

MINUTES OF THE SENATE PUBLIC HEALTH AND WELFARE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 1:30 p.m. on March 15, 2004 in Room 231-N of the Capitol.

All members were present except:

Committee staff present:

Ms. Emalene Correll, Legislative Research
Mr. Norm Furse, Revisor of Statutes
Mrs. Diana Lee, Revisor of Statutes
Ms. Margaret Cianciarulo, Committee Secretary

Conferees appearing before the committee:

Mr. Larry Pitman, President and CEO, Kansas Foundation for Medical Care
Ms. Linda Berndt, Executive Vice President, Kansas Health Care Association
Ms. Annice Davis White, CEO, Caring Hearts, LLC
Ms. Debra Zehr, Vice President, Kansas Association of Homes and Services for the Aging
Ms. Phyllis Kelly, Executive Director, Kansas Adult Care Executives Association
Secretary Pamela Johnson-Betts, Kansas Department on Aging
Mr. Greg Wright, Practicing Attorney, Kansas Trial Lawyers Associating, Overland Park, Kansas

Others attending:

Please See Attached List.

Approval of Minutes

Upon calling the meeting to order, the minutes of February 9, 10, 11, and 12 were distributed to each member of the Committee. The Chair asked that the members notify Ms. Cianciarulo if they have comments, however, if none received by the end of the day Friday, March 19, 2004, they would stand approved.

Hearing on **HB2658** - an act concerning adult care homes; relating to informal dispute resolution providing for an independent review panel

The next order of business was a hearing on **HB2658** and called upon Ms. Correll to give a brief overview of the bill. Her highlights included:

- will create a new law relating to adult care homes and the types of inspection reports and deficiencies that result from regulation of such homes;
- it is important to remember there are two kinds of inspections that are made in adult care homes. One is the inspection which is under the contract of the federal government for medicare certification, so there are two issues here from reading the bill, I am assuming that any type of dispute resolution that would be provided by this bill is suppose to apply to both types of inspections. One part of the state is acting as agent of the federal government and where the state is acting on the states behalf as a licensing agency;
- the bill provides that when a statement of deficiencies is left with an adult care home administrator, that individual within 10 calendar days after receiving may make a written request to the Secretary of Aging for an informal dispute resolution by an independent review panel;
- the bill would allow the administrator to make one request per inspection to dispute any deficiencies with which the Adult care home administrator disagrees;
- deficiencies are what the inspector finds that did not meet the standards or rules and regs.;
- the informal dispute resolution (IDR) can be based on the statement of deficiencies and in any other materials submitted but the department is to provide the administration with face-to-face informal dispute resolution only if requested by the adult care home administrator;

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- sets out what the written request for an IDR is to include (ex. The specific deficiencies being disputed, a detailed explanation of the basis for dispute and any supporting documentation including any information not available at the time of inspection.);
- once a written request for an IDR has been received by the Secretary, he/she is to contact the Center of Medicare and Medicaid Services' (CMS) designated quality improvement organization for Kansas, and that is the Kansas Medical Foundation, and request that the hearing be conducted concerning the disputed deficiency;
- the bill provides a request for this type of resolution is not to delay the timely correction of any deficiency not in dispute and not cause a delay of any enforcement action on the grounds that the IDR has not been completed before the effective date of the enforcement action;
- the cost of the panel which would be the Kansas Medical Foundation is to include traveling expense and other expenses of the review to be paid by contractual agreement with the Center for Medicare and Medicaid Designated Quality Improvement Organization for Kansas and the Department of Aging; and
- feels there are several questions the committee may want to ask about the bill:
 - is it intended to apply to inspections related to day care certification and to state licensing?
 - regarding the ADC administrator that makes the request for an IDR, is there any financial risk there or are all the costs of this dispute resolution process to be paid by the state?
 - whether or not the federal government would cost share.

The Chair then asked if there were questions of Ms. Correll. Senators Brownlee and Wagle asked questions including: who would pay for the contractual agreement, do we have a fiscal note, and is there any internal disputes going on right now?

