IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

vs.

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

Case No. 21CV2385
Chapter 60; Division 7

ORDER ON PLAINTIFFS' SENATE BILL 40 REQUEST FOR RELIEF

WITH NOTICE TO THE ATTORNEY GENERAL

Plaintiffs, Kristin Butler and Scott Bozarth ("Plaintiffs"), filed a petition using the form allowed by the Kansas Supreme Court under 2021 Senate Bill 40, ("Petition") on May 28, 2021 in this SB 40 action, naming as defendants, the Shawnee Mission School District ("District") and its individual board members.[1] Ms. Butler has two children, ages 7 and 10, who had attended Rhein Benninghoven Elementary School. Mr. Bozarth has a 14 year-old who just completed attendance at Hocker Grove Middle School.

Because this is intended to be an expedited proceeding under Senate Bill 40 ("SB 40"), the Court will address only issues pertinent to the immediate relief raised and requested in the petition.

[1] At the Zoom hearing and Division 7's YouTube channel, https://youtu.be/cY19lxxTDQg on June 2, the parties consented to remove all the individual board members as defendants as it is apparent the relief sought relates to a policy enacted by the board. Consequently, the Court dismissed all the board members. Doc. 6.

A summary of SB 40's quick enactment, the courts necessary reaction to the same, and its provisions are in order. On March 16, 2021, the legislature approved SB 40. It immediately went into effect, as directed, when it was published in the Kansas Register on March 25, 2021. Most laws are enrolled to go in effect on July 1.

The plaintiffs used a form petition, provided by the Kansas Supreme Court, but apparently were not aware of the additional local rule requirement, enacted before the supreme court form, that directed the form of filings and information required for an SB 40 petition, notably, that the petition be verified under oath. The Court rectified this at the hearing on Wednesday, June 2, by swearing in the plaintiffs.[2]

SB 40 Section Applicable to this Action

As the preamble to SB 40 states, it is intended to address governmental responses (and powers) to address the Covid-19 pandemic. These include the executive branch, all governmental units, school districts and local health departments. Section 1 is pertinent. The Court has emphasized below the critical provisions for proceedings involving school district appeals and the standards and deadlines that are to be applied. SB 40 has not yet been enrolled in the statute books:

> (a) (1) During the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments thereto, only the board of education responsible for the maintenance, development and operation of a school district shall have the authority ***to take any action, issue any order or adopt any policy***[3]

[2] Our courts strive to allow self-represented persons access to justice in a manner that allows a fair opportunity to be heard in a forum typically predominated by legal professionals so that the merits of a case, win or lose, are both understood and explained. This is known as procedural fairness and ensures access to justice. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, Social Justice: Outcome and Procedure, 35 INT'L J. PSYCHOL. 117 (2000). In theory, a self-represented person is more willing to accept the outcome of a proceeding if she believes she has been heard. Allowing the self-represented a right to be heard, however, cannot be accomplished at the expense of represented parties. In other words, the rules are created to protect all parties to the proceedings.

[3] This is the same word series which appears in § (c)(1) relating to the 30-day time to appeal the same.

made or taken in response to such disaster emergency that affects the operation of any school or attendance center of such school district, including but not limited to, any action, order or policy that:

(A) Closes or has the effect of closing any school or attendance center of such school district;

(B) authorizes or requires any form of attendance other than full-time, in-person attendance at a school in the school district, including but not limited to, hybrid or remote learning, or

(C) ***mandates any action by any students or employees of a school district while on school district property***.

(2) An action taken, order issued or policy adopted by the board of education of a school district pursuant to paragraph (1) shall only affect the operation of schools under the jurisdiction of the board and shall not affect the operation of nonpublic schools.

(3) During any such disaster emergency, the state board of education, the governor, the department of health and environment, a local health officer, a city health officer or any other state or local unit of government may provide guidance, consultation or other assistance to the board of education of a school district but shall not take any action related to such disaster emergency that affects the operation of any school or attendance center of such school district pursuant to paragraph (1).

(b) Any meeting of a board of education of a school district discussing an action, order or policy described in this section, including any hearing by the board under subsection (c), shall be open to the public in accordance with the open meetings action, K.S.A. 75-4317 et seq., and amendments thereto, and may be conducted by electronic audio-visual communication when necessary to secure the health and safety of the public, the board and employees.

