Approved:
Date: February 26, 2002

MINUTES OF THE SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by Chairperson Sandy Praeger at 9:30 a.m. on February 21, 2002 in Room 234 N of the Capitol.

All members were present except:

Committee staff present: Dr. Bill Wolff, Kansas Legislative Research Department
Ken Wilke, Office of the Revisor of Statutes
JoAnn Bunten, Committee Secretary

Conferees appearing before the committee:

Connie Hubbell, Secretary on Aging
Larry Magill, Kansas Association of Insurance Agents
Terry Humphrey, Kansas Trial Lawyer's Association
James J. Long, Attorney, Wichita
Donald S. Andersen, Attorney, Wichita
Robert F. Neises, Wichita
Patricia Dengler, Legal Counsel, Wichita Center for Graduate Medical Education
John Gibson, Legal Counsel, Wesley Medical Center

Others attending: See attached list.

Hearing on SB 586 - Long-term care insurance, restrictions on elimination period

Connie Hubbell, Secretary on Aging, expressed her support for **SB 586** and noted that the bill would allow consumers purchasing long-term care insurance to decide how long their own personal elimination period would be before their policy goes into effect. She pointed out that if a consumer can afford to pay for their own long-term care for 365 days, it may make their insurance premium more affordable. Ms. Hubbell also provided information in her written testimony regarding long-term care guidelines and myths in order to assist people plan for their elder years. (Attachment 1)

Larry Magill, Kansas Association of Insurance Agents, express his support for the bill and noted that one concern is that the bill would encourage the sale of "illusory" coverage. With such a long waiting period, some insureds will either recover and leave the nursing facility before the year is up or will die before ever receiving the insurance benefit. He noted that the lower premium should reflect the lower risk making this somewhat of a moot point. (Attachment 2)

The Revisor called the Committee's attention to a technical error on page 2, line 25 of the bill in which "100" days should be changed to "365" days when the bill is worked.

There were no opponents to the bill.

Hearing on SB 420 - Health care provider insurance availability act; certain health care providers

Proponents to SB 420

Terry Humphrey, Kansas Trial Lawyer's Association, testified in support of **SB 420** which would change the effective date on which nonprofit corporations that administer graduate medical education programs for the University of Kansas School of Medicine become eligible for coverage under the Health Care Provider Insurance Availability Act. She noted that the bill repeals the effective date of July 1, 1997, and amends it to July 1, 2001. Ms. Humphrey gave the Committee a background history of events leading to the passage of 2001 **SB 366** and reasons for introduction of **SB 420** as shown in her written testimony. (Attachment 3)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

James J. Long, Attorney, Wichita, representing the plaintiffs involved in separate actions against several resident employees of the Wichita Center for Graduate Medical Education (WCGME) and Wesley Medical Center, Wichita, testified before the Committee in support of the bill. Mr. Long provided the Committee with information on conditions relating to the lawsuits as shown in his written testimony. (Attachment 4)

Donald S. Andersen, Attorney, Wichita, also representing the plaintiffs, noted they were not aware of the legislation passed last year that would affect their case until after it had been signed into law, and expressed his support for **SB 420** as outlined in his written testimony. (Attachment 5)

Robert F. Neises, Wichita, father of the child referenced to in the lawsuit, expressed his support for the bill and provided the Committee with background information of the events that led to the lawsuit as shown in his written testimony. (Attachment 6)

Written testimony was also received from J. Greg Kite in support of the bill. (Attachment 7)

Opponents to SB 420

Patricia Dengler, Legal Counsel, Wichita Center for Graduate Medical Education, appeared before the Committee in opposition to **SB 420**. Ms. Dengler provided information to the Committee in her written testimony on the circumstances that led to the passage of 2001 **SB 366**. Ms. Dengler noted there is no reason the status of WCGME, KMEF (Kansas Medical Education Foundation) and SHEF (Salina Health Education Foundation) should be different from other employers of health care providers just because they employ residents. She felt that since they are performing an educational function, as opposed to a profit function, the availability of coverage from the Fund is an economic resource that should be available for these entities. (Attachment 8)

John Gibson, Legal Counsel, Wesley Medical Center, testified in opposition to **SB 420**. Mr. Gibson briefed the Committee on the pending lawsuits in Wichita, and concluded by saying in his written testimony that the benefits to injured patients and potential injured patients, and the benefits to the health care system are much better served, and the original intent of the legislature fulfilled, by leaving the 2001 amendment intact and not passing **SB 420**. (Attachment 9)

Written testimony in opposition to the bill was also received from Brad Marples, M.D., Executive Director for the Kansas Medical Education Foundation. (Attachment 10)

Adjournment

The meeting was adjourned at 10:30 a.m. The next meeting is scheduled for February 26, 2002.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE GUEST LIST

DATE: 2-21-02

NAME	REPRESENTING
John Gibson	Wesley Medical Center, Wichita
Patricia Dengler	WCGME
Penny Vogelsang	WCGME
Dave Wysong	citizen
Stephanie Sharp	
Rich Gilliam	Health Midwest
Dave Williams	Wichita Eagle
Sandy Braden	KAIFA
Hillary Hayes	Federico Consulting
Bill Snead	HIAA
Lee Wright	FARMERS INS
Kevin Davis	Am Family Ins
Jon Josserand	University of Kansas
Ron Hein	Wesley Medical Center
Connie Hubbell	KDOA
Shelli Sweeney	KDOA
Tiffany Carney	Sen. Brungardt's Intern
	Barry-Nicole & Holt Families
	KTLA

SENATE FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE GUEST LIST

DATE: 2/21/02

NAME	REPRESENTING
Donald Pindusen	Raney-Neises family
Greg Tite	Holt and Raney-Neises Families
Linda De Coursey	KS Ins. Dept
Mary Ellen Conlee	Via Christi Regional Med. Center
Kath Damron	St Luke Shawnee Mission Health System
Chris Collins	KMS
J. Federico	Federico Consulting

State of Kansas
Department on Aging

Connie L. Hubbell, Secretary

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Senate Financial Institutions and Insurance Committee
February 21, 2002

Report on Senate Bill 586

For information contact:
Sheli Sweeney, Legislative Liaison
(785) 296-5222 or michelle@aging.state.ks.us

Senate Financial Inst. & Insurance
Date: 2-21-02
Attachment No. 1

PRESENTATION TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE
BY
SECRETARY CONNIE HUBBELL
KANSAS DEPARTMENT ON AGING
February 21, 2002

Good morning, Madame Chair and members of the committee. Thank you for this opportunity to present testimony regarding Senate Bill 586. The Kansas Department on Aging supports the increase of flexibility that this bill provides, both for consumers and for underwriters.

Senate Bill 586 allows customers purchasing long-term care insurance to decide how long their own personal elimination period will be before their policy goes into effect. For example, if a customer can afford to pay for their own long-term care for 365 days, it may make their insurance premium more affordable. We support any increase in flexibility in policy writing that gives seniors more options. This change will allow insurance agents and purchasers of long-term care insurance to tailor each policy to the individual policyholder. We support this change.

In addition, the Department on Aging was able to introduce Senate Concurrent Resolution 1614 in response to a directive from the Kansas Legislature. SCR 1614 will expand agency efforts to educate and make Kansans aware of the cost of long-term care, and to encourage them to consider the purchase of long-term care insurance at an age when it is affordable.

Our nation's current long-term care financing system steers people toward impoverishment and reliance on Medicaid. A fundamental shift from Medicaid to private long-term care insurance is a sensible and compassionate way to meet the nation's long-term care needs. It can help protect Americans from financial ruin as they grow older and ease the fiscal burden on states and the federal government. Long-term care insurance can become a large part of the planning process for growing older with dignity, security, and independence. This trend, if realized, could potentially decrease dependence on public monies that finance long-term care for seniors in Kansas.

With the passage of Senate Concurrent Resolution 1614, the Kansas Department on Aging (KDOA) will expand our education and awareness efforts to encourage younger Kansans to start early saving for their elder years and to purchasing long-term care insurance when feasible.

Long-term care is a risk worth insuring against. The risk is largely unpredictable early on because conditions that frequently lead to a need for long-term care, such as the onset of dementia or stroke, often are not foreseeable in youth. However, when an individual has purchased long-term care insurance, the risks and costs of long-term care are spread across a wider population, making the costs for one individual needing long-term care far more affordable.

Those who need long-term care can rarely pay for it out of their own pockets. Nursing home care is expensive, with a nationwide average of $40,000-$50,000 a year and in Kansas an average of $36,500 or $100 per day. That figure is certain to increase. Kansas seniors must spend their life savings and contribute all their income before Medicaid pays for their care. Private insurance pays for only 7 percent of long-term care services (1996), with Medicare paying for 11 percent, while Medicaid pays for 38 percent of long-term care services for elders, with the remaining 56 percent being private pay.

Long-term care insurance can play an important role in helping to provide protection against the cost of long-term care and the expenditure of a lifetime of savings. Long-term care insurance is risk insurance that protects assets--the same way a homeowner's policy protects a house or car insurance protects a car.

The first enhancement to the Department's continuing education and awareness efforts will be to correct some assumptions about retirement and long-term care that hinder people from planning for their elder years and long-term care. We will provide Kansans the information they need to make the right choices for their elder years.

Some of these assumptions include:

- **I will never need long-term care**. Anyone, no matter what their age or state of health, may need long-term care services at some point in their life. Yet 72 percent of Americans say that they are unable to pay for long-term care. Currently, 5.8 million people aged 65 or older need long-term care and this number will increase as more people survive heart attacks, cancer, strokes, and other ailments that once were fatal.
- **Social security will be enough**. According to economists, Social Security will provide only about 25 percent of the income needed in retirement. Persons who rely solely on Social Security income in their elder years will more than likely be living in poverty.
- **It is too late to start saving or to buy long-term care insurance.** Even if an individual gets a late start at saving or the purchase of long-term care insurance, any planning and preparation will make retirement more comfortable and secure. Even up to the ages of 55, 60 and 65, it can make sense for people to purchase long-term care insurance to protect their assets.
- **My children will take care of me**. Since people are living longer and spending more time in retirement, children will be hard-pressed to pay for their own retirement, mortgages, and college tuition for their children as well as supporting their elderly parents. In addition, families are many times unable to care for an elder parent or family member because of the need for two-earner households, changes in the nuclear family such as divorce and remarriage, and the fact that children may not live close to their parents.
- **My health insurance or Medicare will pay for long-term care.** Medicare will pay for rehabilitation at a long-term care facility after a hospitalization, and then only for 100 days. Private health insurance coverage does not cover the cost of long-term care.

Because Medicare does not cover the cost of nursing home care, assisted living, residential health care, or other long-term care, the primary source of private financing of long-term care is the income and

savings of the elderly and their families, or Medicaid. The national caseloads for Medicaid have grown in the past few years and are projected to increase annually.

The second enhancement of KDOA's education and awareness efforts will be to provide guidelines to help answer some of the questions surrounding the purchase of long-term care insurance. The most important question we can help answer is "Who should purchase long-term care insurance?"

