

Testimony re: Shortage of Medicaid Dentists and Corporate Dentistry in Kansas
Joint Committee on Health Policy Oversight
Presented by Betty Wright
December 9, 2010

Chairperson and Members of the Committee:

My name is Betty Wright, and I am the Executive Director of the Kansas Dental Board. The Board consists of nine members: six dentists, two dental hygienists and one public member. The mission of the Dental Board is to protect the public through licensure and regulation of the dental profession.

The Board has been entrusted with enforcing the Dental Practices Act in order to protect the public. We have no voice or stand on the issue of Medicaid providers or reimbursements. In fact there are three references to Medicaid in the Kansas Dental Practices Act (KDPA) are (1) allowing dentists to be employed by FQHCs and indigent clinics who accept Medicaid:

- K.S.A.65-1466. Dental services for dentally indigent persons; entities authorized to employ or contract with persons licensed under dental practices act for such services; reports by federally qualified health centers and clinics employing a national health service corps dentist; requirements for retired dentists providing such dental services.** (a) (1) Notwithstanding any other provision of the dental practices act, a not-for-profit corporation having the status of an organization under 26 United States Code Annotated 501(c)(3) which is also a facility qualified under subsection (b) of K.S.A. 65-431 and amendments thereto to select and employ professional personnel, an indigent health care clinic as defined by the rules and regulations of the secretary of health and environment, or a local health department may employ or otherwise contract with a person licensed under the dental practices act to provide dental services to dentally indigent persons.
- (2) Notwithstanding any other provision of the dental practices act, a federally qualified health center or national health service corps site may employ or otherwise contract with a person licensed under the dental practices act to provide services to any person except that a federally qualified health center and a clinic employing a national health service corps dentist shall report annually to the health care reform legislative oversight committee indicating the income level of their patients and the percentage of patients covered by dental insurance in the preceding year.
- (b) Dentally indigent persons are those persons who are: (1) Determined to be a member of a family unit earning at or below 200% of poverty income guidelines based on the annual update of "poverty income guidelines" published in the federal register by the United States department of health and human services and are not indemnified against costs arising from dental care by a policy of accident and sickness insurance or an employee health benefits plan; or (2) eligible for Medicaid; or (3) eligible for the Kansas federal children's health insurance program; or (4) eligible for other publicly funded health care programs as defined by the Kansas dental board; or (5) qualified for Indian health services. This subsection shall not be construed to prohibit an entity under subsection (a) which enters into an arrangement with a licensee under the dental practices act for purposes of providing services to dentally indigent persons pursuant to subsection (a) from defining "dentally indigent persons" more restrictively than such term is defined under this subsection.
- (c) A licensee under the dental practices act who enters into an arrangement with an entity under subsection (a) to provide dental services pursuant to subsection (a): (1) Shall not be subject to having the licensee's license suspended or revoked by the board solely as a result of such arrangement; and (2) may not permit another person who is not licensed in Kansas as a dentist, and is not otherwise competent, to engage in the clinical practice of dentistry. No entity under subsection (a) or any other person may direct or interfere or attempt to direct or interfere with a licensed dentist's professional judgment and competent practice of dentistry.

And (2), hygienists with extended care permits may provide services to children who qualify for Medicaid:

KSA 65-1456. Dental hygienists; suspension or revocation of licenses, when; notice and hearing; practice of dental hygiene defined; rules and regulations; supervision defined; where performance of practice authorized, issuance of permits therefor; authorized activities, requirements. (a) The board may suspend or revoke the license of any dentist who shall permit any dental hygienist operating under such dentist's supervision to perform any operation other than that permitted under the provisions of article 14 of chapter 65 of the Kansas Statutes Annotated,

or acts amendatory thereof, and may suspend or revoke the license of any hygienist found guilty of performing any operation other than those permitted under article 14 of chapter 65 of the Kansas Statutes Annotated, or acts amendatory thereof. No license of any dentist or dental hygienist shall be suspended or revoked in any administrative proceedings without first complying with the notice and hearing requirements of the Kansas administrative procedure act.

... (f) The practice of dental hygiene may be performed with consent of the parent or legal guardian, on children participating in residential and non-residential centers for therapeutic services, on all children in families which are receiving family preservation services, on all children in the custody of the secretary of social and rehabilitation services or the commissioner of juvenile justice authority and in an out-of-home placement residing in foster care homes, on children being served by runaway youth programs and homeless shelters; and on children birth to five and children in public and nonpublic schools kindergarten through grade 12 regardless of the time of year and children participating in youth organizations, so long as such children birth to five, in public or nonpublic schools or participating in youth organizations also meet the requirements of **medicaid**, healthwave, or free or reduced lunch programs or Indian health services; at any state correctional institution, local health department or indigent health care clinic, as defined in K.S.A. 65-1466, and amendments thereto; and at any federally qualified health center, federally qualified health center look-alike or a community health center that receives funding from section 330 of the health center consolidation act, on a person, inmate, client or patient thereof and on other persons as may be defined by the board; so long as:

