

STATE OF NEW HAMPSHIRE  
BOARD OF EDUCATION

MICHAEL GUGLIELMO

V.

SHAKER REGIONAL SCHOOL BOARD  
SB-FY-12-01-012

PETITIONERS' MEMORANDUM IN SUPPORT OF HIS APPEAL OF THE DECISION OF  
THE SHAKER REGIONAL SCHOOL BOARD

The Shaker Regional School Board has applied Policy GBCD to prohibit Mr. Guglielmo from volunteering in his son's classroom. As applied to Mr. Guglielmo, Policy GBCD violates the equal protection, substantive and procedural due process clauses of the New Hampshire and United States Constitutions.

Substantive Due Process

As applied to a parent, like Mr. Guglielmo, Policy GBCD violates the due process protections afforded all citizens under Part 1, Articles 14 and 15 of the N.H. Constitution and the Fourteenth Amendment to the United States Constitution. Substantive due process guarantees the State will pursue legitimate interests in legitimate ways – ways that do not trench unnecessarily on protected individual rights and interest. Boulders at Strafford v. Town of Strafford, 153 N.H. 633 (2006). To survive a substantive due process challenge, an ordinance must be devoid of unreason and arbitrariness, and the means selected for the fulfillment of the policy must bear a real and substantial relation to that end.

The protected right at stake in this case is the right to parent, a right that has been recognized as fundamental throughout our history. As the Supreme Court has stated, “[w]e have recognized that the family and the rights of parents over it are natural, essential, and inherent

rights within the meaning of the New Hampshire Constitution. Because of their fundamental importance, great judicial deference has been accorded parental rights. They have been found to operate against the State, against third parties, and against the child... We have long recognized the right to raise and care for one's children as a fundamental liberty interest protected by Part I, Article 2 of the State Constitution." In re Nelson, 149 N.H. 545, 547 (N.H. 2003) (internal citations omitted). In re Guardianship of Nicholas P., 162 N.H. 199, 203 (N.H. 2011). Similarly, "[t]he Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," ...including parents' fundamental right to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (U.S. 2000).

Policy GBCD was enacted with the laudable purpose of protecting children from people who might harm them. The pertinent provision reads as follows:

New Hampshire Law specifically prohibits any district from hiring an individual who has been convicted of crimes under RSA 630:1, 630:1-a, 630:1-b; 630:2; 632-A:2, 632-A:3, 632-A:4; 633:1; 639:2, 639:3; 645:1 1(b), II or III; 645:2; 649-A:3, 649-B:3, or 649-B:4; or any violation or attempted violation of RSA 650:2 where the act involves a child in material deemed obscene, in this state under any statute prohibiting the same conduct in another state, territory, or possession of the United States. If a criminal records check reflects a conviction of this type, the conditional offer of employment will be withdrawn. *In addition to these specifically enumerated crimes, the District will not employ or utilize the services of anyone who has been convicted of any felony.* In the event that an employee, volunteer, coach, student intern, student teacher or contracted service provider has been convicted of a misdemeanor, the Board and Administration will review such convictions and determine appropriate action on a case-by-case basis.

(Emphasis provided) Policy GBCD violates substantive due process because by its own terms it applies to all parents who have felony records, regardless of the risk that the parent actually poses. Thus the means selected for the fulfillment of the policy, banning all parents who

are felons from participating in their children's education, does not bear a real and substantial relationship to that end. The policy simply casts too large a net.

There are hundreds of offenses designated as felonies under New Hampshire statutory law, most of which bear no relation to risk of harm to children. A representative sampling makes the point. Among the offenses designated as felonies are: RSA 96:2 False Statements Relative to Public Works or Contracts; RSA 7:28-c. Registration, Contract and Disclosure Requirements for a Paid Solicitor; RSA 78:14. Unstamped Tobacco Products; RSA 74:16. Evasion of Tax on Bank Stock; RSA 644:3-c. Unlawful Interference With Fire Alarm Apparatus; RSA 638:7. Commercial Bribery; RSA 638:8. Sports Bribery; RSA 638:4. Issuing Bad Checks; RSA 638:22. Criminal Acts Involving Cloned Phones and Telephone Cloning Paraphernalia; RSA 638:2.; Fraudulent Handling of Recordable Writings; RSA 639:4. Nonsupport; RSA 638:15. Fraud on the Women, Infants, and Children (WIC) Program; RSA 637:10-b. Fraudulent Retail Transactions. RSA 539:9. Agricultural Vandalism; RSA 539:7. Theft of Utility Services; RSA 485:31. Tampering With Public Water Systems; RSA 485:30. Discharge of Sewage; RSA 481:12. Unlawful Use of Stored Water; RSA 427. Many violations concerning AGRICULTURE, HORTICULTURE AND ANIMAL HUSBANDRY; RSA 262:17. Odometer Tampering; RSA 231:189. Malicious Injury to Aqueducts or Pipes; RSA 227-J:15. Deceptive Forestry Business Practices; RSA 214:20-b. Intoxicated Hunting; RSA 159:23. Criminal Use of Electronic Defense or Aerosol Self-Defense Spray Weapons.

