MINUTES

HEALTH CARE STABILIZATION FUND OVERSIGHT COMMITTEE

October 15, 2014
Room 548-S—Statehouse

Members Present

Gary Hayzlett, Chairperson
Senator Laura Kelly
Senator Vicki Schmidt
Representative Dave Crum
Representative Jerry Henry
Darrell Conrade
Dennis George
Dr. Jimmie Gleason
Dr. Paul Kindling
Dr. Terry "Lee" Mills
Dr. James Rider

Staff Present

Melissa Calderwood-Renick, Kansas Legislative Research Department
David Fye, Kansas Legislative Research Department
Renae Jefferies, Office of Revisor of Statutes
Randi Walters, Committee Assistant

Conferees

Renae Jefferies, Assistant Revisor, Office of Revisor of Statutes
Doug Smith, Executive Director, Kansas Academy of Physician Assistants
Cindy Luxem, President and CEO, Kansas Health Care Association and Kansas Center for Assisted Living
Bob Williams, Executive Director, Kansas Association of Osteopathic Medicine
Sharon Foster, President, Kansas Affiliate of the American College of Nurse-Midwives
Charles "Chip" Wheelen, Executive Director, Health Care Stabilization Fund Board of Governors
Russ Sutter, Actuary, Towers Watson
Rita Noll, Deputy Director and Chief Attorney, Health Care Stabilization Fund Board of Directors
Catherine Gordon, Certified Nurse Midwife and Family Nurse Practitioner, New Birth Company
Kendra Wyatt, BSIE, New Birth Company
Kurt Scott, CEO, Kansas Medical Mutual Insurance Company
Rachelle Colombo, Director Government Affairs, Kansas Medical Society

Morning Session

Welcome and Introductions;
Staff Overview of Selected Materials for Committee Review

Chairperson Gary Hayzlett called the meeting to order at 9:02 a.m. The Chairperson welcomed members and asked them to introduce themselves.

Following the introductions, Chairperson Hayzlett recognized Melissa Calderwood-Renick, Kansas Legislative Research Department (KLRD), for an overview of resource materials provided to the Committee. Ms. Calderwood-Renick stated among the items provided was a summary of legislation for HB 2516, as well as a copy of the legislation. Ms. Calderwood-Renick also stated HB 2516 is one of two bills that immediately impacts the Health Care Stabilization Fund (HCSF), its governance, the membership of the Board of Governors, Kansas Medical Mutual Insurance Company (KaMMCO) and its ability to provide insurance products, and changes the definition of "health care provider" in the Health Care Provider Insurance Availability Act (HCPIAA).

Ms. Calderwood-Renick highlighted SB 311, explaining this bill is the other part of the *Miller v. Johnson* discussion before the Committee last year. She stated this was a measure advocated for by the Kansas Medical Society, Kansas Hospital Association, and a number of provider groups regarding a change in the non-economic damages limitations in statute. She stated there is a summary for this bill, as well as a copy of the enrolled bill, in the Committee resources folder.

Additionally, Ms. Calderwood-Renick stated the Committee resources folder also included copies of the FY 2014 and FY 2015 Subcommittee Reports. She drew the Committee's attention to page 3 of the FY 2015 Subcommittee Report. She stated there was a recommendation made by both the House Budget Committee and the Conference Committee regarding staffing at the HCSF, specifically related to the implementation of HB 2516. Finally, a copy of this Committee's Report to the 2014 Legislature was provided for the Committee's review.

2014 Session Update – HB 2516 and SB 311

Chairperson Hayzlett recognized Renae Jefferies, Office of Revisor of Statutes, to give a session update on SB 311 and HB 2516.

SB 311 amends the code of civil procedure and civil actions relating to limits on recoverable damages for non-economic damages in personal injury actions (Attachment 1). For causes of actions accruing on or after July 1, 2014, to July 1, 2018, the limit is $300,000. For causes of action accruing on or after July 1, 2018, to July 1, 2022, the limit is $325,000; for causes of action accruing on or after July 1, 2022, the limit is $350,000. Before this, the limit had been $250,000. Ms. Jefferies' summary of the bill follows.

The rule of evidence concerning opinion testimony of a person not testifying as an expert witness may be admitted if the judge finds such opinions or inferences are based on the perception of the witness; are helpful to a clear understanding of the testimony of the witness; and are not based on scientific, technical, or other specialized knowledge within the expertise of

the expert. Before testifying as a non-expert witness, the judge may require the witness be examined concerning the facts or data upon which such witnesses opinion or inference is founded.

If an expert opinion regarding scientific, technical, or other specialized knowledge would be helpful to the trier of fact, the witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has reliably applied the principles and methods to the facts of the case. The court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the witness's testimony satisfies the requirements of subsection (b) of KSA 60-456. Such hearing and ruling are to be completed no later than the final pretrial conference.

Lastly, the bill repeals statutes that allow for evidence of collateral source benefits to be admissible in actions for personal injury or death.

HB 2516 concerns health care provider liability insurance relating to mutual insurance companies organized to provide health care provider liability insurance and amends the HCPIAA, which governs the operation of the HCSF (Attachment 2). The bill makes continued HCSF coverage for inactive health care providers (referred to as tail coverage) immediate upon cancellation or inactivation of a Kansas license and professional liability insurance and increases the level of tail coverage available. It makes tail coverage available for new professionals and facilities for prior acts, limits disclosure of HCSF claims information to the public, and makes technical amendments to the statutes. Ms. Jefferies further described the bill as follows.