(1) The dental hygienist has received an "extended care permit" from the Kansas dental board specifying that the dental hygienist has performed 1,200 hours of dental hygiene care within the past three years or has been an instructor at an accredited dental hygiene program for two academic years within the past three years;

(2) the dental hygienist shows proof of professional liability insurance;

(3) the dental hygienist is sponsored by a dentist licensed in the state of Kansas, including a signed agreement stating that the dentist shall monitor the dental hygienist's activities, except such dentist shall not monitor more than five dental hygienists with an extended care permit;

(4) the tasks and procedures are limited to: (A) removal of extraneous deposits, stains and debris from the teeth and the rendering of smooth surfaces of the teeth to the depths of the gingival sulci; (B) the application of topical anesthetic if the dental hygienist has completed the required course of instruction approved by the dental board; (C) the application of fluoride; (D) dental hygiene instruction; (E) assessment of the patient's apparent need for further evaluation by a dentist to diagnose the presence of dental caries and other abnormalities; and (F) other duties as may be delegated verbally or in writing by the sponsoring dentists consistent with this act;

(5) the dental hygienist advises the patient and legal guardian that the services are preventive in nature and do not constitute a comprehensive dental diagnosis and care;

(6) the dental hygienist provides a copy of the findings and the report of treatment to the sponsoring dentist and any other dental or medical supervisor at a participating organization found in this subsection; and supervisor at a participating organization found in this subsection; and

(7) any payment to the dental hygienist for dental hygiene services is received from the sponsoring dentist or the participating organization found in this subsection. ...

Finally (3) the mobile dentistry regulations require the operator to notify patients that their treatment may affect their Medicaid benefits:

KAR 71-8-5. Written procedures; communication facilities; conformity with requirements; driver requirements; consent forms; follow-up treatment. Each operator of a mobile dental facility or portable dental operation shall ensure that the following conditions and requirements are met:

(a) A written procedure for emergency follow-up care is used for patients treated in the mobile dental facility or portable dental operation, and the procedure includes arrangements for treatment in a health care facility that is permanently established in the area where services were provided.

(b) The mobile dental facility or portable dental operation has communication facilities that will enable the operator to contact necessary parties if a medical or dental emergency occurs. The communications facilities shall enable the patient or the parent or guardian of the patient treated to contact the operator for emergency care, follow-up care, or information about treatment received. The health care provider who renders follow-up care shall also be able to contact the operator and receive treatment information, including radiographs when taken.

(c) The mobile dental facility or portable dental operation and the dental procedures performed meet the requirements of K.A.R. 71-1-18.

(d) The driver of the mobile dental facility or portable dental operation possesses a valid driver's license appropriate for the operation of the vehicle.

(e) No services are performed on minors or individuals for whom a guardian has been established without a signed consent form signed by the parent or guardian that includes the following:

(1) An authorization for the treatment to be provided;

(2) an acknowledgement by the parent or guardian that the treatment of the patient at the mobile dental facility or portable dental operation could affect the future benefits that the patient could receive under any of the following:

- (A) Private insurance;
- (B) medicaid; or
- (C) a children's health insurance program; and

(3) an acknowledgement by the parent or guardian that the parent or guardian has been advised to arrange for continued dental care for the patient.

CORPORATE DENTISTRY.

The remaining topic for this committee is on the Kansas law regarding corporate dentistry. There are five provisions in the KDPA that limit corporate ownership. (1) Dentists may not be employed by an unlicensed proprietor; (2) corporations may not practice dentistry (3) dentists may not split fees with a non-dentist; (4) dentist(s) owners must be in the practice a majority of the time the office is operated; (5) and franchises are prohibited.

(1) If the dentist works for a corporation, the corporation is considered to be practicing dentistry as an unlicensed proprietor. Unless a dentist is employed by another dentist or a professional dental corporation or by certain exceptions such as indigent health care clinics, FQHCs, or state institutions, the dentist is in violation pursuant to:

KSA 65-1424. Proprietor defined; revocation of license, when. The term "proprietor" as used in this act includes any person who:

- (a) Employs dentists or dental hygienists in the operation of a dental office; or
- (b) places in possession of a dentist or dental hygienists or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or offices; or
- (c) retains the ownership or control of dental equipment or material or office and makes the same available in any manner for the use by dentists or dental hygienists or other agents except that nothing in this subsection (c) shall apply to bona fide sales of dental equipment or material secured by a chattel mortgage or retain title agreement.

A licensee of dentistry who enters into any of the above-described arrangements with an unlicensed proprietor may have such license suspended or revoked by the board.

(2) Before enacting KSA 65-1425 below against corporate dentistry, early case law described a public policy against corporations practicing medicine and dentistry. In *Winslow v. Board of Dental Examiners*, 115 Kan. 450 (1924) the Supreme Court said "[c]orporations may not be graduated from dental colleges, they have neither learning nor skill, and they may not be examined, registered or licensed as dentists. Therefore, the legislature does not permit the organization of a domestic corporation to practice dentistry." The Court said the prohibition was to protect the public. In the *Winslow* case, the dentist's license was revoked for being employed by a corporation – receiving a salary and commission for dental work on the corporation's clients.