Some guidelines are:

- Determine your resources. People who have $50,000 or more in assets to protect may benefit from purchasing long-term care insurance.
- Purchase early. People should consider buying long-term care insurance when they are between 50 and 60 years old, when they can save on the cost of premiums.
- Purchase inflation protection. Long-term care costs will increase, so buy insurance that increases as costs rise.
- Buy a tax-qualified plan. This means that any payments made by your insurance company for your care can be paid directly to your provider and not taxed to you.
- Purchase a plan that is tailored to meet the individual's needs, e.g. daily benefit cap, benefit length, elimination period (deductible), training for family members who want to provide care, survivorship benefits, fixed term premium payments.
- Decide if it is more feasible to purchase long-term care insurance for one or both spouses, depending on health status, age, and other factors.
- Purchase a policy that provides care in your choice of setting, whether that is in-home services, assisted living or nursing home care.
- Shop for a qualified company with the best price. The top 10 out of 180 companies that sell long-term care insurance sell approximately 70 percent of the policies. Make sure the company you choose is not undercapitalized and is rated highly by industry rating services, such as Standard and Poor's.

A properly selected long-term care insurance policy will allow a policyholder to protect their life savings from depletion if long-term care is needed. An added benefit of the purchase of long-term care insurance is the shifting of financing of long-term care from the public sector to the private sector.

Madame Chair and members of the committee, thank you for the opportunity to discuss the importance of educating Kansans on the purchase of long-term care insurance, and the Department's support of increasing flexibility and options for purchasers of long-term care insurance. I will now stand for questions.

Testimony on Senate Bill 586
Before the Senate Financial Institutions and Insurance Committee
By Larry Magill
Kansas Association of Insurance Agents
February 21, 2002

Thank you madam Chair and members of the Committee for the opportunity to appear today in support of Senate Bill 586, a measure that will allow a broader range of Long Term Care insurance products to be offered in Kansas.

SB 586 extends the current maximum waiting period for Long Term Care coverage sold in Kansas from 100 days to 365 days. The 100 day limit was an arbitrary one set when the product was first introduced in the NAIC model LTC regulation. Although the Insurance Department looked at extending it in 1993 or 1994, it took no action.

If you accept that the average stay in a nursing facility is 2 ½ to 3 years, even a one year waiting period would still afford significant "excess" coverage. Essentially the waiting period is a deductible; in this case a significant size deductible. Allowing a year would benefit two potential groups of insureds: a person who has substantial assets and wants to "self-insure" the small losses but still wants to buy excess coverage at a reasonable rate and the person who has perhaps waited too long to decide to purchase coverage and needs the large deductible to reduce the cost to an affordable level.

One concern is that you are encouraging the sale of "illusory" coverage. With such a long waiting period, some insureds will either recover and leave the nursing facility before the year is up or will die before ever receiving the insurance benefit. The lower premium should reflect the lower risk making this somewhat of a moot point. The consumer received what they paid for.

Since people who run out of funds to pay for nursing facilities end up on Medicaid with the State paying the cost, anything the legislature can do to encourage coverage is very positive. With the Baby Boom generation rapidly approaching retirement and the maximum feasible age for buying the coverage, anything you can do to encourage people to buy Long Term Care, you should do.

We would be happy to provide additional information or answer questions. We urge the Committee to act favorably on the bill.

Senate Financial Inst. & Insurance
Date: 2-21-02
Attachment No. 2

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Committee on Financial Institutions and Insurance

FROM: Terry Humphrey, executive director
Kansas Trial Lawyer's Association

DATE: February 21, 2002

RE: SB 420

Senator Praeger and members of the committee, I am Terry Humphrey, executive director of the Kansas Trial Lawyers Association. Thank you for this opportunity to present testimony in support of SB 420. Put simply, SB 420 proposes to change the effective date on which nonprofit corporations that administer graduate medical education programs for the University Of Kansas School Of Medicine became eligible for coverage under the Health Care Provider Insurance Availability Act. SB 420 repeals the effective date of July 1, 1997, and amends it to July 1, 2001.

We cannot talk about SB 420 in any meaningful way without first revisiting the events of the 2001 legislative session that lead to it. Last session, you may recall, the Wichita Center for Graduate Medical Education (WCGME) and its affiliates testified before the Insurance Committees of both the House and the Senate. At the time, WCGME was a not-for-profit consortium comprised of Wesley Medical Center, Via Christi Regional Medical Center and the University Of Kansas School Of Medicine. WCGME employed KU medical residents, paying their salaries and benefits for their work at these facilities. As an employer of these residents, WCGME, like any other employer, was liable for the actions of its employees. And WCGME, the committees learned, had been named in at least two lawsuits filed in 1999 involving its employee-residents.

Faced with lawsuits, WCGME and its affiliates told committee members about the urgent need to amend the Act to include not-for-profit corporations such as WCGME under the definition of "health care provider." In so doing, WCGME would be covered by the Health Care Stabilization Fund, which it previously had not been. WCGME and Wesley Medical Center persuaded many of us that without such a change in the Act, WCGME would have little or no professional liability insurance.

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Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.

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The proposal to make WCGME a "health care provider" passed the Senate without amendment. While in the House, an eleventh hour amendment was proposed by WCGME and Wesley Medical Center. This amendment would make the coverage of not-for-profit corporations such as WCGME retroactive to July 1, 1997, well before the filing dates of the pending lawsuits. The bill passed the House as amended, the Senate concurred, and Gov. Graves signed the bill into law on May 22, 2001.

That brings us to the present day and to the necessity for SB 420. The amendment making coverage retroactive was a mistake—a huge mistake predicated on misleading testimony provided by WCGME and Wesley Medical Center. Very shortly after the passage of last year's bill, we learned that Wesley Medical Center had contractually agreed to indemnify WCGME for any losses resulting from the negligence of WCGME's employee-residents. That meant that WCGME, through Wesley Medical Center, had, in fact, possessed liability insurance coverage all along. There was no urgent need to change WCGME's status as a "health care provider" and, more important, no reason to make their coverage under the Act retroactive—unless, of course, you consider who stood to benefit from such changes.

Before the law was changed, WCGME and Wesley Medical Center, because of the indemnity agreement, were responsible for the negligence of the employee-residents and any resulting losses. After the law was changed, WCGME and Wesley Medical Center were no longer responsible for the negligence of the residents. Instead, the individual residents will bear this cost up to the limits of their insurance coverage, including any excess coverage through the Fund. Any remaining medical expenses will be borne by the taxpayer through Medicaid. By making these changes retroactive to July 1, 1997, Wesley Medical Center is "off the hook" for any losses that may result from lawsuits filed after that date, including those lawsuits filed in 1999 that prompted WCGME and Wesley to seek a change in the law in the first place. Wesley should not be allowed to shift their potential responsibility to the Kansas taxpayers.

Fearing that they could not defend themselves in the courthouse, WCGME and Wesley Medical Center chose to take their case to the Statehouse. They could not have hoped for a better outcome for themselves. Unfortunately, they succeeded at the expense of at least one of the plaintiffs who filed suit in 1999. Unless the Legislature can turn back the clock for the family whose child suffered permanent brain damage at the hands of WCGME's employee-residents, it should not turn back the clock on laws that would have held the residents' employer accountable. We strongly urge the committee to support SB 420.

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TESTIMONY

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY JAMES J. LONG

PRESENTED FEBRUARY 21, 2002

PROPOSAL FOR LEGISLATIVE CHANGES TO

HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT, K.S.A 40-3401 et seq.

Let me introduce myself. My name is James Long; I represent both Ashley Raney-Neises, and Kimberlyn Holt in separate actions against several resident employees of the Wichita Center for Graduate Medical Education ("WCGME") and Wesley Medical Center, Wichita, Kansas. I wish to thank Senator Praeger and Committee Members for allowing me to speak on behalf ~~on~~ of SB 420 concerning the Health Care Provider Insurance Availability Act, K.S.A. § 40-3401 et seq.

As I am sure you are all familiar, the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq. was amended last year during the wrap-up session (*i.e.*, Senate Bill 366). It is the events leading up to this amendment, and the ramifications of this change in law on these two cases which I wish to discuss.

Ashley Raney-Neises was born on November 4, 1997 at Wesley Medical Center. At her birth, Ashley was diagnosed with hypoxic-eschemic encephalopathy ("HIE"), neonatal seizures, and multiple organ failure. During her labor and delivery, Angela Raney-Neises was attended to solely by a first and fourth year resident employee of WCGME.

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Kimberlyn Holt was born on July 30, 1998 at Wesley Medical Center. At her birth, Kimberlyn Holt was diagnosed with HIE with neonatal seizures. Kimberlyn's birth was the result of a uterine rupture which occurred during labor. During her labor and delivery, Kim Holt (Kimberlyn's mother), was attended to by two first year resident employees of WCGME who had only twenty-eight (28) days of experience in the residency program.

WCGME is, and has always been, a not-for-profit corporation, organized under the general corporation code of Kansas. K.S.A. § 17-16001, et seq. The organizational purpose of WCGME as stated in their Amended and Restated Articles of Incorporation is "[t]o provide for the continuation of the graduate medical education programs at HCA Wesley Medical Center, St. Francis Regional Medical Center, and the Veterans Administrations." WCGME's original Articles of Incorporation were filed with the Kansas Secretary of State on February 26, 1988. The obstetrics and gynecology medical education program is administered by a program director who is employed by Wesley Medical Center.

WCGME's Bylaws state that the "[m]embers of the Corporation shall be Columbia Wesley Medical Center, Via Christie Regional Medical Center, the University of Kansas School of Medicine - Wichita (UKSM-W), and the Veterans Administration Medical and Regional Office in Wichita. The Veterans Administration now plays little, if any role in WCGME.

On October 19, 1999, a lawsuit was filed on behalf of Ashley Raney-Neises. In this lawsuit, plaintiffs' counsel maintained that insofar as WCGME employed residents within the residency program, WCGME, as their employer, was also liable for their actions. This liability is premised on the long-standing, common law doctrine that the employer, rather than the employee, should bear the responsibility and costs for the wrongful actions of an employee when performing services within the scope of their employment.

On January 6, 2000, an initial status conference was held in the Raney-Neises case. At the conclusion of this status conference, after questioning by plaintiffs' counsel, legal counsel for WCGME orally represented to plaintiffs' counsel that WCGME was NOT a health care provider, and thus was NOT covered by the Health Care Insurance Provider Act.[1]

On January 17, 2000, in order to secure a written admission from WCGME's legal counsel that WCGME was NOT a health care provider, plaintiffs' counsel served a First Set of Requests for Admission to WCGME. In this discovery, plaintiffs' counsel requested counsel for WCGME to admit that WCGME "is not a health care provider as defined pursuant to K.S.A. § 40-3401(f)."

On March 3, 2000, WCGME served a response to plaintiffs' First Set of Requests for Admission to WCGME. In its response, contrary to counsel's prior representation, WCGME's counsel denied that it was "not a health care provider as defined pursuant to K.S.A. § 40-3401(f). In these responses, WCGME's counsel averred that WCGME was "a not-for-profit corporation organized for the purpose of rendering professional services by person who are health care providers." Each of these responses proved to be false and misleading.[2]

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[1] This representation appears to be completely inapposite to the Testimony provided by Ms. Patricia Dengler to this Committee on April 26, 2001. In her testimony, Ms. Dengler stated that when the Raney-Neises case was filed, WCGME was informed that "it was a health care provider pursuant to K.S.A. 40-3401(f)."

