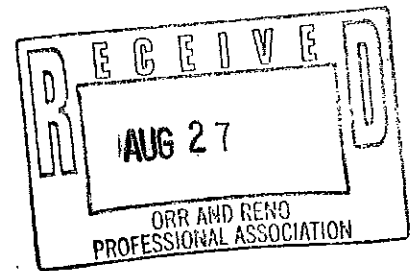


NEW HAMPSHIRE SENATE
107 North Main Street
Concord, NH 03301-4951
(603) 271-2111
TDD Access: 1-800-735-2964



August 17, 2007

HAND DELIVERY

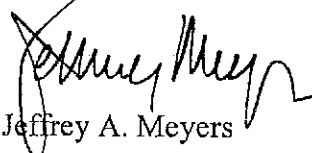
Eileen Fox, Esq., Clerk
New Hampshire Supreme Court
One Noble Drive
Concord, N.H. 03301

Re: Docket No. 2006-0258, Londonderry School District SAU #12,
et al. v. State of New Hampshire

Dear Clerk Fox:

Enclosed please find the original and seven copies of the Assented-To Motion For Leave To File Amicus Curiae Memorandum and Memorandum of Amicus Curiae Speaker of the House and President of the Senate, for filing with the Court. Copies of both the Assented-To Motion and Memorandum have been mailed first-class to all counsel of record.

Very truly yours,


Jeffrey A. Meyers

Enclosures
cc: Counsel of Record

07 AUG 29 PM 2:29
LONDONDERRY
SCHOOL DISTRICT

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2006-0258

LONDONDERRY SCHOOL DISTRICT SAU# 12, et al.

v.

THE STATE OF NEW HAMPSHIRE

**ASSENTED-TO MOTION FOR LEAVE
TO FILE *AMICUS CURIAE* MEMORANDUM**

NOW COME the President of the New Hampshire Senate ("Senate President") and the Speaker of the House of Representatives ("Speaker"), by and through their respective legal counsel, Jeffrey A. Meyers, Esq. and David I. Frydman, Esq., and pursuant to Supreme Court Rule 30, respectfully submit this Assented-To Motion for Leave to File *Amicus Curiae* Memorandum in connection with the Court's Order dated July 20, 2007. As further support for this motion, the Senate President and Speaker state as follows:

1. On or about April 25, 2006, upon an assented-to motion by the Senate President and Speaker, the Court granted leave for the Senate President and Speaker to appear *amicus curiae* for the purpose of filing a brief in this matter.

2. The Senate President and Speaker, through counsel, subsequently filed a brief and participated, through the appearance of House Counsel, at oral argument on June 22, 2006.

3. On July 20, 2007, the Court ordered all parties in this matter to file brief memoranda on or before August 20, 2007 addressing whether in light of Laws 2007, ch.

270 (HB 927), this case should be remanded to the superior court for further consideration and for such further proceedings as it may deem appropriate.

4. The Court's July 20, 2007 Order requires the parties to express their views concerning the status and direction of this case as a result of the policy decisions made by the New Hampshire Legislature when both chambers adopted HB 927. This legislation not only defines the specific criteria and substantive educational content of an adequate education, but it also establishes a further legislative process to determine the cost of an adequate education.

5. Both chambers of the Legislature believe it appropriate, in these circumstances, to submit their views on any potential further action by the Court in this case.

6. Supreme Court Rule 30(3) does not expressly exempt the Legislature from seeking consent of all parties in order to file a brief *amicus curiae*. Although the Senate President and Speaker understand that the Court has construed this rule liberally as to the Legislature, undersigned counsel contacted plaintiffs' counsel, William L. Chapman, Esq., and defendant's counsel, Associate Attorney General Ann Edwards, who both assented to this motion.

WHEREFORE, the Senate President and Speaker respectfully request that this Honorable Court:

A. Grant this Motion for Leave to file an *amicus curiae* memorandum in response to the Court's Order of July 20, 2007; and

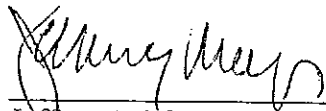
B. Grant such other relief as may be equitable and just.

