

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Donna Green

v.

Earl Metzler, Superintendent

Peter Bealo, Chairman, Timberlane Regional School District,

School Administrative Unit 55, and

George Stokinger, Business Manager, SAU 55

EX PARTE / EMERGENCY COMPLAINT FOR DECLARATORY JUDGMENT,
TEMPORARY RESTRAINING ORDER AND MANDAMUS

I. Introduction

This case involves the intentional and active efforts of the defendants to deny access to basic information by an elected member of the Timberlane Regional School Board (“TRSB”). The instant controversy arises from the legal requirement for the TRSB to authorize a default budget pursuant to RSA 40:13. The plaintiff, acting in her official capacity as a member of the TRSB, will shortly be requested to attest to the “true, correct and complete” character of a document setting the Timberlane Regional School District (“TRSD”) default budget that will be submitted to the New Hampshire Department of Revenue. Ms. Green will be asked to sign this document under penalties of perjury. Despite the solemn nature of this attestation, she has not been provided with sufficient information to discern whether the document she will be asked to sign is, in fact, a

“true, correct, and complete” record as required by the certification clause. In fact, as set forth below, the plaintiff has good cause to believe that proposed default budget does not comply with New Hampshire law.

By bringing this case, the plaintiff seeks to establish her right to reasonable access to non-confidential information¹ relevant to performance of her duties as a member of the TRSB. She makes no claim that accessing this information gives her authority to *act* as an individual board member or to take any action on behalf of the full board. Rather, she merely seeks an order from this Court guaranteeing her a right to *access* relevant, non-confidential information necessary for her to meaningfully discharge her duties as a board member.

Further, Part I, Article 8 of the New Hampshire Constitution, reads as follows:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

The plaintiff maintains that as an elected representative of the people, she is entrusted with a right to access the information sought in this complaint.

II. Parties

¹ The information sought by this complaint is not confidential and no claim to access information that would otherwise not be available to the public is made here. The plaintiff makes this claim without prejudice to her right as a school board member to claim access to non-public information at a later date.

1. The plaintiff Donna Green is a resident of the Town of Sandown and a duly elected member of the TRSB. She was elected in March, 2014 and again in March, 2015. Her current term ends in March, 2018. Donna Green has an address of 3 Cranberry Meadow Road, Sandown, New Hampshire 03873.

2. The defendant Earl Metzler is superintendent of the TRSD. Metzler is sued in his individual and representative capacities. Mr. Metzler's place of business is located at 30 Greenough Road, Plaistow, New Hampshire, 03865-2762.

3. The defendant Peter Bealo is Chairman of the TRSB. Bealo is sued in his individual and representative capacities. TRSB oversees TRSD. Bealo's address is 82 Sweet Hill Road, Hampstead, New Hampshire, 03865.

4. The defendant School Administrative Unit 55 is the statutory entity responsible for providing administrative support to TRSD. SAU 55 has a place of business located at 30 Greenough Road, Plaistow, New Hampshire, 03865-2762.

5. The defendant George Stokinger is the business manager for TRSD and SAU 55 and has a place of business located at 30 Greenough Road, Plaistow, New Hampshire 03865-2762.

III. Jurisdiction and Venue

6. This Court has jurisdiction over this matter pursuant to RSA 491:7 and RSA 491:22. This Court has authority to issue temporary injunctions pursuant to Superior Court Civil Rule 48.

7. Venue is proper in Rockingham County as it is the plaintiff's county of residence and the place of business for the plaintiff, TRSD and SAU 55.

IV. Facts and Legal Background

A. Responsibilities Attendant To Service On Local School Board

8. "All [school] districts legally organized shall be corporations, with power to sue and be sued, to hold and dispose of real and personal property for the use of the schools therein, and to make necessary contracts in relation thereto." RSA 194:2.

9. School boards are the trustees of the district. The school board is entrusted with the hiring of teachers and the management of the prudential affairs of the district. RSA 21:29. The school board is the managing board of the school district. *Foote v. Manchester School District*, 152 N.H. 599, 602 (2005).

B. Default Budget Process

10. TRSD has adopted the "official ballot" form of budgeting.

11. Under New Hampshire law, districts that have chosen this form of governance are required to present two budgets to the voters. One is a proposed "operating budget," defined in RSA 40:13, IX(a). The other is a "default budget," defined in RSA 40:13, IX(b).

