

Report of the Special Committee on Kansas Emergency Management Act to the 2021 Kansas Legislature

CHAIRPERSON: Representative Fred Patton

VICE-CHAIRPERSON: Senator Eric Rucker

OTHER MEMBERS: Senators Marci Francisco, Dennis Pyle, Mike Thompson, and Rick Wilborn; Representatives Mike Amyx, John Barker, Stephen Owens, Bradley Ralph, Eric Smith, Ponka-We Victors, and Valdenia Winn

STUDY TOPIC

The Committee is directed to:

- Review the Kansas Emergency Management Act, the State's new COVID-19 response package (2020 Special Session HB 2016), and the oversight and emergency management approaches utilized in other states, and make recommendations to the Legislature on any improvements or changes that should be considered.

Special Committee on Kansas Emergency Management Act

REPORT

Conclusions and Recommendations

The Committee considers this report a summary of items of interest forwarded by a number of conferees, and it should not be used or construed as a guideline for the executive branch or any state agency. The Committee recommends the chairpersons of the appropriate standing committees of the Legislature consider working with the Office of Revisor of Statutes staff to research and respond to concerns brought by conferees in the form of proposed legislation during the 2021 Legislative Session. The report should not be construed as legislative intent, but merely a fact-finding exercise for standing committees of the 2021 Legislature. [*Note: the Committee reached conclusions but did not make specific recommendations on a number of items discussed.*]

Items for further study by appropriate standing committees. The Committee recommends the appropriate standing committees of the 2021 Legislature further study the following items:

- Changes made to the Kansas Emergency Management Act (KEMA) in 2020 Special Session HB 2016 (HB 2016) regarding the Governor's powers as enumerated in KSA 2019 Supp. 48-925(c);
- Appropriate penalties and enforcement mechanisms for violations of KEMA;
- Language of Section 6 of HB 2016 regarding the closure of businesses;
- Immunity from liability for adult care homes;
- A constitutional amendment that would authorize the Legislature to take certain steps in dealing with an emergency;
- Local authority to implement an order less restrictive than a statewide order during an emergency;
- Extending the authority of the Chief Justice of the Kansas Supreme Court to modify deadlines and time limits after March 31, 2021, by eliminating the sunset provision in HB 2016 or decoupling the authority of the Chief Justice from an emergency declaration;
- A constitutional amendment that would change the requirements for calling a special legislative session;
- Legislation that would enable first responders to share information with law enforcement regarding an individual's exposure to infectious disease;
- Prohibition on executive orders to suspend any portion of the Kansas Criminal Code; and
- Options for combating rampant unemployment insurance claim fraud.

Items raised by conferees needing further study. The Committee agreed the following items raised by conferees could be addressed either by amending KSA 48-923 (governing limitations on the effect of KEMA) or by making it easier for the full Legislature to convene during an emergency, but further study is needed:

- Review of the authority of the Legislature to revoke a governor’s use of the delegated emergency powers to determine whether such authority violates the separation of powers;
- Clarification that states of disaster emergency are to be “proclaimed,” and the exercise of powers delegated in KSA 48-925(c) during a proclaimed state of disaster emergency is to be by issuance of “orders.” KSA 48-925(b) states the powers in KSA 48-925(c) are to be exercised by “orders and proclamations,” while the text of KSA 48-924(b)(1) states a governor is to “proclaim” a state of disaster emergency;
- Clarification by the Legislature on how it intends a governor’s KSA 48-925-delegated emergency powers to interact with the constitutional and statutory powers of other entities, *e.g.*, the State Board of Education and local school boards; and
- Review of the text and operation of provisions in HB 2016 that allow counties to adopt orders less restrictive than a governor’s emergency order relating to public health.

Items raised by conferees outside of the scope of the Committee. The Committee agreed the following items, raised by conferees but outside the scope of this Committee’s charge, should be considered by the 2021 Legislature:

- The 2021 budget committees should study a prioritization penalty for agencies that do not spend money on cybersecurity;
- Whether Kansas public safety telecommunicators should be included in the definition of the term of “emergency responder” in disaster emergency relief efforts;
- Whether statutory speedy trial limits should be suspended or eliminated;
- Whether the content of the executive order allowing for nurse practitioners, nurse anesthetists, and physician assistants to practice in many facilities without physician supervision should be made permanent;
- Whether the provisions of the executive order allowing for health care professionals licensed in other states to practice in Kansas to deliver telehealth without a Kansas license should be made permanent;
- Whether a direct tax credit should be provided in emergency instances when the government issues orders prohibiting evictions and foreclosures;
- What information the Kansas Department of Health and Environment should be required to release during a pandemic, and what time limitations should be placed on the release of that information;
- What changes are necessary for the operation of the Legislature during an emergency (*e.g.*, meeting off-site and remote voting);
- Whether Article 15, § 13 provisions of the *Kansas Constitution* should be expanded to include disasters;

- Whether the closure of businesses during an emergency should require legislative oversight;
- What discretion, if any, should be given to keep businesses open at the local level during an emergency; and
- Whether the Governor should be allowed to close private schools during an emergency.

