Approved: 3-29-06
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 16, 2006 in Room 313-S of the Capitol.

All members were present except:
Jim Ward- excused
Michael Peterson- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Senator Greta Goodwin
Chief Dan Givens, Arkansas City Police
Senator Jean Schodorf
Chief Norman Williams, Wichita Police Department
Lt. Jeff Easter, Wichita Police Department
Kyle Smith, Kansas Bureau of Investigation
Rex Beasley, Office of Attorney General
Representative Sydney Carlin
Rocky Nichols, Disability Rights Center
Robert Collins, Kansas Taxpayers Against Fraud
Michelle Sweeney, Association of Community Mental Health Centers
Kathy Lobb, Advocate Collation of Kansas
Tom Laing, Interhab
Jerry Slaughter, Kansas Medical Society
Bob Day, Division of Health Policy & Finance
Gary Daniels, Secretary of SRS
Jane Rhys, Kansas Council on Developmental Disabilities
Jennifer Schwartz, Kansas Association of Centers for Independent Living

Chairman O'Neal opened the hearing on **SB 180 - preliminary screening tests for alcohol consumption by minors**.

Senator Greta Goodwin, appeared as the sponsor of the bill which would amend the crime of unlawful possession, consumption, or purchase of alcoholic liquor or cereal malt beverages by a minor to allow the use of preliminary screening tests of a minor's breath by law enforcement. (Attachment 1)

Chief Dan Givens, Arkansas City Police, appeared as a proponent of the bill. It would provide that a law enforcement officer may request a person under the age of 21 submit to a preliminary breath screening to determine if alcohol has been consumed and determine if the officer has reasonable grounds to believe that the individual has alcohol in their body. (Attachment 2)

The hearing on **SB 180** was closed.

The hearing on **SB 458 - criminal street gang prevention act**, was opened.

Senator Jean Schodorf requested this bill because of the City of Wichita's concern with the increasing problems of gang activities. The bill creates new crimes for recruiting criminal street gang membership and criminal street gang intimidation. It would also establish a $50,000 minimum bail for street gang members who have been arrested for either of the crimes. (Attachment 3)

Chief Norman Williams, Wichita Police Department, stated that it is important to provide help for those who want to get out of gangs and live a better life. This bill would hopefully stop the intimidation that goes on when a member request he be allowed to withdraw from the club or has terminated his membership. (Attachment 4)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 16, 2006 in Room 313-S of the Capitol.

Lt. Jeff Easter, Wichita Police Department, commented that every community has some type of gang activity. This bill would help stop the gangs recruiting, especially those who are young. Approximately 15 other states have some type of similar legislation. (Attachment 5)

Kyle Smith, Kansas Bureau of Investigation, explained that while the bill is not as strong as they had hoped it was an excellent step toward fighting gang violence and they support it. (Attachment 6)

Chairman O'Neal opened the hearing on **SB 342 - obstruction of medical fraud investigation & forfeiture of proceeds**.

Rex Beasley, Office of Attorney General, appeared in support of the bill which creates the new crime of obstruction of a medicaid fraud investigation and expand the Kansas Standard Asset Seizure and Forfeiture Act to cover the crime of Medicaid fraud.

The crime of medicaid fraud would include: falsifying, concealing, or covering up a material fact or making or causing any materially false writing or document. It would be a severity level 9, nonperson felony. (Attachment 7)

The hearing on **SB 342** was closed.

The hearing on **SB 326 - civil penalties for false claims against the state**, was opened.

Representative Sydney Carlin appeared as the sponsor of the bill. She explained that the bill creates a civil cause of action against any person who knowingly submits or benefits from fraudulent medicaid claims. It would also create civil penalties and trebel damages for violators. Any person who violates the act and within 30 days reimburses the state and cooperates with the investigation would not subject to criminal prosecution or the civil penalties but would be required to pay twice the amount of damages sustained by the state. (Attachment 8)

Robert Collins, Kansas Taxpayers Against Fraud, stated that if the state passes a false claims act it would be eligible to receive up to 25% of a federal match. (Attachment 9)

Rocky Nichols, Disability Rights Center, appeared with concerns on the bill but would support it if the balloon he provided was adopted. (Attachment 10)

His concerns were as follows:

- community based services operated by the state would be restricted in providing services to meet unique needs of those requesting their services
- section 2 (a)(2) gives medicaid state plan and the provider manuals the force and effect of the law when one does not fully comply with federal or state law

Rex Beasley, Office of Attorney General, remarks mirrored those of Senator Schodorf. He worked with the Disability Rights Center to reach agreements on the balloon. He believes it will strengthen the state's ability to prosecute fraudulent acts while also recognizing that mechanisms exist to legally protect the state's responsibility to provide medically necessary individualized services to Kansans with disabilities who are eligible for medicaid. (Attachment 11)

The following conferees were all concerned with the effect section 2 would have on state employees and officials in the performance of their daily job responsibilities:

Michelle Sweeney, Association of Community Mental Health Centers (Attachment 12)
Kathy Lobb, Advocate Collation of Kansas (Attachment 13)
Tom Laing, Interhab (Attachment 14)
Gary Daniels, Secretary of SRS (Attachment 15)
Jane Rhys, Kansas Council on Developmental Disabilities (Attachment 16)
Jennifer Schwartz, Kansas Association of Centers for Independent Living (Attachment 17)

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.

Jerry Slaughter, Kansas Medical Society, believes that the proposed bill is unnecessary because Kansas has ample tools to prosecute these type of cases under the Federal False Claims Act. (Attachment 18)

Bob Day, Division of Health Policy & Finance, informed members that Kansas processes 40,000 medicaid claims a day and reimbursements are in excess of $2 billion dollars. Filing claims with errors occur for anyone filing a claim and requested that they have discretion as to determine which ones are legitimate claims. (Attachment 19)

The hearing on **SB 326** was closed.

The committee meeting adjourned at 6:00 p.m. The next meeting was scheduled for March 20, 2006

STATE OF KANSAS

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TOPEKA

SENATE CHAMBER

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JUDICIAL COUNCIL JUVENILE OFFENDER/ CHILD IN NEED OF CARE
CHILD SUPPORT GUIDELINES

DECISION OF THE COURT
ARKANSAS CITY MUNICIPAL COURT
CASE #:2003-72762
April 27, 2004

K.S.A. 8-1012. If the person submits to the tests, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the test authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or part of the results of a preliminary screening test. Such result shall not be admissible in any civil or criminal action excepting to aid the Court or hearing officer in determining a challenge to the validity of the **arrest** or the validity of the **request** to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto" (emphasis added). From Kansas cases, the Court finds no help.

"As a Judge, how do I ignore a clear statutory provision stating that results of the PBT shall not be admissible in any civil or criminal action except to aid the Court or hearing officer in determining the challenge of validity of the arrest? As a Judge I cannot rewrite the Law. This job is in the hands of the Legislature."

"I have not taken the position that K.S.A. 8-1012 is a good law but it is still the law and as a Judge I must follow it. It is not the Court's duty to rewrite the Law, but to follow it. If the use of the PBT results at trial is as important to Law Enforcement as they believe, then an effort should be made through our elected officials in Topeka to change the law."

CITY OF ARKANSAS CITY

POLICE DEPARTMENT

DANIEL N. GIVENS
Chief of Police

SEAN E. WALLACE
Captain

March 15, 2006

House Judicial Committee
RE: Senate Bill 180

Dear Honorable Representatives:

I have asked our local Senator, Greta Goodwin, to draft Senate Bill 180, in hopes of tying up a legal loophole that restricts Law Enforcement Officers from enforcing under-age drinking laws. I can assure you that if this was not very important to the Arkansas City Police Department and to Law Enforcement Officers across the State, I would not take up your time and I will try to be brief in explaining why we need to make this change and how it affects Law Enforcement Officers throughout the State.

Under KSA 8-1012, you our lawmakers have drafted a law, which states that a Law Enforcement Officer may not bring into evidence a preliminary screening test device, either in Civil or Criminal actions. I know, and you know, that Kansas' lawmakers intentions on that were directed towards DUI, to which we use the PBT for probable cause, only, to make an arrest. We then use either blood or the Intoxilyzer 5000, which have been accepted by the State of Kansas. I do not want to change that in any way, shape or form. However, Kansas' lawmakers' oversight in stating that has handcuffed Law Enforcement Officers in using those important preliminary screening test devices in order to enforce your Kansas Law KSA 41-727.

Kansas drunk driving prevention winter addition, volume 6, issue 1 brings to the forefront Law Enforcement's important responsibilities enforcing underage drinking laws. It also asks law

Working together we CAN make a differen

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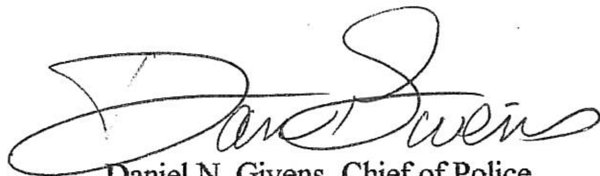
House Judiciary
Date 3-16-06
Attachment # 2

makers to take seriously any efforts to close loopholes to keep underage drinking from occurring. This is exactly what we are asking you to do. I don't have to tell any of you the deadly statistics that we see in our State and in our Country from underage binge drinking and from underage drunk driving. Just the mere fact that we lose 14 teenagers every day, 7 days a week, 365 days a year, due to alcohol related accidents, should be enough to make this bill important to anybody who is addressing the issue.

This Senate Bill 180 is especially important to Law Enforcement agencies like the Arkansas City Police Department and dozens of other Law Enforcement agencies around the State of Kansas, which have community colleges and 4 –year colleges in their Communities. As with other communities, the Arkansas City Police Department takes underage drinking very seriously and works hard to enforce the underage drinking laws. It's extremely disappointing to Law Enforcement Officers and Administration when attorneys compare notes and use the loophole that was, I'm sure, an oversight by good lawmakers in KSA 8-1012, to throw out enforcement of underage drinking laws under KSA 41-727. It's become a known fact in our Community, due to some good defense attorneys, that this loophole exists. Due to this loophole in KSA 8-1012, several good MIC (Minor in Consumption) citations have been overturned in Court, handicapping our efforts to enforce underage drinking laws in the State of Kansas. When asking local judges to use common sense on the bench in our Community, they simply referred me to changing the law, not asking them to divert from the law.

Please take this Senate Bill 180, as drafted by Senator Goodwin, seriously and assist us in keeping young adults safe from underage drinking.



Daniel N. Givens, Chief of Police
Arkansas City Police Department
Arkansas City, Kansas

DNG/mkh

STATE OF KANSAS

JEAN KURTIS SCHODORF
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Testimony on SB 458
Presented to House Judiciary Committee
March 16, 2006

Wichita and other areas of the state are experiencing a resurgence of criminal gang activity similar to the early 1990's. Last April, the Wichita Police Department began holding informational meetings about this activity in an attempt to educate the public about criminal gang activity and the increasing problem of recruiting younger and younger children into gangs.

After attending such a meeting at my daughter's high school, North High, I was visiting an elementary school the very next day. As I was walking into the school behind a third grader and his mother, the boy, who was behind his mother, flashed a gang sign to another student down the hall. I would not have been able to identify it as a sign had I not attended the meeting. I don't know if this third grader knew what it meant, but it was definitely a gang sign. I then mentioned it to the secretary and she had me tell the principal about the incident.

After that incident I learned that the Wichita Police Department wanted to have legislation introduced to help students get out of gangs and to be able to use such legislation as an additional tool in this fight against gang violence.

At our annual South Central Delegation meeting in January, the City of Wichita and the Wichita Police Department presented their agenda and this bill along with one other was their number one legislative priority. Lt. Jeff Easter, of the gang unit, researched other state statutes and wrote this legislation with advice from the Law Department at the city of Wichita.

This bill creates two crimes, recruiting and intimidation, and puts into statue certain definitions regarding what a criminal street gang is and characteristics of members of a street gang. Senator Petersen and I have been working on this bill as well as Representative Brunk on the House side. It has been adopted as a delegation bill.

This bill passed the Senate 40-0 and we are asking your favorable consideration for SB 458.

Jean Schodorf
Dist. 25

House Judiciary
Date 3-16-06
Attachment # 3

Gang Plan 2004

March 31, 2004

GANG PLAN
2004

Abstract

During the summer of 2003, the citizens of Wichita and the Wichita Police Department saw a moderate resurgence in gang activity throughout the City. Crimes - which are symptomatic of gang membership such as drive-by shootings, weapon possessions, drug offenses, and aggravated assaults - showed modest increases in 2003.

In response to this increased activity, Police Chief Norman Williams ordered a review and revision of the department's successful "drive-by shooting task force" which was operational in 1996. Though the scope and personnel commitment to the "task force" would be unnecessary for 2004, the Chief nonetheless instructed subordinate personnel to have a "gang plan" in place before the summer of 2004. In response to the Chief's request, the Field Service Division, with aid from the Gang Unit, formed a response based upon the SARA model of problem solving currently used by the police department to attack long term challenges within the community. The model is outlined as follows:

- *SCAN – a historical review and statement of the situation*
- *ANALYSIS – survey information, community dialogue, and statistical analysis*
- *RESPONSE – a multifaceted action plan*
- *ASSESSMENT – performance measures that will be used to measure success in 90 days*

Field Services will present a report to the Chief of Police by October 1st, 2004, detailing any success, failure, or challenge regarding the proposed plan.

SCAN PHASE

In Wichita and the majority of communities throughout the United States, gang activity is a constant presence. Street gangs throughout the country have inspired movies, music, and fashion trends. As is often the case, sometimes art imitates life and sometimes life imitates art. Regardless, street gang lifestyle is still very appealing to certain factions of youth.

The actual scope of the gang problem in Wichita is complex and difficult to quantify, due to under-reporting by frightened victims. Wichita has seen a decrease in serious gang related violence, as have many other communities throughout the United States. Even with this reduction, there are still too many neighborhoods where the fear of gangs is justifiably pervasive. This warrants law enforcement agencies to continue to devote substantial resources to combat gang crime.

Gang lifestyle is a very high-risk lifestyle. Gang members are involved in many crimes that not only benefit the individual gang member, but also the gang as a whole. Crimes that are reported as most prevalent among gang members throughout the nation are Larcenies, Aggravated Assaults and Burglaries (Office of Juvenile Justice and Delinquency Prevention, November 2000).

As in most major cities, Wichita has seen cocaine use and violent crime associated with the gang presence escalate during the past decade. Many individuals have fallen prey to the use and/or sale of crack (cocaine base) marketed through the gang drug organization. Crack cocaine fuels the gang economy and is one of the driving forces behind the deterioration of both the quality of life and perception of safety in the City of Wichita. The gang philosophy of crack distribution involves large (kilo) quantities of crack being immediately dispersed to dozens of dealers. This distribution method reduces the quantity of each individual drug confiscation substantially coupled with this fact is the transitory nature of the street-level gang drug dealers, who may only deal in any house or location for a period of days before moving on.

