

New Hampshire School Boards Association
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FEBRUARY 2006

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2005-0600

EPPING RESIDENTS FOR PRINCIPLED GOVERNMENT, INC.

V.

EPPING SCHOOL BOARD AND EPPING BOARD OF SELECTMEN

BRIEF OF AMICUS CURIAE
NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF DEFENDANTS

INTERESTS OF THE AMICUS CURIAE

The New Hampshire School Boards Association (NHSBA) is a non-profit, voluntary association whose membership is comprised of approximately 165 of the 176 locally elected school boards in the State of New Hampshire.

As an association of school boards, NHSBA represents the interests of local school boards in the development of state and federal educational policies, provides information and assistance to school boards so that all boards may more effectively perform their duties, and seeks public support and commitment for equal educational opportunities for all New Hampshire children.

The instant case is one of the most important “education” cases this Court has considered over its long history. The Court’s decision here will, in large measure, determine the course which New Hampshire school boards will take in the foreseeable future, and beyond. The Court’s ruling on this matter has the potential to affect how, when, and in what manner school boards can present official government information to their constituents.

As elected bodies entrusted by their towns and cities to direct and oversee public schools of New Hampshire, the school boards of New Hampshire are uniquely positioned to explain to this Court the importance of this case.

NHSBA’s interest here is to ensure that the Court is fully aware of the enormous impact which its decision will have on local school boards throughout New Hampshire, an impact which will reach every school board throughout the State of New Hampshire.

**STATEMENT OF THE QUESTIONS, STATEMENT OF THE CASE,
AND STATEMENT OF THE FACTS**

The *amicus* adopts the statement of the questions, the statement of the case, and the statement of facts as propounded by the defendant Epping School Board.

SUMMARY OF ARGUMENT

The central issues in this case are twofold. First, to what extent can school boards, as public entities, promote and seek public support for the school district policies they develop and implement? Second, what obligations do school boards have to provide private citizens with avenues for the expression of private, political opinions?

In answer to the first question, New Hampshire law charges school boards with numerous duties. Among these duties is the requirement that school boards draft, adopt and implement

policies regarding school district operations. Because the law places such mandates on New Hampshire school boards, it is entirely reasonable and sound to recognize that school boards must be afforded an opportunity to express to their constituents the bases for their decisions. It is also reasonable that school board be afforded the latitude to seek public support for the policies they adopt.

In answer to the second question, school boards have limited obligations to allow private citizens an opportunity to address and petition complaints to the school board. The most apparent opportunity presents itself at school board meetings and school district annual meetings. Certainly, New Hampshire law does not require a school board to allow private citizens the opportunity to use official school district funds to propagate private, personal political views.

ARGUMENT

I. New Hampshire law requires school boards to adopt school district policies. The ability to promote those policies and inform the public of school district policies is a natural and necessary extension of those duties.

Every March, New Hampshire citizens gather in school gymnasiums, auditoriums, and other public spaces for the school district annual meeting. The annual meeting, a longstanding New Hampshire tradition, is design to encourage active and vigorous debate among the townspeople with respect to raising and appropriating money for the support of public schools, and for the transaction of other school district business.

As part of the annual meeting, New Hampshire school boards have various legal duties and responsibilities. Among these duties is the mandate that warrant articles pertaining to the proposed school district budget contain a notation of whether or not the school board recommends the proposal. See generally R.S.A. 32:5. This statute also mandates that when an

appropriation, submitted by a governing body (i.e. the school board) or by petition, appears in the warrant as part of a special warrant article, “the article shall contain a notation of whether or not that appropriation is recommended by the governing body.” Id.

Further school board duties and responsibilities are expressed in New Hampshire Department of Education Rule 303.01. These duties provide a proper understanding of a school board’s obligations. This Rule obligates school boards to, among other things, adopt policies necessary and desirable to control and effectuate the purchase of equipment, supplies or services; to prepare an annual budget in accordance with RSA 32; and determine the educational goals of the district.

The legislative and administrative responsibilities bestowed on school boards produce a stark contrast to petitioner’s claim that “the board is in no position to advance government ‘policy.’” Petitioner’s Brief, Page 25. Also curious is the petitioner’s statement that “until the legislative bodies vote, there is no established polic[y] to advocate for or against.” Petitioner’s Brief, Page 25.