Respectfully submitted,

**The President of the New Hampshire
Senate**

By her counsel,

Aug 17, 2007

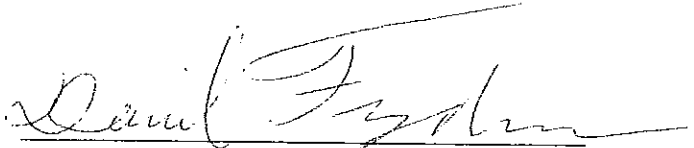


Jeffrey A. Meyers, Esq. (#8211)
Senate Legal Counsel
Room 302, State House
107 North Main Street
Concord, N.H. 03301

The Speaker of the House of Representatives

By her counsel,

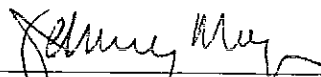
Aug 17, 2007



David I. Frydman, Esq. (# 9314)
House Legal Counsel
Room 308, State House
107 North Main Street
Concord, N.H. 03301

CERTIFICATE OF SERVICE

I, Jeffrey A. Meyers, Esq. hereby certify that the foregoing Assented-To Motion For Leave to File Amicus Curiae Memorandum was, this 17th day of August, 2007, forwarded to Ann Edwards, Associate Attorney General, and William L. Chapman, Esq., counsel of record.



Jeffrey A. Meyers, Esq.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2006-0258

LONDONDERRY SCHOOL DISTRICT SAU# 12, et al.

v.

THE STATE OF NEW HAMPSHIRE

**MEMORANDUM OF AMICUS CURIAE SPEAKER OF THE HOUSE
TERIE T. NORELLI AND PRESIDENT OF THE SENATE SYLVIA B. LARSEN**

NOW COME the Speaker of the House ("Speaker") and the President of the Senate ("Senate President"), by and through their respective counsel, and pursuant to the Court's Order dated July 20, 2007, submit this memorandum concerning whether, in light of the adoption into law of House Bill 927, Laws 2007 ch. 270, this case should be remanded to the superior court for further consideration and for such further proceedings as it may deem appropriate. For the reasons expressed herein, the Speaker and the Senate President urge that the Court stay all proceedings to allow the Legislature to complete the process it has now undertaken to cost an adequate education, regardless of whether the case is remanded.

INTRODUCTION

On June 29, 2007, the Governor signed into law House Bill ("HB") 927. The law defines the specific criteria and substantive educational content of an adequate education beginning with the school year 2008-2009. See 2007 Laws ch. 207:2 (to be codified at RSA 193-E:2-a). The law also directs that the Legislature use the definition of an adequate education to determine the resources necessary to provide essential programs

considering educational needs, and to complete the determination of the cost of an adequate education no later than the end of the 2008 fiscal year. 2007 Laws ch. 207:2 (to be codified at RSA 193-E:2-b).

To this end, the Legislature has established a Joint Legislative Oversight Committee on Costing an Adequate Education ("Joint Legislative Committee"). Id. (to be codified at RSA 193-E:2-d). The Joint Legislative Committee is specifically charged with reviewing and studying the analytical models and formulae for determining the cost of an adequate education and the educational resources needed to deliver an adequate education to the children of the state. Id. (to be codified at RSA 193-E:2-d,II). It will also review transition assistance for school districts that do not presently offer public kindergarten. Id. (to be codified at RSA 193-E:2-d,III). The Joint Legislative Committee must report its findings and recommendations concerning the cost of an adequate education to the Governor, the Speaker and the Senate President no later than February 1, 2008.

The Speaker and the Senate President have now appointed the members of the Joint Legislative Committee and its first meeting will be held on August 27, 2007.

In order to provide the Legislature with the time it requires to determine the cost of an adequate education in accordance with the new definition it has now adopted, the Legislature has also passed an interim education funding plan, See Laws 2007 ch. 262 §06-03-91, which has replaced the education funding plan before the Court in this case, Laws 2005 ch. 257 (HB 616). This plan provides interim education funding through the current biennial budget.

Regardless of whether the Court determines to retain jurisdiction of this case, or to remand it to the superior court, the Court should ensure that no further judicial proceedings are initiated until the Legislature completes its determination of the cost of an adequate education.

ARGUMENT

I. DEFINING, COSTING AND FUNDING AN ADEQUATE EDUCATION ARE LEGISLATIVE FUNCTIONS AND THE LEGISLATURE'S CURRENT EFFORT TO FULFILL THESE FUNCTIONS SHOULD PROCEED WITHOUT A PARALLEL JUDICIAL PROCESS

This Court has consistently held that defining what constitutes an adequate education, calculating the cost thereof and determining the mechanism to fund that education are, in the first instance, functions of the legislative and executive branches, not the judiciary. See *Londonderry School District SAU #12 v. State of New Hampshire*, 154 N.H. 153, 163 (2006) ("*Londonderry*") ("we agree ...that this court or any court not take over the legislature's role in shaping educational and fiscal policy."); see also *Claremont School District v. Governor*, 142 N.H. 462, 475 (1997) ("*Claremont II*")("[w]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government."); accord, *Claremont School District v. Governor*, 147 N.H. 499, 519 (2002)("[a]s the State has previously recognized, the legislative and executive branches are responsible for crafting and implementing a long-term solution to the problems with the educational funding system found by this Court.").

