

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 1:30 P.M. on July 6, 2005, in Room 123-S of the Capitol.

All members were present except:

Barbara Allen- excused
David Haley- excused
Phil Journey- excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Others attending:

See attached list.

Chairman Vratil distributed a proposed senate concurrent resolution. (Attachment 1) The resolution would amend Article 6, Section 1, of the Kansas Constitution by adding a sentence that says, basically, that no court can impose as a remedy the closing of schools or prevent operation of schools. Additionally, the resolution contains an explanatory statement instructing the Secretary of State to submit the amendment to the electors of the state at a special election to be held the first Tuesday following 60 calendar days after the approval of the resolution by both houses.

Chairman Vratil stated that the Committee wanted to allow anyone who wanted to testify to do so. He announced that Senator Goodwin was unable to attend the meeting until 3:15 p.m., therefore, the Committee would take no action until she arrived. If the Committee votes to introduce the resolution, the Senate President intends to refer it to the Committee of the Whole so action can be taken later today. Chairman Vratil encouraged the Committee to authorize introduction of the constitutional amendment to give Committee of the Whole an opportunity to consider the measure.

Chairman Vratil asked if anyone would like to testify in support of the constitutional amendment.

Proponents:

David Owen, Homeless Come Home, stated he had talked with family in Cimarron and Lakin, Kansas. They were concerned that the schools might close. His family, members of his church in Cimarron, and people he visited with in Topeka, all feel that the Court is legislating behind the bench. If there is a way to tell the Supreme Court that only the legislature should appropriate money, please do so.

As there were no more proponents, Chairman Vratil asked if anyone wanted to speak in opposition to the constitutional amendment.

Opponents:

Dr. Gordon Schultz, former Chairman of the Kansas State Board of Education, testified that he lived in the Wichita area and was concerned about the proposed amendment. There is a fine balance of checks and balances, and we must be careful not to usurp the prerogatives of the Court. Yes, the Legislature should appropriate. However, if the Legislature tries to leap-frog over the Courts, its actions will not be well received by the people. If the proposed amendment goes on the ballot, Dr. Shultz believes it will be defeated. He encouraged the Committee to look at the long-term implications of tinkering with the Constitution.

Senator Donovan stated that Kansas currently spends 52% to 54% of its budget on education, and that was before the passage of HB 2247, a \$142 million dollar increase. If the Legislature obeys the Court's current ruling, Kansas spending will increase to about 55 percent. If the Court forces the Legislature to do another \$568 million next year, that will put Kansas far ahead of surrounding states. What would the Court have the Legislature do to raise this kind of funding? Income taxes would need to increase over 20 percent, property

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taxes would need to go from 20 mils to as much as 60 mils, sales tax would need to increase to 8.5 to 9 percent, or some combination of these would be needed. Senator Donovan questioned how legislators are to balance the needs of the taxpayers with the needs of schools.

Dr. Schultz said he did not think Kansas needed to be apologetic about being a leader in funding education. He thought there were alternatives such as economic growth or gaming that should be considered rather than usurping judicial prerogatives. The Legislature has done a great job in avoiding a significant constitutional crisis. Dr. Schultz does not like higher taxes, but knows that a good education costs money. There must be accountability. However, there cutting expenses and improving efficiencies will not add up to the funding needed.

Senator Donovan questioned how the legislators should answer those who think that the Court has overstepped its bounds or respond to people who do not think the Court should tell the Legislature how much to spend on anything. Article 6 says “The legislature shall make suitable provision for the finance of the educational interests of the state.” Since there is no mention of the Court in this statement, Senator Donovan stated he does not see harm in making it clear that the Court has no jurisdiction over the spending of money in Kansas.

Dr. Schultz stated that he knows what the Constitution says about the State Board of Education: it is to handle all elementary and secondary education, the Legislature is to provide the money and the people are to vote for the legislators. He concluded that as he looked back, historically, and he looked at the *Brown* decision and those times, he sees a parallel that isn't exactly fair, but had it not been for an 'activist' court, we would have gone down a path that, as a people, we would have regretted it. Dr. Schultz stated that when talking about constitutional changes, we should not, in the heat of the moment, jump off of that precipice. If this issue is put on the ballot, he believes that people want the courts involved protecting the rights of the disenfranchised, the have-nots, and the less fortunate.

