Approved: May 22, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:34 a.m. on February 4, 2009, in Room 545-N of the Capitol.

All members were present.

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Judge Steven Leben, Kansas Judicial Council Procedure Advisory Committee
Scott Hesse, Legal Counsel, Kansas Board of Healing Arts
Trevor Howard, Court of Tax Appeals
Ray Dalton, Deputy Secretary, SRS
Chuck Simmons, Deputy Secretary, Kansas Department of Corrections

Others attending:
See attached list.

The Chairman called for final action on **SB 85 - Secretary of state; return of filings.**

Senator Vratil moved, Senator Kelly seconded, to amend **SB 85** by striking the word "certified" wherever the word appears in the bill. Motion carried.

Senator Vratil moved, Senator Bruce seconded, to recommend **SB 85** as amended favorably for passage. Motion carried.

The Chairman called for final action on **SB 86 - Secretary of state; letters of good standing**.

Senator Schodorf moved, Senator Bruce seconded, to recommend **SB 86** favorably for passage. Motion carried.

The Chairman called for final action on **SB 132 - Enacting business entity transaction act.**

Senator Vratil moved, Senator Bruce seconded, to amend **SB 132** as reflected in the balloon amendment distributed by the Secretary of State's Office during testimony on February 3. Motion carried.

Senator Kelly moved, Senator Kelly seconded, to recommend **SB 132** as amended, favorably for passage. Motion carried.

The Chairman opened the hearing on **SB 87 - Agencies; disclosure of certain records; administrative procedure; judicial review.**

Judge Steven Leben appeared in support and reviewed the bill as recommended by the Kansas Judicial Council by amending the Kansas Administrative Procedure Act and the Kansas Judicial Review Act.. **SB 87** is intended to strengthen the protections for fair and impartial judgements without sacrificing agency expertise or interfering with policy making responsibilities. Judge Leben summarized the major recommendations included in the bill. (Attachment 1)

Scott Hesse testified in opposition stating **SB 87** would allow litigants to bring suit in the courts before an administrative agency makes its final decision. This change of law would place the public at risk for harm from someone without the ability to practice medicine or any of the healing arts. Mr. Hesse stated the bill will increase litigation and the associated costs to state agencies. (Attachment 2)

Minutes of the Senate Judiciary Committee at 9:34 a.m. on February 4, 2009, in Room 545-N of the Capitol.

Trevor Howard provided neutral testimony requesting a modification to exempt the Kansas Court of Tax Appeals from the provision requiring the presiding officer who is not the "agency head" be staffed by the Office of Administrative Hearings. (Attachment 3)

Written testimony in support of **SB 87** was submitted by:

Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence (Attachment 4)
Robert Waller, Kansas Board of Emergency Medical Services (Attachment 5)

The Chairman opened the hearing on **SB 95 - Trafficking in contraband in a correctional institution or treatment care facility.**

Ray Dalton spoke in support indicating the bill would add care and treatment facilities, such as the Sexual Predator Treatment Program facilities at Larned State Hospital and Osawatomie State Hospital to the types of facilities that trafficking statutes would apply. (Attachment 6)

Chuck Simmons provided neutral testimony in support of **SB 95** but requested an amendment deleting the language excluding parking lots. Correctional facility parking lots provide the public a high degree of access and surveillance is difficult making them highly conducive to the delivery of contraband. (Attachment 7)

The next meeting is scheduled for February 5, 2009.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 4, 2009

NAME	REPRESENTING
Michael Byington	Ks Assn f/t Blind + Visually Impaired
Anthony A. Fadale	AOA/~~AOA~~ SRS
Martha Gabehart	KS. Com on Disability Concerns
Pat Eakes	KCDC
Rick Fleming	Securities Commission
Diane Minear	Sec. of State
Ami Hyten	Topeka Independent Living.
JACK CONFER	BOARD OF HEALING ARTS
Scott Hesse	Board of Healing Arts
Kristi Pankratz	KSBHA
Julia Mowes	KS BHA
Beth Lang	SRS
Sandy Barnett	KCSDV
Laurel Klein Searles	KCSDV
Wayne Bailey	KCVA
[illegible] Peck	KCVA
Pam Scott	Ks Funeral Directors Assn
John Campbell	KID

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 4, 2009

NAME	REPRESENTING
Mike Leitch	AG
Lindsey Douglas	KDA
Richard Smoot	Kansas Action for Children
Joann Cozine	KDOA
Mary Leigh Dyck	KSBTP
Scott Heidner	KS Association of Defense Counsel
Randy M. Hearrell	KS Judicial Council
Christy Molzen	Judicial Council
Rebecca Crotty	KS Court of Tax Appeals
Trevor Wohlford	KS Court of Tax Appeals
Tracy Diel	OAH
Steve Leben	Ks. Judicial Council
Brandon Myers	KS Human Rights Commission
Bill Minner	KS. Human Rights Comm
Ruth Glover	Ks Human Rights Com.
Ray Dalton	SRS
Patrick Woods	SRS

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 4, 2009

NAME	REPRESENTING
Robert Walker	KBSMS

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council - Judge Steve Leben**

DATE: **February 4, 2009**

RE: **2009 SB 87**

The Judicial Council recommends 2009 SB 87, a bill amending the Kansas Administrative Procedure Act and the Kansas Judicial Review Act. The bill was recommended by the Council's Administrative Procedure Advisory Committee after a lengthy study. The bill is intended to strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policy-making responsibilities.

The rationale for each recommended amendment is set out in the attached report. The six major recommendations for change are summarized on page 3 of the report.

