

SESSION OF 2015

SUPPLEMENTAL NOTE ON SENATE BILL NO. 149

As Amended by Senate Committee of the Whole

Brief*

SB 149 would create and amend law governing the civil commitment of sexually violent predators and the Sexual Predator Treatment Program (SPTP), as follows.

The bill would provide that existing and new law governing such civil commitment shall be known as the Kansas Sexually Violent Predator Act (Act).

Provisions would be added to the statute governing the initial identification of a person who may meet the criteria of a sexually violent predator (SVP) to require that notice be given to persons evaluated of the nature and purpose of the evaluation, that the evaluation would not be confidential, and that the person's statements and evaluator's conclusions could be disclosed to certain parties in proceedings under the Act. Disclosures to the Attorney General under the section would be deemed to be in response to the Attorney General's civil demand for information to determine whether a petition shall be filed, and such information would have to be specific to the purposes of the Act and as limited in scope as reasonably practicable.

This statute also would be amended to include certain mental health professionals on the multidisciplinary team and to remove a 30-day deadline for assessment by the team of whether a person is a SVP.

The statute governing the filing of a petition alleging a person is a SVP would be amended to provide that the venue

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

for a petition involving a person convicted of or charged with a federal or other state offense that would be a sexually violent offense in Kansas may be in the county where the person resides, was charged or convicted of any offense, or was released. Provisions would be added to this statute to permit service of the petition on the attorney representing the person, to assess costs to the person for medical care and treatment provided for the person by the governmental entity having custody of the person and allow the governmental entity to obtain reimbursement for such costs from the person, and to clarify that court proceedings are civil in nature.

The statute establishing the Sexually Violent Predator Expense Fund would be amended to broaden its use to include costs related to any civil action relating to commitment under the Act.

The statute governing the probable cause hearing would be amended to specify that the person named in the petition shall be detained in the county jail until the SVP determination is made and to require the judge to file a protective order permitting disclosures of protected health information to parties, counsel, evaluators, experts, and others necessary to the SVP litigation proceedings. The 72-hour time requirement for the hearing would be amended to also allow a hearing as soon as reasonably practicable or agreed upon by the parties.

The statute governing trial on the petition would be amended to change a 60-day deadline from a deadline for trial to a deadline to set the matter for pretrial conference to establish a mutually agreeable date for trial. A right-to-counsel provision would be narrowed to apply only to this statute, rather than to all proceedings under the Act, and provisions regarding retention of experts or professional persons for examination would be modified to instead allow an independent exam under the Rules of Civil Procedure. The bill would clarify this section would not apply to annual examination procedures for committed SVPs.

The statute governing appellate and commitment procedure following the SVP determination would be amended to clarify that appeals would be taken as civil appeals and that persons committed for control, care, and treatment by the Kansas Department for Aging and Disability Services (KDADS) would be required to be segregated in different units than other patients under KDADS supervision.

The statute governing annual examinations for persons committed under the Act would be amended to specify that it shall not apply to persons in transitional or conditional release, and a separate statutory section would be created setting forth the annual examination procedures for persons in transitional or conditional release. A separate statute governing conditional release would be repealed.

With regard to the annual examinations for persons not in transitional or conditional release, the bill would change the procedure for filing a petition for release over the objection of the Secretary for Aging and Disability Services (Secretary) so that such petition would be filed with the Office of Administrative Hearings (OAH), rather than with a court. The petition would have to be in writing and accompanied by certification from a mental health professional who treats the petitioner, or from the person who prepared the annual report, that the petitioner has participated in and complied with all prescribed treatment since the last annual review. Failure to follow or attend treatment could be excused if the failure did not interfere with treatment. If the petition is not filed within 30 days after the person's receipt of the annual report and notice of person's right to petition for transitional release, such right would be deemed waived.

Specific court procedures for hearing on the petition would be deleted to reflect the transfer of hearings to OAH. New procedures for the OAH hearing would be added, including an independent examination under the Rules of Civil Procedure; the requirements for the probable cause hearing, and, if probable cause exists, conversion of proceedings to determine whether the person should be

placed in transitional release; provisions allowing the hearing officer to conduct a conference or hearing by telephone or other electronic means, unless the interests of justice require in-person proceedings at the place where the person is committed; and adjusting the standard for determining whether a transitional release is appropriate. A provision for stay of an order determining a person should be placed in transitional release would be added. The bill would specify which orders and rulings of the hearing officer constitute reviewable initial orders or non-appealable rulings for purposes of the Kansas Administrative Procedure Act (KAPA), would add a protective order provision, and would require certain reports and records to be sealed and opened only by order of the hearing officer or as otherwise provided in the Act. Judicial review under this section would be pursuant to the Kansas Judicial Review Act (KJRA), and venue would be in the county of original commitment.

