

SESSION OF 2022

SUPPLEMENTAL NOTE ON SENATE BILL NO. 541

As Amended by Senate Committee on Judiciary

Brief*

SB 541, as amended, would create law regarding actions taken by a city related to contagious or infectious disease, COVID-19 vaccination passports, and face mask requirements. The bill also would amend law in the Kansas Emergency Management Act (KEMA) and public health statutes related to contagious or infectious disease, remove the sunset provision in the COVID-19 Contact Tracing Privacy Act, and amend law related to student vaccination exemptions.

Actions by City Related to Contagious or Infectious Disease (New Section 1)

The bill would state if a city adopts an ordinance or takes any action related to a contagious or infectious disease, including, but not limited to, an order, resolution or ordinance issued or adopted pursuant to a declared state of disaster or state of local disaster emergency under KEMA, that limits the size of gatherings of individuals, restricts the operation of business, controls the movement of persons, or limits religious gatherings, such ordinance or action could not exceed 30 days in duration at a time before such ordinance or action would need to be renewed, modified, rescinded or allowed to expire. For the purposes of this section, "restricts the operation of business" would include, but not be limited to, any occupancy limitation, limitation on periods of operation, or the exertion by any governmental entity of other

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

significant control on business resources, property or functionality.

The bill would allow any party aggrieved by such decision of the city to file a civil action, within 30 days after the issuance of the decision, in the district court of the county where the city is located. Notwithstanding any order issued by the Chief Justice regarding deadlines or time limitations during a state of disaster emergency, the bill would require the court conduct a hearing within 72 hours of receiving a petition in such action.

The court would be required to grant the request for relief unless the court finds the order is narrowly tailored to the purpose stated in the order and uses the least restrictive means to achieve such purpose. The bill would require the court to issue an order on such petition without reasonable delay after the hearing. Relief under these provisions could not include a stay or injunction concerning the contested action that applies beyond the county in which an action was taken, and the Supreme Court could adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing under these provisions, including rules for consolidations of similar hearings. The court would be required to award a prevailing plaintiff who brings an action under this section the cost of the suit, including reasonable attorney fees.

COVID-19 Vaccination Passports (New Section 2)

The bill would state, notwithstanding any law to the contrary, postsecondary educational institutions, the State Board of Education, local school boards, schools, or school officials could not:

- Issue a COVID-19 vaccination passport (defined in the bill as a document, digital record, or software application indicating an individual's COVID-19

vaccination status) to any individual without the individual's consent;

- Require an individual to use a COVID-19 vaccination passport for any purpose; or
- Refuse access to education or a place accessible to the general public or separate an individual from others based on such individual's COVID-19 vaccination status.

The bill would state a violation of any provision of this section would be a class A nonperson misdemeanor and would define terms applicable to this section.

Face Mask Requirements (New Section 3)

Notwithstanding any law to the contrary, the bill would prohibit any governmental entity or public official from ordering or otherwise requiring a person to wear a face mask as a response to a contagious or infectious disease, but such entity or official could recommend the wearing of face masks under the bill.

Severability Clause (New Section 4)

The bill would state its provisions are severable, and that if any portion of the bill or application to any person or circumstance is declared unconstitutional or invalid, the invalidity would not affect other portions of the bill that can be given effect without the invalid portion or application, and the applicability of such other portions of the bill to any person or circumstance would remain valid and enforceable.

***Amendments to Kansas Emergency Management Act
(Sections 5—8)***

*Limitations on Governmental Powers During a State of
Disaster Emergency or State of Local Disaster Emergency*

The bill would amend the powers of the Governor or local unit of government during a state of disaster emergency or state of local disaster emergency under KEMA, respectively, to provide that no action by a governmental entity or public official would apply to the exercise of religion in a church, synagogue, or other place of worship.

*Judicial Review of Governmental Actions in Response to
State of Disaster Emergencies and State of Local Disaster
Emergencies*

The bill would amend the process of judicial review for actions filed by aggrieved parties in response to executive orders issued by the Governor during a state of disaster emergency under KEMA and for actions filed by aggrieved parties in response to actions taken by local units of government during a state of local disaster emergency under KEMA.

Under current law, when an aggrieved party files a civil action in district court in response to an executive order issued by the Governor or an action taken by a local unit of government, a court must issue an order on a petition filed pursuant to the section within seven days of the hearing on such petition, or the relief requested in the petition must be granted. The bill would replace this seven-day requirement with a requirement that the court issue its order without unreasonable delay after the hearing is conducted, and would remove language requiring relief be granted in the petition if the court's order is not issued within seven days.