This list is not exhaustive, but it demonstrates the vast reach of Policy GBCD. The policy bars all parent-felons from participating in their children's education despite the fact that most of the acts that are designated as felonies by statute in New Hampshire bear no relation to

protection of children. Although some felons may pose a risk to children, most do not. The reach of Policy GBCD is breathtaking. It makes no distinction between the felon who has raped a child and the felon who has failed to stamp cigarettes.

A substantive due process challenge to a policy questions the fundamental fairness of the policy both generally and in the relationship of the particular policy to a particular restriction under the particular conditions existing at the time of the challenge. Caspersen v. Town of Lyme, 139 N.H. 637, 642, (1995); Dow v. Town of Effingham, 148 N.H. 121 (N.H. 2002)

The government bears the burden of proving the fundamental fairness of this rule. State v. Furgal, 161 N.H. 206, 210-211 (N.H. 2010). Here, the government cannot sustain this burden. There is no reason to casually strip the fundamental right of parents to participate in their children's education merely because they have been convicted of a felony. This burdens a status, that of felon, without any reference to the nature of the underlying act or the actual risk of harm to children.

Indeed, the School Board can present no evidence that Mr. Guglielmo poses a risk to harm his son Giovanni or any other child. Far from posing a risk to children, Mr. Guglielmo has dedicated his life to preserving the life of his ill child. He has nurtured and cared for Giovanni with a rare and exemplary passion. He has consistently demonstrated extraordinary compassion, devotion and energy as a parent. Thus, as applied to parents in general and to Mr. Guglielmo in particular Policy GBCD is fundamentally unfair.

In determining whether a policy is a reasonable exercise of the school board's powers and, therefore, can withstand a substantive due process challenge, courts apply the rational basis test. Under this test, courts consider whether the policy bears a reasonable relationship to its

objective and does not unduly restrict fundamental rights. Dow v. Town of Effingham, 148 N.H. 121 (N.H. 2002).

Under this test the policy as applied to parents must fail. This policy creates an irrebuttable presumption that a felon cannot participate in the education of his child. This rule may pass the rational basis test when applied to individuals seeking employment or volunteering to coach or provide contract services. No one has a fundamental right to do any of those things. But the policy fails when applied to parents because it unduly restricts the fundamental right to participate in the education of their children.

#### Equal Protection

Policy GBCD violates equal protection of the law guaranteed by N.H. Const. pt I, arts. 2 and 14 because it treats similarly situated populations differently. LeClair v. LeClair, 137 N.H. 213, 222 (1993). The law singles out an entire subgroup of the population, felons, and excludes them from participating in their children's education.

The New Hampshire Supreme Court has written, "[i]n considering an equal protection challenge under our State Constitution, we must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected. Classifications based upon suspect classes or affecting a fundamental right 'are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.' Classifications involving 'important substantive rights' must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation.... Finally, absent some infringement of a fundamental right, an

important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.” In re Sandra H., 150 N.H. 634, 637-638 (N.H. 2004) (Internal citations omitted; Akins v. Sec’y of State, 154 N.H. 67, 71 (N.H. 2006))

As demonstrated above, there can be no dispute that the instant classification involves a fundamental right, and thus it needs to survive a strict scrutiny test. For parents to be excluded from participation in their children’s education, the school district must justify its action by 1) demonstrating a compelling governmental interest and 2) proving that the classification is necessary to achieve its legitimate purpose. Assuming that the purpose of Policy GBCD is the protection of children, Mr. Guglielmo agrees that this is a compelling governmental interest. However, because the policy captures so many people who pose no risk of harming children, the policy is constitutionally overbroad. State v. Brobst, 151 N.H. 420 (2004).

Strict scrutiny places the burden upon the school district to prove that the policy is "narrowly tailored to promote a compelling [state] interest. If a less restrictive alternative would serve the [state]'s purpose, the [district] must use that alternative." State v. Zidel, 156 N.H. 684, 686 (N.H. 2008)

The policy cannot survive strict scrutiny for the simple reason that the state statutory scheme provides compelling evidence that a less restrictive alternative would serve the district’s purpose. New Hampshire state law prohibits any school district from hiring an individual who has been convicted of certain enumerated offenses that are justifiably related to the safety of children. These include RSA 630:1, 1(Capital Murder), RSA 630:1-a(First Degree Murder); RSA 630:1-b (Second Degree Murder); RSA 630:2(Manslaughter); RSA 632:A-2(Aggravated Felonious Sexual Assault); RSA 632-A:3 (Felonious Sexual Assault); RSA 632-A:4 (Sexual Assault); RSA 633:1(Kidnapping); RSA 639:2(Incest); RSA 639:3(Endangering the Welfare of a

Child or Incompetent); RSA 645:1, III or III (Indecent Exposure and Lewdness, Subsequent Offense); RSA 645:2(Prostitution); RSA 649-A:3 (Child Pornography);RSA 649-A:3-a (Distribution of Child Sexual Abuse Images); RSA 649-A:3-b(Manufacture of Child Sexual Assault Images); RSA 649-B:3 and RSA 649-B:4 (Computer Pornography); or any violation or any attempted violation of RSA 650:2 (Obscenity) where the act involves a child in material deemed obscene. See RSA 189:13-a, V.

