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ATTORNEY GENERAL OPINION NO. 89- 8

The Honorable Winston Barton
Secretary
Social and Rehabilitation Services
Docking State Office Bldg., 6th Floor
Topeka, Kansas 66612

Re: Mentally Ill, Incapacitated and Dependent Persons;
Social Welfare -- Reporting Abuse or Neglect of
Certain Persons -- Reporting Abuse or Neglect of
Residents; Reporting Abuse, Neglect or Need of
Protective Services; Contents of Report; Evaluation
of Reports; Statewide Register

Amendments to the U.S. Constitution -- Rights and
Immunities of Citizens -- Privileges or Immunities;
Due Process Clause

Synopsis: K.S.A. 39-1401 et seq. confidentiality
provisions do not prohibit due process procedures,
but such procedures are not absolutely mandated if
the placement of a name on a list by the State
Department of Social and Rehabilitation Services
pursuant to K.S.A. 39-1401 et seq. does not
threaten or cause the loss of a constitutionally
protected interest in liberty or property. Cited
herein: K.S.A. 38-1523 (Ensley 1986); 39-938;
39-1401; 39-1404; 39-1422; K.S.A. 1988 Supp.
65-516; K.S.A. 65-3508; K.A.R. 30-51-1; U.S.
Const., Amend. XIV.

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Dear Secretary Barton:

You request our opinion regarding K.S.A. 39-1401 et seq. and the need for notice and hearing on findings of abuse or neglect of adults. You are concerned that providing notice and hearing opportunity to a person listed as an abuser pursuant to this act may be contrary to disclosure restrictions. You believe that providing such procedures represents a futile remedy while creating a great burden and expense to both the alleged perpetrator and the agency. It is your position that, under K.S.A. 39-1401 et seq., a finding of abuse by the Department of Social and Rehabilitation Services (SRS) has no practical effect and that due process procedures set forth in Attorney General Opinion No. 86-163 should not be applicable to K.S.A. 39-1401 et seq. procedures because entry or non-entry of a name on the statewide register is not controlling as to decisions or actions taken by other state authorities.

K.S.A. 39-1401 et seq. establish the procedures whereby suspected cases of adult abuse are reported and investigated. K.S.A. 39-1404 and 39-1422 set forth the duties of SRS with regard to investigation, evaluation and written findings. These procedures provide that the secretary shall maintain a statewide register of the reports received, the findings, evaluations and the actions recommended. This register is available for inspection by SRS personnel. Additionally, pursuant to K.S.A. 39-1404(b), when the alleged abuse involves a resident (as defined under K.S.A. 39-1401) a copy of the report of abuse or neglect is forwarded to the secretary of the Department of Health and Environment (KDHE) and in some cases to the secretary of the Department on Aging (KDOA). You also inform us that local law enforcement officers may be contacted.

K.S.A. 39-1404(c) and 39-1422(d) state that neither the report nor the written evaluation of findings shall be deemed a public record. K.S.A. 39-1404(c) also states that "[n]o information contained in the statewide register shall be made available to the public in such a manner as to identify individuals." K.S.A. 39-1422(d) provides that "the name of the person making the original report or any person mentioned in such report shall not be disclosed unless the person making the original report specifically requests or agrees in writing to such disclosure or unless an administrative or judicial proceeding results therefrom." (Emphasis added). These confidentiality provisions limit dissemination of certain information to the general public.

You are concerned that notice and hearing procedures set forth at K.A.R. 30-51-1 et seq. may violate confidentiality provisions. However, K.S.A. 39-1422(d) expressly permits disclosure in the event of "an administrative or judicial proceeding." A hearing on the matter under K.A.R. 30-51-1 et seq. and notification of the availability of such a hearing takes the form of an administrative proceeding. Thus, the statute contemplates a limited exception to the mandated confidentiality protections. It is our opinion that notifying the alleged perpetrator that an administrative hearing is available does not violate the confidentiality protections provided by K.S.A. 39-1401 et seq.

Your principle concern appears to be whether constitutional protections require the provision of due process procedures to a person whose name is to be entered on the mandated state register. Attorney General Opinion No. 86-163 discussed due process notice and hearing procedures in the context of child abuse validation by SRS. That opinion concluded that such due process procedures must be provided before inclusion of a name on the validated abuser list because "[v]alidating an individual as an abuser, which results in the stigma to name, coupled with a loss of employment opportunity, is an action by the state 'sufficient to invoke the procedural protection of the due process clause.'"