12. RSA 40:13, IX(b) precisely defines the process by which the default budget must be set. The statute reads:

"Default budget" as used in this subdivision means the amount of *the same appropriations as contained in the operating budget authorized*

for the previous year, reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and reduced by one-time expenditures contained in the operating budget. For the purposes of this paragraph, one-time expenditures shall be appropriations not likely to recur in the succeeding budget, as determined by the governing body...

13. As a member of the school board, Ms. Green will soon be asked to sign a form from the Department of Revenue Administration (“DRA”) entitled form MS-DS for 2017. A copy of the MS-DS form presented to Ms. Green last year is attached as Exhibit #1. She has been asked to sign this form each year she has served on the school board. The form sets the amount of the default budget and is used by DRA to calculate and set the property tax rate in the event that voters reject the proposed school district operating budget.

14. Form MS-DS includes the following certification:

**SCHOOL BOARD OR BUDGET
COMMITTEE CERTIFICATION**

Under penalties of perjury, I declare that I have examined the information contained in this form and to the best of my belief it is true, correct and complete.

15. Last year Ms. Green was asked to sign this form either on January 14, 2016, immediately following the public hearing on the budget, or at the latest, she was asked to sign the MS-DS form on or before January 24, 2016, when the warrant articles for the school board meeting had to be publicly posted. Last year’s MS-DS was not dated. At that time she refused to sign the required document because she did not have

the underlying budget detail to make a good-faith certification that the default budget submission was “true, correct and complete.”

16. Ms. Green anticipates that she will be presented with the 2017-18 version of the same document following the public hearing on the budget on or about January 12, 2017. The posting date shown on the public calendar for disclosure of the final default budget amount is January 19, 2017.

17. As a member of the TRSD board, Ms. Green serves as a trustee to the district. *Spencer v. Laconia*, 107 N.H. 125, 129 (1966)(citing *Horne v. School District of Chester*, 75 N.H. 411 (1911)).

18. The office of trustee carries with it various duties. Defining the full scope and breadth of those duties is beyond the scope of this case. The only relevant matter for the purposes of this case is that trustees generally, and school board members in particular, require access to information sufficient to allow them to discharge their duties diligently and intelligently.

19. In the case of certifying the default budget, this means that a board members’ duty to the district requires her to form a good faith belief that the information contained in the MS-DS form is, to the best of her belief, “true, correct and complete.”

20. As a member of the school board for the district, the plaintiff has a right to access sufficient information about the district to enable her to discharge her duties

diligently and intelligently. The respondents collectively have a corresponding obligation to provide school district members with timely access to information that is in its possession and that can be provided without undue burden.

21. A political majority on the school board cannot vote to deny a political minority on the school board reasonable and timely access to this information.

C. State Law Governing The Format Of School District Budgets

22. New Hampshire law strictly defines the format in which a school district is required to maintain its budget. Pursuant to RSA 21-J:17, “[t]he accounting officers of the several counties, cities, towns, *school and village districts*, and their departments, shall keep uniform accounts.”

23. The Commissioner of the Department of Revenue is required to adopt rules pursuant to RSA 541-A establishing the format that municipalities and school districts are required to use to maintain their budgets. RSA 21-J:13.

24. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of law. *In re Mooney*, 160 N.H. 607, 611-12 (2010).

25. The Department of Revenue has adopted detailed administrative rules requiring school districts such as the respondent to maintain its budget in function/object code. See, Rev Rule 1100, et seq.

26. The rules adopted by the Department of Revenue specifically require each school district to maintain its budget through the use of established lines denoted variously as “function code” and “object code.”

27. “Function code” means the 4-digit code used to signify expenditures for a particular activity within the accounting system. Rev 1101.10. “Object code” means a 3-digit code added to a function code which signifies a particular service or commodity obtained. Rev 1101.19.

D. TRSD Budgeting Practices

28. In each of the past two budget years, the TRSB has set a default budget that is *higher* than the TRSD’s proposed budget. For the upcoming year, the default budget proposed by the TRSB is once again *higher* than the proposed operating budget.

29. The TRSB has the authority to revisit its proposed default budget at any time prior to its submission of ballots to printing.² It is anticipated that ballots will be sent to printing some time between February 10, 2017 and March 10, 2017.

