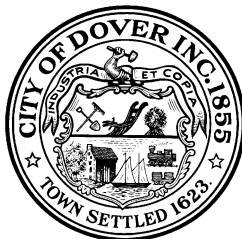


Anthony I. Blenkinsop
City Attorney
a.blenkinsop@dover.nh.gov



288 Central Avenue
Dover, New Hampshire 03820-4169

(603) 516-6520
Fax: (603) 516-6523
www.dover.nh.gov

City of Dover, New Hampshire *OFFICE OF GENERAL LEGAL COUNSEL*

CONFIDENTIAL LEGAL MEMORANDUM

DATE: December 11, 2013
TO: Dover City Council and Dover School Board
FROM: Anthony I. Blenkinsop, City Attorney
CC: J. Michael Joyal, Jr., City Manager and Antonio Fernandes, Superintendent
RE: Ratification of Multi-year tuition contracts entered into by the School Board

QUESTION:

It has been asked whether it is necessary for the Dover City Council to ratify a multi-year tuition contract entered into by the Dover School Board with another municipality pursuant to RSA 194:22.

ANSWER:

Yes, absent a non-appropriation clause¹ in the contract, pursuant to applicable provisions of the Dover City Charter and State law it is necessary for the Dover City Council to ratify the cost/financial portion of a multi-year tuition contract entered into with another municipality by the Dover School Board.²

DISCUSSION:

Background:

Pursuant to its Charter the City of Dover is a single municipal corporation, with powers for municipal and school purposes, including all the powers of a school district conferred by law. *See* Dover City Charter, Article C4-1. The New Hampshire Legislature first established Dover as a single municipal corporation in Special Session Laws 1929, ch. 329:23. As such, the Dover

¹ A Non-Appropriation Clause is a contract clause which allows a governmental entity to terminate a contract without penalty, as of the end of a fiscal year, if funds are not appropriated in the approved budget for the coming fiscal year.

² It is doubtful that inclusion of a non-appropriation clause in a tuition contract under RSA 194:22 is realistic.

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School District is part of the City of Dover; there is one entity—the City of Dover—that includes both municipal and school district functions.

Given its status as a single municipal corporation, the extent of municipal control over school district functions is governed by the City Charter and applicable state law. *See e.g. Laconia Board of Education v. City of Laconia*, 111 N.H. 389 (1971); *Board of Education of Nashua v. Vagge*, 102 N.H. 457 (1960); *Wilcox v. Burnham, et al*, 98 N.H. 64 (1953). “In New Hampshire the extent to which school finances are subject to municipal control in each city is determined by its charter.” *City of Franklin v. Hinds*, 101 N.H. 344 (1958)(citation omitted). “In any particular instance the degree of control to be exercised by either school board members or municipal officers must be ascertained by reference to statutory and charter provisions. Under no circumstance, however, will municipal officers be permitted to exercise any greater degree of control over school finance than that clearly intended by the legislature.” *Id.*

School District/School Board:

The Charter establishes a School District with all powers conferred by law and a School Board of seven elected members. *See Dover City Charter*, Article C4-1 and C4-2. While the Charter does not provide further detail on the powers of the School District and the School Board, it can be fairly inferred that the language of the City Charter means that the Dover School District and School Board have the power and authority of school districts and school boards under New Hampshire law. *See Wilcox*, 98 N.H. 64; *see also Laconia Board of Education*, 111 N.H. 389.

A school board is the governing body of a school district. *See RSA 21:47; see also Foote v. Manchester School District*, 152 N.H. 599, 603 (2004); *Ashley v. Rye School District*, 111 N.H. 54, 55 (1971); *Baker v. Hudson School District*, 110 N.H. 389, 391 (1970). Under New Hampshire law a school board is “entrusted with the hiring of teachers and the management of the prudential affairs of the district.” RSA 21:29. School boards must comply with the rules and regulations of the State Board of Education (RSA 186:5) and must provide, at district expense, elementary and secondary education to all pupils who reside in the district (RSA 189:1-a). School districts have the authority to procure land, build schoolhouses, obtain insurance, purchase vehicles, and pay debts, among other functions. *See RSA 194:3*. School districts may also enter into long-term contracts to jointly maintain a high school with an adjoining district (RSA 194:20) or may contract with another high school for it to serve as the high school maintained by the district (RSA 194:22). Furthermore, single district school administrative units, of which Dover is one, are required to provide superintendent services pursuant to RSA 194-C:4. State Board of Education Administrative Rules also set forth the substantive duties of school boards in New Hampshire including, but not limited to determining the educational goals of the district, preparing a budget, and evaluating the superintendent. *See Ed 303.01*. In short, the New Hampshire Legislature has enacted a comprehensive statutory scheme with respect to the functioning of school boards and school districts that provides these entities with broad authority over the operation of school districts and the schools within them. *See City of Manchester School Dist. v. City of Manchester*, 150 N.H. 664, 671 (2004).

As such, by establishing a school board within the City Charter, without greater description of its authority, it is reasonable to presume that the Dover School Board is vested with the general authority of school boards under State law. However, as referenced above, in a single municipal corporation such as Dover it is the City Charter that determines the extent to which the School Board, in exercising its general authority, is subject to the financial control of the City Council.

