THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Evelyn Sirrell, et al.

v.

State of New Hampshire, et al.

99-E-0692

ORDER

The petitioners are property owners from three different New Hampshire municipalities seeking equitable relief from the statewide education property tax. They filed this Petition for a Declaratory Judgment and for Injunctive Relief requesting that this Court declare the tax unconstitutional, enjoin the State from collecting and distributing this tax, and order the reimbursement of tax dollars already paid and collected under this taxation scheme.

I.BACKGROUND

This dispute arose from the legislature's adoption of House Bill 999 ("HB 999"), an act establishing a uniform statewide education property tax to fund a constitutionally adequate public education. At the time of filing this petition, HB 999 was the most recent legislative response to the ongoing Claremont litigation, which requires that the State provide all children with a constitutionally adequate public education and guarantee adequate funding for that education. See Claremont School Dist. v. Governor, 138 N.H. 183, 184 (1993) ("Claremont I") (holding that part I, article 83 of New Hampshire Constitution mandates a state funded, constitutionally adequate public education).

In 1997, the Supreme Court found that the existing system of school funding in New Hampshire, through disparate local property tax rates varying across towns at percentages up to 400%, violated part II, article 5 of the New Hampshire Constitution. Claremont School Dist. v. Governor, 142 N.H. 462, 465 (1997) ("Claremont II"). The Court found that it was the duty of the legislature and of the Governor to define what is a constitutionally adequate education, to determine the cost of that education, and to implement legislation to fund that education. See id. at 475-477.

The Court cautioned:

> to the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate.

Id. at 471.

The Court then stayed further proceedings in the litigation to allow the legislature time to enact a constitutional school funding program. See id. at 476.

On November 3, 1999, the legislature enacted HB 999. HB 999 is an interim statewide property tax, devoted to funding an adequate education, and it is scheduled to expire in 2003. HB 999 establishes the funding formula as

a uniform rate tax of $6.60 per $1,000.00 of the equalized value of all taxable property in the State. See RSA 76:3 (Supp. 2000). The legislature also established comprehensive procedures for the Department of Revenue Administration's ("DRA") regulation of HB 999.

Because the administrative procedures for the equalization process are complex, the DRA published an informational brochure for each town in the State, to explain to all taxpayers exactly how the property tax rate in their town was calculated and assessed under HB 999. See State Exhibit K (Example of a representative town brochure explaining the state education property tax rate for the Town of Moultonboro). The brochure explains that:

> Property taxes are based on the local assessed valuation of all taxable property within the town, as of April 1 of each year. . .
>
> However, when dealing with property values statewide, these varying local assessment levels between towns create an imbalance. This imbalance between towns must be adjusted in order for a statewide property tax to be proportional. The process to accomplish this is called equalization.
>
> Each year the state [DRA] equalizes the property values for every city and town. Equalization is an adjustment of each town's local assessed values, either upward or downward, in order to approximate the full value of the town's property. Adjustments are not made to any individual properties. Rather, the total value of all property in town is adjusted based upon the comparison of recent property sales with local property assessments. For example, if the comparison of recent sales indicates that on the average, the town is assessing property at 90% of market value, then the total local assessed value of the town would be increased by 10% in order to approximate the town's full value. If the comparison indicates that on the average, the town is assessing at 105% of market value, then the total local assessed value would be decreased by 5%.
>
> The purpose for equalizing local assessed property values is to provide a "level playing field". Once property values have been equalized, public taxes and state revenues shared by towns and cities may be fairly apportioned among them. This includes state education property taxes and the county taxes.

State Exhibit K, Explanation of the State Education Property Tax Rate for Moultonboro.

The State then determines the statewide cost of providing an adequate education on a per pupil basis. For the tax year 1999, this amount was calculated to be $4,200 per pupil. The petitioners do not challenge these calculations in this lawsuit.

The amount of education funds to be raised by the HB 999 property tax was calculated to be approximately $440 million, which was then assessed among the towns according to their proportion of the total statewide equalized value of property. For example, the brochure for the Town of Moultonboro explains:

> The statewide cost of providing an adequate education is $825 million, just over half of which is funded by the statewide property tax. The other portion is provided from other state revenue sources such as sweepstakes revenue and business taxes.
>
> Moultonboro is responsible for raising an amount equal to $6.60 per $1,000 of the town's total equalized valuation. This amount represents the town's share of the statewide cost of providing an adequate education. Moultonboro's share of the statewide property tax is $6.60 x $1,054,987,032 (Total Equalized Value)/ $1,000 =$6,962,914.

> However, in order for the town to raise this amount, the rate must be restated. This is due to the fact that property taxes are billed based upon the local assessed value of property, not the equalized value.

State Exhibit K, Explanation of the State Education Property Tax Rate For Moultonboro.

The State education property tax necessary for Moultonboro to raise $6,962,914 is $7.14 per $1,000 of Moultonboro's locally assessed property value. This number is derived from the percentage difference between its locally assessed value and the DRA's equalized value of Moultonboro's town property. The local assessed value of property in Moultonboro is $975,250,914, while the equalized value is $1,054,987,032. The percentage difference between these values is an increase of 8% after equalization. Accordingly, the equalization process requires that the uniform tax rate of $6.60 per $1,000 of equalized value of property also be increased by 8%, which results in a tax rate of $7.14 billed on the locally assessed value of property in Moultonboro. This higher tax rate, on the lower assessed property value, will generate the same amount of education property tax as the calculation outlined in State Exhibit K.

The DRA calculates two figures that it reports to each town. The first figure is the total amount of the statewide tax to be raised by each town based on its property value, and the second figure is the total amount of adequate education funds that each town requires to educate its pupils, based on the number of pupils within its borders.

The towns that raise funds exceeding the calculated amount in the DRA's second reported figure ("Donor Towns"), must transfer these excess funds to the State. These funds are placed in an Education Trust Fund with the other revenue sources listed above, and ultimately are redistributed to those towns that have insufficient property values to raise their own adequate education funds as calculated by the DRA ("Receiver Towns").

The petitioners each live in Donor Towns and raise three constitutional challenges to HB 999 as it is applied statewide.