[2] Through additional legislative research and discovery it was established that: (1) WCGME was not a "professional corporation"; (2) only professional corporations can render "professional services," and; (3) the "not for profit" provision contained within the Health Care Insurance Provider Act was intended solely for two "private practice professional corporations." See K.S.A. § 17-2701 et seq.; Early Detection Center, Inc. v. Wilson, 248 Kan 869, 877, 811 P.2d 860 (1991); SB 870, Minutes of the House Committee on Insurance, April 8, 1982.

On July 29, 2000, a lawsuit was filed on behalf of Kimberlyn Holt, and the Holt family. In this lawsuit, the Holt family maintained that insofar as WCGME employed residents within the residency program, WCGME was likewise liable for their actions.

On November 1, 2000, plaintiffs' counsel served a Second Set of Requests for Admission to WCGME in the Raney-Neises case. In this discovery, plaintiffs' counsel requested counsel for WCGME to admit that the entire source of funding of WCGME was provided by "the participating hospitals or the member institutions who organized WCGME."

On December 1, 2000, counsel for WCGME served a response to Plaintiffs' Second Set of Requests for Admission. In its response, counsel for WCGME admitted that **"[t]he entire funding of WCGME is provided by the participating hospitals or the member institutions who organized WCGME."**[3]

On January 9, 2001, the deposition of Janice Arbuckle was taken. Ms. Arbuckle is the Associate Dean for the Administration at the University of Kansas School of Medicine - Wichita, and serves as the Chief Fiscal Officer responsible for WCGME's budget, development and control. In her deposition, Ms. Arbuckle testified that WCGME does not receive money from any other source other than the member institutions of WCGME, *i.e.*, Wesley Medical Center and Via Christi Regional Medical Center. **During her deposition, Ms. Arbuckle testified that one-hundred percent (100%) of WCGME's budget was from "non-state funding."**

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[3] In addition to providing this monetary support, plaintiffs' counsel found that WCGME and Wesley Medical Center had entered into a number of contracts. In these contracts, Wesley Medical Center agreed to indemnify WCGME for "any and all costs and liability of whatever kind and character... arising by virtue of [the] activities" of Wesley Medical Center. Exhibit A: Agreement Between WCGME and Wesley Medical Center, at p. 11. Plaintiffs' counsel contends that this indemnity agreement is enforceable insofar as the program director who hires, retains, evaluates, and supervises these residents for WCGME is both an agent and employee of Wesley Medical Center. Exhibit B: Contract of Douglas V. Horbelt, M.D.

On January 24, 2001, the deposition of WCGME's CEO, Penny Vogelsang took place in the Raney-Neises case. During this deposition, Ms. Vogelsang was questioned whether she had ever had any discussions with Rita Noll of the Health Care Stabilization Fund on whether WCGME was covered under the fund. During this deposition, Ms. Vogelsang testified that a week before her deposition, WCGME's legal counsel (David Wooding and Patricia Dengler), and Rita Noll met to discuss "WCGME['s] coverage under the fund as a health care provider." During her deposition, Ms. Vogelsang testified that during this meeting, the "statute pertaining to [the] health care provider [act] was discussed...." During this deposition, WCGME's legal counsel objected to plaintiffs's questions, wherein the Honorable Judge Eric Yost was contacted. During this conference call, WCGME's legal counsel (Wooding) represented to the Court the following:

> Rita Noll is the chief attorney for the Kansas Health Care Stabilization Fund. The Kansas Health Care Stabilization Fund hired me and my law firm to represent WCGME, which is the Wichita Center for Graduate Medical Education. So, you know, the Health Care Stabilization Fund is the insurer for WCGME.
>
> * * *
>
> I am employed by the Healthcare Stabilization Fund which insures WCGME. The meeting was between me, my client and the insurer. The fact that the plaintiffs may wish to take the deposition of Rita Noll or someone else at the fund doesn't obviate the attorney-client privilege in this instance.

As the result of WCGME's representations, plaintiffs' counsel was precluded from delving into the conversations which occurred between Ms. Noll, WCGME counsel, and Penny Vogelsang. At this deposition, plaintiffs' counsel was continually led to believe by WCGME's legal counsel that WCGME was a health care provider, and that it was insured under the Health Care Provider Insurance Availability Act.

Thereafter, on or about April 25, 2001, without plaintiffs knowledge, Senate Bill 366 was introduced. On April 26, 2001, this Committee held hearings on this Bill. During this hearing, Senate Bill 366 was introduced based upon the perceived need by this Committee to provide WCGME (and indirectly Wesley Medical Center), with insurance coverage under the Health Care Stabilization Fund. In her written testimony, Ms. Dengler failed to inform this Committee that Senate Bill 366 would eliminate the responsibility of WCGME for its residents, or expose these residents to additional liability. On May 22, 2001, Senate Bill 366 became law.

On or about June 18, 2001, pursuant to Rule 26 of the Federal Rules of Civil Procedure, counsel for WCGME provided plaintiffs' counsel with additional documents in the Holt case. In review of these documents, plaintiffs' counsel, for the very first time, learned of the existence of Senate Bill 366 and the modifications to the Health Care Provider Insurance Availability Act.

On June 19, 2001, Penny Vogelsang was deposed a second time. This deposition occurred in the Holt case. During this deposition, Ms. Vogelsang was questioned concerning whether any additional meetings had been held to discuss WCGME's status as a health care provider. During this deposition, Ms. Vogelsang testified that she met on at least 12 separate occasions wherein the status of WCGME was discussed. During her deposition, Ms. Vogelsang testified that these meetings took place with lobbyists for the hospitals, legislative personnel, and the attorneys for WCGME.

During her deposition, Ms. Vogelsang testified that during these discussions the issue of WCGME's responsibility was discussed, and that by changing this law WCGME's responsibility would for its residents would be eliminated. In her deposition, Ms. Vogelsang was questioned on whether Ms. Dengler informed the house and senate committees of the ramifications of this change.

In her deposition, Ms. Vogelsang testified as follows:

Q. Did Ms. Dengler inform the senate and house committees that the passage of this statute would eliminate a remedy by the plaintiffs in these two lawsuits?

A. I don't think those words were - - I'm sorry, what do you mean by a "remedy"?

Q. I'll rephrase my question. **Did Ms. Dengler inform the house and senate committees that the passage of this statute would eliminate the vicarious responsibility of WCGME in [the] two lawsuits that were pending**?

A. I can't remember in her testimony if she use "vicarious liability." **She said it would cover the lawsuits defense**.

* * *

Q. **[Did] Ms. Dengler [tell] the senate and house committee that she wanted this legislation to be retroactive to eliminate the vicarious responsibility of WCGME for the residents so that it predated when the cause of actions of these two lawsuits arose**?

A. **No, she didn't state that**.

In addition, in this deposition, Ms. Vogelsang testified that: (1) WCGME does not hold any license from the Kansas Board of Healing Arts, nor any other regulatory authority; (2) WCGME is not a licensed medical care facility; (3) WCGME is not accredited; (4) WCGME does not maintain any medical supplies; (5) WCGME does not solicit patients; (6) WCGME is not a hospital; (7) WCGME does not provide any medical services to the public; (8) WCGME does not provided any patient services; and (9) WCGME is not engaged in the practice of medicine.

For the foregoing reasons, I recommend and support SB 420.

Purpose of Legislative Amendment

1. K.S.A. 40-3401(f) should at the very least be amended to eliminate the retroactivity portion of the statute defining WCGME as a "health care provider." This change of law during the pendency of at least two (2) legal proceedings is both unfair, and effects the substantive rights of the plaintiffs in these proceedings. While it was represented that this change in law was intended to provide insurance coverage to WCGME, the real intent of this law was to eliminate WCGME's common law responsibility for the actions of its employee-residents.

2. K.S.A. 40-3401(f) should be amended insofar as WCGME has left its own employees under-insured. Because SB 366 was made retroactive, WCGME's residents had no opportunity to anticipate the fact that they may be under-insured. Insofar as these resident-employees are under-insured, the taxpayers of the State of Kansas should not have to bear the responsibility of providing for the medical costs to the Raney-Nieses and Holt families in the event that a judgment exceeds their insurance coverage.

Alternatively

3. K.S.A. 40-3401(f) should be amended to exclude WCGME as a "heath care provider." WCGME is in no way involved in the practice of medicine. The Legislature should not be in the business of providing health care insurance coverage to protect the assets of Wesley Medical Center, or any other non-state supported hospital.

4. K.S.A. 40-3401(f) should be amended to exclude WCGME as a "health care provider" insofar as a valid, enforceable indemnity agreement exists between WCGME and Wesley Medical Center. Given Wesley Medical Center's extensive participation and role in the graduate medical education program, it is untenable for either WCGME or Wesley Medical Center to contend that this indemnity agreement does not apply.

AGREEMENT BETWEEN

WICHITA CENTER FOR GRADUATE MEDICAL EDUCATION

AND

COLUMBIA WESLEY MEDICAL CENTER

COLUMBIA WESLEY MEDICAL CENTER (hereinafter referred to as the "Member Institution") and the Wichita Center for Graduate Medical Education, Inc. ("WCGME"), hereby agree to participate in a Graduate Medical Education Program (the "Program") on the following terms and conditions:

WHEREAS, University of Kansas School of Medicine-Wichita ("UKSM-W") is an institution of higher education which conducts programs of graduate medical education for residents; and

WHEREAS, Columbia Wesley Medical Center ("Wesley"), Via Christi Regional Medical Center ("Via Christi") and the Veterans Administration Medical and Regional Office Center ("VA") are health care providers which respectively operate separate acute care hospitals and provide clinical facilities for the conduct of graduate medical education for residents in cooperation with each other and with UKSM-W; and

WHEREAS, said organizations (collectively "Member Institutions") have caused the incorporation and organization of WCGME as a separate nonprofit corporation under the laws of the State of Kansas which has been declared a tax exempt organization pursuant to the provisions of Section 501(c)(3) of the Internal Revenue Code as amended; and

WHEREAS, said Member Institutions desire that the UKSM-W

EXHIBIT

A

shall hereafter serve as sponsor of all graduate medical education programs conducted in the Member Institutions at their respective sites at Wichita, Kansas and that WCGME shall operate and coordinate the Program among all Member Institutions and other institutions of higher education, public and private agencies, the government and the general public;

NOW, THEREFORE, the parties hereto agree to provide for the continuation of graduate medical education programs in the Member Institutions in such form as will effectively coordinate administration of such programs in compliance with the applicable federal and state laws and regulations in order to achieve and enhance quality medical education and to assist the process of continued accreditation.

1. The Program shall include the graduate medical education programs sponsored by UKSM-W, conducted in and together with Member Institutions and operated by WCGME, which are set forth in Exhibit A attached hereto and incorporated herein.

2. The Program shall be operated by WCGME and WCGME shall serve as the coordinating entity (the "Coordinator"). WCGME shall be responsible for coordinating all accreditation activities with the Accreditation Council for Graduate Medical Education ("ACGME") and for all administrative matters which relate to operation of the UKSM-W Graduate Medical Education Program to include, but not be limited to:

a. Assisting with the resident recruitment process of each residency program.

