

To: Representative Fred Patton, Chairman
Members of the House Judiciary Committee

From: Jon Kieffer
Wagstaff & Cartmell, LLP

Date: January 29, 2020

Re: HB 2461 – An Act enacting the public litigation coordination act; relating to contracts by public entities for legal services on a contingent fee basis – OPPOSE

Good afternoon. My name is Jon Kieffer and I'm a partner in the law firm of Wagstaff & Cartmell in Kansas City. I'm pleased to have the opportunity to address the Committee today, in opposition to HB 2461.

My firm represents a number of local governments – cities, counties and school districts – in litigation arising from two of the most significant public health crises in our lifetimes; specifically, the epidemics arising from opioids and the current epidemic of electronic cigarette use, or vaping, that is sweeping through both high schools and middle schools in the United States.

The ravages of the opioid epidemic are by now well-known. Opioid overdoses according to recent data kill over 70,000 Americans each year, or about 130 people each day. Opioid deaths now far exceed those from other causes including automobile accidents and firearms, and within the last several years U.S. life expectancy has for the first time actually declined each year – after decades of increase – because of the staggering number of deaths cause by opioids.

The e-cigarette, or vaping, crisis in the public schools is beginning to receive the same widespread public attention that the opioid epidemic has. The historical context for the vaping crisis is especially disturbing. In 1976, approximately 1 in 3 teenagers smoked traditional combustible cigarettes. 40 years later, in 2016, that number had dropped to a little over 3 percent. That is one of the greatest public health triumphs in a generation and everyone—other than perhaps Big Tobacco-- would agree that trend line is unquestionably moving in the right direction.

But here's the disturbing part: In just about four years, all of that good work that took 40 years to accomplish has now been undone, and then some. Currently it is estimated that at least 30% of high school students vape nicotine through various e-cigarette devices, and the device of choice is made by a company named JUUL – a company that two former U.S. Surgeon Generals and a subcommittee of the U.S. House of Representatives have concluded is largely responsible for this crisis because it targeted youth – and in some instances children as young as eight years old—with marketing for its vaping devices. Depending on the area, those estimates may be over

40% and even approaching 50% of teenagers vaping. Between 2017-2018, The U. S. Centers for Disease Control and Prevention reported that vaping among high school students increased 78% and vaping among middle school students increased 48%. Within the past few weeks, the CDC released its 2018-2019 numbers, and those rates have continued to increase by over 20% just in the last year alone. It is well recognized that e-cigarette use leads in many cases to smoking of traditional tobacco cigarettes as well as being a gateway to other drugs. It is a problem of epic proportions and, by all appearances, it will be the greatest public health challenge of the generation currently coming of age.

Schools in Kansas and across the country are on the very front lines of this epidemic, and they have been and continue to feel the very real financial impact of it. Depending on the area, schools are modifying and remodeling school bathrooms to make it more difficult for students to vape, installing expensive vape detectors, diverting personnel or hiring additional school resource officers to patrol hallways, paying for the cost of after-school tutors for the many kids who are being suspended because of vaping, paying for the cost of programs aimed at prevention, or programs that deliver counseling and treatment. And, they are dealing with constant interruption and distraction in the classroom. All of this is translating to significant, unbudgeted expenses.

My law firm represents approximately 50 school districts in nine states, that collectively consist of over 1,500 individual schools and almost 1 million students. Some of these are among the very largest school districts in the United States. In Kansas, we represent 13 school districts across the state consisting of over 200 schools and over 100,000 students. We're very proud of the fact that Kansas schools were some of the first in the Nation to decide to proactively attack this problem and to lead and not to follow on this critically important issue.

The schools that we represent consist of urban, suburban and rural schools, because this crisis is affecting all of them in many of the same ways. We have met with educators, superintendents and school boards in Kansas and around the country over the past year and they are both energized and angry. They see vaping as an existential threat to their core mission to educate kids while safeguarding their physical, mental and emotional well-being, they are feeling the very real strain on their budgets, and they are unwilling to wait for someone else to act for them, or to not act for them as the case may be, and they are initiating litigation against these companies themselves. That's because they are the closest to the crisis and are dealing with its effects and costs daily.

The lawsuits that we are prosecuting for all of these school districts require no public money whatsoever since we represent the districts purely on a contingent fee basis. That's important, because litigation of this kind is highly specialized, can take years, tens of thousands of hours, and often millions of dollars in litigation expenses – the kind of resources that school districts, local governments or the state is simply not in a position to commit. If and only if there is a net positive financial recovery for a school district or a local government do the attorneys get reimbursed their expenses or paid a fee.

And, the litigation against JUUL and other vape companies – many of them owned in whole or in large part by Big Tobacco companies – is already moving rapidly in a large consolidated proceeding called a Multi-District Litigation, or MDL, under the supervision of a single federal judge who has stated, quite appropriately, that he views the vaping crisis among our nation's teenagers as a public health emergency and he intends to move the cases to

resolution swiftly. And, this will happen without putting a strain on the individual state court systems. In contrast to this considerable momentum in the federal court system that school districts and local governments have already created, only a handful of state AG's have even brought suit against these companies, those that have are only making very limited legal claims which typically do not seek any recovery for schools, and Kansas has not yet taken any legal action to protect its schools.

Importantly, the cases that we are prosecuting for school districts in Kansas and elsewhere are not class actions, where all too often there is a "one size fits all" approach to settlement and monetary recovery. Each of our suits is a separate lawsuit because each school district is different. The harm that vaping has and is causing in Olathe, Kansas is in some respects different than the harm it is causing in Wichita or in rural, Kansas. Individual school districts need to be able to pursue these cases on their own without the mandates and heavy hand of state government.

And, by pursuing these cases on their own, individual districts not only have an important voice and vote on matters of settlement, they insure that any monies paid in settlement actually go to combatting this problem in their district. That stands in contrast with how the Big Tobacco settlements of the 1990's were handled when, after state Attorneys General recovered billions of dollars, many of those dollars went into state general funds to make up for budget shortfalls and were not allocated to the local governments or school districts who needed the money to deal with the problem.

Local governments and school districts have the right to select counsel of their own choosing, and that can profoundly impact the results they obtain. To give you an example from the opioid litigation, in 2007 a group of Attorneys General sued Purdue Pharma, the worst of the worst in terms of opioid makers. That case was settled for \$19.5 million, or less than \$1 million per state. In 2018 local governments sued that same company because it had simply maintained business as usual. Shortly before trial the defendant came up with a \$10 billion plan to help clean up the crisis. That's largely because private lawyers – and the teams of private lawyers that prosecute this litigation – specialize in this work and can bring enormous resources to bear against these companies, no matter how large. The states simply do not have these sorts of resources, for understandable reasons.

Finally, under Article 6 of the Kansas Constitution, school districts are a constitutional entity and a law, such as HB 2461, that tries to deprive a district of legal counsel of its own choosing raises serious constitutional issues.

At bottom, HB 2461 is nothing more than an attempt by a few special interests to essentially obtain legal immunity for and shield some of the very worst corporate behavior so that these companies can continue to make huge profits by fueling enormous and costly public health crises such as the opioid and teen vaping epidemic, all the while leaving Kansas schools and local governments with no recourse for the harms they are suffering as a result.

For all of these reasons I respectfully request that the Committee not support HB 246.