Jim Clark, Kansas Bar Association, reminded the Committee that the Bar Association is opposed to amending the Constitution in a way that restricts the Court and its power to enforce litigation remedies.

Mr. Mark DeSetti, Kansas National Education Association (KNEA), stated that he would agree with the last speaker. Earlier in the process, Senator Vratil had proposed a committee be established to examine the constitutional issues in a rational and non-partisan manner. The proposed committee is the appropriate way to go about pursuing a constitutional amendment. No one wants schools to close. The KNEA believes the Court needs to have a remedy to support the rights of those who have challenged and prevailed in the lawsuits.

Senator Donovan stated recently the Salina Journal talked to some of the plaintiffs involved with the original lawsuit in 1999, such as Ruben Montoy, and when asked if his children received a suitable education, he answered, “Yes, they certainly have, but we represent other kids with other concerns.” Several of the other plaintiffs admitted that their kids did very well, but they explained that this lawsuit was going to get more funding for the folks that didn't get the benefits that their kids did.

Mr. DeSetti stated that the KNEA believes that a plan passed by the Senate was an appropriate response to the Court's order. Passage of that plan by the House of Representatives or passage of the proposed bi-partisan plan would stop any closure of the schools.

Senator O'Connor questioned the language in the resolution regarding the words, “no court shall order any remedy...,” and whether it needed to state, “no Kansas court”. Chairman Vratil stated that since the resolution was to affect the Kansas Constitution, it would regulate and only apply to Kansas state courts, that the legislature has no authority to regulate or limit the federal court. Senator O'Connor questioned if something needed to be added in about an exception for a violation of the U.S. Constitution. Jill Wolters stated “no”, because we have no control over that. Senator Schmidt stated he thought we were okay with the language and the way that it is crafted and stated the prohibition on a court-ordered school shutdown was only triggered in the event that the order results from a violation of the Article 6, Section 1. Senator Schmidt stated that if the order were to result, for example, from the violation of the federal equal protection clause, this language would not be implicated. Jill Wolters concurred. Senator O'Connor then asked about a scenario in which

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a lawsuit occurs over an unsafe building and the remedy of the court would be to shut down the school building or shut down the school, because the building was unsafe for children. She asked would we be putting ourselves in a difficult position with this language? Chairman Vratil stated no, because that would not be a lawsuit brought under Article 6 of the Constitution, and this provision would not apply. Senator O'Connor then gave a scenario of a lawsuit involving a claim about unsafe employees that endanger the life of a child in the school. Chairman Vratil stated that the answer was the same. Senator O'Connor then asked what if there were students behaving in an unsafe manner? Chairman Vratil stated the lawsuit would not be brought under Article 6.

Mr. Mark Tallman, Kansas Association of School Boards, testified as a neutral party, because his organization has not taken a formal position on the issue. They share the concern for the possible closing of schools. He agreed with Mr. DeSetti that we should make sure that the resolution does not close the ability of the courts to provide a remedy if a violation of Article 6 is found.

Bill Reardon, former lobbyist and legislator, stated that, he was concerned about some type of incursion or violation of constitutional judicial review. He would feel more comfortable if the issue were thoroughly studied over a period of a legislative session, or a period beginning now until beginning of the legislative session.

Representative Pat Colloton stated that she wouldn't presume to enlighten the Chairman or Committee members about the scope of school finance litigation. She stated that there had been a number of cases, beginning with *Robinson v. Kahill* in New Jersey, 1973, where the courts found there was a requirement for some equal distribution of state funding.

Senator Donovan stated that the equal distribution of money was a problem. However, he did not think that was the issue. The issue is "suitable" education, which the Court is saying means more money. They are speaking to distribution, of course, but they are really speaking to the fact that we do not give enough money, overall. Senator Donovan told Representative Colloton that she didn't speak of that and he asked what she thought about that it, when the numbers are very clear that Kansas does a much more adequate job than any of the states in the Midwest. Kansas was \$1,000 to \$1,500 dollars per student higher in funding, while its cost of living Kansas is lower than Missouri or Colorado.

