

SESSION OF 2021

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE BILL NO. 40**

As Agreed to March 15, 2021

Brief*

SB 40 would create and amend law regarding the Kansas Emergency Management Act (KEMA), state of disaster emergencies, the Legislative Coordinating Council, and the COVID-19 health emergency.

***Local School Board Actions during COVID-19 State of
Disaster Emergency (New Section 1)***

The bill would create a section of law providing that during the COVID-19 state of disaster emergency, only the board of education responsible for the maintenance, development, and operation of a school district (local school board) would have the authority 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 the school district, including, but not limited to, any action, order, or policy that:

- Closes or has the effect of closing any school or attendance center of such school district;
- 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

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

- Mandates any action by any students or employees of a school district while on school district property.

Any such action, order, or policy could only affect the operations of school under the jurisdiction of the local school board and would not affect the operation of nonpublic schools.

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 could provide guidance, consultation, or other assistance to the local school board but could not take any action related to such disaster emergency that affects the operation of any school or attendance center of the school district.

Any meeting or hearing of a local school board discussing an action taken, order issued, or policy adopted would be open to the public and could be conducted by electronic audio-visual communication when necessary to secure the health and safety of the public, the board, and employees.

*Grievance Process for Actions Taken by School Boards;
Request for Hearing*

The bill would provide that an employee, a student, or the parent or guardian of a student aggrieved by an action taken, order issued, or policy adopted by a local school board under the above provisions or by an action of any employee of a school district violating any such action, order, or policy, could request a hearing by such board to contest the action within 30 days of the action, and such request would not stay or enjoin the action, order, or policy.

Upon receipt of a request for a hearing, the local school board would be required to 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 would be required to issue a decision within seven days after the hearing is conducted. The board could adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under these provisions, including, but not limited to, rules for consolidation of similar hearing.

The bill would allow any party aggrieved by such decision of the local school board to file a civil action, within 30 days after the issuance of the decision, in the district court of the county where the party resides or in Shawnee County District Court. 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 action, order, or policy is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to do so. The bill would require the court to issue an order on such petition within seven days after the hearing. If the court does not do so, the relief requested in the petition would be granted. Relief under these provisions could not include a stay or injunction concerning the contested action, order, or policy that applies beyond the county in which the petition was filed, and the Supreme Court could adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing under these provisions, including rules for consolidation of similar hearings.

***Community College and Technical College Actions
during COVID-19 State of Disaster Emergency (New
Section 2)***

The bill would create a section of law, in substantially similar form to Section 1, regarding the authority of and actions taken by the governing body of a community college

or technical college during the COVID-19 state of disaster emergency, with the following adjustments:

- Provisions regarding schools affected by local school board actions and nonpublic schools would not be included;
- Some of the entities and officials who could offer guidance, consultation, or other assistance would be changed; and
- Parents would not be included in those who could request a hearing.

Legislative Coordinating Council Membership (Section 3)

The bill would amend the statute establishing the Legislative Coordinating Council (LCC) to add the Vice President of the Senate as a member, increasing the total number of LCC members to eight.

Amendments to KEMA (Sections 4 through 9)

***Responsibilities during State of Disaster Emergency
(Section 4)***

The bill would amend this section to provide that the LCC, instead of the State Finance Council, would have the authority to extend a state of disaster emergency beyond the initial 15-day state of disaster emergency period, for specified periods not to exceed 30 days each. The bill would require an affirmative vote of five LCC members for such extension and would remove a limit of one such extension.

The bill would similarly replace the State Finance Council with the LCC in extension provisions for a state of disaster emergency regarding domestic animals, plants, raw

agricultural commodities, animal feed, or processed food, and change the vote required from a unanimous vote to an affirmative vote of five LCC members.

The bill would amend a specific provision regarding the COVID-19 state of disaster emergency to reflect an extension of the state of disaster emergency in Section 3, to reflect the replacement of the State Finance Council with the LCC in the extension procedure, and to remove a prohibition on such extensions past March 31, 2021.

*Ratification and Extension of COVID-19 State of Disaster
Emergency; Executive Orders (Section 5)*

The bill would ratify and continue in existence the COVID-19 state of disaster emergency originally declared by the Governor on March 12, 2020, through May 28, 2021.

The bill would amend a prohibition on proclamation of new state of disaster emergencies related to the COVID-19 health emergency during 2020 or 2021 to specify the prohibition includes state of disaster emergencies related in whole or in part to the COVID-19 health emergency, including, but not limited to, any economic, financial, or other crisis caused by such emergency, and to reflect the replacement of the State Finance Council with the LCC in the extension procedure.