30. It is unclear to the plaintiff how her district’s default budget, if it is consistent with New Hampshire law, could be higher than the proposed budget for 2017-2018,³ given a considerable number of one-time expenditures and capital

² The TRSB can, in fact, revisit its proposed default budget.

³ The plaintiff is aware that the 2017-18 default budget could potentially be higher than the 2017-18 proposed operating budget under certain circumstances. For instance, if the proposed operating budget had significant reductions that could not be reflected in the default budget, the proposed operating budget could be larger than the default budget. However, the plaintiff is aware of no such significant reductions in the proposed operating budget.

improvements contained in the 2016-17 budget. By law, one-time expenditures and capital improvements are required to be stricken from the default budget.

31. By artificially inflating the default budget to an amount higher than the proposed operating budget, the defendants ensure that they are able to secure approval from the voters of continually increasing school operating budgets.

32. If a default budget legally compliant with RSA 40:13 was submitted to TRSD voters, those voters would be able to make a legitimate choice concerning the governance of their school district. By co-opting the default budget and submitting a default budget that does not comply with New Hampshire law, the defendants deprive voters of the opportunity to make a real choice.

E. Information Sought

33. The plaintiff seeks access to the 2017-2018 default budget in the function/object code level of detail. The plaintiff seeks this information in electronic spreadsheet format.

34. At a board meeting held December 15, 2016, the plaintiff made this request. Her request was denied by a majority of the board. At that time the respondents Metzler, Bealo, and Stokinger represented that a default budget in function and object code does not exist.

35. It is unclear how a valid default budget, compliant with New Hampshire law, could have been brought forward by the respondents without using the function/object code format required by New Hampshire law. Pursuant to RSA 40:13, XI, (a):

The default budget shall be disclosed at the first budget hearing held pursuant to RSA 32:5 or RSA 197:6. The governing body, ... shall complete a default budget form created by the department of revenue administration to demonstrate how the default budget amount was calculated. *The form and associated calculations shall, at a minimum, include the following:*

- (1) *Appropriations contained in the previous year's operating budget;*
- (2) *Reductions and increases to the previous year's operating budget; and*
- (3) *One-time expenditures as defined under subparagraph IX(b).*

36. RSA 40:13, XI (a) specifically requires that the default budget be based on the prior year's operating budget. RSA 21-J:13 and 21-J:17, and Rev 1100 et seq., require that the operating budget be maintained and executed in a function/object code level of detail.

37. Despite these two legal requirements, the defendants stated in a public meeting that producing a default budget showing function/object code level of detail would require additional work.

F. Efforts To Obtain Relevant Information.

38. Ms. Green has repeatedly requested that the superintendent's office and the business office provide her with a copy of the default budget in function/object code detail. Exhibit #2.

39. Ms. Green's requests has been consistently denied by the superintendent's office, by SAU #55, and by a majority of the TRSB.

40. The superintendent's office's denial of Ms. Green's effort to obtain basic information about the TRSD is consistent with its conduct toward her over a long period of time.

41. Despite her position as an elected member of the TRSB, Ms. Green has had to file requests for public information pursuant to RSA 91-A in order to obtain basic information about the school district. She has been subjected to all the costs and delays associated with the filing of these requests during her time on the TRSB. The plaintiff has had to pursue her right to access TRSD information all the way to the New Hampshire Supreme Court, successfully arguing that she had a right to obtain information in commonly used and useful electronic file format. See, *Donna Green v. SAU #55, et al.*, Slip op. April 19, 2016.

G. Preliminary Statement Of Reasons To Believe Default Budget Is Artificially Inflated And Inconsistent With New Hampshire Law.

42. Rather than submit a default budget with function/object code level of detail, the defendants presented the TRSB with a default budget that aggregated

multiple function and object budget lines. Exhibit #3. This has the effect of blurring the detail required to analyze the budget for compliance with New Hampshire law.

43. The plaintiff, with the assistance of her husband Arthur Green, has reviewed the aggregated data and has identified several one-time expenditures which should have been deleted from the default budget. See Exhibit #4.

