

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2019-0500

Contoocook Valley School District, Myron Steere, III, Richard Cahoon, Richard Dunning, Winchester School District, Mascenic Regional School District, and Monadnock Regional School District	v.	The State of New Hampshire, New Hampshire Department of Education, Christopher T. Sununu, both individually and in his official capacity as Governor of the State of New Hampshire, and Frank Edelblut, both individually and in his official capacity as Commissioner of the New Hampshire Department of Education
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**APPEAL PURSUANT TO RULE 7**

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**BRIEF FOR THE PETITIONERS,**  
CONTOOCCOOK VALLEY SCHOOL DISTRICT,  
MYRON STEERE, III, RICHARD CAHOON,  
RICHARD DUNNING,  
WINCHESTER SCHOOL DISTRICT,  
MASCENIC REGIONAL SCHOOL DISTRICT, and  
MONADNOCK REGIONAL SCHOOL DISTRICT  
(Oral argument requested, 15 minutes)

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By their attorneys,  
Wadleigh, Starr & Peters, P.L.L.C.  
Michael J. Tierney – NHBA# 17173, on the brief and orally  
Elizabeth E. Ewing – NHBA# 269009, on the brief  
95 Market Street  
Manchester, NH 03101  
(603) 669-4140  
mtierney@wadleighlaw.com      eewing@wadleighlaw.com

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## QUESTIONS PRESENTED

1. Did the Superior Court err in not holding the State's education funding scheme was facially unconstitutional where the undisputed facts demonstrated that there is not a single school district in the State that can provide a constitutionally adequate education on the funding provided by RSA 198:40-a, II(a) and the State was unable to identify a single school district that can provide a constitutionally adequate education on the funding provided by RSA 198:40-a, II(a)? (Petitioners' Motion for Reconsideration.)

2. Did the Superior Court err in not holding the State's education funding scheme was facially unconstitutional where the vast majority of school districts in the State cannot provide a constitutionally adequate education with the funding provide by the State but must raise taxes on local taxpayers to meet the State's obligations? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

3. In light of the fact that the State has failed to implement a constitutional education funding system in the twenty years since *Claremont I* was decided, did the Superior Court err in concluding that it was "prohibited from instructing the Legislature on what is included in a constitutionally adequate education or how funding must be calculated[?]" (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

4. Did the Superior Court err in not granting preliminary declaratory and injunctive relief preventing the State from unconstitutionally requiring the local taxpayers to pay the State's obligation

to fund a constitutionally adequate education for the 2019 fiscal year?  
(Petitioners' Motion for Preliminary Injunction.)

5. Did the Superior Court err in failing to grant declaratory and permanent injunctive relief to prevent the State from funding less than \$9,929 per pupil, exclusive of transportation, for both the 2019 and the 2020 fiscal years? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

6. Did the Superior Court err in concluding that it could not rely on either the petitioning school districts' actual costs of delivering a constitutionally adequate education nor on the Department of Education data as the best evidence in determining whether the State had fully funded a constitutionally adequate education where the Legislature had relied on the same type of data in costing a constitutionally adequate education? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

7. Did the Superior Court err in not determining that facts asserted in affidavits of four school superintendents and not controverted by the affidavit submitted by the State's sole affiant must be deemed admitted for the purpose of summary judgment motions? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Objection to Respondents' Motion for Reconsideration.)

8. Did the Court err in not holding that superintendent services, school nurse services, food services, and all requirements that the State imposes on local school districts are elements of a constitutionally adequate education? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)



9. Did the Superior Court err in not holding the State's per pupil transportation funding was unconstitutional where it did not fund the actual transportation costs in large and rural school districts which are higher than the state average and higher than the transportation costs in small and urban districts? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

10. Did the Superior Court err in finding there was no deprivation of a fundamental right to a constitutionally adequate education where the State chose to fund teachers' benefits at a level that could not fully fund mandatory benefits, including retirement contributions, federal employment taxes, workers' compensation coverage and unemployment insurance, and health and dental insurance? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

11. Did the Superior Court err in failing to hold that the State did not meet its burden of showing that it fully funded facilities operation costs? ((Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

12. Did the Superior Court err in dismissing the claims against the Governor and the Commissioner in their individual capacities? (Petitioners' Objection to Respondents' Motion to Dismiss; Petitioners' Motion for Reconsideration.)

13. Did the Superior Court err in holding that it is the sole obligation of the Legislature to determine the amount of education funding necessary for the provision of a constitutionally adequate education where previous decisions of this Court hold that it is the obligation of the State

and therefore require actions of the executive and potentially judicial branches of government? (Petitioners' Objection to Respondents' Motion to Dismiss; Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **N.H. Constitution, Part II, Article 5**

[Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.] And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of

the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

## **N.H. Constitution, Part II, Article 83**

[Art.] 83. [Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce

or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

**RSA 21-J:34 Reports Required.**

The governing body of each city, town, unincorporated town, unorganized place, school district, and village district, and the clerk of each county convention shall submit to the commissioner of revenue administration the following reports necessary to compute and establish the tax rate for each city, town, unincorporated town, unorganized place, school district, village district and county. The commissioner shall adopt rules under RSA 541-A establishing the form and content of these reports:

...

V. A financial report for each city, town, school district, village district, or county shall be filed showing the summary of receipts and expenditures, according to uniform classifications, during the preceding fiscal year, and a balance sheet showing assets and liabilities at the close of the year. This report shall be submitted on or before April 1 if the municipality keeps its accounts on a calendar year basis, or on or before September 1 if the municipality keeps its accounts on an optional fiscal year basis pursuant to RSA 31:94-a. School districts shall submit financial reports on or before September 1 of each year.

...

## **RSA 100-A:16 Method of Financing**

### **III. EMPLOYER CONTRIBUTIONS.**

(a) On or before the first day of October next preceding each regular session of the state legislature, the board of trustees shall certify to the commissioner of administrative services the amounts which will become due and payable by the state during the biennium next following to the retirement system and it shall be the duty of the commissioner of administrative services in preparing the executive budget for each ensuing biennium to include in the budget the amounts so certified which amounts shall be appropriated by the legislature. The amounts so certified under this subparagraph shall include the unfunded accrued liability of the retirement system. The annual employer contribution requirements effective July 1, 2008 and as calculated each year thereafter shall not be less than the employee contribution rates under RSA 100-A:16, I(a).

(b) A county, city, town, school district or other political subdivision of the state having any employee members who are paid directly by the state but for whom the staff is later reimbursed for the part of their compensation not chargeable to state funds shall likewise reimburse the state for that part of the contribution made by the state to this system which is based on such part of compensation not chargeable to state funds.

(c) At the beginning of each year commencing on the first day of July the board of trustees shall certify to each employer other than the state the percentage rates of contribution due the system from each such employer, and shall assess upon each such employer such percentages of the earnable



compensation of members in its employ, and it shall be the duty of the treasurer or other disbursing officer of each such employer to pay to the board of trustees such portion of the annual amount so assessed at such times and in such manner as the board of trustees may prescribe. Each such employer is hereby authorized to appropriate the sums necessary for the payment of such assessments. The annual employer contribution requirements effective July 1, 2008 and as calculated each year thereafter shall not be less than the employee contribution rates under RSA 100-A:16, I(a).

(d) Notwithstanding RSA 100-A:16, III(a), the New Hampshire retirement system board of trustees shall, within a reasonable period of time not to exceed 30 days from the effective date of this subparagraph, certify to the commissioner of administrative services the amounts that will become due and payable by the state during the biennium beginning July 1, 2009 based upon a state employee group other post-employment benefit (OPEB) plan balance as of July 1, 2009 for the state medical plan subtrust of \$0.00. Such certification shall in all other respects be based upon the data and assumptions used to calculate the state employer rate as certified in September 2008. In no event shall the board of trustees certify a rate in any subsequent year based upon payments made from the medical plan subtrust to the state prior to July 1, 2009.

**RSA 189:28-a Report to the Public.**

I. School boards shall publish in the next annual report, or post at the annual meeting, the general fund balance sheet from the most recently completed audited financial statements or from the most recently completed financial report filed pursuant to RSA 21-J:34, V.

II. In the case of an accumulated general fund deficit, the school board shall insert an article in the warrant recommending such action as they deem appropriate, which may include, but is not limited to, raising a sum of money for the purpose of reducing that deficit.

## **RSA 193-E:2 Criteria for an Adequate Education**

An adequate education shall provide all students with the opportunity to acquire:

- I. Skill in reading, writing, and speaking English to enable them to communicate effectively and think creatively and critically.
- II. Skill in mathematics and familiarity with methods of science to enable them to analyze information, solve problems, and make rational decisions.
- III. Knowledge of the biological, physical, and earth sciences to enable them to understand and appreciate the world around them.
- IV. Knowledge of civics and government, economics, geography, and history to enable them to participate in the democratic process and to make informed choices as responsible citizens.
- V. Grounding in the arts, languages, and literature to enable them to appreciate our cultural heritage and develop lifelong interests and involvement in these areas.
- VI. Sound wellness and environmental practices to enable them to enhance their own well-being, as well as that of others.
- VII. Skills for lifelong learning, including interpersonal and technological skills, to enable them to learn, work, and participate effectively in a changing society.

**RSA 193-E:2-a Substantive Educational Content of an Adequate Education**

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 194-C:4 Superintendent Services.**

Each school administrative unit or single school district shall provide the following superintendent services:

I. An educational mission which indicates how the interests of pupils will be served under the administrative structure.

II. Governance, organizational structure, and implementation of administrative services including, but not limited to:

(a) Payroll, cash flow, bills, records and files, accounts, reporting requirements, funds management, audits, and coordination with the treasurer, and advisory boards on policies necessary for compliance with all state and federal laws regarding purchasing.

(b) Recruitment, supervision, and evaluation of staff; labor contract negotiation support and the processing of grievances; arrangement for mediation, fact finding, or arbitration; and management of all employee benefits and procedural requirements.

(c) Development, review, and evaluation of curriculum, coordination of the implementation of various curricula, provisions of staff training and professional development, and development and recommendation of policies and practices necessary for compliance relating to curriculum and instruction.

(d) Compliance with laws, regulations, and rules regarding special education, Title IX, the Americans with Disabilities Act, home education, minimum standards, student records, sexual harassment, and other matters as may from time to time occur.

(e) Pupil achievement assessment through grading and state and



national assessment procedures and the methods of assessment to be used.

- (f) The on-going assessment of district needs relating to student population, program facilities and regulations.
- (g) Writing, receiving, disbursement, and the meeting of all federal, state, and local compliance requirements.
- (h) Oversight of the provision of insurance, appropriate hearings, litigation, and court issues.
- (i) School board operations and the relationship between the board and the district administration.
- (j) The daily administration and provision of educational services to students at the school facility including, but not limited to, fiscal affairs; staff, student, and parent safety and building issues; and dealing with citizens at large.
- (k) Assignment, usage, and maintenance of administrative and school facilities.
- (l) Designation of number, grade or age levels and, as applicable, other information about students to be served.
- (m) Pupil governance and discipline, including age-appropriate due process procedures.
- (n) Administrative staffing.
- (o) Pupil transportation.
- (p) Annual budget, inclusive of all sources of funding.
- (q) School calendar arrangements and the number and duration of days pupils are to be served pursuant to RSA 189:1.
- (r) Identification of consultants to be used for various services.

## **RSA 195:14 Certification of District Taxes.**

### **I. Voted Appropriations.**

(a) The cooperative school board shall annually within 20 days of the close of the meeting certify to the commissioner of revenue administration and the state department of education, upon blanks prescribed and provided by the commissioner of revenue administration for the purpose, a certificate of the several appropriations voted by the district and estimated revenues, so far as known, and such other information as the commissioner of revenue administration may require.

...

### **II. Non-voted Appropriations.**

(a) Whenever a cooperative school district assumes any obligations of a preexisting district the cooperative school board shall also certify to the commissioner of revenue administration and the state department of education the amount to be raised by taxation to pay such obligations as they become due, and the state department of education shall determine the proportional part thereof to be borne by each preexisting district and notify the commissioner of revenue administration.

...

III. (a) The adequate education grant used in subparagraph I(d) shall be based on the revised estimated revenues contained in the report required in RSA 198:4-d, II.

...

**RSA 198:4-d Reports Required; Cities and School Districts. –**

The governing body of each city and school district shall submit to the commissioner of the department of education the following reports pursuant to rules adopted under RSA 541-A by the commissioner of revenue administration which establish the form and content of such reports:

I. A report filed by the governing body of each city and school district shall certify the appropriations voted by the meeting of the appropriate legislative body, whether city council, mayor and council, or mayor and board of aldermen, or by each annual or special school district meeting, along with estimated revenues. This report shall be filed within 20 days of the close of the meeting.

II. A report filed by the governing body of each city and school district shall revise all the estimated revenues for the year. This report shall be filed by September 1 of each year. The revised estimates by school districts for the adequate education grants calculated under RSA 198:41 shall be considered the most accurate within 5 percent of the amount estimated pursuant to RSA 198:40-a.

III. A financial report for each city and school district shall be filed showing the summary of receipts and expenditures, according to uniform classifications, during the preceding fiscal year, and a balance sheet showing assets and liabilities at the close of the year. This report shall be submitted on or before September 1 of each year. Each statistical report

submitted under this section shall include a certification signed by the chairperson of the school district's governing body or the chairperson of the board of trustees of approved public academies that states: "I certify, under the pains and penalties of perjury, to the best of my knowledge and belief, that all of the information contained in this document is true, accurate and complete."

III-a. The department of education and the department of revenue administration together shall develop and recommend school accounting standards. The departments shall report to the speaker of the house, the senate president, and the governor concerning such accounting standards on or before December 1, 1999.

IV. The budget committee in school districts operating under the municipal budget law shall file the budget within 20 days of the close of the annual or special meeting.

V. If a city or school district is audited by an independent public accountant, it shall submit a copy of the audited financial statements in accordance with RSA 21-J:19, III.

VI. If a city or school district is audited under RSA 671:5, the procedures in RSA 41:31-a through 41:31-d shall be followed.

**RSA 198:40-a Cost of an Opportunity for an Adequate Education.**

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.

**198:40-d Consumer Price Index Adjustment.**

Beginning July 1, 2017 and every biennium thereafter, the department of education shall adjust the cost of an adequate education under RSA 198:40-a based on the average change in the Consumer Price Index for All Urban Consumers, Northeast Region, using the “services less medical care services” special aggregate index, as published by the Bureau of Labor Statistics, United States Department of Labor. The average change shall be calculated using the 3 calendar years ending 18 months before the beginning of the biennium for which the calculation is to be performed.

**198:42 Distribution Schedule of Adequate Education Grants;  
Appropriation.**

. . .

II. For the fiscal year beginning July 1, 2005, and every fiscal year thereafter, the amount necessary to fund the grants under RSA 198:41 is hereby appropriated to the department from the education trust fund created under RSA 198:39. The governor is authorized to draw a warrant from the education trust fund to satisfy the state's obligation under this section. Such warrant for payment shall be issued regardless of the balance of funds available in the education trust fund. If the balance in the education trust fund, after the issuance of any such warrant, is less than zero, the comptroller shall transfer sufficient funds from the general fund to eliminate such deficit. The commissioner of the department of administrative services shall inform the fiscal committee and the governor and council of such balance. This reporting shall not in any way prohibit or delay the distribution of adequate education grants.

III. The department of education shall certify the amount of each grant to the state treasurer and direct the payment thereof to the school district or municipality.



**RSA 491:8-a Motions for Summary Judgment.**

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on

the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

. . .

**Ed 302.01 Executive Officer.**

(a) The superintendent shall:

- (1) Serve as the executive officer of the local school district or districts within the school administrative unit (SAU);
- (2) Be responsible for the overall administrative and leadership services of the SAU; and
- (3) Perform the duties specified in the section.

(b) The superintendent shall be responsible for planning and managing the administrative and leadership services of the local school district or districts within the school administrative unit subject to statutory requirements, these rules, and the policies of the local districts

(c) The administrative and leadership services shall be defined and directed by the governing body employing the superintendent.

(d) Such local district services shall include but not be limited to the following areas:

- (1) Personnel;
- (2) Finance;
- (3) Communication/community relations;
- (4) Student service;
- (5) Maintenance/capital improvement;
- (6) Curriculum;
- (7) Instruction;
- (8) Assessment;
- (9) Short and long range planning;
- (10) Governance for student achievement;

- (11) Policy research;
- (12) Implementation, and review; and
- (13) Overall leadership on educational issues.

(e) The superintendent shall develop and maintain a system of public schools, staffed by certified educators, qualified professionals, and persons providing support services, subject to statutory requirements, these rules, and the policies of the local districts (s).

(f) The superintendent shall provide, develop and implement procedures to achieve educational objectives within the local school district or districts with the school administrative unit.

(g) The superintendent shall be directly responsible to the local school district or districts within the school administrative unit board.

(h) The superintendent may nominate for school administrative unit board appointment one or more assistants, including assistant superintendents, and business administrators. The superintendent may assign duties for the efficient management of the school administrative unit.

**Ed 302.02 Substantive Duties.** The superintendent shall in addition to those duties outlined in Ed 302.01:

(a) Nominate all certified staff and appoint other employees in accordance with state law, the rules of the state board and school board policies;

(b) Direct and supervise the work of all employees of the district or districts within the school administrative unit and shall have all powers necessary to make such direction effective, as outlined in RSA 194-C:4. While the superintendent has ultimate responsibility, he/she may delegate powers and duties to other personnel.

(c) Be responsible for the selection and purchase of textbooks and all other supplemental materials and supplies in accordance with the policies of the school board and the state board and see that the same are distributed to the school, accurately accounted for and economically used;

(d) Be responsible for developing and recommending to the school board or boards within the school administrative unit the annual budget for the support of the educational program and for the operation and maintenance of schools within the district or districts and the school administrative unit in accordance with school board policy;

(e) Be responsible for developing and maintaining an accounting system and financial reporting procedures for all funds in accordance with local school board policy, and local and state laws;

(f) Be responsible for the development of an educational plan including curriculum, instruction, and assessment programs for the district or districts and for recommending a program of

studies suitable to the needs of the pupils and the community in accordance with local school board policies, state statutes and state board rules;

(g) Remove a teacher or other employee of the district in accordance with RSA 189:31;

(h) Recommend the dismissal of certified staff to the board, which has the authority to dismiss in accordance with RSA 189:13;

(i) Provide for temporary staff to fill vacancies and provide supplies immediately needed for the operation of the schools;

(j) Be responsible for maintaining records and filing reports as required by the state board of education and the local school boards;

(k) Admit pupils to the resident school district in accordance with the laws of the state and the rules of the state board and policies of the local board;

(l) Direct pupils to assigned classes and grades, consistent with local school board policies;

(m) Maintain a safe environment for pupils free of hazardous conditions;

(n) Be responsible for the evaluation of personnel and programs in accordance with local school board policies;

(o) Be responsible for implementation of state board rules, which apply in the area of the superintendents jurisdiction;

(p) Be responsible for developing and recommending to the school board or boards within the school administrative unit an annual maintenance program and long-term capital improvement plan;

(q) Be responsible for the implementation and recommendation to the school boards or boards within the school administrative unit a community relations and communications program; and

(r) Be responsible for the implementation and review of school district policies.

**Ed 306.07 School Facilities.** The local school board shall:

- (a) Require that the facilities for each school provide the following:
  - (1) Consistent with RSA 189:24, a clean, healthy, and safe learning environment for all areas of the school building, grounds, and school-related activities;
  - (2) Lighting in compliance with the state building code as provided in RSA 155-A;
  - (3) Exhaust and outdoor air ventilation, proper temperature and humidity conditions in compliance with the state building code as provided in RSA 155-A; and
  - (4) Policy and procedures to comply with RSA 200:48 to minimize pollution caused by idling motor vehicles and an annual evaluation of potential causes of poor indoor air quality utilizing a checklist provided by the department; and
- (b) With regard to school facilities:
  - (1) Customize classrooms and other school-related environments to the needs of different content areas. Any lack of specialized spaces for arts, science, technology education and similar requirements shall be addressed as part of the next construction project at the school that receives school building aid under RSA 198:15-a;
  - (2) Provide for accessibility for students with disabilities;
  - (3) Demonstrate compliance with Saf-C 6000 through completion of a life safety inspection by the local fire department or other authority having jurisdiction as required by RSA 153:14;



- (4) Document compliance with regulations relating to school building, sanitation, sewage disposal, water supply, and other matter affecting public health through inspection by the local health officer, other authority having jurisdiction, or an individual, if no municipal officer is available who has received a master's degree in public health; and
- (5) Demonstrate compliance for all furniture and electrical appliances approved by the school administration and comply with requirements of the state fire code, Saf-C 6000.

**Ed 306.11 Food and Nutrition Services.**

(a) The local school board shall:

(1) Require that each school makes a meal available during school hours to every student under its jurisdiction, in accordance with RSA 189:11-a, I-II;

(2) Provide a qualified individual, such as, but not limited to, a school nutrition/food service director, to oversee the operation of school meals, to maintain proper resources that meet state and federal regulations, and maintain state health requirements for each school site within the district; and

(3) Require that each newly-constructed school or renovated kitchen or cafeteria provide space for the preparation and consumption of meals in compliance with Ed 321.12(d).

(b) All food service employees shall, within their first year of employment, obtain a certificate of completion for an approved sanitation course.

(c) If a school nutrition/food service director is employed, each food service director shall, whenever feasible, obtain certification or credentials from an approved program, including but not limited to School Nutrition Association (SNA) certification, within the first 5 years of employment.

(d) Students shall be provided with an adequate time to consume meals in each elementary school in accordance with the federal Child Nutrition and WIC Reauthorization Act of 2004 (Public Law 108-265).

(e) Students shall be provided with an adequate time to consume meals in each middle and high school in accordance with the federal Child Nutrition and WIC Reauthorization Act of 2004 (Public Law 108-265).

(f) If a waiver is granted pursuant to (a)(1) above due to inadequate space, the school district shall make provisions in the next school physical plant expansion provisions to house a food service preparation and consumption area that is in compliance with Ed 321.12(d).

(g) The policy relative to distribution of healthy foods and beverages that create a healthy environment required by Ed 306.04(a)(21) shall include:

- (1) Standards for nutrient dense foods and beverages for learning level needs of elementary, middle and high school as identified and defined by 7CFR Part 210.10;
- (2) Portion size for nutrient dense foods and beverages in schools which support the framework for healthier food choices in all school environments;
- (3) Nutrition targets for foods and beverages made available outside the federally regulated school meals program. The targets shall follow those developed by a nationally recognized research-based organization, such as but not limited to USDA, or as determined by the department to have standards equivalent to the USDA;
- (4) Developmentally appropriate opportunities to learn food preparation skills that support nationally recognized research-based nutrition standards; and
- (5) Annual communication information about the policy and procedure and related curricula to the school community,

including, but not limited to school staff, school board, parents and students.

(h) Any school in (g)(3) choosing a standard for foods available at school which is not consistent with the USDA standard for Child Nutrition Programs, shall request a waiver from the bureau of nutrition programs and services. The bureau shall evaluate the alternative standards and shall grant the waiver if the alternative standards are determined to be equivalent to the nutrition standards of 7 CFR Part 210.

**Ed 306.12 School Health Services.**

(a) In accordance with federal and state law, including, but not limited to, the Family Educational Rights and Privacy Act (FERPA), Section 504 of the Rehabilitation Act of 1973, RSA 141-C, RSA 169-C, RSA 200:26-41, and RSA 326-B, the local school board shall require that each school provides qualified personnel to carry out appropriate school health-related activities.

(b) Each school nurse employed by a school district shall hold a current license as a registered nurse under RSA 326-B and a current school nurse certificate under Ed 504.07, Ed 504.08 or Ed 504.09. Each registered nurse, licensed practical nurse or licensed nursing assistant employed by a school district shall hold such current license under RSA 326-B. If a school nurse or licensed practical nurse is not available to a school for any reason, at least one other person who has a current first aid and cardiopulmonary resuscitation certification (CPR) certification shall be available.

**Ed 306.37 English/Language Arts and Reading Program.**

(a) Pursuant to Ed 306.26, the local school board shall require that an English/language arts and reading program in each elementary school provides:

- (1) Systematic and continuous instruction which develops students' knowledge of language arts, including listening, speaking, reading, writing, and viewing;
- (2) Instruction which emphasizes how to clarify, order, interpret, and communicate experiences through the skillful use of language;
- (3) Opportunities for each student to exercise, with fluency and ease, oral and written skills and to become acquainted with others' interpretations of experiences through fiction and informational materials, film, television, and other media;
- (4) An environment which promotes the importance of reading;
- (5) Opportunities for each child to become literate;
- (6) Methods for assessing students for appropriate placement in the reading/language arts program, including diagnostic assessment for remediation;
- (7) Support for teachers on interpreting test results;
- (8) Continuous monitoring of each student's progress from grade to grade;
- (9) Early intervention or remediation;
- (10) Instruction for teachers in reading in the content areas; and

(11) Training for instructional staff on methods for effectively meeting the language arts/reading needs of all students and on current developments in language arts/reading.

(b) Pursuant to Ed 306.26, the local school board shall require that an English/language arts and reading program in each middle school provides:

(1) Instruction which emphasizes the use of language to clarify, order, interpret, and communicate experiences including instruction in listening, speaking, reading, writing, and viewing;

(2) Opportunities for each student to develop oral and written skills and to become acquainted with others' interpretations of experiences through fiction and informational materials, film, television, and other media; and

(3) Systematic instruction and activities designed to enable student to:

a. Comprehend and produce progressively more complex oral and written language using various patterns of organization, such as narration, description, enumeration, sequence, cause/effect, comparison/contrast, and problem/solution;

b. Recognize and create literary elements, such as plot, character, setting and point of view in a variety of genres;

c. Apply the writing process, including choosing a topic, generating ideas and locating information, drafting, revising, and editing;

- d. Increase vocabulary through semantics, use of the dictionary, structural analysis, including prefixes and suffixes, and other strategies;
- e. Apply previously learned reading skills to content materials;
- f. Acquire new reading skills and fluency through remedial, developmental, and enrichment programs;
- g. Use appropriate reading techniques to acquire knowledge, including setting the purpose for reading, varying reading speed, and reading for comprehension at the literal, inferential, evaluative, critical, and analytical levels;
- h. Read to satisfy personal interests and recognize that fiction and informational materials can offer insight into life; and
- i. Employ appropriate study skills, including the ability to locate materials, take notes, organize information, and use a variety of sources.

(c) Pursuant to Ed 306.27, the local school board shall require that an English/language arts program in each high school provides:

- (1) Opportunities for students to become familiar with the history, structure, and use of English as the basic medium of communication in our society;
- (2) Opportunities for students to develop proficiency and control in the use of language, an appreciation of a variety of literary forms, an understanding and appreciation of various aspects of



past and present cultures as expressed in literature, and interests for lifelong learning;

(3) Courses totaling at least 6 credits in English which shall be distributed as follows:

a. At least 4 credits required of all students and planned as a purposeful sequence of study which promotes:

1. The development of the basic language skills of listening, speaking, reading, writing, and viewing;
2. The acquisition of knowledge; and
3. The understanding of literature and our literary heritage; and

b. At least 2 elective credits designed to provide increased proficiency in the basic language skills and/or an expanded knowledge and understanding of literature and which may be met by such courses as advanced writing, public speaking, debating, dramatics, humanities, and world literature; and

(4) Systematic instruction and activities designed to enable students to:

- a. Develop effective listening and discussion techniques, distinguish fact from opinion, and identify the principle idea;
- b. Write and present speeches for a variety of purposes and audiences;
- c. Understand and apply the writing process by choosing a topic, generating ideas and locating information, drafting, revising, and editing in order to write well-organized, legible, well-supported papers;

- d. Correctly use the conventions of standard English, such as grammar, punctuation, spelling, capitalization, and word usage, in all written work;
- e. Increase reading speed and comprehension and develop thinking skills, such as inference, applying knowledge, and making judgments;
- f. Develop word recognition skills, such as context clues, prefixes, suffixes, and phonetic analysis, in order to develop an increased vocabulary;
- g. Understand ideas presented in a variety of visual formats such as television advertisements and political cartoons;
- h. Know and appreciate both traditional and contemporary literature, including English, American, and works in translation;
- i. Understand literary analysis through discussion and writing activities;
- j. Recognize how our literary heritage relates to the customs, ideas, and values of today's life and culture; and
- k. Develop study skills which contribute to academic success, such as using the dictionary, note taking, locating information, distinguishing good sources of information from bad sources, and applying information in solving of real-life problems.

**N.H. Rule Evid. 401. Test for "Relevant Evidence"**

**Evidence is relevant if:**

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

### **N.H. Super. Ct. R. 23 Written Interrogatories**

(a) Any party may serve, by mail or delivery by hand, upon any other party written interrogatories relating to any matters which may be inquired into under Rule 21.

...

(d) Interrogatories may be served at any time after service of the action.

...

(i) The party, who is served with interrogatories, shall serve his or her answers thereto, by mail or delivery in hand, upon the party propounding them within 30 days after service of such interrogatories. The parties may extend such time by written agreement.

...

## **N.H. Super. Ct. R. 24 Production of Documents**

(a) Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 21(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 21(b).

(b) Procedure.

(1) The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

...

## **N.H. Super. Ct. R. 26 Depositions**

(a) A party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed 20 unless otherwise stipulated by counsel or ordered by the court for good cause shown.

(b) No notice to the adverse party of the taking of depositions shall be deemed reasonable unless served at least 3 days, exclusive of the day of service and the day of caption, before the day on which they are to be taken. Provided, however, that 20 days' notice shall be deemed reasonable in all cases, unless otherwise ordered by the court. No deposition shall be taken within 30 days after service of the Complaint, except by agreement or by leave of court for good cause shown.

...

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

Over twenty-five years have passed since this Court first held that the State has a constitutional obligation to fund an adequate education for each New Hampshire student. *Claremont Sch. Dist. v. Governor (Claremont I)*, 138 N.H. 183, 187 (1993). Since then, the State has continuously failed to fulfill that obligation, which is comprised of four discrete “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) (quotation omitted). This case focuses on the second and third of those mandates.

Contoocook Valley School District, Myron Steere, III, Richard Cahoon, Richard Dunning, Winchester School District, Mascenic Regional School District, and Monadnock Regional School District (collectively, “the Districts”) filed this petition against the State of New Hampshire, the New Hampshire Department of Education, Governor Sununu, and Commissioner Edelblut (collectively, “the State”), seeking preliminary and permanent injunctive relief and declaratory judgment to remedy the State’s underfunding of an adequate education under RSA 198:40-a, which forces local school districts to increase local taxes to provide to their students the education that the State is constitutionally required to provide.

The Districts demonstrated that no school district in the state could provide a constitutionally adequate education with the base adequacy aid set by RSA 198:40-a because the Legislature’s calculation of that figure was fundamentally flawed. Specifically, the Legislature’s costing of transportation, the number of required teachers, required teachers’ benefits,



and facilities operation and maintenance were not sufficient in any school district, particularly the petitioning districts. And the State provided no funding for the provision of required school nurse, superintendent, and food services. Each of those cost items is included within the Legislature's definition of an adequate education, and the failure to fully fund each resulted in the actual deprivation of the right to a state-funded, adequate education. The Districts further demonstrated that a constitutionally adequate education, according to the State's formula, actually cost \$9,929 per pupil, exclusive of transportation.

A hearing on the Districts' request for preliminary injunctive relief was held on March 29, 2019. The Districts' request was denied on the bases that: 1) no irreparable harm would result in the absence of a preliminary injunction because the trial court intended to resolve the matter before the State could assert sovereign immunity with respect to fiscal year 2019; and 2) that the trial court did not have sufficient evidence to determine the Districts' likelihood of success on the merits. DAO 25-26.<sup>1</sup> While the State "hinted" that significant discovery might be required, the State also requested expedited treatment of this case. *Id.* at 21, n. 13. The trial court concluded that significant discovery was unlikely to be required because the Districts were relying on Department of Education data supplied by the

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<sup>1</sup> "DAO" refers to the defendants' appendix of appealed decisions.

"PAO" refers to the Districts' addendum 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.

"PAI" refers to the Districts' appendix.

Districts to the State and any additional discovery issues would be “discre[te] and well defined.” *Id.* The State was able to propound discovery requests but never did so. *See, e.g.*, N.H. Super. Ct. R. 23(d) (providing that “[i]nterrogatories may be served at any time after service of the action”). Pursuant to the request of all parties, the trial court set an expedited schedule, meant to resolve the merits of this matter before June 30, 2019. DAO 25-26.

The State moved to dismiss, arguing that the trial court should apply a presumption of constitutionality to RSA 198:40-a, despite clear precedent holding that strict scrutiny applied. DAI at 264-66. In addition, the State argued that the cost items identified by the Districts were “ancillary” costs, outside the State’s constitutional obligation, and that Governor Sununu and Commissioner Edelblut should be dismissed in their individual capacities. *Id.* at 263-64, 272-75. The trial court granted the State’s Motion to Dismiss with respect to the governor and the commissioner in their individual capacities but otherwise denied it. DAO at 62, 95, 102. Notably, the trial court: 1) found that the Districts had alleged an actual deprivation of the fundamental right to an adequate education; 2) applied strict scrutiny; 3) concluded that the Legislature had “failed to clearly identify what [cost items] exactly go[] into its definition” of an adequate education, which rendered its costing “impervious to judicial review[;]” and 4) noted that the cost items incorporated into RSA 198:40-a by the Legislature constituted a definition of an adequate education “without proper precision and with inconsistent adherence to Board of Education regulations and questionable judgment.” DAO at 67, 89, 95.

Both the Districts and the State moved for summary judgment. In support of their Motion, the Districts submitted four affidavits from the superintendents of the Districts. DAI at 578, 800, 805, 809. The trial court granted the Districts' motion and denied the State's. DAO at 125. The trial court's decision that RSA 198:40-a is unconstitutional was based primarily on the manifestly incorrect student-teacher ratio used by the Legislature and the Legislature's arbitrary exclusion of transportation funding for high school students. *Id.* at 111-12, 121-22. In addition, the trial court concluded that the Legislature's costing of facilities operation and maintenance was arbitrary, *id.* at 118, although, upon reconsideration, the court found that its ruling was in error because it relied upon the Districts' actual costs for facilities operation and maintenance, *id.* at 140-41. The trial court reiterated that RSA 198:40-a is unconstitutional. *Id.* at 140. The Districts were awarded their attorneys' fees as the suit "contributed to the vindication of important constitutional rights." Nonetheless, the trial court declined to award the Districts injunctive relief. DAO 133-35.

Both the Districts and the State sought reconsideration, which was largely denied. *See* DAO at 138; PAO at 123. This appeal followed.

## **SUMMARY OF ARGUMENT**

It is the obligation of the State to provide a constitutionally adequate education. This mandate is inherent in the New Hampshire Constitution's requirement that the State "cherish" public schools. Part II, Article 83. Everything the State defines as part of an adequate education, it must fully fund. This case is about the State's failure to fund an adequate education. For over twenty-five years, the State has failed to fulfill its constitutional obligations to New Hampshire's students. The State has defined a constitutionally adequate education to include transportation, an adequate number of teachers, certain benefits for those teachers, school nurses, superintendents, food services, and facilities operation and maintenance. Nonetheless, the State has underfunded those cost items or failed to fund them at all. As a result, New Hampshire's school districts have been forced to raise local taxes, resulting in disproportionate State taxes in violation of Part II, Article 5 of the New Hampshire Constitution.

The Districts adequately pled and proved that the State was unconstitutionally underfunding New Hampshire students' education, resulting in a deprivation of the fundamental right to a state-funded adequate education. Strict scrutiny was therefore warranted. But the State offered no rationale whatsoever – much less a compelling interest – to justify these deprivations. Indeed, the State has not even attempted to argue that it is fully funding a constitutionally adequate education. Given the State's twenty-five-year dereliction of its constitutional duties and the complete dearth of *any* rationale for the State's underfunding, the trial court erred in failing to award the Districts injunctive relief.

As the trial court recognized in its Order, RSA 198:40-a,II(a) sets the current base adequacy for all schools at \$3,562.71.<sup>2</sup> DAO at 40.

Nevertheless, the actual average cost of an education, according to Department of Education data, is approximately \$18,901. *Id.* In fact, there is no school district in the State that is able to provide an education at less than \$12,000 per pupil. DAI at 589, ¶ 94.

