UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

The Freedom From Religion Foundation, *et al*. Plaintiffs	*	
v.	*	Civil Action No. 07-cv-356-SM
The United States Congress, *et al*. Defendants	*	

STATE OF NEW HAMPSHIRE'S SUPPLEMENTAL MEMORANDUM OF LAW REGARDING PLAINTIFFS FIRST AMENDED COMPLAINT IN SUPPORT OF THE TO MOTION TO DISMISS

Pursuant to the stipulated joint motion approved by this court on November 14, 2008 allowing to plaintiffs to file an amended complaint, Defendant-Intervenor the State of New Hampshire (hereinafter "State") submits this supplemental memorandum of law in support of the motion to dismiss previously filed by the State, addressing only the new or clarified claims regarding violation of parental and familial rights. No additional argument regarding the added historical facts alleged is necessary, as those matters are adequately addressed by the initial pleadings.

RSA 194:15-c REQUIRING VOLUNTARY PLEDGE OPPORTUNITY IN THE STATE'S PUBLIC SCHOOLS DOES NOT VIOLATE STATE OR FEDERAL CONSITUTIONAL PARENTAL OR FAMILIAL RIGHTS

Count VIII purports to raise strictly a state law claim that RSA 194:15-c violates fundamental parental or familial rights established under the New Hampshire Constitution.[1]

[1] Although plaintiffs' complaint does not identify a specific New Hampshire Constitutional basis for the claim of fundamental parental rights, the New Hampshire Supreme Court has stated that such rights arise under Part I, Article 2 of the New Hampshire Constitution. See *In re Guardianship of Brittany S.*, 147 N.H. 489, 491 (2002).

Therefore, as argued in the State's Memorandum of Law in support of the motion to dismiss, Dkt 14-1, at page 8-9, this is a question of state law that should not be subject to the jurisdiction of this court.

However, plaintiffs' amended pleading has clarified that they are alleging that RSA 194:15-a also violates federal parental and familial rights, as well as state rights. As the New Hampshire court has stated that the federal and state parental rights are co-extensive, the State writes briefly to address both the new and clarified claim regarding parental rights. See *Id.*

The New Hampshire court has never directly addressed whether the fundamental parental rights that arise under Federal or New Hampshire law would give parents the right to object to some element of the public school curriculum. As in federal cases, the contexts in which the New Hampshire court has been solicitous of parental rights have been limited to parental termination cases and denial of a right to choose to take their children out of public schools entirely by home-schooling them. See *State v. Robert H.*, 118 N.H. 713, 715 (1978), *Appeal of Pierce*, 122 N.H. 762, 768 (1982) (concurring opinion), s*ee also Parker v. Hurley*, 514 F.3d 87, 101(1st Cir. 2008). The New Hampshire court has indicated it would look to federal law for guidance. *Brittany S.*, 147 N.H. at 491.

In addressing parents challenges to school curriculum, the federal courts have held that, although the fundamental rights of parents mean that the government cannot deprive parents of the right to send their children to private schools or their equivalent, this does not give parents the right to object to every practice that may offend someone's religious scruples.

> "Students not only read books that question or conflict with their tenets but also write essays about them and take tests-questions for which their teachers prescribe right answers, which the students must give if they are to receive their degrees. The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain

> of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom. . . . Government nonetheless retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. Ed. 1070 (1925), and select private education at their own expense."

Sherman v. Community Consol. School Dist., 980 F.2d 437, 444-45 (7th Cir. 1992).

The First Circuit in *Parker* recently addressed very similar issues. The parents in *Parker* argued that the school district's curriculum, which included reading from books that encouraged respect for gay lifestyles, violated their religious free exercise rights and parental right to raise their children as they wished. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). The *Parker* Court pointed out that, in this context, parental rights and the free exercise of religion overlap and inform each other, and therefore must sensibly be considered together. *Id.* at 99. Here, as argued extensively in the State and other defendant/intervenors' motions to dismiss, there is no valid free exercise claim, as the Pledge is not inherently religious. Therefore the assertion of a violation of parental and familial rights adds nothing and must be dismissed.

The *Parker* Court noted that the right of parents to direct the religious upbringing of their children is distinct from (although related to) any right their children may have regarding their curriculum. *Id.* at 103, citing *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16-18 (2004). However, as in the cases cited by the *Parker C*ourt, the plaintiffs herein fail to identify any way in which the state statute requiring recitation of the Pledge prevents them from meeting their religious obligations to instruct their children in accordance with their own beliefs. Plaintiffs freely admitted and stipulate that none of them have been compelled to recite any words they find objectionable. First Amended Complaint, Dkt 51, Paragraph 55, page 12. Simply being present while others read from books or engage in statements, as the *Parker* Court found, is insufficient to

have forced the plaintiffs, either as parents or children, to violate their beliefs. *Parker*, 514 F.3d at 105.

As in *Parker*, the plaintiffs herein, at bottom, claim that by being exposed to others reciting the Pledge, their children are being indoctrinated in a belief to which they object. However, the *Parker* Court specifically found that the Supreme Court has never utilized an "indoctrination" test under the Free Exercise Clause, much less in a public school case. The *Parker* Court cited with approval *Newdow*, 542 U.S. at 16, in which the child was subject to a similar daily practice of being led in the Pledge of Allegiance, for the proposition that "[A] parent whose child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials", and that therefore the parent's rights are not impaired. *Parker*, 514 F.3d. at 106.

WHEREFORE, for the reasons stated herein and as previously stated in the State's Motion to Dismiss and Memorandum of Law in support thereof (Dkt. 14) and Reply Memorandum (Dkt 41), the State respectfully submits that the Plaintiffs complaint should be dismissed.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

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Certification

December 4, 2008

I hereby certify that a copy of the foregoing document was filed electronically and served electronically by operation of the Court's electronic filing system to all counsel of record.

/s/ Nancy J. Smith
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