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b. Coordination of the recruitment process of each residency program with the National Resident Matching Program ("NRMP").

c. Administration of payroll, benefits, insurance (including health and workers' compensation insurance), all set forth in resident contracts (Exhibit B-1), and other employment matters for residents.

d. Receiving and completing the American Medical Association Annual Resident Census Forms.

e. Receiving and completing certificates verifying the eligibility of residents to take step 3 of the U.S. Medical Licensing Examination, or any other appropriate examination for resident physicians.

f. Providing information and instructions to incoming residents regarding Kansas licensure requirements which must be fulfilled prior to commencement of the residents' training. Keeping current Kansas licensure records for each resident.

g. Development and administration of the due process procedures and oversight of the evaluation of residents as required by the General Requirements of the ACGME.

h. Arranging for periodic internal review and approval of all participating residencies as required by the General Requirements of the ACGME.

i. Arranging and conducting special programs for residents as recommended by the WCGME Board of Directors and/or WCGME Residency Committee.

j. Designing policies and procedures for resident evaluation, dismissal and promotion to assure that Program Directors conduct evaluations in compliance with the General Requirements of the ACGME.

k. Maintaining the official credentials for each resident and providing member institutions copies asrequested.

l. Providing agencies and institutions which make such a request, verification of enrollment and participation of residents in the Program.

m. Coordination of the various ACGME processes for the Program.

n. Conducting and coordinating pre-employment orientation activities for residents with Member Institutions, UKSM-W and Program Directors.

o. Providing for health examinations as required by Member Institutions.

p. Initiating and coordinating efforts to raise financial support to support the Program as described herein.

q. Distribution to the Member Institutions share of the funds paid to WCGME by UKSM-W that are

designated for support of primary care residencies in Wichita. The amount paid to the Member Institutions shall be based on the Member Institution's full time equivalents (FTE's) of primary care residents (primary care residencies are pediatrics, psychiatry, family practice, and internal medicine) as set forth in Exhibit D. WCGME shall make payment pursuant to this section on a quarterly basis for quarters ending September 30, December 31, March 31 and June 30.

r. WCGME shall arrange for the provision of professional liability coverage for each resident duly enrolled in the UKSM-W Program to the limits specified by state law and through a plan acceptable to WCGME.

s. WCGME shall, on a quarterly basis, provide to Member Institution a report of monthly resident rotation schedules and other information as required to reconcile monthly billings and to meet other third party requirements.

3. UKSM-W shall serve as the sponsoring entity and assume full and complete responsibility for design and implementation of the curriculum for each residency program so as to maintain full accreditation of each program. Each residency program will be accredited as a program of UKSM-W. WCGME will coordinate all accreditation activities for each residency program.

4. The Member Institution agrees to the following terms and conditions:

a. To provide the necessary space for the resident programs which are described in Exhibit A, to include such things as a model office (where appropriate), teaching, conference and lecture rooms, and all ancillary services required to support each residency program.

b. To pay WCGME for its pro rata share of the costs WCGME incurs under paragraphs 2 and 7 as computed and set forth in Exhibit C attached hereto. In addition to the costs set forth in Exhibit C, the Member Institution shall pay such other costs and expenses as may be incurred by WCGME, but only to the extent such other costs and expenses are approved by Member Institution. WCGME shall submit an itemized bill to the Member Institution. The method of payment shall be in such amounts, in such manner, and at such times as are from time to time approved by the WCGME Board of Directors.

5. Each graduate medical education training program sponsored by UKSM-W, conducted at the Member Institution and coordinated by WCGME shall be administered by a Program Director who shall be appointed by UKSM-W subject to approval by the WCGME Board of Directors and shall hold an appropriate academic appointment from the University of Kansas.

The Program Director, with the concurrence and approval of the Department Chairman, and the Associate Dean for Graduate Medical Education (ADGME) at UKSM-W, shall be responsible for each residency program's content and quality, and for selecting, assigning and evaluating residents' training in each program.

The Program Director and the Department Chairman may be the same person. The Program Directors and Department Chairmen shall be employed by UKSM-W.

For the family practice programs, there shall be one Program Director for each separately accredited residency program, who shall be appointed in accordance with UKSM-W policies upon recommendation of the Member Institution in which the UKSM-W program is conducted and upon approval by the WCGME Board of Directors.

If the graduate medical education training program includes regularly scheduled assignments to more than one institution, there may be a Program Advisory Committee composed of the Program Director and a Program Coordinator from each institution involved. The Progra Coordinator shall be the faculty member responsible for the program i each respective institution. The Program Advisory Committee shall be chaired by the Program Director and shall be advisory to the Program Director.

The Program Director may assign a resident to an institution other than a Member Institution in accordance with policy adopted by the WCGME Board, provided that such assignment is compatible with ACGME requirements and the teaching objectives of the Program and,

provided further, that appropriate financial support is obtained at a rate approved by the WCGME Board.

6. A Residency Committee shall be constituted in accordance with the Bylaws of WCGME. The Residency Committee shall consider matters related to graduate medical education, foster interdisciplinary cooperation among the graduate medical education programs, and coordinate the individual graduate medical education programs with one another and with the needs for undergraduate medical education. In addition, the Residency Committee shall conduct an ongoing review of the content, quality, location and size of the programs of graduate medical education, utilizing all available information as to local, regional and national needs. All proposals regarding development of new programs or significant modifications of existing programs shall be approved by the Residency Committee and referred with recommendations to the WCGME Board of Directors. UKSM-W must approve all new programs and significant changes prior to submission of these items to the WCGME Board of Directors for approval. All proposals regarding addition of new Member Institutions shall be reviewed by the Residency Committee and referred with recommendations to the WCGME Board of Directors, which shall refer the matter to the Members of WCGME for final action.

The Residency Committee shall meet at regular intervals with the ADGME, who shall act as staff. The Residency Committee shall elect its own presiding officer. The Residency Committee shall

report annually to the Board of Directors for WCGME and the Dean of UKSM-W on the state of the residency programs.

7. WCGME shall enter into Resident Contracts, to be in the form set forth in Exhibit B-1, attached hereto, with each resident in the Program. Pursuant to this contract, WCGME shall pay resident's salaries and provide the other benefits set forth in Exhibits B-1 and B-2.

8. WCGME will arrange for certificates that will be awarded by UKSM-W to residents at the successful completion of one or more years of training and will be signed by the Department Chairman, Dean, Executive Vice-Chancellor and Chancellor of the University of Kansas. The seal of the University of Kansas shall be affixed to the certificate.

9. In the event the Member Institution other than UKSM-W decides not to participate in a particular graduate medical education program, it shall notify the Board of WCGME by January 1st effective for the ensuing fiscal year. The WCGME Board shall refer the matter to the Residency Committee, which shall propose a plan for transition. The Member Institution shall be financially responsible to reimburse WCGME pursuant to Section 4 until expiration of resident contracts then in effect for that fiscal year.

10. The Member Institution may withdraw its participation from WCGME in accordance with the WCGME Bylaws. The Member Institution shall make best efforts to give two (2) years' notice of intent to withdraw. If Member Institution voluntarily

withdraws, it shall be financially obligated to reimburse WCGME pursuant to Section 4 until expiration of Resident Contracts then in effect for the current fiscal year.

11. Termination and suspension from WCGME shall be in accordance with the WCGME Bylaws. In the event UKSM-W ceases to sponsor a Graduate Medical Education Program in Wichita, the Program as defined herein shall terminate. Member Institution remains obligated to pay WCGME for its share of expenses and costs until the end of the fiscal year in which the termination and/or suspension occurs.

12. It is hereby understood and agreed that WCGME is in no way involved in the practice of medicine, and that neither WCGME nor any of its employees who are not residents, should it ever have any, engage in the practice of or the supervision of the practice of medicine. This Agreement is a contract for administrative services only.

Therefore, it is further agreed that the Member Institution shall carry professional liability insurance or be self-insured in amounts approved by WCGME or as required by Kansas law; and that the physicians at the Member Institution who have responsibility for teaching residents or supervising residents will have professional liability insurance as required by Kansas law and in amounts acceptable to Member Institution; and that each of the residents will have professional liability insurance provided pursuant to KSA 40-3401 et seq. It shall be WCGME's responsibility to see that the Kansas Insurance Commission is

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notified of residents who are added to or deleted from the list of active WCGME residents.

The Member Institution shall indemnify, defend and hold WCGME harmless from any and all costs and liability of whatever kind and character to the extent of the Member Institution's coverage for losses, actual or claimed, to persons or property, arising by virtue of activities of the Member Institution, its employees, agents or servants. WCGME shall promptly notify the Member Institution of any claims involving the Member Institution.

Nothing in this Agreement shall constitute a waiver of the right of WCGME, which may exist in the absence of this Agreement, to recover from the Member Institution or a member of its medical staff in the event any liability for damages is imposed upon or claimed against WCGME as a result of the acts or omissions of the Member Institution, its medical staff or its employees.

WCGME shall indemnify, defend and hold Member Institution harmless from any and all costs and liability of whatever kind and character to the extent of WCGME's coverage for losses, actual or claimed, to persons or property, arising by virtue of activities of WCGME, its employees who are not residents enrolled in the Program, agents or servants. The Member Institution shall promptly notify WCGME of any claims involving WCGME.

13. WCGME shall maintain in force and effect at all times the following insurance coverage:

a. Workers' Compensation Insurance.

b. Unemployment Insurance.

c. Such other insurance as the parties agree upon.

14. WCGME shall at all times keep complete and accurate records of all financial transactions. The financial records of WCGME shall be audited annually by a certified public accountant. A copy of the report shall be furnished to the Member Institution. The costs of the annual audit shall be reflected in WCGME's annual budget.

15. Pursuant to Section 952 of the Omnibus Reconciliation Act of 1980 (P.L. 96-499), the parties shall retain and make available upon written request to the Secretary of the United States Department of Health and Human Services, the Comptroller General of the United States, or any of their duly authorized representatives, this Agreement and the books, documents and records of WCGME that are necessary to verify the nature and extent of costs for the furnishing of services pursuant to this Agreement. Such books, documents and records shall be made available until the expiration of four (4) years after the furnishing of services pursuant to this Agreement. This provision is included in this contract in order to assure strict compliance with all requirements of the Medicare Program due to possible application of Section 952 of the Omnibus Reconciliation Act of 1980 (P.L. 96-499) to this contract. If such section is not applicable, then this clause shall be without force and effect.

16. If any provisions of this Agreement or the application

thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remainder of the Agreement or the application of such terms or provisions to persons or circumstances shall not be affected thereby, and the rest of this Agreement shall be valid and enforceable.

17. This Agreement contains the entire agreement of the parties regarding the subject matter and none of the terms shall be changed except by written agreement.

18. This Agreement shall be interpreted according to the laws of the State of Kansas.

19. The parties agree:

a. To comply with the Kansas Act Against Discrimination (K.S.A. 44-1001, et seq.) and not to unlawfully discriminate against any person who performs work hereunder because of race, religion, color, sex, physical handicap unrelated to such person's ability to engage in the work, national origin or ancestry;

b. To include in all solicitations or advertisements for employees the phrase "equal opportunity employer"; and

c. To comply with the reporting requirements set out in K.S.A. 44-1031.

d. To include provisions 19(a), (b) and (c) in every subcontract or purchase order so that they are binding on each subcontractor or vendor.

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20. Notices under this Agreement shall be served on the Chief Executive Officer of the Member Institution and the President of WCGME, by certified or registered mail at the last known address.

21. This Agreement shall take effect as of July 1, 1996. The term of this Agreement shall be for one (1) year from July 1, 1996, and shall renew upon the agreement of the parties each year for one (1) year unless it terminates for reasons set forth therein or is changed or modified by agreement of the parties pursuant to Section 22 herein.

