

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2390

As Amended by House Committee of the Whole

Brief*

HB 2390, as amended, would enact the Kansas Overdose Fatality Review Board Act (Act) and exempt materials used to test for the presence of fentanyl, ketamine, flunitrazepam, and gamma hydroxybutyric acid from the definition of “drug paraphernalia.”

Definitions (New Section 1)

The bill would define terms:

- “Data” would mean all facts, information, records of interviews, written reports, statements, notes, or memorandums secured in connection with an authorized medical research study;
- “Department” would mean, unless the context indicates otherwise, the Kansas Department of Health and Environment;
- “Drug” would mean a substance that produces a physiological effect when ingested or otherwise introduced in the human body, including illicit and legal substances;
- “Institutional review board” would mean the Department Institutional Review Board responsible for reviewing, approving, modifying, rejecting, and monitoring research involving human research

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

subjects recruited to participate in research activities conducted under the Department or using data from the Department as required in the Code of Federal Regulations;

- “Overdose” would mean injury to the body that happens when one or more drugs are taken in excessive amounts, including fatal and nonfatal injuries;
- “Overdose fatality review” would mean a process in which a multidisciplinary team performs a series of individual overdose fatality reviews to identify system gaps and community-specific overdose prevention and intervention strategies;
- “Secretary” would mean, unless the context indicates otherwise, the Secretary of Health and Environment;
- “Substance use disorder” would mean a pattern of use of alcohol or other drugs leading to clinical or functional impairment as defined in the American Psychiatric Association’s Diagnostic and Statistical Manual; and
- “Substance use disorder treatment provider” would mean any individual or entity that is licensed, registered, or certified within Kansas to treat substance use disorders or that has a Drug Addiction Treatment Act waiver from the U.S. Drug Enforcement Administration to treat individuals with substance use disorder using medications approved by the U.S. Food and Drug Administration for such indication.

Board Membership and Duties (New Section 2)

The bill would establish the Kansas Overdose Fatality Review Board (Board) to review information and data related

to drug overdose fatalities in Kansas and to make recommendations regarding evidence-based strategies to prevent or mitigate the consequences of drug overdose. The bill would require the Board to be established before January 1, 2025.

Membership

The bill would provide for the Secretary to oversee the Board and designate the following ex-officio members:

- The Secretary, or the Secretary's designee, as chairperson, with duties established by the Board;
- The Director of the Department Bureau of Epidemiology and Public Health Informatics, or the Director's designee;
- The Department's Program Manager for Drug Overdose Prevention Initiatives;
- The Department's Program Abstractor for the state Unintentional Drug Overdose Reporting System; and
- The Department's State Health Officer.

The Board would also include:

- One member appointed by each of the following agencies or officials to represent the appointing agency or official:
 - Attorney General;
 - Director of the Kansas Bureau of Investigation;
 - Secretary for Aging and Disability Services;
 - Secretary for Children and Families;
 - Secretary of Corrections;

- Board of Pharmacy;
- Emergency Medical Services Board;
- The State Board of Healing Arts (BOHA);
- The Behavioral Sciences Regulatory Board (BSRB); and
- The Kansas State Board of Nursing;
- The following members jointly appointed by the Secretary and the Secretary for Aging and Disability Services:
 - A physician licensed by BOHA who has training in psychiatry or the treatment of addiction;
 - A physician licensed by BOHA with training in medical toxicology or forensic pathology;
 - A coroner or medical examiner who is currently serving as a coroner or medical examiner in Kansas;
 - A person in long-term recovery from a substance use disorder;
 - A Kansas-licensed mental health and substance use disorder treatment provider;
- One member appointed by the Secretary from a list of up to three nominees submitted by the Kansas Hospital Association;
- Up to five additional members appointed by the Secretary who are of relevant disciplines including, but not limited to, federal, state, and local governmental agencies; substance use disorder assessment and treatment facilities; law enforcement; health care; community-based organizations; spiritual or religious organizations; advocacy groups; department nosologists; or county health officers.

Except for the ex-officio members, each member of the Board would serve a three-year term. Each member of the Board would be paid compensation, subsistence allowances, mileage, and other expenses as provided in statute.

The Board would be required to develop policies and procedures to be used by the Board, including, but not limited to:

- Guidelines for Institutional Review Board approval pursuant to federal regulations;
- Procedures for developing interagency memorandums of understanding;
- Procedures for sharing data among all agencies involved; and
- Procedures for investigating drug overdose deaths.