(c) (1) An employee, a student or ***the parent or guardian of a student aggrieved by an action taken, order issued or policy adopted by the board of education of a school district*** pursuant to subsection (a)(1), or an action of any employee of a school district violating any such action, order or policy, ***may request a hearing by such board of education to contest such action, order or policy within 30 after the action was taken, order was issued or policy was adopted by the board of education.*** Any such request shall not stay or enjoin such action, order or policy.

(2) ***Upon receipt of a request under paragraph (1), the board of education shall conduct a hearing within 72 hours of receiving such request for the purposes of reviewing, amending or revoking such action, order or policy. The board shall issue a decision within seven days after the hearing is conducted.***

(3) The board of education may adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including but not limited to rules for consolidation of similar hearings.

(d)(1) An employee, student or ***the parent or guardian of a student aggrieved by a decision of the board of education under subsection (c)(2) may file a civil action*** in the district court of the county in which such party resides or in the district court of Shawnee county, Kansas ***within 30 days after such decision is issued by the board***. Notwithstanding any order issued pursuant to K.S.A. 2020 Supp. 20-172(a), and amendments thereto, the court shall conduct a hearing within 72 hours receipt of a petition in any such action. ***The court shall grant the request for relief unless the court finds the action taken, order issued or policy adopted by the board of education is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to achieve such purpose. The court shall issue an order on such petition within seven days after the hearing is conducted. If the court does not issue an order on such petition within seven days, the relief requested in the petition shall be granted.***

(2) Relief under this section shall not include a stay or injunction concerned the contested action, order issued or policy adopted by the board of education that applies beyond the county in which the petition was filed.

(3) The supreme court may adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including but not limited to, rules for consolidation of similar hearings.

As a result of SB 40, a number of cases were filed in this Court's various divisions.[4]

Supreme Court Administrative Order 2021-RL-032

In response to SB 40, the Kansas Supreme Court issued its A.O. 2021-RL-032 (filed 4/13/21), that sets out emergency rules and suggested forms, depending on the governmental entity being challenged for Covid-19 restrictions. It enumerates the contents of the petition to assist district courts in prioritizing these new causes of action, spurred by the legislative reaction to

[4] Division 7 previously had a case, *Baker v. Blue Valley and Olathe School Districts, et al.,* Case No. 21CV1942, (filed 5/3/21), but the case was removed to federal court under 28 U.S.C. 1446(d), because the plaintiffs had invoked a federal constitutional right under the Equal Protection Clause. Docs. 25, 26 (filed 5/6/21). That case had over 20 defendants and over 1,200 documents attached to the petition. Recently, a similar case has been filed again in this division. *Baker v. Blue Valley School District (Merrigan) et al.,* Case No. 21CV2505 (filed 6/4/21), even though the federal case is pending between the same parties and, presumably, could be amended, because it asserts that an update to the district's pandemic policy occurred on May 28. ¶ 10 of Doc. 1.

Another division of the Court, Division 6, determined, in part, that the requested relief was impermissible because it sought to challenge, retroactively, a policy enacted before SB 40 and, therefore, changed substsantive rights. It is cited in the District's motion to dismiss which will be discussed below. *See Charlotte I. O'Hara v. Blue Valley School District and Blue Valley School District Board of Education*, Case No. 21CV01464, Journey Entry dated April 28, 2021.

pandemic policies enacted by school districts and other governmental units. In particular, it requires the petitioner to identify the who, what, when, where, why and how that any governmental entity has infringed upon some individual concern.[5]

Johnson County Administrative Order No. 21-01

Even before the issuance of 2021-RL-032, the Tenth Judicial District issued its administrative order to handle anticipated SB 40 cases. The supreme court order recognized this, by noting that "[t]hese emergency rules should be read *in conjunction with other applicable rules*, statutes, and Supreme Court Administrative Orders. But these rules control if any provision of a (a) Supreme Court rule or order or (b) district court rule or order conflicts with these rules."

In many respects, both of the above administrative rules require that judges be given basic information to know the basis for the case arriving on their doorsteps in an expedited fashion. The local district rule requires the petitioner provide actual filing notice to the respondent (or defendant government) no less than 24 hours after its filing. It likewise requires a response within 24 hours. In each instance, and unlike 2021-RL-032, it requires a verified petition and response. This cuts down on evidentiary issues at the anticipated expedited hearing and also ensures the litigants are undertaking the significance of the process that supplants other cases.[6]

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[5] The rule makes clear that the self-represented petition should not be rejected for failing to meet some requirements:

> The court approves these emergency rules of procedure with an understanding some petitioners may be unrepresented. Accordingly, failure to comply with this order or complete the attached forms is not a reason for a clerk to reject a submission. A court must allow a petitioner to supplement the petition with omitted information required by this order when justice so requires.