The bill would state, notwithstanding any other provision of law to the contrary, all executive orders (EOs) issued during the COVID-19 state of disaster emergency will be revoked on March 31, 2021, and shall be null and void. The bill would provide that any new EOs issued during the COVID-19 state of disaster emergency or during a new state of disaster emergency related to the COVID-19 health emergency would be subject to revocation by the Legislature or by the LCC, pursuant to procedures provided in Section 6 of the bill.

Powers during State of Disaster Emergency (Section 6)

The bill would amend this section to add the term “executive” to those orders issued by the Governor under its provisions and to replace the State Finance Council with the LCC in provisions regarding review and revocation of EOs related to state of disaster emergency. The bill would require the chairperson of the LCC to call a meeting of the LCC to occur within 24 hours of the issuance of such EO for purposes of reviewing the order, and would allow the LCC, when the Legislature is not in session or is adjourned during session for three or more days, to revoke such EOs with the affirmative vote of five members. This section would be amended to reflect the specific limitations placed on EOs related to the COVID-19 state of disaster emergency by Section 4 of the bill.

The bill would amend a provision restricting the Governor’s power or authority to take certain actions regarding firearms or ammunition during a state of disaster emergency to state the Governor would not have the power or authority to limit or otherwise restrict the sale, purchase, transfer, ownership, storage, carrying, or transporting of firearms or ammunition, or any component or combination thereof, including any components or combination thereof used in the manufacture of firearms or ammunition, or seize or authorize the seizure of any firearms or ammunition, or any component or combination thereof, except as otherwise permitted by state or federal law.

The bill would remove an expired provision regarding restrictions on business operations and movement or gathering of individuals.

The bill would allow any party aggrieved by an EO issued under 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 (whether for-profit or not-for-profit) to file a civil action, within 30 days after the issuance of the EO,

in the district court of the county where the party resides or in Shawnee County District Court. 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 EO is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to do so. The bill would require the court to issue an order on such petition within seven days after the hearing. If the court does not do so, the relief requested in the petition would be granted. Relief under these provisions could not include a stay or injunction concerning the contested EO that applies beyond the county in which the petition was filed, and the Supreme Court could adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing under these provisions, including rules for consolidation of similar hearings.

The bill would amend provisions regarding the powers of a board of county commissioners to issue an order relating to public health that includes provisions less stringent than a statewide EO to state that such orders would operate in the county in lieu of the Governor's EO.

*Business Activity; Gathering or Movement of Individuals
(Section 7)*

The bill would amend the KEMA section prohibiting the issuance of an order during a COVID-19 state of disaster emergency that substantially burdens or inhibits the gathering or movement of individuals or operation of any religious, civic, business, or commercial activity, to remove the section's expiration date of March 31, 2021, allowing the section to remain effective past that date.

State of Local Disaster Emergency (Section 8)

The bill would amend the KEMA section governing states of local disaster emergency to add provisions allowing a party aggrieved by specified actions taken by a local unit of government pursuant to the section to file a civil action in the district court of the county where the action was taken. The parameters and procedures for such action would otherwise be substantially similar to those provided by Section 5 of the bill regarding EOs.

Violations (Section 9)

The bill would amend this section to provide an exception to continuing civil penalties for violations of KEMA or related rules and regulations or lawful orders or proclamations. The exception would make a knowing violation of an executive order issued pursuant to Section 5 that mandates a curfew or prohibits public entry into an area affected by a disaster a class A nonperson misdemeanor.

Kansas Intrastate Emergency Mutual Aid Act (Section 10)

The bill would amend the definition of “emergency responder” in the Kansas Intrastate Emergency Mutual Aid Act to include 911 call center public safety telecommunicators and physician assistants.

Revocation of Orders of the Secretary of Health and Environment (Section 11)

The bill would amend a statute governing the powers of the Secretary of Health and Environment (Secretary) to provide that, in the event of a state of disaster emergency declared by the Governor or a state of local disaster emergency, the Legislature could revoke, by concurrent resolution, an order issued by the Secretary to take action

related to such disaster emergency. The bill would allow the LCC, when the Legislature is not in session or is adjourned during session for three or more days, to revoke such orders with the affirmative vote of five members.

Authority of County Health Board and Local Health Officers (Section 12)

The bill would amend a statute governing the powers of boards of county commissioners acting as the county board of health (board) and local health officers (officers) to provide, if an officer determines it is necessary to issue an order mandating the wearing of face masks, limiting the size of gatherings of individuals, curtailing the operation of business, controlling the movement of the population of the county, or limiting religious gatherings, the officer must propose such order to the board. At the next regularly scheduled meeting of the board or at a special meeting of the board, the board would review the proposed order and could take any action related to the proposed order the board determines is necessary. The proposed order could become effective if approved by the board or, if the board is unable to meet, if approved by the chairperson of the board or the vice chairperson of the board in the chairperson's absence or disability.

