STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

November 21, 1986

ATTORNEY GENERAL OPINION NO. 86-163

The Honorable Ron Fox
State Representative, 21st District
4216 W. 73rd Terr.
Prairie Village, Kansas 66208

Re: Public Health -- Maternity Hospitals, Homes for Children -- Constitutionality of K.S.A. 65-516(a)(3); Child Abuse Validation by the Department of the Social and Rehabilitation Services

Synopsis: K.S.A. 65-516(a)(3) provides that no person may be licensed to operate a child day care home or child boarding home if said person has a resident, employee or regular volunteer who has been validated as a child abuser by the Department of Social and Rehabilitation Services (SRS) pursuant to K.S.A. 1985 Supp. 38-1523. In our opinion, validating an individual as a child abuser without affording that individual sufficient notice and an opportunity to be heard violates the individual's constitutional right to due process. Since the statute does not provide for notice and hearing and there are not rules and regulations to supplement it, K.S.A. 65-516(a)(3) as applied does not meet the constitutional requirement of due process. To insure that due process requirements are met, those procedures must be codified by statute or agency rules and regulations. Cited herein: K.S.A. 1985 Supp. 38-1523; K.S.A. 65-128; 65-501; 65-504; 65-516; 77-415; 75-3306; K.A.R. 30-7-26 et seq.; L. 1980, ch. 184, §2; L. 1982, ch. 259, §2; L. 1983, ch. 140, §46; L. 1984, ch. 225, §1; L. 1985, ch. 210, §1; U.S. Const., 14th Amendment.

* * *

Dear Representative Fox:

You have requested our opinion regarding the constitutionality of a quasi-judicial power in a state agency, and whether due process is met as a result thereof. Specifically, you question K.S.A. 65-516(a)(3), which reads in part:

> "No person shall knowingly maintain a boarding home for children or maintain a family day care home if, in such boarding home or family day care home, there resides, works or regularly volunteers any person who:
>
> . . . .
>
> "(3) has committed an act of physical, mental or emotional abuse or neglect or sexual abuse as validated by the department of social and rehabilitation services pursuant to K.S.A. [1985] Supp. 38-1523 and amendments thereto;" (Emphasis added.)

I. History of the Statute

K.S.A. 65-516 originated in 1980, barring convicted child abusers, convicted sex offenders and carriers of infectious or contagious diseases from residence in a day care facility. L. 1980, ch. 184, §2. It has been amended four times. L. 1982, ch. 259, §2; L. 1983, ch. 140, §46; L. 1984, ch. 225, §1; L. 1985, ch. 210, §1. The 1982 amendment increased the list of persons affected by including persons who had 1) children declared deprived or removed from the home pursuant to the Kansas juvenile code, 2) signed a diversion agreement involving abuse, 3) been found to be incapacitated, or 4) been found unfit to have custody of a minor. L. 1982, ch. 259, §2. L. 1983, ch. 140, §46 clarified the earlier years' language. In the above situations, due process was afforded the barred party.

In 1984, the Legislature added to the K.S.A. 65-516 list those validated as child abusers by SRS. See K.S.A. 65-516(a)(3), L. 1984, ch. 225, §1. Interestingly, the 1985 Legislature added the word "knowingly" to "[n]o person shall maintain a boarding home . . ." in reference to licensing restrictions upon day care providers. L. 1985, ch. 210, §1. The validation procedure, however, remained in the

hands of the SRS, and no court review procedure was mentioned.

II. Constitutional Requirement of Due Process

A. Statutory law requires licensing for private child day care and child boarding home providers. K.S.A. 65-501 states:

> "It shall be unlawful for any person, firm, corporation or association to conduct or maintain a maternity hospital or home, or a boarding, receiving or detention home for children under 16 years of age without having a license or temporary permit therefor from the secretary of health and environment. Nothing in this act shall apply to any state institution maintained and operated by the state."

Case law discusses the state's interests in protecting both an individual's due process rights and the children involved. O'Sullivan v. Heart Ministries, Inc., 227 Kan. 244 (1980) held the State of Kansas has a legitimate and compelling interest to protect children and therefore may require private providers to be licensed. Rydd v. St. Board of Health, 202 Kan. 721 (1969) [cited with approval in Elkins v. Showcase, Inc., 237 Kan. 728 (1985)], sets out the powers of an administrative agency issuing or denying licenses to child care providers. Rydd formulates a three-pronged test for procedural due process in denying a license, holding (1) notice, (2) an opportunity to be heard, and (3) an opportunity to defend are constitutionally required. See also Attorney General Opinion No. 86-156, p. 2.