22. Amendments to this Agreement shall be made only upon the vote of at least nine (9) Directors of the WCGME Board, along with approval of the Member Institutions.

IN WITNESS WHEREOF, the parties have executed this Agreement as of January 14, 1997.

WCGME

LeRoy Rhemer
President

Penny L. Vogbaug
Chief Operating Officer

COLUMBIA WESLEY MEDICAL CENTER

Chief ~~Executive~~ Officer

Reviewed by:

Patricia M. Engle

WCGME Counsel

Columbia Wesley Medical Center Counsel

Counsel for the University of Kansas
School of Medicine-Wichita

8/22/96

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EXHIBIT A

GRADUATE MEDICAL EDUCATION PROGRAMS
and the
WICHITA HOSPITALS AT WHICH EACH IS CONDUCTED

FY 1997

	St Francis Campus	St Joseph Campus	Wesley	VA	Other Locations
Anesthesiology	x	x			
Family Practice:					
St Francis Campus	x				
St Joseph Campus		x			
Wesley			x		
Internal Medicine	x		x	x	
Ob/Gyn			x		
Orthopaedics	x	x	x	x	x
Pediatrics			x		
Psychiatry	x	x	x	x	
Radiology			x		
Surgery	x		x	x	

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PROFESSIONAL SERVICES AGREEMENT
EXCLUSIVE PROVIDER

GA-784 7/94

EXHIBIT B

Addendum _____

This Addendum is attached to, made a part of and executed simultaneously with that certain Professional Services Agreement (GA-525) between the undersigned, dated the 10th day of October, 19 95.

Facility concludes that an exclusive relationship in the Service will best facilitate the delivery of efficient, effective and quality patient care. Such a relationship is expected to improve the relationships between the ~~Service,~~ Program the Medical Staff and other services of the Hospital; afford effective utilization of the Facility's equipment; provide consistent service and quality control; provide prompt availability of professional services; simplify scheduling of patients and physician coverage; enhance the efficient and effective administration of the service - all of which enhance the quality of patient care. In furtherance of these purposes, Facility hereby establishes Contractor as its exclusive provider upon and subject to the following terms:

1. Operation of the Service

A. Contractor shall assume complete responsibility for the professional operation of the Service and shall provide all professional services which Facility requires to be provided through the Service. ~~Any esoteric, unusual or other procedures which cannot reasonably be performed through the Service will be sent to an outside provider selected by Facility.~~

B. ~~Contractor shall provide, without charge, those services within its capabilities which are necessary to complete annual physicals for Facility's employees.~~

C. Contractor's Representatives shall prepare timely, complete and accurate medical records in accordance with the policies and procedures of Facility and all professional standards applicable to medical records documentation. All of such records shall be and remain the property of Facility. Contractor and each Contractor's Representative shall have access to those records created by the respective Contractor's Representative as may be necessary for the continuing care of the patient and as otherwise permitted by law.

D. Contractor's Representatives shall participate actively in the affairs of the Medical Staff, including, without limitation, serving on committees and discharging such other obligations as may be requested by the Medical Staff, Governing Body or any duly appointed officer or committee thereof.

E. Contractor agrees that, as requested by Facility, Contractor shall negotiate in good faith for participation by Contractor and any Contractor's Representative designated by Facility in such programs and/or networks in which Facility may participate with health maintenance organizations, preferred provider organizations, other payors and physician-hospital organizations. Facility agrees to assist Contractor in negotiating terms of participation. However, in the event Contractor fails to agree to terms of participation and, as a result thereof, Facility is threatened with exclusion or expulsion from the network or program or reduced compensation for its services, then Facility may immediately terminate the exclusive provisions of this exhibit and further terminate the Agreement in its entirety pursuant to Section 3.4 of the Agreement.

F. Contractor shall conform to any and all lawful directives issued from time to time by Facility's Chief Executive Officer provided that such directives are consistent with the scope and principles of this Agreement.

G. Other: Shall serve as Chairman of the Obstetrics and Gynecology Residency Program at Wesley Medical Center.

2. Director of Service

Douglas V. Horbelt, M.D. shall serve as Director of the ~~Service~~ Program and perform the following undertakings:

A. Participate as requested in the administrative functions as necessary to ensure the effective and efficient management of the Service.

B. Participate as requested in Facility's plans and programs adopted to assess and improve the quality and efficiently of Facility's services, including, but not limited to, quality assessment and improvement, utilization review, risk management, infection control, etc.

C. Provide such supervision, management and oversight to the Service to assure that the professional services rendered meet or exceed accepted standards of care.

D. Participate as requested in the long range planning of Facility, including, but not limited to, equipment selection, budgeting, staffing, etc.

E. Provide or arrange for in-service training for Facility's employees and Contractor's Representatives.

F. Cooperate with Facility regarding administrative, operational or personnel problems in the Service and promptly inform Facility and appropriate Medical Staff committees of professional problems in the Service in accordance with Medical Staff Bylaws, Rules and Regulations and Facility policy.

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G. Assist Facility in obtaining and maintaining accreditation and all licenses, permits and other authorizations, plus achieving all

H. Assure the maintenance of accurate, complete and timely patient and other records regarding the Service in order to facilitate the delivery of quality patient care and provide the information required for Facility to obtain payment for its services.

I. Other: _____

_____

_____

3. Facilities and Services Provided by Facility

A. Facility shall provide on the Facility premises the space designated by the Facility for the Service, plus any expendable supplies, equipment, and services necessary for the proper operation of the Service. The minimum services to be provided by the Facility are janitor, standard facility telephone, laundry, and utilities.

B. Facility shall employ all non-physician technical and clerical personnel it deems necessary for the proper operation of the Service. The Director of the Service shall direct and supervise the technical work and services of such Department personnel. However, Facility retains full administrative control and responsibility for all such Service personnel.

4. Schedule of Services

A. The Service shall be conducted during those days and times which Facility determines to be necessary in order to properly address patient needs and effectively coordinate with other operations. It is agreed that as of the Effective Date, Contractor shall provide services upon the following schedule(s) (check and complete the applicable terms):

(i) ☐ Full-time in-house service, _____ hours per day, _____ days per week.

(ii) ☒ Part-time in-house service, 2 hours per day, 5 days per week as provided in Subsection (iii) below, or upon the following days: _____

(iii) ☐ If Facility anticipates a variable need for Contractor's services, or if this subsection is applicable by virtue of its designation in the above subsections, then Facility and Contractor shall meet on a weekly/monthly/quarterly basis (circle one) and establish schedules for Contractor's services during the ensuing period.

(iv) ☐ On-call coverage _____ hours per day, _____ days per week. "On-Call" coverage is defined as Contractor's availability at the Facility within _____ minutes of the attempt to contact Contractor.

(v) ☐ Other: _____

_____

5. Exclusive Provider

Provided the Contractor continues to demonstrate its capabilities to fulfill Facility's requirements and is not otherwise in default, Contractor shall be Facility's exclusive provider of the services encompassed by this Agreement, except that any practitioner with appropriate privileges under the Service may continue to use the resources dedicated to the Service for secondary consultations.

6. Effect of Termination

Upon the termination of this Agreement for any reason, Facility may terminate or otherwise qualify or limit the medical staff membership and/or clinical privileges of any or all of Contractor's Representatives. Further, upon any severance of the affiliation between Contractor and a Contractor's Representative, Facility may terminate or otherwise qualify or limit the medical staff membership and/or clinical privileges of such Contractor's Representative. The rights of Facility under this Section shall supersede any contrary terms as may be established in the Medical Staff Bylaws. Contractor shall deliver to Facility a written statement from each Contractor's Representative acknowledging and agreeing to these concurrent termination provisions.

CONTRACTOR:

By: _____

Title: _____

Reviewed and Approved:

_____
~~Senior Vice President~~ Western Group

Approved As To Form:

FACILITY: 001167

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PROFESSIONAL SERVICES AGREEMENT
FLAT FEE FOR ADMINISTRATIVE SERVICES ONLY

GA-7&0 7/94

Addendum A

This Addendum is attached to, made a part of and executed simultaneously with that certain Professional Services Agreement (GA-525) between the undersigned, dated the 10th day of October, 1995.

A. As sole compensation for the services provided pursuant to this Agreement, Facility shall pay to Contractor the sum of $[redacted] per hour, not to exceed 10 hours per week (insert: day, week, or month). Such compensation shall be made by the 15th day of the month following that in which such services were rendered. However, such payment shall not be made until Contractor has submitted time records for the period for which payment is due, pursuant to Section 1.6 of this Agreement. In the event of an early termination of this Agreement, such compensation shall be paid for periods in which services were performed and cease, as of the date of termination, or Contractor's breach, if applicable.

B. The compensation agreed to in Paragraph A, above, shall not exceed $[redacted] for any month nor $[redacted] for the term of the Agreement.

C. Contractor shall not bill or collect from any patient or payors for services provided by Contractor pursuant to the terms of this Agreement. Contractor's sole compensation for services provided hereunder shall be the monies paid by Facility per paragraph A above.

Addendum B:
This contract is drawn to reimburse the contractor for work performed beginning January 1, 1995 and not heretofore paid.

CONTRACTOR:

By: [signature]

Title: Chairman, Ob/Gyn Residency Program

FACILITY:

By: [signature]
Facility Chief Executive Officer

Reviewed and Approved:

[signature]
Senior Vice President Western Group

Approved As To Form:

[signature]
Legal Counsel

001168

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TESTIMONY

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY DONALD S. ANDERSEN

PRESENTED FEBRUARY 21, 2002

PROPOSAL FOR LEGISLATIVE CHANGES TO

HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT, K.S.A. 40-3401 *et seq.*

My Name is Don Andersen, and I am, along with James Long and Greg Kite, Ashley Raney-Neises's attorney.

Before going further, I would like to thank Senator Praeger and this committee for allowing the Neises's family to be heard on SB 420. We know that Senator Praeger was not required hold a hearing on this proposed legislative change. We deeply appreciate the fact that she has, and we are grateful for the opportunity to be heard. I only hope that our testimony may benefit this committee in its consideration of the bill.

I have been a lawyer for seventeen years and have represented people like Ashley Raney-Neises during most of that time. However, never before have I ever been involved in a situation quite like this one. Always before I waged my legal battles before a court of law. This is the first time I have ever had to fight a legal issue in one of my cases in front of a legislative body. In many ways, I feel wholly inadequate and ill-prepared for the task now before me.

The fact that I am having to address one of my cases before this committee, I believe, underscores the wrong that occurred last year when the amendment to K.S.A. 40-3401 *et seq.* was passed and enacted. When I say "wrong," I am not referring to

Senate Financial Inst. & Insurance
Date: 2-21-02
Attachment No. 5

any ill motive or intent on the part of members of this committee, or, for that matter, any other member of the state legislature; rather, I am referring to those outside the legislative body who proposed and backed the legislation last year. They are the ones who have committed a wrong. By supporting changes in K.S.A. 40-3401 *et seq.*, and testifying before this committee, they had no desire whatever to benefit Ashley Raney-Neises by urging the legislature to retroactively create liability insurance coverage for WCGME. Their real motive was to reduce their own potential exposure to liability in Ashley's case.