The bill would allow any party aggrieved by an order issued under the above provisions to file a civil action in the district court of the county in which the order was issued. The procedures for such action would be substantially similar to those provided elsewhere in the bill regarding EOs and states of local disaster emergency.

Amendment and Repeal of Additional Statutes (Sections 13 and 15)

The bill would amend a statute regarding the State Finance Council to remove a reference to the KEMA statute

regarding responsibilities during a state of disaster emergency to reflect the other amendments made by the bill.

The bill would repeal a version of the KEMA statute regarding the powers of the Governor during a state of disaster emergency that would go into effect on March 31, 2021, and a KEMA section prohibiting closure of schools without the approval of the State Board of Education.

Severability Clause (New Section 14)

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

Conforming and Technical Amendments

The bill would make conforming and technical amendments throughout to ensure consistency in statutory phrasing.

Effective Date (Section 16)

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

Conference Committee Action

As it entered conference, SB 40 would have added and amended law regarding the roles of the Division of Conservation within the Kansas Department of Agriculture and the State Conservation Commission.

The Conference Committee agreed to replace the contents of SB 40, as amended by the House Committee of the Whole, with contents modified from HB 2416, as amended by the House Committee on Judiciary, and Sub. for SB 273, as amended by the Senate Committee of the Whole, regarding KEMA, state of disaster emergencies, the LCC, and the COVID-19 health emergency.

Background

As introduced and passed by the Senate and the House of Representatives, SB 40 contained contents regarding the Kansas Department of Agriculture. The Conference Committee agreed to replace these provisions with contents modified from Sub. for SB 273, as amended by the Senate Committee of the Whole, and HB 2416, as amended by the House Committee on Judiciary, regarding KEMA, state of disaster emergencies, the LCC, and the COVID-19 health emergency.

[*Note:* In the background for each bill below, provisions or amendments that were retained or modified and included in the Conference Committee agreement are noted.]

Sub. for SB 273

SB 273 was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Petersen.

As introduced, among other provisions, SB 273 would have:

- Created a new category of “public health disaster emergency” under KEMA and defined powers, duties, and limitations related to such emergencies, including review of proposed EOs by the Attorney General;

- Created a legislative Joint Committee on Emergency Management (JCEM) and provided it with various powers and duties;
- Established standards and limitations related to local orders intended to prevent the spread of an infectious, contagious, or communicable disease [Note: The Conference Committee included modified provisions related to local orders.];
- Provided procedures for persons aggrieved by various orders under KEMA or related statutes to contest such orders or seek judicial review of such orders [Note: The Conference Committee included modified provisions related to judicial review.];
- Limited the authority to take various actions affecting the operation of schools to the board of education of the relevant school district [Note: The Conference Committee included modified provisions related to the operation of schools.];
- Amended KEMA to reflect the above provisions and adjust the powers of the Governor under KEMA [Note: The Conference Committee included modified amendments to KEMA.];
- Clarified compensation for losses under KEMA;
- Adjusted penalties for violations of KEMA [Note: The Conference Committee included modified adjustments to KEMA violations.];
- Amended the definition of “emergency responder” in the Kansas Intrastate Emergency Mutual Aid Act [Note: The Conference Committee included a modified amendment to this definition.];
- Amended provisions regarding the Secretary’s authority to issue orders to prevent the introduction

of or prevent the spread of infectious or contagious disease [*Note:* The Conference Committee included a provision allowing revocation of certain orders issued by the Secretary.]; and

- Amended provisions regarding the authority of boards of county commissioners and local health officers to issue orders regarding the spread of infectious, contagious, or communicable diseases [*Note:* The Conference Committee included modified provisions regarding such authority and orders.].

Senate Committee on Judiciary

In the Senate Committee hearing on February 24, 2021, a representative of the Kansas Association of Counties provided neutral testimony on the bill, stating concerns related to the reduction of authority of local health officers to respond to public health emergencies within a school district. No other testimony was provided.