First, they contend that the DRA's property valuation and tax assessment procedures are so flawed that the property tax is not "equal in valuation and uniform in rate", nor does it result in "proportional and reasonable" taxation as mandated by Claremont II and part II, article 5 of the New Hampshire Constitution.

Second, the petitioners contend that the State's failure to perform statewide property revaluations every five years is a direct violation of part II, article 6 of the New Hampshire Constitution and that this failure to constitutionally revalue all property results in disproportional property valuations for tax assessment purposes.

Finally, the petitioners contend that the DRA's redistribution of their tax dollars to the receiver towns, without some form of oversight as to where the funds are spent, denies them the equal protection guaranteed by part I, article 12 of the New Hampshire Constitution. The petitioners specifically argue that they, and all taxpayers in donor towns, are being treated differently from taxpayers in receiver towns because there is no opportunity to vote on how their tax dollars are being spent, while the receiver town taxpayers are voting to use these education funds to reduce their own local taxes. Further, the petitioners contend that the State has no procedures to govern the redistribution of their tax dollars, to assure them that the education funds are being used solely to fund an adequate education in the receiver towns. See Opinion of the Justices, 145 N.H. ___ (decided December 7, 2000).

The petitioners concede that HB 999 establishes a constitutionally "uniform rate" tax. However, they contend that as applied the tax is fundamentally unfair and unconstitutional. The Court notes that legislative enactments are given a presumption of validity. However, legislative enactments still must comply with constitutional requirements both facially and as applied.

Part II, Article 5 of the New Hampshire Constitution grants the legislature:

> full power and authority . . . to impose and levy proportional and reasonable assessments, rates, and taxes upon all inhabitants of, and residents within, the said state;

> and upon all estates within the same . . .

Part II, Article 6 of the New Hampshire Constitution further provides that:

> The public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property . . . and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.

Finally, part I, article 12 governs the reciprocity of equal protection and taxation, and stated simply requires that all similarly situated taxpayers be treated the same. Stated literally the provision requires strict proportionality of each taxpayer's portion of the public expense, "according to the amount of his taxable estate." Smith v. Department of Revenue Administration, 141 N.H. 681, 686 (1997) (quoting Opinion of the Justices, 4 N.H. 565, 568 (1829)).

These three constitutional provisions must be interpreted together to determine the fairness of any taxation scheme enacted by the legislature, and these are the provisions at issue in this case.

II.EVIDENCE

This petition is the first challenge to HB 999 under these constitutional provisions and the Court held a six day trial on its merits. The evidence presented at trial focused on the DRA's administration of HB 999 and its effects on both the towns and the taxpayers of New Hampshire. From the testimony, exhibits and memoranda submitted at trial the Court finds the following facts.

The petitioners had the burden at trial of proving that the statewide property tax is unconstitutional, and they presented evidence regarding both the DRA's procedural administration of the tax and an expert analysis of the New Hampshire property tax procedural system.

The petitioners first called Linda Kennedy, who is the Deputy Director for the Property Appraisal Division of the DRA, to testify about the DRA's administration of HB 999. Ms. Kennedy is in charge of both the equalization processes and the ratio studies that the DRA performs annually within the State to administer the property tax. She has been employed with the DRA since approximately 1991, she has an associate's degree from Plymouth State College, and she instructs local assessing officials about property appraisals and the equalization process. Ms. Kennedy extensively testified at trial about her duties, and about the DRA procedures for its equalization process and ratio studies.

Ms. Kennedy testified that the purpose of the equalization process is to achieve equity in property values across all of the towns within the State. The DRA's focus is only to achieve equity across towns and not across individual taxpayers. She testified that historically, the DRA performed assessments of properties across the state. However, state expansion, market changes, and new legislation have taken the DRA away from performing assessments and placed it in a more administrative capacity over the individual municipalities. She explained that both the State and its legislation have expanded so much that the DRA now lacks the resources to perform statewide property assessments. Ms. Kennedy stated that while she provides courses and information to municipalities about the property appraisal process, the municipalities conduct their own property valuations within their borders, and submit these total valuations to the DRA.

Ms. Kennedy testified that she significantly relies on the values reported to her by each municipal assessing official. She stated that the DRA does not have the resources to perform audits of each municipality, just as they do not have the resources to perform the individual assessments. Consequently, she must rely on the information provided by each town. She stated that each town submits a DRA form MS-1 that lists the total value of its town properties, the changes to its town properties, any exemptions and credits claimed, as well as its town utilities.

The towns obtain their data through several different methods. Ms. Kennedy explained that some towns perform full revaluations and physical inspections of the properties within their borders, some towns perform partial

revaluations by physically inspecting certain classes of properties, some towns perform annual updates by taking the property assessments from the previous year and adjusting them by the inflation rate and the sales that have occurred within those towns, and some towns perform "annual pick-ups", which involve taking the previous year's assessment and adding and subtracting value based on the information reported to them by the property owners. All of these methods, however different, are considered acceptable by the DRA because the DRA does not have one set method of valuation for the towns to apply.

After receipt of the town valuations, Ms. Kennedy testified that she conducts a ratio study, which is the basis of her equalization process. A ratio study involves a comparison of the locally assessed values of property submitted by the municipalities, to the sales prices of all properties sold in the past year in each municipality. The properties used in the ratio study are only those that consist of land, buildings, and manufactured housing, and do not include current use or utility property because these properties are not subject to the education property tax. She further noted that to conduct a meaningful ratio study she requires both a valid assessed property value and a valid sales price for each property used.

She admitted that without both a valid property assessment and a valid sales price, the study is flawed.

Ms. Kennedy testified that the DRA contracts with Real Data Corporation ("RDC") to obtain the sales information of all properties sold within the State in the past year. RDC annually collects this information from the Registries of Deeds in each county. The DRA also receives sales information from their DRA Form PA-34, which is supposed to be submitted to the DRA by each buyer of real property in the State, within thirty days of purchase and of filing their deed. However, because this form is relatively new, the submission rates have not been consistent, but they have been increasing annually.

