

Kansas State Board of Healing Arts testimony in response to Senate Substitute for House Bill 2054

June 1, 2020

Kansas legislative leadership,

The Kansas State Board of Healing Arts (“KSBHA”) submits the comments below regarding Senate Substitute for HB2054 to assist legislators in evaluating the bill. The Board is composed of 15 members, 12 of whom are licensed Kansas healthcare providers, and 3 of whom are well qualified members of the public who represent each congressional district. No group is better suited to fairly and expertly evaluate issues relating to safe professional practice of the healing arts in Kansas.

Although there are aspects of the bill that the Board supports, such as section 19, which allows temporary regulatory flexibility to facilitate the state’s response to COVID19, the Board believes it is duty bound to advise the legislature that **the Board has significant public safety concerns related to some provisions of section 9 and section 20 of the bill.**

The KSBHA supports expediting the licensing process and temporarily reducing regulatory requirements to the extent necessary to allow our state’s health care system to effectively respond to the pandemic, but respectfully suggests, to protect the safety of the public, the legislature work with the KSBHA and other stakeholders to develop solutions that are efficient and practical and that retain the Board’s ability to protect public safety in a workable manner. We stand ready to collaborate with legislators and stakeholders to increase flexibility and efficiency while protecting patient safety.

Section 20:

- Problematic provision: **Subsection (h) of section 20 (allowing any health care professional licensed in any state or territory to practice in Kansas without the need for a Kansas license or Kansas regulatory oversight) is the most concerning subsection in the bill.** The Board believes this subsection endangers public safety.
 - This appears to remove all jurisdiction by Kansas regulatory boards to regulate these individuals in any manner. The Board’s jurisdiction to remove unsafe providers from practice in Kansas or otherwise discipline providers for misconduct is under KSA 65-2836 and is attached to Kansas licensure. In other words, we can only regulate those who hold Kansas licenses.
 - Under subsection (h), absent criminal activity, **no Kansas authority would have the jurisdiction to regulate the practice of these individuals.** In other words, Kansas licensees would be regulated by Kansas, but anyone from out of state could practice in Kansas with no regulatory oversight. Kansas licensees would be

required to practice by the public safety rules contained in KSA 65-2836 and KSA 65-2837, but out of state licensees would not.

- This subsection is not limited in scope in any manner – includes healthcare professionals from out of state providing services in Kansas completely unrelated to pandemic.
 - Potential fix: Delete subsection (h). In addition to being unsafe, this provision is unnecessary, as **these providers already have access to the temporary emergency license** that the Board created under executive order 20-08, and that authority also exists in this bill in another section (section 19). Further, these providers **already have access to the telemedicine temporary license waiver** described in section 17 of this bill (and contained in executive order 20-08)
- Problematic provision: Subsections (a), (b), (c) remove the supervision requirements for midlevel practitioners (Physician Assistants and Advance Practice Registered Nurses). Similarly, subsection (g) creates a vague category of “respiratory therapist extender” that would be permitted to provide “other healthcare services” determined by their employer.
 - Although the language of section 20 limits this to “designated healthcare facilities”, the **definition of designated healthcare facilities (subsection (m)) includes essentially every location in the state at which healthcare is provided**, not just hospitals and large clinics that have well-structured organizational oversight from medical leadership.
 - These subsections remove any meaningful limitation of the scope of practice of these providers, because “appropriate to [the provider’s] education, training and experience” is subjective and subsection (m) leaves the discretion solely to the “designated healthcare facility” at which they’re practicing, which, again, includes essentially any location in the state at which healthcare is delivered.
 - **This allows each employer to determine the scope of practice permitted at their location rather than the scope practice being determined by Kansas law** and/or by the body of experts designated under Kansas law to regulate those healthcare providers, the Board of Healing Arts.
 - In addition to the public safety concerns associated with eliminating supervision requirements, allowing each location to determine the scope of practice for their midlevel practitioners could create a patchwork of inconsistent scopes of practice.
 - Potential fix: Rather than simply removing physician supervision of midlevel providers and removing the scope of practice limitations contained in Kansas law, use the provision that was included in Executive Order 20-08: “the Board is authorized to temporarily waive, to the extent the Board determines such waiver will not harm public safety and welfare, any other regulatory requirements falling under the Board’s enforcement authorities for the purpose of preparing for, responding to, and mitigating any effect of COVID-19.”
 - The Board has already removed regulatory barriers for mid-level practitioners under this authority and remains willing to work with hospitals and other facilities to ensure that regulations are not unreasonably preventing the effective and safe use of midlevel practitioners to quickly and efficiently respond to any COVID19 spikes.
 - **The Board is composed of 15 members, 12 of whom are licensed Kansas healthcare providers. No group is better suited to fairly and expertly evaluate the safe scope of practice for these practitioners.**
- Problematic provision: Subsection (e) would allow pharmacists to practice medicine to a limited extent (routine health maintenance care for chronic diseases or “similar conditions”) without

