

Committee Reports to the 2015 Kansas Legislature



Supplement

**Kansas Legislative Research Department
March 2015**

2014 Legislative Coordinating Council

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Supplement

Special Committee on Ethics, Elections and Local Government
Special Committee on Judiciary

Legislative Budget Committee
Joint Committee on Pensions, Investments and Benefits
Joint Committee on State Building Construction

Health Care Stabilization Fund Oversight Committee
Telecommunications Study Committee



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Foreword

This publication is the supplement to the *Committee Reports to the 2015 Legislature*. It contains the reports of the following committees: Special Committee on Ethics, Elections and Local Government; Special Committee on Judiciary; Legislative Budget Committee; Joint Committee on Pensions, Investments and Benefits; Joint Committee on State Building Construction; Health Care Stabilization Fund Oversight Committee; and Telecommunications Study Committee.

This publication is available in electronic format at <http://kslegresearch.org/KLRD-web/Publications.html>.

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Summary of Conclusions and Recommendations

Special Committee on Ethics, Elections and Local Government

Abandoned Properties. The Committee reviewed the current situation regarding municipalities' ability and inability to address abandoned properties in the state. The Committee toured two such properties and received a summary of an additional property, selected to illustrate the different issues associated with vacant and abandoned properties. Experts testified, both from the perspectives of the municipalities and from that of property owners.

Combining Elections. Currently in Kansas, elections for officials of cities, school districts, and most additional smaller political subdivisions are held in the spring of odd-numbered years. Legislation has been attempted in recent years to move all such spring elections to the fall. The Special Committee studied the issue by examining election timing history and practices in other states, hearing from an elections specialist from the National Conference of State Legislatures; hearing directly from three other states' experts on the challenges and benefits of combining elections, either completely or partially, in those states; and hearing a presentation by the author of a book on the subject of election timing and its relationship to turnout.

Consolidated Law Enforcement. The Committee received information as a follow-up to 2014 SB 436 which related to statutes that authorize counties meeting certain criteria to consolidate their law enforcement agencies and establish an alternative law enforcement authority rather than electing a sheriff. The Committee heard from Riley County and Manhattan City Commission officials, who indicated the current alternative system was working well in Riley County, the only county currently with such a system. A representative of the group that proposed SB 436 agreed with the other conferees and indicated the group has no interest in reintroducing the bill.

Special Committee on Judiciary

Foster Parents Bill of Rights Act (2014 SB 394)

The Committee recommended introduction of a Senate bill containing language proposed by the Kansas Judicial Council based upon the Foster Parents' Bill of Rights legislation considered in 2014 (Sub. for SB 394). The Committee recommended further consideration of the implementation of a grievance process.

The Committee recommended the introduction of two House bills: one addressing the out-of-state criminal history issue raised in *State v. Murdock*, 299 Kan. 312 (2014), and one addressing the search warrant issue raised in *State v. Powell*, 299 Kan. 690 (2014).

The Committee recommended the introduction of a Senate bill addressing patent infringement claim abuse. The Committee recommended the introduction of a House bill based upon 2014 HB 2711, the "Public Speech Protection Act."

Legislative Budget Committee

The Legislative Budget Committee is statutorily directed to compile fiscal information and to study and make recommendations on the state budget, revenues, and expenditures and on the organization and functions of the state, its departments, subdivisions, and agencies with a view of reducing the cost of state government and increasing efficiency and economy. After receiving and reviewing information on topics including consensus revenue estimates, tax law changes, gaming revenues, expenditures for human services, education funding, agency budget requests, and the Governor's allotment plan, the Committee made no conclusions or recommendations.

Joint Committee on Pensions, Investments and Benefits

The Joint Committee concludes the current break-in-service requirements for persons returning to work after retirement should be reviewed. The post-retirement provisions scheduled to sunset on June 30, 2015, should be addressed. The 2015 Legislature should consider the ability of Kansas Public Employees Retirement System (KPERs) to recapture benefits, if certain conditions are present.

The Joint Committee concludes members in the KPERs Correctional groups, along with local law enforcement personnel who meet the training requirements, should be enrolled in Kansas Police and Firemen's Retirement System. The additional employer contribution funding for those who were in KPERs Correctional should come from the State General Fund.

The Joint Committee concludes pension obligation bonding and emerging retirement plan trends in the private sector should be reviewed during the 2015 Legislative Session.

Proposed Legislation: None.

Joint Committee on State Building Construction

The Committee recommended all agencies' five-year capital improvement plans, leases, and sales of land or facilities reviewed by the Committee. The Committee also recommended supplemental projects for the Department of Corrections and the State Historical Society. The Committee capped the Salina Kansas Highway Patrol Training Academy retaining wall project costs at \$631,300 and the Expo facility repair project for the Kansas State Fair at \$5.5 million.

Health Care Stabilization Fund Oversight Committee

The Committee reviewed its statutory oversight role and the necessity for contracting for an independent actuarial review. The Committee continues in its belief that the Committee serves as a vital role as a link among the Health Care Stabilization Fund (HCSF) Board of Governors, the health care providers, and the Legislature and its oversight should be continued. The Committee recognized the additional analysis provided by the HCSF Board of Governors' actuary to account for the legislative changes enacted in 2014, including new health care providers subject to the HCSF coverage requirements, the change in tail coverage compliance, and changes to the non-

economic damages cap specified in tort law; the Committee concluded there is no need to contract for an independent actuarial review in 2014. The Committee made other recommendations relating to the statutory reimbursement schedule created in 2010 for administrative services provided by the HCSF Board of Governors and inclusion of a statement regarding the HCSF and the purpose of and use for the Fund.

Telecommunications Study Committee

The Committee reaffirms existing state public policy regarding telecommunications but suggests House and Senate committees that work with utilities issues review the portion of the policy that addresses advancing the development of a statewide telecommunications infrastructure. The Committee recommends those committees receive presentations on the audit of the Kansas Universal Service Fund (KUSF) and study definitions of telecommunications terms in existing law with a focus on “future-proofing” the definitions to accommodate rapid changes in technology. The Telecommunications Study Committee may wish to meet at least once during Session to further consider issues raised during the KUSF audit.

Report of the Special Committee on Ethics, Elections and Local Government to the 2015 Kansas Legislature

CHAIRPERSON: Senator Mitch Holmes

VICE-CHAIRPERSON: Representative Steve Huebert

OTHER MEMBERS: Senators Oletha Faust-Goudeau, Steve Fitzgerald, and Michael O'Donnell;
and Representatives John Barker, Keith Esau, Mike Kiegerl, and Tom Sawyer

STUDY TOPICS

- Review Issues Pertaining to Abandoned Properties. The study will include the following:
 - Review current statutes related to abandoned property;
 - Review economic and potential public safety issues for local communities; and
 - Review potential impact on state and local government revenues.
- Study Moving Elections to Fall and Consider 2014 SB 436 Concerning Consolidation of Law Enforcement Agencies
 - Study the subject of moving spring elections to the fall in order to increase voter turnout for local elections; and
 - Review 2014 SB 436 which addresses statutes that authorize Riley County to consolidate its law enforcement agencies and establish a Law Enforcement Director.

Special Committee on Ethics, Elections and Local Government

ABANDONED PROPERTIES

Conclusions and Recommendations

The Committee makes no conclusions or recommendations.

Proposed Legislation: None.

BACKGROUND

The Legislative Coordinating Council (LCC) in 2014 created the Special Committee on Ethics, Elections and Local Government, which was composed of nine members. The LCC charge to the Committee included the following:

- Review issues pertaining to abandoned properties. The study is to include reviewing current relevant statutes, economic and potential public safety issues for local communities, and potential impact on state and local government revenues;
- Review 2014 SB 436 which addresses statutes that authorize Riley County to consolidate its law enforcement agencies and establish a Law Enforcement Director; and
- Study moving spring elections to the fall.

The Committee was granted three meeting days by the LCC. It met on October 10, November 21, and December 12, 2014. The issue of abandoned properties was addressed during the first and second Committee meetings.

KSA 12-1750 through 12-1756g govern cities' powers and duties regarding abandoned or dangerous properties. KSA 2014 Supp. 12-1750, subsection (c), defines "abandoned property" as:

(1) Any residential real estate for which taxes are delinquent for the preceding two years and which has been unoccupied continuously by persons legally in possession for the preceding 90 days; or

(2) commercial real estate for which the taxes are delinquent for the preceding two years and which has a blighting influence on surrounding properties. "Commercial real estate" means any real estate for which the present use is other than one to four residential units or for agricultural purposes.

KSA 12-1751 grants cities the authority to do either of the following:

- Cause the repair or removal of, or to remove any structure located within the city, which may have become unsafe or dangerous; or
- Cause the rehabilitation of or to rehabilitate any abandoned property located within the city.

The remaining statutes prescribe the hearing process and response and remediation action process to be implemented and the time line of that process in the instance of a city's finding of unsafe or dangerous or abandoned property.

COMMITTEE ACTIVITIES

The Committee toured vacant or abandoned properties in Topeka and discussed with conferees several issues with respect to the problem of vacant, unsafe, and abandoned property. Among the issues are the following:

- Property rights, both of the owners of the vacant or abandoned property and of the neighbors;
- Neighborhood safety, with respect to both police and fire protection;
- Property values; and
- The definition of “abandoned” in statutes.

Led by a representative for the City of Topeka, the Committee visited two abandoned properties and also heard about issues regarding a third. The Topeka city representative explained each of the properties was an example of the kinds of problems abandoned housing represents.

The first property was located in a moderate-income neighborhood considered “healthy” by the city in terms of poverty, crime, and property values. However, the owner is deceased, there is a reverse mortgage on the property, and the property was foreclosed upon and sold in 2013.

The first property did not meet the legal definition of “abandoned property” because a minimal amount of taxes had been paid. Topeka city officials indicated the property is not inhabited, lighting around it is poor, vegetation overgrowth makes it difficult to watch the property, and police have no legal grounds to question trespassers because the property is not posted for no trespassing. Officials stated homeless persons look for places to get out of the weather, and, if someone were to light a fire inside this vacant home, the fire could spread. They explained firefighters must fight a house fire assuming the structure is occupied. As of 2013, the appraised value had dropped by nearly 46 percent, and the condition of the house depreciates surrounding property values.

The second property, located in a low-income neighborhood ranking as “needing intensive care” in terms of neighborhood health, is vacant, has been boarded up, and has been cited for 21 violations since 2010. The house has been in foreclosure several times and the current mortgage owner is in California and has not responded when contact attempts have been made. A neighbor indicated the property had been stripped of assets such as copper pipe, two doors were open, the cellar is not secure, and people have been seen entering and leaving. City officials said there is a large homeless population in the area due to the proximity of the Rescue Mission, the house has been used by people consuming alcohol and drugs, children might frequent the house in the summer, and the property is unsafe for young children to walk by on their way home from school in large part due to danger of sexual assault. Also, the second story is not structurally sound, the dilapidated structure hinders and endangers firefighters, and neighboring structures are close enough to be in danger if the property were to catch fire.

After the tour, Topeka city officials and citizens emphasized the above-mentioned, as well as additional issues. For example, vacant and abandoned properties involve the issue of private property rights—of the owner, as well as of the owners of neighboring properties—and the protection of neighbors. One official noted vacant and abandoned properties fall into several categories related to ownership and safety. For example, some, as indicated by the first property visited, do not meet the statutory definition of “abandoned.” The question of how to address the issues posed by such properties becomes complicated, and a property can be vacant for five or six years before a city can take action. A Topeka neighborhood association representative stated, among other things, members of his association estimated three or four abandoned properties exist on each street in that Topeka area. A police representative discussed crime prevention issues, such as partnering with neighbors and “environmental design” plans such as boarding up windows and perhaps painting over such boarding to indicate the property is under care and make use of such a structure by unauthorized people easier to detect.

A representative of the Topeka Police Department noted a Florida study indicates blocks with abandoned properties have 3.2 times as many drug calls, 1.8 times as many theft calls, and twice the number of violence calls than neighborhood blocks without abandoned buildings. Each police call means fewer resources available for other parts of the city.

With respect to fires, a Topeka Fire Department representative stated in the past three years, there had been 41 fires in vacant structures in Topeka—20 percent of all fires investigated. Code violations are frequently sent after investigation of such fires; what happens after that depends on the extent of damage to the structure.

A City of Wichita representative echoed the concerns explicated by the Topeka officials when he distributed a map of an area within Wichita with high incidence of delinquent property tax; the map was color coded to show the varying amounts of taxes owed and time of delinquency status. He said there are some intense areas of blight.

A League of Kansas Municipalities (LKM) representative summarized the findings of a survey LKM distributed to Kansas municipalities. Forty-eight cities responded about the number of abandoned properties. The LKM representative said the respondent cities represented cities from the smallest to the largest. The survey results constitute evidence abandoned properties appear to be a problem with cities of all sizes but particularly in cities with declining populations. The median time of the respondent cities' properties being abandoned was four years. Survey respondents indicated the most common type of owner was an individual who has moved away. Other owners were banks and mortgage companies, landlords, and non-local investors.

The LKM representative testified this topic is a priority with LKM, and organization representatives plan to meet with concerned

individuals to address the issue. Usually the city's inability to find the property owner is the biggest problem. The LKM representative reiterated an earlier observation that owners will pay enough of the delinquent tax bill so the property is not legally abandoned, so no action can be taken, and stated a change in the definition of "abandoned property" could help the cities.

A Kansas Association of Realtors representative testified from the perspective of property owners. In reference to KSA 12-1750, subsection (c), paragraph (1), he stated there should always be two factors used to determine whether a home is abandoned. He indicated support for continuing two years of delinquent *ad valorem* taxes as one factor; however, he questioned the part of the "abandoned property" definition stating the property must be vacant for 90 days, noting an owner could be absent for that period of time on a work assignment, for example. While agreeing the issues presented by city officials were problematic, the representative requested the Committee weigh carefully the need for an additional tool to address the issues related to deteriorating properties against the potential erosion of private property rights.

Representative Stan Frownfelter distributed a copy of the aforementioned statutes (with language from proposed 2013 HB 2075 inserted) and concluded the October hearing on this issue by quoting from a *Kansas City Star* editorial that stated vacant properties had become a major problem in Kansas City that "can create a chronic downdraft in property values," as well as creating other issues of safety and sanitation.

CONCLUSIONS AND RECOMMENDATIONS

The Committee makes no conclusions or recommendations.

Special Committee on Ethics, Elections and Local Government

COMBINING ELECTIONS

Conclusions and Recommendations

The Committee spent two of its three assigned days on the topic of combining elections. Presentations were received from experts from around the nation. The Committee heard directly from three other states' experts on the challenges and benefits of combining elections, either completely or partially, in those states. The Committee also received a presentation from a staff representative of the National Conference of State Legislatures, regarding the history and current practice of election scheduling in the nation, and from Kansas election officials.

Following this review and Committee discussion, the Committee did not make any conclusions or recommendations.

Proposed Legislation: None.

BACKGROUND

The Legislative Coordinating Council (LCC) in 2014 created the Special Committee on Ethics, Elections and Local Government, which was composed of nine members. The LCC charge to the Committee included the following:

- Review issues pertaining to abandoned properties. The study is to include reviewing current relevant statutes, economic and potential public safety issues for local communities, and potential impact on state and local government revenues;
- Review 2014 SB 436 which addresses statutes that authorize Riley County to consolidate its law enforcement agencies and establish a Law Enforcement Director; and
- Study moving spring elections to the fall.

The Committee was allowed three meeting days by the LCC. It met on October 10, November

21, and December 12, 2014. The issue of combining elections was addressed during the second and third Committee meetings.

Article 4, Section 2 of the *Kansas Constitution* states, "General elections shall be held biennially on the Tuesday succeeding the first Monday in November in even-numbered years. Not less than three county commissioners shall be elected in each organized county in the state, as provided by law." No further constitutional direction is given regarding specific types of elections or their timing.

Kansas statutes require federal, state, and county elections be held in the fall of even-numbered years. Elections for officials of cities, school districts, and all additional political subdivisions are held in the spring of odd-numbered years. Special elections may be held at other times.

The first bill proposing moving spring elections to the fall was introduced in the 2010 Legislative Session. The debate has continued. At least ten bills have been introduced on or amended to include the topic, with seven of those offered in

the 2013-2014 biennium. At the end of the 2014 Legislative Session, a study was requested on the topic.

COMMITTEE ACTIVITIES

The Committee heard from several experts in the field of elections. For a broad, out-of-state perspective, three individual conferees and two panels made presentations on the timing of elections. A staff representative of the National Conference of State Legislatures (NCSL) presented information on election timing history as well as summarized several other states' laws and practices. The former local election administrator in Maricopa County, Arizona, (now a senior advisor to the Democracy Project of the Bipartisan Policy Center in Washington, D.C.) provided extensive detail on Arizona's experience with combining elections and the issues it presented. Panels of state and local election officials from two other states with some level of combined elections (Utah and Nebraska) addressed questions and discussed the issues in detail. Finally, the author of the only published book on the topic of election timing and its effect on voter turnout made a presentation.

With respect to Kansas-specific information, Kansas Legislative Research Department (KLRD) staff presented information summarizing testimony received during the 2013-2014 biennium. In addition, the Special Committee Chairperson also arranged for testimony from Kansas state and local election officials, including the Secretary of State and election officials from Johnson, Douglas, and Hodgeman counties.

Historical Background and Information on Other States

The NCSL staff representative stated, through the 19th century, local government decisions as to whether to hold elections together with or separate from state elections varied. Generally speaking, over three decades beginning in the 1890s, local elections were separated from state and federal elections. Over approximately the past generation, when changes have occurred, the change has been to combine election dates. The goals have been to save money by running fewer elections and

increase voter turnout by combining local with higher visibility elections.

The NCSL staff representative presented information on election timing and voter turnout for the 2012 election, which information was obtained from the book *Timing and Turnout: How Off-Cycle Elections Favor Organized Groups* by Dr. Sarah Anzia. (Note: Dr. Anzia provided direct testimony, which is summarized later in this report.) The NCSL representative noted the following:

- Twelve states hold their school board elections in November of even-numbered years, along with the general election; and
- Turnout in 2012 in states with November even-year municipal elections was as follows: Oregon – 64 percent; Nebraska – 61 percent; Rhode Island – 58 percent; Kentucky – 56 percent; and Arkansas – 51 percent. (Information came from the 2012 Elections Performance Index, created by the Pew Charitable Trusts. The Index listed Kansas' rate as 58 percent.)

The NCSL representative then summarized nationwide election-date-related legislation. From 2010 through 2014, 125 bills were introduced in 31 states. Of these, 13 bills (or 10 percent of the total) were enacted in 11 states. The passage rate for election-date bills is about half of that for all bills regardless of subject matter (20 percent). Variations in the 125 proposed bills included setting uniform election dates; consolidating elections in November of even-numbered years; combining school and municipal elections in the spring, or in November of odd-numbered years; changing the schedule for specific classes of cities; and permitting (rather than requiring) jurisdictions to consolidate elections. The 13 enacted bills consolidated elections or created uniform dates, and most addressed school district elections.

The NCSL representative indicated no state has revisited its decision to consolidate elections. She then provided greater detail about recent changes made in several states, including the following:

- New Jersey (made it optional to move the annual school election to November in odd-or even-numbered years; New Jersey elections for legislative and statewide offices are held in odd-numbered years);
- Michigan (took an incremental approach to consolidate elections over several years; cost savings have been reported);
- Idaho (limited elections to two dates in each calendar year, allowed school districts two additional election dates, and allowed a portion of state sales tax to be used to reimburse counties);
- Texas (reduced the number of election dates from four every two years to three, and a proposal to reduce the number to two might be offered in the 2015 Legislative Session);
- Kentucky (while November of even-numbered years is the norm, local entities may choose another date if they pay the cost); and
- New Mexico (an unsuccessful ballot measure would have permitted school elections to be held at the same time as partisan elections).

Regarding voter drop-off, she reported studies are few but a study of California elections by the Greenlining Institute compared turnout for elections in cities that consolidated elections with turnout in cities that did not choose to consolidate elections. The study found some drop-off but higher turnout for the last measure on the ballot in the cities with consolidated elections.

The NCSL representative then provided several consolidation options, based on other states' laws:

- Move all or some of the municipal, school, or other small elections to the fall of even years (most dramatic change);
- Move smaller elections to November of odd-numbered years, which perhaps

would increase turnout based on fall being the customary voting season;

- Allow (instead of require) jurisdictions the choice of consolidating their elections; and
- Reduce the number of special elections.

If the decision is made to consolidate election dates, the NCSL representative suggested the following items to consider:

- Whether the change would be workable in rural communities;
- Who would pay the initial costs of changing;
- Whether constitutional or statutory changes need to be made;
- Whether municipal charters have rules that align with state rules;
- How much transition time election officials would need to work out new plans and train poll workers;
- The fact voter education would be required; and
- The possibility data about how the change is working are unreliable until the new procedure becomes the norm.

The NCSL representative also provided suggestions to make transition to a new system easier, such as reducing the number of ballot styles required. Finally, she provided the following list of possible options to consolidating elections that might increase voter turnout:

- Using voting centers, where any voter in the county could vote at any voting center;
- Conducting some or all elections entirely by mail; and
- Increasing the availability of good voter information (such as providing

information via direct mail from a public office and making that official information available also through newspapers and political parties' websites). She indicated some states have requirements for voter information, which is delivered for every ballot, and a California political scientist has shown a correlation between states with robust statutes requiring voter information and high turnout.

Election Consolidation Challenges and Mitigations

The former Maricopa County Election Administrator, who served in 2013 on the Presidential Commission on Election Administration and now is a senior advisor to the Democracy Project of the Bipartisan Policy Center, gave a detailed presentation on Arizona election timing and turnout, with emphasis on the challenges and benefits of consolidating elections.