The exceedingly violent period, beginning in 1989, associated with the evolution of criminal street gangs in the City of Wichita has followed the historical development of gangs in other major cities. The general public has now articulated the desire to suppress the violence and eliminate the gang activities in our city.

ANALYSIS PHASE

Department personnel used a two-prong approach to analyze the issue of gang impact on our community that would help to formalize a set of response plans. The statistical packet regarding gang related numbers and crimes is attached to this document (see attachment A). Wichita Police also hosted a number of dialogue meetings with citizens, students, and other law enforcement personnel to determine what their perceptions are regarding the gang problem and to help formulate a response plan. In each session, two basic questions were asked:

- What is the police role in dealing with gangs?
- What is the community role in dealing with gangs?

After these questions were asked, department personnel manned flip-charts and wrote down suggestions or ideas from the group. A field service captain or division chief served as the scribe for this session.

We initially met with the community on March 29, 2004. Over 30 citizens attended and gave excellent input regarding the issues set forth (roster for this meeting – attachment B). After this meeting, a follow-up gathering was called on April 19, 2004, and the plans and suggestions were ranked (attachment C), finalized, and presented (roster for this meeting – attachment D).

Additionally, two meetings were held to collect data input from middle and high school students from the area. The first meeting was held at Southeast High School on April 29, 2004, and the second was held at Northwest High School on May 6, 2004. A similar format was followed and the youth gave input regarding the two questions posed above (rosters from these meetings – attachment E).

Finally, a meeting was held on May 12, 2004, that was attended by every Community Police Officer, SCAT Officer, and SRO on the Wichita Police Department. The same two questions were asked during this meeting followed by 90 minutes of dialogue and ideas.

The compilation of all meetings and surveys was compiled into an action plan document that is summarized into areas of prevention & intervention, suppression, and long term solutions. Following are the overall goals regarding this effort through community, youth, government and civic partnership:

* *"Reduce criminal activities that impact our neighborhoods that are associated with gang members".*
* *"Partner with the community/neighborhoods to prevent illegal gang activities in neighborhoods".*
* *"Partner with civic and youth organizations to develop and implement intervention programs for high-risk youth".*
* *"Partner with various government agencies in providing intelligence and monitor to proactively address the re-entry of gang members into the community".*

RESPONSE PLANS

Prevention and Intervention Actions

1. All neighborhoods which are impacted by gang crime will work to initiate or reinvigorate a neighborhood watch within their block.
2. Neighborhoods will work to educate themselves regarding gang activity; this will be achieved with update presentations from Lt. Ramzah, Lt. Speer, and members of the neighborhood SCAT teams.
3. The Department will build a "DARE type" program that talks to the issue of gangs; this program will be presented to youth during summer activities and by the SRO's next school year.
4. Citizens will commit to increased "ride-alongs" with police officers who ride in areas of high gang activity.
5. The police department will examine the feasibility of a police "explorers program".
6. The Gang Unit and Janet Johnson will create a media education session regarding gang crimes for our local media.
7. The community will form a permanent "gang coalition" committee that will receive frequent updates regarding gang activity. ***
8. SRO's will plan a joint education meeting involving USD 259 parents & students, gang unit officers, and the District Attorney's.
9. The gang unit will develop and information curriculum regarding gang graffiti and "how to read it".
10. Both the community and SRO's will identify two students or children who are "high risk" concerning gang membership. Each entity will then provide mentorship to the youth.
11. The Department will review changing shift times so that officers will be more available in the hours right after school for intervention.
12. The gang unit will reinvigorate the tattoo removal program.
13. A youth "train the trainer" program regarding gang activity will be promoted in the middle and high schools next school year.
14. There will be increased communication between SCAT and CP officers and church official regarding gang activity in local neighborhoods.
15. Review and coordinate with other government agencies to increase summer employment opportunities for youth in the community.
16. Coordinate with "re-entry" facilitators regarding juvenile offenders.

Suppression Actions

1. Target KNOWN gang members and conduct selective enforcement efforts after legal violations – **there will no random stops, driver's license check points or "weapons" check points.**
2. Identify 8 main KNOWN gang targets and assign each one to a gang officer for special monitoring.
3. Monitor areas which become "hot" regarding gang activity – increase patrols in these areas when an increase is noted; conduct legal and valid stops when appropriate.
4. Provide a block of supervisor training regarding:
   a. 911 calls dealing with gang incidents
   b. how to handle gang crime witnesses
   c. reasonable suspicion and probable cause case law and table top exercise
5. Increase communication and interaction with INS and the State parole office.
6. Create a true "gang hotline" for citizens to call in tips.
7. Increase activation of mounted unit in hot gang areas such as Old Town or the Radisson Hotel area.
8. Review the addition of more drug sniffing dogs.
9. Provide digital cameras for field officers to assist in tracking and monitoring gang members.
10. Review the splitting of the gang unit away from felony assault so that gang unit can concentrate more on gang members.
11. Review SCAT directive and modify if appropriate.
12. Create a budget for unmarked cars to assist in monitoring gang activity.
13. Create a SCAT rotation with the gang detectives and provide other training opportunities for SCAT officers to aid in gang enforcement.
14. Solicit more involvement from TOPS officers to aid in gang enforcement.
15. Create a gang section for the "beat books" with contemporary gang information.
16. Review laws that would enable greater suppression efforts such as recent California law that bars street gang members from associating with one another after certain convictions.

Long Term Initiatives

1. Continue emphasis on diversity hiring.
2. Increase police resources over the next 5 years so that public safety initiatives can be maintained.
3. Create a tighter partnership network with nonprofit groups such as Big Brothers/Big Sisters, Boys and Girls Club, etc. so that at risk youth are serviced and steered away from the gang lifestyle.

ASSESSMENT PHASE

Citizen Surveys

The citizen group who convened to discuss and create this plan will be reconvened no later then December 1, 2004. During this meeting, the police department will provide a survey so that citizens can rate our success (or lack of success) regarding the aforementioned strategies.

Student Surveys

All students who assisted with the creation of this plan will be reconvened to discuss strategies implemented over the summer. A survey will be provided.

Officer Surveys

All SRO's, SCAT and CP officers, along with a sample of beat officers, will be surveyed regarding the department efforts with this gang plan.

Crime Analysis

A comprehensive review of summer crime analysis, the same as provided in this document will be reviewed to determine if the gang problem as increased or decreased during the summer months of 2004.

CONCLUSION

Gang violence and crime is a manifestation of gang membership. Crimes such as drive-by shootings, drug & weapon violations, and assaults are symptomatic in relation to the root problem of gang membership.

According to recent statistics, gang membership in the Wichita community is dominated by ethnic groups – 3 out of every 4 registered gang members belong to an ethnic group – a number not representative of the general population of the larger community. In the first half of 2004, the Wichita Police Department has been involved in a racial profile study which calls for data collection on every stop by police in the field. This dynamic adds challenge to compiling a reasonable gang plan. Increased suppression efforts that involve extra stops, patrol, etc. in areas frequented by gang members will skew the racial profile study numbers. All groups (citizens, students, and police) were sensitive to this issue and agreed that all suppression efforts need to be closely monitored so that individual rights are not infringed upon. The hope is that this gang plan will not only reduce the symptomatic criminal problems associated with gang activity, but will more importantly address the issue reducing gang membership by youth. This will only occur through partnership between citizens (private and business) and police.

TESTIMONY

City of Wichita
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Norman D. Williams
Wichita Chief of Police

Senate Bill 458
Street Gang Prevention

March 16, 2006

The City of Wichita supports Senate Bill 458. The City of Wichita is requesting this legislation to help the Wichita Police Department and other law enforcement agencies in the state of Kansas combat gang violence and recruitment.

In 2004 and 2005 Wichita experienced a resurgence of gang violence, particularly involving juveniles between the ages of 14 and 17. These juveniles have been involved in multiple and various crimes that impact the quality of life of our citizens and instill a sense of fear and trepidation in our community.

On January 14, two 15-year-old gang members fired multiple shots at a Kansas Highway Patrol Trooper, who had one of their friends pulled over on a car stop. Four days later, Wichita police discovered this same gang's graffiti on a building in Wichita that read **"187 Wichita PD"** This graffiti tagging, done by the Vato Loco Boys (VLBs) was a direct threat to kill a police officer. The "187" is the penal code in California for murder, and whatever noun follows in the tagging represents the intended target. Gang members already have an inherent belief that their lives will be short- lived and they have no respect for, or fear of, law enforcement officers. They also have little regard for average citizens, and place little value on human life.

A short two weeks later, on January 28, a member of the Buc Lao Killers gang, opened fire in Old Town in Wichita with more than 20 citizens present. He then attempted to fire his weapon at police and fled in his vehicle. He was arrested a short time later, booked into jail, yet in less than a week was out of jail on bond.

On January 31, a group of high school students and young people, some of who were Crips and Blood gang members, engaged in a shoot-out at the intersection of Zimmerly and Apache near Southeast High School in Wichita over the lunch hour. This was the fourth time in a 10-day period that the two groups had clashed in violence. Wichita Police made their first arrest in the case the next day when a 17-year-old was taken into custody. This young man reported that he grew up in a "gang family"; and he purports he was "jumped in" (initiation involving physical beating) to gang life when he was 12-years-old. He has five brothers and four sisters; his two older brothers are well-known gang members and are currently guests of the Kansas Department of Corrections. His other two brothers are only seven and eight years old, but unless something changes we fully expect them to become gang members.

These incidents cover only a two-week period. The Police Department and the Wichita community deal with these types of incidents on a daily basis.

No community in Kansas is immune from gang presence. Gang members, because of their associations, have a built-in network and are very mobile and transitory, often traveling to other Kansas communities to hide after committing crimes. In the January 31 shooting I just talked about, one of those suspects was located hiding out in a house in Hutchinson with one of his fellow gang members who had recently been paroled there.

In a more tragic example, members of the Asian Boys gang stormed in a home on May 25, 2001, and opened fire on a family living there. An 18-year-old resident was fatally wounded in the exchange of gunfire, and the assailants, a 19-year-old and a 16-year-old immediately left Wichita and headed to Salina. Ultimately they

House Judiciary
Date 3-16-06
Attachment # 4

apprehended and convicted for their crime. In 1997, Chester Jamerson, a Crip gang member, com[illegible]d a double homicide killing two Blood gang members in Wichita and then fled to Topeka.

Often gang members on the lam flee to neighboring states, traveling through various Kansas communities. In 1998 Oscar Torres, VLB gang member, killed eight-year-old Tony Galvan. He was booked into jail, made bond, and then fled. In 2005, he was located in Mexico, but is currently fighting extradition. The Galvan family waits for justice to be served. In 2004 David Pope, a member of the Junior Boys, murdered Tellus Colvin and then fled to Oklahoma City; in 2005 Demarco Colbert, a Crip gang member, killed Lazetta Smith and then fled to Tulsa, Oklahoma. The list goes on and on.

And there always remains the threat of new gangs moving into our state. In 2005, we documented two graffiti instances that have been identified as MS-13 taggings. The MS-13s are a very violent gang comprised of illegal immigrants from El Salvador that originated on the West Coast. They migrated to the East Coast and are now establishing a presence in the Mid-West. In 2004, the Virginia State Legislature was forced to pass new legislation to deal with this one street gang. (see attached article)

Because Wichita has always been on the cutting edge in addressing gangs and gang violence, our Department members are considered experts and are often called upon to assist, collaborate with, and/or provide training to other agencies. I have attached a list of those agencies.

Proposed Senate Bill 458 is just one facet of the Wichita Police Department's effort to proactively stem the tide of gang violence. Its purpose is to enhance the safety and well being of citizens and visitors throughout the state of Kansas by taking an aggressive approach to gang violence and recruitment. This proposed legislation would enable law enforcement agencies throughout Kansas to:

- Make gang members more accountable for their violent actions, and to penalize them for recruiting others into the gang, particularly our children. Throughout the state we are seeing an increase in the aggressive recruitment by gang members of young, impressionable children.

- Prevent witness and victim intimidation by gang members that have been arrested. Often times, the gang member is released on bond before the victim or witness has appeared in court to testify. This makes retaliation by gang members' all the more probable.

- Prevent retaliation by gang members against persons that are trying to get out of gangs and build a better life.

Law enforcement has an obligation to proactively address gang violence, and a responsibility to protect life and property in our communities. Proposed Senate Bill 458 would provide law enforcement officers with another tool to protect our communities and our children. All of us, including law enforcement, citizens, civic organizations, churches, etc., must work together to protect our cities from gang violence.

Your support of Senate Bill 458 is appreciated.

Gangs In the Wichita Community

Facts and Figures

- Individuals must meet stringent criteria before becoming "documented" gang members
- Currently in Wichita there are approximately 1,900 "documented" gang members.
- There are approximately 60 different gangs or "sets" of gangs in the Wichita area.
- There are 141 documented gang members, (seven percent of the total number) that are 17 or younger.
- An additional 147 youth between the ages of 13 and 17 are documented as gang "associates" because of their close ties to gang members.
- In 2005 there were 37 drive-by shootings where the victims or suspects were juveniles.
- At least once a month in 2005, gang detectives worked a case where victims/witnesses, or their family members, were threatened or assaulted by gang members prior to trial.
- In 2005, 194 new gang members were documented. This was up from 84 in 2004 and 67 in 2003.
- More than 140 guns were seized from gang members in 2005.
- WPD arrested more than 460 documented gang members in 2005.
- The WPD gang database is audited every year for accuracy. If a documented gang member cuts gang ties and has no negative police contact or gang activity for a period of three years, he/she is removed from the database.

Agencies that WPD has worked with on gang issues

All of the surrounding cities, towns and communities in the Wichita metro area
Federal Bureau of Investigation
Alcohol, Tobacco and Firearms
Office of Special Investigations - Air Force
Criminal Investigation Division - Army
Naval Criminal Investigative Service - Navy
Drug Enforcement Agency
Internal Revenue Service
Office of Inspector General – Social Security Administration
Immigration and Customs Enforcement
State and Federal parole and probation
US Postal Inspectors
US State Department
INTERPOL
Houston, TX
Los Angeles, CA
Los Angeles County, CA
San Diego, CA
San Diego County, CA
Phoenix, AZ Police
Denver, CO Police
Dallas, TX Police
Ft. Worth, TX Police
Garland, TX
Texas Rangers
Texas Dept. of Public Safety
Oklahoma Bureau of Investigation
Las Vegas Metro
Kansas City, KS
Kansas City, MO
Lawrence, KS
Ford County, KS
Oklahoma City, OK
Tulsa, OK
Arlington, TX
Winfield, KS
Wellington, KS
El Dorado, KS
Augusta, KS
Kingman, KS
Kansas Highway Patrol
Manhattan, KS
US Penitentiary El Reno
US Penitentiary Leavenworth
US Penitentiary Florence
US Penitentiary Fort Worth
US Penitentiary Balch springs
California Department of Justice

MS-13s: Los Angeles' Unwelcome Export to Virginia

[**to the lead story in Muehler v. Mena**]

By Nicolas Zimmerman, Medill News Service

While Hollywood films and Lakers jerseys may still be Los Angeles's most popular exports, the city is also becoming famous for one of its more notorious by-products: violent Latino street gangs. And parts of the country are having no choice but to start paying attention.