[6] In cases of domestic violence, for example, a verified petition is required for emergency *ex parte* relief for protection from abuse even before the defendant is afforded a hearing. K.S.A. 60-3105(a). The Protection from Abuse Act recognizes that the self-represented often will resort to its protections and instructs that it should be liberally construed to facilitate access to justice. K.S.A. 60-3101(b).

One of the difficulties with SB 40, however, is that it provides little in the way of procedures. It provides short deadlines and an immediacy that appears intended to short-circuit other court cases which often have emergent issues, such as domestic violence or business restraining orders. Even in domestic violence protection cases, the defendant has 21 days from the filing of the petition to respond at a hearing. K.S.A. 60-3106. Here, the defendant school district has 72 hours from the filing of the petition to respond.

Because courts cannot render an advisory opinion and must make factual and legal conclusions in their decisions, the verification standard provides a factual basis for an expedited ruling. Merely stating, for example, that statements are made upon a party's "best knowledge and belief" is not sufficient, factually, to proceed with a decision. *Marriage of Bahlmann*, 56 Kan. App. 2d 901, 907, 440 P. ed 597 (2019).

Local A.O. No. 21-01 also fills in the details of the procedure lacking in SB 40 because it requires production of the order by the governmental unit or school district that is the subject of the "action" to be reviewed. Sometimes, the record is lacking in appeals to the district court so that the court may have to remand the matter to obtain necessary information before it can finalize a decision. *See Wheatland Elec. Co-op., Inc. v. Polansky*, 46 Kan. App. 2d 746, 749, 265 P.3d 1194, 1199 (2011) (noting that district court decision is not final until after remand to agency).

Local A.O. No. 21-01 allows for a court to make its final determination after the hearing or any continuances have been completed. In complex cases, it would be impossible for the Court, potentially, to hear all of the evidence in one day.

Lastly, the local A.O. asks the petitioner to identify any underlying process where the petitioner was allowed to appear and raise any issues prior to the adoption or issuance of any

relevant order or policy under review to identify the aggrieved plaintiff's burden or alternative suggestions the petitioner may have raised. This is significant because a court is required to consider whether the school district used a means that "is narrowly tailored to respond to the state of emergency and [that] uses the least restrictive means to achieve such purpose" An additional requirement of the local A.O. is to certify whether the petitioner had the opportunity to appear and to be heard to have an opportunity to raise the issues the court is supposed to review.

The Decision the Court is Being Asked to Review

The plaintiffs, in their petition, seek review of an email dated May 6, 2021, from the superintendent of schools after it became apparent the plaintiffs were questioning the entire school pandemic policy and not some specific action taken against their children. The District justified, in its response, in denying the plaintiffs a hearing, that the determination by another division in another case had denied relief under similar circumstances:

> The action taken, order issued, or policy adopted by the board did not happen within 30 days of the request. Please see paragraph 2 of the attached Order, dated April 28, 2021, issued by the Hon. Robert J. Wonnell, Judge of the District Court of Johnson County, Kansas. The Board of Education's Resolution on Affirming Reopening Plan was adopted more than 30 days ago (adopted July 27, 2020). The Board has not made any changes to this Resolution since it was adopted.

Before addressing this issue, the Motion to Dismiss[7] filed by the District, which the Court will now address as part of its overall order, essentially asserts that the plaintiffs may not contest a policy enacted before SB 40 took effect. In the case referenced, *Charlotte I. O'Hara v. Blue*

[7] At the hearing of this matter, the District's motion was argued. Tthe plaintiffs were asked if they wished to file a response. This is a civil action, § (d)(1) (noting the same) and K.S.A. 60-201(b) states that the code of civil procedure governs such proceedings. Other than the shortened time frames, K.S.A. 60-212 allows for motions to dismiss. Both plaintiffs indicated they were prepared to respond to the District's motion and did so. At the end of the hearing, however, the Court indicated it would take under advisement the motion and make any further orders necessary in its written order.