For a background on Arizona elections, she said Arizona has four consolidated election dates: in March, May, August, and November. All elections must fall on one of those dates. However, municipalities' requirements historically were based on population: any municipalities over 175,000 in population were designated to have November elections while all others could choose any of the four sanctioned dates. Municipalities increasingly have conducted their elections all by mail. The primary is semi-open; voters registered to a recognized party get that party's ballot and unaffiliated voters may select a party ballot for each primary election (except for Republican and Democrat precinct committee persons). Arizona being an initiative and referendum state, there is a statutory requirement to mail voters a sample ballot and publicity pamphlet of voting information; in addition, pollworkers are trained for each election. Voters may vote in person at an early voting location, by mail (either for each election or as a permanent early voter), or at the polls on Election Day. As in Kansas, Arizona has a mix of partisan and nonpartisan office races.

Maricopa County alone has 6,000-7,000 ballot styles, due to candidate position rotation within each race for each voting precinct, the existence of many districts, and voter eligibility in a primary

election. Some actions have been undertaken to mitigate this problem. For example, there are officials, such as precinct committee people, who have no opponent and therefore are "elected outright." In Maricopa County recently, there were 639 uncontested races for which 724 ballot styles otherwise would have been printed had it not been for the practice of electing outright. The addition of each added ballot style costs approximately \$45.

Another example was given of a decision made to mitigate the number of ballot styles. In one Maricopa County area's ballot, 24 precinct committee persons were to be elected out of 54 candidates. Space also was needed on the ballot for a write-in candidate for each of the 24 positions. However, it was decided write-in lines would not be added because adding the lines would have split the race between the front and back of the ballot and dramatically increased the length of the ballot, and there were no official write-in candidates.

The conferee stated a review was conducted on voter fatigue, or voter drop-off to determine whether voters did finish ballot voting by comparing the top race and propositions at the bottom of the ballot by position. Graphs presented indicated the highest voter drop-off occurred in 2004; she provided some detail regarding variances in drop-off by type of precinct.

The conferee noted a long ballot will cause voting issues for a large number of voters. Longer ballots take voters more time to read. For example, one Arizona constitutional amendment was 600 words long.

Sometimes it is difficult to find polling places, and at least one state is now using a school in-service day for election day, she said. During these days, teachers are attending workshops and there is ample parking at the schools.

The conferee also noted election consolidation also raises a question as to whether terms of those elected should change in length.

According to the conferee, the cities of Tucson and Phoenix, each chartered under home rule authority, filed a lawsuit taking the position they

were not required to hold elections in the fall of even-numbered years. The appeals court upheld the lower court ruling the Legislature could not tell charter home rule cities when to hold elections; thus, these cities were not required to hold their city elections in the fall of even-numbered years. Incidentally, the ruling came out 6 days before the primary election date, 20 days after early voting started, and 39 days after mailing military and overseas ballots. The Arizona Attorney General is challenging the ruling, she said, but as of the conferee's presentation there had been no decision. The conferee added other home rule cities would need to seek court approval individually to be granted similar status.

Election Timing and Its Effect on Voter Turnout

Sarah Anzia, Ph.D., Assistant Professor of Public Policy of the University of California Berkeley, gave a presentation on election timing. Her presentation was based in large part on her book, *Timing and Turnout: How Off-Cycle Elections Favor Organized Groups* (The University of Chicago Press, 2014), which, she said, is the first and only book published on this subject. She also has published numerous articles.

Data were collected on laws governing elections in the states. Dr. Anzia noted there are more than 500,000 elected officials and most represent local government. Most are elected not on "Election Day" (November of even-numbered years) but on other days. A table presented in her slides listed the timing for state, county, municipal, and school elections in each state. For most state governments and counties, elections are held on Election Day. Municipal and school board elections mostly are held at other times. The conferee stated for many cities, elections are held when they are because American citizens want it that way. Some people favor having local elections on different days than national elections because it allows voters to focus on a shorter list of candidates and issues. Other people favor having local elections on the same day as national elections because combining the elections boosts voter turnout for local elections.

Dr. Anzia stated information has been gathered indicating voter turnout is lower in off-cycle (other

than Election Day) than on-cycle (Election Day) elections. Turnout also depends on whether the election includes presidential candidates. Of 57 cities across the country, turnout was 29 percent lower off-cycle than in cities that held elections on Election Day.

The main argument of Dr. Anzia's book is that shifting from on-cycle to off-cycle elections increases the electoral presence of "the organized." That is, many people are members of organized groups that have a large stake in an election turn out to vote regardless of timing, and off-cycle election timing enhances the effectiveness of mobilization efforts by organized groups (such as teacher unions, employee unions, and political parties). The impact of election timing on policy outcome is due largely to mathematics—with lower turnout, fewer votes are needed to sway an election one way or the other. Hence, less effort is needed by organized groups to change the outcome of an election.

Dr. Anzia stated officials elected in an off-cycle election should be more responsive to those organized groups. In support of this, she summarized conclusions from an eight-state study (2003-2004 data), reported also on 2006 and 2007 school board election turnout data from Minnesota, and reported on her study based on a recent change in Texas election timing law. In both the Minnesota and the eight-state study, Dr. Anzia examined the effect of voter turnout on average teacher salary. She concluded school districts with off-cycle elections pay higher teacher salaries and such salary premium is associated with lower voter turnout. Dr. Anzia reported questions remain regarding this study, such as whether all bias had been omitted when the study was conducted and whether school officials might choose election timing on the basis of anticipated outcomes. The summary of the Texas study was school trustees forced to switch to on-cycle elections gave smaller salary raises to teachers, and the response was greater in districts in which teachers were more highly organized.

Her study of the effect of election timing on turnout in California city elections found the higher turnout of on-cycle elections is not eliminated by ballot drop-off. The effect of on-cycle election timing on turnout dwarfs the effects

of many other factors people consider to be important.

Dr. Anzia noted much more study is needed on the effect of election timing on turnout as many questions still are unanswered.

Consolidated Elections in Utah and Nebraska

The following Utah and Nebraska election officials provided information to the Committee regarding their experiences with consolidated elections:

- Utah—The Deputy Director of Elections for Utah, located in the Lieutenant Governor’s Office, and the county election officers for Tooele and Davis counties; and
- Nebraska—The Deputy Secretary of State for Elections and the county election officers for Lancaster, Wayne, and Hooker counties.

According to the Utah panelists, Utah has been on a cycle of odd- (municipal) and even-numbered year (all other, including school board) elections for a very long time. Voter turnout is better in even-numbered years. The largest numbers of voters turn out for presidential (70 to 80 percent) and congressional elections. The municipal elections in odd-numbered years have about 20 percent turnout, and 5 or 6 percent turn out for the primaries. There is no desire to move municipal elections to even-numbered years. Special elections are held on either the primary or general election dates.

The Utah officials said the state has held even-numbered-year elections for school districts for so long, taking school boards off the ballots of even-numbered years would not make the task easier. Local and state school board members have staggered terms, so not all are up for election in the same year. When the state redrew legislative and related district boundaries, school districts were asked to match the precinct lines wherever possible for school board elections. The 2014 ballot was four pages, front and back, on 11-inch by 17-inch paper. Given voters may choose a straight-party vote option, there is risk that

nonpartisan offices will be missed on the paper ballot but not electronically, because the system prompts voters to continue down the ballot. This issue does not affect primaries. Time constraints are the biggest hurdle to the combined elections, according to the officials.

According to its participants, nearly all of Nebraska’s elections are held in November of even-numbered years. This has been done for approximately 20 years statewide, and longer in several cities.

As with Utah, the Nebraska officials saw no problem with its combined elections, again, largely because elections have been combined for a long time. Panelists saw no issues since Nebraska has a good voter registration system which helps with ballot styles, poll worker training for election day regarding matching precincts to boundary lines, and other provisions in place. The addition of a school district or city election is not the cause for voter fatigue, but rather amendments, bond issues, sales tax increases, and other special races.

Finally, many Nebraska elections, such as those for water, irrigation, and other small districts, are conducted at annual meetings. Nebraska does allow special elections to be conducted, but they cannot be near other election dates.

Ballots on Demand

Representatives of Election Systems and Software (ES&S) presented information on and then demonstrated the company’s ballot on demand (BOD) product.

According to the conferees, several issues related to election consolidation include the time and effort it takes to get all the information placed on the electronic ballot and the related high level of complexity. Some of the issues follow:

- Combining elections requires a longer ballot and, in many cases, a second page. Longer ballots might cause voter drop-off; and

- Having more ballot styles adds to the complexity of ballot distribution, creates a larger potential for error, and increases the cost.

BOD originally was designed not only to eliminate printing waste, but also to automate the ballot selection process. BOD is connected to a polling place, the voter is checked in, and the address of the voter determines the elections to be voted (which ballot style the voter receives). A bar code obtained through an online program, ExpressPass, can be used to further speed voting. ExpressPass provides a sample ballot to the voter prior to the election on which the voter may make his or her selections. At the polling place, a bar code identifies the ballot and the ballot can be produced onto which the voter enters his or her choices from the sample ballot rather than thinking through the ballot and then filling it out for the first time at the polling place. This process reduces the time spent in the voting booth. BOD is most useful where many ballot styles are voted, such as advanced voting and consolidated polling places, resulting in savings by using fewer machines, fewer polling places, and fewer poll workers.

Kansas Election Official Issues and Cost Perspectives

Secretary of State. Secretary of State Kris Kobach stated he believes moving spring elections to the fall of even-numbered years will increase voter turnout. He supports such a move only if the complexities of the resulting elections are reduced. Secretary Kobach called attention to examples of multiple ballot styles. With the addition of precinct, city, and school elections, complexity and polling error potential increase.

The Secretary indicated his support of election consolidation legislation is conditional upon its inclusion of four concepts:

- Making nonpartisan elections partisan, and having a partisan primary and a separate ballot for people who are not affiliated with major parties;
- Simplifying ballots by reducing the number of different ballot rotations;

- Requiring certain elections to be conducted at-large rather than by member district; and
- Reducing the cost of the election of political party precinct committeemen and committeewomen at the August primary election by extending their terms from two to four years and setting their elections in gubernatorial election years.

Election turnout results by Kansas county for elections in 2008 through 2014 were included in the Secretary's presentation. Local spring election turnout (for 2009, 2011, and 2013) ranged from 6.2 percent (Sedgwick – 2013) to 56.0 percent (Sherman – 2011). Fall general election turnout (for 2008, 2010, and 2012) ranged from 37.3 percent (2010, a nonpresidential election year – Cherokee) to 85.8 percent (2008, a presidential election year – Logan). The average fall election turnout rate is lower in nonpresidential election years than in presidential election years. Turnout rates vary due to many factors even for a single county, such as the specific election content.

Urging an increase in advance voting was given as a way to reduce polling place issues when combining elections. The Secretary noted some states mail in advance to every voter a pamphlet describing each voting issue. Voter drop-off does occur, he said, but at a fraction of a percent.

County election officers. The county election officers for Johnson, Douglas, and Hodgeman counties presented their perspectives on possible consolidation of elections. The Chairperson invited them not to opine on whether to combine elections, but instead to discuss issues related to combining elections.

The Johnson County Election Commissioner said several points should be considered in discussing consolidating elections. They included the following:

- Each election is unique;
- Each election varies in complexity as there were more than 1,500 ballot types, or styles, in the August election in Johnson County;

- Citizens have high expectations; Johnson County has been one of the top five most highly regarded counties with regard to citizen services;
- Growth provides scale issues; elections are expensive and in Johnson County, there are 370,000 participants;
- Of 60 elections in the past 10 years, 40 have been special elections (mainly mail ballots) and spring primaries;
- Voter turnout for special elections is greater than for regular spring elections; the worst turnout for mail ballot special elections was better than the best turnout in April;
- Privacy and identity theft are voter concerns;
- Finding polling places and recruiting election workers is becoming more difficult; and
- Advance voting brings cost efficiencies (such as not renting polling places) and introduces other costs, such as BOD machines.

The Douglas County Clerk, who currently serves as president of the Kansas County Clerks and Election Officials Association, provided a mid-sized county perspective. Douglas County has 76,000 registered voters, 125 precincts (the largest with more than 2,700 voters and the smallest with only one), 59 polling places, and all sizes of cities. The largest number of ballot styles at one polling place is 14, and the county averages three elections a year. E-poll books are being added slowly; color coding on poll books and ballots is used to help with ballot accuracy. School district elections present the biggest complexity. They require different ballots, particularly for school districts that “finger” into Douglas County. The county also has drainage districts and, for them, the definition of “qualified voter” is different: landowners, not residents, are qualified to vote. Douglas County also is experiencing increasing difficulty in acquiring polling places. Schools

cannot be used because of security issues, and private places are refusing as well. Another problem is adding technology to, for example, township halls that were not built for so many computer hookups. The Douglas County Clerk reiterated BOD works best in voting centers. If the number of polling places were reduced and voting was moved to fewer voting centers with bigger spaces, fewer machines would be needed. Kansas law would need to be changed in order to allow all counties to use voting centers.

The Hodgeman County Clerk provided a small-county perspective. Hodgeman County has a population of fewer than 2,000, with 1,400 registered voters. The number of polling places recently has dropped from six to two. The county has two cities of the third class. It is a paper-ballot-based county and it has backup for all documents. Voters may decide whether to vote by paper or electronically (touch screens are available). Each polling place serves multiple precincts. Ballot programming and ballot printing are outsourced; if the county decided to do its own programming more staff would be required. As with Douglas County, school districts cause the biggest complexity. In the 2012 primary election, there were 30 ballot styles. If school district elections were added, there would be 58 ballot styles at a cost of \$21 per voter. The county has a higher per-voter cost because of the number of precincts and the small number of voters.

Election cost spreadsheets were provided for each of these three counties. The same data also were provided by Stafford County, which is twice the size of Hodgeman County, and Barton County, which has a population ranking between those of the small rural county and Douglas County. For the 2014 general election, the costs per ballot ranged from \$1.81 in Johnson County to \$7.23 in Hodgeman County.

Summary of Bill Testimony in Favor Of and Opposed To Combining Elections

KLRD staff summarized “pro” and “con” arguments that have been presented in testimony on several previous election consolidation bills. As stated previously, since 2011 at least ten bills have been introduced on the topic or amended to include such content, and seven of those bills were

active in the 2013-2014 biennium. The testimony summary was considered a “working draft” and input was sought if there appeared any dispute with the reported information.

Staff explained this topic began by considering the move of spring elections to the fall of even-numbered years, but auxiliary issues moved into the discussion and changed the content and testimony on the various bills. One of the auxiliary issues, *i.e.*, the move would complicate the ballots, resulted in a recommendation to change nonpartisan elections to partisan. This recommendation then engendered additional comments from conferees.

Arguments made frequently in favor of moving spring elections to the fall of *even*-numbered years were to improve voter turnout, reduce costs, and increase the visibility and importance of elections resulting in more informed voters.

Arguments in opposition were the following: combining elections would result in a lengthier ballot; it would become more difficult to manage elections, possibly resulting in problems at the polls and additional errors; it would add confusion for voters; it could preclude voters from becoming informed about all candidates; it would be more costly for candidates; and it would shift – not reduce – costs, resulting in every-other-year, feast-or-famine budgets.

Arguments in favor of moving the spring elections to the fall of *odd*-numbered years were these: it would offer a reasonable alternative to the even-numbered year option; increase voter turnout; eliminate the problem of providing an additional election year; spread out the election calendar; provide adequate ballot production time (to allow military and overseas voters to receive

ballots in a timely manner); and increase voter turnout without adding costs.

Those making arguments in opposition stated any voter turnout increase is pure conjecture and it would swap one freestanding election for another while requiring entities to change the entire process for election terms and procedures. In addition, several arguments in opposition mirrored the reasons for moving to the fall of even-numbered years but might not have applied similarly.

As stated previously, some issues initially considered to be auxiliary issues became policy issues, such as partisan versus nonpartisan elections. Another auxiliary issue addressed as a policy issue by opponents was taking elections on a member district basis and mandating they become at-large.

CONCLUSIONS AND RECOMMENDATIONS

The Committee spent two of its three assigned days on the topic of combining elections. Presentations were received from experts from around the nation. The Committee heard directly from three other states’ experts on the challenges and benefits of combining elections, either completely or partially, in those states. The Committee also received a presentation from a staff representative of the National Conference of State Legislatures, regarding the history and current practice of election scheduling in the nation, and from Kansas election officials.

Following this review and Committee discussion, the Committee did not make any conclusions or recommendations.

Special Committee on Ethics, Elections and Local Government

RILEY COUNTY CONSOLIDATED LAW ENFORCEMENT

Conclusions and Recommendations

The Committee made no conclusions or recommendations.

Proposed Legislation: None.

BACKGROUND

The Legislative Coordinating Council (LCC) in 2014 created the Special Committee on Ethics, Elections and Local Government, which was composed of nine members. The LCC charge to the Committee included the following:

- Review issues pertaining to abandoned properties. The study is to include reviewing current relevant statutes, economic and potential public safety issues for local communities, and potential impact on state and local government revenues;
- Review 2014 SB 436 which addresses statutes that authorize Riley County to consolidate its law enforcement agencies and establish a law enforcement director; and
- Study moving spring elections to the fall.

The Committee was given three meeting days. It met on October 10, November 21, and December 12, 2014. The issue of Riley County's consolidated law enforcement was addressed during the first Committee meeting.

The *Kansas Statutes Annotated* (KSA) Chapter 19, Counties and County Officers, Articles 8 and 44 address law enforcement. Article 8 addresses county sheriffs and applies to all counties not covered by Article 44. The latter

article addresses the establishment, operation, and procedures for abandonment of a countywide law enforcement department in counties meeting eligibility criteria.

Article 44 allows for consolidation of law enforcement in counties that meet eligibility criteria based on population and assessed valuation. A bill to allow such consolidation was considered in 1969 and referred to an interim study subcommittee; the subcommittee members concluded Riley County should be a "pilot" county for consolidating law enforcement activities. Several changes have been made to the law since then. The matter of consolidating law enforcement in Riley County was placed on the Riley County ballot in 1972 and, due to sufficient local concern, again in 1974.

The article currently contains four consolidated law enforcement acts:

- KSA 19-4401 through 19-4423;
- KSA 19-4424 through 19-4445;
- KSA 19-4446 through 19-4467 (repealed in 1973); and
- KSA 19-4468 through 19-4486.

Although the statutes originally were drafted to apply only to certain counties, criteria in current law would allow 31 counties to consider the question of a consolidated countywide law enforcement agency if 2013 population and county

valuation data are considered. Those criteria, which are a combination of population and assessed tangible valuation, are listed, followed by a listing of counties that appeared to qualify. Additional criteria were available under these laws, but no counties appeared to meet them:

- Population 20,000-23,000, valuation more than \$70 million (KSA 19-4403): Cherokee, Labette, and Pottawatomie;
- Population 3,000-4,000, valuation \$28 - \$50 million (KSA 19-4470): Jewell, Lincoln, Rush, Smith, and Woodson;
- Population 5,000-12,000, valuation more than \$75 million (KSA 19-4470): Anderson, Brown, Clay, Cloud, Coffey, Doniphan, Ellsworth, Grant, Gray, Harper, Kingman, Linn, Marshall, Nemaha, Pratt, Rice, Rooks, Russell, Scott, Stevens, Thomas, Wabaunsee, and Wilson.

Riley County is the only county to have consolidated under Article 44. The provisions applicable to Riley County, KSA 19-4424 through 19-4445, specify the appointed leader of the consolidated department will be its director and abolish the office of sheriff. That is one of the few ways this act differs from the other two.

In 2014, SB 436 was introduced and referred to the Senate Committee on Ethics and Elections. The bill, which died in Committee, would have made the Riley County law enforcement agency director an elected, not an appointed, position.

COMMITTEE ACTIVITIES

The Chairperson introduced the issue by stating neither Riley County officials nor the Riley County legislative delegation are among those seeking the statutory change. These groups believe the current consolidated system works well, he said.¹

After receiving background information from a staff member, the Committee heard testimony

¹ The original Committee charge included the following parenthetical statement, which was subsequently removed by the LCC: “Other counties have not followed the example. Currently, representatives from Riley County are seeking a hearing on the possible repeal of the statutes.”

from the chairman of the Board of Riley County Commissioners, the Director of the Riley County Police Department, a Manhattan city commissioner, and a representative of the group that proposed 2014 SB 436.

The county officials provided information about the law enforcement system in Riley County. In the 1960s, one official said, there were serious crimes in the county. Since consolidation, the officials stated, crime has decreased and law enforcement resources have been used more efficiently. One official said the law enforcement “agency” (the term used in statute) is composed of seven members and acts similarly to a board of directors. It consists of one county commissioner, one county resident, one Manhattan commissioner, two Manhattan residents, the Riley County Attorney, and one additional appointee (appointed alternately by the city and the county). Kansas State University maintains its own police department. The testimony stated support for a law enforcement director not involved in politics and stated studies found per capita law enforcement expenditures lower than those of peer counties. One Committee member noted the uniqueness of Manhattan was not addressed—it is situated in two counties, meaning both Pottawatomie County and Riley County maintain some jurisdiction.

The Manhattan City Commissioner provided a signed letter from the City Commissioners of Manhattan that stated, after the law was enacted to allow consolidation by ballot, support was received by a margin of nearly 70 percent. The letter also stated the City believes it has quality, effective law enforcement services.

The representative of the group that proposed SB 436 noted the consolidated law enforcement system does work well and is efficient. He agreed with the other conferees. The group has no interest in reintroducing the bill and is communicating and discussing issues with the law enforcement agency.

CONCLUSIONS AND RECOMMENDATIONS

The Committee made no conclusions or recommendations.

Report of the Special Committee on Judiciary to the 2015 Kansas Legislature

CHAIRPERSON: Senator Jeff King

VICE-CHAIRPERSON: Representative Lance Kinzer

OTHER MEMBERS: Senators David Haley (replaced by Pat Pettey for November meeting), Forrest Knox, and Greg Smith; and Representatives Erin Davis, Annie Kuether, Janice Pauls, and John Rubin

CHARGE

- Foster Parents' Bill of Rights Act (2014 SB 394), Juvenile Justice, Responses to Kansas Supreme Court Decisions
 - Consider 2014 SB 394, the Foster Parents' Bill of Rights Act, and related reforms;
 - Consider juvenile justice in Kansas;
 - Consider possible responses to Kansas Supreme Court decisions from the end of the regular Session; and
 - Should any time remain during the authorized days, the Committee would discuss legislation and policies under consideration for the 2015 Session.
- Patent Infringement (2014 HB 2663)
 - Study enactments in other states regarding patent infringements;
 - Study and review 2014 HB 2663; and
 - Make recommendations for the Kansas Legislature to consider regarding patent infringements.