After Ms. Kennedy receives all sales data and all locally assessed property valuations, she performs a sales screening process to determine what sales should be included in the ratio study. She stated that only "arms-length" sales can be included in the study, and defined this term as those sales that involve a knowledgeable buyer, a knowledgeable seller, an exposure to market forces and a valid form of consideration. She testified that these sales would primarily include traditional real property sales through a real estate broker. Ms. Kennedy stated that use of arms-length sales is the only way to arrive at an accurate assessment of fair market value within a town.

Ms. Kennedy testified that she will exclude all sales that she determines are not arms-length transactions from the ratio study. However, the DRA does not have any set procedures for exclusions of sales, so this determination is completely within her discretion. She errs on the side of excluding sales if they seemed to be over or under fair market value for any reason. She listed numerous types of sales that she considers are rarely good indicators of fair market value. Specifically, she generally excludes all family sales, trust sales, town sales, current use sales, multi-parcel sales, corporate sales, commercial sales, utility sales, lease sales, private sales, out-of-state sales, re-sales, as well as any other sales that she determines are not indicative of fair market value.

Ms. Kennedy stated that she further excludes "outlier" sales, which she defined as those sales that are significantly above or below their locally assessed property value, that do not fall within one of the regularly excluded categories. She gave an example to describe what she considers an "outlier". She stated that a sale of a property that is locally assessed at $4,800.00 but is sold for $18,000.00 would be considered an outlier, because it would have an extreme sales ratio. She stated that because she would not be able to explain why the values would be so different for this hypothetical property, she would exclude it from the study under an assumption that it could not accurately reflect the fair market value of that property.

Ms. Kennedy stated that all of her statistical calculations assume that the data that she receives from all sources is accurate.

After screening all of the sales for each town to determine which sales should be included in her study, Ms. Kennedy must find the reported locally assessed property value for each sale. These two values are then used to establish an individual ratio for each property used in the study. The individual ratios are calculated by dividing

the locally assessed value of a property by its reported sales price. Ms. Kennedy then determines the one ratio that she will use to equalize all of the property values in each town.

Ms. Kennedy stated that she uses several different calculated ratios for New Hampshire municipalities, depending on the municipality's composition and its properties sold. She sometimes uses the mean ratio for the town, which is the average of all property ratios in the study, that she sometimes uses the median ratio for the town, which is the middle property ratio in the study, that she sometimes uses the aggregate ratio which is the town's total assessed property value divided by its total sales prices, and that she sometimes will use a weighted mean ratio, which gives effect to how often certain property sales ratios arise in the study. Ms. Kennedy confirmed that her choice of ratio for each town will affect its total equalized property value and the total tax assessed. However, she did not confirm what ratio she actually applied to each of the 259 towns in the State. Ms. Kennedy unequivocally stated that the choice of ratio used is wholly within her discretion because the DRA does not have any set ratio, formula, or procedures for her to use in this aspect of the equalization process.

The final statistical calculation that Ms. Kennedy performs is a Coefficient of Dispersion ("COD") for each town. The DRA defines the COD as the average percentage deviation of property assessments within a town from the median property ratio in that town.[1] See Joint Exhibit 4. She stated that the DRA considers any COD less than 20 to be an acceptable range of property values, because the majority of New Hampshire towns are rural residential areas and the COD is determined by the composition of the town. See Exhibit 8. However, the Court notes that the DRA considers any town with a COD over 16 to have a borderline to unacceptable equity of property values. See Exhibit 13.

Under the DRA's definition of COD, a COD of 20 would mean that a 40% differential in property assessment values would exist in a town, by the average property in that town being potentially assessed between 20% above and 20% below the median ratio. For example, if the median ratio in a town is 1/1 for a property assessed at $100,000, the other property assessments for all properties in that town that are actually worth $100,000, would range from $80,000 to $120,000. In contrast, Ms. Kennedy explained that a COD of 20 would indicate to her, that 20% of properties within a town are assessed above the median ratio and 20% are assessed below the median ratio for that town.

After all of her statistical analysis is complete, Ms. Kennedy submits the data to the Municipal Services Division of the DRA who then calculates the actual tax rates and issues the tax warrants to each town. Ms. Kennedy testified that she additionally drafts a summary of her ratio studies and equalization surveys to give to the Commissioner of Revenue Administration. See Exhibits 9-12.

These summaries basically inform the Commissioner about the results of each statistical calculation that she performed and about the overall equity of property valuation across the towns in the State. The summaries indicate that there are 259 cities, towns and municipalities in New Hampshire, and that 26 towns are unincorporated, essentially having little or no taxable property, so they are not included in her studies. Out of the 233 remaining towns, at least 71 have not performed any form of revaluation since 1994. See Exhibit 4.

The summaries for tax years 1996-1998 each additionally inform the Commissioner how the State is complying with the property valuation requirement in part II, article 6 of the New Hampshire Constitution, which requires a five year valuation of estates. See Exhibits 9-11. However, the summary for tax year 1999, which was prepared after this lawsuit began, does not include any reference to this constitutional requirement. See Exhibit 12. Upon questioning by the petitioners' counsel, Ms. Kennedy testified that this constitutional reference was specifically omitted from the 1999 equalization survey upon the advice and recommendation of DRA counsel.

The summaries further demonstrate that for the tax year 1997-1998, 124 out of 233 towns had borderline to unacceptable CODs over 16. See Exhibits 11-12. This equals 47.8% of the towns in the State. See id. In tax year 1998-1999, 107 out of 235 towns had borderline to unacceptable CODs. See Exhibit 12. This equals 41.3% of the towns in the State. See id. Therefore, for the tax years in question, under the DRA definitions almost half of the towns in the State had unacceptable ratios for equity of property values.

Ms. Kennedy reported that the DRA does not use confidence intervals or any form of reliability indicators to confirm any of their calculated statistics, just as the DRA does not verify any of the locally assessed property values that are used in the calculations, or have any set procedures for including or excluding sales data. There is no set sample size required for her ratio study, and sometimes she will use random samples of properties in a town. The DRA is presently attempting to update all of its technology, resources, and procedures, so that the statistics can become more accurate and reliable.