Valley School District and Blue Valley School District Board of Education, Case No. 21CV01464, the Hon. Robert J. Wonnell, Division 6, resolved the case by first finding that Ms. O'Hara did not have standing to object to the mask policy and, second, determined that her challenge sought to impose a retroactive and substantive change in the law which was not indicated in SB 40.

The retroactivity portion of the *O'Hara* court's order addresses the *status quo* policy that was enacted before SB 40 came into effect. The reference to appealing decisions within 30 days assumes that efforts to contest mask policies put into effect before SB 40 became law cannot be contested as new "actions, orders or policies" because to do so would retroactively impose standards that were not in effect at the time. In other words, when all branches of state government were grappling with responses to the pandemic, they implemented measures to prevent the spread of the COVID-19 virus.[8]

On March 12, 2020, Governor Laura Kelly issued an emergency declaration for the State of Kansas in response to COVID-19. On March 17, 2020, Governor Kelly extended the closure of K-12 schools for the duration of the 2019-2020 school year by Executive Order # 20-07. Like all schools across the country, SMSD undertook measures for school operations during the 2020-21 school year. On July 27, 2020, the SMSD Board of Education approved a Resolution Affirming

[8] The Court would note that the Judicial Branch is no different. It instituted various protocols for emergency hearings for in-person hearings, allowed for remote proceedings for most all cases, and, to this day, still requires masking in courthouses, even though Johnson County, for example has lifted its mask requirements. The Tenth Judicial District, while it occupies a county facility, is a state judicial facility administered by the Kansas Supreme Court. The court, in turn, takes its administrative guidance from its chief justice and its chief judge. Overall authority on COVID matters is addressed by 2021-PR-048 (requiring all district and appellate courts to develop and follow minimum standard health protocols to avoid exposing court users, staff and judicial officers to COVID-19). Johnson County A.O. 21-04 (filed 5/31/21) (beginning 6/1/21, allowing fully vaccinated persons to be in courthouse but if not vaccinated, requiring use of a mask and requiring all jurors, vaccinated or not, to continue to wear masks).

Reopening Plans.[9] By this Reopening Resolution, the Board affirmed the school reopening plan,[10] which included a cloth mask requirement for students, staff, and visitors , and which was "informed by actionable criteria articulated by the Centers for Disease Control and Prevention, the Kansas Department of Health and Environment, and the Johnson County Department of Health and Environment."

The facts developed at the hearing are that Ms. Butler's two children received exemptions from wearing masks. However, because they were distanced under CDC protocols from other masked children, she contends that they suffered psychological harm and ended up wearing masks so they would fit in. One of them now will attend a summer band camp sponsored by the district but the exemption is still in effect. Ms. Bozarth testified that he could have sought an exemption from the masking requirement but chose not to do so because of ostracism concerns if his child did not wear a mask. Thus, it is apparent the plaintiffs offer a Catch-22 dilemma that can only be resolved by abolition of any mask policy.

Essentially, then, the Court is faced with the criticism of *any* mask policy from the plaintiffs and their view that the superintendent of schools did not give them a "hearing." The question begs itself, a hearing to do what? The District's motion assumes that the plaintiffs want to contest the policy that was enacted more than 30 days ago. The email is not an "order" or "policy" or "action"

[9] The SMSD Board of Education's July 27, 2020 Resolution is publicly available on the SMSD website: https://go.boarddocs.com/ks/smsd/Board.nsf/files/BRWPH564A4EF/$file/Resolution%20on%20Reopening%20Plan.pdf

[10] SMSD's Operational Plan for Reopening Schools is publicly available on the SMSD website: https://go.boarddocs.com/ks/smsd/Board.nsf/files/BRRTPY75F341/$file/2020-21%20Operations%20and%20Student%20Services%20Plan%20for%20Reopening%20Schools.pdf

itself but an acknowledgment that the District is doing nothing new and there is nothing to "hear." The plaintiffs have not identified any action, order or policy occurring within the past 30 days.

In arguing on behalf of both parents, Mr. Bozarth made it clear that they are contesting the original policy, not just the effects of granting exemptions or the need for social distancing. He argued, very clearly, that the mask mandate "should never have been in place in the first place." This is clear form their petition which they verified before the Court:

> Butler's and Bozarth's child/children are mandated (syn commanded, directed, instructed) to wear masks in order to attend school. *This violates federal law, the ethics of the Nuremberg code, and a parent's right to decide medical treatment for their child.* Further, the district cannot and will not produce empirical scientific data justifying their policy nor any analysis informing parents, students, and staff of risk and benefits of the policy. (Emphasis added.)