In the Senate Committee hearing on February 25, 2021, representatives of the Kansas Association of Community College Trustees and the Kansas Chamber, an attorney, and Senator Steffen testified as **proponents** of the bill, each offering recommendations to improve the bill. Written-only **proponent** testimony was provided by the Attorney General and a representative of the Kansas Policy Institute & Kansas Justice Institute. Neutral testimony was provided by a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association, requesting amendments regarding penalties for KEMA violations. Written-only neutral testimony was provided by representatives of the Kansas Association of Local Health Departments and the Kansas Association of School Boards. The Secretary of Health and Environment and a representative of the Governor's Office testified as **opponents** of the bill, expressing concerns about the

comprehensive changes to law proposed by the bill without sufficient time for review and its potential effect on the current state of disaster emergency related to the COVID-19 pandemic.

On February 25, 2021, the Senate Committee adopted amendments to:

- Replace the power of local and city health officers to issue orders with the power to make recommendations;
- Allow meetings of the JCEM to be conducted by electronic audio-visual communication;
- Grant the JCEM oversight authority regarding expenditures of federal funds related to state disaster declarations, to allow staff of the Division of Legislative Post Audit to assist the JCEM, and to require reports and testimony from the Director of the Budget, as requested by the JCEM;
- Clarify the district court's responsibilities regarding hearings [*Note: The Conference Committee included modified provisions regarding hearings.*];
- Clarify that requests for hearings under Section 4 of the bill shall be made through an action brought under Chapter 60 of the *Kansas Statutes Annotated* [*Note: The Conference Committee included similar language.*];
- Make a violation of any provision, rule or regulation, or executive order issued pursuant to KEMA a class A nonperson misdemeanor [*Note: The Conference Committee included modified language regarding KEMA violations.*];
- Add a definition of "accepted scientific";
- Grant investigative power to the JCEM;

- Add references to attendance centers and clarify provisions affecting nonpublic schools [*Note*: The Conference Committee included modified language regarding schools.];
- Apply provisions of the bill regarding closure and grievances to governing bodies of community colleges and technical colleges [*Note*: The Conference Committee included modified language regarding community colleges.];
- Broaden the limitation on the Governor’s power to seize or restrict use and sale of ammunition and firearms [*Note*: The Conference Committee included a similar provision.];
- Add a limitation to the Governor’s power regarding a health care facility’s ability to provide services;
- Clarify timing in the provision governing JCEM and AG review of executive orders;
- Clarify orders issued under public health statutes amended by the bill must be “narrowly tailored” [*Note*: The Conference Committee included references to “narrowly tailored” in provisions regarding judicial review.]; and
- Clarify a limitation on the Governor’s powers related to business closure and mandatory immunizations.

The Senate Committee recommended a substitute bill reflecting these amendments.

Senate Committee of the Whole

On March 1, 2021, the Senate Committee of the Whole adopted amendments to:

- Adjust the membership of the JCEM; and
- Adjust the definition of “emergency responder”
[*Note:* The Conference Committee further adjusted this definition.].

HB 2416

The bill was introduced by the House Committee on Federal and State Affairs at the request of Representative Barker.

As introduced, HB 2416 would have, among other provisions:

- Created a new KEMA section regarding issuance of EOs during a state of disaster emergency;
- Provided authority to the LCC, to review certain EOs and, when the Legislature is not in session, to extend a state of disaster emergency and to authorize the Governor’s continued use of powers
[*Note:* The Conference Committee included modified provisions regarding the LCC’s authority.];
- Amended KEMA provisions regarding powers and authority during a state of disaster emergency
[*Note:* The Conference Committee included modified amendments to KEMA.];
- Provided for review by the Attorney General of EOs issued under KEMA; and
- Provided for parties aggrieved by an EO issued under KEMA to file a court action regarding the EO
[*Note:* The Conference Committee included modified provisions for judicial review.].

House Committee on Judiciary

In the House Committee hearings on February 24 and 25, 2021, a representative of the Kansas Chamber testified as a **proponent** of the bill. The Attorney General provided written-only proponent testimony.

A representative of the Governor's Office and a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association provided neutral testimony. A representative of the Heartland Institute and a representative of the Kansas Justice Institute and Kansas Policy Institute provided written-only neutral testimony.

No other testimony was provided.

On March 1, 2021, the House Committee amended the bill to:

- Add 911 dispatch personnel to the definition of "emergency responder" in the Kansas Intrastate Emergency Mutual Aid Act [*Note: The Conference Committee further adjusted this definition.*];
- Extend the initial period of a state of disaster emergency from 15 to 30 days; and
- Make technical and conforming amendments.