Representative Colloton stated she felt that the distribution was not quite right under the funding formula. In 1992, it was skewed to the rural districts. We are providing plenty of funds for education, the problem is in the way the formula allocates funds. She stated the Article 6 language that directs that "the legislature shall make suitable provision for finance..." was somewhat unique among state constitutions. It places the responsibility squarely upon the shoulders of the Legislature for suitably funding schools. Since the *Rose* case, all of the adequacy cases that have occurred (38 out of 45 states) some sort of order has resulted. Nineteen states have had to do cost studies. Of the court cases that addressed adequacy in the last 10-15 years, most have not instructed the legislature to spend "X" amount of money because their state constitutions were not worded like the Kansas Constitution. Instead they have suggested a remedy could be found through additional programming either for classes of students or in certain school districts. Representative Colloton stated that there cannot be a remedy that prevents the operation of a public school. The question under suitability would be, does the order for any sort of programming prevent the operation of the public schools, and whether those series of cases would or would not be affected by the schools.

Chairman Vratil stated recessed the meeting until 3:15 p.m..

Chairman Vratil reconvened the meeting at 3:15 p.m. and opened up the floor for discussion by Committee members who would like to comment or propose amendments to the resolution.

Chairman Vratil directed members' attention to the explanatory statement at the bottom of the concurrent resolution (Attachment 1). He specifically directed them to the fourth line where the word "education" appears. The word "education" was intended to modify and describe the subject of Article 6 of the Kansas constitution. Chairman Vratil suggested the Committee might want to consider an amendment putting the word "concerning" in front of the word "education", so the line would read, "...that the public schools be closed as a result of any violation of article 6 of the Kansas constitution, concerning education,". A motion

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was made to amend the resolution in all three clauses of the explanatory statement to make the same correction. Senator Umbarger moved, seconded by Senator Schmidt, and the motion carried.

Senator O'Connor stated that she supported the proposal dealing with Article 6. She said that the Committee previously passed out an Article 2 amendment and held a hearing on another Article 6 amendment. Senator O'Connor asked staff if it would be appropriate to amend that Article 6 information and explanatory language into this resolution. She stated she was extremely upset that we cannot get a resolution that will bring the courts into check out of the Senate and over to the House of Representatives. Chairman Vratil questioned Senator O'Connor on what the other Article 6 amendment concerned. Senator O'Connor stated she didn't have a clear memory of it, but as she recalls, it was an additional sentence added to Article 6 where the article talks about the Legislature providing for suitable funding to finance education. Chairman Vratil stated without knowing the exact language it would be difficult to add it to the resolution. He suggested that if the Committee votes to introduce proposed concurrent resolution, the Senate President would refer the resolution to the Committee of the Whole where it would become amendable.

Senator Donovan stated what Senator O'Connor was referring to **SCR 1603**. While he did not disagree with the Senator's approach, he believed the best option would be to pass the resolution before the committee. While he agreed with Senator O'Connor's view that previous resolutions were important, changes to the current resolution might shrink the number of votes available for it at this time.

Senator O'Connor responded that she understands that this might actually shrink the votes, but perhaps there needed to be a vote because there was a lot of confusion, especially in the Senate, about who supports the resolution and who does not. If there is support, it might be important to get the votes recorded.

Senator Goodwin asked what influence the new resolution would had if it had been in place when the current lawsuit was brought to the courts. Chairman Vratil stated that if the proposed resolution had been in effect in 1999 when the lawsuit was brought to the courts, it would have precluded the Court's ability to close schools. If the people approve the amendment, the common belief is that the Court would not be able to use school closure as a remedy. Senator Goodwin then asked what other remedies would the court have at its disposal if the Legislature refuses to follow the Court's decision. Chairman Vratil stated he thought the remedies available to the Court are limited only by the limits of the Court's creativity.

