

**CHARTER COMMISSION
LEGAL ISSUES REGARDING EDUCATION**

January 16, 2013

6:00 p.m.

Chairman Duval called the meeting to order.

Chairman Duval called for the pledge of allegiance, this function being led by Dominic Girard.

The Clerk called the roll.

Present: Commissioners Duval, Girard, Martin, Lopez, Clayton, Ashooh

Absent: Commissioners D'Allesandro, Pappas, Infantine

Chairman Duval addressed item 3 of the agenda:

3. Minutes from meeting January 2, 2013.

(Note: Previously distributed to the board via email for review)

*On motion of **Commissioner Lopez**, duly seconded by **Commissioner Ashooh**, it was voted that the minutes be accepted.*

Chairman Duval addressed item 4 of the agenda:

4. Discussion regarding education legal issues.

Chairman Duval stated tonight we are pleased to have our legal counsel, Attorney Rick Lehmann with us. Attorney Lehmann was asked to join us tonight to give us at least some preliminary opinion and maybe some direction relative to the issues that came up as a result of last week's work session with educators. We will welcome Attorney Lehmann on his first opportunity to meet with the commission. I'll begin the process by opening it up for question from commissioners. Attorney Lehmann, good evening. Thank you for joining us tonight during this inclement weather.

Attorney Rick Lehmann, Charter Commission Legal Counsel, stated good evening.

Chairman Duval stated I know a number of questions were posed by commissioners, specifically Commissioner Girard had several that he forwarded to Attorney Lehmann. If you want to open it up to discussion you are more than welcome to.

Commissioner Girard stated thank you, Mr. Chairman. Mr. Lehmann, I don't know if you want me to ask the question.

Attorney Lehmann responded I think it is probably easier if you just go ahead and ask me the question.

Chairman Duval stated I just want to make sure you did get them. We were on the same page.

Attorney Lehmann stated I got an email with a series of questions on. I had a chance to look into it to some extent. Some of the questions I didn't fully understand and some of them I wasn't able to get complete answers to. Subsumed within some of the questions are some things that are obviously going to be big issues.

Chairman Duval stated I agree. Just a note for fellow commissioners, the idea tonight was to preliminarily have this dialogue with Attorney Lehmann. Of course, Attorney Lehmann will be conducting his further due diligence based upon this discussion tonight and ongoing discussion that may follow questions we may have of him in the coming weeks.

Attorney Lehmann stated let me just start by saying that I didn't want to run off and do a huge amount of research without really having some questions to focus on.

Chairman Duval stated this is just initial dialogue and I thought the idea was, and per my exchange with Attorney Lehmann, just for the sake of commissioners' knowledge and better understanding, just to allow him some opportunity before we get to the point of taking any formal action down the road on any of these matters pertaining to education related topics. This will start things off and allow him some time to get some additional work done.

Commissioner Lopez stated just for the record, I think your email indicated that Tom Clark could not be here.

Chairman Duval stated he cannot attend tonight, right.

Commissioner Lopez asked how about Mr. Sanders?

Chairman Duval replied he could not attend either.

Commissioner Girard stated Attorney Lehmann, I know a question that many of the commissioners have, so I think it is probably the best place to start, has to do with whether or not the charter generally and the tax cap specifically applies to the School District. The School District attorney seems to have a different point of view than the city solicitor. My specific question is, when it comes to matters of the Manchester charter does the School Board's attorney have standing to offer opinions on what the charter calls for or does the opinion of the city solicitor generally govern the actions of the City departments and the School District?

Attorney Lehmann replied I guess the question is going to be determined by the answer to the question whether the School Board attorney has standing to issue an opinion to whom? The specific question is what authority does he have to have an opinion.

Commissioner Girard stated let me clarify the question. The School Board and the School District has gotten an opinion from their attorney regarding whether or not the School District is in fact bound by the tax cap to present a budget that conforms to the tax cap. The city solicitor of Manchester has said that they must comply. Their attorney has said that they do not have to comply. Where you have competing legal opinions over the application of the Manchester city charter, is there a superior authority that is the final say on how the process moves forward?

Attorney Lehmann replied to some extent I think the city solicitor's opinion is probably of greater importance to the Board of Mayor and Aldermen. That said, when two people have competing legal interpretations of what the law is and what the law governs, typically those are resolved by agreement or by a judge. My quick read of the School Board's attorney's letter did didn't suggest to me that the lawyer is not saying that the School Board, by the tax cap, to the extent that it can't be raise or they can't go over the

cap without two-thirds vote, but rather the process by which you get to that is concerned with whether first, if the School Board presents its budget subject to its growth cap and the general City budget is also subject to the cap and as an aggregate they stay within the cap.

Commissioner Girard stated having read the School District attorney's opinion, I would agree with your assessment. He says you can ask for whatever you want, but ultimately the City budget has to be subject to the cap. However, that is in conflict with City Solicitor Clark's ruling that the budget they request from the aldermen must, at its inception, conform to the cap. The question becomes, what is the legal authority of the School Board? I think you can take the specifics out of it. I think you can take the specific issue out of it where you have... I'm assuming, is there any reason to believe that the Manchester School District is not subject to the charter of the City of Manchester?

Attorney Lehmann replied it is subject to the charter and it is subject to the State education laws, simultaneously.

Commissioner Girard stated understood. If there is no reason to believe that it is not subject to the City charter, is there any reason to believe that the rulings of the city solicitor, when it comes to matters of the charter as they apply to the School District are not the governing rulings?