Proposed Legislation: None

BACKGROUND

The Special Committee on Kansas Emergency Management Act was created by the Legislative Coordinating Council (LCC) to review the Kansas Emergency Management Act (KEMA); 2020 Special Session HB 2016 (HB 2016), enacted to address the COVID-19 pandemic; and the oversight and emergency management approaches utilized in other states. The Committee was directed to make recommendations to the Legislature on any improvements or changes that should be considered.

The Committee was authorized by the LCC to meet for six days and met at the Statehouse on August 24, 25, and 26, 2020, and on September 22, 23, and 24, 2020.

COMMITTEE ACTIVITIES

August 24 – 26 Meetings

In accordance with its charge, the Committee met to hear informational presentations from legislative staff and testimony from stakeholders related to KEMA, HB 2016, and the oversight and emergency management approaches utilized in other states.

Staff Presentations

History and review of KEMA. An Assistant Revisor of Statutes provided a brief history of the KEMA. She noted its origin in 1951 as a civil defense act. She traced its development through 1955, when worker insurance was addressed; to 1975, when emergency preparedness was placed under the Kansas Adjutant General's Department; and to 1994, when the Division of Emergency Management was established, and lead authority

in an emergency was established if the Governor was not available. Amendments to KEMA followed in 2001 and 2002, addressing animal and plant diseases, and in HB 2016. The Assistant Revisor outlined the various provisions of KEMA and noted recent changes to KEMA.

Review of HB 2016. The Assistant Revisor elaborated further on HB 2016 as it relates to specific emergency issues. She explained the provisions of the bill related to the use of disaster relief funds; the authority of the Governor and the State Finance Council in regard to closing businesses and establishing timelines; the authority of county commissioners and county and local boards of health; and the authority of the state school board regarding school closures.

The Assistant Revisor identified special provisions of the bill that address COVID-19 issues or entities affected by the pandemic, including the reopening of businesses closed by the Governor's declaration, privacy concerns raised by COVID-19 contact tracing, the pandemic's effect on employment security law, the increased needs for health care, the vulnerability of adult care homes, the curbside sale of liquor; and statutory adjustments to court and first responder functions.

Emergency management in other states. Staff from the National Conference of State Legislatures (NCSL) presented information regarding emergency and disaster management and legislative oversight of emergency executive powers in other states. NCSL staff reviewed the current constitutional and statutory landscape related to executive powers during an emergency or disaster. Staff stated all 50 states authorize their governors to declare a state of emergency, under which executive authority is expanded, and certain

statutes may be suspended. Staff delineated conditions under which a legislature may revoke a governor's orders and identified states that have enacted legislation to amend emergency management declarations by strengthening legislative oversight.

Comments From Stakeholders

Wolf Creek Generating Station. The Oversight Director of Wolf Creek Generating Station reviewed statistics regarding the station; he noted the station produces 1,200 megawatts of power, has been operational since 1985, and is licensed through year 2045. He outlined the function of a nuclear plant and the variety of safety systems that protect the public. He then described the plant's emergency preparedness: coordination with the Kansas Division of Emergency Management (KDEM), quarterly training meetings, mock disaster drills that include other agencies and 400 participants, and post-drill evaluations. Regarding cybersecurity, he said the plant has two separate systems (a business system and an operational system) that minimize cyber intrusions. He reported the pandemic has had no adverse impact on plant operations.

Adjutant General. The Adjutant General reviewed the history of KEMA. He stated the statutes began as a civil defense provision in the event of a nuclear attack, an emphasis that was broadened in 1974 to an all-hazards focus that has been periodically updated, most recently in response to the COVID-19 pandemic. He noted in 2013 KDEM received accreditation through the Emergency Management Accreditation Program, a recognition that enhances Kansas' ability to muster a variety of resources in response to any disaster at any time.

The Adjutant General explained the Governor's declaration of an emergency activates KDEM's resources to coordinate with local governments and responded to members' questions regarding potential statutory changes, supply storage, and assistance roles.

Kansas Department of Health and Environment (KDHE). The Secretary of Health and Environment reviewed the impact of HB 2016 on KDHE. He briefly listed historic disasters that KDHE has responded to and specifically how the

agency is dealing with the COVID-19 pandemic. He noted COVID-19 cases in August seemed to be trending down from July's 12,822 new-case peak. He detailed eight "lines of effort" including epidemiology/disease tracking; lab testing; media and community education and engagement; isolation management; policy guidelines; acting as a governmental entity liaison; best practices research; and management of materials, supplies, stockpile, and surge. The Secretary stated KDHE has a goal of conducting 60,000 COVID-19 tests per month through 2020.