Section 1 is a new section providing that for all claims made on or after July 1, 2014, the amount of HCSF liability for a judgment or settlement against a resident or nonresident inactive health care provider shall be equal to the minimum professional liability insurance policy limits required pursuant to Section 6 of the bill plus the level of coverage selected by the health care provider pursuant to subsection (1) of KSA 40-3403 at the time the incident or claim arose.

Section 2 adds a new subsection (d), which provides, in addition to other requirements of the law, any plan or agreement for the sale, merger, consolidation, or change of control of any company organized under the provisions of the HCPIAA shall not be effective unless such plan or agreement has been approved by resolution of the governing board of directors or board of trustees of the association that formed such company.

Section 5 of the bill amends definitions of and adds new definitions to the HCPIAA. The definition of "health care provider" is amended to include as of January 1, 2015, physician assistants, nursing facilities, assisted living facilities, resident health care facilities, and certain advanced practice registered nurses (who are certified in the role of nurse midwife). It also clarifies what "health care provider" does not include and adds providers to the list of those excluded from the definition due to an inactive license or a federally active license that offers protection under the Federal Tort Claims Act. Definitions for "board" and "board of directors" are added to distinguish between the two distinct boards, and the appropriate new term replaces existing references to the two boards. It also provides a definition for "*locum tenens* contract", which means a temporary agreement not to exceed 182 days per calendar year that employs a health care provider to actively render professional services in Kansas. It provides for the definition of "professional services" to mean patient care or other services authorized under the HCPIAA governing licensure of a health care provider.

Section 6 addresses professional liability insurance coverage. It clarifies professional liability insurance and HCSF coverage are a condition of licensure to practice in the state for health care providers. Further, the bill clarifies HCSF liability is based on the level of HCSF coverage selected by a health care provider. The HCSF is not liable for any claim not normally covered by a medical professional liability insurance policy.

Inactive health care providers are ensured of having HCSF tail coverage equal to the amount of such provider's primary insurance coverage plus the amount of HCSF coverage selected and in effect at the time the event resulting in a claim of medical negligence occurred. Beginning July 1, 2014, the five-year compliance period requirement prior to being eligible for tail coverage is removed. Now, any health care provider has tail coverage immediately upon canceling or inactivating a Kansas license and the provider's professional liability insurance policy.

In lieu of a claims made policy otherwise required under KSA 40-3402 (Section 6 of the bill), a nonresident health care provider employed pursuant to a *locum tenens* contract to provide services in Kansas as a health care provider may obtain basic coverage under an occurrence form policy if such policy provides professional liability insurance coverage and limits required by KSA 40-3402.

Section 7 provides the Board of Governors of the HCSF is authorized to grant temporary exceptions from the professional liability insurance and HCSF coverage under exceptional circumstances. It also makes a technical change in several places by striking "director of accounts and reports" and replacing the term with "secretary of administration." Additionally, it provides that "in the event of a claim against a health care provider for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, the liability of the HCSF shall be limited to the amount of coverage selected by the health care provider at the time of the incident giving rise to the claim."

The membership of the Board of Governors is increased from 10 to 11 members. The eleventh member is to be a representative of an adult care home. All employees of the HCSF employed by the Board of Governors are unclassified employees. Section 7 also requires health care provider surcharge refunds are not to be issued until notice cancellation requirements are met.

Other changes in the bill require the Health Care Provider Insurance Availability Plan (Plan) to make available professional liability insurance coverage for prior acts. Such policies are required to have limits of coverage not to exceed $1 million per claim or $3 million annual aggregate liability for all claims made as a result of personal injury within the state on or before December 31, 2014. The tail coverage is available only to new professionals and facilities made part of the "health care provider" definition. Such providers must be in compliance with the coverage requirements on January 1, 2015.

Time allowed for insurers providing basic professional liability insurance coverage to notify the Board of Governors of such coverage for the purpose of hospital credentialing has been shortened. Insurers failing to report a written or oral claim or action for damages for malpractice to the appropriate state health care provider regulatory agency and the Board of Governors no longer face suspension, revocation, denial or renewal, or cancellation of the insurer's certificate of authority to do business in Kansas or certificate of self-insurance. Instead, the Board of Governors will level a civil fine against the insurer for such violation.

Additionally, membership of the Board of Directors of each plan is reapportioned to replace one of the three members who are representatives of foreign (out-of-state) insurers with the chairperson of the Board of Governors or the chairperson's designee and to replace one of two members of the general public with an additional health care provider.

Following the update, a Committee member asked for an explanation of the statement "the five-year compliance period requirement prior to being eligible for tail coverage is removed."

Chairperson Hayzlett recognized Charles (Chip) Wheelen, Executive Director, HCSF Board of Governors, to answer the question. Mr. Wheelen stated, in 1988, the Legislature conducted an interim study and decided a good way to generate more surcharge revenue would be to impose a five-year requirement such that tail coverage would not be available to physicians or other health care providers unless they paid for it. Mr. Wheelen stated this has been an administrative nightmare for years, and also has created an extraordinary hardship for young physicians. Mr. Wheelen noted the Board of Governors decided this was probably the best time in the history of the HCSF to repeal that requirement, and the Legislature agreed.