Attorney Lehmann replied I would think that they would be the primary place to look for guidance.

Commissioner Girard stated so absent a lawsuit that the School District might file against the City over different interpretations, the decision of the city solicitor stands. That is how it works in the City of Manchester.

Attorney Lehmann responded speaking as someone who advises bodies like yourselves, I don't think that I, as the lawyer, make rulings. I can give you advice as to what I think your legal obligations are and I think that the city solicitor's advice to members of City government about what their legal obligations are, if I were a member of the City government or advising an individual member of the City government, my advice would be that you should listen to your city solicitor. That is your primary source of legal information. People who get elected aren't required to follow the advice of lawyers; they can do what they want. To some extent they do it at their own peril.

Commissioner Girard stated there were several other commissioners who had questions on this topic. Before I move on, if there are more questions, I'm happy to yield the floor, Mr. Chairman.

Commissioner Ashooh stated Attorney Lehmann, if we can reduce this down to its very basic premise, the City government, municipal government, is bound by the tax cap. They are the sole funders of the School Board so they really can't proceed any further with what the tax cap allows unless they are willing override it. Is that correct?

Attorney Lehmann replied yes. You can't spend more than the tax cap allows without an override vote.

Commissioner Ashooh stated to that extent it doesn't make any difference what the School Board submits because the City is bound by the tax cap, unless they choose to override it with a ten vote plurality.

Attorney Lehmann stated I believe that's correct.

Chairman Duval stated so the bill for services for education they submit to the Board of Mayor and Aldermen is bound by the tax cap. That is the bottom line. It is a practical matter.

Attorney Lehmann stated when it is combined with the general services portion of the City budget together, they have to be under the cap; I agree. Reading that provision, 6.15 of the current charter, it is not entirely clear to me whether they are each individually bound by the cap or whether as an aggregate they are. I think you could probably make a case either way. As the people being asked to revise the charter that might be one of the things that you want to clarify so you don't get into this.

Chairman Duval stated this notion of getting a third opinion so to speak from you, ultimately is a moot point because as you say, even if you have three sides that disagree, it would ultimately have to be decided before a judge more than likely.

Attorney Lehmann stated the Board of Mayor and Aldermen are entrusted by the voters of this city to make decisions. They always should seek the advice and take the advice of whoever offers an informed opinion and hopefully the lawyers involved in the case can offer them an informed opinion, but at the end of the day, you need to answer to the voters on the decision. At the same time they have to come up with a total spending number that doesn't exceed the cap unless there is an override vote.

Commissioner Martin stated just to clarify, were you noting in Attorney Teague's opinion, you noted paragraph 6.15 A (3). Is that the paragraph in the charter that you were referring to?

Attorney Lehmann replied that is what I was referring to.

Commissioner Martin stated thank you. I just wanted to make note of that as we move forward. It is not a bad idea to take a look at that.

Chairman Duval stated just briefly, could you give a quick summary of what that is. What are we speaking of specifically. What does that relate to?

Attorney Lehmann stated I don't actually have that in front of me.

Commissioner Martin stated I don't have that portion of the charter at hand. I would have to look it up.

Commissioner Lopez stated it is 6.15 A (3) that you are referring to: "In submitting their proposed budgets to the board of aldermen, the mayor and school district shall not propose total expenditures excluding amounts payable in connection with municipal bond" and so on down the line. If I may, Mr. Chairman, I agree with you about the process. I agree to what Attorney Lehmann is saying about the process, but if you go to 6.03 of the city charter, that sets the process. The mayor sets the process on the budget in submitting it for the School District and the departments. To me, there is nothing wrong. They have to comply with the tax cap and submitting their budget according to 6.03. The other problem that comes up is whether or not they can submit another budget, which they did last year. I can tell you that the aldermen probably appreciate that because I can tell you that if you do the process as you indicated and as the other attorney, John Teague, indicated the School Board can send a budget over to the Board of Mayor and Aldermen, they would look at it, send it back, take another two or three weeks and comply with the tax cap and we'll see what the tax cap looks like. The think the short end of the stick is that the process is excelled by the mayor indicating by 6.03 and 6.15 that the tax cap is what he wants in the budget. It doesn't mean that as a body they can't submit another one like they are going to. I'm comfortable in the ruling of the city solicitor on the city charter because he has the final say. As far as challenging, the Board

of Mayor and Aldermen could challenge the city solicitor and get a third opinion if they want to pay for it is some other citizen wanted to do that, they could do that too. I think that the charter would be upheld under the city solicitor's ruling, in my opinion. Do you agree with that?

Attorney Lehmann replied the charter is going to be upheld. The question is whether the interpretation that each, and I know there is the whole controversy of the school being a department, but whether the school is a department of the City has to submit its budget as if the cap applied to it or if the school could grow 15% and tell the rest of the City that they are going to have to cut to make up the difference so it doesn't go over the tax cap. I assume that at the end of the day that is the underlying concern. When the school presents its budget it would be higher than it would be as a proportion of the cap that applied in the last budget. Am I correct that that is the source of the conflict?