For persons in transitional or conditional release, the bill would create a new section containing the provisions for annual examination and petition to the court for release over the Secretary's objection. These provisions would largely be the same or similar to existing provisions for court review of petitions for release over the Secretary's objection. The bill would adjust the standard for determining whether the person should be placed on conditional release or final discharge. Requirements for compliance with the prescribed treatment, rules and regulations, and staff directives would be added. Any final determination by a court under this section would be appealable as a civil appeal.

The bill would amend the statute governing petitions for transitional release authorized by the Secretary so that such petitions would be served on and heard by OAH rather than by a court. If the hearing officer orders the person be placed in transitional release, the officer would be required to notify the court that committed the person under the Act. An initial order would be reviewable pursuant to KAPA, and judicial review would be pursuant to KJRA. Venue for judicial review would be in the county of original commitment.

The statute governing transitional release, conditional release, and final discharge would be amended to reflect the new OAH provisions, adjust the standard for such release or discharge, and expand the limit on SVPs that may be placed by the Secretary in any one county on transitional or conditional release from 8 to 16. This expansion would be effective July 1, 2015.

The bill would amend the statute setting forth rights and rules of conduct for SVPs as follows:

- Change the term “patient” to “person” in the definitions and throughout the section;
- Add definitions for “emergency lockdown” and “individual person management plan”;
- Clarify that rights under the section are statutory rights;
- Adjust the provision related to therapeutic labor, including requiring evaluation of the labor by staff every 180 days, instead of every 120 days;
- Adjust provisions related to treatment and medication, including adding more specific directions for administering medication over a person’s objection;
- Adjust provisions related to restraint and seclusion, including increasing the required monitoring interval from 15 to 30 minutes;
- Add provisions allowing for the use of individual person management plans;
- Specify that individual religious worship must comply with applicable law and facility rules and policies;

- Require persons to pay reasonable costs to receive copies of records, and allow the head of a treatment facility or designee to refuse disclosure if it will likely be injurious to the welfare of the person;
- Specify that the right to send and receive mail is subject to reasonable limitations and mail is subject to examination and inspection for contraband per facility rules and policies;
- Specify that contraband may be confiscated;
- Clarify what items a person may not receive through the mail;
- Clarify that use of clothing and toilet articles must comply with facility rules and policies;
- Clarify the right to possess personal property;
- Clarify the right to see visitors;
- Narrow the right to present grievances;
- Establish that reasonable limitations may be set on spending money;
- Remove a provision for an informal hearing regarding the denial of any rights under the decision, and clarify that notice of decision is all that is required when the facility makes an administrative decision of general applicability;
- Establish that proceedings concerning an action by KDADS shall be governed under KAPA and KJRA, and that a person appealing any alleged violation or any other agency determination must exhaust all available administrative remedies before requesting a hearing under KAPA;

- Provide requirements for notice of right to appeal, request for hearing, and review of such request to OAH;
- Allow any hearing before OAH, or any proceeding under KJRA, to be conducted by telephone or other electronic means, unless the presiding officer or court determines the interests of justice require an in-person hearing. An in-person proceeding shall occur at the place where the person is committed; and
- Establish venue in Pawnee County, Kansas, for all proceedings brought pursuant to KJRA, unless otherwise provided in the Act.

The bill would amend the statute governing *habeas corpus* for persons committed under the Act to make the section's provisions applicable to any civil action filed by such person, would add the filing fee as a cost to be taxed, and would tax the costs to the person bringing the action. Provisions would be added with certain requirements for affidavits, and trust fund and other account statements for persons committed under the Act who seek to file civil actions without prepayment of fees. If the court determines the person is indigent, costs would be taxed to the county responsible for the costs, and a district court receiving a statement of costs from another district court would be required to approve payment, unless it is not the county responsible for the costs. A claimant county could maintain an action against the debtor county if costs are not paid within 120 days. Requirements for payment of the filing fee, for filing *in forma pauperis*, and for payment of an initial partial filing fee would be added. The bill would specify that no person committed under the Act would be prohibited from bringing a civil action or pursuing an appeal for the reason that such person has no assets and no means by which to pay the initial partial filing fee. A provision for judgment of costs would be added. Finally, existing provisions related to dismissal and a "three-strikes-and-you're-out" frivolous filing prohibition

would be moved to this section from the subsequent statutory section, and would be deleted from that section.