In medical malpractice and hospital negligence cases in Kansas, health care providers with liability insurance coverage under the Kansas Health Care Stabilization Fund cannot be vicariously liable for the conduct of other health care providers who are also covered by the same Fund. This prohibition against vicarious liability applies no matter what the relationship is between the two health care providers. Normally, an employer is responsible for the acts or omissions of his or her employee, provided those acts or omissions occur within the scope of employment. Lawyers and judges call this vicarious liability. But in Kansas, if one is fortunate enough to be health care provider who is covered by the Fund, that person is insulated from liability for the acts or omissions of his or her employee who is also covered by the Fund.

In Ashley Raney-Neises's lawsuit, the defendant Wichita Center for Graduate Medical Education [WCGME] is the employer of the residents in the obstetrical residency program at Wesley Medical Center in Wichita, Kansas. A question in the lawsuit was whether WCGME could be vicariously liable for the conduct of certain

residents in their care and treatment of Angela and Ashley Raney-Neises. To answer that question, one had to determine whether WCGME was covered by the Kansas Health Care Stabilization Fund.

Early on in the lawsuit, it became abundantly clear to Ashley's attorneys that WCGME probably was not covered by the Fund. A tremendous amount of time was devoted to this legal issue, and as the issue evolved, it became clear not only to us but to all parties involved that, under the law as it existed, WCGME would be vicariously liable for the wrongful conduct of its resident employees.

Why is the vicarious liability of WCGME important to Ashley Raney-Neises? Ashley is profoundly brain damaged as a result of what happened to her at birth. She has spastic quadriplegia and is severely mentally disabled. Her pediatrician has testified in her case that she will never be able to walk, talk, or even feed herself. Because of her respiratory problems, she is also at constant risk for developing respiratory tract infections, severe illnesses, or even death.

Adequate care to sustain Ashley's life requires a tremendous amount of resource. She is literally in need of 24-hour care, seven days a week from qualified professionals for the rest of her life. A pediatric physical medicine and rehabilitation specialist has evaluated Ashley and has assessed her future care needs. Based on his assessment, it is reasonably estimated that the cost of care, over her lifetime, will exceed $30,000,000.00.

As the lawsuit evolved and progressed, WCGME and Wesley became very much aware that we knew of the potential for WCGME being vicarious liable for the conduct

of its residents in the care and treatment of Ashley Raney-Neises. They knew that, given the state of the law, it was likely that WCGME would be held responsible for the wrongful conduct of its residents, and that prospect of that scared them to death.

So what did Wesley and WCGME do? Knowing that they could not possibly win under the "rules of the game," they attempted to have those rules changed. WCGME and Wesley came to the legislature last year in an attempt to have the law changed in order to shield WCGME from being liable for wrongful conduct of its residents. Apparently, representatives of WCGME and Wesley told the legislature that the proposed change of law would provide insurance coverage for WCGME, which would in turn be beneficial to the plaintiff in this case, and two others like. They succeeded in convincing the legislature that the change was needed. But in doing so, did WCGME or Wesley ever once mention to this committee or to the legislature that the change in law would bring with it the elimination of vicarious liability of WCGME for the conduct of their residents? We doubt that they did, but we were not here. No one informed us that a bill was being introduced in the wrap-up session that would dramatically alter the course of Ashley's case and adversely impact prospects for Ashley to receive adequate compensation for her catastrophic injuries. The bill was introduced, passed and signed into law without our knowledge. We did not discover that the law had changed until a month after the Governor signed it. I assure you, if the Neises had been told last year that a bill had been introduced that would retroactively affect Ashley's case, they would have done whatever was necessary to be here, as they are today, to defend their

daughter's interests, explain to this committee the true effect of the bill, and urge its members to vote against it.

We believe that out of fairness to Ashley Raney-Neises SB 420 should be passed to right a wrong that was committed last year when the amendment to K.S.A. 40-3401 *et seq.* was passed and enacted. On behalf of the Ashley Raney-Neises, and her parents, Robert Neises and Angela Raney-Neises, I urge this committee to vote for SB 420.

Thank you.

TESTIMONY

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY ROBERT F. NEISES II

PRESENTED FEBRUARY 21, 2002

PROPOSAL FOR LEGISLATIVE CHANGES TO

HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT, K.S.A. 40-3401 *et seq.*

Ladies and gentlemen of the committee, I am Rob Neises. With me today is my wife, Angela, and our daughters, Ashley, who is 4 years old, and Kaitlyn, who is nine months. We are not here to try the merits of our daughter Ashley's case. I would like to talk to you about the proposed bill, and why we feel that repeal of the retroactive effect of the law is needed. I will be as brief as possible, but please remember, we are here because the law, as amended last year, specifically affects our daughter Ashley's rights.

The law enacted last year was made retroactive to four months before the date our daughter Ashley was born. Ashley was born on November 4, 1997. The coverages provided under the law to WCGME, one of the defendant's in our daughter's lawsuit, was made retroactive to July 1, 1997. Our understanding is that three lawsuits were affected by the change in law last year. Ashley's was the earliest of those three. Therefore, clearly the retroactive provision in the law was made to cover our daughter's case.

Although we are not lawyers, it is our understanding that the change in law last year has had potentially devastating effects on Ashley's case. It has reduced the

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potential liability of the WCGME, and has made it far more difficult for our daughter to realize adequate compensation for the injuries and damages that she sustained at birth as a result of negligence of the defendants.

First, I'd like to tell you what its like to be us. As you can see, Ashley is severely handicapped. She has a severe form of cerebral palsy and mental retardation, which we believe were caused by the care she and her mother received during the labor and delivery. Ashley cannot walk; she cannot crawl, she cannot sit up; nor can she talk, eat, or do anything that is normal for a child of her age. Ashley's pediatrician tells us that her condition is permanent, and that she will need twenty-four-hour a day care for the rest of her life. That care is being provided by my wife and me.

Everything we do as a family, we have to ask ourselves: How will it affect Ashley? For example, I have to weigh job offers and promotions with making sure I won't earn too much money. Currently the State of Kansas only allows me to gross about $1700 a month to keep Ashley's Medicaid card. We cannot put her on my insurance at work, because it will not cover the most important part of Ashley's survival - eating. I've been forced to turn down promotions, overtime, and job offers just because it would affect our daughters ability to survive. I have to provide for a family of four, plus purchase the things Ashley needs that Medicaid won't cover, all on about $2200 a month salary.

But even though the medical card is a godsend, the card only covers half of what Ashley needs. Many items purchased with the card have to be used well beyond their useful lives. One small example of this is the toe probe for her pulse oximeter. The

pulse oximeter is used to monitor Ashley's oxygen levels at night. As you can tell, Ashley has difficulty breathing. The pulse oximeter enables us to make certain Ashley gets enough oxygen during the night. The toe probe for the pulse oximeter is essentially a Band-Aid with a wire. It should be changed at least twice a week, if not more often. As it stands, Medicaid will only pay for two of these probes every month. Who can make two Band-Aids last for a whole month? We have to.

Ashley has many therapists who try to help her with her needs. When her therapists suggest a new therapy or device, we must apply to Medicaid for approval. Medicaid usually takes more than sixty days to make its decision, and normally the decision is to turn down our request. We then have look to other resources, which usually takes another thirty to forty-five days.

Ashley's special needs also make it difficult for us to leave home. Moving her requires extraordinary amount of effort and time, which we do not have a lot of. The few times Ashley has left the house is normally to see her therapists or doctors, or for special occasions such as the hearing today.

In short, the only way Ashley will be able to get everything she needs is for if she wins her lawsuit and receives adequate compensation. The law enacted last year may decrease or even eliminate the possibility of receiving just compensation for Ashley.

I would like to tell you a little more about what we have experienced. Our lives changed dramatically four and one-half years ago. When Ashley was born, she was not breathing, her heart was not beating, the color of her skin was blue, and she did not move. It took nearly 20 minutes to resuscitate her. She was in the hospital for nearly a

month after her birth. For most of that time, she was in the newborn intensive care unit of Wesley Medical Center. Amazingly, before the doctors even knew if she would survive, the staff members of Wesley Medical Center began demanding to know how we were going to pay for Ashley's care, or if we had contacted a lawyer. Then, to make matters worse, 16 days after her birth Wesley Medical Center began "damage control" meetings. The hospital lawyer and risk management personnel met with the obstetrical nurses who cared for Angela during her labor, and after the meeting, late entries were made in the hospital chart about what occurred during a critical period of the labor. Since that time, we believe Wesley Medical Center and others have tried everything they could to cover up what really happened on November 4, 1997. The change in law last year was only another blatant attempt to derail Ashley's case. No one even had the courtesy to contact us about the proposed amendment, even though the law was specifically passed to affect Ashley's case.

The net effect of the law today is to make the taxpayers of Kansas responsible for the expenses associated with raising a severely disabled child. In the last four and one-half years, the taxpayers of Kansas have spent huge sums of money helping us care for Ashley, and that was just for her medical needs.

My wife and I believe that the health care providers responsible for Ashley's injuries should cover the expense of raising Ashley instead of the taxpayers of Kansas. The people responsible for Ashley's condition think the Kansas taxpayers should spend millions of dollars over the next forty to fifty years to provide for Ashley's care. We do not. We believe those responsible for Ashley's condition should compensate her for

her needs, not the taxpayers of this state.

Finally, the bill you're considering would right a wrong – a wrong perpetrated not only on us, or our daughter Ashley, but on you ladies and gentlemen, and the taxpayers of Kansas. This bill would make those responsible for the severe injuries and damages from which my daughter suffers responsible for their actions of November 4, 1997, and not the taxpayers of the State of Kansas.

Thank you Senator Praeger and other members of this committee for allowing me to be heard.

Written only

TESTIMONY

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY J. GREG KITE

PRESENTED FEBRUARY 21, 2002

PROPOSAL FOR LEGISLATIVE CHANGES TO

HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT, K.S.A. 40-3401, et seq.

INTRODUCTION

My name is Greg Kite. I am counsel of record on behalf of the plaintiffs in two (2) of three (3) pending medical negligence/brain-damaged baby cases against resident physicians (employees) of the Wichita Center for Graduate Medical Education ("WCGME"), as well as Wesley Medical Center in Wichita, Kansas. These two (2) cases are: HOLT, et al. vs. WESLEY, et al., U.S. District Court Case No. 00-1318-JAR and RANEY-NEISES, et al. vs. WESLEY, et al., Sedgwick County District Court Case No. 99 C 3157. Thank you Senator Praeger and Committee Members for allowing me to present testimony on SB 420, concerning the Health Care Provider Insurance Availability Act, K.S.A. 40-3401, et seq.

As you know, the Health Care Provider Insurance Availability Act, K.S.A. 40-3401, et seq. was amended last year during the wrap-up session (Senate Bill 366). The actual and practical effect of these changes in the law on the pending legal actions is the subject matter of my testimony.