Commissioner Lopez stated I'm just looking at who has the authority to do what. This argument has been going around for so long, whether it should be a department. I think every year I was an alderman it was brought up. The documentation that was given in 2008 by the city solicitor and finance officer and the documentation that I had looked up and set to the other commissioners, the board of aldermen will continue to appropriate to the school department, School District, it doesn't make a difference. They can't change line items. They give them a bottom line. The school department hires the superintendent and hires teachers or terminates them. The aldermen have nothing to do with that. That is by State law. I'm sure you are all well aware of it. This has been around and around so many times I think it is just going to come back to home base.

Commissioner Girard stated if we had exhausted this topic, I'm ready to move on to my next question. Along that line, good segue Commissioner Lopez, as you know I posed many questions about the district potentially becoming a department. Is there anything,

Attorney Lehmann, in State law that would prevent the Manchester School District from once again being a department of the City of Manchester?

Attorney Lehmann replied I think the thing that prevents that is the thing that the Supreme Court relied on when it made its decision. I think it was the last time you had a Charter Commission and you tried to pull the School District into a City department and the Supreme Court said you can't do that because 49:B and 49:C define what a city government looks like and merging an existing school district with the city is not authorized by the statute that allows the City to change its form of government. That is what the Supreme Court decided when they took it up a while ago. I'm not aware of things have changed, but perhaps they have. I would be glad to look.

Commissioner Girard stated I was going to ask you about that and unfortunately Commissioner Infantine who is a State rep isn't with us tonight, but if I recall correctly, I think he said that back in 2003 or 2004, as a representative he actually proposed and got passed legislation that cleared that legal block that disqualified the amendment that the voters of Manchester passed in 2001 that would have allowed for that. Is that something that you could look into?

Attorney Lehmann replied absolutely. That is something that is easy to find out. Was it 2003, 2004?

Commissioner Girard replied it was shortly after it went down in defeat, but I'm sure Commissioner Infantine would know when it was.

Commissioner Lopez asked what was the question?

Commissioner Girard replied the question was whether or not there was anything in State law that prevented the Charter Commission from recreating the district as a department. I know what the Supreme Court said, but again, I'm recalling something that Commissioner Infantine said, legislation he had passed to remove that legal obstacle. I don't know if we can move on to the next question...

Commissioner Lopez stated we were told that the bill did pass up at the State, that they could make the School District a department under certain conditions such as HR and IT mixing with our HR and IT. There is a law on the books. It will save you some time; all you have to do is see Tom Clark. I'm sure he has it. I thought I had it here, but I don't. Again, it doesn't take away those other things of the School District getting the bottom line.

Commissioner Girard stated I am actually going to ask about that. Assuming the legal obstacle that the Supreme Court cited back in 2001 or 2002 has been cleared and the School District is made a department, what authority, if any, would the Board of Mayor and Aldermen have to dictate line item expenditures within the operating budgets of the schools?

Attorney Lehmann replied I'm going to have to pass on that and research that further. I don't know the detail. Unlike a lot of City departments... Not a lot of City departments have their own statutes, but there is a pretty thorough statutory scheme on how schools have to operate so it would be a matter of finding out how the general powers that cities have, that the Board of Mayor and Aldermen have, to oversee the operations of City departments. It intersects with these special rules governing the way schools operate. It is slightly more complicated and I'm not comfortable giving an opinion tonight.

Commissioner Girard stated but we need to raise the question. Just as a little background, before the district sued for separation and created the current paradigm, the way it used to work was that the schools had a lump sum appropriated for just their general fund operating budget and the City didn't have line item authority. We gave them a number and it was entirely up to them to allocate the number. Even during times when the Board of Mayor and Aldermen sent out what were called do not spend directives, at the time the School District was immune from those directives because of the State law governing their budget. What we also used to be able to do... Right now they get this great big pot of money, which in some ways, frankly, is deceiving about the money they have to spend on so called education and I think it presents a PR problem for them, but back in the day, if I can use that term, we used to put the money for the school nurses in the Health Department, we used to put the money for snow plowing and playground maintenance with the parks department. We had an entire department just for building maintenance of the schools and other things like that. We still accounted for all the expenditures on the State forms. The City departments still worked with the schools to determine how many nurses, how many resources officers, what capital projects were going to be done to repair the building, but we put it in the department line item and didn't have any of these chargebacks or anything else.

Attorney Lehmann stated it was more of a functional budgeting rather than a jurisdictional budget.

Commissioner Girard stated right because right now we put all that money in a great big budget and then the departments that provide the service send an invoice to the schools that send the money back to the City. It is kind of a convoluted thing. If that helps you in your legal research that is how it used to be and I don't know what may have changed.

Attorney Lehmann stated it is entirely possible that either of those are possible and it is a matter of choice for you.

Commissioner Martin stated the House Bill that changed things so to speak is HB778.

Attorney Lehmann asked do you have a year for that?

Commissioner Martin replied I believe it is 2004, but it could be 2003. I'm looking at a memo from my own archives from the School District that went to some aldermen and that is dated August 2004 so it is possible that it could be 2003.

Commissioner Girard stated Attorney Lehmann, we have had people come testify before this body, suggesting that we vest the School Board and School District with budget and taxing authority. Is that possible for us to do and what steps would we have to go through for that to happen if we so chose to do that? I guess could we do it and if we could what are the steps?

Attorney Lehmann replied I don't know if you could do that. I know there are school districts in the state that have that authority, but I believe they are created by statute. I don't know that they are created by ordinance or anything that is in your power. I don't think that you have the authority to create a body with the power to tax. I think that would have to come out of Concord.

Commissioner Girard asked so that does not lie within the realm of this commission?