Both tried to argue that sticking to the policy was something new at the hearing, aware of the fact that they had not identified any new action, order or policy. Attached to the petition is an email from Mr. Bozarth to the board members in which he says that "I take grievance with your COVID response." He then requests a hearing over his daughter's required use of a mask, claiming it borders on "wreckless [sic] endangerment and/or assault. My child is being harmed physically, mentally and emotionally by the SMSD policy requiring masks." Thus, he avoided seeking an exemption and allowed his daughter to continue to wear a mask but maintains the harm from this is the District's fault. But the policy at stake is not new. Nor is a continuation or reaffirmation of the policy new.

"The "relief" requested in the petition seeks a return of the filing fee, compensating expenses for "consulting doctors about health issues [Mrs. Butler's] children suffered as a result of the district's policy," and Mr. Bozarth's request for documents, essentially, contesting the foundation of the district's Covid-19 policy, the medical professionals it relies upon, and "removal

of mandatory masks." This is not an action for discovery, but a truncated hearing to address emergent issues. In every respect, then, it is apparent that the focal objective of the "aggrieved decision" is not an email but the policy that is almost eleven months old. Plaintiffs essentially object to the continuation of the policy and contest the original criteria for the original masking requirement. They do attach, however, an April 30,2021, email that indicates the district is keeping "**all mitigating procedures, including mandatory mask-wearing, in place**. This is consistent with the advice we received yesterday from Dr. Sammi Areola, Director of the Johnson County Department of Health and Environment." (Emphasis in original.)

One of the difficulties here is that the District superintendent, Dr. Michael Fulton, refused to provide any "hearing" which seems arbitrary until one determines the history of the complaints by the plaintiffs that makes it abundantly clear they are targeting the entire policy. A hearing is usually something that seeks some individualized or adjudicative response by a complaining party regarding something specific that has happened to them. Neither of the plaintiffs here seek individual relief from the policy, the denial of which would be a decision or "action" from which a hearing and appeal might be necessary. They apparently already had appeared in front of the school board and made their displeasure known with the mask policy. So it is understandable that Dr. Fulton determined, as an agent of the board, that no "hearing" was needed to hear the same complaint about the policy enacted in July 2020.

As the Court learned at the hearing, Ms. Butler's children are exempt from the masking policy but did not like the social distancing requirement that attended their exemption. Mr. Bozarth likewise indicated he could have obtained the same exemption but chose otherwise because he objects to the policy itself. If the legislature intended to directly challenge existing policies in school districts, it should have stated that plainly. However, it did not do so.

In the unlikely event the legislature intended to unleash the floodgates of litigation with every person who objects to a mask policy, the Court then would have the obligation to conduct a trial over the health guidelines, expert testimony and CDC guidelines that have been the foundation of many of pandemic rules used by the various government entities.

While District counsel argued that the superintendent's decision was not the "decision" of the board, this is too fine of a distinction. Dr. Fulton is obviously authorized to speak on behalf of board policy, including SB 40 issues. SB 40, section (c)(3) provides:

> The board of education *may adopt* emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including, but not limited to, rules for consolidation of similar hearings.

The District is not required to adopt procedures for hearings. But it can directly respond through its designated agent that it is not providing a hearing because it is not necessary once it gauges what the aggrieved person really is seeking. The Court has no information about District procedures, if they exist or Dr. Fulton's actual board-conferred authority with regard to SB 40 hearings. That is not the District's burden. Rather, the plaintiffs bear the burden of proof that requires them to identify the "action" from which they are "aggrieved." Here, the Court determines there is no action that required a hearing.

The District's motion points out that Section 1 of SB 40 has expired,[11] and it has no application to the SMSD Board of Education because it only applies only to actions taken from March 25, 2021, through the end of the COVID-19 state of disaster emergency. As part of SB 40 (Section 5), the state of disaster emergency ended on May 28, 2021. Further, the 2020-21 school

[11] Section 1(a)(1) states: "During the state of disaster emergency related to the COVID-19 health emergency…"

year ended the day before plaintiffs filed their SB 40 Petition, on May 27, 2021. The District argues, then, that plaintiffs' children are no longer attending school and cannot be "aggrieved."