The bill would also require the court to award a prevailing plaintiff the cost of the suit, including reasonable

attorney fees, in actions filed pursuant to the sections in KEMA described above.

Actions Taken, Orders Issued, or Policies Adopted by Local School Boards or Community or Technical Colleges Related to Contagious or Infectious Disease

In the sections of KEMA governing the operation and closure of local school districts, community colleges, and technical colleges during the COVID-19 state of disaster emergency, the bill would remove references to the COVID-19 state of disaster emergency and would replace them with references to “contagious or infectious disease” in provisions authorizing a local school board or governing body of a community or technical college to take actions, issue orders, or adopt policies affecting the operation of such schools, attendance centers, or community or technical colleges.

The bill would add a limitation on the actions, orders, or policies described above in each section that such actions, orders or policies could not exceed 30 days in duration before such actions, orders, or policies would need to be renewed, modified, rescinded, or allowed to expire.

In addition, the bill would make the same changes as described above with respect to judicial review of actions filed by aggrieved parties for actions taken, orders issued, or policies adopted by local school boards, community or technical colleges, and would also require the court to award the prevailing plaintiff the cost of the suit, including reasonable attorney fees.

Face Mask Requirements

The bill would specify that neither the Governor nor a local unit of government would have the power under KEMA to order or otherwise require the wearing of face masks as a response to a contagious or infectious disease during a state of disaster emergency or state of local disaster emergency.

***Amendments to COVID-19 Contact Tracing Privacy Act
(Section 9)***

The bill would remove the sunset provision contained in the COVID-19 Contact Tracing Privacy Act (Act), to state the bill's provisions would be in force and effect on and after the bill's effective date, notwithstanding the prior expiration of the Act on May 1, 2021. The bill would also remove outdated references to rules and regulations related to the Act.

Amendments to Public Health Statutes (Sections 10—15)

The bill would clarify that the power of the Secretary of Health and Environment (Secretary) to supervise the general health of the people of the state or the power of local health officers to supervise cases of infectious or contagious disease under the public health statutes would not include the power to order a person to wear a face mask in response to contagious or infectious disease.

In addition, the bill would specify if the Secretary takes any action related to a contagious or infectious disease that limits the size of gatherings or individuals, restricts the operation of business, controls the movement of persons, or limits religious gatherings, such action would be required to be narrowly tailored to the purpose of the action and use the least restrictive means to achieve such purpose and be limited to 30 days in duration before it would need to be renewed, modified, rescinded, or allowed to expire.

The bill would also amend law governing the authority of local health officers to replace the term "curtailing" with "restricting" in reference to actions taken with respect to operation of business to make the above limitations applicable to local health officers and would amend the judicial review process for actions filed by aggrieved parties against local boards of health in the same manner as elsewhere in the bill. The bill would also require the court to award a prevailing plaintiff the cost of the suit, including

reasonable attorney fees in actions filed against local health officers.

The bill would amend a provision governing the non-admission of students due to infectious or contagious disease to state no person could be denied access to any public, parochial, or private school or licensed child care facility under this provision unless there are reasonable grounds to believe that such person is actually infected with a disease suspected of being infectious or contagious, and would specify any exclusion from a facility or school under this section would not be subject to remote learning limitations found elsewhere in statute.

The bill would apply New Section 3 of the bill to also prohibit face mask orders or requirements as part of a local health officer's response to cases of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis (infantile paralysis), epidemic cerebro-spinal meningitis, and other acute infectious, contagious, or communicable diseases.

Amendments to Student Health Statutes (Section 16)

The bill would amend law related to alternative certifications (exemptions) for required tests and inoculations (immunizations) for first-time enrollment at child care facilities and schools. The bill would replace language in the current religious exemption provision to provide that children and students enrolling in such facilities and schools would be exempt from immunization required by the Secretary if the student presents a written statement signed by one parent or guardian that the immunizations would violate sincerely held religious beliefs of the parent, guardian, or child.

The bill would provide that an exemption based on sincerely held religious beliefs would be granted without inquiring into the sincerity of the request. The bill would specify that "religious beliefs" includes, but is not limited to,

theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views.

Additionally, the bill would amend this section to provide an exemption to the immunization requirement when an immunization does not have final approval by the U.S. Food and Drug Administration. To qualify for this exemption, the student could present the same written statements to the Secretary as for other exemptions authorized by law, but for an exemption based on the endangerment of the life or health of the child, such statement could be signed by a parent or guardian in addition to a licensed physician.

The bill would state no student who has presented alternative certification pursuant to the above provisions could be denied enrollment or participation in any school activity, or segregated or separated from other students as a result of such student's vaccination status. The bill would also make technical amendments to this section, including replacing the word "pupil" with "student."