Senate Judiciary
2-4-09
Attachment 1

REPORT OF THE JUDICIAL COUNCIL
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE

APPROVED BY THE JUDICIAL COUNCIL ON
DECEMBER 9, 2008

BACKGROUND

In June 2006, the Judicial Council's Administrative Procedure Advisory Committee requested that the Council assign it the task of studying the Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* Both Acts were originally passed in 1984 and had not been significantly amended since that time. Advisory Committee members were aware of several areas in which the Acts could be improved and believed that a comprehensive review of both Acts was needed. The Judicial Council agreed and made the requested assignment.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee taking part in this study were:

Carol L. Foreman, Chair, Topeka; Deputy Secretary of the Department of Administration
Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings
James G. Flaherty, Ottawa; practicing attorney
Jack Glaves, Wichita; practicing attorney
Hon. Steve Leben, Topeka; Kansas Court of Appeals Judge
Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law
Brian J. Moline, Topeka; practicing attorney and former member of the Kansas Corporation Commission
Camille A. Nohe, Topeka; Assistant Attorney General
Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice
Steve A. Schwarm, Topeka; practicing attorney
John S. Seeber, Wichita; practicing attorney
Mark W. Stafford, Topeka; practicing attorney

METHOD OF STUDY

In conducting its study of KAPA and KJRA, the Administrative Procedure Advisory Committee held 24 meetings over two and a half years. The Committee solicited and considered input from a variety of sources, including state agencies, agency legal counsel, and other attorneys practicing in the area of administrative law. The Committee also met with two students in the University of Kansas Law School's Public Policy Clinic who prepared a research paper

addressing specific administrative law issues suggested by the Committee.

As it reviewed each Act, the Committee considered the case law interpreting each section. Because the original versions of KAPA and KJRA were based, at least in part, on the 1981 Model State Administrative Procedure Act, the Committee also considered a revised version of the Model Act currently under consideration by the Uniform Law Commissioners.[1] When proposing amendments to KAPA and KJRA, the Committee adapted language from the revised Model Act if the Act's language was consistent with the Committee's resolution of an issue, because the Model Act's language has been carefully vetted and because using that language would promote consistency with other states.

During the period in which the Committee was studying the KAPA and KJRA, various bills were introduced in the Kansas Legislature proposing amendments to those statutes. Responding to legislative requests, the Committee provided testimony or commented on several of these bills, and in several instances suggested specific language that was the product of the Committee's ongoing discussions. This report represents the culmination of the Committee's comprehensive review of both statutes, although it incorporates a number of recommendations or comments already submitted to the legislature.

COMMITTEE RECOMMENDATIONS

The Committee proposes the adoption of a number of amendments to KAPA and KJRA, which are contained in 2009 SB 87. The "Comments" section beginning at page 7 of this report discusses the reasons for each of the amendments, many of which are technical or intended for purposes of clarification. This report will not discuss technical or clarifying amendments, but rather will focus on the Committee's most important recommendations concerning agency adjudication and judicial review. Most of these recommendations address the same concerns that prompted legislative attention to KAPA and KJRA over the last few years: Whether the agency's role in investigating and prosecuting violations of the laws it administers is compatible with its acting as a fair and impartial adjudicator. States respond to this issue in a variety of ways, ranging from giving agencies complete control over adjudication to making hearing officers independent and precluding agency review.[2] Currently, Kansas law provides agencies with very strong tools to control adjudication and offers relatively few protections to ensure fair and impartial agency adjudications. Many of the Committee's recommendations are intended to significantly strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities.

The Committee recommendations, which concern both the conduct of hearings under KAPA and the effectiveness of judicial review under KJRA, can be summarized as follows:

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[1] National Conference of Commissioners on Uniform State Laws, Revised Model State Administrative Procedure Act (Draft), available on line at http://www.law.upenn.edu/bll/archives/ulc/msapa/2008_amdraft.htm.

[2] Two fairly recent articles by the same author provide a useful compendium and summary of state approaches to these issues. *See* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 Ind. L. Rev. 401 (2005); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 Admin. L. Rev. 1355, 1382-85 (2002).

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)

2. The separation of agency adjudicators from personnel involved in investigations and prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)

5. KJRA should emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621) **Note:** This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather would restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.

6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

A. Recommended Amendments to KAPA: The first three recommendations involve amendments to KAPA to provide greater protections to parties in the conduct of KAPA hearings.

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)

The advisory committee recommends raising the burden of proof to "clear and convincing evidence" for disciplinary actions concerning occupational and professional licenses in order to provide greater protection for these especially important interests. Occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of

proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.[3] This higher standard of proof already applies by virtue of Supreme Court Rule in attorney disciplinary proceedings and may apply to other licenses as well.[4] The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the advisory committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

2. The separation of agency adjudicators from personnel involved in investigations or prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)

The most troubling situation from a fundamental fairness perspective is when agency personnel who act in an investigatory, prosecutorial or adversarial capacity on a case are also involved in the adjudication of that case. Currently, K.S.A. 77-514, which governs the presiding officer in hearings, does not contain any separation of functions requirement and K.S.A. 77-525, which prohibits ex parte communications, would not appear to apply to communications between the agency head serving as presiding officer and agency personnel who had investigatory or prosecutorial roles. Although judicial decisions in Kansas require separation of functions,[5] the advisory committee recommends the addition of a separation of functions requirement to K.S.A. 77-514 to provide more specific guidance. To reinforce this separation, the Committee recommends that the prohibition on ex parte communications under KAPA should be expanded to bar communications between presiding officers and investigatory or prosecutorial personnel regarding pending cases.

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)

Under current law, agencies review decisions of hearing officers in the Office of Administrative hearings "de novo"; *i.e.*, without any deference to the hearing officer decision. While such de novo review power is critical to the agency's policy making function and to the application of its expertise (which hearing officers lack), concerns may arise because the hearing officer rather than the agency has the opportunity to observe the witnesses and because this

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[3] *See, e.g.*, Johnson v. Board of Governors of Registered Dentists, 913 P.2d 1339, 1345-47 (Okla.1996); Nguyen v. State, 144 Wash.2d 516, 29 P.3d 689, 690-97 (2001); Painter v. Abels, 998 P.2d 931, 941-42 (Wyo.2000). *But see* Eaves v. Board of Med. Exam'rs, 467 N.W.2d 234, 237 (Iowa 1991); Rucker v. Michigan Bd. of Med., 138 Mich.App. 209, 360 N.W.2d 154, 155 (1984); Petition of Grimm, 138 N.H. 42, 635 A.2d 456, 461 (1993); In re Polk, 90 N.J. 550, 449 A.2d 7, 12-17 (1982); Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17, 19-20 (1998); Gandhi v. Medical Examining Bd., 168 Wis.2d 299, 483 N.W.2d 295, 298-300 (Ct.App.1992).

[4] *See* Lacy v. Kansas Dental Bd., 274 Kan. 1031, 1036 58 P.3d 668, 673 (2002) (application of clear and convincing evidence standard in case involving dentist's license).