The trial court correctly found that RSA 198:40-a is not constitutional in its application to any school district but incorrectly concluded that the statute was not facially unconstitutional. PAO at 132-33. And the trial court's dismissal of Governor Sununu and Commissioner Edelblut in their individual capacities was error where the constitutional obligation to fully fund an adequate education resides with the State, not just the Legislature, and where "restraint of forbidden action is not imposed by the courts upon the state but upon those asserting the right to take action as though it were the state's . . . ." *Conway v. New Hampshire Water Res. Bd.*, 89 N.H. 346 (1938). For the same reason, it was error for the trial court not to award injunctive relief against Governor Sununu and Commissioner Edelblut. Finally, the trial court erred in not holding that the State's scheme for funding education, with property tax rates that vary by in excess of 700% across municipalities, was not unconstitutional under Part II, Article

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<sup>2</sup> Pursuant to RSA 198:40-d, the base adequacy figure statutorily increases each biennium with inflation and was \$3,636.06 for the 2019 fiscal year. For the 2020 and 2021 fiscal years, the base adequacy aid will be \$3,708.78 per pupil.

5 of the New Hampshire Constitution, requiring that taxes be proportional and reasonable.

## STANDARD OF REVIEW

This appeal requires the review of certain errors the trial court made in granting the Districts' Motion for Summary Judgment, including the denial of a permanent injunction. "In reviewing the trial court's grant of summary judgment, [the Supreme Court] consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Skinny Pancake-Hanover, LLC v. Crotix*, 172 N.H. 372, 376, (2019) (quotation omitted). "If [the Supreme Court's] review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, [the Court] will affirm the grant of summary judgment." *Id.* (quotation omitted). The Court "review[s] the trial court's application of the law to the facts *de novo*." *Id.* (quotation omitted).

"The decision to grant equitable relief necessarily depends upon the factual circumstances in each case." *City of Keene v. Cleaveland*, 167 N.H. 731, 742 (2015) (quotation omitted). "Because the division line between equity and law is not precise[,] courts have considerable discretion in determining whether equity should intervene to aid litigants in the protection of their legal rights." *Id.* (quotation, brackets, and ellipsis omitted). The Supreme Court "will uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Id.* Injunctive relief is appropriate where "repeated acts of wrong are done or threatened . . . ." *State v. Linsky*, 117 N.H. 866, 877 (1977).

The State also argues on appeal that the trial court erred in denying the State's Motion to Dismiss. When evaluating the trial court's ruling on a

motion to dismiss, this Court analyzes “whether the allegations in the plaintiff’s pleadings 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) (quotation omitted). A plaintiff’s allegations are assumed to be true, and the Court construes all reasonable inferences in the light most favorable to the plaintiff. *Id.* The Court’s “threshold inquiry involves testing the facts alleged in the pleadings against the applicable law.” *Id.* Dismissal is appropriate only when “the facts pled do not constitute a basis for legal relief.” *Id.* (quotation omitted). The Court “may also consider documents attached to the plaintiff’s pleadings, or documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint.” *Id.* (quotation and brackets omitted).



## ARGUMENT

### I. THE FUNDAMENTAL RIGHT TO A CONSTITUTIONALLY ADEQUATE EDUCATION IN NEW HAMPSHIRE MUST BE JUDICIALLY ENFORCED LEST IT BE HOLLOWED OUT

More than twenty-five years ago, this Court first held that Part II, Article 83 of the New Hampshire Constitution, which obligates the State “to cherish the interest of literature and the sciences, and all seminaries and public schools,” “commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.” *Claremont I*, 138 N.H. at 187. “The duty placed on the State encompasses *cherishing* the public schools.” *Id.* at 192 (emphasis added). The Court went on to “emphasize the corresponding right of the citizens to . . . enforce[]” the State’s duty. *Id.* The task of defining the education required by the Constitution was “in the first instance, for the legislature and the Governor.” *Id.* Nonetheless, the Court explained that “the State’s constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.” *Id.* The Court expressed “confiden[ce] that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, *and the appropriate means* to provide through public education, the knowledge and learning essential to the preservation of a free government.” *Id.* at 193 (emphasis added).

The Court’s confidence was, alas, misplaced. In the intervening years, numerous challenges have successfully been brought to the State’s

educational funding system; not once has the State successfully defended the merits of such a challenge. *See, e.g., Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 155 (affirming trial court’s finding “that the State has failed to define a constitutionally adequate education”); *Claremont Sch. Dist. v. Governor (Claremont II)*, 142 N.H. 462, 465 (1997) (holding financing system for public schools unconstitutional). At every turn, the State has failed to fulfill its constitutional obligation. Even now, the State conspicuously does not argue that it fully funds a constitutionally adequate education. *See generally*, State’s Brief.

While the New Hampshire judiciary has historically refrained from ordering specific, affirmative relief, this Court has never held that it cannot, or that doing so would result in a violation of the separation of powers. *See, e.g., Claremont II*, 142 N.H. at 476 (“[W]e do not remand for consideration of remedies at this time, but instead stay all further proceedings until the end of the upcoming legislative session . . . .”) (emphasis added). On the contrary, the Court in 2006 warned that “[d]eference . . . has its limits.” *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 163. “[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.” *Id.* (emphasis added).

**II. THE SUPERIOR COURT ERRED IN FAILING TO AWARD PRELIMINARY AND PERMANENT RELIEF.**

**a. The Districts adequately pled and proved an actual deprivation of the fundamental right to a state-funded, adequate education.**

The Districts pled that the State was failing to fully fund a constitutionally adequate education by failing to fully fund transportation costs, an adequate number of teachers, teacher benefits, school nurses, superintendent services, food services, and facilities operation and maintenance. DAI at 374, ¶ 24 (“The State does not currently provide sufficient funds for each and every school district to provide a constitutionally adequate education.”); 376-77, ¶¶ 33-42 (alleging transportation costs are not fully funded); 377-79, ¶¶ 43-58 (alleging the State provides funding for an inadequate number of teachers); 379-380, ¶¶ 59-70 (alleging that the State underfunds teacher benefits); 380-82, ¶¶ 71-89 (alleging that the State provides no funding whatsoever for the provision of constitutionally-required services, including school nurses, superintendents, and food services); 382-83, ¶¶ 90-100 (alleging that the State fails to provide sufficient funding for facilities operation and maintenance); 385, ¶¶ 112-120 (alleging that Winchester, which contracts with Keene High School to provide its students a high school education, cannot provide its high school students a constitutionally adequate education anywhere in New Hampshire for less than \$10,000 per pupil, exclusive of transportation).

The State argues on appeal that the Districts’ allegation that “[t]he State does not currently provide sufficient funds for each and every school

district to provide a constitutionally adequate education” is a conclusion of law. The State is wrong. A “constitutionally adequate education” is defined by RSA 193-E:2-a, RSA 198:40-a, and the administrative rules adopted by the State Board of Education.<sup>3</sup> The Districts’ allegation that the State does not provide sufficient funds for each and every school district to provide that education as defined by the State is not a conclusion of law; it is a factual allegation buttressed by the Districts’ subsequent, specific allegations as to the ways in which the State’s current funding falls short. *See* DAI at 376-83, ¶¶ 33-100. Those allegations are “reasonably susceptible of a construction that would permit recovery[.]” *Grand Summit Hotel Condo. Unit Owners’ Ass’n* 171 N.H. at 345 (quotation omitted), because the State is obligated to *fully* fund a constitutionally adequate education, *see Opinion of the Justices*, 145 N.H. 474, 476 (2000) (“[T]he mandate of Part II, Article 83 . . . imposes upon the State the *exclusive* obligation to fund a constitutionally adequate education.” (emphasis added)).

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<sup>3</sup> Prior attempts to define a constitutionally adequate education were held to lack sufficient specificity. As the Supreme Court recognized over a dozen years ago: “[s]tanding alone, RSA 193-E:2 does not fulfill the State’s duty to define the substantive content of a constitutionally adequate education.” *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 161. In response, the State now takes the position that a constitutionally adequate education is substantively defined by RSA 193-E:2-a, which, pursuant to RSA 193-E:2-a, IV(a) and RSA 193-E:2-a, VI(a) includes the administrative rules as adopted by the State Board of Education. *See* Ed. 306.

- i. The Superior Court was obligated to rely upon the uncontradicted affidavits submitted in support of the Districts' Motion for Summary Judgment and the Districts' actual costs of providing an adequate education to their students

The Districts submitted the affidavits of four superintendents in support of their Motion for Summary Judgment, as required by RSA 491:8-a, II. The Court was not only entitled to rely upon those affidavits, which contained admissible evidence, but obligated to do so.

The State argues that the affidavits themselves were insufficient to meet the Districts' burden at summary judgment because the affidavits "contain[] conclusory statements and not evidentiary facts." State's Brief at 35. Anything more than a cursory review of those affidavits reveals that they contain discrete, specific factual averments upon which the trial court could – and did – rely. *See* DAO at 108 (citing Dassau Aff., DAI at 802, ¶ 22 for proposition that Winchester has thirty-two students in eighth grade); 116 (citing Witte Aff., DAI at 807, ¶ 19; Saunders Aff., DAI at 588, ¶¶ 85-86 for Monadnock and ConVal's plant operations costs); 119 (citing Saunders Aff., DAI at 582, ¶ 28; Dassau Aff., DAI at 803, ¶ 25; Witte Aff., DAI at 806, ¶ 11; and Russell Aff., DAI at 810, ¶ 12 for the Districts' transportation costs). The court relied upon specific factual averments contained within the affidavits, not any arguably conclusory assertion, to conclude that an actual deprivation of the fundamental right to a state-funded adequate education had occurred. *See* DAO at 108, 116, 119-20.

The State argues that, nevertheless, the trial court should not have considered the superintendents' affidavits because "the 'data' contained in those affidavits came directly from the [allegedly] inadmissible exhibits."

State's Brief at 36. But the State has it backwards; as the State has repeatedly argued, the data in the exhibits that the trial court declined to rely upon was reported to the State by the school districts. *See, e.g.*, DAIII. at 195 (“[T]he data in those exhibits are reported *by the school districts themselves . . .*” (emphasis in original) (quotation omitted)). In other words, the data came from the affiants, not the other way around. The affiants, superintendents of the Districts, have personal knowledge of the information contained within the affidavits and attested to the information contained therein under oath. *See* DAI at 578, 800, 805, 809 (noting that the affiants were sworn). That information was reported to the State and certified as accurate under oath pursuant to the State's requirements, set forth in RSA 21-J:34, RSA 189:28-a, RSA 195:14, and RSA 198:4-d. The State has never questioned the veracity of the Districts' reports. If the State wanted more specific information about how school districts were spending money and how much was being spent on adequacy, it could have easily required school districts to include additional information.

The facts set forth in the Districts' affidavits, including the Districts' actual costs, were both relevant and admissible to show the actual deprivation of a state-funded, adequate education. Evidence is relevant and admissible if “it tends to make the existence of any fact consequential to the determination of the action more or less probable than it would be without admission of the evidence.” *In re Haines*, 148 N.H. 380, 381 (2002); *see also* N.H. R. Evid. 401. “[E]vidence does not have to be infallible to be admissible. If it is of aid to a judge or jury, its deficiencies or weaknesses are a matter of defense, which affect the weight of the evidence but do not determine its admissibility.” *State v. Arsenault*, 115 N.H. 109, 111 (1975)

(quotation omitted) (cited by *State v. Dahood*, 148 N.H. 723, 727 (2002)). The evidence presented in the Districts' affidavits tended to make the existence of a fact in consequence – namely, that the State was unconstitutionally underfunding education – more likely. And the uncontroverted evidence was entitled to significant weight. As described above, the specific facts relied upon by the trial court were extremely probative of whether an actual deprivation had occurred. *See, e.g.*, DAO at 108 (citing Dassau Aff., DAI at 802, ¶ 22, stating that there are 32 Winchester students in the eighth grade, for the impossibility of attaining the 1:30 teacher-student ratio used by the State to calculate funding). The facts, for example, that Winchester pays \$14,023 per pupil for its high school students to attend Keene High School (excluding transportation and special education costs) and that there are no schools where Winchester could send its students for what the State provides in base adequacy funding are admissible facts probative of the fact that the base adequacy funding is not adequate at all. DAI at 802, ¶ 18-20. Perhaps most tellingly, the Legislature relied on the same categories of facts contained in the Districts' affidavits when it costed an adequate education in 2008. *See* Joint Legislative Oversight Committee on Costing an Adequate Education's February 1, 2008 Final Report, DAI at 714 (incorporated into RSA 198:40-a by 2008 New Hampshire Laws Ch. 173 (S.B. 539)). The State does not point to a single New Hampshire Rule of Evidence that would exclude the Districts' affidavits. *See* State's Brief at 33-39. The State's arguments all go to the weight of the evidence, not its admissibility.

If the evidence presented by the affidavits raised significant questions, as the State posits that it did, *see* State's Brief at 36-37, the State

had recourse. RSA 491:8-a, II provides that recourse: “[W]ithin 30 days contradictory affidavits based on personal knowledge [may be] filed or the opposing party [may] file[] an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits.” The State filed no such affidavits. Nor did the State file “contradictory affidavits based on personal knowledge.” *Id.* In the absence of such affidavits, RSA 491:8-a required the trial court to take the facts in the Districts’ affidavits as true: “facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, *unless* . . . contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing . . . grounds for believing that contradictory evidence can be presented at a trial. . . .” RSA 491:8-a, II (emphasis added). The trial court was therefore not only entitled, but *obligated*, to rely upon the Districts’ affidavits.

The State did not conduct any discovery into the facts set forth in the affidavits (which, as the State concedes, are similar to the facts set forth in the exhibits to the Districts’ Petitions). State’s Brief at 36. The State had every right to conduct discovery. The trial court indicated as much in its Order on the Districts’ Motion for Preliminary Injunction. DAO at 21, n. 13. And the Superior Court Rules plainly authorized the State to propound discovery as soon as it was served with the Petition. *See, e.g.*, N.H. Super. Ct. R. 23(d). Yet, the State failed to do anything of the sort.

In short, the State now complains that the Districts’ evidence, of which the State had notice from the outset of the litigation, was not perfectly tailored to the State’s preferences, although the State elected to do



absolutely nothing to investigate that evidence further. The State's own litigation strategy is hardly grounds upon which to overturn the trial court's ruling on summary judgment.

- ii. Each of the categories of costs identified by the Districts is a part of a constitutionally adequate education as defined by the Legislature

The Legislature has defined the substantive content of a constitutionally adequate education in RSA 193-E:2-a, which incorporates the administrative rules as adopted by the State Board of Education.<sup>4</sup> RSA 193-E:2-a, I, IV(a). In addition, the Legislature incorporated the Joint Legislative Oversight Committee on Costing an Adequate Education's February 1, 2008 Final Report as the basis for RSA 198:40-a. *See* 2008 New Hampshire Laws Ch. 173 (S.B. 539) ("The joint legislative oversight committee on costing issued detailed findings and recommendations on the composition of the cost of an adequate education and how the funds for an adequate education should be allocated and accounted for in order to ensure that the educational needs of all public school students are met. These findings and recommendations were submitted to the general court and are an integral basis of the costing determinations reflected in this act."); *see*

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<sup>4</sup> The statute incorporates the version of Ed. 306 that was in place as of the 2007 adoption of RSA 193-E:2-a by 2007 NH Laws 270. The Districts refer, for the purposes of this appeal, to the current rules, as the differences between the regulations in effect in 2007 and currently are not material to the issues of school nurses, superintendents, facilities operation and maintenance, and food services.

also DAI at 674. Together, the statutes and the administrative rules require that the State fully fund transportation costs, an adequate number of teachers, funding for the benefits for those teachers, funding for facilities operation and maintenance, and funding for the provision of nurse, superintendent, and food services. As set forth below, the Districts proved an actual deprivation of the fundamental right to a State-funded, adequate education with respect to each of these cost items.<sup>5</sup>

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<sup>5</sup> The State now argues that the trial court erred by “focus[ing] 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.” State’s Brief at 35. Below, the State never advanced the argument that, even if the State was underfunding particular cost items required for constitutional adequacy, RSA 198:40-a could still be constitutional “as a whole.” *See generally*, DAII at 3; DAIII at 191. That issue should, therefore, be deemed waived. *See Vention Med. Advanced Components, Inc. v. Pappas*, 171 N.H. 13, 27 (2018) (“This court has consistently held that we will not consider issues raised on appeal that were not presented in the lower court.” (quotation omitted)). Even if the issue is not deemed waived, the State never identified a single school district that is able to provide an adequate education with the funding provided by RSA 198:40-a. Each of the superintendents submitted an affidavit attesting that an adequate education could not be provided on the funds received without raising taxes locally and that not a single school district in the state spends less than \$12,000 per pupil. DAI at 579, ¶¶ 8-10; DAI at 590, ¶ 94; DAI at 801, ¶¶ 6-8; DAI at 802, ¶ 19; DAI at 806, ¶ 6-8; DAI at 809, ¶ 6-8.

1. The Districts proved an actual deprivation of the fundamental right to a state-funded, adequate education by demonstrating that the State was underfunding transportation

The Legislature included the cost of transportation in the “universal cost,” which is the “cost necessary to provide children the opportunity for an adequate education.” DAI at 685, 696; *see also* RSA 198:40-a, III (“The sum total calculated under paragraph II shall be the cost of an adequate education.”). In doing so, however, the Legislature included funding only for students in first through eighth grade. DAI at 696. The Superior Court properly recognized that this determination resulted in an actual deprivation. DAO at 122-23. If transportation is important for students to have the opportunity to obtain a guaranteed education, then that is true for students of all ages. The State is not providing funding to transport a significant proportion of students – a third of all the grades – to school.

Furthermore, regardless of where students happen to reside, the State is obligated to provide transportation for them to attend school as part of the State’s obligation to fully fund an adequate education. *See* RSA 193-E:2 (“An adequate education shall provide all students with the *opportunity* to acquire [enumerated skills and knowledge].” (emphasis added)). Due to the vastly different costs of transporting students in large rural districts as compared to small urban districts, the State is obligated to provide actual transportation costs, not just the average cost. While the Superior Court was correct in holding that the State’s failure to fund high school transportation was unconstitutional, the Superior Court erred in failing to also find that actual transportation costs must be provided regardless of whether a student

attends an urban or large rural school. *See* PAO at 127-28 (“While there is merit to the Petitioners’ argument that the State should fund transportation in consideration of each school district’s unique transportation costs, and the Legislature would obviously be wise to fund more accurately rather than excessively, the Petitioners have failed to show that a per-pupil costing scheme would fail in all instances such that the Court must mandate a new scheme.”) The Superior Court erred in requiring that the Petitioning school districts show that the State was underfunding in all school districts where it was sufficient to show that the underfunding was occurring in the petitioner’s school districts.

While transportation is only \$411.32 per pupil in the City of Manchester, in ConVal, per pupil transportation costs are \$914.60. DAI at 582, ¶¶ 27-28. If the State is providing only \$315 per pupil to both Manchester and ConVal, then Manchester must raise via local taxation \$96.32 (\$411.32-\$315) per pupil to transport the students to school while ConVal must raise \$599.60 (\$914.60-\$315) per pupil just to get the students to school. This is over a 600% difference.

None of the other petitioning school districts are able to provide transportation on the funds provided by the State either. In Mascenic, per pupil transportation costs are \$619.81 per pupil. DAI at 810, ¶ 9. In Winchester, per pupil transportation costs are \$962.73 per pupil. DAI at 801, ¶ 14. In Monadnock, the per pupil transportation costs are \$1,040.29 per pupil. DAI at 806, ¶ 11. Therefore, Mascenic must raise approximately \$314.81 (\$619.81-\$315) per pupil via local taxation just to meet the State’s obligation of transporting students to school, Winchester must raise \$647.73 (\$962.73-\$315) in local taxation to meet transportation costs and

Monadnock must raise \$725.29 (\$1040.29-\$315) in local taxation to meet transportation costs. In addition to failing to meet its obligation to fully fund an adequate education under Part II, Article 83, such a variation in a state tax also violates Part II, Article 5. *See Claremont II*, 142 N.H. at 471 (“There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty.”).

Because the State is constitutionally obligated to fund the actual transportation costs of each school district and the Districts’ actual transportation costs were uncontroverted, the trial court erred by failing to order injunctive relief compelling the State to fund the actual costs of transportation in ConVal, Mascenic, Monadnock, and Winchester for fiscal years 2019 and 2020 and declaratory relief that the failure to fully fund transportation would be unconstitutional.

2. The Districts proved an actual deprivation of the fundamental right to a state-funded, adequate education by demonstrating that the State was underfunding teacher salaries by using an inaccurate student-teacher ratio.

RSA 193-E:2-a implicitly requires teachers to implement the substantive educational program set forth in the statute. The regulations presume the presence of a teacher. *See, e.g.*, Ed. 306.37(a) (requiring “[s]ystematic and continuous instruction[;]” “[s]upport for teachers on interpreting test results[;]” “[i]nstruction for teachers in reading in the content areas”). And the Legislature explicitly costed the salary for the requisite number of teachers to implement an adequate education for New Hampshire’s students. DAI at 687.

The ratio that the legislature used, however, was the maximum number of students permitted per class: ratios of 1:25 for grades K-2 and 1:30 for grades 3-12. *See id.* The idea that any school could operate with perfect efficiency – in other words, at maximum classroom size – at all times is simply, demonstrably incorrect. For example, Winchester School District has only thirty-two students in the eighth grade. DAI at 802, ¶ 22. To comply with the minimum standards set by the State, Winchester must have two teachers and a student-teacher ratio of 1:16. In addition, state regulations also require teachers to be certified in the subjects that they teach, which further precludes the perfect optimization of class sizes. *See* DAI at 583, ¶ 37. No school district in the State has teacher student ratios of 1:25 or 1:30. *See* DAI at 583, ¶ 38. In fact, no school district in the State of New Hampshire has a teacher student ratio higher than 1:17.5. *See* DAI at 584, ¶ 43. Thus, using the maximum classroom size as the student-teacher ratio for funding purposes results in an actual deprivation of the right to a State-funded adequate education.

3. The Districts proved an actual deprivation of the fundamental right to a state-funded, adequate education by demonstrating that the State was underfunding teachers' benefits

The cost of teacher benefits is a part of providing the cost of a constitutionally adequate education. The Legislature determined that teacher benefit costs are part of the State's constitutional obligation when it included benefit costs as part of the "universal cost" under RSA 198:40-a. DAI at 692. The Legislature arbitrarily determined that the cost of teacher benefits is 33% of a third-year teacher's salary (i.e., \$35,539), or \$11,728

per teacher. *See* DAI at 692; DAI at 584, ¶ 47. This arbitrary determination results in underfunding for State- and Federal- required benefits for teachers.

First, schools must contribute 17.8% of a teacher's salary to the New Hampshire Retirement System. *See* DAI at 585, ¶ 50. This is not choice made at the local level but a statutory requirement of the State. RSA 100-A:16, III. For a third-year teacher paid \$35,539 per year, the retirement contribution is therefore \$6,325.94. Schools must also pay 7.65% of a teacher's salary in federal employment taxes. *See* DAI at 585, ¶ 52. Again, payment of federal employment taxes is not a choice made at the local level. For a teacher paid \$35,539 per year, the federal employment taxes will therefore total \$2,718.73. State-required workers compensation coverage and unemployment insurance cost the districts at least \$150 per year. DAI at 585, ¶ 54. Those three required benefits for a teacher paid \$35,539 per year total \$9,194.67.

Thus, despite the Legislature's recognition that the cost of health insurance is "a major component in any benefits package[,]" of the \$11,728 for benefits allocated by the State per teacher, only \$2,533.33 is designated for health insurance. DAI at 692. And that amount is demonstrably inadequate: actual costs of health and dental insurance average more than \$16,000 per year in ConVal. *See* DAI at 585, ¶ 55. That cost is on par with other New Hampshire school districts. DAI at 585, ¶ 57; *see also* DAI at 806, ¶ 12 (health and dental insurance more than \$16,000 per year). Even the State's own affiant, Caitlin Davis, said that the State's share of the cost of health insurance for state employees was over \$8,000 for the least expensive health insurance plan (for a single person) and over \$26,000 for a

family plan. *See* DAIII 101-106. The evidence therefore demonstrates an actual deprivation with respect to the amount of funding provided for teachers' benefits.

4. The Districts proved an actual deprivation of the fundamental right to a state-funded, adequate education by demonstrating that the State was underfunding facilities operation and maintenance

The Legislature determined “that a clean, healthy and safe learning environment is needed for students to have the opportunity for an adequate education as defined in RSA 193-E:2-a.” DAI at 696. The provision of “a clean, healthy, and safe learning environment for all areas of the school building, grounds, and school-related activities” is likewise required by Ed. 306.07(a)(1). The State’s funding for that “clean, healthy and safe learning environment” amounts to \$195 per pupil per year. DAI at 696.

That amount does not even cover the oil and gas bill at ConVal. DAI at 588, ¶ 86. In fact, in both ConVal and Monadnock, facilities operation costs more than \$1,400 per student per year. DAI at 588, ¶ 85; DAI at 807, ¶ 19. Having identified that facilities operation and maintenance is a part of an adequate education, the State is obligated to fully fund the Districts’ facilities operation and maintenance; it is not permitted to “shift any of the constitutional responsibility to local communities.” *Opinion of the Justices*, 145 N.H. at 476.



5. The Districts proved an actual deprivation of the fundamental right to a state-funded, adequate education by demonstrating that the State was providing no funding for the provision of nurse, superintendent, and food services

Nurse, superintendent, and food services are part of a constitutionally adequate education. They are required by the Board of Education regulations, which are incorporated into the definition of a constitutionally adequate education by virtue of RSA 193-E:2-a, IV(a).<sup>6</sup> The State allocates no funding whatsoever for the provision of these required services, resulting in an actual deprivation. State regulations, specifically Ed. 306.12, require the provision of a school nurse. *See* DAI at 586, ¶ 63. Nurses meeting New Hampshire state requirements command salary and benefit packages in excess of \$65,562.00. *See* DAI at 586, ¶ 66. Providing funding for a constitutionally adequate education requires at least \$294 per pupil in school nurse costs. DAI at 586, ¶ 68.

Ed. 302.01, Ed. 302.02, and RSA 194-C:4 require that schools have superintendent services and detail the various and necessary responsibilities of the superintendent's office, including all fiscal oversight of the district

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<sup>6</sup> The State appears to argue that only select Board of Education regulations are incorporated. *See* State's Brief at 45. If that were true, however, it is virtually impossible to discern which Education regulations are specifically incorporated – resulting in precisely the same problem that the Court identified in *Londonderry*. 154 N.H. at 153 (“[I]f . . . the education rules and regulations . . . provide some level of education beyond that of a constitutionally adequate education, the point of demarcation cannot currently be determined.”).

budget. Ed. 302.01; Ed. 302.02. *See* DAI at 587, ¶ 70. Where the State requires superintendent services as part of providing an education, the State is responsible for providing these services as part of providing the funding for a constitutionally adequate education. “Whatever the State identifies as comprising constitutional adequacy it must pay for.” *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 162. The average salary and benefit package for a qualified superintendent will, on average, exceed \$158,000. *See* DAI at 587, ¶ 72. Larger districts require a business administrator and/or assistant superintendent. *See* DAI at 587, ¶ 73. A school district requires a second person in the superintendent’s office after the pupil population exceeds 1,000 pupils. *See* DAI at 587, ¶ 74. Therefore, state required superintendent services cost approximately \$158 per pupil.

Finally, the Education regulations, in particular, Ed. 306.11, also require all public schools to provide food services regardless of the amount of loss to the school district. *See* DAI at 587, ¶ 75. The State Department of Education has published reports indicating that although state-wide \$70,227,479 was spent on food service, only \$36,609,730 in food service revenue was collected resulting in a loss of \$33,617,749. *See* DAI at 587, ¶ 76. Spread over the state’s 166,321 pupils, this is an annual food service loss of roughly \$200 per pupil. *See* DAI at 587, ¶ 77. Current education funding statutes attribute \$0 to food service losses. *See* DAI at 588, ¶ 78.

The State’s allocation of \$0 for the provision of nurse, superintendent, and food services is an actual deprivation of the right to a state-funded, adequate education where those services are required by the Legislature’s definition of an adequate education.

**b. Because the Districts pled and proved actual deprivations of the fundamental right to a state-funded, adequate education, strict scrutiny was warranted.**

“[I]n this State a constitutionally adequate public education is a fundamental right.” *Claremont II*, 142 N.H. at 473. “When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny.” *Id.* at 472. The Districts adequately pled and proved that the State’s actions have impinged upon the Districts’ students’ rights to a state-funded, constitutionally adequate education; therefore, under the rule of law stated in *Claremont II*, the correct standard by which to measure the State’s actions is strict scrutiny. “To withstand strict scrutiny, the law must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.” *Opinion of the Justices*, 167 N.H. 539, 542 (2015) (quotation omitted). “This analysis is inherently fact-specific.” *Id.* And the burden of demonstrating the existence of a compelling governmental interest and the law’s necessity to the accomplishment of its legitimate purpose resides with the State. *Id.*

The State has offered no compelling governmental interests for its continued failure to fully fund the cost components that it incorporated into the definition of an adequate education and offered no explanation as to how RSA 198:40-a’s underfunding is necessary to the accomplishment of any legitimate purpose. *See generally*, State’s Brief. Therefore, the trial court correctly determined that RSA 198:40-a is unconstitutional.

**c. The State's failure to proffer any rationale whatsoever in the face of strict scrutiny warranted a judicial remedy.**

The judiciary has the authority to craft an equitable remedy for the State's unconstitutional failure to fund an adequate education for the Districts' students. In *Londonderry*, the Court explained that, if the State failed to define a constitutionally adequate education before a particular date, the Court would "then be required to take further action to enforce the mandates of Part II, Article 83 of the New Hampshire Constitution." 154 N.H. at 163. The Court enumerated possible options:

(1) invalidating the funding mechanism . . . ; (2) appointing a special master to aid in the determination of the definition of a constitutionally adequate education; or (3) implementing the remedy outlined in the concurring opinion of Justice Duggan and remanding the case to the trial court for further factual development and a determination of whether the State is providing sufficient funding to pay for a constitutionally adequate education.

*Id.* at 162-63 (quotation omitted). After all, "the judiciary has a responsibility that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential." *Id.* (emphasis added). It has been thirteen years since this Court issued that warning to the Legislature; the State has had more than adequate time to develop a constitutionally sound educational funding system. Its decades-long failure requires that the judiciary craft an equitable remedy, lest the fundamental right to an adequate education "be hollowed out[.]" *Id.*; *see also Linsky*, 117 N.H. at 877 (holding injunctive relief is appropriate where "repeated acts of wrong are done or threatened . . .").

**d. Even under less stringent standards, RSA 198:40-a would appropriately be found unconstitutional and an equitable remedy would be warranted.**

The appropriate standard to be applied is strict scrutiny because the right to a state-funded education is fundamental. *See Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 758 (2007) (“Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny.”). However, it bears noting that RSA 198:40-a does not pass constitutional muster under intermediate scrutiny or rational basis review either.

“Classifications involving important substantive rights are subject to intermediate scrutiny[,]” and rational basis review is applied “absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification . . .” *Id.* (quotations omitted). “[I]ntermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective.” *Id.* at 762. Under intermediate scrutiny, “[t]he burden to demonstrate that the challenged legislation meets this test rests with the government . . . .” *Id.* “To meet this burden, the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations.” *Id.* (quotations omitted). On the other hand, the “rational basis test requires that legislation be only rationally related to a legitimate governmental interest and . . . contains no inquiry into whether legislation unduly restricts individual rights . . . .” *Id.* at 718.

By failing to supply any rationale for the insufficient funding provided to school districts by RSA 198:40-a, the State would have failed to meet its burden under intermediate scrutiny. *See generally*, DAII at 3-17; State’s Brief. It has identified no important governmental objective and, therefore, offered no argument that RSA 198:40-a was substantially related to such an objective. But RSA 198:40-a fails even under rational basis review. The only legitimate governmental interest at play in this case is the State’s duty to “cherish . . . public schools[.]” N.H. Constitution, Part II, Art. 83; *see also Claremont I*, 138 N.H. at 187 (recognizing that “cherish,” as used in Part II, Art. 83, means “[t]o support, to shelter, to nurse up” (quotation omitted)). As the trial court astutely noted, there is no rational relationship between that duty and the selection of the student-teacher ratio incorporated into RSA 198:40-a, DAO at 111-12; for the selection of an arbitrary percentage of the universal cost as facilities operation and maintenance funding, DAO at 118-19; or for the Legislature’s choice to exclude transportation funding for high school students, DAO at 123. In addition, there is no rational basis for funding transportation, a part of the legislatively-defined “adequate education,” at \$315 per pupil in every district in the state, where rural school districts must pay substantially more than that. *See* DAI at 582, ¶¶ 27-28. And the State does not even bother to try asserting an interest in its underfunding.

Under any standard of review, RSA 198:40-a is unconstitutional, and a remedy is warranted because of the decades-long failure of the State to fully fund a constitutionally adequate education, which is the State’s “exclusive obligation.” *Opinion of the Justices*, 145 N.H. at 476.

### **III. THE SUPERIOR COURT ERRED IN FAILING TO FIND THAT RSA 198:40-a IS FACIALLY UNCONSTITUTIONAL**

The trial court's correct finding that RSA 198:40-a "could not have been found constitutional in its application to any school district" mandated a finding that RSA 198:40-a, II(a) is facially unconstitutional. PAO at 132-33. "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *State v. Lilley*, 171 N.H. 766, 772 (2019), cert. denied, 140 S. Ct. 858 (2020). "To prevail on a facial challenge, the challenger must establish that no set of circumstances exists under which the challenged statute or ordinance would be valid." *Id.*

Citing 16 C.J.S. Constitutional Law § 163, the trial court instead concluded that the Districts' facial challenge failed because the consideration of extrinsic evidence is not permitted on a facial challenge. That supposition is not borne out by New Hampshire precedent. *See State v. Addison*, 165 N.H. 381, 567-568 (2013) (considering New Hampshire death sentences and executions since 1869 in evaluating defendant's facial challenge to RSA 630:1; RSA 630:5); *State v. Hunt*, 155 N.H. 465, 473 (2007) (considering statistical evidence proffered by defendants in determining whether sobriety checkpoints are facially unconstitutional). After all, when making a facial challenge, "the challenger must establish that no set of circumstances exist under which the challenged statute . . . would be valid." *Lilley*, 171 N.H. at 772. In some circumstances, challengers must refer to extrinsic evidence to meet that burden.

In addition, the trial court's Omnibus Order denying the State's Motion to Dismiss identifies two alternative bases upon which to find RSA 198:40-a, II(a) facially unconstitutional without the use of extrinsic evidence. First, "the Legislature effectively codified a 'Cost of an Opportunity for an Adequate Education' that included things the State argues are not part of an 'adequate education.' . . . [F]ailing to isolate what is constitutionally required[ ] is alone sufficient to invalidate RSA 198:40-a." DAO at 90 (citations omitted). Second, no extrinsic evidence is required to conclude that funding transportation costs only for students in grades one through eight, despite transportation being part of a constitutionally adequate education for all students grades one through twelve, is unconstitutional in all circumstances. The trial court erred in not holding that RSA 198:40-a was facially unconstitutional.

Regardless of whether the Districts' facial challenge should have succeeded, the trial court's award of attorneys' fees was appropriate under the substantial benefit theory. *See Claremont Sch. Dist. v. Governor (Claremont VIII)*, 144 N.H. 590, 598 (1999). The trial court ruled correctly that RSA 198:40-a "could not have been found constitutional in its application to any school district." PAO at 132-33. The benefits of this ruling will "flow to all members of the public," whether or not the statute is held to be unconstitutional facially or as applied. *Claremont VIII*, 144 N.H. at 598.



#### **IV. THE SUPERIOR COURT ERRED IN FAILING TO FIND THAT THE STATE'S CURRENT SYSTEM OF FUNDING EDUCATION ALSO VIOLATES PART II, ARTICLE 5 OF THE NEW HAMPSHIRE CONSTITUTION**

The trial court erroneously concluded that, because the questions raised by the State's funding system "chiefly rest on the base adequacy aid, the amount of which is now invalidated, [it] cannot address the SWEPT further." DAO at 126. But the State's obligation to cost and fund an adequate education are two separate mandates. *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 155-56 (outlining State's four obligations under Part II, Article 83). While the trial court correctly determined that the State's costing of an adequate education was unconstitutional, it erred by declining to address the constitutionality of the State's funding mechanism.

The State has decided to fund its constitutional obligation largely through property taxes. "The command of Part II, Article 5 is that taxes be proportional and reasonable, thereby forbidding varying property tax rates across the State to support the public duty to provide education." *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 158 (1998). In the *Claremont* decisions, the State's method of funding education was held to be unconstitutional because local education property tax varied by up to 400% across the state. *Claremont II*, 142 N.H. at 470. Although the disparity in tax rates decreased shortly after the *Claremont* decisions, they have now reverted to rates even more egregious than twenty-five years ago.

