No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

BUTLER, KRISTEN and BOZARTH, SCOTT,
Plaintiffs
v.

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

ATTORNEY GENERAL DEREK SCHMIDT
Intervenor/Appellant.

AMICUS BRIEF OF KANSAS ASSOCIATION OF SCHOOL BOARD LEGAL ASSISTANCE FUND

Appeal from the District Court of Johnson County, Kansas.
The Honorable David W. Hauber, District Judge
District Court Case No. 21-CV-2385

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INTRODUCTION

After Governor Kelly closed Kansas school attendance centers in the spring of 2020 in response to the global COVID-19 pandemic, public school administrators, boards, teachers, and instructors worked diligently over the summer months to plan for a safe return to in-person learning for the 2020-2021 school year. Boards of education and boards of college trustees reviewed advice from the Centers for Disease Control, the Kansas Department of Health and Environment and local health authorities to establish plans for reopening schools safely, though the pandemic continued to rage. Schools adopted layered strategies to reduce the likelihood of spreading the virus. The majority of Kansas schools elected to require face coverings as part of their COVID-19 intervention strategies to begin the school year.

Anecdotal evidence suggests the strategies worked. After losing the opportunity to participate in spring sports and activities and to hold proms, spring performances and traditional graduation ceremonies at the end of the previous school year, Kansas schools completed the 2020-2021 school year with few interruptions related to COVID-19 outbreaks. Nevertheless, in the spring of 2021, the Kansas legislature enacted SB 40, a statutory assault on public and school safety measures that begins with a presumption that board-adopted COVID-19 intervention strategies overreach. The Bill placed schools on the defensive side of a strict scrutiny inquiry when a student, parent, or staff member merely asserted that he or she was "aggrieved" by any component of those strategies. Judge Haubert correctly concluded the statutory scheme which requires plaintiffs to show little to no justiciable injury, which presumes unwarranted government intrusion through

school safety measures, and which imposes the specter of a default judgment being rendered through absolutely no fault of the school defendants is manifestly unfair and unconstitutional.

I. SB 40 unfairly burdened Kansas public schools and community colleges as they sought to defend safety protocols during the COVID-19 pandemic.

As both Shawnee Mission School District and Blue Valley Unified School District No. 229 ably demonstrated, SB 40 forced school districts to devote precious time and financial resources to the defense of grievances, mainly over masking requirements. Taking advantage of the 72-hour hearing requirement, grievants frequently filed their complaints to require hearings to be scheduled either within 24 hours or on the weekend or a holiday. More concerning than mere inconvenience is the lack of time school personnel and attorneys had to prepare a defense. While the Attorney General asserts that the school districts should have had evidence supporting safety measures readily available, this argument presupposes that the boards' attorneys are similarly informed and prepared to defend the schools' policies. The assertion also ignores the need to research authorities and arguments presented by complainants to be able to prepare an adequate rebuttal.

Considering the possible consequences of a school losing an SB 40 challenge, the process should not be so rushed. SB 40 allows a student, parent, or staff member who is "aggrieved by an action, order or policy described" in the legislative enactment to challenge that action, order or policy. SB 40 §§ 1(c)(1), 2(c)(1). As a practical matter, those seeking redress under the bill are not merely asking for individual relief, but

seeking to invalidate COVID-19 mitigation measures and policies applicable to entire buildings or school systems. Experience early in the 2021-2022 school year—which, after many schools opened without mask requirements or other mitigation measures employed in the previous school year, has already been marked by the closing of school buildings and even some entire districts for a period due to COVID-19 outbreaks—suggests that the defeat of safety measures that proved effective in the 2020-2021 school year could have dangerous consequences[1]. The prospect of such serious and far-reaching outcomes merits time for a more thoughtful and robust adjudicative process. SB 40 treats enforcement of mask mandates and other COVID-19 intervention procedures in the schools as a civil rights emergency. COVID-19 has cost students time in school and deprived them of educational experiences. It has cost an unfortunate number of people their lives. SB 40's presumption that the very interventions adopted to combat these serious issues should be treated so suspiciously and adjudicated so abruptly is misguided.