The wake-up calls for law enforcement officers and residents of Northern Virginia have come rapidly and with cannon-force. In July 2003, Brenda Paz, an 18-year-old federal witness, was stabbed to death and left on the banks of the Shenandoah River. In May 2004, a 16-year-old in Fairfax, Va., had his hands almost completely chopped off by a machete-wielding youth. A week later, a 17-year-old Herndon, Va., youth was shot dead by an assailant on a bicycle.

Authorities in affluent Fairfax County, Va., say all three murders appear to be the work of members of Mara Salvatrucha, or MS-13, a violent street gang composed primarily of illegal immigrants from El Salvador.

The gang took root during the 1980s in Los Angeles, as Salvadorans fled the country's brutal civil war for the relative calm of LA. Many of the original MS-13 members had ties to the Salvadoran street gang La Mara and the paramilitary group Farabundo National Liberation Front, according to the Orange County District Attorney's office.

MS-13's presence has been building in Northern Virginia for the last decade, says Mindy Grizzard, a board member of the Virginia Gang Investigators Association. One of the reasons, authorities say, is the area's sizable Central American community. Fairfax County is home to more than 30,000 Central Americans, according to the 2000 U.S. Census. Of these, more than 20,000 are Salvadoran.

Another reason MS-13 has migrated toward the nation's capital, says Grizzard, is the region's affluence. This, combined with the fact that before MS-13 no gang had firmly entrenched itself in Northern Virginia, has made the area an attractive drug market for an enterprising street gang to tap.

While MS-13's mere presence in Fairfax, Loudon, Alexandria, Arlington and Prince Williams counties is not news, the recent sharp increase in gang membership, and corresponding escalation of violence, is. The sensational nature of recent gang-related incidents has focused the public's attention on the issue, Grizzard said.

"When the guy got his hands hacked off by a machete, that blew the whole thing out of the water," she said.

As a result MS-13 has swiftly become a cause celebre among Virginia politicians, with the state's attorney general, governor and a state representative all creating task forces in the last two years to deal with the problem.

Investigators estimate that the entire Washington D.C., metropolitan area is home to five to six thousand members of MS-13. Of these, at least 1,500 live in Fairfax County, according to Mike Porter, an investigator who has been dealing with the gang for almost a decade.

Porter says the gang is believed to be responsible for at least 10 murders in Northern Virginia over the last several years. And of all the gang-related crime in Fairfax County, Porter estimates that 90 percent of it is committed by members of MS-13.

On July 1, 2004, several new Virginia laws took effect aimed at helping law enforcement arrest gang members and keep them in jail.

dition to MS-13 members' lurid use of machetes to settle disputes with their rivals, the characte[illegible] that separates the gang from most others is that most of its members live in this country illegally. In recognition of this, one of Virginia's new laws allows police to detain for up to 72 hours illegal aliens who have previously been convicted of a felony, deported and reentered the country illegally.

Keith Applewhite, a member of the gang task force who testified in front of the Virginia General Assembly, said he thinks this law in particular will help curb the problem with MS-13.

"What it comes down to is we're trying to be proactive," Applewhite said of the growing gang problem. "We're learning from other states and slowing it down while we can."

Before the law came into effect, officers were powerless to detain a suspect on the grounds that he had been deported and reentered the country illegally. Officers had to wait until they caught gang members doing something illegal. After MS-13 members were convicted of felonies and deported, many of them simply returned to the U.S. clandestinely.

Now if a police officer recognizes an illegal alien who has already been deported as a convicted felon, Applewhite explained, the police officer can detain the individual until the Immigration and Naturalization Service can have him deported.

Applewhite stressed that a police officer would either have to recognize a suspect as a convicted felon and deportee, or he would have to uncover this information as part of an unrelated search. Still, the application of the law may be affected by a case that will be heard by the U.S. Supreme Court during its 2004-05 term.

In Muehler v. Mena, the Court will decide whether the questioning of an individual about his or her immigration status constitutes a search as defined by the 4th Amendment.

In the case, police officers obtained a warrant to search a suspected gang safe house for evidence pertaining to a drive-by shooting two weeks before. Iris Mena, who was not believed to be a gang member, was pulled out of bed at gunpoint, marched to her garage and detained for two to three hours.

While police and SWAT team members searched Mena's house, a member of the INS inquired about Mena's citizenship and searched through her purse for her papers.

The high court will decide whether law enforcement officials have the right to question a lawfully detained suspect regarding his resident status. If the Supreme Court rules against law enforcement,they fear the new Virginia law will do little to combat gangs like MS-13.

Unless the Supreme Court overturns the decision made by the 9th Circuit Court of Appeals, in California, officers in Virginia will not have the right to question an individual in custody of his immigration status unless there exists a reasonable suspicion that the detainee is an illegal alien.

If Virginia's police are hamstrung by the Supreme Court ruling, state lawmakers may want to adopt one of Los Angeles' own tactics in the war against gangs: injunctions. In March of this year, L.A. City Attorney Rocky Delgadillo obtained a court order that bars members of MS-13 from certain activities in prescribed areas.

Members of the gang, who the City Attorney's office said have been linked to 18 murders over the last two years, are prohibited from meeting together in public, trespassing, creating graffiti and other gang-related activities. More than 20 such injunctions have been granted in Los Angeles to get at gang violence.

Delgadillo's office said that some neighborhoods affected by these injunctions have seen a 50 percent reduction in gang crimes over the past year. Results like that would probably be a welcome sight in Northern Virginia.

TESTIMONY

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Lt. Jeffery T. Easter
Commander of the Gang Section

Senate Bill 458
Street Gang Prevention

March 16, 2006

The City of Wichita supports Senate Bill 458. The City of Wichita is requesting this legislation to help the Wichita Police Department and other law enforcement agencies in the state of Kansas combat gang violence and recruitment.

During 2004 and 2005 a sharp increase in gang violence, gang recruitment and gang related retaliatory cases were observed in Wichita. The Wichita Police Department met with citizen groups, business leaders, high school students and the faith based community to devise a diverse plan to address the ever-growing gang problem. The group developed a comprehensive plan that addressed prevention and enforcement techniques that suggested both law enforcement and citizen groups' work within a partnership to directly affect the gang problem. The Gang Plan, (attached) also called for the Wichita Police Department to research new laws that could assist in the fight against gang recruitment and gang violence.

Gangs gain their power through fear and intimidation. Because of that fear, juveniles can be easily recruited into a gang and can be easily influenced to commit criminal acts for the gang. When juveniles finally realize what they are involved in, it is hard to get away from the gang and the lifestyle that is offered by gangs. I would like to offer a few examples of how gang intimidation has influenced younger gang members and crimes that have been committed due to fear and intimidation.

On July 1, 2005, a known Blood gang member shot another Blood gang member. One of the witnesses, a known Blood gang who was also a juvenile, did not attend court because other gang members had threatened him. The juvenile gang member was tracked down by gang unit detectives and he stated to the police that he was afraid for his life and for the life's of his family members because he had been threatened to not testify in this particular trial. The juvenile also refused to identify who had threatened him and his family.

In July of 2005, a known Vato Loco Boy gang member was walking down the street when a Players For Life gang member pointed a gun at him and threatened to shoot him. This was the fourth incident involving these two rival gangs in a time frame of two weeks. The PFL gang member was arrested and charged with aggravated assault. On August 10, 2005, a day before the preliminary hearing in the above case, members of the PFL gang, which one member was a juvenile, threatened the VLB gang member and his girlfriend. After the threats were made, the PFL's then rammed the VLB's car off the road and told him to not show up for court. During the investigation into this incident, two arrests were made and two individuals were charged.

In 1991, a 15-year-old juvenile was recruited into a gang. He did not like the gang life and told his fellow gang members that he wanted out of the gang. An unwritten code of gangs is blood to get into the gang and blood to get out of a gang. On August 18, 1991, this juvenile gang member was lured behind a building at 2700 N. Woodland were he was met by the leader of this particular gang. The leader possessed a shotgun and shot the juvenile several times, resulting in his death. The juvenile had made a mistake in joining the gang but paid the ultimate price for trying to get out.

T oungest age that I have seen associating with a gang is seven-years-old. In the summer of 2005, se juveniles who are known gang members were caught along with a seven-year-old male, spray painting gang graffiti on local businesses. The first grader claimed to be a member of North Side Gangsters along with his cousins. The graffiti that was being painted was NSG graffiti and all of the juveniles were wearing colors related to the NSG gang.

These are just a few examples of the many cases that take place daily on our streets.

Law Enforcement spends an inordinate amount of time on gang cases due to their complexity. There have been several incidents where gang members have been arrested for person felony crimes such as drive by shootings and aggravated assaults; however, receive small bonds of $25,000 or less. In most of these cases the suspect only has to post 10 percent of the bond and then he is released. In Wichita, we have experienced gang members commit a violent crime and then bond out of jail prior to being charged. The gang member then threatens the victim(s) or commits a retaliatory shooting against the rival gang. The need for a mandatory cash surety bond on known gang members who commit a felony crime is needed to prevent future victims of violence and the spread of fear and intimidation.

One example of the bonding issue occurred in February of 2005. A total of 18 drive-by shootings occurred in the month of February and four were attributed to one particular gang member, Ishmael Agnew. Due to the lack of cooperation and intimidation taking place, there was not sufficient probable cause for arrest. A detective conducted a background check and found two felony cases that had not been charged yet. One case was charged and the Mr. Agnew bonded out of jail. The other case, felon in possession of firearm, was investigated further and the weapon was sent to the Sedgwick County Forensic Science Center for DNA testing. Within the next two weeks two more drive by shootings occurred and this same gang member was a suspect in one of the shootings. The gun case was then charged due to the DNA matching that of our suspect. When the warrant was issued, Gang Officers located Mr. Agnew and he was found in possession of a gun and crack cocaine. He was not given a bond due to the violation of his first bond. He was eventually charged with one of the drive by shootings and two gun cases. After his arrest the second time, there was a sharp decrease in drive by shootings over the next three months and we believe it was due to Mr. Agnew being in jail awaiting trial. By the time of his conviction we had tied him to six drive by shootings in a month time frame.

In closing, your support of this bill will give parents the hope they so desperately need to keep their kids on the right track without fearing retaliation, and hopefully prevent any future homicides of juveniles who want out of gangs. The passing of this bill will also send a clear message to gang members that the State of Kansas is no longer going to allow bullies and criminals to threaten and intimidate our young people and their families.

Thank you for your support of Senate Bill 458.

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

House Judiciary Committee

Testimony in Support of SB 458
Kyle G. Smith
Legislative Chair
Kansas Peace Officers Association
March 16, 2006

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Kansas Peace Officers Association in support of SB 458, an anti-street gang bill. Essentially, SB 458 utilizes the 'continuing criminal enterprise' (CCE) approach that has proven very successful in other jurisdictions to fight organized crime. A 'criminal street gang' is defined to require the commission or attempt to commit, two serious crimes and having as it's primary activities the commission of such crimes. By defining such criminal organizations and what constitutes membership, the law can provide enhanced penalties, thus crippling such dangerous gangs.

Membership or association is not made illegal per se, as is done in most CCEs, but rather new crimes are created for recruiting members (section 3) and intimidating people from leaving the gang (section 4). Section 5 might be the most useful portion of the bill by requiring a $50,000 bond for gang members. Section 6 amends current statutory language concerning criminal nuisances to utilize the new definitions.

While not as strong as a true CCE, this bill is an excellent step forward in fighting gang violence and the KPOA strongly supports it.

Thank you for your time and consideration.

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March 16, 2006

House Judiciary Committee

Dear Chairman O'Neal, Vice-Chair Kinzer, and Members of the Committee:

Thank you for allowing me to appear today on behalf of Attorney General Phill Kline to support Senate Bill No 342. My name is Rex Beasley. I am a Deputy Attorney General and the head of Attorney General Phill Kline's Medicaid Fraud and Abuse Division. Our Division is the Medicaid Fraud Control Unit (MFCU) required of the states by the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. *95-142),* enacted by Congress in 1977. Along with establishing the state Medicaid Fraud Control Units, Congress provided the states with incentive funding to investigate and prosecute Medicaid provider fraud, and to investigate fraud in the administration of the Medicaid program. The Kansas Medicaid Fraud Control Unit needs more legislative tools to fulfill the mission envisioned for it by Congress - tools that Medicaid Fraud Control Units in other states already have and are using to their advantage in protecting their states Medicaid dollars.

Senate Bill 342 does not create new legal concepts. It merely adds two new items to concepts already existing in our laws. Both are needed to strengthen our fight against Medicaid fraud and to return dollars fraudulently taken from the Medicaid program.

First, New Section 1 dealing with obstruction of a Medicaid investigation supplements the existing provisions of K.S.A 21-3846(a)(8). Currently under K.S.A 21-3846(a)(8) making a false claim to the Medicaid program includes making or presenting or submitting false or fraudulent books, records, documents, data or instruments to any properly identified law enforcement officer, any properly identified employee or authorized representative of the attorney general, or to any properly identified employee or agent of the department of social and rehabilitation services, or its fiscal agent, in connection with any audit or investigation involving any claim for payment or rate of payment for any goods, service, item, facility or accommodation payable, in whole or in part, under the medicaid program. New Section 1 to Senate Bill 342 makes it a violation of the law to falsify, conceal or cover up material facts during an investigation of Medicaid fraud and abuse. The effective investigation and discovery of Medicaid fraud depends on the ability to find the truth. This part of the bill will aid us in our investigations by making it illegal to obstruct a Medicaid fraud investigation. Like the penalties currently established for violating K.S.A 21-3846(a)(8), obstruction of a Medicaid investigation, as prohibited by Senate Bill 342 is a severity level 9, nonperson felony.