Consistent with the statutes and rules referenced above, it is clear that school boards (and not the legislative bodies) have the legal responsibility and discretion to create school district policy. Necessarily coexistent with this duty is the reasonable expectation that school boards will be given the latitude to explain and recommend appropriate policies. As expressed in Ed. 303.01, creating district policies lies within a school board’s obligations; advancing those policies is a legitimate and necessary function to ensure the effective operations of a school district.

Compelling legal justifications, as cited above, support a school board’s explicit and inherent duties to engage in the very actions of which petitioner complains. Without the

discretion to inform and “educate” the citizens about the board’s goals, objectives and motives, a school board could not express its combined policy preferences without fear of violating the law. And, in fact, the failure to engage in these very activities would likely violate the trust and expectations that the community has placed in a school board.

Furthermore, recognizing that school boards need the discretion to promote the very policies they enact is a reasonable and essential extension of their statutory and regulatory duties. Preventing school boards from using public funds to explain why the board supports a particular policy or recommends the passage of a warrant article would adversely affect the implementation of school board duties.

The speech complained of by the petitioner is government speech, presented by elected officials in their official capacity as school board members. It is not coercive or manipulative. Rather, it is speech necessary for the school board to fulfill its statutory duties. To impose broad restrictions on the board in the manner advanced by the petitioner would prevent school boards from effectively satisfying and completing the very tasks and functions they were elected to perform.

However, an even greater concern is the impact that such a prohibition would have on New Hampshire citizens. If the petitioner’s arguments were accepted, the Court’s ruling would impose a “chilling effect” on school board members. Rather than fostering beneficial discussion and debate at school board and annual meetings, school board members would be relegated to providing nothing more than insipid data, statistics and numbers. Absent would be any consideration as to why the board supports a particular measure, why it adopted a particular policy, or why it recommends a particular warrant article. The voters would then be left with nothing more than a bare understanding of the board’s goals and objectives. Both the laws of

New Hampshire and New Hampshire citizens expect more from locally elected officials than they be mere conduits of information that is already known.

The Epping School Board is required by law to create and adopt many policies, consistent with the expectations of its constituents. It is also that Board's duty to inform Epping residents and taxpayers of the school board's proposal and initiatives. Urging support and backing of the board's policies, goals and objectives is a necessary and logical extension of that duty. The Epping School Board has a compelling and vital interest in adequately informing residents and taxpayers of board incentives and reasons. To enjoin the Epping School Board from performance of these fundamental duties would unduly "hamstring" the Board, and would ultimately work a disservice on the very citizens that the Board has been elected to serve.

New Hampshire citizens expect, and often demand, "openness in the conduct of public business." See generally R.S.A. 91-A. It is recognized that such openness is "essential to a democratic society." Id. The openness that is central to a flourishing democracy, in which citizens are informed of government actions, is only enhanced by the Epping School Board's actions in this matter. In the spirit of this principle, a school board's ability to develop policy, adequately inform citizens of such policies, and take measures to garner support for its policies should not be limited.

In sum, to find for the petitioners would unduly and unreasonably inhibit the very conduct that we expect and need from locally elected school boards.

- II. A school district annual report is created for the purpose that the school board can disseminate information pertaining to school district policies, objectives, and fiscal matters. It is not created to advance personal agendas of private citizens.**

Petitioner states that this matter initially began in January 2005 when Thomas A. Sutcliffe, Chairperson for Epping Residents for Principled Government, Inc., requested that the Epping School Board provide him or his organization with a “fair and reasonable” opportunity to present his viewpoints. The petitioner initially requested it either be allowed to send a rebuttal mailing at school district and taxpayer expense, or be allowed to include a statement of dissent in the school district’s annual report.

New Hampshire law already provides the petitioner with sufficient avenues to petition the school board for a redress of grievances. The fact is the petitioner does have a right to be heard and a right to present its viewpoints and opinions – at the school district annual meeting and at other school board meetings.