Ms. Kennedy's testimony indicated that the DRA has been using some form of equalization process since the 1970's and that this process does a fairly accurate job of equalizing the property values across the towns in this State. However, it is clear that none of her statistical analysis equalizes the individual property values of taxpayers across the State, nor was the equalization process ever intended to do so. Her testimony also established that the DRA has no set procedures or standards for her to use in these ratio studies or in the equalization process. Finally, Ms. Kennedy testified that the ratio that she uses will affect the equalized valuation, which in turn will affect the tax assessed on each taxpayer.

The Court finds that Ms. Kennedy's testimony confirms the petitioners' contention that there can be little confidence in the reliability of the statistical studies on which the DRA relies to support the constitutionality of HB 999. First, no verification or validation occurs for any of the sales data or for any of the property assessments on which the studies are based. The entire process of equalization is based on multiple levels of inconsistent procedures and formulas, which as applied to individual taxpayers in the State, do not allow for an equal valuation of properties across the State.

The property assessments are based on unconfirmed values, which are established through inconsistent procedures and then reported by each town. If any town has an interest in adjusting the values of its properties to achieve a better tax rate, the system without set procedures is easily manipulated. Additionally, each town uses its own method of determining its property values. Moreover, the sample sizes used in the sales analysis are very limited, with many exclusions, and with no set procedures or verification process for exclusion of sales. So many sales are excluded from the study, that these samples give very little indication of what percentage of town property is actually being used in the equalization process, or how indicative the samples are of the fair market value of property in any town across the State. In fact, the evidence presented demonstrates that some town's ratios were calculated from studies based on as few as two property values. Finally, the statistical results and CODs for each town show that almost half of the towns in the State are not either equitably assessed or accurately valued.

The petitioners also presented Laura Thibodeau, who is the City Assessor for the City of Keene, to testify about Keene's local procedures for property valuation and tax assessment. The petitioners specifically chose the assessor for the City of Keene, because of all 259 cities, towns, and unincorporated municipalities in this State, Keene has not performed a full revaluation of its local property since 1971. It has been thirty years since its last property valuation, yet Keene has maintained relatively consistent property ratios and COD's through using its own equalization process and ratio study. Moreover, Keene is one of the largest cities in New Hampshire. Therefore, if its property tax valuation is inequitable, procedural errors can not be lightly dismissed.

Ms. Thibodeau explained that Keene realized that its system was extremely outdated and it hired a property assessment consultant, John Ryan, to evaluate and update its property appraisal system. See Pet'rs Exhibit 45. Ms. Thibodeau reported that Mr. Ryan opined that approximately 15% of the taxable property in the City was never taxed because revaluations were not performed. See id. He recommended a full revaluation, implementation of a computerized mass appraisal ("CAMA") system, and standardization of assessment procedures, to more fairly distribute the tax burden in the City. See id. Mr. Ryan informed her that even if the CODs were consistent, that would not guarantee an equitable or uniform distribution of the tax burden within a town. He explained that this form of assessments means that some citizens are paying more than their fair share and some citizens are paying less, while some property is not being assessed at all. This is the reason why trending, or updating, can never be an adequate substitute for revaluations of property within any taxing district.

The State called the Commissioner of Revenue Administration, Stanley Arnold, to testify about the DRA's equalization policies and procedures. The Commissioner stated that the equalization process achieves reasonable

proportionality across towns in this State and that this is all that the Constitution requires. He admits that under HB 999 the taxing district is the State, however, he stated that having towns with poor CODs does not affect individual taxpayers in other towns, because bad CODs only arise in smaller towns with much lower property values.

Commissioner Arnold related that all towns in the State receive the DRA's equalization survey, and if they are not happy with the process, values, or calculations contained in the survey, they can appeal its results to the Bureau of Tax and Land Appeals ("BTLA"). According to the testimony of the Deputy Commissioner of Revenue Administration, neither taxpayers nor towns may appeal the equalized valuations of any other towns, or of any other town's taxpayers. However, the Commissioner testified that he is convinced the tax system is working because there are very few town-wide appeals to the BTLA. Commissioner Arnold acknowledged that eleven donor towns did bring appeals to the BTLA prior to this lawsuit, but that these appeals were withdrawn because the DRA agreed to proceed to this trial, rather than defend numerous appeals in addition to this lawsuit.

Commissioner Arnold acknowledged that Ms. Kennedy also has an extreme amount of discretion in the equalization process, but, he explained that as long as she has a rational basis for the ratios or the values that she uses in the studies, the results will be equitable. He agreed that there may be properties being over and under-assessed across the State, however, he maintained that this problem arises in any property tax system and that the improperly assessed property values will essentially cancel each other out statewide. Further, the Commissioner explained that the State of New Hampshire does not have the time, the resources, nor the money to perform individual assessments statewide.

The Commissioner stated that a statewide tax would be impossible to maintain in New Hampshire if full revaluations of property were constitutionally required every five years as suggested by the petitioners, and especially if the complete responsibility for its administration remained with the State. He explained that the legislature extensively debated all of these issues prior to adopting HB 999, and it concluded that it would not re-work the entire New Hampshire property taxation system. He testified that the legislature determined that HB 999 should use the equalization process that was already in place, because it would be much less expensive and much easier to implement statewide.

The State next called the Assistant Commissioner of Revenue Administration, Barbara Reid, who is also the Director of the Municipal Services Division of the DRA, to testify about how the education adequacy funds work, how the uniform tax rate is assessed, and how the tax warrants are issued.

Ms. Reid explained that the education adequacy funds include the total raised from the education property tax, the education adequacy grants, and all other general revenue appropriated to fund education. For the 2000 tax year, a total of $825 million dollars was appropriated to fund an adequate education in New Hampshire. Of this amount, $442 million dollars are raised through the education property tax established in HB 999 and $383 million dollars are raised through other revenue sources including the state lottery. Of the $442 million dollars raised through the property tax, $418 million dollars are distributed to the school districts of the towns where the money is collected, to fund their adequate education amount.

She testified that only the remaining $24 million dollars are placed in the Education Trust Fund with the $383 million dollars from the other sources. It is this fund that distributes the education adequacy grants to the receiver towns. The adequacy grants are distributed to those towns with insufficient property values to raise the adequate education amount per pupil for the number of pupils within their borders.