II. The question of the constitutionality of SB 40 as applied to Kansas public schools is not moot.

All parties appear to agree that since sections 1 and 2 of SB 40 applied only to policies and actions adopted "[d]uring the state of disaster emergency related to the

[1] On September 14, 2021 the *Kansas Reflector* reported that 31 Kansas schools are experiencing COVID-19 outbreaks, and that four school districts, so far, have shut down at least some grades due to COVID outbreaks. Kansas Reflector, https://kansasreflector.com/2021/09/14/four-kansas-school-districts-temporarily-close-as-covid-19-outbreaks-hit-31-schools/ (last visited Sept. 15, 2021). USD 350 St. John-Hudson announced on September 14 that it would be closed for a week due to COVID-19 cases, with no remote classes or meals provided. Kake.com, https://www.kake.com/story/44727949/kansas-school-district-closes-due-to-rising-covid-cases-staff-shortage (last visited Sept. 15, 2021). On August 27, USD 353 Wellington shut down the entire district when at least 40 students tested positive after only eight days of classes. CJOnline, https://www.cjonline.com/story/news/education/2021/08/27/kansas-covid-clusters-shut-down-class-and-sports-wellington-ks-school-district-usd-353-delta-variant/5617186001/ (last visited Sept. 15, 2021).

COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments thereto," the rights and responsibilities conferred by those sections mostly passed out of existence when the Legislative Coordinating Council allowed the statewide declaration of pandemic emergency to expire on June 15, 2021. Clearly, no party has standing to assert rights under sections 1 and 2 of SB 40 to contest policies adopted or actions taken since that date. Both Defendant/Appellee Shawnee Mission Public School Board of Education and Amicus Blue Valley Unified School District No. 229 capably argued on behalf of public primary and secondary schools that the issue of constitutionality is not moot.

SB 40's treatment of community and technical colleges merits separate attention, however. Those institutions are covered by section 2 of SB 40, while primary and secondary education systems are covered by section 1. The two sections parallel each other in most respects. However, whereas section 1(c)(1) provides students, parents, and staff members of primary and secondary schools the ability to challenge pandemic mitigation policies only "within 30 days after the action was taken, order was issued or policy was adopted by the board of education," section 2 places no such limitation on complainants in the community and technical college realm. Rather, the provision applicable to those institutions states:

> "An employee or a student aggrieved by an action taken, order issued or policy adopted by the governing body of a community or technical college pursuant to subsection (a)(1), or an action of any employee of such college violating any such action, order or policy, may request a hearing by such governing body to contest such action, order or policy."

SB 40, § 2(c)(1).

Since the state of pandemic emergency was allowed to expire more than 30 days ago, primary and secondary students, parents, and staff cannot challenge mitigation policies adopted during the state of emergency under SB 40 any longer. Further, SB 40 does not govern any policies adopted since the state of disaster declaration expired. However, the absence of a 30-day limit in section 2 leaves open the possibility that a community or technical college student or staff member may continue to have the right to employ the procedures of SB 40 to challenge any COVID-19 mitigation action taken or policy adopted during the state of emergency to this day. Assuming some of those policies remain in effect as cases of COVID-19 continue to plague Kansas communities, such a challenge is imminently foreseeable. It can hardly be argued that consideration of the validity and enforceability of the statute is nonjusticiable when students and staff at these institutions may still avail themselves of the procedures and standards that it imposes.

III. SB 40 improperly imposes a strict scrutiny standard and allows plaintiffs to prevail without demonstrating a legally justiciable injury

The test for standing in Kansas requires a plaintiff to "demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.2d 1196 (2014) (citing *Cochran v. Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 908-09), 249 P.3d 434 (2011)). A party must "present an injury that is concrete, particularized, and actual or imminent." *Id.* (citing *Ternes v. Galichia*, 297 Kan. 918, 921, 305 P.3d 617 (2013)).

Grievants and complainants in SB 40 proceedings have not generally met the "particularized injury" requirement that is required to gain access to the courts. Though some have based their complaints on claims of infringement of civil liberties and allegations concerning physical and mental effects of masking, SB 40 only requires that complaining parties assert that they are "aggrieved." Once that assertion is made, public education defendants must overcome the hurdles of "narrowly tailored" and "least restrictive measures" to sustain their COVID-19 safety policies. Plaintiffs are held to no standard of establishing actual harm, injury, or damages. The presumptive posture of SB 40 blunts the process of weighing the equities involved in enforcement of COVID-19 mitigation policies and places the entire burden of proof upon the schools.