Statutory law provides the above due process requirements of notice and hearing for the license applicant. K.S.A. 65-504 states in part:

> "(a) The secretary of health and environment shall have the power to grant a license to a person, firm, corporation or association to maintain a maternity hospital or home, or a boarding home for children under 16 years of age.
>
> . . . .

> "(c) Whenever the secretary of health and environment refuses to grant a license to an applicant, the secretary shall issue an order to that effect stating the reasons for such denial and within five days after the issuance of such order shall notify the applicant of the refusal. Upon application not more than 20 days after the date of its issuance a hearing on the order shall be held in accordance with the provisions of the Kansas administrative procedure act.
>
> "(d) When the secretary of health and environment finds upon investigation or is advised by the secretary of social and rehabilitation services that any of the provisions of this act are being violated . . . the secretary of health and environment shall, after giving notice and conducting a hearing in accordance with the provisions of the Kansas administrative procedure act, issue an order revoking such license and such order shall clearly state the reason for such revocation.
>
> "(e) Any applicant or licensee aggrieved by a final order of the secretary of health and environment denying or revoking a license under this act may appeal the order in accordance with the act for judicial review and civil enforcement of agency actions. (Emphasis added.)

As K.S.A. 65-504(d) mandates, state action commences only after notice and hearing are afforded. The licensee or applicant is not aggrieved until after notice and hearing or final determination. After notice and hearing, an appeal is available. K.S.A. 65-504(e).

As for due process for the resident, worker or regular volunteer affected by K.S.A. 65-516, research indicates that due process requirements have not been codified for the person validated as an abuser by the Department of Social and Rehabilitation Services (SRS). It is our opinion, therefore, that such codification must be accomplished, either by statute or agency rules and regulations or both.

B. Section 1 of the Fourteenth Amendment to the United States Constitution states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Procedural due process is the manner in which a governmental entity may act. The courts have consistently held that procedural due process requires notice and an opportunity to be heard.

The portion of the 14th Amendment stating "nor shall any State deprive any person of life, liberty, or property, without due process of law" has been construed by the United States Supreme Court to include "a person's good name, reputation, honor or integrity" as a liberty interest which must be afforded due process. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), a state statute provided certain persons could forbid in writing the sale or gift of intoxicants to problem drinkers. The ban was enforced by a police chief listing names of problem drinkers with local liquor stores. Those people listed were not given notice or an opportunity to contest. The Court held labeling a person as a problem drinker was, to some people, a badge of disgrace, and thus required notice and hearing. The procedural due process of notice and hearing afforded Ms. Constantineau was not for any crime she allegedly committed, it was for having her name listed as a drunkard. Whether or not she was a drunkard was not the issue. Her right to be notified of the listing of her name and her right to contest the listing at a hearing was the procedural due process issue.

K.S.A. 65-516 allows validation of an alleged abuser and the subsequent listing of his or her name with various governmental agencies throughout Kansas, the fifty states and the federal government. Abuse, unlike drunkenness, may be considered a crime, thus requiring as much protection for an alleged abuser, if not more, as afforded an alleged drunkard. (See, e.g., Owen v. City of Independence, 445 U.S. 622

(1979), where the city council impugned an individual's name without notice or opportunity to be heard. The Court held, regardless of the truth of the statement, that an individual's good name is sufficient reason for the mechanism of notice and hearing; see also Board of Regents v. Roth 408 U.S. 564 (1972), where the Court held that when a public employer, in discharging an employee, makes charges that injure the employee's reputation or impose a stigma that forecloses the employee's freedom to take advantage of other employment opportunities, due process requires that the employee receive an opportunity to clear his or her name.)

