



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

January 5, 1977

ATTORNEY GENERAL OPINION NO. 77- 4

Mr. Robert M. Corbett, Attorney
Department of Health and Environment
Building 740 - Forbes Air Force Base
Topeka, Kansas 66620

Re: Public Health--Health Facilities--Review of Application
By Health Systems Agency

Synopsis: Any health systems agency operating within the state of
Kansas pursuant to K.S.A. 1976 Supp. 65-4801 et seq.
must initiate the formulation of its own criteria for
the review of applications for certificates of need.

Similarly, all health systems agencies in Kansas should
conduct reviews of any application for certificate of
need which is submitted to it, and make comments and
recommendations on said applications to the Secretary
of Health and Environment.

* * *

Dear Mr. Corbett:

The National Health Planning and Resources Development Act of
1974 (42 U.S.C. 300k et seq.) was enacted in an effort "to
facilitate the development of recommendations for a national
health planning policy, to augment area wide and state planning
for health services, manpower, and facilities, and to authorize
financial assistance for the development of resources to further
that policy." 42 U.S.C. 300k. Among the provisions of this
federal law is a mandate for the creation of various health ser-
vice areas throughout the United States. 42 U.S.C. 300l.
Following the guidelines set forth in the law, the Secretary
of Health, Education and Welfare has divided Kansas into four

Mr. Robert M. Corbett
Page Two
January 5, 1977

health service areas, the geographical boundaries of which are found in 40 Fed. Reg. 4039 (1975).

In addition, 42 U.S.C. 300k et seq. requires the establishment of a health systems agency (HSA) for each of the health service areas. The primary responsibility of an HSA is the promotion of effective health planning for its health service area, and the promotion of the development of health services, manpower and facilities which meet identified needs. Statutes which cover the structure, functions and responsibilities of the HSA are found at 42 U.S.C. 3001 et seq.

In order to integrate Kansas into this comprehensive federal plan, the Kansas Legislature enacted certain statutes which presently appear in Chapter 263 and 280 of the 1976 Session Laws (statutory designations are K.S.A. 1976 Supp. 65-4701 et seq., and K.S.A. 1976 Supp. 65-4801 et seq.). K.S.A. 1976 Supp. 65-4710 states that a Kansas HSA is an agency which has "entered into an agreement with the federal secretary of health, education and welfare in accordance with the requirements of...42 U.S.C. 3001-4." Additional HSA requirements for staffing, goals, required activities and functions are found at K.S.A. 1976 Supp. 65-4711 through 4731.

The HSA about which you have specifically inquired is located in what federal officials have designated as Kansas Area 2. 40 Fed. Reg. 4039 (1975). At present the federally approved HSA for Area 2 is the Northeast Kansas Health Systems Agency (NEKHSA), a non-profit corporation. NEKHSA attained its official designation after it made application to, and was approved by the Secretary of Health, Education and Welfare to act as the Area 2 agency. Actual notification of this appointment was made on July 6, 1976, when HEW entered into an Area Designation Agreement with NEKHSA. Also included in the designation agreement was a grant of financial assistance to NEKHSA of \$120,750 to fund the first year of operation. (The initial grant was later supplemented by an additional award of \$54,250 which was conferred on October 6, 1976, bringing the total funding allocation to \$175,000.)

In addition to the HSA duties and responsibilities which were briefly outlined above, one of the most important HSA functions is the review of applications for certificates of need. Pursuant to K.S.A. 1976 Supp. 65-4801 et seq., there exists a requirement that certain health facility projects may not be undertaken in Kansas unless a certificate of need has first been obtained. Under the new statutory guidelines any party who wishes to obtain a certificate of need must first file an application with the Kansas Secretary of Health and Environment and, with the appropriate Kansas HSA. K.S.A. 1976 Supp. 65-4806. After the application has been so submitted, it is the duty of the HSA to conduct

Mr. Robert M. Corbett
Page Three
January 5, 1977

the initial review, and to forward comments and a recommendation to the Secretary of Health and Environment. K.S.A. 1976 Supp. 65-4731; K.S.A. 1976 Supp. 65-4807. Once the Secretary of Health and Environment receives the HSA's recommendation it may approve, modify or deny the application. K.S.A. 1976 Supp. 65-4808.