[5] *E.g.*, Pork Motel, Corp v. Kansas Department of Health and Environment, 234 Kan. 374, 383 (1983).

standard appears to give the agency authority to disregard the findings of fact made by the independent hearing officer. The advisory committee believes that the draft Revised Model State Administrative Procedure Act,[6] which requires the agency to have "due regard" for the hearing officer's obligation to view witnesses takes a reasonable approach and its proposed amendment to K.S.A. 77-527 reflects this approach. Under this standard, the agency would, in effect, be required to explain why it is rejecting the credibility determinations of the hearing officer. This requirement in turn interacts with the Committee's proposals to strengthen judicial review, discussed below.

B. Recommended Amendments to KJRA: Recommendations 4 and 5 involve amendments to KJRA designed to make judicial review more available and meaningful as a check on the fairness of agency decisions without interfering with the agencies' expertise and legitimate policy making functions.

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)

During its review of KJRA, the Committee received comments expressing concern that pleading and exhaustion requirements in KJRA were being applied to dismiss or reject challenges to agency action for technical reasons unrelated to the merits of the challenge. The Committee believed that some of these technical barriers were unreasonable and unnecessary. First, with regard to the initiation of actions for judicial review, K.S.A. 77-614 contains a number of very specific pleading requirements that are not required in ordinary civil actions. While more detailed information is necessary and helpful in conducting the action for judicial review, many courts have interpreted these requirements as jurisdictional, applied them very strictly, and refused to allow amendments to correct minor errors. This strict application is not necessary to the effective conduct of judicial review and deprives many parties of their day in court. Thus, the Committee recommends amendments to clarify that the pleading requirements are not jurisdictional in the sense that pleadings can be amended to correct mistakes if doing so will not cause prejudice. Second, the Committee also recommends language to clarify an exception to exhaustion requirements in K.S.A. 77-612 when administrative remedies are inadequate or when exhausting administrative remedies would cause irreparable harm. These exceptions have been recognized in some court cases in Kansas, and the committee believes that they should be defined by statute. Similarly, the Committee also recommends expanding an exception in K.S.A. 77-617 to allow parties to raise issues on review that were not presented to the agency if those issues were not reasonably knowable during the administrative process.

5. KJRA should be amended to emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621)

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[6] Revised Model State Administrative Procedure Act § 418(e).

Under the Kansas Supreme Court's approach to the "substantial evidence" standard of review, courts should consider only the evidence in the record that favors the agency decision, and disregard contrary evidence.[7] The Committee believes that this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. It is particularly problematic when the agency reverses the decision of a hearing officer, because it treats the hearing officer's decision as essentially irrelevant. The Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) of the requirement that an agency decision be supported by substantial evidence ***in light of the record as a whole***, which includes consideration of the contrary evidence in the record and specifically treats a hearing officer's decision as part of that record. The Committee believes that amending K.S.A. 77-621 to ensure that on judicial review the court will consider contrary evidence in the record, including the hearing officer's contrary decision, would reinforce the importance of the neutral hearing officer's factual findings–particularly credibility determinations based on the opportunity to view the witnesses–without impairing the agency's legitimate policy making functions. This change would work together with the Committee's recommendation that the agencies should be required to give due regard to the hearing officer's ability to observe witnesses. More broadly, it would require agencies to explain more fully their reasons for rejecting contrary evidence in the record. This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.)

The language of the Committee's proposed amendment is adapted from one of two alternative versions of the scope of review standards in the Revised Model State Administrative Procedure Act.[8] The other alternative version is consistent with the current version of the KJRA in Kansas and the Committee considered additional language clarifying the reviewing court's obligation to consider all the evidence in the record to be necessary. After hearing concerns from some agencies that the Committee's proposed language would adopt the de novo standard of review, which was never the Committee's intention, the Committee added additional language to specify that de novo review does not apply. That language is not adapted from the Revised Model Act.

C. Additional Recommendation: Recommendation 6 addresses additional issues.

6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

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[7] *See, e,g.*, Blue Cross and Blue Shield of Kansas v. Praeger, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003) ("[T]he courts are not concerned with evidence contrary to the agency findings but must focus solely on evidence in support of the findings."); Kaufman v. State Department of Social and Rehabilitation Services, 248 Kan. 951, 962, 811 P.2d 876, 884 (1991); *In re* Andover Antique Mall, L.L.C., 33 Kan. App. 3d 199, 207-08, 99 P.3d 1117, 1124 (Kan. Ct. App. 2004). *See generally*, Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 Kansas Bar Association Journal 22, 27-29 (June/July 1995).

[8] Revised Model State Administrative Procedure Act § 509 (Alternative 2).

Two additional aspects of the Committee's proposals warrant mention, even though they are not related to the central issue of strengthening the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities. First, the Committee proposes new language in K.S.A. 77-503 to clarify the computation of time and make that computation workable for the time limits incorporated in KAPA. The Committee has also proposed conforming amendments to some other provisions in KAPA that set time limits. These changes are not intended to significantly alter the existing time limits, but rather to address particular issues that arise because of the very short time limits associated with some actions under KAPA. Second, the Committee proposes a new section of KAPA (77-503a) that would permit presiding officers to keep the personal information regarding victims of crimes out of the public record to protect their health, safety, and liberty. The Committee has included a similar amendment for the Kansas Open Records Act, which would add such information to the exceptions to Act in K.S.A. 45-221. In addition, the Committee proposes an amendment to K.S.A. 77-523 that would authorize a hearing officer to close a KAPA hearing when information required by law to be kept confidential would otherwise be disclosed.

COMMENTS TO 2009 SB 87

New Section 1.

The Advisory Committee recommends the addition of a new section to KAPA to protect the names, addresses and other contact information of alleged victims of crime, abuse, domestic violence or sexual assault. The Committee also recommends a related amendment to K.S.A. 45-221(a) of the Open Records Act to provide that agencies are not required to disclose such information pursuant to an Open Records request.

Section 2 (amending K.S.A. 45-221).

The Advisory Committee recommends that the Open Records Act be amended to provide that agencies are not required to disclose the name, address, location or other contact information of alleged victims of crime, abuse, domestic violence or sexual assault if release of that information might jeopardize their health, safety, or liberty . The Advisory Committee also recommends a new section be added to KAPA (77-503a) to allow a presiding officer to protect this kind of sensitive information.

Section 3 (amending K.S.A. 77-501).

This technical amendment reflects the addition of various new sections to KAPA since the Act was originally enacted in 1984.