Attorney Lehmann replied I don't believe so, but I am not comfortable giving you a real firm handshake on that on, but my initial impression is that you can't create a taxing authority without specific statutory authority.

Commissioner Girard stated there is a lot of discussion over what role, if any, the mayor of Manchester should continue to have on the School Board. I think the mayor has always been chairman of the School Board.

Commissioner Ashooh stated on the previous point, on the ability to create tax authority, all tax authority comes from the State. It has been tried several times in the past to allow for the City of Manchester to collect an additional tax on the meals and rooms because we generate so much of it and it has been denied because all of that taxing authority has to come from the State by statute. I have always believed that we don't have the authority to create a taxing body. Our delegation may lobby for it at the State, but we can't do it.

Chairman Duval stated I think there are other districts in the state that do have that authority that are autonomous in every way. Concord comes to mind, if I am not mistaken.

Attorney Lehmann stated Concord I know is established by statute specifically and that it has that authority. Concord is an outlier; Concord is different.

Commissioner Girard stated let's just assume that legislation passed and created a paradigm where Manchester could do that. I have also been told, Committeeman Beaudry here the other night said that their lawyer, even though they haven't written it out, said that they don't believe they are subject to the charter of Manchester and because they are an independent School District they should have their own charter. Do you see any possible way where the School District of Manchester is not subject to the charter and if we were to create it, State legislation passes and they can become a taxing district, would they have to have their own charter established as a district with that authority or would they still be subject to the Manchester city charter?

Attorney Lehmann replied it would depend what the State legislation said. The State legislation could require them to adopt a charter or the State legislation could say that they are up and running without one.

Commissioner Girard stated because the Concord School District has some charter, am I correct?

Attorney Lehmann replied I believe it does.

Commissioner Girard stated I think I spoke with Chuck Douglas who served on the charter commission and might know something about that. I'm a little fuzzy on the details.

Attorney Lehmann stated I believe it does, but again, because Concord has special legislation it is its own special case. Whether or not a charter would be required and whether the school district as an independent taxing authority that might be created might be subject to a charter or might be subject to the City of Manchester charter or independent of it would depend on the authorizing legislation.

Commissioner Girard stated as I started to say before, the position of mayor has been the subject of conversation and what, if any, role it should have. My question is pretty specific: is it possible to vest the mayor of the City of Manchester as chairman of the School Board with the powers of the presiding officer? In other words, he would have a veto and not a vote. Is that something that is allowable under State law?

Attorney Lehmann replied partly that may be determined by what HB778 says. It is something that could be done. There is no reason they couldn't do that for you in Concord if you could get that through. Under the current law, my understanding of the

way it works currently, the mayor is an ex-officio chairman, but is a non-voting, non-vetoing...

Commissioner Girard interjected the mayor, by charter, is the chairman. He is ex-officio, but he gets to choose whether or not he wants to exercise the role of chair. He has a vote, but no veto.

Attorney Lehmann asked he does have a vote?

Commissioner Girard stated he does have a vote, but no veto.

Attorney Lehmann stated the interesting thing about that is there is a whole statutory section in the 600s section of election laws that govern how school boards are chosen. I don't believe that that actually discusses the mayor having a vote on the board. The historical perspective in Manchester may predate all this and I'm sure someone has looked at it in the past. There is nothing that would preclude you from creating a situation in which a mayor can... If that is what you are talking about, getting laws passed up in Concord, I can't think of anything that would prevent you or the folks up in Concord from creating a situation that gives the mayor a veto on the School Board.

Commissioner Girard asked are you saying that we would need to have legislation like that passed or are you saying you would have to look into it know?

Attorney Lehmann replied I would have to look into it to know for sure.

Commissioner Girard stated along that line, there are some who are concerned that the mayor, being chairman of the School Board, creates a conflict of interest with the overall budget process because he serves on both boards. I don't agree with that, but would it be possible to create a situation where for purposes of developing the budget the vice

chairman of the School Board would have the authority of chairman of the School Board for the purposes of developing and proposing a budget so that the mayor, who has to oversee the entire process, would not have that conflict of interest?

Attorney Lehmann replied I haven't seen a statute that allows a city to create that dynamic. There is nothing that I can think of that would prevent from authorizing it. I don't see it in the existing statute or charter.

Commissioner Girard stated New Hampshire is the kind of state that in the absence of an enabling statute, the answer is no until or unless it is enabled.

Attorney Lehmann stated you can only do those very limited things.

Commissioner Girard stated we are not a home rule state. Along that line, could this Charter Commission, as a way of trying to mitigate what people see as potential conflicts, assuming we couldn't do as I just asked, could this commission, by charter, establish a standing subcommittee of the School Board specifically for budgets and empower that subcommittee to work with the administration to develop and propose the School Board budget to the School Board itself for consideration as a way of creating a process for some who believe the mayor has a conflict in would be removed from?

Attorney Lehmann responded I would say that without a statutory change or legislative change, probably not.

Commissioner Girard asked could the charter establish, generally speaking, for the aldermen or the School Board standing committees that have certain authorities and powers?

Attorney Lehmann replied it depends on what the authorities and powers are. Certainly, you could place the aldermen in the School Board for the purposes of suggesting, recommending, monitoring.

Commissioner Girard stated I don't want the aldermen on the School Board.

