to assure that nursing home providers fulfill the contracts they sign and to honor their pledges to meet publicly established standards of care.

Government is a major purchaser of nursing home care. Last year in Kansas, Medicaid paid nearly \$274 million (\$117 million from the State General Fund) to adult care homes, and 54% of nursing home residents were helped by Medicaid funding. Taxpayers, and those who pay privately, want to be sure they are receiving value for the dollars they send to the nursing home industry.

2. Adequate staffing tops the list of predictors of quality care. Numerous studies, as well as common sense, support this conclusion. The level of staffing determines if your mother will be helped to the bathroom instead having to wear a diaper, whether her teeth or dentures are brushed daily, whether your dad learns to walk again, or has help feeding himself, or has meaningful activities.

II. Abuse, Neglect and Exploitation of Residents

When consumers are concerned enough to complain about care, it is usually because a facility is failing to ensure the basic health, safety, and dignity of one or more residents, and not because the paint is scuffed or the carpet is faded.

Most consumers, and particularly the residents themselves, will put up with a lot before they complain. Many develop affectionate relationships with their direct caregivers and don't want to add to their load or get them in trouble by complaining.

Many residents and family members are afraid to complain for fear of retaliation. If you are physically frail and poor, or if your mother has Alzheimer's, it is difficult and maybe impossible to go somewhere else if you aren't satisfied with the service you're getting.

Many staff members also fear retaliation for reporting abuse or neglect of residents. Even though our statutes prohibit such retaliation by facilities, the reality is that employees do get fired for reporting abuse and neglect, and they have little recourse or protection if they are.

The vulnerability of residents and staff to retaliation is a primary reason for our strong opposition to KDHE's policy permitting some nursing facilities to conduct their own investigations of certain complaints of abuse or neglect.

We agree that every nursing facility should conduct an internal investigation of each suspected incident of abuse and neglect. That is necessary but not sufficient. *KDHE must*

also be responsible for conducting independent investigations of all complaints of abuse, neglect or exploitation of residents. The regulator should not be allowed to turn over its responsibilities to the facilities it regulates. That is a clear conflict of interest, and it is also a failure of the agency to protect the safety and welfare of residents and to be accountable to taxpayers .

There are too many reasons why a facility might do an inadequate investigation, or even cover up problems. If a staff member has already gone through facility channels with a complaint about abuse of a resident, she must feel confident that if she has the courage to call the complaint hotline her complaint will be investigated by KDHE staff, and not by her boss.

A recent Attorney General's Opinion (#97-6) concluded that KDHE is required by statute to investigate reports of abuse, neglect or exploitation of residents, but that the agency has discretion in whom it utilizes to conduct the investigations. In light of this opinion, we believe the statute should be amended to clarify that KDHE is required to directly investigate all complaints of abuse, neglect or exploitation of residents, and not delegate any investigations to providers.

You will be hearing from the Legislative Division of Post Audit about a Performance Audit of KDHE's regulation of nursing homes which was instigated by our organization. In addition to our concerns about the delegation of some complaint investigations, consumers have consistently complained about the "Notice to Complainant" form letter they receive from KDHE. When consumers go to the trouble to report a problem, they want and deserve more complete information than this notice provides.

The performance audit also indicated KDHE did not use the authority it has to double some fines and to impose them for longer periods of time. We have been pleased that KDHE has begun to impose larger fines in some situations, because we believe it shouldn't be cheaper for a provider to pay a fine than to correct the problem.

I will close by affirming that residents, their families, and advocates don't seek punishment of providers, we seek good care. We don't believe that enforcement alone produces good care, but without some accountability, history has shown us that too many nursing homes will not provide decent care. We rely on our government agencies and you as legislators to provide that needed accountability.

Thank you for the opportunity to discuss a few of our concerns. I will be happy to respond to your questions.