Section 4 (amending K.S.A. 77-503).

New subsection (c) is intended to clarify that, when a time requirement under KAPA is expressed in days, all days must be counted including intervening Saturdays, Sundays and legal holidays, unless the statute specifically provides otherwise. Those portions of new subsection (c) relating to the first and last days of any counting period are based on K.S.A. 60-206(a). However, K.S.A. 60-206(a) was not adopted in its entirety.

Section 5 (amending K.S.A. 77-511.

The technical amendment in subsection (c) is intended to clarify that subsection (c) applies to the commencement of a hearing, whether upon an application for order pursuant to subsection (a) or upon a request for hearing pursuant to subsection (b), but not to other KAPA hearings.

Section 6 (amending K.S.A. 77-512).

The Advisory Committee recommends raising the burden of proof to "clear and convincing evidence" for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual in order to provide greater protection for these especially important interests. The amendment is narrowly drafted so that it applies only to proceedings against an individual licensee and not business licensing proceedings. Also, if another statute states a different burden of proof, that statute will control.

The clear and convincing evidence standard is met when the evidence shows that the truth of the facts asserted is "highly probable." *In re B.D.-Y.*, 286 Kan. __, 187 P.3d 594 (2008). The Advisory Committee believes this heightened standard is appropriate because occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.

This higher standard of proof already applies in attorney disciplinary proceedings by virtue of Supreme Court Rule 211(f). (2007 Kan. Ct. R. Annot. 304.) It may also apply to other licenses as well. See *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1036, 58 P.3d 668, 673)2002( )application of clear and convincing evidence standard in case involving dentist's license(and Attorney General Opinion No. 95-54)in professional license or registration disciplinary proceedings, an agency should establish its claim by clear and convincing evidence(. The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the Committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

The Advisory Committee acknowledges that the issue of what burden of proof should apply to occupational and professional licensing disciplinary proceedings is a difficult one and not without some disagreement among different agencies. The Committee considered the

alternative option of amending individual licensing statutes to change the burden of proof on a case-by-case basis, instead of recommending an amendment that will apply to licensing proceedings across the board. However, the Committee believes its recommended amendment is a more workable solution.

The Committee's other recommended amendments to this section are mostly technical, but one point is important to note. Under the provisions of subsection (c), the heightened burden of proof does not apply to emergency proceedings.

Section 7 (amending K.S.A. 77-513).

The technical amendment in subsection (b) reflects the addition of a new section to KAPA in 1990.

Section 8 (amending K.S.A. 77-514).

New subsection (h) is a separation of functions provision that is intended to address the troubling situation that arises when agency personnel who act in an investigatory or prosecutorial capacity in a proceeding are also involved in the adjudication by the agency. The amendment would prohibit a person who has participated in an investigatory or prosecutorial capacity in connection with a proceeding, or who is supervised by such a person, from acting as presiding officer or providing confidential legal or technical advice to a presiding officer in that proceeding.

The amendments contained in subsection (a) were inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendments were part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 39. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

Section 9 (amending K.S.A. 77-519).

The amendment to subsection (c) allows a presiding officer to determine the manner of service.

Section 10 (amending K.S.A. 77-520).

New subsection (e) is intended as a clarification of whether a default order is an initial order or a final order depending upon who issues it.

Section 11 (amending K.S.A. 77-521).

In general, time limits under KAPA which are expressed in days refer to calendar days rather than business days. The amendments to this section create an exception to the general rule; the time limits in this section should be counted as business days rather than calendar days. "Business day" is defined at K.S.A. 77-503(c).

Section 12 (amending K.S.A. 77-523).

The amendments to subsection (f) are intended to clarify that a presiding officer may close parts of a hearing pursuant to any statute which expressly authorizes closure or requires information to be kept confidential. In addition, any hearing under KAPA is deemed not to be a meeting pursuant to the Open Meetings Act.

Section 13 (amending K.S.A. 77-525).

The amendment in subsection (a) expands the prohibition on ex parte communications by prohibiting intra-agency communication between presiding officers and investigatory or prosecutorial personnel.

Section 14 (amending K.S.A. 77-527).

The amendment to subsection (d) deals with agency review of a presiding officer's initial order. The amendment requires an agency head, in reviewing findings of fact by a presiding officer, to give due regard to the presiding officer's credibility determinations. The language of this amendment was taken from the draft Revised Model State Administrative Procedure Act, which the Advisory Committee believes strikes an appropriate balance between protecting the independent fact findings of a hearing officer and preserving the agency's policy-making role.

Section 15 (amending K.S.A. 77-528).

The technical amendment is intended to make this section read more clearly.

Section 16 (amending K.S.A. 77-529).

The amendment to subsection (b) is intended to clarify that findings of fact and conclusions of law are required in an order on reconsideration that alters a prior order, but not in an order that merely states the prior order will be reconsidered.

New subsection (c) clarifies, when there are multiple parties to a proceeding and one party has filed a petition for judicial review, the agency retains jurisdiction to consider a petition for reconsideration filed by another party to the proceeding, so long as it is timely filed.

Section 17 (amending K.S.A. 77-531).

The technical amendment is intended to make this section read more clearly.

Section 18 (amending K.S.A. 77-532).

The amendments to this section clarify that confidential internal communications permitted under K.S.A. 77-525 are not part of the state agency record, while oral or written statements allowed by a presiding officer pursuant to K.S.A. 77-523(c) are part of the state agency record.

Section 19 (amending K.S.A. 77-534).

Although a prehearing conference may be rarely needed before a conference hearing, the Advisory Committee believes there is no justification for a blanket prohibition on prehearing conferences in this context.

Section 20 (amending K.S.A. 77-537).

This amendment is intended to clarify that, when an agency enters a summary order and one of the parties requests a hearing, the burden of proof does not shift to the party requesting the hearing to prove that the summary order was entered in error. If a hearing is requested, the burden of proof remains with the party who sought the summary order in the first instance.

Section 21 (amending K.S.A. 77-549).

The amendments are intended as a clarification.

Section 22 (amending K.S.A. 77-550).

The amendment is intended as a clarification.

Section 23 (amending K.S.A. 77-551).

The technical amendment in subsection (c) corrects what appears to have been a drafting oversight.

The amendment contained in subsection (a) was inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendment was part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 43. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

Section 24 (amending K.S.A. 77-601).

