THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2006-0432

Patricia Bedford and Anne Breen

v.

New Hampshire Community Technical College System
and New Hampshire Division of Personnel

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# BRIEF FOR NEW HAMPSHIRE COMMUNITY TECHNICAL COLLEGE SYSTEM AND DIVISION OF PERSONNEL

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N.H. COMMUNITY TECHNICAL
COLLEGE SYSTEM AND DIVISION
OF PERSONNEL

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(15 Minutes)

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## ISSUE PRESENTED

Whether the Superior Court erred when it reversed a finding of no probable cause made by the Commission for Human Rights regarding a claim of discrimination based on sexual orientation brought by two lesbian state employees after being denied benefits provided to married state employees but not to unmarried state employees regardless of sexual orientation.

## STATEMENT OF THE CASE

The Petitioners below brought their complaints of discrimination to the New Hampshire Commission for Human Rights ("Commission"). The Commission found no probable cause. Petitioners appealed to the Merrimack County Superior Court pursuant to RSA 354-A:22 and that court reversed the findings of the Commission, that the Petitioners had been disparately treated and impacted by the State's policy. This appeal followed.

## STATEMENT OF FACTS

The facts in this matter are undisputed. S. App.[1] 38-40. The Petitioners[2] below, Patricia Bedford and Anne Breen, ("Petitioners," or "Bedford," or "Breen") are state employees who work at the New Hampshire Technical Institute in Concord ("NHTI"), an educational institution which is part of the New Hampshire Technical College System. S. App. 38-40.

Co-respondent[3] below, New Hampshire Technical College System ("NHCTCS"), is a state agency created by the State of New Hampshire to provide, within its financial ability, for the preparation of youth and adults to engage in employment as technicians and skilled workers and for continued higher education to the mutual benefit of those persons, business and industry, and the general economy of the state. S. App. 38-40; RSA 188-F:1.

Co-respondent Division of Personnel ("Division"), is a division of the New Hampshire Department of Administrative Services, also a state agency. S. App. 38-40. The Division is the State's central human resources authority for all state agencies with responsibility for position classification, compensation, personnel rules development and overseeing the administration of all employee benefit programs except for the State's retirement system. S. App. 38-40; RSA 21-I:42. The Division is also responsible for labor contract negotiations by providing assistance to the Governor and the State Negotiating Team, among other things. S. App. 38-40; RSA 21-I:42.

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[1] References to "S. App. ___" refer to the appendix to the State's brief.
[2] References to "Petitioners" are to Appellees Bedford and Breen.
[3] References to the "State," "Respondent," or "Co-respondent(s)" refer to the New Hampshire Technical College System ("NHCTCS") and the Division of Personnel ("Division"), a division of the New Hampshire Department of Administrative Services both of which are state agencies.

The State below asserted that neither state agency discriminates on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin or sexual orientation. S. App. 38-57.

The Petitioners, in their charge of discrimination filed with the Commission, state that each are lesbians who have been in a loving and committed relationships with their same-sex partners for years. S. App. 38-40. In Breen's case, her partner is the birth mother of a child they raise together. S. App. 38-40.

As state employees, each are entitled to certain benefits which include health and dental insurance, sick time, dependant care and bereavement leave. S. App. 38-40. There are no allegations in either Bedford's or Breen's complaint that, as single state employees, they are being denied benefits typically provided to unmarried state employees. The Petitioners allege that the State has discriminated against them by denying them certain employment benefits as those benefits relate to their same-sex domestic partner and, in Breen's case, the child she raises with her partner due to her sexual orientation. S. App. 38-40. Specifically, they complain that due to their sexual orientation they are unable: a) to provide their same-sex domestic partner with health care and dental benefits afforded married state employees; b) to provide health care and dental benefits for the child of their domestic partner; c) to use accrued and unused sick leave as sick dependent leave for the purpose of caring for their domestic partner's child; and d) "should the situation arise," are unable to use earned sick leave as bereavement leave due to the administrative rules of the Division and the Collective Bargaining Agreement ("CBA") entered into between the State and the State Employee's Association ("SEA" or "union"). S. App. 38-40.

The Petitioners brought their complaints against their employer and the Division to the Commission which found no probable cause. S. App. 38-40.

It is conceded that neither Petitioner receive the benefits they seek in this case. There is also no dispute that, as state employees, the Petitioners receive the same benefits similarly situated unmarried state employees receive. S. App. 38-40. Likewise, in Breen's case, because the child she shares with her domestic partner is not her child, biologically or adopted,[4] she was unable to provide that child with health care or dental benefits typically provided through her state employee benefit package. S. App. 38-40. These benefit limitations are applied equally to all unmarried state employees regardless of sexual orientation. S. App. 38-40.

As classified state employees, the Petitioners are exclusively represented by the State Employees' Association ("SEA"). S. App. 38-57. The SEA, together with the State, negotiated a contract that is binding on the parties and delineates the rights and benefits of all classified employees.[5] S. App. 38-40; RSA 273-A.

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[4] Since this matter was first litigated, it is believed Breen has adopted the child and is, as are other similarly situated state employees, able to provide health care and other benefits to her adopted child.

[5] The Petitioners are members of the SEA and, as a result, have acquiesced to and are obligated by law to their representation and are bound by the contract they ratified. Even if they were not members, they would still be bound to the CBA and its terms. RSA 273-A.

## SUMMARY OF THE ARGUMENT

The Petitioners in this case, two lesbian state employees, are not entitled to the benefits they seek simply because they are not married. As unmarried state employees they are being treated just like all other unmarried state employees regardless of their inability to get married or their sexual orientation.

New Hampshire's antidiscrimination statute does not offer protections to those claiming to be denied employee benefits while asserting discrimination on the basis of sexual orientation. In this case, both the antidiscrimination statute and the statutes that define state employee benefits are being applied equally to all state employees. So too are the administrative rules and collective bargaining agreement that govern state employee benefits. Thus, all unmarried employees are being treated similarly regardless of sexual orientation.

