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 DENYING REQUEST FOR STAY

The Attorney General has filed a motion pursuant to K.S.A. 60-262, to stay the effect of this Court's final order, Doc. 19, declaring unconstitutional SB 40. Doc. 20. This request for a stay has been filed pursuant to a notice of appeal directly to the Kansas Supreme Court.[1] Doc. 21. Oral argument on this motion was conducted on July 27, 2021. The Court denies the Attorney General's motions for the reasons outlined below.

The Request for Stay

The Attorney General's motion cites K.S.A. 60-262(e) as authority for granting a stay on appeal. That provision, a subsection of K.S.A. 60-262, which is entitled ***Stay of Proceedings to***

[1] K.S.A. 60-2101(b) provides:

> The supreme court shall have jurisdiction to correct, modify, vacate or reverse any act, order of judgment of a district court or court of appeals in order to assure such act, order or judgment is just, legal and free of abuse. An appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court.

***Enforce* Judgment,** is inapplicable. Subsection (e) simply provides that the state does not have to post a bond during an appeal. There is no judgment requiring a bond or otherwise. Despite this, the Attorney General argues that the Court's July 15, 2021, order has created confusion that "will persist and *potentially hamper* the State's ability to respond to *a future disaster emergency*, inviting the very sort of 'legal anarchy' that troubled the court." Doc. 20 at 2 (emphasis added). As noted at oral argument, the Attorney General's argument is speculative. If there is any confusion it is rooted in SB 40. The Court restored the baseline constitutional rights of the District that was hampered by SB 40's enforcement provisions.

Additionally, the Attorney General asserts that the Court's "opinion broadly declares that all of SB 40 is 'unenforceable.' But there are many provisions of SB 40 unconnected to the challenged judicial review process. For instance, Section 3 of SB 40 adds the Vice President of the Senate as an eighth member of the Legislative Coordinating Council." He goes on to note that there is no reason this cannot be severed from the Court's ruling. *Id.* There is no "severance" provision in K.S.A. 60-262,[2] partial or otherwise.

The Court inquired of the Attorney General's representative, solicitor general, Brant Laue, as to why the Attorney General failed to address the severability argument, when given an opportunity to do so on the primary briefing. His response, during oral argument, essentially, was that the Court's constitutionality concerns were off the mark.

> We felt that the arguments concerning the unconstitutionality of SB 40 were frankly so poor and so overwhelmingly in our favor and we also felt that the mootness issue which had to be dealt with initially, and we think the supreme court will deal with initially, were so overwhelming that frankly if the statute was not unconstitutional there was no need and we did not think the court would reach the severability issue.

[2] Severance is an option when a misjoined claim occurs in a lawsuit and the Court is empowered to sever or dismiss the same. K.S.A. 60-221. That is not this case.

Even when the Court *did reach* the severability issue, however, the Attorney General failed to file a motion to alter or amend the judgment, it seems, because he was supremely confident of the overbreadth of the Court's order, the mootness issue and, therefore, saw no further need to address the same.

At this stage, then, it is clear the Attorney General deliberately avoided addressing the Court on two occasions to address the subject of the stay now being sought, over the speculation that the impact of the Court's decision *might* impact issues other than those addressed in the order. Mr. Laue accurately describes that order as having a declaratory effect but the stay authority he invokes, K.S.A. 60-262, does not address stays of declaratory judgments.

The Shawnee Mission School District ("District"), filed a response's, Doc. 22, which reflects the Court's concerns about the relative harms of a stay:

> The Attorney General has now requested that the Court stay its Order pending appeal, citing a concern that there is "confusion about the validity of other provisions of SB 40 not at issue in this case." The time for the Attorney General to identify specific provisions of SB 40 that he believes should be saved by its severability clause was in his briefing prior to the Court's Final Order, or perhaps in a motion to alter or amend judgment under K.S.A. 60-259(f). Rather than using the proper avenues for requesting a limitation on, or clarification of, the Court's Order, the Attorney General has asked the Court to stay its Order while the appeal process takes place. Even if an expedited appeal process occurs, a decision from the Supreme Court could take several months. Neither the District, nor the other governmental entities subject to SB 40, nor the courts, should be left unshielded from the constitutional violations in SB 40 while the appeal process plays out. Further, the District, as the prevailing party, should not be deprived of the benefit of the judgment in its favor because the Attorney General failed to address other portions of the act in its pre-judgement briefing, and/or to file a post-judgment brief providing arguments and authorities in support of a request for an amended judgment.