More recent United States Supreme Court cases have fashioned a "stigma plus" test which an aggrieved party must pass before constitutional protections are afforded. In Paul v. Davis, 424 U.S. 693, 701 (1976), the Court stated specifically that "reputation alone, apart from some more tangible interests such as employment [is not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Rather, the injury to reputation must occur together with some other "alteration of status." Id. at 706-10. (Emphasis added.) Jungels v. Pierce, 638 F. Supp. 317 (N.D. Ill. 1986), citing Roth, supra with approval, stated that for purposes of procedural due process, an employer's own rules or mutually explicit understandings may support a protected property interest of an employee. See also Perry v. Sinderman, 408 U.S. 593 (1972).

III. Application of Due Process Standards to the Situation in Question

As the chief legal counsel of SRS has stated, a day care facility, upon receiving an application for employment, contacts SRS. SRS then checks its Central Registry and informally advises the day care provider whether the applicant appears on the list. The advice is given with the understanding that should a day care provider employ someone on the list, the day care provider's license may be in jeopardy. A similar situation arises when someone already employed by a day care provider is validated by the SRS as being an abuser. The day care provider must discharge or suspend the employee or face the possibility of losing its license.

When a name is listed, a stigma attaches. The alleged abuser is "screened out" of employment, residence or volunteer work in a boarding home or family day care home for children. (See K.S.A. 65-516, supra.) Loss of domicile and employment

opportunity are ascertainable results of validation. This "stigma plus" test triggers the requirement of procedural due process.

K.S.A. 75-3306(a) states:

> "The secretary of social and rehabilitation services shall provide a fair hearing for any person who is an applicant, client, inmate, other interested person or taxpayer who appeals from the decision or final action of any agent or employee of the secretary. The hearing shall be conducted by an employee or employees of the secretary of social and rehabilitation services to be designated by the secretary as an appeals referee or committee. The secretary of social and rehabilitation services shall prescribe the procedure for hearing all appeals.
>
> "It shall be the duty of the secretary of social and rehabilitation services to have available in all intake offices, during all office hours, forms for filing complaints for hearings, and appeal forms with which to appeal from the decision of the agent or employee of the secretary. The forms shall be prescribed by the secretary of social and rehabilitation services and shall have printed on or as a part of them the basic rules and regulations for hearings and appeals prescribed by state law and the secretary of social and rehabilitation services." (Emphasis added.)

Presuming that "other interested person" includes those validated by the SRS as being an abuser, the Kansas Administrative Regulations regarding "Complaints, Appeals and Fair Hearings" and which implement K.S.A. 75-3306, grant only a right to appeal an action by the state. K.A.R. 30-7-26 et seq. This fact has been confirmed by the chief legal counsel of the SRS.

It is our opinion that due process (which includes notice, an opportunity to be heard and an opportunity to defend) must be granted to the resident, worker or regular volunteer affected

by K.S.A. 65-516 before he or she is listed and validated as an abuser by a state agency, before he or she needs to appeal. In other words, before validation of an individual can occur, a fair hearing, akin to the due process afforded the licensee or applicant of K.S.A. 65-504, must be offered. Validating 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." Paul v. Davis, supra at 706-10. K.S.A. 75-3306 and K.A.R. 30-7-26 et seq. are not sufficient to meet the necessary notice and hearing requirements.

IV. Conclusion

A. In our opinion, due process provisions for persons to be listed in the central registry must be codified. Adequate notice must be defined. Regulations unclear as to application and definition must be clarified to afford minimal due process. Statutory rights must be clarified and strengthened.

There is no statute akin to K.S.A. 65-504 which would give the resident, regular volunteer or employee the notice, hearing and right to defend required by law. Likewise, there is no rule and regulation similar to K.S.A. 65-504 for the resident, regular volunteer or employee. The law requiring rules and regulations, K.S.A. 77-415, states in part:

> "As used in K.S.A. 77-415 to 77-437, inclusive, and amendments thereto, unless the context clearly requires otherwise:
>
> "(1) 'State Agency' means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state.
>
> . . . .
>
> "(4) 'Rule and regulation,' 'rule,' 'regulation' and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having

> the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency. Every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in a state agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render the same a rule or regulation within the meaning of the foregoing definition, nor shall it constitute specific adoption thereof by the state agency so as to be required to be filed." (Emphasis added.)

Thus, due process must either be adopted by the agency in rules and regulations, or by the legislature, or both.