The Chair then called on the first proponent, Mr. Larry Pitman, President and CEO of the Kansas Foundation for Medical Care (KFMC), who gave a history of their organization including:

- formed to provide a mechanism for physician peer review at time when more and more third-party payers were making claim determinations regarding utilization and quality that impacted the payment decision;
- incorporated in 1972 by the Kansas Medical society;
- has been designated Quality Improvement Organization (QIO) for Kansas since 1974;
- a 15-member Board of Directors governs KFMC;
- has had several contracts with the Kansas Department of Social and Rehabilitation Services; and,
- has the experience and ability to oversee the Informal Dispute Resolution (IDR)

A copy of Mr. Pitman's testimony is ([Attachment 1](#)) attached hereto and incorporated into the Minutes as referenced.

The second proponent to testify was Ms. Linda Berndt, Executive Vice President, Kansas Health Care Association (KHCA), who stated that they represent nearly 200 nursing and assisted living facilities, including nursing facilities for mental health, long-term care units of hospitals, senior housing and community service providers across the state of Kansas. She stated as the bill is written there is no objective or third-party review (thus their providers rarely use this process) and in addition, many providers fear retribution should they use the current process. Lastly, she stated KHCA would suggest that there are other funding options available including an assessment of the nursing and assisted living facility providers that they would be glad to explore. A copy of her testimony is ([Attachment 2](#)) attached hereto and incorporated into the Minutes as referenced.

The third proponent was Ms. Annice Davis White, CEO of the Caring Heart LLC who stated that their organization was a professional geriatric care management practice located in Overland Park, Kansas. She stated that currently, the Informal Dispute Resolution system as it exists can easily be interpreted as a conflict of interest and offered five points showing why it is important that the informal dispute resolution process be moved to an independent review panel:

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- 1) A fair and impartial process is needed;
- 2) Eliminate the conflict of interest that potentially compromises the system;
- 3) The regulatory agency should have an outside review source that analyzes their work;
- 4) Current process exacerbates and burdens an already overloaded bureaucracy;
- 5) Unlimited and unquestionable power and control can only further weaken the entire profession.

A copy of her testimony is ([Attachment 3](#)) attached hereto and incorporated into the Minutes as referenced.

The next to proponent to testify was Ms. Debra Zehr, Vice President, Kansas Association of Homes and Services for the Aging (CAHSA), who stated that their organization represents over 160 not-for-profit long-term health care, housing, and community service providers throughout the state and believes it makes sense to have the IDR process handled in a way that is as independent and objective as possible and this bill would mark a constructive step towards that end. A copy of her testimony is ([Attachment 4](#)) attached hereto and incorporated into the Minutes as referenced.

Ms. Phyllis Kelly, Executive Director of the Kansas Adult Care Executives Association (KACE) was last proponent conferee to testify. She stated KACE represents over 250 adult care home executives in nursing homes and assisted living facilities throughout Kansas and that other state regulatory agencies use an independent review panel when inspection and compliance issues are disputed. Stating oftentimes, federal law requires an independent entity to be used. She cited a memo released from the Centers for Medicare and Medicaid Services (CMS) on June 12, 2003 reiterating that state agencies can use third parties to conduct the IDR and provided guidance to the state agencies when independent panels are used. A copy of her testimony is ([Attachment 5](#)) attached hereto and incorporated into the Minutes as referenced.

The Chair then called on the first opponent, Secretary Pamela Johnson-Betts, Kansas Department on Aging, who stated that the bill would give adult care homes the ability to request from the Secretary of Aging to convene an independent review panel to consider disputes arising from a survey and the original bill was amended to require that the Kansas Department on Aging (KDOA) contract with the CMS quality improvement organization for the purposes of hearing the dispute. She also described the current administrative review process and the information dispute resolution process. And lastly, she offered the department's concerns including: the fiscal cost (the current KDOA budget cannot accommodate the external review process unless the agency is appropriated additional funds. A copy of her testimony and attachments, memos from the Centers for Medicare and Medicaid Services, are ([Attachment 6](#)) attached hereto and incorporated into the Minutes as referenced.