Attorney Lehmann stated but you are talking about a subcommittee operating in the school environment. I don't know that you could empower them. The laws authorizing school districts create the powers of the school districts. I don't think that this commission could take them away by putting road blocks or dissenting opinions or otherwise empower people. Being an advisory role or a communicative role or a monitoring and coming back, then I think you could probably do those types of things.

Commissioner Girard stated let me clarify, and maybe I shouldn't have mentioned the aldermen and the School Board in the same sentence. Forget I mentioned aldermen. As a way of developing a process at the School Board to try to address some of the issues that people believe present a conflict of interest, could we create a standing subcommittee of the School Board that has authority over the budget development process of the School District rather than the way it runs now, which is, generally speaking, the entire School Board is involved with the mayor as the chairman, if he chooses to exercise that role of chairman, he is still going to be the budget officer of the City of Manchester, but could we say there is a budget committee and the purpose of the budget committee is to work with the administration to develop the School District budget for approval by the School Board and then approval by the School Board over to the Board of Aldermen for their official request. Could they do that?

Attorney Lehmann asked the question is whether the charter can create a subcommittee of members of the School Board?

Commissioner Girard replied yes, for a specific purpose.

Attorney Lehmann stated I guess my impulse is to say no, but again, that is not an informed opinion. My sense is, to the extent that the School board is an independent agent, attempts by the drafters of the City charter to interfere with the School Board are going to be potentially problematic. It doesn't mean it is out of the question.

Commissioner Girard stated I'm just trying to think of ways where, if the conflict of interest of issue presents itself, we have some mechanism to address it other than making a determination that the mayor stays on the School Board and people who have this problem as a conflict of interest continue to nitpick at it or we remove the mayor from the School Board or somehow diminish his role, which is going to create another whole set of issues for us.

Attorney Lehmann stated it may be that the thing to do is more specifically define what constitutes a conflict of interest within the City government.

Commissioner Lopez stated I would like to pick up on this a little bit. Have you reviewed our charter?

Attorney Lehmann replied I have. I'm hoping not to be quizzed on it.

Commissioner Lopez stated when the charter put this process together about separation of authority, if you go to section 4.01 on the School District and the three paragraphs pertaining to the School District, I think that will answer your question. To answer Commissioner Girard's question, the School Board in their authority can appoint their own finance committee, or budget committee, which they have in the past. The chairman of that committee presented a budget to the Board of Mayor and Aldermen. They have all the power in the world to do that. Under the current system they voted to have a

committee as a whole, like the board of Mayor and Aldermen, so each authority can do what they want, depending on what they want. In the paragraphs of section six in presenting budgets, section 6.15 spells out the aspects of who has the authority to set the budgets. In the interest of another question, we were told that in order to change the tax laws of the State, first you must put a referendum question on the ballot and the people must determine whether or not they want to give taxing authority to the School District before you even go to the State and try to change State law. Do you know anything about that?

Attorney Lehmann replied I don't, but I can find out.

Commissioner Lopez stated the conversation with our city attorney could solve a lot of these particular problems because they are very complicated, even though they sound simple, just like the tax cap itself in the City of Manchester. I'll leave it at that.

Commissioner Ashooh stated this is more of an observation than anything else. It seems the question of the mayor's role with the School Board seems to arise at times when we have mayors who are more involved with the School Board operations than less involved or when there is a conflict of opinion. I'll cite three examples. The first one is Mayor Shaw who was going to be the mayor of everything and obviously didn't get along real well with the School Board; Mayor Baines who was very much in tune with the School Board so we had 6% raises in the budget every year to support what ultimately ended up to be a \$100 million ten vote passage of a bond to redo all the schools; and Mayor Gatsas who comes at this as much more of the budget hawk and therefore there is a question of authority and everything else. We can come up with hypothetical situations of if this mayor does this, if this mayor does that we should just remove him when there is silence, when the School Board has a mayor that they like and there is no silence when they have a mayor who is a little too aggressive for their terms. Bottom line is that we can come up with all kinds of scenarios, but unless we hear that there is a real reason to get the mayor

out of it over the broad scale and not just because one mayor is more aggressive than the other, or one mayor brings more to the table for the School Board I think it is a non-issue, for me. I think we really are talking about funding for the school department and that still comes back, whether it is a department or a district, to the bottom line that we have taxpayers in the City of Manchester who have to foot the bill. The tax cap has given them some comfort in that the bill that what they are going to pay is only going to be increased if there is a political will on the board to say there are ten votes to say it is necessary to do this. I have no problem with that. Rather than going to the hypothetical, unless we hear, and there is a public hearing next week, strongly that there is a real reason and that reason doesn't come to the Charter Commission it goes through the Board of Mayor and Aldermen to give them the political will to get ten votes to increase the budget. Other than that I think we probably need to move along on this and say let's hear more about what people have to say. No one can make an argument to me that the political will exists to change the system I'm not in favor of it.

Commissioner Girard stated Attorney Lehmann, we have also heard from people who think that this commission should change the timeline for the adoption of a School District budget. Is it possible for the City of Manchester to operate with two different timelines, one for the School District and one for the rest of the City? Is there something in State statute that says you have a budget process that everyone goes through? In other words, can you have a bifurcated process?

Attorney Lehmann replied I think you probably could, but I think a bifurcated process, and to some extent you do now, but a bifurcated process makes dealing with the tax cap extremely troublesome. You have two balls moving at the same time and each relies on the other in the scope of what it is authorized to do.