Another question brought up by a Committee member was to verify the time period the insurer has to notify has been shortened by the new law, and also whether insurance companies can face suspension, revocation, denial or renewal, or cancellation. Mr. Wheelen stated the notification period was slightly shortened. He then indicated he was not sure he could answer the second question because he is not affiliated with the Insurance Department, but he believes the Department has the authority to discipline an insurer that fails to comply.

Health Care Stabilization Fund Board of Governors' Staff Reports, 2013-2014

Chairperson Hayzlett called on Mr. Wheelen to provide the Board's statutory annual report (as required by KSA 40-3403(b)(1)(C) (Attachment 3, Page 1-9). The Director's report for FY 2014 indicated net premium surcharge revenue collections amounted to $24,231,068. Mr. Wheelen noted even though over $24 million was collected in surcharge revenue, over $9 million was earned from investments. He stated the reserves set aside to pay liabilities are invested by the Pooled Money Investment Board from a very conservative perspective. The report indicated the lowest surcharge rate for a health care professional was $50 (chiropractor, first year of Kansas practice; opting for lowest coverage option) and highest surcharge rate was $14,058 for a neurosurgeon with five or more years of HCSF liability exposure (selected highest coverage option). Application of the Missouri modification factor would result in a total premium surcharge of $18,275 for this health care practitioner. The report detailed the medical professional liability cases. Mr. Wheelen stated only 3 out of the 20 cases that went to jury trials resulted in verdicts for the plaintiff. The average compensation per settlement (52 cases involving 63 claims were settled) was $381,046, a 9.0 percent increase compared to FY 2012. These amounts are in addition to compensation paid by primary insurers (typically $200,000 per claim). The report states amounts reported for verdicts and settlements were not necessarily paid during FY 2014. Total claims paid during the fiscal year amounted to $25,029,266. The report also provided the balance sheet, as of June 30, 2014, indicating assets of $265,988,612 and liabilities amounting to $202,561,375. Mr. Wheelen stressed even though the balance sheet was accurate at midnight on June 30, 2014, one minute later at 12:01 a.m. on July 1, 2014, our liabilities increased almost $28 million because of SB 311 and HB 2516.

Mr. Wheelen also submitted historical information about the creation and evolution of the HCPIAA. Mr. Wheelen stated three principle features of the HCPIAA have remained intact since 1976, which he strongly believes are interrelated; and all three must be maintained:

- A requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage as a condition of licensure;

- Creation of a Joint Underwriting Association, the "Health Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and

- Creation of the Health Care Stabilization Fund to, (a) provide supplemental coverage above the primary coverage purchased by health care providers and, (b), serve as reinsurer of the Availability Plan.

Mr. Wheelen stated last year there was discussion regarding the *Miller v. Johnson* decision. He stated a number of groups, professions, and facilities not previously defined as health care providers had indicated renewed interest as a result of the decision. When they learned the Kansas Medical Society was planning to request introduction of a bill to amend that part of the HCPIAA, the Board of Governors felt there were a couple of really important improvements that also should be addressed. One of those was to improve the tail coverage. Not only is it good for health care providers to be able to know their tail coverage will be provided immediately upon retiring from active practice or relocating out-of-state, Mr. Wheelen noted, it is good for patients. Mr. Wheelen stated if a patient is injured or there is an unfortunate medical outcome and if the system decides they should be compensated, there will always be a reliable source of revenue in that event. Mr. Wheelen stated he believes that is what the Kansas Supreme Court was talking about when the Court described the *quid pro quo* that basically upheld the legislature's authority to impose limits on non-economic damages in personal injury actions.

Mr. Wheelen next addressed SB 311 that incrementally increases the cap on non-economic damages for causes of action accruing on or after the specified July 1 date. He stated once those step-by-step increases are analyzed, over an eight-year period of time, there is going to be a 40.0 percent increase in non-economic damages in the cap. He explained it does not necessarily mean there will be a 40.0 percent increase in every single professional liability claim, but it does mean there probably will be some increase. Mr. Wheelen stated that is why upon passage of those two bills, the HCSF Board of Governors exercised the contingency clause in its contract with Towers Watson. Normally, the actuary prepares its report in March or April and by May, the Board of Governors has already established the surcharge rates for the fiscal year beginning July 1. In 2014, the Board of Governors had to reactivate its actuary and have him reanalyze its liabilities as a result of the passage of those two bills.

Mr. Wheelen then addressed the Committee's discussion from last year regarding whether other states employ an independent actuary to offer second opinions. He stated the Board of Governors surveyed the other six states that currently have some type of patient compensation fund and have provided the results in this report (Indiana, Louisiana, Nebraska, New Mexico, South Carolina, and Wisconsin). Mr. Wheelen stated, among the few states that do have a patient compensation fund, the states are all different in various ways. He pointed out most of the states employ an independent actuary. Mr. Wheelen stated Kansas has always maintained the kind of fiscal discipline necessary for a program like this to be successful.