Title VII and the analysis used by the courts in Title VII cases is not applicable. Further, RSA 354-A:7 and RSA 21-I:52 do not support the Petitioners' theory of the case because those statutes were never intended to permit the sought-after benefits to go to unmarried state employees. Further, sexual orientation protections under the antidiscrimination statute are not as broad as the Petitioners claim. As a result, the Petitioners are not being disparately treated or impacted. The majority of case law does not support their position and the court below erroneously relied on minority opinion cases when rendering its decision.

Lastly, the United States and New Hampshire Constitutions are not offended by treating all unmarried state employees similarly even if that means denying unmarried heterosexual and homosexual state employee benefits provided to married state employees.

## ARGUMENT

### I. THE PETITIONERS ARE NOT ENTITLED TO THE BENEFITS THEY SEEK WHICH ARE PROVIDED EQUALLY TO ALL STATE EMPLOYEES REGARDLESS OF SEXUAL ORIENTATION.

The State appeals a decision of the Merrimack County Superior Court after it decided an appeal from the Commission for Human Rights pursuant to RSA 354-A:21. In that appeal, the Petitioners argued, among other things, that they were the victims of disparate treatment and disparate impact because they were disqualified from certain employment benefits because they were unmarried and unable to marry under New Hampshire law. The State disagrees arguing, in part, that the Petitioners do not qualify for the disputed benefits they seek, that the protections offered under this State's antidiscrimination does not extend to the sought-after benefits and they are not being disparately treated or impacted because marriage is a proper qualifier and all unmarried state employees are being treated equally under the law. In applying these facts to the law, the court below erred and the finding of no probable cause made by the Commission should be upheld.

In superior court proceedings there is a presumption that the Commission's finding are *prima facie* lawful and reasonable, and shall not be set aside except for errors of law unless the court was persuaded, by a clear preponderance of the evidence, that the order was unjust or unreasonable. *E.D. Swett, Inc. v. N.H. Commission for Human Rights*, 124 N.H. 404, 408-9 (1984). One way a party may meet its burden of showing that an order is unjust or unreasonable is to demonstrate that the record contains no evidence to sustain the order. *Appeal of Granite State Electric, Co.*, 121 N.H. 787 (1981). The facts of this case, as argued before the Commission and the Superior Court were undisputed.

A. **Petitioners Are Not Statutorily Entitled To The Benefits They Seek.**

The Petitioners, openly lesbian women, are not being discriminated against due to their sexual orientation. The Petitioners assert that they are being discriminated against in violation of RSA 354-A:7. The relevant portion of RSA 354-A:7 became law upon the passage of Laws 1997, ch. 108. Its statement of intent provides "[w]hile the State of New Hampshire does not intend to promote or endorse any sexual life style other than the traditional marriage-based family, the legislature recognizes the need to provide protections in certain areas to individuals on account of their sexual orientation" (emphasis added). Laws 1997, ch. 108:1. These certain areas do not include the employee benefits sought after by the Petitioners for their same-sex partners. Sexual orientation "means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality." *Id.* at 108:2. Thus, the law treats homosexuals and heterosexuals equally.

RSA 354-A:7 states that "[i]t shall be an unlawful discriminatory practice:

> I. For an employer, because of the age, sex, race, color, marital status, physical or mental disability, creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

RSA 354-A:7.

The issue before this Court is, in the first instance, one of statutory construction. This Court is the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. *Appeal of Ann Miles Builder*, 150 N.H. 315, 318 (2003). When the issue raised presents a question of statutory construction, the Court should begin

its analysis with an examination of the statutory language. *Id.* The Court should not consider words and phrases in isolation but rather within the context of the statute as a whole. *N.H. Dep't of Health & Human Servs. v. Bonser*, 150 N.H. 250, 251 (2003). This will enable the Court to better discern the Legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

The Petitioners urged the court below to interpret this State's antidiscrimination statute in isolation without taking all of the relevant statues and law into consideration. Similarly, the court took them out of context and stretched the application of the antidiscrimination statue far beyond its intended affect.

The Division of Personnel is the State's centralized human resources authority for all state agencies, including the NHCTCS, and is responsible for negotiating the compensation and benefit package provided to all state employees, including the Petitioners. The Division, through the Department of Administrative Services, is also responsible for implementing the resulting CBA and related statutes. RSA 21-I:27-28; RSA 21-I:30; and RSA 21-I:42. At issue in this case is whether the Petitioners are entitled to have the State paid health benefits extended to their same-sex partners. RSA 21-I:30 regarding state employee health benefits states, at pertinent parts, that:

> I. The state shall pay a premium for each state employee ... including spouse and minor, fully dependent children, if any, ... toward group hospitalization, hospital medical care, surgical care and other medical benefits plan or self funded alternative within the limits of the funds appropriated at each legislative session and providing any change in plan or vendor is approved by the fiscal committee of the general court prior to its adoption. Funds appropriated for this purpose shall not transferred or used for any other purpose.

RSA 21-I:30.

In this case, the Petitioners cannot claim the State did not pay their premiums for their health and dental insurance policies. Just as all other unmarried state employees, they are provided with a health and dental insurance policy at no cost. As the only state employee in their respective households, they are provided the same level of benefits all other similarly situated state employees are provided regardless of sexual orientation.

As with all benefits provided to state employees, health and dental benefits are negotiated and are addressed in the CBA. These benefits are provided so long as the health plans are "within the limits of the funds appropriated" at "each legislative session" and approved by the "fiscal committee of the general court." RSA 21-I:30. By focusing only on the section of the statute that prohibits discrimination on the basis of sexual orientation, the Petitioners fail to take into consideration other relevant, more recent and more specific statutes regarding state employee benefits. *Board of Selectmen v. Planning Board*, 118 N.H. 150, 152 (1978).

