

To: Senate Judiciary Committee

From: Kim Lynch, KDADS Senior Litigation Counsel

Date: February 18, 2015

Subject: SB 149, Civil commitment of sexually violent predators

Chairman King and members of the Committee:

I appreciate the opportunity to present testimony in support of SB 149. While the Kansas Department for Aging and Disability Services (KDADS) has collaborated with the Kansas Attorney General's Office and is supportive of the entire bill, this testimony is limited to those portions that directly affect KDADS. There are several benefits to the State, KDADS, Larned State Hospital (LSH), and persons committed to the Sexually Violent Predator Treatment Program (SPTP), otherwise referred to as the residents, in passing this legislation, including: (1) expedited due process, (2) increased clarity within the patient bill of rights, (3) increased safety measures to protect employees and residents of SPTP, and (4) increased efficiency within the administrative process.

### **(1) Expedited Due Process**

KDADS agency attorneys handle numerous cases each year brought by residents civilly committed to SPTP. In the last six years, residents have filed close to 160 cases. In nearly all of these cases, the resident is unhappy with an action taken by SPTP. Examples of complaints include:

- Whether residents can receive pornographic materials while in the program,
- Whether residents can solicit pen pals, including child pen pals while in the program,
- Whether a resident may possess a "No No hair removal kit" while in the program,
- Whether SPTP administration can place window coverings on the outside of the residents' doors to provide privacy to the residents while allowing SPTP staff to complete health, safety, and security checks,
- Whether to maintain the safety and security of the facility, SPTP administration can limit the number of vendors from which residents may order personal property, etc.

Residents bring these cases to the Pawnee County District Court in a variety of ways, through a writ of habeas corpus under K.S.A. 60-1501, through a claim under 42 U.S.C. § 1983, through a writ of mandamus, through an action in replevin, through a request for declaratory judgment, or through a general tort claim seeking damages against the State, or an employee of the State. Pawnee County has one judge, who is also the judge for five other counties. Due to the number of cases filed, and the amount of documents filed within each case, these cases take years to complete at the district court level. For instance, there are cases filed in 2009 that remain active.

Because nearly all of these cases involve an administrative action taken by SPTP, this legislation would require the resident to exhaust all administrative remedies within SPTP before the resident may file a claim in district court.

Once all remedies are exhausted, the resident may appeal a final determination to the Office of Administrative Hearings for review.

The Office of Administrative Hearings has a number of Administrative Law Judges that are able to provide an independent review of the agency administrative action to determine whether the agency acted within its scope of authority. The Office of Administrative Hearings will hear these appeals where the resident is located. This will increase safety within the community by eliminating the need for travel. This will also save LSH and the State resources from paying for travel and safety and security related costs.

Only after the entry of a final agency order may a resident appeal to district court for review. By this point in the proceedings, all of the factual issues will be vetted and there will be a fully developed record.

The Office of Administrative Hearings will provide an independent and fair review of the resident's complaints in an expedited and efficient manner. This is beneficial to all parties involved with these cases.

## **(2) Increased Clarity within the Patient Bill of Rights**

In recent years, due to a lack of clarity, there have been a number of cases filed concerning the meaning of certain rights found within the SPTP bill of rights, K.S.A. 59-29a22. This legislation seeks to clearly define the statutory rights and the role that SPTP and its staff perform in maintaining those rights.

- Mail – This section of the legislation clarifies that residents have a right to send and receive mail with *reasonable limitations*. A resident's mail is subject to physical examination and inspection. A resident may not receive through the mail any sexually explicit materials, items defined as contraband, or items deemed to jeopardize the resident's individual treatment, another resident's treatment, or the therapeutic environment of the facility.

These changes will help ensure a safe and secure environment within SPTP by preventing the entry of contraband and sexually explicit material through the mail system. These changes make it clear that SPTP staff are authorized to inspect and examine incoming mail.

- Property – As the program continues to expand, issues concerning property and storage have become more significant. Residents do not have an unfettered right to possess anything they so desire while in a confined setting. This section of the legislation clarifies that residents are allowed to possess a reasonable amount of personal property, as long as it complies with state laws and facility rules and policies. There is a limited amount of space within each resident's room and there is a limited amount of storage within the facility.
- Spend Money – This section of the legislation seeks to ensure that residents have the statutory right to spend their money as they choose within *reasonable limitations*, except (1) when restricted by facility rules or policies; or (2) to the extent the authority over the money is held by another.

The changes to these three sections combined are in direct result to a series of recent appellate court rulings, finding that because residents have a right to receive mail, a right to possess personal property, and a right to spend their money as they choose, once they order a mail item over the phone, they may possess the item upon its receipt within the facility under the Uniform Commercial Code. The problem with this series of decisions is that it does not place any limits on what a resident is able to purchase over the phone and then thereby, is allowed to possess. Merely because a resident becomes the owner of personal property does not mean the resident is allowed or entitled to possess the property while in a confined setting. Rather, SPTP should be afforded discretion in determining which items of property residents are allowed to possess and which items they are not allowed to possess. These changes seek to ensure that SPTP, LSH, and KDADS are afforded a reasonable amount of discretion to make agency determinations for legitimate governmental reasons.

This legislation does not provide residents with a private right of action to go straight to district court. Rather, in providing residents with the ability to appeal a final determination of SPTP, LSH, or KDADS to the Office of Administrative Hearings, this ensures residents have a sufficient remedy.

This legislation is necessary to clarify each of these issues.

### **(3) Increased Safety Measures for the Protection of Hospital Employees and Residents**

While all residents have been determined to be sexually violent predators, a portion of the population is excessively violent and aggressive. These excessively violent and aggressive residents have not only threatened SPTP staff and other residents, but many have physically attacked employees or other residents causing broken bones or other serious bodily injuries.

By requiring residents to exhaust their administrative remedies through SPTP and then through an appeal to the Office of Administrative Hearings, this should enable the Pawnee County District Court to more expeditiously handle all of the criminal cases filed when an excessively violent and aggressive resident physically attacks an employee or another resident. Many of these cases take years to progress through the criminal process. In some instances, while the cases are being prosecuted, the resident is sent back to SPTP to await trial, subjecting SPTP employees and other residents at risk for further attacks and criminally violent behavior by the aggressor.

This legislation increases the safety measures SPTP staff may use in dealing with resident(s) who become excessively violent or aggressive, when the behavior cannot be addressed through routine psychiatric methods.

### **(4) Increased Efficiency within the Administrative Process**

The totality of these legislative changes ensures a more thorough and robust administrative process within SPTP, LSH, and KDADS. By requiring residents to exhaust administrative remedies, this provides the agency and the Office of Administrative Hearings with the opportunity to resolve the situation at the lowest possible level, without the need for district court involvement.

We appreciate the Committee's consideration of this bill. At this time, I welcome the opportunity to answer any questions you may have regarding this bill.