In 1999, the Statewide Education Property Tax (SWEPT) (RSA 76:3) was originally adopted at a uniform rate of \$6.60 per thousand. *See* N.H. Laws 1999, 17:14; *Claremont Sch. Dist. v. Governor*, 144 N.H. 210,

213 (1999). Had the SWEPT stayed at that rate and been uniformly applied across the State, the State would likely now be able to fully fund an adequate education for all school children. Instead, twenty years later, SWEPT's rate has been decreased to \$2.17 per thousand, less than one third of its original rate. *See* DAI at 590, ¶ 97. Because the State does not provide full funding for a constitutionally adequate education as the State has defined it, local communities need to raise taxes locally to be able to provide that education. DAI at 802, ¶ 21; DAI at 806, ¶ 8; DAI at 590, ¶ 100; DAI at 591, ¶ 108; DAI at 810, ¶ 8. Where local property taxes are necessary to meet the State's obligation to provide a constitutionally adequate education, it is a state tax and must be applied in compliance with Part II, Article 5 of the New Hampshire Constitution. *See Claremont II*, 142 N.H. at 471; *see also Opinion of the Justices*, 145 N.H. at 477 (proposed education funding scheme unconstitutional where it required raising of local taxes to fund part of the cost of a constitutionally adequate education.)

Currently, the community of Troy has a combined tax rate of \$21.52., while the community of Newington has a total education tax rate of \$3.19 *See* DAI at 592, ¶ 111. This is a difference of approximately 675%. Winchester has a combined local and state education tax rate of \$22.65. *See* DAI at 802, ¶ 21. Compared to Newington, this is a difference of approximately 710%. If tax rates variation of almost 400% violated Part II, Article 5 in *Claremont*, surely the 710% difference in tax rates currently violate Part II, Article 5. "There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty." *Claremont II*, 142 N.H. at 471. By the same logic, it is

unconstitutional to tax real estate in one town at seven times the rate that similar property is taxed in another town. The State's educational funding system therefore violates Part II, Article 5 of the New Hampshire State Constitution. The Superior Court erred in not explicitly holding that such disproportional taxation is unconstitutional.

**V. THE SUPERIOR COURT ERRED IN DISMISSING THE INDIVIDUAL DEFENDANTS**

The trial court erred in dismissing Governor Sununu and Commissioner Edelblut in their individual capacities because the Districts were entitled to equitable relief barring the individual defendants from violating Part II, Article 83 of the New Hampshire Constitution. "What is forbidden by the Constitution is outside the field of state activity; restraint of forbidden action is not imposed by the courts upon the state, but upon those asserting the right to take the action as though it were the state's and as though binding upon it." *Conway*, 89 N.H. at 346. Commissioner Edelblut is responsible for distributing adequate education grants, and Governor Sununu is obligated to draw a warrant from the education trust fund to satisfy the state's obligation to fund constitutionally adequate education. RSA 198:42. Where the school districts seek equitable relief to prohibit Governor Sununu and Commissioner Edelblut from discharging their responsibilities unconstitutionally by underfunding New Hampshire students' education, naming the governor and commissioner as defendants in their individual capacities was not only proper but necessary. *See Conway*, 89 N.H. at 346.

The trial court's decision to dismiss the governor and the commissioner in their individual capacities was based on its impression that

an order compelling the individual defendants to act in accordance with New Hampshire's Constitution could not be addressed to those defendants in their individual capacities, despite the controlling precedent in *Conway*. PAO at 136. The trial court's failure to conform to that controlling precedent was error. Furthermore, the trial court mistakenly concluded that "the Constitution only puts obligations upon the Legislature to define, cost, fund and account for an 'adequate education.'" PAO at 137. The Constitution compels the *State of New Hampshire* to provide a state-funded, adequate education, and this Court has previously recognized the governor's role in the performance of that duty. *Claremont I*, 138 N.H. at 192 ("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. . . . The duty placed on the *State* encompasses cherishing the public schools." (emphasis added)). For that reason, too, the trial court's decision dismissing the governor and the commissioner in their individual capacities was error.

## **VI. THE STATE'S APPEAL SHOULD BE REJECTED**

The State advances seven arguments on appeal. Each of those arguments should be rejected.

The State argues that the trial court's "hybrid inquiry[.]" which included a review of the legislative history of RSA 198:40-a, was improper because the Districts did not prove an actual deprivation of a fundamental right and the statute was, in the State's estimation, therefore entitled to a

presumption of constitutionality.<sup>7</sup> State’s Brief at 39-43. The State is wrong on several counts. First, the Districts did prove an actual deprivation of the fundamental right to a state-funded, adequate education. *See supra* § II (a). And the Joint Committee’s Final Report was specifically incorporated into the statute. *See* 2008 New Hampshire Laws Ch. 173 (S.B. 539) (“The joint legislative oversight committee on costing issued detailed findings and recommendations on the composition of the cost of an adequate education and how the funds for an adequate education should be allocated and accounted for in order to ensure that the educational needs of all public school students are met. These findings and recommendations were submitted to the general court and are an integral basis of the costing determinations reflected in this act.”). Having proven that deprivation, the correct standard to be applied was strict scrutiny, not a presumption of constitutionality. *Claremont II*, 142 N.H. at 472. The trial court, faced with

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<sup>7</sup> The State now argues that the trial court should have only considered the sum total provided to the Districts by RSA 198:40-a. State’s Brief at 40. Below, the State never advanced the argument that, even if the State was underfunding particular cost items required for constitutional adequacy, RSA 198:40-a could still be constitutional “as a whole.” *See e.g.*, DAII at 3; DAIII at 191. That issue should, therefore, be deemed waived. Even if the Court does not deem that issue waived, the suggestion that, if several cost items were underfunded, the “universal cost,” which is the “cost of an adequate education,” is still somehow adequate should be rejected. DAI at 685, 696; *see also* RSA 198:40-a, III. If the figure fails to adequately fund required costs but, as the State appears to argue, overfunds other cost items contained within the “universal cost,” then the State runs into the same problem as it did in *Londonderry*: The demarcation of what is constitutional adequacy and what is ancillary is entirely inscrutable, and the statute is unconstitutional. 154 N.H. 153.

*no explanation whatsoever* from the State’s pleadings for the deprivation, *see generally*, DAII at 3; DAIII at 167, searched the legislative history to find that rationale. *See, e.g.*, DAO at 122 (“Thus, the statue represents the Legislature’s funding for all school districts and students of all grades, and the Joint Committee explicitly costed transportation for all students at a dollar amount insufficient to provide transportation for all students.”). Finding none, the trial court correctly concluded that the statute was unconstitutional. The trial court’s method is consistent with strict scrutiny, which is the applicable standard.

The State also argues that the trial court erred in drawing improper inferences in the Districts’ favor. State’s Brief at 48-49. Not so. The trial court relied upon sworn affidavits, based on the affiants’ personal knowledge, demonstrating that none of the Districts could provide an adequate education with the aid provided by RSA 198:40-a because the State was not fully funding the cost items it had included in the definition of a constitutionally adequate education. For example, the trial court relied upon Winchester’s eighth-grade student-teacher ratio. DAO at 110-11. Winchester’s student-teacher ratio cannot, under any circumstances, approach the student-teacher ratio used by the Legislature in calculating the base adequacy aid. This is because the State’s own regulations require that Winchester split its 32 eighth graders between two classes, resulting in a teacher-student ratio of 1:16. The Court drew no inferences at all in that analysis. It certainly could not have drawn the inference that the State now advances: that there is a way to attribute that disparity to Winchester’s “individual . . . choices[.]” State’s Brief at 49.

The State's remaining five arguments can be disposed of relatively quickly. First, the State argues that the trial court erred in concluding that the Districts had adequately alleged a deprivation of the fundamental right to a state-funded education. State's Brief at 22. As set forth in more detail *supra* § II(a), the Districts adequately pled that the State had deprived their students of the right to a state-funded, adequate education by pleading specific, factual information demonstrating cost items that the State was not fully funding despite their inclusion in the legislative definition of a constitutionally adequate education.

Second, the State argues that the trial court erred in relying upon the Districts' affidavits at summary judgment. State's Brief at 22. For the reasons set forth *supra* § II(a)(i), the trial court was entitled to and, indeed, obligated to rely upon those affidavits. *See* RSA 491:8-a, II. They contained admissible, relevant factual information that was probative of the degree to which the State was failing to fully fund adequate education in the Districts.

Third, the State argues that transportation, teacher benefits, the provision of school nurse, superintendent, and food services, and facilities operation and maintenance are not part of a constitutionally adequate education. State's Brief at 23. According to the Legislature's definition, however, they are. *See* RSA 198:40-a; DAI at 697-99. This issue is discussed in detail *supra*, § II(a)(ii).

Fourth, the trial court did not "depriv[e]" the State of the opportunity to conduct discovery. State's Brief at 24. As explained *supra* § II(a)(i), the State opted not to pursue discovery at all. They were entitled by the court rules to seek interrogatory answers, depositions, and requests for the production of documents. N.H. Super. Ct. R. 23, 24, 26. The State

propounded no discovery requests. Furthermore, the State had access to the data contained in the Districts' affidavits well before this suit was ever filed – it was originally compiled for submission to the Department of Education and certified as accurate under oath by force of statute. *See* RSA 21-J:34, RSA 189:28-a, RSA 195:14, and RSA 198:4-d.

Finally, the State argues that the trial court erred in awarding the Districts attorney's fees. State's Brief at 24. As discussed *supra* § III, the award of attorney's fees was warranted under the substantial benefit theory, regardless of whether the Districts' facial challenge succeeded, because the trial court correctly concluded that RSA 198:40-a is unconstitutional in its application in every single school district in the state. PAO at 132-33.



## CONCLUSION

“Whatever the State identifies as comprising constitutional adequacy it must pay for.” *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 162. The Districts are only asking the Court to order the State to pay for what the State has required schools to do as part of its own definition of constitutionally adequate education. This Court long ago recognized that “[t]he State [has] the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of the constitutional responsibility to local communities.” *Opinion of the Justices*, 145 N.H. at 476. For years, the State has continuously sought to improperly shift its burdens to local school districts: the burden to fund a constitutionally adequate education, the burden of proof in legal challenges to that scheme, and the burden of determining what, exactly, comprises the cost of an adequate education. More than anything, the State has offloaded the burden of “cherishing” education to local school districts throughout the state by providing them with inadequate funding and leaving school districts to shoulder the burden. The Districts respectfully request that this Court finally place those burdens where they belong – with the State – and remand for a determination of appropriate injunctive relief.

## **REQUEST FOR ORAL ARGUMENT BEFORE THE FULL COURT**

This case concerns the protection of fundamental constitutional rights and the proper remedy when the State repeatedly fails to act in accordance with the New Hampshire Constitution. The Districts request oral argument of at least fifteen minutes to be argued by Attorney Michael J. Tierney.

Respectfully submitted,  
CONTOOCOOK VALLEY SCHOOL DISTRICT,  
MYRON STEERE, III,  
RICHARD CAHOON,  
RICHARD DUNNING,  
WINCHESTER SCHOOL DISTRICT,  
MASCENIC REGIONAL SCHOOL DISTRICT, and  
MONADNOCK REGIONAL SCHOOL DISTRICT

April 15, 2020

By their attorneys,  
*/s/ Michael J. Tierney*  
Wadleigh, Starr & Peters, P.L.L.C.  
Michael J. Tierney – NHBA# 17173  
Elizabeth E. Ewing – NHBA# 269009  
95 Market Street  
Manchester, NH 03101  
(603) 669-4140  
mtierney@wadleighlaw.com  
eewing@wadleighlaw.com

### **CERTIFICATE OF SERVICE**

I, Michael J. Tierney, certify that the foregoing brief, including the referenced addendum and appendix, have this day been served upon Daniel E. Will, Esq., Anthony J. Galdieri, Esq., Lawrence M. Edelman, Esq, and Samuel R.V. Garland, Esq. through the Supreme Court's e-filing system.

*/s/ Michael J. Tierney*  
Michael J. Tierney

### **CERTIFICATE OF COMPLIANCE**

I, Michael J. Tierney, certify that the foregoing brief complies with N.H. Supreme Ct. R. 26(2), (3), and (4). Every issue specifically raised herein has been presented to the court below and properly preserved for appellate review by a properly filed pleading. The foregoing also complies with N.H. Supreme Ct. R. 16(11) and contains 11,840 words, excluding the table of contents, table of authorities, pertinent texts of constitutions, statutes, regulations and rules, and addendum.

*/s/ Michael J. Tierney*  
Michael J. Tierney

## **ADDENDUM OF APPEALED DECISIONS**

April 5, 2019	<b>Order on Motion for Preliminary Injunction .....</b>	<b>PAO 1</b>
June 5, 2019	<b>Order on the State’s Motion to Dismiss and the Parties’ Cross-Motions for Summary Judgment .....</b>	<b>PAO 25</b>
July 29, 2019	<b>Order on Petitioners’ Motion to Reconsider .....</b>	<b>PAO 123</b>

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

CHESHIRE, SS.

SUPERIOR COURT

Contoocook Valley School District,  
Myron Steere III, Richard Cahoon, Richard Dunning,  
and Winchester School District

v.

State of New Hampshire, New Hampshire Department of Education,  
Christopher T. Sununu, Individually and as Governor, and  
Frank Edelblut, Individually and as Commissioner<sup>1</sup>

No. 213-2019-CV-00069

**ORDER ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

Contoocook Valley School District ("ConVal"), Myron Steere III, Richard Cahoon, and Richard Dunning filed this petition for declaratory judgment and injunctive relief on March 13, 2019; the Winchester School District ("Winchester") was added by assent as a petitioning party (collectively, "the Plaintiffs"). (Am. Compl.) The Plaintiffs' Amended Complaint alleges the State is violating the constitutional mandate to adequately fund education, resulting in increased tax burdens on municipalities. The Plaintiffs have moved for a preliminary injunction and request for this Court to order the State to pay \$16,961,843.75 to ConVal and \$4,515,702.69 to Winchester in education base adequacy aid funds that the Plaintiffs assert are owed by April 1, 2019. (ConVal Mot. Prelim. Inj. 4; Winchester Mot. Prelim. Inj. 5.) The State objects. A hearing on this matter was held on March 29, 2019. For the following reasons, the Plaintiffs' motions for preliminary injunction are DENIED.

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<sup>1</sup> Collectively referred to as "the State."

## FACTS

The parties essentially agree to the following “facts,” which are contained in the Plaintiffs’ Amended Complaint and incorporated in the Plaintiffs’ Motion for Preliminary Injunction as well as the State’s Objection. ConVal and Winchester both provide education to the pupils in their districts; ConVal to the nine towns it contains, and Winchester solely to the Town of Winchester. (Am. Compl. ¶¶ 14–15.) Both ConVal and Winchester receive funds from the State to provide a constitutionally adequate education. (*Id.* at ¶¶ 20–21.) These funds, called base adequacy aid, are dispersed as a function of a statutory scheme enacted following a New Hampshire Supreme Court determination that a State-funded constitutionally adequate public education was a fundamental right. *See Claremont Sch. Dist. v. Governor (Claremont II)*, 142 N.H. 462, 473 (1997); *Londonderry Sch. Dist. SAU 12, et al. v. State of New Hampshire*, 154 N.H. 152, 160–63 (2006); RSA 193-E:1. Because Winchester does not have its own public high school, Winchester pays tuition of \$14,023 for its high school students to attend Keene High School.<sup>2</sup> (Am. Compl. ¶¶ 100–01.) This tuition agreement was approved by the State Board of Education and is on par with other agreements the Board has approved. (*Id.* at ¶¶ 103–04.)

In 2008, the New Hampshire Legislature created a Joint Legislative Oversight Committee on Costing an Adequate Education (“the Joint Committee”).<sup>3</sup> (Am. Compl. ¶¶ 22–24; *see* Final Report.) The Joint Committee was charged with studying “the cost

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<sup>2</sup> Winchester’s Motion for Preliminary Injunction notes that this amount is the general education tuition rate, while Winchester must pay \$31,000 of tuition to Keene High School for students who receive special education services. (Winchester Mot. Prelim. Inj. ¶ 7, n. 1.) The Motion also notes that transportation costs are not included in tuition. (*Id.* at ¶ 9.)

<sup>3</sup> The Joint Committee’s Final Report and Findings, attached to the State’s Objection as Exhibit A, is hereinafter referred to and cited as the “Final Report.”

of providing the opportunity for an adequate education and the educational needs and resources necessary to ensure its delivery to the public school children of the State.”

(Final Report 3.) The Joint Committee reported that it held eighteen meetings that totaled more than fifty hours of testimony and deliberations in which it considered state and national education policy, finance professionals’ methodologies, policy considerations, briefings from New Hampshire Department of Education (“DOE”) staff, and other materials on education finance. (Id.) As a result, the Joint Committee determined the universal cost per pupil was \$3,456. (Id. at 4.) This cost included amounts for teacher salary and benefits; principal and principal assistant salary and benefits; guidance counselors; library media specialists; technology coordinators; custodians; instructional materials; technology (e.g. computers); teacher professional development; facilities operation and maintenance; and transportation. (Id.; Am. Compl., Ex. A.)<sup>4</sup> The Joint Committee’s conclusions and findings are contained in its Final Report, and the Legislature went on to establish the statutory scheme in place today, codified in RSA chapters 193-E and 198. (Final Report 3.) The Joint Committee’s price per pupil is the current basis for the base adequacy aid determination, and the amount is adjusted every biennium based on the average change in the Consumer Price Index (“CPI”). RSA 198:40-d; (Am. Compl. ¶¶ 21–23.) The current base adequacy aid amount for the 2019 Fiscal Year is \$3,636.06 per pupil. (Id. at ¶ 25.) The Plaintiffs assert that the State’s calculation suffers from several flaws, and specifically challenges five areas of the Joint Committee’s Final Report. (Id. at ¶ 26; 2008 Spreadsheet.)

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<sup>4</sup> The Plaintiffs’ Exhibit A contains solely Appendix A of the Final Report. This exhibit is hereinafter referred to as the “2008 Spreadsheet.”

The Plaintiffs first challenge the 2008 Spreadsheet's funding to cover transportation costs. (Am. Compl. ¶¶ 27–34.) The 2008 Spreadsheet incorporates a base universal transportation cost of \$315 per pupil and includes it in the total per pupil amount to provide the base adequacy aid of \$3,456. (*Id.* at ¶ 28; 2008 Spreadsheet.) In its Final Report, the Joint Committee “recognized that neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy.” (Final Report 23.) However, the Joint Committee also stated, “Nevertheless, the Committee determined that transportation to school for students who reside far from school is an important consideration for students to have the opportunity for an adequate education.” (*Id.*) The Joint Committee further noted that the principle that transportation costs were an important consideration was reflected in State law RSA 189:6,<sup>5</sup> which requires school districts to provide transportation to all pupils grades 1 through 8 who live more than two miles from the school to which they are assigned. (*Id.*) Thus, “[t]he Committee decided to include transportation costs in the universal cost calculation,” but noted that its calculation only included “the costs for elementary and middle school students as high school students are not entitled to transportation services” and that it “reduced the statewide total of transportation costs for those students by subtracting any costs not attributable to transporting students.” (*Id.*)

The Plaintiffs have submitted a DOE document, titled “General Fund Transportation Expenditures,” which reflects each municipality in the State and its actual transportation costs. (Am. Compl., Ex. B.) The Plaintiffs highlight that not one of the municipalities with ten or more pupils has transportation costs less than \$400 per pupil,

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<sup>5</sup> The Joint Committee mistakenly identified this statute as RSA 198:6 in its Final Report. (Final Report 23.)



according to the DOE document. (Am. Compl. ¶ 28; id., Ex. B.) The DOE document depicts that ConVal’s transportation cost is \$914.60 per pupil; Winchester’s is \$962.73; and the average actual transportation cost for all districts is \$827.56 per pupil. (Id. at ¶¶ 31–33; id., Ex. B.) The Amended Complaint states that it costs substantially more to transport pupils to school in large rural districts as compared to compact urban districts.<sup>6</sup> (Id. at ¶ 30.) The Plaintiffs assert that providing transportation for pupils to attend school is part of the State’s obligation to fully fund an adequate education pursuant to Part II, Section 83 of the New Hampshire Constitution. (Id. at ¶ 34.)

The Plaintiffs next challenge the 2008 Spreadsheet’s teacher-student ratio. (Id. at ¶¶ 35–51.) In explaining its “Universal Cost Calculation,” or how it reached its figure for the base adequacy aid, the Joint Committee made a specific finding that “the student teacher ratio necessary to provide the opportunity for an adequate education in New Hampshire is 25 students to 1 teacher in kindergarten through grade two; and 30 students to 1 teacher in grades three through twelve.” (Final Report 14.) Its basis for this decision, the Final Report states, was that “the New Hampshire minimum standards for public school approval,” contained in Board of Education regulation Ed 306.17(a), “reflect the student-teacher ratios that are adequate in the state.” (Id.)

The Plaintiffs state that these ratios are not based on actual teacher-student ratios but rather on maximum classroom size as established in Ed 306.17(a)(1).<sup>7</sup> (Am. Compl. ¶ 38.) Teacher-student ratios are not the equivalent of classroom size, the Amended Complaint states, and the ratios are thus not accurate. (Id. at ¶¶ 37, 39.) The

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<sup>6</sup> At the hearing on the Motions for Preliminary Injunction, counsel for the Plaintiffs stated that ConVal buses cover about 3,000 miles each day as an illustration of ConVal’s high transportation costs in contrast with more urban municipalities.

<sup>7</sup> The Court notes that Ed 306.17 does contain these ratios, but provision (a)(1) is limited to kindergarten; the other figures are contained in Ed 306.01(a)(2) and (3).

Amended Complaint provides the example that in a school of thirty-one students, the regulation would require two teachers, thus creating a ratio of 1:15.5, not 1:30. (*Id.* at ¶ 40.) The Amended Complaint also highlights that teachers are given time during the school day to plan their classes such that a teacher may not teach all four blocks in a four-block day and that teachers would usually teach five out of eight periods in other schools. (*Id.* at ¶ 41.) Further, State regulations require teachers to be certified in the subjects that they teach, thereby precluding the complete maximization of class sizes. (*Id.* at ¶ 42.) The Amended Complaint asserts that no school district in the State has teacher-student ratios of 1:25 or 1:30, and that the State is able to, and has in fact, computed the average teacher-student ratio for each year for the past ten years, citing to a DOE publication of statewide teacher-student ratios for 2007 to 2017. (*Id.* at ¶¶ 43–45; *id.*, Ex. C.) The DOE document computes teacher-student ratios by dividing the total number of students in the State by the total number of teachers, and the data for the most recent year available, 2015, indicates a ratio of 1:9.96. (*Id.* at ¶ 45; *id.*, Ex. C.) The Amended Complaint cites to another DOE document from the DOE’s Division of Education Analytics and Resources that analyzed teacher-student ratios for grades 1–12 and determined the statewide average for the 2017–2018 school year was 1:12.6, excluding preschool and kindergarten. (*Id.* at ¶ 47; *id.*, Ex. D.) No school district in the State has a teacher-student ratio higher than 1:17.5; and, in the past ten years, the statewide average teacher-student ratio never exceeded 1:12.6, according to the Amended Complaint. (*Id.* at ¶¶ 48–49; *id.*, Ex. D.) Their point, as the Court interprets it, is that the ratio used by the Legislature in deriving the adequacy base rate shares no logical nexus (or rational basis) with reality or actual ratios.

Third, the Plaintiffs challenge the 2008 Spreadsheet's failure to incorporate "the actual cost of providing benefits to teachers and other staff." (Id. at ¶ 51.) The Final Report determined that salary and benefit percentages should be used in calculating the base adequacy aid and elaborates on its rationale for selecting a base salary, stating, "The Committee determines that the cost of adequacy should be calculated using a teacher salary calculated at the state average for a teacher with a bachelor's degree and three years [sic] experience plus benefits at 33% of salary." (Final Report 19.) The Final Report states that, in assisting with the Joint Committee's determination of proper salary level and benefit percentages, the DOE prepared reports documenting the 2007–2008 schoolyear salary schedules utilized by public schools across the State, specifically "costs for personnel benefits, including the average rate for benefits as a percentage of teacher salary." (Id. at 18.) The Final Report does not elaborate on how it chose the 33% figure, but explains its selection of a base salary level of a teacher with three years' experience: "The Committee decided that a teacher with three years [sic] experience is the most appropriate salary to choose for costing purposes because after three years of experience a teacher completes a probationary period for employment purposes." (Id. at 19.)

The Plaintiffs point to the 2008 Spreadsheet, which presumes the total cost of teacher benefits will be 33% of the first-year teacher's salary, or \$11,728, per teacher. (Id. at ¶ 52; 2008 Spreadsheet.) Yet, the Amended Complaint states, actual teacher benefits exceed \$11,728 in every school district in the State. (Am. Compl. ¶ 53.) In explaining teacher benefits, the Plaintiffs cite four requirements placed on school districts: RSA 100-A:16, III, which contains the New Hampshire Retirement System and

requires an employer contribution of 17.80% for 2019 through 2021 per teacher, (Id., Ex. E); federal employment taxes, which require school districts to pay 7.56%; workers compensation coverage and unemployment insurance, which totals at least \$150 per teacher per year; and health insurance premiums. (Id. at ¶¶ 55–64.) The Amended Complaint states, “The portion of health insurance premiums paid by the school district for a teacher will alone total in excess of \$17,000.00.” (Id. at ¶ 60.) As an illustration of health insurance costs, the Amended Complaint points to the State’s compensation to its own employees, which total more than \$26,700 in health insurance contributions and more than \$31,800 in total benefit packages. (Id. at ¶ 64; id., Ex. F.) Thus, providing funding that presumes teacher benefits packages cost only \$11,728 per teacher fails to meet the State’s constitutional mandate of providing funding for an adequate education. (Id. at ¶ 65.)

Fourth, the Plaintiffs challenge the 2008 Spreadsheet’s calculus for failing to include several State-required services; specifically, nurse services, superintendent services, and food services. (Id. at ¶¶ 66–67.) The Amended Complaint states that Ed 306.12 requires the provision of a school nurse and that RSA 200:29 requires school nurses to have completed their nursing degrees and have three years of experience.<sup>8</sup> (Id. at ¶¶ 69–70.) Nurses that meet these requirements command salary and benefit packages in excess of \$65,562, and the DOE’s most recent survey of school nurses

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<sup>8</sup> The Amended Complaint states that this statute, “as amended in 2016,” contains this requirement. Prior to 2016, RSA 200:29 did not impose requirements on a school nurse’s qualifications beyond that he or she be a registered professional nurse licensed in New Hampshire. RSA 200:29 (1971) (amended 2016). The Court notes that both versions of the statute use the permissive term “may,” but that the regulation cited, Ed 306.12, contains the mandatory term “shall,” as it did in 2008, in requiring “qualified personnel to carry out appropriate school health-related activities.” Ed. 306.12 (2008) (amended 2017); Ed. 306.12 (2019).

determined there is a statewide average of one school nurse for every 223 pupils. (Id. at ¶¶ 71–72; id., Ex. G at 3.) The Amended Complaint asserts that a constitutionally adequate education thus requires at least \$294 per pupil for school nurse costs, yet school nurse costs are not part of the 2008 Spreadsheet. (Id. at ¶¶ 73–74; 2008 Spreadsheet.)

In regard to superintendent services, the Amended Complaint cites to RSA 194-C:4, Ed 302.01, and Ed 302.02, which require schools to have superintendent services and detail the necessary responsibilities of the superintendent’s office, including all fiscal oversight of the district budget. (Am. Compl. ¶ 75.) The average salary and benefit package for a qualified superintendent, the Amended Complaint asserts, exceeds \$158,000. (Id. at 77.) Larger districts required a business administrator and/or an assistant superintendent, and districts with more than 1,000 pupils require a second person in the superintendent’s office. (Id. at ¶¶ 78–79.) The 2008 Spreadsheet does not account for superintendent services. (2008 Spreadsheet.)

In regard to food services, the Amended Complaint states that Ed. 306.11’s requirement that all public schools provide food services has resulted in an annual loss of \$33,617,749, or roughly \$200 per pupil, according to submitted DOE reports. (Id. at ¶¶ 80–82; id., Ex. H.) As current education-funding statutes do not provide any funds to food services losses, the Amended Complaint states, the State is failing to meet its obligation to provide sufficient funds. (Id. at ¶¶ 83–84.)

Fifth, the Amended Complaint addresses the 2008 Spreadsheet’s failure to properly provide funding for facilities operation and maintenance. (Id. at ¶¶ 85–93.) The Amended Complaint explains, “Children need lights and heat in their schools in

order to learn and the driveways and parking lots need to be snowplowed so children can get to school.” (*Id.* at ¶ 86.) The funding formula contained in the 2008 Spreadsheet attributes \$195 per pupil for facilities operation and maintenance, yet, according to the statewide average for plant operations, the cost is \$1,462.66 per pupil.<sup>9</sup> (*Id.* at ¶¶ 87–89; 2008 Spreadsheet.) The Final Report states that it “determined that a clean, healthy and safe learning environment is needed for students to have the opportunity for an adequate education as defined in RSA 193-E:2-a.” (Final Report 23.) The Joint Committee’s decision to fund facilities and operation maintenance at \$195 per pupil was based on information it received from the DOE, which reflected that “facilities operation and maintenance constitutes about 8% of the total school cost.” (*Id.*) The Final Report states that it applied this percentage to “the projected universal costs as calculated through the Committee’s other decisions” and arrived at \$195.<sup>10</sup> (*Id.*) In ConVal, plant operations include approximately \$500,000 in oil/gas, approximately \$500,000 in electricity, and more than \$160,000 in snowplowing, which amounts to \$1,406.81 per pupil. (Am. Compl. ¶ 90.) The Amended Complaint asserts that, because the State has funded only 13% percent of the actual expenses for facilities operations and maintenance, according to the DOE’s data, the State has failed to meet its constitutional mandate to fund an adequate education. (*Id.* at ¶¶ 92–93.)

The Plaintiffs have submitted a calculus that includes the same data the Joint Committee used with the exceptions of corrected figures for the teacher-student ratio;

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<sup>9</sup> The Plaintiffs calculated this figure by consulting a DOE report, titled “State Summary Revenue and Expenditures of School Districts 2017-2018,” which reflects that plant operations cost \$243,271,198; the Plaintiffs divided this figure by 166,321.18, which they state is the total number of pupils in the State. (*Id.* at ¶ 89, n. 7; *id.*, Ex. H (Doc. 13).)

<sup>10</sup> The Final Report does not explain why the 8% figure resulted in \$195 per pupil when the Joint Committee concluded that the universal cost, or base adequacy aid per pupil, was \$3,456, 8% of which is \$276.48.

corrected teacher and staff benefits to reflect actual levels; maintenance costs at \$1,400 per pupil; the superintendent, nurse, and food services figures included; and no transportation costs included. (Am. Compl., Ex. I.) For transportation costs, the Plaintiffs state the average cost for ConVal is \$914.60 per pupil. (Id. at ¶ 96.) Using this calculus, and including the proposed transportation cost, the Amended Complaint asserts that the cost of providing a constitutionally adequate education to pupils in ConVal is \$10,843.60. (Id. at ¶ 97.) In Winchester, with an average transportation cost of \$962.73 per pupil, the cost is \$10,891.73. (Id. at ¶¶ 98–99.)

The State has provided ConVal with three of the four base adequacy aid installments pursuant to RSA 198:42. (Id. at ¶ 115.) The State's fourth payment is due on or about April 1, 2019. (Id. at ¶ 118.) For the 2019 Fiscal Year, pending its final payment to ConVal, the State intends to provide ConVal with \$7,432,106.64 in base adequacy aid funding, which is \$3,636 multiplied by the 2,044 pupils in ConVal. (Id. at ¶¶ 111, 114.) According to the Plaintiffs' calculus, however, the State must provide ConVal with \$22,164,318.40, or \$10,843.60 per pupil, to meet its constitutional obligation. (Id. at ¶ 112.) Even with that amount, the aid would cover less than half of ConVal's approximate \$48,000,000 in education expenses each year. (Id. at ¶ 113.) The Plaintiffs assert that, without injunctive and declaratory relief from this Court, ConVal will incur a shortfall of more than \$16,961,843.75 with the final April 1, 2019 payment remaining. (Id. at ¶ 117.)

Similarly, the State's fourth installment payment to Winchester is pending. (Id. at ¶ 124.) The State intends to provide Winchester with \$1,967,214.27 in base adequacy aid funding. (Id. at ¶ 123.) According to the Plaintiffs' calculus, the State must provide

Winchester with \$5,892,752.68, or \$10,891.73 per pupil, to meet its constitutional obligation. (Id. at ¶ 122.) The Plaintiffs assert that, without injunctive and declaratory relief from this Court, Winchester will incur a shortfall of more than \$4,515,702.69 with the final April 1, 2019 payment remaining. (Id. at ¶ 124.)<sup>11</sup>

The Plaintiffs also assert facts concerning the 2020 Fiscal Year. (Id. at ¶¶ 135–49.) According to the same calculus, the Amended Complaint asserts that, because ConVal will have approximately 2,035 students during the 2020 Fiscal Year and because the base adequacy aid will increase to \$3,708.78 as per the CPI adjustment, the State must provide ConVal with at least \$22,066,726 for the 2020 Fiscal Year. (Id. at ¶¶ 136, 138–39.) Yet, the State’s published forecast of its anticipated funding to ConVal for the 2020 Fiscal Year is \$7,547,367.30. (Id. at ¶ 140.) And, because Winchester will have approximately 542 students and as per the CPI adjustment, the Plaintiffs assert the State must provide Winchester with at least \$5,903,317.66. (Id. at ¶¶ 137, 141.) However, the State’s anticipated funding to Winchester for the 2020 Fiscal Year is \$1,990,873.10. (Id. at ¶ 142.)

The Amended Complaint further states that the State obtains a majority of the funds used for the base adequacy aid through the Statewide Education Property Tax (“SWEPT”), collected pursuant to RSA 76:3. (Id. at ¶ 106.) The SWEPT was originally adopted at a uniform rate of \$6.60 per thousand dollars in property value. (Id. at ¶ 107.) The SWEPT has since been decreased to \$2.06 per thousand, less than one-third of its

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<sup>11</sup> Plaintiffs were involved in sponsoring HB 678, filed on 01-03-2019. This bill sought to raise the adequacy base rate from \$3561 per pupil to \$9929 per pupil. This would have had a \$1.13 billion fiscal impact on the 2020 budget. At the hearing in this matter, the State indicated that the current request in this suit, if extended to other school districts that will experience a “shortfall” similar to Plaintiffs, would result in a \$1.3 billion fiscal impact. HB 678 was retained in committee on 02-19-2019.



original rate. (Id. at ¶ 108.) State education aid now consists of a smaller percentage of total education expenditures than it had in 1999, and local communities have had to increase their tax rates to make up for the decreased or stagnant State aid with increasing educational expenditures. (Id. at ¶¶ 109–10.) The Amended Complaint states that education property taxes vary greatly throughout the State, which the Plaintiffs allege is unconstitutional. (Id. at ¶¶ 126, 130; id., Ex. K.) Communities such as Newington have a total education tax rate of \$3.19, while Dublin has a combined local and state education tax rate of \$16.46. (Id. at ¶ 127; id., Ex. K.) The Town of Winchester has a combined local and state education tax rate of \$22.65. (Id. at ¶ 128; id., Ex. K.)

The Plaintiffs allege that RSA 198:40-a(II)(a), which contains the base adequacy aid, is unconstitutional on its face and as applied to both ConVal and Winchester. (Id. at ¶ 131.) The Plaintiffs also allege that the State has unconstitutionally applied, and intends to continue to unconstitutionally apply, RSA chapter 198 to deny ConVal and Winchester full educational adequacy aid. (Id. at ¶ 150.) In seeking declaratory relief, the Plaintiffs assert that it would be unconstitutional to further delay the full funding of education and that the State is constitutionally required to provide at least \$22,066,726 to ConVal and \$5,903,317.66 to Winchester for the 2020 Fiscal Year. (Id. at ¶¶ 145, 146–48.) The Plaintiffs also request attorneys’ fees. (Id. at ¶ 149.) The Amended Complaint explains that RSA 198:42(II) provides the State governor authorization to draw a warrant from the State’s education trust fund “to satisfy the state’s obligation under this section,” and that after the State makes all of its intended grants as of April 1, 2019, the trust will have a surplus of \$20,000,000. (Id. at ¶¶ 132–34, 158–59.)