Mr. Wheelen next commented on the Medical Professional Liability Insurance (PLI) Market. He stated there has been a number of inquiries from insurance agents asking whether there is any way their clients (primarily adult care homes) can continue to purchase their basic

coverage from non-admitted carriers. Mr. Wheelen stated the HCPIAA states health care providers must be insured by admitted carriers. Mr. Wheelen's report states, when the Legislature passed the original HCPIAA, the Legislature wanted to make certain health care providers were insured by companies subject to regulatory oversight by the Insurance Commissioner. In addition, admitted carriers are required to pay assessments into a guaranty fund such that if an insurance company becomes insolvent, any remaining claims for which the company would have been liable can be paid by the guaranty fund. He stated it is extremely important to have all the components in place so that if those health care providers cannot purchase their coverage in the independent market, they need that safety net to make certain they can comply with the requirements of the HCPIAA. Mr. Wheelen stated there are at least seven insurance companies that have already obtained the authorization from the Insurance Commissioner and have indicated an interest in selling coverage to the adult care facilities.

Mr. Wheelen next addressed "a few unforeseen minor problems" in the implementation of HB 2516. He stated there are some physician assistants who continue to maintain active licenses solely for the purpose of providing charity care at clinics for medically indigent patients. The Board of Healing Arts does not have authority to create an exempt license for those physicians assistants and will be requesting legislation to create an exempt license category for physician assistants. The legislation would allow these physician assistants to continue providing charity care in those limited settings, and they would be exempt from the professional liability insurance requirements under the HCPIAA. Mr. Wheelen highlighted another issue; the Board of Nursing does not have the authority to grant inactive licenses to advanced practice registered nurses (APRNs). Mr. Wheelen explained, fortunately the Legislature delegated authority to the Board of Governors to grant temporary exemptions to health care providers when there are exceptional circumstances. In these circumstances, an affidavit must be signed that swears the health care provider will not provide patient care in the State of Kansas during the period of exemption. The Board of Nursing and the Board of Governors has agreed to accept that in those limited circumstances. Mr. Wheelen also stated it has been suggested the Secretary for Aging and Disability Services does not have sufficient authority to enforce compliance with the HCPIAA. Mr. Wheelen stated they respectfully disagree with that suggestion, but to be certain, they have corresponded with the General Counsel at the Department for Aging and Disability Services (KDADS), requesting his opinion on this matter. Depending on the KDADS' response, a request for legislation delegating necessary enforcement authority to the Secretary may be required. In the conclusion of his remarks, Mr. Wheelen stated, at this time, the HCSF Board of Governors does not believe there is any reason to amend the HCPIAA in the near future.

Chairperson Hayzlett then recognized Russ Sutter, Towers Watson, to provide an actuarial report (Attachment 3, Page 10-14). | The actuarial report serves as an addendum to the report provided to the HCSF Board of Governors dated March 20, 2014, and the subsequent analysis of legislative changes dated September 8, 2014. Mr. Sutter addressed forecasts of the HCSF's position at June 30, 2014, and June 30, 2015. The forecast of the HCSF's position at June 30, 2014, is as follows: the HCSF held assets of $261.88 million and liabilities of $190.26 million, with $71.62 million in reserve. The projection for June 30, 2015, is as follows: assets of $265.89 million and liabilities of $194.04 million, with $71.85 million in reserve. The report notes the forecasts were based on a review of HCSF data as of December 31, 2013. The report states, in the 2013 study, the actuaries forecasted higher levels of assets ($265.4 million) and liabilities ($197.5 million) at June 2014, with a lower unassigned reserve ($67.8 million). Payment activity in calendar year 2013, however, was higher than anticipated. The actuary stated, based on the annual study, the overall conclusion is that the HCSF is in a very strong financial position with unassigned reserves at about $72 million and not changing much as a result of FY 2015 activity. Mr. Sutter stated the forecasts assumed there would be no change in

surcharge rates for FY 2015; $24.1 million in surcharge revenue in FY 2015; a 3.85 percent yield on HCSF assets; continued full reimbursement for KU/WCGME (University of Kansas (KU)/Wichita Center for Graduate Medical Education (WCGME)) claims, with continued payback of reimbursements from the state that were delayed until FY 2014; no change in current Kansas tort law; and potential increase in claims due to Missouri's 2012 overturn of non-economic damage caps. Mr. Sutter noted the Board of Governors, at its March 2014 meeting, elected to make no change to the surcharge rates for FY 2015.

Mr. Sutter next reviewed the HCSF's liabilities at June 30, 2014. The liabilities highlighted included claims made against active providers as $79 million; associated defense costs as $15.9 million; claims against inactive providers reported by the end of FY 2014 as $7.1 million; tail liability of inactive providers as $75.2 million; future payments as $14.9 million; claims handling $5.5 million; and "other", which is mainly plaintiff verdicts on appeals, as $.9 million; for a total of Gross Liabilities of $198.4 million of which some of the liabilities are for the KU and WCGME programs that the HCSF is reimbursed for $8.2 million for a final net liability of $190.3 million. Mr. Sutter further detailed why the tail liability of inactive providers is such a high number. He stated that as of June 2014, anyone who has been in the HCSF for five years, does not have to pay the HCSF any more surcharge revenue to have the tail liabilities covered by the HCSF. He stated this is a very long-term liability, a very big liability, and a very challenging liability to quantify, but one the actuaries believe is appropriate for the HCSF to recognize. Mr. Sutter stated this is the single biggest item affected in the short run by the 2014 legislative changes. A Committee member inquired about how this is figured. Mr. Sutter explained they look at the history of inactive provider claims based on when they occurred and when they are reported; they have information about how long providers were in the system before those providers left the system; and with this provider data, they built a model to figure out of the 10,000 or so providers in the system today and consider when they likely will retire and project when those retirees likely will sustain claims. The model has a lot of assumptions, but estimates are made for health care providers in the system: their future retirement dates; the potential for claims reported against them; the resolution of those claims; and the cost for resolution based on the year the potential claim(s) are resolved.