Next, Section 2 adds Medicaid fraud to the current list of conduct and offenses giving rise to forfeiture of assets which were used in committing the fraud, the proceeds of the fra assets derived from or realized through any proceeds obtained from the fraud. Under the cı

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state of the law a person who commits fraud on, or causes fraud to be committed on, the Medicaid program and receives money as a result, does not have to worry about having to give up any of that money, or any assets purchased with that money if he or she is caught. That is because Medicaid fraud is not one of the offenses or conduct enumerated in our current forfeiture statute - K.S.A. 60-4104. The example below is a good illustration of why it should be.

In 2003 a woman in Atchison County, Kansas was caught submitting fraudulent claims to the Medicaid program. The Medicaid Fraud Control Unit charged and convicted her on 4 counts of Conspiracy to commit Medicaid fraud; 4 counts of Medicaid fraud; and two counts of criminal solicitation to make false claims to the Medicaid program. On June 14, 2004 she was placed on probation and ordered to repay the Medicaid program the $47,862.01 that she had illegally obtained, plus interest. Forty-seven thousand, eight hundred, sixty-two dollars and one cent that could have been used by someone on a Medicaid waiting list if it had not been illegally taken out of the program. The defendant's probation officer reported to me that as of March 15, 2006 the defendant has repaid the Medicaid program only $380.00. Perhaps more disturbing than the non-payment is what the probation officer reported to me that she saw on a visit to the defendant's home. The probation officer reported to me that in the defendant's home she saw a big screen television, a home theater/stereo system, and other high dollar electronic equipment including a computer and fax machine. Given the defendant's economic situation there is a high probability that most, if not all, of the electronics seen in her home were purchased with money illegally obtained from the Medicaid program. Under current Kansas law the defendant can not be compelled to return either the Medicaid money she took or any assets purchased with that money. However, if the defendant had stolen livestock, for example, she would have been subject to the forfeiture provisions currently in K.S.A. 60-4104.

It seems inherently unjust that someone who steals from the Kansas Medicaid program should be able to keep the stolen money or property purchased with the stolen money. That money needs to be returned to the Medicaid program for appropriate use by those for whom it is intended.

The Medicaid fraud control act provides for reimbursement to the Medicaid program for funds improperly obtained and also allows the Medicaid Fraud Control Unit to recover its fees and expenses incurred in enforcing the act. Thus the Kansas Attorney General already has two existing Medicaid funds; the Medicaid fraud reimbursement fund and the Medicaid fraud prosecution revolving fund. Senate Bill 342 would create the "Kansas attorney generals' medicaid fraud forfeiture fund" as a way to segregate, manage and account for those funds specifically acquired through forfeiture. Forfeiture funds for the Kansas Bureau of Investigation, the Kansas Highway Patrol, the Kansas Department of Corrections, and the Kansas National Guard currently exist by virtue of K.S.A. 60-4117.

Our current forfeiture statute in K.S.A. 60-4117 provides for the disposition of forfeited property and use of proceeds of sale. Section (c) of K.S.A. 4117 provides specified priorities for the distribution of the proceeds of any sale, other than a sale of firearms. Those priorities are as follows: (1) for satisfaction of any court preserved security interest or lien; (2) for payment of all proper expenses of the proceedings for forfeiture and disposition, including expenses of seizure,

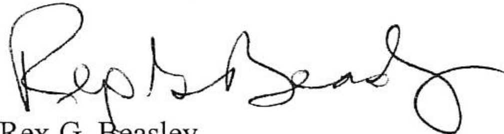
inventory, appraisal, maintenance of custody, preservation of availability, advertising, service of process, sale and court costs; (3) reasonable attorney fees; and (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement. Thereafter, any proceeds remaining must be credited, subject to any interagency agreement, to the appropriate agency's state forfeiture fund described above

However, certain federal restrictions on the use of money recovered by the Medicaid Fraud Control Unit require somewhat different priorities when the forfeiture involves the Medicaid program. Specifically, while the current Medicaid fraud control act allows the Medicaid Fraud Control Unit to recover its fees and expenses incurred in enforcing the act, current federal policy subordinates the recovery of those fees and expenses until restitution has been made to the Medicaid program. Unfortunately Senate Bill 342 as it is currently written fails to take that into account and needs to be revised slightly to recognize the unique priority required by the federal policy. Rather than prolong the hearing, I would propose, with your permission, to work with the Revisors Office to change the distribution priorities for proceeds in Medicaid cases to comply with the federal policy just described. Those changes would be technical in nature and would not change the spirit or intent of the current bill.

On behalf of Attorney General Phill Kine, I encourage the Committee to support Senate Bill 342 with the requested technical amendments, and to recommend the bill for passage.

Respectfully.

OFFICE OF THE ATTORNEY GENERAL
PHILL L KLINE



Rex G. Beasley
Deputy Attorney General
Director, Kansas Medicaid Fraud Control Unit

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HOUSE OF
REPRESENTATIVES

Committee Assignments:
Ranking Minority Member: Higher Education
Economic Development
Taxation

March 16, 2006

To: Chairman Representative Mike O'Neal
And Ranking Democrat Representative Janice Pauls
And Members of the House Judiciary Committee

From: Representative Sydney Carlin, Dist 66. Sydney Carlin #66

Re: SB326

What is the problem? Hardworking taxpayers give their money to support the projects and programs that we put in place here in the legislature. Most people that contract with the state are honest and upright citizens. Unfortunately, people sometimes steal from the state. (Examples are in your packet.) During the interim we talked about Medicaid and Medicare fraud and ways to provide legal remedies for the state --civil punishments for those who steal from us. SB 326 does this.

When I was in Florida in 1993 for a League of Cities Conference, I heard advertisement after advertisement about how to report fraud against the state's Medicaid/Medicare system. That is when I became aware of the very large-scale problem we face in this country that threatens our excellent health care system and contributes to the escalating costs of its delivery.

We all get magazines and articles nearly every day that try to describe the health care cost problem and ways to protect this excellent health care system. Just this week we got the *CSG State News for January 2006*. On pages A20-A21 is a short piece, with blue highlight, called "Bleeding Dollars Stanching the flow of misuse and abuse confronts a hard reality." It briefly describes fraud, waste and abuse in the Medicaid program in states such as New York, California, Tennessee, South Carolina, Ohio and Maine. It opens the door to the difficult questions we need to continue to ask. It will take time to unlock the answers; it is not a simple thing.

Kansas is not alone in this kind of legislation, several other states (approximately 40 including Colorado, Oklahoma and Missouri) have come up with legislation that brings a lot of money to their states – and we are missing

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that could be available to the state to help breathe life back into important state programs. The Federal Government has passed and President Bush signed on February 8th, legislation that would give incentives to states that pass *certain* legislation as spelled out in a section of the Deficit Reduction Act of 2005. You can also take a look at the laws passed by Michigan, Indiana, Tennessee, New Hampshire, or review the activity taking place in Canada at this time.

I came across some things that I would like to see added – because I think we can do even better.

People who have contracts with the state should be held to the highest possible standard because they are being paid with the dollars earned by our hard working taxpayers!

1) I think this bill should be expanded to include all transactions of the state and local governments. (Not be limited to Medicaid/Medicare)

For example, we can look at the legislation that was just passed by the state of Michigan to strengthen their existing False Claims Against the State Act.

2) Michigan added a civil cause of action if the state does not decide to prosecute. We should allow local, county or district attorneys, or any individual and his attorney, to bring an action on behalf of the state or local government.

Many times it is the citizen who is in a position to know about the cheating that is going on in the billing process. And when they can't live with the information they have, they come forward, often at great personal cost.

3) We need to add a piece similar to the Consumer Protection Act, to protect the "relaters" – "whistleblowers" – who relate important information to the state, it could be called a "Taxpayer Protection Clause."

I come here today to ask you to do the work on this issue and get ready to begin an interesting journey into the subject. The bill before us is a positive beginning of a solution to all the "stuff" you have been seeing in the press. We need to get started, because it is a good thing for Kansas.

In Fiscal Year 2004 the U.S. Justice Department recovered more than $1.609 billion from legal actions brought under the Federal False Claims Act. $309 million of that was recovered by the Justice Department alone and the other $1.3 billion came as a result of private causes of action initiated by whistleblowers.

Since January 2001 the federal govt. has recovered more than $3.46 billion from pharmaceutical manufacturers alone for illegal drug marketing and pricing practices in cases initiated only by whistleblowers under the Federal False Claims Act.

Just since this committee began meeting on September 19th, there has been:

1) A $150 million dollar settlement on September 20th against British drug maker GlaxoSmithKline, in part for reselling partially used anti-nausea medications used for cancer patients, sold a second time back to Medicaid for nursing home patients.

2) A $37.5 million dollar settlement on September 23rd with Gambro Healthcare—a dialysis and medical services provider for kickbacks, unnecessary tests, and billing fraud—a case in which states like Massachusetts under their False Claims Act received $538,000.

3) A $704 million settlement on October 17th with Swiss drug maker Serono Labs for illegal marketing and pricing schemes related to the anti-wasting drug Serostim, used in cancer and Aids patients to prevent rapid weight-loss at a full treatment price of more than $21,000 per patient. States such as Florida recovered roughly $54 million in this settlement under their False Claims Act.

4) A $1.35 million settlement on October 25th with a Nevada Pharmacy—payable to the State of Nevada—when three nurses brought a private cause of action against the pharmacy under their False Claims Act for improperly diluting the drug Synagis before administering it to premature infants. This allowed the dose to go twice as far and be double-billed to Medicaid.

5) A $40 million settlement on October 25th with Erlanger Medical Center in Tennessee in connection with kickbacks and the false billing practice of "upcoding". $10 million of this will go to the State of Tennessee under their False Claims Act.

6) A $124 million settlement on November 1st with King Pharmaceuticals for conspiring with Pharmacy Benefits Management companies ("PBMs") to conceal discounts given to its best customers and avoid having to reimburse Medicaid the difference under Medicaid law.

7) A $32.5 million settlement on November 15th in California with Redding Medical Center and four of its doctors for performing unnecessary heart surgeries on government healthcare (Medi-Cal) patients.

Each of these cases was brought as a private cause of action by whistleblowers because of clandestine practices by the companies that had gone completely undetected by government prosecutors.

The largest on-going case is the one reported by the Attorney General of California this year against 39 drug manufacturers seeking a total of nearly $1.3 Billion for fraud against their Medicaid ("Medi-Cal"), Public Employee Health Plan, Public Employee Retirees Health Plan, S-CHIP (Kansas calls Healthwave), and Workers' Comp. funds. And California is able to recover funds lost to each of those budgets because, like the one we're proposing for Kansas, their False Claims Act isn't limited to Medicaid only.

Additionally, there are more than 148 drug fraud cases involving nearly 500 drugs currently under investigation by the Justice Department for illegal marketing and pricing frauds. Large sums coming out of those settlements can come to Kansas—because most of them affected Kansas as well as all other states—if we enact this legislation first.

Lastly, by enacting the False Claims Act we're proposing prior to January 1st, 2007, with all of its contained provisions, the State will qualify for additional financial benefit from the Federal Govt. by having its federally required FMAP (Federal Medical Assistance Payments) reduced by 10 percent. (Audrey should have the hard dollar figures on this—I asked her last week to look those up for you.)

Kansas Taxpayers Against Fraud

Fighting Tax Increases By Eliminating Waste & Fraud

House Judiciary Committee
March 16th, 2006

Chairman O'Neal and Committee members, as the President of Kansas Taxpayers Against Fraud and Director of the K-TAF Policy Research Group, I appreciate the opportunity today to submit testimony at Representative Carlin's request, and in support of her balloon amendments to SB 326.

Perhaps your constituents are telling you that they aren't being taxed enough or that Medicaid is too *in*expensive to the State. I don't know. What I do know is that the people and business owners I talk to around the State tell me that they are already at the economic brink and cannot afford any more taxes. Kansas is, after all, one of the highest taxed states in the Midwest already. Similarly, many seniors in our State on Medicaid tell me that they can't afford any higher healthcare costs for deductibles or co-pays if the State goes that direction to solve the growing Medicaid crisis. So, what is to be done?

On February 1st of this year, Congress enacted the Deficit Reduction Reconciliation Act which President Bush signed into law on February 8th. This law gives tremendous economic incentives to states to enact False Claims Laws similar to the Federal False Claims Act (31 USCA §3729, et. seq.) This is legislation regarding civil procedure and civil penalties against those who defraud the state, and is to be administered under the direction of the Attorney General's Office. Hence, the legislation has been referred to this committee.

This federal legislation enacted last month is cutting the growth of money Congress will be giving to states for Medicaid. That is what is being "taken away". In exchange, Congress is allowing states to keep large sums more of what they and the justice department recover in actions regarding Medicaid fraud. That is what is being given to the states in return—*upon the exclusive condition* that those states enact a state false claims act that is comparable to the federal false claims act in addressing Medicaid fraud.

Some lobbyists around the statehouse have been confusing legislators with inaccurate arguments about this bill such as: 1) It isn't needed because it duplicates already existing law, and 2) It would somehow create new burdens or record keeping requirements for doctors or hospitals already under onerous paperwork requirements. As stated, this argument is inaccurate, but an explanation here may help:

Because Kansas' Medicaid budget is comprised of roughly 62% federal funds and 38% state funds, only 62% of Kansas' Medicaid budget is currently protected by a false claims act—the federal act. A Kansas false claims act, therefore, *does not duplicate* already existing law, but would instead merely apply the same laws and penalties to Kansas' 38% that already applies to the feds' 62%-- now protecting 100 cents of every Medicaid dollar instead of just the 62 cents that don't belong to Kansas anyway. Further, this legislation does not create any new burdens or record keeping requirements. Those requirements already exist under federal law. What this legislation does is simply to allow the state the same right of recovery to its 38 cents that the feds have to their 62 cents, and it creates further deterrence for those who are truly defrauding the State.

SB 326 was the outgrowth of the Interim Committee's study on reducing waste, fraud, and abuse against the Medicaid budget. But the federal legislation did not exist during the interim session or even prior to the Senate vote on SB 326 on January 20th. The balloon amendment before you, however, contains all of SB 326, but has added on to it all of the necessary elements to qualify for all benefits under the new federal law. As attested to by the federal Health and Human Services Office of Inspector General, which oversees the federal program and distribution of Medicaid recoveries, some 43 states have already, since February 8th, sought to enact legislation like what these balloon amendments create

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Unfortunately, SB 326 without the balloon amendments only helps Kansas finally catch up with where Arkansas already was several years ago in terms of Medicaid fraud prevention efforts implemented by the Legislature and, as of July 2006 will leave us among the seven least effective states in the country, according to HHS/OIG's General Counsel in his conversation with Representative Carlin on March 8th. Kansas can do better and can finally move into the 19th, 20th, and 21st centuries in government fraud prevention efforts by implementing what the federal government has been utilizing since 1863 and other states since 1992 in eliminating government waste, fraud and abuse.