The first amendment reflects the addition of various new sections to the KJRA since it was originally enacted in 1984. The second amendment changes the name of the act to the Kansas judicial review act. Because both bench and bar commonly refer to the act by that short title and commonly abbreviate the title as the "KJRA," the Advisory Committee recommends that the name of the act be changed to reflect common usage.

Section 25 (amending K.S.A. 77-603).

This amendment provides that the KJRA does not apply to agency actions concerning the civil commitment of sexually violent predators pursuant to K.S.A. 59-29a01 *et seq*. The amendment is intended as a direct response to *Williams v. DesLauriers*, 38 Kan. App. 2d 629,

172 P.3d 42 (2007), which held that the KJRA, rather than petition for writ of habeas corpus, was the appropriate method for a sexually violent predator who was civilly committed to a state hospital to assert his due process claim.

Section 26 (amending K.S.A. 77-612).

The purpose of the recommended amendment is to clarify and codify existing case law exceptions to the requirement that a petitioner for judicial review must first exhaust administrative remedies. See, *e.g.*, *State ex Rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 172 P.3d 1154 (2007) (if no agency remedy is available or if remedy is inadequate, exhaustion of administrative remedies is not required); *In re Lietz Const. Co.*, 273 Kan. 890, 47 P.3d 1275 (2002) (constitutional issues do not lend themselves to administrative determination and are subject to de novo review; thus, they are properly before the court even though they were not first argued before the agency). The language of the amendment was taken from Section 507(e) of the draft Revised Model State Administrative Procedure Act.

Section 27 (amending K.S.A. 77-614).

The amendments to this section are intended to accomplish three objectives: 1) prevent dismissal of an appeal for lack of jurisdiction when there is some defect in the petition for judicial review; 2) allow the petition to be amended under the same standard as K.S.A. 60-215; and 3) provide that substantial compliance with service requirements is sufficient under the same standard as K.S.A. 60-204. Because the amendments are based on provisions from the code of civil procedure, any existing case law interpretations of the corresponding provisions will be helpful to courts interpreting the amendments.

The amendments are intended as a direct response to *Bruch v. Dept. of Revenue*, 282 Kan. 764, 148 P.3d 538 (2006), and similar cases which have required strict compliance with the pleading requirements of this section. The Advisory Committee believes that pleading and service requirements for judicial review of an administrative action should be no more difficult or technical than similar requirements under the code of civil procedure.

Section 28 (amending K.S.A. 77-617).

The amendment in subsection (d)(2) is intended to allow a party to raise an issue which the party was not aware of, and could not reasonably have been aware of, before the filing of the petition for judicial review. For example, a party might find out about an *ex parte* communication with the agency only after a petition for judicial review was filed. K.S.A. 77-619 already allows a district court to receive evidence about the unlawfulness of the decision-making process. The amendment to this section explicitly allows such an issue to be raised.

Section 29 (amending K.S.A. 77-621).

Under current Kansas law, courts reviewing administrative decisions are instructed to disregard contrary evidence in the record and focus solely on the evidence that supports the agency findings. See *Blue Cross and Blue Shield of Kansas v. Praeger*, 276 Kan. 232, 263, 75

P.3d 226, 246 (2003). The Advisory Committee believes this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. The current Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) of the requirement that an agency decision be supported by substantial evidence "in light of the record as a whole," which includes consideration of the contrary evidence in the record. See, *e.g.*, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456 (1951).

The amendment contained in new subsection (d) directs the reviewing court, when applying the substantial evidence standard of review, to consider the whole record, including the evidence that detracts from the agency finding, and specifically requires consideration of any contrary hearing officer findings. The amendment is adapted from one of two alternative versions of the scope of review standards contained in Section 509 of the draft Revised Model State Administrative Procedure Act. The Committee chose the alternative which best clarifies the substantial evidence standard and explicitly addresses the role of the hearing officer's decision. The Committee believes that the amendment strikes an appropriate balance between protecting the independent factual findings of a hearing officer and preserving the agency's role as the entity to which the Legislature delegated policy-making authority.

The Committee heard concerns from some agencies that the Committee's recommended amendment would encourage courts to adopt a de novo standard of review. To clarify that this is not the intended effect of the amendment, the Committee added the final sentence in subsection (d) indicating that courts are not to reweigh evidence or engage in de novo review. The Committee believes this would restore the original intent of the KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record. The last sentence added to subsection (d) was not adapted from the Revised Model Act.

The amendment to subsection (c)(7) is intended to clarify that the appropriate standard of judicial review of an agency's factual determination is dependent on the underlying standard of proof.

Section 30 (repealer).

The Advisory Committee recommends repeal of K.S.A. 77-507, 77-507a, and 77-605 because they are no longer needed.

TESTIMONY OF WM. SCOTT HESSE

May it please the committee; I am Scott Hesse, General Counsel for the Kansas State Board of Healing Arts. For twenty of the last twenty-five years I have defended state employees, state agencies and state agency decisions before the courts as an Assistant Attorney General, Assistant General Counsel to the Kansas Corporation Commission and now as General Counsel to the Kansas State Board of Healing Arts. I have participated in many of the types of cases Senate Bill 87 intends to change. On behalf of the Board of Healing Arts, I stand before you today in opposition to sections 26 and 27 of Senate Bill 87.

Section 26 of Senate Bill 87 would allow litigants to bring suit in the courts before an administrative agency makes its final decision. In other words, a litigant would not be required to "exhaust its administrative remedies" prior to bringing a petition for judicial review in the courts. In my client's opinion, this change of law would place the public at risk of harm from someone who may not have the ability to practice medicine or any of the other healing arts.