Special Committee on Judiciary

FOSTER PARENTS' BILL OF RIGHTS ACT (2014 SB 394)

Conclusions and Recommendations

The Committee recommends a Senate bill containing the Judicial Council proposed legislation based upon 2014 Sub. for SB 394 be introduced for the 2015 Session. The Committee also recommends, as the issue is further considered by the Legislature, additional consideration be given to the question of whether the grievance process should be adopted in statute or rule and regulation or implemented by agency policy.

Proposed Legislation: One bill.

BACKGROUND

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of the Foster Parents' Bill of Rights Act (2014 SB 394), the Committee was directed to consider that proposed bill and related reforms.

The topic was requested by Senator Jeff King as Chairperson of the Senate Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

2014 SB 394. SB 394 would have enacted the Kansas Foster Parents' Bill of Rights Act within the Kansas Code for Care of Children (Code). In the 2014 Senate Committee on Judiciary, representatives of Kansas Foster and Adoptive Children Inc. and the Midwest Foster Care and Adoption Association, as well as a social worker

and several foster parents, testified in support of the bill. A representative of EmberHope submitted written testimony supporting the bill.

A representative of DCF testified as a neutral conferee, and a representative of KDHE submitted written neutral testimony.

The Senate Committee adopted a substitute bill suggested by the proponents and neutral conferees modifying the language in the Bill of Rights, removing a section to create a State Foster Care and Adoption Board, and removing some changes to existing statutes proposed in the original bill.

The Senate Committee of the Whole amended the substitute bill to remove a provision to allow foster parents to request all available information, when possible, before deciding whether to accept a child for placement.

The bill passed the Senate on final action by a vote of 34-3. It received a hearing in the House Judiciary Committee, where the same conferees provided testimony as in the Senate Committee, but no further action was taken on the bill and it died in House Committee. Representative Lance Kinzer, Chairperson of the 2014 House Judiciary Committee, subsequently requested the Kansas Judicial Council conduct a study on the topic of the legal rights of foster parents, asking the

Council to review the current legal rights of foster parents and consider areas where those rights could be responsibly expanded, using Sub. for SB 394 as a base, while keeping in mind possible unintended consequences.

Sub. for SB 394, as amended, would have done the following:

- Recognized foster parents' integral role in the effort to care for displaced dependent children, and declared that foster parents have the right to be treated by DCF, KDHE, and other partners in the care of abused and neglected children with dignity, respect, and trust. The bill would have stated foster parents shall treat all children in their care, each child's birth family, and all members of the child professional team with dignity and respect;
- Required KDHE to provide foster parents with written notification of their rights under the Act at the time of initial licensure and license renewal;
- Required DCF to publish the Prevention and Protection Services Policy Procedure Manual on the DCF public website and require access for foster parents to DCF policies posted on the DCF website. Foster parents would have had access to rules and regulations regarding their licensure which are posted on the KDHE website, and would have been required to comply with the licensure requirements and policies of their licensing agency and child placing agency;
- Required DCF to provide foster parents with pre-service training and required DCF, KDHE, or the child placement agency to provide training at appropriate intervals to meet mutually assessed needs of the child and to improve foster parent skills;
- Required DCF to provide to foster parents, prior to and during placement, pertinent information regarding the care and needs of the child, and to protect the foster family to the extent allowed under state and federal law;
- Required DCF to provide information to foster parents regarding the number of times a child has been removed and the reasons for removal, to the extent permitted by law, and allowed DCF to provide names and phone numbers of previous foster parents if authorized by the previous foster parents;
- Required DCF to arrange for pre-placement visits between foster children and family foster home parents, when appropriate and feasible;
- Allowed foster parents to ask questions about the child's case plan or to encourage or refuse a placement. Such refusal could not serve as the sole determining factor in subsequent placements if such placement is in the best interests of the child. After placement of a child with foster parents, DCF would have been required to update the foster parents as new relevant information about the child and the child's parents and other relatives is gathered;
- Required DCF to provide timely notification to foster parents of all case plan meetings concerning children placed in their homes. Foster parents would have been encouraged to participate in such meetings and provide input, and would have been informed by KDHE regarding their family foster home licensure;
- Required DCF to, when appropriate and feasible, establish reasonably accessible respite care for children in short-term foster care, in consultation with the foster parents. Foster parents would have been required to follow DCF policies and procedures in requesting and using respite care;
- Required foster parents to treat information received from DCF about the child and child's family as confidential,

except necessary information provided to practitioners for the medical or psychiatric care of the child or to school personnel in securing a safe and appropriate education. Foster parents would have been required to share information they learn about the child and child's family, or concerns arising in the care of the child, with the caseworker and other members of the child professional team;

- Allowed foster parents to continue the practice of their own family values and routines while respecting the child's cultural heritage and cultural identity and needs. DCF would have been required to provide foster parents with relevant information on specific religious or cultural practices of the child;
- Required all discipline and discipline methods to be consistent with state law and rules and regulations, including those adopted by DCF and KDHE.
- Stated visitations with the child's siblings or biological family should be scheduled at a time meeting the needs of all parties, whenever possible;
- Required foster parents to be flexible and cooperate with family visits and provide supervision and transportation for the child for such visits;
- Required DCF to provide, upon a former foster parent's request, general information, if available, on the child's progress if the child was in the custody of the Secretary for Children and Families and the child and child's placement agreed;
- Required 30-days' advance notice to foster parents, in accordance with the statute governing change of placement;
- Set forth the right of foster parents to be considered, when appropriate, as a placement option when a child formerly

placed with such foster parents re-enters the child welfare system;

- Required foster parents to inform the caseworker in a timely manner if the foster parents desire to adopt a foster child who becomes free for adoption. If the foster parents did not choose to pursue adoption, they would have been required to support and encourage the child's permanent placement, including providing certain information and accommodating transitional visitation;
- Required advance notification to foster parents of all court hearings and reviews pertaining to a child in their care and of their right to attend and participate under applicable state and federal law;
- Set forth the right of foster parents to complete and submit to the court the foster parent court report form;
- Set forth foster parents' access to the appeals and grievance processes pursuant to state law and regulations and policies of DCF and KDHE; and
- Set forth the foster parents' right to contact DCF or KDHE regarding concerns or grievances about management decisions or delivery of service issues.

The bill would have defined "foster parent" and "family foster home."

The bill would have amended the Code with regard to access to information contained in law enforcement records to remove licensed or registered child care providers from the list of individuals or agencies entitled to access such information.

The bill would have amended the statute within the Code governing change of placement to require 30 days' written notice of a planned change in placement to various parties when a child has been in the same foster home or shelter facility for three months or longer. Under current law, such written notice is required if a child has

been in the same placement for six months or longer.

Finally, the bill would have updated agency references to reflect agency reorganization.

COMMITTEE ACTIVITIES

In November, the Special Committee received the written *Report of Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee on Foster Parents' Rights – 2014 SB 394* (“Judicial Council Report”). At its November meeting, the Committee heard an overview of the Judicial Council Report from Judicial Council representatives and testimony on the issue from various stakeholders.

Overview of Judicial Council Report

A representative of the Kansas Judicial Council presented the Committee with an overview of the Judicial Council study and report. He reviewed the charge to the Judicial Council per Representative Kinzer’s request (described above) and noted the Judicial Council Advisory Committee added six temporary members to ensure foster parents and other relevant stakeholders were part of its discussion and held three all-day meetings to study the issue. It approved its final report in early November *via* teleconference.

Among those foster parent concerns highlighted by the representative were these: status of foster parent as part of a team; improved information sharing; notice and participatory rights for key decisions; consideration for relationship in adoption, re-fostering, and updates on well-being; protection from retaliation and complaint process; a need for Foster Parent Allies and State Foster Care and Adoption Board; and the desire for a comprehensive statutory statement of rights and responsibilities.

The Judicial Council representative noted the concerns of state agencies involved in the foster care system, including issues that currently are addressed elsewhere in detail by statute or regulation; the potential for conflict and confusion

if there are multiple provisions addressing the same subject; and whether some proposals are consistent with best practices. The Advisory Committee also recognized that the rights of foster parents must respect the rights and needs of other parties involved in the system, including the foster child or youth, the parents, and other relatives or adults with close emotional ties to the child or youth.

He then outlined the conclusions and recommendations the Advisory Committee reached with the above considerations in mind. The Advisory Committee concluded statutory protections could provide security but must be consistent with other law. While foster parents play an essential role in the system, they are not equivalent to agency personnel, and changes should be avoided that would make them agents of the state. While information sharing with foster parents is adequately addressed under current law, notice could be strengthened for moving a child (but is not feasible to provide for every meeting). Consideration for the relationship of a foster parent with a foster child or youth could be improved, but not at the expense of other rights. Access to an internal grievance process would help protect foster parents, but use of Foster Parent Allies or creation of a state board would not be desirable at this point. The Judicial Council representative noted the proposed legislation, modified from Sub. for SB 394, reflected the conclusions outlined above, as well as made some additional changes addressing specific issues.

In response to questions from the Committee, the Judicial Council representative noted the foremost consideration for the Advisory Committee was how to structure the system to produce the best results for the most children. He emphasized the importance of the proposed changes relating to strengthening notice for child moves and the grievance procedure. He stated that, moving forward, there would be value in considering the rights of the foster child and focusing on what foster children or foster youth might like to see as they move through the system. He also provided the Committee with a document comparing SB 394 with existing statutes and regulations.

Judicial Council Proposed Legislation

[Note: because the Judicial Council's proposed legislation is based on Sub. for SB 394, the following describes only the differences between the proposed legislation and the summary of Sub. for SB 394 provided earlier in this report.]

The Judicial Council proposed legislation modifies Sub. for SB 394 by:

- Adding language recognizing training provided by foster parent support groups;
- Adding language ensuring foster parents may ask questions about a case plan without it serving as the determining factor for a subsequent placement;
- Adding language encouraging foster parents to participate in other placement meetings when appropriate and feasible;
- Removing language regarding confidentiality of information that is not consistent with existing regulations;
- Restoring and clarifying language related to foster parents' responsibility to seek information related to a placement;
- Removing the provisions related to cultural heritage and identity, discipline, and visitation scheduling, which are covered in detail in current regulations;
- Rewording the provision allowing DCF to provide information on the well-being of a child to a former foster parent;
- Removing the language specifically giving foster parents the right to be considered as a placement option, adding language specifying that a person with whom a child has "close emotional ties" may include a foster parent for purposes of preferences in granting custody for adoption, and adding a reference to this preference language in the disposition statute;

- Clarifying language related to foster parents' responsibility to support and encourage permanent placement;
- Removing definitions for "foster parent" and "family foster home" that are unnecessary or inconsistent with definitions found elsewhere;
- Restoring the six-month qualifying period to trigger the notice requirements for a change in placement and requiring the hearing to be held within seven days; and
- Adding language requiring 72 hours' written notice to a foster parent of any plan to change placement of a child who has been in the foster home for more than 30 days but less than 6 months, and requiring private child placing agencies to develop and implement an internal grievance process through which a foster parent can object to such placement change.

Stakeholder Testimony

The Assistant Director for Legal Services, Prevention and Protection Services at DCF presented testimony to the Committee supporting the concept of a Foster Parents' Bill of Rights. She noted her participation in the Judicial Council Advisory Committee study and reported that DCF prepared a foster parents' rights document during the summer of 2014 and posted it to the DCF website. DCF also appointed a Foster Parent and Youth Ombudsman in June 2014 to specifically address concerns of foster parents and youth. Information regarding these initiatives was sent to every licensed Kansas foster home, and a copy of this information was provided to the Committee.

The Assistant Director noted a few suggested revisions by DCF to the Judicial Council proposed legislation and the ongoing efforts of a workgroup made up of many stakeholders, agency representatives, and other entities involved in the Kansas child welfare system to address concerns and issues relating to foster parents' rights. This workgroup prefers that foster parents rights provisions be incorporated in policy rather than in

statute, and plans to utilize the current DCF foster parents' rights document in considering and proposing further revisions or additions.

In response to Committee questions, the Assistant Director stated the contractual providers already have internal grievance procedures. The Committee asked the Assistant Director to provide more information regarding these procedures for the January meeting.

When asked if the primary goal is reintegration or permanency, the Assistant Director responded that it depends on the facts and circumstances in each case. The ultimate goal is to prevent removal in the first place, then to achieve reintegration with the original family. If it is not feasible for the child to remain in or return to the home, then the goal is to move toward reintegration as soon as possible.

The President and CEO of the Midwest Foster Care and Adoption Association (MFCAA), and original drafter of the Foster Parent Bill of Rights as introduced in SB 394, reviewed some of the foster parent concerns and issues that led to the introduction of a Foster Parent Bill of Rights, including fear of retaliation and feeling unheard, unsupported, and unable to voice opinions and concerns. Retention of foster parents is critical to the child welfare system. She also reviewed the steps taken by DCF during the summer (as outlined by the Assistant Director) and the efforts of the Judicial Council Advisory Committee and the workgroup (identified as the Kansas Bill of Rights Group [KBORG]). She participated in both the Advisory Committee study and in KBORG.

The MFCAA president stated her belief that it is critically important for foster parents to have easy access to a bill of rights set forth in law, which can be accomplished by enacting the Judicial Council proposed legislation. She asked the Committee to support the proposed legislation.

The Executive Director of the Kansas Foster and Adoptive Parent Association (KFAPA) reported her association initiated KBORG to work on a foster parent bill of rights, and a majority of the group wants to pursue a bill of rights via DCF policy. KBORG plans to continue working toward that end, identifying gaps that may need to be

addressed in the Judicial Council proposed legislation. KBORG also plans to focus on identifying and developing specific trainings for foster parents, foster children, and child welfare workers.

The Committee asked the KFAPA Executive Director to try to provide feedback from KFAPA members regarding the Judicial Council report for the January meeting.

Committee Discussion

During discussion, Committee members raised the following points:

- While the grievance process should not be micromanaged by the Legislature, it is important to provide enough structure so that foster parents think the review is meaningful;
- When addressing foster parents' rights, it is necessary to balance the constitutional rights of the natural parents with the rights provided to foster parents, which may look different depending on whether parental rights have been terminated;
- While the proposed legislation is a good start, there will be further efforts made during the 2015 Session to expand the scope of the examination of and reforms related to the foster care system, including the roles that various state agencies play in the system. Also needing to be examined are cases that drag on in the courts, delaying permanency;
- The scheme of definitions provided for elements of the foster care system, mainly in regulation, needs to be examined to ensure consistency and to determine whether definitions should be added to statute; and
- The causes leading children and youth to enter the foster care system should be examined, as well as why children and youth cannot be reintegrated with their families.

Further Information and Discussion

In January, the Assistant Director for Legal Services, Prevention and Protection Services at DCF provided the Committee with further information about the grievance process for foster parents when a change in placement is to be made for a child who has been in the foster home more than 30 days but less than 6 months. At least 72-hours' written notice is required, and the foster parent shall have a reasonable opportunity to express concerns to an agency representative other than the case manager or supervisor managing the case. An impartial internal committee of experienced child welfare practitioners shall review the grievance and situation to determine whether the change in placement is in the best interests of the child, considering all relevant factors. The review decision shall be documented and a verbal or written response shall be provided to the foster family before any move occurs.

The Assistant Director indicated both contractual providers have agreed to implement this procedure to ensure a consistent grievance process in these situations.

The KFAPA Executive Director submitted responses from a survey of KFAPA members regarding the Judicial Council proposed legislation. A Committee member noted that nearly 90 percent of the respondents preferred a bill of rights be placed in law rather than in policy, and that a substantial percentage wanted to see more changes made beyond those in the proposed legislation.

CONCLUSIONS AND RECOMMENDATIONS

The Committee recommends a Senate bill containing the Judicial Council proposed legislation be introduced for the 2015 Session. The Committee also recommends, as the issue is further considered by the Legislature, additional consideration be given to the question of whether the grievance process should be adopted in statute or rule and regulation or implemented by agency policy.

Special Committee on Judiciary

RESPONSES TO KANSAS SUPREME COURT DECISIONS

Conclusions and Recommendations

To address the out-of-state criminal history issue raised in *State v. Murdock*, 299 Kan. 312 (2014), the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the amendments to KSA 2014 Supp. 21-6811(e), KSA 2014 Supp. 21-6810(d), and KSA 22-3504 recommended by the Kansas County and District Attorneys Association (KCDAA), and that such legislation be referred to the House Committee on Corrections and Juvenile Justice.

To address the search warrant issue raised in *State v. Powell*, 299 Kan. 690 (2014), the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the following amendment to KSA 2014 Supp. 22-2502, based upon the KCDAA recommendation: replace the current specific listing of things for which a magistrate may issue a search warrant with a general statement that a warrant may be issued for the search or seizure of any item that can be seized under the Fourth Amendment to the *United States Constitution*. The Committee recommends this legislation be referred to the House Committee on Corrections and Juvenile Justice.

Proposed Legislation: A House bill based upon KCDAA recommendations to address the *Murdock* issue and a House bill based upon KCDAA recommendations to address the *Powell* issue.

BACKGROUND

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of recent Kansas Supreme Court decisions, the Committee was directed to consider possible responses to Kansas Supreme Court decisions released near the end of or after the 2014 regular legislative session.

The topic was requested by Senator Jeff King as Chairperson of the Senate Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

COMMITTEE ACTIVITIES

In September, the Committee reviewed its charges and received an overview of three recent Kansas Supreme Court decisions from the Senior Deputy District Attorney with the Johnson County District Attorneys' Office. The three cases discussed were *State v. Murdock*, 299 Kan. 312 (2014); *State v. Reiss*, 299 Kan. 291 (2014); and *State v. Powell*, 299 Kan. 690 (2014).

State v. Murdock. In *Murdock*, the Kansas Supreme Court held that a defendant's out-of-state convictions occurring before enactment of the

Kansas Sentencing Guidelines Act (KSGA) should be scored as nonperson felonies, instead of as person felonies, for criminal history purposes because Kansas did not have a comparable person crime designation before the KSGA.

The Johnson County Senior Deputy District Attorney noted language in the opinion suggested the holding might apply to *all* pre-KSGA convictions, both in-state and out-of-state, but there was a pending motion by the state for rehearing to clarify the extent of the holding.

He further noted the opinion suggested the Legislature take action if the holding did not comport with the Legislature's intended classification of pre-KSGA convictions, and that the dissent stated the holding "completely overlooks [Kansas'] sentencing structure, purpose, and design."

The Johnson County Senior Deputy District Attorney reviewed the Kansas Sentencing Commission's notice to criminal justice stakeholders advising them to adhere to the *Murdock* holding and treat all crimes committed prior to July 1, 1993, as nonperson crimes for criminal history purposes.

In response to questions from the Committee, he explained the practical effect of the *Murdock* holding would be to entitle some offenders to shorter sentences due to the lower severity of nonperson felonies in calculating criminal history. He reported the Attorney General's office estimated the holding could affect up to 800-900 inmates. He noted proposed legislation could be explored once the pending motion for rehearing was resolved and the extent of the holding clarified.

The Committee asked for more information regarding the possible impact of the *Murdock* decision once the motion for rehearing was resolved.

State v. Reiss. In *Reiss*, the Kansas Supreme Court reversed a conviction for driving under the influence, holding that an incidental traffic stop had evolved into an investigative detention,

requiring reasonable suspicion of criminal wrongdoing, and that such reasonable suspicion did not exist under the facts of the case. Because the Supreme Court relied heavily on Fourth Amendment search and seizure protections in reaching its holding, the Johnson County Senior Deputy District Attorney noted it would be difficult to take any legislative action in response to the decision.

State v. Powell. In *Powell*, police obtained a search warrant for the defendant's blood, hair, cheek cells obtained using oral swabs, and fingerprints. The Supreme Court held the district court erred in admitting this evidence because the affidavit used to obtain the warrant was insufficient. Although the defendant also argued the evidence should be suppressed because KSA 2014 Supp. 22-2502 does not authorize a search warrant for blood, hair, fingerprints, or cheek cells, the Supreme Court declined to reach this argument because it had reversed the district court on other grounds. However, the Court noted "the Legislature may wish to consider whether the statute's plain language appropriately addresses legislative intent." The Johnson County Senior Deputy District Attorney noted a number of questions asked by justices at oral argument related to this issue. In response to questions from the Committee, the conferee stated he thought the Legislature could address the issue without causing harm to existing cases under the search warrant statute.

The Committee asked for information regarding how other states have addressed biological material in their warrant statutes. At the November meeting, Committee staff presented information on warrant statutes and rules in Colorado, Louisiana, Maine, Montana, and Rhode Island that include provisions related to biological materials.

Proposed Legislation and Testimony

At the September meeting, the Committee asked the Johnson County Senior Deputy District Attorney to work with the Kansas County and District Attorneys Association (KCDAA) to craft proposed legislation to address the issues raised in *Murdock* and *Powell* and to present this proposed legislation at the next meeting.

In November, the Johnson County Senior Deputy District Attorney presented proposed legislation on behalf of the KCDAA. The KCDAA recommended addressing the *Murdock* decision by amending KSA 2014 Supp. 21-6811(e) by specifying the Kansas Criminal Code as the source for designating comparable offenses and modifying “comparable offense” by adding the phrase “an existing”; amending KSA 2014 Supp. 21-6810(d) to clarify that felony convictions or juvenile adjudications committed before July 1, 1993, shall be scored as person or nonperson using an existing comparable offense under the Kansas Criminal Code; and amending KSA 22-3504 to add time limitations for motions to correct illegal sentences, allowing extensions only to prevent manifest injustice.

The KCDAA recommended addressing the *Powell* decision by amending KSA 2014 Supp. 22-2502 to add subsections specifically allowing search warrants to be issued for the search or seizure of any biological material, including but not limited to DNA (deoxyribonucleic acid), cellular material, bodily tissues, bodily fluids, saliva, urine, blood, hair, fingernail clippings or scrapings, or fingerprints or palmprints; and any item that can be seized under the Fourth Amendment to the *United States Constitution*.