It is a macroeconomic fact that taxes stifle economic growth, and the higher the tax, the greater the obstacle to growth. Some have tried to portray a False Claims Act as somehow anti-business or harmful to business in some way. Yet overwhelming empirical evidence indicates just the opposite. Roughly half of the states without an income tax have a False Claims Act comparable to SB 326 with its balloon amendments, which has helped them to continue without requiring burdensome taxes. And, even in the absence of income taxes, those states have stronger Medicaid Budgets than Kansas and have larger numbers of businesses relocating to their states because there is no income tax. Further, the most business-friendly state in the country, where all serious corporations flock to incorporate themselves is Delaware, which itself has had a false claims act for a number of years now. The truth is that false claims acts are business friendly by fostering free-market competition on a leveled playing field without forcing otherwise honest providers to break the law simply to keep up with a competitor who amasses wealth and size by defrauding the government. In fact, a 2005 survey in Virginia found that, since most providers don't commit fraud, their businesses have thrived in the years since Virginia enacted its False Claims Act because the few fraudulent competitors—many of whom were from out-of-state anyway—are no longer allowed to participate in government contracts. And where medicine is concerned, the AMA's own reports of the geographic distribution of physicians in the U.S. since 1992 show that there has been neither decrease or unusual increase of physicians in any field of medicine in states that had enacted False Claims Acts compared to those that had not.

As you will see from the information explaining the federal benefits to those states which enact the federally required provisions . . . if our state's Medicaid Fraud Control Unit was able to recover the average it has been recovering in recent years (which has certainly been an impressive amount), Kansas' portion recovered would be $37 million more, taken from the federal share, in the year of that recovery, all for having enacted this entire Bill, than Kansas' portion of that recovery would otherwise be. That would free up $37 million from SGF to be spent somewhere else, or even to increase compensation for the many honest Medicaid providers, who too often take a financial hit when treating Medicaid rather than privately insured patients. In any event, the federal reward is not limited to one year, it is on-going every year. (That is quite an incentive!)

SB 326 is a big step in the right direction for Kansas' budget. Some of the proposed balloons would make it more effective still, even in the absence of any private cause of action provisions. But, of course, to qualify for the millions of dollars we would get from the federal government, Kansas would have to include the private cause of action amendments as well; but that is for the committee to decide.

In an election year, I would hope that Committee members would not return home to their constituents to report that a handful of white-collar criminals won out, and that the legislature returned this offer from Congress' consisting of millions of dollars in Medicaid funds, and are now leaving their constituents, as taxpayers or Medicaid recipients, to make up the difference.

Respectfully Submitted,

Robert Collins, President
Kansas Taxpayers Against Fraud

Robert Collins

Cash Back for State Action

Under the Deficit Reduction Act of 2005 (S.1932), if a state has a qualifying False Claims Act, it is eligible for more money when Medicaid False Claims Act cases are decided.

The law says the state is eligible for 10 percent more money, but this is a *10 percent increase on the state side of the split.*

For example, if a state had a 50/50 recovery split without a qualifying state False Claims Act, the split would be 40/60 if the state had a qualifying state False Claims Act.

In the real world, that works out to be a 20 percent increase in Medicaid award money returned to the state (i.e. an increase of 10 percentage points on a base of 50 percentage points). Most states will get more than this; no state will get less, provided they have a qualifying state False Claims Act.

To give an example: In the recent Serono settlement, New York state recovered $80 million. If New York had a qualifying False Claims Act, however, it would have gotten $96 million -- an additional $16 million to be used for health care services for the needy. That $16 million is a 20 percent increase over the original $80 million.

Appended below is a table that shows the Federal / State Medicaid cost sharing splits by state. Note that these matching rates are for FY 2007, and illustrative. Federal/State Medicaid cost sharing splits shift a bit from year to year, and the actual percentage going back to a state in any given case will have to be calculated based on the time frame covered by the False Claims Act settlement or judgment.

For a state law to qualify for an increased award in Medicaid False Claims Act recovery cases, the state law should be at least as tough as the Federal statute. The Inspector General of the U.S. Department of Health and Human Services (OIG) will be judging the eligibility of each state, based on four key aspects of their False Claims Act law:

1) Definition of a false claims and establishment of liability:
Does the law establish liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a);

2) As effective in encouraging and rewarding whistleblowers:
Does the state law contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code;

3) The seal: Does the state law contain a requirement for filing an action under seal for 60 days with review by the State Attorney General, and;

4) Adequate penalties: Does the state law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code?

Any state interested in passing a state False Claims Act would do well to adhere, as closely as possible, to the Federal statute.

State	Federal Portion of Medicaid (percentage of Medicaid Financed by the Federal Government)	State Portion of Medicaid (percentage of Medicaid Financed by the state)	**Percent increase in the False Claims Act Award a state would get if it had a qualifying state FCA law, compared to if it does not.**
Alabama	68.85	31.15	32.10
Alaska	51.07	48.93	20.43
American Samoa	50	50	20
Arizona	66.47	33.53	29.82
Arkansas	73.37	26.63	37.55
California	50	50	20
Colorado	50	50	20
Connecticut	50	50	20
Delaware	50	50	20
District of Columbia	70	30	33.33
Florida	58.76	41.24	24.24
Georgia	61.97	38.03	26.29
Guam	50	50	20
Hawaii	57.55	42.45	23.55
Idaho	70.36	29.64	33.73
Illinois	50	50	20
Indiana	62.61	37.39	26.74
Iowa	61.98	38.02	26.30
Kansas	60.25	39.75	25.15
Kentucky	69.58	30.42	32.87
Louisiana	69.69	30.31	32.99
Maine	63.27	36.73	27.22
Maryland	50	50	20
Massachusetts	50	50	20
Michigan	56.38	43.62	22.92

Minnesota	50	50	20
Mississippi	75.89	24.11	41.47
Missouri	61.60	38.4	26.04
Montana	69.11	30.89	32.37
Nebraska	57.93	42.07	23.76
Nevada	53.93	46.07	21.70
New Hampshire	50	50	20
New Jersey	50	50	20
New Mexico	71.93	28.07	35.62
New York	50	50	20
North Carolina	64.52	35.48	28.18
North Dakota	64.72	35.28	28.34
Northern Mariana Islands	50	50	20
Ohio	59.66	40.34	24.78
Oklahoma	68.14	31.86	31.3
Oregon	61.07	38.93	25.68
Pennsylvania	54.39	45.61	21.92
Puerto Rico	50	50	20
Rhode Island	52.35	47.65	20.98
South Carolina	69.54	30.46	32.82
South Dakota	62.92	37.08	26.96
Tennessee	63.65	36.35	27.51
Texas	60.78	39.22	25.49
Utah	70.14	29.86	33.48
Vermont	58.93	41.07	24.34
Virgin Islands	50	50	20
Virginia	50	50	20
Washington	50.12	49.88	20.04
West Virginia	72.82	27.18	36.79
Wisconsin	57.47	42.53	23.51
Wyoming	52.91	47.09	21.23

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Testimony to the
House Judiciary Committee

Testimony and Presentation of Balloon Amendment Regarding SB 326
February 16, 2006

Chairman O'Neal and the honorable members of the committee, my name is Rocky Nichols. I am the Executive Director of the Disability Rights Center of Kansas, formerly Kansas Advocacy and Protective Services (KAPS). The Disability Rights Center of Kansas (DRC) is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As the state designated protection and advocacy system for Kansans with disabilities our task is to advocate for the legal and civil rights of persons with disabilities as promised by federal, state and local laws, including Medicaid.

DRC became interested with SB 326 when consumers of disability services began calling with concerns that the bill would have potentially devastating affects on their services. After a thorough review of the Bill as passed by the Senate and the concerns of the broader disability community DRC was able to identify the many pitfalls and unintended consequences that would result if SB 326 were enacted. As a result of those findings DRC has been working closely with the Attorney General's Medicaid Fraud Division to craft amendments that would serve both the interests of the state to deter fraud, and the necessary medical needs of Kansans with disabilities. With that back-drop DRC offers the attached balloon amendments to SB 326.

As amended by the Senate SB 326 causes great concern to the disability community. It is our view if SB 326 were enacted as proposed, the more flexible community based services programs operated by the state (which save taxpayer

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dollars and are preferred by people with disabilities) would be severely restricted in fulfilling their mandate to provide quality services that are designed to meet the unique needs of the persons served. Often times, those unique needs have not been addressed in the Medicaid state plan or in a provider manual and so consumers, parents, guardians, advocates, and state program staff have periodically advocated for services allowed by federal and state law but were not necessarily contemplated when the state plan and provider manuals were written. Because of its use of such broad terminology as "attempting to obtain" or "attempting to authorize," in its current form SB 326 may make both advocating for and obtaining services under that scenario a prosecutable offense. Although DRC does not believe that is the intent, it certainly is the result.

The disability community is concerned that Section 2 (a)(2) without the balloon gives both the Medicaid state plan and the provider manuals the force and effect of law when in some cases, the state plan or provider manuals may not fully comply with federal or state law. For example, the state Medicaid program is responsible to arrange for, or provide all services "necessary to correct or ameliorate defects and physical and mental illnesses and conditions" for children under age 21 and eligible for EPSDT (42 U.S.C. 1396d(r)(5)). DRC has encountered multiple cases where the state plan or provider manual either arbitrarily capitates services to children, or the state Medicaid program denies a necessary service. With the enactment of SB 326 State Medicaid program employees will be faced with a very difficult decision, "do I comply with the federal law and authorize the medically necessary services and commit Medicaid fraud under K.S.A. 21-3910?", or "do I do nothing and protect my own interest?"

That is just one example of the unintended, but real affect of SB 326 without the balloon. Another unintentional but real consequence of SB 326 is the chilling affect on the state's obligations implement other important statutes that impact Kansans with disabilities. For example, the Developmental Disabilities Reform Act enacted in the mid 1990's establishes the policy that the State of Kansas will make every effort to provide services that empower persons with developmental disabilities in community based settings rather than state institutions (KSA 39-1802). Further, the 1988 Legislature required the State to establish the first Home and Community Based Services waiver under Medicaid and to ensure the maximum level of self direction / self determination be provided in the receipt of services under the waivers (KSA 39-7,100). It is the opinion of DRC and the disability community that enactment of SB 326 in its current form would raise significant barriers to the full implementation of these critical state policies and obligations.

Community based services and other individually designed and medically necessary services for people with disabilities are not an exact science and do not fit the formulary type plan or manual envisioned by SB 326. They require flexibility and fluidity. Without the ability to meet individualized plans of care persons with disabilities will be forced back to the more expensive and less humane institutional system of care. That makes for poor public policy.

With that in mind DRC offers its balloon amendments. All of the proposed amendments are directed at Section 2 of the Bill. As stated earlier, DRC worked cooperatively with the Attorney General's staff to strengthen the state's ability to prosecute fraudulent acts while also protecting the state's responsibility to provide medically necessary individualized services to Kansans with disabilities who are eligible for the Medicaid program. Without adoption of these amendments DRC cannot support SB 326.

DRC and Attorney General AMENDMENTS (see attached balloon):

Amendment #1: Page 3, line 31 – strike language that makes "attempting to obtain" or "attempting to authorize" because it is so broad that it criminalizes good faith advocacy by consumers, parents, advocates, providers and state employees.

Amendment #2: Page 3, line 34 – Strike "provider manual" because the federal and state laws rules and regulations are implemented through the state plan, not the manuals. Provider manuals are fairly fluid and can be changed periodically without federal review. Changes to the state Medicaid plan require CMS review and authorization.

Amendment #3: Page 3, line 34 – Insert language "whichever is least restrictive." In other words, the federal Medicaid statutes trump both state law and the state Medicaid plan and it may be least restrictive. If so, services can be provided that meet the medically necessary standard.

Amendment #4: Page 3, line 35 – Strike all of Section 2(a)(3) because it is unnecessary with the amendments to Section 2(a)(2). They are essentially the same provision.

Amendment #5: Page 4, line 22 – Insert New (d). New (d) simply confirms that it is not considered fraud under this act for consumers, advocates or providers to: A. advocate for services; and, B. continue current pilot projects under Medicaid that

are consistent with federal or state law, e.g., the self-determination project under the DD waiver.

Amendment #6: Page 4, line 22 – Insert New (e) that confirms that it is not considered misuse of public funds to implement services that are otherwise required by state or federal laws. Examples include the Developmental Disabilities Reform Act (KSA 39-1802), self determination / self direction in home and community based services programs (KSA 39-7,100), the Americans with Disabilities Act of 1990 (42 USC 12132) and EPSDT provision of Medicaid (42 USC 1396a). These are all current laws that impact the Medicaid program in Kansas and must be included in any discussion that either restricts or expands the program.

Amendment #7: Page 4, line 22 – Insert New (f) which makes it clear that amending or changing the state Medicaid plan or a HCBS waiver with federal approval is not considered fraud.

Amendment #8: Page 4, line 22 – Insert New (g) to require the Kansas Medicaid program to implement rules and regulations that implement Section 2 and its provisions. Rules and regulations can be written that clarify even more what is, and what is not considered misuse of public funds under this act.

ONE LAST EXAMPLE:

Consider this example … a parent who has a child with a significant mobility impairment. Their child is a young adult entering high school. Under Medicaid, the young person received a manual wheelchair that was fitted to their body size and shape as is appropriate. The chair meets their need at the time it is purchased and meets the requirement of medical necessity under the EPSDT program. The child is now 18, ready to exit high school and has found a job at a local department store. However, they have outgrown their chair and their disability has worsened to the point that pushing it is no longer an option. Their doctor prescribes a new motorized wheelchair, explains that it is medically necessary due to growth and deterioration of disability, and asks for prior authorization as is required by Medicaid.

The Kansas Medicaid program denies the request because the state plan restricts EPSDT recipients to one wheelchair for every five years, and claim that the "most economical" option is another push chair when the child has completed their five year period. The consumer's family advocates for Medicaid to provide the

wheelchair and the Medicaid program employee agrees that it is medically necessary and authorizes the service.

Question #1: Would the provisions of Section 2 of SB 326 apply and therefore the action of the consumer's family and the state employee be considered "misuse of public funds?" YES

Question #2: Would the provisions of Section 2 of SB 326 as amended by DRC balloons apply and therefore the action of the consumer's family and the state employee be considered "misuse of public funds?" NO. Why? Because the Medicaid program employee is complying with the federal law.