The statutory scheme described in RSA 189:13-a, V was carefully thought out. The legislature denied access to school children to felons who were determined most likely to pose a danger to them based on reasonable and objective criteria – conviction for a felonious crime that was either especially violent, such as murder, or that targeted children. This is a narrow classification of individuals and the classification is necessary to achieve the goal of the statute, to protect school children.

In contrast, Policy GBCD varies substantially and materially from the state statutory scheme. The policy does not apply to the narrow classification convicted felons most likely to victimize children, rather it applies across the board to any individual convicted of any felony, no matter how far removed from presenting risk of harm to children.

Additionally, RSA 189-13-a, V on its face applies only to potential employees of the school district. It does not apply to parents. Query whether the statute would survive an ‘as applied’ challenge when the fundamental rights of parents were implicated and the statute would need to survive strict scrutiny rather than the rational basis test.

Finally, while Mr. Guglielmo agrees that protection of children is an important governmental objective, the school district has not demonstrated how prohibiting anyone who

happens to have a felony record from attending a school function or volunteering in a class advances this objective.

### Procedural Due Process

Policy GBCD also fails because it provides no procedural protections for a parent like Mr. Guglielmo. The School District has no burden to show that the parent-felon poses a risk of harm to a child, and there is no way for the parent to challenge the restriction. For that reason the policy violates procedural due process. State v. Furgal, 161 N.H. 206, 214 (N.H. 2010).

“To determine the process due in a particular proceeding, we employ a three-prong balancing test. We consider the private interest that will be affected by the official action . . . the risk of an erroneous determination of such interest through the procedures used, and the probable value, if any, of the additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail....As for the private interest at stake, parental rights are "natural, essential, and inherent rights" within the meaning of the State Constitution... The loss of one's children can be viewed as a sanction more severe than imprisonment. ” In re Baby K., 143 N.H. 201, 205 (N.H. 1998)

It is true that the school district is not seeking to deprive Mr. Guglielmo of his parental rights in toto, but it is seeking to deprive him of a significant and valuable component of his parental rights. The policy itself is mandatory. Once a parent is determined to have a felony record, he cannot volunteer in any capacity in the school. That determination is final. The policy provides for no opportunity to appeal that determination, or to submit evidence that the parent poses no risk.



In this case, the School Board did grant Mr. Guglielmo permission to come to a meeting and plead his case. However, this acquiescence to Mr. Guglielmo's request to appear should not be construed as a "hearing". This informal appearance lacked any indicia of a due process hearing. Mr. Guglielmo had no meaningful opportunity to present evidence about his lack of risk to harm children. No witnesses were called. No record of the proceedings was kept. No burden of proof was allocated. No objective criteria were considered. The school board simply reiterated its decision to prevent Mr. Guglielmo from volunteering in his son's class based entirely on his status as felon.

The school has an interest in protecting children from people who pose an actual risk of harm to them. It has no interest in protecting children from those who pose no risk of harm. Without a meaningful hearing to determine risk of harm, there is a great risk that a parent like Mr. Guglielmo will be erroneously deprived a fundamental parental right without due process of law.

### Conclusion

The Board of Education would do well to consider the words of the New York Family Court, "[t]he higher the right is regarded, the more jealously the courts guard it against government intrusion." In re Ginnan, 101 Misc. 2d 853 (N.Y. Fam. Ct. 1979). There is no right that is regarded more important than the rights afforded to parents. Parental rights and responsibilities are the very foundation of our society. Rather than discouraging parent participation in education, the school should do all it can to assure that responsible parents are given every opportunity to participate in their children's educational experience. Shaker Regional School District has intruded into the realm of parental rights and prohibited far more

conduct than is necessary to insure the safety of the children entrusted to it. The Board should find that Policy GBCD is unconstitutional as applied to parents like Mr. Guglielmo.

Respectfully submitted,  
MICHAEL GUGLIELMO,  
by his attorney,



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#### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been mailed and sent by email to James A. O'Shaughnessy, Esq and John F. Teague, Esq., attorneys for Shaker Regional School Board this 5<sup>th</sup> day of March, 2012.



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Barbara Keshen