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ATTORNEY GENERAL OPINION NO. 83- 102

Charles V. Hamm, General Counsel
Legal Division
Department of Social and Rehabilitation Services
State Office Building, Sixth Floor
Topeka, Kansas 66612

Re: Automobiles and Other Vehicles -- Serious Traffic
 Offenses -- Driving While Under Influence of Alco-
 hol; Certification of Community-based Alcohol and
 Drug Safety Action Programs

 Public Health -- Alcoholism and Intoxication Treat-
 ment -- Licensure of Treatment Facilities

Synopsis: Pursuant to K.S.A. 8-1008, as amended by 1983
 Substitute for House Bill No. 2132, community-
 based alcohol and drug safety action programs are
 authorized to perform a variety of services re-
 lating to persons who have been arrested for the
 offense of driving while under the influence of
 alcohol. Included in such services are evalua-
 tions of persons being considered for diversion
 or who have been convicted but not yet sentenced.
 Certification of the programs which are authorized
 to so act in each judicial district is determined
 by the administrative judge of the district or,
 in the event such judge declines to do so, by the
 Secretary of the Department of Social and Rehabili-
 tation Services. Such certification is for the
 limited purpose of providing the services speci-
 fied by K.S.A. 8-1008, as amended, and does not act
 as a substitute for licensure under K.S.A. 65-4001
 et seq. and 65-4601 et seq. In that diagnostic
 services are included within the definition of
 treatment contained in the latter acts, a community-
 based alcohol and drug safety action program must
 be licensed under such acts before it may offer
 such services under K.S.A. 8-1008, as amended.

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Cited herein: K.S.A. 8-1008, 8-1567, both as amended by 1983 Substitute for House Bill No. 2132, K.S.A. 65-4001, 65-4003, 65-4601, K.A.R. 1982 Supp. 30-31-2, L. 1982, ch. 144.

* * *

Dear Mr. Hamm:

As General Counsel for the State Department of Social and Rehabilitation Services (SRS), you request our opinion on a question regarding certification of community-based alcohol and drug safety action programs. Such programs are authorized by K.S.A. 8-1008 to offer a series of services in connection with the enforcement of K.S.A. 8-1567, which establishes the offense of operating a motor vehicle while under the influence of alcohol or drugs. As amended by 1983 Substitute for House Bill No. 2132, K.S.A. 8-1008 provides for certification of the programs by the administrative judge of the judicial district, or, in some limited circumstances, SRS. In view of other existing statutes which concern licensure of alcoholism and drug abuse treatment facilities, you inquire whether K.S.A. 8-1008 replaces or preempts any certification requirements which are contained therein.

As enacted into law, 1983 Substitute for House Bill No. 2132 significantly amends K.S.A. 8-1008, which itself was enacted during the previous session, becoming effective on July 1, 1982. (L. 1982, ch. 144). Prior to the effective date of the new law (April 21, 1983), K.S.A. 8-1008 provided that the Secretary of SRS should certify community-based alcohol and drug safety action programs (ADSAP), which would then provide certain specified services. These included pre-sentence evaluations of persons who had been convicted of a violation of K.S.A. 8-1567, supervision of such persons following their sentencing, if they were required to complete an ADSAP or an abuse treatment program, or any combination of such services. Payment for such services was through the state alcohol and drug safety action program fund, administered by SRS, to which each person convicted or diverted under K.S.A. 8-1567 paid \$85.

More specifics concerning the pre-sentence evaluation were set forth at subsection (c) of the statute, which stated:

"The presentence alcohol and drug evaluation report shall contain an evaluation concerning the defendant's prior traffic record, characteristics and history of alcohol or drug problems, and the amenability of the defendant to education and rehabilitation. The presentence

alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the defendant. The presentence alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse."

Furthermore, the report was to be considered by the court prior to sentencing, with the judge presumably guided in imposing a lenient or severe sentence by information contained in the report concerning the defendant's prior history of substance abuse, potential for future violations, and receptiveness to education and/or treatment.

As amended by the 1983 legislature, K.S.A. 8-1008 now places more control for certification of a community-based ADSAP on a local level, as well as broadening the duties of such a program. Certification decisions now rest initially with the administrative judge of each judicial district, who can approve an individual program "with consultation and approval of a majority of the judges of the district court of the district and municipal judge of cities lying in whole or in part within the district." [K.S.A. 8-1008(b)]. Only if the administrative judge declines to certify any program by June 20 (i.e., 60 days after the effective date of the act), shall the secretary of SRS have the authority to do so. Further decentralization of the system is found in the handling of the \$85 assessment, which will now stay at the local level, the state alcohol and drug safety action program fund having been abolished. [K.S.A. 8-1008(f)]. In addition to providing pre-sentence evaluations and monitoring of persons sentenced under K.S.A. 8-1567, each ADSAP will now also perform evaluations on persons being considered for diversion, and will supervise and monitor those individuals who, pursuant to such an agreement, participate in education or treatment programs. As was the case under the original law, these evaluations contain a history of the defendant's prior traffic record, characteristics and alcohol or drug problems, as well as recommendations concerning the amenability of the defendant to education and rehabilitation.

In certifying a community-based ADSAP, the administrative judge is required to determine that the program is capable of providing the following:

"(1) The evaluations, supervision and monitoring required under subsection (a); (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or

(d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law." [K.S.A. 8-1008(b)].

The statute contains no other requirements, either as to the qualifications of the individuals running the program or the facilities or procedures employed in any education or treatment activities.