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LEGISLATIVE BACKGROUND

Plaintiffs' counsel discovered that the intended beneficiaries of this law included only those persons who were actually licensed and engaged in the practice of medicine. Indeed, plaintiffs' counsel was particularly interested in why the Legislature chose the language it did when it amended this law back in 1983. The language that plaintiffs' counsel was interested in was the language, which defined a health care provider to include "a Kansas not-for-profit corporation organized for the purpose of rendering professional services by persons who are health care providers." K.S.A. § 40-3401(f). On previous occasions, counsel for WCGME maintained that WCGME fell within this definition. Thus, counsel was particularly interested in this language. What plaintiffs' counsel learned through additional legislative research was the following:

1. Only "professional" corporations can "render[] professional services" (*See* K.S.A. § 40-4301; *see, e.g., Early Detection Center, Inc. v. Wilson,* 248 Kan. 869, 877, 811 P.2d 860 (1991);

2. The Kansas Health Care Provider Insurance Act was amended in 1982 so that private "professional" not-for-profit corporations could be included under the definition of a health care provider;

3. Bob Hayes testified in favor of SB 870 and explained that the bill "was requested to cover one of the private practice professional corporations" who had "changed its corporate status to a not-for-profit corporation"; and

4. WCGME was not organized as a "professional" corporation.

Now realizing that WCGME did not fall within any definition of "health care provider" under the Kansas Health Care Provider Act, plaintiffs anticipated obtaining a ruling from the court on this issue. However, what plaintiffs' counsel did not know was that counsel for WCGME and Wesley Medical Center had sought out certain Representatives to lobby for a change in the law. This effort occurred during the pendency of these cases, more specifically, during discovery, at the very same time defense counsel was maintaining that WCGME fell within the definition of a "health care provider." Later, after the law was amended, plaintiffs' counsel was informed that defendants had surreptitiously obtained a change in this law.

NET EFFECT

The actual and practical effect to the Holt and Neises families and to the taxpayers cannot be overstated. The newly amended definition of "health care provider" in the Kansas Health Care Provider Act eliminates WCGME's responsibility for the negligence of its employee-residents and shifts this responsibility entirely onto the residents themselves and the taxpayers. Before the change in the law, WCGME was responsible for these residents (along with Wesley Medical Center, who had contractually agreed to indemnify WCGME for any such loss). After this amendment, the individual residents and the taxpayers will bear these costs.

The residents will bear the costs up and to the limits of his or her insurance coverage (and any liability they may have to pay any excess judgment). The remaining costs will be borne by Medicaid, *i.e.*, the taxpayers. Because the amendment is retroactive, the residents in the program will also be unable to buy additional or excess coverage to limit their exposure to an excess judgment. Thus, the only entity to benefit from these changes in the law was Wesley Medical Center.

WRITTEN TESTIMONY

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY PATRICIA DENGLER, COUNSEL FOR

WICHITA CENTER FOR GRADUATE MEDICAL EDUCATION, INC.

PRESENTED ON FEBRUARY 21, 2002

Opposition to S.B. 420, which proposes to amend one section of the Health Care Provider Insurance Availability Act, K.S.A. 40-3414(i)(1) through (3)

Thank you, Senator Praeger and committee members, for allowing this hearing on S.B. 420, which would amend the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq. I am counsel for Wichita Center for Graduate Medical Education, Inc. (WCGME) and I am here to testify in opposition to S.B. 420.

Last year I appeared to testify in support of amendments that we proposed to the Health Care Provider Insurance Availability Act that clarified the status of WCGME, Salina Health Education Foundation (SHEF) and Kansas Medical Education Foundation (KMEF) as "health care providers" and therefore allowed these entities to access the coverage from the Health Care Stabilization Fund. All three entities employ residents, licensed physicians, who care and treat patients under the supervision of attending physicians, so the vicarious liability exemption in the statute, that has been found to be constitutional, then applied to these employers.

WCGME, the largest of the three residency administrative programs, was formed 13 years ago when individual sponsors of residency programs in Wichita joined together to create a community consortium to administer these residency programs. Thirteen years ago, this consortium of private and government entities included the University of Kansas School of Medicine - Wichita (UKSM-W), Veterans' Administration, St. Joseph Medical Center, Wesley Medical Center and St.

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Francis Regional Medical Center. At present, due to mergers and changes in government policies, the members are UKSM-W, Wesley and Via Christi. WCGME does not operate any clinics but it administers 13 residency programs and employs 250 residents. During their residencies, the residents are based at different facilities, including Via Christi and Wesley. Upon completion of the residency programs, approximately 60% of the graduates remain in Kansas to practice medicine.

KMEF is a nonprofit educational foundation that educates medical students and residents through a Family Practice residency program in Topeka. The residency program is sponsored by KMEF and affiliated with the University of Kansas School of Medicine. This year the residency program will end, but the educational program for medical students and the clinic operated by KMEF will continue.

SHEF is a nonprofit educational foundation that operates the Smoky Hill Family Practice residency program in the Salina area. This program is sponsored by UKSM-W. SHEF also operates a clinic.

Following the passage of S.B. 366 during the 2001 legislative session, all three entities paid the statutorily determined surcharge to the Fund, including the amount to bring each entity into compliance with the statute back to July 1, 1997. Although WCGME is the only entity of the three to have been sued as a defendant in medical malpractice cases, all three entities now have the benefit of coverage from the Fund, including the payment of defense costs. This coverage allows these three entities the exemption of vicarious liability for the actions of employed residents or other health care providers. Under the current legislation, with the amendments made during the last session, this status will be in effect for any claims filed alleging medical malpractice that occurred on or after July 1, 1997. Even though the statute of limitations is generally two years for these types of claims, the statute of limitations is eight years from the time of the alleged action for any claims involving those

under 18 years of age. The retroactive effect of the 2001 legislation does not provide coverage or the vicarious liability exemption for any claims that may exist for actions prior to July 1, 1997.

As you will recall, when WCGME, SHEF and KMEF approached the legislature last year with a proposal to amend the Health Care Provider Insurance Availability Act, there was a two-fold purpose. First, to correct a clerical error by the Fund and, second, to clarify ambiguity in the Act as to coverage for these entities as employers of residents who are covered by the Fund and therefore make the coverage consistent with other employers of health care providers.

With respect to the first reason, in 1999 and 2000, WCGME was sued in two medical malpractice lawsuits, along with residents, attending physicians, a hospital, the University and the residency program directors, and accused of negligent supervision and training of the residents. WCGME was informed by the Fund that it was considered to be a "health care provider" so coverage existed for any judgement or settlement and a defense would be provided. The source of this information was a compliance document maintained by the Fund that listed WCGME as being in compliance with Fund requirements. Since 1990, WCGME has paid the Fund the surcharge for the residents' excess coverage. In March, 2001, WCGME was informed that the initial determination of "health care provider" status by the Fund was incorrect due to a clerical error and WCGME was not covered by the Fund. Subsequent to the receipt of that information, WCGME was sued in a third lawsuit, which also alleged negligent supervision and training. This past summer, WCGME was dismissed from that third lawsuit.

WCGME's decision to join with SHEF and KMEF to propose an amendment to the Act was not its first choice at solving this dilemma. Claims were filed with WCGME's Directors and Officers Liability and General Liability carriers. These claims were denied since the actions arose out of medical malpractice allegations and the damages claimed included bodily harm. Attempts were made

to secure commercial coverage for WCGME with malpractice carriers, but those attempts were not successful. Either the coverage was not available since the commercial carriers would not be covering the resident-employees or the coverage was cost-prohibitive. WCGME had never included funds in its budget for medical malpractice defense or damages. Funding from WCGME's members is limited, so the decision was made to seek a legislative solution.

When we reviewed the Act last spring, it became evident that including WCGME, SHEF and KMEF as "health care providers" would coincide with the intent of the legislation and the types of entities already considered to have that status. Further, the statute mandated that the "employers" of persons engaged in residency training had to pay the surcharge to the Fund. In addition, one section of the statute, K.S.A. 40-3404(a) referred to the surcharge being made "upon the employers of persons engaged in residency training". We believed that defining WCGME, SHEF and KMEF as "health care providers" would clear up any confusion. In addition, specifically defining these entities as "health care providers" would create a source of recovery for plaintiffs who might be successful in obtaining a judgment against any of these entities in malpractice cases. This source of recovery was not in existence at the time.

S.B. 420 would eliminate the retroactive effect of the amendments passed last year. We are opposed to S.B. 420 for the following reasons.

First, although we are not arguing the merits of the pending lawsuits, if WCGME is found liable, or these other entities are ever sued and found liable on claims going back to July 1, 1997, there now exists a source of recovery, up to $1 million dollars, for plaintiffs and a source of defense costs, which includes costs for expert witnesses, for these entities to access. Without this retroactive provision, there are no funds. Each of these entities are nonprofit and do not have funds or insurance coverage available. There is a serious risk that these entities would dissolve if faced with a judgment.

This would have consequences for the graduate medical education program in Kansas. In Wichita, for example, the situation would revert to each of the hospitals sponsoring and operating residency programs. The costs for these programs would be higher, for example, because the residents would not be able to access malpractice coverage from the Fund as they do now. The cost savings of the consortium which administers the existing programs would be lost. There would be a reduction in residents educated in these programs so a reduction in physicians available for Kansas and other areas.

From our prior meetings with the supporters of S.B. 420, one of their arguments is that the retroactive portion of the 2001 amendments eliminated their opportunity to reach WCGME through the vicarious liability theory, that is that an employer is responsible for the acts of its employees. The vicarious liability theory is a creature of common law developed through cases. When the constitutionality of the Act was challenged several years ago, the Supreme Court recognized that no one has a vested right to claim recovery under that theory. The Court further ruled that the legislature had the right to change those rules and exempt one health care provider from the vicarious liability of another health care provider's actions if an adequate substitute was provided. In this instance, the adequate substitute was coverage under the Fund for WCGME and the other entities since there was nothing before. If the resident is the actual wrongdoer, there is coverage for the damages under the Fund. This situation is different than most employer-employee situations where the employee normally does not have funds to cover damages. Even if the vicarious liability exemption did not exist, the evidence would still have to prove that WCGME did something wrong and not just through the actions of its resident. In addition, WCGME and the other entities are potentially at risk for other cases involving alleged acts of malpractice prior to July 1, 1997 if minors received the care.

Their second reason for supporting S.B. 420 is that the elimination of the retroactive language

would allow them, if they are successful in their lawsuits, to access some insurance policy maintained by Wesley, through an indemnification clause in the annual agreements between WCGME and Wesley. None of the language in these agreements indemnifies either party for the actions of residents. If WCGME is held liable for actions of Wesley, its employees or agents, then WCGME can seek indemnification. The residents are employed by WCGME, not by Wesley.

Second, WCGME, KMEF and SHEF oppose S.B. 420 because the legislation passed last year, including the retroactive language, places WCGME, SHEF and KMEF in the same position as other employers of health care providers. There is no reason for their status to be different just because they employ residents. Since they are performing an educational function, as opposed to a profit function, the availability of coverage from the Fund is an economic resource that should be available for these entities.

In conclusion, WCGME, SHEF and KMEF join in opposition to S.B. 420. This is not just an issue that involves one family that believes it was damaged by the care and treatment of a health care provider or involves one hospital or one entity or one physician. The effect of the proposed legislation would be contrary to the rationale for the passage of the Health Care Provider Insurance Availability Act passed in 1976 and the subsequent amendments, including those passed last year.

Written Testimony Regarding S.B. 420
To The Senate Financial Institutions and Insurance Committee

By John Gibson
Legal Counsel For Wesley Medical Center
Wichita, Kansas

Presented February 21, 2002

S.B. 420 proposes to amend one section of the Health Care Provider Insurance Availability Act, K.S.A. 40-3414(i)(1) through (3), relating to non-profit corporation that administer Graduate Medical Education Programs

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I. BRIEF HISTORY OF THE NON-PROFIT CORPORATIONS THAT ADMINISTER GRADUATE MEDICAL EDUCATION PROGRAMS.