A representative of the Kansas Association of Criminal Defense Lawyers opposed the KCDAA’s proposed amendment to KSA 22-3504 (motions to correct illegal sentences) on the grounds the amendment would not solve the perceived problem and could actually prevent the state from filing a motion to correct an illegal sentence in certain situations.

Committee Discussion

In January 2015, the Committee reviewed the material presented on the topic at the September and November meetings in 2014 and made the following recommendations.

CONCLUSIONS AND RECOMMENDATIONS

To address the *Murdock* issue, the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the amendments to KSA 2014 Supp. 21-6811(e), KSA 2014 Supp. 21-6810(d), and KSA 22-3504 recommended by the KCDAA, and that such legislation be referred to the House Committee on Corrections and Juvenile Justice. The Committee has concerns with the proposed changes to KSA 22-3504, but wants to submit them without recommending those changes favorably or unfavorably so that they may be further considered by the Legislature.

To address the *Powell* issue, the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the following amendment to KSA 2014 Supp. 22-2502, based upon the KCDAA recommendation: replace the current specific listing of things for which a magistrate may issue a search warrant with a general statement that a warrant may be issued for the search or seizure of any item that can be seized under the Fourth Amendment to the *United States Constitution*. The Committee recommends this legislation be referred to the House Committee on Corrections and Juvenile Justice.

Special Committee on Judiciary

PATENT INFRINGEMENT (2014 HB 2663)

Conclusions and Recommendations

The Committee recommends a Senate bill addressing patent infringement claim abuse be introduced in the 2015 Session using the language presented by the Kansas Bankers Association at the January meeting, but incorporating only the second of the two suggested exemptions (the pharmaceutical exemption referencing federal statutes).

Regarding anti-SLAPP (strategic lawsuit against public participation) legislation, the Committee recommends the language of 2014 HB 2711 be introduced as a House bill in the 2015 Session.

Proposed Legislation: Two bills.

BACKGROUND

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of patent infringement (2014 HB 2663), the Committee was directed to study enactments in other states regarding patent infringements, study and review 2014 HB 2663, and make recommendations for the Kansas Legislature to consider regarding patent infringements.

The topic was requested by Representative Lance Kinzer as Chairperson of the House Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

COMMITTEE ACTIVITIES

In September, the Committee received an overview of 2014 HB 2663 and other states' legislation and heard testimony from proponents and opponents of HB 2663.

Bad Faith Assertions of Patent Infringement

Topic Overview: 2014 HB 2663. Committee staff explained HB 2663 arose in response to bad faith assertions of patent infringement (often called "patent trolling"), in which firms purchase or license patents from inventors for the purpose of sending demand letters to companies that use equipment incorporating technology allegedly covered by the patents. These demand letters threaten lawsuits unless "settlement" or "licensing" fees are paid. The legitimacy of the patents upon which such claims are made may be suspect, but it is often more economical for a company being threatened to just pay the "settlement" or "licensing" amount offered than to contest the patent claim.

Committee staff provided a review of HB 2663, explaining the bill would have prohibited bad faith assertions of patent infringement, establishing definitions and factors to be

considered as evidence of such bad faith assertions. The bill also would have established factors to be considered as evidence that an assertion of patent infringement was not made in bad faith. The bill would have allowed any target of the prohibited conduct to bring a civil action for equitable relief, damages, costs and fees, and exemplary damages in the amount of \$50,000 or three times the total of damages, costs, and fees, whichever is greater. Upon motion by the target and a showing of a reasonable likelihood of a bad faith assertion, the defendant would have been required to post a bond of up to \$250,000. The Attorney General also would have received enforcement authority.

The bill was patterned after legislation enacted in Vermont. HB 2663 did not receive a hearing during the 2014 Session and died in the House Judiciary Committee.

Other states' legislation. Committee staff reviewed legislation enacted in other states since 2013 intended to address bad faith assertions of patent infringement. Most of the bills (including HB 2663) have been patterned after the Vermont legislation, which was the first to pass, although many states have made modifications to the Vermont model to add exemptions for certain types of notifications or patent holders or to limit enforcement to the state Attorney General. As of the September 2014 meeting, 18 total states had adopted patent trolling legislation. Legislation was pending in four additional states, while legislation was introduced but died in seven states (including Kansas with HB 2663).

Testimony. A representative of the Kansas Bankers Association (KBA) asked the Committee to recommend passage of the language of HB 2663 to the 2015 Legislature. She stated the bill was drafted narrowly to help Kansas companies respond promptly and efficiently to patent infringement assertions against them, lessening the burden of potential litigation on such companies and reducing the harm caused by bad faith infringement claims, while not interfering with the enforcement of good faith assertions of patent infringement. The KBA representative said that association is willing to work with industries with concerns regarding the legislation.

A representative of the American Bankers Association also appeared in support of the language of HB 2663. He presented an overview of state legislation intended to address bad faith patent infringement claims, the relationship of such legislation to federal patent law, First Amendment concerns with such legislation, other opposition to such legislation and how it can be addressed, and the case law that is beginning to develop around such legislation.

The Committee received written testimony from representatives of the Kansas Attorney General, Kansas Association of Realtors, and Kansas Credit Union Association, as well as from a Kansas certified public accountant, encouraging the Committee and the Legislature to take action to address bad faith patent infringement claims.

A representative of the Pharmaceutical Research and Manufacturers of America (PhRMA) presented testimony in opposition to the language of HB 2663, stating concerns that the law could conflict with federal regulation of patent law and run afoul of the Supremacy Clause, as well as encroach on First Amendment rights. He stated PhRMA supports reasonable efforts to stop patent enforcement abuses. PhRMA is working with the KBA to develop amendments that would address its objections to the legislation and plans to continue working with the KBA to resolve concerns.

The Committee received written testimony from a representative of The Innovation Alliance opposing the language of HB 2663 and encouraging the Legislature to develop legislation that would address the abuses of mass mailing of bad faith demand letters while protecting legitimate communications.

Committee discussion. The Committee encouraged the parties to continue working toward compromise legislation. The Committee also requested more information addressing whether the current Kansas Consumer Protection Act could be used to curb patent trolling and how other states might be using existing consumer protection laws in this way. Committee members asked if bad faith litigation was limited to the patent context and requested more information regarding an anti-SLAPP (strategic lawsuit against public

participation) bill that was introduced in 2014 (HB 2711).

Further information. In November, the Committee received further information responding to the questions raised in September.

An assistant Kansas Attorney General appeared before the Committee to explain that the Kansas Consumer Protection Act could not be used in most patent trolling cases because it covers only conduct in connection with “consumers” and “consumer transactions.” Bad faith assertions of patent infringement are more likely to arise in business-to-business transactions.

Committee staff presented information on efforts in Minnesota, Nebraska, New York, and Vermont to combat patent trolling using existing consumer protection laws. Staff also provided examples of exemptions contained in some state patent infringement abuse legislation and information regarding the definition of the term “meritless” as it is used in the Vermont law and in HB 2663.

Anti-SLAPP Legislation

Topic overview: 2014 HB 2711. Also in November, Committee staff presented an overview of 2014 HB 2711, the anti-SLAPP “Public Speech Protection Act.” The bill would have required a party bringing a claim against a person arising from that person’s “public participation and petition,” as defined in the act, to verify the claim is made in good faith and not to suppress free speech. The bill would have allowed unverified claims to be stricken and sanctions for verified claims that violated the law. Additionally, the bill would have allowed a party to move to strike a claim based upon an action of public participation and petition, with an automatic stay taking effect upon the filing of such a motion. A defending party would be entitled to costs and attorney fees if it was determined a claim was unverified or if a motion to strike was successful, and punitive damages could be awarded to deter repetition of the conduct. Similarly, costs and attorney fees would have been awarded to a responding party if a motion to strike was frivolous or intended to delay. If a government contractor was found to have violated the act, the court would have been

required to send the ruling to the head of the relevant government agency doing business with the contractor.

Representative Jan Pauls, who requested the introduction of HB 2711 in 2014, told the Committee the bill was intended to provide a timely remedy when frivolous lawsuits are filed to intimidate and silence people with limited resources who exercise their First Amendment right to free speech. Such lawsuits and the prospect of expensive litigation can have a chilling effect on free speech. Representative Pauls reported similar acts have been passed in 28 states, the District of Columbia, and Guam, usually with widespread bipartisan support.

Updates and Discussion

In January 2015, Committee staff reviewed the information the Committee had received on the topic at the September and November meetings.

A representative of the KBA presented the Committee with a clean draft of proposed legislation based upon 2014 HB 2663. She explained the KBA had worked with PhRMA, Pfizer, and Caterpillar to develop the new draft, which incorporated technical clarifications as well as two exemptions intended to address the concerns of various parties.

According to the KBA representative, the first exemption was drawn from the Illinois version of the legislation and clarified the bill was not to be construed to deem it an unlawful practice to take certain steps in attempting to license or enforce a patent in good faith.

She stated the second exemption was requested by Pfizer and exempted demand letters or patent infringement assertions arising under federal statutes dealing with pharmaceutical regulation.

A representative of PhRMA stated he had not heard from Pfizer regarding the exemptions, and that he had forwarded the new version of legislation to the companies involved in PhRMA but had not yet heard back from them. He told the Committee that the interested companies would be

able to address any further concerns once the legislation was introduced.

Regarding the anti-SLAPP legislation, Representative Pauls reported the Kansas Supreme Court currently has a committee studying possible filing restrictions for litigants who repeatedly file frivolous, malicious, or repetitive pleadings. She asked the Special Committee to consider recommending introduction of the language of 2014 HB 2711 as a committee bill.

CONCLUSIONS AND RECOMMENDATIONS

The Committee recommends a Senate bill addressing patent infringement claim abuse be introduced in the 2015 Session using the language presented by the KBA at the January meeting, but

incorporating only the second of the two exemptions (the pharmaceutical exemption referencing federal statutes). Committee members expressed support for the concept behind the first exemption (clarifying the bill was not to apply to certain patent enforcement actions taken in good faith), but noted some concern with the wording of the exemption as presented and whether it would render the rest of the bill meaningless.

Regarding anti-SLAPP legislation, the Committee recommends the language of 2014 HB 2711 be introduced as a House bill in the 2015 Session. Some Committee members noted their support of the concept of the bill despite concerns with some of the specific language, including the language related to punitive damages, damages for failure to verify, and liberal construction of the statute.

Report of the Legislative Budget Committee to the 2015 Kansas Legislature

CHAIRPERSON: Senator Ty Masterson

VICE-CHAIRPERSON: Representative Gene Suellentrop

OTHER MEMBERS: Senators Jim Denning and Laura Kelly; and Representatives Jerry Henry, Marvin Kleebe, and Ron Ryckman, Jr.

CHARGE

The Legislative Budget Committee is statutorily directed to compile fiscal information, and to study and make recommendations on the state budget, revenues, and expenditures, and on the organization and functions of the state, its departments, subdivisions, and agencies with a view of reducing the cost of state government and increasing efficiency and economy.

ASSIGNED TOPICS:

- Study human services caseloads, historic trends, and the impact of KanCare;
- Review the budget and programs of the Department of Education;
- Review the Technical Education program's projected use and expenditures, actual costs, and outcomes; and
- Study the new GED Accelerator program at the Board of Regents and its projected use and outcomes.

Legislative Budget Committee

REPORT

Conclusions and Recommendations

The Committee makes no conclusions or recommendations.

- ***Proposed Legislation:*** None

BACKGROUND

The Legislative Budget Committee is statutorily directed to compile fiscal information, and to study and make recommendations on the state budget, revenues, and expenditures, and on the organization and functions of the state, its departments, subdivisions, and agencies with a view of reducing the cost of state government and increasing efficiency and economy.

The Committee's intention was to gather information to gauge where the State stands financially concerning consensus estimates and to formulate ideas for the remaining six months of the FY 2015 and going forward into FY 2016.

COMMITTEE ACTIVITIES

The Legislative Budget Committee met on November 11, 2014, to review fiscal information regarding revenues and expenditures and to specifically discuss the revenue estimates and what components comprise the state tax revenue, humans services caseloads, technical education, and the GED Accelerator Program.

State Budget, Revenues, and Expenditures

Staff from the Kansas Legislative Research Department (KLRD) briefed the Committee on the Consensus Revenue Estimate Memorandum from November 2014. Staff explained the consensus revenue adjustments and how consensus estimates are developed. Staff stated the process involves the

KLRD, the Division of the Budget, the Kansas Department of Revenue (KDOR), and three consulting economists from state universities. Staff explained several tables that compared the consensus estimates with the actual year-to-date figures. Staff noted the final FY 2014 revenue estimates from April 2014, ended up being too high because of the extent to which capital gains and other income had been accelerated into the waning days of calendar year 2012—thereby accelerating into FY 2013 certain income tax receipts that otherwise would have been received in FY 2014.

Staff also distributed the KDOR's estimates on the combined impact of 2012 Senate Sub. for HB 2117 and 2013 HB 2059, which made changes to the Kansas tax law, including an in-depth breakdown of the changes these two bills had on Kansas income taxes.

Staff from the KDOR presented information that disaggregated the Kansas individual income tax components. The KDOR staff provided a detailed breakdown of withholding, estimated payments, regular remittances, and tax refunds by fiscal year.

Staff from the KLRD, the Division of the Budget, Kansas Lottery, and Racing and Gaming Commission met in October 2014, to project expanded gaming revenues from the three state-owned and operated gaming facilities. The KLRD staff provided Committee members with a summary of the revised revenues to the Expanded Lottery Act Revenues Fund (ELARF) and

agencies' requested transfers and expenditures from the fund in FY 2015, FY 2016, and FY 2017.

Total transfers and expenditures from the ELARF in FY 2015 are estimated to be \$86.3 million. The Department of Administration has requested \$36.3 million, all for debt service payments. This is a decrease of \$479,000, or 1.3 percent, and is due to the FY 2013 refinancing of bonds. The FY 2015 revised estimate for the ELARF includes \$10.5 million for Kan-Grow Engineering Funds and \$39.5 million for the Department of Education to reduce the unfunded actuarial liability of KPERS, which is unchanged from the FY 2015 approved amount. Expanded gaming revenues transferred to the fund are estimated to total \$77.7 million, which is a decrease of \$3.2 million, or 3.9 percent, below the FY 2015 approved amount. The decrease is attributable to lower revenues in the Southwest and South-central gaming zones. Revenues transferred to the ELARF are projected to be insufficient to cover requested transfers and expenditures. Pursuant to 2014 S. Sub for HB 2338, a State General Fund transfer will be issued in FY 2015 to cover the revenue shortfall to meet the Fund's approved transfers and expenditures. It is anticipated the State General Fund transfer will total \$8.5 million.

Total transfers and expenditures from ELARF are estimated to be \$106.3 million for FY 2016. Compared to the FY 2015 revised estimate, this is an increase of \$20.0 million due to the Board of Regents' request for \$20.0 million for deferred maintenance. Transfers and expenditures for Department of Administration debt service payments, KPERS unfunded actuarial liability, and Kan-Grow Engineering Funds remain unchanged from the FY 2015 revised estimate. Expanded gaming revenues transferred to the fund are estimated to total \$77.4 million, which is a decrease of \$316,000, or less than 1.0 percent, below the FY 2015 revised estimate. The decrease is attributable to lower expanded gaming revenues in the Northeast gaming zone, offset by higher revenues in the Southwest and South-central gaming zones. The FY 2016 revenue transfers to the ELARF include the anticipated payment of a \$5.5 million privilege fee by a gaming facility manager in the southeast gaming zone. Revenues transferred to the ELARF are projected to be insufficient to cover requested transfers and

expenditures for FY 2016, leaving a negative ending balance of \$23.3 million.

Total transfers and expenditures from ELARF are estimated to be \$106.3 million for FY 2016, which is unchanged from the FY 2016 request. Expanded gaming revenues transferred to the fund are estimated to total \$82.2 million, which is an increase of \$4.8 million, or 6.2 percent, above the FY 2016 request. The increase is largely attributable to the anticipated half-year operation of a gaming facility in the Southeast gaming zone. Revenues transferred to the ELARF are projected to be insufficient to cover requested transfers and expenditures for FY 2017, resulting in a negative ending balance of \$47.4 million.

Human Services Caseloads

Staff from KLRD explained the human services caseload impacts detailed in the Fall 2014 Human Services Consensus Caseload Estimates. FY 2015, FY 2016, and FY 2017 impacts are specified below.

In 2015, the revised estimate for all human service caseloads is an all funds increase of \$106.6 million and a State General Fund increase of \$46.2 million above the budget approved by the 2014 Legislature. Each program's specific effect is as follows.

The estimate for Temporary Assistance to Families (TAF) is a decrease of \$200,000 from all funding sources and \$3,437,508 from the State General Fund expenditures from the amount approved by the 2014 Legislature. The all funds decrease is due to a series of policy changes which began in fall 2011 and resulted in a declining TAF population. The State General Fund reductions were the result of meeting the federal maintenance of effort requirements through other allowable expenditures, mainly the refundable portion of the Earned Income Tax Credit. The estimate for contracted foster care services is anticipated to decrease by \$300,000 from all funding sources, and increase by \$10.2 million from the State General Fund. The increase in all funds is mostly attributable to a slight decrease in the number of children anticipated to be in the foster care system. In addition, there is an ongoing conversation with the federal Administration for Children and

Families regarding expenditures from the Title IV-E foster care funding source and the state is still waiting on ultimate decisions on the issue. The estimate in FY 2015 includes the addition of \$13.1 million, all from the State General Fund, to provide adequate cash flow for the program.

The FY 2015 caseload estimate for the Department of Corrections' Out of Home Placements is \$20.4 million. This is an overall decrease from the FY 2015 approved amount of \$300,000 partially offset by a State General Fund increase of \$500,000. The all funds decrease is attributable to fewer children in the system, specifically in the Youth Residential Center II facilities, and the State General Fund increase is due to less available Title IV-E federal funding.

The FY 2015 estimate for KanCare Medical is \$2.7 billion from all funding sources, including \$1.0 billion from the State General Fund, reflecting an increase of \$108.4 million from all funding sources and \$39.0 million from the State General Fund above the amount approved by the 2014 Legislature. The increase in KanCare Medical is largely attributable to a slight growth in the population served and the costs associated with the Affordable Care Act Insurer Fee included in the capitated rate payment (except for long term care services and supports which are excluded from the federal requirements). Kansas Department for Aging and Disability Services' (KDADS) KanCare includes the addition of \$6.3 million for payments to the MCOs for mental health assessments for both the current year and prior years, which had not been previously included in the capitation payments. The estimate includes funding of \$4.0 million from the Problem Gambling and Addictions Grant Fund.

The FY 2016 estimate is \$3.0 billion from all funding sources, including \$1.2 billion from the State General Fund. The estimate is an all funds increase of \$126.4 million and a State General Fund increase of \$76.6 million above the FY 2015 revised estimate. The base Medicaid matching rate determined by the federal Centers for Medicare and Medicaid Services increased the required state share by 0.57 percent between FY 2015 and FY 2016. The estimated impact of this adjustment in FY 2016 is \$16.2 million in additional State General Fund required for caseload expenditures.

The estimate for TAF caseloads has decreased by \$1.1 million from all funding sources, with no impact on State General Fund expenditures, from the revised FY 2015 estimate. The number of individuals estimated to receive cash assistance benefits from TAF is estimated to continue to decline. This results from a combination of lower anticipated applications for assistance and an increase in the rate of denials of the applications. It is estimated the contracted foster care services will increase by \$2.6 million from all funding sources, and decrease by \$10.0 million from the State General Fund. This is due to the reduction of the one-time increase in State General Fund expenditures in FY 2015 to address the federal IV-E funding issue partially offset by the anticipated increase in the number of children receiving services.

The Department of Corrections (DOC) expenditures for Out of Home Placements for FY 2016 are estimated to be \$20.2 million from all funds. This is a decrease of \$200,000 from all funds and \$1.0 million from the State General Fund, below the revised FY 2015 estimate. This is largely due to fewer children in the system, specifically in the Youth Residential Center II facilities, and increased federal Title IV-E funding.

The FY 2016 estimate for KanCare Medical is \$2.8 billion from all funding sources, including \$1.1 billion from the State General Fund. The new estimate is higher than the revised FY 2015 estimate by \$124.7 million from all funding sources and \$87.3 million from the State General Fund. The increase is largely attributable to a slight growth in population and the increased costs associated with the Affordable Care Act Insurer Fee included in the capitation rates (except for long-term care services and supports which are excluded from the federal requirements) and the fact that plan year 2016 includes 53 weeks of payments, rather than the standard 52 weekly payments. The FY 2016 estimate for KDADS' KanCare Medical includes an increase of \$7.1 million, all from the State General Fund, to replace fee fund moneys which were no longer available. The estimate also includes funding of \$4.0 million from the Problem Gambling and Addictions Grant Fund.

The FY 2017 estimate is \$3.1 billion, including \$1.3 billion from the State General

Fund. The estimate is an all funds increase of \$32.9 million and a State General Fund increase of \$44.5 million above the FY 2016 estimate. The base Medicaid matching rate for federal contribution increased the state share by 0.16 percent between FY 2016 and FY 2017. The estimated impact of this adjustment in FY 2017 is \$4.9 million in additional State General Fund required for caseload expenditures.

The estimate for TAF caseloads has decreased by \$1.0 million from all funding sources, with no impact on State General Fund expenditures, from the FY 2016 estimate. The number of individuals estimated to receive cash assistance benefits from TAF is estimated to continue to decline. This results from a combination of lower anticipated applications for assistance and an increase in the rate of denials of the applications. The estimate for contracted foster care services is estimated to increase by \$2.3 million from all funding sources, and increase by \$7.0 million from the State General Fund, due to an anticipated increase in the number of children receiving services and the replacement of \$5.3 million in fee funds utilized in the previous year no longer being available.

The DOC expenditures for Out of Home Placements for FY 2017 are estimated to be \$19.5 million from all funds. This is a decrease of \$700,000, all from the State General Fund below the FY 2016 estimate and largely is due to fewer children in the system, specifically in the Youth Residential Center II facilities.