When a statute's language is plain and unambiguous, the Court need not look beyond it for further indication of legislative intent, and should refuse to consider what the Legislature might have said or add language that the Legislature did not see fit to incorporate in the statute. *Balke v. City of Manchester*, 150 N.H. 69, 71 (2003). In this case, the Legislature's intent was clearly articulated in Laws 1997, ch. 108 where it made clear that it was not extending this State's antidiscrimination statute to promote or endorse anything but traditional family-based marriages. If this Court, however, finds the statute to be ambiguous, the legislative history makes it clear that the intent of the legislation was not to extend employment benefits to the point of providing them to same-sex partners. Further, the antidiscrimination statute should not be read in isolation but must be read in combination

with the health care benefit statute, related appropriations, the collective bargaining statutes, the administrative rules that have long interpreted these statutes and the CBA. "If any reasonable construction of the two statutes taken together can be found, this Court will not find that there has been an implied repeal." *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 153 (1978). When interpreting two statutes which deal with similar subject matter, the Supreme Court will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. *Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 282 (1988) (citation omitted).

It is to be presumed that the Legislature would not enact legislation which nullifies to an appreciable extent the purpose of a statute, *Kalloch v. Board of Trustees*, 116 N.H. 443, 445 (1976); and statutes in *pari materia* should be read as a part of a unified cohesive whole. *State Employees Ass'n v. N.H. PELRB*, 118 N.H. 885, 890 (1978), 2A Sutherland on Statutory Construction § 51.03 (1972). And finally, as a general principle of statutory construction, this Court will presume that the legislature knew the meaning of the words it chose, and that it used those words advisedly. *Starr v. Governor*, 151 N.H. 608, 610 (2004).

The health and benefits statute requires regular legislative review, both as to the substance of what is being negotiated and its cost. In this instance, the various benefits at issue were negotiated by the State and the SEA and subsequently submitted to the Legislature for ratification. The Legislature considered the CBA, including all cost items, and authorized the CBA to become binding on both the State and its employees including the Petitioners. RSA 273-A:3; RSA 273-A:9; RSA 21-I:30.

Considering all of the statutes addressing this issue, especially in light of the limiting language of Laws 1997, ch. 108's statement of intent, with the periodic reviews done by the

Legislature, it is proper to conclude that the Legislature did not intend RSA 354-A to be as broadly read as the Petitioners would have this Court read it. The Petitioners, therefore, are not being discriminated against because they receive the same benefits all unmarried state employees receive and because the Legislature has regularly approved them both in terms of substance and cost.

### B. The State's Health Benefit Statute And Administrative Rules Are Applied Equally To All State Employees And Do Not Authorize The Benefits The Petitioners Seek.

The Division of Personnel, the agency charged with implementing the State's health benefits statute has never interpreted it to include same-sex domestic partners and has applied it equally to all state employees regardless of their sexual orientation. Similarly, the Division's administrative rules apply to all state employees and all executive branch agencies, including NHCTCS. The Division's administrative rules govern the benefits provided to all state employees. RSA 21-I:43.

The administrative gloss doctrine applies when the provision in question is ambiguous, the agency responsible for its administration has interpreted it over a period of years in a consistent manner, and the Legislature has not interfered with this interpretation. *Hansel v. City of Keene*, 138 N.H. 99, 104 (1993). "[T]he long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *Hamby v. Adams*, 117 N.H. 606, 609 (1977); *see* 2A C. Sands, Statutes and Statutory Construction § 49.09 at 400-01 (4th ed. rev. 1984) (administrative interpretation of statute is presumed correct following legislative reenactment); *United States*

*v. Rutherford*, 442 U.S. 544, 554 (1979) ("we are reluctant to disturb a longstanding administrative policy that comports with" the language, history and purpose of a statute).

Administrative rule Per 1204.05, promulgated by the Division, sets out the allowable uses of sick leave, including dependant care and bereavement leave. *Id.* Per 1204.05(c) states that "[a]n employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household." Per 1204.05(c). Dependant care is defined as "sick leave used to care for a person residing in the employee's household who may be legally claimed as a dependent for tax purposes." Per 102.21. There is no evidence in the record that the child of Breen's domestic partner may be legally claimed for tax purposes as a dependent. Therefore, Breen is unable to use her sick time for the dependant care of her domestic partner's child.

All of the administrative rules promulgated by the Division pertaining to leave are applied equally to all state employees regardless of sexual orientation.

Similarly, the administrative rule providing for bereavement leave states that "[a]n employee shall be entitled to utilize up to 4 days of accumulated sick leave for a death in the employee's immediate family...." Per 1204.05(d). Immediate family is defined as "wife, husband, children, mother-in-law, father-in-law, parents, step-parents, step-children, step-brothers, step-sisters, grandparents, grandchildren, brothers, sisters, legal guardians, daughters-in law, sons-in-law and foster children. Per 102.32. Since the Petitioners' domestic partners do not fit into one of the specified categories of persons, should their partners die, the Petitioners would be unable to use accrued sick time for bereavement leave. Again, as with the administrative rules pertaining to sick leave and dependent care, the administrative rules promulgated by the Division regarding bereavement leave treats all

unmarried state employees similarly and are applied equally to all state employees regardless of sexual orientation.

Accordingly, the Petitioners are being treated just like all other unmarried state employees living with a domestic partner.

### C. The CBA Is Applied Equally To All State Employees And Does Not Authorize The Benefits The Petitioners Seek.

The collective bargaining process for all classified state employees, including the Petitioners, is addressed in RSA 273-A. RSA 273-A:9, at pertinent parts, states that "[a]ll cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated...." RSA 273-A:9.

In this case, as classified state employees, the Petitioners are exclusively represented by the SEA. The SEA, together with the State, negotiated a contract that is binding on the parties and delineates the rights and benefits all classified employees are entitled to. The CBA for fiscal years 2001-2003 states, at pertinent parts, that a "Labor Management Committee is established" and that "[t]he purpose of the committee shall be to ensure the application, clarification and administration of [the CBA]." CBA § 4.2. "This committee is also charged with determining eligibility of health and dental benefits." CBA § 4.2.3 (2001-2003). Under the facts of this case, State and union negotiators entered into an agreement defining the eligibility criteria for the health and dental plans they chose. The CBA does not provide health care or dental benefits to unmarried domestic partners, regardless of sexual orientation, or to unrelated children. CBA (2001-2003).

