THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0500

Contoocook Valley School District Winchester School District Mascenic School District Monadnock School District Myron Steere, III Richard Cahoon Richard Dunning	v.	The State of New Hampshire New Hampshire Department of Education Christopher T. Sununu Frank Edelblut

APPEAL PURSUANT TO RULE 7 FROM THE JUDGMENT OF THE CHESHIRE COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANTS

THE STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE DEPARTMENT OF EDUCATION
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(Oral Argument Requested: 15 minutes)

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TEXT OF RELEVANT LAWS & STATUTES

RSA 193-E:2-a

I. Beginning in the school year 2008-2009, the specific criteria and substantive educational program that deliver the opportunity for an adequate education shall be defined and identified as the school approval standards in the following areas:

(a) English/language arts and reading.

(b) Mathematics.

(c) Science.

(d) Social studies.

(e) Arts education.

(f) World languages.

(g) Health education, including a policy for violations of RSA 126-K:8, I(a).

(h) Physical education.

(i) Engineering and technologies.

(j) Computer science and digital literacy.

II. The standards shall cover kindergarten through twelfth grade and shall clearly set forth the opportunities to acquire the communication, analytical and research skills and competencies, as well as the substantive knowledge expected to be possessed by students at the various grade levels, including the credit requirement necessary to earn a high school diploma.

II-a. Instruction in support of kindergarten standards shall be engaging and shall foster children's development and learning in all domains including physical, social, cognitive, and language. Educators shall create a learning environment that facilitates high quality, child-directed experiences based upon early childhood best teaching practices and play-based learning that comprise movement, creative expression, exploration, socialization, and music. Educators shall develop literacy through guided reading and shall provide unstructured time for the discovery of each child's individual talents, abilities, and needs.

III. Public schools and public academies shall adhere to the standards identified in paragraph I.

IV.

(a) The minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education. The general court shall periodically, but not less frequently than every 10 years, review, revise, and update, as necessary, the minimum standards identified in paragraph I and shall ensure that the high quality of the minimum standards for public school approval in each area of education identified in paragraph I is maintained. Changes made by the board of education to the school approval standards through rulemaking after the effective date of this section shall not be included within the standards that constitute the opportunity for the delivery of an adequate education without prior adoption by the general court. The board of education shall provide written notice to the speaker of the house of representatives, the president of the senate, and the chairs of the house and senate education committees of any changes to the school approval standards adopted pursuant to RSA 541-A.

(b) Neither the department of education nor the state board of education shall by statute or rule require that the common core standards developed jointly by the National Governors Association and the Council of Chief State School Officers be

implemented in any school or school district in this state. If the local school board elects not to implement the common core standards or the common core state standards adopted by the state board pursuant to RSA 541-A, the local school board shall determine, approve, and implement alternative academic standards.

(c) On or after the effective date of this subparagraph, the state board of education shall not amend any existing academic standards and shall not approve any new academic standards without prior review and recommendation of the legislative oversight committee established in RSA 193-C:7.

(d) In this paragraph, "academic standards" shall have the same meaning as in RSA 193-E:2-a, VI(b).

V.

(a) The general court requires the state board of education and the department of education to institute procedures for maintaining, updating, improving, and refining the minimum standards for public school approval for each area of education identified in paragraph I. Each school district shall be responsible for maintaining, updating, improving, and refining curriculum. The curriculum shall present educational goals, broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies, and knowledge called for by the minimum standards for public school approval for each area of education identified in paragraph I. It is the responsibility of local teachers, administrators, and school boards to identify and implement approaches best suited for the students in their communities to acquire the skills and knowledge included in the curriculum, to determine the scope, organization, and sequence of course offerings, and to choose the methods of instruction, the activities, and the materials to be used.

(b) The state board of education shall adopt rules, pursuant to RSA 541-A, relative to the approval of alternative programs for granting credit leading to graduation.

VI. In this section:

(a) "Minimum standards for public school approval" mean the applicable criteria that public schools and public academies shall meet in order to be an approved school, as adopted by the state board of education through administrative rules.

(b) "Academic standards" means what a student should know and be able to do in a course or at each grade level.

(c) "Curriculum" means the lessons and academic content taught in school or in a specific course or program.

RSA 198:40-a

I. For the biennium beginning July 1, 2015, the annual cost of providing the opportunity for an adequate education as defined in RSA 193-E:2-a shall be as specified in paragraph II. The department shall adjust the rates specified in this paragraph in accordance with RSA 198:40-d.

II.

(a) A cost of $3,561.27 per pupil in the ADMA, plus differentiated aid as follows:

(b) An additional $1,780.63 for each pupil in the ADMA who is eligible for a free or reduced price meal; plus

(c) An additional $697.77 for each pupil in the ADMA who is an English language learner; plus

(d) An additional $1,915.86 for each pupil in the ADMA who is receiving special education services; plus

(e) An additional $697.77 for each third grade pupil in the ADMA with a score below the proficient level on the reading component of the state assessment administered pursuant to RSA 193-C:6 or the authorized, locally-administered assessment as provided in RSA 193-C:3, IV(i), provided the pupil is not eligible to receive differentiated aid pursuant to subparagraphs (b)-(d). A school district receiving aid under this subparagraph shall annually provide to the department of education documentation demonstrating that the district has implemented an instructional program to improve non-proficient pupil reading.

III. The sum total calculated under paragraph II shall be the cost of an adequate education. The department shall determine the cost of an adequate education for each municipality based on the ADMA of pupils who reside in that municipality.

ISSUES PRESENTED

I. Whether the trial court erred by concluding that the plaintiffs pleaded and proved an actual deprivation of a fundamental right when they alleged no well-pleaded facts and proffered no admissible evidence demonstrating that they cannot deliver an adequate education on the per-pupil cost set forth in RSA 198:40-a.

II. Whether the trial court erred by creating and employing an anomalous "hybrid inquiry," whereby it conducted an exacting audit of RSA 198:40-a's legislative history to bolster its conclusion that the State was depriving the plaintiffs of a fundamental right.

III. Whether the trial court erred by implying that certain services the plaintiffs contended the State must fund fall within the definition of an "adequate education," when the legislature, within its broad discretion, did not include those services in the statutory definition.

IV. Whether the trial court erred by denying the defendants' requests for discovery into the plaintiffs' alleged actual per pupil costs prior to finding definitively that the plaintiffs proved a deprivation of the right to an adequate education.

V. Whether the trial court erred when, in granting the plaintiffs' motion for summary judgment, it refused to infer in the defendants' favor that the difference between the State funding provided under RSA 198:40-a

and the amount school districts actually spend on education is attributable to services provided in excess of what the Constitution requires.

VI. Whether the trial court erred by awarding the plaintiffs attorney's fees under the "substantial benefit theory" when the plaintiffs prevailed only on their as-applied challenge and the legislature could target relief specifically to the plaintiffs.