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As Amended by Senate Committee
Session of 2006

SENATE BILL No. 326

By Special Committee on Medicaid Reform

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10. AN ACT concerning civil actions and civil penalties; relating to false or
11. fraudulent claims***; amending K.S.A. 21-3910 and repealing the existing***
12. ***section***.
13. Be it enacted by the Legislature of the State of Kansas:
14. Section 1. (a) As used in this act: (1) "Claim" means an electronic,
15. electronic impulse, facsimile, magnetic, oral, telephonic or written communication
16. that is utilized to identify any goods, services, item, facility or
17. accommodation as reimbursable to ***by*** the state of Kansas, or its fiscal
18. agents, or which states income or expense and is or may be used to determine
19. a rate of payment by the state of Kansas, or a fiscal agent of the
20. state;
21. (2) "knowing" and "knowingly" means that a person, with respect to
22. information has actual knowledge of this information, acts in deliberate
23. ignorance of the truth or falsity of the information, or acts in reckless
24. disregard of the truth or falsity of the information. The terms "knowing"
25. and "knowingly" do not require proof of specific intent to defraud.
26. (b) (1) Except as otherwise provided, any person who: (A) Knowingly
27. presents, or causes to be presented, to the state of Kansas, or a fiscal
28. agent of the state, a false or fraudulent claim for payment or approval;
29. (B) knowingly makes, uses, or causes to be made or used, a false record
30. or statement to get a false or fraudulent claim paid or approved by the
31. state of Kansas, or a fiscal agent of the state; (C) conspires to defraud the
32. state of Kansas; (D) is a beneficiary of an inadvertent submission of a
33. false claim to the state of Kansas, or a fiscal agent of the state, subsequently
34. discovers the falsity of the claim, and fails to disclose the false
35. claim to the state of Kansas, or a fiscal agent of the state; or (E) is the
36. beneficiary of an inadvertent payment or overpayment by the state of
37. Kansas of moneys not due and knowingly fails to repay the inadvertent
38. payment or overpayment to the state of Kansas is liable to the state for a
39. civil penalty of not less than $5,000 and not more than $10,000, plus three
40. times the amount of damages which the state sustains because of the act
41. of such person.
42. (2) If the court finds that: (A) The person committing the violation

1. of this act furnished officials of the state responsible for investigating false
2. claims violations with all information known to such person about the
3. violation within 30 days after the date on which the defendant first obtained
4. the information, (B) such person fully cooperated with any state
5. investigation of such violation, and (C) at the time such person furnished
6. the state with the information about the violation, no criminal prosecution,
7. civil action or administrative action ***had commenced pursuant to***
8. ***this act*** with respect to such violation, and the person did not have actual
9. knowledge of the existence of an investigation into such violation, the
10. court may assess not less than two times the amount of damages which
11. the state sustains because of the act of the person.
12. (3) A person violating this act shall also be liable to the state for the
13. costs of a civil action brought to recover any such penalty or damages.
14. (c) The attorney general shall investigate violations under this act. If
15. the attorney general finds a violation of this act, the attorney general may
16. bring a civil action under this act. Nothing in this act shall be construed
17. to create a private cause of action.
18. (d) The attorney general may simultaneously conduct criminal investigations
19. and proceedings while conducting civil investigations and proceedings
20. concerning the same subject matter for violations as described
21. in this act.
22. (e) Upon a showing by the state that certain actions of discovery in a
23. proceeding under this act may interfere with the state's investigation or
24. court proceeding of a criminal matter arising out of the same facts, the
25. court may stay all proceedings under this act. Such showing shall be conducted
26. *in camera*.
27. (f) Any action pursuant to this act must be commenced within five
28. years from the date when the falsity or fraud is discovered.
29. (g) In any action brought under this act, the state shall be required
30. to prove all essential elements of the cause of action, including damages,
31. by preponderance of the evidence.
32. (h) Any pleading filed claiming relief pursuant to this act is not subject
33. to the requirements of subsection (b) of K.S.A. 60-209, and amendments
34. thereto, except that such pleading shall set forth the period of time
35. of the allegedly false or fraudulent claims and shall generally describe the
36. false or fraudulent nature of the claims or scheme composed of several
37. claims.
38. (i)Any action under this act may be brought in any district court
39. where the defendant, or in the case of multiple defendants, any one defendant
40. can be found, resides, transacts business, or in which any act
41. prohibited by this act occurred, or in the district court of Shawnee county.
42. (j) Whenever the attorney general has reason to believe that any person
43. may be in possession, custody or control of any documentary material

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1. or information relevant to an investigation under this act, the attorney
2. general, before commencing a civil proceeding, may issue in writing and
3. cause to be served upon such person, a civil investigative demand. Such
4. demand shall require such person to: (1) Produce such documentary material
5. for inspection and copying, (2) answer in writing written interrogatories
6. with respect to such documentary material or information, (3) give
7. oral testimony concerning such documentary material or information, or
8. (4) furnish any combination of such material, answers or testimony.
9. (k) Whenever any person fails to comply with any civil investigative
10. demand issued under subsection (j), or whenever satisfactory copying or
11. reproduction of any material requested in such demand cannot be done
12. and such person refuses to surrender such material, the attorney general
13. may file a petition for an order of such court for the enforcement of the
14. civil investigative demand in the district court.
15. (l) A final judgment rendered in favor of the state in any criminal
16. proceeding, whether upon a verdict after a trial or upon a plea of guilty
17. or *nolo contendere*, shall stop the defendant from denying the elements
18. of the offense in any action brought under this act which involves the
19. same facts or circumstances as in the criminal proceeding.
20. (m) Intent to repay or repayment of any amounts obtained by a person
21. as a result of any acts prohibited in subsection (b) shall not be a
22. defense to or grounds for dismissal of an action brought pursuant to this
23. act. However, a court may consider any repayment in mitigation of the
24. amount of any penalties assessed.
25. ***Sec. 2. K.S.A. 21-3910 is hereby amended to read as follows:***
26. ***21-3910. (a) Misuse of public funds is*** *knowingly:*
27. ***(1) Using, lending or permitting another to use, public money***
28. ***in a manner not authorized by law, by a custodian or other person***
29. ***having control of public money by virtue of such person's official***
30. ***position****;*
31. *(2) ~~attempting to obtain~~, authorizing, ~~attempting to authorize~~ or allowing*
32. *any payment for medicaid services that exceeds the limitations of*
33. *federal laws, rules and regulations, Kansas laws, rules ~~and regulations~~, or*
34. *the terms of the Kansas medicaid plan ~~or the provider manual~~; or*
35. ~~*(3) by-passing or overriding an edit, attempting to by-pass or override*~~
36. ~~*an edit or allowing an edit to be by-passed or overridden, including,*~~
37. ~~*but not limited to, deactivation of any edit, in any claims submission or*~~
38. ~~*processing system used by the Kansas medicaid program or any of its*~~
39. ~~*contractors, unless such conduct is consistent with existing written exceptions*~~
40. ~~*established by, or with the express written approval of, an official*~~
41. ~~*of the Kansas single state medicaid agency who is authorized to make*~~
42. *~~such exceptions~~.*
43. ***(b) As used in this section, "public money," means any money***

INSERT: , whichever is least restrictive

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1. ***or negotiable instrument which belongs to the state of Kansas or***
2. ***any political subdivision thereof****, including money provided to the state*
3. *of Kansas by the federal government.*
4. (c) Misuse of public funds is a severity level 8, nonperson felony.
5. (1) *Misuse of public funds where the aggregate amount of money paid or*
6. *claimed in violation of this section is $100,000 or more is a severity level*
7. *5, nonperson felony.*
8. *(2) Misuse of public funds where the aggregate amount of money paid*
9. *or claimed in violation of this section is at least $25,000 but less than*
10. *$100,000 is a severity level 7, nonperson felony.*
11. *(3) Misuse of public funds where the aggregate amount of money paid*
12. *or claimed in violation of this section is at least $1,000 but less than*
13. *$25,000 is a severity level 9, nonperson felony.*
14. *(4) Misuse of public funds where the aggregate amount of money paid*
15. *or claimed in violation of this section is less than $1,000 is a class A*
16. *nonperson misdemeanor.* ***Upon conviction of misuse of public funds,***
17. ***the convicted person shall forfeit the person's official position****, and*
18. *shall thereafter be prohibited from holding any official, employee or contract*
19. *position with the state of Kansas or any political or taxing subdivision,*
20. *when such convicted person would have control of public money by*
21. *virtue of such person's official position.*
22. ***Sec. 3. K.S.A. 21-3910 is hereby repealed.***
23. Sec. 2 ***4***. This act shall take effect and be in force from and after its
24. publication in the statute book.

INSERT: (d) Nothing in this section shall prohibit the Kansas Medicaid program, its contractors, providers, recipients or their representatives, or others from: (A) advocating for medically necessary services or supports, or (B) continuing any current Medicaid projects, including the self determination project.

INSERT: (e) As used in this section, misuse of public funds shall not include instances where the provision or authorization of a service is required or otherwise authorized by federal law or regulation, or state law or regulation, including implementing services and supports which allow persons with disabilities opportunities of choice to increase their independence, productivity, integration and inclusion into the community (KSA 39-1802), promotion of the maximum self determination and self direction by the recipient (KSA 39-7,100), ensuring that Kansans with disabilities are not subject to inappropriate or unnecessary institutionalization (42 USC 12132), and ensuring that the Kansas Medicaid program arranges for all medically necessary services and supports for children under age 21 that corrects or ameliorates their physical health, mental health or disability (42 USC 1396a).

INSERT: (f) Nothing in this section shall prohibit the state or the state Medicaid agency from amending or changing, subject to federal approval, home and community based services waiver programs to increase the amount of self determination or self direction for individuals served by the waivers.

INSERT: (g) The Kansas Medicaid program shall promulgate rules and regulations which shall be consistent with federal or state law and which implement the provisions of this section.

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
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March 16, 2006

House Judiciary Committee

Dear Chairman O'Neal, Vice-Chair Kinzer, and Members of the Committee:

Thank you for allowing me to appear today on behalf of Attorney General Phill Kline to support Senate Bill No 326 and the balloon amendments proposed in the testimony of Rocky Nichols Executive Director of the Disability Rights Center of Kansas. My name is Rex Beasley. I am a Deputy Attorney General and the head of Attorney General Phill Kline's Medicaid Fraud and Abuse Division. Our Division is the Medicaid Fraud Control Unit (MFCU) required of the states by the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142), enacted by Congress in 1977. Along with establishing the state Medicaid Fraud Control Units, Congress provided the states with incentive funding to investigate and prosecute Medicaid provider fraud, and to investigate fraud in the administration of the Medicaid program. The Kansas Medicaid Fraud Control Unit needs more legislative tools to fulfill the mission envisioned for it by Congress - tools that Medicaid Fraud Control Units in other states already have and are using to their advantage in protecting their states' Medicaid dollars.

Senate Bill 326 accomplishes two separate purposes. It creates a Civil False Claims Act and then amends K.S.A. 21-3910 which prohibits the misuse of public funds. The balloon amendments proposed by the Disability Rights Center of Kansas concern only the amendments to K.S.A. 21-3910. I will first discuss the need for a Civil False Claims Act and then the need for changes in the wording of K.S.A. 21-3010 and the proposed balloon amendments.

A Civil False Claims Act for the State of Kansas would fill one of the gaps in our ability to recover over-payments of our Medicaid dollars from those who have obtained them improperly. Currently the Medicaid Fraud and Abuse Division has statutory authority to bring criminal actions for Medicaid fraud but has no specific state statutory authority to independently bring a state civil action for damages for filing a false claim or statement with the Kansas Medicaid program. While we seek orders of restitution in the criminal cases we file, specific statutory authority to file civil false claims actions in those cases where fraud is apparent but the available proof does not rise to the level of beyond a reasonable doubt, would greatly strengthen our ability to protect the integrity of the Kansas Medicaid program and Kansas Medicaid dollars.

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Currently the federal government and approximately 29 states have some form of Civil False Claims Act which they use successfully as part of their anti-fraud activities. There is no question that fraud exists within the Kansas Medicaid program and we need to go after it. Medicaid dollars are too precious to waste.

Turning now to the amendment to K.S.A. 21-3910, which prohibits misuse of public funds. Clearly our Medicaid dollars are public funds in the custody and control of those who administer the Kansas Medicaid program. K.S.A 21-3910 prohibits the misuse of public funds. Misuse of public funds is using, lending or permitting another to use, public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such person's official position. "Public money," is defined as any money or negotiable instrument which belongs to the state of Kansas or any political subdivision thereof. The federal government gives the state slightly over 60% of the state's Medicaid funding. One of the requirements to obtain federal funding is for the state to submit and obtain federal approval of a State Medicaid Plan. The federal government then expects the state Medicaid program to follow not only the state laws but also a myriad of federal rules regulations and policies as well as the state plan. From time to time the federal government audits the state Medicaid program for compliance. Conduct and practices that are inconsistent with sound fiscal, business or medical practice and results in an unnecessary cost to the Medicaid program constitutes abuse of the Medicaid program under the Code of Federal Regulations. When the federal government finds payments that exceed the limitations of federal laws, rules and regulations, Kansas laws, rules and regulations, or the terms of the Kansas Medicaid plan, it requires the state to repay those dollars - regardless of whether those inappropriate payments are ever recovered from the person firm or entity who received the overpayment. Those repayments come out of the pockets of Kansas taxpayers. The persons entrusted with administering the Kansas Medicaid program are prohibited from using, lending or permitting another to use, public money in a manner not authorized by law. The amendments to K.S.A. 21-3910 remind those who handle the state Medicaid funds that they are committing a crime if they knowingly allow or authorize any payment for Medicaid services that exceeds the limitations of federal laws, rules and regulations, Kansas laws, rules and regulations, or the terms of the Kansas Medicaid plan. Such conduct is not only inconsistent with sound fiscal, or business practice and results in an unnecessary cost to the Medicaid program but also constitutes abuse of the Medicaid program and misuse of public funds and should not be tolerated.

We worked with the Disability Rights Center of Kansas to reach the balloon amendments which will strengthen the state's ability to prosecute fraudulent acts while also recognizing that mechanisms exist to legally protect the state's responsibility to provide medically necessary individualized services to Kansans with disabilities who are eligible for the Medicaid program.

Again, on behalf of Kansas Attorney General Phill Kline, I wish to thank you for the opportunity to present this testimony to you and urge you to vote in favor of Senate Bill 326 with the balloon amendments and to take all other necessary actions to strengthen the ability of the Medicaid Fraud Control Unit to investigate and prosecute Medicaid Fraud and Abuse in both criminal as well as civil actions in this state.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL
PHILL KLINE

Rex G. Beasley
Deputy Attorney General
Director, Kansas Medicaid Fraud Control Unit

Mister Chairman and members of the Committee, my name is Michelle Sweeney, I am the Policy Analyst for the Association Community Mental Health Centers of Kansas, Inc. The Association represents the 29 licensed Community Mental Health Centers (CMHCs) in Kansas who provide home and community-based, as well as outpatient mental health services in all 105 counties in Kansas, 24-hours a day, seven days a week. In Kansas, CMHCs are the local Mental Health Authorities coordinating the delivery of publicly funded community-based mental health services. The CMHC system is state and county funded and locally administered. Consequently, service delivery decisions are made at the community level, closest to the residents that require mental health treatment.