As a cost item affecting the terms and conditions of employment for all classified state employees, the CBA must be approved by the Legislature. RSA 21-I:30; RSA 273-A:9.

In this case, the Legislature appropriated funds sufficient only to pay the premium for each state employee, RSA 21-I:30, but did not appropriate funds sufficient to pay for health care and dental benefits for unmarried domestic partners or unrelated children. The Joint Employee Relations Committee, established pursuant to RSA 273-A:9, specifically addressed this issue at their June 21st and 22nd, 2001 hearings. S. App. 58-65. At that hearing, the state negotiator, Thomas F. Manning, represented to the committee that, after discussing this matter with the Governor, "the state ha[d] no intention to and will not add domestic partners to the health insurance benefit plan under any circumstances. The[re] will not be any additions unless they come before this committee." *Id.* Dennis Martino, manager of collective bargaining unit for the SEA, stated "that the Association's understanding is the employees, spouses and dependents are covered in the health plan. <u>The inclusion of domestic partners cannot take place because it would change expenditures</u> (emphasis added). They would have to come to a new agreement and come before this committee. *Id.* Mr. Martino read a statement that … said: 'we will not add domestic partners under any circumstances unless we come back to you.'" *Id.* The measure passed the Committee 13-1. *Id.*

Neither the Legislature nor the negotiators drew a distinction between homosexual or heterosexual domestic partners. They simply denied appropriating funds to cover health benefits to domestic partners of state employees regardless of sexual orientation.

Clearly RSA 273-A authorizes the State and the union to enter into a contract which is binding on both the State and its employees including the Petitioners. In addition to excluding domestic partner benefits, the CBA, just like the administrative rule governing use of sick leave and bereavement leave, does not authorize the use of dependant care or

bereavement leave for unmarried domestic partners. CBA at § 11.2; CBA at § 11.2.1 ; CBA § 11.2.2.

The CBA language is essentially identical to the language used in the Division's administrative rules governing the same subject and neither authorize the use of sick leave for the dependant care of an unmarried domestic partner or an unrelated child who has not been adopted by the state employee. The same it true for the use of bereavement leave. The CBA, just like the Division's administrative rules, is neutral on its face and is equally applied to all state employees and does not entitle the Petitioners to the benefits they seek. Moreover, the Legislature weighed in on the issue of domestic partners and rejected it as a cost item.

### D. The Legislative History Of RSA 354-A:7 And RSA 21-I:52 Does Not Support The Petitioners' Theory Of The Case.

The Petitioners rest their case on the provision of RSA 354-A:7 prohibiting discrimination on the basis of sexual orientation. They, however, read the statute too broadly and, as argued *supra*, do not take into consideration the legislative language limiting its application nor do they. When read in context with its intent, RSA 354-A:7 does not support their theory of the case and does not support the provision of the benefits they seek.

As argued *supra*, the antidiscrimination statute was amended in 1997 by adding sexual orientation to the list of protections contemplated under the law. RSA 354-A:7 (eff. January 1, 1998); Laws 1997, ch. 108. The legislation also amended RSA 21-I:52. When Laws 1997, ch. 108 (1997) was introduced into the House of Representatives as House Bill 421, the Legislature initially referenced "sexual orientation" in the general sections of the bill listing it among the other protected classes. The bill, however, was substantially amended

before it even left the House when the Legislature removed "sexual orientation" from the list of protected classes and made it a separate, stand-alone sentence. *House Journal,* March 19, 1997 at p. 525. Thus, sexual orientation protections are clearly distinguishable from the rest of the protected classes noted under the law. Representative Barbara Hull, reporting for the House of Representatives Judiciary Committee, wrote, without mentioning other benefits, that "[t]his bill extends civil rights in employment, public accommodation in housing...." *Id.* The bill's statement of intent, however, was also amended to state, "[w]hile the State of New Hampshire does not intend to promote or endorse any sexual lifestyle other than the traditional marriage-based family, the legislature recognizes the need to provide protection in certain areas to individuals on account of their sexual orientation." Laws 1997, ch. 108:1. Those "certain areas" were narrowly restricted to employment (applying for and keeping a job), housing and public accommodation but not benefits even though the Legislature could have easily done so by amending RSA 21-I:52 to include benefits. In other words, the intent of Laws 1997, ch. 108 as declared by its writers was narrowly drawn and was not enacted to guarantee benefits to anyone who lives a "lifestyle other than in the traditional marriage-based family." *House Journal,* March 19, 1997 at p. 525; Laws 1997, ch. 108:1.

This construction of the bill continued in the New Hampshire Senate when Senator Deborah Pignatelli, a member of the Senate Committee on Internal Affairs, stated that "[the bill's] aim is to prevent people from being deprived of housing, a job, or public accommodation solely on account of their sexual preference..." and that "[i]t [was] a narrowly drawn bill." *Senate Journal*, May 6, 1997 at p. 518. Thus, the bill was never intended to be as broadly applied as the court below applied it or as the Petitioners would like this Court to apply it.

Furthermore, throughout the entire legislative history there is almost no discussion or testimony regarding the type of employment benefits the Petitioners seek to extend to their same-sex partners.[6] The vast majority of the testimony was focused solely on getting and keeping a job, housing and public accommodation. There are no such allegations in this case. In fact, the record is clear that the Petitioners are receiving the benefits of being state employees regardless of their sexual orientation. Their complaint is that those benefits are not being extended to their domestic partners or, in Breen's case, their domestic partner's child. To do so would extend both the antidiscrimination statute and the Division's statute way beyond their legislative intent and authorization.

When a statute's language is plain and unambiguous, the Court need not look beyond it for further indication of legislative intent, and should refuse to consider what the legislature might have said or add language that the Legislature did not see fit to incorporate in the statute. *Balke v. City of Manchester*, 150 N.H. 69, 71 (2003). In this case, the controlling statutes are clear, especially when looked at in their totality, but to the extent they are not, the legislative history does not support the Petitioners' position. In other words, to interpret Laws 1997, ch. 108 by broadening its reaches to incorporate the benefits the Petitioners now seek would expand the bill's scope beyond its legislative intent.