Commissioner Girard stated some have suggested that March 31st should be the deadline for the adoption of the school budget. If we did that and something changed dramatically at the State level and revenues to the City for the coming budget year were dramatically affected then it would fall on the rest of the City government to absorb that or force the aldermen's hand on a tax cap question because the school budget would have already been decided. Is that what you are saying?

Attorney Lehmann replied exactly.

Commissioner Girard stated conversely, if a windfall came and the budget is decided for the schools that had it done by March 31st, they could have potentially missed out on a windfall.

Attorney Lehmann stated that's right, but to some extent you can carry over to future years.

Commissioner Girard stated the last question I have and I ask it only reluctantly because it has been brought to my attention and I would simply like to have the air cleared. As you know Commissioner Martin is an employee of the School District. Is there any conflict of interest that you know of legally that would interfere with her ability to cast a vote or otherwise participate in discussions having to do with the School District at all?

Attorney Lehmann replied I'm not aware of any State law that would prohibit participation. I haven't reviewed the City ethics provisions closely, but it is hard for me to imagine where the conflict would arise.

Commissioner Girard stated I personally don't think there is one, but I have had it brought to my attention and I would rather ask it and have it answered than to have people keep tripping about it to whatever end.

Attorney Lehmann stated I don't see it, honestly.

Commissioner Martin stated in regards to, and this might not be the right time for us to discuss or debate issues because we are paying for Attorney Lehmann and we want to make sure we are maximizing the use of his time, but it should be noted that there are many communities in the State of New Hampshire that resolve their town budgets and their school district budgets at the same time with deadlines of April 1st or March 31st. If they can do it I'm not sure why we can't if it is determined that it is in the best interest of the functioning of this City. That was a point that I wanted to make. Thank you, Mr. Chairman.

Chairman Duval stated point well made and a good one at that.

Commissioner Lopez stated I guess the question I want to pose is this: Commissioner Infantine brought up a very good point, but I don't; think it can be done. We were elected under 49:B (4) and then under 49:B (5) we have to put the whole thing on the ballot and explain it and it is voted as one. You probably heard about this already. Can you divide it? He believes that 49:B (5) and I'm not speaking for him, and 49:B (6), submission to the voters... The simple things we can agree on, the mayor's salary for an example. Everyone believes, at least I think everyone believes... Something simple, that is more administrative.

Chairman Duval stated housekeeping measures.

Commissioner Lopez stated whatever we want to call them, but these five or six administrative measures we totally agree on and then there are the tough ones. I can't see anything where you can divide it, but I thought it was an interesting idea.

Attorney Lehmann stated that question is so central to what you are doing here that I don't want to offer any opinion at all without having a chance to look at it. It goes to the very heart of everything you are doing here. It is an interesting concept. I guess my assumption had always been that it had to go on the ballot as a single item, but that is just an assumption and it is a uniformed assumption, but I would be more than happy to give you a more complete answer.

Commissioner Lopez stated we don't want to spend hours on it. We will go to the secretary of state.

Attorney Lehmann stated this sounds like a 15 or 20 minute question.

Chairman Duval stated the preliminary response we got through Representative Infantine who did ask the Secretary of State's Office and they said it had to be taken as a whole.

Commissioner Girard stated my last question really isn't a school question. Do you want to save it for another time?

Chairman Duval replied let's save it. Let's have him focus on this right now.

Commissioner Martin asked procedurally, what should we expect going forward? We have asked several questions of Attorney Lehmann tonight. Will there be a follow up? Will we receive something in writing?

Chairman Duval asked Attorney Lehmann, what is your suggestion and do you have a prescribed timeline that you might have for us? We tackled the elephant in the room and it was done by design so we are giving you some lead time. What do you think?

Attorney Lehmann replied well I guess what I would propose to do... Hopefully I will get a transcript from Maura. How long do you think we are looking at?

Clerk Leahy replied it has been a fairly quick meeting so I should be able to do it quickly.

Attorney Lehmann stated I will get the transcript from her and what I propose to do is email you the questions that I understand that I am being asked to answer. I'll try and frame those questions in ways that are both answerable and that I think encapsulate the heart of what you are asking.

Chairman Duval asked would you like commissioners to qualify those before you proceed to make sure we are on target?

Attorney Lehmann replied right and then you can circulate them and people can say no, that is not really what I am interested in, this is what I really meant. You don't want me to spend your time answering the wrong question.

Commissioner Girard stated I would ask you to, for example, I was asking about the role of the mayor and trying to figure out ways to potentially handle what some perceive the conflict of interest and you said define conflict of interest. As you are reading through the transcript, if you see what the issues are and maybe we are not asking the right question, we are dancing all around the head, but you understand the issue from a legal point of view and how we would approach it then I personally am happy to have

those answers because sometimes we know we need to ask something we are just not sure what.

Chairman Duval stated if commissioners have any objection to this, please voice your objection. It is striking that Concord is the outlier so to speak, an autonomous school district body. Seeing that you may cross paths with Attorney Douglas from time to time and I heard someone mention that he was on the charter commission for Concord when that was changed, could we have some kind of historical perspective or summary with respect to Concord's change?

Attorney Lehmann replied I think I can give it to you now. I think that Concord is a historical accident dating back 60 or 70 years. I'll find out why or how it came to be, but it is old. It is my understanding that it is something that has been around forever so it is just one of those historical things that carries on and no one really knows why.

Chairman Duval asked was there a move in recent years to change it to something other than to try to dismantle that?

