

SESSION OF 2016

**SUPPLEMENTAL NOTE ON SENATE BILL NO. 422**

As Amended by Senate Committee of the Whole

**Brief\***

SB 422, as amended, would continue the updating of statutes transferred to the Kansas Department for Aging and Disability Services (KDADS) under 2012 Executive Reorganization Order No. 41, in order to clarify and consolidate the existing authority of the Secretary for Aging and Disability Services (Secretary) with regard to the licensure process for residential care facilities, residential and day support facilities, private and public psychiatric hospitals, psychiatric residential treatment facilities (PRTFs), community mental health centers (CMHCs), and providers of other disability services licensed by the Secretary; provide background checks of service providers; and provide for an enforcement process with intermediate steps as an alternative to provider licensure revocation. The bill also would prohibit the outsourcing or privatization of any operations or facilities of Larned State Hospital or Osawatomie State Hospital without specific authorization by the Legislature.

Additionally, the bill would provide for the development, establishment, and enforcement of standards for the care, treatment, health, safety, welfare, and comfort of individuals residing in or receiving treatment or services by a person or entity licensed under the bill. The bill also would provide for the development, establishment, and enforcement of standards for the construction, maintenance, or operation of facilities, hospitals, centers and providers of services that promote safe and adequate accommodation, care, and treatment of individuals residing in or receiving treatment in

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\*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>

the listed settings. Further, the bill would define specific terms and grant the Secretary rules and regulations authority.

The bill would be in effect upon publication in the *Kansas Register*.

Additional bill details follow.

## **Definitions (Section 2)**

The terms defined by the bill would include:

- “Center” would mean a CMHC;
- “Facility” would mean any place other than a CMHC or hospital that meets the requirements established in regulations created and adopted by the Secretary, where individuals reside and receive treatment or services provided by a person or entity licensed under the bill;
- “Hospital” would mean a psychiatric hospital;
- “Individual” would mean a person who receives behavioral health, intellectual disabilities, developmental disabilities, or other disability services as set forth in the bill;
- “Licensing agency” would mean the Secretary;
- “Other disabilities” would mean any condition for which individuals receive home and community based waiver services;
- “Provider” would mean a person, partnership, or corporation employing or contracting with appropriately credentialed persons that provide behavioral health (excluding substance use disorder services for the purposes of this bill), intellectual disability, developmental disability, or

other disability services according to the requirements in the rules and regulations created and adopted by the Secretary; and

- “Services” would mean behavioral health, intellectual disability, developmental disability, and other disability services, including: residential supports, day supports, care coordination, case management, workshops, sheltered domiciles, education, therapeutic services, assessments and evaluations, diagnostic care, medicinal support, and rehabilitative services.

The bill also defines: CMHC, department, licensee, psychiatric hospital, PRTF, residential care facility, and Secretary.

### **Duties of the Secretary (Section 3)**

The following would be among the duties of the Secretary outlined in the bill:

- Enforce laws relating to the hospitalization of mentally ill individuals in a psychiatric hospital and the diagnosis, care, training, or treatment of individuals receiving services through CMHCs, PRTFs for individuals with mental illness, residential care facilities or other facilities or services for individuals with mental illness, intellectual disabilities, developmental disabilities, or other disabilities;
- Inspect, license, certify or accredit centers, facilities, hospitals and providers for individuals with mental illness, intellectual disabilities, developmental disabilities, or other disabilities pursuant to federal legislation, and deny, suspend, or revoke a license granted for causes shown;

- Set standards for, inspect, and license all providers and facilities for individuals with mental illness, intellectual disabilities, developmental disabilities, or other disabilities receiving assistance through KDADS which receive or have received after June 30, 1967, any state or federal funds, or facilities where individuals with mental illness, intellectual disabilities, or developmental disabilities reside, who require supervision or require limited assistance with the taking of medication. The Secretary would be authorized to develop rules and regulations to allow the facilities to assist an individual with the taking of medications when the medication is in a labeled container dispensed by a pharmacist; and
- Do other acts and things necessary to execute the authority expressly granted to the Secretary.

Additionally, the bill outlines other duties prescribed to the Secretary.

### ***Injunctive Relief***

In addition to the existence or pursuit of other remedies, the Secretary, as the licensing agency, would be authorized pursuant to the Kansas Judicial Review Act (KJRA) to maintain an action for an injunction against any person or facility to restrain or prevent the operation of a residential care facility, crisis residential care facility, private or public psychiatric hospital, PRTF, provider of services, CMHC or any other facility providing services to individuals without a license.