Ms. Reid stated that there are many statutes and administrative procedures for each town to follow to receive these grants and that it would be extremely difficult for a town to misuse the funds that they receive. If the DRA has any reason to believe that a town may be misappropriating its education grant, the DRA has the power to audit its school district and school budget each school year. See RSA 21-J:34 (2000). Ms. Reid stated that all school district officials are also subject to removal for misappropriation, and the adequacy grants are subject to revocation if the DRA or the Town feels that the appropriation is improper or is being misused.

Ms. Reid also elaborated on the Commissioner's explanation for why the DRA feels that disparate tax assessments within towns are not a problem under HB 999. Ms. Reid stated that the disparities should only arise within an individual town and that each taxpayer within that town has the right to petition for an abatement or to appeal to the BTLA. She stated that the DRA monitors these private remedies, and uses them as a form of negative assurance that the taxes are being equitably assessed across taxpayers within individual towns. She concluded that because there are very few petitions for abatements and very few appeals to the BTLA, no negative data is generated and the DRA receives a negative assurance that the system is working fairly. The Court notes that abatement procedures for taxpayers can be intimidating and therefore, the Court questions this assurance relied on by the DRA. Ms. Reid opined that in contrast, a positive assurance would occur if the DRA received some form of affirmative data that the tax was working fairly. However, she could not confirm whether the DRA has ever received any positive data from any town in response to HB 999.

Ms. Reid stated that inequities may arise under this system, but only between taxpayers. Therefore, she feels that the equalized property tax works fairly across all of the towns in the State. She stated for an example, that the taxpayers in Portsmouth should not care how property is being assessed in Keene, as long as they feel that they are being properly assessed in Portsmouth. She stated that if Portsmouth taxpayers are being properly assessed by the City of Portsmouth, then they are paying their fair share of the education property tax and they are not having their constitutional rights violated. Ms. Reid agrees with the petitioners that there is no remedy for an aggrieved Portsmouth taxpayer to challenge the property assessments or taxes paid by Keene taxpayers, but she feels that it does not matter as long as they are paying their own fair share of the property tax in the town where their property is located.

The Court notes that all members of the DRA personnel at this trial testified that the taxing district for HB 999 is the State and that the New Hampshire Constitution requires equal and proportional valuations across this taxing district. However, all of their testimony demonstrates the recurring fallacy underlying HB 999, that the New Hampshire Constitution only requires equality and proportionality across the towns within the State and not across all individual taxpayers. The Court additionally notes that this lack of legal remedy for individual taxpayers is important, because if one town in the State is inaccurately assessed, or fails to assess 15% of its taxable property, the entire town is not paying its fair share of this statewide tax and this will affect the amount of statewide tax assessed by the DRA to all other taxpayers and towns throughout the State.

The only witness called by either side to testify about the actual appropriation of education funds to the school districts, was the recently retired Commissioner of Education, Elizabeth Twomey. Ms. Twomey testified that the State of New Hampshire does not keep any specific documentation regarding how each school district uses its education funds, because school districts have always maintained local control of their budgets. See RSA 198:42 (2000). She stated that the Department of Education can not and will not direct school districts how to budget their education grants. Each district votes on its own budget, which is then approved by the voters of each town in the district.

Ms. Twomey recounted that in April 2000, the Department of Education did attempt to survey all of the school districts in the State, to determine exactly how their education adequacy funds were being spent and how their budgets had changed in recent years. The Department of Education planned to send the results of the survey to the Governor to assist her Blue Ribbon Commission in determining proper education funding for each district, adequate education needs in each district, and exactly what is an adequate education for all school districts in the State. However, she stated that both the surveys and their responses had numerous problems, and that their results were so ambiguous that they were never used nor ever submitted to the Governor.

Ms. Twomey stated that the surveys were very poorly worded and resulted in ambiguous, unintelligible, and unreliable responses. She stated that the Department of Education also did not use any validation procedures to determine who, in each school district, answered the questions on the surveys. Ms. Twomey stated that the surveys specifically asked how each school district is using its adequacy funds, whether the school district was comprised of donor or receiver towns, whether the school district publicly votes on its budget, how its funds were used for the 1999-2000 school year and how they would be used in the 2000-2001 school year.

She stated that many school districts did not respond to any questions if they answered that they were comprised of donor towns, that many towns answered that they used the funds for various educational expenses, and that many towns answered that they used the funds for local tax relief. Ms. Twomey further explained that none of the surveys were signed, some surveys had miscellaneous annotations and underlining, some surveys had question marks written in, and some surveys even corrected her construction of the sentences. She stated that she determined that the results were useless and she never submitted the surveys to anyone.

Ms. Twomey noted a common misconception among taxpayers and the general public in the State, that education adequacy funds only are distributed to receiver towns, when these funds actually are distributed to all school districts and, as explained by Ms. Reid, all school districts vote on how their own funds are used. Between the DRA's powers of appropriations and the statutory procedures for municipal control of school district budgets, she believes that sufficient procedures exist to ensure that the HB 999 funds go solely to the school districts.

Both the petitioners and the State also presented numerous expert witnesses in the fields of property appraisal, tax assessment, equalization, and statistical studies both to challenge and to defend the New Hampshire taxation system and HB 999. While these experts disagreed on several points, they did agree on the most major premises of their analyses.

All of the expert witnesses agreed that New Hampshire is the most property tax reliant State in the nation, with one of the most antiquated and handicapped taxation systems. All of the experts also agreed that New Hampshire and the DRA need to implement standard procedures for towns and DRA employees, perform audits of towns within the State to validate data, and calculate confidence and reliability indicators for all of their statistics used. All of the experts also indicated that the equalization process is aimed at establishing equity between towns, but is not focused nor directed to establishing equity between taxpayers. Finally, all of the experts agree that full revaluations of property are required at least every six years, and preferably every five years as required by the New Hampshire Constitution, to maintain any sense of uniformity and accuracy in property tax assessment system.

The petitioners hired the property tax consulting firm of Almy, Gloudemans, Jacobs & Denne ("A&G") to specifically review the DRA's ratio study and equalization procedures that Ms. Kennedy recounted at this trial. A&G performed this study and drafted a report of their findings entitled: Review of Sales Processing for the DRA Equalization Study: Being Consistently Inconsistent. At trial, the petitioners called David Gaskell, Richard Almy, and Robert Gloudemans to testify about this study and about their findings.

