Disability Rights Center of Kansas
214 SW 6th Ave., Suite 100 ♦ Topeka, KS 66603
Phone: 785.273.9661 ♦ Toll Free: 1.877.776.1541
Toll Free TDD: 1.877.335.3725 ♦ Fax: 785-273-9414
E-mail address: info@drckansas.org

February 17, 2022
Opponent for HB 2697
Oral Testimony
House Judiciary Committee

Mr. Chairman and members of the House Judiciary Committee,

My name is Lane Williams. I am the Legal Director at the Disability Rights Center of Kansas (DRC). DRC is a public interest legal advocacy organization that is part of a national network of federally mandated organizations empowered to advocate for Kansans with disabilities. DRC is officially designated by the State of Kansas as Kansas' protection and advocacy system. DRC is a private, 501(c)(3) nonprofit corporation, organizationally independent of state government and whose focus is the protection and enhancement of the rights of Kansans with disabilities.

Although DRC is supportive of fixing this issue and appreciates the effort KDADS has put into crafting this, we are very concerned there are a number of unintended consequences that deserve further work.

DRC supports the goal of establishing more options to provide qualified evaluations and, if necessary, restoration treatment for criminal defendants concerning the issue of competency to stand trial. DRC further supports conducting the evaluations and providing the treatment locally and on an outpatient basis whenever possible. Providing more qualified options could help address the unconscionably long wait times most criminal defendants experience before space opens for them at one of the state hospitals. DRC, however, has concerns with the bill as drafted which warrant further review, and we suggest that the Judicial Committee refer the bill to the Kansas Judicial Council to review the proposed amendments and other parts of statutory procedure described below and report its findings and recommendations.

Our concerns are as follows:

1) Neither the statutory procedure as currently written or amended specifies the professional qualifications that are required for any facility or individual other than the state security hospital to conduct competency evaluations a provide treatment. The only requirement is that the provider be "appropriate."[1] DRC believes the statute should be more specific as to what qualifications an outside provider must have so the quality of the evaluations and treatment are provided consistently throughout the state.

2) K.S.A. 22-3303 currently requires the secretary for aging and disability services to file a petition for involuntary civil commitment pursuant to K.S.A. 59-2946, *et seq.* for certain defendants who

[1] See, for example, p. 1, lines 23-26: "…the court may: (A) *Order an evaluation be completed by* the state security hospital *or its agent, a state hospital or its agent* or any appropriate state, county, private institution or facility…"

are found not competent after 6 months of treatment.[2] HB 2697 amends the statute to provide that the county or district attorney where the charges are filed can also file this petition. The amendments also add new sections with filing requirements depending whether the evaluation is inpatient or outpatient and where the evaluation takes place. The proposed amendments also further require in each case that "*[t]he court **shall issue an order for care and treatment** within 21 days of receipt of the certification from the chief medical officer of the institution or head of the facility unless exceptional circumstances warrant delay."*(emphasis added). [3] This amendment ignores the definition in K.S.A. 59-2946(f)(1) which excludes from involuntary commitment an individual who is not likely to cause harm to self or others or who has, for example, a traumatic brain injury (TBI) or an intellectual disability (ID):

> "Mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e), who also lacks capacity to make an informed decision concerning treatment, is likely to cause harm to self or others, and whose diagnosis is not solely one of the following mental disorders: Alcohol or chemical substance abuse; antisocial personality disorder; intellectual disability; organic personality syndrome; or an organic mental disorder.

The proposed amendment, however, seems to require the court to disregard these statutory limitations. If passed, the amendment will require the commitment of all incompetent defendants with a TBI or ID–regardless of the charge–indefinitely because they will never become competent due to the nature of her disability. Such an outcome is contrary to the public policy that no individual should lose her liberty indefinitely without due process. A mandate to file for commitment and then commit involuntarily regardless of the person's disability is not due process.

3) HB 2697 proposes to add new sections K.S.A. 22-3303(c)(5) and (e)(5) providing that the defendant "may be credited with all or any part of the time during which the defendant was committed and confined in such public institution." (p. 6, lines 38-42 and p. 9, lines 7-11). DRC believes all time spent in a treatment facility should be required to be credited as time served if convicted.

4) Proposed K.S.A. 22-3303(f)(3) at p. 9, beginning at line 26, establishes a procedure for discontinuing psychotropic medications two days prior to a hearing if it adversely affects the defendant's judgment or hampers her ability to prepare for and participate in the hearing. This section seems to contradict the reason for the medication. If the medication is part of the treatment program to get the defendant competent, but it impairs her ability to help with her defense, it makes little sense for the medication to be prescribed in the first place.

5) The proposed addition of section (f)(4) to K.S.A. 22-3304 at p. 10, lines 7-18, allowing the administration of medication over a defendant's objection is potentially problematic and unconstitutional. The United States Supreme Court in *Sell v. U.S.,* 539 U.S. 166 (2003) prescribes numerous criteria which must be met in order to allow the forcible administration of medication. For example, at pp. 179-80, the Court states:

> …the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further

[2] P. 4, lines 10-12.
[3] P. 4, lines 12-15 and 33-36; p. 5, lines 35-38; p. 6, lines 14-17; p. 8, lines 4-7 and 26-29.

> important governmental trial-related interests. This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances.

Examples of other criteria noted by the Court include consideration of the seriousness of the crime and whether less intrusive alternatives exist. 539 U.S. 181. None of these criteria appear to have been considered in the language of Section (f)(4). Given the important liberty interests at stake, this issue needs further review.

6) Finally, while providing more options for evaluation and treatment may reduce the wait time for evaluations and treatment, DRC believes amendments to the procedure must include a reasonable deadline for the state to provide those after the court orders it. Other states have deadlines, in some cases as a result of litigation. It would be prudent to research other states' requirements and experience with deadlines.

In conclusion, DRC believes referring HB 2697 to the Judicial Council provides the opportunity to develop a more fair process for incompetent defendants, and reasonably balances public safety concerns.

Thank you for your time and consideration and I would be happy to stand for questions at the appropriate time.