Department of Health and Environment

James J. O'Connell, Secretary

NOTICE TO COMPLAINANT

The Kansas Department of Health and Environment (KDHE) operates an adult care Complaint Program. Individuals may call, write, or present in person issues and allegations of abuse, neglect, exploitation, or failure to provide adequate care in facilities licensed by KDHE. This program is guided by federal and state laws and regulations. KDHE is required by law (KSA 39-1404) to notify a complainant, upon request, that an allegation of abuse, neglect, or exploitation has been made and if the allegations of abuse, neglect, or exploitation have been substantiated that corrective measures will be taken.

This program is regulated by laws regarding confidentiality. The law (KSA 39-1411(d)) specifies that the report received and the written findings, evaluations, and actions recommended by KDHE are confidential and not subject to the Open Records Act. Issues or allegations may be considered abuse, neglect, or exploitation if they meet the definitions of the law (KSA 39-1401). Investigations may or may not provide proof sufficient to meet those definitions. Issues or allegations which do not meet the definitions under the law (KSA 39-1401) may be violations of professional standards of conduct or federal; and state regulations.

Investigations that find that a facility is not complying with regulations may result in the facility being cited deficiencies. Statements of deficiencies and other information about facility surveys are public information. The information can be obtained by making a request to Field Services, Bureau of Adult and Child Care, Landon State Office Building, Suite 1001, 900 SW Jackson, Topeka, Kansas 66612-1290. There is a charge for researching and duplicating this information.

In some cases, it is not possible for the investigators to substantiate that the issues or allegations are abuse, neglect, exploitation, or failure to provide adequate care. This does not mean that the issues or allegations are unfounded or untrue.

(over for investigation results)

OCT 25 1996

Date: 10/21/96

Complaint Case No. 96-

Received On: 10/1/96

The **INITIAL INVESTIGATION OUTCOME** of the above-cited case was as follows:

- Events occurred which were outside the realm of accepted standards of practice.
- These events do not meet the definition of abuse, neglect, or exploitation as specified by KSA 39-1401.
- These events are undergoing legal review to determine if they meet the definition of abuse, neglect, or exploitation as specified by KSA 39-1401.
- Corrective measures will be taken.
- Investigation could not substantiate the allegations. However, certain other practices were found to be outside the realm of accepted standards and, therefore, deficiencies were written.
- Investigation could not substantiate the allegations.
- Referral made to: _____
- Other: _____

If you have further information or more specific details which may assist the investigation, please contact the agency by writing to:

Complaint Program/Field Services
Bureau of Adult and Child Care/KDHE
Landon State Office Building, Suite 1001
900 SW Jackson
Topeka, Kansas 66612-1290

Thank you for your cooperation with this program.

**LEGISLATIVE POSITIONS
1997 LEGISLATIVE SESSION**

LONG TERM CARE OMBUDSMAN

1. KABC supports the privatization of the Long Term Care Ombudsman program and advocates its placement outside state government in order to eliminate conflicts of interest and to better serve long term care residents.

ADULT CARE HOME REGULATION

1. KABC opposes the policy of KDHE to delegate certain complaint investigations to nursing homes. We support adequate funding to permit department staff to conduct all investigations of abuse and neglect.

2. KABC opposes the policy of KDHE to issue licenses to Assisted Living, Residential Health Care Facilities, and Home Plus based on the facilities' self-attestation, rather than an inspection. We support adequate funding to permit the department to complete these initial inspections, and to conduct annual surveys of all licensed adult care homes.

3. KABC supports the development by KDHE of a complaint profile on each adult care home, which would be public information. We support adequate funding for the department to provide this information.

4. KABC supports adequate funding to permit KDHE to appoint receivers to operate adult care homes if conditions exist which are life threatening to the residents, if the home is insolvent, or if the license has been revoked. Receivership is preferable to relocating residents and provides better protection of the health, safety and legal rights of residents.

FUNDING FOR LONG TERM CARE

1. KABC supports adequate funding of long term care programs and services. We support the continued expansion of home and community based long term care services.

2. KABC supports careful monitoring and oversight of the transfer of long term care services from SRS to KDOA to assure it is accountable to the public, that it successfully diverts individuals from nursing homes who can be cared for adequately in other settings, that it provides adequate case management services to its clients, that it creates a single point of entry for long term care services, and that it eliminates duplication of services among state agencies.