As noted above, these data are not disputed by the State, to the extent that they are contained in data from the DOE. The State's opposition to this matter is focused on the Court's authority to grant the relief requested, or, in other words, whether the Court has the authority to make and impose factual findings that are inconsistent with factual findings that were derived from the legislative process. That is a complicated question, but not one that needs to be resolved today.

The State also argues that principles of equity require denial of the request for a preliminary injunction because of the timing of the legislative budget process: that a court order encumbering the State with a \$1.3 billion payout in this fiscal year would significantly disrupt the current legislative budget process.

#### STANDARD OF REVIEW

A preliminary injunction is considered an extraordinary remedy. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "An injunction should not be issued unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law and the party seeking an injunction is likely to succeed on the merits." ATV Watch v. N.H. Dep't of Res. & Econ. Dev., 155 N.H. 434, 437 (2007) (ellipses and brackets omitted). "The granting of an injunction . . . is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Gauthier v. Robinson, 122 N.H. 365, 368 (1982). "Although a party seeking a preliminary injunction must show that it would likely succeed on the merits, injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted." Kukene v.

Genuardo, 145 N.H. 1, 4 (2000). A denial of a preliminary injunction is not by itself a determination that the underlying case is frivolous. Id.

### ANALYSIS

Both ConVal and Winchester have moved for a preliminary injunction enjoining the unconstitutional underfunding of both districts. (ConVal Mot. Prelim. Inj. (Doc. 2); Winchester Mot. Prelim. Inj. (Doc. 8).) The State has objected. The two motions for preliminary injunction contain facts from the Amended Complaint, including the discrepancy between the State’s provided base adequacy aid to both districts and what the Plaintiffs allege is constitutionally required. (ConVal Mot. Prelim. Inj. ¶¶ 4–5; Winchester Mot. Prelim. Inj. ¶ 12–14.) In addition to the Amended Complaint’s facts concerning Winchester, Winchester’s Motion also states that Winchester is “one of the most property poor districts in the state with only \$443,886 equalized value per pupil and does not have the capacity to raise local property taxes to pay for a constitutionally [adequate] education as compared to other communities with greater property.” (Winchester Mot. Prelim. Inj. ¶4.) Winchester’s Motion cites to a DOE document titled “Equalized Valuation Per Pupil, 2017-2018.” (Id.)

Both motions provide the same argument for a preliminary injunction. First, ConVal and Winchester assert that they will be irreparably harmed if a preliminary injunction is not issued before April 1, 2019 as the State will likely argue that sovereign immunity bars this Court from granting injunctive relief after that date. (ConVal Mot. Prelim. Inj. ¶ 9; Winchester Mot. Prelim. Inj. ¶ 18.) Second, both assert there is no adequate remedy at law as this case seeks to prevent the State from acting unconstitutionally in the future. (ConVal Mot. Prelim. Inj. ¶ 10; Winchester Mot. Prelim.

Inj. ¶ 19.) And third, both assert that they are likely to succeed on the merits as the 2008 Spreadsheet contains computational errors that can be corrected with the State's own data as published by the DOE. (ConVal Mot. Prelim. Inj. ¶ 11; Winchester Mot. Prelim. Inj. ¶ 20.) Both cite to a Superior Court Order in Bedford School District v. State to support the assertion that this Court may issue equitable relief requiring the State to provide constitutionally required funds. (ConVal Mot. Prelim. Inj. ¶ 12; Winchester Mot. Prelim. Inj. ¶ 21); Bedford Sch. Dist. v. State, Cheshire Cty. Super. Ct., No. 216-2016-CV-00396 (April 6, 2017) (Ruoff, J.). And, both motions repeat RSA 198:42(II)'s authorization to the State governor to draw a warrant to use funds from the education trust fund to satisfy the State's obligations under RSA chapter 198. (ConVal Mot. Prelim. Inj. ¶ 13; Winchester Mot. Prelim. Inj. ¶ 22.)

According to the Plaintiffs' theory, the State is obligated to distribute funds as fulfillment of its constitutional obligation to provide an adequate education. The Amended Complaint seeks declaratory judgment that RSA 198:40-a(II)(a) is unconstitutional, and the Plaintiffs seek preliminary injunction to prevent the State from violating Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution. (Am. Compl. 22; ConVal Mot. Prelim. Inj. 4; Winchester Mot. Prelim. Inj. 5.) Effectively, the Plaintiffs ask for this Court to determine that they are likely to succeed in showing RSA 198:40-a(II)(a) is unconstitutional and to order the State to provide the funds that the Plaintiffs have calculated as constitutionally sufficient base adequacy aid. The Plaintiffs have stated that the anticipated fourth installment of the State's dispersion of base adequacy aid is due on or about April 1, 2019, and that June 30, 2019 is the end of the

2019 Fiscal Year. (Am. Compl. ¶¶ 115–16.) The Plaintiffs therefore seek payment from the State by April 1. (ConVal Mot. Prelim. Inj. ¶ 14; Winchester Mot. Prelim. Inj. ¶ 23.)

The State objects to the Plaintiffs’ motions for preliminary injunction. The State relies on the Joint Committee’s findings in the Final Report and states that the cost components the Plaintiffs’ highlight are “ancillary and beyond those directly attributable to delivery of what the Constitution requires – *i.e.*, the core “substantive educational program” detailed in RSA 198-E:2-a. (State’s Obj. Mot. Prelim. Inj. 2.) The State also characterizes the Plaintiffs’ request for injunctive relief as asking the Court to aggregate funds to those ancillary cost components and direct millions of dollars in payments from the State in violation of the New Hampshire Constitution’s Separation of Powers Clause. (*Id.*) The State asserts that the Plaintiffs have failed to satisfy the burden to obtain a preliminary injunction. (*Id.*)

#### I. Irreparable Harm

Both ConVal and Winchester have alleged the same impending irreparable harm: that the State will likely argue that sovereign immunity bars this Court from granting injunctive relief after April 1. (ConVal Mot. Prelim. Inj. ¶ 9; Winchester Mot. Prelim. Inj. ¶ 18.) Neither party has articulated any other potential or ongoing harm. The State has not raised sovereign immunity as a defense nor addressed the Plaintiffs’ argument in its Objection.

Under the doctrine of sovereign immunity, the State cannot be sued for damages in its own courts without its consent or permission. In re Estate of Raduazo, 148 N.H. 687, 692 (2002). The Court has jurisdiction to enjoin the State where a plaintiff seeks a declaratory judgment that actions taken by the State are unconstitutional. Lorenz v. N.H.

Admin. Office of the Courts, 152 N.H. 632, 635, *as mod.* (Feb. 16, 2006). When a Court determines that the State has acted unconstitutionally, the Court may order prospective equitable relief to enjoin state officials to conform their conduct to the law, notwithstanding any impact on the State treasury. *See* Milliken v. Bradley, 433 U.S. 267, 289 (1977) (discussing prospective-compliance relief exception to sovereign immunity, established in Ex parte Young, 209 U.S. 123 (1908)). A court may also grant retrospective “compensatory” equitable relief when such relief is part of an existing plan or operation that has been decreed by a court. *See id.* at 290 (“That the programs are also ‘compensatory’ in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.”). However, sovereign immunity bars a retrospective award for constitutional wrongdoing in the absence of such a decree when the award is indistinguishable from an award of damages paid from State funds. *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974).

The Plaintiffs have asserted that, in the absence of a preliminary injunction, the doctrine of sovereign immunity will bar this Court from granting injunctive relief. While the Court agrees that sovereign immunity would bar a retrospective award of equitable relief, the Court disagrees that sovereign immunity would arise in the absence of the requested preliminary injunction. As the Plaintiffs point out, the 2019 Fiscal Year ends on June 30. The Plaintiffs have not shown that the State would be disabled from providing any Court-ordered payment after April 1 and before June 30, and the Court will not presume as such. While the April 1 date has passed, and thus the State’s fourth installment of base adequacy payments to the Plaintiffs has potentially been dispersed, the Plaintiffs seek funds from the State as fulfillment of its constitutional obligations

during the 2019 Fiscal Year. Because the 2019 Fiscal Year has not ended, the Plaintiffs thus seek prospective relief. Because June 30 has not passed, nor is it immediately looming, the Court does not agree that a preliminary injunction is warranted. See Bedford Sch. Dist. v. State, Cheshire Cty. Super. Ct., No. 216-2016-CV-00396, at 16–18 (April 6, 2017) (Ruoff, J.) (stating that relief in school funding case was not barred by sovereign immunity when petitioners’ suit was filed after the final education adequacy payment had passed but before the end of the fiscal year); City of Dover, et al. v. State, Sullivan Cty. Super. Ct., No. 219-2015-CV-312, at 10 (Sept. 2, 2016) (Tucker, J.) (stating that compensation for past funds wrongly withheld in school funding case were barred by sovereign immunity). After June 30, the Plaintiffs’ apprehension that sovereign immunity will bar an award will be valid. **Both** parties have requested **expedited** treatment from this Court on this matter; as such, the Court intends to fully dispose of this matter by June 30.<sup>12</sup> The parties are ordered to plan accordingly because the mutual request for expedited treatment is granted and the Court expects nothing less from the parties.<sup>13</sup>

As stated, the Plaintiffs have not provided any other explanation of what irreparable harm they will incur without a preliminary injunction. There has been no other explanation of why or how the Plaintiffs will be harmed in the absence of immediate receipt of the requested funds. Because the Court has found that sovereign

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<sup>12</sup> For this reason, the Court also finds there is an adequate remedy at law to address the Plaintiffs’ petition. The Court therefore does not address this part of the preliminary injunction standard.

<sup>13</sup> The State hinted at the hearing that this case might require significant discovery. Both plaintiffs (and the Court) disagree. As the State clearly articulated at the hearing, the fiscal impact of \$1.3 billion is significant. Thus, this case is worthy of dedicating resources necessary to resolve this by June 30, 2019. Moreover, because the plaintiffs rely on DOE data, the factual and discovery issues, if any, are very discreet and well defined.

immunity will not bar relief in the absence of a preliminary injunction, and the Plaintiffs' alleged irreparable harm will not result, the Plaintiffs' Motions for Preliminary Injunction are DENIED. The Court further addresses the parties' arguments below.

II. Likelihood of Success on the Merits

The Court also addresses that it could not grant the Plaintiffs' motions for preliminary injunction because it does not have sufficient undisputed evidence before it to demonstrate the Plaintiffs' likelihood of success on the merits.

The Court agrees with the Plaintiffs that the "flaws" it identifies in the Joint Committee's funding of a constitutionally adequate education appear problematic. The base adequacy aid amount of \$3,636 is a far cry from the actual (approximate) amount of \$18,000 per pupil.<sup>14</sup> It does not appear, based on DOE data, that there is a single school district in the State that could function if it only spent \$3,636 on each student. But that is not the test the Court must apply at this point and numbers can be deceiving in the absence of more information. Therefore, in examining the circumstances of this case, the Court finds it inequitable to determine the merits, or likelihood of success on the merits, on the factual record the Court has before it presently.

The parties have provided the Court with the Final Report, containing the Legislature's analysis and conclusions on what composes a constitutionally adequate education and its appropriate funding, while the Plaintiffs have provided supplementary material that they assert the Legislature was constitutionally required to consider. As the Plaintiffs characterize their evidence, the DOE has provided accurate data with which the Joint Committee's findings do not align. However, there has been no

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<sup>14</sup> HB 678, and this suit more or less, only seek a \$9,929 base adequacy rate. Both sides agree that all school districts provide funding well above and beyond the base adequacy rate through local taxation. The \$18,000 figure was discussed at the hearing.



evidence contextualizing or validating the Plaintiffs' evidence—specifically, the DOE data—as relevant to the constitutional inquiry before the Court.<sup>15</sup> And, the State disputes that the DOE data is appropriate for this Court to consider. The Court agrees with the State that the Plaintiffs must establish that the Legislature's definition of "adequate education" embraces the cost components and funding amounts they have identified; or, alternatively, the Plaintiffs must show that the Legislature's determination of base adequacy aid effectively fails to meet its obligation to fund a constitutionally adequate education. See Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc., 159 N.H. 627, 640 (2010) ("The party challenging a statute's constitutionality bears the burden of proof."). The Court is unable to rely on the Plaintiffs' evidence at this stage of the litigation to find either. Therefore, the Court is unable to determine whether the Plaintiffs will or will not succeed on the merits.

By way of analogy, the Court likens the evidentiary issue to that on a motion for summary judgment: the moving party must show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. RSA 491-a, III. When a material fact is disputed, determining the factual merits as a matter of law is improper. However, whether facts are "material" is a question of law. Here, the Court has yet to find that the Plaintiffs' evidence (the DOE data) is material to determine

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<sup>15</sup> The Plaintiffs argued at the preliminary injunction hearing that Rideout v. Gardner requires the State to use "real data" when legislation affects fundamental rights, rather than speculative data, and that the DOE provides such real data. 838 F.3d 65 (1st Cir. 2016). First, it is unclear how Rideout will apply to this inquiry—as the First Circuit applied intermediate scrutiny, and the lower court applied strict scrutiny, 123 F.Supp.3d 218 (D.N.H. 2015), to a question concerning free speech. Second, whether the DOE data may be considered "real data" that would support a legislative restriction on a fundamental right, as Rideout required, is not the question before the Court; the Plaintiffs ask the inverse, to use the DOE data to upend a legislative decision. Accordingly, Rideout does not shed light on whether the DOE data is appropriate to consider in this matter.

whether the State's base adequacy aid is constitutionally sufficient.<sup>16</sup> And, as noted, the State objects to the Court considering the Plaintiffs' evidence. Therefore, in considering the circumstances of this case and principles of equity, the Court cannot determine the Plaintiffs' likelihood of success.

The Court also notes that, for the same reason, it is precluded from granting the requested injunction at this time. The Court agrees with the State's distinction between a preliminary injunction and a mandatory injunction. (State's Obj. Mot. Prelim. Inj. 3.) While a preliminary injunction "is a provisional remedy that preserves the status quo pending a final determination of the case on the merits," a mandatory injunction "requires affirmative action by the non-moving party in advance of trial" and thus "alters rather than preserves the status quo." Mottolo, 155 N.H. at 63; Braintree Labs., Inc. v. Citigroup Glob. Markets Inc., 622 F.3d 36, 41 (1st Cir. 2010); see New England Employee Benefits Co., Inc. v LeSage, No. 2017-CV-00246, 2017 WL 6061157, at \*5 (N.H. Super. Dec. 06, 2017) ("The few cases that have afforded [a mandatory injunction as] relief have done so either after a full trial on the merits or where there is evidence of broad dissemination of a clearly objectively false statement." (citations omitted)). Currently, the status quo is such that ConVal and Winchester will receive the fourth and final installment of the base adequacy funds of \$3,636.06 per pupil. (Am. Compl. ¶ 25.) The Plaintiffs request significant alteration of the status quo and seek payment of more than \$20 million. (ConVal Mot. Prelim. Inj. 4; Winchester Mot. Prelim. Inj. 5.) As this Court has yet to make any factual findings and cannot yet rule on the propriety of

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<sup>16</sup> The Court notes that any attacks on the definition of adequacy, or fiscal items not contained in the definition of adequacy, are also purely legal issues -- as are the separation of powers issues which loom large in this case. There is nothing in the factual record before the Court to explain why certain items discussed by the plaintiffs are not contained in the definition of adequacy.

legislative factual findings, it finds it is improper and inequitable to order a mandatory injunction.

Lastly, the Court notes that the Plaintiffs' motions for preliminary injunction do not ask this Court to find RSA 198:40-a(II)(a) unconstitutional at this stage in litigation yet asks the Court to order the State to disperse the requested funds as if it were. The Plaintiffs thus ask the Court to put the cart before the horse and order funds dispersed contrary to a presumptively valid law. N.H. Health Care Ass'n v. Gov., 161 N.H. 378, 385 (2011) ("In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds." (quoting Baines v. N.H. Senate President, 152 N.H. 124, 133 (2005))). As noted, the evidence before the Court is insufficient to upset that presumption and support a preliminary injunction.<sup>17</sup>

### CONCLUSION

The Court finds the Plaintiffs will not incur irreparable harm in the absence of a preliminary injunction because the State will not be able to claim sovereign immunity before the end of the 2019 Fiscal Year, June 30, 2019, has passed. And, the Court lacks sufficient evidence to determine the Plaintiffs' likelihood of success on the merits. Furthermore, without this ability, the Court is unable to sufficiently find facts to support a mandatory injunction. For these reasons, the Plaintiffs' motions for a preliminary injunction are DENIED.

In light of the Court's finding that it will resolve this matter prior to June 30, 2019, the Court imposes the following deadlines: Dispositive Motions are due on (or before) April 29, 2019. Responses to Dispositive Motions: May 6, 2019. Orders on dispositive

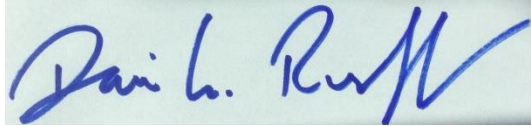
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<sup>17</sup> The Amended Complaint also has asserted an argument that varying property taxes are unconstitutional. (Am. Compl. ¶¶ 126, 130.) The Plaintiffs have not asserted this argument as a basis for a preliminary injunction and the Court therefore does not address it.

motions will be issued within 10 days by the Court. A final hearing on the merits, if dispositive motions are denied, in this matter will be the week of June 3, 2019.

SO ORDERED.

April 5, 2019

A handwritten signature in blue ink, appearing to read "David W. Ruoff", is shown on a light blue background.

Hon. David W. Ruoff  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 04/05/2019

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

CHESHIRE, SS.

SUPERIOR COURT

Contoocook Valley School District,  
Winchester School District,  
Mascenic School District,  
Monadnock School District,  
Myron Steere III, Richard Cahoon,  
and Richard Dunning<sup>1</sup>

v.

State of New Hampshire, New Hampshire Department of Education,  
Christopher T. Sununu, Individually and as Governor, and  
Frank Edelblut, Individually and as Commissioner<sup>2</sup>

No. 213-2019-CV-00069

**ORDER ON THE STATE'S MOTION TO DISMISS AND  
THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**Summary**

According to the Petitioners, the actual cost of an education—based on Department of Education data—is approximately \$18,901 per student. In this case, the Petitioners are asking the Court to set the base adequacy amount at \$9,929 per student for fiscal year 2020 and \$10,843.60 for 2019. RSA 198:40-a,II(a) sets the current base adequacy aid award for all schools at \$3,562.71 per student, based on a formula determined by a legislative committee in 2008. The parties agree that not a single school in the State of New Hampshire could or does function at \$3,562.71 per student.

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<sup>1</sup> Collectively referred to as “the Petitioners.”

<sup>2</sup> Collectively referred to as “the State.”

Because of the dearth of evidence in the legislative record to support such a determination, the Court finds RSA 198:40-a,II(a)—which is essentially the gateway to an adequate education in New Hampshire—unconstitutional as applied to the Petitioning school districts.

The opportunity to receive an adequate education is a fundamental right under the New Hampshire Constitution, thus, the Court applies strict scrutiny in examining how the Legislature arrived at its \$3,562.71 figure and the costing formula that produced it. However, even under the more deferential “rational basis” standard of review, the Court would reach the same conclusion in this case.

As discussed below, the Court stops short of picking its own number as the appropriate cost for an adequate education—at this point. The impact of the Petitioners’ request on the State budget is approximately a \$1.6 billion increase. Such a decision should not rest in the hands of judges. However, as the Supreme Court has repeatedly warned in school funding cases: constitutional rights must be enforced or they cease to exist. Almost every constitutional challenge to the Legislature’s attempts to define and provide funding for an adequate education has been successful. It has been more than twenty-five years since the New Hampshire Supreme Court first instructed the Legislature to comply with its exclusive obligation to define and provide funding for an adequate education. As explained below, in this Court’s judgment, the Legislature is not there yet.

Because the Court invalidates RSA 198:40-a,II(a), which is the starting point for the determination of the SWEPT contribution, the Court does not reach the merits of the Petitioner’s claim that the SWEPT is unconstitutional. When the Legislature adopts a

constitutional costing methodology that likely increases the base adequacy amount, the amount of SWEPT contributions, and therefore any claim it is disproportionate, will be ripe for adjudication.

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### **Introduction**

This case challenges the sufficiency of the State's funding of an adequate education. The Petitioners assert facial and as-applied challenges to RSA 198:40-a, II(a), which sets the cost of adequate education on a per pupil basis. According to the Petitioners, the per pupil cost set forth in RSA 198:40-a, II(a) fails to sufficiently fund an adequate education as guaranteed by Part II, Article 83 of the New Hampshire Constitution. The result, the Petitioners allege, is that school districts are forced to increase their local taxes in order to fund an adequate education, which in turn violates Part II, Article 5. The Petitioners also challenge the Statewide Education Property Tax ("SWEPT"), asserting that, because of the State's insufficient aid, property-poor school districts are forced to raise their property taxes in order to compensate for the lack of State funding via the SWEPT while property-wealthy districts do not. This, the Petitioners allege, violates Part II, Article 5 of the New Hampshire Constitution.

The Court previously denied the Petitioners on their request for a preliminary injunction. See Contoocook Valley Sch. Distr., et al. v. State, et al., Cheshire Cty. Super. Ct., No. 213-2019-CV-00069 (April 5, 2019) (Order, Ruoff, J.). However, because the Petitioners raised valid concerns about sovereign immunity, the Court established an expedited schedule for the litigation to conclude before June 30, 2019, the end of the 2019 Fiscal Year. Subsequently, the State moved to dismiss the Second Amended Petition and the Petitioners filed an objection. Both parties have also filed motions for summary judgment and respective objections. This Order addresses all pending pleadings.

I. Second Amended Petition

A. **Facts**

The Contoocook Valley (“ConVal”), Winchester, Mascenic, and Monadnock school districts each provide education to the pupils in their districts. (2d Am. Pet. ¶¶ 17–22.) All of the petitioning school districts receive funds from the State in order to provide a constitutionally adequate education. (*Id.* at ¶¶ 23–26.) These funds, called base adequacy aid, are dispersed as a function of a statutory scheme enacted following a New Hampshire Supreme Court determination that the New Hampshire Constitution “imposes a duty on the State to education its citizens and support the public schools” and New Hampshire students have a corresponding fundamental right to a State-funded constitutionally adequate public education. See Londonderry Sch. Dist. SAU 12, et al. v. State of New Hampshire (Claremont XII), 154 N.H. 152, 160–63 (2006); Claremont Sch. Dist. v. Governor (Claremont II), 142 N.H. 462, 473 (1997); Claremont Sch. Dist. v. Governor (Claremont I), 138 N.H. 183, 188 (1993); RSA 193-E:1. The petitioning school districts currently receive base adequacy aid at the rate of \$3,636.06 per pupil.<sup>3</sup> (2d Am. Pet. ¶¶ 26–28.)

The base adequacy aid amount was determined by the Joint Legislative Oversight Committee on Costing an Adequate Education (“the Joint Committee”). (*Id.* ¶ 29.) The Joint Committee’s conclusions and findings are contained in its Final Report.<sup>4</sup> Following the issuance of the Final Report, the Legislature established the statutory

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<sup>3</sup> This litigation solely concerns the base adequacy aid contained in RSA 198:40-a, II(a). The other figures in RSA 198:40-a, II(b)–(e), which provide funding for English language learners, special education learners, and other specific services, are not addressed.

does not concern additional differentiated aid, the Court only addresses this per-pupil figure.

<sup>4</sup> The Joint Committee’s Final Report and Findings, attached to the State’s Objection as Exhibit A, is hereinafter referred to and cited as the “Final Report.”

scheme in place today, codified in RSA chapters 193-E and 198. (Final Report 3.) The Joint Committee was charged with studying “the cost of providing the opportunity for an adequate education and the educational needs and resources necessary to ensure its delivery to the public school children of the State.” (Final Report 3.) The Joint Committee reported that it held eighteen meetings that totaled more than fifty hours of testimony and deliberations in which it considered state and national education policy, finance professionals’ methodologies, policy considerations, briefings from New Hampshire Department of Education (“DOE”) staff, and other materials on education finance. (Id.) Its determined cost, which was \$3,450 per student, included amounts for teacher salary and benefits; principal and principal assistant salary and benefits; guidance counselors; library media specialists; technology coordinator; custodians; instructional materials; technology (e.g. computers); teacher professional development; facilities operation and maintenance; and transportation. (Id. ¶¶ 29–30, n. 3; 2d Am. Pet., Ex. A.)<sup>5</sup>

## **B. Claims Asserted**

The Petitioners assert that the State’s calculation suffers from several flaws and specifically challenge five areas of the Joint Committee’s Final Report. (Id. at ¶ 32.) While the Petitioners’ challenge is to the base adequacy aid, their specific arguments are to the cost determinations in the Joint Committee’s Final Report.

The Petitioners first challenge the funding of transportation costs. (2d Am. Pet. ¶¶ 35–42.) The 2008 Spreadsheet incorporates a base universal transportation cost of \$315 per pupil. (Id. ¶ 34; 2008 Spreadsheet.) The Petitioners have submitted a DOE

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<sup>5</sup> The Petitioners’ Exhibit A contains solely Appendix A of the Final Report. This exhibit is hereinafter referred to as the “2008 Spreadsheet.”

document, titled “General Fund Transportation Expenditures,” which reflects the actual transportation costs in each municipality in the State. (2d Am. Pet., Ex. B.) The Petitioners highlight that not one of the municipalities with ten or more pupils has transportation costs less than \$400 per pupil and that the average per pupil transportation cost is \$827.56, according to the DOE document. (2d Am. Pet. ¶¶ 35–37; id., Ex. B.) The DOE document depicts that ConVal’s transportation cost is \$914.60 per pupil; Winchester’s is \$962.73; Mascenic’s is \$619.81; and Monadnock’s is \$1,040.29. (Id. at ¶¶ 38–41; id., Ex. B.) The Petitioners assert that it costs substantially more to transport pupils to school in large rural districts as compared to compact urban districts.<sup>6</sup> (Id. ¶ 36.) The Petitioners further assert that providing transportation for pupils to attend school is part of the State’s obligation to fully fund an adequate education pursuant to Part II, Section 83 of the New Hampshire Constitution. (Id. ¶ 42.)

The Petitioners next challenge the 2008 Spreadsheet’s teacher-student ratio. (Id. ¶¶ 41–58.) The Joint Committee relied on a Board of Education regulation in selecting its ratio, which was “25 students to 1 teacher in kindergarten through grade two; and 30 students to 1 teacher in grades three through twelve.” (Final Report 14.) The Petitioners state that these ratios are not based on actual teacher-student ratios but rather on maximum classroom size as established in Ed. 306.17(a)(1).<sup>7</sup> (2d Am. Pet. ¶ 46.) Teacher-student ratios are not the equivalent of classroom size, the Petitioners state, and the ratios are thus not accurate. (Id. ¶¶ 46–47.) The Second Amended Petition provides the example that in a school of thirty-one students, the regulation

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<sup>6</sup> At the hearing on the motions for preliminary injunction, counsel for the Petitioners stated that ConVal buses cover about 3,000 miles each day as an illustration of ConVal’s high transportation costs in contrast with more urban municipalities.

<sup>7</sup> The Court notes that Ed 306.17 does contain these ratios, but provision (a)(1) is limited to kindergarten; the other figures are contained in Ed 306.01(a)(2) and (3).

would require two teachers, thus creating a ratio of 1:15.5, not 1:30. (Id. ¶ 48.) The Petitioners also highlight that teachers are given time during the school day to plan their classes such that a teacher may not teach all four blocks in a four-block day and that teachers would usually teach five out of eight periods in other schools. (Id. ¶ 49.) Further, State regulations require teachers to be certified in the subjects that they teach, thereby precluding the complete maximization of class sizes. (Id. ¶ 50.)

The Petitioners assert that no school district in the State has teacher-student ratios of 1:25 or 1:30, and that the State is able to, and has in fact, computed the average teacher-student ratio for each year for the past ten years, citing to a DOE publication of statewide teacher-student ratios for 2007 to 2017. (Id. ¶¶ 51–53; id., Ex. C.) The DOE document computes teacher-student ratios by dividing the total number of students in the State by the total number of teachers, and the data for the most recent year available, 2015, indicates a ratio of 1:9.96. (Id. ¶ 53; id., Ex. C.) The Second Amended Petition cites to another DOE document from the DOE’s Division of Education Analytics and Resources that analyzed teacher-student ratios for grades 1–12 and determined the statewide average for the 2017–2018 school year was 1:12.6, excluding preschool and kindergarten. (Id. ¶ 55; id., Ex. D.) No school district in the State has a teacher-student ratio higher than 1:17.5 and, in the past ten years, the statewide average teacher-student ratio never exceeded 1:12.6, according to the Second Amended Petition. (Id. ¶¶ 56–57; id., Ex. D.)

Third, the Petitioners challenge the 2008 Spreadsheet’s failure to incorporate “the actual cost of providing benefits to teachers and other staff.” (Id. ¶ 59.) The Petitioners point to the 2008 Spreadsheet, which presumes the total cost of teacher

benefits will be 33% of the first-year teacher's salary, or \$11,728, per teacher. (2d Am. Pet. ¶ 60; 2008 Spreadsheet.) The Petitioners contend that this amount is insufficient because actual teacher benefits exceed \$11,728 in every school district in the State. (Id. ¶ 53.) In explaining teacher benefits, the Petitioners cite four requirements placed on school districts: RSA 100-A:16, III, which contains the New Hampshire Retirement System and requires an employer contribution of 17.80% for 2019 through 2021 per teacher, (Id., Ex. E); federal employment taxes, which require school districts to pay 7.56%; workers compensation coverage and unemployment insurance, which totals at least \$150 per teacher per year; and health insurance premiums. (Id. ¶¶ 63–67.) According to the Petitioners, “The portion of health insurance premiums paid by the school district for a teacher will alone total in excess of \$17,000.00.” (Id. ¶ 68.) As an illustration of health insurance costs, the Petitioners point to the State's compensation to its own employees, which total more than \$26,700 in health insurance contributions and more than \$31,800 in total benefit packages. (Id. ¶ 69; id., Ex. F.) Thus, providing funding that presumes teacher benefits packages cost only \$11,728 per teacher fails to meet the State's constitutional mandate of providing funding for an adequate education. (Id. at ¶ 70.)

Fourth, the Petitioners challenge the 2008 Spreadsheet's calculus for failing to include several State-required services; specifically, nurse services, superintendent services, and food services. (Id. ¶¶ 71–89.) The Petitioners state that Ed. 306.12 requires the provision of a school nurse and that RSA 200:29 requires school nurses to have completed their nursing degrees and have three years of experience.<sup>8</sup> (Id. ¶¶ 73–

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<sup>8</sup> The Second Amended Petition states that this statute, “as amended in 2016,” contains this requirement. (2d Am. Pet. ¶ 75.) Prior to 2016, RSA 200:29 did not impose requirements on a

75.) Nurses that meet these requirements command salary and benefit packages in excess of \$65,562, and the DOE's most recent survey of school nurses determined there is a statewide average of one school nurse for every 223 pupils. (Id. ¶¶ 76–77; id., Ex. G at 3.) The Petitioners assert that a constitutionally adequate education thus requires at least \$294 per pupil for school nurse costs, yet school nurse costs are not part of the 2008 Spreadsheet. (Id. ¶¶ 78–79; 2008 Spreadsheet.)

In regard to superintendent services, the Petitioners cite to RSA 194-C:4, Ed. 302.01, and Ed. 302.02, which require schools to have superintendent services and detail the necessary responsibilities of the superintendent's office, including all fiscal oversight of the district budget. (2d Am. Pet. ¶ 80.) The average salary and benefit package for a qualified superintendent, the Petitioners assert, exceeds \$158,000. (Id. ¶ 82.) Larger districts require a business administrator and/or an assistant superintendent, and districts with more than 1,000 pupils require a second person in the superintendent's office. (Id. ¶¶ 83–84.) The 2008 Spreadsheet does not account for superintendent services. (2008 Spreadsheet.)

In regard to food services, the Petitioners state that Ed. 306.11's requirement that all public schools provide food services has resulted in an annual loss of \$33,617,749, or roughly \$200 per pupil, according to submitted DOE reports. (Id. ¶¶ 85–87; id., Ex. H.) As current education-funding statutes do not provide any funds to

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school nurse's qualifications beyond that he or she be a registered professional nurse licensed in New Hampshire. RSA 200:29 (1971) (amended 2016). The Court notes that both versions of the statute use the permissive term "may," but that the regulation cited, Ed 306.12, contains the mandatory term "shall," as it did in 2008, in requiring "qualified personnel to carry out appropriate school health-related activities." Ed. 306.12 (2008) (amended 2017); Ed. 306.12 (2019).



food services losses, the Petitioners state, the State is failing to meet its obligation to provide sufficient funds. (Id. ¶¶ 88–89.)

Fifth, the Petitioners address the 2008 Spreadsheet’s failure to properly provide funding for facilities operation and maintenance. (Id. ¶¶ 90–100.) The Petitioners explain, “Children need lights and heat in their schools in order to learn and the driveways and parking lots need to be snowplowed so children can get to school.” (Id. ¶¶ 92–91; 2008 Spreadsheet.) In ConVal, plant operations include approximately \$500,000 in oil/gas, approximately \$500,000 in electricity, and more than \$160,000 in snowplowing; this results in a per-pupil cost for plant operations cost of \$1,406.81. (Id. ¶ 95.) Monadnock has facilities operations and maintenance expenses of \$2,271,633.86, which results in a per-pupil facilities and maintenance cost of \$1,482.92. (Id. ¶ 98.) The funding formula contained in the 2008 Spreadsheet attributes \$195 per pupil for facilities operation and maintenance. (Id. ¶ 97.) And, according to the DOE, the statewide average cost for plant operations is \$1,462.66 per pupil, thus the \$195 per pupil funding only covers 13% of actual expenses. (Id. ¶ 99.)<sup>9</sup> The Petitioners assert that, because the State has funded only 13% percent of the actual expenses for facilities operations and maintenance, according to the DOE’s data, the State has failed to meet its constitutional mandate to fund an adequate education. (Id. ¶¶ 99–100.)

The Petitioners have submitted a calculus that includes the same data the Joint Committee used with the exceptions of corrected figures for the teacher-student ratio; corrected teacher and staff benefits to reflect actual levels; maintenance costs at \$1,400

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<sup>9</sup> The Petitioners calculated this figure by consulting a DOE report, titled “State Summary Revenue and Expenditures of School Districts 2017-2018,” which reflects that plant operations cost \$243,271,198; the Petitioners divided this figure by 166,321.18, which they state is the total number of pupils in the State. (Id. ¶ 89, n. 7; id., Ex. H (Doc. 13).)

per pupil; the superintendent, nurse, and food services figures included; and no transportation costs included. (2d Am. Pet., Ex. I.) For transportation costs, the Petitioners state the average cost for ConVal is \$914.60 per pupil. (Id. ¶ 107.) Using this calculus, and including the proposed transportation cost, the Second Amended Petition asserts that the cost of providing a constitutionally adequate education to pupils in ConVal is \$10,843.60 per pupil. (Id. ¶ 108.)

Winchester does not have its own public high school, thus Winchester pays tuition of \$14,023 per pupil for its high school students to attend Keene High School, which does not include transportation. (2d Am. Pet. ¶¶ 112–13.) This tuition agreement was approved by the State Board of Education and is on par with other agreements the Board has approved. (Id. ¶¶ 114–15.) Transportation costs in Winchester are \$962.73 per pupil. (Id. ¶ 109.) Thus, the Petitioners assert that, with an average transportation cost of \$962.73 per pupil, the cost of providing an adequate education in Winchester is \$10,891.73 per pupil. (Id. at ¶¶ 109–10.) The Second Amended Petition states that, when Winchester closed its high school and started paying tuition for its students to attend Keene High School, it resulted in cost savings of more than \$1,000 per pupil, which exceeds its transportation costs. (Id. ¶ 117.) There are no high schools in the State where Winchester could send its students with \$3,636.06 in tuition, as the base adequacy aid provides. (Id. ¶ 119.) Nor are there any high schools in reasonable geographic proximity to Winchester that Winchester could send its students for less than \$10,000 per pupil. (Id. ¶ 120.)

The Petitioners assert that no school district can provide a constitutionally adequate education or meet the requirements of RSA 193-E:2-a on only \$3,636.06, the

current base adequacy aid provided by the State, as “the State’s own data” indicate the cost of providing a constitutionally adequate education, exclusive of transportation, is more than \$9,929. (Id. ¶¶ 102–03; id., Ex. I.) Citing to the DOE’s data of cost per pupil in 2017–2018, the Petitioners contend “there is not a single district in the [State] where the per pupil expenditures are less than \$12,000.” (Id. ¶ 105.)

