

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

BUTLER, KRISTIN, and BOZARTH, SCOTT,
Plaintiffs/Petitioners,

Case No. 21CV2385

v.

Chapter 60; Division 7

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,
Defendant/Respondent.

**ATTORNEY GENERAL'S BRIEF
ON THE CONSTITUTIONALITY OF SB 40**

In its order of June 9, 2021, this Court expressed concerns about the constitutionality of 2021 Senate Bill 40 and invited the Attorney General to address those concerns. Because the relevant provisions of SB 40 only apply during the declared COVID-19 disaster emergency, which has expired, any constitutional challenges to SB 40 are moot. Even if those challenges were not moot, they would have no merit.

I. Any constitutional challenges to SB 40 are moot, because the school board's statutory authority to issue a mask mandate under SB 40 has expired with the end of the state of disaster emergency.

Section 1(a) of SB 40 provides that local school boards have authority “[d]uring the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b” to “take any action, issue any order or adopt any policy made or taken in response to such disaster emergency that affects the operation of any school or attendance center of such school district.” By the plain text of this provision, any action of a school board taken under this section is

limited to the period of the disaster emergency. Section 1(d), which authorizes civil actions seeking to set aside school board actions taken under Section 1(a), therefore only applies during the COVID-19 disaster emergency.

The COVID-19 state of disaster emergency described in K.S.A. 2020 Supp. 48-924b was extended to June 15, 2021, by the Legislative Coordinating Council (LCC) as authorized by Section 4(a)(5) of SB 40. But the LCC did not extend it beyond that date.¹ As a result, the COVID-19 disaster emergency has now ended, and the school board's authority to issue a mask mandate under SB 40 has likewise expired.

As a consequence of the end of the COVID-19 disaster emergency and the corresponding expiration of the school board's authority under SB 40, constitutional challenges to Section 1 of SB 40 are moot. Courts generally cannot decide moot questions or render advisory opinions. *See State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012). The mootness doctrine "recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly before" the court. *State v. Bennett*, 288 Kan. 86, 89, 200 P.3d 455 (2009) (quoting *Bd. of Johnson Cty. Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.3d 716 (1996)).

Although there is an exception to the mootness doctrine when the issue "is one capable of repetition and one of public importance," *id.*, that exception does not

¹ <https://www.cjonline.com/story/news/coronavirus/2021/06/15/kansas-covid-emergency-declaration-expires-republican-mask-order-governor-laura-kelly-objects/7656962002/>

apply here. The school board’s authority under Section 1 of SB 40 and the civil action procedure provided thereunder only apply during the COVID-19 disaster emergency, which has now expired, so the issue is not capable of repetition. Even if a new disaster emergency were to occur at some point in the future, SB 40 does not apply to future emergencies, so new legislation, which may or may not contain the same provisions, would be required in that situation. There is therefore no justification for this Court to address the constitutionality of SB 40.

II. SB 40 was constitutional.

Although no party has challenged the constitutionality of SB 40, the Court’s June 9, 2021, order expressed potential constitutional concerns with the bill. While those concerns are now moot, the State provides the following analysis to reassure the Court that Section 1 of SB 40 did not pose any constitutional problems.

A. School districts lack standing to challenge state statutes on due process grounds.

The Court’s order expressed concern that SB 40 might violate school districts’ due process rights. But the U.S. Supreme Court has repeatedly held that political subdivisions of a State have no due process rights that may be violated by state laws. *See Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.”); *Risty v. Chicago, R.I. & Pac. Ry. Co.*, 270 U.S. 378, 390 (1926) (“The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the

Fourteenth Amendment.”); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (“The city cannot invoke the protection of the Fourteenth Amendment against the state.”); *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (same); *see also Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991) (“It is well established that a political subdivision may not lodge constitutional complaints against its creating state.”); *City of Moore v. Atchison, Topeka, & Santa Fe Ry.*, 699 F.2d 507, 511-12 (10th Cir. 1983) (“[P]olitical subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds.”).

The Kansas Supreme Court has applied the same principle when it comes to the Kansas Constitution. *See Gannon v. State*, 298 Kan. 1107, 1133-34, 319 P.3d 1196 (2014) (holding that school districts lack standing to bring a due process claim under Section 18 of the Kansas Bill of Rights because they are political subdivisions of the State). Accordingly, any claim that SB 40 deprives school districts of due process would be without merit.

B. SB 40 did not unconstitutionally encroach on judicial power.

The Court’s order also cited *State v. Buser*, 302 Kan. 1 (2015), which held that a statute imposing deadlines for appellate decisions violated the separation of powers. But the statute in *Buser* contained a remedial process that required the court to set an intended decision date, which could ultimately lead to the Chief Justice setting a firm intended decision date. SB 40 does not contain a similar remedial process that might infringe on the judicial power. Rather, it provides that

if a decision is not issued within seven days of the hearing, the requested relief seeking to set aside the school board action is automatically granted, which is allowable because school districts, as government entities, are not entitled to the same due process rights as private litigants.

In some ways, SB 40 is similar to a speedy trial statute, which requires dismissal of the State's criminal case if the defendant is not brought to trial within a specified period of time. SB 40 likewise directs judgment against the school board if the board is unable to provide a justification for its actions that would allow the court to uphold its actions within seven days of a hearing. If actions taken by local school boards are well-reasoned and supported by evidence, there should be no problem with a court finding those actions to be justified within seven days. If a court is unable to determine whether a district's pandemic restrictions are justified within seven days of a hearing, that suggests the restrictions are questionable at best, and the Legislature has reasonably determined that the restrictions should be set aside in those circumstances. Allowing questionable restrictions to remain in effect for a prolonged period would have the effect of a judgment against the students and their parents who are challenging the restrictions, in that the restrictions would remain in effect during the delay, possibly until the end of the emergency. The Legislature has reasonably provided that when the question is so close that a court is unable to decide a case within seven days, judgment should be entered in favor of school children and their rights rather than allowing a de facto win for school districts based on delay.

* * *

While SB 40 is constitutional, there is no need for this Court to reach that question, which is moot given the expiration of the disaster emergency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document has been served upon the following by e-mail on this 23rd day of June, 2021:

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