3. KABC supports incentives for the purchase of long term care insurance, provided the purchase of such coverage is appropriate for the individual's needs and resources.



State of Kansas

Office of the Attorney General

301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

January 3, 1997

MAIN PHONE: (913) 296-2215
FAX: 296-6296
TTY: 291-3767

ATTORNEY GENERAL OPINION NO. 97- 6

The Honorable Lana Oleen
State Senator, 22nd District
Chair, Legislative Post Audit Committee
State Capitol, Room 136N
Topeka, Kansas 66612



Re: Mentally Ill, Incapacitated and Dependent Persons; Social Welfare—Reporting Abuse, Neglect or Exploitation of Certain Persons—Abuse, Neglect or Exploitation of Residents; Duties of Department of Social and Rehabilitation Services and Department of Health and Environment; Investigations; Assistance of Appropriate Public or Private agencies, Groups or Individuals

Synopsis: The Kansas department of health and environment is required to investigate complaints involving abuse, neglect, or exploitation of residents of nursing homes. In conducting the investigation, the department has authority to utilize any private agency, group, or individual. Utilizing the facility against whom the complaint was made to gather information as part of the investigation is not prohibited by statute. Cited herein: K.S.A. 1995 Supp. 39-923; K.S.A. 39-1401; 39-1404; 39-1409; 65-425; 65-5101; 77-621.

* * *

Dear Senator Oleen:

As chair of the legislative post audit committee, you ask our opinion regarding the procedures used by the Kansas department of health and environment (KDHE) in investigation of complaints involving abuse at nursing homes. Specifically you ask:

HOUSE HEALTH/HUMAN SERVICES

Attachment 4-1
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"Can the Department of Health and Environment fulfill its statutory responsibilities under K.S.A. 39-1404 by relying on nursing homes to investigate their own complaints of abuse, neglect, or exploitation?"

KDHE is responsible for licensure of adult care homes (nursing homes), K.S.A. 1995 Supp. 39-923 *et seq.*, medical care facilities (hospitals), K.S.A. 1995 Supp. 65-425 *et seq.*, and home health facilities, K.S.A. 65-5101 *et seq.* KDHE and the Kansas department of social and rehabilitative services (SRS) are jointly given the responsibility of investigating reports of abuse, neglect, or exploitation of residents of certain facilities by K.S.A. 39-1404. For purposes of the statutes concerning reporting of abuse, neglect or exploitation, "resident" is defined by K.S.A. 39-1401(a) as follows:

"(a) 'Resident' means:

"(1) Any resident, as defined by K.S.A. 39-923 and amendments thereto; or

"(2) any client cared for in an adult family home; or

"(3) any individual kept, cared for, treated, boarded or otherwise accommodated in a medical care facility;

"(4) any individual with mental retardation or a developmental disability receiving services through a community mental retardation facility or residential facility licensed under K.S.A. 75-3307b and amendments thereto; or

"(5) any individual, kept, cared for, treated, boarded or otherwise accommodated in a state psychiatric hospital or state institution for the mentally retarded."

K.S.A. 39-1404(a) sets forth what is to happen when there is a report of abuse, neglect, or exploitation of a resident:

"The department of social and rehabilitation services or the department of health and environment upon receiving a report that a resident is being, or has been, abused, neglected or exploited, or is in a condition which is the result of such abuse, neglect or exploitation or is in need of protective services, within 24 hours of receiving such report, shall initiate an investigation, including a personal visit with the resident and, within two weeks of receiving such report, shall complete the investigation to determine if the resident is being or has been abused, neglected or exploited or is in a condition which is a result of such abuse, neglect or exploitation. The investigation shall include, but not be limited to, a visit to the named resident and consultation with those individuals having knowledge of the facts of the

particular case. Upon completion of the investigation of each case, written findings shall be prepared which shall include a finding of whether there is or has been abuse, neglect or exploitation, recommended action and a determination of whether protective services are needed. If it appears that a crime has occurred, the appropriate law enforcement agency shall be notified by the department investigating the report."