A little more nuanced argument is the District's argument that the legislature cannot impose retroactive liability on the District. This is a question of law. *State v. Brownlee*, 302 Kan. 491, 508, 354 P.3d 525 (2015). Generally, a statute operates prospectively unless there is clear language to indicate otherwise unless the statute is procedural only. *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016).

SB 40 does a couple of things to suggest a substantive change in the law. First, it does not defer to the independent decision-making of school boards unless it was intended to question all pandemic responses of every government entity. Assuming otherwise, the more logical view is that actions taken after the law's effective date can be reviewed and subject to strict scrutiny to ensure it is narrowly tailored to ensure the most limited application to the individual. Local school boards have a recognized state constitutional in that they are generally supervised by the state board of education which is required to maintain, develop, and operate local public schools through locally elected boards. Art. 6, § 5 of the KAN. CONST.

The legislature does not have *carte blanche* authority over school districts which do not have self-executing authority under the constitution. *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 253, 885 P.2d 1170, 1183 (1994). In that way, both the legislature and school districts have vested duties that must be harmonized. Eliminating school districts' authority to enact measures to protect public health and safety would be a remarkable and substantive change.

Accordingly, any change in SB 40 to change the authority of school boards in protecting the public health of its students, staff and patrons would be a dramatic change. SB 40 must be

viewed, then, as protecting on prospective changes in policy after SB 40 became law. But here, it has no application to the plaintiffs who complain about past injuries under a policy enacted in July of 2020. And, they do not claim about an application of the policy that is unique to them or that injures them. Indeed, the exemptions were narrowly tailored and presented the least restrictive means in any exemption application (or not) to the plaintiffs. Arguing that a reaffirmation of a policy to fit within SB 40's 30-day requirement to appeal from its enactment, does not make it new. The law is not retroactive and cannot be reasonably interpreted to address anything more than a change in policy or an individualized application that demonstrates a harm plaintiffs have failed to identify.

Problems with SB 40[12] and the Plaintiffs' Claims

When district courts are required to review the actions of administrative or other actions, typically an available remedy is to remand the matter to make sufficient determinations. Normally, when an administrative agency, for example, adopts an order or regulation, it is presumed valid. *Barbury v. Duckwall Alco Stores*, 42 Kan.App.2d 693, Syl. ¶ 1, 215 P.3d 643 (2009).

The difficulty in SB 40, however, is that it seems to preempt all other civil actions in preference for an SB 40 petition. It requires an interpretation of whether the districts have used aa narrowly tailored approach with the least restrictive means to regulate the pandemic mitigation measures. A different standard, however, exists for an aggrieved person contesting one of the

[12] The Court raises these serious issues *sua sponte* because it has been given no choice but to adjudicate a case and controversy within a scheme that cannot be separated from its impact on the judiciary. *Tolen v. State*, 285 Kan. 672, 675–76, 176 P.3d 170, 173 (2008) (citing *State v. Adams*, 283 Kan. 365, 367, 153 P.3d 512 (2007) (addressing a speedy trial issue *sua sponte* because consideration of the issue was necessary to serve the ends of justice or prevent the denial of fundamental rights).

other governmental units identified in SB 40 who must show that he or she is "substantially burdened."[13]

SB 40 imposes a hard 72-hour hearing requirement for both the school district and the courts. It then imposes a seven-day decision requirement after holding an evidentiary hearing (assuming the hearing can be completed in one day). Assuming that pandemic health advisories and guidelines may change and impact people with real consequences, the application of an existing policy either individually requiring exemptions or the creation of a new policy seems to be the intent of SB 40's mandate. Neither of those applies here.

SB 40 is vague o in a number of respects. It does explicitly state that these hearings are *de novo*, meaning it starts all over again. But it does suggest underlying district hearings that are subject to review. But it also hobbles the defendant if the court, for whatever reason, fails to render a decision within a very short period of time.[14] This division of the Court alone has had three such matters assigned to it, one of which was removed to federal court, had numerous plaintiffs and defendants, with over 1,200 documents attached to the petition. The principal plaintiffs in that case filed another SB 40 case. Several other cases were filed in Division 6.

Of great concern is the attempt to pressure courts to give preference to hear and then decide such cases within seven days of the hearing or otherwise "**the relief requested in the petition shall be granted."** This leaves open the likelihood that wildly inappropriate claims for relief, damages or even an injunctive requests to strike down carefully calibrated policies would prevail

[13] *See* Section 8 (e)(1) ("Any party aggrieved by an action taken by a local unit of government pursuant to this section that has the effect of ***substantially burdening*** or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business or commercial activity…" Emphasis added.