The bill would be in effect upon publication in the *Kansas Register*.

Background

The bill was introduced by the Senate Committee on Federal Affairs at the request of Senator Petersen, on behalf of Senator Warren.

As the bill was referred to the Senate Committee on Judiciary, it also contained provisions regarding compensation for property affected by governmental actions and property tax relief for businesses affected by governmental restrictions or shutdowns. On March 9, 2022, the Senate Committee removed these sections of the bill and inserted them into HB 2416, creating a substitute bill.

Senate Committee on Judiciary

On March 3, 2022, the Senate Committee on Judiciary held an informational hearing on potential legislation regarding orders and actions by public officials relating to vaccine passports, face mask requirements, gathering limitations, business restrictions, and religious gathering limitations. In the hearing, 19 citizens provided testimony in support of such potential legislation; 36 citizens provided written-only support. One citizen provided neutral testimony.

In the Senate Committee hearing on March 7, 2022, an attorney, a representative of the Kansas Chamber of Commerce, and two citizens provided **proponent** testimony on the bill, stating various concerns over governmental actions taken during the COVID-19 pandemic. Written-only proponent testimony was provided by three citizens.

Representative Jacobs provided neutral testimony on the bill, expressing concern that the bill does not adequately protect the free exercise of religion guaranteed by the *U.S. Constitution*.

Representatives of the Kansas Association of Counties, Immunize Kansas Coalition, and the League of Kansas Municipalities, and one citizen testified as **opponents** to the bill, stating concerns the bill will hinder the ability of governmental actors to effectively respond to future emergencies. Written-only opponent testimony was provided by representatives of the Harvey County Health Department, the Kansas Academy of Family Physicians, the Kansas Association of Local Health Departments, the Kansas Association of School Boards, the Kansas National Education Association, the Kansas State Board of Education, and Nurture KC; a representative of the cities of Merriam, Mission, Prairie Village, and Westwood Hills; and three citizens.

On March 9, 2022, the Senate Committee amended the bill to:

- Add language in KEMA to limit the powers of the Governor and local units of government during emergencies with respect to the free exercise of religion;
- Remove two sections governing compensation for property affected by governmental actions and property tax relief for businesses affected by governmental shutdowns or restrictions [**Note:** the Senate Committee inserted these sections in HB 2416, creating a substitute bill]; and
- Remove provisions pertaining to face mask requirements in schools and insert provisions prohibiting any governmental entity or public official from requiring face masks as a response to contagious or infectious disease.

Fiscal Information

[**Note:** The fiscal note prepared by the Division of the Budget references some provisions regarding compensation and property tax relief now contained in Senate Sub. for HB 2416.]

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Kansas Department of Health and Environment states that enactment of the bill would result in increased expenditures for the agency, if found by a district court in a civil action to be responsible for and directed to provide awards of compensation pertaining to and resulting from restrictions on use of property due to a governmental action related to a contagious or infectious disease, and issued or adopted by the state, county, or other political subdivision. A total fiscal effect could not be estimated.

The Kansas State Department of Education and the Office of the Governor state enactment of the bill would not

have any fiscal effect on the operations of either agency. The Kansas Board of Regents reports enactment of the bill would not have a fiscal effect on higher education.

The Office of the Attorney General reports that while enactment of the bill could reduce some of the State's potential legal liability in future cases, certain provisions could be subject to legal challenge. The Office of the Attorney General states some litigation defense could be handled by the Office, but it is possible that specialized outside counsel would need to be hired by the State. The total fiscal effect could not be estimated.

The Kansas Department of Revenue states the effects of any future shutdowns or restrictions that would result in the State paying back a portion of a property owner's property taxes cannot be estimated.

The Office of Judicial Administration (OJA) states enactment of the bill could increase the number of cases filed in district court, requiring more time spent by court personnel. The OJA estimates enactment of the bill could result in the collection of docket fees and fines assessed in those cases filed under the bill's provisions. According to OJA, a fiscal effect cannot be estimated.

Any fiscal effect associated with enactment of SB 541 is not reflected in *The FY 2023 Governor's Budget Report*.

The Kansas Association of Counties and the League of Kansas Municipalities both state that enactment of the bill would increase costs for local governments related to the defense of potential litigation and would subject local governments to claims for compensation under the bill. A total fiscal effect could not be estimated by either organization.

Public health; contagious or infectious disease; Kansas Emergency Management Act; face mask requirements; vaccination passports, Secretary of Health and Environment; local health officers; inoculation exemptions