Secretary Duties and Confidentiality of Data (New Section 3)

Under the bill, the Secretary would be required to:

- Identify drug overdose death cases;
- Review autopsy reports, death certificates, medical records, and other relevant data;
- Review interactions with the health care system, behavioral health system, social services, educational institutions, children and family services, the criminal justice system, and any other systems with which a decedent had contact prior to a drug overdose death;
- Contact family members and other affected or involved persons to collect additional relevant data;

- Consult with members of the Board to evaluate the records and data collected;
- Make determinations regarding the preventability of drug overdose death cases;
- Develop recommendations to prevent drug overdose deaths, including recommendations for changes to statutes, rules and regulations, policies, and procedures; and
- Disseminate findings and recommendations to:
 - The governor;
 - The Legislature;
 - The House Committee on Health and Human Services, Senate Committee on Public Health and Welfare, and any successor committees;
 - The Kansas Prescription Drug and Opioid Advisory Committee;
 - Local policymakers;
 - Health care providers and facilities;
 - Behavioral health professionals;
 - Law enforcement;
 - The general public; and
 - Other stakeholders as determined by the Board.

Secretary Access to Data and Records

The bill would provide the Secretary access to the following identifiable data sources and records:

- Complete law enforcement investigative information and reports regarding a drug overdose death in Kansas;

- Any autopsy records and coroner's investigative records regarding a drug overdose death in Kansas;
- Any medical records regarding a drug overdose death or previous overdoses by a decedent;
- Emergency medical services records regarding a drug overdose death or previous overdoses by a decedent;
- A decedent's controlled substance dispensation records from the prescription monitoring program established by the Prescription Monitoring Program Act; and
- Records, data, and reports from any other applicable entity that has provided services to a decedent.

The bill would authorize the Secretary to apply to the district court for the issuance of a subpoena to compel the production of any relevant data or information requested by the Secretary. Any data or information received by the Secretary pursuant to the subpoena would be confidential and privileged information not subject to disclosure.

Secretary Access to Medical Records

The bill would require the following persons to provide the Secretary with reasonable access to all relevant medical records associated with a drug overdose death case under review:

- Licensed health care providers;
- Licensed medical care facilities;
- Licensed community mental health centers;

- Licensed drug abuse treatment facilities;
- Licensed addiction counselors;
- Licensed substance use disorder programs; and
- Licensed pharmacies.

Any person providing medical records to the Secretary in accordance with the bill would not be liable for civil damages or be subject to criminal or disciplinary administrative action for good-faith efforts to provide such records.

Information, records, reports, statements, notes, memorandums, or other data collected would be:

- Privileged and confidential and not admissible as evidence in any action of any kind in any court or before any other tribunal, board, agency, or person;
- Prohibited from being exhibited or disclosed in any way, in whole or in part, by any person except as may be necessary for the purpose of furthering the pertinent investigation;
- Prohibited from being disclosed in any manner by any person participating in an investigation.

The bill would provide for all proceedings and activities of the Board under the Act to be confidential. Opinions of the Board or its members formed as a result of such proceedings and activities and any records obtained, created, or maintained would be confidential and not subject to the Open Records Act, Open Meetings Act, subpoenas, discovery, or introduction into evidence in any civil or criminal proceeding. The bill would not restrict the right to discover or use in any civil or criminal proceeding any document or record that is available entirely independent of proceedings and activities of the Board or its members.

The bill would prohibit questioning of the Secretary or representatives of the Secretary in any civil or criminal proceeding regarding information presented in or opinions formed as a result of an investigation. The bill would not prevent the Secretary or representatives of the Secretary from testifying to information obtained independently of the provisions of the bill or to public information.

Confidentiality of records would be provided in the bill through July 1, 2028; continuing such provisions beyond that date would require legislative action.

The bill would require reports of aggregate non-individually identifiable data and non-individually identifiable data that is disaggregated by race and ethnicity, biological sex, or age to be compiled on a routine basis for distribution in an effort to further study the causes and problems associated with drug overdose deaths. Such reports would be distributed to health care providers, medical care facilities, and other persons necessary to further the purpose of reducing the drug overdose death rate.

Medical Research Studies

The bill would require the Secretary to receive data acquired in connection with medical research studies conducted for the purpose of reducing morbidity or mortality from drug overdose. The bill would authorize the Secretary or staff or with other qualified persons, agencies, or organizations to conduct such studies. If such a study were conducted using any funding not provided by the state of Kansas, the bill would require the source of such funding to be clearly identified in the study.

If authorization to conduct such a study were granted by the Secretary, all data voluntarily made available to the Secretary for this purpose would be confidential and used solely for the purpose of medical research. Research files and opinions expressed in such research would not be

admissible as evidence in any court or before any other tribunal, except that statistics or tables resulting from such data would be admissible to use as evidence.

The bill would not effect the right of any patient or patient's guardians, representatives, or heirs to require medical care facilities, physicians, other health care providers, adult care homes, or other persons or agencies to furnish the patient's health care records upon written authorization. Such records could be admissible as evidence.