Judicial action is inappropriate at this time because the Legislature and Governor have acted and are continuing to act to complete the tasks required under *Claremont II*, *supra*. HB 927 is a critical step in a multi-stage legislative process to define, cost and

fund the opportunity for an adequate education. The opportunity for an adequate education is now defined and the Legislature has begun the process of determining its cost. After receiving the recommendations of the Joint Legislative Committee, the Legislature will complete the costing "as expeditiously as possible" but no later than June 30, 2008. 2007 Laws ch. 270:2 (to be codified at RSA 193-E:2-b,III). Only when the costing process is complete will the Legislature be able to adopt a permanent education funding plan.

Any judicial proceeding to review HB 927, whether before this Court or before the superior court, prior to the completion of the costing process, is premature and could undermine the work of the Joint Legislative Committee and the Legislature. HB 927 specifically directs that the Legislature use the newly-adopted definition of the opportunity for an adequate education in RSA 193-E:2-a to determine the resources necessary to provide essential programs. 2007 Laws ch. 270 (to be codified at RSA 193-E:2-b,I). Thus, the definition must necessarily serve as the foundation of the work of the Joint Legislative Committee. Were a court to weigh in prior to June 2008, the work of the Joint Legislative Committee and the Legislature could be undermined.

Further action by the judiciary at this time would be inconsistent with the Court's view that decisions regarding the costing of education are replete with policy decisions, best suited for the legislative and executive branches. *See Londonderry, 154 N.H at 166-67 (Duggan, J. concurring in part and dissenting in part)*("[m]aking this determination would be an arduous process -- one far better suited for elected decision-makers rather than a single member of the judiciary."). In order to allow the Legislature the opportunity to complete the process in which it is currently engaged and fulfill its duty to

make these difficult policy decisions, the Speaker and the Senate President believe it is critical that all judicial proceedings in this case should be stayed until the Legislature can complete its work.

II. SEPARATION OF POWERS PROHIBITS THE IMPROPER IMPOSITION OF THE JUDICIARY INTO THE LEGISLATURE'S DETERMINATION OF EDUCATION POLICY AND FUNDING DECISIONS

It has long been established that the separation of powers doctrine, as articulated by the New Hampshire Constitution Part I, Article 37, "is violated by an improper imposition upon one branch of the constitutional duties belonging to another, or an encroachment by one branch upon a constitutional function of another branch of government." *Petition of the Judicial Conduct Committee*, 151 N.H. 123,125 (2004) (citing *Opinion of Justices*, 110 N.H.359, 363 (1970)). When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable. *Id.*

The Legislature readily acknowledges that the separation of powers doctrine does not prevent judicial review of the constitutionality of legislative action. *See Baines v. New Hampshire Senate President*, 152 N.H. 124, 129 (2004)(citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 391 (1990)). Yet, this Court's duty to decide state constitutional disputes, *see Petition of Below*, 151 N.H. 135, 139 (2004), can -- and should -- be discharged after the Legislature completes the costing and funding determinations that are presently before it. *Baines v. New Hampshire Senate President*, *supra*, 152 N.H. at 129 (citation omitted)(emphasis added).

In September 2006, the Court stayed all proceedings to allow the Legislature to define a constitutionally adequate education as that definition "is essential to all other

issues, including the cost of a constitutionally adequate education and the method by which to raise the necessary funds” See Londonderry, 154 N.H. at 162. Now that the Legislature has adopted that definition, the same legislative deference is warranted. A similar respect for the separation of powers and deference to the political branches of government necessitates that regardless of whether the Court decides to retain jurisdiction of this case, or to remand it to the superior court, any further order of this Court should ensure that no further proceedings are to be initiated until the Legislature completes its determination of the cost of an adequate education. The failure of the Court to allow for the completion of the costing process without judicial involvement would move the Court perilously closer to taking on the education financing role for itself. See Londonderry, 154 N.H. at 173 (Galway, J., *dissenting*).

III. THE REPLACEMENT OF THE EDUCATIONAL FUNDING PLAN AT ISSUE, HB 616, HAS RENDERED THIS CASE MOOT. ACCORDINGLY, IT SHOULD BE DISMISSED.