### ***Reports and Information***

Superintendents, executive, or other administrative officers of all psychiatric hospitals, CMHCs, or facilities

serving individuals with intellectual disabilities or developmental disabilities, and facilities serving other disabilities receiving assistance through KDADS would be required to furnish reports and information to the Secretary.

#### **Rule and Regulations Authority (Section 4)**

The Secretary would be authorized to adopt rules and regulations necessary to carry out the provisions of the bill. The bill provides a list of the types of minimum standards and requirements the Secretary would be authorized to prescribe by rules and regulations. The bill would clarify the authority granted to the Secretary under the bill would be in addition to other statutory authority the Secretary has to require the licensing and operation of centers, facilities, hospitals, and providers and would not be intended to be construed to limit any of the powers and duties of the Secretary under Article 59 of Chapter 75 of the *Kansas Statutes Annotated* (the Kansas Act on Aging).

#### **Compliance with State Law, Ordinances, Rules and Regulations (Section 5)**

The bill would require strict compliance with all pertinent state laws and lawfully adopted ordinances and rules and regulations in the operation of any center, facility, hospital, or provision of services in the state. All centers, facilities, hospitals, and providers would be required to comply with all lawfully established requirements and rules and regulations of the Secretary and the State Fire Marshal, and any other government agency pertinent and applicable to such centers, facilities, hospitals, and providers, their buildings, staff, facilities, maintenance, operation, conduct, and the care and treatment of individuals.

### **Licensure Requirement (Section 6)**

A center, facility, hospital, or a provider would be prohibited from operating or providing services in the state without a license issued by the Secretary pursuant to an application for licensure and compliance with the requirements, standards, rules, and regulations.

### **Application for Licensure (Section 7)**

The bill would require an application for a license to operate a center, facility, or hospital or to be a provider of services to be made in writing to the Secretary on forms made available by the Secretary and signed by the person or persons seeking the license or by a duly authorized agent. The application would be required to contain all information required by the Secretary, as the licensing agency, which could include affirmative evidence of the applicant's ability to comply with the standards and rules and regulations adopted under the bill.

### **Issuance of License, Inspections, Investigations, and Fees (Section 8)**

The bill would provide for the issuance of a license by the Secretary with the approval of the State Fire Marshal, upon receipt of an initial or renewal application if the applicant is fit and qualified and if the center, facility, hospital, or provider meets the requirements under the bill and the adopted rules and regulations. The Secretary, the State Fire Marshal, and the county, city-county, or multi-county health departments or their designated representatives would be required to make any necessary inspections and investigations to determine the conditions existing in each case. A written report of such inspections, investigations, and recommendations by the State Fire Marshal, and the county, city-county, or multi-county health departments or their designated representatives would be required to be filed with

the Secretary and a copy of the report be provided to the applicant.

The fees for the initial and renewal application would be fixed by the Secretary by rules and regulations. The non-refundable licensure fees would be paid to the Secretary at the time of initial application and annually thereafter. The fees in effect immediately prior to the effective date of the bill would remain in effect on and after the effective date of the bill until the Secretary establishes a different fee by rules and regulations.

Licenses would be issued only for the premises or providers named in the application, or both, and would not be transferable or assignable. The license would be required to be posted in a conspicuous place in the center, facility, hospital, or provider's principal location. A license would be denied or revoked for the failure to file the annual report and pay the renewal of licensure fee. The license would be required to state the type of facility or service for which the license is granted, the number of individuals for whom granted, the person or persons to whom granted, the date, and such additional information and special limitations deemed appropriate by the Secretary.

A license would remain in effect until the date of expiration specified by the Secretary, unless suspended or revoked. Renewal applications would be required to contain the information in such form as required by the Secretary and be accompanied by the payment of any required annual fee. A license would be issued and effective until the date of expiration upon review and approval by the Secretary and the State Fire Marshal or their duly authorized agents.

### **Restrictions on the Operation and Provision of Services (Section 9)**

A licensee would be prohibited from knowingly operating a center, facility, hospital, or be a provider of services if any

person who works in these settings or for a provider of services has been convicted of crimes specified in the bill or has had action taken against them, including:

- A felony conviction for crimes against persons;
- A felony conviction for crimes involving controlled substances;
- A conviction for any act involving crimes against persons, sex crimes, crimes affecting family relationships and children, unlawful disclosure of tax information, unlawful interference with a firefighter or an emergency medical services attendant, permitting a dangerous animal to be at large, selling or promoting the sale of sexual relations, buying sexual relations, and certain anticipatory crimes involving attempt or conspiracy to commit such acts;
- A conviction for promoting obscenity or promoting obscenity to minors;
- Adjudicated a juvenile offender because of having committed an act, which, if committed by an adult, would constitute the commission of a felony and which is a crime against persons, or is any act described above;
- Committed an act of physical, mental, or emotional abuse or neglect or sexual abuse, and who is listed in the Child Abuse and Neglect Registry maintained by the Kansas Department for Children and Families (DCF), and:
  - Failed to successfully complete a corrective action plan deemed appropriate and approved by DCF; or
  - The record has not been expunged by DCF;