No employee of the Secretary would be able to interview any patient named in any report or any relative of such patient unless otherwise provided in statute. The bill would not prohibit publication by the Secretary or a duly authorized cooperating person, agency, or organization of final reports or statistical compilations derived from morbidity or mortality studies if the reports or compilations do not identify individuals, associations, corporations, or institutions that were subject of the studies and do not reveal sources of information.

Penalty for Violating Confidentiality

The bill would specify that any person who knowingly discloses any information or record made or kept confidential pursuant to the Act would be guilty of a class A nonperson misdemeanor.

Drug Paraphernalia Exceptions

The bill would exempt any materials used or intended for use to test a substance for the presence of fentanyl, a fentanyl analog, ketamine, flunitrazepam, or gamma hydroxybutyric acid from the definition of "drug paraphernalia."

The bill would remove the definition of "possession" from the statute regarding crimes involving controlled substances.

The bill would also amend a statute regarding emergency opioid antagonists to require, rather than authorize, a pharmacist furnishing an emergency opioid antagonist to provide consultation to the person to whom the emergency opioid antagonist is furnished.

The bill also would make technical amendments.

Background

The bill was introduced by the House Committee on Health and Human Services at the request of Representative Clifford on behalf of the Department.

House Committee on Health and Human Services

In the House Committee hearing, **proponent** testimony was provided by the State Health Officer; representatives of the Association of Community Mental Health Centers of Kansas; BrightHouse, Inc., Kansas Hospital Association; Kansas Recovery Network, Safe Streets Wichita, and Wyandotte County Public Health Department; and four private citizens. Proponents generally stated the Board and legalization of drug testing materials would help reduce the number of drug overdose deaths in the state, which have been increasing.

Written-only proponent testimony was provided by Representative Probst; representatives of DCCCA, Johnson County Mental Health Center, Kansas Academy of Family Physicians, Kansas Association of Local Health Departments, Mental Health and Substance Abuse Coalition, Mirror, Inc., Pawnee County Health Department, and Saline County Health Department; and four private citizens.

No other testimony was provided.

The House Committee amended the bill to:

- Add to the Board a member from the Board of Nursing;
- Add to the Board a member appointed by the Secretary from a list of up to three nominees submitted by the Kansas Hospital Association;
- Specify that the findings and recommendations of the Board should be submitted to the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare or any successor committees annually, by the first day of Legislative Session in January;
- Specify that any person who knowingly discloses any information or record made or kept confidential pursuant to the Act would be guilty of a class A nonperson misdemeanor.

House Committee of the Whole

The House Committee of the Whole amended the bill to include materials used to test for flunitrazepam, also known as Rohypnol, to the list of materials that would be excluded from the definition of “drug paraphernalia.”

Fiscal Information

The Department estimates the bill would require up to 3.5 new FTE positions and increase expenditures by \$300,000, all from the State General Fund, in FY 2024. The estimate is based on the agency’s experience with the Kansas Maternal Mortality Review Committee that has a similar structure and function. The necessary positions would include a coordinator to convene stakeholders, community organizations, and pertinent state agencies to develop a comprehensive and systemic response to overdose fatalities, and to perform administrative tasks; part time epidemiologist and vital statistics staff to perform duties as required within

the bill; and up to two abstractor and record custodians to collect, analyze, abstract, and report data from various sources. There also would be costs related to data sharing agreements, data requests, mileage and per diem reimbursements, and fees associated with accessing decedent records. The agency notes there would be system-wide health care and public safety cost savings related to prevention of chronic disease and harm reduction, although the total costs cannot be estimated. The agency would monitor and apply for pertinent federal funding opportunities to reduce the State General Fund costs.

The Kansas Board of Pharmacy reports that enactment of the bill would result in costs associated with appointing a member to the Board, providing K-TRACS data to the review board, and any other stakeholder response, which are anticipated to be handled within existing resources.

The BSRB notes that while there are no costs for the agency associated with the bill, there would be costs associated with compensation and reimbursement of Board members in FY 2024, and beyond, for the state.

The Office of Judicial Administration reports enactment of the bill would have a negligible fiscal effect on expenditures and revenue for the Judicial Branch.

According to the Department of Corrections, Kansas Bureau of Investigation, Kansas Department for Aging and Disability Services, the Kansas Board of Emergency Medical Services, BOHA, and Kansas Department for Children and Families, enactment of the bill would not result in a fiscal effect on the operations of any of the respective agencies. Any fiscal effect associated with the bill is not reflected in *The FY 2023 Governor's Budget Report*.

Drugs; drug overdoses; Kansas Overdose Fatality Review Board; drug paraphernalia; fentanyl; ketamine; gamma hydroxybutric acid; flunitrazepam; drug testing strips