Mr. Sutter next reviewed the HCSF's Rate Level Indications for FY 2015 noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of about $28 million; change in liabilities, an increase of about $3.8 million; administrative expenses of about $1.6 million; and transfers to the Availability Plan and KDADS are assumed to be $200,000 (assumes no Availability Plan transfer); totaling the cost for the HCSF to "break-even" for another year at $33.8 million. Mr. Sutter stated the HCSF has two sources of revenue, investment income based on the 3.85 percent yield assumption of $9,898 million and surcharge from providers of $23.905 million; therefore, the rate-level indication is a slight increase of about 1.0 percent. Mr. Sutter stated from their perspective, the HCSF's rates are pretty close to adequacy – "what is needed." Mr. Sutter then reviewed a 15-year history of what the HCSF's indicated costs per active provider have been for settlements and defense costs (less reimbursed amounts). He stated essentially there has been no inflation in the business over the last 15 years.

Mr. Sutter next discussed the effect of the changes made by the 2014 Legislature in SB 311 and HB 2516. The actuary summarized the estimates of the HCSF's financial position at June 30, 2015. Mr. Sutter stated, prior to the legislative changes, the HCSF would have had an unassigned reserve of $71.85 million. However, with the changes, it is believed there will be an impact to the liabilities of $27.8 million raising the liabilities from $194.04 million to $222.83 million. This would leave an unassigned reserve of $44.06 million. Mr. Sutter stated in their view, this projected $44 million still makes the HCSF a financially stable environment. He stated the

impact on these liabilities is largely a one-time hit. In answer to a question from a Committee member regarding at what level unassigned reserves become too low, Mr. Sutter responded by stating it is a judgment call. The actuary indicated less than $20 million would start to be a concern. Mr. Sutter next discussed estimates of the legislative changes in HCSF liabilities by specific change, breaking out those changes by active providers versus inactive providers.

Mr. Sutter concluded his remarks with the following observations regarding the effect of the 2014 legislative changes.

- The increase in caps on non-economic damages has only a modest initial impact on the HCSF's losses from active providers. That impact will grow over time. Ultimately, it is estimated the higher caps will increase the HCSF's indicated rate level by 10.0 percent;

- The changes relative to inactive providers cause an immediate and material increase in the HCSF's liabilities. However, that impact is virtually a one-time hit; and

- The changes cause additional uncertainty in estimates of the HCSF's liabilities until the effects can be quantified with subsequent experience.

Chairperson Hayzlett recognized Rita Noll, Deputy Director and Chief Attorney, HCSF Board of Governors, to address the FY 2014 medical professional liability experience (based on all claims resolved in FY 2014 including judgments and settlements) (Attachment 3, Page 15-22). Ms. Noll began her presentation by noting jury verdicts. Of the 27 cases involving 35 Kansas health care providers tried to juries during FY 2014, 25 were tried to juries in Kansas courts and two cases were tried to juries in Missouri. The largest number of trials were held in the following jurisdictions: Sedgwick County (8), Johnson County (6), Wyandotte County (3), Jackson County, Missouri (2), and Reno County (2). Of those 27 cases tried, 23 resulted in defense verdicts and 1 case resulted in a mistrial. Juries returned verdicts for the plaintiffs in 3 cases and resulted with expenditures from the HCSF, with 1 of those cases now on appeal.

Ms. Noll highlighted the claims settled by the HCSF, noting, in FY 2014, 63 claims in 52 cases were settled involving HCSF monies. Settlement amounts for the fiscal year totaled $24,005,914—these figures do not include settlement contributions by primary or excess insurance carriers. Ms. Noll stated this FY data represents 16 fewer claims than the previous year, and about $3.6 million less than the previous year. Ms Noll noted, in the last couple of years, the settlement amounts have been greater than the averages, reflecting a trend for higher settlements. Although there were 16 fewer settlements, more fell into the highest category of settlements. A big component to these amounts is due to past and future medical expenses. Of the 63 claims involving HCSF monies, the HCSF provided primary coverage for inactive health care providers in 9 claims. The HCSF also "dropped down" to provide first-dollar coverage for six claims in which aggregate primary policy limits were reached. Primary insurance carriers tendered their policy limits to the HCSF in 54 claims. In addition to the $24,005,914 incurred by the HCSF, primary insurers contributed $10,135,000 to these settlements. Further, testimony indicated, four claims involved contributions from an insurer whose coverage was excess of HCSF coverage; the total amount of these contributions was $3,875,000. Ms. Noll's testimony also indicated, in addition to settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 97 claims in 86 cases. The total amount of these reported settlements was $8,909,740. Ms. Noll's report included figures from FY 2000 to FY 2014 for comparison. Ms. Noll's testimony also included a

report of HCSF total settlements and verdicts, FY 1977 to FY 2014. Ms. Noll next provided a report of new cases indicating there were 268 new cases during FY 2014. She noted, for the previous five years in a row, there was a decrease in the number of claims, so it was not unexpected there was a moderate increase for FY 2014. She also stated, since Missouri found their cap on non-economic damages unconstitutional a few years ago, she will be watching closely to see if the number of claims involved in the HCSF filed in Missouri increases.