STATEMENT OF THE FACTS AND OF THE CASE

RSA 198:40-a establishes the per-pupil cost of delivering the standard- and criteria-driven "substantive educational program" required for an "adequate education," as defined in RSA 193-E:2-a. On March 13, 2019, the Contoocook Valley School District ("ConVal") and three of its board members initiated this action against the State of New Hampshire, the New Hampshire Department of Education, the Governor, and the Commissioner of the Department of Education,[1] ("State" or "defendants") alleging that RSA 198:40-a violates Part II, Articles 83 and 5 of the New Hampshire Constitution. DAI 7.[2] The plaintiffs contended that RSA 198:40-a should include funding for services that the legislature determined ancillary to and beyond what the Constitution requires. *See generally* DAI 9-20. The plaintiffs sought an order (a) declaring RSA 198:40-a, II(a) unconstitutional on its face and as applied to ConVal; and (b) directing the State to remit tens of millions of dollars to ConVal out of the education trust fund for costs ConVal incurred or anticipated incurring during the 2019 and 2020 fiscal years. DAI 24-26. The plaintiffs did not challenge the definition of an "adequate education" set forth in RSA 193-E:2-a.

The plaintiffs contended that RSA 198:40-a must fund: (1) certain transportation costs; (2) certain teacher-benefits costs; (3) school nurse

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[1] The Governor and the Commissioner were named in both their official and individual capacities.

[2] "DAO ___" refers to the defendants' appendix of appealed decisions.
"DAI ___" refers to volume I of the defendants' appendix.
"DAII ___" refers to volume II of the defendants' appendix.
"DAIII ___" refers to volume III of the defendants' appendix.
"Tr. ___" refers to the transcript of the March 29, 2019 preliminary injunction hearing.

personnel costs; (4) superintendent services costs; (5) food services costs; and (6) certain facilities operation and maintenance costs. DAI 9-20. The plaintiffs also asserted that the teacher-student ratios the legislature factored into its cost-funding formula were constitutionally inadequate. DAI 12-14. The plaintiffs sought a preliminary injunction requiring the State to remit to ConVal additional funding to which ConVal claimed constitutional entitlement. DAI 89-93. Eventually, the Winchester, Mascenic and Monadnock School Districts ("Winchester," "Mascenic" and "Monadnock" respectively) joined the suit and requested similar relief. DAI 95. The plaintiffs maintained from the outset that they could prove their case based solely on eleven exhibits, attached to their original petition, containing unaudited data collected and published by the State. DAI 19-24.

The trial court held a preliminary injunction hearing on March 29, 2019. At that hearing, the defendants emphasized that if the plaintiffs intended to prove their case using ConVal's and Winchester's actual costs, then the defendants would need to conduct discovery into those costs. Tr. 34, 46, 48, 71-72. In response, the plaintiffs insisted that they intended to proceed using only "the State's own data" and "the State's own formula," Tr. 56, meaning they intended to show that RSA 198:40-a's per-pupil cost fell short of statewide unaudited spending averages. *See* Tr. 56-58. The defendants argued that discerning what those averages reflect in terms of constitutional adequacy versus extra-constitutional spending would require "an intensive fact-finding mission." Tr. 48.

In an April 5, 2019 order, the trial court agreed with the plaintiffs that little if any discovery would be necessary. DAO 19. The trial court established an expedited schedule, setting an April 29 deadline for

dispositive motions, a merits hearing for the week of June 3, and promising a final resolution before the fiscal year ended on June 30. DAO 25-26. The trial court further denied the preliminary injunction motions, concluding that, based on the expedited schedule, the plaintiffs risked no irreparable harm. DAO 25.

The defendants moved to dismiss for failure to state a claim. *See* DAI 259-288. The defendants argued, among other things, that this Court's decisional law and the legislature's definition of "adequate education" did not require the State to fund any of the ancillary services identified in the plaintiffs' petition and that the data in the plaintiffs' exhibits were irrelevant to the trial court's analysis. DAI 264-278.

The plaintiffs filed a second amended petition, adding the Mascenic and Monadnock School Districts as plaintiffs and asserting new, conclusory, allegations that they could not provide an adequate education on State funding alone. *See generally* DAI 370-395. The plaintiffs filed a motion for summary judgment that same day. *See* DAI 544. The defendants moved to strike both filings, reiterating that to defend against the plaintiffs' new allegations, they needed "extensive discovery on, among other things, how each school district spends the resources provided by the State and what services each district provides in excess of those required under the statutory definition of 'adequate education.'" DAI 820. Without that discovery, the defendants argued, it would be impossible to "determine whether each school district in question can deliver an adequate education on the funding the State provides." DAI 820. The defendants represented that they "would almost certainly need to secure one or more experts" and

argued that their factual defenses would "depend on the specific circumstances as they exist in each school district." DAI 820.

The trial court denied the motion to strike on April 29, 2019, crediting the plaintiffs' assertion that the second amended petition would "call for the same evidence as the previous petitions with the only exception being evidence of Monadnock's facilities operation and maintenance." DAO 31. The trial court emphasized that the plaintiffs' theory was "unquestionably unchanged" and "[did] not turn on how each school district spends the resources provided by the State," but rather "on the base adequacy aid, a static figure that the State has provided to each [plaintiff], and its failure to fulfill the actual costs of the same five items the original petition stated have been underfunded in ConVal." DAO 31, 37. According to the trial court, "nothing in the Second Amended Petition change[d] the [plaintiffs'] legal theory such that new evidence [would be] required." DAO 30-31. The trial court, moreover, suggested that the defendants filed their motion to delay the proceedings, and warned that future requests to restructure the case would be met with skepticism. *See* DAO 36, 38.

The defendants moved for summary judgment. DAII 3-18. The defendants argued that the data in the plaintiffs' eleven exhibits were not admissible, competent and reliable to prove "the minimum amount of funding needed to provide the opportunity for an 'adequate education'" because they purported to reflect total school-district expenditures throughout the State, were "reported *by the school districts themselves*," and failed to differentiate "those costs necessarily incurred to deliver the opportunity for an adequate education and those amounts an individual

school district might choose to expend above and beyond what is constitutionally mandated." DAII 4 (emphasis in original). The defendants contended that the plaintiffs could not prevail as a matter of law because they relied solely on those inadmissible data. DAII 2, 7-17.

On May 16, 2019, the trial court issued an interim order concluding that it could resolve the case on the papers and canceling the merits hearing. DAO 39. On June 5, 2019, the trial court issued a 98-page omnibus order in which it: denied in substantial part the defendants' motion to dismiss;[3] denied in full the defendants' motion for summary judgment; granted in part the plaintiffs' motion for summary judgment; and invalidated RSA 198:40-a, II(a) as applied to the plaintiff school districts. *See generally* DAO 40-137. The trial court also awarded the plaintiffs their attorney's fees under the "substantial benefit" theory. DAO 135-136.