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[6] In testimony before the Senate, Representative William McCann briefly raised the issue of "health insurance benefits." He also testified about a copy of a letter he had received from an employee of Nynex who complained that his employer, Nynex, was paying for health insurance benefits for employees with "same-sex partners" but not for employees with heterosexual partners. The former executive director of the Human Rights Commission, in responding to the Nynex employee's letter, speculated that it "appears from you[r] letter that Nynex is discriminating against you based on your sexual orientation. Because the Legislature declined to add 'sexual orientation' as a protective category... the Commission has no jurisdiction over your claim." *Senate Committee on Internal Affairs, Minutes, April 29, 1997* at p. 3.

## II. A MAJORITY OF THE CASE LAW DOES NOT SUPPORT THE PETITIONERS' POSITION THAT THEY ARE BEING DISCRIMINATED AGAINST.

The Petitioners claim both disparate treatment and disparate impact relying on a minority of cases not applicable here. Title VII does not protect against discrimination on the basis of sexual orientation. Therefore, a Title VII analysis is not applicable here. Even if it were, to find discrimination based on sexual orientation, the Court must first find that the denial of the benefits falls within the protections offered under RSA 354-A:7. They do not.

If this Court were to analyze this case under Title VII, however, it must first determine whether the Petitioners have been disparately treated. To do so, this Court must first look to whether the Petitioners have met their burden of establishing a *prima facie* case that the State's policy is discriminatory. The Petitioners must show that: 1) they are members of a protected class; 2) they qualify for the benefits sought; 3) despite their qualifications they were denied benefits or terms and conditions of their employment; and 4) those same benefits were provided to similarly situated state employees outside of their protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing the criteria by which a petitioner may make a *prima facie* case of discrimination in a Title VII action); *Madeja v. MPB Corp.*, 149 N.H. 371, 378 (2003) (establishing that in considering an issue of first impression under RSA chapter 354-A, "[the Court] rel[ies] upon cases developed under Title VII to aid in [its] analysis."). If the State's policy is found to be discriminatory, the burden shifts to the employer to articulate some nondiscriminatory justification for the policy. If that burden is met, the Petitioners must produce proof that the reasons are a mere pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

If the Petitioners cannot establish a *prima facie* case under the disparate treatment analysis, the Court will consider whether the petitioners have established a *prima facie* case under the disparate impact analysis. "It has long been understood that discrimination, whether measured quantitatively or qualitatively, is not always a function of a pernicious motive or malign intent. Discrimination may also result from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals." *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 (1st Cir. 1995). "[T]his understanding is reflected in the concept of disparate impact discrimination--a concept born of a perceived need to ensure that Title VII's proscriptive sweep encompasses not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* "In the disparate impact milieu, the *prima facie* case consists of three elements: identification, impact, and causation." *Id.* "First, the plaintiff must identify the challenged employment practice or policy, and pinpoint the defendant's use of it. Second, the plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit.... Third, the plaintiff must demonstrate a causal relationship between the identified practice and the disparate impact." *Id.*

Once a plaintiff has established a *prima facie* case under the disparate impact analysis, the burden shifts to the defendant to either attack the sufficiency of the plaintiff's proof, or to acknowledge the legal sufficiency of the *prima facie* case but show that the policy is "job related and consistent with business necessity, or that it fits within one or more of the explicit statutory exceptions...." *Id.* at 602. If the defendant is successful in establishing a legitimate nondiscriminatory purpose for the policy, the burden shifts back to the plaintiff to show that the professed purpose is pretextual. *Id.*

The Petitioners did not meet their burden and the court below failed to follow this analysis and, as a result, erred when it reversed the decision of the Commission.

A. **The Petitioners Did Not Suffer Disparate Treatment.**

To establish disparate treatment, the Petitioners must be members of a protected class. They are not.

Title VII outlaws discrimination based on race, color, religion, gender, or national origin. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). In so doing, the law forbids "overt discrimination" in the form of disparate treatment. *Id.*

Sexual orientation discrimination is not protected under Title VII. 42 U.S.C.A. § 2000e, *et seq*. Thus, to determine whether the Petitioners are entitled to any protection at all, this Court must look to this State's antidiscrimination statute, RSA 354-A. As argued *supra*, RSA 354-A was never intended to be as broadly read as the Petitioners would like this Court to do. It was never intended "to promote or endorse any sexual lifestyle other than the traditional marriage-based family." Laws 1997, ch. 108:1. Thus, the State's antidiscrimination statute does not contemplate the protections the Petitioners seek in this matter. Further, the Petitioners argue that due to their "sexual orientation" they are entitled to certain protections under the law. However, sexual orientation is defined to include both homosexuals and heterosexuals. RSA 21:49; Laws 1997, ch. 108:2. Thus, the Petitioners are offered no more protections than their unmarried, opposite-sex co-workers. Therefore, to expand the employment benefits the Petitioners seek here would also require expanding them to opposite-sex unmarried couples as well; an expansion rejected by the Legislature. Thus the Petitioners are not members of a protected class.

Furthermore, the Petitioners are not qualified for the benefits they seek. Those benefits are specifically reserved for only those who are married regardless of sexual orientation. RSA 21-I:30; Per 1204(c), (d); CBA 11.2; 11.2.1;11.2.2. Thus, they do not qualify for the sought-after benefits under the terms and conditions of their employment. What the Petitioners are seeking are not benefits for themselves but benefits for their domestic partners despite not being responsible for their partner's health care debt or the lack of a nexus between their domestic partner and the State. As noted, there is no dispute that the Petitioners receive the same benefits as other unmarried state employees receive. Thus, all unmarried state employees are treated similarly and are likewise denied the benefits the Petitioners assert a right to. Therefore, the State does not discriminate on the basis of sexual orientation and the Petitioners have not met their burden to prove a *prima facie* case. Even if the Petitioners were able to meet their *prima facie* burden, the State's policy is nondiscriminatory and is justified because, by excluding unmarried couples, it is designed to save the state taxpayers the burden of paying a higher premium for their employees health benefit. S. App. 58-65.