In addition to their challenges to the Joint Committee’s Final Report, the Petitioners have articulated that the insufficient base adequacy aid amount provided under RSA 198:40-a, II(a) results in an unconstitutional reliance on local taxes by function of the Statewide Education Property Tax (“SWEPT”). (Id. at ¶ 123.) The Petitioners state that the State obtains a majority of the funds used for the base adequacy aid through the SWEPT, collected pursuant to RSA 76:3. (Id. at ¶ 123.) The SWEPT was originally adopted at a uniform rate of \$6.60 per thousand dollars in property value. (Id. at ¶ 124.) The SWEPT has since been decreased to \$2.06 per thousand, less than one-third of its original rate. (Id. at ¶ 125.) State education aid now consists of a smaller percentage of total education expenditures than it had in 1999, and local communities have had to increase their tax rates to make up for the decreased or stagnant State aid with increasing educational expenditures. (Id. at ¶¶ 126–27.) The Petitioners assert that education property taxes vary greatly throughout the State, and communities such as Newington have a total education rate of \$3.19 while Dublin has a combined local and state education tax rate of \$16.46. (Id. ¶¶ 152–53; id., Ex. K.) Winchester has a combined local and state education tax rate of \$22.65, New Ipswich has a combined education tax rate of \$21.28, and Troy has a combined tax rate of \$21.52. (Id. ¶¶ 154–56; id., Ex. K.) The difference between Newington and Troy, the

Second Amended Petition states, is 675%. (Id. ¶ 156; id., Ex. K.) The Petitioners assert that the State cannot fund education through tax rates that vary by more than 400%. (Id. ¶ 157.)

In regard to the 2019 Fiscal Year, the Second Amended Petition asserts that the State must provide base adequacy aid funding to ConVal of \$22,164,318.40, or \$10,843.60 for each of ConVal's 2,044 pupils, to ConVal. (Id. ¶¶ 128–29.) This amount would still only cover less than half of ConVal's approximately \$48,000,000 education expenses each year. (Id. ¶ 130.) The Petitioners aver that, “A constitutionally adequate education cannot be provided to the approximately 2,044 students in the ConVal School District without more base adequacy funding than will be provided by the State pursuant to RSA 198:40-a(II)(a) as modified by RSA 198:40-d.” (Id. ¶ 134.) For Winchester, the Petitioners assert that the State must provide base adequacy aid funding of approximately \$5,892,752.68, or \$10,891.73 for each of Winchester's 541.03 pupils. (Id. ¶¶ 136–38.) For Mascenic, the Petitioners assert that the State must provide base adequacy aid funding of approximately \$10,357,560.07, or \$10,548.81 for each of Mascenic's 981.87 pupils. (Id. ¶¶ 147–50.) The Second Amended Petition asserts that the petitioning school districts are forced to raise their local taxes to provide their students with a constitutionally adequate education. (Id. ¶¶ 135, 146, 151.)

In regard to Monadnock, the Petitioners assert that Monadnock cannot provide a constitutionally adequate education on only \$3,636.06 per pupil, and that Monadnock's towns have had to raise additional funds via local taxation to provide a constitutionally adequate education. (Id. ¶¶ 145–46.) The Petitioners also state that Monadnock cannot provide the requirements of RSA 193-E:2-a and Ed. 306. (Id. ¶ 142.) The

Second Amended Petition does not provide an amount that Monadnock is allegedly owed by the State, but states that Monadnock has a student population of 1,531.86. (Id. ¶¶ 141–46.)

In regard to the 2020 Fiscal Year, the Petitioners assert that base adequacy aid will increase to \$3,708.78 but that the State must provide no less than \$9,929 plus actual transportation costs. (Id. ¶¶ 163–64.) The State’s failure to fully fund adequate education, according to the Petitioners’ calculations, will result in the local taxing authorities needing to raise the funds locally in the 2020 Fiscal Year. (Id. ¶ 165.)

The Second Amended Petition also names Governor Sununu and Commissioner Edelblut in their individual capacities, in that Governor Sununu is authorized to draw a warrant from the education trust fund to satisfy the State’s obligation to fund constitutionally adequate education as per RSA 198:42, and Commissioner Edelblut is responsible for distributing adequate education grants as per RSA 198:42. (Id. ¶¶ 182–83.)

The Petitioners seek for this Court to issue a permanent injunction barring the State from violating Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution; to issue a declaratory judgment finding RSA 198:40-a, II(a) unconstitutional both on its face and as applied to the Petitioners; to award injunctive relief and equitable relief against Commissioner Edelblut and Governor Sununu in their individual capacities, if necessary; to award the Petitioners their reasonable costs and attorney’s fees; and to grant such further relief as is reasonable and just. (Id. at 25.)

## II. Motion to Dismiss

### A. **Standard of Review on Motion to Dismiss**

In ruling on a motion to dismiss, the Court determines “whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery.” Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). When “ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiff’s] pleadings are sufficient to state a basis upon which relief may be granted.” Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014) (quoting Avery v. N.H. Dep’t of Educ., 162 N.H. 604, 606 (2011)). “To make this determination, the court would normally accept all facts pled by the [plaintiff] as true, construing them most favorably to the [plaintiff].” Id. However, the Court will not “assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law.” Snierston v. Scruton, 145 N.H. 73, 76 (2000), as modified (Nov. 22, 2000) (quotation and citation omitted).

### B. **State’s Arguments for Dismissal**

The State has raised several grounds for dismissal. First, the State seeks dismissal of Governor Sununu and Commissioner Edelblut in their individual capacities. (State’s Mot. Dismiss 5–6.) The State then asserts that the relevant standard of review is rational basis and that this Court has an obligation to substantially defer to the Legislature on education funding matters. (Id. at 6–8.) Along with this theory, the State argues that the Petitioners bear the burden of proof in demonstrating that a fundamental

right has been violated; specifically, the State argues the Petitioners have failed to allege that RSA 198:40-a, II(a) results in delivery of a constitutionally inadequate education. (Id. at 8–11, 28–29.) The State argues that the Petitioners have not and cannot form such an allegation because the Legislature has clearly defined and provided what constitutes an “adequate education.” The State asserts that because the State has provided the Petitioners with the content of the Legislature’s definition of an “adequate education,” the Second Amended Petition must be dismissed. (Id. at 11–20.)

The State has also asserted that the Petitioners’ evidence, documents from the DOE, have no bearing on whether RSA 198:40-a, II(a) is unconstitutional as rational basis is the appropriate standard of review, a standard that does not permit the Court to inquire whether the Legislature could have or should have considered different evidence or data in forming its costing and funding mechanism. (Id. at 20.)

The State also seeks dismissal of the Petitioners’ claim concerning the SWEPT because the Petitioners have not asserted that the SWEPT is applied disproportionately nor that it results in the delivery of a constitutionally inadequate education. (Id. at 28–29.)

And, the State denies that the Petitioners may receive the relief they seek, as the Petitioners seek what the State characterizes as a “mandatory injunction,” akin to a writ of mandamus, which is an “extraordinary remedy” they are not entitled to without allegations that the State is providing an inadequate education. (Id. at 21–22.)

The Court first addresses the individual liabilities of Governor Sununu and Commissioner Edelblut. Infra Part II.C. Second, the Court addresses the State’s challenge to the Petitioners’ evidence. Infra Part II.D. Then, the Court determines

whether the Petitioners' allegations concern the deprivation of a fundamental right. Infra Part II.E. This analysis necessarily involves review of the legislative process and intent behind RSA 198:40-a, II(a). Infra Part E.4. Then, the Court reviews the Petitioners' claim concerning the SWEPT, followed by their request for injunctive relief. Infra Part II.F–G.

### **C. Liability of Governor Sununu and Commissioner Edelblut**

The Petitioners have included Commissioner Edelblut and Governor Sununu in their individual capacities under the theory that “[n]either Commissioner Edelblut nor Governor Sununu have yet complied with the New Hampshire Constitution by ensuring education is cherished and fully funded.” (2d Am. Pet. ¶¶ 184–85.) Because both Governor Sununu and Commissioner Edelblut have acted contrary to their official obligations, the Petitioners allege, they have not acted in their official capacity but rather illegally and in their individual capacities, and they are thus implicated according to the established principle that “[w]hat is forbidden by the Constitution is outside the field of state activity . . . .” (Pet’rs’ Obj. Mot. Dismiss 17 (quoting Conway v. N.H. Water Res. Bd., 89 N.H. 346 (1938)); 2d Am. Pet. ¶ 185.) Therefore, if there is no other remedy, a remedy must lie against Commissioner Edelblut and Governor Sununu in their individual capacities and sovereign immunity will not bar such a claim. (Id. ¶¶ 186–87.)

The State has moved for dismissal of Governor Sununu and Commissioner Edelblut as parties in their individual capacities. (State’s Mot. Dismiss 5–6.) The State argues, “[e]ven assuming the plaintiffs are entitled to the relief they seek in their Amended Petition, . . . they have asserted no facts on which the Governor or the Commissioner could be found individually liable.” (Id.) The State points to the



Petitioners' requested prospective declaratory and injunctive relief, which, if granted, "would extend solely to the Governor and Commissioner's rights and responsibilities in executing the State's laws." (State's Mot. Dismiss 5.) The Court agrees with the State.

Under the Ex parte Young doctrine, a suit against a state official in his official capacity seeking prospective equitable relief is permitted, while a suit requesting retroactive relief is considered to be a suit against the state. Frazier v. Simmons, 254 F.3d 1247, 1253 (10th Cir. 2001); Ex parte Young, 209 U.S. 123 (1908). When state officials are sued in their individual capacities, the Court analyzes whether the relief sought is related to their individual or official capacity. "Applying this principle [from Ex parte Young], an action is barred by the Eleventh Amendment, even though a state official is named as the defendant, 'if the state is the real, substantial party in interest. Whether the state is the real party in interest turns on the relief sought by the plaintiffs.'" Id. (emphasis added). When a state official's actions do not conform to the law, a court is empowered to issue declaratory judgment to prevent him or her from acting *ultra vires*. See O'Neil v. Thomson, 114 N.H. 155, 159 (1974).

Though the Petitioners have sought relief from Governor Sununu and Commissioner Edelblut under the theory that both have acted contrary to their official duties, and therefore illegally, their claims against both individuals are characterized by the relief sought. According to the Petitioners, the relief sought is for Governor Sununu and Commissioner Edelblut to act according to law that the Petitioners have not alleged is unconstitutional. If both individuals were ordered to act under the unchallenged law, as the Petitioners request, they would be acting in their official capacities. Furthermore, even if both Governor Sununu and Commissioner Edelblut have acted illegally in the

past as the Petitioners have alleged, the Petitioners do not seek a remedy for those past illegal actions, nor does their requested relief require a finding that they have acted illegally in the past. It instead requires a finding that they are obligated, prospectively, to act. It is thus clear that the Petitioners' concern with Governor Sununu and Commissioner Edelblut is in their official capacities. For the same reasons, it is not necessary for this Court to have Governor Sununu and Commissioner Edelblut before it in their individual capacities to determine whether they must act according to the law.

Also, notably, if Governor Sununu and Commissioner Edelblut are obligated to act as the Petitioners have theorized, thus leaving them without discretion, the Court's order for injunctive relief would be limited to their official capacities.<sup>10</sup> See Ex parte Young, 209 U.S. at 158 (“There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.”).

In their objection to the State's Motion to Dismiss, the Petitioners have explained that the Second Amended Petition explicitly seeks relief against Governor Sununu and Commissioner Edelblut in their individual capacities, asking the Court “to prohibit Governor Sununu and Commissioner Edelblut from discharging their responsibilities unconstitutionally.” (Pet'rs' Obj. Mot. Dismiss 17.) Characterizing the relief sought as a negative—an order to prevent action—does not change that the relief sought would be ordering Governor Sununu and Commissioner Edelblut to act according to the law,

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<sup>10</sup> If it is otherwise, that the action sought concerns discretionary functions, then the Eleventh Amendment would preclude this Court from issuing the requested relief. See Ex parte Young, 209 U.S. at 158.

which necessarily would be an affirmative, prospective order carried out in their official capacities.

Therefore, Governor Sununu and Commissioner Edelblut, as parties in their individual capacities, are DISMISSED.

#### **D. Petitioners' Evidence**

In both its Motion to Dismiss and Motion for Summary Judgment, the State has asserted that the Petitioners' evidence, which consists mostly of DOE data, is inappropriate for this Court to consider. The State asserts that rational basis review is appropriate because of the historical deference New Hampshire courts have afforded the Legislature in developing school funding plans and statutes. (State's Mot. Dismiss 6–10, 20.) As such, the Court may not delve into the Legislature's justifications for codifying the Joint Committee's costing at RSAS 198:40-a, II(a) nor may consider the Petitioners' competing evidence of costs. (Id. at 20.)

On a motion to dismiss, the Court must accept all facts pled by the plaintiff as true. Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014). The State has insisted that the DOE data has no bearing on the Petitioners' allegations that RSA 198:40-a, II(a) is unconstitutional. (State's Mot. Dismiss 20.) At least at the motion to dismiss stage, the Court disagrees. The Petitioners have alleged both a facial and as-applied challenge to the statute, and the DOE data purports to depict how RSA 198:40-a, II(a) has funded, or failed to fund, New Hampshire school districts. On an as-applied challenge, it is appropriate for the Court to consider how a challenged law applies to the petitioning party. See State v. Lilley, No. 2017-0116, 2019 WL 493721, at \*2 (N.H. Feb. 8, 2019) (discussing a facial versus as-applied challenge); Colo. Right To Life Comm., Inc. v.

Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007) (“[A]n as-applied challenge tests the application of that restriction to the facts of a plaintiff’s concrete case.”); see also 16 C.J.S. Constitutional Law § 163. Without weighing the materiality of the DOE data, it is at least relevant to the Petitioners’ as-applied challenge. Therefore, the Court will not exclude the Petitioners’ evidence at this stage.

## **E. Deprivation of a Fundamental Right**

### **1. *Scrutiny***

The State asserts that the Petitioners have failed to allege facts demonstrating that the State has fallen short of its constitutional duty to deliver an adequate education and therefore the Second Amended Petition must be analyzed under rational basis review rather than strict scrutiny, the level of review reserved for allegations concerning the deprivation of fundamental rights. (State’s Mot. Dismiss 6–11, 25–29.) In order to determine whether the Petitioners have alleged a claim, the Court must also determine whether those allegations trigger strict scrutiny level of review.

The State asserts that the Petitioners “contend that [the State’s current] funding remains constitutionally deficient because it does not cover the full amounts” of what the petitioning school districts have expended on the five allegedly flawed areas of the Joint Committee’s costing decision. (State’s Mot. Dismiss 25.) The State’s articulation of the Petitioners’ legal theory is inaccurate, in that the Petitioners do not assert that it is the State’s duty to “cover the full amounts” of what the school districts have expended. (State’s Mot. Dismiss 25.) Rather, the Petitioners assert that the State is obligated to fund an adequate education according to its own data. (2d. Am. Pet. 14.) Furthermore, the Petitioners have explained that the amount of base adequacy aid they have

requested according to their asserted costing “would still only cover less than half of ConVal’s approximately \$48,000,000 in educational expenses each year.” (Pet’rs’ Mot. Summ. J. 5, n. 1.)

The State is correct that the Petitioners have not alleged that they have been unable to provide an adequate education within their districts. Nonetheless, the Petitioners’ allegations do not fall short of alleging that there has been a constitutional violation. The Petitioners’ theory has consistently been that the petitioning school districts, in receiving the base adequacy aid provided via RSA 198:40-a, II(a), are not receiving sufficient funds to provide a State-funded adequate education. Specifically, the State is failing to sufficiently fund what the Legislature has determined it is obligated to fund according to its definition of an adequate education. While the Petitioners have not alleged that the proposed underfunding has resulted in the provision of something less than an adequate education, they have alleged that the underfunding forces the petitioning school districts to raise their local taxes to compensate for the insufficient funds and that this impinges on the students’ fundamental right to a State-funded adequate education. The alleged constitutional violation, therefore, is not that the petitioning districts’ students are being deprived of an adequate education entirely; they, rather, are alleging that the students have a fundamental right to a State-funded education, and that while they are receiving an adequate education, it has wrongfully been provided by municipalities picking up the funding where the State has left off.

School funding has frequently been challenged as disproportional taxes in violation of Part II, Article 5 of the New Hampshire Constitution. See Claremont Sch. Dist. v. Governor (Claremont VII), 144 N.H. 210, 214 (N.H. 1999); Opinion of the

Justices, 142 N.H. 892, 900 (1998). In those cases, rational basis scrutiny is applied, and a court examines whether the Legislature had “a just reason for the classification” resulting in a disproportional tax that “serve[s] the general welfare” and that may “not be arbitrary.” Claremont VII, 144 N.H. at 214. However, if “an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny.” Claremont II, 142 N.H. at 474; see State v. Hollenbeck, 164 N.H. 154, 160 (2012) (“[A] heightened standard of review applies when a fundamental right or protected liberty interest is at issue.”). The fundamental right articulated in Claremont II encompasses more than simply receiving an education that meets the definition of adequate education; it is a right to a State-funded adequate education. Claremont II, 142 N.H. at 473 (“We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education.”).

In City of Nashua v. State, strict scrutiny was applied when the City of Nashua alleged that HB 616<sup>11</sup> “violate[d] the State’s constitutional duty to fund and adequate public education” because, “[b]y its nature,” the duty to fund an adequate education was “inextricably linked to the public’s fundamental right to a constitutionally adequate public education.” No. 05-E-0257, 2006 WL 563314, at \*2 (N.H. Super. Mar. 8, 2006) (Order, Groff, J.). Justice Groff explained that the Supreme Court had issued four mandates to the Legislature—“define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability”—as adopted in

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<sup>11</sup> The House Bill at issue in City of Nashua—Laws 2005, Ch. 257 (“HB 616”)—was also the bill at issue in Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII), in which the Supreme Court found that the Legislature had failed to define a constitutionally adequate education. 154 N.H. 153, 155 (2006).

Claremont II. City of Nashua, 2006 WL 563314, at \*4; see also Claremont Sch. Dist. v. Governor (Accountability), 147 N.H. 499, 505 (2002) (stating the “four mandates”). With these four mandates, Justice Groff explained,

the Supreme Court has made it clear in its decisions that the State's duty is not merely to provide and fund a constitutionally adequate education but that it must meet all of these four mandates as each one is an integral part of the duty of the State to provide a constitutionally adequate education.

City of Nashua, 2006 WL 563314, at \*8. Indeed, in reiterating the constitutional duty, the New Hampshire Supreme Court had previously found that an earlier bill that would “rely, in part, upon local property taxes to pay for some of the cost of an adequate education” would “directly contradict the mandate of Part II, Article 83, which imposes upon the State the exclusive obligation to fund a constitutionally adequate education.” Opinion of the Justices (Reformed Public School Financing System) (Claremont IX), 145 N.H. 474, 476 (2000) (emphasis added). The scope of the State’s duty to provide an adequate education—and the scope of the fundamental right to an adequate education—must therefore also include the costing and funding. City of Nashua, 2006 WL 563314, at \*6 (“The duty imposed on the Legislature by the Constitution, however, is not to ‘adequately fund’ education, but to *totally* fund ‘a *constitutionally adequate education*.’”); see also Londonderry (Claremont XII), 154 N.H. at 156 (“[T]hese four mandates comprise the State's duty to provide an adequate education.”); Londonderry School Dist. SAU #12 v. State, No. 05-E-0406, 2006 WL 6161061, at 4 (N.H. Super. Mar. 07, 2006) (Order, Groff, J.) (applying strict scrutiny to review of HB 616).

Strict scrutiny is inappropriate when an actual deprivation of a right has not occurred. State v. Lilley, 204 A.3d 198, 208 (N.H. 2019) (“For limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of

the right.”). On this motion to dismiss, the question is solely whether the Petitioners have alleged an actual deprivation. The Second Amended Petition unquestionably alleges a deprivation. (2d Am. Pet. ¶ 14.) Whether the Petitioners have demonstrated a deprivation is a separate question addressed infra. See infra Part III.C.

The Court finds that the Petitioners have alleged a constitutional violation and deprivation of a fundamental right. Upon such allegations, the Court will apply strict scrutiny. See Claremont II, 142 N.H. at 475 (“We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy.”); see also Londonderry School Dist. Sau #1, 2006 WL 6161061, at 4 (“[I]n this case the petitioners claim that HB 616, which serves to implement the public's fundamental right to an adequate education, does, in fact, impinge that right. Thus, the Court finds and rules that the strict scrutiny standard applies in this case, and, as a result, the State must satisfy the heightened standard of review of strict scrutiny.”).

While the State has insisted that the Petitioners must still “demonstrate that the amounts the State has actually appropriated for those costs components results in the delivery of an inadequate education,” the Court finds that it would be improper to require such a showing on a motion to dismiss. (State’s Mot. Dismiss 26.) Effectively, the State argues that the Petitioners cannot challenge the State’s funding when the petitioning school districts have sufficiently raised local funds to provide an adequate education. The State asks this Court to preclude the Petitioners from seeking judicial review when the Petitioners have made efforts to raise taxes to provide their students



with an adequate education, an obligation that belongs to the State. The State's misplacement of that responsibility is the basis for the Petition. The Court agrees with the Petitioners that they "are not obligated to let their students be harmed by the State's failure to provide funding before they can seek redress with the courts." (Pet'rs' Obj. Mot. Dismiss 11.)

## 2. *Presumption of Constitutionality and Deference to Legislature*

The State has pointed to case law expressing that a court will "generally defer to legislative enactments." (State's Mot. Dismiss 7 (citing City of Manchester v. Sec. of State, 163 N.H. 689, 696 (2012) ("[W]e must presume that the [law in question] is constitutional, and we will not declare it invalid except upon inescapable grounds." (quotation omitted))).<sup>12</sup> This is especially true, the State asserts, when "the Constitution imposes a duty on the legislature to develop a plan in a complex area that requires reconciliation of various competing goals and policies." (Id. (citing City of Manchester, 163 N.H. at 697).)

Generally, the Court's review of whether a legislative act is unconstitutional is premised on the rule that the constitutionality of a legislative act is to be presumed, and a statute is not to be held unconstitutional unless a clear and substantial conflict exists between it and the constitution. A statute will not be declared invalid except upon inescapable grounds.

City of Nashua, 2006 WL 563314, at \*2 (quotations, brackets, and citations omitted).

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<sup>12</sup> The Court does not refer to City of Manchester because the Supreme Court has otherwise established deference to the Legislature in school funding cases in ample precedent. However, the Court notes that the legislative deference demonstrated in City of Manchester included a weakened version of strict scrutiny applied to gun control legislation that was likened to the level of scrutiny applied when reviewing election law challenges and zoning cases. See City of Manchester, 155 N.H. at 698–99. There is currently no indication that the fundamental right to a State-funded adequate education should be similarly scrutinized.

Legislative deference cannot be reconciled with strict scrutiny, as strict scrutiny requires a compelling state interest for a restriction or impingement on the fundamental right at issue, rather than permitting the Court to defer to the Legislature. Akins v. Sec'y of State, 154 N.H. 67, 73 (2006) (“To comply with strict judicial scrutiny, the governmental restriction must ‘be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.’” (quoting Follansbee v. Plymouth Dist. Ct., 151 N.H. 365 (2004))). Indeed, strict scrutiny carries a “presumption of unconstitutionality.” Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 699 (2007); see City of Nashua, 2006 WL 563314, at \*2 (citing to Claremont II and noting that, because “a constitutionally adequate public education is a fundamental right,” despite the general rule that a court presume the constitutionality of a legislative act, strict scrutiny must be applied to challenge of school funding bill); see also 16 C.J.S. Constitutional Law § 252 (“The usual strong presumption in favor of constitutionality does not apply where rights, privileges, and immunities of citizens are involved or where a classification must meet a strict scrutiny test because it is inherently suspect.”).

Furthermore, when the meaning of a statute is not in question, a court is not obligated to read legislation as presumptively constitutional as it is when there is a question of statutory construction. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, 159 N.H. 627, 640 (2010) (“In this case, however, there is no question of statutory interpretation. The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, we cannot avoid our obligation to say so.” (quotation omitted)).

Nonetheless, New Hampshire courts have, with its litany of school funding cases, recognized that school funding involves crucial policy decisions that are only proper for the Legislature to determine. E.g. Londonderry (Claremont XII), 154 N.H. at 156 (“Since the inception of the education cases in 1993, we have consistently deferred to the legislature's prerogative to define a constitutionally adequate education.”); Claremont Sch. Dist. v. Governor (Claremont XI), 147 N.H. 499, 518 (2002) (“The development of meaningful standards of accountability is a task for which the legislative branch is uniquely suited.”); Claremont II, 142 N.H. at 475 (“[W]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government . . . .”); Claremont I, 138 N.H. at 192 (“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.”). Contra Londonderry (Claremont XII), 154 N.H. at 163 (“Respectful of the roles of the legislative and executive branches, each time this court has been requested to define the substantive content of a constitutionally adequate public education, we have properly demurred. Deference, however, has its limits. . . . [T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.”). However, this deference has been demonstrated not in construing a law but rather in limiting a judicial mandate to the other branches of government. The Court’s review of constitutionality is thus not limited by any deference to the Legislature, but the Court notes that this established principle in school funding cases curtails its ability to provide injunctive relief. See Seymour v. Region One Bd. of

Educ., 803 A.2d 318, 326 (Conn. 2002) (stating, in review of state school funding costing, that “[s]imply because the legislature has passed a statute adopting a particular fiscal formula cannot mean that a court may not entertain a constitutional challenge to that formula”); infra Part IV.B.

### 3. *Burden of Proof*

The State further asserts that the Petitioners bear the burden of proof to “establish that the legislature’s definition of an ‘adequate education’ embraces those ancillary, indirect costs they identify.” (State’s Mot. Dismiss 10.)

As found above, strict scrutiny is proper as the Petitioners have alleged a constitutional violation concerning a fundamental right. Under strict scrutiny, and in the absence of a presumption that the challenged law is valid, the State would bear the burden of proof to rebut the presumption that the law is unconstitutional. See Fisher v. Univ. of Tx. at Austin, 136 S. Ct. 2198, 2222 (2016) (“Strict scrutiny is a searching examination, and it is the government that bears the burden of proof.”); 16 C.J.S. Constitutional Law § 259 (“[W]here fundamental rights are involved, and there is no presumption of validity, the government has the burden of proving beyond a reasonable doubt that the statute is constitutional.”). Because the Second Amended Petition triggers strict scrutiny, the burden of proof at this stage in litigation is on the State.

### 4. *The Definition of “Adequate Education”*

The State argues that the New Hampshire Legislature has properly defined “adequate definition” and that the Petitioners’ identified costs do not fall into this definition. (State’s Mot. Dismiss 11–14.) Thus, the State argues, it has no constitutional obligation to fund those ancillary costs. (Id. at 14.) The State has argued

that the Legislature’s definition of “adequate education” includes RSA 193-E:2-a as well as the Board of Education “Minimum Standards for Public School Approval” in Ed. 306. (State’s Mot. Dismiss 12–14.) This is according to RSA 193-E:2-a, VI(a), which defines “Minimum standards for public school approval” as “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.” The State then has matched each section of the ten “school approval standards” areas in RSA 193-E:2-a, I with ten Board of Education regulations contained within Ed. 306, stating that those ten regulations “substantively define[]” the topics mandated by RSA 193-E:2-a. (State’s Mot. Dismiss 13–14.)

The Petitioners have previously insisted that they are not challenging the first or fourth Claremont II mandates, that is, the mandates that the Legislature “define an adequate education, . . . and ensure its delivery through accountability fund it with constitutional taxes.” Londonderry (Claremont XII), 154 N.H. at 155–56. The Petitioners rather intended to narrow their challenge to the second and third mandates, which are to “determine the cost” and “fund it with constitutional taxes.” Id. Nonetheless, the Petitioners’ theory and arguments hinge on whether the Legislature’s definition includes the items the Joint Committee included in its “universal cost.” (Pet’rs’ Obj. Mot. Dismiss 8–9.) Significantly, the Petitioners’ theory has assumed that the Legislature’s definition of an “adequate education” already includes those cost items because the Joint Committee’s 2008 Spreadsheet included them or because Board of Education regulations require them. The State has insisted on a narrower definition and that the 2008 Spreadsheet includes more than what makes up an “adequate education,”

according to the Legislature's definition. It is therefore impossible for this Court to address the Petitioners' costing argument without first determining what the Legislature included in its definition of "adequate education." Given the long history of interchange between the Legislature and the Judiciary, it is necessary for the Court to consider the legal evolution of school funding jurisprudence in New Hampshire.

a. "Adequate Education" in the Legislature

In 1993, Claremont I determined that the New Hampshire Constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in [this State] and to guarantee adequate funding." 138 N.H. 183, 184 (1993). Four years later, Claremont II animated that duty by articulating four specific mandates to the Legislature, the first of which was to "define an adequate education." Londonderry (Claremont XII), 154 N.H. at 155–56 (explaining four mandates from Claremont II). The Claremont II decision also highlighted seven criteria from the Supreme Court of Kentucky in "establishing general, aspirational guidelines for defining educational adequacy." Claremont II, 142 N.H. at 474–75.

In January 1998, Governor Jeanne Shaheen proposed a plan to address the Claremont II decision by creating "a working group to develop a standard of educational adequacy . . . ." Advancing Better Classrooms: Governor Proposes the ABC Plan to Address Claremont Decision, Office of the Governor, at 1–2 (Jan. 15, 1998). The first part of the governor's plan was to "determine[] a standard of adequacy for children's education." *Id.* at 1. The working group, called the Governor's Task Force on Educational Adequacy, submitted its findings on February 9, 1998. Recommendations Concerning the Implementation of the "A Better Classroom" Plan, Governor's Task

Force on Educational Adequacy (Feb. 9, 1998). In consideration of the Supreme Court decisions, descriptions, articles, and laws from other states implementing educational reform programs, and in consultation with “knowledgeable people from across the country,” the Task Force formed a definition of an “adequate education.” Id. at 2–3. The definition included eight points, which were nearly identical to the seven criteria Claremont II borrowed from the Supreme Court of Kentucky. Compare id. with Claremont II, 142 N.H. at 474–75. The Task Force also listed three proposed “Alternative Methods for Calculating the Cost of an Adequate Education,” including a method based on the annual cost per pupil, one based on the annual statewide total revenues and expenditures for school districts, and one that would identify five school districts that met school approval standards and had a higher percentage of students than the statewide average achieving at the proficient and advanced levels on the state assessment and then divide by the total pupils in those five districts. Recommendations Concerning the Implementation of the "A Better Classroom" Plan, Governor’s Task Force on Educational Adequacy, at 6 (Feb. 9, 1998).

Later that year, the Legislature codified what was essentially the Task Force’s definition of “adequate education,” narrowed to seven points, in RSA 193-E:2 and labeled them the “Criteria for an Adequate Education.” Laws 1998, Ch. 389 (HB 1075-FN-A-LOCAL). Also that year, the Supreme Court issued an advisory opinion rejecting Governor Shaheen’s education financing plan. See Opinion of the Justices (School Financing) (Claremont IV), 142 N.H. 892, 901 (1998).

Two years later, in Claremont IX, the Supreme Court declared a proposed targeted-aid plan unconstitutional. 145 N.H. 474 (2000). The Supreme Court was

unimpressed with RSA 193-E:2: Despite not having a question before it concerning the definition of an “adequate education,” and despite RSA 193-E:2’s codification, the Supreme Court stated “constitutional adequacy” had “yet to be defined,” a task that had been assigned to the Legislature. 145 N.H. at 477; see Mosca, [The Original Understanding of the New Hampshire Constitution's Education Clause](#), 6 Pierce L. Rev. 209, 245 (2007). The Legislature took no action in response.

As such, when the Supreme Court issued the first Londonderry (Claremont XII) opinion in 2006, the Legislature had failed to develop a more specific definition of “adequate education.” The Supreme Court declared the State still had not developed “distinct substantive content” as to what constitutes “adequacy” such that the cost thereof could be isolated. 154 N.H. at 160. Thus, without more than RSA 193-E:2, for a court to assess whether a constitutionally adequate education is being provided, either a special master or “a trial judge would likely have to determine the levels of ‘skill,’ ‘knowledge,’ ‘grounding’ and ‘sound wellness’ to which an educable child is entitled.” Id. Hoping to avoid such outcomes, the Supreme Court retained jurisdiction “with the expectation that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007.” Id.

In 2007, the Legislature passed HB 927, which “[s]et[] forth the substantive educational content of an adequate education,” “[r]equire[d] the establishment of criteria to identify schools with greater educational challenges for the provision of additional education aid,” and established the Joint Committee. Laws 2007, Ch. 270 (“HB 927”) (statement of purpose). In the bill’s statement of purpose, it read, “The general court



embraces its duty to define a constitutionally adequate public education for every child in the state.” HB 927, 270:1. The final bill stated:

[T]he 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.
- (h) Physical education.
- (i) Technology education, and information and communication technologies.

HB 927, 270:2. These criteria went on to be codified at RSA 193-E:2-a.<sup>13</sup> In addition to this list, the bill’s statement of purpose explained:

In responding to its responsibility to determine the specific criteria and substantive education program that deliver the opportunity for an adequate education, the general court analyzed the current education delivery system established jointly through the legislative and executive branches. Specifically, the general court reviewed the standards for public school approval and the state’s curriculum frameworks. As part of its review, the general court determined which of the standards and curriculum frameworks provide the opportunity for an adequate education. In analyzing the school approval standards and curriculum frameworks, the general court recognized that they were developed with the widespread participation of educators, business people, government

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<sup>13</sup> Provision (i) was added via amendment in the House of Representatives. House Report, HB 927, at 4–10. Also, RSA 193-E:2-a has since been amended such that provision (i) is now “Engineering and technologies” and a provision (j) has been added to include “Computer science and digital literacy.” Laws 2018, 274:1 (HB 1674).

officials, community representatives, and parents. As a result of the quality of both the standards and the frameworks, the general court identifies the standards in RSA 193-E:2-a and the curriculum frameworks that support those standards as the specific criteria for an adequate education.

H.B. 927, 270:1, IV (emphasis added).

Minority members of the Education Committee voiced concerns about whether the Joint Committee would be developing a definition of “adequate education” apart from assessing associated costs. See House Report, HB 927-FN, at 109–11 (Minority of the Committee on Education Report, March 22, 2007) (“It is the position of the minority of the committee that the Legislature must define adequacy, but that we must also determine the cost, fund it in a constitutional manner and ensure its delivery.”). The minority of the Education Committee also opposed an amendment to HB 927 that included mandatory kindergarten “as a component of adequacy,” which “the courts have never weighed in on, nor suggested should be part of adequacy.” Id. at 109 (statement of Rep. Stiles).

The Senate Committee on Education held a hearing on HB 927 that included testimony from members of the House Committee on Education explaining that the creators of the bill struggled to develop a definition of adequate education without considering the associated costs. See Senate Report, HB 927 (Senate Education Committee Hearing, May 14, 2007), at 40 (statement of Rep. Rous) (“This bill is an attempt to recognize that there is a fine line between determining adequacy and determining cost and that is why it includes general wording.”); id. (“The committee had to repeatedly remind themselves not to talk about the funding portion.”).<sup>14</sup>

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<sup>14</sup> Transcription of the Education Committee’s hearing is located within the Senate Report for HB 927 at pages 43–71.

Also at this hearing, House representatives explained the definition of “adequate education” and what it included and excluded, recognizing “the State is responsible for whatever is included in the definition of adequacy.” Id. at 48 (questioning of Rep. Rous).

Representative Rous stated:

The discussion about definition versus cost was always, we were always kind of treading a fine line between these two categories and I think that you will find that as you talk about this bill and this definition. So, this language was an attempt on House Education’s part to say that we recognize that there are services that required [sic] in order to provide the instructional areas that we have set forth, but without being extremely specific about what they were because it was felt that that was beginning to list cost items, we talked about it in a general way. We did include credentialed teachers as one of those education supports and we were specific about that.

Id. at 44.

Ultimately, a House representative explained, the bill included less in the definition of “adequate education” than could have been articulated and less than some representatives wanted:

[I]f I had my druthers, that I would include many more things. . . . [Preceding bills] put[] in perhaps more than what we finally wound up with. We were very conservative. It was a struggle on the subcommittee not to put more things in and, as you have already heard, it was a struggle not to mention finance.

Id. at 61 (statement of Rep. O’Niel). A House representative also expressed that the bill included items that they did not know how they could be funded, but included them anyway, such as credentialed teachers: “[P]erhaps the State needs to take over some part of teacher pay. I don’t know what part that would be. I don’t know how that would be worked out. But, it is in here and it is in here for a reason.” Id. at 53 (questioning of Rep. Dunn).

