

Appendix A

Laws & Statutory Regulations

SELF-DIRECTED PERSONAL ASSISTANCE SERVICES

1. 1989 Session of Kansas Legislature – Passed H.B. 2012
This law did the following:
 - Allowed individuals under the HCBS program to have the option to self-direct their personal assistance services, or to have someone direct services on their behalf.
 - Established an exemption to the nurse practice act concerning the performance of “health maintenance activities.”
 - Defined attendant care services.
2. 1989 session also passed H.B. 2694, which defined who could be the provider of non-medical attendant self-directed services.
 - Home Health Agencies
 - Centers for Independent Living

DEFINITIONS:

Attendant Care Services means those “basic and ancillary services which enable an individual in need of in-home care to live in the individual’s home and community rather than in an institution and to carry out functions of daily living, self-care and mobility.

Basic services shall include, but not be limited to:

1. Getting in and out of bed, wheelchair or motor vehicle, or both,
2. Assistance with routine bodily functions including but not limited to:
 - Health maintenance activities;
 - Bathing and personal hygiene;
 - Dressing and grooming, and
 - Feeding, including preparation and cleanup.

Ancillary services means services ancillary to the basic services provided to an individual in need of in-home care who needs one or more of the basic services and include the following:

1. Homemaker type services, including but not limited to shopping, laundry, cleaning, and seasonal chores;
2. Companion type services, including but not limited to, transportation, letter writing, mail and escort, and

3. Assistance with cognitive tasks including but not limited to, managing finances, planning activities, and making decisions.

Health maintenance activities include but are not limited to, catheter irrigation, administration of medications, enemas and suppositories; and wound care.

There are now five separate statutes which address attendant care and self-direction. They are:

K.S.A. 65-5101

Defines who is eligible to provide self-directed services under the HCBS Waiver. It defines home health agencies and Independent Living Agencies.

K.S.A. 65-5102

This section indicates that an entity that is a home health agency may not provide services with the exception of non-medical attendant services, unless it is licensed.

K.S.A. 65-1124

This section refers to acts which are NOT prohibited by law. The most important of which is letter “m” which states that “no provisions of this law shall be construed as prohibiting performance of attendant care services directed by or on behalf of an individual in need of in-home care as the terms “attendant care services” and “individual in need of in-home care” are defined...”

K.S.A. 65-6201

This section includes the definitions described above and sets the exemption to the nurse practice act by defining health maintenance activities: includes but are not limited to, catheter irrigation, administration of medications, enemas, and suppositories; and wound care, if such activities in the opinion of the attending physician or licensed professional nurse may be performed by the individual if the individual were physically capable, and the procedure may be safely performed in the home.

K.S.A. 39-7,100

Defines HCBS services. It further sets the rights of individuals in need of in-home care who are recipients of attendant care services and the parents or guardians of minors who are at least 16 years of age and who are in need of in-home care shall have the right to choose the option to make decisions about, direct the provisions of and control the attendant care services received by such individuals including but not limited to, selecting, training, managing, paying, and dismissing of an attendant.

These bodies of law tell us three basic things:

1. What are attendant care services
2. Who can provide such services and under what conditions

3. What are the rights of consumers of such services

- 1) Attendant care services are defined as “basic and ancillary services which enable an individual in need on in-home care to live in an individual’s home and community rather than an institution and to carry out functions of daily living, self-care and mobility.
- 2) In the statute, “basic and ancillary services” are further defined. For purposes of this discussion, one of the types of ancillary services, “health maintenance activities”, will be highlighted. Essentially, health maintenance activities are invasive, medical or quasi-medical procedures which normally must be provided and/or supervised by licensed professionals. Kansas law exempts the licensure requirement for “performance of attendant care services directed by or on behalf of an individual in need of in-home care.”
- 3) “Recipients of attendant care services and the parents and guardians of individuals who are minors at least 16 years of age and who are in need of in-home care shall have the right to choose the option to make decisions about, direct the provisions of, and control the attendant care services received by such individuals including, but not limited to, selecting, training, managing, paying, and dismissing of an attendant.”

KEY TERMS

“right to choose...” and “including, but not limited to...”

- HCBS eligible people in Kansas have a right to control their attendant services.
- Such control must include the five elements (selecting, training, managing, paying, and dismissing of an attendant) in order to meet the statutory requirement for self-direction. These five elements are not exhaustive, but they are necessary. If any of the five are missing, then the service cannot be considered “self-directed.” Further, only “Independent Living Agencies” and certain uncertified employees of home health agencies may administer self-directed attendant services. In the case of home health agency employees, they cannot be held out as “home health aides” and cannot be nurse supervised and the minimum five conditions described above must be met in order for “self-direction” to be obtained. For both independent living agencies and home health agencies, the employer responsibilities are shared with the self-directed consumer and are limited to payroll and accounting type administrative functions.
- Other related services may or may not be provided depending on the individual agency’s programs and the desires of the consumer. Examples included assistance with background checks, assistance with recruitment, providing additional training to consumers and so on.