[14] Supreme Court Rule 166(a) requires a ruling on most civil motions within 30 days after final submission and, in other civil matters a ruling within 90 days. Rule 166(b).

with judicial consideration. Here, plaintiffs seek damages allegedly done to their children because they had to wear masks. SB 40 does not mention damages. But, by legislative *fiat*, SB 40 necessarily declares all these considerations forfeit if the requested relief is not addressed immediately. It allows for no judicial consideration or discretion but still seeks the imprimatur of a legal judgment. The Court is aware of no case where a legislature can eliminate due process in favor of the party that bears the burden of proof if an adjudication is tardy.

In this case, for example, the children of the plaintiff/petitioners are not attending school or even compelled to be in school or wear masks. Ms. Butler's one child will be in band camp which does not begin until June 14-18, and, presumably, is a voluntary program where her child is not compelled to either attend much less wear a mask. After carefully questioning the plaintiffs, it is apparent their SB 40 suit is not about any policy that occurred with the past 30 days.

The apparent emergency features of SB 40 do not apply to this case. Plaintiffs' children are not in school. Courts do not decide moot issues or render advisory opinions unless a real controversy exists that requires determination. *State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866, 869 (2012. While the mootness doctrine is subject to exceptions, including one where the harm is capable of repetition or involves a question of public importance, *State v. DuMars*, 37 Kan.App.2d 600, 605, 154 P.3d 1120, *rev. denied* 284 Kan. 948 (2007), the nature of the pandemic and its now-shifting guidelines makes it highly doubtful that the pandemic policy that was enacted in the dark days of uncertainty, will be the same policy, if any, in the months ahead before schools reopen in the fall. Noting has changed since July 2020.[15] Accordingly, this action is subject to

[15] At the hearing of this matter, both parents agreed that their complaints related to the mask policy although Ms. Butler's children had exemptions from that policy. Mr. Bozarth testified he could have obtained one but chose not to subject his daughter to the stigmatization of social distancing that attended that Ms. Butler's children when they showed up without masks. They ended up choosing to wear masks to avoid the stigma. .

dismissal as moot without a showing of specific and current harm to the plaintiffs that meets the requirements of SB 40. Plaintiffs are ordered to demonstrate, within 10 days of this order, any action, beyond an email, that the District has taken that constitutes some current policy that impacts their children. If they cannot demonstrate the same, this suit will be dismissed.[16] Even if plaintiffs conceivably could show some harm, significant problems exist with SB 40.

The most significant issue is the default provision identified above that declares the plaintiff's relief requested as sacrosanct if the court fails to render its decision within seven days of the hearing. This goes far beyond the legislature's previous attempt to demand judicial adherence to legislative deadlines about when decisions emanate from the supreme court.[17]

> Whether a statute is unconstitutional because it violates the separation of powers doctrine is for this court to determine. Because, as we reaffirmed just last year, "the final decision as to the constitutionality of legislation rests exclusively with the courts ... [T]he judiciary's sworn duty includes judicial review of legislation for constitutional infirmity.' [Citation omitted.]" *Gannon v. State*, 298 Kan. 1107, 1159, 319 P.3d 1196 (2014); *State ex rel. Slusher v. City of Leavenworth,* 285 Kan. 438, 452–53, 172 P.3d 1154 (2007) (declaring veteran's preference statute constitutional); *Petersilie v. McLachlin,* 80 Kan. 176, 180, 101 P. 1014 (1909) (holding unconstitutional a legislative declaration of the truth of facts because an invasion of the province of the judicial branch); *Auditor of State v. A.T. & S.F. Railroad Co.*, 6 Kan. 500, 506, 1870 WL 507 (1870) ("It is emphatically the province and duty of the judicial department to say what the law is.") (quoting *Marbury v. Madison, 5 U.S.* [1 Cranch 137, 177, 2 L.Ed. 60 [1803]).

State v. Buser, 302 Kan. 1, 2, 2015 WL 4646663 *2 (2015) (holding K.S.A. 20-3301 (Supp. 2014), using similar language to SB 40 that if supreme court fails to enter its decision within 30 days of

[16] Because the Court is informing the attorney general to intervene in this matter, it will withhold final judgment in this case, pending a response.