- Had a child removed from the home based on a court order finding the child to be deprived or a child in need of care based on a finding of physical, mental, or emotional abuse or neglect or sexual abuse, and the child has not been returned to the home, or the child reaches majority before being returned to the home, and the person has failed to satisfactorily complete a corrective action plan;
- Had parental rights terminated; or
- Signed a diversion agreement or an immediate intervention agreement involving a charge of child abuse or a sexual offense.

The bill also would prohibit a person who has been found to be an adult with an impairment in need of a guardian or conservator, or both, from operating a center, facility, hospital or being a provider of services.

### ***Criminal History Record Check***

The Secretary would be required to notify the licensee, within ten business days, when the result of a national criminal history record check or other appropriate review reveals unfitness for licensure as described above. The bill would protect a licensee, its contractors, or its employees, from civil liability for a refusal to employ or discharge from employment when acting in good faith to comply with disqualifying factors contained in the bill.

A licensee or member of the staff who received information regarding the fitness or unfitness of any person would be required to keep such information confidential, but would be allowed to disclose the information to the person who is the subject of the request. A violation of this section would be an unclassified misdemeanor punishable by a fine of \$100.

The Secretary would be authorized to require an individual seeking licensure or applying to work in a facility to be fingerprinted and submit to a state and national criminal history record check. The Secretary would be authorized to submit the fingerprints to the Kansas Bureau of Investigation (KBI) and the Federal Bureau of Investigation for a state and national criminal history record check. The Secretary would have access to any criminal history record information in the possession of KBI regarding any criminal history information, including adjudications of a juvenile offender, which, if committed by an adult, would have been a felony conviction. The bill would authorize KBI to charge KDADS a reasonable fee for providing criminal history record information. The Secretary would charge each person or licensee for each person about whom an information request has been submitted.

The licensee operating a center, facility, hospital, or a provider of services would be required to request from KDADS information regarding any criminal history information relating to a person who works in the center, facility, hospital, or for a service provider or who is being considered for employment or volunteer work. The licensee would be required to report the dates of employment and separation of all persons working for the licensee. Any employment agency that provides employees to work in a center, facility, hospital, or a provider of services would be required to request and receive an eligibility determination from KDADS. The licensee would be required to obtain written documentation that such employees are eligible to work. The licensee would be allowed to hire an applicant for employment on a conditional basis pending the results of an eligibility determination from KDADS. As required by the federal Patient Protection and Affordable Care Act, a person disqualified from employment due to a valid background check would have the right to appeal in accordance with requirements, standards, and rules and regulations to be promulgated by the Secretary.

The provisions of this section would not apply to a person who works for a center, facility, or hospital, and

currently is licensed or registered by an agency of this state to provide professional services and provides such services as part of the work such person performs at the center, facility, or hospital. However, a licensee may request criminal history record information from KDADS on these persons.

A licensee operating a center, facility, hospital, or a provider of services would be prohibited from requiring an applicant under this section to be fingerprinted, if the applicant has been the subject of a background check under the bill within one year prior to the application for employment with the licensee and has maintained a record of continuous employment, with no lapse of employment of over 90 days in any center, facility, hospital, or a provider of services covered by the bill.

Persons in the custody of the Secretary of Corrections and who provide services under direct supervision in non-patient areas on the grounds or other areas designated by the Secretary of Corrections would not be subject to the provision of this section while providing such services.

### **Grandfathered Licenses (Section 10)**

Licenses issued for centers, facilities, hospitals, and providers prior to the effective date of the bill would continue in force until the licensed date of expiration, unless suspended or revoked. Persons holding such licenses that are in force on the effective date of the bill would be permitted not more than four months from the effective date of the bill to comply with the rules and regulations and standards promulgated under the bill where the rules and regulations differ in any substantial respect from those in force and effect immediately prior to the effective date of the bill.