- Finally, self-direction is an option for people to choose. Not everyone is ready, or willing, to take on this responsibility. Traditional home health is critical for filling the gap for people who choose to remain in their own homes, but prefer professional assistance and intervention in the decision making surrounding their care.

NOTE: Medicare licensed providers probably cannot provide the self-directed option.

- Medicare requires licensure and certification, and professional supervision of all workers and services which precludes self-direction.
- An additional concern is the number of hours that an attendant can work. Attendants under the self-directed option are not independent contractors. Agencies need to be aware that hours worked in excess of forty per week are covered by wage and hour laws which mandate overtime. Allowing attendants to work more than forty hours without paying overtime exposes an agency to overtime

House Bill No. 2012

By Special Committee on Public Health and Welfare

Re Proposal Nos. 37 and 40

12-22

AN ACT concerning individuals in need of in-home care; defining certain terms, directing the secretary of social and rehabilitation services to perform certain duties as part of the home and community based services program; providing an exemption from the Kansas nurse practice act; amending K.S.A. 65-112 and K.S.A. 1988 Supp. 65-1124 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. As used in this act:

(Now K.S.A. 65-6201, Chapter 65.—PUBLIC HEALTH, Article 62.—

MISCELLANEOUS PROVISIONS, 65-6201. Individuals in need of in-home care; definitions.)

- (a) “Attendant care services” means those basic and ancillary services which enable an individual in need of in-home care to live in the individual’s home and community rather than in an institution and to carry out functions of daily living, self-care and mobility.
- (b) “Basic services” shall include, but not be limited to:
 - (1) Getting in and out of bed, wheelchair or motor vehicle, or both;
 - (2) assistance with routine bodily functions including, but not limited to:
 - (A) health maintenance activities;
 - (B) bathing and personal hygiene;
 - (C) dressing and grooming; and
 - (D) feeding, including preparation and cleanup.
- (c) “Ancillary services” means services ancillary to the basic services provided to an individual in need of in-home care who needs one or more of the basic services, and include the following:
 - (1) Homemaker-type services, including but not limited to, shopping, laundry, cleaning and seasonal chores;

- (2) companion-type services including but not limited to, transportation, letter writing, reading mail and escort; and
- (3) assistance with cognitive tasks including, but not limited to, managing finances, planning activities and making decisions.
- (d) “Health maintenance activities” include, but are not limited to, catheter irrigation; administration of medications, enemas and suppositories; and wound care, if such activities in the opinion of the attending physician or licensed professional nurse may be performed by the individual if the individual were physically capable, and the procedure may be safely performed in the home.
- (e) “Individuals in need of in-home care” means any functionally disabled individual in need of attendant care services because of impairment who requires assistance to complete functions of daily living, self-care and mobility, including, but not limited to, those functions included in the definition of attendant care services.
- (f) “Physician” means a person licensed to practice medicine and surgery.

New Sec. 2. (a) As used in this section:

(Now K.S.A. 39-7,100, Chapter 39.—MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS; SOCIAL WELFARE, Article 7.—SOCIAL WELFARE, 39-7,100. Home and community based services program; definitions; program requirements; demonstration projects. (a) As used in this section:)

- (1) “Home and community based services programs” mean the programs established under the state medical assistance program under plans or waivers as defined in the federal social security act in accordance with the plans or waivers adopted by the secretary of social and rehabilitation services and the secretary of aging, either separately or jointly, to provide attendant care services to individuals in need of in-home care who would require admission to an institution if the attendant care services were not otherwise provided.
- (2) “Secretary” means either the secretary of social and rehabilitation services or the secretary of aging.
 - b) The secretary as part of the home and community based services programs, subject to social security act grant requirements, shall provide that:

- (1) Priority recipients of attendant care services shall be those individuals in need of in-home care who are at the greatest risk of being placed in an institutional setting;
 - (2) individuals in need of in-home care who are recipients of attendant care services and the parents or guardians of individuals who are minors at least 16 years of age and who are in need of in-home care shall have the right to choose the option to make decisions about, direct the provisions of and control the attendant care services received by such individuals including, but not limited to, selecting, training, managing, paying and dismissing of an attendant.
 - (3) any proposals to provide attendant care services solicited by the secretary shall be selected based on service priorities developed by the secretary, except that priority shall be given to proposals that will serve those at greatest risk of being placed in an institution as determined by the secretary;
 - (4) providers, where appropriate, shall include individuals in need of in-home care in the planning, startup, delivery and administration of attendant care services and the training of personal care attendants; and
 - (5) within the limits of appropriations therefore, the home and community based services programs shall serve eligible individuals in need of in-home care throughout this state.
- (c) Within the limits of appropriations therefore, the secretary may initiate demonstration projects to test new ways of providing attendant care services and may conduct specific research into ways to best provide attendant care services in both urban and rural environments.
- (d) *On or before October 1, 1990, the secretary shall submit a written report to the governor and to the legislature, which report shall include a summary of attendant care services provided under the home and community based services program, a description of the service models utilized as part of the program, the costs by service model and units of service provided per client, client demographics and such other information as the secretary deems appropriate.*

