

Lex Loci: A Survey of New Hampshire Supreme Court Decisions

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What judicial decision, after being handed down, has been called a "political tsunami", "stunning"¹, a decision rendered by a "judicial oligarchy"², a decision that will rend the fabric of our community and will lead "to less control of how much communities spend on education", and "has the potential. . .to change the entire way we govern ourselves"⁴, "the grossest form of despotism"⁵, was "misguided"⁶, and "directly usurped the authority of the Legislature"?! If you guessed *Brown v. Board of Education*,⁸ the landmark 1953 Warren Court decision requiring desegregated schools, you were wrong. All are reactions to the New Hampshire school funding case, *Claremont School District v. Governor**, decided December 30, 1993.

As Yogi Berra used to say, "it's deja vu all over again". There is a remarkable similarity to the *Brown* and *Claremont School District* cases and the hyperbolic reactions to them. In both, a Republican dominated court was led by its Republican Chief Justice who carefully crafted an opinion which picked up diverse members of the court to produce an unanimous decision leading to a decisive pronouncement on a major school issue directly contrary to the position put forward by the political party and leaders who appointed a majority of the very judges who rendered the decision.

The reaction to both decisions range on the verge of hysteria. In both decisions, there is a hint of a constitutional crisis in the reactions, a thread of defiance by the executive and legislature to the judiciary: the Court may make its decision but let it try to enforce it. It has even been stated that the result of the New Hampshire decision would be a court ordered income tax in the state.⁹

There are some reactions to the *Claremont School District* case that appear to be whistling in the dark. Consider the reaction of the senior assistant attorney general who argued the case for the state, who said of the decision, "[t]he court hasn't said there is a problem at all."¹⁰ Or the comment of the conservative chairman of the state board of education, who found that the supporters of the school districts were "pinning their hopes on rhetoric that has no force of law."¹¹

Lost in all of the heavy political crossfire has been the remarkable decision itself. Who would have guessed that this conservative court would be led by its conservative chief justice into an unanimous decision which spoke plainly and without rhetoric to the essential issue involved in the plaintiff school district's lawsuit? The Court consisted of all present members of the Supreme Court except for Justice Thayer who recused himself since his wife was formerly chairman of the board of education. His replacement was former Chief Justice Grimes who certainly would fall into the conservative category. [Is this the first time in New Hampshire history that two chief justices have sat on a case?] The result achieved by the Court was made more difficult because it could not simply affirm a decision of the superior court upholding the plaintiff school district's

lawsuit; rather the Court had to overturn a decision made by a respected superior court justice, appointed to the superior court by Governor John Sununu.

The lawsuit itself was a simple one: an action by five "property-poor" school districts who contended that because of the state's heavy reliance on the property tax to fund education, poor towns did not get the same level of education offered in wealthier towns and this resulted in a violation of the constitutional duty of the state to provide an adequate public education. The state defended the lawsuit vigorously, taking the position that there were no words in the state constitution and no evidence in the constitution's history or development that provided that the state had a duty to support education. The lower court, agreeing with the state, had dismissed the plaintiffs' petition for injunctive relief and declaratory judgment for failure to state a cause of action upon which relief could be granted.

On appeal to the Supreme Court, the unanimous Court held very simply that "part II, article 83 (of the New Hampshire Constitution) imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire **and to guarantee adequate funding**" (emphasis added). In its analysis, the Court was not writing on a blank slate, acknowledging that "[n]umerous state courts have in recent years decided cases challenging, on constitutional grounds, systems of financing public education" and requiring changes in the distribution formula to more equitably provide state support. One such case is *Serrano v. Priest* 12 from California which established the formula known as "Augenblick formula" for a more equitable distribution of state educational support. Earlier in New Hampshire, a lawsuit similar to the present one had been filed in 1981, but was settled on the basis that the property poor towns accepted the Augenblick formula in a settlement in 1985. However, total state education aid in New Hampshire to public schools did not subsequently increase substantially: the state's small share (\$85,000,000) of the \$1.1 billion educational budget makes New Hampshire last in the nation in state funding of education.

The Court, in its simple and clear analysis, ignored the decisions in other states since they turned on constitutional provisions dissimilar to New Hampshire's. However, the Court gave great weight to the Massachusetts constitutional provision since New Hampshire shared an early history with Massachusetts and our state modeled much of our constitution on the one adopted by Massachusetts four years earlier and the fact that the Massachusetts constitution contains a nearly identical provision regarding education. The Court then looked to the decision of the Massachusetts Supreme Judicial Court in *McDuffey v. Secretary of the Executive Office of Education*, 13 which interpreted the Massachusetts constitutional provision to require the state to support the public schools, which while delegable to the local municipalities to some degree, "does not include a right to abdicate the obligation imposed. . .by the Constitution."¹⁴

Our New Hampshire constitutional provision is found in article 83 entitled "Encouragement of Literature, etc.," which speaks of "the duty of the legislators... to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions. . .for the promotion of agriculture, arts,

sciences, commerce, trades, manufacturers, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence. . . among the people." The state contended that these words were merely rhetoric or statements of good intentions but the Court did not agree:

We do not construe the terms "shall be the duty. . . to cherish" in our constitution as merely a statement of aspiration. The language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools. (emphasis added).

Having identified that a duty exists, the Court then emphasized the corresponding right of the citizens to its enforcement. The Court concluded that "in New Hampshire a free public education is at the very least an important substantive right. . . .The right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty," for which "[a]ny citizen has standing to enforce this right."

The decision concluded with a ringing peroration:

Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.

The Court remanded the case for decision to the luckless superior court judge who, by lottery, received this case in the first instance, for further proceedings consistent with the opinion. What will happen now? Knowing our wonderful state, this political football will probably be kicked around for years to come. However, unless a compromise between the contending political forces is reached, the author predicts that the superior court judge will proceed with a decision in the case that will result in New Hampshire being judicially required to adequately fund, in a substantially increased amount, the state's portion of the public education costs for New Hampshire's schoolchildren.

What a sweet victory for Arthur Nighswander and the other attorneys who brought the first lawsuit seeking the relief granted in this decision. When that earlier case was settled out of court, the then Governor, John Sununu, no lover of lawyers or the legal system, commented that the school districts had settled the case because they "didn't have a leg to stand on."¹⁵ Without a leg, or a pot for that matter, the plaintiffs have succeeded in the face of near unanimous state governmental opposition.

Endnotes

1. *The Union Leader*, December 31, 1993, p. 1.
2. *The Boston Globe*, January 16, 1994, N.H. Weekly, p. 10.

3. Senator Judd Gregg as quoted in *The Union Leader*, January 10, 1994, p. 1.
4. Id.
5. Id.
6. Id.
7. Id.
8. 347 U.S. 483 (1953).
9. Senator Judd Gregg as quoted in *The Union Leader*, January 10, 1994, p.1.
10. *The Boston Globe*, January 16, 1994, *N.H. Weekly*, p. 10.
11. Id.
12. 5 Gal. 3d 584, 487 P.2d 1241 (1971).
13. 425 Mass. 545 (1993).
14. Id. at 606.
15. *The Union Leader*, December 31, 1993, p. 16.