44. Further, the plaintiff and her husband have identified instances in which the defendants have created a default budget that shows apparent increases in aggregated line items. For example, the TRSD default budget sheet shows aggregated function "21xx Student Services" with an increase of \$150,127. See Exhibit #4. This comprises 55 budget lines. The increase amount corresponds exactly to all of the increases and decreases in these 55 lines as contained in the proposed operating budget for 2017-18. See Exhibit #5 (. In other words, this aggregated category simply reproduces the proposed budget, rather than following the statutory requirement to reproduce the current year budget with only those changes allowed and required by New Hampshire law.

45. Without access to function/object code level detail, however, it is not possible for the plaintiff to examine the default budget in enough detail to know with the certainty required to perform her basic duties as a member of the TRSB.

IV. CLAIMS FOR RELIEF

CLAIM I - Declaratory Judgment

46. All facts alleged in the previous and following paragraphs are incorporated herein by reference.

47. The declaratory judgment statute reads as follows:

any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive.

48. As a school board member, Ms. Green has a right and a duty to obtain information relevant to her performance of her role as a validly elected member of the TRSB.

49. The information Ms. Green seeks here is information relevant to the performance of her duties as a school board member. As set forth above, school board members in New Hampshire serve as trustees of the district and have the responsibility to manage the district's prudential affairs.

50. Reviewing the budgeting and expenditure of money paid by taxpayers for the support and maintenance of the schools is incontrovertibly part of the plaintiff's duty to participate in management of the TRSD's prudential affairs.

51. Likewise, ensuring that the TRSD places a default budget that conforms with New Hampshire law is part of the plaintiff's duty to participate in management of the TRSD's prudential affairs

52. As stated previously, Ms. Green makes no claim to being able to take any action on the budget as an individual member of TRSB. Rather, she merely seeks to

obtain non-confidential information in a useable format to enable her to propose actions and policies to her colleagues on the TRSB and to ensure that a default budget that complies with New Hampshire law is offered to the public.

53. A majority of the TRSB does not have the authority to deny a duly elected, individual member of the TRSB, access to basic information about the district.

54. Members of political minorities, or individual members of governing bodies, cannot be deprived of their right to access relevant, non-confidential information by political majorities. Likewise, members of political minorities cannot be relieved of their duty to the public they serve by the mere fact that a political majority fails to perform its duties in a diligent and intelligent manner.

55. Accordingly, Ms. Green asks this Court to issue a declaration stating that she has a right to obtain easily produced, non-confidential information in a useable electronic format within a reasonable period of time following her request, at no cost to herself. In particular, Ms. Green asks this Court to issue a declaration stating that she has a right to be provided with the 2017-2018 TRSD default budget in function/object code detail.

56. Further, Ms. Green asks this Court to issue a declaration stating that the TRSD and/or SAU #55 have a corresponding duty to produce a default budget for submission to the TRSB showing the TRSD default budget in function/object code detail.

CLAIM II - Mandamus

57. All facts alleged in the previous and following paragraphs are incorporated herein by reference.

58. Mandamus is an extraordinary remedy. A writ of mandamus will issue when “the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief.” *In re Cigna Health Care*, 146 N.H. 683, 687 (2001).

59. As a member of the TRSB, the plaintiff has a duty to make diligent inquiry into the operation of the school district. This includes inquiry into whether the default budget of the TRSD complies with New Hampshire law.

60. Ms. Green previously requested that she be provided with an copy of the TRSD default budget, in function/object code level of detail. The respondents denied her requests.

61. Accordingly, Ms. Green has no alternative but to seek this Court’s intervention and ask this Court to issue a Writ of Mandamus.

62. Ms. Green seeks a Writ of Mandamus ordering the TRSD and any of the respondents in possession of the TRSD 2017-18 default budget, to produce a copy of that budget, in a commonly used electronic file format, and in the function/object code detail. Ms. Green requests that this file be provided to her upon receipt of a Writ of Mandamus, forthwith.

63. To the extent that the respondents may claim that the documents sought does not currently exist, Ms. Green seeks a Writ of Mandamus ordering respondents Metzler, Stokinger and/or SAU #55 to compile the relevant information in the function/object code level of detail required by New Hampshire law, and to produce a copy of that budget, in a commonly used electronic file format. Ms. Green requests that this file be provided to her upon receipt of a Writ of Mandamus, as soon as is reasonably practicable.