Attorney Lehmann replied well there is a lot of discussion about it on the Concord city charter commission. That was the big question, whether to ask the legislature to change the statute authorizing the district...

Chairman Duval interjected it failed?

Attorney Lehmann replied I don't believe they did it.

Chairman Duval asked you mean the commission didn't take action on it ultimately? There was discussion and they didn't take action on it.

Attorney Lehmann stated right.

Chairman Duval stated interesting; it has been around for decades.

Commissioner Lopez stated thank you, Mr. Chairman. I want to be sure of something here. I don't want to waste your time and our time. Besides 49:B which was already answered, I'm not sure if we asked you any questions. Do we have a question that he is supposed to research?

Chairman Duval replied yes, there were several

Attorney Lehmann stated there was the questions related to the legal authority of the School Board itself; the interpretation of 6.15 because I do think that language is subject to a lot of interpretation; whether there is any authority dictating whether the School Board is independently subject to its tax cap growth or if it only falls within the greater City budget which as a whole is the one thing subject to the tax cap; there is the question about what Commissioner Infantine's bill says and what it means to become a district.

Chairman Duval stated does it clear the way.

Attorney Lehmann stated whether it essentially clears the ways, whether there is some way to give the mayor a veto rather than simply having him be an individual voting member of the School Board, whether a referendum would be required before going to the legislature to ask them to create a taxing district within the city; whether you can divide the question, although you guys seems to think the answer to that is no, you cannot. I don't know if there is a dissenting vote on that. And whether the mayor has a conflict of interest; and whether that activity should be characterized as a conflict of interest when he participates in both the establishment in the School Board and the broader City budget.

Commissioner Lopez asked can I ask you, sir, when you render these opinions, that you quote State law?

Attorney Lehmann replied of course. Let me say that I don't think anybody cares what my personal opinion is, nor should you.

Commissioner Lopez stated I think most of these questions have been answered previously.

Chairman Duval stated we have one at large committee member here tonight. I just want to recognize School Committee Member Kathy Staub who took the time to be with us tonight for this work session. She was here last week as I noted as well. Briefly, Committee Member Staub, did anything tonight ring a bell for you that you might want to ask seeing as we are in this work session mode with regard to education? You took the time to come out tonight so was there anything that rang a bell that you might want to pose to the commission that might go to Attorney Lehmann? I didn't mean to put you on the spot, by the way, but I appreciate you being in attendance.

School Committee Member Staub responded originally I had given them the administrative rules regarding how School Board members are supposed to proceed. We are supposed to develop a budget that meets State standards and legally follow federal law. We are conflicted because the City charter directly says that the School District needs to present a budget under the charter number and we also have the RSAs from the State plus the administrative rules that say that we need to present a budget that meets the needs of the students that provides an adequate education and then follows State and federal law. That is the conflict that we are dealing with because we are being pulled by two masters. I think we are looking for some clarification on that. I was also looking at the legislation that started its life as Senate Bill 2, I'm sorry I don't have the RSA, that

was passed in 2011 that allowed towns to have tax caps. I am not an attorney, but I tried to read through it and see if this supersedes other State law regarding the administrative rules and the RSAs regarding education. We would just like to have that cleared up. Also there is this whole conflict, if we are not permitted under the charter, there is a provision for an override vote, but we are not permitted, the mayor has told us that we are forbidden to even consider presenting a budget over the tax cap so we are not even allowed to make the case for overriding the tax cap. You may have good reasons, but there isn't a provision for doing that. That is something else that I would like to have clarified. We have people saying different things to us, whether people are right or not.

Chairman Duval stated thank you very much, Committee Member Staub.

Commissioner Lopez stated the City charter dictates how the mayor will proceed. I think this notion that he doesn't have the authority to do this and do that, it is spelled out in the charter that he does have that authority. The case of the School Board not having that authority to appear before the Board of Mayor and Aldermen and make a case for them to override the tax cap is there today. That doesn't take any research; it is there. They, as a governing body, vote for \$160 million and they give a number of the tax cap to the mayor and they can still appear before the Board of Mayor and Aldermen and make their case to override. I don't think there is any research on that myself.

Commissioner Girard stated I would agree with Commissioner Lopez.

Commissioner Ashooh stated my understanding of the process is just what former Aldermen Lopez stated in that the school department has to submit a budget. Their budget number can be whatever they want it to be, but the City has to deal with the tax cap number. Bottom line on that is that the City has to reserve its power to then meet the adequate needs for an education in the State of New Hampshire by managing contracts, vendors and all the other things. We have contracts coming up with the teachers' union,

there has been an ongoing battle over benefits and that kind of structure, whether it is sustainable or not, that is where the City needs to reserve that power. It is not just the expenditures in the classroom, it is how you manage the entire budget, can you get to a tax cap number and if you can't then the obligation rests with the Board of Mayor and Aldermen to override the tax cap to provide the necessary expenditure to make the State requirements. What we are talking about now is not if we have to change the laws or the rules; it is more can we give the aldermen the will to raise and spend more money from the taxpayers and if you can't that is their role as watchdogs, not to spend more money unless they have the political will. That political will has to come from the school department and the residents who say we need to make this expenditure. I think that power needs to be reserved.