Lastly, there is no evidence in the record of pretext and Petitioners are unable to argue pretext now. Therefore, the Petitioners failed to establish a *prima facie* case of discrimination.

**B. <u>The Petitioners Do Not Suffer Disparate Impact.</u>**

The Petitioners also claim they suffer disparate impact. They do not. In light of the statutory limitations of the sexual orientation protections in RSA 354-A, case law does not support the Petitioners' assertion that the prohibition against discrimination on the basis of sexual orientation mandates the provision of same-sex domestic partner health care coverage

or the use of sick leave benefits. *Lilly v. City of Minneapolis*, 973 P.2d 717 (Colo. 1998); *Ross v. Denver Dept. of Health and Hospitals*, 883 P.2d 516 (Colo.Ct. App. 1994); *Hinman v. Dept. of Personnel Administration*, 167 Cal. App.3d 516 (1985); *Phillips v. Wisconsin Personnel Com'n.*, 482 N.W.2d 121 (Wis. App. 1992); *Beaty v. Truck Ins. Exchange*, 8 Cal. Rpter.2d 593 (Cal. App. 3 Dist. 1992). For example, in *Ross*, an employee was denied family sick leave benefits to care for her same-sex partner because such a relationship did not fall within the state agency's definition of "immediate family" just as in this case. The plaintiff alleged that the definition of immediate family allowed an employee to take family sick leave to care for a husband or wife, but not for her same-sex partner, and as such, violated a state agency rule prohibiting discrimination on the basis of sexual orientation.

The court disagreed holding that the plaintiff was not denied family sick leave benefits because she was a homosexual. As in this case, the definition was applied equally to heterosexual and homosexual employees and thus did not discriminate on the basis of sexual orientation. An unmarried heterosexual employee also would not be permitted to use family sick leave benefits to care for his or her unmarried opposite sex partner. Thus, the court said, the employer did not treat homosexual employees and similarly situated heterosexual employees any differently. *Ross*, 883 P.2d at 518.

In the *Ross* case, the court held that simply because the rule prohibiting discrimination on the basis of sexual orientation was promulgated after the definition of "family member" did not mandate that it had a superseding effect with respect to determining who was to be deemed a family member for purposes of sick leave. Just as in this case, the court noted that the plaintiff could cite no legislative history to demonstrate that this was the intent of the parties in adopting the language prohibiting discrimination on the basis of sexual orientation.

As in *Ross*, the denial of benefits in the instant case is not based on the sexual orientation of the Petitioners. Rather, it is based on the health plan negotiated through the CBA, ratified by the Legislature and applied equally to all state employees regardless of sexual orientation. In this case, the plan treats both heterosexual and homosexual employees the same; an unmarried heterosexual employee could no more qualify for benefits for their opposite sex domestic partner than could a homosexual employee for their same-sex partner.

The California Court of Appeals also squarely addressed this issue in *Hinman v. Dept. of Personnel Administration*, 167 Cal. App.3d 516 (1985). There the court considered whether the denial of dental benefits coverage to unmarried partners of homosexual state employees unlawfully discriminated against them in violation of a state executive order prohibiting employment discrimination on the basis of sexual orientation. The court wrote:

> The terms have the same effect on the entire class of unmarried persons. Rather than discriminating on the basis of sexual orientation, therefore, the dental plans distinguish eligibility on the basis of marriage. There is no difference in the effect of the eligibility requirement on unmarried heterosexual employees and unmarried homosexual employees. Thus, the plaintiffs are not similarly situated to heterosexual employees with spouses. They are similarly situated to other unmarried state employees. Unmarried employees are all given the same benefits; plaintiffs have not shown that unmarried homosexual employees are treated differently than unmarried heterosexual employees.

*Hinman* at 526. As in *Hinman*, the Petitioners cannot show that homosexual employees are treated any differently from unmarried heterosexual employees with respect to eligibility for domestic partner coverage. *Also see Phillips v. Wisconsin Personnel Board*, 167 Wis.2d 205 (1992).

In *Phillips v. Wisconsin Personnel Board, id.*, the Wisconsin appeals court upheld the denial of health insurance to the same sex domestic partner of a state employee. The court

said "[w]e do so because the rule is applied to hetero and homosexual employees and this does not discriminate against the latter group. Nor does the rule treat gender differently than the other; it is applied equally to males and females. It is keyed to marriage and, as we said, it does not illegally discriminate by doing so." *Id.* at 212. In discussing these claims, the Court noted:

> In this case the personnel commission ruled that Phillip's complaint failed to state a claims for discrimination based on sexual orientation because the challenged [-] rule distinguishes between married and unmarried employees, not between homosexual and heterosexual employees.... And while [the plaintiff] complains that she is not married to her partner only because she may not legally marry another woman, that is not a claim of sexual orientation discrimination in employment; it is claim that the marriage laws are unfair because of their failure to recognize same sex marriages. It is the result of that restriction, not the insurance eligibility limitations in the statute and the department rule that Phillips is unable to extend her state employee health insurance benefits to [her same-sex partner]. And any change in that policy is for the legislature, not the courts. *Id.* at 221-222.

In *Rutgers Council of AAUP Chapters v. Rutgers, the State University*, 298 N.J. Super. 442 (1997), the New Jersey Superior Court found that the denial of health benefits to domestic partners of university employees did not violate their right to equal protection under the state constitution, as no discriminatory intent based on sexual orientation could be found. The court cited *Hinman* with approval. The Court also said that in the past and in the instant matter, "we have not been disposed to expanding plain language to fit more contemporary views of family and intimate relationships" in dealing with statutory and contract interpretation issues, thus refusing to expand the concept of spouse beyond its legal limits. *Id.* at 449. Accordingly, the existence of a clause banning discrimination on the basis of sexual orientation has not been read to mean the automatic establishment of domestic

partner coverage. In other words, sexual orientation, whether homosexual or heterosexual, was not and is not, a factor in deciding what benefits the Petitioners are entitled to.