## **Inspections and Investigations (Section 11)**

Inspections and investigations would be required, announced or unannounced, and reported in writing by the authorized agents and representatives of the Secretary and State Fire Marshal, and of the county, city-county, and multi-county health departments as often and in the manner prescribed by rules and regulations promulgated under the bill. Upon presenting adequate identification to carry out the requirements of the bill, access would be required to be given at any time to the premises of any center, facility, hospital, or provider, depending on the type of service provided by the provider and locations. Access to the premises of a facility that is a private residence would be required to be given only for cause as prescribed by rules and regulations adopted under the provisions of the bill. Failure to provide the required access could constitute grounds for denial, suspension, or revocation of the license. The bill would require a copy of any inspection or investigation reports required by this section to be furnished to the applicant or licensee. The bill would require an exit interview with the licensee.

The Secretary would be required to inspect any facility or provider of residential services, which serves two or more residents who are not self-directing their services and are subject to licensure under the bill.

Licensees would be required to post in a conspicuous place a notice indicating the most recent inspection report and related documents may be examined upon request. Subject to a reasonable charge to cover copying costs, a licensee would be required to provide the most recent inspection report and related documents upon request.

## **Provisional Licenses (Section 12)**

A provisional license would be allowed to be issued to any center, facility, hospital or provider which is temporarily unable to conform to all the standards, requirements and

rules and regulations established under the bill. Such a provisional license would be subject to approval by the State Fire Marshal. A provisional license would be for to a period of six months to allow for necessary corrections, but one additional successive six-month provisional license could be granted at the Secretary's discretion. A change of ownership during the provisional licensing would not extend the time for the requirements to be met that were the basis for the provisional license, nor entitle the new owner to an additional provisional license.

### **Disciplinary Action (Section 13)**

If the Secretary finds a substantial failure to comply with the requirements, standards or rules and regulations established under the bill, an order denying, suspending, or revoking the license would be authorized after notice and an opportunity for a hearing under the Kansas Administrative Procedure Act (KAPA). Any licensee or applicant would have the right to appeal such an order under the KJRA.

When the Secretary denies, suspends, or revokes a license, the applicant would not be eligible to apply for a new license or reinstatement of a license for two years from the date of denial, suspension, or revocation. Any applicant issued an emergency order by the Secretary denying, suspending, or revoking a license may apply for a new license or reinstatement of a license at any time upon submission of a written waiver of any right conferred on the applicant or licensee under the KAPA and the KJRA to the Secretary in a settlement agreement or other manner approved by the Secretary. A licensee issued a notice of intent to take action by the Secretary would be allowed to enter into a settlement agreement, as approved by the Secretary, with the Secretary at any time upon submission of a written waiver of any right conferred under the KAPA and the KJRA.

### **Grounds for Denial, Suspension or Revocation of a License (Section 14)**

The bill would define “person” to mean:

- Any person who is an applicant for a license or who is the licensee and who has any direct or indirect ownership interest of 25 percent or more in the center, facility or hospital;
- The owner in whole or in part, of any mortgage, deed of trust, note, or other obligation secured, in whole or in part, by such center, facility, or hospital; or any of the property or assets of such center, facility, or hospital; or
- If the center, facility, hospital, or provider is organized as a corporation, is an officer or director of the corporation, or if the facility is organized as a partnership, is a partner.

The Secretary would be authorized to deny, suspend, or revoke the license of any person who meets any of the seven grounds outlined in the bill. The grounds include:

- Willful or repeated violations of any provision of law or rules and regulations adopted pursuant to the bill or the Kansas Act on Aging;
- Denial, suspension, revocation, or limitation of a license to operate a center, facility, or hospital; censure or other disciplinary action taken; or denial of an application for licensure by the proper licensing authority of another state, territory, District of Columbia, or other country, with a certified copy of the record being conclusive evidence of this action;
- Failure or refusal to comply with the Medicaid and Medicare requirements under specified sections of

the Social Security Act, or Medicaid and Medicare regulations under specified sections of the Code of Federal Regulations, with a certified copy of the record being conclusive evidence of this action; or

- A felony conviction.

### **Penalties (Section 15)**

A person operating a center, facility, hospital, or a provider of services in the state without a license under the bill would be guilty of a class B misdemeanor. Violations of any other provision of the bill or rules and regulations promulgated under the bill also would be a class B misdemeanor.

Regardless of the existence or pursuit of other available remedies, the Secretary would be authorized to maintain an action, under the KJRA, in the name of the state for injunction or other process against any person or agency to restrain or prevent the operation of a center, facility, hospital, or provision of services without a license under the bill.

### **Correction Orders (Section 16)**

The bill would allow for the issuance of a correction order by the Secretary or a designee to a licensee when the State Fire Marshal or the Marshal's representative or a duly authorized representative of the Secretary inspects or investigates a center, facility, hospital, or provider, and determines there is noncompliance with the provisions of the bill or the Kansas Act on Aging or rules and regulations and the noncompliance is likely to adversely affect the health, safety, nutrition, or sanitation of the individuals or the public. The correction order would be served on the licensee either personally or by certified mail, return receipt requested. The correction order would be required to be in writing, state the specific deficiency, cite the statutory provision or rule and

regulation alleged to have been violated, and specify the time allowed for correction.