The Joint Committee, charged by HB 927, completed its findings and issued its Final Report on February 1, 2008. The Joint Committee was charged with “review[ing] and study[ing] the analytical models and formulae for determining the cost of an adequate education and the educational needs and resources needed to deliver an adequate education for children throughout the state.” HB 927, 270:2. In regard to the definition of an “adequate education” that the Joint Committee considered, the Final Report’s explanation of the “universal cost calculation” states that the Joint Committee “reviewed the statutory definition of an adequate education” as defined in RSA 193-E:2-a, which included “the New Hampshire school approval standards in nine<sup>15</sup> specific content areas.” (*Id.* at 13.) The Joint Committee’s definition also cited RSA 193-E:2-a, II, and the Final Report stated:

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.

(Final Report 13.) The Final Report states, “As the definition is based on the New Hampshire school approval standards, the [Joint] Committee reviewed the school approval standards and relied on the relevant parts of those standards to calculate the universal cost.” (*Id.*)

The Joint Committee’s findings were adopted in SB 539 in early 2008. See Laws 2008, Ch.173 (“SB 539”). The Senate Committee on Education held a hearing on the bill that included testimony from Senator Estabrook, co-chair of the Joint Committee with Representative Rous. Senate Report, SB 539 (Senate Committee on Education

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<sup>15</sup> The statute currently contains ten content areas, but the tenth, RSA 193-E:2-a(l)(j), was only added in 2018. See supra Note 13.

Hearing, March 4, 2008), at 49; (Final Report 6, 8). In explaining the Joint Committee's Final Report, Senator Estabrook stated that the Joint Committee "worked within the constraints of the court's unique rulings to pay first and last dollar of adequacy, and to avoid any consideration of property wealth." Senate Report, SB 539 (Senate Committee on Education Hearing, March 4, 2008), at 49. Representative Rous also provided a statement, and concluded saying, "I believe that the [Joint] Committee acted thoughtfully and responsibly and has met the Court's order to define and cost an adequate education and I urge the Senate to pass this bill and send it to the House." Id. at 63.

Speakers at the hearing voiced disagreements with the Joint Committee's costing. Representative Stiles pointed to the Final Report's statement that while the Joint Committee was school and curriculum based, the Joint Committee had "included a few positions that are not directly correlated with learning as much as nutrition is." Id. at 65. Representative Stiles referenced the "minimum standards for public school approval" and Ed. 306.11, "which states that the local school board shall require that each school makes a meal available during the hours to every student under its jurisdiction in accordance with RSA 189:11-a, [] I and II." Id. at 66. Representative Stiles pointed out that this regulation was "on the same page as the custodial and secretarial services which you have included in your universal cost . . . ." Id. She took issue with the Joint Committee's report, which stated that the basis for its decision in regard to food services was that "most food service programs are self-supporting" and thus as "beyond the scope of definition and need not be included in the universal cost." Id.

Then, Nate Greenberg, the then-Superintendent of Schools for SAU No. 12, testified that his main disagreement with SB 539 was the per-pupil universal cost of \$3,450:

This amount is significantly less than the cost of adequacy. Among the reasons why, and likely one of the most important reasons, is the student-teacher ratios it uses are too high. The ratios do not reflect the situation of New Hampshire schools today . . . . While the Committee's reliance on the school approval standards is generally defensible, in this instance, it is not. I say this because the actual number of classroom teachers indicates that the student-teacher ratios are far lower than twenty-five to one and thirty to one.

Id. at 79–80. Mr. Greenberg's written statements reference DOE data that indicated the 2006–2007 actual average statewide student-teacher ratio was 16 to 1. Id., Attachment 9. He also said that it was worth noting that the "school approval standard that sets these ratios is actually stated in terms of '25 or fewer students' and '30 or fewer students.'" Id.

In the Education Committee's Hearing Report provided to the Senate, it is noted that Senator Foster asked Mr. Greenberg, "if these numbers are wrong, then what is the cost." Id. at 46. Mr. Greenberg responded that he did not have a number, but that "\$3,400 is significantly lower than the actual costs," that "one cannot put 35 students in a high school English class," and that, "with lower class sizes, we can prevent learning problems." Id. Then, the Hearing Report reflects that Senator Foster "reminded everyone that the Committee's job was to define an adequate education," and "that with all that has been said today, Mr. Greenberg still does not have a number." Id. at 46–47.

The Senate Education Committee also heard testimony from Representative Lyman, who was the legislative representative of the Monadnock Regional School District Board of Education. Id. at 71. Mr. Lyman stated, "[T]he fact that you are

considering a per pupil cost of \$3,450. This seems ludicrous in a district that is spending over \$11,000 per student at our high school.” Id.

Rick Trombly of the National Education Association of New Hampshire (“NEA-NH”) also testified to the committee. Id. at 74, Attach. 8. Mr. Trombly’s written statement’s said:

Last September NEA-NH was pleased to appear before the Joint Legislative Oversight Committee on Costing an Adequate Education to offer its opinion as to how that Committee should discharge its obligations. Our suggestion was to utilize the expertise of the stakeholders: community leaders, education experts, legislatures and parents, and in particular experts who have done studies like this before. The Committee elected to use a different model for this process. The result of the Committee’s work is contained in Senate Bill 539. While we applaud the diligence of the Committee, w[e] cannot agree with its conclusions. We have another concern. Because the Committee’s dollar amounts are so close to the actual amounts appropriated in recent years, some will question how the Committee arrived at those dollar amounts.<sup>16</sup> Our position is that any costing formula must be based on the real needs of schools. Only then can the state meet its obligation to fund an adequate education for our children.

Id. Mr. Trombly also cautioned against using “the State’s standards on class size,” since they did not consider school districts that have a smaller population and did not meet those class sizes. Id. at 75. He also stated, “[O]ur underlying problem is that those items that were costed, some were low-balled and those items that were not costed that are critical to delivering an adequate education, that’s where we come from.” Id. at 76–77.

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<sup>16</sup> The Court interprets this to suggest—very plausibly—that the Joint Committee had reverse-engineered the costing formula and figure; that it had tacitly adapted the definition, formula multipliers, and cost amounts to comply with the previous year’s budget appropriation. If this is true, it squarely undercuts the behest in Claremont II and its progeny that the Legislature determine the cost of an adequate education and then fund it. Taking a specific final budget figure and then twisting the costing process to mathematically result in it does not adhere to Claremont II’s constitutional directive.

b. Judicial Review of Legislature's Efforts

Later in 2008, the Supreme Court addressed HB 927. See Londonderry Sch. Dist. SAU #12 v. State (Claremont XIII), 157 N.H. 734, 735 (2008). The Supreme Court, having retained jurisdiction over the matter after invalidating HB 616, requested the parties file briefs in light of the Legislature's efforts to define and cost an adequate education. Id. at 735–36. The petitioners and the NEA-NH as *amicus curiae* alleged several infirmities with the Legislature's efforts to define an "adequate education": "In addition to highlighting that the accountability requirement has yet to be met, they claim insufficiency in the universal cost per pupil, the allocated differentiated aid and the student-teacher ratio." Id. at 736. The State argued that the action was moot because HB 616 was no longer before the Supreme Court and that HB 927 had not been subjected to a factual inquiry before a trial court. Id. The Supreme Court agreed with the State that the action was moot, finding there was no substantial similarity between HB 616 and HB 927. Id. at 736–37. "Although we are mindful of the petitioners' claims that the new legislation presents new problems, it is precisely for this reason that the controversy before this court is now moot." Id. at 737.

Two justices concurred with the majority opinion, authored by Justice Hicks, while Chief Justice Broderick and Justice Duggan dissented. Id. at 737–45. Chief Justice Broderick highlighted the history of school-funding litigation, pointing out that the Supreme Court had declined to appoint a master to take evidence and make recommendations to the Supreme Court regarding accountability because the State had represented that "it was making progress in developing a delivery and accountability system . . . ." Id. at 738–39 (Broderick, J., dissenting). "In so doing, we intended that



the political branches have an unimpeded opportunity to fulfill their constitutional responsibilities.” Id. at 739. Concluding his review of school funding’s legislative and judicial journey, Chief Justice Broderick stated:

It is readily apparent that despite its near decade long assurances that our public education system would contain the requisite controls to ensure the delivery of a constitutionally adequate education, the State has not met its acknowledged obligation. This court, for the past fifteen years, has repeatedly, respectfully and appropriately deferred to the political branches to resolve the critical issues the numerous school funding decisions have identified. . . . Deference, however, has its limits. Constitutional rights must be enforced or they cease to be rights.

Id. at 740 (citations omitted). Chief Justice Broderick encouraged the political branches to “complete their unfinished work in funding, providing for, and ensuring a constitutional adequate education for each public school student in our state so that the long unfulfilled promise of our State Constitution can finally be realized.” Id. at 740–41.

Justice Duggan echoed Chief Justice Broderick’s sentiment that it was the Supreme Court’s role to “uphold and implement the New Hampshire Constitution.” Id. at 745 (Duggan, J., dissenting) (quoting Claremont II, 142 N.H. at 475). He also addressed the petitioners’ concerns with HB 927 and the Joint Committee’s determination of a cost of an adequate education. Id. at 743–44. The petitioners argued the universal cost per pupil was insufficient, arguing that the Legislature had factored in “unreasonably high student-teacher ratios, low teachers’ salaries, and insufficient funding for special needs students” in determining cost. Id. at 743. Justice Duggan also noted NEA-NH’s arguments that the student-teacher ratio was miscalculated and that too few provisions were made for classroom aides, substitute teachers, and school administrators. Id. Both the petitioners and the NEA-NH requested the Supreme Court retain jurisdiction over the matter until the Legislature met

its remaining obligations. Id. The State’s response, Justice Duggan noted, was that “it is apparent that there would need to be in-depth fact-finding before the plaintiffs could prove their assertions that these legislative decisions do not meet constitutional muster.” Id. at 744.

Justice Duggan first disagreed with the majority regarding mootness in that he believed the matter was of pressing public interest and thus appropriate for the Supreme Court to retain. Id. at 744–45. He then discussed the Supreme Court’s responsibility in light of “the role of the political branches” and the sentiment in Claremont II that the Judiciary was “not appointed to established education policy, nor determine the proper way to finance its implementation.” Id. (quoting Claremont II, 142 N.H. at 475).

The Joint Committee held eighteen meetings and heard testimony from the public, educators, administrators, education stakeholders, and state as well as national education policy and finance professionals. Following the Joint Committee’s report of its findings and recommendations, the plaintiffs disputed the base numbers used to determine the universal cost per pupil as well as the construction of the formula used to reach that figure. The submitted memoranda demonstrate disagreement over, for example, student-teacher ratios, teachers’ salaries, and who makes up necessary personnel. These are fact-driven disputes that are normally decided by a trial court. I agree with the Chief Justice that there exist other unresolved issues as to whether the legislature has complied with the mandate to provide a constitutionally adequate education, but these issues should be resolved in the first instance by the superior court. I, therefore, would dismiss this appeal without prejudice and remand to the superior court.

Id. at 745.

c. Analysis of the Present Definition of an “Adequate Education”

This Court now picks up where the Supreme Court left off in 2008: review of HB 927 and the Legislature’s latest effort to define, cost, fund, and account for an adequate education. See Londonderry (Claremont XIII), 157 N.H. at 736–37.

The purpose of HB 927 was “to define the opportunity for a constitutionally adequate public education for every child in the state,” while the Joint Committee was created solely to “complete the determination of the cost of an adequate education in accordance with the provisions of this chapter . . . .” HB 927, 270:2; RSA 192-E:2-b, III (repealed by Laws 2009, Ch. 198 (SB 180-FN)). It is clear from the legislative history above that the Legislature struggled with defining “adequate education” separate from its costing. It is also clear that the Joint Committee was effectively put in a position to define an “adequate education” beyond the definition provided in HB 927. The Joint Committee, in various places throughout its Final Report, explained what it determined was and was not part of the definition of adequate education, but did not delineate those items in the 2008 Spreadsheet, which includes all items within the universal cost and became codified at RSA 193-E:2-a as the “Substantive Educational Content of an Adequate Education.”

The items that the Joint Committee expressly called part of the definition of an “adequate education” are as follows: salaries and benefits for “personnel,” which included teachers, specialty teachers, principals, administrative assistants, guidance counselors, library media specialists, technology coordinators, and custodians, (Final Report 14–21); and “non-personnel costs,” which included instructional materials and supplies, technology, teacher professional development, and facilities operation and

maintenance, (id. at 21–22). Then, the Joint Committee explicitly stated that school central offices, district administrative staff, school nurses, teacher aids, and food service personnel were not “included in the calculation of the universal cost” because “the definition of the opportunity for an adequate education is school and curriculum based.” (Id. at 17.) The Joint Committee also “recognized that neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy,” but nonetheless included transportation costs in the universal cost calculations because it was “an important consideration for students to have the opportunity for an adequate education.” (Id. at 23.) All of the items in the universal cost, whether part of the definition of an “adequate education” or not, were listed on the 2008 Spreadsheet without notation. (See 2008 Spreadsheet.)

Meanwhile, the Final Report woefully lacks meaningful explanation for the Joint Committee’s conclusions. The Joint Committee explained that, “[d]uring its meetings, the Committee deliberated on the components of costing an adequate education, the relevant data related to that costing and the policy choices involved in determining those costs.” (Final Report 10.) Yet, the Final Report does not include any of that “relevant data” it considered nor information on the internal “motions” made and “straw polls” it took. (Id.) While a list of the Joint Committee’s meetings and their subject matters was attached to the Final Report, no documents from those individual meetings have been provided or located. (Id., App. A.) Thus, when the Joint Committee’s Final Report states a conclusion or finding, the only explanation for that finding is the Joint Committee’s brief statements labeled, “Basis for decision,” within the Final Report. (Final Report 14.) That is not enough.

The items the Joint Committee determined were part of the definition of an “adequate education” were typically supported by a citation to a Board of Education regulation in the item’s “Basis for decision” section. Others, however, were not, and were either included without explanation or by the simple statement that “the definition of an adequate education includes” that item. (See id. at 14.) For example, principals, library media specialists, and guidance counselors were included according to Ed. 306.15(a)(1), and administrative assistants were included according to Ed. 306.10. (Id. at 15–16.) Yet, technology coordinators were included because they were “needed to provide the opportunity for an adequate education as defined by RSA 193-E:2-a,” which “includes the substantive educational program as provided in the school approval standards in technology education, and information and communication technologies” and “requires ‘opportunities to acquire the communication, analytical and research skills’ and competencies in addition to the substantive knowledge expected to be possessed.” (Id. at 16–17.) “The Committee determined that central to those opportunities are the availability of computers and other technological tools. In order to provide these tools, schools need a technology coordinator to set up and maintain computers, and other technology equipment.” (Id. at 17.) The Joint Committee did not cite to a Board of Education regulation, though the State points the Court to Ed. 306.42, which concerns “Information and Communication Technologies Program” requirements. Ed. 306.42; (State’s Mot. Dismiss 13.)

The best that can be inferred from the Final Report is that the Joint Committee deemed certain items to be part of an “adequate education” solely on its own judgment of what items were “based on substantive curriculum areas and associated skills” or

were within “the educational components of the school.” (Final Report 17 (explaining why certain personnel were not included).) Indeed, in SB 539’s statement of purpose, the Legislature reiterated the Joint Committee’s role: “The individual components of the cost were selected on the basis of their effectiveness in delivering educational opportunity and after extensive review, debate and discussion by the [Joint Committee] and the general court.” SB 539, 173:1, II. Thus, the Joint Committee’s judgment did not strictly align with HB 927’s definition of “adequate education” but rather included sporadic Board of Education requirements or no regulation at all; what the Joint Committee costed was according to its own, unexplained decision.

The Final Report states, “As the definition [of an adequate education] is based on the New Hampshire school approval standards, the [Joint] Committee reviewed the school approval standards and relied on the relevant parts of those standards to calculate the universal cost.” (*Id.*) The Joint Committee determined which “parts of those standards” were “relevant” to the definition. Though the Petitioners have stated that they do not challenge the Legislature’s definition of an “adequate education,” it is apparent to the Court that the Legislature failed to clearly identify what exactly goes into its definition.

The Joint Committee’s decision-making process and related conclusions raise significant constitutional concerns. First, it has made its costing, and RSA 198:40-a, II(a), impervious to judicial review. The State has proposed that the Joint Committee chose to include cost items that were outside of the definition, and this assertion is supported by the Final Report’s explanations of why it included transportation, something it considered to be “an important consideration for students to have the

opportunity for an adequate education” even though outside the definition. (Final Report 23.) The Supreme Court has affirmed that the Legislature may include items that “far exceed the constitutional standard of adequacy,” though the Court only accepted that premise “[f]or the purposes of [that] appeal.” Londonderry (Claremont XII), 154 N.H. at 160. Yet, the same issue that arose in that case arises here:

If the statutory scheme that is in place provides for more than constitutional adequacy, then the State has yet to isolate what parts of the scheme comprise constitutional adequacy. More specifically, under the statutory scheme there is no way a citizen or a school district in this State can determine the distinct substantive content of a constitutionally adequate education. Consequently, its cost cannot be isolated. Such a system is also impervious to meaningful judicial review.

Id. (emphasis added). Here, according to the State’s theory, RSA 198:40-a, II(a) includes a cost for things beyond the definition of an “adequate education.” (State’s Mot. Dismiss 17.) As the statute, the Joint Committee, and the 2008 Spreadsheet fail to provide a cost of an adequate education alone, RSA 198:40-a, II(a) is also “impervious to judicial review.” Londonderry (Claremont XII), 154 N.H. at 160. The costs that the Joint Committee reached as its universal cost were codified into RSA 198:40-a, II(a). (Pet’rs’ Obj. Mot. Dismiss 8.) In that way, the Legislature effectively codified a “Cost of an Opportunity for an Adequate Education” that included things the State argues are not part of an “adequate education.” RSA 198:40-a (provision title). The act of codifying the Joint Committee’s universal cost without distinguishing how much an adequate education costs raises the same issues that arose in Londonderry (Claremont XII). Accepting the State’s assertion that the Joint Committee included more than was required, yet failing to isolate what is constitutionally required, is alone sufficient to invalidate RSA 198:40-a, II(a).

Even beyond this point, it is clear that the Joint Committee’s costing failed to adhere to the State’s proposed litany of Board of Education regulations or to cost items that other regulations require. The State argues that the Legislature sufficiently defined an “adequate education” and that the Joint Committee properly abided by that definition. The State insists that the “statutes and regulations” it identifies in its Motion to Dismiss “objectively and precisely identify and define an ‘adequate education’ in sufficient detail” according to the Supreme Court’s mandate in Londonderry (Claremont XII). (State’s Mot. Dismiss 11–14.) These regulations are, according to the State: Ed 306.31, 306.37, 306.40, 306.41, 306.42, 306.43, 306.45, 306.46, 306.47, and 306.48. (id. at 13–14.) The Final Report reveals otherwise. Rather than selecting items only according to the ten cited Board of Education regulations that the State has matched with RSA 193-E:2-a’s definition, the Joint Committee included items within its universal cost—and explicitly determined that those items were part of an “adequate education”—that are required by other Board of Education regulations. For example, none of the State’s cited regulations explicitly provide for the Joint Committee’s cost items such as teacher salaries and benefits (Final Report 14 (citing Ed. 306.17(a)(1))); guidance counselors (id. at 15–16 (citing Ed. 306.39(d)(4) & (f))); instructional materials (id. at 21–22 (citing Ed. 306.09(a)(1))); teacher professional development (id. at 22 (citing Ed. 306.15(a)(2))); or facilities operations and maintenance costs (id. at 23 (citing Ed. 306.07(a)(1))). Though common sense perhaps demands such costs be included in providing an “adequate education,” the Joint Committee clearly did not adhere to an “objective[] and precise[]” definition of an “adequate education” that can be illustrated with only the State’s proposed selection of Board of Education regulations. (State’s Mot. Dismiss 14.)



Furthermore, as both the Petitioners and representatives during the Senate Education Committee hearing have expressed, the Joint Committee did not include other items that the Board of Education regulations mandate for school approval. Representative Stiles noted that the Joint Committee refused to fund food and nutrition services despite Ed. 306.11, which states, “The local school board shall: (1) Require that each school makes a meal available during school hours to every student under its jurisdiction, in accordance with RSA 189:11-a, I-II; . . . .”<sup>17</sup> And, the Petitioners have pointed to Ed. 306.12, which states, “the local school board shall require that each school provides qualified personnel to carry out appropriate school health-related activities,” specifically nurses. Ed. 306.12(a) & (b). The Final Report notes that, though the Joint Committee “considered whether other positions should be included in the universal costs,” including “school nurses, teacher aides and food service personnel,” it ultimately concluded that “since the definition of the opportunity for an adequate education is school and curriculum based, . . . . a school nurse who provides health care services, rather than educational or educationally related services [was] beyond the scope of the universal cost.” (Final Report 17.) Thus, even assuming that the State’s argument can be construed to mean that the entirety of Board of Education regulations Ed. 306 provides the definition of an “adequate education,” as stated above, the Joint Committee did not include all of the items contemplated in Ed. 306 that are, at least arguably, as much educational components as the items that were included. From the Final Report, there is no explanation of why the Joint Committee included a custodian but not school nurses, especially since the mandate the Joint Committee

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<sup>17</sup> According to the Final Report, food services were not included because “most food services programs are self-supporting and furthermore outside the educational components of the school . . . .” (Final Report 17.)

cited to support costing a custodian—Ed. 306.07(a)(1)—calls for a “a clean, healthy, and safe learning environment.” (Final Report 17 (emphasis added).) Nor does the Joint Committee explain why it included facilities operation and maintenance but not transportation;<sup>18</sup> or teacher professional development but not superintendent services, which are required by RSA 194-C:4 and are assumed present in schools by several Board of Education regulations. (Ed. 306.04; Ed. 306.15; Ed. 306.28; Ed. 306.29; Ed. 306.30). The Petitioners have also pointed out that the Joint Committee included some items required by RSA 189:24, a statute providing the State Board of Education approval for a “Standard School,” but not superintendent services that it requires:

A standard school is one approved by the state board of education, and maintained for at least 180 days in each year . . . in a suitable and sanitary building, equipped with approved furniture, books, maps and other necessary appliances, taught by teachers, directed and supervised by a principal and a superintendent, each of whom shall hold valid educational credentials issued by the state board of education, with suitable provision for the care of the health and physical welfare of all pupils.

RSA 189:24 (emphasis added); (Pet’rs’ Obj. Mot. Dismiss 9, n.7).

Importantly, the Supreme Court has addressed the idea of relying on Board of Education regulations to fulfill the constitutional mandate to define an adequate education. In Londonderry (Claremont XII), the State argued that RSA 193-E:2 provided a constitutionally sufficient definition of adequacy, and that “the Legislature has delegated to the State Board [of Education] the authority and the duty to prescribe

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<sup>18</sup> While the Joint Committee did include transportation, it explicitly stated that “neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy.” (Final Report 23.) And though there is no Board of Education regulation requiring transportation, the Petitioners have highlighted that providing transportation is at least an arguable part of providing the opportunity for an adequate education, as is supported by the Joint Committee’s decision to cost transportation. Also, the Joint Committee did cite to a statute when determining to contribute to transportation costs: RSA 189:6, which requires school districts to “provide transportation to all pupils in grade 1 through 8 who live more than 2 miles from the school to which they are assigned.” (Final Report 23.)

uniform standards for all public schools in New Hampshire.” 154 N.H. at 161 (brackets omitted). The State pointed to Board of Education regulations contained in Ed. 306 and to RSA 186:5 & 8, which require local school boards to “comply with the rules and regulations of the state board.” Id. The State argued:

The school approval standards are very detailed and demanding; they govern nearly every facet of a school's operation. The standards prescribe how schools must be organized and staffed as well as the particular educational content of each subject taught. See, e.g., Ed 306.17 (setting forth maximum class sizes); Ed 306.37 (detailing requirements for English program). These standards are monitored by DOE, which grades individual schools on their compliance with the standards. Ed 306.40(b)(1)-(4).

Id. The Supreme Court responded:

If it is the State's position that RSA 193–E:2 together with the education rules and regulations, curriculum frameworks and other statutes define a constitutionally adequate education, we defer to the legislature's judgment. We note, however, that if the current system of delivery in combination with the statutory definition establishes a constitutionally adequate education, there would be no need for any local education taxes as the State would be required to pay for implementing the entire statutory scheme. Indeed, if that is the case, we question whether \$837 million, the amount currently allotted for public education under House Bill 616, is facially sufficient to fund the school system as required by that statutory scheme. Alternatively, if, as the State asserts, the education rules and regulations, curriculum frameworks and other statutes provide some level of education beyond that of a constitutionally adequate education, the point of demarcation cannot currently be determined. . . . Whatever the State identifies as comprising constitutional adequacy it must pay for.

Id. at 162–63 (emphasis added). Therefore, the Petitioners’ and Representative Stiles’ objection to funding some required items and not others is a sentiment shared by the Supreme Court: if the State is to rely on Ed. 306 to define “adequate education,” the State must fund everything that part requires of a school. And, if the Legislature intended for all of Ed. 306 to be included in its definition of an “adequate education,”

then the Joint Committee wrongfully excluded a significant amount of cost items that are required by Ed. 306.

The Joint Committee's unexplained, potentially unintended, costing methodology and conclusions effectively defined an adequate education without proper precision and with inconsistent adherence to Board of Education regulations and questionable judgment. This taints the result. There is also the concern that a costing committee may not be capable of objectively defining an adequate education apart from considering those items' costs such that cost consideration may discourage inclusion of essential items. In any event, the Court can only conclude that the Joint Committee's costing of an "adequate education" did not comport with the State's definition of an "adequate education" nor with other interpretations of RSA 193-E:2-a. For the purposes of this analysis, the Court only finds that the State's proposed interpretation of an "adequate education" fails and the State's Motion to Dismiss is rejected.

#### 5. *Petitioners' Claims*

While this Order contains the Court's decision on the parties' cross-motions for summary judgment, the Court addresses here why it denies, in part, the State's Motion to Dismiss. The State has ultimately moved for dismissal by alleging that the Petitioners have failed to allege that the State's actions have resulted in "the delivery of an inadequate education." (State's Mot. Dismiss 26.)

As the Court has articulated above in its discussion of the fundamental right to a State-funded adequate education, the Petitioners have already alleged that the State is failing to fulfill its constitutional duty by failing to provide a State-funded adequate education. Infra Part II.E.1. And, though the State is correct that the Petitioners have

not alleged that students in their districts are receiving anything less than an “adequate education,” the Petitioners have alleged that their delivery of an “adequate education” has not been enabled by State funding, an integral part of the fundamental right. See City of Nashua, 2006 WL 563314, at \*4. The Court construes the fundamental right at issue as a right to the opportunity to a fully State-funded adequate education. As the Petitioners have alleged that the adequate education their students are receiving is not fully State-funded, and as that is an integral part of the right, the Petitioners have successfully alleged a constitutional violation against the State. Their claims are therefore not dismissed and the Motion to Dismiss, insofar as it requests such, is DENIED.

#### **F. SWEPT**

The State also argues the Petitioners have failed to state a claim related to SWEPT. (Id. at 28–29.) The Petitioners have asserted that the SWEPT, in concert with RSA 198:40-a, II(a), violates Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution because it has caused “communities, like ConVal, Winchester, Monadnock, and Mascenic, . . . to increase their tax rates to make up for decreased or stagnant state aid with increasing educational expenditures,” and “[t]he State cannot constitutionally fund education through tax rates that vary by more than 400% throughout the state.” (2d Am. Pet. ¶¶ 123–57; pg. 25.) The Second Amended Petition compares the “total education tax rate” in Newington, which is \$3.19, with Dublin, which is \$16.46. (Id. ¶ 153; id., Ex. K.) And, the Petitioners highlight that the combined local and state tax education rate in Winchester is \$22.65, \$21.28 in New Ipswich, and \$21.52 in Troy. (Id. ¶¶ 154–56.) Thus, the Petitioners allege, RSA 198:40-a, II(a),

which contains the base adequacy aid amount determined by the Joint Committee and approved by the Legislature, is unconstitutional both facially and as applied. (*Id.* ¶ 158.)

The State has argued that the Petitioners have not alleged that the SWEPT is applied unequally throughout the State nor that the SWEPT results in the delivery of a constitutionally inadequate education, thus the Petitioners have not alleged a violation of either article. (State’s Mot. Dismiss 28–29.)

Article 83 of the New Hampshire Constitution, the “Encouragement of Literature” provision, is the basis of the Claremont II determination that the State has an affirmative duty to provide a State-funded adequate education. Claremont II, 142 N.H. *passim*. As explained above, the Supreme Court has determined that this affirmative duty contains four mandates: “define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.” City of Nashua, 2006 WL 563314, at \*4; *see also* Claremont (Accountability), 147 N.H. at 505 (stating the “four mandates”). Article 5 of the New Hampshire Constitution provides that the Legislature may “impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.” *See* Claremont II, 142 N.H. at 468. It “requires that ‘all taxes be proportionate and reasonable—that is, equal in valuation and uniform in rate.’” *Id.* (quoting Opinion of the Justices, 117 N.H. 749, 755 (1977)). “[T]he test to determine whether a tax is equal and proportional is to inquire whether the taxpayers’ property was valued at the same per cent of its true value as all the taxable property in the taxing district.” Claremont II, 142 N.H. at 468 (quoting Bow v. Farrand, 77 N.H. 451, 451–52 (1915)).

The SWEPT is codified in RSA 76:3, which states, “the commissioner of the department of revenue administration shall set the education tax rate at a level sufficient to generate revenue of \$363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8 . . . .” Municipalities collect the SWEPT, retain the funds, and report the amounts raised to the State. The State then provides each municipality with the difference between the amount raised and what is necessary to fulfill the base adequacy aid amount due to that municipality. See RSA 76:3; RSA 76:8.

The Petitioners allege that property-wealthy municipalities naturally raise funds via the SWEPT that exceed their needs for funding an adequate education and are permitted to retain the excess funds. (2d Am. Pet. 21, n.10.) Meanwhile, property-poor municipalities do not raise enough via the SWEPT to fund an adequate education, requiring the State to provide funds to reach the necessary base adequacy aid. This results in the disproportionate per-pupil amounts in school districts, where property-wealthy districts raise and retain excessive funds via the SWEPT, while property-poor districts only receive funds up to the amount of the base adequacy aid. Also, the Petitioners claim that the Supreme Court has already found that allowing property-wealthy municipalities to retain the SWEPT is unconstitutional. (Id. (citing Opinion of the Justices, 142 N.H. 892, 900 (1998)).)

In Claremont II, the Supreme Court considered a school-funding tax scheme in which “[l]ocally raised real property taxes [were] the principal source of revenue for public schools,” and direct legislative appropriates accounted for the remainder. Claremont II, 142 N.H. at 466. At the time, the responsibility for providing elementary and public education was placed on the local school districts. Id. Under this tax

scheme, municipalities would assess an annual tax of \$3.50 per thousand of property value “for the support of that district’s schools,” and would then “produce[] a budget that specifie[d] the additional funds required to meet the State’s minimum standards.” Id. at 467. Then, a “sum sufficient to meet the approved school budget” would be assessed on the taxable real property in that district, and the commissioner of revenue administration would compute a property tax rate for school purposes in each district. Id. That rate would then be levied by city and town officials “to provide the further sum necessary to meet the obligations of the school budget.” Id. Therefore, the total value of property subject to taxation varied among municipalities. Id.

The plaintiffs in Claremont II argued that the tax was a State tax and therefore had to be proportional according to Article 5 of the New Hampshire Constitution. Id. at 467–68. The Supreme Court agreed that the purpose of the tax was “overwhelmingly a State purpose” and that even though “the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax.” Id. at 469. “Although the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution.” Id. Therefore, because the tax was disproportionate, it was found unreasonable. Id.

There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State’s educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable .

Id. at 471.



In 1998, the Supreme Court issued an advisory opinion on a new school-funding allocation formula and a property tax abatement scheme. Opinion of the Justices (School Financing), 142 N.H. 892, 898 (1998). The proposed bill purported to establish a uniform State education tax rate based upon the equalized value of all taxable real property in the State. Id. at 899. However, the bill also authorized a “special abatement” for “[t]he amount of state education tax apportioned to each town . . . in excess of the product of the statewide per pupil cost of an adequate education . . . times the average daily membership in residence for the town.” Id. (omissions in original). Logistically, in accounting for the special abatement, the commissioner of revenue administration would calculate each municipality’s tax by multiplying the State education tax rate by the total equalized value of property within it, then subtracting the special abatement. Id. Thus, the special abatement would apply before a tax bill was issued to taxpayers. Id. The effect of this scheme, the Supreme Court noted, was that the “the effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined ‘adequate education’ for its children.” Id. Though the proposed bill initially would have an equalized valuation and uniform rate, the abatement effectively required some taxpayers to pay “a far higher tax rate in furtherance of the State’s obligation to fund education than others.” Id. at 902. The issue for the Supreme Court was the special abatement and the disproportionate State-tax rates that resulted. Id. at 900–01. The abatement was not supported by good cause or just reasons, and, “to the extent that a property tax is used to raise revenue to satisfy the State’s obligation to provide an adequate education, it must be proportional across the State.” Id. at 901.

The goal of the bill in Opinion of the Justices (School Financing) was to prevent municipalities from financially contributing to the adequate education of children in other towns or school districts. Id. at 901. However, “the purpose of an abatement or an exemption can never be to achieve disproportionality for disproportionality's sake.” Id. And, the Supreme Court highlighted that “[t]he benefits of adequately educated children are shared statewide.” Id. at 902.

The State is correct that an Article 5 challenge to a tax scheme will not stand when the challenged tax is applied proportionally. Unlike in Claremont II or Opinion of the Justices (School Funding), there has not been an allegation that the State has levied the SWEPT or any other education tax in different proportions or unequally throughout the State. Nonetheless, the Court cannot construe the Petitioners’ tax argument separate from its constitutional challenge to RSA 198:40-a because the Petitioners have alleged that, as the SWEPT functions, the State is failing to fulfill its obligation to fully fund an adequate education. As the Supreme Court has established, shifting public school funding to local school districts is the equivalent of a State tax. See Claremont II, 142 N.H. at 703. By alleging that the State is relying on local taxation to fund an adequate education and that local school districts are forced to raise that amount at different tax rates depending on their property wealth, the Petitioners have alleged that the State imposes disproportionate taxes. This is clearly a concern raised in Opinion of the Justices (School Funding) and Claremont II. See Opinion of the Justices (School Funding), 142 N.H. at 901; Claremont II, 142 N.H. at 902 (invalidating tax scheme that imposed disproportionate taxes on school districts to fund adequate education).

This was also a concern raised at the trial court in Londonderry School Dist. SAU #12, 2006 WL 6161061, at \*25. The trial court found that HB 616 resulted in disproportional taxes because “a significant amount of the funds raised by the [SWEPT] in many of the ‘property-rich’ municipalities would likely exceed the cost of providing a State defined adequate education,” resulting in “many ‘property-rich’ municipalities retaining [SWEPT] proceeds in excess of the cost of an adequate education” while “‘property-poor’ municipalities will be required to use the full amount of [SWEPT] assessment revenues collected to support the cost of an adequate education.”<sup>19</sup> Id. at 28–29. Thus, the trial court found that HB 616 “create[d] a non-uniform tax rate” without a constitutional justification “to permit the retention of those excess funds by the ‘property-rich’ municipalities.” Id. at 29. The Supreme Court did not address the trial court’s finding concerning the education tax scheme, as it only affirmed the trial court’s determination that the State had failed to define a constitutionally adequate education; its remaining findings, including that on the tax scheme proposed in HB 616, were stayed. See Londonderry (Claremont XII), 154 N.H. at 155.

The Court determines the Petitioners’ challenge to RSA 198:40-a infra, and that decision’s effect on the SWEPT challenge is discussed infra. See infra Part III.D. At this stage, however, the Court finds the Petitioners have sufficiently alleged a constitutional challenge to the SWEPT. Thus, the State’s Motion to Dismiss in regard to the Petitioners’ SWEPT argument is DENIED.

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<sup>19</sup> HB 616 concerned the Statewide Enhanced Education Tax (“SEET”), which is the same tax as the SWEPT. The SEET was codified in RSA 76:3, and the statute was amended in 2008, changing “statewide enhanced education tax” to “education tax,” or SWEPT. See SB 539, 173:15.

