

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 23, 1997 in Room 423-S of the State Capitol.

All members were present.

Committee staff present: Emalene Correll, Legislative Research Department
Lois Hedrick, Committee Secretary

Conferees appearing before the committee:
James O'Connell, Secretary, Kansas Department of Health and Environment

Others attending: See Guest List attached (Exhibit 1)

Chairperson Mayans welcomed everyone to the meeting and announced there will be continued discussion concerning nursing home regulation. He then welcomed Secretary O'Connell, asking that he brief the committee on his department's handling of nursing home and patient abuse problems.

Secretary O'Connell began by stating that while the department disagrees with some of the conclusions of the Post Audit report on nursing homes, the report is being utilized to develop practices and regulation that actually improve regulatory factors and compliance to assure quality care and safety of patients in long term care facilities (see testimony attached, Exhibit 2.) Chairperson Mayans inquired about the hearing officer's duties and how many such officers (and their names) were on staff. Secretary O'Connell indicated there are 8 full time attorneys on staff: including one General Counsel and 1.6 administrative hearing officers (William Rein is the full time officer) who are also attorneys. Chairperson Mayans indicated he will ask the hearing officer to appear before the committee next week for further discussion of the issues in the Post Audit Report.

Secretary O'Connell responded to questions raised by committee members about the program administration for nursing home inspections and how infractions are followed to resolution. Secretary O'Connell indicated that KDHE employees were monitored to insure that actions are within their scope of authority; and that infractions relating to professional problems in care homes (physicians, nurses and other professional staff) are the responsibility of other state regulatory agencies who are responsible to oversee professional standards.

Chairperson Mayans thanked Secretary O'Connell for his appearance and expressed appreciation for his comments.

Chairperson Mayans indicated that the committee will consider bill introductions and hear Mr. John Kiefhaver, with Kansas Health Care, at next Tuesday's meeting.

The meeting was adjourned at 2:45 p.m.

The next meeting is scheduled for January 28, 1997.

HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST

DATE: JANUARY 23, 1997

[Please Print]

NAME	REPRESENTING
Ronald F. Scheid	A.C.
Maule Myers	A.G.
Keith Haxton	
TK Shively	KANSAS LEGAL SERVICES, INC.
Gerald Blah	KDH
Patricia Maben	KDHE
John Kiefhaber	Ks Health Care Assn.
Rich Gritchie	Health Midwest
Larrie Ann Brown	KHA
Jan Kaku	Ks Gship Prog
Pat Wemmers	" " "
Myron A. Dunavan	St. Long Term Care Ombudsman
Frances R. Walden	K.D.O.A.
Dave Ranney	W. Lute Eagle
Aubrey Howlett	ACLU
Scott Alsinger	Div of Budget
Sandra Stand	KABC
Jan Linnell	KDHE
Jessie Baker	Hein + Weir

HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
 GUEST LIST
 DATE: JANUARY 23, 1997

[Please Print]

NAME	REPRESENTING
Danielle Noe	Gov Office
Steve Bosa	DHE
Jeffrey	DA
Evelyn McCannick	SRS/AMS
Martin Huuwa	Hawaii's Capital Resort
Michelle Peterson	PRAG
Dawn Reed	KSPA
Tom Bell	KHA
Nicole Johnson	Inten

Testimony presented to
House Health and Human Services Committee
by
The Kansas Department of Health and Environment
Nursing Homes and Patient Abuse Issues

- Thank you for the opportunity to talk with you about improvements instituted in recent months at KDHE.
- While we disagree with some of the conclusions and interpretations made in the Legislative Post Audit Report discussed with you yesterday, we have used it as part of our efforts to develop appropriate changes in our regulatory program for Nursing Facilities.
- The criteria we apply in analyzing potential changes are:
 - 1) Will the change actually lead to increased regulatory compliance and improved protection of residents?
 - 2) Is the change contemplated supported by objective evaluation of information and experience?
 - 3) Does the possible change or additional requirement create a burden or unjustified cost to providers that results in diversion of resources from regulatory compliance or quality services to residents?
 - 4) Is the change supported by sufficient legal authority?

- Application of these criteria obviously involves making judgments about which reasonable people may disagree, but I feel you should know the general principles on which the following changes have been based:

- 1) Whenever the process of revoking a facility's license is begun, we are now issuing a simultaneous order banning new admissions. This seems to us to be logically correct and it prevents the possibility that new residents might be placed in a situation where serious deficiencies have already been identified. I'd be remiss if I did not tell you that this action has not yet been tested by administrative or judicial appeal. An argument can be made that this action imposes an economic penalty before the facility has an opportunity to make its case on appeal.

- 2) Civil money penalties have not in the past been assessed for those intervening days between the initial determination of a violation and a follow up that determines the violation still exists. I understand that this policy was based on a belief that clear and convincing evidence is required to support imposition of a fine and that, as a practical matter in most cases, that evidentiary standard required direct observation. I believe that the "clear and convincing" evidentiary standard is an unnecessarily stringent one and where a preponderance of evidence supports a reasonable conclusion that the violation existed on the intervening days, that is sufficient to support a fine for those days.

Again, this policy change has not yet been tested by administrative or judicial appeal.