In *Beaty v. Truck Ins. Exchange*, 8 Cal. Rpter.2d 593 (Cal. App. 3 Dist. 1992), the issue was whether an insurer violated the Civil Rights Act when it refused to offer a couple living together in a homosexual relationship the same insurance policy and at the same premium it offers to married couples. Claims of both sexual orientation and marital status discrimination were rejected by the court. The court wrote "[e]qually important, the shared responsibilities and the legal unity of interest in a marital relationship - a status not conferred on unmarried couples of whatever their sexual orientation - provide a fair and reasonable means of determining eligibility for services and benefits. *Id.* ; *also see Miller v. C.A. Muer Corp*, 43 FEP 1195 (Mich, 1984).

While not applicable here, under Title VII, the disparate impact approach is designed to root out "employment policies that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another <u>and</u> cannot be justified by business necessity" (emphasis added). *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *accord Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785, 101 L.Ed.2d 827 (1988); Civil Rights Act of 1964, § 701, *et seq.*, 42 U.S.C.A. § 2000e, *et seq.* In this case, the court below did not fully analyze this matter and failed to adequately consider business necessity. As noted *supra*, in a disparate impact case there are three elements to be considered: identification, impact, and causation." *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601-02 (1st Cir. 1995). If the plaintiff established a *prima facie* case, the burden shifts to the defendant to either attack the sufficiency of the plaintiff's proof, or to

acknowledge the legal sufficiency of the *prima facie* case but show that the policy is "job related and consistent with business necessity, or that it fits within one or more of the explicit statutory exceptions...." *Id.* The Petitioners have failed to meet their burden in all respects.

First, as noted above, claims of sexual orientation do not fall within the protections of either RSA 354-A or Title VII. Next, the Petitioners have failed to demonstrate a causal relationship between identified practice and disparate impact. *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1016 (1st Cir. 1984). The Petitioners have simply asserted that because they are lesbians and are unable to marry, they are being denied the benefits heterosexual state employees have because they can marry. In reality, the Petitioners are being denied benefits, not because they are lesbians, but solely because they are not married. Their sexual orientation is not connected to the denial of benefits. The marriage statutes in this State, RSA 457, *et seq.,* are presumed to be constitutional thus making any classification based on marriage permissible as a matter of law. *Niemiec v. King*, 109 N.H. 586, 587 (1969).

Most significantly, the State has a legitimate business purpose for its policy. Civil Rights Act of 1964, §§ 701, *et seq.*; 703(h); 712; 42 U.S.C.A. §§ 2000e, *et seq.*; 2000e-2(h); 2000e-11. That is, the sought-after benefits in this case would advantage someone (the Petitioners' partners) who neither the State nor the Petitioners are legally obligated to benefit. In other words, if the present policy was struck down, the Petitioners would have their benefits expanded to someone they have no legal responsibility for. The purpose of health insurance is to pay for medical bills that must be paid as a contractual obligation between the service provider and the beneficiary of those services. In this instance, what the Petitioners are asking the Court to do is to order the State to pay medical bills for someone who the Petitioners themselves are not legally obligated to pay. Their request, in essence, would be a

windfall and would benefit a third party who is not, in any way, connected to the State or to the Petitioners. *Braatz v. LIRC*, 496 N.W.2d 597, 600 (Wis. 1993). This was the very concern legislators raised when the issue of including domestic partners on the State's health insurance policy was raised when the CBA was considered. S. App. 58-65.

Rep. Kenneth Weyler expressed concern that, if the domestic partner benefit was approved it would "bind the State to a domestic partner of a State employee that the employee is not bound to." *Id.* His view was that this was a policy matter that "should be decided by the Legislature." *Id.* Rep. Neal Kirk raised the issue of "additional funding" being required. *Id.* Both State and union negotiators assured the Legislature that under no circumstances would there be an increase in funding without coming back to the Legislature. *Id.* The union representative stated "[t]he inclusion of domestic partner benefits cannot take place because it would change expenditures. *Id.* These are legitimate business necessity reasons but, in this case, the Court below failed to take them into consideration when it rendered its decision.

If the defendant is successful in establishing a legitimate nondiscriminatory purpose for the policy, under the disparate impact analysis, the burden shifts back to the plaintiff to show that the professed purpose is pretextual. *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601-02 (1st Cir. 1995). In this instance, there were no allegations of pretext to consider.

The Petitioners, citing, *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001) and *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (2005), urged the court below to find disparate impact and reverse the Commission's finding of no probable cause. Those cases, however, are distinguishable from this case. In *Levin v. Yeshiva University*, 754

N.E.2d 1099 (N.Y. 2001), the issue before that court was whether married students and unmarried gay or lesbian students were allowed equal access to student housing. The court, in that case, concluded they were not. In that case, and unlike New Hampshire's statute, the antidiscrimination ordinance was clearly directed at sexual orientation protections. Further, the ordinance contained explicit language applicable to disparate impact claims. This is not the case here.

In *Alaska Civil Liberties Union, supra,* the Alaskan Supreme Court decided that case on state constitutional grounds where an explicit constitutional provision prohibiting same-sex marriages conflicted with its equal protection clause. There, the court determined the policy at issue was facially discriminatory on equal protection grounds noting that their equal protection clause required a "more stringent" interpretation and even at its lowest level of scrutiny, required a "substantial" connection between the classification and government interest. *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781, 787, 791 (2005). Under the Alaskan Constitution, employment benefits similar to those at issue here were constitutional until their constitution was amended to include their so-called Marriage Amendment thus forcing the court to reconcile it with their equal protection clause. *Id.* at 789 n. 38. The Petitioners have also cited below *Tanner v. Ore. Health Scis. Univ.*, 157 Or. App. 502 (1998). Again, that case turned on a provision in Oregon's State Constitution and pre-existing case law interpreting the Oregon Constitution where the court found there was no unlawful employment practice where the insurance policy at issue excluded unmarried couples without regard to sexual orientation. *Id.* More importantly, the statutory antidiscrimination claim raised in *Tanner*, which is similar to the one being raised here, was denied by the Oregon Supreme Court resting instead on the constitutional claim. The

Petitioners have abandoned their constitutional challenge.