David Gaskell is the former Director of Equalization for the State of New York, a certified tax assessor, and was hired by A&G to perform a field study on the DRA data. Mr. Gaskell hired field collectors to go from town to town to collect information, then he performed an analysis on the information they collected to find procedural patterns of assessment and valuation. He explained to the Court that A&G specifically did not perform an independent ratio study or an independent equalization survey, that they merely reviewed existing DRA data and processes, and documented their findings.

Richard Almy is a former director of the IAAO and is a partner at A&G. Mr. Almy testified that he was in charge of compiling statistics from the DRA's published data and documenting any inconsistencies that he found compared to standard assessing procedures.

Robert Gloudemans was the managing partner in charge of this project for A&G. Mr. Gloudemans is a nationally recognized expert in property appraisal, assessment, and taxation. He was also involved in the development of the IAAO standards for property assessment and appraisal, on which the DRA relies. Recently, Mr. Gloudemans was hired by the State of Vermont to perform an in depth analysis and equalization study of Vermont's property tax system during their education funding difficulties. He was also hired to perform similar studies for approximately 12 other states.

In the New Hampshire study, Mr. Gloudemans chose to study thirty-three representative sample towns to review the DRA's data and procedures. Initially, he chose every eighth town in the State alphabetically, but he found

that the majority of these towns were in Rockingham County, and therefore were not a representative sample of the entire State. He explained that he then re-organized the towns by the number of parcels of property contained therein, and he then took every eighth town on the list. He stated that he added four additional towns, and explained the reasons for each addition. These additional towns were Antrim, Keene, Moultonboro, and Salem.

Mr. Gloudemans concluded that New Hampshire is the most property tax reliant state in the nation and that it has the most deficient property tax system.

Mr. Gloudemans identified several areas of concern with the New Hampshire property tax system. First, he stated that the most significant concern is the age of and the inaccuracies in the property data used by the DRA. As conceded by the State, property data is the foundation of any mass appraisal system for property taxation such as New Hampshire's. Accordingly, fair, accurate, and current data is required to maintain uniform valuations of property. Mr. Gloudemans recommended frequent revaluations of all property within the State. The IAAO standard for revaluation is every six years. He noted that the New Hampshire Constitution requires revaluation every five years, which he felt was an even better standard. See N.H. Const. part II, art. 6.

Mr. Gloudemans stated that the keys to establishing equal values across a taxing district are regular and full revaluations of property. Once revaluations of property are regularly being performed, the process of "trending" or "updating" property values can be a very accurate method of keeping current property values for short periods of time. He testified that without regular, full revaluations, the equalization process not only fails to allow values to be equalized across towns, where the process is focused, but also across taxpayers. He stated that there can be no consistency or reliability in a system that does not perform regular revaluations of its property being taxed and that without current, consistent data there can be no proportionality across taxpayers.

Mr. Gloudemans was also concerned with the extremely small sales samples used in the ratio study, because of the importance of the ratio used to New Hampshire's property tax. He stated that the sample size used in the DRA study significantly affects the reliability of the statistics, especially when there are no confidence intervals calculated to monitor their reliability. He suggested that the DRA might either expand the geography of each sample used in the study or expand the time period for the sales used in each sample in the study, but stated that a change of some sort is necessary to achieve fairness in the study.

Mr. Gloudeman's overall recommendation was that the DRA implement uniform standards and procedures for both the ratio study and the equalization process. He stated that this would ensure the reliability of the data used and increase the consistency and accuracy of the results. He explained that all local data used should be validated through audit procedures. He stated that this need for local audits is heightened when the localities perform their own assessments and sales screenings, because each locality may have a vested interest in achieving lower CODs and lower ratios, which directly affect the assessment of taxes to be paid.

The evidence indicated that the DRA has little interest in any town that receives a good COD. However, Mr. Gloudemans stated that it is not enough for the DRA only to examine the data for towns receiving bad CODs. He stated that the DRA needs to ensure that the good CODs calculated are actually representative of the equity in these towns.

Mr. Gloudemans stated that most importantly the State needs to implement standard procedures and actually follow those procedures for both property valuations and tax assessments across the State. He felt that if uniform procedures are in place, many of the other problems with the New Hampshire system will correct themselves. However, Mr. Gloudemans was also very clear that these procedures and standards would only be effective if they follow a full statewide property revaluation, to allow a current base from which to operate. He testified that a full revaluation would allow these uniform standards and procedures in the DRA's trending process to produce accurate and effective results for the interim years between regular revaluations.

Mr. Gloudemans stated that presently almost all of the assessment procedures in New Hampshire are extremely discretionary, both at the State and at the local level. He stated that different towns use different procedures to establish their own property assessments and that the State uses different standards still, to deal with the

unverified data that it receives from each town. Mr. Gloudemans concluded that the process used is the key to fair and accurate taxation.

He testified that bad uniformity of procedures leads to bad uniformity of results, therefore, to achieve a system that is "equal in valuation and uniform in rate" for New Hampshire taxpayers, the DRA must use a uniform procedure across the State and this procedure can only be effective if it follows a full statewide property revaluation.

The State also presented several expert consultants in the fields of property assessment, equalization, and statistical studies who reviewed the reports and conclusions of A&G, and reviewed the DRA's own internal procedures.

First, the State hired Gary McCabe to review the DRA equalization process and results. Mr. McCabe is an expert in equalization systems and performed a six-week review of the New Hampshire process.

Mr. McCabe identified several specific strengths and weaknesses in the DRA's equalization system. Mr. McCabe found that the strengths of the present system included the sales data sheets (DRA Form PA-34) submitted by the buyers of real property, the involvement of local officials in the assessment process, the knowledge and training of the DRA employees, and the abatement and appeals process to the BTLA.

