

Tucker Poling, Acting Executive Director

Laura Kelly, Governor

Testimony before the Senate Committee on Judiciary re: KEMA

January 11, 2020

Chairwoman Warren and Honorable Committee Members,

The Kansas State Board of Healing Arts (“Board”) submits this testimony to assist legislators in evaluating an extension of provisions of the Kansas Emergency Management Act (“KEMA”) as established in HB2016. The Board is composed of 15 members, 12 of whom are licensed Kansas healthcare providers. I am Tucker Poling, Acting Executive Director of the Board. The Board licenses and regulates more than 32,000 Kansas healthcare providers in 16 different healthcare professions. The mission of the Board is public protection, based on the statutory recognition “that the practice of the healing arts is a privilege . . . and is not a natural right of individuals” and that “provisions covering the granting of that privilege and its subsequent use, control and regulation” be directed toward “the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice . . .” See K.S.A. 65-2801, et seq.

Although there are many aspects of KEMA that the Board supports continuing during the existence of the state of emergency declared by the legislature, such as temporary regulatory flexibility to facilitate the state’s response to COVID19, the Board believes it is duty-bound to advise the legislature that **the Board has significant public safety concerns related to some provisions of the bill**. The Board respectfully suggests the legislature amend the bill in a manner that retains the Board’s ability to protect public safety. **The most vital revision can be achieved through deleting two sentences** in subsection (h) of New Section 23 of HB2016. We stand ready to collaborate with legislators and stakeholders to increase flexibility and efficiency while protecting public safety during the existence of a declared public health emergency.

The Board’s most pressing concerns with KEMA, in descending order of concern, are as follows:

New Section 23 of HB2016 at subsection (h)

This is the most problematic subsection in the Act. The Board believes this subsection endangers public safety because it allows any “health care professional” (a term not defined in the Act) licensed and in good standing in any state or territory to practice within Kansas without the need for a Kansas license or *Kansas regulatory oversight*.

- The Board’s jurisdiction to remove unsafe providers from practice in Kansas or otherwise discipline providers for misconduct is under KSA 65-2836, and is attached to licensure. In other words, we can only regulate licensees.

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- This subsection allows individuals from out of state to practice in Kansas with no Kansas regulatory oversight.
- Absent criminal activity, no Kansas authority has the jurisdiction to regulate the practice of these individuals.
- This subsection is not limited in scope in any manner – it includes services completely unrelated to the pandemic.
- **Potential fix:** Delete subsection (h) (or, at minimum, delete the first and last sentence of the subsection). In addition to being unsafe, this provision is unnecessary for COVID response. These healthcare providers already have access to:
 - The free [temporary emergency license](#) authorized in New Section 22. (The Board originally created this license under executive order 20-08).
 - The free licensure [waiver process for telemedicine](#) authorized in New Section 20. (Originally created under executive order 20-08.)
 - The liability immunity provisions of New Section 10.
 - Fast-track reciprocal license via the [Interstate Medical Licensure Compact](#) (IMLC), pursuant to K.S.A. 65-28,133, which now includes 31 member states.

New Section 10 at subsection (a)

The following language could be construed as a defense against any professional disciplinary action taken related to any healthcare provider's actions during the emergency declaration, including fraudulent, unethical, and dangerous behavior: "...a healthcare provider is **immune from . . . administrative fines or penalties** for acts, omissions, healthcare decisions or the rendering of or the failure to render healthcare services, . . . , as a direct response to any state of disaster declared . . ."

- For example, if a provider took unscrupulous advantage of vulnerable patients and offered unsafe purported "COVID cures", he could argue that his actions were taken in direct response to the pandemic emergency and he is therefore immune from any administrative action by the board against his license. This language could also be construed as a defense against any licensure consequences for any acts of gross negligence committed against Kansas patients that the provider could characterize as arising out of action taken in response to the state of disaster.
- **Potential fix** – The following revisions would preserve the primary policy goal of this provision (which we understand to be immunity from civil lawsuits) while preserving some baseline KSBHA jurisdiction to protect patient safety during the emergency:
 - Add a new subpart (c)(2) that would follow (c)(1) of New Section: "The provisions of this section shall not apply to disciplinary actions of a Kansas professional licensing body when it is established that the act, omission or healthcare decision from which the disciplinary action arose constituted gross negligence, willful, wanton or reckless conduct, sexual misconduct, conduct that posed a direct danger to public health and safety, or when it is established that the licensee's continuation in practice would constitute a danger to the public health and safety."

New Section 23 at subsection (j)

Subsection (j) has language that could be interpreted to require the Board to issue licenses and renew licenses without charging any fee. If this interpretation were accepted by courts, this would eliminate the revenue of the agency. This provision is unnecessary, as the Board is already providing relief for those who are unable to pay their licensing fees due to COVID19 financial distress (as well as extending continuing education deadlines, and allowing a free temporary licensure option for those whose licensing exams have been cancelled).

- **Potential fix:** Delete subsection (j).

New Section 23 of HB2016 at subsections (a), (b), and (c)

Subsections (a) through (c) remove supervision requirements for midlevel practitioners (physician assistants and advance practice nurses). Similarly, subsection (g) creates a vague category of “respiratory therapist extender” that would be permitted to provide “other healthcare services” determined by their employer.

- Although the language of section 20 limits this to “designated healthcare facilities”, the definition of designated healthcare facilities (**subsection (m)**) references a definition from a different statute (K.S.A. 40-3401(f)) that includes essentially every location in the state at which healthcare is provided, not just hospitals and large clinics that have well-structured organizational oversight from medical leadership.
- These subsections remove any meaningful limitation of the scope of practice of these providers, because “ appropriate to [the provider’s] education, training and experience” is subjective and subsection (m) leaves the discretion solely to the “designated healthcare facility” at which they’re practicing, which, again, includes essentially any location in the state in which healthcare is delivered.
 - This allows each employer to determine the scope of practice permitted at their location rather than the scope of practice being determined by Kansas law and/or by the body of experts designated under Kansas law to regulate those healthcare providers, the Board of Healing Arts.
 - In addition to the public safety concerns associated with eliminating supervision requirements, allowing each location to determine the scope of practice for their midlevel practitioners could create a patchwork of inconsistent scopes of practice.
- **Potential fix:** Rather than simply removing physician supervision of midlevel providers and removing the scope of practice limitations contained in Kansas law, use the provision that was included in Executive Order 20-08: “the Board is authorized to temporarily waive, to the extent the Board determines such waiver will not harm public safety and welfare, any regulatory requirements falling under the Board’s enforcement authorities for the purpose of preparing for, responding to, and mitigating any effect of COVID-19.”

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New Section 23 of HB2016 at subsection (e)

Subsection (e) allows pharmacists to practice medicine to a limited extent (routine health maintenance care for chronic diseases or “similar conditions”) without physician supervision currently required under Kansas law (collaborative practice agreement with physician). The Board does not believe it is safe for pharmacists to provide medical care without the supervision and defined limits and protocols that come with a collaborative practice agreement.

- **Potential fix:** Delete subsection (e).

Thank you for considering this testimony. **I welcome any comments, questions, or further dialogue with members of the committee.** Please feel free to contact me on my cell (785-760-0686) at any time or via email at tucker.poling@ks.gov .

Sincerely,



Tucker L. Poling
Acting Executive Director