[17] It also conflicts with the Supreme Court's administrative authority in Rule 166, allowing district courts 30 days to render decisions on motions.

a joint request for a decision from counsel, the chief justice must establish a "firm intended decision date by which the court's decision shall be made.").

SB 40, in addition to establishing very short deadlines for hearings and decisions that conflict with both local rules and supreme court rules, penalizes the governmental defendant if a decision fails to emanate within seven days of a hearing. It does this repetitively in each of its applicable sections. § 1(d)(1) (boards of education); § 2(d)(1) (community colleges); §6 (g)(1) (gubernatorial action)[18]; § 8 (e)(1) (local units of government); § 12 (d)(1) (local health officer determinations). In this manner, SB 40 defaults the defendant and gives the plaintiff whatever relief is requested. So, if a patron does not like masks or ascribes to an unscientific or fringe theory that contests pandemic policy measures, it may seek to strike the same down through defaulted injunctive relief. The judicial trigger in SB 40 is: "do this now or else," which threatens to heap public opprobrium on the courts for even permitting such relief to occur by default.

In other words, SB 40 tips the scales of justice toward the plaintiff as a judicial goad. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citation omitted).

Potentially, any governmental defendant who presents objections is at risk for a default pinned to the failure to issue a decision. The rules for default judgments are contrary to this scheme. Procedural due process requires a hearing *before* there is a permanent deprivation of

[18] Added into SB 40's restrictions against gubernatorial disaster or emergency powers are that the governor may not limit or otherwise restrict anything related to firearms or ammunition, (d). or have the power to alter or modify any election laws, (e). These are tied into the "aggrieved" persons who can contest any executive order.

rights [judgment], although an *unresponsive defendant* may forfeit this constitutional right. *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 494, 781 P.2d 1077, 1081 (1989) *cert. denied*, 495 U.S. 932 (1990) (upholding default for failure to answer as not a violation of due process). A judgment entered without due process, however, is void if a court acts inconsistently with the same, *id.* at 495-96, and the same should apply to legislative acts that are inconsistent with due process.

SB 40 disrupts due process upon pain of an insufficiently responsive judiciary that awaits disposition on the merits. But, if not decided within the short deadline imposed, the defendant suffers the stinger of a judgment without judicial determination. SB 40 eliminates the role of the judiciary, then, in deciding its cases. A fundamental rule of statutory construction is that the intent of the legislature governs, and that courts must adhere to K.S.A. 60-102 to secure *the just*, speedy *and* inexpensive determination of every action. (Emphasis added). These are conjunctive requirements. Speed or expediency cannot supplant a just determination. *Fisher v. DeCarvalho*, 298 Kan. 482, 500, 314 P.3d 214, 224–25 (2013) (reversing district court's dismissal with prejudice of malpractice action that failed to meet service requirements).

The Court is convinced that SB 40 presents significant constitutional problems that require the intervention of the Kansas Attorney General pursuant to K.S.A. 75-764(b)(2) (requiring notice of the disputed validity of a statute to be served on the attorney general to be given an opportunity to appear and be heard). The Court notes that SB 40 does contain a severability clause in § 14 to prevent the invalidity of other portions of the act if any portion of the same is declared unconstitutional or invalid.

By copy of this order, the Court invites the attorney general to appear to intervene and be heard on this matter. Likewise, the parties may brief or address any arguments raised by the Court or through any intervention.

Accordingly, the Court will withhold finalizing its order until such a hearing can be scheduled but otherwise denies the plaintiffs any relief as being moot and untimely for the reasons stated above unless they can demonstrate additional evidence that they believe the Court has overlooked. If plaintiffs submit additional evidence they shall do so through a verified brief or pleading that does not depend upon any technical format but should be sent to the District with a certificate of mailing and filed with the clerk of the district court under any heading that indicates it is a response to the Court's order. Under Supreme Court Rule 133(a), the Court does not find that further oral argument on plaintiffs' additional evidence, if any, will aid the Court in its decision. Defendant may respond to any such further evidence within 10 days.

If the attorney general decides to intervene, the Court will schdedule oral argument for such hearing only.

IT IS SO ORDERED.

6/8/21 /s/ David W. Hauber

_____ _____

DATE DISTRICT COURT JUDGE, DIV. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60 258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e mail addresses provided by counsel of record in this case and any self-represented parties. The Court also notifies the attorney general by email at ksagappealsoffice@ag.ks.gov.

/s/ DWH