Each CMHC has a defined and discrete geographical service area. With a collective staff of over 4,000 professionals, the CMHCs provide services to Kansans of all ages with a diverse range of presenting problems. Together, this system of 29 licensed CMHCs form an integral part of the total mental health system in Kansas.

As part of licensing regulations, CMHCs are required to provide services to all Kansans needing them, regardless of their ability to pay. This makes the community mental health system the "safety net" for Kansans with mental health needs – both target and non-target populations. The target population consists of adults who have a severe and persistent mental illness (SPMI) and children/adolescents who have a serious emotional disturbance (SED). The non-target population is basically everyone else served by the CMHC.

The Medicaid program is a vital safety net for adults and children with mental illness. CMHCs respond 24/7 to individual crises and emergencies for those suffering from mental illness—whether that is someone who is dangerous and out of control after they come into contact with law enforcement, or someone who is suicidal in the middle of the night. Any and all such emergencies may be responded to by CMHC staff. Each individual adult and/or child has different and varied needs and require various services for treatment, recovery and maintenance of their illness. The original version of Senate Bill 326 did give us pause. There truly is no way to anticipate any and every single circumstance that may present itself around someone's mental illness. Given the fact the CMHCs are required by SRS to serve all who present for treatment, regardless of payor source, the concern we have is that a situation may arise when treatment is medically necessary for an individual while at the same time reimbursement under Medicaid may be in question. It would be vastly unfair to charge fraud against a mental health center or their director for billing errors.

We stand before you today in support of Senate Bill 326, with the balloon amendments that have been described by the Disability Rights Center of Kansas. We believe the amended version of the bill will assist in identifying purposeful fraud in the Medicaid program, while at the same time allowing providers of mental health services to do their utmost in providing treatment, services, and recovery options to children and adults with serious mental illnesses in our state. The Association main concerns are that CMHCs not be criminalized for making billing errors and that the Secretary still be able to negotiate audit settlements if Senate Bill 326 is adopted.

Thank you for the opportunity to speak with you today, I am happy to stand for any questions.

Association of Community Mental Health Centers of Kansas, Inc
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House Judiciary Committee

Testimony on Senate Bill 326

March 16, 2006

Presented by:

Michelle Sweeney, Policy Analyst
Association of CMHCs of Kansas, Inc.

Self-Advocate
Coalition of Kansas

To: House Judiciary Committee
From: Kathy Lobb
Self Advocate Coalition of Kansas
Kathylobb@sbcglobal.net

Members of the committee:

My name is Kathy Lobb and I am the legislative liaison with the Self Advocate Coalition of Kansas, better known as SACK. We are a statewide advocacy group for people with developmental disabilities made up of over 20 local self advocacy groups across the state.

I am a consumer of Medicaid services. Medicaid fraud takes money away from the individual consumer for his or her services and the providers who work hard to help them. It also makes it hard for people to receive the services they depend upon such as residential or day services. It increases paperwork for the provider so they have less time to provide the actual services. SACK understands the need to limit Medicaid fraud. SACK wants to be sure that people with disabilities receive the services they need and that those providers who are paid but do not provide services are punished.

SACK is very worried about the second part of this bill.
We want people to have control of their own lives and get the supports they really need. The people that I know who have self determination funding would loose this individualized way of taking control of their money and their life. People who need extra help and are currently getting extra support through extraordinary funding would not be able to continue to get the help they need to be part of the community. This is not fair to them or their families.

I am afraid this bill would limit the chances of people with developmental disabilities to be able to take advantage of new ideas for services wherever they live or work. The way people like me are supported in the community has changed a lot in the past; SACK hopes it will continue to change to give us even better ways to be part of our community, be more empowered and make our own decisions about our lives. We are afraid that this bill would make SRS and others afraid to try new things for fear of being charged with fraud.
People with developmental disabilities have always been told "no you can't do this or try that". SACK is concerned that this bill makes it harder to get providers to say "YES" when we need extra help or a different way to get what we need to be independent.

Don't let your concern about fraud limit our lives.

If you have any questions, you can contact me at 785-749-5588.

Thank you for your time,
Kathy Lobb

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Testimony before the House Judiciary Committee
Regarding Senate Bill 326, as amended by the Senate, regarding Medicaid fraud.

Tom Laing, Executive Director, InterHab

March 16, 2005

On behalf of the Board of Directors of InterHab we support the intent behind SB 326, and urge the House committee to consider amending the bill to assure that unintended effects of the bill do not jeopardize state and local efforts to continue refinements in the disability service arena to strengthen the role of persons served in determining how best to meet their service needs.

In our initial review of the bill we saw little to recommend in the way of changes, but officials at SRS believed the language in Section 2 to be of a nature that would result in the impairment of currently evolving program designs. Persons with disabilities who have the capacity to self direct their supports and services would be losers in a scenario of strict and literal enforcement of the current language.

Advocates reviewed a number of amendments to clarify Section 2, and we are not conversant enough to adequately assess each of those amendments; therefore, we urge the committee to consider merely deleting section 2 of the bill, and preserve the heart of the proposal as contained in Section 1, which we believe would be a positive step to address that which the interim Medicaid legislative panel and the Attorney General hoped to accomplish this session.

We support the identification and prosecuting of those who willfully defraud the system. We only ask that, in our efforts to do so, that we do not create law that would unintentionally criminalize the actions of honest and well meaning advocates for quality consumer-driven services.

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Kansas Department of

Social and Rehabilitation Services

Gary Daniels, Secretary

House Judiciary Committee
March 16, 2006

SB 326 - Civil and Criminal Penalties
Regarding Use of Public Funds

Health Care Policy
Gary Daniels, Secretary
785.296.3271

For additional information contact:
Public and Governmental Services Division
Kyle Kessler, Deputy Secretary

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Kansas Department of Social and Rehabilitation Services
Gary Daniels, Secretary

House Judiciary Committee
March 16, 2006

SB 326 - Civil and Criminal Penalties Regarding Use of Public Funds

Chair O'Neal and Committee Members, I am Gary Daniels, Secretary of the Kansas Department of Social and Rehabilitation Services (SRS). Thanks you for the opportunity to present our concerns regarding Senate Bill 326.

SRS strongly supports efforts to reduce fraud and abuse in publicly funded programs, and measures to hold both service providers and our staff accountability for their actions associated with those programs. People needing the services SRS manages are simply too vulnerable, and the resources to meet those needs are simply too valuable.

However, SRS is concerned about the possible unintended consequences of Section 2(a) of this bill. Part (a)(1) of that section is language that exists in current law and we believe that provides sufficient criminal remedy against a public employee misusing public funds. The language of parts (a)(2) and (a)(3) of that section seem overly technical, extremely broad and open to a vast range of interpretations, and as a result are confusing. The primary concern is that this language will have a chilling impact on state officials and employees in the performance of their daily job responsibilities. If our understanding of this language is correct, it could greatly reduce flexibility to problem solve unique situations, and to effectively resolve complex and challenging situations that arise in human service programs.

While we certainly agree that all laws, regulations, rules and policies should be followed, to make every failure to follow every program rule subject to criminal prosecution seems to go too far. In the implementation of service programs – especially those involving multiple funding streams (all with unique ground rules) and involving multiple service needs/providers – policies are clearly needed to provide standards and procedures of general applicability. However, policies that establish guiding principles must have some operational flexibility in order to allow unusual situations (outside the general applicability) to be assessed and addressed. Some samples of hypothetical scenarios that potentially are affected by this bill are attached. It would be untenable for employees faced with these types of situations to have to bear the weight of criminal prosecution when striving to reach sensible – and lawful – solutions. The natural result would have to be that situations are very rigidly managed, and people needing services would ultimately suffer.

There are currently numerous systems and safety measures in place – such as federal audits, state audits, internal reviews, and staff supervision – to discover and respond if improper payments have been made. And abundant remedies currently exist to deal with these situations, either administratively, civilly or criminally.

For these reasons, we respectfully ask the Committee to consider removing Section 2(a) from this bill. Thank you for your consideration.

Examples of Practical Scenarios Potentially Affected By SB 326

#1 A 17-year-old male with significant developmental disabilities has been removed from his natural home due to physical abuse. Because of the intensity of his support needs, a suitable foster home is not available, and in his area of the state there is no available residential services for youth with developmental disabilities. However, a long-term and stable provider of residential services for adults has both services and a home available that can well meet the young man's needs, where a 19-year-old lives who goes to the same school and is friends with the 17-year-old. Residential services for adults are defined in the provider manual as "for persons 18 years of age or older." *Should the young man be prohibited from moving to the available home and getting the available services? For the 7 months remaining before the young man turns 18, should the services he needs not be paid for? Should no services in the home where he lives be paid for? Should no services delivered by the adult residential provider be paid for? Should authorizing that service arrangement be a crime?*

#2: A personal service provider who supports a lady with physical disabilities fills out her record of service for several days in a row. On some of the days the provider uses the style of "Feb. 20" and on others she puts "2/19/06". The provider manual requires as documentation that the provider note the "complete date (MM/DD/YYYY) that service was provided." The attendant care worker is a young employee, new to the service delivery field, and is providing very good supports; she adequately documents her services every day, but slipped on the date style on some of her notes. *For those days not dated accurately, should additional provider education be supplied? Should the services on those days not be paid for? Should no services delivered by that attendant care provider be paid for? Should opting to further educate the provider and pay for the services delivered be a crime?*

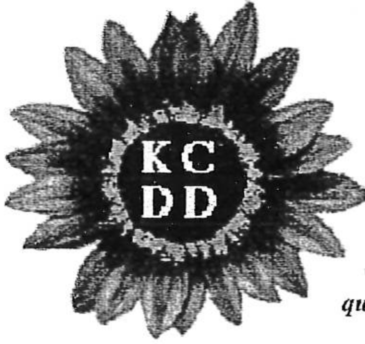
#3: The Kansas Medicaid State Plan regarding Early and Periodic Screening Diagnosis and Treatment (EPSDT) services for youth has in its opening service limitation language that: "Limitations may be exceeded for EPSDT participants when determined medically necessary through the prior authorization process." Included in the EPSDT services are inpatient psychiatric facility services, with the limitation of: "Up to six month stay in Level VI Group Care." Providers are attempting to meet the psychiatric needs of youth and get them returned to their home within six months, but cannot in every situation find suitable arrangements to meet the long-term and very complex support needs for each youth. Therefore, some youth are reviewed and receive prior authorization to continue Level VI care. CMS (Centers for Medicare and Medicaid Services), after an audit of the services, advises Kansas that the six month limitation must be enforced and no

Medicaid service can continue after the six months pass. *Should each child be removed from Level VI services at the conclusion of six months? Should Kansas go back in time and offer to reimburse federal payments for all similar situations? Should Kansas continue to allow the services, but pay providers with state funds only? Should decisions made while working through these issues be considered a crime?*

#4: Also related to Level VI services, the provider manual instructs that: "A 30 consecutive day time period must lapse between discharge and readmission into the same level of placement prior to initiating a new coverage period." A young lady had been served in a Level VI facility, and after 125 days of service and extensive after-care planning, a foster care placement is arranged in her community. She discharges to that home and is settling into her new routine. After 20 days, she has a psychiatric crisis eruption; community services are provided and she seems to be stabilizing, but she learns that her biological mother has cancer and her psychiatric condition worsens to the point that she becomes a danger to herself at day 26. After emergency intervention, her treatment team believes that the best option for the young lady's recovery is to return to the Level VI facility where she had established strong treatment relationships, so the request for those services is made at day 27. *Should the request be denied because 30 days has not lapsed? Should the services from days 27 through 30 be paid for with state funds? Should the entire "new coverage period" be paid for with state funds? Should the decision made be considered a crime?*

#5: A 53-year-old man is living in a small rural Kansas town with his 81-year-old mother. The man has developmental disabilities and has resided with his parents all his life, and they provided the bulk of his needed support – supplemented by neighbors and fellow church members. Early one morning a neighbor down the street sees the man wandering about, appearing to be in a daze. He goes to check the situation and discovers that tragically the mother has passed away. The police contact the nearest Community Developmental Disability Organization (CDDO), which steps in to assist. The man is immediately determined eligible for services, and everyone who knows the man indicates that it would be devastating to him to have to move from the town. The CDDO has a group home in the town, providing residential services to 8 adults, but no other setting is available that would meet his needs. They have a spare room in the home that can be quickly converted to a bedroom, and they are willing to either purchase or build another home for some of the people they serve to live in. However, that will take 3-6 months to accomplish. The provider manual instructs that adult residential services "will not be offered in ... a setting 9 beds or larger." The CDDO is requesting a time-limited exception to that standard while they prepare to meet the long-term needs of this man. *Should the man be prohibited from moving to the available home in his town and*

getting the available services? For the 3-6 months of services he needs not be paid for? Should no services in the home where he lives be paid for? Should no services delivered by the adult residential provider be paid for? Should authorizing that service arrangement be a crime?



Kansas Council on Developmental Disabilities

KATHLEEN SEBELIUS, Governor
DONNA BEAUCHAMP, Chairperson
JANE RHYS, Ph. D., Executive Director

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"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

HOUSE JUDICIARY COMMITTEE
March 16, 2006
Room 313-S

Mr. Chairperson, Members of the Committee, my name is Jane Rhys, and I am here on behalf of the Kansas Council on Developmental Disabilities to testify against part of S.B. 326. The Council is federally mandated and federally funded – we receive no state funds. Our mission is to provide information to policymakers, promote systems change and innovation, and advocate for individuals with developmental disabilities.

First we definitely are opposed to Medicaid fraud. Public funds should not be used for personal profit nor should they be used for persons who do not qualify for services. However, certain parts of this bill appear to be throwing the baby out with the bathwater and we have grave concerns.

We have studied this bill closely and Section 2 on page 3 that begins: "Misuse of public fund . . ." is where our apprehensions lie. This part of the bill has been interpreted by several attorneys to mean that *no agency employee may approve any provision of funds outside what is in current Medicaid waivers and policy manuals*. Kansas has used exceptions to fund unique programs and also to meet the extraordinary needs of certain individuals who do qualify for a Kansas waiver.

Examples under the Home and Community Based Services (HCBS) waiver for Developmental Disabilities (DD) include extraordinary funding. Currently there are five tier levels of funding for individuals who are eligible for the HCBS/DD Waiver. Individuals who may need this level of funding include persons leaving a state hospital and persons who have "aged out" of the Attendant Care for Independent Living (ACIL) Waiver. These individuals typically have needs that go beyond what is provided to most of the persons on the DD waiver. Another example is our Self Determination program. Persons on this program direct their own services. They do not receive additional funds, rather they

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determine what they need and develop their budget accordingly. They absolutely do not wish to return to the method under which service providers are in charge of their funding.