In denying the motion to dismiss, the trial court concluded that the plaintiffs had "unquestionably" alleged the deprivation of a fundamental right. DAO 67. The trial court then proceeded to conduct an extensive audit of RSA 198:40-a's legislative history, including findings and recommendations made by the Joint Legislative Oversight Committee on Costing an Adequate Education ("Joint Committee"), DAO 71-95, which the legislature adopted when promulgating RSA 198:40-a, *see* Laws 2008, ch. 173. The trial court questioned several assumptions and decisions reflected in that legislative history, DAO 86-95, and ultimately concluded

[3] The trial court dismissed only the individual-capacity claims against the Governor and Commissioner. DAO 59-62.

that both RSA 198:40-a and RSA 193-E:2-a were constitutionally suspect as a result. DAO 126-28.

With respect to the defendants' motion for summary judgment, the trial court acknowledged that it could not properly consider the plaintiffs' exhibits. DAO 104.[4] Nevertheless, the trial court inferred that RSA 198:40-a deprived the plaintiffs of a fundamental right because the cost-funding formula reflected in that statute did not account for actual teacher-student ratios and because there was a "large disparity" between the level of funding for facilities operation and maintenance costs and transportation costs and the actual amounts the plaintiffs spent on those items. DAO 108-113, 116-123. The trial court derived these "actual" values from affidavits attached to the plaintiffs' motion for summary judgment, which contained the same or similar data as the plaintiffs' inadmissible exhibits. DAO 105, 108-113, 116-123. Relying on its audit of RSA 198:40-a's legislative history, the trial court concluded that these "actual deprivations" were not justified by any compelling State interest. DAO 111-113, 118-119, 122-123.

Both sides sought reconsideration. The defendants highlighted several manifest errors of law and argued that the trial court effected a result that the defendants had been assured would not occur: a ruling in the plaintiffs' favor based on the actual, on-the-ground conditions the plaintiff school districts alleged. *See generally* DAIII 191-215. The defendants argued that the trial court imposed this change *sua sponte* after the

[4] The trial court suggested that there was a genuine dispute as to the exhibits' weight and materiality. DAO 104. As explained below, they were in fact inadmissible.

defendants repeatedly protested that they could not competently defend against claims based on actual conditions without the opportunity to conduct discovery, including expert discovery, into how the plaintiff school districts actually spent their money. DAIII 200. The defendants reiterated that the plaintiffs' figures might, for example, include spending beyond what is constitutionally necessary to deliver an adequate education. DAIII 202-203. The defendants accordingly requested that the trial court vacate its June 5 order and enter judgment their favor. DAIII 214.

On July 26, 2019, the trial court summarily rejected most of the defendants' arguments. DAO 139. The trial court did, however, conclude that it had improperly relied on actual facility operations and maintenance costs when determining that the funding the State provided for those costs violated the plaintiffs' fundamental rights. DAO 139-145. The trial court neither addressed the defendants' contentions with respect to teacher-student ratios and transportation costs, nor altered its decision to invalidate RSA 198:40-a, II(a) on an as-applied basis.

Though it did not change the outcome, the reconsideration order did provide further insight into the trial court's constitutional analysis. DAO 142-143. The trial court, quoting from its order on the plaintiffs motion to reconsider, observed that "RSA 198:40-a, II(a) is a unique statute, more likened to a price tag than an explicit restriction on a fundamental right." DAO 142 (citation omitted). The trial court continued that:

> [I]t was not RSA 198:40-a, II(a)'s dollar figure, on its face, that was determined unconstitutional; it was how that dollar figure was reached that failed scrutiny. The statute could not be determined constitutional or unconstitutional from solely its language. The Court's invalidation of RSA 198:40-a, II was not solely on its

> language as facial challenges require but rather the Court looked behind the Legislature's language to the legislative history and legislative fact-finding. In that way, the Court considered extrinsic evidence, beyond the statute on its face, in considering the dollar amount and the Joint Committee's intentions and costing decisions.

DAO 143 (citation, ellipsis, and bracketing omitted). The trial court thus concluded:

> The particular nature of the [plaintiffs'] challenge, the Legislature's codification process, and school funding all called for a hybrid inquiry: an analysis of the circumstances behind a statute's language, which is performed in an as-applied analysis with extrinsic evidence, and an analysis of the statute's inherent unconstitutionality when applied to any school district, a facial inquiry.

DAO 143 (citation and quotation omitted).

This appeal followed.

SUMMARY OF THE ARGUMENT

The plaintiffs could not prevail on their claims as a matter of law. Throughout this litigation, the plaintiffs relied solely on conclusory assertions that the State was not meeting its constitutional funding obligation, which they attempted to support with eleven exhibits containing unaudited, aggregate data collected and published by the State. The defendants repeatedly explained that those data did not differentiate between costs that school districts necessarily incur to deliver a constitutionally adequate education and costs incurred beyond what the Constitution requires. Consequently, it was impossible to discern from the data whether the plaintiffs could deliver a constitutionally adequate education on State funding alone. Because the plaintiffs relied only on those data to prove their claims, they failed to meet their burden of proof. The trial court therefore should have entered judgment in the defendants' favor.

In reaching the opposite conclusion, the trial court committed several manifest errors of law. First, the trial court erroneously concluded that the plaintiffs had "unquestionably" alleged a deprivation of a fundamental right. DAO 67. In fact, the plaintiffs' pleadings contained only unadorned legal conclusions as to the ultimate issue in this case. The plaintiffs accordingly failed to state a claim for relief, and the defendants were entitled to dismissal.

Second, the trial court erroneously relied on the affidavits attached to the plaintiffs' motion for summary judgment to infer a deprivation of a fundamental right. Those affidavits contained the same inadmissible data

as the plaintiffs' exhibits or data that was inadmissible for the same reasons. Because the plaintiffs relied solely on inadmissible evidence, they could not prove their claims. The defendants' were accordingly entitled to summary judgment.

Third, the trial court erroneously bolstered its unsupported conclusion that the plaintiffs' had proved a deprivation of the right to an adequate education by creating and employing an anomalous "hybrid inquiry." Applying this bespoke standard, the trial court conducted an exacting audit of RSA 198:40-a's legislative history, contravening, among other things, this Court's clear guidance in analogous contexts that the proper inquiry must focus on the constitutionality of the final figure adopted by the legislature without concern for the components of that figure or the rationale underpinning it. This type of review finds no basis in authority, raises profound separation-of-powers concerns, is incompatible with several of this Court's long established rules of statutory interpretation, and imposes an unworkable standard on the legislature and the judiciary.

Fourth, the trial court erred by implying that the services the plaintiffs claim are constitutionally required actually fall within the statutory definition of an adequate education. This Court has made clear that the legislature has broad discretion when defining an adequate education. The legislature did not include any of the services in question in the definition set forth in RSA 193-E:2-a, the plaintiffs did not challenge that definition, and, in any event, the plaintiffs failed to demonstrate that this exclusion deprived their students of an adequate education.

These errors, taken together or in isolation, require reversal and the entry of judgment in the defendants' favor. But even if they do not, the trial court committed at least two additional errors requiring that its judgment be vacated. First, the trial erred by depriving the defendants of any meaningful opportunity to conduct discovery despite the defendants' repeated requests, prior to any finding that the plaintiffs proved a deprivation of the right to an adequate education. Second, the trial court erred when, in granting the plaintiffs' motion for summary judgment, it refused to draw an inference in the defendants' favor that the difference between the State funding provided under RSA 198:40-a and the amount the school districts actually spend on education is attributable to services the plaintiffs provide in excess of what the Constitution requires. These errors require, at a minimum, this Court to vacate and remand should it determine the defendants are not entitled to judgment in their favor.