Representative Kristey Williams, Chairperson, House Committee on K-12 Education Budget. Representative Williams discussed the effects the pandemic has had on students and outlined recommendations for amending the emergency management statutes. Referencing the normal "summer slide" of a student's proficiency loss, she stated the loss during the pandemic has increased.

Representative Williams then offered the following recommendations to help define roles and responsibilities for local school district boards related to executive orders and the number of school contact hours:

- Exclude private schools from Section 7 of HB 2016;
- Codify the Kansas State Board of Education guidance on meeting the statutory school-term requirements, especially as it relates to remote learning;
- Clarify local school boards have broad governing authority over the daily operation of public schools, especially as related to public health;
- Clarify the duties and obligations of the three branches of state government in relation to public education;
- Require school districts to offer additional opportunities for at-risk students to receive additional educational opportunities; and

- Provide education savings accounts for students when the school district does not provide in-person instruction.

Representative Williams also provided resources regarding funding remote learning and related opinions from the Kansas Attorney General.

Kansas State Department of Education (KSDE). The Commissioner of Education presented KSDE’s response to HB 2016. He noted the educational vision of KSDE and referenced the 1,200-page document “Navigating Change: Kansas’ Guide to Learning and School Safety Operations.” After commenting KSDE has authority over educational standards, but not over the operations of any local school board, he said the goals of the plan are to assure a strong learning environment for students and keep students and staff safe. He outlined the key factors in instructional competence and identified the three learning environments: on-site, hybrid (schools operating at reduced capacity), and remote, all of which are governed by gating criteria.

Kansas Association of Counties. The Legislative Policy Director and General Counsel of the Kansas Association of Counties offered a county perspective on KEMA. He stated his belief that a disaster response should be tailored to the type of disaster. He further stated that because disaster legislation cannot anticipate details of future disasters, such legislation should provide a general framework that allocates authority to relevant individuals or local governing entities. He noted KEMA grants two types of authority, general and specific, and he offered observations to show how HB 2016 creates gaps in authority. He explained HB 2016 exempts KSA 65-201 and KSA 65-202 from county home rule authority, an action he described as inconsistent with local control. He stated school districts operate under different authority from counties, a fact that creates confusion for county officials. He further stated the current disaster declaration has an expiration date, after which it is not clear whether federal aid can be accessed. He recommended if amendments are made to HB 2016, the statute clarify the distribution of authority to provide a hierarchy for school boards, county commissioners, and KSDE.

Kansas Chamber of Commerce and National Federation of Independent Businesses.

The Vice President of Government Affairs, Kansas Chamber of Commerce, and the State Director of the National Federation of Independent Businesses jointly addressed issues related to the Governor’s executive orders and the orders’ impact on the business community. The Vice President said he appreciated the Governor including the business community in the original executive order planning but stated his belief that as the pandemic has continued, the executive orders have had serious negative effects economically, as well as glaring inconsistencies in how the orders have been implemented. He recommended the distinctions between “essential businesses” and “non-essential businesses” be eliminated and an operational risk-management policy be established. He also stated, while HB 2016 provides checks and balances for due process at the local level, he believes it does not offer the same checks and balances at the state level, and check and balances should be adopted at the state level. He also stated his belief that some health officials have been too aggressive in enforcing the executive orders on the business community.

Kansas Department of Agriculture (KDA).

The Chief Counsel of KDA reviewed the agency’s responsibilities to provide security for the state’s plants and animals during a disaster emergency. He reported the Secretary of Agriculture is authorized either independently or in cooperation with other government entities to control plant pests and to designate certain species of plants as noxious weeds. He stated the Secretary and the Animal Health Commissioner have broad authority to respond to contagious or infectious animal diseases by a stop-movement order or a quarantine. He explained a Governor’s emergency declaration regarding animal disease in the state is rare unless a disease outbreak is national and the declaration is needed to access federal funds. He detailed the agency’s comprehensive security and emergency exercises in conjunction with other agencies and its participation in the state’s emergency management system. He noted KDA also offers a supporting role to other agencies during emergencies.