Commissioner Martin stated I think I understand what Committee Member Staub is trying to say and I understand all of the conflict surrounding labor agreements and so forth. Last year was a perfect example. We had contracts with labor unions, one that I belong to as well, agreed upon contracts that were negotiated, two parties agreed to, it was what it was. We had things that we needed to do for kids that we couldn't do to meet an adequate education by RSA, but to meet the tax cap that number had to be lower but our class sizes were not within State guidelines and other things that we are offering. I understand that and I understand the question being, what is the trump card? What supersedes and what do we do when we are in that position. Can we, as our role of charter commissioners, do something about the structure of the cap, to not create that conflict. If I may, Mr. Chairman, Committee Member Staub, is that what you were trying to get to?

Committee Member Staub replied it is about having two masters. The language in the tax cap says that the School District must present a budget below the cap but does that prevent us from also developing a budget to follow the State guidelines. That needs to be cleared up because we have been told specifically that the city attorney and the mayor

believe that we are forbidden to discuss anything that exceeds the tax cap. Whatever the answer is, we want it cleared up.

Chairman Duval stated Attorney Lehmann, I think you have the gist of it. That question was asked previously.

Attorney Lehmann stated my initial thought, and it is going to sound disturbingly like a lawyer's way of looking at the world, but that is what I do, I understand that the School Board feeling and people in the school community are feeling that they don't have the resources to deliver what the State is requesting from them in terms of what they perceive to be educational adequacy and appropriate education for students in the City. At the same time they are not entirely in the position to make that determination. That in a lot of ways is a judicial determination. While they may have a feeling of being pulled in competing directions I would say that the budget cap is a hard number. It is easily calculated; you know what it is going in. What constitutes educational adequacy and whether you can meet the standards is a little softer in the sense that it is derived from other formulas including how much you pay the teachers and how much you pay for heat and all the other things that go into educational costs. Those decisions can't be made by a single person. They are decisions that are made over time by lots of people with lots of competing interests that all sort of come together at one pressure point on students per classroom or are we delivering an adequate education. It is a much softer calculation and it is not subject to the same kind of precision that the tax cap number is. The tax cap number is right there in the charter and when you can calculate it I think you have to and on the softer things I think you have to find a way to adapt and overcome whatever the difficulties are. I'm not here to suggest that that is easy for the people on the School Board or that they are going to have an easy time with that. Maybe if a judge looked at it one day he would say you're not doing it, but until that happens I think it is hard to say we are not going to comply with the tax cap.

Commissioner Martin stated just so I understand, at 306.27, the standards for public school approval, are standards for public school approval in New Hampshire that we have to comply with as a School District. Don't be impressed; I only know them because I had to study them. You are saying that in the legal world those are softer than the tax cap?

Attorney Lehmann replied no, I'm not saying they are softer. The State administrative rules have the force and effect of law. What I am saying is soft, and maybe that is not the right word, but the manner in which you come to be having difficulty complying with those. The reason we have 27 instead of 20 students per classroom is because of a decision that someone made about the number of classrooms to have and the number of teachers to have, those types of decision and things that are completely out of your control like how many students you have. When I say those are soft decision I don't mean that those are easy or can't be accounted for or they are not objective, only that they were made somewhere else. The things that cause you to have trouble complying with those were decisions made long ago or were made by someone else through collective bargaining.

Commissioner Clayton stated Attorney Lehmann, I have to admit I felt a chill a moment ago when you said should a judge one day look at this. You and I have spent way too much time in federal court and we know now the way to solve problems in New Hampshire is to take the State to court, whether it be over mental healthcare or hospital Medicaid reimbursement rates, and I would hate to see the City come to the point where it is the subject of litigation because they feel that the states are not meeting adequate State standards. I would hope, as you said, there is a little bit of wiggle room. I would love to think that we could find a happy medium without having school advocates resorting to litigation for not meeting state standards.

Attorney Lehmann stated obviously no one wants to be in litigation and the goal is never to be in litigation, but if someone is going to make the determination that... I'm not sure that the School Board is empowered to make a determination that educational adequacy is not being met and therefore the tax cap can be ignored if they are unable to raise the two thirds vote to override.

Commissioner Girard asked Attorney Lehmann, is it not the case that before a charter amendment can be placed on the ballot it has to be reviewed by the attorney general and the secretary of state to make sure there is no conflict with State law?

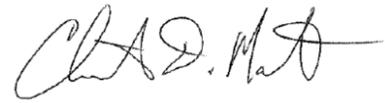
Attorney Lehmann replied that's true.

Commissioner Lopez stated I just want to refer to 49:C (23). It is in reference to the budget process and control in reference to the city charter.

Chairman Duval stated Attorney Lehmann, thank you very much. We will excuse you and we look forward to hearing from you with a summary of those questions that were posed and qualified before the commission and then you can begin the process in earnest. Next week, it is worth mentioning for the public watching at home tonight that there is a public hearing next Wednesday night in these chambers starting at 6:00 p.m. on the topic of education. We strongly encourage citizenry to come out next Wednesday night if they have an opinion to express, a concern to share with us relative to education in the City of Manchester, anything they think might fall within the jurisdiction of this commission. Committee Member Staub I'm sure will be getting the message out to her constituencies as well. Whatever we can do to get the message out to invite the public for next Wednesday night... Commissioners will band together and do that in the upcoming days before next Wednesday. I think that is it for tonight.

*There being no further business, on motion of **Commissioner Ashooh**, duly seconded by **Commissioner Martin**, it was voted to adjourn.*

A True Record. Attest.

A handwritten signature in black ink, appearing to read "Chad Martin". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Secretary of the Commission