Claim III - Temporary and Permanent Injunction

64. All facts alleged in the previous and following paragraphs are incorporated herein by reference.

65. The plaintiff seeks an injunction prohibiting the TRSB from presenting the 2017-18 version of the document contained in Exhibit #1 to the voters of the TRSD until such time as the respondents have produced a default budget for review by the TRSB that contains budget information in the function/object code level required for an intelligent and meaningful review by the TRSB.

66. “The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” *ATV Watch v. N.H. Dep’t of Resources and Economic Development*, 155 N.H. 434, 437-38 (2007)(quoting *N.H. Dep’t of Env’tl. Servs. v. Mottolo*, 154 N.H. 57, 63 (2007)). An injunction may issue if the plaintiff shows that “there is an immediate danger of irreparable harm to the party seeking injunctive

relief, ... there is no adequate remedy at law ... [and the] party seeking an injunction [is] likely [to] succeed on the merits." *Id.*

67. There is an immediate danger of irreparable harm. Consideration by TRSD voters of the operating and default budgets is scheduled to begin on January 30, 2017 with the posting of the budget and warrants for deliberative session on February 9, 2017.

68. If the voters are not provided with a default budget that complies with New Hampshire law and that has been properly scrutinized by the TRSB, then the public's right to consider a legal default budget for the 2017-18 school year will be permanently lost.

69. Further, if Ms. Green, as an elected member of the TRSB is not provided with sufficient information to discharge her duties to the district she represents, her right as a school board member to be provided with, and to review, pertinent information prior to the public vote on the budget will be permanently lost.

70. Ms. Green asserts this right both as an individual board member and as the representative of the voters who elected her to her position.

71. There is no adequate remedy at law. New Hampshire law provides no specific mechanism for school board members to challenge the failure of the respondents to provide her with access to the budget information sought.

72. For reasons set forth above, the plaintiff is likely to succeed on the merits.

VI. Request For Attorney's Fees

73. It is simply absurd that a member of a local school board is required to obtain the services of an attorney for the purpose of receiving basic budget information about the school district the voters elected her, in conjunction with other board members, to manage.

74. By pursuing this litigation, Ms. Green is enforcing a public right to have the schools, which the public supports through taxes, accountably managed.

75. Accordingly, vindication of this public right confers a broad public benefit that entitles Ms. Green to an award of her attorney fees.

VII. Request For Ex Parte Relief

76. This complaint is filed as an ex parte request for relief due to the need for rapid action on the plaintiff's request for relief. As discussed more fully within, the calendar of meetings to deliberate on and vote on the school budget is compressed and will not allow for the ordinary pace of litigation if this matter is to be resolved.

77. The plaintiff does not seek an immediate order from the court prior to a hearing attended by all parties and their counsel.

78. The plaintiff has contacted counsel to the defendants, James O'Shaughnessy, Drummond Woodson, 1001 Elm Street, Suite 303, Manchester, NH, 03101. At the time of this writing, Attorney O'Shaughnessy has indicated that the defendants could be contacted through him, although he was not at this time

authorized to accept service on their behalf. The the undersigned will provide Attorney O'Shaughnessy with a copy of this pleading prior to its filing.

RESPECTFULLY SUBMITTED

Donna Green

By her attorney,

January 3, 2017

Richard J. Lehmann (Bar No. 9339)
Lehmann Law Firm, PLLC
835 Hanover Street, Suite 301
Manchester, N.H. 03104
(603) 731-5435

CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to James O'Shaughnessy, Drummond Woodson, 1001 Elm Street, Suite 303, Manchester, NH, 03101, who was contacted about this matter. Attorney O'Shaughnessy agreed to ensure that all defendants received copies of this pleading. However, as of this writing, Attorney O'Shaughnessy was not authorized to accept service on their behalf.

January 3, 2017

Richard J. Lehmann

ATTESTATION

I swear under oath that I have reviewed this complaint and that the facts alleged herein are true and that it is my opinion that these facts justify the issuance of emergency relief.

January 3, 2017

Donna Green, Plaintiff

State of New Hampshire County of _____

This instrument was acknowledged before me this 3rd day of January, 2017, by Donna Green.

_____(Signature of notarial officer) Title (and Rank)

[My commission expires_____]