Ms. Noll next addressed the self-insurance programs and reimbursement for the KU Foundations and Faculty and residents. Ms. Noll highlighted the FY 2014 KU Foundations and Faculty, and University of Kansas Medical Center (KUMC) and WCGME program costs. Ms. Noll stated the FY 2014 KU Foundations and Faculty program amount of $2,749,707.77 increased considerably from FY 2013. Ms. Noll stated there were two primary reasons for this increase. The first reason was there were more settlements for KU Foundations and Faculty at nine settlements, compared to five the previous year. The second reason was a very large catastrophic damages case filed about 18 months ago and 16 full-time faculty members and residents were named as defendants. Ms. Noll noted it is very expensive to defend 16 physicians in a high-dollar catastrophic damages case. Ms. Noll also noted two cases involving faculty members went to trial as defense verdicts, which also is expensive and increases attorneys' fees and expenses. There were no FY 2014 settlements or judgments for the KU and WCGME resident programs. Ms. Noll noted, there was a decrease in the amount of attorneys' fees and expenses incurred in defending the residents.

Ms. Noll stated the report lists the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME residents since inception. She stated FY 2014 was an above-average year by about $1 million. She noted the KU and WCGME residents program was a little below average for FY 2014. Ms. Noll stated, for the last several years, the HCSF stopped receiving reimbursements due to budgetary concerns. The 2010 Legislature addressed this issue with a compromise providing that for FYs 2010, 2011, 2012, and 2013, the HCSF would not be reimbursed for expenses and costs of these programs. Beginning FY 2014, two important things would happen: normal reimbursements would happen for the HCSF; and the HCSF would start being repaid for those amounts for their accrued receivables. Ms. Noll reported both of those things have happened; normal reimbursements occurred starting July 1, 2013; and they have received 20.0 percent of the of the accrued receivables for the last two years in July. The HCSF received $1,544,084.43 reimbursement in July 2013, and $1,544,084.43 in July 2014. The remaining reimbursement receivables are $4,632,253.37. Ms. Noll also provided information about monies paid by the HCSF for those claims greater than the $200,000 primary coverage. She stated these are the claims that involve the HCSF as an excess carrier. There were no claims for the KU and WCGME residents, although six of the nine claims against the faculty members did involve the HCSF excess coverage of $2.9 million. Ms. Noll concluded her presentation stating the one thing she is monitoring, as Missouri no longer has a cap on their non-economic damages and KU has achieved National Cancer Center Designation, which means a greater presence in the state (*e.g.* clinics and rotations), is the possibility more lawsuits involving the KU Faculty residents will be filed in Missouri.

Following the presentations, the Chairperson opened the meeting to questions for Ms. Noll, Mr. Wheelen, and Mr. Sutter.

Ms. Noll responded to a question regarding whether the HCSF Board of Governors' staff were seeing any multiple claims against certain faculty members at the KUMC, stating there are not any certain faculty members that have more claims than others.

- In answer to whether electronic medical records are helping to keep settlements down due to better documentation, Ms. Noll responded she believes as residents in training are trained on the systems and the systems are more compatible with other systems, there are going to be fewer and fewer claims that involve records kinds of issues.

- Mr. Wheelen responded to a question addressing the new facilities that are becoming part of the HCSF, stating the actuary will be continuously monitoring the loss experience of each category of health care provider, so there is an entirely separate category exclusively for skilled nursing facilities and another separate category exclusively for the assisted living and residential health care facilities. If it is determined the loss experience is attributable to those categories of health care providers, and the claims are extraordinary and for some reason differ from other categories like hospitals and physicians, then the surcharge rates collected from those categories will be increased.

- In answer to whether the adult care homes can continue to purchase insurance from a non-admitted carrier, Mr. Wheelen stated those facilities must purchase their primary insurance coverage from an admitted carrier (*i.e.* $100,000 from the HCSF) and then any additional amount of coverage from an Excess and Surplus carrier; although he believes they will not get a better premium rate than what they can get by paying their surcharge to the HCSF.

- Mr. Wheelen responded to the issue of whether there should be a request for a statute to provide an exemption for APRNs not currently covered under the HCPIAA, stating they have an informal agreement with the Board of Nursing the next time the Board needs to amend the Nurse Practice Act, that will be one of the requested amendments.

Response from Health Care Providers Included in the HCSF by Enactment of 2014 HB 2516

Doug Smith, Executive Director, Kansas Academy of Physician Assistants (KAPA), was recognized to provide input regarding the new legislation's impact on KAPA's membership (Attachment 4). Mr. Smith stated physician assistants were included in the legislation as a new party under the definition. He stated, generally, the response by their members has been very positive. Mr. Smith stated there is one unintended consequence in regard to exempt licenses for physician assistants providing charitable care at facilities not specifically designated as "federally qualified" that the KAPA will address by proposing legislation in the 2015 Legislative Session. Mr. Smith concluded his remarks noting the requirements for physician assistants to have coverage in place do not take effect until July 1, 2015, so time remains to address the exempt licensure provisions.