The FY 2017 estimate for KanCare Medical is \$2.9 billion from all funding sources, including \$1.1 billion from the State General Fund. The new estimate is higher than the FY 2016 estimate by \$32.3 million from all funding sources and \$38.2 million from the State General Fund. The increase is attributable to a slight growth in population and the increased costs associated with the Affordable Care Act Insurer Fee included in the capitation rates (except for long-term care services and supports which are excluded from the federal requirements). This is partially offset by the elimination from the estimated expenditures of risk corridor payments for the contractors. The original three year contract provisions will end in December 2015. The FY 2017 estimate includes \$4.0 million, all from the Problem Gambling and Addictions Grant Fund.

The Committee discussed at length the impact of the change in the Federal Medicaid Assistance Percentage rate which will require additional state funds for the program in FY 2016 and FY 2017 as well as the effect of the Insurer Fee required under the Affordable Care Act.

Education

Staff provided an overview of the K-12 State Aid and the consensus estimating process. The consensus estimating process was completed on November 10, 2014, subsequent to agencies submitting budgets with revised expenditures for the current fiscal year, including the Department of Education. General and Supplemental General State School Aid and Capital Outlay State Aid are provided for each of the unified school districts in Kansas through the Department of Education budget.

Estimates included the need for an increase in Supplemental General State Aid (Local Option Budget (LOB) state aid) in the amount of \$34.3 million for FY 2015; \$38.4 million for FY 2016 and FY 2017. The reason for the increase was due to an increase in the 81.2nd percentile of assessed valuation per pupil from \$109,275 to \$116,700.

Estimates also included the need for an increase in Capital Outlay State Aid in the amount of \$19.8 million for FY 2015 and nearly \$25.0 million for FY 2016 and FY 2017. This was due to many school districts increasing their capital outlay mill levies to the maximum eight mills because the full funding of LOB state aid allowed districts to lower LOB mill levies freeing the districts to increase the capital outlay mill levies.

Because of an increase in revenues from the 20 mill levy and because the base state aid per pupil continued to be based on \$3,852 for FY 2015, General State Aid realized a decrease of State General Funds by \$945,000, even though enrollments increased by 1,375 students.

Finally, because of an increase in bonded capital improvement projects, the estimate for capital improvement state aid (bond and interest state aid) increased by \$12.0 million for FY 2015. The increase for FY 2016 was \$20.0 million and for FY 2017 it increased by \$27.5 million.

Staff provided a report on career technical education, which is a new innovative program launched in 2012 to accelerate career technical education as authorized under 2013 SB 155. The report included a budget history of both the incentive to the school districts and the tuition assistance for the students. It was shown that participation in the program has more than doubled from the 2012 to the 2014 school years. Staff also provided a breakdown of 2013 SB 155 and the incentives by geographical region for FY 2014.

Governor's December 9, 2014, Allotment Plan

Staff gave an overview of the items outlined in the Governor's December 9, 2014, allotment plan. Staff noted the consensus revenue estimating process was completed on November 10, 2014, subsequent to agencies submitting budgets with revised expenditures for the current fiscal year. The results of the new consensus revenue estimates identified a \$278.7 million State General Fund shortfall in FY 2015. This prompted the Governor to address the shortfall with an allotment plan totaling \$280.7 million which reduced State General Fund expenditures by \$66.4 million. The allotment plan also included recommendations to transfer funds and adjust non-State General Fund expenditures an additional \$214.3 million. The adjustments included in the \$214.3 million and the 4.0 percent Legislative Branch reduction will require legislative approval to implement.

Among the significant items in Governor's December 9, 2014, allotments are the following items:

- Reduction of \$40.7 million, as a result of decreasing the Kansas Public Employer Regular and School Member Employer contribution rate (excluding KPERs Death and Disability) from 10.42 percent to 8.65 percent in FY 2015;
- Reduction of \$6.3 million, as a result of a decrease in the total FY 2015 State General Fund reappropriation;
- Reduction of \$7.1 million, as a result of a

4.0 percent reduction over the last six months or 2.0 percent for the whole fiscal year to Cabinet and other State General Funded agencies in FY 2015;

- Reduction of \$2.9 million for bond refinancing; and
- Reduction of \$5.4 million due to the delay of the Meyer Building Expansion at the Larned State Hospital.

Agency Budget Requests for Current Year 2015 and Budget Years 2016 and 2017

The Committee received a copy of a compilation of the budget requests from State agencies. The document included a summary overview of the major items. Of note, the FY 2015 revised agency estimate totals \$15.7 billion, including \$6.4 billion from the State General Fund. This is an all funds increase of \$312.2 million, or 2.0 percent, and a State General Fund increase of \$61.1 million, or 0.97 percent, above the FY 2015 approved budget. The request funds 36,859 FTE positions, a reduction of 573.5 FTE positions, from the FY 2015 approved budget. The FTE reduction is attributable to reclassifying FTE positions as non-FTE unclassified positions. The FY 2015 agency request does not include the additional \$106.6 million, including \$46.2 million from the State General Fund, identified as needed to fully fund human service caseloads from the November 2014 consensus caseload estimating process.

The FY 2016 agency request totals \$16.3 billion, including \$7.1 billion from the State General Fund. This is an all funds increase of \$605.1 million, or 3.9 percent, and a State General Fund increase of \$691.4 million, or 10.9 percent, above the FY 2015 revised agency estimate. The request funds 36,925 FTE positions, an increase of 66 FTE positions, from the FY 2015 revised estimate. The FY 2016 agency request does not include the additional \$126.4 million, including \$76.6 million from the State General Fund, identified to fully fund human service caseloads from the November 2014 consensus caseload estimating process.

The FY 2017 agency request totals \$16.4 billion, including \$7.3 billion from the State General Fund. This is an all funds increase of \$152.4 million, or 0.9 percent, and a State General Fund increase of \$211.4 million, or 3.0 percent, above the FY 2016 agency request. The request funds 36,916 FTE positions, a reduction of 9 FTE positions, from the FY 2016 agency request. The FY 2016 agency request does not include the additional \$32.9 million, including \$44.5 million from the State General Fund, identified to fully fund human service caseloads from the November 2014 consensus caseload estimating process.

The document also included specific information on each state agency related to the budget requests.

KPERS Securities Litigation Counsel

A representative of the Kansas Retirement System for Public Employees (KPERS), explained the KPERS Request for Proposals for securities litigation counsel. Pursuant to KSA 2014 Supp. 75-37,135, these proposals must be reviewed by the Legislative Budget Committee when the legal services exceed \$1.0 million.

CONCLUSIONS AND RECOMMENDATIONS

Following its review, the Committee makes no conclusions or recommendations.

Report of the Joint Committee on Pensions, Investments and Benefits to the 2015 Kansas Legislature

CHAIRPERSON: Senator Jeff King

VICE-CHAIRPERSON: Representative Steven Johnson

OTHER MEMBERS: Senators Anthony Hensley, Mitch Holmes, Laura Kelly, and Ty Masterson; and Representatives John Edmonds, Daniel Hawkins, Charles Macheers, Gene Suellentrop, and Ed Trimmer

CHARGE

- Working after retirement;
- Future pension reforms for corrections workers; and
- Discuss legislation and policies under consideration for the 2015 Session.

Joint Committee on Pensions, Investments and Benefits

REPORT

Conclusions and Recommendations

The Joint Committee concludes the current break-in-service requirements for persons returning to work after retirement should be reviewed. The post-retirement provisions which are scheduled to sunset on June 30, 2015, should be addressed. The 2015 Legislature should consider the ability of the Kansas Public Employees Retirement System (KPERS) to recapture benefits, if certain conditions are present.

The Joint Committee concludes members in the KPERS Correctional groups, along with local law enforcement personnel who meet the training requirements, should be enrolled in the Kansas Police and Firemen's Retirement System (KP&F). The additional employer contribution funding for those who were in KPERS Correctional should come from the State General Fund.

- The Joint Committee concludes pension obligation bonding and emerging retirement plan trends in the private sector should be reviewed during the 2015 Legislative Session.

Proposed Legislation: None.

BACKGROUND

The Joint Committee on Pensions, Investments and Benefits was created in 1992 and is directed by KSA 46-2201 to:

- Monitor, review, and make recommendations relative to investment policies and objectives formulated by the KPERS Board of Trustees;
- Review and make recommendations related to KPERS benefits; and
- Consider and make recommendations on the confirmation of members nominated by the Governor to serve on the KPERS Board of Trustees.

The Joint Committee may introduce legislation it determines to be necessary.

The Legislative Coordinating Council charged the Joint Committee to study working after retirement and pension reforms for corrections workers.

COMMITTEE ACTIVITIES

The Joint Committee met on November 17 and December 19, 2014. It reviewed KPERS long-term funding, working after retirement, pension reforms for corrections workers, disability benefits for certain law enforcement officers, and the Governor's Allotment Plan.

Review of KPERS Long-Term Funding

The Joint Committee reviewed the valuation report of the KPERS actuary, which is a snapshot of the financial condition of the retirement plan as of December 31, 2013. The actuarial valuation, which is different from the market valuation, was

estimated to be \$14.6 billion. Actuarial assets are calculated by “smoothing” investment gains and losses over a five-year period. A market value higher than the actuarial value means that deferred investment gains will flow through valuations over the subsequent four years. There is an estimated \$1.2 billion in deferred gains. Due to investment gains over the past two years, the funding status has improved for all membership groups (KPERs state, school, and local groups; Kansas Police and Firemen’s Retirement System; and Judges Retirement System). It is believed that legislative reforms enacted in 2012, including increased employer and employee contributions, will continue to aid in improving funding. Assuming all actuarial assumptions are met in the future, KPERs will be fully funded at the end of the amortization period (FY 2033).

Investment returns make up the largest source of income for benefits distributed. KPERs’ investment portfolio had a 17.7 percent total return for calendar year 2013. As of June 30, 2014, KPERs’ annualized, time-weighted total return over a 20-year period was 8.9 percent.

Recent Changes to Law

A provision of 2012 HB 2333 requires any cost of legislation determined by KPERs’ consulting actuary be reported to the Joint Committee. During the 2013-2014 Legislative Biennium, two enacted bills were determined to affect the actuarial costs. The first bill, 2013 HB 2213, changed the cap on the benefits for KP&F members from 80 percent of final average salary to 90 percent. Based on the 2012 valuation, the change increased the unfunded actuarial liability of the KP&F plan by \$13.3 million. KP&F member contributions were increased from 7.0 percent for all years up to the benefit cap (32 years) and 2.0 percent thereafter to 7.15 percent for all years of service, effective July 1, 2013. No increase was necessary in employer contributions to fund the actuarial cost of the change. The second bill, 2014 HB 2533, made changes to the KPERs Tier 3 cash balance plan including decreasing the guaranteed interest crediting rate from 5.25 percent to 4.0 percent and eliminating the Board of Trustee’s role in granting dividend credits in favor of a formulaic dividend. The actuarial cost is an estimated nominal savings for the State-School Group of \$3.0 billion over 48

years (\$251.8 million in present value). Changes do not reduce the unfunded actuarial liability, which means the majority of the cost savings are due to the lower normal cost rate after the unfunded actuarial liability is fully paid.

Working after Retirement

Staff from the Office of Revisor of Statutes, the Kansas Legislative Research Department, and KPERs provided information, respectively, regarding the current law on working after retirement, the history of those policies, and statistics and options for future policy.

Current Law

Under KSA 2014 Supp. 74-4914, KPERs members are subject to a waiting period of 60 days before a member may return to work for an employer who participates in KPERs. When returning to work for the same employer, retirees are subject to a \$20,000 earnings limitation. The State of Kansas is considered a single employer, but each school district is considered a different employer. The \$20,000 cap does not apply to retirees employed as substitute teachers or to officers, employees, or appointees of the Legislature. Nurses who return to work for a state institution are also exempt. There is no earnings limitation for a retiree who works for a different participating employer, and no employee contribution is required. However, the employer is required to make a contribution at the actuarial contribution rate plus the statutorily prescribed employee contribution rate (Tiers 1 and 2 = 6.0 percent, each). Retirees who provide service to a participating employer through a third-party contractor are still subject to restrictions.

Certain licensed school personnel, as specified in KSA 2014 Supp. 74-4937(3), are exempt from the \$20,000 cap. The participating employer of that retiree must pay to KPERs the actuarially determined employer contribution based on the retiree’s compensation during the period of employment plus 8.0 percent. Retirees make no employee contribution. This exemption expires on July 1, 2015, and after that date KPERs and its actuary are required to report the experience to the Joint Committee on Pensions, Investments and Benefits.

History of Working After Retirement

The Legislature has alternated between a policy of restrictions and a policy of no restrictions for certain retirees who go back to work for a participating employer, including state agencies, local units of government, school districts, other governmental entities, and other educational institutions. In the early 1960s when KPERS was established, there were restrictions on returning to work after retirement if the employment was with a participating KPERS employer. Most of the post-retirement restrictions were eliminated by the mid-1980s. Starting in 1988, new restrictions were instituted. Since then, exceptions to the statutory restriction have been authorized gradually and later revised.

Statistics and Future Policy Options

KPERS staff and its actuary examined the employment records of over 6,600 individual retirees who returned to work in one or more years from calendar years 2007 through 2013. While the conferees cautioned that the data examined was not necessarily reliable enough to make conclusions about all post-retirement behavior, they observed school retirees made up the largest group returning to work. Of the retirees returning to work for the state, for local governments, and in non-licensed positions for school employers, larger numbers were returning to the same employer, most likely on a part-time basis due to the earnings cap. For local and school employers, over 50 percent of retirees who returned to work for the same employer did so within a few months of retiring. Those returning to state employment appeared to wait slightly longer. While it was difficult to quantify compensation after returning to work, due to a variety of job arrangements, it was observed that the earnings cap may have caused the average compensation to be less. On average, a licensed school retiree returning to work for the same employer had significantly lower compensation than one who worked for a different school district.

When considering future policy options, it was suggested post-retirement goals, the length of a *bona fide* separation before returning to work, the extent and quantity of benefits, the age of the retiree, earnings, hours worked by the retiree,

length of re-employment, the employer, the type of position, and employer contributions be considered.

Pension Reforms for Corrections Workers

Staff from the Office of Revisor of Statutes, the Kansas Legislative Research Department, and KPERS, respectively, provided information regarding the current law on corrections workers, the history of those policies, and the benefit structure for KPERS Correctional members.

Current Law

Security officers of the Department of Corrections are members of KPERS. The officers are divided into two groups. Group A (C55) is for the security officers whose positions are classified as correction officers and their supervisors. Group B (C60) is for security officers who work within a correctional institution and have regular contact with inmates but who are in positions not classified as corrections officers, such as support personnel. The minimum retirement date for a person in Group A is either at age 55 with a minimum of 3 consecutive years of experience or when the person has 85 points, which is the sum of years of service plus age. The minimum retirement date for a person in Group B is either at age 60 with a minimum of 3 consecutive years of experience or when the person has 85 points. Early retirement for Group A is allowed at age 50 with 10 years of service, and for Group B it is allowed at age 55 with years of 10 years of service.

For security officers who are in Tier 2, the normal retirement date for those in Group A is age 55 with 10 years of service, including 3 years immediately preceding retirement. For Tier 2 members who are in Group B, the normal retirement age is 60 with 10 years of service, including 3 years immediately preceding retirement. To be eligible for early retirement in Tier 2, Group A security officers must be age 50 with 10 years of experience, including 3 years immediately preceding retirement. For Group B the early retirement date is age 55 with 10 years of service, including 3 years immediately preceding retirement. Retirement benefits for security officers are calculated in the same manner as for

other KPERS members (1.85 percent x years of service x final average salary).

Starting January 1, 2015, newly hired security officers are exempted from the cash balance plan and become members of KPERS Tier 2.

History of KP&F Membership

Prior to the establishment of KPERS in 1961, the Legislature created other retirement plans for certain governmental employees, including two plans for public safety (law enforcement) state employees. Both plans eventually merged with KPERS in some manner, either consolidating with KPERS to provide membership for eligible members or transferring the administration of the continuing plans to the administration of the KPERS Board of Trustees. In 1968, employees of the State Highway Patrol and the Kansas Bureau of Investigation were authorized to participate in the KP&F plan. The separate pension boards relating to those two agencies were abolished, and the funds were transferred to KPERS for administration. KP&F membership was broadened to include university police officers in 1988; Capitol Police Officers and Motor Carrier Inspectors in 2004, when the groups were reorganized into the State Highway Patrol; enforcement officers in the Office of State Fire Marshal in 2005; and firefighters serving the 190th Kansas Air National Guard as non-military employees.

Over the years various groups of state employees have been unsuccessful in gaining KP&F membership: correctional security officers in the Department of Corrections, the Division of Alcoholic Beverage Control of the Department of Revenue, the Kansas Lottery, the Kansas Racing and Gaming Commission, the Office of Securities Commissioner, Court Services Officers, and the Enforcement Division of the Department of Wildlife, Parks and Tourism.

Other Testimony

The Secretary of Corrections provided testimony supporting the transfer of juvenile correctional officers and parole officers to KPERS Corrections, noting the creation of KPERS Tier 3 will only further increase the disparity in the

retirement plans offered to front-line staff, which may impact recruitment, retention, or employee morale. According to the agency, transferring these officers to KPERS Corrections would impact 393 employees. Of this, 134 are currently participating in Tier 2. Currently 1,918 employees are in KPERS Corrections, with 745 of those employees in Tier 2. The additional cost in employer contribution is estimated at \$1.9 million, which the agency suggested come from the State General Fund.

The Joint Committee also received testimony from individual corrections workers who either supported or were opposed to the transition. A representative of the Kansas Organization of State Employees encouraged the Joint Committee to address pay and safety at the same time pension membership was considered.

Other Issues

Definition of “police.” The Joint Committee heard testimony from county law enforcement officials regarding KPERS’ interpretation of the definition of the term “police,” and variations of the word, so as to deny KP&F disability benefits to sheriffs’ deputies who worked in a jail or detention center. A representative of the Kansas Association of Chiefs of Police, the Kansas Peace Officers Association, and the Kansas Sheriffs Association proposed an amendment to the definition, specifying that certified law enforcement officers who are assigned to a jail, detention center, or other correctional facility shall not be denied benefits.

Governor’s Allotment Plan. The Director of the Budget explained the portion of the Governor’s Allotment Plan that would reduce the employer contribution rate to the FY 2012 level. The roll-back will be a reduction in employer contribution amounts for six months that will not be carried forward into the Governor’s FY 2016 and FY 2017 budget proposals. The employer contribution rate will be restored to its statutorily set level. The Joint Committee was requested to study additional short-term reform options, such as revising the method used to calculate asset valuations (moving from an actuarial method to a market value method) and considering the impact of reamortization of the actuarial liability by

extending the amortization period. The Director of the Budget also requested three long-term options be studied:

- Issuing pension obligation bonds to reduce the unfunded actuarial liability with net proceeds in the amounts of either \$1.0 billion or \$1.5 billion with debt service from a source other than employer contributions;
- Revising the plan design for new hires and non-vested KPERS members to include:
 - Member election of cash-balance or defined-contribution plan; or
 - A hybrid cash-balance, defined-contribution plan; and
- Emerging trends in the private sector such as annuitization.

CONCLUSIONS AND RECOMMENDATIONS

The Joint Committee concludes the 2015 Legislature should review the current break-in-service requirements in concert with the ability for members to unretire without penalty; and it should consider the ability of KPERS to recapture benefits, should a member return to employment before the end of the break-in-service requirements.

The Joint Committee concludes the working-after-retirement provisions that are set to expire at the end of FY 2015 should be addressed by the 2015 Legislature.

The Joint Committee concludes the 2015 Legislature consider moving KPERS Correctional retirement from a subgroup of the KPERS plan to a subgroup of the KP&F plan.

The Joint Committee concludes the 2015 Legislature should review the possibility of including juvenile corrections and parole officers in the KPERS Correctional retirement plan and consider funding from the State General Fund for the additional employer contribution.

The Joint Committee concludes the 2015 Legislature should consider amending state law to allow sheriffs' deputies who meet the training requirements of KP&F retirement, but whose primary job duties in local jails exclude them from KP&F eligibility, be enrolled as KP&F members.

The Joint Committee concludes the potential for bonding to increase the assets in the KPERS Trust Fund and for reamortizing the payment of the unfunded actuarial liability should be reviewed by the 2015 Legislature.

The Joint Committee concludes the 2015 Legislature should review, with the assistance of the KPERS Board and staff working with insurance companies, the emerging retirement plan trends in the private sector.

Report of the Joint Committee on State Building Construction to the 2015 Kansas Legislature

CHAIRPERSON: Senator Kay Wolf

VICE-CHAIRPERSON: Representative Steve Brunk

OTHER MEMBERS: Senators Marci Francisco, Laura Kelly, Forrest Knox, and Larry Powell;
and Representatives John Alcala, Steve Alford, Mark Hutton, and Jim Ward

STUDY TOPICS

- Study, review, and make recommendations on all agency five-year capital improvements plans, leases, land sales, and statutorily required reports by agencies;
- Review buildings within the Capitol Complex included in 2014 SB 423; and
- Travel throughout the state to observe the many state-owned buildings including the State's veterans' homes at Winfield and Dodge City, the State Hospital at Larned, the School for the Deaf and the School for the Blind.

Joint Committee on State Building Construction

ANNUAL REPORT

Conclusions and Recommendations

The Joint Committee recommended all agencies' five-year capital improvement plans, leases, and sales of land and facilities that came before the Committee. The Joint Committee recommends the following:

- Include the three proposed Private Industry Expansions by the Department of Corrections;
- Include the supplemental requests using private funding for the windows at Constitution Hall and roof at the State Archives Building for the State Historical Society;
- Cap the funding for the repairs to two retaining walls at the Salina Academy of the Kansas Highway Patrol to \$631,300; and
- Cap the funding of the Expo facility repair and replacement at the Kansas State Fairgrounds to \$5.5 million.

Proposed Legislation: None.