Volume I, Section 2000 et seq. of the Kansas Manual of Youth Services (the Department of Social and Rehabilitation Services workers' manual) does reveal some notice to the alleged abuser. Section 2520 states that the worker, in consultation with the supervisor, shall make a decision as to the result of an investigation of abuse. The result of the investigation shall either be confirmed, unconfirmed, unfounded or unknown. (An opinion regarding the standards of proof and the degree of investigation used by the social worker is omitted due to the narrow scope of the opinion request.) Prior to closing the file, the worker is to notify the alleged abuser. The notice may be made verbally and confirmed in writing on Youth Services form number 3102. The date of verbal notice is to be noted on form number AS-0505. (See Vol. I, Section 2530 of the KMYS.)

A reading of YS-3102 reveals a form used to notify a recipient of state benefits and services that the recipients' benefits may be discontinued. A reading of AS-0505 reveals an activity sheet used to log in the times and dates a social worker contacted a person or agency.

In a 1985 letter regarding validation and statutory compliance received by SRS Area Managers, Chiefs of Social Services and Social Service Supervisors from the Youth Services State Commissioner, it was stated that the action of the Validation Committee (established in an effort to comply with child care facilities licensing) "does not change the finding of the social services worker who conducted the investigation nor the information in the Central Registry. It does review the available material . . . to determine if there is sufficient documentation to sustain a recommendation to revoke or deny a license or registration [of the applicant]." (Emphasis added.) The finding of the social worker regarding an alleged abuser does not change.

We have recently been advised that the SRS procedural manual has been revised to afford more adequate notice. We have not been provided a copy of the revised draft, and therefore cannot comment on its adequacy. In any event, K.S.A. 77-415(4) clearly provides that a rule of an agency, adopted by that agency to govern its enforcement or administration of legislation shall be adopted by that agency and filed as a rule and regulation. The manual, therefore, would not be sufficient for purposes of establishing the administration and regulation of this validation procedure.

B. Recommended Procedures. It is recommended, given the gravity of such a listing, that the notice form include: notification to the alleged abuser that he or she has been accused, that a right to a hearing exists, that if 30 days lapse without a response the hearing will be conducted with only the proponent's evidence, and that a right to appeal a hearing decision exists. It is further recommended that the notice be sent in a fashion similar to a subpoena or summons. In all of the above, the concept that a fair hearing be given prior to listing/validation is of paramount concern.

K.A.R. 30-7-26 currently defines only "client," "appellant," "respondent," and "impartial." Inclusion of a definition of "abuse" or "alleged abuser" subject to validation is recommended. The term "other interested person" as it appears in K.S.A. 75-3306(a) seems insufficient in light of the weight of the allegations. The appropriate social workers' manuals and letters should also be redrafted to reflect this policy. Finally, as indicated above, due process requirements of adequate notice and an opportunity to be heard must be adopted in statutory or regulatory form or both.

All of the above actions would have the dual effect of granting the required due process to an alleged abuser, as

well as furthering the state's interest in protecting children, in that a truer and more manageable list of alleged abusers would be circulated to the appropriate agencies. (Note: the validation list is used for other purposes by other agencies of the fifty states and the federal government. Given the narrow scope of the opinion request, further substantive due process analysis of validation is omitted.)

C. The due process afforded the licensee or applicant in K.S.A. 65-504 is the minimum the state must grant to the alleged abuser as well as the licensee. Current legislation and rules and regulations do not insure the constitutional right of the alleged abuser to be notified before the state lists that individual in the "Central Registry" as a child abuser.

The position of Kansas and of the United States in statutory and case law is clear: when a liberty and property interest is affected by state action, notice and hearing must be afforded. Furthermore, this state action must be enacted through legislation or adopted by the state agency in rules and regulations. K.S.A. 77-415.

In conclusion, K.S.A. 65-516(a)(3) provides that no person may be licensed to operate a child day care home or child boarding home if said person has a resident, employee or regular volunteer who has been validated an abuser by the Department of Social and Rehabilitation Services pursuant to K.S.A. 1985 Supp. 38-1523. In our opinion, this validation procedure does not meet constitutional requirements of due process unless and until legislation and/or agency rules and regulations are drafted providing for due process to the alleged perpetrator.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Thomas Lietz

Thomas Lietz
Assistant Attorney General

RTS:JLM:TL:crw