### **G. Injunctive Relief**

Similarly, as the Petitioners' request for injunctive relief is addressed in the Court's determination of the parties' motions for summary judgment, the Court need not reach the State's request to dismiss the Petitioners' requests for injunctive relief. As discussed infra, the Court does not grant the Petitioners injunctive relief. See infra Part IV.B.

### **III. Cross-Motions for Summary Judgment**

#### **A. Standard of Review**

A motion for summary judgment should be granted where “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. In ruling on cross-motions for summary judgment, the Court “consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law.” JMJ Properties, LLC v. Town of Auburn, 168 N.H. 127, 129–30 (2015). Where “no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law.” N.H. Ass’n of Counties v. State, 158 N.H. 284, 287–88 (2009). To defeat summary judgment, the non-moving party “must set forth specific facts showing that there is a genuine issue [of material fact] for trial.” Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citing RSA 491:8-a, IV). A fact is material if it affects the outcome of the litigation. See Bond v. Martineu, 164 N.H. 210, 213 (2012).

## **B. Petitioners' Evidence**

As with its Motion to Dismiss, the State has objected to the Petitioners' evidence. (State's Mot. Summ. J., *passim*.) The State's Motion for Summary Judgment does not address the merits of this litigation beyond its objection to the Petitioners' evidence.

In regard to the State's Motion for Summary Judgment, the Court does not weigh the DOE data for two reasons. First, the Court may wholly adjudicate the constitutional questions raised in the Second Amended Petition even without the DOE data, as demonstrated infra. See infra Part III.C. Second, the standard for a motion for summary judgment does not permit consideration of evidence that is in dispute. The DOE data is not factually disputed; the State does not allege that the DOE data is false. But, the weight of the evidence and its materiality are disputed. Even though the data may abstractly represent how RSA 198:40-a, II(a) has impacted the Petitioners, the State has raised questions of its reliability when the DOE receives its data from New Hampshire school districts themselves. (State's Mot. Summ. J. 2.) This fact might not fully discredit the data's accuracy, but because the Court has received affidavits from the petitioning school districts' superintendents with more specific and undisputed allegations, the Court need not fully address this issue. The Court therefore accepts the Petitioners' evidence for a limited purpose: it reflects the State's capability to gather information from the school districts that pertains to the State's obligation to provide an adequate education.<sup>20</sup>

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<sup>20</sup> It is not apparent that consideration of the DOE data would be improper when this litigation thoroughly concerns legislative actions and decisions. The State has not provided any alternative evidence of what the Legislature has considered in making its decisions nor has it asserted that the Legislature would not rely on the same DOE data the Petitioners have provided. In fact, the Legislature expressly did rely on previous versions of the same DOE data in making many of the decisions in the Final Report.

As far as the DOE data that potentially reflects RSA 198:40-a, II(a)'s impact on the petitioning school districts, the Court relies instead on the affidavits provided by their superintendents and the specific, attested-to facts they have provided. See infra Part III.C.

### **C. Scrutiny**

As established above, the Petitioners have alleged that the State is failing to fulfill its constitutional mandate to sufficiently fund an “adequate education.” For this reason, in the analysis of the State’s Motion to Dismiss, strict scrutiny was proper. In determining whether strict scrutiny is proper on the parties’ motions for summary judgment, the Court must consider the principle that “[f]or limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of the right.” Lilley, 204 A.3d at 208. It is beyond question that the Petitioners are receiving base adequacy aid in the amount set out in RSA 198:40-a, II(a). However, the Petitioners have argued that the funding is insufficient to provide a State-funded adequate education. Therefore, the Court’s inquiry is whether the amount of the base adequacy aid as provided in RSA 198:40-a, II(a) results in an actual deprivation of the fundamental right to a State-funded adequate education.

In arguing a deprivation has occurred, the Petitioners have alleged facial and as-applied challenges to RSA 198:40-a, II(a). Their facial challenge fails because the statute does not deprive the Petitioners of a fundamental right on its face. While the underlying calculus upon which the base adequacy aid was determined may be questionable, or even obviously illogical, the statute and its text are not. See Hollenbeck, 164 N.H. at 158 (“To prevail on a facial challenge to a statute, ‘the

challenger must establish that no set of circumstances exists under which the Act would be valid.” (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))). Indeed, though the Petitioners have alleged that no school district in the State may provide a constitutionally adequate education on RSA 198:40-a, II(a)’s base adequacy aid alone, it is not apparent on the statute’s face that it could not, in some circumstance, provide sufficient funding. Id. (“A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications.” (quoting United States v. Carel, 668 F.3d 1211, 1217 (10th Cir. 2011))). Moreover, even if the base adequacy aid provided in RSA 198:40-a, II(a) may demonstrably be insufficient to fund an adequate education in any school under any circumstances, this would require consideration of extrinsic evidence, which is not permitted on a facial challenge. 16 C.J.S. Constitutional Law § 163. Thus, to determine whether a deprivation has occurred, the Court must analyze RSA 198:40-a, II(a)’s application to the Petitioners. If the petitioning school districts have received base adequacy aid that fails to meet the State’s obligation, strict scrutiny will be applied to the statute, in which case the State must demonstrate that the Legislature had a compelling government interest in its calculation of the base adequacy aid figure contained in RSA 198:40-a, II(a). Lilley, 204 A.3d at 205 (stating that strict scrutiny requires the government to show that the challenged legislation “is necessary to achieve a compelling government interest and is narrowly tailored.”); Claremont II, 142 N.H. at 472 (“When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny.”); City of Nashua, 2006 WL 563314, at \*2.

An as-applied challenge concedes that the statute may be constitutional in many of its applications but contends that it is not so under the particular circumstances of the case.<sup>21</sup> Lilley, 204 A.3d at 205. The Petitioners' alleged deprivation of a fundamental right is specific. They do not allege that the students are being deprived of an adequate education but rather that the State has not sufficiently funded that education. A demonstration of this allegation therefore requires comparison between what the State is providing and what Part II, Article 83 of the New Hampshire Constitution requires the State to provide. The State's constitutional obligation, as repeatedly stated supra, was made unclear by the Legislature's adoption of the Joint Committee's costing. As the Petitioners have challenged the Legislature's costing rather than definition, they have alleged a constitutional deprivation of funds the Legislature is obligated to provide according to its own definition. The Court finds the most appropriate way to determine whether the Petitioners have alleged an actual deprivation is to analyze each "flaw" that the Petitioners have highlighted in the 2008 Spreadsheet. If the alleged flaws in the Joint Committee's costing resulted in funding that falls short of what the Legislature has defined as an adequate education, then the Petitioners, as recipients of the base adequacy aid provided according to the Joint Committee's calculations, will have demonstrated an actual deprivation and strict scrutiny will be applied. This inquiry maintains appropriate deference to the Legislature's role in defining an "adequate education" while also fulfilling the Court's role of ensuring constitutional guarantees. See Londonderry (Claremont XII), 154 N.H. at 163 ("[T]he judiciary has a responsibility

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<sup>21</sup> It is possible that a challenge to RSA 198:40-a,II(a), as currently written, could only be sustained, or exist, as an "as applied" challenge because it involves the costing process that underlies it. In other words, the statute can only be interpreted in the context of how it is applied to the school districts.



to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.”); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 785 (Tex. 2005) (“It would be arbitrary, for example, for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals.”).

### 1. *Teacher-Student Ratios*

The Petitioners allege that, because the teacher-student ratio used in the Joint Committee’s calculation of a universal cost was based on maximum class sizes rather than a proper ratio, they have been deprived of their fundamental right to an adequate education funded by the State. According to the Petitioners, “[n]o school district in the State has teacher student ratios of 1:25 or 1:30.” (2d Am. Pet. ¶ 51.) Winchester Superintendent Kenneth Dassau has stated in his affidavit that Winchester has thirty-two students in the eighth grade, a figure that, by regulation, requires two teachers and results in a student-teacher ratio of 1:16. (Dassau Aff. ¶ 22; Pet’rs’ Mot. Summ. J. 9.)<sup>22</sup> The Petitioners do not seek for the State to fund whatever number of teachers that school districts choose to have but rather ask that the State provide a constitutionally adequate education by using a costing method with an accurate teacher-student ratio. The Petitioners allege that RSA 198:40-a, II(a)’s base adequacy aid—as a product of Joint Committee’s chosen student-teacher ratio—results in a deprivation of the fundamental right to a State-funded adequate education. (2d Am. Pet. ¶ 58.) The Court agrees.

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<sup>22</sup> The Petitioners have not otherwise focused on their individual ratios but have pointed to DOE data the Petitioners have submitted. (2d Am. Pet. ¶ 53.) As stated above, the Court need not consider the DOE data to address this issue. See supra Part III.A.

In explaining its “Universal Cost Calculation,” or how it reached its figure for the base adequacy aid, the Joint Committee made a specific finding that “the student teacher ratio necessary to provide the opportunity for an adequate education in New Hampshire is 25 students to 1 teacher in kindergarten through grade two; and 30 students to 1 teacher in grades three through twelve.” (Final Report 14.) Its basis for this decision, the Final Report states, was that “the New Hampshire minimum standards for public school approval,” contained in Board of Education regulation Ed. 306.17(a), “reflect the student-teacher ratios that are adequate in the state.” (*Id.*)

Ed. 306.17(a) sets a ceiling for class sizes rather than a requirement of teachers employed and the figures it contains clearly do not set a required ratio or a school employment requirement. It states:

(a) Class size for instructional purposes, in each school shall be:

- (1) Kindergarten - grade 2, 25 students or fewer per educator, provided that each school shall strive to achieve the class size of 20 students or fewer per educator;
- (2) Grades 3 - 5, 30 students or fewer per educator, provided that each school shall strive to achieve the class size of 25 students or fewer per educator; and
- (3) Middle and senior high school, 30 students or fewer per educator.

(b) These class size requirements may be exceeded for study halls, band and chorus, and other types of large group instruction, including but not limited to, lectures, combined group instruction, and showing of educational television and films.

(c) In the interest of safety, the maximum number of students in laboratory classes in such areas as science and career and technical education shall be determined by the number of work stations and the size and design of the area. In no case shall the number of students in laboratory classes exceed 24.

Ed. 307.17 (emphasis added). The regulation provides the maximum number of students to one teacher, clearly suggesting that a school with such ratios will be functioning at the maximum capacity permitted for school approval. Indeed, Ed. 307.17(c) appears to prohibit a laboratory class size at the amount the Joint Committee costed and, effectively, incentivizes schools to have.

By calculating the universal cost with the ratio of 1 to 25 for kindergarten through grade 2 and 1 to 30 for grades 3 through 12, the Joint Committee must have assumed that all school districts will function at the maximum capacity—by choosing to calculate costs according to the classroom maximum capacity, the Joint Committee’s ratio effectively does not permit for a school to have any classroom with fewer students than the maximum. For example, a high school may have 300 students and a dozen classrooms with 25 students each. This would call for a dozen teachers, yet the Joint Committee has calculated that only 10 teachers are necessary. Also, Ed. 306.17(a)(1) prevents classrooms from having more than 30 students in a classroom, and if a school district decides to have fewer than 30 students in any class, it is prohibited from having another classroom with more than 30 to average its proportions and match the ratio that the Joint Committee selected.

Aside from the DOE data, the Petitioners have provided the Court with Winchester’s student-teacher ratio. Because the Petitioners challenge the Joint Committee’s funding as applied to them, they only need to demonstrate the Joint Committee’s calculation was flawed and that the petitioning districts received base adequacy aid according to this flawed calculation. As the Court has determined the Joint Committee’s selected ratio has computed aid for fewer teachers than the

Petitioners have, and the Court finds the Petitioners' showing sufficient. Therefore, RSA 198:40-a, II(a), as applied to the petitioning school districts, results in an actual deprivation of the fundamental right to a State-funded adequate education. This conclusion is sufficient to trigger strict scrutiny.

The Court finds that the State lacks a compelling government interest to support the Joint Committee's teacher-student ratio that was used in calculating the base adequacy aid in RSA 198:40-a, II(a). The Joint Committee failed to explain why a school should be expected to function at maximum capacity—and exactly at maximum capacity, rather than allowing for anything less—in providing an adequate education or why the regulation's ceiling provides an appropriate basis for determining costing. It is accepted that a school district may locally control its number of teachers and thus vary from the Joint Committee's projected ratio, yet the Joint Committee's selected teacher-student ratio does not provide for local control when it presumes all classrooms will function at exactly maximum capacity. Claremont II, 142 N.H. at 475 (“We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy.”); see infra Part IV.A.

Furthermore, the legislative history behind SB 539, which codified the Joint Committee's universal cost as the base adequacy aid, reveals the flawed ratio has been protested since its inception, yet the Legislature codified a school funding statutory scheme that entirely relied on the flawed ratio. There is no evident government interest in using a faulty ratio nor can the Court conjure one. See Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 782 (Md. 1983) (stating that heightened scrutiny in review of

school funding system “does not tolerate random speculation concerning possible justification for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose”).

It is possible that the base adequacy aid amount would remain the same if the Joint Committee used a more appropriate ratio for computing teacher salaries and benefits. However, a more appropriate figure is not before this Court. It has been demonstrated that the base adequacy aid contained in RSA 198:40-a, II(a) results in insufficient funding as applied to the Petitioners. See Londonderry School Dist. Sau #12, 2006 WL 6161061, at \*11 (“In order for the State to fulfill its duty to provide a constitutionally adequate education, the Legislature must, in addition to specifically and substantially defining an adequate education, provide a reasonable method to determine what an adequate education will cost.”). Also, there is no indication that the Joint Committee considered any other information concerning student-teacher ratios.

Though strict scrutiny is the appropriate level of review, the Court notes that there is no rational basis for the Joint Committee’s reliance on Ed. 306.17(a)(1) for selecting the ratios it did. Lilley, 204 A.3d at 205 (“Our rational basis test requires that legislation be rationally related to a legitimate government interest.”). The teacher-student ratio was based on a regulation that clearly limits classroom sizes and has no rational relationship to calculating the number of teachers school districts will have. A cap on classroom sizes, naturally, sets the absolute minimum number of teachers that a school would need to employ. There is no rational relationship between Ed. 306.17(a)(1) and selecting a teacher-student ratio with which to fund an adequate education. The faulty ratio alone is sufficient to find that RSA 198:40-a, II(a) is

unconstitutional. However, by way of further explanation, the Court addresses the Petitioners other highlighted flaws with the Final Report.

## 2. *Teacher Benefits*

In addition to the faulty student-teacher ratio that controls costing of teacher salaries and benefits, the Petitioners have challenged the Joint Committee's calculation of teacher benefits. (Pet'rs' Mot. Summ. J. 7–9.)

The Final Report determined that salary and benefit percentages should be used in calculating the base adequacy aid and elaborates on its rationale for selecting a base salary, stating, "The Committee determines that the cost of adequacy should be calculated using a teacher salary calculated at the state average for a teacher with a bachelor's degree and three years [sic] experience plus benefits at 33% of salary." (Final Report 19.) The Final Report states that, in assisting with the Joint Committee's determination of proper salary level and benefit percentages, the DOE prepared reports documenting the 2007–2008 schoolyear salary schedules utilized by public schools across the State, specifically "costs for personnel benefits, including the average rate for benefits as a percentage of teacher salary." (*Id.* at 18.) The Final Report does not elaborate on how it chose the 33% figure, but explains its selection of a base salary level of a teacher with three years' experience: "The Committee decided that a teacher with three years [sic] experience is the most appropriate salary to choose for costing purposes because after three years of experience a teacher completes a probationary period for employment purposes." (*Id.* at 19.)

The Petitioners' apparent concern with the 2008 Spreadsheet's costing of teacher benefits is the amount provided according to the Joint Committee's 33%

calculation rather than specifically the percentage.<sup>23</sup> (2d Am. Pet. ¶¶ 61, 70; Pet’rs’ Mot. Summ. J. 8–9.) They assert that base adequacy aid “does not provide for full benefit costs” and highlight four benefits that the school districts must provide: the New Hampshire Retirement System’s determined teacher retirement contribution, federal employment taxes, State-required workers compensation cover and unemployment insurance, and health and dental insurance. (2d Am. Pet. ¶¶ 59–70; Pet’rs’ Mot. Summ. J. 7.) The Petitioners have utilized the DOE website’s average teacher salary in calculating that these four benefits amount to \$27,000, an amount that exceeds the Joint Committee’s costing of \$11,728 in benefits. (*Id.* ¶¶ 62, 70.) The Petitioners have not provided information about their specific costs but rather use the DOE website’s average salary in calculating what the State is obligated to pay in teacher benefits. The Petitioners have also alleged that “[t]he portion of health and dental costs paid by the school district for a teacher will alone average in excess of \$17,000.00.” (*Id.* ¶ 68) And, ConVal Superintendent Saunders has attested that “[a]ctual teacher benefits exceed \$11,728 in every school district in the State.” (Saunders Aff. ¶ 48.) Thus, it is undisputed that each of the petitioning school districts is paying more than \$11,728 in teacher benefits.

The Court cannot find that the Joint Committee’s costing of teacher benefits is flawed according to the Petitioners’ allegations. While the Petitioners have illustrated a discrepancy between what the Joint Committee costed in teacher benefits and what the actual costs are, the relevant question is whether there is a discrepancy between what

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<sup>23</sup> The Court notes that the Petitioners incorrectly allege that the Joint Committee used a first-year teacher salary in calculating teacher benefits. (2d Am. Pet. ¶ 60; Pet’rs’ Mot. Summ. J. 7.) The Joint Committee specifically explained that it used a third-year teacher’s salary and why. (See Final Report 18.)

the State is obligated to provide and what is provided in the base adequacy aid.<sup>24</sup> The Joint Committee chose 33% as “the proper . . . benefit percentage[] to be used in calculating the universal cost for each position it determined should be included in the cost.” (Final Report 18–19.) It is not made clear from the evidence that the Joint Committee’s 33% calculation does not provide funds for those four benefits when using the appropriate teacher salary. It is thus unclear whether the base adequacy aid fails to sufficiently cost teacher benefits as the Legislature intended. Without more information about what the Legislature costed, the Court cannot discern whether it has failed to fulfill that intention and cannot find an actual deprivation of teacher benefits.

While the Petitioners may be paying more in teacher benefits than the Joint Committee calculated, it is not clear to this Court that the 2008 Spreadsheet failed to sufficiently cost teacher benefits. It may be that the Joint Committee used an inappropriate teacher salary in calculating the teacher benefits, in which case the flaw is the Joint Committee’s selection of a teacher salary. The Petitioners have not made that allegation.

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<sup>24</sup> The Court notes that there is support for using actual costs to determine whether an adequate education is being provided. The Washington Supreme Court heavily relied on the disparity between what the state was funding and what actual costs were in finding that the state’s school funding system was “broken.” McCleary v. State, 269 P.3d 227, 257–58 (Wash. 2012); see also Gannon v. State, 319 P.3d 1196, 1237 (Kan. 2014) (“[A]ctual costs remain a valid factor to be considered during application of our test for determining constitutional adequacy under Article 6.”). This Court does not entirely rely on the Petitioners’ evidence of actual costs for two reasons: First, this Court is capable of assessing the State’s failure to fulfill its obligation to fund an adequate education by comparing what the State has already determined it is obligated to fund and what it has costed and funded. And second, New Hampshire courts have yet to use actual costs as the bar for funding an adequate education. The Court notes, but does not adopt, the State’s argument that the State is not obligated to fund actual costs because of the principle of “local control.” If actual costs were the standard, the State impliedly argues, the State’s funding of an adequate education would be at the mercy of local school districts’ ministerial decisions rather than the constitutional obligation to provide an adequate education. The issue of local control and actual costs is addressed infra. Infra Part IV.A.



### 3. *Facilities Operation and Maintenance*

The Petitioners have challenged the Joint Committee's calculation of facilities operation and maintenance costs in its universal cost. The Joint Committee determined that the universal cost should include \$195 per pupil for facilities operation and maintenance, relying on Ed. 306.07(a)(1), which the Joint Committee found required schools to provide a "clean, healthy and safe learning environment . . . for students to have the opportunity for an adequate education as defined in RSA 193-E:2-a." (Final Report 23.) The Joint Committee stated that it received "the latest school district reporting forms" from the DOE and that "facilities operation and maintenance constitutes about 8% of the total school costs," which was \$195 per pupil. (*Id.*) The Final Report does not contain that DOE information, nor does it explain how, or how much of, the DOE's data on facilities operation and maintenance costs relate to the germane requirement of providing a "clean, healthy and safe learning environment." The Final Report states that it applied this percentage to "the projected universal costs as calculated through the Committee's other decisions" and arrived at \$195.<sup>25</sup> (*Id.*)

The Petitioners argue that the \$195-per-pupil figure is arbitrary and that the petitioning districts spend well above this amount: Monadnock plant operations cost approximately \$1,482.92 per pupil, and ConVal plant operations cost approximately \$1,406.81 per pupil. (Witte Aff. ¶ 19; Saunders Aff. ¶ 85.) The \$195-per-pupil figure "does not even cover the oil/gas bill in ConVal," which is approximately \$500,000. (Saunders Aff. ¶ 86; Pet'rs' Mot. Summ. J. 12.)

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<sup>25</sup> The Final Report does not explain why the 8% figure resulted in \$195 per pupil when the Joint Committee concluded that the universal cost, or base adequacy aid per pupil, was \$3,456, 8% of which is \$276.48.

As the Petitioners point out, “[w]hatever the State identifies as comprising constitutional adequacy it must pay for.” (Pet’rs’ Mot. Summ. J. 12 (quoting Londonderry (Claremont XII), 154 N.H. at 162).) The Joint Committee identified facilities operation and maintenance costs as a part of the definition of an “adequate education,” and the Petitioners have demonstrated that their actual costs considerably exceed the \$195 per pupil the Joint Committee costed. The Court acknowledges the State’s argument that comparing the Joint Committee’s costing to the Petitioners’ actual costs is not an equal comparison when school districts may have included costs outside of the State’s funding responsibility as the Joint Committee defined it. Yet, the Joint Committee did not delineate what portion of facilities operations and maintenance costs it intended to cost; it can only be inferred that the Joint Committee intended to provide “a reasonable and sufficient amount to include for facilities operation and maintenance.” (Final Report 23.) The large disparity between \$195 and all of the petitioning school districts’ actual costs is sufficient to demonstrate that the Petitioners have been actually deprived of a “reasonable and sufficient amount” to provide for facilities operation and maintenance. (Id.) Again, while the Court does not rely on actual costs as the standard for the Legislature’s funding, it is constitutionally suspect that the Joint Committee funded only \$195 per pupil when all of the petitioning school districts pay nearly tenfold that amount. The State has not refuted the Petitioners’ allegations of their costs nor alleged that they are outliers or unusual.

The Court also notes that the Joint Committee included a custodian in its universal cost based on Ed. 306.07(a)(1), which states: “The local school board shall: (a) Require that the facilities for each school provide the following: (1) Consistent with RSA

189:24, a clean, healthy, and safe learning environment for all areas of the school building, grounds, and school-related activities; . . . .” (Final Report 21; 2008 Spreadsheet). RSA 189:24 further states, “A standard school is one approved by the state board of education, and maintained . . . in a suitable and sanitary building . . . .” As the Petitioners have alleged, there is no explanation of why the Joint Committee’s intent to provide for a “clean, healthy and safe learning environment” did not include more accurate allocations for lights, heat, and snowplowing; why those items were not explicitly included in the definition; or whether those items were even considered as part of the definition. (2d. Am. Comp. ¶¶ 90–100.) Instead, the Joint Committee provided an 8% figure that is not a “reasonable and sufficient amount” for funding school districts’ facilities operations and maintenance costs. By receiving the base adequacy aid with this insufficient allocation for facilities operation and maintenance, the Petitioners have demonstrated they have been actually deprived of a fundamental right to an adequate education and strict scrutiny applies.

The Joint Committee’s arbitrary costing of facilities operation and maintenance costs fails scrutiny. Even though the Joint Committee may not have been obligated to cost the school districts’ cost down to the last dollar, the large disparity between the funding and the actual costs indicates the stark insufficiency of the 8% figure. The Final Report lacks explanation of what government interest is served by selecting that percentage. The Court cannot assume that the 8% figure is the product of vigorous Legislative contemplation that involved an undisclosed compelling interest, nor can the Court assume that RSA 198:40-a, II(a) is narrowly tailored to accomplish that undisclosed interest. It is only apparent that the Petitioners have substantially higher

facilities operation and maintenance costs than the 8% figure has allowed for, and that the Joint Committee provided no explanation for its costing. These circumstances require invalidation under strict scrutiny. Similarly, because the Court has no explanation for the 8% figure before it and rather has evidence of a significant gap in funds, the Court cannot find a rational basis to support the 8% figure. Thus, the percentage would also fail rational basis review.

#### 4. *Transportation*

The Petitioners have also challenged the Joint Committee's costing of transportation. While the Joint Committee expressly stated that transportation was not a part of the definition of an "adequate education," the Petitioners argue that, because the Joint Committee chose to fund transportation in its universal cost, the State is obligated to provide actual transportation costs and not just the average costs. (Pet'rs' Mot. Summ. J. 16.) In ConVal, per-pupil transportation costs are \$914.60. (Saunders Aff. ¶ 28.) In Winchester, transportation costs are \$962.73 per pupil. (Dassau Aff. ¶ 25.) In Monadnock, where high school students live substantially farther than two miles away from the high school they attend, it is \$1,040.29 per pupil. (Witte Aff. ¶ 11.) In Mascenic, transportation costs are \$619.81 per pupil. (Russel Aff. ¶ 12.) The Petitioners have also argued that the Joint Committee lacked a rational basis for its decision to fund transportation only for elementary and middle school students. (Pet'rs' Mot. Summ. J. 13.) The Joint Committee's universal cost included a transportation cost of \$315 per pupil. (Final Report 23; 2008 Spreadsheet.) The inquiry is whether the Joint Committee's inclusion of \$315 per pupil for transportation costs, as part of its costing of an adequate education, has resulted in an actual deprivation of the

Petitioners' fundamental right to a State-funded adequate education. The Court finds that it has.

In its Final Report, the Joint Committee “recognized that neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy.” (Final Report 23.) However, the Joint Committee also stated, “Nevertheless, the Committee determined that transportation to school for students who reside far from school is an important consideration for students to have the opportunity for an adequate education.” (*Id.*) The Joint Committee further noted that the principle that transportation costs were an important consideration was reflected in State law RSA 189:6,<sup>26</sup> which requires school districts to provide transportation to all pupils grades 1 through 8 who live more than two miles from the school to which they are assigned. (*Id.*) Thus, “[t]he Committee decided to include transportation costs in the universal cost calculation,” but noted that its calculation only included “the costs for elementary and middle school students as high school students are not entitled to transportation services” and that it “reduced the statewide total of transportation costs for those students by subtracting any costs not attributable to transporting students.” (*Id.*)

Because the Joint Committee included transportation in its costing but expressly stated that it was not part of the definition of an “adequate education,” it appears the Legislature’s intent was to not be held accountable for transportation costs as the State must fully fund what it determines is comprised in the definition. However, RSA 198:40-a, II(a) was codified with the Joint Committee’s universal cost, which included a

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<sup>26</sup> The Joint Committee mistakenly identified this statute as RSA 198:6 in its Final Report. (Final Report 23.)

transportation cost of \$315 per pupil. See RSA 198:40-a, II(a); (2008 Spreadsheet.) Even with the intention that transportation not become the State's responsibility, the Legislature chose to fund transportation within base adequacy aid. The Legislature codified the Joint Committee's universal cost in RSA 198:40-a, II(a) as the cost to an adequate education with no distinction in base adequacy aid without transportation costs for high school students. The Joint Committee's attempt to qualify transportation as merely "an important consideration for students to have the opportunity for an adequate education" rather than part of the definition of an "adequate education" does not change that RSA 198:40-a, II(a) provides funds to school districts for transportation. (2008 Spreadsheet); see RSA 198:40-a, II ("Cost of an Adequate Education"); SB 539, 173:1, IV ("The cost of the opportunity for an adequate education consists of several elements. All such elements must be provided in order to ensure the delivery of the state's constitutional duty. . . . The universal cost represents the costs attributable only to the subset of education that is included in the definition in RSA 193-E:2-a.").

RSA 198:40-a, II(a) does not distinguish between transportation costs for different grade levels, thus school districts are provided \$315 per pupil for their transportation costs including transportation for high school students. (2008 Spreadsheet); RSA 198:a, III ("The sum total calculated under paragraph II shall be the cost of an adequate education."). Thus, the statute represents the Legislature's funding for all school districts and students of all grades, and the Joint Committee explicitly costed transportation for all students at a dollar amount insufficient to provide transportation for all students. It is undisputed that the petitioning school districts receiving this base adequacy aid pay for transportation for students of all grade levels.

Therefore, the Joint Committee's decision to exclude the costs of transportation for high school students has resulted in an actual deprivation of a fundamental right and strict scrutiny is warranted.

RSA 198:40-a, II(a) fails strict scrutiny for the Joint Committee's untenable decision to provide transportation costs to all students except high school students. The Joint Committee's basis for its decision, according to the Final Report, consisted of the following: "In calculating the transportation amount to include, the Committee decided to use only the costs for elementary and middle school students as high school students are not entitled to transportation services." (Final Report 23.) The Joint Committee relied on RSA 189:6, which requires school districts to provide transportation to all pupils grades 1 through 8. The Petitioners assert that, "[i]f transportation is important for students to have the opportunity to obtain a guaranteed education, then that is true for students of all ages, not only the students designated in a pre-existing statute." (Pet'rs' Mot. Summ. J. 13.)

RSA 189:6 lacks any relevance to the State's constitutional obligation to provide an adequate education. Even if the Joint Committee intended to only provide for some transportation costs and not all, the Joint Committee's decision to exclude high school students does not comport with the constitutional duty to fund an adequate education. There is no apparent connection between RSA 189:6 and the State's constitutional obligation to provide an adequate education, and the Encouragement of Literature clause in the New Hampshire Constitution, as historically interpreted, does not distinguish between students of certain grade levels. N.H. Const. Pt. 2, Art. 83. While school districts are not required by statute to transport high school students, they are

required to provide education to those students. The State’s constitutional mandate has been to fund an adequate education for all students; the fact that high school students are not included in RSA 189:6 does not mean that high school students are not owed that constitutionally mandated opportunity to an adequate education. No other government interest, compelling or otherwise, has been provided in the Final Report to support the Joint Committee’s decision, and the Court will not assume one.

Furthermore, as stated, even if the Joint Committee intended to fund transportation costs only partially, its universal cost was codified in RSA 198:40-a, II(a) with no such distinction, effectively providing school districts base adequacy aid with diluted transportation costs that were to be used for all students’ transportation. There is no compelling government interest for this actual deprivation. Also, while RSA 189:6 provides an explanation for the Joint Committee’s decision, there is no explanation for why the Legislature would codify a “Cost of an Opportunity for an Adequate Education,” a fundamental right to all students, that includes transportation costs intentionally insufficient to provide transportation to high school students. There can be no rational basis for this decision, and the statute would even fail the lower scrutiny of rational basis review.

#### 5. *State-Required Services Not Included in 2008 Spreadsheet*

The Petitioners have also challenged RSA 198:40-a, II(a) and its failure to cost school nurses, superintendent services, and food services. (2d Am. Pet. ¶¶ 71–89.) The Petitioners argue these items are part of the definition of an “adequate education” because they are items required by Board of Education regulations Ed. 306, and that because the Legislature “incorporated DOE regulatory requirements in Part 306 into the



statutory definition of a constitutionally adequate education, the State must pay for all it requires of schools.” (Pet’rs’ Mot. Summ. J. 18–19.)

As explained in the Court’s analysis of the State’s Motion to Dismiss, the Joint Committee distinguished what it considered was part of the definition of an “adequate education” and expressly excluded certain items like school nurses and food services. Supra Part II.E.4.c. The Court determined above that the Joint Committee’s selection of specific Board of Education regulations and exclusion of others when costing an adequate education was often arbitrary or unexplained. Supra Part II.E.4.c & III.C. And, the Court found that even though it appeared that the entirety of Ed. 306 had been included or relied upon in establishing the definition of an “adequate education,” the Joint Committee had clearly not costed other items that Ed. 306 requires. It may be that the Legislature intended for everything in Ed. 306 to be costed by the Joint Committee, but the Joint Committee did not cost everything those regulations require. However, in deciphering whether an actual deprivation has occurred, the Court will not presume that the definition of an “adequate education” includes school nurses, superintendent services, and food services such that the Petitioners were obligated to cost those items. Such an analysis would require the Court to define what the fundamental right to an adequate education includes, a task reserved for the Legislature. See infra Part IV.B.

Therefore, the Court does not determine that the Petitioners have been deprived of a fundamental right by the exclusion of school nurses, superintendent services, and food services from RSA 198:40-a, II(a). Also, as the Petitioners have demonstrated deprivation from the previous “flaws” analyzed, it is not necessary to make that determination.

6. *RSA 198:40-a, II(a) Fails Strict Scrutiny*

For the above reasons, RSA 198:40-a, II,(a) must be invalidated. The Petitioners have demonstrated actual deprivations of the fundamental right to the opportunity to a State-funded adequate education, and the Joint Committee's Final Report fails to provide any compelling government interests for its allocations. The Court notes that much of the statute's failure is due to the lack of legislative record that, potentially, could have explained the Joint Committee's conclusions. However, some of the Joint Committee's decisions, most notably its teacher-student ratio, appear baseless and the products of arguably illogical and unsound conclusions and findings such that legislative support likely would not have changed Court's decision. As noted above, one possible explanation for the figure derived by the Joint Committee can be found in the coincidental similarity between the appropriation generated by the 2008 per pupil cost and the prior year's budget appropriation for school funding. See supra. n.16.

**D. SWEPT**

In addressing the Petitioners' Motion for Summary Judgment, the Court last addresses the SWEPT. As already explained above, the SWEPT results in disproportionate funds between school districts based on whether a school district is in a property-wealthy or property-poor area. Supra Part II.F. However, a tax's effect is separate from the tax itself. Article 5's concern with proportionality has clearly been limited to the tax itself, as it mandates that a tax be imposed proportionally. Supra Part II.F. Yet, in regard to the alleged disproportionate effect of the SWEPT, the Court notes that it is obvious that the disparity in school funds between property-wealthy and property-poor is concerning. See Londonderry (Claremont XII), 154 N.H. at 155. There

is a potential constitutional issue regarding whether the State is fulfilling its obligation to fund an adequate education when students throughout the State may be receiving drastically different qualities of education due to large differences in school funding. See Opinion of the Justices (School Funding), 142 N.H. at 901; Claremont II, 142 N.H. at 902 (invalidating tax scheme that imposed disproportionate taxes on school districts to fund adequate education). And, a viable constitutional question remains of whether the State has relied on local taxes to fulfill its obligation to provide an adequate education. As these questions chiefly rest on the base adequacy aid, the amount of which is now invalidated, the Court cannot address the SWEPT further. The Petitioners do not argue that the SWEPT itself results in the disproportionate school funds but rather it is the gap left over that concerns the Petitioners: property-poor towns only receive base adequacy aid to make up the gap between their collected SWEPT and what is required for an adequate education, while property-wealthy towns are permitted to keep their collected SWEPT even in excess of what is required for an adequate education. Because the Court has invalidated RSA 198:40-a, II(a), the thrust of the Petitioners' argument—the base adequacy aid amount contained in that statute—cannot be addressed at this time. In the Court's view, the Petitioner's arguments to invalidate the SWEPT are not ripe for adjudication because the baseline or starting point for determining any SWEPT "gap" has been invalidated.

#### IV. Relief

##### **A. RSA 198:40-a, II(a) is Invalidated**

The Court is aware that while the Petitioners sought for this Court to invalidate RSA 198:40-a, II(a), the Court does not provide the precise relief the Petitioners

requested. The Petitioners seemingly sought for this Court to replace the cost calculation in RSA 198:40-a,II(a) with its own cost calculation or instruct the Legislature on how to “cost” certain factors. The Court will not pick its own number. As has been echoed consistently in New Hampshire jurisprudence in the past, that determination is not for the Judiciary and is expressly reserved for the Legislature and the Executive Branch. Insofar as this Court’s decision extends into the Legislature’s prerogative, such intrusion is warranted. As repeatedly found above, the Joint Committee’s conclusions were not only unsupported by the legislative record but were clearly or demonstrably inadequate according to the Legislature’s own definition of an adequate education.