Sec. 3. K.S.A. 1988 Supp. 65-1124 is hereby amended to read as follows: 65-1124. No provisions of this law shall be construed as prohibiting:

(Now K.S.A. 65-1124, Chapter 65.—PUBLIC HEALTH, Article 11.—REGULATION OF NURSING, 65-1124. Acts which are not prohibited. No provisions of this law shall be construed as prohibiting:)

- (a) Gratuitous nursing by friends or members of the family;
- (b) the incidental care of the sick by domestic servants or persons primarily employed as housekeepers;
- (c) caring for the sick in accordance with tenets and practices of any church or religious denomination which teaches reliance upon spiritual means through prayer for healing;
- (d) nursing assistance in the case of an emergency;
- (e) the practice of nursing by students as part of a clinical course offered through a school of professional or practical nursing or program of advanced registered professional nursing approved in the United States or its territories;
- (f) the practice of nursing in this state by legally qualified nurses of any of the other states as long as the engagement of any such nurse requires the nurse to accompany and care for a patient temporarily residing in this state during the period of one such engagement not to exceed six months in length, and as long as such nurses do not represent or hold themselves out as nurses licensed to practice in this state;
- (g) the practice by any nurse who is employed by the United States government or any bureau, division or agency thereof, while in the discharge of official duties;
- (h) auxiliary patient care services performed in medical care facilities, adult care homes or elsewhere by persons under the direction of a person licensed to practice medicine and surgery or a person licensed to practice dentistry or the supervision of a registered professional nurse or a licensed practical nurse;
- (i) the administration of medications to residents of adult care homes or to patients in hospital-based long-term care units, including state operated institutions for the mentally retarded, by an unlicensed person who has been certified as having satisfactorily completed a training program in medication administration approved by the secretary of health and environment and has completed the program on continuing education

adopted by the secretary, or by an unlicensed person while engaged in and as a part of such training program in medication administration;

- (j) the practice of mental health technology by licensed mental health technicians as authorized under the mental health technicians' licensure act;
- (k) performance in the school setting of nursing procedures when delegated by a licensed professional nurse in accordance with the rules and regulations of the board;
- (l) performance of attendant care services directed by or on behalf of an individual in need of in-home care as the terms "attendant care services" and "individual in need of in-home care" are defined under K.S.A. 65-6201 and amendments thereto;
- (m) performance of attendant care services directed by or on behalf of an individual in need of in-home care as the terms "attendant care service" and "individual in need of home care" are defined under section 1.

Sec. 4 K.S.A. 65-5112 is hereby amended to read as follows: 65-5112.

(65-5112, Chapter 65.—PUBLIC HEALTH, Article 51.—HOME HEALTH AGENCIES, 65-5112. Act not applicable to certain individuals or organizations. The provisions of this act shall not apply to:)

- (a) Individuals who personally provide one or more home health services if such persons are not under the direct control and doing work for and employed by a home health agency;
- (b) individuals performing attendant care services directed by or on behalf of an individual in need of in-home care as the terms "attendant care services" and "individual in need of in-home care" are defined under K.S.A. 65-6201, if the individuals performing such services are not under the direct control and doing work for and employed by a home health agency; or
- (c) any person or organization conducting a home health agency by and for the adherents of any recognized church or religious denomination or sect for the purpose of providing services for the care or treatment of the sick or infirm who depend upon prayer or spiritual means for healing in the practice of the religion of such church, religious denomination or sect; or

Article 51. Home Health Agencies

65-5101. Definitions. As used in this act, unless the context otherwise requires:

- (b) “home health agency” means a public or private agency or organization or a subdivision or subunit of such agency or organization that provides for a fee one or more home health services at the residence of a patient but does not include local health departments which are not federally certified home health agencies, durable medical equipment companies which provide home health services by use of specialized equipment, independent living agencies, the department of social and rehabilitation services and the department of health and environment;