Prior to *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003), the Massachusetts case that upheld same-sex marriage, the Massachusetts Supreme Judicial Court, in *Connors v. City of Boston*, 430 Mass. 31 (1999), struck down an executive order by the mayor of Boston extending health care benefits to same-sex partners finding that such an expansion was improper because it was done outside of the province of the legislature and that the mayor's order was inconsistent with legislature's grant of authority. *Id.* at 42-43. Similarly as argued here by the State, the grant of legislative authority in this case has restricted the State from extending benefits to same-sex partners (and to unrelated children) and limited the authority of the Commission to render a decision which would "promote or endorse any sexual lifestyle other than traditional marriage." *House Journal*, March 19, 1997 at p. 525; *see also* Laws 1997, ch. 108:1; 9 (intended to assure [only] basic rights); 17.

And finally, "[t]o date, no state or city has attempted to enforce a general nondiscrimination law against a private sector employer's benefit plan that provides benefits only to spouses or dependents...." *See* Catherine L. Fisk, ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment, 8 UCLA Women's L.J. 267 (1998) at 277-78.

To expand the scope of this State's antidiscrimination statute to provide same-sex benefits in the context of State employment could, inadvertently, expand them into the private sector as well. Surely the affect from such a ruling would be widespread and contrary to the intent of the antidiscrimination statute.

In this case, the State's policy is neutral on its face and as applied and should be upheld.

## III. THE STATE'S POLICIES ARE CONSTITUTIONAL UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

No matter how the Petitioners try to present the issue, what they are really arguing is that New Hampshire's marriage statute and the statutory scheme that provides benefits to its employees is unconstitutional and therefore any benefits triggered by the marriage statute is likewise unconstitutional.

Similar to the way the courts viewed this matter in *Rutgers* and *Beaty,* this Court has stated that for purposes of federal equal protection analysis, homosexuals do not constitute a suspect class, nor are they within the ambit of the so-called "middle tier" level of heightened scrutiny. *Opinion of the Justices*, 129 N.H. 290, 296 (1987). Therefore, since no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining federal equal protection rights is whether RSA 21-I:30 as applied is "rationally related to a legitimate governmental purpose." *Id.* at 296, *citing Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). Likewise, under the New Hampshire Constitution there is no suspect class involved, nor is heightened scrutiny requiring the application of the fair and substantial relation test, *Carson v. Maurer*, 120 N.H. 925, 932 (1980), appropriate. *Opinion of the Justices*, 129 N.H. at 298. The proper test under the State Constitution is the rational relationship test. *Id. See Estate of Cargill v. City of Rochester*, 119 N.H. 661, 667 (1979).

The Petitioners are not similarly situated to married employees since their companions are not their legal spouses. Further, unlike married couples, the Petitioners are not responsible for the health care debts, or for that matter any other debt, of their same-sex partners. *Braatz v. LIRC*, 496 N.W.2d 597, 600 (Wis. 1993). Instead, they are similarly

situated to unmarried employees and are treated no different than other unmarried employees regardless of sexual orientation.

The Federal and State Equal Protection Clauses do not "demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (quotation omitted). Where a classification "realistically reflects the fact that the [two groups] are not similarly situated in certain circumstances," *id.*, and the legislation's differing treatment of the groups is sufficiently related to a government interest, it will survive an equal protection challenge. *See id.* at 472-73. This Court's "similarly situated" analysis focuses on the dissimilarities of the classes, which were self-evidently a basis for reasonable classification. *Walker v. Exeter Region Co-op. School Dist.*, 284 F.3d 42, 44 (2002); *see also Emond v. N.H. Dep't of Labor*, 146 N.H. 230, 231 (2001); *McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 712 (2001). In those decisions, this Court concluded that the plaintiffs were not similarly situated which justified the difference in treatment under the law. *McGraw*, 145 N.H. at 712. The federal courts would apply the same equal protection standard of review, *i.e.*, rational basis. *See id.; Walker*, 284 F.3d at 46. Thus, although the language in some of this Court's decisions varied from that used by federal courts, this Court has concluded that our state equal protection analysis is identical. *In re: Sandra H.*, 150 N.H. 634 (2004).

In considering an equal protection analysis, this Court has said that homosexuals do not constitute a suspect class, nor are they within the ambit of the so-called "middle tier" level of heightened scrutiny, as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof. *Opinion of the Justices*, 129 N.H. 290

(1987) *citing Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). There is no right to adopt, to be a foster parent, or to be a childcare agency operator, as these relationships are legal creations governed by statute just as the benefits at issue here are. Therefore, since no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining a statute's constitutionality for federal equal protection purposes is whether the legislation is "rationally related to a legitimate governmental purpose." *Opinion of the Justices*, 129 N.H. 290, 296 (1987) *citing Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

In this instance, the State is acting in accord with New Hampshire law and are promoting traditional marriage-based families while holding down the cost of providing benefits to its employees. Therefore, there is no equal protection violation in denying benefits to same-sex partners and their children.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below and uphold the decision of the Commission.

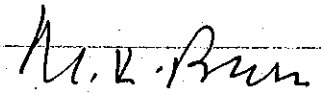
The State desires to be heard orally.

Respectfully submitted,

NEW HAMPSHIRE COMMUNITY
TECHNICAL COLLEGE SYSTEM AND
DIVISION OF PERSONNEL

By their attorneys,

Kelly A. Ayotte
Attorney General



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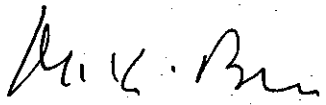
November 15, 2006

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Jon Meyer, Esquire, Backus, Meyer, Solomon & Branch, LLC, P.O. Box 516, Manchester, NH 03105-0516 and Michele Granda, Esquire, Karen L. Lowey, Esquire, Gay and Lesbian Advocates and Defenders, 30 Winter Street, Suite 800, Boston, MA 02108, counsel of record.



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