BACKGROUND

The Joint Committee was established during the 1978 Session. The Special Committee on Ways and Means recommended the bill creating the Joint Committee, 1978 HB 2722, as a result of its interim study of state building construction procedures.

The Joint Committee was expanded from six members to ten members by 1999 HB 2065. It is composed of five members of the Senate and five members of the House of Representatives. Two members each are appointed by the Senate President, the Senate Minority Leader, the Speaker of the House of Representatives, and the House Minority Leader. The Chairperson of the Senate Committee on Ways and Means and the Chairperson of the House Committee on Appropriations serve on the Joint Committee or appoint a member of such committee to serve (KSA 46-1701).

Terms of office are until the first day of the regular legislative session in odd-numbered years. A quorum of the Joint Committee is six members. The Chairperson and Vice-chairperson are elected by the members of the Joint Committee at the beginning of each regular session of the Legislature and serve until the first day of the next regular session. In odd-numbered years, the Chairperson is to be a Representative and the Vice-chairperson is to be a Senator. In even-numbered years, the Chairperson is to be a Senator and the Vice-Chairperson is to be a Representative (KSA 46-1701).

The Joint Committee may meet at any location in Kansas on call of the Chairperson and is authorized to introduce legislation. Members receive the normal *per diem* compensation and expense reimbursements for attending meetings during periods when the Legislature is not in session (KSA 46-1701).

The primary responsibilities of the Joint Committee are set forth in KSA 2014 Supp. 46-1702. The Joint Committee is to review and make recommendations on all agency capital improvement budget estimates and five-year capital improvement plans, including all project program statements presented in support of appropriation requests, and to continually review and monitor the progress and results of all state capital construction projects. The Joint Committee also studies reports on capital improvement budget estimates that are submitted by the State Building Advisory Commission. The Joint Committee makes annual reports to the Legislature through the Legislative Coordinating Council (LCC) and other such special reports to the appropriate committees of the House of Representatives and the Senate (KSA 2014 Supp. 46-1702).

Each state agency budget estimate for a capital improvement project is submitted to the Joint Committee, the Division of the Budget, and the State Building Advisory Commission by July 1 of each year. Each estimate includes a written program statement describing the project in detail (KSA 2014 Supp. 75-3717b).

The budget estimate requirement does not apply to federally funded projects of the Adjutant General or to projects for buildings or facilities of the Kansas Correctional Industries of the Department of Corrections that are funded from the Correctional Industries Fund. In those cases, the Adjutant General reports to the Joint Committee each January regarding the federally funded projects, and the Director of Kansas Correctional Industries advises and consults with the Joint Committee prior to commencing such projects for the Kansas Correctional Industries (KSA 2014 Supp. 75-3717b and 75-5282).

The Secretary of Administration issues monthly progress reports on capital improvement projects including all actions relating to change orders or changes in plans. The Secretary of Administration is required to first advise and consult with the Joint Committee on each change order or change in plans having an increase in project cost of \$125,000 or more, prior to approving the change order or change in plans (KSA 2014 Supp. 75-1264). This threshold was increased from \$25,000 to \$75,000 in 2000 HB 2017, and to \$125,000 in 2008 HB 2744. Similar

requirements were prescribed in 2002 for projects undertaken by the State Board of Regents for research and development facilities and state educational facilities (KSA 2014 Supp. 76-786), and in 2004 for projects undertaken by the Kansas Bioscience Authority (KSA 2014 Supp. 74-99b16).

If the Joint Committee will not be meeting within 10 business days, and the Secretary of Administration determines that it is in the best interest of the state to approve a change order or change in plans with an increase in project costs of \$125,000 or more, 2000 HB 2017 provided an alternative to prior approval by the Joint Committee. Under these circumstances, a summary description of the proposed change order or change in plans is mailed to each member of the Joint Committee, and a member may request a presentation and review of the proposal at a meeting of the Joint Committee. If, within seven business days of the date the notice was mailed, two or more members notify the Director of Legislative Research of a request to have a meeting on the matter, the Director will notify the Chairperson of the Joint Committee, who will call a meeting as soon as possible. At that point, the Secretary of Administration is not to approve the proposed action prior to a presentation of the matter at a meeting of the Joint Committee.

If two or more members do not request the proposed matter be heard by the Joint Committee, the Secretary of Administration is deemed to have advised and consulted with the Joint Committee and may approve the proposed change order, change in plans, or change in proposed use.

The comprehensive energy bill 2009 Senate Sub. for HB 2369 required the state to establish energy efficient performance standards for state-owned and -leased real property, and for the construction of state buildings. State agencies are required to conduct energy audits as least every five years on all state-owned property, and the Secretary of Administration is prohibited from approving, renewing or extending any building lease unless the lessor has submitted an energy audit for the building. Each year, the Secretary of Administration shall submit a report to the Joint Committee that identifies properties where an excessive amount of energy is being used.

COMMITTEE ACTIVITIES

The LCC approved six meeting dates for the Joint Committee on State Building Construction, of which three were to be travel days. Those meetings were held September 9 and 10, October 21, November 19 and 20, and December 15, 2014. One additional day was requested and granted by the LCC. The Committee also met on January 12, 2015, prior to the beginning of the 2015 Session. During the 2014 interim meetings, the Joint Committee reviewed agencies' five-year capital improvement plans. All plans were approved.

Five-Year Plans

The Director of Public Works for the Adjutant General's Department reviewed the rehabilitation and repair projects for the 315 buildings under its authority. A planned new State Emergency Management Operations and Training Center was also discussed. This project will cost \$5.9 million in FY 2017 and consolidate Air and Army National Guard operations at Forbes Field in Topeka. The Committee expressed concern in recommending the \$5.9 million and a motion was made to recommend the agency's five-year plan, but exclude the \$5.9 million pending further information.

The Adjutant General provided further testimony on the agency's new Emergency Management Operations and Training Center and proposed Fusion Center addition and the Committee recommended the \$5.9 million expenditure for the project.

The Director of the Kansas Department of Corrections presented three proposed Private Industry Expansions along with the five-year plan and all were approved.

The Director of Operations of the Kansas Department of Transportation (KDOT) noted the agency's 966 buildings to maintain. This includes subarea bay modernization and salt domes.

The Building Services Supervisor for the Department of Commerce discussed the agency's seven workforce centers across the state. All capital improvements are federally funded.

The Director of the Historical Society discussed the more than 50 buildings used for rehabilitation and repair. There was discussion on two supplemental projects—window repairs at Constitution Hall in Lecompton and a roof repair on the State Archives Building. The Committee recommended the five-year plan including the two additional supplemental projects.

The Deputy Superintendent of Operations for the Kansas Schools for the Deaf and Blind noted they serve 1,700 Kansas residents. There are 70-80 students residing at the School for the Blind and 120 reside at the School for the Deaf. Many administrative functions have been consolidated between the two schools.

The Director of the Kansas Commission on Veterans Affairs Office discussed the projects at Fort Dodge, Winfield, and the cemeteries. There are 135 residents at Fort Dodge and 120-140 at Winfield. The majority of residents now are veterans of the Vietnam War.

The Director of the Bureau of Investigation (KBI) updated the Committee on the three major offices for the KBI—the headquarters, the annex, and the office in Great Bend. There was also an update on the new forensic lab being built at Washburn University.

The Comptroller for the Kansas Insurance Department discussed routine maintenance and repair projects. The Committee asked for and received additional information on the specific projects for which the money would be used.

The Chief Fiscal Officer for the Kansas Department of Labor discussed the rehabilitation and repair projects that are all paid with federal funds. They also discussed the white house at 427 SW Topeka Avenue that the agency had tried to sell. The federal government has been satisfied with a payment for the property, and the agency will raze the building and is proposing a new maintenance facility on the site.

The Senior Operations Manager for the Department for Children and Families explained the agency has no current capital improvement projects scheduled for the one building it owns and all other agency buildings are leased.

The Director of Facilities Planning for Pittsburg State University reviewed the current projects. A future dorm project is using construction manager design-build process at a guaranteed maximum cost.

The Director of Facilities Planning with Fort Hays State University discussed current and future projects at the university. He noted that because of leadership changes at the university, some projects were being revisited and may change.

The Associate Director of Projects with the University of Kansas Medical Center discussed the Health Education building and parking garage. The parking garage will be operational by December 2016 and the building completed by December 2017.

The Director of Facilities Planning for Wichita State University discussed current and future projects and noted university officials are in discussion with the city regarding street entrances. There are currently no plans to change the location of the football stadium.

The Associate Vice President for Facilities at Kansas State University discussed renovations, upgrades, improvements, and new construction. University officials are coordinating plans with the federal National Bio and Agro-Defense Facility regarding Roberts Hall.

The University Architect/Director of Design and Construction Management for the University of Kansas discussed current projects and the campus master plan.

The Director of Facilities for the Board of Regents discussed the rehabilitation and repair fund and priority list at each university for the funding. He also discussed the need for additional funds for deferred maintenance at the universities.

The Director of Facilities and Procurement Management commented on the methodology used for assessing building conditions and responded to questions about the demolition of the Docking State Office Building.

The Chief Financial Officer for the Judicial Branch discussed the addition of two office suites at the Judicial Center.

The Chief Fiscal Office from the Kansas Highway Patrol (KHP) discussed the Vehicle Fleet Storage and Maintenance Facility at Billard Airport, Topeka. There was a request for funding of two supplemental projects—replacing water mains at the KHP Training Academy in Salina and paving at the new F Troop headquarters in Wichita. Also discussed was the deterioration of two retaining walls at the Salina Academy. The Committee recommended the five-year plan including the two supplemental projects. The motion also included a cap to the funding for the retaining wall replacement at \$631,300.

The Budget Director for the Kansas Department of Wildlife, Parks and Tourism reviewed new construction and additions for the agency. Also discussed was the rehabilitation and repair of current facilities.

The Facilities Architect for the Kansas Department for Aging and Disability Services viewed the plans for the five state hospitals that comprise 196 buildings. The rehabilitation and repair projects were discussed and it was noted there is a mounting amount of deferred maintenance to many buildings.

The General Manager of the Kansas State Fair noted the facility hosted 400 non-fair events during the year and that the attendance at the 2014 Fair was the fourth-highest in the Fair's history. Also discussed was the \$300,000 state matching contribution to be made annually. The Committee recommended the five-year plan with a repair and replacement cap for the Expo facility of \$5.5 million.

The Project Architect from the University of Kansas Medical Center presented a project to construct a simulation center by renovating the first floor of Sudler Hall. This project will be incorporated into the Health Education space that is currently under construction.

Statutorily Required Reports

The KDOT Deputy Secretary and State Transportation Engineer presented the agency's inventory of surplus property. In FY 2014, 28 properties were sold. The Kansas Turnpike Authority and KDOT are co-locating in Emporia.

Leases and Sales

The Deputy Director of the Office of Facilities and Procurement Management for the Department of Administration presented the following leases and sales, all of which were recommended by the Committee:

- Parole Office for the Department of Corrections in Hutchinson;
- Department of Corrections surplus farm ground in north Topeka;
- Department of Children and Families surplus warehouse in Wyandotte County;
- KBI office in Lenexa;
- Kansas Department for Children and Families lease of the Athene Building in Topeka;
- Department of Revenue lease of the Scott Building in Topeka;
- Department of Revenue lease of the Mills Building in Topeka;
- Department of Revenue Division of Vehicles lease of the former Dillons grocery store at 29th and Topeka Avenue in Topeka;
- Kansas Corporation Commission office in Hays;
- Office of the State Bank Commissioner in Topeka; and
- Rainbow Mental Health was sold to the University of Kansas Foundation.

The Deputy Secretary of Corrections alerted the Committee to possible litigation concerning a lease for a parole office in Kansas City, Kansas.

The Deputy Director of Design Construction, and Compliance, Office of Facilities and Procurement Management for the Department of Administration discussed the plans to relocate the Data Center currently in the Landon Building to the Burlington Northern Santa Fe building or Curtis State Office Building.

State Facility Tours

The Committee toured the four buildings the Department of Administration is authorized to sell under the terms of enacted 2014 SB 423. They include the Landon and Eisenhower buildings, currently owned by the state. The bill also provides for exercising the option of purchase and selling the Curtis and Myriad buildings currently owned by the Topeka Public Building Commission and leased to the state.

After the tour, the bonded indebtedness and other relevant fiscal information was shared with the Committee and discussed. The debt for three of the buildings was greater than the assessed value.

The Committee toured Larned State Hospital. The superintendent explained the facility contains three hospitals including the State Security Program, the Department of Corrections facility for mental patients, and the Sexual Predator Treatment Program. The Committee toured the Meyer, Jung, and Issac Ray buildings.

The Committee toured the Kansas Soldiers' Home in Dodge City. The tour included the Veterans' Cemetery, one of the cottages, the historic Custer Building, Lincoln and Grant dormitories, the Eisenhower administration building, and Halsey Hall, the long-term care facility.

The Committee toured the Kansas Veterans' Home at Winfield. The superintendent stated the facility has an average annual population of 91 individuals in long-term care, 22 residents in assisted living, and 18 beds in the Alzheimer's Unit. The Committee was also shown the 40-bed expansion in the Triplett unit.

The Committee toured the School for the Deaf in Olathe. The Committee was shown the current remodeling of the Roth Building and the upgrades to the heating, ventilation, and air conditioning.

The Committee toured the School for the Blind in Kansas City. The school serves 165 students on campus and approximately 1,100 students statewide. The Information Resource Office for both schools noted to the Committee that the schools are program centers and not enrollment centers.

CONCLUSIONS AND RECOMMENDATIONS

The Joint Committee recommended all agencies' five-year capital improvement plans, leases, and sales of land and facilities that came before the Committee. The Joint Committee recommended the following:

- Include the three proposed Private Industry Expansions by the Department of Corrections;
- Include the supplemental requests using private funding for the windows at Constitution Hall and the roof at the State Archives Building for the State Historical Society;
- Cap the funding for the repairs to two retaining walls at the Kansas Highway Patrol's Salina Academy to \$631,300; and
- Cap the funding of the Expo facility repair and replacement at the Kansas State Fairgrounds to \$5.5 million.

Report of the Health Care Stabilization Fund Oversight Committee to the 2015 Kansas Legislature

CHAIRPERSON: Gary Hayzlett

LEGISLATIVE MEMBERS: Senators Laura Kelly and Vicki Schmidt; and Representatives David Crum and Jerry Henry

NON-LEGISLATIVE MEMBERS: Darrell Conrade; Dennis George; Dr. Jimmie Gleason; Dr. Paul Kindling; Dr. Terry "Lee" Mills; and Dr. James Rider

CHARGE

- The Committee annually receives a report on the status of the Health Care Stabilization Fund and makes recommendations regarding the financial status of the Fund.

Health Care Stabilization Fund Oversight Committee

ANNUAL REPORT

Conclusions and Recommendations

The Health Care Stabilization Fund Oversight Committee addressed the two statutory questions posed annually to the Committee. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the Health Care Stabilization Fund Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the Health Care Stabilization Fund (HCSF) in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas.

The Committee notes the enactment of 2014 legislation provides HCSF coverage requirements for five new categories of health care providers, impacts the short-term and long-term liabilities for the HCSF, including the provision of tail coverage and its availability to health care providers with less than five years of experience in the HCSF. Additionally, the current and future changes to the statutory cap on non-economic damages and the impact on claims filed and the associated dollar amount of the claims, will require continued monitoring. Committee oversight of impacts not only on the HCSF but also updates on new health care providers' experiences with the HCSF coverage will continue.

Actuarial Review. The Committee discussed its oversight of actuarial reporting provided by the HCSF Board of Governors and whether there was a need to contract for an independent actuarial review in 2015. The Committee recognized the additional analysis provided by the HCSF Board of Governors' actuary to account for the legislative changes enacted by the 2014 Legislature, including new health care providers subject to the HCSF coverage requirements, the change in tail coverage compliance from a five-year waiting period to immediate coverage, and changes to the non-economic damages cap specified in tort law. Following discussion on the actuarial analysis provided to the Committee and the Board of Governors and the routine audits the Board as a state agency is subject to, the Committee concluded there is no need to contract for an independent actuarial review in 2015.

Other recommendations. The Committee then considered information presented by the HCSF Board of Governors' representatives and health care provider and insurance company representatives. The Committee agreed to make the following recommendations:

- **Reimbursement of the HCSF.** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the University of Kansas Foundations and Faculty and the University of Kansas Medical Center (KUMC) and Wichita Center for Graduate Medical Education (WCGME) residents for state Fiscal Years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have received 20 percent of the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July 2014. The remaining reimbursement receivables are \$4,632,253.37.

- ***Fund To Be Held in Trust.*** The Committee recommends the continuation of the following language to the Legislative Coordinating Council (LCC), the Legislature, and the Governor regarding the HCSF:
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund (SGF). The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act (HCPIAA), the HCSF is required to be “. . . held in trust in the state treasury and accounted for separately from other state funds.”
 - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Proposed Legislation: None.

BACKGROUND

The Committee was created by the 1989 Legislature and is described in KSA 40-3403b. The 11-member Committee consists of 4 legislators; 4 health care providers; 1 insurance industry representative; 1 person from the public at large, with no affiliation with health care providers or with the insurance industry; and the Chairperson of the Board of Governors of the Health Care Stabilization Fund or another member of the Board designated by the Chairperson. The law charges the Committee to report its activities to the Legislative Coordinating Council and to make recommendations to the Legislature regarding the Health Care Stabilization Fund. The reports of the Committee are on file in the Legislative Research Department.

The Committee met October 15, 2014.

COMMITTEE ACTIVITIES

Report of Towers Watson

The Towers Watson actuarial report serves as an addendum to the report provided to the HCSF Board of Governors dated March 20, 2014, and the

subsequent analysis of legislative changes dated September 8, 2014. The actuary addressed forecasts of the HCSF's position at June 30, 2014, and June 30, 2015. The forecast of the HCSF's position at June 30, 2014, is as follows: the HCSF held assets of \$261.88 million and liabilities of \$190.26 million, with \$71.62 million in reserve. The projection for June 30, 2015, is as follows: assets of \$265.89 million and liabilities of \$194.04 million, with \$71.85 million in reserve. The report notes the forecasts were based on a review of the HCSF data as of December 31, 2013. The report states that in the 2013 study, the actuaries forecasted higher levels of assets (\$265.4 million) and liabilities (\$197.5 million) at June 2014, with a lower unassigned reserve (\$67.8 million). Payment activity in calendar year 2013, however, was higher than anticipated. The actuary stated based on the annual study, the overall conclusion is the HCSF is in a very strong financial position with unassigned reserves at about \$72 million and not changing much as a result of FY15 activity. The actuary stated the forecasts assume there would be no change in surcharge rates for FY 2015; \$24.1 million in surcharge revenue in FY 2015; a 3.85 percent yield on the HCSF assets; continued full reimbursement for University of Kansas (KU)/WCGME claims, with continued payback of reimbursements from the state that

were delayed until FY 2014; no change in current Kansas tort law; potential increase in claims due to Missouri's 2012 overturn of non-economic damage caps. The actuary noted the HCSF Board of Governors, at its March 2014 meeting, elected to make no change to the surcharge rates for FY 2015.

The actuary next reviewed the HCSF's liabilities at June 30, 2014. The liabilities highlighted included claims made against active providers as \$79 million; associated defense costs as \$15.9 million; claims against inactive providers reported by the end of FY 2014 as \$7.1 million; tail liability of inactive providers as \$75.2 million; future payments as \$14.9 million; claims handling \$5.5 million; and "other" which is mainly plaintiff verdicts on appeals as \$.9 million; for a total of gross liabilities of \$198.4 million of which some of the liabilities are for the KU and WCGME programs that the HCSF is reimbursed for \$8.2 million for a final net liability of \$190.3 million. The actuary further detailed why the tail liability of inactive providers is such a high number, stating that as of June 2014, anyone who has been in the HCSF for five years, does not have to pay the HCSF any more surcharge revenue to have the tail liabilities covered by the HCSF. He stated this is a very long-term liability; a very big liability; and a very challenging liability to quantify, but one the actuaries believe is appropriate for the HCSF to recognize. The actuary emphasized this is the single biggest item affected in the short run by the 2014 legislative changes. In response to a question, the actuary explained they look at the history of inactive provider claims based on when they occurred and when they are reported; they have information about how long providers were in the system before those providers left the system; and, with this provider data, they built a model to figure out of the 10,000 or so providers in the system today and consider when they likely will retire and project when those retirees likely will sustain claims. The model has a lot of assumptions, but estimates are made for health care providers in the system: their future retirement dates; the potential for claims reported against them; the resolution of those claims; and the cost for resolution based on the year the potential claim(s) are resolved.

The actuary next reviewed the HCSF's Rate Level Indications for FY 2015 noting the

indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of about \$28 million; change in liabilities, an increase of about \$3.8 million; administrative expenses of about \$1.6 million; and transfers to the Health Care Provider Insurance Availability Plan (Availability Plan) and the Kansas Department for Aging and Disability Services (KDADS) are assumed to be \$200,000 (assumes no Availability Plan transfer); totaling the cost for the HCSF to "break-even" for another year at \$33.8 million. The actuary stated that the HCSF has two sources of revenue: investment income based on the 3.85 percent yield assumption of \$9,898 million and surcharge from providers of \$23.905 million; therefore, the rate-level indication is a slight increase of about 1 percent. The actuary stated from their perspective, the HCSF's rates are pretty close to adequacy – "what is needed." The actuary then reviewed a 15-year history of what the HCSF's indicated costs per active provider have been for settlements and defense costs (less reimbursed amounts). He stated essentially there has been no inflation in the business over the last 15 years.

Impact of 2014 Legislation. The actuary also discussed the effect of the changes made by the 2014 Legislature in SB 311 and HB 2516. The actuary summarized the estimates of the HCSF's financial position at June 30, 2015. The actuary stated, prior to the legislative changes, the HCSF would have an unassigned reserve of \$71.85 million. However, with the changes, it is believed there will be an impact to the liabilities of \$27.8 million raising the liabilities from \$194.04 million to \$222.83 million. This would leave an unassigned reserve of \$44.06 million. The actuary indicated this projected \$44 million still makes the HCSF a financially stable environment. He stated the impact on these liabilities is largely a one-time hit. The Committee and actuary discussed the level of reserves that would trigger a cause for concern for the actuaries. The actuary indicated less than \$20 million would start to be a concern. The actuary also provided estimates of the legislative changes in the HCSF liabilities by specific change, breaking out those changes by active providers versus inactive providers.