League of Kansas Municipalities. The General Counsel of the League of Kansas Municipalities testified regarding the role of cities

in dealing with the KEMA. She noted the differences between cities and counties, the latter functioning as an administrative arm of the State and the former existing solely to provide services to residents. She stated Kansas has three classes of cities based on population and range in size from 12 residents to almost 400,000, with a variety of administrative systems that function under the State's constitutional home rule statutes. She stated, under the current KEMA structure, a city's role is to participate in the county's comprehensive emergency management program. However, she reported the normal chain of command established for emergencies has not functioned effectively during the COVID-19 disaster primarily due to a lack of statewide oversight or a comprehensive information center. She stated her belief that the Governor's executive orders focused on counties, ignored the role of cities, and allowed discretionary and erratic enforcement that created confusion for local officials and citizens. The General Counsel recommended the statutes be amended to make clear the role of cities, and she suggested, for long-term emergencies such as the pandemic, an executive order should differentiate enforcement responsibilities among varying geographic areas of the state.

State Fire Marshal. The State Fire Marshal outlined the agency's involvement under KEMA. He explained the Fire Marshal is involved in the Kansas Response Plan, an all-hazards plan that provides a framework and assigns responsibilities to supporting agencies. He reported the agency is responsible for 3 of the 15 Emergency Support Function (ESF) Annexes (Fire, Search and Rescue, and Hazardous Materials). He provided details for each of these functions. He noted the pandemic falls outside the agency's ESF responsibilities, but cited specific ways the agency has assisted in addressing needs of groups and governmental entities. The State Fire Marshal commented he saw no areas where KEMA needs adjusting, but he relayed a message from the Kansas Firefighters' Association requesting a review of KEMA to identify areas of efficiency and consolidation, specifically mission overlap among Kansas Search and Rescue, the Kansas Forest Service, and KDEM.

Office of the Attorney General. The Attorney General reviewed the provisions of KEMA, specifically KSA 48-920 *et seq.* He noted the

unprecedented use of KEMA in responding to the COVID-19 pandemic and executive orders have presented many complex legal questions. He further noted HB 2016 addresses some of these legal issues by clarifying the language of KSA 48-925(b) that the Governor's delegated powers found in KSA 48-925(c) are comprehensive, not merely illustrative, and that violations are considered civil, not criminal.

The Attorney General then listed further concerns and recommended changes in nine topic areas:

- A distinction should be made between delegated powers that are administrative and those that are clearly legislative;
- Two Kansas Supreme Court decisions make the KEMA mechanism for a legislative check on a Governor's use of delegated emergency powers possibly constitutionally flawed;
- The Governor is delegated extraordinary power to suspend state statutes, but the text specifies only "regulatory" powers may be suspended; the term "regulatory" does not clearly mark a boundary or indicate a definitive application;
- To further clarify the issue, it would be helpful for the Legislature to require a Governor to specify which statutes are to be suspended;
- KSA 48-925(b) states the powers of KSA 48-925(c) are to be exercised by "orders and proclamations." An earlier statute uses only the word "proclaim." A commingling of the terms "orders" and "proclamations" injects ambiguity into the statutes;
- KSA 48-925 does not mention schools, but the statute has been used to regulate the operation of schools and may be in violation of Article 6, § 5 of the *Kansas Constitution*;
- The Home Rule clause of the *Kansas Constitution* grants an authority to cities

that can be limited only by legislative action, introducing an ambiguity as to whether a Governor's executive order is a legislative action;

- HB 2016 establishes a mechanism whereby county commissioners may adopt orders that are less restrictive than the Governor's emergency orders; what is not clear is whether the county's orders can replace the Governor's executive order; and
- One interpretation of KEMA allows a Governor to circumvent legislative actions by declaring sequential states of emergency.

The Attorney General then raised broader policy issues that KEMA presents when what has been declared as an emergency extends for an indeterminate amount of time. He posed seven questions to be considered in formulating changes to KEMA. He followed up these questions by encouraging members to review Article 15, § 13 of the *Kansas Constitution* and to consider an amendment to ensure the Legislature is included in emergency decision-making when dealing with long-term emergencies like the current pandemic.

September 22 – 24 Meeting

The Committee again met to hear presentations from staff, testimony from interested parties on KEMA and HB 2016, and to make recommendations to the 2021 Legislature based on testimony heard and discussion by the Committee.

Staff Presentations

Timeline of COVID-19 pandemic public health emergency events. An Assistant Revisor of Statutes briefly noted a memorandum providing a timeline of events related to the COVID-19 public health emergency.

Relevant statutory authority for the Secretary of Health and Environment, county commissioners, and local health officers. The Assistant Revisor reviewed a memorandum summarizing the statutory authority given to the Secretary of Health and Environment, boards of

county commissions, and local health officers during a public health emergency.

Application of statewide public health orders to Native American reservations. The Assistant Revisor reviewed a memorandum explaining the application of state and tribal council public health orders to residents and businesses located on Native American reservation land in Kansas.