- (f) “independent living agency” means a public or private agency or organization or a subunit of such agency or organization whose primary function is to provide at least four independent living services, including independent living skills training, advocacy, peer counseling and information and referral as defined by the rehabilitation act of 1973, title VII, part B, and such agency shall be recognized by the secretary of social and rehabilitation services as an independent living agency. Such agencies include independent living centers and programs which meet the following quality assurances:
 - (1) Accreditation by a nationally recognized accrediting body such as the commission on accreditation of rehabilitation facilities; or
 - (2) receipt of grants from the state or the federal government and currently meets standards for independent living under the rehabilitation act of 1973, title VII, part B, sections (a) through (k), or comparable standards established by the state; or
 - (3) compliance with requirements established by the federal government under rehabilitation services administration standards for centers for independent living;

65-5102. Home health agencies required to be licensed. No home health agency, including Medicare and Medicaid providers, shall provide one or more of the home health services specified in subsection (c) of K.S.A. 65-5101 and amendments thereto, other than attendant care services, or shall hold itself out as providing one or more of such home health services, other than attendant care services, or as a home health agency unless it is licensed in accordance with the provisions of this act.

65-1124. Acts which are not prohibited. No provision of this law shall be construed as prohibiting:

- (m) performance of a nursing procedure by a person when that procedure is delegated by a licensed nurse, within the reasonable exercise of independent nursing judgment and is performed with reasonable skill and safety by that person under the supervision of a registered professional nurse or a licensed practical nurse;

65-6201. Individuals in need of in-home care; definitions. As used in this act:

- (d) “Health maintenance activities” include, but are not limited to, catheter irrigation; administration of medications, enemas and suppositories; and wound care, if such activities in the opinion of the attending physician or licensed professional nurse may be performed by the individual if the individual were physically capable, and the procedure may be safely performed in the home.

39-7,100. Home and community based services program; definitions; program requirements; demonstration projects. (a) As used in these sections:

- (1) “Home and community based services programs” mean the programs established under the state medical assistance program under plans or waivers as defined in the federal social security act in accordance with the plans or waivers adopted by the secretary of social and rehabilitation services and the secretary of aging, either separately or jointly, to provide attendant care services to individuals in need of in-home care who would require admission to an institution if the attendant care services were not otherwise provided.

SESSION OF 1989

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2012

As Recommended by Senate Committee on Public Health and Welfare

Brief

H.B. 2012, as amended by the House Committee of the Whole, creates new laws concerning individuals in need of in-home care. The bill would permit “individuals in need of care,” defined as adults who are functionally disabled because of physical impairment to receive “attendant care services,” defined as services which enable an individual to live in the individual’s home and community rather than in an institution. Attendant care services include “health maintenance activities” if such activities, in the opinion of an attending physician or a licensed professional nurse could be performed by the individual if the person were physically able to do so and the procedures may be safely performed in the home. The Kansas Nurse Practice Act is amended to exempt the performance of attendant care services from those services that the act prohibits if not provided by licensed nurses.

The bill directs the Secretary of Social and Rehabilitation Services to follow specific guidelines in operating the existing Home and Community Based Services component of the Medical Assistance program, including the right of recipients of services to make decisions about the provision of services, i.e., the right to select, train, manage, pay, and dismiss an attendant. Additionally, the Secretary, within the limits of appropriations, is authorized to initiate demonstration projects to test new ways of providing attendant care services and to conduct specific research into ways to provide such services in both urban and rural environments. The House Committee of the Whole extended the time at which the new provisions relating to the Home and Community Based Services program apply to October 1, 1989.

H.B. 2012, as amended, requires the Secretary to submit a written report to the Governor and the Legislature by October 1, 1990, summarizing services provided, client demographics, and such other information as the Secretary deems appropriate.

Finally, K.S.A. 65-2112, a section of the home health agency statutes, is amended to make it clear that persons providing attendant care services under the provisions of the bill are not to be considered to be under the direct control and employed by a home health agency.

Background

H.B. 2012, as amended, was recommended by the interim Special Committee on Public Health and Welfare as a result of its study under Proposal No. 37 – In-Home Care and Services for Handicapped and Functionally Disabled Persons and Proposal No. 40 – Limitations on Delivery of In-Home Service. That Committee found, among other things, that: in-home services provide an important alternative to institutional placement that should be strengthened and expanded in Kansas; persons in need of in-home care represent various needs and desires and include disabled individuals who are physically handicapped because of injury or from birth as well as the elderly who because of disease or other condition are unable to carry out activities of daily living; the most controversial programs are those operated by the Department of Social and Rehabilitation Services as non-medical attendant care, personal care services, and medical attendant care; there is sufficient controversy over the way services are provided to require legislative action to resolve the issues; any resolution should apply to all persons who are in need of in-home services whether they receive services that are reimbursed through a governmental program, through third-party payers, or private pay; and that an exception to the scope of practice of licensed nurses should be created for the provision of in-home care that meets the standards established for attendant care services.

A number of conferees supported the provisions of H.B. 2012 as amended.