Finally, the trial court erred by awarding the plaintiffs attorney's fees under the "substantial benefit" theory. The plaintiffs did not confer a substantial benefit on the general public because they only prevailed on their own as-applied challenge and the legislature could craft a remedy specific to them. Thus, even if this Court were to affirm the trial-court's judgment, it should reverse the fee award.

ARGUMENT

I. THE RIGHT TO AN ADEQUATE EDUCATION

In *Claremont School District v. Governor*, 138 N.H. 183 (1993) (*Claremont I*), this Court held that "part II, article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools and to guarantee adequate funding." *Id.* at 184. This Court concluded that the right to an adequate education is "held by the public to enforce the State's duty," and that "[a]ny citizen has standing to enforce this right." *Id.* at 192. While this Court cited several sources to which its co-equal branches might look for guidance, *id.* at 192-93, it declined to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor." *Id.* at 192. The Court remanded the case to the trial court to determine whether the State was meeting its constitutional obligation to provide an adequate education. *Id.* at 193

Education funding returned to this Court four years later, following a ruling by the trial court that the State was meeting its constitutional duty. *See Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 465-66 (1997) (*Claremont II*). This Court reversed, not on grounds that the plaintiffs had been deprived their constitutional right, but holding that the local property tax levied to fund education constituted a state tax and that the variance of its rate from locality to locality violated Part I, Article 5. *Id.* at 465-66. This Court also held that the right to a State funded education is a fundamental right, resolving a question left open in *Claremont I*. *Id.* at 473.

The Court noted that "[t]he substance of the right may be achieved in different schools possessing, for example, differing library resources, teacher-student ratios, computer software, as well as the myriad tools and techniques that may be employed by those in on-site control of the State's public elementary and secondary school systems." *Id.* at 474. This Court emphasized that, as long as the State is meeting its constitutional obligation to fund an adequate education, it "may delegate its obligation to provide [that education] to local school districts," which may choose "to dedicate additional resources to their schools or to develop programs beyond those required for [constitutional adequacy]." *Id.* at 475-76.

Claremonts I and *II* defined the broad parameters of this newly declared constitutional right. In *Claremont II*, this Court cited approvingly to "seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy." *Id.* at 474, 475 (quoting *Rose v. Council for Better Edu., Inc.*, 790 S.W.2d 186, 212 (K.Y. 1989)). Those criteria envisioned a core curriculum comprising the constitutional minimum the State must fund. *Id.* at 474-75 This Court cautioned, however, that "[w]hile the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines." *Id.* at 475 (citation and quotation marks omitted). The Court accordingly did not provide an analytical framework for determining the constitutionality of a particular definition or funding formula, nor evaluate the plaintiffs' programs against a constitutional standard, instead limiting its holding to the nature of the

right and the manner in which the State raised revenues to provide education funding. *See generally id.*

The constitutional right articulated in *Claremont I* and expounded upon in *Claremont II* is unique. Whereas most constitutional rights are "negative" rights proscribing certain governmental conduct, the right to an adequate education is a "positive" right compelling *affirmative* governmental action.[5] Moreover, unlike other positive constitutional rights, whose parameters are clear from the constitutional text, *see, e.g.*, N.H. Const. Pt. I, Art. 15 ("Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown . . . ."), Part II, Article 83 sets forth no identifiable standard for the State to meet its affirmative duty to deliver an "adequate education." And, this Court did not endeavor to define the scope of the State's duty in *Claremont I* or *Claremont II*, leaving the State with only "aspirational guidelines" on which to proceed. *Claremont II*, 142 N.H. at 474.

This spawned a series of legislative efforts and continued litigation, resulting in more than ten decisions from this Court. In the course of those decisions, this Court distilled the State's duty down to four mandates: "'define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.'" *Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 155-56 (2006)

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[5] A "negative right" is "[a] right entitling a person to have another refrain from doing an act that might harm the person entitled." *Black's Law Dictionary* (11th ed. 2019). A "positive right" is "[a] right entitling a person to have another do some act for the benefit of the person entitled." *Id.*

(*Londonderry*) (quoting *Claremont School District v. Governor*, 147 N.H. 499, 505 (2002)). The Court has frequently addressed the State's attempts to satisfy the first, third, and fourth of these mandates. *See Londonderry*, 154 N.H. at 155 (failure to define adequate education); *Claremont Sch. Dist.*, 147 N.H. at 500 (failure to provide for accountability); *Opinion of the Justices*, 145 N.H. 474, 477 (2000) (proposed property tax unconstitutional); *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 212 (1999) (property tax unconstitutional); *Opinion of the Justices*, 143 N.H. 429, 434 (1999) (referendum to determine tax unconstitutional); *Opinion of the Justices*, 142 N.H. 892, 902 (1998) (proposed tax abatement unconstitutional). This appeal, however, concerns only the second mandate: the State's duty to determine the cost of an adequate education.

II. THE PLAINTIFFS NEITHER PLEADED NOR PROVED THAT THE PER-PUPIL COST SET FORTH IN RSA 198:40-A RESULTS IN AN ACTUAL DEPRIVATION OF A FUNDAMENTAL RIGHT.

A. The analytical framework

This Court recently reiterated that, "[f]or limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of the right." *State v. Lilley*, 171 N.H. 766, 776 (2019). The plaintiffs accordingly had to plead a deprivation of their fundamental right to an adequate education to survive a motion to dismiss and prove such a deprivation with admissible evidence to survive a motion for summary judgment. *Id.*; *see also Claremont II,* 142 N.H. at 474 ("[W]hen an individual school or school district offers something less than educational adequacy, the governmental action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny.").

This basic analytical framework has been in place since at least 1972. In *Laconia Board of Education v. City of Laconia*, 111 N.H. 389 (1972), the Laconia Board of Education challenged the City Council's unilateral reduction of the city's school budget, arguing the city could not provide an education meeting minimum statutory and regulatory standards on the diminished funds. *Id.* at 390-93. On appeal, this Court acknowledged that "[t]here may be a point at which reductions and modifications to meet the budget reduction ordered by the city council would result in educational services and programs that are less than the statutes or State Board's minimum standards require." *Id.* at 393. The Court observed, however, that "[w]hen such a situation occurs[,] the school

board *may present evidence to substantiate that situation* and thus be entitled to obtain from the city council the funds necessary to provide the required educational program." *Id.* (emphasis added). In other words, this Court placed the burden on the challenging school board to prove in the first instance, that the actual funding received was insufficient to deliver the statutorily mandated public education. *See id.* at 393-94. The Court did not shift this burden to the City Council or audit the City Council's reasoning.

At a constitutional level, this Court's ratemaking jurisprudence reflects a similar analysis, in which this Court has held that:

> [T]he constitution is only concerned with the end result of a rate order; *i.e.*, that it be just and reasonable. . . . [T]he particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant. . . . The only limitation on the methodology is that it produce neither confiscatory nor exploitative rates.