Emergency and disaster declarations in Kansas. A Senior Research Analyst of the Kansas Legislative Research Department reviewed emergency and disaster declarations in Kansas. He explained the difference between a federal disaster declaration (*i.e.*, issued only by the President) and a state declaration (*i.e.*, issued by a Governor or a Tribal Chief Executive) and outlined the types of assistance available through emergency declarations, major disaster declarations, and fire management assistance declarations.

Recent information technology security audits. The Information Technology (IT) Audit Manager, Legislative Division of Post Audit (LPA), briefed the Committee on recent IT security audits. She reported more than 50 percent of the agencies audited between 2017 and 2019 did not substantially comply with IT security standards and best practices. She noted two causes for these lapses: Top management failed to make IT security a priority, and staff resources were inadequate to maintain security. She listed the most common security weaknesses in the audited agencies; items included failure to patch vulnerabilities, insufficient training of staff, inadequate protection of data, and absence of account security control. She stated Kansas' 2018 Cybersecurity Act has strengthened the State's IT security, but she warned of significant consequences if present vulnerabilities are used by hackers to gain access to state data and networks. She recommended creating a stronger security posture across state agencies.

Comments from Stakeholders

Office of the Governor. The Chief of Staff, Office of the Governor, outlined concerns of the Governor in relation to KEMA. He noted KEMA is a blending of legislative and executive emergency authority and, citing the *Kansas*

Constitution statement that the Governor has “supreme executive power,” he said KEMA should not be made so cumbersome as to restrict the Governor’s power to protect and provide for Kansas citizens. He further cited the State’s 2005 adoption of the National Incident Management System, which provides a framework for emergency responses. He also commented the home rule provisions in state law should not hinder the State’s action under KEMA, and local or regional approaches to emergency management often create a patchwork of confusing restrictions. The Chief of Staff said he cautions against changes to KEMA that would jeopardize federal assistance and warned outside legal review or publication requirements for executive orders will needlessly delay state action and assistance.

Judicial Branch. The Special Counsel to the Kansas Chief Justice said the Kansas courts were grateful for HB 2016 and 2020 House Sub. for SB 102, which addressed continuity of operations for Kansas courts during an emergency. He reviewed the authority of the Chief Justice during an emergency to modify a deadline or time limit established by statute, modify speedy trial requirements, and adjust time limits under civil statutes. In considering changes to KEMA and providing continuity for the court system, he recommended the following:

- Eliminate the provision contained in HB 2016 that sunsets the Chief Justice’s authority to modify deadlines and time limits after March 31, 2021;
- Grant the Chief Justice authority to modify deadlines and time limits outside of a statewide emergency declaration;
- Codify the provision that permits the Chief Justice to regulate time limits for the courts; and
- Make permanent the use of two-way audio-visual communication in court proceedings.

Kriegshauser Law, LLC. The principal of Kriegshauser Law, LLC, reviewed what he stated he considers limitations in KEMA when dealing

with health events such as the current COVID-19 pandemic. He noted three principles in dealing with emergencies such as the current pandemic: A three-branch form of government is a system of checks and balances; in a pandemic, a government needs to act decisively and efficiently; and the previous two principles create conflicts and inefficiencies that must be bridged by due process.

The principal of Kriegshauser Law offered eight recommendations:

- Continue the changes made by HB 2016;
- Broaden the language of Section 6 in HB 2016 to allow legislative collaboration;
- Remove “private schools” from Section 7 of HB 2016;
- Increase due process for long-term disasters;
- Clarify that local units of government do not have authority to add regulations to an executive order;
- Make executive orders subject to a hearing within 72 hours (KSA 65-129c);
- Require KDHE to maintain a central repository for all executive orders and health information; and
- Define the term “commandeered or otherwise used in coping with a disaster” in KSA 48-933(c).

City Manager, Dodge City. The City Manager of Dodge City reviewed a typical disaster response process and emphasized preparation is key in addressing any disaster. He reviewed the steps for emergency management outlined by the Federal Emergency Management Agency (FEMA)—prevention, mitigation, preparedness, response, and recovery—and the emotional stages of those surviving a disaster. He stated KSA 65-5722 outlines the power and duties of the Commission on Emergency Planning and Response and noted the Emergency Support Function (ESF)

mechanisms that offer coordinated responses to a disaster. The City Manager said the cities and counties that followed these protocols handled the emergency orders better than those that did not. Responding to a question, he stated counties that developed their own emergency preparedness plans were more effective than those that approved a plan without adapting it to their county.