The last opponent was Mr. Greg Wright, a practicing attorney in Overland Park, Kansas, and a member of the Kansas Trial Lawyers Association (KTLA), who stated that nursing facilities already have the right to contest cited deficiencies through:

- 1) a federally-required informal dispute resolution process, and
- 2) the enforcement appeals process

He also stated it is uncertain and unclear”

- 1) as to how the proposed “independent review panel” will fit into the existing system; and
- 2) why a new level of “appeal” is needed.

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Lastly, he listed KFMC's concerns including:

- 1) subsection (d) appears to permit the facility to delay correction of a deficiency simply because it is in a dispute. (This is not safe for residents and it's probably contrary to federal law);
- 2) the bill does not preclude nursing facility representatives from serving on this "independent" panel (if this is the concern for the industry, then it makes sense to exclude any industry representative from being on the IDR panel);
- 3) training for the panel members and required minimum qualifications to assure a base of knowledge are absent from the bill;
- 4) much of the survey content is related to nursing care, yet there is no requirement that the panel include a registered nurse;
- 5) there is no requirement for a consumer representative to serve on the panel;
- 6) residents do not have an equal opportunity to challenge the surveyor's failure to cite deficiencies; and
- 7) safeguards to protect against frivolous and unfounded requests for review are lacking.

A copy of his testimony is (Attachment 7) attached hereto and incorporated into the Minutes as referenced.

As there was no neutral testimony, the Chair directed the Committee to the one piece of written testimony in opposition to the bill from Ms. Deanne Bacco, Executive Director, Kansas Advocates for Better Care (KABC) who stated that the proposed use of the federally contracted quality improvement organization, Kansas Foundation for Medical Care (KFMC) is an improvement to the original bill but it is not clear:

- 1) What becomes of their recommendation?
- 2) Who has the final decision about disputed deficiencies?
- 3) If the use of KFMC is seen as an improvement to the current system, has the Centers for Medicare and Medicaid Services (CMS) notified this Committee that this proposed review panel not only is allowable by law and regulation, but is also an improvement to the process of dispute resolution?
- 4) For any deficiency that is in dispute, what is the time line for correction? (If a deficiency is found to be incorrectly cited, there would be nothing to correct, however if found to be a substantiated citation, the correction will be very long overdue, to the detriment of the nursing home residents.) She stated there needs to be a safeguard against long-running deficiencies.

A copy of her testimony is (Attachment 8) attached and incorporated into the Minutes as referenced.

As there was no neutral or written testimony, the Chair asked for questions or comments from the Committee. Senators Salmans, Wagle, and Brungardt and Ms. Correll asked questions of Mr. Buening, Mr. Wright, Mr. Pitman, and Secretary Johnson-Betts ranging from:

- do you receive requests to review deficiencies from facilities other than those that are federally certified or from other assisted living facilities, and do you have a number as to how many of these in each category?
- it has been noticed that the fire Marshall appears to oppose the bill in the House and that what is presented to us today, his inspections were taken out for this hearing, what keeps him/her from being involved in this process?
- do you know what other states are doing for the informal dispute regulations and are they set up the way Kansas is or are they approaching it differently, what are they doing if they have a dispute process, and what is happening in other states that don't and who is reviewing their disputes?
- how many cases are reviewed by that next tier up and do they then go to the district court or what happens?
- was the person involved in the survey also one of the people who reviewed it?
- could Ms. Correl request an updated fiscal with the House amendments?

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- did Mr. Pitman have the estimate on the cost;
- why aren't your findings irrelevant in this review ?
- were you contemplating using in-house staff?

Adjournment

As it was going on 2:35 p.m. past Senate session time, the Chair concluded the hearing and the meeting was adjourned.

The next meeting is scheduled for Tuesday, March 16, 2004.