A board of education is normally "entitled to a presumption of the regularity of its actions." *Brown v. Bd. of Educ.*, 261 Kan. 134, 151, 928 P.2d 57 (1996). SB 40 dispenses with any such presumption. SB 40 puts school boards on the immediate defensive regarding measures they adopted to protect students and staff from COVID-19 exposure. To prevail against a challenge under SB 40, boards must demonstrate that the measures are "narrowly tailored to respond to the state of disaster emergency" and use "the least restrictive means to achieve such purpose." SB 40, §§ 1(d)(1) and 2(d)(1). This strict scrutiny standard is normally applied to legislative action that burdens a fundamental right, in which case the infringement must be narrowly tailored to serve a compelling government interest. *State v. Genson*, 59 Kan.App.2d 190, 201, 481 P.3d 137 (2020) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). For burdens on lesser

rights, the infringement will be upheld if it bears merely a rational relation to a legitimate government interest. *Id.*

The legitimacy of the purpose supporting schools' COVID-19 safety measures is beyond question. The measures are necessary to protect students and staff from infection during in-person learning, to decrease the likelihood of school interruptions resulting from the virus, and to limit chances that school operations will cause COVID-19 to spread in the broader community. Though some grievants have attempted to frame compulsory masking as an affront to individual liberties, the Supreme Court has long recognized that state action does not unlawfully infringe on personal liberty when the action is deemed necessary for the public health and safety. *See Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (upholding mandate for smallpox vaccination, even though "some physicians of great skill and repute do not believe that vaccination is a preventive of smallpox"). Legal Assistance Fund respectfully suggests that no fundamental liberty interest to attend school free of a facemask exists. Even if such a right does exist, the public health emergency, the seriousness of COVID-19 illness, the severe taxing of medical resources and services occasioned by high infection rates in our communities, and the ever-mounting death tolls resulting from the virus provide more than sufficient basis to conclude that strict scrutiny is an inappropriate standard to be applied to preventative measures adopted by public schools.

Perhaps the most pernicious provision of SB 40 is that which awards automatic judgment to the plaintiff in an SB 40 action in the event the district court does not render judgment within seven days of the hearing on the complaint—a hearing which must be

held withing 72 hours of the complaint's filing. SB 40 §§ 1(d)(1), 2(d)(1). Such a judgment may be imposed even if the school district or college appears, puts on evidence, and establishes its entitlement to judgment in its favor. The Attorney General assumes that "[i]f 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." Aplt. Brf. P. 19. This presumption is unwarranted. Any number of reasons could account for a court's delay in ruling. The press of more urgent cases, the need to study evidence and review applicable precedents to inform the ruling, or unforeseen circumstances beyond the control of both the judge and the litigants are just as likely to explain delay as any deficiency in the school's defense. Any litigants who appear as parties to a lawsuit—even state agencies or political subdivisions—should be assured of a reasonable hearing and decision on the merits of the case. They should not be threatened with a default judgment that is utterly beyond their own control to avoid.

IV. Conclusion

Conducting school during the COVID-19 pandemic has taxed even the most dedicated board members, teachers, and educational administrators. The processes adopted to make the school environment as safe as possible have created extra work and responsibility for everyone associated with school operation. SB 40 compounded the burden by raising a baseless presumption that schools' COVID-19 safety measures unfairly infringe on students' and employees' rights and by imposing needlessly stringent deadlines and standards of proof on schools to justify those measures. In its groundless imposition of a strict scrutiny standard, its deadlines which are unreasonably short for a

thorough and fair inquiry into claims, and its threat of default judgment based solely on an arbitrary judicial deadline that is beyond a school district's control, SB 40 is legislative overreach. Kansas Association of School Boards Legal Assistance Fund respectfully requests that the Court affirm the district court's order invalidating SB 40.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 23, 2021, the foregoing brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

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