In view of the certification procedure set up by K.S.A. 8-1008, as amended, you inquire whether a community-based ADSAP must also be licensed under K.S.A. 65-4001 et seq. and 65-4601 et seq. A previous opinion of this office, No. 81-90, summarized these two acts as follows:

"Although there are separate statutes which deal with the licensure of facilities for the treatment of alcoholism and those which concern drug abuse, the two areas are treated quite similarly, both conceptually and procedurally. In both areas the Legislature has sought to regulate the operation of 'treatment facilities' for those persons afflicted with either of these conditions, and has done so by requiring all 'treatment facilities' to be licensed before they may operate. K.S.A. 65-4012, 65-4601. Once a license is granted, rules and regulations promulgated by the Secretary must be observed, under threat of license suspension or revocation. K.S.A. 65-4015, 65-4016, 65-4608, and 65-4612. As noted, criminal penalties, as well as injunctive relief, are available for use against unlicensed facilities which continue to operate without a license."

The term "treatment" is specifically defined in the former act to mean:

"the broad range of emergency, outpatient, intermediate, and inpatient services and care, including diagnostic evaluation, medical, psychiatric, psychological, and social service care, vocational rehabilitation and career counseling, which may be extended to alcoholics and intoxicated persons." K.S.A. 1982 Supp. 65-4003(11).

While no similar definition exists in the drug abuse statutes, the secretary of SRS is empowered to adopt rules and regulations to further both acts, and in such rules a definition

of treatment appears which includes drug abuse victims. K.A.R. 1982 Supp. 30-31-2. One of the components of treatment identified in this rule is a diagnostic and referral program, which is defined to include:

"diagnostic and referral services to persons who have a present or past history of alcohol or drug abuse. The services are provided through the provision of medical, dependency, social, and psychological assessments and the development of a plan to provide those services." (Emphasis added.) K.S.A. 1982 Supp. 30-31-2(g).

In our opinion, the performance of pre-diversion or pre-sentence evaluations by a community-based ADSAP clearly falls within the definition of treatment which is contained in the above statutes and regulations. Such evaluations are by the very terms of K.S.A. 8-1008 diagnostic in nature, in that they are for the purpose of determining a defendant's past history with alcohol and drug abuse and his or her present situation, and thereby recommending the education or treatment program which would best fit his or her needs. In passing sentence, the court can then structure that part of the order accordingly. In the same manner, the prosecuting attorney, in setting up a diversion agreement, can be expected to rely on the evaluation as a reliable diagnosis of the individual's problems and on the recommendations as a plan for future action.

In the preparation of this opinion, it has been forcefully argued to us that the legislature, in removing certification authority from SRS under K.S.A. 8-1008, intended that agency to have no further control over a local ADSAP. Insofar as certification and the receipt of funds under K.S.A. 8-1008(e) is concerned, we agree. However, nothing in 1983 Substitute for House Bill No. 2132 amends either the statutes or the regulations which currently require licensure of treatment facilities for alcoholism or drug abuse. Since the passage of the alcoholism treatment act in 1972 and the corresponding act for drugs in 1976, the legislature has recognized that facilities offering such treatment must be carefully regulated if the substance abuse crisis is to improve. Accordingly, while it has now delegated certification duties under K.S.A. 8-1008 to the district courts, we see no indication that such certification wipes out overnight the more elaborate system of licensure under the earlier acts. While the legislature is of course free to do so, we will not read into the statute by inference what is nowhere expressly stated, given the continued existence of these earlier acts.

Nor do we think that this is a situation where a more recent piece of specific legislation controls over an earlier, more

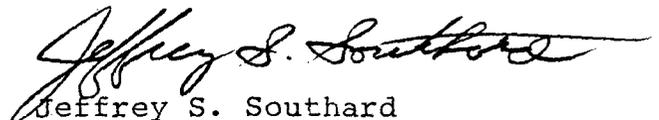
general enactment. Garden City Educators Ass'n v. Vance, 224 Kan. 732 (1978), American Fidelity Insurance Co. v. Employers Mutual Casualty Co., 3 Kan.App.2d 245 (1979). Indeed, the terms of K.S.A. 8-1008 are very vague as to the requirements which an ADSAP must meet, beyond listing the services to be provided, while all facets of treatment, including diagnostic and referral services, are covered by the earlier acts. This is rather a case where such acts would have to be repealed by implication, a construction which is not favored by the law. City of Overland Park v. Nikias, 209 Kan. 643 (1972). Only when the later enactment's provisions are so repugnant to the former's that both cannot be given effect will such a repeal be found. In the Matter of Suesz' Estate, 228 Kan. 275 (1980). Here, the authority of SRS to license treatment facilities remains, with the district courts' involvement arising only if such facilities desire to engage in specific types of services for DUI defendants. In short, it is our opinion that certification under K.S.A. 8-1008 acts to add an additional option for those facilities already providing alcoholism and drug abuse services, and does not replace one system of licensure with another.

In conclusion, pursuant to K.S.A. 8-1008, as amended by 1983 Substitute for House Bill No. 2132, community-based alcohol and drug safety action programs are authorized to perform a variety of services relating to persons who have been arrested for the offense of driving while under the influence of alcohol. Included in such services are evaluations of persons being considered for diversion or who have been convicted but not yet sentenced. Certification of the programs which are authorized to so act in each judicial district is determined by the administrative judge of the district or, in the event such judge declines to do so, by the Secretary of the Department of Social and Rehabilitation Services. Such certification is for the limited purpose of providing the services specified by K.S.A. 8-1008, as amended, and does not act as a substitute for licensure under K.S.A. 65-4001 et seq. and 65-4601 et seq. In that diagnostic services are included within the definition of treatment contained in the latter acts, a community-based alcohol and drug safety action program must be licensed under such acts before it may offer services under K.S.A. 8-1008, as amended.

Very truly yours,



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