The actuary concluded his remarks with a few additional observations regarding the effect of the 2014 legislative changes.

- The increase in caps on non-economic damages has only a modest initial impact on the HCSF's losses from active providers. That impact will grow over time. Ultimately, we estimate the higher caps will increase the HCSF's indicated rate level by 10 percent.
- The changes relative to inactive providers cause an immediate and material increase in the HCSF's liabilities. However, that impact is virtually a one-time hit.
- The changes cause additional uncertainty in estimates of the HCSF's liabilities until the effects can be quantified with subsequent experience.

The Executive Director then spoke to discussion during the 2013 interim regarding the *Miller v. Johnson* decision and potential legislation. He stated a number of groups, professions, and facilities not previously defined as health care providers had indicated renewed interest as a result of the decision. When they learned the Kansas Medical Society (KMS) was planning to request introduction of a bill that would amend that part of the HCPIAA, the HCSF Board of Governors felt there were a couple of really important improvements that also should be addressed. One of those was to improve the tail coverage. The Executive Director noted not only is it good for health care providers to be able to know their tail coverage will be provided immediately upon retiring from active practice or relocating out-of-state, a patient who is injured or experiences an unfortunate medical outcome will have access to a reliable source of revenue in that event.

The Executive Director addressed SB 311 and its impact, stating once those step-by-step increases are analyzed, over an eight-year period of time, there is going to be a 40 percent increase in non-economic damages in the cap. He explained it does not necessarily mean there will be a 40 percent increase in every single professional liability claim, but it does mean there probably will be some increase. The Executive Director stated that is why upon passage of the two bills, the HCSF Board of Governors exercised the

contingency clause in its contract with Towers Watson, in an effort to reanalyze liabilities.

Comments

In addition to the report from the HCSF Board of Governors' actuary, the Committee received information from Committee staff detailing resource materials provided for consideration including the bill summaries and copies of enacted legislation, 2014 HB 2516 and SB 311, the FY 2014 and FY 2015 subcommittee and budget committee reports, and the Committee's prior conclusions and recommendations from its most recent annual report. The Committee analyst stated HB 2516 is one of two bills that immediately impacts the HCSF, its governance, the membership of the HCSF Board of Governors, Kansas Medical Mutual Insurance Company (KaMMCO) and its ability to provide insurance products, and changes the definition of "health care provider" in the HCPIAA. The second bill, SB 311, is the other part of the *Miller v. Johnson* discussion before the Committee last year. She stated this was a measure advocated for by the KMS, Kansas Hospital Association, and a number of provider groups regarding a change in the non-economic damages limitations in statute. She also highlighted a recommendation in the subcommittee reports made by both the House Budget Committee and the Conference Committee regarding staffing at the HCSF Board of Governors, specifically related to the implementation of HB 2516.

A representative of the Revisor of Statutes' Office provided an overview of the 2014 legislation. The revisor first summarized SB 311, noting the bill amended the Code of Civil Procedure relating to the limits on recoverable damages for non-economic damages in personal injury actions. For causes of actions accruing on or after July 1, 2014, to July 1, 2018, the new limit is \$300,000. For causes of action accruing on or after July 1, 2018, to July 1, 2022, the limit will be \$325,000; for causes of action accruing on or after July 1, 2022, the limit will be \$350,000. Prior to enactment of the bill, the limit had been \$250,000. Additionally, the bill amended the rule of evidence concerning opinion testimony to clarify a person not testifying as an expert witness may be admitted if the judge finds such opinions or

inferences are: based on the perception of the witness; are helpful to a clear understanding of the testimony of the witness; and are not based on scientific, technical, or other specialized knowledge within the expertise of the expert. Finally, the bill repealed statutes that allowed for evidence of collateral source benefits to be admissible in actions for personal injury or death.

HB 2516 related to the operation of mutual insurance companies organized to provide health care provider liability insurance and amends the HCPIAA, which governs the operation of the HCSF. [The bill made continued HCSF coverage for inactive health care providers (referred to as tail coverage) immediate upon cancellation or inactivation of a Kansas license and professional liability insurance and increases the level of tail coverage available. The bill made tail coverage available for new professionals and facilities for prior acts, limited disclosure of the HCSF claims information to the public, and made technical amendments to the statutes.

Among the provisions summarized, the revisor noted in Section 5 of the bill, the definition of “health care provider” is amended to include as of January 1, 2015, physician assistants, nursing facilities, assisted living facilities, resident health care facilities, and certain advanced practice registered nurses (who are certified in the role of nurse midwife). The bill also clarified what “health care provider” does not include and added providers to the list of those excluded from this definition due to an inactive license or a federally active license that offers protection under the Federal Tort Claims Act. Definitions for “board” and “board of directors” are added to distinguish between the two distinct boards, and the appropriate new term replaces existing references to the two boards. The bill also provided a definition for “*locum tenens* contract,” which means a temporary agreement not to exceed 182 days per calendar year that employs a health care provider to actively render professional services in Kansas. The bill defined “professional services” to mean patient care or other services authorized under the HCPIAA governing licensure of a health care provider.

Section 6 addressed professional liability insurance coverage, clarifying professional liability insurance and the HCSF coverage are a

condition of licensure to practice in the state for health care providers. Further, the bill clarified the HCSF liability is based on the level of the HCSF coverage selected by a health care provider. The HCSF is not liable for any claim not normally covered by a medical professional liability insurance policy.

Additionally, inactive health care providers are ensured of having the HCSF tail coverage equal to the amount of such provider’s primary insurance coverage plus the amount of the HCSF coverage selected and in effect at the time the event resulting in a claim of medical negligence occurred. Beginning July 1, 2014, the five-year compliance period requirement prior to being eligible for tail coverage is removed. Now, any health care provider has tail coverage immediately upon canceling or inactivating a Kansas license and the provider’s professional liability insurance policy. In lieu of a claims made policy otherwise required under KSA 40-3402 (Section 6 of the bill), a nonresident health care provider employed pursuant to a *locum tenens* contract to provide services in Kansas as a health care provider may obtain basic coverage under an occurrence form policy if such policy provides professional liability insurance coverage and limits required by KSA 40-3402.

Section 7 provided the HCSF Board of Governors of is authorized to grant temporary exceptions from the professional liability insurance and the HCSF coverage under exceptional circumstances. The bill also provided “in the event of a claim against a health care provider for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, the liability of the HCSF shall be limited to the amount of coverage selected by the health care provider at the time of the incident giving rise to the claim.” The membership of the HCSF Board of Governors is increased from 10 to 11 members (The eleventh member is to be a representative of an adult care home.). All employees of the HCSF employed by the Board of Governors are unclassified employees.

Other changes in the bill required the Availability Plan to make available professional liability insurance coverage for prior acts. Such policies are required to have limits of coverage not

to exceed \$1 million per claim or \$3 million annual aggregate liability for all claims made as a result of personal injury within the state on or before December 31, 2014. The tail coverage is available only to new professionals and facilities made part of the “health care provider” definition. Such providers must be in compliance with the coverage requirements on January 1, 2015. Time allowed for insurers providing basic professional liability insurance coverage to notify the HCSF Board of Governors of such coverage for the purpose of hospital credentialing has been shortened. Insurers failing to report a written or oral claim or action for damages for malpractice to the appropriate state health care provider regulatory agency and the Board of Governors no longer face suspension, revocation, denial or renewal, or cancellation of the insurer’s certificate of authority to do business in Kansas or certificate of self-insurance. Instead the Board of Governors will level a civil fine against the insurer for such violation.

Following the briefing, the Committee and the Executive Director, HCSF Board of Governors, discussed the removal of the five-year compliance period required prior to eligibility for tail coverage. The Executive Director explained, in 1988, the Legislature conducted an interim study and decided a good way to generate more surcharge revenue would be to impose a five-year requirement such that tail coverage would not be available to physicians or other health care providers unless they paid for it. He stated this has presented administrative challenges for years, and also has created an extraordinary hardship for young physicians. Another question raised by a Committee member was to verify the time period the insurer has to notify has been shortened by the new law and also whether insurance companies can face suspension, revocation, denial or renewal, or cancellation. The Executive Director stated the notification period was slightly shortened. He then indicated he was not sure he could respond fully to the question because he is not affiliated with the Insurance Department, but he believes the Department has the authority to discipline an insurer that fails to comply.

Chief Attorney’s Update. The Deputy Director and Chief Attorney for the HCSF Board of Governors next addressed the FY 2014 medical professional liability experience (based on all

claims resolved in FY 2014 including judgments and settlements). The conferee began her presentation by noting jury verdicts. Of the 27 cases involving 35 Kansas health care providers tried to juries during FY 2014, 25 were tried to juries in Kansas courts and two cases were tried to juries in Missouri. The largest number of trials were held in the following jurisdictions: Sedgwick County (8), Johnson County (6), Wyandotte County (3), Jackson County, Missouri (2), and Reno County (2). Of those 27 cases tried, 23 resulted in defense verdicts and 1 case resulted in a mistrial. Juries returned verdicts for the plaintiffs in 3 cases and resulted with expenditures from the HCSF, with 1 of those cases now on appeal.

The Chief Attorney then highlighted the claims settled by the HCSF, noting in FY 2014, 63 claims in 52 cases were settled involving HCSF monies. Settlement amounts for the fiscal year totaled \$24,005,914—these figures do not include settlement contributions by primary or excess insurance carriers. The conferee stated this FY data represents 16 fewer claims than the previous year, and about \$3.6 million less than the previous year. The conferee noted, in the last couple of years, the settlement amounts have been greater than the averages, reflecting a trend for higher settlements. Although there were 16 fewer settlements, more fell into the highest category of settlements. A big component to these amounts is due to past and future medical expenses. Of the 63 claims involving the HCSF monies, the HCSF provided primary coverage for inactive health care providers in nine claims. The HCSF also “dropped down” to provide first-dollar coverage for six claims in which aggregate primary policy limits were reached. Primary insurance carriers tendered their policy limits to the HCSF in 54 claims. In addition to the \$24,005,914 incurred by the HCSF, primary insurers contributed \$10,135,000 to these settlements. Further, testimony indicated, four claims involved contributions from an insurer whose coverage was in excess of the HCSF coverage; the total amount of these contributions was \$3,875,000. The Chief Attorney’s testimony also indicated, in addition to settlements involving the HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 97 claims in 86 cases. The total amount of these reported settlements was \$8,909,740. The report included figures from FY 2000 to FY 2014 for comparison. The Chief Attorney’s testimony also

included a report of the HCSF total settlements and verdicts, FY 1977 to FY 2014. The Chief Attorney next provided a report of new cases indicating there were 268 new cases during FY 2014. She noted, for the previous five years in a row there was a decrease in the number of claims, so it was not unexpected there was a moderate increase for FY 2014. She also stated, since Missouri found its cap on non-economic damages unconstitutional a few years ago, she will be watching closely to see if the number of claims involved in the HCSF filed in Missouri increases.

The Chief Attorney also addressed the self-insurance programs and reimbursements for the KU Foundations and Faculty and residents. She highlighted the FY 2014 KU Foundations and Faculty, and KUMC and WCGME program costs. The Chief Attorney stated the FY 2014 KU Foundations and Faculty program amount of \$2,749,707.77 increased considerably from FY 2013. The conferee stated there were 2 primary reasons for this increase. The first reason was there were more settlements for KU Foundations and Faculty at 9 settlements, compared to 5 the previous year. The second reason was a very large catastrophic damages case filed about 18 months ago; 16 full-time faculty members and residents were named as defendants. The Chief Attorney noted it is very expensive to defend 16 physicians in a high-dollar catastrophic damages case. She also noted two cases involving faculty members went to trial as defense verdicts, which also is expensive and increases attorney's fees and expenses. There were no FY 2014 settlements or judgments for the KU and WCGME resident programs. She noted there was a decrease in the amount of attorneys' fees and expenses incurred in defending the residents.

The Chief Attorney's report also listed the historical expenditures by fiscal year for the KU Foundations and Faculty and the KU and WCGME Residents since inception. She stated FY 2014 was an above-average year by about \$1 million. She noted the KU and WCGME Residents program was a little below average for FY 2014. The Chief Attorney stated, for the last several years, the HCSF stopped receiving reimbursements due to budgetary concerns. The 2010 Legislature addressed this issue with a compromise providing that for fiscal years 2010, 2011, 2012, and 2013, the HCSF would not be

reimbursed for expenses and costs of these programs. Beginning FY 2014, two important things would happen; normal reimbursements would happen for the HCSF; and the HCSF would start being repaid for those amounts for their accrued receivables. The conferee reported both of those things have happened; normal reimbursements occurred starting July 1, 2013; and, they have received 20 percent of the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July 2014. The remaining reimbursement receivables are \$4,632,253.37. The conferee also provided information about monies paid by the HCSF for those claims that are greater than the \$200,000 primary coverage. She stated these are the claims that involve the HCSF as an excess carrier. There were no claims for the KU and WCGME residents, although six of the nine claims against the faculty members did involve the HCSF excess coverage of \$2.9 million. The Chief Attorney concluded her presentation stating the one thing she is monitoring, as Missouri no longer has a cap on its non-economic damages and KU has achieved National Cancer Center Designation, which means a greater presence in the state (e.g. clinics and rotations), is the possibility more lawsuits involving the KU Faculty Residents will be filed in Missouri.

In answer to whether electronic medical records are helping to keep settlements down due to better documentation, the Chief Attorney responded she believes as residents in training are trained on the systems and the systems are more compatible with other systems, there are going to be fewer and fewer claims that involve records kinds of issues.

Medical Malpractice Insurance Marketplace. The Committee then reviewed the current marketplace for medical malpractice insurance. The Chief Executive Officer (CEO), KaMMCO, stated, overall, the market in Kansas, much like the market across the country, is a very vibrant, competitive marketplace. He stated, in many cases, there are multiple options for providers and rates are as low as they have been in many years, so it is an extremely good marketplace for health care providers purchasing malpractice insurance. The conferee stated market conditions are often cyclical. Additionally, the numbers of claims have

fallen for a few years, and are at all-time lows, which has really helped from a pricing standpoint, stability, and price competitiveness. The CEO stated it is his expectation the issues anticipated for the nurse midwives, the physician assistants, and adult care facilities are transitional issues regarding the way they used to buy it versus the way they now will need to buy it. The CEO indicated the insurance industry is in the process of responding to those issues. He stated KaMMCO does insure physician assistants who are affiliated with KaMMCO physicians or hospitals, and the company is committed to a market for long-term care facilities. The CEO stated any of those providers unable to acquire the required mandated insurance from an admitted carrier in Kansas, have the Availability Plan available to help them with that transition if it becomes an issue. He also noted the Insurance Department is working with a number of carriers to get these filings approved so everyone can find a home in the admitted market under the new requirement by January 1, 2015.

In a response to a question, the CEO indicated KaMMCO is very active in the area of risk management. He stated many carriers have some version of risk management loss prevention, and it is expanding and growing because the nature of the risks are changing. The conferee further stated there are different providers to consider as traditionally care management has been provided by a physician and now it is being provided by an APRN, a physician assistant, or some other physician extender, such as a hospitalist. He stated the transitions of care provide opportunities for things to fall through the cracks, with information not being transferred from place to place. The CEO stated, as electronic health records get better, it is a great example of issues where information will be able to be transferred easier and faster from provider to provider as a patient goes from place to place. The CEO noted, over the course of the last five or six years, there has been a tremendous amount of changes in health care. The insurance industry is trying to do what it can to make sure the industry is responsive to the changes to provide the best opportunity to care for patients in a safe way and reduce adverse outcomes.

The Director of Government Affairs, KMS, was next recognized. She stated KMS introduced SB 311 and HB 2516 in response to the Kansas Supreme Court's ruling (*Miller v. Johnson*) in an

effort to maintain the cap indefinitely. She stated KMS does believe the Committee should continue and legislative oversight is appropriate and necessary. The conferee concluded by stating KMS does not believe there needs to be an independent actuarial review.

The Executive Director, in response to a question from the Committee regarding inactive providers, clarified there are legal definitions of "inactive" that are extremely important. There are inactive licensees, which means providers who do not provide any patient care. Under the HCPIAA, not only does the inactive provider no longer provide patient care, but this provider no longer has liability insurance coverage. Regarding the tail coverage responsibility, this means the individual physician or other health care provider is no longer seeing patients. He stated the one exception is the exempt licensee who can continue to provide patient care in a very limited context; typically, it is at a clinic for medically indigent patients. The Executive Director also stated there is a source for recovery in the event one of those patients is injured, because, if the inactive exempt physician is a charitable health care provider, then the patient has access to recover under the Kansas tort law.

In response to a question from the Committee regarding vicarious liability, the Chief Attorney responded there is a statute that provides one defined health care provider is not vicariously liable for another health care provider. For example, a doctor and a hospital are named in the suit; since doctors and hospitals are both defined health care providers, the hospital is not responsible for the doctor's actions and *vice versa*. Nurse midwives and physician assistants are not defined health care providers. So, a hospital or a professional corporation or a physician could be found vicariously liable for a physician assistant's or nurse midwife's actions. Starting in January 1, 2015, when these two groups become defined health care providers, the physician or the hospital is not going to be vicariously liable for these groups. The Chief Attorney stated she anticipates there will be increased numbers of claims being made against physician assistants and nurse midwives.

New Health Care Providers – Implementation Update. The Executive Director of the Kansas Academy of Physician Assistants (KAPA) was

recognized to provide input regarding the new legislation's impact on KAPA's membership. [He stated, generally, the response by their members has been very positive. The Executive Director stated there is one unintended consequence in regard to exempt licenses for physician assistants providing charitable care at facilities not specifically designated as "federally qualified" the KAPA will address by proposing legislation in the 2015 Legislative Session. The conferee concluded his remarks noting the requirements for physician assistants to have coverage in place do not take effect until July 1, 2015, so time remains to address the exempt licensure provisions.

The President and CEO of the Kansas Health Care Association and Kansas Center for Assisted Living, was recognized to provide input regarding long-term facilities that will come into the HCSF. [She stated they are working through some issues, noting many of their providers are not based in Kansas and have many different business practices where their companies are based. The conferee's testimony stated both associations have been educating and working with providers to understand the new law. She stated there have been a lot of changes over the last couple of years, so it is believed this coverage will give an opportunity for providers to have some stability in one side of their practice. The conferee assured the Committee they are working with their providers on these risk management issues. She concluded by stating they may have some more comments and experience to address a year from now.

Two owners of the New Birth Center, Overland Park, were recognized to provide comments on the inclusion of nurse midwives into the HCSF. One of the conferees noted two out of three birth centers in Kansas have non-physician owners. She stated they believe Kansas is ideal for the growth of midwife owned birth centers and their goal is to expand their business. She also stated their model is highly dependent on the malpractice insurance market that gives them competitive malpractice insurance options. The conferees encouraged the Committee to consider the following:

- The HCSF and its plan participants have the ability to create a market;

- Encourage the plans to report the markets and participation requirements in a transparent manner; and
- Consideration of the inclusion of licensed birth center facilities as a covered entity in future revisions of the HCSF statute.

One of the conferees concluded by stating the success of their business is highly dependent on the HCSF and the Kansas malpractice market operating in an open and competitive manner especially for self-employed nurse midwives. A Committee member asked for clarification regarding if it was New Birth Center's request to include licensed birth center facilities as a covered entity the next time the HCPIAA is opened. The conferees concurred.

The Executive Director of the Kansas Association of Osteopathic Medicine (KAOM) submitted written testimony. His testimony indicated KAOM supported 2014 HB 2516 and SB 311 and the association has not received any negative comments or concerns from osteopathic physicians regarding the legislation. One improvement highlighted was the tail coverage provision for retired physicians. The remarks indicate this provision has taken some of the worry about retirement from physicians who no longer intend to practice on a full-time basis, but would like to see patients on a part-time basis.

The President of the Kansas Affiliate of the American College of Nurse-Midwives (ACNM) submitted written remarks, highlighting the variety of practice settings for nurse midwives – hospitals, group practices, three freestanding birth centers, homes, military bases, health departments, and health centers – and concerns about the cost of medical liability insurance coverage. Two provider issues included in the remarks were the case of a nurse-midwife, who is employed at a Federally Qualified Health Center, who works one day a month at a health department, has been informed the health department will not purchase coverage for the nurse-midwife. The other issue of concern is for nurse-midwives employed at birth centers or those who have a home birth business; only two insurance companies listed on the HCSF Board of Governors' website offer basic coverage to "all health care providers." While the Availability Plan

is an option, the application for this plan was not yet available. This lack of companies offering basic policies to nurse-midwives, the remarks indicate, limits competition and may drive up the price of coverage. The president's testimony concludes with information regarding communications between ACNM, the Executive Director for the HCSF Board of Governors, and the Board of Nursing regarding nurse-midwives licensure status in instances where the nurse-midwife no longer renders professional services in Kansas (*There is not currently an "inactive" license option for Kansas APRNs.*).

Statutory report, Fund history, and implementation of legislation. The Executive Director, provided the Board of Governor's statutory report (as required by KSA 40-3403(b)) for FY 2013. Among the items detailed in the report:

- The balance sheet, as of June 30, 2014, indicated assets of \$265,988,612 and liabilities amounting to \$202,561,375. The Executive Director noted, however, with the July 1, 2014, implementation of 2014 legislation, the HCSF liabilities increased almost \$28 million the next day.
- Net premium surcharge revenue collections amounted to \$24,231,068. The report indicated the lowest surcharge rate for a health care professional was \$50 (chiropractor, first year of Kansas practice; opting for lowest coverage option) and highest surcharge rate was \$14,058 for a neurosurgeon with five or more years of HCSF liability exposure (selected highest coverage option). It was noted application of the Missouri modification factor would result in a total premium surcharge of \$18,275 for this health care practitioner.
- The average compensation per settlement (52 cases involving 63 claims were settled) was \$381,046, a 9.0 percent increase compared to FY 2012. These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). The report states amounts reported for verdicts and settlements were not necessarily paid

during FY 2014. Total claims paid during the fiscal year amounted to \$25,029,266.