Pursuant to an interagency agreement between the secretary of aging, the secretary of health and environment, and the secretary of social and rehabilitation services, KDHE has assumed responsibility for investigation of reports of possible abuse, neglect or exploitation for residents of nursing homes, hospitals, and adult care facilities. SRS has assumed responsibility for such investigations for reports concerning residents at other facilities. This opinion only considers residents of nursing homes.

The language of K.S.A. 39-1404 is quite clearly mandatory. The term "shall" is used repeatedly, and not in a manner in which it could be interpreted to mean "may," even with the most contorted of legal machinations. If a report is received, there **must** be an investigation and the investigation must meet the specified criteria. The required investigation can be described as a ministerial act "meaning the public officer or agent is required to perform based upon a given set of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion about the propriety or impropriety of the act to be performed." *State ex rel. Stephan v. Kansas Racing Comm'n*, 246 Kan. 708, 716-17 (1990).

That it is compulsory for KDHE to perform such investigations, does not mean that KDHE is without authority in whom it uses to perform such investigations. K.S.A. 39-1409 provides:

"In performing the duties set forth in this act, the secretary of social and rehabilitation services or the secretary of health and environment may request the assistance of the staffs and resources of all appropriate state departments, agencies and commissions and local health departments **and may utilize any other public or private agency, group or individual who is appropriate** and who may be available to assist such department in the investigation and determination of whether a resident is being, or has been, abused, neglected or exploited or is in a condition which is a result of such abuse, neglect or exploitation." (Emphasis added.)

The legislature did not define who an "appropriate" individual or group is, other than to say the person or group must be available to assist KDHE. Essentially the legislature has granted KDHE discretion in whom KDHE uses to conduct investigations. If KDHE's choice were challenged in court, the scope of review would be whether its choice was "unreasonable, arbitrary or capricious." K.S.A. 77-621.

KDHE's complaint program policies and procedures manual classifies reports by the priority with which they need to be investigated, code 1, 2, or 3. Code 1 complaints generally involve complaints of abuse, neglect, and exploitation that involve immediate jeopardy to the resident. Code 1 complaints are investigated on site by KDHE surveyors, with the investigation starting the day the complaint is received.

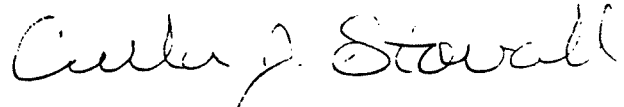
Code 2 complaints generally involve complaints of abuse, neglect, and exploitation which do not involve immediate jeopardy to the resident. The investigation of these complaints must be initiated by the end of the next working day following receipt of the complaint. KDHE allows these complaints to be investigated by the nursing home facility itself if the complaint was self-reported by the facility or the complaint was anonymous. KDHE mails a report to the facility, which it must complete and return within seven calendar days of receipt of the complaint. KDHE will then conduct an on site investigation if the report is inadequate or certain other criteria are met.

Code 3 complaints generally involve "general care" concerns or vague allegations of abuse, neglect or exploitation. The investigation of these complaints is incorporated into the next inspection, so long as it is not more than six months later.

This classification scheme evidences that KDHE has exercised its discretion and has done so in a manner that appears rational. We are unable to say that it constitutes an unreasonable exercise of its discretion. We note that there are also federal requirements for investigations of complaints of abuse and neglect involving residents receiving medicare and medicaid, but the federal requirements differ and we have not been asked to review them.

In conclusion, KDHE is required by statute to investigate reports of abuse, neglect or exploitation of residents of nursing homes. K.S.A. 39-1404 makes an investigation mandatory and specifies certain aspects of the investigation. Under K.S.A. 39-1409, however, KDHE has discretion in whom it utilizes to conduct the investigations, and we are unable to say that KDHE has improperly exercised its discretion.

Very truly yours,



CARLA J. STOVALL
Attorney General of Kansas



Steve Phillips
Assistant Attorney General

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