Kansas County and District Attorneys Association. The District Attorney of the 18th Judicial District appeared on behalf of the Kansas County and District Attorneys Association. He focused on the impact of HB 2016 and House Sub. for SB 102 on the Kansas courts. He stated when the COVID-19 emergency order was extended, a serious backlog in the court system was created, which is a delay that violates a defendant's constitutional and statutory rights to a speedy trial. He stated the stay-at-home order and the social-distancing requirement made it "almost impossible" to select jurors for a jury trial. The District Attorney recommended amending KSA 2020 Supp. 20-172 (provisions of House Sub. for SB 102) to allow the Chief Justice to modify deadlines and time limits "when the Chief Justice determines such action is necessary to secure the health and safety of court users, staff, and judicial officers" rather than making that authority conditional on a Governor's emergency declaration. He also made the suggestion to eliminate or sunset the statutory right to a speedy trial and allow the constitutional right to a speedy trial to take precedence. He stated the current court dockets are overwhelmed with pending cases.

Kansas Hospital Association (KHA). The Vice President of Government Relations of KHA reviewed the effects KEMA has had on Kansas hospitals. She noted the COVID-19 pandemic occurring first on the East Coast allowed advanced preparations for Kansas hospitals, and she outlined procedures initiated to protect both staff and patients. The Vice President said early difficulties involved communication among the hospitals, an issue that was improved by the KHA introducing daily calls statewide. She expressed gratitude for the assistance of the Kansas National Guard and the central warehouse for personal protective equipment (PPE).

Americans for Prosperity-Kansas. The Director of Americans for Prosperity-Kansas

reviewed the effects of the pandemic on the business community and suggested what provisions should be retained or eliminated from KEMA. She urged members to make permanent HB 2016 Sections 20 to 24, which waive scope of practice restrictions for certain health care professionals and allow expansion of telemedicine. The Director stated parts of the Governor's executive orders created barriers for businesses and restrictions that limited business owners' freedoms, such as the designation of essential and nonessential businesses. She also recommended limited liability protection for businesses negatively impacted by the executive orders.

Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association. The Legislative Liaison for the law enforcement organizations offered specific recommendations to improve KEMA and indicated KEMA has worked well for short-lived natural disasters, but has been too limiting for the COVID-19 pandemic. He reviewed the challenges faced by law enforcement officers in enforcing the various executive orders and interpreting the parameters established by KEMA. The Legislative Liaison affirmed the provisions in HB 2016 that changed violations of health-related orders from criminal to civil penalties, but he said the bill failed to address other types of violations having varying severity levels. He recommended creation of a central repository for executive orders so law enforcement entities can coordinate enforcement and a violation grid similar to that of a sentencing grid to distinguish between health care infractions and more serious violations. After commenting on the difficulty for jails to appropriately deal with infected individuals, he recommended amending provisions in Section 18 of HB 2016 to address sharing information with first responders and to replace the term "COVID-19" with "infectious disease."

Johnson County Sheriff's Office. A Special Deputy Sheriff reviewed the history of the COVID-19 pandemic and related federal emergency declarations, the Governor's executive emergency orders, and complementary orders restricting certain public activities issued by local health officials. He indicated these orders and interpretations created confusion as to what constituted a lawful order and which statutes or regulations were suspended under emergency

orders. The Special Deputy Sheriff made three recommendations to assist law enforcement personnel in being more effective during a pandemic:

- Define which statutes are “regulatory in nature” that may be suspended under KEMA;
- Make the civil penalties enacted under HB 2016 permanent; and
- Make the speedy trial issue a priority for the 2021 Legislative Session.

Kansas Emergency Management Association (Association). The President of the Association explained the Association is dedicated to providing excellence in emergency management that offers comprehensive preparation, planning, and collaboration. In addressing the relationship between a county and cities within that county, he stated county-led emergency planning will provide more continuity than having cities create their own emergency plans.

Kansas Advocates for Better Care. The Executive Director of Kansas Advocates for Better Care addressed the effects of KEMA and the COVID-19 pandemic-related executive orders on long-term care facilities. She gave three anecdotal examples to illustrate issues related to long-term care facilities, assisted living facilities, and home health care individuals and emphasized it was important to provide timely information that includes the location of COVID-19 outbreaks. The Executive Director explained individuals over 65 years old are especially vulnerable to the harmful effects of COVID-19. She shared a table showing that Kansas seniors represented 44 percent of hospitalizations and 80 percent of COVID-19 deaths in the state. Members requested follow-up information that would identify deaths caused directly by COVID-19, which deaths had the disease as a contributing factor, and what percentage of COVID-19 cases occurred in people of color.

Kansas Health Care Association (KHCA). The President and Chief Executive Officer (CEO) of KHCA reviewed the contributions to

communities and the state by long-term-care and assisted living facilities. She noted her members must interact with KDHE, the Kansas Department for Aging and Disability Services, KDEM, local health care coalitions, and county health departments. She noted difficulties for providers, including hiring and retaining staff during the pandemic, delays in obtaining COVID-19 test results, testing costs, and the delicate balance between keeping residents safe and allowing interaction with families. The President and CEO recommended two changes in regulations: allow those working as medical staff under executive orders to be given professional accreditation when the order expires, and address liability issues related to caring for residents during an emergency.