Fiscal Information

SB 273

According to the fiscal note prepared by the Division of the Budget on SB 273, as introduced, the Adjutant General indicates enactment of the bill would require no additional funds to implement. However, the agency notes that if the

current COVID-19 pandemic emergency is not renewed prior to March 31, 2021, all eligible pandemic response activities that are currently being fully reimbursed by the Federal Emergency Management Agency (FEMA) would cease, leading to an increase in spending from the State General Fund (SGF) in the current fiscal year. The agency notes that it spent approximately \$3.2 million during January 2021 that will be reimbursed by FEMA.

The Office of the Attorney General (OAG) indicates provisions requiring the OAG to review and produce opinions regarding EOs could be implemented without additional funding or staff. However, the OAG notes that certain provisions of the bill would likely be challenged in court as violating the separation of powers, with two branches of state government being on opposing sides of litigation. If that occurs, the OAG would be required to hire outside counsel to represent one of the sides at a cost of approximately \$250,000 to \$300,000, all from the SGF.

The Division of the Budget estimates that enactment of SB 273 has the potential for increasing litigation in the courts, resulting in a fiscal effect on the operations of the court system. However, it is not possible to estimate the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a fiscal effect cannot be determined.

The Department of Health and Environment (KDHE) notes that public health disasters have not been realized on a regular basis. However, any additional workload for increased oversight, reporting, and communications required by enactment of SB 273 could be implemented with KDHE's existing staff. If a disaster would continue for several months, then additional staffing could be needed, such as a communications officer, fiscal analyst, epidemiologist, and a litigation attorney. However, a potential fiscal effect cannot be estimated.

The Department of Education indicates enactment of the bill would have no fiscal effect on state aid payments to school districts. The provisions of the bill regarding the State Board of Education could be implemented with its existing staff and budget.

Legislative Administrative Services (LAS) indicates that the enactment of SB 273 would increase expenditures in the Legislature's budget, with the creation of the Joint Committee on Emergency Management, beginning in FY 2021. LAS estimates additional costs of \$6,237 in FY 2021 and \$39,445 in FY 2022, all from the SGF, would be required for expenses of the newly created committee for an estimated one meeting in FY 2021 and six meetings in FY 2022. The costs would include legislator salaries, subsistence, and mileage reimbursement (\$5,898 in FY 2021 and \$35,385 in FY 2022), as well as a committee assistant salary (\$339 in FY 2021 and \$4,060 in FY 2022).

Any fiscal effect associated with the enactment of SB 273 is not reflected in *The FY 2022 Governor's Budget Report*.

The Kansas Association of Counties states that the limitation of powers included in SB 273 could defect a response to an emergency; however, a fiscal effect cannot be estimated.

HB 2416

According to the fiscal note prepared by the Division of the Budget on HB 2416, as introduced, the Adjutant General indicates enactment of the bill would require no additional funds to implement. However, the agency notes that if the current COVID-19 pandemic emergency is not renewed prior to March 31, 2021, all eligible pandemic response activities that are currently being fully reimbursed by FEMA would cease, leading to an increase in spending from the SGF in the current fiscal year. The agency notes that it spent

approximately \$3.2 million during January 2021 that will be reimbursed by FEMA.

The OAG indicates provisions that would require the agency to review and produce opinions on executive orders could be implemented without additional funding or staff. However, the OAG notes that certain provisions of the bill would likely be challenged in court as violating the separation of powers, with two branches of state government being on opposing sides of litigation. If that occurs, the OAG would be required to hire outside counsel to represent one of the sides at a cost of approximately \$250,000 to \$300,000, all from the State General Fund.

The Division of the Budget estimates enactment of HB 2416 would have the potential for increasing litigation in the courts, resulting in a fiscal effect on the operations of the court system. However, it is not possible to estimate the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a fiscal effect cannot be determined.

The Department of Education indicates enactment of HB 2416 would have no fiscal effect on state aid payments to school districts. The provisions of the bill regarding the State Board of Education could be implemented with its existing staff and budget.

LAS indicates that the enactment of HB 2416 would increase expenditures in the budget of the LCC. LAS estimates additional costs of \$12,385 in FY 2021 and \$61,922 in FY 2022, all from the State General Fund, would be required for an estimated additional three meetings in FY 2021 and an additional 15 meetings in FY 2022. The costs would include legislator salaries, subsistence, and mileage reimbursement.

The Kansas Association of Counties states that the limitation of powers included in the bill could defect a

response to an emergency; however, a fiscal effect cannot be estimated.

Any fiscal effect associated with the enactment of HB 2416 is not reflected in *The FY 2022 Governor's Budget Report*.

Kansas Emergency Management Act; Legislative Coordinating Council; Secretary of Health and Environment; local health officers; local school boards; community colleges; state of disaster declaration; executive orders; extension of COVID-19 state of disaster emergency

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