Cindy Luxem, President and Chief Executive Officer (CEO), Kansas Health Care Association and Kansas Center for Assisted Living, was recognized to provide input regarding facilities that will come into the HCSF (Attachment 5). Ms. Luxem stated they are working through some issues, noting many of their providers are not based in Kansas and have many different business practices where their companies are based. Ms. Luxem noted a correction on her submitted testimony: they plan to be fully implemented by January 1, 2015. Ms. Luxem's testimony stated both associations have been educating and working with providers to

understand the new law. She stated there have been a lot of changes over the last couple of years, so it is believed this coverage will give an opportunity for providers to have some stability in one side of their practice. Ms. Luxem assured the Committee they are working with their providers on these risk management issues. Ms. Luxem concluded by stating they may have some more comments and experience to address a year from now.

Written only testimony was provided by:

- Bob Williams, Executive Director, The Kansas Association of Osteopathic Medicine (Attachment 6); and

- Sharon Foster, President, Kansas Affiliate of the American College of Nurse-Midwives (Attachment 7).

Update on the Current Status of the Medical Malpractice Insurance Market; Update on the Health Care Provider Insurance Availability Plan (the Joint Underwriting Association)

Kurt Scott, CEO, KaMMCO, was recognized to give an update of the medical professional liability market in Kansas. He stated KaMMCO serves as a servicing carrier for the Availability Plan. Mr. Scott stated, overall, the market in Kansas, much like the market across the country, is a very vibrant, competitive marketplace. He stated, in many cases, there are multiple options for providers and rates are as low as they have been in many years, so it is an extremely good marketplace for health care providers purchasing malpractice insurance. Mr. Scott stated market conditions are often cyclical. Additionally, the numbers of claims have fallen for a few years, and are at all-time lows, which has really helped from a pricing standpoint, stability, and price competitiveness. Mr. Scott stated it is his expectation the issues anticipated for the nurse midwives, the physician assistants, and adult care facilities are transitional issues regarding the way they used to buy it *versus* the way they will now need to buy it. Mr. Scott indicated the insurance industry is in the process of responding to those issues. He stated KaMMCO does insure physician assistants who are affiliated with KaMMCO physicians or hospitals, and the company is committed to a market for long-term care facilities. Mr. Scott stated any of those providers unable to acquire the required mandated insurance from an admitted carrier in Kansas, have the Availability Plan available to help them with that transition if it becomes an issue. Mr. Scott also noted the Insurance Department is working with a number of carriers to get these filings approved so everyone can find a home in the admitted market under the new requirement by January 1, 2015. No written testimony was provided.

In a response to a Committee member's question, Mr. Scott indicated KaMMCO is very active in the area of risk management. He stated many carriers have some version of risk management loss prevention and it is expanding and growing because the nature of the risks are changing. Mr. Scott stated there are different providers to consider as traditionally care management has been provided by a physician and now it is being provided by an APRN, a physician assistant, or some other physician extender, such as a hospitalist. He stated the transitions of care provide opportunities for things to fall through the cracks, with information not being transferred from place to place. Mr. Scott stated, as electronic health records get better, it is a great example of issues where information will be able to be transferred easier and faster from provider to provider as a patient goes from place to place. Mr. Scott stated, over the course of the last five or six years, there has been a tremendous amount of changes in health care. The insurance industry is trying to do what it can to make sure that it responds to the changes to provide the best opportunity to care for patients in a safe way and reduce adverse outcomes.

Mr. Wheelen, in response to a question from the Committee regarding inactive providers, clarified there are legal definitions of "inactive" that are extremely important. There are inactive licensees, which means providers who do not provide any patient care. Under the HCPIAA, not only does the inactive provider no longer provide patient care, but this provider no longer has liability insurance coverage. Regarding the tail coverage responsibility, this means the individual physician or other health care provider is no longer seeing patients. He stated the one exception is the exempt licensee who can continue to provide patient care in a very limited context; typically, it is at a clinic for medically indigent patients. Mr. Wheelen also stated there is a source for recovery in the event one of those patients is injured, because, if the inactive exempt physician is a charitable health care provider, then the patient has access to recover under the Kansas tort law.

In response to a question from the Committee regarding vicarious liability, Ms. Noll responded there is a statute that provides one defined health care provider is not vicariously liable for another health care provider. For example, a doctor and a hospital are named in the suit; since doctors and hospitals are both defined health care providers, the hospital is not responsible for the doctor's actions and *vice versa*. Currently, nurse midwives and physician assistants are not defined health care providers. So, a hospital or a professional corporation or a physician could be found vicariously liable for a physician assistant's or nurse midwife's actions. Starting in January 1, 2015, when these two groups become defined health care providers, the physician or the hospital is not going to be vicariously liable for these groups. Ms. Noll stated she anticipates there will be increased numbers of claims being made against physician assistants and nurse midwives. Ms. Noll concluded by stating there are benefits of being a defined health care provider with the protections of the HCSF in the statute.

Rachelle Colombo, Director of Government Affairs, Kansas Medical Society (KMS), was recognized. Ms. Colombo stated KMS introduced SB 311 and HB 2516 in response to the Kansas Supreme Court's ruling in an effort to maintain the cap indefinitely. She stated KMS does believe the Committee should continue and legislative oversight is appropriate and necessary. Ms. Colombo concluded by stating KMS does not believe there needs to be an independent actuarial review. No written testimony was provided.