The Executive Director also submitted historical information about the creation and evolution of the HCPIAA, highlighting three principle features of the HCPIAA that have remained intact since 1976, are interrelated and must be maintained:

- A requirement that all health care providers, as defined in KSA 40-3401, maintain professional liability insurance coverage as a condition of licensure;
- Creation of a Joint Underwriting Association, the "Health Care Provider Insurance Availability Plan," to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and
- Creation of the Health Care Stabilization Fund to, (a) provide supplemental coverage above the primary coverage purchased by health care providers; and (b) serve as reinsurer of the Availability Plan.

The Executive Director noted the discussion before the Committee regarding the *Miller v. Johnson* decision at its last meeting. He stated a number of groups, professions, and facilities not previously defined as health care providers had indicated renewed interest as a result of the decision. When they learned the KMS was planning to request introduction of a bill to amend that part of the HCPIAA, the HCSF Board of Governors felt there were a couple of really important improvements that also should be addressed. One of those was to improve the tail coverage. He then addressed the Committee's discussion from last year regarding whether other states employ an independent actuary to offer second opinions and indicated the Board of Governors surveyed the other six states that currently have some type of patient compensation fund and have provided the results in this report (Indiana, Louisiana, Nebraska, New Mexico, South Carolina, and Wisconsin). The Executive Director stated, among the few states that do have

a patient compensation fund, the states are all different in various ways. He pointed out most of the states employ an independent actuary. He stated Kansas has always maintained the kind of fiscal discipline necessary for a program like this to be successful.

The Executive Director next commented on the Medical Professional Liability Insurance (PLI) Market. He stated there has been a number of inquiries from insurance agents asking whether there is any way their clients (primarily adult care homes) can continue to purchase their basic coverage from non-admitted carriers. The Executive Director stated the HCPIAA states health care providers must be insured by admitted carriers. The Executive Director's report states, when the Legislature passed the original HCPIAA, the Legislature wanted to make certain health care providers were insured by companies subject to regulatory oversight by the Insurance Commissioner. In addition, admitted carriers are required to pay assessments into a guaranty fund such that if an insurance company becomes insolvent, any remaining claims for which the company would have been liable can be paid by the guaranty fund. He stated it is extremely important to have all the components in place so that if those health care providers cannot purchase their coverage in the independent market, they need that safety net to make certain they can comply with the requirements of the HCPIAA. The Executive Director stated there are at least seven insurance companies that have already obtained the authorization from the Insurance Commissioner and have indicated an interest in selling coverage to the adult care facilities.

Finally, the Executive Director addressed "a few unforeseen minor problems" in the implementation of HB 2516. He stated there are some physician assistants who continue to maintain active licenses solely for the purpose of providing charity care at clinics for medically indigent patients. The Board of Healing Arts does not have authority to create an exempt license for those physician assistants and will be requesting legislation to create an exempt license category for physician assistants. The legislation would allow these physician assistants to continue providing charity care in those limited settings, and they would be exempt from the professional liability insurance requirements under the HCPIAA. The

Executive Director highlighted another issue: the Board of Nursing does not have the authority to grant inactive licenses to APRNs. He explained, fortunately the Legislature delegated authority to the HCSF Board of Governors to grant temporary exemptions to health care providers when there are exceptional circumstances. In these circumstances, an affidavit must be signed that swears the health care provider will not provide patient care in the State of Kansas during the period of exemption. The Board of Nursing and the Board of Governors has agreed to accept that in those limited circumstances.

The Executive Director also stated it has been suggested the Secretary for Aging and Disability Services does not have sufficient authority to enforce compliance with the HCPIAA. He stated they respectfully disagree with that suggestion, but to be certain, they have corresponded with the General Counsel at the KDADS, requesting his opinion on this matter. Depending on the KDADS' response, a request for legislation delegating necessary enforcement authority to the Secretary may be required. A Committee member later posed a question about whether legislation should be introduced regarding delegating necessary enforcement authority to enforce compliance with the HCPIAA to the Secretary without awaiting a response from the KDADS general counsel. The Executive Director indicated their position will depend on the general counsel's response since KDADS regulates these types of facilities. The Executive Director stated he believes the statute is clear and if clarification is needed, he will communicate with the Legislature.

The Executive Director responded to questions following his presentation and first addressed the new facilities that are becoming part of the HCSF, stating the actuary will be continuously monitoring the loss experience of each category of health care provider, so there is an entirely separate category exclusively for skilled nursing facilities and another separate category exclusively for the assisted living and residential health care facilities. If it is determined the loss experience is attributable to those categories of health care providers, and the claims are extraordinary and for some reason differ from other categories like hospitals and physicians, then the surcharge rates collected from those categories will be increased. In answer to whether the adult care homes can

continue to purchase insurance from a non-admitted carrier, the Executive Director stated those facilities must purchase their primary insurance coverage from an admitted carrier (*i.e.* \$100,000 from the HCSF) and then any additional amount of coverage from an Excess and Surplus carrier; although he believes they will not get a better premium rate than what they can get by paying their surcharge to the HCSF. The Executive Director responded to the issue of whether there should be a request for a statute to provide an exemption for APRNs not currently covered under the HCPIAA, stating they have an informal agreement with the Board of Nursing the next time the Board needs to amend the Nurse Practice Act, that will be one of the requested amendments.

CONCLUSIONS AND RECOMMENDATIONS

The Health Care Stabilization Fund Oversight Committee addressed the two statutory questions posed annually to the Committee. The Oversight Committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the Health Care Stabilization Fund in providing stability in the professional liability marketplace, which allows for more affordable professional liability coverage to health care providers in Kansas.

The Committee notes the enactment of 2014 legislation provides HCSF coverage requirements for five new categories of health care providers, impacts the short-term and long-term liabilities for the HCSF, including the provision of tail coverage and its availability to health care providers with less than five years of experience in the HCSF. Additionally, the current and future changes to the statutory cap on non-economic damages and the impact on claims filed and the associated dollar amount of the claims, will require continued monitoring. Committee oversight of impacts not only on the HCSF but also updates on new health care providers' experiences with the HCSF coverage will continue.

Actuarial review. The Committee discussed its oversight of actuarial reporting provided by the HCSF Board of Governors and whether there was

a need to contract for an independent actuarial review in 2015. The Committee recognized the additional analysis provided by the HCSF Board of Governors' actuary to account for the legislative changes enacted by the 2014 Legislature, including new health care providers subject to HCSF coverage requirements, the change in tail coverage compliance from a five-year waiting period to immediate coverage, and changes to the non-economic damages cap specified in tort law. Following discussion on the actuarial analysis provided to the Committee and the HCSF Board of Governors and the routine audits the Board as a state agency is subject to, the Committee concluded there is no need to contract for an independent actuarial review in 2015.

Other recommendations. The Committee then considered information presented by the Board of Governors' representatives and health care provider and insurance company representatives. The Committee agreed to make the following recommendations:

- **Reimbursement of the HCSF.** The Committee notes the reimbursement schedule created by 2010 SB 414. This law allowed for the reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the KU Foundations and Faculty and the KUMC and WCGME residents for state Fiscal Years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013; and, the HCSF Board of Governors have received 20 percent of the the accrued receivables for the last two years in July. The HCSF received \$1,544,084.43 reimbursement in July 2013, and \$1,544,084.43 in July 2014. The remaining reimbursement receivables are \$4,632,253.37.
- **Fund to be held in trust.** The Committee recommends the continuation of the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the HCSF:
 - The Health Care Stabilization Fund Oversight Committee continues to be

concerned about and is opposed to any transfer of money from the HCSF to the State General Fund (SGF). The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on the behalf of each individual health care provider. Those payments made to the HCSF by health providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the Health Care Provider Insurance Availability Act (HCPIAA), the HCSF

is required to be “. . . held in trust in the state treasury and accounted for separately from other state funds.”

- Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the Health Care Stabilization Fund shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Report of the Telecommunications Study Committee to the 2015 Kansas Legislature

CO-CHAIRPERSON: Senator Mike Petersen

CO-CHAIRPERSON: Representative Joe Seiwert

OTHER MEMBERS: Senators Marci Francisco, Tom Hawk, Forrest Knox, Jeff Longbine, Julia Lynn, Ty Masterson, Robert Olson, and Greg Smith; and Representatives Rob Bruchman, Will Carpenter, John Doll, Randy Garber, Ramon Gonzalez, Annie Kuether, Ronald Ryckman, Sr., Scott Schwab, Jack Thimesch, and Brandon Whipple

CHARGE

- Study telecommunications and selected funding sources;
 - The Kansas Universal Service Fund; and
 - The Federal Universal Service Fund;
- The possibility of establishing a Kansas Broadband Fund; and
- Other issues determined by the Legislative Coordinating Council.

Telecommunications Study Committee

ANNUAL REPORT

Conclusions and Recommendations

The Telecommunications Study Committee reaffirms the State public policy regarding telecommunications set out in KSA 66-2001, but suggests the Senate Utilities Committee and the House Utilities and Telecommunications Committee consider a review of subsection (d), which addresses advancing the development of a statewide telecommunications infrastructure.

The efficiency and effectiveness audit of the Kansas Universal Service Fund was extensive. The Senate Utilities Committee and the House Utilities and Telecommunications Committee should receive presentations by the audit firm during the 2015 Legislative Session.

Both the audit and other issues raised during the Committee's meetings need to be further considered during the 2015 Legislative Session. Accordingly:

- The Committee may meet at least once during the Session; and
- The Senate Utilities Committee and the House Utilities and Telecommunications Committee should study the definitions of telecommunications terms in existing law with a focus on “future-proofing” those definitions to accommodate the rapid changes in technology. Terms to be reviewed should include broadband (currently defined as a specific speed of transmission), telecommunications services, and telecommunications infrastructure.

Proposed Legislation: None.

BACKGROUND

The Telecommunications Study Committee was created by 2013 HB 2201, a bill which also further deregulated telecommunications in Kansas, made changes to distributions from the Kansas Universal Service Fund (KUSF), and allowed the Board of Regents to charge fees for services provided by the Kan-Ed program.

The Committee's charge is to study telecommunications issues, the KUSF, the Federal Universal Service Fund (FUSF), the State's public policy on telecommunications, the possibility of establishing a Kansas Broadband Fund, and other issues determined by the Legislative Coordinating Council. In addition, the Committee is charged with determining the scope of an efficiency and

effectiveness audit of the KUSF. The audit was to be administered by the Kansas Department of Revenue and submitted to the Committee by November 1, 2014.

The Committee is required to submit an annual report to the Senate Committee on Utilities and the House Committee on Utilities and Telecommunications and to submit a report and policy recommendations for telecommunications to those committees as well as to the Senate Committee on Ways and Means and the House Committee on Appropriations, prior to December 31, 2014. The Telecommunications Study Committee sunsets on June 30, 2015.

The Committee met twice during the 2013 Legislative Interim, November 6 and December

12, 2013, and received presentations on topics including the history of telecommunications legislation in Kansas from 1996 through 2013, an overview of the KUSF, state and federal Do-Not-Call legislation, the process for determining KUSF high-cost support, and changes to the FUSF. In addition, the Committee received testimony from industry groups on the effects of changes to the KUSF and the FUSF, and determined the scope of an audit of the KUSF.

COMMITTEE ACTIVITIES

The Committee met once during the 2014 Legislative Interim, on December 16. The Committee received a presentation on the audit of the efficiency and effectiveness of the KUSF; discussed the State's public policy on telecommunications, as set out in KSA 66-2001; received a presentation on broadband funds in four states; and developed its recommendations.

Audit of the Efficiency and Effectiveness of the Kansas Universal Service Fund

Representatives of QSI Consulting, Inc., presented the results of the contracted audit of the KUSF. This section summarizes their findings. Overall, the auditor concluded the KUSF is well-run, with audit and affiliate transaction procedures in place to ensure the KUSF is appropriately sized, contributions are collected from the correct companies, and distributions to recipients are effectively managed. The passage of 2013 HB 2201—which capped KUSF high-cost funding for certain types of carriers, eliminated KUSF funding for certain others, and initiated a phase-out of funding for still other types of carriers—has ensured the KUSF will not grow out of control.

The audit evaluated Kansas statutes and rules governing operation of the KUSF, reviewed the Kansas Corporation Commission's (KCC) audit processes for the KUSF, analyzed factors that determined the level of KUSF support received by recipients from 1997 to 2013, and identified quantifiable benefits of the KUSF program. The audit scope statement developed by the Committee identified specific analyses the auditors were to include in conducting the review, and the report contains extensive appendix tables documenting

this analysis in addition to a lengthy narrative. Major audit findings are discussed below.

Kansas statutes provide the KCC the necessary authority to administer the KUSF in an efficient and effective manner, but do not provide incentives for specific investments by providers other than guaranteeing Rural Local Exchange Carriers (RLECs) can recover the costs of all regulated telephone plants. Part of the review of statutory authority involved an assessment of whether KUSF statutes offered a balanced approach to investments while containing overall costs, and whether statutes allow for investment in technologies such as broadband and cable voice over internet protocol (VoIP).

Kansas telecommunications statutes do not address incentives to invest generally or to expand advanced service capabilities beyond those identified in 1996. The statutes do not address controls or limits on the amount of investment in network facilities and supporting expenses that are eligible for KUSF support.

The statutes are silent regarding the relationship between KUSF cost-based support and investment in broadband, cable VoIP, or other services that may or may not be considered telecommunication services. Only a limited class of broadband-capable facilities (schools, hospitals, libraries, and state and local government agencies) are included in the definition of universal service.

Because Kansas statutes do not prohibit or limit investment in facilities for providing broadband, cable VoIP, or other services that may not be considered telecommunication services from receiving KUSF support, the primary control mechanism is federal rules that govern cost allocation, separations, and affiliate transactions. The effect of using these federal rules is discussed later in this report.

Statutes do not directly address the impact of loss of lines on KUSF support, but they implicitly account for these losses because RLECs' embedded costs, revenue requirements, investments, and expenses are used to determine support. As an RLEC's revenue declines due to line losses, its need for KUSF support is likely to

increase. However, support could be limited by the cap created in 2013 HB 2201. In contrast, the statutory support mechanism for CenturyLink is structured in such a way that its KUSF funding decreases in proportion to line losses.

The KCC follows standard processes when auditing the RLECs that receive cost-based support. The auditors found the timeframe to complete audits is reasonable and audit processes were consistent across companies.

Kansas' statutory framework historically tied KUSF distribution payments to the cost of providing service. Support for the two carriers who chose price-cap regulation, Southwestern Bell (now AT&T) and CenturyLink, was based on the number of supported lines served in high cost areas. The per-line support was calculated using a forward-looking cost model. KUSF support for the RLECs, who chose rate-of-return regulation, was based on each carrier's embedded costs, revenue requirements, investments, and expenses. Competitive eligible telephone companies (CETCs) were covered by an "identical support" rule that provided them the same level of support as the incumbent carrier.

That framework changed with the passage of 2013 HB 2201. Southwestern Bell, which chose to become an "electing carrier," is no longer eligible for KUSF support. CenturyLink's annual KUSF support has been capped – it is limited to the lesser of 90 percent of the support it received in the 12-month period ending February 28, 2013, or \$11.4 million. RLECs are subject to a \$30 million annual group cap. Payments to CETCs are being phased out over a four-year period.

The Federal Communications Commission separations and cost allocation rules used to determine KUSF support for rate-of-return RLECs are outdated. Under those rules, 75 percent of the cost of local loop facilities is allocated to intrastate jurisdiction, but because the rules were created before voice and broadband services began sharing the network, the costs are treated as if the facilities were used exclusively for voice service. To the extent the cost of loop facilities jointly used by voice and broadband services is allocated only to voice service, intrastate revenue requirement calculations, which determine KUSF support, will

continue to overstate the cost of providing voice service. The audit offers three alternative approaches the KCC could use to allocate loop and other network costs between voice and broadband.

KUSF support has dropped significantly since its inception. Annual payouts dropped from a high of \$96.4 million in 1998 to \$41.9 million in 2013, largely because of the decline in support for Southwestern Bell beginning in 2000.

Since 2002, CenturyLink has been the largest recipient of KUSF support, with annual payments ranging from \$9.5 million to \$17.6 million. Within the RLECs, five carriers have received the most funding: Rural Telephone Service Company, Pioneer Telephone Association, Twin Valley Telephone, Craw-Kan Telephone Cooperative, and Southern Kansas Telephone. None of the five have received more than \$5 million per year.

The number of voice lines for the local exchange carriers decreased by approximately 64 percent between 1997 and 2013 (an average decline of 6 percent per year), while broadband service lines have increased by approximately 22 percent per year since 2003.

KUSF support payments comprise about 23 percent of the average recipient's revenue. Combined KUSF and FUSF payments comprise about 51 percent of the average Kansas RLEC's total regulated revenues.

From 1997 through 2013, the KUSF paid out support of nearly \$1 billion. Southwestern Bell and CenturyLink together received approximately 51 percent of the funding, while the RLECs received about 44 percent of the funding. On a net basis (when contributions are subtracted from distributions), the RLECs as a group benefited most. About 67 percent of KUSF contributions came from carriers that do not receive any KUSF support, including wireless carriers, VoIP providers, toll, and others.

Kansas also is a major beneficiary of the FUSF. Statewide, between 1998 and 2013, Kansas received approximately \$2.6 billion in funding, while contributing only \$0.9 billion to the FUSF. The RLECs again benefited most, receiving about 70 percent of the funding for Kansas.

The auditors noted it is difficult to determine the exact impact of the KUSF on local telephone rates, but concluded local rates likely would have been higher than actual rates if the KUSF subsidy was not available. Over the time period reviewed, RLECs received an average subsidy of \$23 per line per month.

State Public Policy on Telecommunications

The Kansas Telecommunications Act of 1996 set out a telecommunications policy framework which is codified in KSA 66-2001. The Act declares it to be the public policy of the State to:

- Ensure every Kansan has access to a first-class telecommunications infrastructure that provides excellent services at an affordable price;
- Ensure consumers realize the benefits of competition through increased services and improved facilities and infrastructure at reduced rates;
- Promote consumer access to a full range of telecommunications services, including advanced services that are comparable in rural and urban areas throughout the state;
- Advance development of a statewide infrastructure capable of supporting applications such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to internet providers, and others; and
- Protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience, and necessity.

Committee members discussed possible changes to the policy, which has not been modified since it was adopted in 1996. Issues debated included whether broadband and data are encompassed within the term “telecommunications”; how to allocate costs between data and voice; recognition that VoIP

“voice” transmissions are actually data; whether it is possible to determine the nature of transmissions passing through the networks; the difficulty of determining appropriate statutory terminology given the rapid changes in communications technology; and whether the phrase “advance development of a statewide infrastructure” was written to create Kan-Ed. Staff were directed to explore the Kan-Ed issue and to request the KCC provide information on what is running through the networks. Committee members agreed all of the issues should be further discussed in the standing committees.

State Broadband Funds

Staff from the Kansas Legislative Research Department reviewed broadband funds created in four states. Broadband was expanded in many states using federal moneys provided through the American Recovery and Reinvestment Act of 2009. More recently, some states have created or renewed funding for state broadband funds. Four state programs were reviewed as follows:

- The **California** Advanced Service Fund supports projects that provide broadband to areas without access and, if funds are available, supports additional build-out in underserved areas. The Fund is supported by a 0.464 percent surcharge on intrastate telecommunications services. Infrastructure grants are available for up to 70 percent of project costs in unserved areas and 60 percent in underserved areas. Companion loans provide supplemental financing for grant recipients of up to 20 percent of project costs. The Fund also provides grants and loans to cover the costs of installing broadband in public housing. Eligible applicants include telephone and wireless companies, as well as governmental units in limited circumstances. Public housing authorities can apply for public housing grants.
- The **Maine** ConnectME grants provide funding for last-mile infrastructure to provide broadband in unserved areas. Grants are funded by a 0.25 percent surcharge on instate communications services. Grants provide up to 50 percent

of the cost, matched with funding from an internet service provider, of bringing affordable access to unserved homes and businesses which then pay a monthly access fee to the service provider. Eligible applicants include local governments and authorities, private for-profit companies that provide broadband, and any other group deemed capable.

- The **Minnesota** Border-to-Border Broadband Development grants provide funding for middle-mile and last-mile infrastructure that supports broadband service scalable to speeds of at least 100 Mbps download and 100 Mbps upload in unserved and underserved areas. Grants are funded by a one-time appropriation of \$20 million from the general fund and require matching funds equal to at least 50 percent of the total project cost. Eligible applicants include incorporated businesses or partnerships, political subdivisions, Indian tribes, and certain Minnesota nonprofit groups.
- The Connect **New York** Broadband Grant Program provides funding for last-mile projects to expand broadband in unserved and underserved areas. The program is funded with \$25 million in state funds, and requires matching funds equal to 20 percent of the total project cost. Eligible applicants include incorporated organizations, tribal organizations, local units of governments, cooperatives, private corporations, and limited liability organizations.

CONCLUSIONS AND RECOMMENDATIONS

The Telecommunications Study Committee reaffirms the State public policy regarding telecommunications set out in KSA 66-2001, but suggests the Senate Utilities Committee and the House Utilities and Telecommunications Committee consider a review of subsection (d), which addresses advancing the development of a statewide telecommunications infrastructure.

The efficiency and effectiveness audit of the KUSF was extensive. The Senate Utilities Committee and the House Utilities and Telecommunications Committee should receive presentations by the audit firm during the 2015 Legislative Session.

Both the audit and other issues raised during the Committee's meetings need to be further considered during the 2015 Legislative Session. Accordingly:

- The Committee may meet at least once during the Session; and
- The Senate Utilities Committee and the House Utilities and Telecommunications Committee should study the definitions of telecommunications terms in existing law with a focus on "future-proofing" those definitions to accommodate the rapid changes in technology. Terms to be reviewed include broadband (currently defined as a specific speed of transmission), telecommunications services, and telecommunications infrastructure.