- 3) Fines are subject to appeal and administrative appeals are heard by an independent hearing officer. Some fines are reduced as a result of these hearings, which provide for the due process rights of the facility. The results of administrative hearings are subject to review by the Secretary and my office is reviewing these results more closely to assure that penalties remain meaningful and consistent.

I want to clarify what may be a misconceptions based on published reports and comments that reductions in fines are simply and routinely "negotiated" between the facility and the agency. This view does not recognize the role of the administrative appeal process.

There are situations in which settlement rather than pursuit of administrative or judicial appeal is appropriate. These situations arise when extensive delay, legal time and costs, or non-availability of witnesses are factors. We have adopted a policy of seeking, in addition to correction of the deficiencies that led to the fine, application of some part of any negotiated reduction to an expenditure within the facility that will enhance the quality of service to residents above that required by regulations.

- 4) There is a continuing need to assure a sufficient workforce for Nursing Facilities. You heard yesterday about the very high turnover of personnel. These are very demanding and difficult jobs, both emotionally and physically and a high percentage of people who enter the field choose to leave it. Training is therefore a continual need. HCFA's regulatory process demands that approval of a facility as a training site for Certified Nursing Assistants be withdrawn when a facility is in a certain survey status, such as subject to an extended survey or partial extended survey. This prohibition of training under

the HCFA requirement is supposed to operate whether violations relate to training capability or not. KDHE has worked with HCFA's Regional Office and has pursued a practice of not prohibiting training automatically, but only when the capability to train is compromised by the nature of violations found. To do otherwise would aggravate an already difficult recruitment and retention problem. Some may see this as "going easy" on the industry, but we should not follow a lock step process that is in fact contrary to the interests of the residents.

- 5) In a similar vein, we have received HCFA approval to begin a pilot project on February 1 of eliminating the requirement for submittal of a plan of correction regarding survey findings that are subject to resurvey within a period of several days. We believe, and HCFA agrees, that preparation and submittal of this paperwork is probably counterproductive and the effort should be focused on putting improvements in place rather than on describing how they will be put in place. Again, some may characterize this as going easy on the industry, but forcing adherence to a non-productive process wastes everyone's resources. Obviously, detailed plans of correction will be required for problems found uncorrected on resurvey.

This is a one-year pilot study and is subject to modifications that experience indicates are appropriate.

Our approach to program modifications is based on the principles I described earlier and we believe these changes reflect those principles and will benefit the effectiveness of the program and the services provided to residents.

I want to take just a few minutes to address some of the testimony you heard yesterday. I know that in addition to my comments today, you will hear from the industry and perhaps others. I know that you will carefully balance all of the information you receive in making any legislative decisions. As my contribution to balancing information, I offer the following:

- 1) While the Legislative Post Audit staff disagreed with the categorization of just 10 percent of complaints as made by KDHE's Registered Nurse staff, I would ask that you recognize that the post audit staff found fully 90 percent were not categorized too low! We don't know whether they found any complaints that they believed were categorized too high.

- 2) I believe that all direct care givers in Nursing Facilities are either directly credentialed or licensed by a state entity or are subject to direct supervision by a licensed professional. Therefore, the licensure or certification process requires documentation of training, education, etc., and improper performance can result in loss of that status. This includes Certified Nursing Assistants whose names are placed on a Register which prohibits their being hired or working in a facility if they have committed abuse, neglect or exploitation. Over 300 persons have been so registered in the last four (4) years. Administrators are also licensed and an average of nine (9) referrals per year are made to their licensing board.

- 3) The impression may have been left yesterday that all Code 3 complaint investigations are deferred for an extended period of time. First, the Code categorization does not determine the time for investigation, each complaint is evaluated individually. Second, we did a random sample of 98 Code 3 complaints received from January 1 through July 31, 1996 and found that 47 percent were investigated within two weeks and that overall average time from receipt to investigation was 27.65 days, with the 90% investigated in less than 50 days. My point is that the response time is determined on an individual case basis by Topeka-based and regional manager Registered Nurses. By the way, the complaint discussed yesterday involving soiled clothing and no bathing was investigated within 48 hours and was not confirmed.

- 4) Sandra Strand described to you the volatile turnover situation faced by Nursing Facilities and the fact that, due to rapid changes in staff and other factors, the level of service to residents can change in a very short period of time -- I believe she characterized it as "from one day to the next." I believe that is an accurate characterization in many instances and can affect any health facility. It is also a reason to be very circumspect about the value and reliability of a KDHE report or evaluation or rating of a facility. Such a document, as a practical matter, will be outdated almost immediately in the great majority of cases. The facility itself is the only practical source of up-to-date information about itself.

I should also note that K.S.A. 39-935 requires that a notice be posted announcing that the latest survey report is available within the facility.

- 5) I had the feeling yesterday that comments about fines being too low created the impression that a facility need only pay the fine and not correct the violation. The fine is in addition to corrections and is intended to be part of, but not the only, incentive for improved performance.

- I apologize for the length of my report, but I feel these are very important issues that I know all members of this Committee take very seriously and deserve full discussion. KDHE staff present and I will be pleased to answer any questions.

Testimony presented by: James J. O'Connell
Secretary
KS Department of Health and Environment

January 23, 1997