I will give as an example a case which was recently argued in the Kansas Supreme Court and is currently before the Shawnee County District Court.[1] In this case the doctor violated the standard of care required for OB/GYNs. The Board began its investigation and ultimately determined two babies died because of the doctor's failure to follow the minimum standard of care. While the case was ongoing, the licensee, Dr. Amir Friedman, changed the status of his license from active to inactive. He then left the state and used his inactive Kansas license to obtain an active medical license in New Jersey. The licensee did not renew his Kansas license which later lapsed. Before the

[1] *Friedman v. Kansas State Board of Healing Arts,* 2009 WL 102962 (January 16, 2009).

license was cancelled as a matter of law the Board brought a petition to revoke the license. Prior to exhausting his administrative remedies, the now former licensee brought suit in the District Court attempting to enjoin the Board from hearing the administrative case. The District Court ruled Dr. Friedman had failed to exhaust his administrative remedies and dismissed the case. The Board continued its license revocation proceedings. Dr. Friedman appealed. The Board revoked the license[2] and he then appealed. The Supreme Court dismissed the appeal affirming the District Court's Order because Dr. Friedman failed to exhaust his administrative remedy. The proposed language in Section 26 of Senate Bill 87 would allow a licensee, such as Dr. Friedman, to bring suit against the Board in District Court without exhausting his administrative remedies. This change of law would slow down, even stopping, the administrative process and allow an unqualified person the privilege of practicing medicine. The public would be in grave danger because the Board could be prevented from carrying out its duties to prevent unqualified persons from practicing medicine.

The Board also opposes Section 27 of Senate Bill 87. The change is intended to allow administrative litigants easier access to the courts. In my experience, cases are fully tried before an administrative agency. Some cases take weeks to try before a hearing examiner. The Board reviews all decisions made by any Presiding Officer. In all practicality, a litigant has one appeal to the Board before a case gets appealed to the

[2] In the Presiding Officer's Initial Order he said "Finally, although not relevant to the revocation of the Respondent's license, note must be made of the Respondent's behavior throughout the hearing of this matter. To say that the Respondent's behavior was bizarre would be kind. His behavior was largely, if not totally, out of control. While certainly it is understandable that a licensee who is faced with discipline by the Board would be upset or angry, a licensee should be able to maintain control and composure over one's self at least a majority of the time. The Respondent could not. The Respondent's behavior was, as stated above, at best bizarre. Therefore, should the Respondent seek relicensure from the Board, the Board would be well advised that prior to granting the Respondent a license that they should have the Respondent thoroughly examined by a psychiatrist to determine whether he is fit for licensure."

District Courts. The strict pleading requirements of the KJRA are intended to focus the court's attention on the issue that the party wishes appealed. If the legislature allows notice pleading, such as used in the District Courts under K.S.A. Chapter 60, the case will simply be retried in the District Courts instead of a judicial review of issues where there may have been error. Simpler pleading requirements will encourage more litigation. More litigation increases costs to everybody, including state government. More litigation takes time which places the public at risk from charlatans who should not have the privilege to practice medicine.

State courts and state agencies are already overburdened with litigation and the expenses associated with it. The changes proposed in Sections 26 and 27 of Senate Bill 87 will make it harder for important administrative issues to be resolved and increase the costs to litigants and state government. If these sections are allowed to remain, the State, the Board and other agencies will be hindered in their ability to protect the public. The Board of Healing Arts requests these provisions be removed from the Bill.

K A N S A S

REBECCA W. CROTTY, CHIEF JUDGE
BRUCE F. LARKIN, JUDGE
J. FRED KUBIK, JUDGE

COURT OF TAX APPEALS

KATHLEEN SEBELIUS, GOVERNOR

SENATE BILL 87:
TESTIMONY IN SUPPORT OF MODIFICATION TO PROVIDE LIMITED EXCEPTION FOR COURT OF TAX APPEALS

Senate Committee on Judiciary
February 4, 2009

Mr. Chairman and Members of the Committee:

Following is a summary of the Court of Tax Appeals' testimony before the committee in regard to Senate Bill 87.

Position:

The Kansas Court of Tax Appeals is neutral with regard to S.B. 87 but supports a limited modification to Section 8 of the bill. The proposed modification would except the Court of Tax Appeals from the requirement that presiding officers who are not members of the "agency head" be staffed by the Office of Administrative Hearings (OAH).

Rationale for Proposed Modification:

Senate Bill 87, §8 would amend K.S.A. 77-514(a) to require that the presiding officer in a hearing be "the agency head, one or more members of the agency head, or a person assigned by the [OAH]." Section 8 also amends other portions of the statute. All of these amendments are ostensibly aimed at safeguarding the separation of functions within an agency to ensure that agency personnel involved in an investigatory or prosecutorial capacity do not influence the eventual adjudication of the matter.

The court acknowledges the important policy considerations underlying S.B. 87, §8. Fundamental fairness, not to mention due process, requires that the rulemaking, prosecutorial and investigative functions of an administrative agency be adequately separated from the agency's adjudicative functions.

DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., SUITE 451, TOPEKA, KS 66612-15(
Telephone 785-296-2388 Fax 785-296-6690 http://www.kansas.gov/cota/
E-mail: Maildesk@cota.ks.gov

Statutory measures to ensure adequate separation of agency functions are appropriate for agencies that wear multiple hats – legislative, investigative, prosecutorial, and judicial – and in fact act as parties in matters that come before them. But such measures are not appropriately applied to the Court of Tax Appeals because the court serves but a single, limited role – that of neutral decisionmaker. Simply put, the court never has a horse in the races that it decides.

Following is a summary of the court's function and role:

1. The court is a specialized tax tribunal within the executive branch of state government. It was established on July 1, 2008, pursuant to Sub. House Bill 2018.

2. The court is the highest administrative tribunal to hear cases involving *ad valorem* (property), income, sales, compensating use, and inheritance taxes, along with other matters involving taxation by state and local authorities.

3. The court is an independent tax tribunal, meaning that it is not affiliated with the Kansas Department of Revenue or any other taxing authority. The Court of Tax Appeals is a neutral decision-making body.

4. The court is solely a quasi-judicial agency. Unlike other administrative bodies, the court has no investigative, prosecutorial or quasi-legislative powers.

5. The court is the only administrative body subject to the Kansas supreme court rules of judicial conduct applicable to district court judges.