Mr. McCabe also found many weaknesses that mirrored those found by A&G. Mr. McCabe noted that many of the sample sizes used in the ratio study were too small to generate confidence in the ratios produced. He also noted that no confidence intervals were calculated by the DRA for any town samples to determine whether they were reliable. Mr. McCabe found that the DRA made too many adjustments to the data used in the sales ratio study and testified that these adjustments could significantly undermine the reliability and confidence in its results. Finally, Mr. McCabe found that the DRA did not perform any representativeness studies to confirm how representative each sale used in the study was, in relation to both its community and to the rest of the State.

Despite the weaknesses that he found, Mr. McCabe concluded that overall the DRA's equalization procedures were satisfactory, but they focused on equalizing towns and not taxpayers. He did recommend that the DRA increase the sample sizes used in the study, audit the towns and their submitted data, establish written uniform guidelines for consistent application, and revalue all properties in the State to ensure that locally assessed values are actually achieving their fair market values.

Mr. McCabe concluded that in equalization studies, the COD is the only accurate measure of local assessment performance and uniformity, and that in his six-week study of New Hampshire procedures he found that thirty percent of all of the towns in the State had CODs greater than 20. Mr. McCabe agreed with A&G that a COD greater than 20 is unacceptable and determined that this thirty percent of the towns have poor assessment performance and uniformity.

The State also hired Richard Wasserstein and Peter Davis (collectively "WD") to "examine the methodology, data and conclusions presented in the [A&G] reports and offer an objective opinion as to the accuracy and reliability of the information presented." See WD Report of June 15, 2000 at p.A-2.

Mr. Wasserstein testified for the State about the purpose and reliability of statistical studies, such as those used by A&G and by the DRA. Mr. Wasserstein works for the State of Kansas and is a professor of statistics at Washburn University. Mr.Wasserstein is an expert in mathematical studies and in statistical analysis.

Mr. Wasserstein testified that the purpose of statistics and statistical studies is to allow people to make informed decisions. He stated that statistics are merely predictors and can never fully solve problems. He emphasized, however, that they especially can not solve any problems when they are based on small sample sizes. He stated that in small jurisdiction such as New Hampshire, it is very difficult to perform any sort of statistical analysis and achieve any form of accurate or reliable results. Mr. Wasserstein feels that when small samples are used, a full audit of all data is required before the data can be analyzed or relied upon at all.

Mr. Wasserstein also addressed Ms. Kennedy's exclusion of outliers from her original ratio study. Mr. Wasserstein defines outliers as any value much larger or smaller than the rest of all ratios/sales/values used in a study. He stated that essentially they are any value that does not look like the rest of the population of values in a study. Mr. Wasserstein testified that there is no real explanation for why outliers occur. He stated that they may arise from human error, bad assessment values, non-arms length sales, or from numerous other sources. He emphasized that the lack of explanation for these outliers is exactly why they can not be excluded from a sales study.

Mr. Wasserstein stated that these outliers should be rigorously studied to determine why they occur, and that they should be included for representativeness in a state that uses very small sample sizes. He explained that only after the full study is performed and all outliers are included, then outliers can be trimmed because they will no longer affect the town's ratio. Mr. Wasserstein stated that in a study such as the DRA's, with such small sample sizes, outliers can have extreme effects on the results and must be included until the complete study is done.

Mr. Wasserstein essentially stated the same overall conclusion as A&G. He recommended that the DRA perform a full revaluation of property statewide, increase sample sizes, calculate confidence intervals, implement standard procedures for towns and the DRA, and perform audits or some other objective measure of the accuracy of the local assessors values. All of the expert witnesses agreed that the New Hampshire property tax system, based on equalization, can work, but they also agreed that it only attempts to establish equity across towns and not taxpayers. Moreover, all experts agreed that it needs significant changes to ensure a fair system of taxation.

Peter Davis testified for the State about the accuracy of the A&G conclusions in their report. Mr. Davis is the ratio study supervisor for the State of Kansas and was a member of the IAAO standards drafting committee. Mr. Davis testified that he has worked with A&G before and he highly respects their work. Mr. Davis testified that his role was only to review the A&G report to determine if the errors that they found existed in the DRA system were significant enough to require correction or to constitute a constitutional violation.

Mr. Davis testified that WD found that the errors reported by A&G were not statistically significant enough to require a complete overhaul of the New Hampshire equalization system. Moreover, Mr. Davis testified that based on the small statistical differences in the equalization results, the errors that did exist in the DRA system did not mandate a full statewide revaluation. Compare State Exhibit MM, with State Exhibits PP and QQ. Yet, he also explained that all jurisdictions, including New Hampshire, require full physical inspection and reappraisal of properties at least every six years. Finally, Mr. Davis found that Ms. Kennedy's procedures for the DRA ratio study were adequate, but that they needed to be improved. See WD Report of June 15, 2000 at pp.A-3-4.

As noted above, A&G found serious errors in the DRA procedures and the New Hampshire property tax system. Mr. Davis testified that WD found no serious discrepancies in the DRA procedures when compared with standard assessment procedures, but he explained that the DRA should calculate confidence intervals, should use strict procedures for outlier trimming, and should always validate the information received from local officials.

Mr. Davis explained that any successful property tax system requires both uniform and level assessments. He stated that uniformity of assessments is measured by the COD and that levelness of assessments is measured by the proximity of the sales median ratio to 1.0. Mr. Davis explained that in most ratio studies the median ratio is the ratio used to calculate the levelness of assessments. He further explained that generally the ratio chosen will affect the tax rate and therefore the statistical results. However, he noted that Ms. Kennedy's use of different ratios across the State did not seem to effect the results of her statistical calculations.

In his analysis of the DRA ratio study, Mr. Davis was very concerned with the small sample sizes used by the DRA. He testified that while the IAAO accepts all of the four ratios used by Ms. Kennedy, they recommend that with samples as small as those used in New Hampshire that the assessor use the weighted mean ratio, and use consistent procedures when this ratio is applied. He stated that this is necessary to achieve any level of proportionality in assessments and to reach the closest approximation of fair market value. He further testified

that the ratio ultimately chosen should be used consistently throughout the taxing district, and that confidence intervals always should be calculated to determine the reliability of the ratios.