KSA 65-1425. Corporations not to practice dentistry; exception; employee to display name. Except as provided in K.S.A. 17-2706 *et seq.*, no corporation shall practice, offer, or undertake to practice or hold itself out as practicing dentistry. Every person practicing dentistry as an employee of another shall cause his name to be conspicuously displayed and kept in a conspicuous place at the entrance of the place where such practice is conducted: *Provided, however,* That nothing herein contained, shall prohibit a licensed dentist from practicing dentistry as the agent or employee of another licensed dentist in this state, or from practicing dentistry as the agent or employee of any state hospital or state institution where his only remuneration is from the state, or from any corporation which provides dental service for its employees at no profit to the corporation.

(3) The division of dental fees is a violation, some business models in which a corporation shares in the profits of a dentist may be considered as fee splitting with a corporation, also the process of "bonuses" for staff when patients are converted to more profitable procedures, can be viewed as a violation of the KDPA:

KSA 65-1436. Grounds for refusal to issue license or for action against license of dentist or dental hygienist; disciplinary action by board; notice and hearing; professionally incompetent defined; physical or mental examination. (a) The Kansas dental board may refuse to issue the license provided for in this act, or may take any of the actions with respect to any dental or dental hygiene license as set forth in subsection (b), whenever it is established, after notice and opportunity for hearing in accordance with the provisions of the Kansas administrative procedure act, that any applicant for a dental or dental hygiene license or any licensed dentist or dental hygienist practicing in the state of Kansas has:

... (7) engaged in the division of fees, or agreed to split or divide the fee received for dental service with any person for bringing or referring a patient without the knowledge of the patient or the patient's legal representative, except the division of fees between dentists practicing in a partnership and sharing professional fees, or in case of one licensed dentist employing another;

(4) In order to assure that the dentist owner is overseeing the operations of the office, and is accountable to the board and to the patients, all owners of a dental practice are to be present in the office a majority of the time the office is operating, except for a recent change in order to alleviate access to care issues in rural areas, there is an exception to the majority presence rule (g), but most dentists must comply see (d) below:

KSA 65-1435. Improper use of certain names by dentists; exceptions; unlawful acts; suspension or revocation of license. (a) Except as otherwise provided in this section, it shall be unlawful for any person or persons to practice or offer to practice dentistry under any name except such person's own name, which shall be the name used on the license granted to such person as a dentist as provided in this act, or to use the name of any company, association, corporation, clinic, trade name or business name in connection with the practice of dentistry as defined in this act.

... (d) It shall be unlawful, and a licensee may have a license suspended or revoked, for any licensee to conduct a dental office in the name of the licensee, or to advertise the licensee's name in connection with any dental office or offices, or to associate together for the practice of dentistry with other licensed dentists in a professional corporation or limited liability company, under a name that may or may not contain the proper name of any such person or persons or to associate together with persons licensed to practice medicine and surgery in a clinic or professional association under a name that may or may not contain the proper name of any such person or persons and may contain the word "clinic," **unless such licensee is personally present in the office operating as a dentist or personally overseeing such operations as are performed in the office or each of the offices during a majority of the time the office or each of the offices is being operated.**

(e) Nothing in this section shall be construed to **permit the franchise practice of dentistry.**

(f) The violation of any of the provisions of this section by any dentist shall subject such dentist to suspension or revocation of a license.

(g) Notwithstanding the provisions of subsections (d) and (e), a licensee shall be permitted to own two dental offices in addition to the licensee's primary office location under the following conditions:

(1) The licensee's secondary dental office is located within a 125 mile radius of the licensee's primary office; and

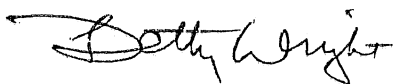
(2) the licensee's secondary dental office is located in a county with a population of less than 10,000 according to the 2000 United States census:

(5) The KDPA is clear that franchise dentistry, another form of corporate dentistry, is prohibited – pursuant to (e) above.

The purpose of these restrictions on the corporate practice of dentistry are to assure that the dentist is in control of the office itself; and is in control of the treatment decisions for the patients. The legislation was enacted to hold the dentist accountable for the direct care of the patient. Once the dentist becomes simply an employee, or absentee owner, the office focus tends to be on maximizing profits, rather than maximizing care for the patient. The Kansas law intentionally creates a dental care system that is a "cottage industry" where the dental home of the patient is owned and operated by the provider of care. The business model is intentionally restrictive, so that the dentist owner is accountable to the board. If corporations and other absentee owners are in charge; they tend to demanding lower quality materials, higher patient volumes, and/or shorter patient treatment times the employed dentists are placed in the position of a poorer standard of care. The board would not have authority over the root cause of the problem, but the practitioner who is subject to the pressure must uphold professional standards. Kansas laws and regulations are currently in the best interest of the public.

I will be glad to answer any questions from the committee.

Respectfully submitted,



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