Senator Schmidt stated he would have preferred to have enacted, at least put on the ballot, the amendment recommended out of the Judiciary Committee on June 24, 2005, with respect to Article 2, and clarifying the appropriations power. There are Senators and friends in the House that feel the avenue we ought to be pushing here. He stated that if he thought that avenue had a chance of success during this special session, he would be happy to push it to the end of the road. However, he believes it is a dead end because there are not enough members in the House of Representatives (principally, though not exclusively, members of the minority party) who would vote to put it on the ballot. He was not interested in making a point. To make a point, he would stand on his "Aye" vote for the prior constitutional amendment which passed 30-9 in the Senate and say "we tried." He was interested in solving a real problem that was made clear by the Court's order last Saturday. The Court is contemplating the closure of public schools should the Legislature fail to comply with their order. Senator Schmidt stated he didn't believe the Court has the constitutional authority to order schools closed. No member of the Senate may believe that it has that power because the Senate passed **SB 5** by 39-0. Senator Schmidt stated he did not believe that it was ever intended by the framers of the constitution, nor did he believe that it is consistent with the plain language of the constitution, for the courts to order schools closed. Stepping back to a common sense perspective, it sort of reminded him of the old expression from a generation ago, "I have to destroy the village in order to save it". Senator Schmidt stated it seems truly bazaar to suggest that, in order to better educate our children suitably, we're going to close the schools where they receive an education. From both the common sense, and a constitutional standpoint, the court has pointed to a road that the legislature should not take. This resolution is intended to put a road block in that dead end road and to prevent all from going down the path of disrupting our children's education, the family lives of parents and of teachers and of others who rely on the school system while the legislators have their ongoing debates here on what is the right thing to do on school funding and the ongoing debate about what is the court's role and what is the legislature's role. This is very narrow, very targeted, very clear, and all it does is say the schools are going to stay open, whatever else may happen.

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Senator Schmidt stated to Senator O'Connor that he recognized that she was not convinced that he is as enthusiastic as he needs to be on some of the things she cares deeply about, but wanted to assure her he was. At the end of the day, he cannot make 84 members of the House of Representatives push the green button when the vote comes. Given that reality, he is looking for something that can at least avert catastrophe, and he believed that this resolution accomplishes that. He has said several times over the last 12 days he believes we are on the verge of having a bi-partisan school finance bill. He would very much like to have a bi-partisan constitutional amendment to keep our schools open, and he is hopeful we can get there if the Committee puts this on the floor and debates it tonight.

Senator O'Connor responded to Senator Schmidt that she believes he feels strongly about this and she has not doubted it for some time, but she does know that there is a lot of political gamesmanship going on and there has been for some time. It is part of the 13 years she has been here and it's nothing new. Senator O'Connor stated her concern was that the vote, with the trigger in it, the bill has never been tested on the House. If it fails to get the 84 votes, she believes that the citizens would like to know which legislators voted "no" so that they could explain their vote, whether they are democrats or republicans— it doesn't matter. She thought the citizens deserve to see that vote, and that's what she wants to see happen— even if it does fail— proving to her it doesn't have 84 votes. Senator O'Connor stated that she thinks of it this way— that, for example, she is a person who opposes the amendment to Article 2, and is sitting there looking at approximately \$150 million dollars for the schools that she does want to see passed, and this is the way to get it. Is she going to vote against the \$150 million or vote for it— even though it has this amendment on there that she doesn't like. That test has not happened. We have people saying, "oh, I'll never vote for it", but when it comes down to it— she was a member of the House eight years, and she's watched the dance. The only way to do it is to test it. She doesn't have a crystal ball to know what is going to happen there but believes the people back home need to know who is going to vote "no", because her constituents feel very strongly about this issue. It is a very difficult thing that is being asked of many of the legislators— to abandon the clarification to the courts that they did, indeed, overstep their boundaries. She, for one, wants to see that vote somehow— whether it is Article 2 or Article 6-, she doesn't care, and that's why she will be doing whatever she can to gather support.

Senator Schmidt stated although he understood Senator O'Connor's desire to get a vote to clarify to the courts that they overstepped their boundaries, he didn't feel that we would be able to get over the hurdle of the resurrecting the Article 2 amendment. He stated that trying to obtain a second vote on the Article 2 issue was not in their best interests at this point.

Senator Goodwin stated she agreed. She had 52 e-mails from Sedgwick, Sumner and Cowley counties asking her to take care of school funding now. She stated that perhaps we do that now and try and take up a constitutional amendment in January. She stated that amending the constitution should not be taken lightly and needs to be thought through.

Senator Donovan stated that 95 percent of his e-mails indicated they want to tell the courts to leave us alone. He stated that what we've done up to now is confusing to the public. If we do nothing, the public is going to blame the legislature. We need to get it on the ballot and let the people vote. If it doesn't pass, then the public will blame the courts. No one wants to close the schools. It serves no purpose.

A motion was made to introduce the proposed senate concurrent resolution, as amended. Senator O'Connor moved, seconded by Senator Bruce, and the motion carried. Senator Betts and Senator Goodwin voted "no" and asked for their votes to be recorded in the minutes.

Chairman Vratil adjourned the meeting.