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See e.g. *Sullivan v. Flynn*, 116 N.H. 547, 548 (1976); *Laconia Board of Education v. City of Laconia*, 111 N.H. 389, 391 (1971); *Board of Education of Nashua v. Vagge*, 102 N.H. 457, 460 (1960).

City Council:

Section C3-11 of the Dover City Charter establishes the City Council as the governing body of the City and provides that the City Council “shall have all the powers and discharge all the duties conferred or imposed upon city councils, boards of mayor and alderman and selectmen of towns by law.” The City Council has ultimate control over the adoption of an annual budget and all City appropriations. See gen. Dover City Charter, Article VI. The City Council is the appropriating body for the School District budget. The School Board lacks the authority to appropriate funds and has no authority to spend in excess of the total amount appropriated for the schools by the City Council.³ Under State law, the City Council is the legislative body of the City. See RSA 21:48.

Decisions of the New Hampshire Supreme Court evaluating charter provisions similar to those in Dover make clear that the City Council is the appropriating body and the School Board is the manager and controller of the public schools within limits of the appropriation made by the City Council. See *Rochester Educ. Assoc. v. City of Rochester*, 116 N.H. 402, 405 (1976); see also *Laconia Board of Education v. City of Laconia*, 111 N.H. 389, 391 (1971) (citing to *Franklin v. Hinds*, 101 N.H. 344 (1958)). That being said, the Court in *Laconia Board of Education* recognized that a city council is obligated to appropriate money required for statutory mandated programs and services, and to meet minimum standards required by the State Board of Education. 111 N.H. 389, 392 (1971). However, optional or elective programs and services may be eliminated or reduced by reason of insufficient appropriations by a city council. *Id.* At 393.

Multi-year Tuition Contract:

Here, the School Board seeks to enter an optional multi-year tuition agreement with another municipality pursuant to RSA 194:22, which would permit that municipality to send up to 400 of its students to Dover High School per year and obligate Dover to educate these students. These are students that but for the contract Dover would not be required to educate. See RSA 189:1-a. There are annual costs associated with educating these out of District students; in fact tuition for these students is based on Dover’s annual per pupil cost. As such, in preparing an annual budget during each year of the contract it will be necessary for the School Board to seek appropriations that will be sufficient for it to fulfill its obligations under the contract. While there will be revenue associated with the contract to include in the School District budget submitted to the City Council, it is only the City Council that has the authority to appropriate money necessary to comply with this contract on an annual basis. See 16 P. Loughlin, *New Hampshire Practice, Municipal Taxation and Road Law*, § 1.05, at 1-12 (2008). Only the City Council can bind itself

³ This fact is underscored by the failure of two referenda that would have provided the Dover School Board the authority to adopt its own budget. Specifically, the State Legislature in Special Session Laws 1977, Chap. 127 authorized a referendum on the method of approval of the Dover School budget. Section 1 of this act would have created a new section of the Dover Charter empowering the school committee with the authority to prepare and adopt its own final budget to be submitted to the City Council; and the final clause of that section would have mandated that “[t]he council shall not amend or reject the final budget as amended.” The City election in November 1977 failed to adopt this amendment. A subsequent non-binding referendum in 1992 to see whether voters favored a revision to the City Charter to give the School Board “the right to raise taxes and appropriate money for school purposes without being required to obtain the review and approval of the City Council also failed to pass.

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to making appropriations under a multi-year agreement. *See Appeal of the Sanborn Regional School Board*, 133 N.H. 513 (1990).

In *Foote v. Manchester School District*, 152 N.H. 599 (2005), the New Hampshire Supreme Court examined the multi-year tuition agreement between the Town of Bedford and the City of Manchester, which had been entered into pursuant to RSA 194:22, wherein Bedford would send its students to Manchester for high school. The Court recognized that each school district consists of a legislative and governing body – the governing body is the school board and the legislative body is the school district meeting (or in the case of the City of Dover, the City Council). The Court held:

Generally, the authority to make contracts on behalf of the school district rests with the school board, as the district's governing body. The school board is thus the managing board of the school district. The authority to raise and appropriate money, on the other hand, rests with the school district meeting as the district's legislative body.

Foote, 152 N.H. at 603 (quotations and citations omitted). Under RSA 194:22 the *Foote* Court concluded this meant that “[t]he school board ‘may make a contract with a[] . . . high school . . . located in this state,’ and the district voters at a district meeting may ‘raise and appropriate money to carry the contract into effect.’” *Id.* While the Court's review was focused on Bedford as the sending district under the contract, it follows that should the receiving district (i.e. Dover) need to appropriate funds under the contract then its legislative body (i.e. the City Council) may raise and appropriate money to carry the contract into effect as well.

As such, the Dover School Board may make the multi-year tuition contract, but it is the Dover City Council that must raise and appropriate the money to carry the contract into effect.

CONCLUSION:

For the foregoing reasons, pursuant to the Dover City Charter and State law is it necessary for the Dover City Council to ratify the cost/financial portion of a multi-year tuition contract entered into with another municipality by the Dover School Board, as such a contract requires appropriations by the City Council beyond the current fiscal year.