6. The court is not a party to any action and has no capacity to sue or be sued.

Suggested Modification to Senate Bill 87, §8

The court suggests the following modification to the bill:

Sec. 8. K.S.A. 2008 Supp. 77-514 is hereby amended to read as follows: 77-514. (a) ~~For agencies listed in subsection (h) of K.S.A. 75-37,121,and amendments thereto~~, ***For agencies except the Kansas state court of tax appeals,*** the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. ~~For all other agencies, the agency head, one or more members of the agency head, a~~

~~presiding officer as signed by the office of administrative hearings, or, unless prohibited byK.S.A. 77-551, and amendments thereto, one or more other persons des ignated by the agency head shall be the presiding officer.~~

This modification excepting the Court of Tax Appeals from the OAH requirement is appropriate for the following reasons:

- The purpose of the OAH provision is not served in the tax appeal process. Independent central adjudicatory panels such as the OAH are designed to promote the perception, if not the reality, of impartial decisionmaking in matters that otherwise would have been adjudicated by the very agency that made the rules, investigated the facts and prosecuted the action. Unlike these "multi-hat" agencies, the Court of Tax Appeals serves only one role in the state's tax administration process: It adjudicates tax disputes. So nothing is gained by requiring Court of Tax Appeals hearings to be outsourced to the OAH. In fact, the Court of Tax Appeals is itself an independent adjudicatory panel like the OAH. The difference between the court and the OAH is that the court specializes in tax law while the OAH hears cases involving numerous other areas of the law.

- The OAH provision would disrupt the court's workflow and cause delays in case disposition. While the votes of two tax law judges are required by statute for any final order of the Court of Tax Appeals to be effective, there are many preliminary matters, such as discovery disputes, which can and should be heard and decided quickly and efficiently by others within the court who are not a member of the agency head. Qualified court personnel should be able to issue an initial order under KAPA, allowing the parties to move on with litigation without delay. These initial orders are of course subject to final review by the court pursuant to K.S.A. 77-526(a). To require all discovery and prehearing disputes to be officiated and disposed of by two judges of the court would bog down the process and divert the judges' attention from more substantive matters.

- Finally, it should be noted that under a KAPA bill introduced last session (Sub. H.B. 2618), the court's predecessor, the Board of Tax Appeals, was excepted from a similar provision involving the OAH.

Respectfully Submitted,

Trevor C. Wohlford
Chief Hearing Officer

Kansas Coalition Against Sexual and Domestic Violence

UNITED AGAINST VIOLENCE

634 SW Harrison Topeka, Kansas 66603
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org • www.kcsdv.org

Senate Judiciary Committee
Senate Bill 87
February 4, 2009
Proponent

Chairman Owens and Members of the Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a statewide non-profit organization with member programs across the state providing direct services to victims of sexual and domestic violence and stalking.

KCSDV appreciates the attention to victim safety and confidentiality included in Senate Bill 87 and recognizes the complicated nature of this bill as it addresses the Kansas Administrative Procedures Act, the Kansas Open Records Act, and the Kansas Judicial Review Act. KCSDV submits this written testimony in support of SB87.

Confidentiality and safety are at the core of the many concerns victims of sexual and domestic violence and stalking have as they reach out for help, whether that help is through the criminal justice system, an administrative agency, or in a civil proceeding. Kansas recognizes this need for safety and confidentiality in a variety of other statutes. What follows is a list of where those provisions can be found:

- Employment Security Insurance Act for Domestic Violence Survivors (K.S.A. 44-760), enacted in 2003, requires confidentiality that can be found in K.S.A. 44-706(a)(12)(B).
- Taking time off from work to address sexual and domestic violence (K.S.A. 44-1131 to 1133), enacted in 2006, requires that employers keep information confidential and that provision can be found in K.S.A. 44-1132.
- Address Confidentiality Program (Safe at Home Program) was enacted in 2006 and allows victims of domestic violence, sexual assault, stalking and trafficking to obtain a confidential address. Administered by the Kansas Secretary of State's office, this program can be found at K.S.A. 75-451 through 458.
- Protection from Abuse Act (K.S.A. 60-3101 *et seq.*) allows a victim of domestic violence to request that her address remain confidential; that provision can be found at K.S.A. 60-3104(e).

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- Protection for Stalking Act (K.S.A 60-31a01 *et seq.*) requires that the court keep the address and telephone number of the petitioning stalking victim confidential and that provision can be found at K.S.A. 60-31a04(3).
- Kansas Supreme Court rules require that appellate documents refer to victims of sexual assault by initials only. See Supreme Court Rule 7.043(c).
- The Uniform Child Custody Jurisdiction and Enforcement Act (K.S.A. 38-1336 *et seq.*) provides for safety and confidentiality if the health, safety, or liberty of a party or child would be jeopardized and can be found at K.S.A. 38-1356(e), with additional provisions for addressing safety at K.S.A. 38-1357(c).

SB87 is a great supplement to the other protections found throughout Kansas statutes and rules. On behalf of victims of sexual assault, domestic violence, and stalking, KCSDV supports this bill and applauds the drafters for considering these core and critical needs for survivors.

KANSAS

DENNIS ALLIN, M.D., CHAIR
ROBERT WALLER, EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

BOARD OF EMERGENCY MEDICAL SERVICES

Testimony

Date: February 4, 2009

To: Senate Committee on Judiciary

From: Robert Waller, Executive Director

RE: 2009 Senate Bill 87

Chairman Owens and members of the Senate Committee on Judiciary, thank you for the opportunity to provide testimony on the Senate Bill 87, my name is Robert Waller and I am the Executive Director for the Kansas Board of Emergency Medical Services (KBEMS).

As Executive Director of the Kansas Board of Emergency Medical Services, the Board appreciates the Judicial Councils efforts and its intent to strengthen administrative law, without unduly interfering with agency authority and responsibilities. KBEMS agrees with many of the changes presented in 2009 Senate Bill 87, however KBEMS would offer the following amendments and adjustments due to the language provided or a lack of clarification of verbiage.

Amendments:

Section 6, subsection (b)

> *Unless otherwise provided by law, the burden of proof for disputed issues of fact in occupational or professional license disciplinary proceedings against an individual shall be by clear and convincing evidence.*

KBEMS is greatly concerned with the verbiage "clear and convincing" evidence. This places a great burden on the agency, both evidentiary and fiscally, to provide evidence that has met the "clear and convincing" standard. The preponderance of evidence provides a balance between the agency bringing forth evidence that State law has been violated, and the respondent's rights and duties to dispute such evidence. The language places the burden solely on the agency to prove that the respondent has committed an offense, and places no burden on the respondent to prove that the evidence is false. KBEMS would request that the standard be left to a preponderance of evidence.

Section 26, subsection (d):

> *(d) the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.*

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Voice 785-296-7296 Fax 785-296-6212 www.ksbems.org

KBEMS is unclear of who holds the burden of proof relating to whether the administrative remedies have been exhausted. The language is unclear of what constitutes "irreparable harm", what circumstances allow a petitioner to "bypass" the requirement of administrative remedies, and what qualifies a petitioner to request such a remedy. The petitioner seems to have no restriction in their ability to request such remedies, and no direction or restriction on what occurred that would invoke such a remedy. KBEMS would request revision of the language to clarify the language or strict the ability to "relieve a petitioner of the requirement to exhaust any or all administrative remedies".

