



To: Senate Financial Institutions and Insurance Committee

From: Jerry Slaughter
Executive Director

Date: February 2, 2010

Subject: SB 414; Concerning the Health Care Stabilization Fund and the allotment authority of the Secretary of Administration authorized by KSA 75-3722

The Kansas Medical Society appreciates the opportunity to appear in support of SB 414, which was introduced at our request by this committee. This bill contains two changes to existing law: one substantive, the other purely technical. The substantive change is found on page 8 of the bill at lines 32-34. It amends KSA 40-3403(j) with the addition of a new subsection (6), which exempts the statutorily required transfers from the state general fund to the HCSF pursuant to that section of the law from the Secretary of Administration's allotment authority contained in KSA 75-3722 *et seq.* The technical change is found on page 11 of the bill at line 24. It amends KSA 40-3404(a) by striking the word "fiscal" from the statute, which will allow the HCSF Board of Governors to wait until after the end of a fiscal year to set the annual premium surcharge that must be paid by health care providers. This technical change is not controversial, and the balance of our testimony will focus only on the substantive change involving the allotment statute.

Background

Since 1976, physicians, hospitals and several other categories of health care providers have been required by law to purchase professional liability, or as it is more commonly known, "medical malpractice" insurance. We have a somewhat unique structure in Kansas that blends privately-purchased, basic insurance limits with a statewide pooling mechanism that provides coverage for higher limits of exposure. The entity that provides higher insurance limits of insurance coverage is called the Health Care Stabilization Fund (found at KSA 40-3401 *et seq.*). For the past 34 years the HCSF has done its job well, and along with our tort reform measures such as the cap on noneconomic damages, has been a key factor in the stability of the Kansas medical malpractice insurance market. It should be noted that, with the sole exception of the issue that is the subject of SB 414, the HCSF is entirely funded by premiums charged to health care providers. It is also important to note for the record that the HCSF has been operated in a fiscally responsible manner, so that it will always be able to meet its responsibility to pay judgments and settlements that are due to injured persons who bring claims against health care providers.

In 1989, in order to lower the cost of medical malpractice insurance which the state purchased for the full-time faculty and the residents in training affiliated with the KU School of Medicine, the state of Kansas established a partially self-insured program which involves the HCSF. In essence, the HCSF administers the self-insurance program for the faculty and residents, which most importantly, includes the payment of claims and legal costs. The state of Kansas assumed liability for a portion of the cost of the insurance program, with the medical school faculty and their practice foundations paying for the balance. In any fiscal year, if the claims costs exceed the amount paid in by the faculty foundations, the State General Fund (SGF) is obligated by law to transfer to the HCSF the difference. The amount varies each year, but on average, the SGF responsibility for faculty and residents has been in the \$2.5 million range per year. The statutory provisions which govern this self-insurance arrangement are found at KSA 40-3403(c) and (j); and also at KSA 40-3414(d), (h) and (i).

The issue in SB 414

In February 2009 and then again in July 2009, the Secretary of Administration issued an allotment order pursuant to KSA 75-3722, which withheld the SGF transfers owed the HCSF for medical malpractice claims the HCSF had already paid. For FY 2009 the amount withheld was slightly over \$2.9 million. For FY 2010, it is estimated that the amount will be in a similar range. Apparently, the Governor has recommended that no transfer be made in FY 2011 as well. If the allotment orders for FY 2010 and 2011 are carried out, it will cost the HCSF (or more accurately, the health care providers who pay the premiums into the HCSF) somewhere between \$8-9 million. Those unreimbursed funds will have to be made up in the form of higher premiums to ensure that there are adequate funds to pay claims and expenses against the HCSF.

The effect of the allotment orders by Governor Sebelius and Governor Parkinson is a shifting to physicians, hospitals and other health care providers in the private sector, costs associated with claims against residents and faculty at KU, *that are legally the responsibility of the state of Kansas*.

Let me be clear that the neither the faculty, residents nor KU itself have in any way created this problem. All parties to this self-insurance arrangement, *except the state of Kansas*, are doing exactly what the law requires of them.

The effect of SB 414

Passage of SB 414 would exempt this self-insurance arrangement from the allotment statute, KSA 75-3722 *et seq.* In other words, the state's self-insurance program for faculty and residents would be restored to its proper operation, and the privately-practicing physicians and hospitals throughout the state would not be forced to pay for liabilities that are legally the responsibility of the state of Kansas.

There are numerous examples of other funds within state government that are not subject to the allotment statute. Some have specific language such as that suggested in SB 414, which exempts the particular fund from the allotment statute. Examples of such funds are the Solid Waste Management Fund (KSA 65-3415a), the Hazardous Waste Management Fund (KSA 65-3491), the Drycleaning Facility Release Trust Fund (KSA 65-34,146), the Underground Petroleum Storage Tank Release Trust Fund (KSA 65-34,114), and the Aboveground Petroleum Storage Tank Release Trust Fund (65-34,129).

Other funds are exempted from the allotment statute by virtue of classifying their transfers as “demand” transfers, which has the effect of not making them subject to allotment. Examples of such funds are the Local Ad Valorem Tax Reduction Fund (KSA 79-2959), the State School District Finance Fund (KSA 72-6438), and the County and City Revenue Sharing Fund (KSA 79-2964).

Conclusion

For nearly three and a half decades, health care providers have met their responsibilities under the law, and provided the funds to operate a fiscally sound insuring mechanism, the Health Care Stabilization Fund. For the past twenty years, the state of Kansas has chosen to operate, in conjunction with the HCSF, the self-insurance arrangement that covers KU faculty and residents, in lieu of purchasing their insurance from the private insurance market. That self-insurance arrangement has worked well, and we support its continuation. However, the physicians, hospitals and other health care providers throughout the state should not also have to cover the state of Kansas’ financial obligations under the self-insurance arrangement, by virtue of an allotment ordered by the Governor. If the state does not want to assume those obligations in the future, it should make other arrangements. It should not, in essence, levy a tax on health care providers for obligations that are not properly theirs.

These allotment orders have unfairly put KU, its medical faculty and residents in a bad light throughout the state, because it has created the unfortunate appearance that privately-practicing health care providers are subsidizing KU’s obligations, when in fact the KU medical school faculty, administration and residents have consistently met their obligations under the law, and done everything required of them. This is not a problem of their making, and they deserve no blame for it. The state voluntarily entered into this self-insurance arrangement two decades ago, and now the state, by virtue of these allotment orders, has unilaterally repudiated its legal obligation to KU faculty and residents, and to the broader provider community, by failing to live up to its financial obligations. The actions of the state are neither fair, nor defensible.

We believe a strong argument can be made that because medical school faculty have significant teaching and research responsibilities, and thus unable to accommodate a full clinical component in their professional activities, that the state should either provide for

completely, or participate in a significant way, in providing their required professional liability coverage. Additionally, because residents are really students in the truest sense of the word, the state should pay the full cost of their liability protection.

We urge you to pass SB 414, and end this cost-shifting of state obligations onto the physicians, hospitals and other health care providers in the state. The state of Kansas must honor its legal and financial obligations. Thank you for allowing us the opportunity to offer these comments.