TESTIMONY IN SUPPORT OF HOUSE BILL No. 2313

Submitted by Carl "Bill" Ossmann
Chief Litigation Attorney
Kansas Department of Social and Rehabilitation Services

Good afternoon

It is my understanding that House Bill No. 2313 was introduced to address issues related to lawsuits filed by patients of the Kansas Sexual Predator Treatment Program.

Certainly no one would question the right of these residents to pursue legitimate claims in state court civil actions or to seek relief from continuing unconstitutional mistreatment in a habeas corpus proceeding.

The provisions in this bill are modeled after existing state and federal law and are proposed to deal with baseless, repetitive and frivolous lawsuits by patients at the SPTP. Defending these lawsuits requires the investment of staff time and institutional resources. Agency legal staff are required to review and respond to these lawsuits and a judicial resources are required to docket, process and address them.

In checking with the Clerk of the District Court in Pawnee County I found out that there were 26 habeas corpus cases filed in 2009, that numbered dropped to 11 the following year and then ballooned to 114 petitions filed between January and October 2011. Some of these cases involve multiple habeas claims, and in some cases, multiple petitioners. In each habeas case the district judges is first required to review the petition. If the judge determines that a writ should issue, the program staff and administrators, along with hospital and agency attorneys, then are required to file a response to the writ.

New section 1 (a) would require patients in the SPTP to exhaust their administrative remedies before filing a lawsuit against the state of Kansas, any political subdivision of the state, any public official, the Secretary of Social and Rehabilitation Services or an employee of the department of social and rehabilitation services. This subsection is virtually identical to K.S.A. 75-52,138 which provides,

> Any inmate in the custody of the secretary of corrections or in a county jail, prior to filing any civil action naming the state of Kansas, any political subdivision of the state of Kansas, any public official, the secretary of corrections, the warden, the sheriff, or an employee of the department of corrections or the county, while such employee is engaged in the performance of such employee's duty, as the defendant pursuant to the rules of civil procedure, shall have exhausted such inmate's administrative remedies, established by rules and regulations promulgated by the secretary of corrections or by county resolutions, concerning such civil action. Upon filing a petition in a civil action, such inmate shall file

with such petition proof that the administrative remedies have been exhausted.

The exhaustion of administrative remedies serves two main purposes: first, it protects SPTP administrative authority, in that it gives SPTP administrators an opportunity to correct any mistakes with respect to the programs they administers before the matter lands in court, and it discourages disregard of the program's procedures, and, second, it promotes efficiency, in that claims generally can be resolved much more quickly and economically in proceedings before program administrators than in litigation. With regard to claims of continuing unconstitutional mistreatment, the exhaustion of administrative remedies results in a record which might be used by a district judge to initially determine if the plaintiff is entitled to relief in the district court. It could also serve as a convenient and efficient way to answer any writ that might be issued.

It should be noted that this provision would not alter the rule that state exhaustion requirements do not apply to civil rights actions brought under 42 U.S.C. § 1983.

New Section 1 (b) is based upon 28 U.S.C. § 1915 (e)(2). The federal provisions generally address proceedings in forma pauperis and the specific subsection allows the court to screen out those cases which are frivolous, malicious, fail to state a claim or seek monetary relief from a defendant who is immune from such relief. The court could also act where the Plaintiff has filed an affidavit of poverty which is untrue. The court would be authorized to take this action prior to any summons being served, and without requiring a defendant to file a motion to dismiss.

New Section 1 (c) is modeled after language found in the Prison Litigation Reform Act (PLRA)(28 U.S.C.A. § 1915(g)). This Act provides that a prisoner may not bring an in forma pauperis civil action or appeal if the prisoner has, on three or more prior occasions, brought an action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim, unless the prisoner is under imminent danger of serious physical injury. This subsection would prevent patients from repeatedly filing and/or appealing cases where they have a demonstrated litigious history.

Section 2 would amend K.S.A. 60-1501 to require in subsection (b) that patients at the SPTP, like inmates in the custody of the secretary of corrections, file any habeas action in a timely fashion. The statute would require that patents file within 30 days from the date the action was final with a provision that their time limit is extended while they administrative remedies are pursued. Stale claims would be barred and residents complaints about their alleged mistreatment could no longer relate to events occurring months or years earlier.