



Disability Rights Center of Kansas

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COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE

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Thank you for the opportunity to speak before you, my name is Nick Wood. I am the Systems Change Coordinator and Lead Investigator at the Disability Rights Center of Kansas (DRC). The DRC is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for people with disabilities. As such, DRC is the officially designated protection and advocacy organization for Kansans with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, organizationally independent of state government and whose sole interest is the protection of the legal rights of Kansans with disabilities.

In a climate of fears of further budget cuts to programs in Kansas, the DRC has continued investigation and review of the policies and practices the State of Kansas uses to administer these important programs so that we may continuously monitor and zealously advocate for the rights of Kansans with disabilities. Although we have ongoing concern for all the funding of all HCBS programs, our comments today center on the future of services for Kansans with developmental disabilities and mental illnesses.

SB 272 from 2009 was aimed at people who had been accused of a felony, but this new bill's poor construction makes us believe that it could be used against anyone (with Traumatic Brain Injury or other Intellectual Disability for example) who is accused of any crime and found not competent. Then, that person could be civilly committed to **any facility**:

"Treatment facility" means any mental health center or clinic, psychiatric unit of a medical care facility, psychologist, physician or other institution or individual authorized or licensed by law to provide either inpatient or outpatient treatment to any person."

As written, the bill would subject 'incompetent' defendants to burdensome release standards which could result in life-long commitments. A decision by the United States Supreme Court in *Jackson v. Indiana* barred the indefinite commitment of people found not competent to stand trial solely on the basis of their continued incompetence. Other decisions have found it is unconstitutional for a State to require an involuntarily committed person to bear the burden of



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DRCK believes the bill would violate these decisions and would
repeal the rules governing the commitment and release of defendants
found not competent to stand trial.

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We feel the bill assumes several things that incompetency equates mental illness with dangerousness. It also assumes that extended commitment equates a greater likelihood of restored competency. And it assumes that any facility, even psychiatric facilities, are appropriate for indefinite detention. The bill would create a new standard for initial and continued commitment of individuals without a determination of guilt at a significant cost to the State.

Passage of the Bill would result in an Unconstitutional Law

In *Jackson v. Indiana*, the Court held that it is a violation of a person's rights under the Constitution to equal protection if a state's procedures for discharge from a treatment facility are more stringent for a criminal defendant who has been held incompetent to stand trial and is unlikely to obtain competence, than an individual who has otherwise been involuntarily committed under a state's civil commitment laws.

The *Jackson* court and several other court decisions have also held that indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. A defendant cannot be held more than a reasonable period of time necessary to determine whether there is substantial probability that he will attain competency in the foreseeable future.

HB 2707 puts the burden on a criminal defendant, by clear and convincing evidence, to prove he is not a danger to himself or others and should be discharged. K.S.A. 59-2966, applicable to involuntary civil commitment, puts the burden on the petitioner to prove "by clear and convincing evidence" that the proposed patient is mentally ill and subject to involuntary commitment. The burden of proof is reversed under HB 2707, making it a violation of equal protection under *Jackson*.

HB 2707 then potentially leads to a person being committed for an indeterminate amount of time to a facility without an involuntary civil commitment.

Olmstead

In 1999, the US Supreme Court decided that "unjustified isolation of individuals with disabilities is properly regarded as discrimination based on disability" and therefore a violation of rights guaranteed under the Americans with Disabilities Act (ADA). Since the *Olmstead* Decision, the US Department of Justice (DOJ) and President Bush's New Freedom Commission have



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re: state decision by further detailing the responsibilities of every citizen with disabilities in institutions.

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EQUALITY ♦ LAW ♦ JUSTICE

A legal complaint against states filed by the Department of Justice, have defined what an Olmstead violation looks like. It is important to stress that these are the arguments of the DOJ, but we expect these are some of the standards that Kansas will be held accountable to if it finds itself in a position similar to other states that have been subject to costly intervention from courts after being sued by the DOJ. The DOJ is aggressively enforcing the ADA and the right to live in the community.

A few excerpts from the DOJ's complaint that we feel are relevant to Kansas:

"The State segregates hundreds of individuals with ... disabilities in institutions that are not the most integrated setting appropriate to their needs, and fails to provide adequate community supports and services to individuals who are discharged from the institutions or who are at risk of institutionalization."

"Typically, the State does not meaningfully consider a resident for a more integrated setting unless the resident or their family/guardian proactively requests a more integrated setting."

"Most residents do not proactively request a more integrated setting because the State does not properly educate residents on what community resources are available, or the possible benefits of community placements."

"While confined in the institution, residents do not receive appropriate treatment to support their eventual discharge to a less restrictive setting in the community."

"Residents who have been confined for many years are not actively reassessed for opportunities to move to a less restrictive setting appropriate to their needs."