Doc. 22 at 2-3.

The Court invited the Attorney General to specifically address the severability clause, Doc. 19 at 26; Doc. 9 at 19-20. But for the reasons outlined during oral argument, no response was forthcoming. He then failed to file a post-judgment request to alter or amend the judgment pursuant to K.S.A. 60-259(f), even after filing the notice of appeal. Ordinarily, a trial court does not have jurisdiction to modify a judgment after it has been appealed *and the appeal docketed* at the appellate level. *ARY Jewelers v. Krigel*, 277 Kan. 464, 473, 85 P.3d 1151 (2004). But that did not occur either.

The Attorney General's current motion for a stay appears to be a salvage operation. The District accurately interprets the motion as asking the Court to prevent its judgment from being relied upon. Doc. 22 at 3. Of course, a court cannot erase its words. The order also is not an injunction. As noted at oral argument, there are specific provisions that address stays for injunctions, K.S.A. 60-262(a)(1) (stating that injunctions are not stayed) and K.S.A. 60-262(c) (noting a "court may suspend, modify, restore or grant the injunction "on terms for bond or other terms that secure the opposing party's rights.") They do not apply here. Failing to provide the Court with *any* authority beyond K.S.A. 60-262, the Attorney General resorts to suggesting the Court has "inherent power" to issue a stay. But this is not such a case for the Court to exercise if such discretionary power is available.

At oral argument, the Attorney General's representative also acknowledged parroting the Court's description of SB 40 as promoting "legal anarchy" to suggest the Court's order has effected the same on issues never addressed. This turn-of-phrase, however, is apparently intended for some other audience but not a court of law. It also does not consider the baseline constitutional concerns at stake and that were addressed. Any future concerns about the impact of the Court's order and SB 40, lie with SB 40's architects, the Legislature, and, ultimately, the supreme court.

The District, as the prevailing party, has a right to rely upon the Court's order:

> As to the claim that the District "does not currently suffer any injury as a result of SB 40", the Attorney General seems to be unfamiliar with the incredibly difficult work being done right now by Kansas school districts and their volunteer board members. Students return to school in a matter of weeks, and COVID-19 cases and hospitalizations are increasing. School districts do not have the luxury of viewing pandemic response measures, or the possibility of a new state of disaster emergency and revival of SB 40, as "moot." School boards across the State are facing the daunting and high-pressure task of developing appropriate operating and mitigation plans for the 2021-22 school year , and then updating those plans as needed. At the Shawnee Mission School District's Board of Education meeting scheduled for this coming Monday, July 26, 2021, the Board will discuss and approve a 21-22 Fall mitigation plan. The Board should be able to approve and update a mitigation plan, and update that plan as necessary, with the protection of the Court's July 15th Order and with the assurance that it is shielded from a "potential parade" of SB 40 lawsuits if a new state of disaster emergency is declared.[3]

Doc. 22 at 3-4.

As noted at oral argument, once this Court's judgment was appealed, the motion for stay invoked an ephemeral world in appellate jurisdiction.

> The filing of a timely notice of appeal and docketing of that appeal with an appellate court divests the district court of jurisdiction in the case. ***In the time between the filing of a notice of appeal and its docketing, the district court and appellate court have simultaneous jurisdiction,*** but once the appeal is docketed the district court loses its jurisdiction over the case. At that point, only the appellate court has jurisdiction to change the district court's order.

Matter of Marriage of Brownback, 2020 WL 2296943, * 6, 462 P.3d 202 (Kan. Ct. App. May 8, 2020) (emphasis added). The Attorney General is not without a remedy. He can immediately docket this case and ask the supreme court to address the expressed need for a stay.

[3] The District, most likely in reliance of the Court's order, recently decided at its board meeting last night to require masking for all elementary students, while making masks optional for middle and high schools.

https://www.kansascity.com/news/local/education/article253036358.html

In Kansas, the district court retains jurisdiction over the case until an appeal is docketed or a motion to docket the appeal out of time is filed with the appellate court. *Sanders v. City of Kansas City,* 18 Kan.App.2d 688, 692, 858 P.2d 833, *rev. denied* 253 Kan. 860 (1993), *cert. denied* 511 U.S. 1052 (1994).

At this stage, however, the request for stay outlined by the Attorney General cites speculative harm and is not justified. Accordingly, the Court finds no basis for any stay of its judgment. The motion for stay is denied.

IT IS SO ORDERED.

7/27/21 /s/ David W. Hauber

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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.

/s/ DWH