If re-inspection by the State Fire Marshal, the Fire Marshal's representative, or a duly authorized representative of the Secretary finds the licensee has not corrected the deficiency or deficiencies specified in the correction order, the Secretary would be authorized to assess a civil penalty not to exceed \$500 per day, per deficiency, against the licensee for each day after the day following the deadline for correction specified in the correction order, up to a maximum assessment of \$2,500. The licensee would be required to be served with a written notice of assessment.

In determining the amount of the civil penalty to be assessed, the Secretary first would be required to consider the following:

- The severity of the violation;
- The good faith effort exercised by the center, facility, hospital, or provider to correct the violation; and
- The history of compliance of the licensee with the rules and regulations. The Secretary would be authorized to double the civil penalty assessed the licensee, up to a maximum of \$5,000, if some or all of the deficiencies cited in the correction order were cited in an inspection or investigation which occurred within 18 months prior to the inspection or investigation that resulted in the correction order.

Payment of civil penalties assessed would be due and payable within ten days of service of the written notice of assessment on the licensee, unless additional time is granted by the Secretary. If payment is not made within the applicable time period, the Secretary would be authorized to file a certified copy of the notice of assessment in district court to enforce the notice in the same manner as a judgment of the

district court. Civil penalties collected under provisions of the bill would be deposited in the State General Fund.

### **Severability Clause (Section 17)**

If a provision of the bill or its application is held invalid, the invalidity would not affect other provisions or applications that can be given effect without the invalid provisions or application, such that the provisions of the bill would be severable.

### **Prohibition on State Hospital Outsourcing or Privatization (Section 18)**

The bill would prohibit a state agency from entering into any agreement or taking any action to outsource or privatize any operations or facilities of Larned State Hospital or Osawatomie State Hospital without prior specific authorization by an act or an appropriation act of the Legislature.

A state agency would not be prevented from renewing any agreement in existence prior to March 4, 2016, for services at Larned State Hospital or Osawatomie State Hospital if the new agreement is substantially the same as an existing agreement. Additionally, a state agency would not be prevented from entering into an agreement with a different provider for services at Larned State Hospital or Osawatomie State Hospital if the agreement is substantially similar to an agreement for services in existence prior to March 4, 2016.

### **Background**

The bill was introduced by the Senate Committee on Public Health and Welfare at the request of KDADS. At the Senate Committee on Public Health and Welfare hearing, a

representative of KDADS testified in support of the bill. The representative stated the bill would provide a consolidated, more defined licensure process; increase protection for individuals receiving care and services through background checks; and provide support for provider expansion and enhanced protection for individuals and communities through an improved enforcement process that includes intermediate steps. The representative stated the bill would provide a more clear statutory foundation in meeting the federal background check requirement and the Home and Community Based Services settings rule.

Neutral testimony was provided by the State Fire Marshal and a representative of InterHab. The State Fire Marshal stated the actual number of facilities that would need to be inspected and licensed under the bill is unknown and requested authorization to fund an additional inspector position from existing funds in the Fire Marshal Fee Fund to be filled only when and if the increase in facility numbers justify the additional position. The InterHab representative stated the bill, in its original form, authorizes KDADS to have an unimpeded right to enter the private residential premises of any person receiving services, a matter that should be addressed in statute by clarifying that a “facility” does not include private residences owned or rented by a person served, or that person’s family, and not addressed through rules and regulations. The representative also stated the language regarding inspections should be clarified to provide that, unless there is a showing of cause relating to a threat of imminent risk to health or safety of the person served, the State should not have the right to inspect at any time and should schedule appointments to conduct routine business.

The Senate Committee amended the bill to change the definition of “other disabilities;” clarify those for whom a license may be issued and that, if applicable, a license would state the type of service for which the license is granted; clarify access to a facility that is a private residence for inspections and investigations would only be allowed for

cause, as prescribed by rules and regulations; and change the effective date to publication in the *Kansas Register*.

The Senate Committee of the Whole amended the bill to add language prohibiting the outsourcing or privatization of any operations or facilities of Larned State Hospital or Osawatomie State Hospital without specific authorization by the Legislature; add language relating to state agencies entering into or renewing an agreement for services at the state hospitals; and change the title of the bill.

According to the fiscal note prepared by the Division of the Budget, enactment of the bill, as introduced, would have no fiscal effect.