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November 13, 2012

ATTORNEY GENERAL OPINION NO. 2012-29

Kelli Stevens, General Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, KS 66612

Re: Public Health—Healing Arts—Delegation of Acts Which Constitute the
Practice of Healing Arts

Schools—General Provisions—School Sports Head Injury Prevention Act

Synopsis: The evaluation and clearance required by the School Sports Head Injury
Prevention Act for a school athlete who is suspected of having suffered a
concussion or head injury must be performed by a health care provider as
that term is defined in the Act. Cited herein: K.S.A. 2011 Supp. 65-
28,127; K.S.A. 65-28a02; 65-28a08; K.S.A. 2011 Supp. 65-6902; 65-6906;
72-135.

* * *

Dear Ms. Stevens:

As General Counsel for the Kansas State Board of Healing Arts, you ask whether the
School Sports Head Injury Prevention Act¹ allows a health care provider to delegate the
required evaluation and written clearance of a school athlete who has been removed
from a sports competition or practice due to a suspected concussion or head injury.

The School Sports Head Injury Prevention Act provides, among other things, that a
school athlete who “suffers, or is suspected of having suffered, a concussion or head
injury during a sport competition or practice session . . . shall be removed from” the

¹ K.S.A. 2011 Supp. 72-135.

competition or practice.² The athlete “shall not return to competition or practice until the athlete is evaluated by a health care provider and the health care provider provides such athlete a written clearance to return to play or practice.”³

The Act defines “health care provider” as “a person licensed by the state board of healing arts to practice medicine and surgery.”⁴ You inform us that this definition includes doctors of medicine and osteopathy (M.D.s and D.O.s). It does not, however, include other persons who provide patient services, such as physician assistants, nurses, or athletic trainers.⁵

Although these persons are not health care providers for purposes of the School Sports Head Injury Prevention Act, you believe that they may provide the required examination and clearance of a school athlete when delegated such authority by a health care provider. You note that the Healing Arts Act authorizes health care providers, within certain parameters, to “delegate[] acts which constitute the practice of the healing arts to other persons.”⁶ Additionally, the Physician Assistant Licensure Act⁷ defines the practice of a physician assistant as “medical services within the education, training and experience of the physician assistant that are delegated by the responsible physician,”⁸ while the Athletic Trainer Licensure Act⁹ provides that a licensed physician may delegate to an athletic trainer the acts of “injury prevention, physical evaluation, emergency care and referral or physical reconditioning relating to athletic activity.”¹⁰

Importantly, though, the statutes you cite are all contained in acts that govern the licensure of health care professionals. When these statutes refer to delegation, they are best read as describing the process by which a physician authorizes other persons to perform certain medical tasks that would otherwise constitute the unlicensed practice of medicine. Thus, it is clear that a physician assistant, nurse, or athletic trainer who evaluates a school athlete with a head injury does not engage in the unauthorized practice of the healing arts as long as the person complies with these statutes. But that does not mean that a school athlete who has been evaluated by physician assistant, nurse, or athletic trainer has been evaluated and cleared *by a health care provider*, which is what the plain language of the School Sports Head Injury Prevention Act requires.¹¹

² K.S.A. 2011 Supp. 72-135(e).

³ K.S.A. 2011 Supp. 72-135(f).

⁴ K.S.A. 2011 Supp. 72-135(b)(2).

⁵ See, e.g., K.S.A. 65-28a02 (defining a “physician,” as opposed to a physician assistant, as “any person licensed by the state board of healing arts to practice medicine and surgery”).

⁶ K.S.A. 2011 Supp. 65-28,127.

⁷ K.S.A. 65-28a01 *et seq.*

⁸ K.S.A. 65-28a08.

⁹ K.S.A. 2011 Supp. 65-6901 *et seq.*

¹⁰ K.S.A. 2011 Supp. 65-6902(b); 65-6906(d).

¹¹ We note, however, that the School Sports Head Injury Prevention Act does not preclude other persons from *assisting* in the required evaluation.

Because the text of the School Sports Head Injury Prevention Act unambiguously states that the required evaluation and clearance must be provided by a “health care provider” as that term is defined in the Act, there is no need to consider the Act’s legislative history.¹² In any event, this legislative history is a mixed bag. The Act was first introduced as 2011 Senate Bill 33, which was referred to the Senate Public Health and Welfare Committee.¹³ That committee considered defining the term “health care provider” to mean “a person licensed to practice medicine or surgery, *or an advanced registered nurse practitioner, a physician assistant, or an athletic trainer working pursuant to delegation by or a written collaboration agreement with a person licensed to practice medicine or surgery.*”¹⁴ The committee rejected the italicized language and instead defined “health care provider” as “a person licensed to practice medicine or surgery.”¹⁵ This indicates that the committee did not intend to allow nurses, physician assistants, or athletic trainers to provide the required examination and clearance.

Of course, it is possible that the committee members believed the language they rejected was unnecessary to allow persons delegated by a health care provider to perform the evaluation and clearance. The supplemental notes to the bill suggest as much in that they all include a paragraph stating “KSA 65-28,127 outlines the written protocol process which allows a person licensed by the State Board of Healing Arts to practice medicine or surgery or chiropractic to enter into a practice protocol or delegate to other persons those acts and functions within the normal and customary specialty, competence and lawful practice of the responsible licensee.”¹⁶ But these supplemental notes also contain a disclaimer stating that they were “prepared by the Legislative Research Department and do not express legislative intent.”¹⁷

Although the legislative history of the School Sports Head Injury Prevention Act is ambiguous, its text is clear. Given this plain language, we opine that the examination and clearance required by the Act must be provided by a health care provider, *i.e.*, a person licensed to practice medicine and surgery, not a person delegated by such a health care provider.

Sincerely,

Derek Schmidt
Attorney General

¹² *Miami County Bd. of Comm’rs v. Kanza Rail-Trails Conservatory, Inc.*, 292 Kan. 285, 320 (2011).

¹³ The Act ultimately was incorporated into and passed as part of 2011 House Bill 2182.

¹⁴ *Minutes*, Senate Public Health and Welfare Committee, February 15, 2011.

¹⁵ *Minutes*, Senate Public Health and Welfare Committee, February 16, 2011.

¹⁶ Supplemental Note on Sub. for 2011 SB 33, As Recommended by Senate Committee; Supplemental Note on Sub. for 2011 SB 33, As Amended by Senate Committee of the Whole; Supplemental Note on Sub. for 2011 SB 33, As Amended by House Committee.

¹⁷ *Id.*

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