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This due process clause was designed to "protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 646, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Human service agencies must operate within constitutional limits, including due process requirements. Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); See also 16A Am. Jur. 2d Constitutional Law, § 822 (1979).

A person has a constitutional right to due process if a state action threatens loss of a constitutionally protected interest in life, liberty or property. 16A Am. Jur. 2d Constitutional Law, §§ 837, 845 (1979). The issue thus becomes whether the state action of SRS in maintaining the mandated statewide register or notifying other authorities pursuant to K.S.A. 39-1401 et seq. in any way threatens an

individual with the loss of a constitutionally protected interest.

As recognized in Attorney General Opinion No. 86-163, a person's interest in his reputation alone, apart from some more tangible interest such as employment, has been held not to be a liberty interest by itself sufficient to invoke the due process procedural protections. Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405, reh den 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976). Rather, the injury to reputation must occur together with some alteration of a constitutionally protected status. Id. at 706-710. See also Board of Regents v. Roth, 408 U.S. 622 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Owens v. City of Independence, Mo., 445 U.S. 622 (1979).

In McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981), the court stated that failure to renew a teacher's contract may diminish the protected liberty interest to engage in "the common occupation of life" and thus "if plaintiff can show the trier of fact that nonrenewal caused or enhanced her alleged reputational damage, she will have shown that she was entitled to hearing or other reasonable opportunity to clear her name." Id. at 643. In Morgan v. Mansfield, 569 F.Supp. 710 (D. Co. 1983), the plaintiff sought recovery due to loss of employment as a government contractor which resulted from the public release of a defamatory government report about the company. The court held that there was no constitutional guarantee against this state action without due process of law. Id. at 715. In Miller v. City of Mission, Kansas, 705 F.2d 368 (10th Cir. 1983), the court found that an assistant police chief was denied due process when he was dismissed and stated that:

"The concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities." Weathers v. West Yuma County School District R-J-1, 530 F.2d 1335, 1338 (10th Cir. 1976)

The manner in which a public employee is terminated may deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for

dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal."

The 7th Circuit recognized in Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985) that the disclosure of an unfavorable FBI report about an individual (Perry) seeking employment with the government entitled the plaintiff to due process protections. Although the decisions made by other entities concerning the plaintiff's employment were not controlled by the FBI report, the court recognized that by releasing false information the government virtually made it impossible for Perry to obtain work within the government. In Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987), the ninth circuit court considered a case wherein a former counselor supervisor for a private nonprofit corporation was discharged after his employers were unfavorably evaluated by government officials who then threatened the company with the loss of federal funding if they did not fire the supervisor. The court found that, under state law, the counselor had a protected property interest in his employment and that his due process rights had therefore been violated. Id. at 1373. In Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988), the 10th circuit found that there was no change in the plaintiff's status and that therefore he had not been deprived of a protected property or liberty interest. In discussing when the government must provide due process the court stated:

"The liberty interest that due process protects includes the individual's freedom to earn a living." Lentsch v. Marshall, 741 F.2d 301, 303 (10th Cir. 1984). However, as the Supreme Court has stated, injury to one's 'reputation alone, apart from some more tangible interests such as employment,' is not subject to the requirements of due process. . . . Our cases recognize that the 'more tangible interests' involve something more than an investigation of the sort conducted by the Hospital in this case. See Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988) (plaintiffs' employment terminated);

Harris v. Blake, 798 F.2d 419 (10th Cir. 1986) (plaintiff required to withdraw from graduate study program), cert. denied, _____ U.S. _____, 107 S.Ct. 882, 93 L.Ed. 2d 836 (1987); Koerpel v. Heckler, 797 F.2d 858 (10th Cir. 1986) (plaintiff excluded from eligibility for Medicaid reimbursements); Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986) (plaintiff's employment terminated); Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) (plaintiff suspended without pay and demoted); Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984) (plaintiff discharged); Walker v. United States, 744 F.2d 67 (10th Cir. 1984) (plaintiff's employment terminated)."

Wade v. Goodwin, 843 F.2d 1150 (8th Cir. 1988), concerns the erroneous placement of an individual's name on a list of "survivalists" by the police and the release of that list to the news media. The court did not believe that Wade had stated a due process violation claim based on a deprivation of a state created right. "One's reputation alone is neither is 'liberty' nor a 'property' interest protectible by the due process clause of the Fourteenth Amendment. . . . Wade's claim of injury to his ability to make a living and obtain loans and credit, even if true, do not implicate any action by the state of Arkansas beyond general injury to his reputation." Id. at 1152.