The majority of this Court’s conclusion pertains to the Legislature’s definition of an “adequate education” despite the Petitioners resistance to that inquiry. The parties’ conflicting explanations of the Legislature’s definition strongly suggested that the Legislature has repeated its failure in Londonderry (Claremont XII), in which the Supreme Court found RSA 193-E:2 was an inadequate definition of “adequate education.” 154 N.H. at 160. Many of the issues in Londonderry (Claremont XII) arose in this case, including the difficulty, or impossibility, “for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the State’s obligations to fund the cost of a constitutionally adequate education begin and end.” Id. at 161. While the State presented what it called an “objective[] and precise[]” definition of an “adequate education” that the Joint Committee adhered to, it is clear from the Final Report that the Joint Committee included items outside of the regulations to which the State cites. (State’s Mot. Dismiss 14.)

Nonetheless, the Court does not invalidate RSA 193-E:2-a on these facts. First, the Petitioners do not request it to. Second, it has not been clearly demonstrated that the “definition” of an “adequate education” in RSA 193-E:2-a is entirely unworkable. Indeed, in using this imprecise statute, the Legislature created an entity that further defined an “adequate education”—of course, this was the Joint Committee on costing, an entity that was likely delegated this task unintentionally. Yet, if the Legislature determines that RSA 193-E:2-a is a proper foundation and creates a committee, or other vehicle, to further and specifically define what goes into “adequate education” and then costs, the Court cannot at this stage say that would be improper. Importantly, this Court has not determined that the “definition” in RSA 193-E:2-a fails to provide an “adequate education” in its content; it is the automation, application and costing of that statute that has failed. A solution may be reliance on RSA 193-E:2-a while also codifying a more specific breakdown of base adequacy aid with clear formulas for each item and notation of whether each item falls into the definition of an “adequate education”—without an eye towards reaching a specific total appropriation amount. The Legislature is only bound by Claremont II’s four mandates and the Supreme Court precedent that has honed those mandates, and this Court upholds the tradition of preserving legislative control over how the State fulfills its constitutional obligation to provide an adequate education. Appropriately, it is the courts’ role in ensuring that responsibility is fulfilled. See Ct. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 224 (Conn. 2010) (“The judicial role is limited to deciding whether certain public educational systems, as presently constituted and funded, satisfy an articulated constitutional standard.”); Neeley, 176 S.W.3d at 785.

The Court also has not directly addressed the Petitioners' overarching argument that the State's failure to accurately and fully fund an adequate education burdens local school districts and forces them to raise local taxes. It is implied in that duty that local school districts may not be relied upon to provide the funds that are required to provide an adequate education. Claremont IX, 145 N.H. at 476 ("The State may not shift any of this constitutional responsibility to local communities as the proposed bill would do."). In other states, school districts have challenged inequitable taxes by juxtaposing the facilities and capabilities of property-poor school districts in providing an education with property-wealthy districts. See McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 552–54 (Mass. 1993); see also Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 143–46 (Tenn. 1993). However, here, the Petitioners have not demonstrated that, even with unequal local taxes throughout the State, students are receiving different qualities of education. The Court notes, however, that other states have determined that disparities in education funding between property-poor school and property-wealthy school districts require legislative attention when local taxes are relied upon to fulfill a constitutional obligation to provide an adequate education. See e.g., Gannon v. State, 420 P.3d 477, 493 (Kan. 2018); McDuffy, 615 N.E.2d at 553–54; DeRolph v. State, 728 N.E.2d 993, 999 (Ohio 2000) ("The valuation of local property has no connection whatsoever to the actual education needs of the locality, with the result that a system overreliant on local property taxes is by its very nature an arbitrary system that can never be totally thorough or efficient."); Neeley, 176 S.W.3d at 756 ("Compensation must be made for disparities in the amount of property value per student so that property owners in property-poor districts are not burdened with much heavier tax rates

than property owners in property-rich districts to generate substantially the same revenue per student for public education.”); Brigham v. State, 692 A.2d 384, 390 (Vt. 1997); id. at 396 (“Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere *fortuity* of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system.”).

There also remains the issue of whether “actual costs” have been ignored by the Legislature due to an inappropriate emphasis placed by the Legislature on the principle of retaining “local control,” resulting in unconstitutional underfunding. See San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (finding disparate funding for education in Texas schools was rationally related to “local control”). As repeated, it has not yet been established in New Hampshire that the Petitioners may seek full funding of actual costs. See supra Note 24. This Court does not address whether actual costs is the proper standard for the Legislature to consider in costing an adequate education, but notes the disparate funding that has been highlighted in this litigation cannot be excused by the principle of “local control.” See supra Note 24. Local control has been revered and protected in much of this State’s school funding jurisprudence, and the Legislature is applauded for recognizing that school districts are uniquely situated such that complete or actual funding could, in theory, wrest them of that control. Nonetheless, it is clear from the Supreme Court’s mandate that the Legislature must fully fund what it defines as an “adequate education,” and it is essential that the Legislature respect local control in its definition of an “adequate education” and

not through selective costing of an adequate education. See Claremont II, 142 N.H. at 475 (“We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy.”). The principle of local control is not fulfilled when the State’s funding results in local school districts being coerced into using their locally raised funds to fulfill obligations of the State, a scenario that removes the discretion protected by “local control.”

Notably, the Vermont Supreme Court found that disparities in property-poor versus property-wealthy school districts resulting from an equal statewide education tax, even in the absence of an allegation that property-poor districts did not provide a baseline constitutionally required education, failed rational basis review. Brigham, 692 A.2d at 390. In recognizing the value of local control, the Vermont Supreme Court stated: “[I]nsofar as ‘local control’ means the ability to decide that more money should be devoted to the education of children within a district, we have seen . . . that for poorer districts ‘such fiscal freewill is a cruel illusion.’” Id. (quoting Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971)); see also Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 154–56 (Tenn. 1993) (“If a county has a relatively low total assessed value of property and very little business activity, that county has, in effect, a stone wall beyond which it cannot go in attempting to fund its educational system regardless of its needs. In those cases, local control is truly a ‘cruel illusion’ for those officials and citizens who are concerned about the education of the county’s school children.”).

The Court further notes that there are two possible issues with the Legislature’s reliance on the Board of Education regulations. The first is expressed in Londonderry



(Claremont XII), in which the Supreme Court determined that, if the State is going to rely on Ed. 306 in its entirety to illustrate what components go into an “adequate education,” every requirement from the regulations would need to be entirely State-funded. 154 N.H. at 162–63. Or, alternatively, if the State argues that Ed. 306 contains more than what composes an “adequate education,” then the State has still failed to sufficiently and specifically define which regulations within Ed. 306 compose an adequate education. Secondly, the Court questions the wisdom in relying on the Board of Education regulations, either all or only some, for the Legislature’s constitutional obligation to define an adequate education. As demonstrated in the legislative process that created RSA198:40-a, II(a), the Board of Education regulations are not lists of cost items but rather guidelines and principles designed to regulate and better school conditions. It is beyond dispute that the role of the Department of Education is distinct from the Legislature, and while collaboration is productive and should be encouraged, it is inappropriate to assume that the Board of Education creates its regulations according to a constitutional mandate to provide a State-funded adequate education. See Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (“[B]ecause many of the [Board of] Regents’ and Commissioner[ of Education]’s standards exceed notions of a minimally adequate or sound basic education—some are also aspirational—prudence should govern utilization of the Regents’ standards as benchmarks of educational adequacy.”). The Court notes that Massachusetts’ Supreme Judicial Court’s review of its General Court’s reliance on its Board of Education:

[I]t is generally within the domain of the “legislatures and magistrates” to determine how they will fulfil their duty under Part II, C. 5, § 2. In fulfilment of their duty, they may, as they have done, assign some responsibilities for education to the local communities of the Commonwealth. At all times,

however, the ultimate responsibility for educating the public belongs to the ‘legislatures and magistrates.’ If the mandate of the Constitution is not met, or if a statutory structure which worked at one time no longer works, the responsibility for the failure to educate falls squarely on the Commonwealth, specifically the “legislatures and magistrates.” They may delegate, but they may not abdicate, their constitutional duty.

McDuffy, 615 N.E.2d at 550 (finding a constitutional duty to provide an education as per the Commonwealth’s Constitution). The Board of Education is not responsible for funding an education or for making determinations about what specific items compose the New Hampshire resident students’ right to an opportunity for an adequate education, nor should it be.

## **B. Injunctive Relief**

In regard to injunctive relief, the Court does not grant the Petitioners’ request to bar the State from violating Article 5. As stated, the Court cannot reach the Article 5 issue because the SWEPT is proportional and the crux of the Petitioners’ Article 5 argument is RSA 198:40-a, II(a), a statute this Order invalidates. Therefore, whether the SWEPT has an unconstitutional effect as a product of that statute is a question not ripe for adjudication at this point.

Also, this Court does not grant the Petitioners’ request for injunctive relief in the form of ordering Commissioner Edelblut and Governor Sununu to draw funds from the Education Trust Fund. (2d Am. Pet. ¶¶ 159–61.) The Petitioners do not have valid grounds to seek the amount that they request. In calculating their requested amount, the Petitioners take the 2008 Spreadsheet and input DOE data to calculate what they assert the base adequacy aid should be. (2d Am. Pet. ¶ 104; *id.*, Ex. I.) Regardless of the DOE data’s relevance or validity, this request relies on RSA 198:40-a, II(a) and the 2008 Spreadsheet, both of which represented the Legislature’s selection of specific

items that compose an “adequate education”; neither is valid as per this Order. In RSA 198:40-a, II(a)’s absence, the remaining definition of an “adequate education” comes from RSA 193-E:2-a, a statute the Court has already determined does not specify what items go into an “adequate education.” Indeed, the Legislature was unable to use solely RSA 193-E:2-a to determine what defines an adequate education, as demonstrated by its need to rely on the Joint Committee to further define an “adequate education.” Even if the statute remained valid, the 2008 Spreadsheet upon which the Petitioners rely in their calculation has been discredited; the 2008 Spreadsheet’s “flaws” were the primary reasons for RSA 198:40-a, II(a)’s invalidation. To rely on the 2008 Spreadsheet’s cost items now would be improper.

Furthermore, as the Court stated in regard to the Petitioners’ arguments of what ought to have been included in the 2008 Spreadsheet, supra Part III.C.5, it is the Legislature’s role to define an “adequate education.” Not only do the Petitioners rely on the now-invalidated and highly questionable costing contained in the 2008 Spreadsheet and Final Report, but they also seek funds for items expressly not part of the definition of an “adequate education.” (Pet’rs’ Mot. Summ. J., Ex. I.) If the Court granted the Petitioners’ request, the Court would effectively be defining an “adequate education” and infringing on a role reserved for the Legislature. This is clearly improper. As has been established in Claremont II and consistently adhered to, the Judiciary will not usurp the Legislature’s role in defining an adequate education:

[W]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government and why we did so in the unanimous opinion of this court in Claremont I.

Claremont II, 142 N.H. at 475; see also Londonderry (Claremont XII), 154 N.H. at 156 (“Since the inception of the education cases in 1993, we have consistently deferred to the legislature’s prerogative to define a constitutionally adequate education.”); Claremont XI, 147 N.H. at 518; Claremont IX, 145 N.H. at 477 (“[T]he content of a constitutionally adequate education must be defined, in the first instance, by the legislature.”); Claremont I, 138 N.H. at 192 (“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.”); N.H. Const. Pt. 1, Art. XXXVII.

### **C. Attorney’s Fees**

The Petitioners have also requested attorney’s fees. (2d Am. Pet. 25.) The State has not responded to this request, and the Petitioners have not elaborated on the merit of shifting their fees to the State. However, the Supreme Court has previously awarded attorney’s fees as per the substantial benefit theory. See Claremont Sch. Dist. v. Governor (Costs and Attorney’s Fees) (Claremont VIII), 144 N.H. 590, 595–99 (1999). “An award of attorney’s fees to the prevailing party where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well, has been recognized as an exception to the American rule that each party must bear its own attorney’s fees.” Id. at 595. This theory permits cost shifting not to penalize the State “but rather to compensate the plaintiff towns for their efforts on behalf of the public.” Id. Thus, the award does not turn on the defendants’ good or bad faith. Id. (quoting Silva v. Botsch, 121 N.H. 1041, 1044 (1981)).

School funding cases such as this “combine two significant rights specifically protected by the State Constitution and of primary concern to New Hampshire citizens;

namely, education and taxation.” Id. at 596. In Claremont VIII, the Supreme Court recognized that the plaintiffs had initiated an action that resulted in establishing that Article 83 imposed a duty on the State to provide a constitutionally adequate education, to guarantee its adequate funding, and that the property tax then levied was disproportionate and unreasonable in violation of Article 5. Id. In bringing suit, the plaintiffs had “contributed to the vindication of important constitutional rights” and, “[i]n doing so, they have conferred a significant benefit upon the general public, and it is thus the general public that would have had to pay the fees incurred if the general public had brought the suit.” Id.

Here, the Petitioners have similarly sought to enforce an important constitutional right and, in the process, have established that the State’s constitutional mandate to provide an adequate education extends to its costing of an adequate education. See supra Part II.E. By doing so, the Petitioners have established this fundamental right to “all members of the public.” Claremont VII, 144 N.H. at 598.

While the Supreme Court noted in Claremont VIII that it did not opine that “attorney’s fees are recoverable for litigation related to these proceedings,” the Court does not find this case distinguishable from Claremont VIII such that the Petitioners’ relief is not also a benefit to the public. Id. at 598. As in Claremont VIII, the Petitioners contributed to the recognition and enforcement of a “significant right[] specifically protected by the New Hampshire Constitution and primary concern to New Hampshire citizens”: education. Id. at 596. Therefore, the Petitioners’ request for attorney’s fees is GRANTED.

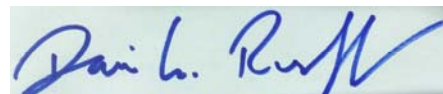
Petitioners are given 30 days to submit an affidavit of fees for the Court to review.

V. Conclusion

The Court does not take this decision lightly and recognizes its significant implications. As the Supreme Court has recognized, the Joint Committee's efforts are laudable and exceptional examples of how a legislature ought to automate and protect its citizens' rights. However, the same principle that lauds the Joint Committee members and their dedication to public education also requires more from the Legislature. As every court decision on the matter has recognized, school funding is no small task, and the burden on the Legislature is great. Yet, as every court decision has similarly recognized, the Legislature is the proper governmental body to complete it. As has been the result in the past, the Court expects the Legislature to respond thoughtfully and enthusiastically to funding public education according to its constitutional obligation.

SO ORDERED.

June 5, 2019



David W. Ruoff  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 06/05/2019

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

CHESHIRE, SS.

SUPERIOR COURT

Contoocook Valley School District  
Winchester School District,  
Mascenic School District,  
Monadnock School District,  
Myron Steere III, Richard Cahoon,  
and Richard Dunning<sup>1</sup>

v.

State of New Hampshire, New Hampshire Department of Education,  
Christopher T. Sununu, Individually and as Governor, and  
Frank Edelblut, Individually and as Commissioner<sup>2</sup>

No. 213-2019-CV-00069

**ORDER ON PETITIONERS' MOTION TO RECONSIDER**

The Petitioners originally brought suit to enjoin the State from underfunding education in their districts and sought for this Court to declare the system of education funding unconstitutional. In its June 5 Order, this Court found RSA 198:40-a, II(a), the provision containing the State's calculation of base adequacy aid, was unconstitutional as applied to the Petitioners.<sup>3</sup> Specifically, the Court determined that the State's calculation of what goes into the base adequacy aid was severely flawed, resulting in unconstitutional underfunding to the petitioning districts according to what the Legislature determined composes a constitutionally adequate education.

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<sup>1</sup> Collectively referred to as "the Petitioners."

<sup>2</sup> Collectively referred to as "the State."

<sup>3</sup> Contoocook Valley Sch. Dist., et al. v. State of New Hampshire, et al., Cheshire Cty. Super. Ct., No. 213-2019-CV-00069 (June 5, 2019) (Ruoff, J.) ("June 5 Order").

The Petitioners now seek for this Court to reconsider four portions of its June 5 Order. First, the Petitioners assert that the Court erred in not reaching the Petitioners' argument that transportation cannot be provided to school districts on a state-average basis. (Pet'rs' Mot. Recons. 2–5.) Second, the Petitioners request the Court reconsider whether the State's allocation of teacher benefits under RSA 198:40-a, II(a) resulted in an actual deprivation. (Id. at 5–6.) Third, the Petitioners request the Court to reconsider its determination that a facial challenge to RSA 198:40-a, II(a) failed. (Id. at 6–7.) And last, the Petitioners assert that the Court erred in dismissing Governor Sununu and Commissioner Edelblut in their individual capacities from the suit. (Id. at 8–10.) The State has objected to the Petitioners' motion. The Court addresses each argument in turn.

"A motion for reconsideration allows a party to present points of law or facts that the Court has overlooked or misapprehended." Barrows v. Boles, 141 N.H. 382, 397 (1996) (quotation omitted); Super. Ct. R. 12(e). "Whether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court." Lillie-Putz Trust v. Downeast Energy Corp., 160 N.H. 716, 726 (2010).

#### I. Transportation

In its June 5 Order, the Court determined that RSA 198:40-a, II(a) was unconstitutional for several reasons, one of which was the State's explicit provision of transportation funding for students in elementary and middle school but not high school students. (June 5 Order 75–79.) By calculating \$315 in transportation costs per pupil, the amount intended for transporting non-high school students, and then dispensing that amount to school districts with no distinction, the Legislature explicitly and intentionally



distributed insufficient funding for an item it intended to be funded as part of “the opportunity to an adequate education” for every student. (Id.); see RSA 198:40-a (provision including base adequacy aid with \$315 amount and titled “Cost of an Opportunity for an Adequate Education”).

The Petitioners seek for this Court to reconsider its decision because “the Court does not appear to have reached the Petitioners’ argument that transportation cannot be provided to the school districts on a state average basis.” (Pet’rs’ Mot. Recons. 2.) The Petitioners have repeatedly juxtaposed the transportation costs in New Hampshire school districts and the unique distances each district must cover in transporting students; there is “over a 600% difference” in transportation costs between Contoocook Valley (“ConVal”) and Manchester school districts. (Id. at 2–3.)

As noted in the June 5 Order, the Legislature appeared to recognize transportation as a vital part of the opportunity to an adequate education yet took pains to exclude transportation from the definition of an “adequate education”; an attempt, the Court postulated, “to not be held accountable for transportation costs as the State must fully fund what it determines is comprised in the definition.” (June 5 Order 77.) The Court reviewed RSA 198:40-a, II(a)’s provision of transportation funding because transportation was undisputedly included in the base adequacy aid and the Court sought to review whether “the alleged flaws in the Joint Committee’s costing resulted in funding that falls short of what the Legislature has defined as an adequate education.” (Id. at 63.)

As the Court has already declared the underfunding of transportation in RSA 198:40-a, II(a) and its supporting calculation contained in the 2008 Spreadsheet

unconstitutional, the Petitioners seek for the Court to declare the statute “even more” unconstitutional. Or, more succinctly, the Petitioners request for the Court to elaborate on how the Legislature should fund transportation as part of an adequate education and to state that the New Hampshire Constitution requires tailored transportation funding to each school district.

The Court cannot address transportation funding as the Petitioners have framed it for several reasons. First, the Court does not have a system of funding before it to review that includes the scheme the Petitioners propose; the now-invalidated funding in RSA 198:40-a, II(a) was disseminated on a per-pupil basis, which inherently does not include the tailored funding that the Petitioners seek. The Court’s review compared the Legislature’s costing with what it had itself determined it must fund. The Petitioners’ current request seeks for this Court to go beyond the scope of that review; the Petitioners’ request the Court to affirmatively define how transportation should be funded rather than to address whether the Legislature sufficiently costed what it determined composed an adequate education. The Petitioners therefore ask the Court to deem transportation a special consideration that requires a costing and funding scheme beyond one that the Legislature created or this Court has reviewed. For the reasons expressed in the June 5 Order, this Court is prohibited from instructing the Legislature on what is included in an adequate education or how funding must be calculated—beyond, of course, the repeated and clear obligation on the Legislature that what is included in the definition of an “adequate education” must actually be funded. (June 5 Order 83–91.) The Court’s scope of review has been limited by principles of separation of powers and deference to the Legislature, established in the litany of

preceding school funding cases, in defining an “adequate education.” (June 5 Order 83–91.) The Court has not, and will not, expand that scope now to begin instructing the Legislature how to fund education.

Second, while the Petitioners have illustrated that transportation costs vary per school district, those variations were not the cause of RSA 198:40-a, II(a)’s failure. Indeed, even with varying transportation costs in different school districts, it is not beyond question that the Legislature may fund transportation at a uniform, per-pupil rate that is so high that it would satisfy the transportation costs in a district with even the most expensive transportation costs. In such a case, transportation would be sufficiently (and overly) funded in every school district even without consideration of varying costs between them. In other words, the primary flaw of RSA 198:40-a, II(a)’s transportation funding was not its indiscriminate funding to school districts with varying transportation costs but rather its failure to accurately cost transportation, an issue that made the base adequacy aid insufficient for all school districts. The Court therefore did not reach the issue the Petitioners now highlight nor did it need to.

However, the Court repeats the longstanding constitutional obligation that the Legislature must fully fund what it determines goes into an “adequate education.” Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII), 154 N.H. 153, 162 (2006) (“Whatever the State identifies as comprising constitutional adequacy it must pay for.”). While there is merit to the Petitioners’ argument that the State should fund transportation in consideration of each school district’s unique transportation costs, and the Legislature would obviously be wise to fund more accurately rather than excessively, the Petitioners have failed to show that a per-pupil costing scheme would fail in all

instances such that the Court must mandate a new scheme. That is to say, the Court will not instruct the Legislature on how to fund transportation; only that, if the Legislature determines transportation is part of the constitutional, fundamental right to the opportunity to an adequate education, it must cost and fully fund it for every student in the State in a way that withstands strict scrutiny review. And, as determined in the Court's June 5 Order, the Legislature may not sidestep this obligation by intentionally under-costing transportation. (June 5 Order 77.)

## II. Teacher Benefits

In its June 5 Order, this Court found that it could not determine that RSA 198:40-a, II(a) failed to sufficiently cost teacher benefits because it was not evident that the Joint Committee intended to cover the specific expenses the Petitioners highlighted. (June 5 Order 71.) And, again, the Court's review was limited to determining whether the Legislature had sufficiently funded what the Legislature had determined went into an "adequate education." Because it was not clear whether the Legislature had intended to cost teacher benefits in contemplation of the specific required benefits the Petitioners' highlighted, the Court could not determine if the costing was insufficient.

Now, the Petitioners have asserted that the Court may grasp RSA 198:40-a, II(a)'s insufficiency by using the Joint Committee's proposed teacher salary, calculating the cost of teacher benefits according to the four required benefits, and comparing it with the Joint Committee's costing of the total of teacher benefits. (Pet'rs' Mot. Recons. 5–6.) In their motion, the Petitioners demonstrate that when calculating the cost of retirement contributions, federal employment taxes, and workers compensation and unemployment coverage according to the \$35,539 salary the Joint Committee used,

only \$2,533.33 remains for health insurance. (Id.) This amount “is demonstrably inadequate,” the Petitioners state, because “actual costs of health and dental insurance average more than \$16,000 per year in ConVal.” (Id. at 6.)

The Court emphasized in its June 5 Order that it was not fully relying on the discrepancies between RSA 198:40-a, II(a)’s funding and actual costs. (June 5 Order 71, n.22.) Rather, the question with teacher benefits was whether the Legislature had set out to cost teacher benefits and then failed to sufficiently cost them. As stated, because the Legislature did not explain what it intended to include within “teacher benefits,” the Court could not compare its intentions with what it costed or the Petitioners’ actual costs for teacher benefits. While the Petitioners presented specific required benefits, the Joint Committee only used a blanket cost item of “teacher benefits” in the 2008 Spreadsheet. The Petitioners’ motion with additional arithmetic unfortunately does not remedy the Final Report’s opaqueness. The Court’s inability to apprehend the Legislature’s intent was not for want of clearer math but rather for explanation of the Legislature’s intent to cost and fund teacher benefits. The Court’s June 5 Order made clear that the Joint Committee’s Final Report woefully lacked explanation, and its portion on teacher benefits was no different. Because it is unclear whether the Legislature included the benefits the Petitioners have highlighted in the definition of an adequate education throughout, the Court cannot determine that the Joint Committee was obligated to cost and fund them.

The Petitioners’ request in its motion to reconsider seeks for the Court to address teacher benefits more fully so as to establish the Legislature’s obligation to cost and fund teacher benefits with at least the four required benefits they have highlighted. As

repeated, the Court is prevented from defining an “adequate education” more specifically than the Legislature has. It is well-established that the Court cannot instruct the Legislature on how to define an “adequate education,” thus it is beyond this Court’s purview to say that the Joint Committee must have or is required to include the specific benefits the Petitioners have listed.

As repeatedly demonstrated throughout the Court’s June 5 Order, the Court held the Legislature accountable to its own definition of an “adequate education”; but as its intent in regard to teacher benefits is unclear, the Court cannot fill that vacuity with its own definition of what is included in teacher benefits as the Petitioners’ request would require. And, though the Petitioners have demonstrated that they are providing teacher benefits in amounts beyond the Joint Committee’s costing, the Court cannot rely on the petitioning districts’ costs as evidence that the Joint Committee intended to include them. Indeed, according to the Petitioners’ calculations and argument, it would appear impossible that the Joint Committee considered those benefits or costed base adequacy aid to cover them. If the Court were to rely on that discrepancy as evidence that the Joint Committee did not intend to cost those benefits, then the Court could not hold the Legislature accountable for failing to do so, the opposite of what the Petitioners seek.

It is clearly within the Legislature’s purview to define what composes an “adequate education,” and if it did not consider these benefits to be part of that definition, the Court will not mandate that they are. Therefore, the Court’s determination in its June 5 Order remains.

### III. Facial Challenge to RSA 198:40-a, II(a)

The Petitioners next disagree with the Court's holding that their facial challenge to RSA 198:40-a, II(a) could not stand. The Petitioners argue that the Court should have found the statute facially unconstitutional because of its recognition that "[t]he parties agree that not a single school in the State of New Hampshire could or does function at \$3,562.71 per student" as provided in the base adequacy aid. (Pet'rs' Mot. Recons. 6; June 5 Order 1.) The Petitioners also challenge the Court's determination that a facial challenge may not consider extrinsic evidence on a facial challenge, citing to "precedent demonstrating the opposite is true." (Pet'rs' Mot. Recons. 6.) "In some circumstances, challengers must refer to extrinsic evidence to meet that burden." (Id.) The State has responded that the fact the Petitioners focus on, that no New Hampshire school district can provide an adequate education on the amount of base adequacy aid contained in RSA 198:40-a, II(a), was not assented to but could not be contested because there was no opportunity for discovery. (State's Obj. Mot. Recons. ¶¶ 26, 28–29.)

A facial challenge is "a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." State v. Lilley, 171 N.H. 766, 204 A.3d 198, 205 (2019). Meanwhile, "an as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." Id.

In addressing this issue in the June 5 Order, the Court had stated that the Petitioner's "facial challenge fails because the statute does not deprive the Petitioners of a fundamental right on its face," and the Court also noted that "[i]t is possible that a

challenge to RSA 198:40-a,II(a), as currently written, could only be sustained, or exist, as an ‘as applied’ challenge because it involves the costing process that underlies it. In other words, the statute can only be interpreted in the context of how it is applied to the school districts.” (June 5 Order 64, 66, n.21.) Upon reconsideration, the Court has not determined otherwise, but elaborates on the special circumstances of the Petitioners’ challenge that prevents a strictly facial analysis.

RSA 198:40-a, II(a) contains the dollar amount of the base adequacy aid, determined by the Joint Committee, that was to be distributed on a per-pupil basis. As found in the June 5 Order, that dollar amount was derived from severely flawed calculations, inappropriate discretion by the Joint Committee, and unacceptable opaqueness in the legislative fact-finding. It was for those reasons that the Court invalidated RSA 198:40-a, II(a); not because the Petitioners had specifically demonstrated what the Legislature should have costed, but by demonstrating that what the Legislature did cost was unconstitutionally flawed. Then, RSA 198:40-a, II(a) was invalidated because, the Court found, that flawed dollar amount was applied to the Petitioners, *de facto* resulting in an actual deprivation. Importantly, it 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 Petitioners’ assertion now, that no school district in the state could function on that amount, has no bearing on that decision. Again, RSA 198:40-a, II(a) was invalidated not solely because it resulted in a constitutional deprivation when applied to the Petitioners but because it was flawed at its core. In that way, the Court agrees:



RSA 198:40-a, II(a), as it stood, could not have been found constitutional in its application to any school district. However, that alone does not form or necessitate a facial challenge as traditionally understood. As demonstrated in the June 5 Order, the base adequacy aid is indeed insufficient in every New Hampshire school district, but it is insufficient because of the flaws in its calculations, not the language on its face. The Court's invalidation of the statute was not based 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. Having determined that the number was flawed to the extent that any application of it to a school district results in a deprivation, the Court invalidated RSA 198:40-a, II(a) through an as-applied analysis.

RSA 198:40-a, II(a) is a unique statute, more likened to a price tag than an explicit restriction on a fundamental right. Standing alone, RSA 198:40-a, II(a) solely reveals that school districts are being funded at a certain amount. Nothing in the statute states an intention to underfund, nor does its language reveal the Joint Committee's missteps. There is nothing facially unconstitutional about the figure provided; it is only after review of what the dollar amount comprises, the Joint Committee's findings, and the Legislature's unmet constitutional charge is its insufficiency revealed. Therefore, even if it is uncontested that the amount provided in RSA 198:40-a, II(a) is insufficient to provide an adequate education in any of New Hampshire school districts, that fact alone does not form a facial challenge. Because of the unique nature of RSA 198:40-a, II(a),

a facial challenge does not seamlessly apply; an as-applied challenge, as demonstrated in the June 5 Order, sufficed.

The Petitioners' challenge is the first of its kind in that the Legislature's costing and codified base adequacy aid has not been challenged before. Even with a litany of school funding cases, it is not clear whether a facial challenge would be appropriate for a statute like RSA 198:40-a, II(a). See Londonderry Sch. Dist. SAU No. 12 v. State, 154 N.H. 153, 162 (2006) (disagreeing with Justice Groff that House Bill 616 was facially unconstitutional for failing to contain a definition of constitutional adequacy but staying trial court's findings and retaining jurisdiction); Claremont Sch. Dist. v. Governor (Claremont XI), 147 N.H. 499, 514 (2002) (finding RSA 193:E-2, combined with minimum standards set by Department of Education ("DOE"), were "facially insufficient" because DOE standards excused compliance with certain standards and thus the State had not met its mandate of accountability in school funding); Claremont Sch. Dist. v. Governor (Claremont V) (Extension of Deadlines), 143 N.H. 154, 160 (1998) ("Because the State concedes that it has not completed its efforts to define and implement a constitutionally adequate education as required by Claremont II, we decline the present invitation to determine whether the definition adopted is facially unconstitutional."); City of Nashua v. State, No. 05-E-0257, 2006 WL 563314, at \*15 (N.H. Super. Mar. 8, 2006) (declining to rule on the City of Nashua's as-applied challenge to House Bill 616 because the State had yet to determine the cost of an adequate education).<sup>4</sup> And,

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<sup>4</sup> Though the Petitioners have pointed to several cases that allegedly show a facial challenge may consider extrinsic evidence, the Court does not agree with that characterization. (See Pet'rs' Mot. Recons. 6–7 (citing State v. Addison, 165 N.H. 381, 567–68 (2013) and State v. Hunt, 155 N.H. 465, 473 (2007))). In Addison, the Supreme Court explicitly did not include extrinsic evidence in its analysis. 165 N.H. at 567. And, in Hunt, the Supreme Court acknowledged the challengers' extrinsic evidence but determined it was irrelevant to the

given the uniqueness of RSA 198:40-a, II(a), the Court determined that the appropriate analysis was 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. For this reason, the Court could not sustain a strictly facial challenge.

Therefore, the Court does not change its original determination in the June 5 Order that a facial challenge cannot stand but elaborates on the unique circumstances of this case and RSA 198:40-a, II(a).

#### IV. Governor Sununu's and Commissioner Edelblut's Individual Capacities

The Petitioners next challenge the Court's determination that Governor Sununu and Commissioner Edelblut may be dismissed in their individual capacities. (Pet'rs' Mot. Recons. 8–10.) In its June 5 Order, the Court dismissed them in their individual capacities because the relief the Petitioners sought clearly concerned their official capacities and not individual. (June 5 Order 19–21.) The Petitioners have argued that the Court's analysis was flawed because Ex parte Young does not apply in state court and because they alleged an ongoing violation of state law that may be redressed by prospective injunctive relief against the two individuals. (Pet'rs' Mot. Recons. 8–10.) The State disagrees and characterizes the Petitioners' sought relief as one that “sounds in mandamus (forcing a public official to perform a ministerial obligation on a prospective basis).” (State's Obj. Mot. Recons. 10.)

First, the Court need not reconsider whether Ex parte Young applies because the Petitioners have assented that they only seek prospective injunctive relief, something

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constitutional challenge. 155 N.H. at 473. In any event, as the Court has not and will not apply a strictly facial challenge to RSA 198:40-a, II(a), the issue is irrelevant.

that is not barred by Ex parte Young. (June 5 Order (“Under the Ex parte Young doctrine, a suit against a state official in his official seeking prospective equitable relief is permitted . . . .” (citing Frazier v. Simmons, 254 F.3d 1247, 1253 (10th Cir. 2001); Ex parte Young, 209 U.S. 123 (1908)); Frazier, 254 F.3d at 1253 (“[T]he Ex parte Young doctrine enables a plaintiff to circumvent the Eleventh Amendment. Under this doctrine, a suit against a state official in his official capacity seeking prospective equitable relief is permitted, while a suit requesting retroactive relief is considered to be a suit against the state.” (citations omitted))). Thus, even if Ex parte Young applied, the Petitioners’ sought relief would not be barred.

Second, the Court disagrees with the Petitioners’ assertion that alleging that Governor Sununu and Commissioner Edelblut “are in the process of breaching their duty for fiscal year 2019, and . . . they will breach their duty in fiscal year 2020” concerns their individual capacities. The Petitioners seek for both individuals to be compelled by this Court to “act in accordance with the Constitution.” (Pet’rs’ Mot. Recons. 8.) This logically cannot be granted by ordering injunctive relief from Governor Sununu’s or Commissioner Edelblut’s individual capacity; it can only come from their official capacities. Indeed, ordering Governor Sununu, in his individual capacity, to provide school districts with the constitutionally mandated “adequate education” would be futile; his involvement with school funding whatsoever is in his official capacity as governor. Therefore, the Court agrees with the State that the Petitioners’ request amounts to a mandamus, an order pertaining solely to one’s official capacity. See Marbury v. Madison, 5 U.S. 137, 169 (1803) (defining a writ of mandamus as a writ “directed to an officer of government, and its mandate to him would be, to use the words

of [Justice] Blackstone, ‘to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice” (emphasis added)); In re City of Fall River, Mass., 470 F.3d 30, 32 (1st Cir. 2006) (“Among [a mandamus] ordinary preconditions are that the agency or official have acted (or failed to act) in disregard of a clear legal duty and that there be no adequate conventional means for review.”); *Mandamus*, Black’s Law Dictionary (11th ed. 2019) (“The modern writ of mandamus may be defined as a command . . . directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.” (emphasis added)). Because the relief the Petitioners seek could only be granted by ordering Governor Sununu and Commissioner Edelblut to act in their official capacities, that relief must be characterized as such. Governor Sununu and Commissioner Edelblut, in their individual capacities, were therefore properly dismissed.

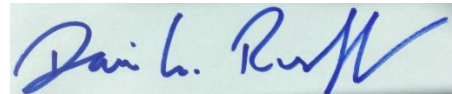
Additionally, the Court notes that Petitioners’ request is amorphous; they seek for this Court to compel both individuals to act according to the Constitution, but it has been emphasized that the Constitution only puts obligations upon the Legislature to define, cost, fund, and account for an “adequate education.” The extent to which Governor Sununu and Commissioner Edelblut are involved in providing that constitutional mandate has yet to be determined because this Court has invalidated RSA 198:40-a, II(a), which contained the Joint Committee’s costing and the Legislature’s allocation for school funding, as well as called into question the Legislature’s definition of an “adequate education.” Because it is the Legislature’s constitutional responsibility to

create and animate a school funding system, Governor Sununu's and Commissioner Edelblut's individual capacities are not implicated. The composition of an "adequate education" and the logistics of providing it to New Hampshire school districts have been reset, thus the Court is unable to order Governor Sununu and Commissioner Edelblut to act in any specific way.

Therefore, subject to the clarifications and explanations above, the Motion is DENIED.

SO ORDERED.

July 26, 2019



David W. Ruoff  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 07/29/2019