In re Public Serv. Co., 130 N.H. 265, 275 (1988) (*Souter*, J.). This Court has emphasized that a challenge to some particular aspect of a rate will fail "unless the claim is that the entire rate is either unjust or unreasonable." *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 676 (2001). This analysis, similar to the analysis contemplated in *Laconia Board of Education*, focuses on whether a particular dollar amount is inadequate without considering what comprises that number or its underlying rationales.

This analytical framework makes equal sense in the present context. As this Court emphasized in *Lilley*, a plaintiff alleging a deprivation of a fundamental right must prove his or her claim before the defendant must prove a defense. 171 N.H. at 776. Thus, the plaintiffs bore the initial

burden in this case of both pleading and proving that they could not deliver a constitutionally adequate education on the per-pupil cost set forth in RSA 198:40-a. Any failure to do so necessitated judgment in the defendants' favor.

Against this backdrop, the trial court erred in four fundamental ways. First, the trial erred by concluding that the plaintiffs had "unquestionably" alleged the deprivation of a fundamental right, DAO 67, when the plaintiffs never set forth any well-pleaded, as opposed to conclusory, allegations of such a deprivation. Second, the trial court erred by inferring an actual deprivation of a fundamental right as a matter of law based on inadmissible data that the trial court acknowledged it could not consider, DAO 104, and that did not demonstrate that the per-pupil cost set forth in RSA 198:40-a was insufficient to fund an adequate education. Third, the trial court erred by fashioning and employing an anomalous "hybrid inquiry," whereby it substituted plaintiff proof with a freewheeling audit of RSA 198:40-a's legislative history and came to its own, subjective conclusion that purported flaws in the underlying deliberative process rendered both RSA 198:40-a *and* RSA 193-E:2-a—a statute the plaintiffs never challenged—constitutionally suspect. Finally, the trial court erred by implying that the services the plaintiffs alleged that the State failed to adequately fund fall within the statutory definition of "adequate education" in the first place. These errors, which ignore established precedent and subvert the proper analytical framework, require reversal.

B. The plaintiffs did not plead an actual deprivation of a fundamental right.

To state a claim, a plaintiff must articulate well-pleaded allegations of fact that are "reasonably susceptible of a construction that would permit recovery." *Grand Summit Hotel Condo. Unit Owners' Ass'n v. L.B.O. Holding, Inc.*, 171 N.H. 343, 345 (2018) (citation and internal quotation marks omitted). When considering challenges to pleading sufficiency, this Court "assume[s] the truth of all well-pleaded facts" and "construe[es] all inferences in the light most favorable to [the plaintiff]," *Garod v. Steiner Law Office, PLLC*, 170 N.H. 1, 5 (2017), but will not accept allegations "that are merely conclusions of law," *Ramos v. Warden, N.H. State Prison*, 169 N.H. 657, 970 (2017) (citations and quotation omitted).

The trial court concluded that the plaintiffs had "unquestionably" alleged an actual deprivation of a fundamental right based solely on paragraph 24 of the second amended petition.[6] In that paragraph, the plaintiffs alleged that "[t]he State does not currently provide sufficient funds for each and every school district to provide a constitutionally adequate education." DAI 374. This statement, by its plain terms, is nothing more than a legal conclusion as to the ultimate issue in this case: whether RSA 198:40-a sufficiently funds a constitutionally adequate education. It was therefore not entitled to an assumption of truth, and could not defeat the defendants' motion to dismiss. *See Ramos*, 169 N.H. at 970. The other allegations to which the plaintiffs pointed in the proceedings

[6] In its June 5 order, the trial court cited paragraph 14 of the second amended petition. DAO 67. It later clarified on reconsideration that this was a citation error. DAO 144.

below, such as paragraphs 26, 101, 103, 134, 142, 144, 145, 151, 165, and 176, are similarly deficient. The well pleaded facts do not support the trial court's conclusion that the plaintiffs alleged an actual deprivation of a fundamental right, and the plaintiffs' claims should have been dismissed. In concluding otherwise, the trial court erred.

C. The plaintiffs did not prove an actual deprivation of a fundamental right.

Even if the plaintiffs' claims could have survived dismissal, the defendants were entitled to summary judgment. To avoid the defendants' summary judgment motion, the plaintiffs needed to introduce *admissible evidence* sufficient to generate a factual question as to whether the plaintiffs can deliver an adequate education on the per-pupil cost set forth in RSA 198:40-a. *See* RSA 491:8-a, II. The trial court could neither excuse the plaintiffs from this burden nor assume a deprivation in the absence of proof. Thus, the trial court had to determine whether the plaintiffs' proffered evidence was in fact admissible to prove the inadequacy of the per-pupil cost. RSA 491:8-a, II; *accord U.S. ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 84 (1st Cir. 2012) ("[T]he district court could not properly conduct its summary judgment analysis without determining the admissibility of [an expert report], which speaks directly to the heart of [the plaintiff's] claims.").

Throughout the litigation, the plaintiffs maintained that they needed only the eleven exhibits they attached to their pleadings to prove a deprivation of the right to an adequate education. In their motion for summary judgment, as well as their reconsideration motion and objection to

the plaintiffs' summary judgment motion, the defendants explained why none of the plaintiffs' exhibits was admissible for that purpose. *See* DAII 7-17. The exhibits all suffered from the same fatal flaw: they contained only aggregations of self-reported, unaudited data, which the defendants and the trial court could not disaggregate into amounts attributable to the core educational program and amounts not constitutionally required but that the districts nevertheless chose to spend. DAII 7-8; *see generally* DAII 7-17; DAIII 173-179, 194-195. Because it was impossible to determine from that data what costs the school districts incurred to deliver an adequate education, as defined in RSA 193-E:-2-a, they were not relevant to prove the deprivation the plaintiffs alleged. DAIII 176, 188 (citing *N.H. R. Ev.* 401 & 402). Additionally, the exhibits were inadmissible because the plaintiffs did not identify any witness with "personal knowledge" to testify about the data they contained, meaning, the exhibits lacked foundation and could not be deemed competent and reliable. DAIII 175-177, 194 (citing RSA 491:8-a, II; *N.H. R. Ev.* 602). The plaintiffs accordingly failed to prove their claims.

The trial court acknowledged in its merits order that it could not consider the data contained in the plaintiffs' exhibits as part of its summary judgment analysis. DAO 104.[7] But the trial court did just that, concluding that the plaintiffs "proved" the deprivation they alleged based "undisputed allegations" in four affidavits attached to the plaintiffs' motion for summary judgment. DAO 104-05. The trial court initially concluded that

[7] The trial court erroneously suggested that the weight and materiality of these exhibits were in dispute. DAO 104. As explained *supra*, the exhibits were inadmissible.

these affidavits demonstrated that the teacher-student ratios adopted by the legislature and the level of transportation and facilities operation and maintenance funding the legislature provided resulted in an actual deprivation of a fundamental right. DAO 108-113, 116-123. On reconsideration, the trial court concluded that the evidence with respect to facilities operation and maintenance costs was "inconclusive." DAO 144. Thus, the trial court invalidated RSA 198:40-a, II(a), as applied to the plaintiffs, based on its conclusions with respect to teacher-student ratios and transportation costs.