This rather lengthy discussion of recent court decisions demonstrates the complexity of the issue and the difficulty of determining whether a particular state action requires due process notice and hearing procedures. In Attorney General Opinion No. 86-163 we concluded that due process procedures were necessary when placing someone's name on the child abuse validation list because such a listing not only stigmatized the individual, but was coupled with a loss of employment as a result of K.S.A. 65-516(a)(3) requirements. Those requirements precluded someone (who might otherwise be completely entitled to employment pursuant to state law) from working in or maintaining a boarding home for children or a family day care if previously validated as an "abuser" by SRS pursuant to K.S.A. 38-1523 (Ensley 1986). Thus, because state action pursuant to K.S.A. 38-1523 (Ensley 1986) caused a name to be placed on a list, and K.S.A.

65-516(a)(3) precluded employment or licensing of that person, due process procedures were necessary before that protected interest could be deprived.

If the actions of SRS, as dictated by K.S.A. 39-1401 et seq., deprive an individual of a constitutionally protected interest in life, liberty or property, that individual must be provided with notice of the action and the opportunity to defend himself before that action is taken. If, however, the state action has no impact on a constitutionally protected interest, due process procedures are not required. The test can be simply stated, but the many state actions possibly involved makes the issue difficult to answer.

You state that, unlike the validation process for child abuse, the adult abuse findings by SRS and the mandated listing on the state register have no necessary or binding force and effect on any action taken by other state authorities. Attorney General Opinion No. 86-163 focused, in part, on the automatic state action that occurred as a result of being labeled an abuser by SRS. Once SRS validated a person as a child abuser, existing statutes required results that could negatively impact on an individual's protected constitutional interests in future or current employment. Thus, because actions taken by SRS in placing a person's name on the validated child abuser list resulted in such a deprivation, due process procedures were required.

Unlike the situation discussed in Attorney General Opinion No. 86-163, it appears that the only state action required by K.S.A. 39-1401 et seq. is the placement of a person's name on a list and the notification of certain other state entities. We are unaware of any state action required or automatically resulting from the placement of a person's name on the state register of adult abuse or as a result of the notification of other state authorities. It is your belief that before action against a person whose name has been placed on the state register may be taken by other notified state authorities, those other authorities must conduct their own investigation and, if warranted, those agencies must provide due process procedures. Thus, it is your contention that, unlike the child abuse validation process, SRS actions to list and notify cause no deprivation of a constitutionally protected interest.

Research of statutory and regulatory authority concerning the Kansas Department of Health and Environment (KDHE) and discussion with KDHE personnel affirms that neither

statutory nor regulatory KDHE authority prohibit employment or licensing of a person listed on the registry. If there is a choice not to employ an individual in an adult home, that decision is made by the private employer and is not required or requested by the state. However, when KDHE notifies an employer-licensee that their employee has been listed as an adult abuser by SRS, that employer-licensee may independently decide to take action against an employee rather than face proceedings against their license. It may be persuasively argued that this action by a private employer is caused by the state action in maintaining a list and is the result of KDHE contacting the employer-licensee. See Merritt v. Mackey, Id. Thus, prior to state action affecting constitutionally protected interests in certain employment, due process procedures must be available to the affected individual. If a person is currently employed in an adult home, SRS, KDHE or other pertinent state authorities must provide due process notice and hearing procedures to the individual employee prior to affecting any constitutionally protected interest. Should a change in the law allow future employers to obtain the information as to who is listed on the abuse register (thus effectively precluding future employment by such employers), placement of a name on the register may require due process procedures. See Perry v. F.B.I., 759 F.2d 1271 (7th Cir. 1985).

Although placement of a person's name on the state register by SRS as mandated by K.S.A. 39-1401 et seq., may represent the stigmatization of a persons character by the government, it appears that state law does not result in or require SRS actions to automatically impact upon a constitutionally protected interest. State law does not dictate that findings under K.S.A. 39-1401 et seq. result in any action other than maintaining a list and notifying other authorities that they may need to investigate a certain person or situation. This is in some ways analogous to notifying the police that a crime is suspected. Should facts or authority previously not considered or presented result in SRS actions causing an injury to a constitutionally protected interest, due process procedures would obviously be required.

Therefore, it is our opinion that if the only state action resulting from the placement of someone's name of the state register by SRS (as required by K.S.A. 39-1401 et seq.) is notification of the required authorities, that agency is not required to provide constitutional due process procedures. However, actions of SRS or other state authorities that have an impact upon a constitutionally

protected interest require provision of due process
protections.

Very truly yours,



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