At present the administrator of NEKHSa has expressed a reluctance to review any applications for certificates of need which have been forwarded to him. It is the position of NEKHSa that the analysis of certificate of need applications is of extreme importance and should not be conducted without established criteria, and without a staff capable of conducting the review. As the initial review is the responsibility of the HSA, it would appear as though without some type of action at the HSA level, the entire program might cease to function and therein lies the problem which was addressed in your letter of inquiry.

As the problem is of a twofold nature, we should first seek to resolve the issue of whether or not there are presently sufficient criteria available to allow an HSA to conduct a review of an application. Attention should therefore be given to K.S.A. 1976 Supp. 65-4807 which states that an HSA shall review applications "in accordance with procedures established pursuant to section 1532 of public law 93-641 (42 U.S.C. 300n-1)." A further examination of the text of 42 U.S.C. 300n-1(a) reveals that when conducting reviews each HSA shall "follow procedures, and apply criteria, developed and published by the agency in accordance with regulations of the Secretary..." As used in the context of the previously cited sentence, the word "agency" must be taken to mean the HSA; and "Secretary" is meant to infer the Secretary of Health, Education and Welfare. All of which is to say that NEKHSa can establish its own criteria for review, as long as those criteria do not conflict with any rules or regulations promulgated by the Department of Health, Education and Welfare.

Interestingly enough, federal regulations regarding review criteria have not yet gone into effect. Proposed regulations of this type have been published in the Federal Register, appearing at 41 Fed. Reg. 11692 (1976), but these are not expected to go into effect until late January, 1977. However, there is nothing which would prevent an HSA from using the proposed federal regulations as a guideline to adopt interim review criteria which could be used until the federal regulations were made permanent. One should also not overlook the possibility that review criteria could also be based upon the guidelines which appear in the state and federal statutes. In particular these criteria can be found within the provisions of 42 U.S.C. 300n-1 which is incorporated by reference in K.S.A. 1976 Supp. 65-4807.

In addition, the State Health Coordinating Council (SHCC) has promulgated interim criteria which were passed on November 10, 1976

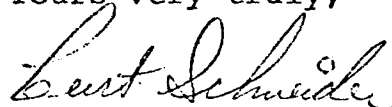
Mr. Robert M. Corbett
Page Four
January 5, 1977

and became effective December 17, 1976. While K.S.A. 1976 Supp. 65-4804 indicates that SHCC criteria are to be used by the Department of Health and Environment in its review of certificate of need applications, there is no reason why the same standards could not be used by HSA to develop its own criteria. Therefore, with the sources available to an HSA, it seems that with due diligence it should be able to establish its own review criteria.

There still remains the question of whether or not a HSA which lacks a staff that meets the personnel requirements outlined in K.S.A. 1976 Supp. 65-4715, should undertake these reviews. Initial inquiry should be directed to K.S.A. 1976 Supp. 65-4731 and 65-4807, both of which mandate review of certificates of need by Kansas HSAs. As the above cited statutes took full force and effect on July 1, 1976, any agency founded after that date should presumably assume its review responsibilities as soon as its Area Designation Agreement has been authorized by the Secretary of Health, Education and Welfare, and it has promulgated its review criteria. While review of applications for smaller projects could be undertaken by persons lacking technical expertise, there are undoubtedly some proposals which could only be evaluated by experienced medical experts. In situations demanding review of major projects, an HSA lacking a full staff could either review the applications and make recommendations on its own, or it could follow the suggestions of K.S.A. 1976 Supp. 65-4715(b) and employ a consultant to provide it with technical data. But whatever the decision made by the HSA, it must adhere to the demand of the legislature and provide the Department of Health and Environment with comments and recommendations on each application which has been submitted to it.

Therefore, it is the opinion of this office that each HSA operating in Kansas must proceed immediately to formulate its own review criteria, and to review any applications for certificates of need which it receives.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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