CONCLUSIONS AND RECOMMENDATIONS

On September 24, the Chairperson reviewed the previous five days of testimony heard by the Committee and presented a list of 37 items for Committee discussion and recommendation. The Committee considers this report a summary of items of interest forwarded by a number of conferees, and states it should not be used or construed as a guideline for the executive branch or any state agency. The Committee may recommend that the chairpersons of the appropriate standing committees of the Legislature consider working with the Office of Revisor of Statutes staff to research and respond to concerns brought by conferees in the form of proposed legislation during the 2021 Legislative Session. The report should not be construed as legislative intent, but merely a fact-finding exercise for standing committees of the 2021 Legislature.

HB 2016 provisions that should be made permanent. The Committee agreed the enumerated powers found in KSA 48-925 should be considered an exhaustive list and not merely examples of the kinds of powers granted to the Governor pursuant to an emergency declaration, and each emergency order issued by the Governor should be required to list which enumerated power in KSA 2020 Supp. 48-925(c) the order is based upon.

Discretion of local health officers to make sanitation inspections of school buildings. The

Committee agreed county officials should be given discretion in applying executive orders.

Penalties and enforcement for violations of KEMA. The Chairperson referenced a follow-up document from a representative of law enforcement organizations that recommends sanctions for violations and inclusion of a new subsection of KSA 48-939. Extensive discussion followed, but the Committee agreed it is not the task of this Committee to decide the appropriate penalties, and the issue should be sent to the Judiciary committees of each body in the 2021 Legislative Session.

Separate category for human pandemic disasters in KEMA. The Committee agreed that no conferees requested the Committee break KEMA into specific sections.

Designation of when legislative oversight should be increased. The Committee agreed any time-period regulation should first distinguish between a local disaster and a statewide disaster. The Committee agreed a legislative voice is needed, whether that be an expansion of the State Finance Council or reconvening the entire Legislature. The Committee noted the need to make it easier for the Legislature to conduct business remotely to anticipate future emergencies that make it dangerous or impractical to meet at the Statehouse.

How legislative oversight should be provided and mechanisms for revoking executive orders. The Committee discussed the following possibilities:

- Leave the statute as it is with the State Finance Council representing the Legislature but, after a certain time period, add further legislative input;
- Expand the State Finance Council, with consideration to the geographic areas represented;
- Call the Legislature into a special session;
- The Legislature should review the Governor’s veto power in KSA 75-3711(b); and

- If the Legislature opposes the executive order, allow the expanded State Finance Council to override the executive order with a two-thirds vote.

Authority of the Legislature to extend a disaster declaration. The Committee agreed the Governor should have exclusive authority to declare or extend disaster declarations and generally manage the disaster response.

Authority of a legislative oversight body to modify or extend a disaster declaration by 30 days. The Committee agreed the State Finance Council or other oversight body should have the authority to decide such time limits and there is a need to recognize the difference between emergency declarations and emergency orders. The Committee agreed it is more concerned about emergency orders than emergency declarations.

Legal review of emergency orders. The Committee agreed, if the State Finance Council were to be expanded, its review and ability to override any order with a two-thirds vote would be sufficient. In addition, advice and counsel by the Attorney General might be appropriate prior to issuance of orders.

Effective dates of executive orders. The Committee agreed some sort of clarifying language might be appropriate, such as “effective when publicly announced” and not necessarily an effective date only upon publication in the *Kansas Register*.

Mechanism to establish a state of emergency in order to qualify for federal disaster assistance. The Committee agreed no action should be taken regarding this issue.

Central repository for data related to the COVID-19 pandemic, including case rates, death rates, hospitalizations, emergency orders, statutory reports, and other information, maintained by KDHE. A member stated there may be a need for a central repository, but without a clear implementation strategy, these issues are too complex to make a statutory change effective. Another member stated Chapter 65 of the *Kansas Statutes Annotated* requires reports, and the public

needs to be able to see those reports, so having a venue to review those orders seems to be of value. Another member stated expansion of broadband service should be a priority if the Legislature requires KDHE to maintain a central repository.

Clarification of language in KSA 48-933(c) (i.e., “commandeered or otherwise used in coping with a disaster”). A member noted a need to define what “commandeer” means. Another member stated this issue should not be addressed by statute and that there is concern over a process where liability is created on the part of the State through statute. Another member stated officials need to retain the authority to use property during an emergency without opening themselves to liability.

Restriction on counties opting out of statewide orders. The Committee agreed this issue need not be addressed.