The trial court's analysis suffered from multiple fatal flaws. First, the trial court improperly focused on the sufficiency of certain aspects of the per-pupil cost set forth in RSA 198:40-a at the expense of analyzing the sufficiency of that cost as a whole. *See Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 676. The trial court erred because the proper inquiry focuses on whether the per-pupil cost set by the legislature, however derived, funds an adequate education as the legislature has defined it. *See id.*; *In re Public Serv. Co.*, 130 N.H. at 275; *accord Laconia Bd. of Educ.*, 111 N.H. at 393. The trial court then compounded this error by conducting its own review of the legislative process that led to RSA 198:49-a instead of focusing on the sufficiency of the plaintiffs' proof.

The trial court further erred by basing its decision on inadmissible evidence. The plaintiffs' affidavits, on which the trial court exclusively relied, contained data that were inadmissible for the same reasons as the data in the plaintiffs' exhibits, and also contained conclusory statements and not evidentiary facts. *Granite State Mgmt. & Res. v. City of Concord*, 165 N.H. 277, 290 (2013) ("The affidavits should set forth evidentiary, and

not ultimate, facts and should set forth the facts with particularity, mere general averments being insufficient."). Indeed, most of the "data" contained in those affidavits came directly from the inadmissible exhibits. For instance, the "data" in the affidavits reflecting three of the four plaintiff school districts' transportation costs, by the plain terms of the affidavits, derived directly from plaintiffs' Exhibit B. *See,* DAI 801 (Winchester affidavit), 806 (Monadnock affidavit), 810 (Mascenic affidavit) (all citing Exhibit B).

The affidavit of ConVal's superintendent and Exhibit B do reflect slightly different per-pupil transportation costs for ConVal during the 2017 fiscal year. *Compare* DAI 582 (ConVal affidavit) *with* DAI 599 (Exhibit B). Without any meaningful opportunity to conduct discovery, however, the defendants could not probe whether this difference—exactly $30 dollars per pupil—resulted from something more than a simple typographical error. In any event, the value in the ConVal affidavit remained inadmissible, as the plaintiffs provided no explanation for its derivation or what services it included. Thus, it suffered from the same fatal flaw as the similar value in Exhibit B: it was self-reported by ConVal and did not distinguish between those costs Conval claimed constitutionally required and those ConVal chose to make in excess of the constitutional baseline. The plaintiffs therefore could not meet their burden of proof with the transportation cost "data" in the ConVal affidavit.

The trial court concluded that the teacher-student ratios on which the legislature relied deprived the plaintiffs of a fundamental right primarily due to "flaws" it identified while auditing RSA 198:40-a's legislative history. *See* DAO 109-113. But the trial court also purported to base that

conclusion on Winchester's "actual" teacher-student ratio. *See* DAO 108. The trial court derived that "actual" ratio from paragraph 22 of the affidavit of Winchester's superintendent, which states: "Winchester only has 32 students in the Eighth Grade." DAI 802. From this single sentence, the trial court determined that Winchester's "actual" teacher-student ratio, at least in eighth grade, was 16 to 1, which in the court's view supported a conclusion that the State was not meeting its constitutional funding obligation. DAO 108, 110. Once again, however, this left the trial court (and the defendants) no way to separate the staffing and curriculum necessary for Winchester to deliver a constitutionally adequate education from any staffing and curriculum Winchester chose to provide in excess of that constitutional baseline. Thus, Winchester's "actual" teacher-student ratio, as derived by the trial court, was likewise inadmissible to demonstrate the deprivation of a fundamental right, and the trial court improperly considered it.

For these reasons, the trial court erred by considering the plaintiffs' affidavits at all. The trial court further erred, however, by inferring an actual deprivation of a fundamental right from "disparities" between the "actual" values it derived from those affidavits and the corresponding values incorporated into the cost-funding formula. DAO 110-111; 121-122. Even though the trial court emphasized that it was not considering the actual values as a constitutional baseline, analytically, this is a distinction without a difference. It is impossible to discern from these "disparities" what services the plaintiff school districts provided, and what commensurate costs they incurred, in excess of what the Constitution requires. As a result, any disparity might simply be a product of a district's

spending choices rather than reflective of a constitutional inadequacy. The plaintiffs proffered no other evidence from which the trial court could have separated those services and costs. Without *any* admissible evidence in the record, the trial court erred by concluding that the State was actually depriving the plaintiffs of a fundamental right based solely on the "disparities" the trial court identified in the inadmissible evidence it chose to consider.

To be sure, the plaintiffs could have attempted to meet their burden by presenting evidence that that the plaintiff school districts necessarily expend more on the core educational program set forth in RSA 193-E:2-a than the State provides in funding. If the plaintiffs had proceeded on that theory, and their petition had survived dismissal, then the State would have been entitled to the opportunity to explore the plaintiffs' allegations through robust discovery, and present its positions to the trial court at summary judgment or, if necessary, trial. The trial court, in turn, would have made its decision based on actual evidence of the cost of an adequate education rather than inadmissible evidence and its own audit of the legislative process. While this may have been "an arduous process," *Londonderry*, 154 N.H. at 167 (*Duggan*, J., concurring in part and dissenting in part), it is one that comports with the regular course civil procedure and for which there is decisional support. *See, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1207 (Kan. 2014) ("At trial, the plaintiffs elicited testimony from various employees of the plaintiff districts; representatives from the Kansas Association of School Boards, Kansas Board of Regents, and Kansas State Department of Education; members of the legislature; and experts in the field of school finance. In response, the State called a series of school

finance experts. In addition to this extensive testimony, 650 exhibits were received into evidence."); *McCleary v. State*, 269 P.3d. 227, 245 (Wash. 2012) ("The court heard testimony from 28 fact and expert witnesses, with another 27 witnesses testifying via deposition. . . . During the course of the testimony, over 500 exhibits came into evidence.").

Instead, the plaintiffs chose a different path. This path resulted in the plaintiffs proffering *no* admissible evidence to support their constitutional claims. The defendants were accordingly entitled to summary judgment. This Court should reverse the trial court's contrary ruling.

D. The trial court erred by fashioning and employing an anomalous self-styled "hybrid" standard of review.

As mentioned, the trial court bolstered its erroneous conclusion that the State was actually depriving the plaintiffs' students of a fundamental right through an exacting audit of RSA 198:40-a's legislative history. *See, e.g.*, DAO 71-95, 111-113, 117-119, 120-123, 125, 127, 131-132, 137, 142-143. In its orders on the parties' motions for reconsideration, the trial court clarified that this audit was part of a "hybrid inquiry" that the trial court alone developed and employed, which it characterized as

> an analysis of the circumstances behind [RSA 198:40-a's] language, which is performed in an as-applied analysis with extrinsic evidence, and an analysis of the statute's inherent unconstitutionality when applied to any school district, a facial inquiry."