The statute governing appealable orders under Chapter 59 would be amended to except appeals under the KJRA from those appeals over which appeals under this section have priority.

The KJRA would be amended to allow it to apply to the Act.

An existing provision regarding the release of a person who has undergone an identified physiological change rendering the person unable to commit a sexually violent offense would be moved to a new section and amended to change the burden of proof from the State to the person. The person would be required to demonstrate such change by clear and convincing evidence.

The bill would establish that the cost of post-commitment hearings, annual review hearings, evaluations, or other expenses provided for in the Act, as well as any SPTP administrative hearings involving the statutory rights of a SVP, or other program decisions appealed to OAH, shall be paid by the county responsible for the costs, which would be defined as the county where the person was determined to be a SVP. OAH would be required to provide a statement to such county at the conclusion of any of these proceedings, and the county would be required to pay within the earlier of 60 days after receipt of the bill or prior to the expiration of the fiscal year in which the costs were incurred.

The bill would establish that the reasonable costs incurred for the care and custody of a person committed pursuant to the Act while such person is in the custody of a county law enforcement agency for a pending criminal proceeding shall be paid by the county with custody of the person, and the Secretary would be required to reimburse the county from the SPTP New Crimes Reimbursement Account for all costs that would have been paid from the account if the

person had remained in the custody of the Secretary. If no such funds are available, the county could file a claim against the State. The Secretary would be directed to develop and implement a procedure for such reimbursements by January 1, 2016.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Attorney General. In the Senate Committee, representatives of the Attorney General's Office, the Kansas Association of Counties, and KDADS testified in support of the bill. The director of OAH and a representative of the Kansas Sheriffs' Association submitted written testimony supporting the bill. Two citizens, an attorney, and a former therapist for the SPTP testified in opposition to the bill. The Legislative Post Auditor provided written neutral testimony and an update of an ongoing audit of the SPTP.

The Senate Committee amended the bill to add the provisions of SB 185, regarding costs incurred for the care and custody of a person committed pursuant to the Act while such person is in the custody of a county law enforcement agency.

The Senate Committee of the Whole amended the bill to clarify the provision related to costs incurred for the care and custody of a committed person while in the custody of a county law enforcement agency covers only reasonable costs when the person is in custody for a pending criminal proceeding. The amendment also clarified the reimbursement account and changed the date by which the Secretary must implement a reimbursement procedure from July 1, 2015, to January 1, 2016.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, KDADS indicates the bill would have no immediate fiscal effect on the agency or the

state hospitals. However, should the SPTP need to be expanded, there would be associated costs. OAH estimates the bill's provisions would increase its expenditures by approximately \$160,000 annually, beginning in FY 2016, for an additional 1,500 hours spent by administrative law judges conducting hearings. Administrative law judges are compensated \$100 per hour, plus specified court costs, which per the bill would be reimbursed by the county in which the case was filed. However, the Kansas Association of Counties indicates counties would realize savings from transportation expenses that would offset any costs.

The Attorney General's Office indicates it would realize savings in travel costs and more efficient review hearings, but any savings would be negligible. The Office of Judicial Administration indicates shifting cases to OAH could produce savings for district courts. Shifting the responsibility for costs from counties to civilly committed persons could create a delay in receiving payments. However, the precise savings or delay in revenues cannot be provided until the courts have operated under the bill's provisions. Any fiscal effect is not reflected in *The FY 2016 Governor's Budget Report*.

Background of SB 185

The bill was introduced by the Senate Committee on Judiciary at the request of Senator Holmes. In the Senate Committee, Senator Holmes and representatives of the Kansas Sheriffs' Association and the Kansas Association of Counties testified in support of the bill. A representative of KDADS testified in opposition to the bill.

According to the fiscal note prepared by the Division of the Budget on SB 185, KDADS indicates the bill would increase expenditures for Larned State Hospital, but a precise estimate cannot be provided, as the number of SPTP residents who may enter the custody of a county law enforcement agency cannot be predicted. Any

reimbursements would need to be covered by increases to the Hospital's State General Fund appropriation.

The Kansas Association of Counties indicates SB 185 would increase revenues to counties, but cannot provide a precise estimate. Any fiscal effect associated with SB 185 is not reflected in *The FY 2016 Governor's Budget Report*.