Other examples include exceptions related to durable medical equipment purchases, in which the state approved item does not meet the person's needs and another item is substituted. Frequently exceptions save the state money.

Another exception example is the three bid requirement in which a person must obtain bids from three different places in order to purchase equipment. While this is a reasonable request for those in urban areas, it does work in our rural areas. Exceptions have been granted so that these individuals may obtain much needed equipment with fewer bids.

Who are these "individuals"? Under the HCBS/DD Waiver we find "Ann" who is 18, lives with her parents, and has a cognitive disability that limits her ability to read and think. She also has physical disabilities and uses a wheelchair for mobility. "Ann" also needs an accessible place to live (no stairs, lowered light switches, an accessible bathroom, etc.) "Ann" lives in St. Francis – almost as far north and west as one can be in Kansas. "Ann" needs a new wheelchair. She is permitted to get only one bid because purveyors of wheelchairs are few and far between. If this exception is not allowed under this bill, "Ann" and her family will have to do a lot of traveling in order to get three bids.

"Ann" is one of many people who would be affected by this bill. I have also brought written testimony from Rud Turnbull, the father of a young man in Lawrence who uses self determination in obtaining his services. These people are not trying to defraud Medicaid nor are the state employees who granted the exceptions. They are trying to improve the lives of people with developmental disabilities by being flexible in the provision of services.

As always, I appreciate the opportunity to speak to you and would be happy to answer any questions.

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Jennifer Schwartz
Executive Director

Member Agencies:

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Coalition for Independence
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ILC of Northeast Kansas
Atchison, KS
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Independent Living Resource Center
Wichita, KS
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Independence, Inc.
Lawrence, KS
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Independent Connection/ OCCK
Salina, KS
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LINK, Inc.
Hays, KS
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Prairie Independent Living Resource Center
Hutchinson, KS
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Resource Center for Independent Living, Inc.
Osage City, KS
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Southeast Kansas Independent Living, Inc.
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House Judiciary Committee
Mike O'Neal, Chair
SB 326
March 16, 2006

Chairperson O'Neal and members of the Committee, thank you for the opportunity to provide comments in opposition of SB 326, as currently written, an act concerning civil actions and civil penalties; relating to false or fraudulent claims. I am Jennifer Schwartz, the Executive Director of the Kansas Association of Centers for Independent Living (KACIL). KACIL represents 12 Centers for Independent Living (CILs) across Kansas. KACIL is driven by the following mission statement: *To coordinate efforts within Kansas and the United States to the extent that these efforts will further independent living for all. KACIL will advocate for the civil rights of Kansans with disabilities.*

Centers for Independent Living provide services to people with any disability, of all ages. CILs provide information and assistance to businesses and other entities in the community to increase opportunities for people with disabilities to live, work, and play in all aspects of community life.

I would note that the Statewide Independent Living Council of Kansas (SILCK) also rises in opposition to this legislation as currently written, and concurs with the comments included in this testimony. Throughout the 12 year history of the SILCK, it has followed the purpose, as mandated by the federal Rehabilitation Act of 1973, to advocate and promote the civil and human rights of people with disabilities in all aspects of life.

SB 326 seeks to eliminate Medicaid Fraud, which we wholeheartedly support. KACIL is committed to ensuring the Medicaid program is able to nimbly and efficiently provide the services Kansans need. Medicaid fraud hurts people who need services because fraud diverts state and federal dollars from people waiting for services toward people who are defrauding Medicaid. KACIL members work with state Medicaid officials and the Attorney General's Medicaid Fraud and Control Unit on a regular basis to eradicate fraud. One CIL recently told me that their staff assists the Attorney General's office with fraud investigations

214 SW 6th Street, Suite A ◆ Topeka, KS 66603-3719 ◆ Voice/

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several times a year and that their CIL is involved with two investigations as we speak.

When SB 326 was first introduced we did not come forward in opposition, but after further examination we believe the bill contains unintended consequences that would negatively affect individuals who qualify for long-term care supports and services and utilize the Home and Community Based Services Waivers (HCBS).

The disability community has worked hard to develop relationships with State Agencies to provide information and gain an understanding of how we can best serve individuals with disabilities. We believe the unintended consequences would come to the forefront when those administering the programs are faced with making exceptions. At times SRS staff have made researched and carefully thought-out exceptions to rules to assist an individual in making it through a crisis situation or when an individual has changing needs. They also occasionally make exceptions on the number of hours a person might need for an interim period of time or on the way services are delivered so that the person can be supported and remain in their economical, community-based living situation. Not all people's needs fit neatly into the design of state programs. I am sure you have all heard from constituents whose needs do not precisely match the services available. There is a big difference between these people and people who seek to defraud Medicaid for their own gain. For example:

> *An individual in Salina who qualified for the HCBS-PD waiver began receiving services and had requested that he self-direct the services he was receiving so that he could take responsibilities for those services being provided. In the beginning this individual struggled with learning to interview, hire and schedule the personal assistants that he employed. He came close to giving up on these services, and could have ended up in a nursing home, a more costly option for Kansas, but SRS made an exception and increased the number of hours allowed for two months to allow time for his Independent Living Counselor to work with and teach him about directing these services. We are happy to report that he is still living in his own home, and has an entire system in place to self-direct the services he is receiving*
>
> *When an individual is on the HCBS-PD waiting list and then offered a slot on the HCBS-PD waiver, the policy manual states that the individual has 30 days for services to be set up and in place or the slot could be offered to the next individual who qualifies. Under current practice if there are extenuating circumstances, the Independent Living Counselor can request additional time if the person's services are not in place. This situation happens for several reasons: not being able to secure staff in time to work for the individual; still needing to secure housing; making accessibility accommodations to their current home; getting the right equipment in*

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place in the persons home; etc. We know there are a lot of steps for an individual with a disability to transition into their own home and receive services, and sometimes these steps don't occur within the time allotted by an external timetable.

People who receive day services on the HCBS-DD waiver must be out of their homes for at least 25 hours per week engaging in a meaningful work-related activity. At times people with developmental disabilities have the ability and desire to have a job, but due to a difficult health situation are not able to work 25 hours per week. In these cases, SRS staff are allowed to look at the entire situation and decide to lift the 25 hour requirement to ensure a person can do meaningful work for 15 or 20 hours per week instead.

Section 2 of SB 326 would not allow for these individual exceptions. These examples could possibly be addressed and policies could be developed, but it is impossible for us to predict what the next situation might bring. We believe it is crucial to have good laws in place that are flexible enough to empower and support the individuals they apply to and still operate economically.

KACIL and the SILCK are uncomfortable with the current version of the bill, and are concerned with the unintended consequences of this bill as written. We would respectfully request that Section 2 be stricken from SB 326.

When developing state law we must remember that we are working with individuals' lives and need to ensure that the policies and statutes have flexibility to support individuals. It is critical that laws respect the professional decision-making ability of state employees who are charged with administering them.

Thank you for your time and thoughtful consideration of this legislation, and please remember that the bottom line is we need to take our time and really consider the effects of this legislation on the lives of the citizens of Kansas.

Jennifer Schwartz
Executive Director

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To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: March 15, 2006

Subject: SB 326; False Claims Act

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 326, which deals with fraudulent claims submitted for state payment. Our principal interest in this legislation is its application to claims submitted by physicians in conjunction with services provided to individuals covered by the Medicaid program.

SB 326 establishes a state-level false claims act that is for the most part consistent with the Federal False Claims Act (31 U.S.C. 3729(a) *et seq.*). There already exists ample statutory authority, both federal and state, to investigate and prosecute fraud in Medicaid. In addition to the criminal sanctions contained in the Kansas Medicaid Fraud Control Act found at K.S.A. 21-3844, *et seq.*, the federal Office of Inspector General within the Department of Health and Human Services is empowered under Title XI of the Social Security Act (Section 1128A) to assess civil monetary penalties against entities found to have submitted false claims or committed fraud in the Medicare and Medicaid programs. Additionally, the Federal False Claims Act mentioned above authorizes civil monetary penalties and assessments against entities who make false statements or claims to any federal agency. The Anti-Fraud and Abuse Amendments of 1977 to Title XIX of the Social Security Act establishes state Medicaid Fraud Control Units (MFCUs), one of which also operates in Kansas. Additionally, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) also further authorizes OIG to conduct investigations, audits and evaluations related to health care fraud. In other words, there are numerous laws already on the books that contain both civil and criminal penalties for committing fraud in Medicaid.

While we believe that this bill is unnecessary, because there already exist ample tools to find and prosecute Medicaid fraud, as pointed out above, there are two points we would like to make regarding SB 326. First, we support the language not authorizing private causes of action contained in subsection (c) of section 1, found at lines 14-17 on page 2 of the bill. This issue was discussed by the interim committee, and it was felt that allowing private causes of action could encourage the filing of unmeritorious allegations of fraud by private individuals since they, and their attorneys, would stand to gain financially from any settlements or judgments arising

from the action. We believe the approach contained in the bill as it is written is appropriate. It relies on the Attorney General to bring an action for violation of the Act, presumably after an investigation and a showing that there is a reasonable basis to suspect actual fraud.

Second, we encourage the Committee to consider placing a statement in the committee minutes which clarifies that the False Claims Act is not intended to punish honest mistakes or innocent claims submitted through mere negligence. When the Federal False Claims Act went through its revisions a number of years ago, Congress specifically included the "knowing" requirement to make it clear that honest mistakes would not constitute a violation of the law.

Thank you for the opportunity to comment on SB 326.

ROBERT M. DAY, Ph.D, Director

K A N S A S

KATHLEEN SEBELIUS, GOVERNOR

DIVISION OF HEALTH POLICY AND FINANCE

Testimony on:
Senate Bill 326 – Civil and Criminal Penalties Regarding Use of Public Funds

Presented to:
House Judiciary Committee

By:
Dr. Robert Day, Executive Director
Division of Health Policy and Finance

March 16, 2006

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House Judiciary
Date 3-16-06
Attachment # 19

Kansas Division of Health Policy and Finance
Robert M. Day, Director

House Judiciary Committee
March 16, 2006

SB 326 – Civil and Criminal Penalties Regarding Use of Public Funds

Chair O'Neal and Committee Members, my name is Dr. Robert Day, and I am the director of the Division of Health Policy and Finance, the single state agency responsible for administering the Medicaid program. I want to thank you for the opportunity to share with you some of the implications of provisions in SB 326 regarding false claims that have come to my attention since the bill's introduction earlier in the session.

Having run the Medicaid program as its director from 1999-2004, and now managing the state employee health insurance program as well, I understand the need to provide all the necessary tools to prevent fraud and abuse in the Medicaid program. Kansas Medicaid is a large and important program – a very complex program to operate. On average, the program processes 40,000 medical claims every day, seven days a week, and will reimburse providers in excess of $2 billion this year for services rendered to nearly 400,000 Kansans. The number and variety of services that may be provided to our beneficiaries is staggering: standard medical care now includes approximately 16,000 different procedures or products, 200,000 different pharmaceutical products, over 100,000 unique medical diagnoses. The definition of standard or medically necessary care changes constantly, presenting the Medicaid program with decisions about coverage and benefits on a continual basis.

In a mechanical sense, payment for medical services is administered primarily through the electronic Medicaid Management Information System (MMIS), which evaluates, or "adjudicates," claims for Medicaid reimbursement. The rules governing these payments are set out in broad terms in state and Federal law, but are operationalized in a series of contractual relationships between the Federal government and the state, and between the state and providers. The state's participation in the Federally-funded Medicaid program is based on a contract with the Center for Medicare and Medicaid Services (CMS), i.e., the Medicaid "state plan." The state is engaged in contracts with several thousand providers who have agreed to provide services to Medicaid customers. Deviations from these contractual arrangements constitute an administrative application of discretion in managing the program, but they are not illegal. Section 2 of SB 326 would endow these contractual relationships with the status of law, criminalizing any deviations from the explicit terms of the contracts.

The difficulty with SB 326 is that it is predicated on the assumption that the law, i.e., Medicaid payment policy, can be perfectly and completely represented in written form, contract or an automated payment system. This is an interesting hypothesis, and we are unable to answer the question of whether it might be possible to codify Medicaid payment policies completely. In practice, private insurance plans and state Medicaid programs do not attempt such complete codification, but instead rely in part on administrative processes to operationalize payment policies.

Our own staff routinely apply administrative discretion to operate the Kansas' Medicaid program, and this discretion has led to a number of important decisions to deviate from codified payment policies. Recent

examples of administrative discretion in Kansas Medicaid include:

- Covered prescription drugs for seniors eligible for both Medicaid and Medicare for several weeks following implementation of Medicare Part D drug coverage [*Federal and state law stipulated that drug coverage would end January 1, 2006, but by mutual and public– though not codified – agreement, this restriction was delayed until February 8th to ensure access to medically necessary drugs*].
- Covered Vitamin D for premature twin babies [*Medicaid does not cover vitamins*].
- Covered replacement medications for a beneficiary who had lost the drugs to a house fire [*Medicaid does not allow early refills for medication*].
- Covered the purchase of a replacement inhaler for a child who had lost it [*Medicaid does not allow early refills for medication*].
- Covered the purchase of replacement medications for a beneficiary whose drugs were stolen [*Medicaid does not allow early refills for medication*].
- Covered four dental cleanings per year for a beneficiary with oral cancer [*Medicaid only pays for two dental cleanings per year*].
- Covered a compounded (custom-mixed) drug for a baby with cystic fibrosis [*Medicaid does not cover all drugs*].
- Covered an additional three months of physical therapy for a beneficiary with bilateral mastectomy and adhesions from radiation therapy burns [*Medicaid covers six months of physical therapy*].
- Allowed a cochlear implant procedure to be performed in Wichita [*Medicaid allows cochlear implants at KU Medical Center in Kansas City*].
- Covered a continuous positive airway pressure (CPAP) machine for a child [*Medicaid does not cover CPAP machines*].
- Covered robotic therapy for a stereostatic reduction of a brain malformation for medical necessity [*Medicaid does not cover this service*].
- Covered inguinal hernia repair for females for medical necessity [*Medicaid does not cover this service for females*].

Without the ability to apply some administrative discretion in the operation of the Medicaid program, the state will not be able to provide these sorts of unusual and often unpredictable medically necessary services to beneficiaries.

Recommendation: To ensure that the Kansas Health Policy Authority is able to fulfill the statutory mission of the Medicaid program, we recommend that Section 2 be deleted.

Thank you for the opportunity to share my concerns about this bill. I would be happy to answer any questions the committee might have.