DAO 142-143. The trial court attempted to explain this inscrutable standard by noting that RSA 198:40-a "could not be determined constitutional or unconstitutional from solely its language." DAO 143.

The trial court thus took it upon itself to "look[] beyond the Legislature's language to the legislative history and legislative fact finding." DAO 142. The trial court concluded that "[t]he particular nature of the [plaintiffs'] challenge, the legislature's codification process, and school funding all call[ed] for" such an approach. DAO 143. Neither side advocated this approach and the trial court offered no authority—even indirect—for this extraordinary standard.

To the contrary, authority directly undercuts the trial court's bespoke "hybrid inquiry." In analogous contexts, this Court's jurisprudence, as well as that of other jurisdictions, contemplates testing solely the final figure produced against the relevant constitutional standard. *See, e.g.*, *Appeal of Campaign for Ratepayers Rights*, 145 N.H at 676; *In re Public Serv. Co.*, 130 N.H. at 275. This Court suggested the same basic analysis in *Laconia Board of Education*. *See* 111 N.H. at 393. None of this Court's school-funding decisions remotely hints that a court should audit the legislative process; nor has this Court in any constitutional context articulated this type of "hybrid inquiry."

And for good reason. The trial court's standard, as applied in this case, excused the plaintiffs' failure to prove an actual deprivation of a fundamental right, contravening this Court's precedent. *See Lilley*, 171 N.H. at 776. The trial court assumed that burden itself and met it, without evidentiary proof of constitutionally necessary costs, but by combing through the legislative record and identifying what the trial court subjectively viewed as "flaws" in the deliberative process that led to RSA 198:40-a. This analysis finds no support in any legislative or decisional

law, is untethered from any discernible, much less administrable legal standards, and raises profound separation-of-powers concerns.

Along the way, the trial court rejected this Court's consistent admonition to afford legislative enactments, such as RSA 198:40-a, a presumption of constitutionality. While the trial court concluded that such a presumption "cannot be reconciled with strict scrutiny," DAO 69, it jumped to strict scrutiny prior to evaluating admissible evidence to conclude that the plaintiffs had proved deprivation of their fundamental right—*i.e.*, until the plaintiffs actually overcame the presumption of constitutionality. *See Lilley*, 171 N.H. at 776. The trial court further misapplied this Court's decision in *Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n*, 159 N.H. 627 (2010). In *Tuttle*, this Court held that the presumption of constitutionality does not attach "when there is no question of statutory interpretation" and "[t]he effects of the legislation are obvious and acknowledged." *Id.* at 640. In this case, however, the trial court concluded that RSA 198:30-a, II(a) "could not be determined constitutional or unconstitutional solely from its language," DAO 143, and that it was "not apparent on the statute's face that it could not, in some circumstances, provide sufficient funding," DAO 106. In other words, the trial court acknowledged that the effects of RSA 198:30-a are neither "obvious" nor "acknowledged," and *Tuttle*, by its own terms, had no bearing on the trial court's inquiry. RSA 198:40-a was therefore entitled to a presumption of constitutionality.

The trial court also ignored this Court's clear directive not to consider legislative history absent ambiguous statutory text. *See Anderson v. Estate of Wood*, 171 N.H. 524, 528 (2018) ("Unless we find statutory

language to be ambiguous, we will not examine legislative history." (Citation and quotation marks omitted)). As the trial court correctly observed, RSA 198:40-a, II(a) is "unambiguous as to the amount provided" and the plaintiffs only challenged "the soundness of that figure." DAO 143. In light of these observations, and consistent with the precedents cited above, the trial court should have limited its inquiry to whether the per-pupil cost set forth in RSA 198:40-a itself satisfied constitutional adequacy, an inquiry based on the parties' evidence. Instead, the trial court took RSA 198:40-a's lack of ambiguity (and the plaintiffs' lack of proof) as license "to look beyond the statute's language at the legislative process behind it." DAO 143. This decision departed significantly from established and governing precedent, *see Anderson*, 171 N.H. at 528; *In re Public Serv. Co.*, 130 N.H. at 275, and improperly required the legislature to justify its costing decision without first requiring the plaintiffs to prove the deprivation of a fundamental right, *see Lilley*, 171 N.H. at 776.

The flaws in the trial court's approach are further exposed by its complaint that RSA 198:40-a's funding formula does not "strictly align" with RSA 193-E:2-a's definition of "adequate education." *See* DAO 89-90. The trial court, through its exacting audit of the legislative process that led to RSA 198:40-a, in essence imposed a requirement that all school-funding legislation be supported by a comprehensive legislative record in which any services the legislature funds perfectly match the core educational program adopted by the legislature. But this Court has never stated nor suggested that the legislature may only fund education at a level that "strictly aligns" with the statutory definition or that a legislative enactment related to school funding will only survive a constitutional challenge if the legislature

sufficiently "shows its work." Indeed, the trial court's approach raises significant separation-of-powers concerns by denigrating the legislative function and imposing the judiciary as a super-legislature free to subject the deliberative process of a co-equal branch to exacting judicial scrutiny simply because it relates to school funding. This approach is incompatible with the broad legislative discretion reflected in this Court's school-funding jurisprudence. *See Londonderry*, 154 N.H. at 160 ("Determining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch."); *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160-61 (1998) ("We observe that the only way for an orderly solution to occur is for legislation implementing such a solution to be enacted."); *Claremont I*, 138 N.H. at 192-93 ("We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."). It also removes any incentive for the legislature to provide State funding beyond what is strictly required to fund the core educational program and risks a significant likelihood that the judiciary will end up running the State's education systems. For these reasons, too, the "hybrid inquiry" is unworkable in practice, and the trial court erred in adopting it.

In sum, the trial court's "hybrid inquiry" finds no basis in authority, is incompatible with several of this Court's long term rules of statutory interpretation, raises profound separation-of-powers concerns, and imposes an unworkable standard on the legislature and the judiciary. The trial court erred in creating and applying that standard. Under the correct standard, the defendants were entitled to judgment in their favor.

E. The services the plaintiffs allege the State is required to fund do not fall within the statutory definition of an adequate education.

The above discussion assumes that the services the plaintiffs contended the State is obligated to fund—transportation, teacher benefits, school nurse personnel, superintendents, food services, and facilities operation and maintenance—actually fall within the statutory definition of an adequate education. They do not. In finding for the plaintiffs, the court necessarily included those costs rather than deferring to the legislature's definition of adequacy, as this Court has directed.

In RSA 193-E:2-a, I, the legislature defined an adequate education, as this Court instructed, by setting forth a core educational program that comprises the constitutional minimum. The plaintiffs do not challenge RSA 193-E:2-a, which defines an adequate education as instruction in: (a) English/language arts and reading; (b) mathematics; (c) science; (d) social studies; (e) arts education; (f) world languages; (g) health education; (h) physical education; (i) engineering and technologies; and (j) computer science and digital literacy.