Years ago, as the physician teaching residency programs became more diverse and complex in Kansas, it became expedient and necessary to create non-profit administration corporations for the purpose of inter alia, providing uniform handling of the residents in the different residency programs, uniform salaries, employment benefits, etc. There are three such non-profit administration corporations, being Salina Health Educational Foundation (SHEF) in Salina, Kansas Medical Education Foundation (KMEF) in Topeka and the Wichita Center for Graduate Medical Education (WCGME) in Wichita. WCGME was created in 1988 to administer all the residency programs at the community hospitals in Wichita. WCGME has proven to be a tremendous asset to the residency program and has been instrumental in attracting high quality residents and providing a smooth administration of the business and employment aspects of the residency programs in Wichita. WCGME is a joint effort between the community hospitals in Wichita and the University of Kansas School of Medicine. For all of the physician residents that receive training in the community hospitals and at the University of Kansas School of Medicine in Wichita, WCGME is the employer for all of the business and employment benefit related aspects of the residency program. The existence and viability of WCGME, SHEF and KMEF are important to the physician education system in Kansas. They all play integral roles in attracting quality residents and retaining those residents as practicing physicians in Kansas. Over 60% of the physician residents that receive their residency training in Wichita remain in Kansas as practicing physicians.

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II. EFFECT OF BEING A HEALTH CARE PROVIDER UNDER THE LAW:

The Health Care Provider Insurance Availability Act (K.S.A. 40-3401, et seq) hereinafter referred to as the "Insurance Act" was originally passed in 1976 by the Kansas Legislature to address problems relating to medical negligence claims and lawsuits in Kansas. The Insurance Act does a number of things, including the requirement of medical malpractice insurance and the granting of certain tort reform benefits for all parties.

A. Provides insurance coverage.

K.S.A. 40-3402 requires that every health care provider in Kansas maintain a policy of professional liability insurance, and provides for excess coverage by the Kansas Health Care Stabilization Fund, which was created by the Insurance Act. The purpose of this was to assure that a fund of money was available behind each health care provider to pay for injuries to patients negligently caused by that health care provider. This innovative 1976 law has proven over the years to be a great benefit to health care providers and patients/claimants. This law requiring insurance coverage has been challenged in court and upheld by the Kansas Supreme Court as legal and constitutional.

B. Provides exemption from vicarious liability.

What is vicarious liability? When one negligently causes injury to another that person can be held liable to compensate the injured person. In certain situations, however, a third person who did not cause injury can also be held liable, vicariously liable, to the injured person. The classic example is the employer-employee relationship. The accepted vicarious liability standard is that if an employee negligently causes an injury while working in the course of his/her employment not only is the employee liable, but the employer is vicariously liable. There are other situations where a third party can be vicariously liable for injury caused by another person.

A provision in the Insurance Act, K.S.A. 40-3403(h), states that a health care provider in Kansas shall have no vicarious liability or responsibility for any injury or death arising from the rendering of health care by any other health care provider. Thus, anyone who is defined as a health care provider will be held liable for their own negligent acts which may injure a patient, and there will be coverage available to pay for such injury, but will not be liable for, or vicariously liable for, injury caused by another health care provider. If a physician is employed by another physician or by a clinic or a hospital and causes an injury, the physician can be held liable for such injury, but the employing physician, clinic or hospital cannot be held liable. This innovative provision of the law also has proven to be valuable to the health care system over the years. It also has been judicially challenged and upheld as legal and constitutional.

III. THE EFFECT OF THE 2001 LEGISLATIVE CHANGE.

In early 2001, the director of the Kansas Health Care Stabilization Fund determined that WCGME may not actually be covered under the Insurance Act. Legislation was passed in 2001 that clarified that the non-profit residency program administrator corporations were to be clearly defined as health care providers, and that such definition would be effective as of July 1, 1997.

A. Provides $1 million coverage to each non-profit Residency administrator corporations.

The primary effect of the legislative change is to assure that each of the administrative corporations has $1 million coverage behind them to pay for any liability they may have to injured patients. This is simply a codification of the original legislative intent that all persons and entities involved in the health care process be covered. The most obvious benefit of this is that injured patients are provided protection by the insurance covering these administrative corporations, including WCGME in Wichita. If they are held liable they will have at least $1 million of coverage to pay for such liability. The 2001 legislation also serves to protect the University of Kansas School of Medicine, and the community hospitals, all of whom deal with the non-profit administrative corporations. Their protection is provided by the fact that WCGME has its own coverage and can stand responsible for its acts.

B. Provides vicarious liability protection.

Another effect of the 2001 legislative change is that the non-profit residency administrator corporations are provided with the vicarious liability exemption protection. This means that, for example, WCGME, SHEF and KMEF as employers of residents will not be held liable for the negligent acts of the residents if a patient is injured. The residents are liable for their own acts and are provided $1 million coverage for their acts. While the non-profit corporate administrators remain liable for their own acts and are afforded $1 million coverage to pay for those acts, as health care providers they are not vicariously liable for the acts of their employees, the resident physicians.

IV. EFFECT ON TWO WICHITA CASES - Holt and Raney-Neises

In both the Holt and Raney-Neises cases, pending in Wichita, residents have been sued, the University of Kansas School of Medicine has been sued, WCGME has been sued, Wesley Medical Center has been sued, and the physician program directors have been sued.

A. Provides $1 million coverage not otherwise available for WCGME liability.

In the lawsuits it has been alleged that WCGME is liable for injury to the plaintiffs as a

result of alleged improper supervision of the residency programs. The first and most obvious effect of the 2001 legislation is that it assures there is $1 million of coverage backing up WCGME to pay for any liability that is assessed in either case. Absent the 2001 legislative change, no coverage is available to WCGME. WCGME is a corporation without assets, and without the coverage provided by the 2001 legislation there would be no funds available for WCGME to pay for its liability. Thus, the 2001 legislative change affords a tremendous benefit to the plaintiffs in the Holt and Raney-Neises cases.

B. Does not deprive plaintiffs right to recover from liable parties.

A reading of the Amended Petition in the Raney-Neises case, and the Amended Complaint in the Holt case, indicates that the plaintiffs are seeking recovery from a number of different defendants for their individual acts. Under the law, as amended in 2001, each and every one of those defendants are responsible for their acts of negligence that are proven, and each and every one of those defendants have behind them at least $1 million of coverage provided via the Insurance Act. In neither of the lawsuits have the plaintiffs raised an issue that they are in some way harmed by the passage of the 2001 legislative amendments. They have not claimed that any of the defendants, if found liable, would be unable to pay for such liability. They have not claimed in court that the 2001 legislative amendments are improper or are in any way injurious to them.

It is my understanding that the plaintiffs in the Holt and Raney-Neises cases are the catalysts for the introduction of Senate Bill 420, to repeal the actions taken last year. It is my understanding that they oppose the vicarious liability exemption on the theory that without the exemption WCGME, as employer, will be liable for any judgment against the residents. The plaintiffs then apparently will say that a contractual indemnification agreement between Wesley and WCGME will cause Wesley to be responsible for the WCGME liability. There is no support for the proposition that the indemnification agreement would serve to transfer liability from the resident ultimately to Wesley Medical Center. If this is true, then the original intent of the Legislature that one health care provider not be vicariously liable for the acts of another health care provider is not followed. However, the indemnification does not serve the purpose plaintiffs apparently feel it does, see attached indemnification provision, and accordingly the apparent purpose of the Wichita plaintiffs in proposing the instant legislation is mooted. The indemnification agreement clearly states that Wesley will indemnify WCGME for any activities of Wesley. If the liability of WCGME arises from WCGME's own acts or own contractual obligations, then Wesley is not liable for indemnification. In these two cases any liability that WCGME has as the employer of the residents has nothing to do with acts by Wesley, and the indemnification does not apply. Accordingly, for plaintiffs to take the position that the 2001 legislation deprives them the opportunity to obtain funds from Wesley is incorrect.

Any responsibility that Wesley Medical Center has to WCGME by virtue of the indemnification agreement exists regardless of the 2001 legislation or the legislation now being

proposed. Accordingly, if that indemnification clause is the basis for plaintiffs to seek legislative changes, there is no need. Legislation, last year's and the current legislation, do not affect the indemnification in any manner whatever.

In conclusion, the benefits to injured patients and potential injured patients, and the benefits to the health care system, are much better served, and the original intent of the legislature is fulfilled, by leaving the 2001 amendment intact, and not passing S. B. 420.

notified of residents who are added to or deleted from the list of active WCGME residents.

The Member Institution shall indemnify, defend and hold WCGME harmless from any and all costs and liability of whatever kind and character to the extent of the Member Institution's coverage for losses, actual or claimed, to persons or property, arising by virtue of activities of the Member Institution, its employees, agents or servants. WCGME shall promptly notify the Member Institution of any claims involving the Member Institution.

Nothing in this Agreement shall constitute a waiver of the right of WCGME, which may exist in the absence of this Agreement, to recover from the Member Institution or a member of its medical staff in the event any liability for damages is imposed upon or claimed against WCGME as a result of the acts or omissions of the Member Institution, its medical staff or its employees.

WCGME shall indemnify, defend and hold Member Institution harmless from any and all costs and liability of whatever kind and character to the extent of WCGME's coverage for losses, actual or claimed, to persons or property, arising by virtue of activities of WCGME, its employees who are not residents enrolled in the Program, agents or servants. The Member Institution shall promptly notify WCGME of any claims involving WCGME.

13. WCGME shall maintain in force and effect at all times the following insurance coverage:

a. Workers' Compensation Insurance.

TESTIMONY Written only

TO THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

BY BRAD MARPLES, M.D.

PRESENTED ON FEBRUARY 21, 2002

S.B. 420

PROPOSAL FOR LEGISLATIVE CHANGES TO

HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT, K.S.A. 40-3401 et seq

My name is Brad Marples, M.D., I am the Executive Director for the Kansas Medical Education Foundation (KMEF). KMEF is a not-for-profit Kansas corporation. The sole purpose of the corporation is to administer medical education in Topeka. Thank you Senator Praeger and Committee Members for allowing me to speak in opposition to the proposed changes to the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq. in Senate Bill 420.

The Kansas Medical Education Foundation (KMEF) administers the family practice residency program in Topeka, which is funded by Stormont-Vail Regional Medical Center and St. Francis Medical Center and affiliated with the University of Kansas. KMEF is provided professional liability coverage and defined as a "health care provider" through S.B. 366. KMEF pays into the Health Care Stabilization Fund for excess coverage.

If S.B. 420 is passed, it would jeopardize coverage for potential claimants against KMEF as well as WCGME and Salina Health Education Foundation (SHEF). The Topeka Family Practice

Senate Financial Inst. & Insurance
Date: 2-21-02
Attachment No. 10

Residency Program physicians practice obstetrics and pediatrics. Any medical care provided between 1997 and 2001 which might result in a future malpractice suit would not be covered if S.B. 420 is passed. KMEF would, in effect, "go bare" for malpractice insurance coverage.

Conclusion

This is more than a Wichita based issue. I urge you to vote against S.B. 420 for the good of potential claimants throughout the state.

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