Section 27, subsection (c):

> *Failure to include some of the information listed in subsection (b) in the initial petition does not deprive the reviewing court of jurisdiction over the appeal. Leave to supplement the petition with omitted information required by subsection (b) shall be freely given when justice so requires.*

KBEMS believes the language does not identify a timeline by which the petition for judicial review (subsection (b) (1) through (7) shall be provided. The language does not provide a date by which the information much be submitted, a minimum of those items (b)(1) through (7) that must be submitted, or what penalty would be invoked if such information was not provided within a particular time period (if a deadline is included). The current language allows a respondent to extend a petition for judicial review for an unlimited amount of time due to there being no current restriction placed within the language. KBEMS would request a maximum of 30 days to be included as a deadline of complete submission or a minimum "submission of information" within the petition for validation and request for further documentation.

Section 27, subsection (e):

> *(e) In any method of serving process, substantial compliance shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that the petition or appeal had been filed.*

KBEMS believes the language does not identify "valid service of process" or "substantial compliance". KBEMS in no why presents its statements in a detrimental or frivolous manner. However, KBEMS questions whether an "email", a "voicemail", or a casual conversation between the respondent and any "representative" of an agency would be tantamount to a "valid service of process". Additionally, the language allows the court to determine "substantial compliance" (not withstanding some irregularity or omission) that the party served was made aware that the petition or appeal had been filed. The language does not clarify, as stated previously, what constitutes being "made aware" or how the party served was "made aware". KBEMS would request that the language be clarified to define "valid service of process" and to what degree or amount "substantial compliance" represents "valid service of process".

Conclusion

Simply members of the Senate Committee on Judiciary, KBEMS supports many of the concepts and amendments to law provided within 2009 SB 187. However, KBEMS is greatly concerned with the language as presented above both fiscally and legally, and would like to ensure that language is amended or clarified before approval is given.

Thank you for your consideration.

KANSAS

DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

Don Jordan, Secretary

Senate Judiciary Committee
February 4, 2009

SB 95- Traffic in Contraband
in a Correctional Facility or Care & Treatment Center

Disability & Behavioral Health Services
Ray Dalton, Deputy Secretary

For Additional Information Contact:
Patrick Woods, Director of Governmental Affairs
Docking State Office Building, 6th Floor North
(785) 296-3271

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KANSAS
DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

SB 95 – Traffic in Contraband in a Correctional Facility or Care & Treatment Center

Senate Judiciary Committee
February 4, 2009

Chairman Owens and members of the Committee, I am Ray Dalton, Deputy Secretary of SRS. Thank you for the opportunity to appear before you today to discuss SB 95.

SRS supports this legislation, which will enhance and support patient and staff safety and security.

This bill concerns operations at Larned State Hospital (LSH). LSH operates three distinct programs on their campus. They operate the State Security Hospital, which provides mental health services to the criminally insane, as well as provides mental health services to Department of Corrections inmates, and is already included in the contraband statutes. The second program they operate is the Psychiatric Services Program, a civil program, which provides mental health services to adults, children and adolescents living in the western portion of the state. This program is not included in these statutes and the proposed changes will not affect this program.

The last program operated by LSH is the Sexual Predator Treatment Program (SPTP). SB 95 incorporates the SPTP into the bill as it concerns contraband. The bill makes a distinction between a correctional institution and a care and treatment facility. It is important to ensure the SPTP at Larned is not considered a correctional institution, as this could put the constitutionality of the program in jeopardy. The constitutional requirements of this program require the program to be for the care and treatment of the people committed to the program.

The bill then allows for the Secretary of Corrections to determine what contraband is for a correctional institution, and allows the Secretary of SRS to determine what contraband is in a care a treatment facility. The nature of medical treatment facilities is much different than in correctional institutions. Hospitals are a therapeutic/treatment environment and some items that might be considered contraband in the Department of Corrections environment would not be considered contraband in hospitals. An example would be as residents move along the treatment continuum they would prepare meals for themselves and be allowed to have knives for cooking. Conversely, movies that might be appropriate to show to a general population of inmates might not be appropriate for viewing by pedophiles.

SRS supports this bill, and I would be glad to answer any questions the Committee may have.

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on SB 95
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
February 4, 2009

The Department of Corrections supports SB 95. However, the department urges that SB 95 be amended to delete the exclusion of parking lots from the definitions of "correctional institutions" and "care and treatment facilities". The department is of the understanding that the Department of Social and Rehabilitation Services does not have an objection to this proposed amendment.

SB 95 amends K.S.A. 21-3826, which was last amended in 1997. The criminal prohibition against the possession of contraband in and on the grounds of a correctional facility provided by K.S.A. 21-3826 has served the public safety issues of the department. The department appreciates SRS's interest in extending the application of K.S.A. 21-3826 beyond the State Security Hospital to include its care and treatment facilities.

The department, however, urges amendment of SB 95 to delete the proposed language excluding parking lots from the definitions of "correctional institution" and "care and treatment facility". These areas are an integral part of a correctional institution. Correctional facility parking lots are locations where the public has a high degree of access and where surveillance is difficult. Minimum custody inmates on work details also have access to parking lots. Thus, facility parking lots are locations conducive to the delivery of contraband. Contraband may be left in the parking lot for pick up by inmate work details or thrown over the facility perimeter fence by persons in the parking lot. Excluding parking lots from the coverage of the statute will adversely impact the overall security of correctional facilities.

Current law recognizes the importance of addressing contraband in facility parking lots by including those areas as part of the grounds of a correctional institution. The department further believes that inclusion of parking lots as part of a care and treatment facility grounds regarding the prohibition of contraband is important to the department since it shares parking lots at various locations with SRS treatment facilities.

The department urges that SB 95 be amended by:

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- Deleting "'Correctional institution' does not include any parking lot open to the public." at page 1, lines 28 and 29; and
- Deleting "'Care and treatment facility' does not include any parking lot open to the public." at page 1, lines 34 and 35.

The department appreciates the Committee's consideration of a proposed amendment to SB 95.

7-2