The statute characterizes this enumerated list as "the minimum standards" for public school approval and contemplates that the State Board of Education will adopt rules against which to evaluate whether a school meets those standards. RSA 193-E:2-a, V(b). The statute sets forth additional constitutional minimum obligations, and provides that those standards "shall constitute the opportunity for the delivery of an adequate education." RSA 193-E:2(a), IV(a). The statute is clear, however, that the enumerated list constitutes the sum total of the minimum standards for an

adequate education: not even the Department of Education or the State Board of Education may amend the enumerated list without the legislature's approval. RSA 193-E:2-a, IV(a)-(c).

RSA 193-E:2-a mentions none of the services on which the plaintiffs based their funding challenge, nor does any applicable administrative rule. *See N.H. Admin. R. Ed.* 306.31, 306.37, 306.40, 306.41, 306.43, 306.45, 306.46, 306.47, and 306.48. While "school health services" and "food nutritional services" are mentioned in *N.H. Admin. R. Ed*. 306.40(a), they fall within the non-educational portion of that regulation. Thus, each of the services the plaintiffs in question is ancillary to the substantive educational program established by the legislature.

This Court has made clear that, within broad parameters, the manner in which the legislature chooses to define an adequate education is afforded considerable deference. Indeed, as discussed above, this Court has emphasized throughout its school-funding decisions the respective roles of the judicial and legislative branches. *See, e.g.*, *Londonderry*, 154 N.H. at 160; *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160-61 (1998); *Claremont I*, 138 N.H. at 192-93. This Court will not invalidate a legislative enactment simply because its challengers "have devised one that appears to satisfy constitutional and statutory requirements to a greater degree than the plan approved by the Legislature." *See City of Manchester v. Sec'y of State*, 163 N.H. 689, 698 (2012) (citation and quotation marks omitted); *see also Londonderry*, 154 N.H. at 163 (citing approvingly to redistricting decisions). Thus, the mere fact the plaintiffs believe the definition of adequate education should include transportation costs, teacher benefit costs, school nurse personnel costs, superintendent services

costs, food services costs, and facilities operation and maintenance costs does not make those services constitutionally required. Because the plaintiffs premised their case on the exclusion of those services from the statutory definition, they could not prevail as a matter of law. For this reason, too, the defendants were entitled to judgment in their favor, and the trial court erred in concluding otherwise.

III. OTHER INSTANCES OF ERROR

In addition to the errors described above, which compel reversal and judgment in the defendants' favor, the trial court committed several additional errors requiring, at the very least, that this Court reverse and remand the case for appropriate discovery and, if necessary, trial.

A. The trial court erred by depriving the defendants of any meaningful opportunity for discovery.

If the defendants were not entitled to dismissal or summary judgment, then the trial court could not have properly adjudicated the plaintiffs' claims without having structured a robust discovery process and trial. "Obviously, by its very nature, the summary judgment process presupposes the existence of an adequate record." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 280 (4th Cir. 2013) (citations and quotation marks omitted). A trial court "therefore must refuse summary judgment where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Id.* (citations, quotation marks, and bracketing omitted); *see also Moore v. Shelby Cty., Ky.*, 718 F. App'x 315, 320 (6th Cir. 2017) ("Common sense dictates that before a district court tests a party's evidence, the party should have the opportunity to develop and discover the evidence.").

Despite repeated requests, the trial court refused to allow the defendants to develop and discover evidence bearing on the plaintiffs' claims. The trial court then determined that an actual deprivation had occurred without evidentiary proof, and, after assuring the defendants that it

would hold the plaintiffs to their eleven exhibits, ruled in the plaintiffs' favor based on the very theory against which the defendants contended they needed discovery to defend. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 280 ("Chief among its errors was the district court's award of summary judgment to the [plaintiff] without allowing the City any discovery."). Thus, if this Court determines the defendants were not entitled to dismissal or summary judgment, the case should be remanded so that it can be appropriately structured to afford meaningful discovery—including expert discovery—related to the plaintiff school districts' ability to deliver an adequate education on the funding the State provides.

B. The trial court erred by drawing improper inferences in the plaintiffs' favor.

When reviewing a motion for summary judgment, a court must "consider the affidavits and other evidence, and all inferences properly drawn therefrom, *in the light most favorable to the non-moving party*." *Jeffery v. City of Nashua*, 163 N.H. 683, 685 (2012) (citation omitted) (emphasis added). Departing from that standard, the trial court inferred that the State deprived the plaintiffs' students of their fundamental right to an adequate education based on superficial "disparities" between Winchester's "actual" teacher-student ratio and the plaintiffs' "actual" transportation costs and corresponding ratios and costs adopted by the legislature when promulgating RSA 198:40-a. *See* DAO 108-113, 116-123. As the defendants repeatedly noted, the court drew an improper inference in the plaintiffs' favor. DAIII 203, 204, 225. The trial court could just as

reasonably have inferred that these differences were attributable to the individual school districts' choices to provide services and programs above and beyond what the Constitution requires. DAIII 203, 204, 225. Thus, the trial court misapplied the summary judgment standard to the defendants' detriment. This stands as an additional basis to vacate the trial court's judgment.

IV. THE TRIAL COURT ERRED BY AWARDING THE PLAINTIFFS ATTORNEY'S FEES

Because the defendants should have prevailed as a matter of law, the plaintiffs were not entitled to an award of attorney's fees. But even if this Court were to affirm the trial court's merits determinations, it should still reverse the fee award. This Court has never held that attorney's fees are necessarily available when a plaintiff prevails on a constitutional challenge to the State's education-funding system. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 598 (1999) ("We express no opinion as to whether attorney's fees are recoverable for litigation related to these proceedings."). While the trial court awarded the plaintiffs fees under the "substantial-benefit" theory, the plaintiffs only prevailed on their as-applied challenge. Accordingly, even if the trial court's judgment is affirmed, RSA 198:40-a is invalid as to the plaintiffs themselves, and the legislature may target relief specifically to the plaintiff school districts after appropriate proceedings. Thus, the plaintiffs have not conferred a substantial benefit *on the general public* warranting an award of fees. *See id.* at 595 (discussing "[a]n award of attorney's fees to the prevailing party where the action conferred a substantial benefit *not only on the plaintiffs* who initiated the action, but on the public as well . . . ." (emphasis added)). The trial therefore erred in awarding the plaintiffs attorney's fees under the substantial-benefit theory.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that this Honorable Court reverse the judgment below.

The defendants request a fifteen-minute oral argument.

The defendants certify that the appealed decisions are in writing and are included with the filing of this brief in a separate appendix, pursuant to *Sup. Ct. R.* (3)(i).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Daniel E. Will, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,464 words, excluding the table of contents, the table of authorities, and the texts of the pertinent laws and statutes, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

February 18, 2020

/s/Daniel E. Will
Daniel E. Will

CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that a copy of the State's brief shall be served on Elizabeth E. Ewing, Esquire and Michael J. Tierney, Esquire, counsel for Contoocook Valley School District, Winchester School District, Mascenic School District, Monadnock School District, Myron Steere, III, Richard Cahoon, and Richard Dunning, through the New Hampshire Supreme Court's electronic filing system.

February 18, 2020 *<u>/s/Daniel E. Will</u>*
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