physician supervision currently required under Kansas law (collaborative practice agreement with physician).

- The Board does not believe it is safe for pharmacists to provide medical care for chronic diseases without the supervision and defined limits and protocols that come with a collaborative practice agreement. The current system works well.
- Problematic provision: Subsection (j) has language that could be interpreted to require the Board to issue licenses and renew licenses without charging any fee.
 - If this interpretation were ultimately accepted by courts, this would eliminate all revenue of the agency.
 - This provision is unnecessary, as the board is already providing relief for those who are unable to pay their licensing fees due to COVID19 financial distress (as well as extending continuing education deadlines, allowing a temporary licensure option for those whose licensing exams have been cancelled, and allowing fee-free temporary licenses for those supporting COVID-19 response efforts).

Section 9:

- Problematic provision: Subsection (a), "...a healthcare provider is immune from . . . *administrative fines or penalties* for acts, omissions, healthcare decisions or the rendering of or the failure to render healthcare services, . . ." The statutory language is unclear but **could be construed as a defense against any administrative professional disciplinary action arising out of a provider's actions during the emergency declaration, including fraudulent, unethical, or dangerous unprofessional conduct in violation of KSA 65-2836.**
 - For example, if a provider who took unscrupulous advantage of vulnerable patients and offered unsafe purported "COVID cures" that amount to quackery, he could argue that his actions were taken in response to the emergency and he is therefore immune from the Board taking any administrative action against his license.
 - **Potential fix:** Revise the language to clarify that providers would not be immune from Board actions to address unprofessional conduct barred by KSA 65-2836.
 - This could be accomplished by inserting "Nothing in this section shall be construed to confer immunity from a professional disciplinary action taken by a Kansas professional licensing body, or fines or penalties assessed by a Kansas professional licensing body pursuant to such actions, based on a healthcare provider's violation of a Kansas statute governing professional licensing."
- Otherwise, the Board supports those provisions of Section 9 that provide reasonable protection for providers from lawsuits seeking monetary compensation arising out of providers' healthcare decisions directly affected by the COVID-19 health emergency.
- Further, the Board already announced (very early in this crisis) that technical violations of the Healing Arts Act based on providers' good faith COVID-19 response efforts will not be treated as a disciplinary matter by the Board. And in the context of substantive violations of the Healing Arts Act that occur in the course of good faith COVID-19 response efforts, the Board will consider the fact that the provider committed the violation in the course of a good faith attempt to respond to the pandemic emergency to be a significant mitigating factor in the event a disciplinary complaint is filed with the Board against the provider for such violation.

Thank you for considering the Board's input on this bill. Please feel free to contact our Acting Executive Director with any questions.

Sincerely,



Tucker L. Poling
Acting Executive Director
General Counsel
Tucker.Poling@ks.gov
(785) 296-0710
(785) 760-0686 cell



Steven Gould, D.C.
President
Steven.Gould@ks.gov



Kimberly Templeton, M.D.
Chair, Legislative Committee
Kimberly.Templeton@ks.gov