Discretion of cities in following multiple county orders. In the case of a city that is located in two or more counties, KSA 48-929(g) provides that a city may petition the boards of county commissioners to determine which county has authority; if this process does not occur, then it may be appropriate for the Governor to decide which county is in charge until the counties and city come to an agreement.

Authority of the Governor to declare sequential states of disaster. The Committee agreed sequential states of disaster should be declared only when there is legislative oversight.

Requirement of the Governor to state which statutes are intended to be suspended when using powers delegated by KSA 48-925(c)(1). A member noted the the Governor has already indicated such parameters during the current emergency orders. Another member stated, as suggested by the Attorney General, the Governor should include each statute that he or she intends to be suspended in each executive order going forward.

Homeland Security Regions for local emergency orders. The Committee agreed counties should continue to issue emergency orders rather than have orders issued for the seven

regions designated in Kansas by the U.S. Department of Homeland Security.

Discretion in local enforcement of executive orders. The Committee agreed clarification may be needed to say a city is acting on behalf of the State when an executive order gives a city discretion in enforcing said order.

Law enforcement powers of the Adjutant General. The Committee made no recommendation related to this issue.

Items raised by conferees needing further study. The Committee agreed the following items raised by conferees during testimony could be addressed either by amending KSA 48-923 (governing limitations on the effect of KEMA) or by making it easier for the full Legislature to convene during an emergency:

- Review of the authority of the Legislature to revoke a governor’s use of the delegated emergency powers to determine whether such authority violates the separation of powers;
- Clarification that states of disaster emergency are to be “proclaimed,” and the exercise of powers delegated in KSA 48-925(c) during a proclaimed state of disaster emergency is to be by issuance of “orders.” KSA 48-925(b) states the powers in KSA 48-925(c) are to be exercised by “orders and proclamations,” while the text of KSA 48-924(b)(1) states a governor is to “proclaim” a state of disaster emergency;
- Clarification by the Legislature on how it intends a governor’s delegated emergency powers in KS 48-925 to interact with the constitutional and statutory powers of other entities, e.g., the State Board of Education and local school boards; and
- Review of the text and operation of provisions in HB 2016 that allow counties to adopt orders less restrictive than a governor’s emergency order relating to public health.

Items raised by conferees outside of scope of the Committee. The Committee agreed the following items raised by conferees were outside the scope of this Committee’s charge, and the items should be considered by the 2021 Legislature:

- The 2021 budget committees should study a prioritization penalty for agencies that do not spend money on cybersecurity;
- Whether Kansas public safety telecommunicators should be included in the term of “emergency responder” in disaster emergency relief efforts;
- Whether statutory speedy trial limits should be suspended or eliminated;
- Whether the provisions of the executive order allowing nurse practitioners, nurse anesthetists, and physician assistants to practice in many facilities without physician supervision should be made permanent;
- Whether the content of the executive order allowing health care professionals licensed in other states to deliver telehealth in Kansas without a Kansas license should be made permanent;
- Whether a direct tax credit should be provided in emergency instances when the government issues orders prohibiting evictions and foreclosures;
- What information KDHE should be required to release during a pandemic, and what time limitations should be placed on the release of that information;
- What changes are necessary for the operation of the Legislature during an emergency (e.g., meeting off-site and remote voting);
- Whether Article 15, § 13 of the *Kansas Constitution* should be expanded to include disasters;

- Whether the closure of or restrictions on businesses during an emergency should require legislative oversight;
- What discretion, if any, should be given to keep businesses open at the local level during an emergency; and
- Whether the Governor should be allowed to close private schools during an emergency.

Items for further study by appropriate standing committees. The Committee recommends the appropriate standing committees of the 2021 Legislature further study the following items:

- Changes made to KEMA in HB 2016 regarding the Governor’s powers enumerated in KS A 48-925(c);
- Appropriate penalties and enforcement mechanisms for violations of KEMA;
- Language of Section 6 of HB 2016 regarding the closure of businesses;
- Immunity from liability for adult care homes;
- A constitutional amendment that would authorize the Legislature by statute to take certain steps in dealing with an emergency;
- Local authority to implement an order less restrictive than the statewide order;
- Extending the authority of the Chief Justice of the Kansas Supreme Court to include the power to modify deadlines and time limits after March 31, 2021, by eliminating the sunset provision in HB 2016 or decoupling the authority of the Chief Justice from an emergency declaration;

- A constitutional amendment that would change the requirements for calling a special legislative session;
- Legislation that would enable first responders to share information with law enforcement regarding an individual's exposure to infectious disease;
- A prohibition on executive orders to suspend any portion of the Kansas Criminal Code; and
- Options for combating rampant unemployment insurance claim fraud.