Chairperson Hayzlett returned to an earlier topic and recognized Catherine Gordon and Kendra Wyatt, New Birth Center, to provide comments on the inclusion of nurse midwives into the HCSF (Attachment 8). Ms. Gordon stated she and Ms. Wyatt own a free-standing birth center in Overland Park, Kansas. Ms. Wyatt then referenced their submitted testimony stating two out of three birth centers today have non-physician owners. Ms. Wyatt stated they believe Kansas is ideal for the growth of midwife owned birth centers and their goal is to expand their business. She also stated their model is highly dependent on the malpractice insurance market that gives them competitive malpractice insurance options. Ms. Wyatt stated they encourage the Committee to consider the following:

- The HCSF and its plan participants have the ability to create a market;
- Encourage the plans to report the markets and participation requirements in a transparent manner; and
- Consideration of the inclusion of licensed birth center facilities as a covered entity in future revisions of the HCSF statute.

Ms. Wyatt concluded by stating the success of their business is highly dependent on the HCSF and the Kansas malpractice market operating in an open and competitive manner especially for self-employed nurse midwives. A Committee member asked for clarification regarding if it was New Birth Center's request to include licensed birth center facilities as a covered entity the next time the statute is opened. Ms. Wyatt concurred.

Proposed Amendments to the Health Care Provider Insurance Availability Act

The Chairperson next asked if there were any proposed amendments to the HCPIAA. No such amendments were brought before the Committee.

Committee Discussion for the Purposes of Reaching Conclusions and Making Recommendations to the 2015 Legislature; Direction to Staff for the Committee Report to the Legislative Coordinating Council

Chairperson Hayzlett invited Committee discussion for the purposes of reaching conclusions and making recommendations to the 2015 Legislature.

A Committee member posed a question about whether legislation should be introduced regarding delegating necessary enforcement authority to enforce compliance with the HCPIAA to the Secretary for Aging and Disability Services without awaiting a response from the KDADS general counsel. After being recognized by Chairperson Hayzlett, Mr. Wheelen stated their position will depend on the general counsel's response since KDADS regulates these types of facilities. Mr. Wheelen stated he believes the statute is clear and if clarification is needed, he will communicate with the legislature.

Chairperson Hayzlett then invited Committee discussion about the two statutory questions posed to the Oversight Committee:

- Should the Committee request an independent actuarial review of the Health Care Stabilization Fund be completed in 2015; and

- Should the Committee be continued for another year.

Following brief Committee discussion of actuarial analysis and the report provided to the Committee by the Board of Governors' actuary, *the motion was made by Dr. Kindling and seconded by Senator Kelly that it was not necessary to request an independent actuarial review for FY 2015.* Committee members and Mr. Wheelen discussed the cost and funding for a second independent analysis. Mr. Wheelen stated if the Committee wanted to pursue a second analysis, additional funding would be needed in FY 2016. Answering whether he thought a second analysis should ever be done, Mr. Wheelen stated he has the greatest confidence in Towers Watson. In answer to a question from the Committee regarding if this was an issue that needed to be discussed every year, Melissa Calderwood-Renick stated it is a statutory requirement, and one of the two questions asked of the Committee each year. Ms. Calderwood-Renick noted the discussion of the independent analysis or completion of a second review had been discussed when the *Miller v. Johnson* case was pending. She noted the actuary had completed additional analysis to provide the Board of Governors updated analysis reflecting legislation enacted by the 2014 Legislature. A Committee member clarified that there is a difference between an actuary and an audit. Mr. Wheelen stated being a state agency, the

HCSF is subject to audit. He stated an audit is looking at financial activity which is completely different from actuarial analysis. *After all comments and questions had been answered, the motion carried.*

Chairperson Hayzlett turned to discussion of the question of should the Committee be continued for another year. *The motion was made by Representative Crum and seconded by Dr. Rider to continue the Oversight Committee. With no further discussion, the motion carried.*

The Committee then discussed changing the statute that requires the Committee to talk about a second actuarial review every year. *The motion was made by Senator Kelly and seconded by Senator Schmidt that should the opportunity present itself during the next legislative session, an amendment be offered to remove this particular statute from the law. With no further discussion, the motion carried.*

Items requested by the Committee for inclusion in the Committee report will continue as follows:

- Funds to be Held in Trust. The Committee recommends the continuation of the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the Health Care Stabilization Fund:
    - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act, the HCSF is required to be ". . . held in trust in the state treasury and accounted for separately from other state funds."
    - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in the Health Care Stabilization Fund shall remain therein and not be credited to or transferred to the State General Fund or to any other fund.

- Ms. Calderwood-Renick discussed other issues to be highlighted for members of particularly the Insurance Committees:
    - The five new categories of health care providers, the short-term and long-term liabilities that have been presented to the Committee as it relates to tail coverage, and also both the immediacy of tail coverage and the removal of the five-year compliance period. The amount of tail coverage that would be made available.
    - The increase of monitoring the Committee will need to do in conjunction with the Board of Governors associated with the impact of the 2014 legislation and projected impacts on the HCSF.

Adjourn

The Chairperson thanked the Committee members, staff, and attendees for their participation in this annual review.

There being no further business to come before the Committee, the meeting was adjourned at 11:32 a.m.

Prepared by Randi Walters
Edited by Melissa Calderwood-Renick

Approved by the Committee on:

February 3, 2015
(Date)