New Hampshire law provides that “a meeting of every school district shall be held between March 1 and March 25.” R.S.A. 197:1. Department of Education Rule 303.01 states school boards shall “hold meetings for the transaction of business at least once in 2 months.” These regular school board meetings and the annual school district meeting provides a proper and adequate forum for town residents to address the school board, petition for warrant articles, vote on such warrant articles, and discuss, argue or debate official board action. For the petitioner to claim it was denied a fair and reasonable opportunity to present its opinions is simply not accurate. Notably, no evidence has been presented that the Epping School Board, in any way, prevented the petitioner from speaking or expressing its own opposing viewpoint.

Despite having the legal right to present its opinions to the board and persuade Epping voters to agree with its platform, the petitioner initially sought to have its viewpoints included in the school district’s annual report, or alternatively, to have the school district pay for it to conduct a mailing of material that presented its views. The Epping School District Annual

Report has never been a forum for Epping residents to express their personal opinions; and the petitioner has not provided any examples of any New Hampshire school district annual report being used for such a purpose.

The school district annual report is not an open forum such that the public has a right to include personal political and social statements within. The annual report is a public document created by an elected body pursuant to statutory mandates. R.S.A. 198:4 clearly includes all items that shall be stated in the annual report; absent from those items is any provision requiring that private citizens be afforded the right to have their viewpoints or beliefs published and paid for by the school district. More importantly, a school district annual report is the primary instrument used to inform taxpayers and residents of various activities guided by the school board, and its administration and staff. It is not, and never has been, a forum for private citizens to disseminate an array of politically charged opinions.

Allowing various citizens' groups the opportunity to include in the annual report a statement of their position would establish an imprudent precedent adversely affecting all New Hampshire school boards.

First, to allow expansive broadcasting of all viewpoints would turn the annual report into a publication resembling the editorial pages of the Concord Monitor or the Manchester Union Leader. No longer would the annual report serve to inform town residents of the school board's operations, policies, and fiscal affairs. Instead, the annual report would turn into a free advertising mechanism for everyone opposed to school board actions – all at taxpayer expense.

Ironically, granting petitioner's requested relief would, without question, increase printing and publishing costs borne by the school district; and such increased spending is part of the very conduct complained of in this matter by the petitioner. It is a curious argument that, on

one hand the school board is accused by the petitioner of engaging in wasteful spending, while the effect of what the petitioner seeks would unnecessarily inflate that wasteful spending by demanding the Epping School Board (and by extension, Epping taxpayers) pay for its mailings and space in the annual report. Such inconsistencies meet neither sound legal nor public policy considerations.

Secondly, allowing the petitioner to insert its political message would be contrary to the intent of the annual report. As stated above, the legislature has determined the minimum requirements that must be included in the annual report. R.S.A. 198:4. Based on these statutory requirements, the intent of the annual report is to provide town residents with an accurate and detailed manual of school district business, and not to provide town residents with a forum to espouse their personal political beliefs.

Thirdly, by recognizing that the petitioner has a legal right to insert its statement of positions in an annual report would be a disservice to New Hampshire residents. The intent of the annual report is to inform town residents of the school board's policies, goals and fiscal matters. If private groups were allowed free advertising in the annual report, the school board's statements stand to be lost in the morass of advertisements and editorials. The public would therefore have a more difficult time discerning what was school board policy and what was a statement of belief from dissatisfied taxpayer.

To underscore this point, it is important to note that school boards are required to take painstaking steps to ensure the information contained in an annual report is accurate and truthful. If private citizens were allowed to insert private opinions, there is no guarantee such private opinions would be truthful or accurate. In essence, the school board would be forced to defend itself against erroneous charges. Clearly this is not the intent or purpose of a school district

annual report. School boards should be free from having to defend themselves in a publication it is required to provide. Such a burden on school boards would be enormous, unnecessary, and against established policy considerations.

CONCLUSION

Based on the foregoing reasons, *amicus* respectfully asks this Court to affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this brief have been forwarded by first class mail, postage pre-paid, to Charles G. Douglas, III, Esq., counsel for the petitioner, Diane M. Gorrow, Esq., counsel for respondent Epping School Board, and John J. Ratigan, Esq., counsel for respondent Epping Board of Selectmen.

Date: _____

By: _____
Barrett M. Christina, Staff Attorney