The principal issue raised by Plaintiffs in this case -- the constitutionality of HB 616 -- is now moot because the Legislature has replaced that plan with a new interim education funding plan. Accordingly, the Court should dismiss the case as moot.

“[T]he question of mootness is one of convenience and discretion and is not subject to hard and fast rules. Generally, however, a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead.” *In re Juvenile*, 154 N.H. 763, 765 (2007) (quoting *Appeal of Hinsdale Fed. of Teachers*, 133 N.H. 272, 276 (1990)).

The funding plan before the Court in this case, HB 616, no longer exists, having been replaced by the Legislature with an interim education funding plan in the budget just

adopted. See Laws 2007 ch. 262 §06-03-91. With the adoption of an interim education funding plan, the constitutionality of HB 616 is no longer before the Court and the case can be dismissed Cf. *Silva v. Botsch*, 120 N.H. 600, 601 (1980)(commenting that expiration of selectmen's tenure would normally render action over board removal moot).

Moreover, Plaintiffs did not challenge the statutory definition of an adequate education. They asserted that HB 616 was unconstitutional in itself because it failed to define, cost out, and ensure delivery of a constitutionally adequate education. See *Londonderry SAU #12 et al. v. State of New Hampshire*, No. 05-E-0406, slip op. at 2 (Hillsborough County Superior Court - Southern District, March 8, 2006); but see *Id.* at 7 (Groff, P.J. finding, in response to State's argument, that Plaintiffs challenged entire statutory framework of adequate education, as amended by HB 616).

The parties in the present case, or anyone else, remain free to challenge the constitutionality of the definition of an adequate education as enumerated in HB 927, and will be free to challenge the Legislature's determination of the cost of an adequate education. However, those possible challenges should be raised in future litigation based upon the Legislature's completed actions.

CONCLUSION

Throughout the *Claremont* and *Londonderry* litigation, the Court has consistently expressed its view that establishing education and fiscal policy are foremost the prerogative of the legislative and the executive branches. Only in the absence of action by the other branches, has this Court expressed any intention of fashioning a judicial remedy to ensure a constitutionally adequate education for the children of this state. *Londonderry*, supra, 154 N.H. at 163 (citing *Petition of Below*, 151 N.H. 135 (2004)).

In enacting HB 927, the Legislature has completed the essential task under *Claremont II* by defining the opportunity for an adequate education. It is now proceeding to determine its cost and has adopted a new interim education funding plan. The Court's Order of July 20, 2007 was issued *sua sponte*; none of the Plaintiffs had come forward after the adoption of HB 927 to seek any further relief at this time. The Legislature should complete the tasks of costing and adopting a permanent funding plan for a constitutionally adequate education without the involvement of the judiciary. The Court should also preclude any immediate judicial review of the recently adopted definition and present actions on costing in deference to the separation of powers.

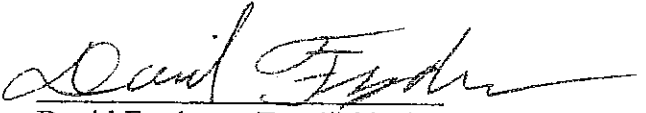
Regardless of whether the Court chooses to retain jurisdiction of this case, or remand it to the superior court, it should enter such orders as necessary to stay all further proceedings in the case until after the Legislature has completed the costing process at the end of the current fiscal year.

Respectfully submitted,

SPEAKER OF THE HOUSE
TERIE T. NORELLI

By Her Counsel,

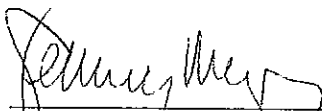
Date: 8-17-07

By: 
David Frydman, Esq. (# 9314)
House Legal Counsel
Room 308, State House
107 North Main Street
Concord, N.H. 03301

PRESIDENT OF THE SENATE
SYLVIA B. LARSEN

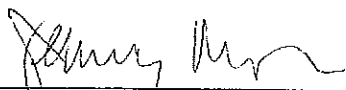
By Her Counsel,

Date: 8-17-07

By: 
Jeffrey A. Meyers, Esq. (#8211)
Senate Legal Counsel
Room 302, State House
107 North Main Street
Concord, N.H. 03301

CERTIFICATE OF SERVICE

I, Jeffrey A. Meyers, do hereby certify that the within Memorandum of Amicus Curiae Speaker of the House and President of the Senate has this 15th day of August been mailed first class, postage prepaid to William L. Chapman, Esq., Ann Edwards, Associate Attorney General, and all other counsel of record.


Jeffrey A. Meyers