Mr. Davis further testified that in a perfect world New Hampshire would have annual revaluations, but that these may be extremely cost-prohibitive and impractical. He also stated that equalization can be very effective to update property data for short periods, however, he felt that even equalization requires modified annual inspections of property and full revaluations at least every 6 years. Mr. Davis testified that a full revaluation would include a full physical review of all properties in the State, including the land, buildings, boundaries, additions and subtractions, and that revaluation should additionally include an interview with each property owner. Mr. Davis also recommended that both the DRA and each town adopt the CAMA system to store all data, updates, and statistical calculations for property appraisal and assessment.

Mr. Davis agreed with A&G that New Hampshire is one of the most property tax dependent states in the nation and that its taxpayers should have a quality system of taxation. He stated that he feels that implementing A&G's recommendations may be cost- prohibitive, but that the expense may be necessary if New Hampshire plans to continue relying on statewide property tax revenues.

Mr. Davis's ultimate conclusion was that the New Hampshire property tax system was very antiquated and handicapped by its limited resources, but that DRA and town employees were all doing their best with the resources and procedures available to them.

On cross-examination, it became apparent to the Court that Mr. Davis's positions relative to the practices and procedures of the DRA were substantially in accord with the A&G report. Mr. Davis testified that while equalization may correct sales ratios across towns, it will never correct the ratios or varying assessments across individual taxpayers. Mr. Davis explained that equalization can never fully work without full revaluations because those taxpayers who are under-assessed will never report it, and therefore all properties that are underassessed will never be addressed unless there is a full revaluation statewide.

He disagreed with the DRA's opinion, and stated that the process needs some remedy for a taxpayer in Portsmouth to seek an abatement or a revaluation in Keene if there is evidence of bad assessments in Keene, because Keene taxpayers would not be paying their fair share of a statewide tax. Mr. Davis testified that once a full revaluation is done of all properties within the state, it will be a fairly easy, efficient, and cost-effective system to maintain. However, it may well be very costly to perform the initial revaluation.

The Court notes that the WD analysis of the A&G report of the DRA's statistical studies is of limited value in determining whether individual taxpayer property in New Hampshire is being valued equally.

First, all of the experts agree that equalization measures only the equity of property values across towns, and not across individual taxpayers. Second, the underlying DRA figures on which both expert reports are based, come from local town assessments without any statewide uniformity, sales data which is included and excluded without any set procedures statewide, and differing ratios are used for the calculations for each town statewide. Therefore, the Court finds that the actual statistical calculations performed by each side's experts are not a true representation of the actual taxing situation being applied to taxpayers in New Hampshire.

The parties extensively debated at trial the statistical calculations and charts created by both WD and A&G. Errors were noted and recalculations performed, and the only point ultimately agreed upon was that none of the charts reflected the actual situation occurring in New Hampshire. Compare State's Exhibits PP and QQ with State Exhibit MM.

The petitioners' exhibits were calculated based upon data given to them by the DRA with minor adjustments, and the State's exhibit was calculated only with the data reviewed from the DRA and the data contained in the A&G report. If the underlying DRA data is flawed or unreliable, all calculations based on that data are also flawed and unreliable. See Exhibits PP, QQ, and MM. Moreover, the testimony indicates that none of the charts presented reflect the actual values and ratios used by the DRA. The Court has no confidence that these charts

can reflect the New Hampshire property tax system as it affects individual taxpayers, or as testified to by the DRA personnel.

As a result of the lack of uniformity and consistency in the procedures generating these numbers, the numbers presented in all of the charts lack support to make them meaningful to the Court.

What is clear from the expert testimony presented by both sides, is that without uniformity in assessments, sales, and ratios, without adequate sample sizes, without confidence intervals, and without full physical revaluations of property every five years to establish a base for a successful taxing system, the tax as applied is not equal in valuation nor proportional across the State.

III. DISCUSSION

The specific issues raised in the petitioners' challenges question the fundamental fairness of the taxation scheme in HB 999 as it is applied statewide, and the Court will address each of the petitioners' challenges in turn.

A. STANDARD OF REVIEW

In a constitutional challenge to a taxing scheme, the petitioners bear the burden of proving by a preponderance of the evidence that the scheme causes disproportionate taxation. See Appeal of Andrews, 136 N.H. 61, 64 (1992) (citing constitutional mandate for taxation and burden of proof in abatement proceedings); Appeal of Bow, 133 N.H. 194, 199 (1990)(citing burden of proof for town appeals to BTLA). As noted above, the taxing district for the statewide education property tax established in HB 999 is the State. Claremont II, 142 N.H. at 469.

The ultimate constitutional mandate for any taxation scheme, is that all taxes be proportional and reasonable, thereby assuring that all similarly situated taxpayers are taxed in a similar manner that is "equal in valuation and uniform in rate." Claremont II, 142 N.H. at 468; see also Boehner v. State, 122 N.H. 79, 84 (1982).

B. DRA PROPERTY VALUATION AND TAX ASSESSMENT PROCEDURES

The petitioners first constitutional challenge addresses the DRA's entire method of administering HB 999. They contend that the DRA's equalization process, on which the tax is based, does not result in proportional or reasonable taxation that is equal in valuation and uniform in rate across the individual taxpayers in the State.

"The test to determine whether a tax is equal and proportional is to inquire whether the taxpayer's property was valued at the same percent 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 taxing district for valuation and assessment of a uniform education property tax is the state. Claremont II, 142 N.H. at 469.

The Constitution also requires that all property be valued within a reasonable time before the tax is assessed. See Claremont II, 142 N.H. at 468; Bow, 77 N.H. at 452; see also N.H. Const. part II, article 6. This property valuation is required to ensure proportionality in assessments. See Claremont II, 142 N.H. at 468. While mathematical certainty is not required, it is clear that proportionality requires that all property be valued at the same ratio of its fair market value across the taxing district. See Rollins v. Dover, 93 N.H. at 450-451; see also Appeal of Andrews, 136 N.H. 61, 64-65.

The evidence presented at trial demonstrates that all taxable property subject to the statewide property tax is not being taxed at the same percent of fair market value or at the same ratio across the State.

First, the evidence demonstrates that the statewide CODs, which measure equity in property assessments, result in unacceptable disproportionality of taxation. The DRA indicated that it finds any town with a COD of 20 or below to have acceptable uniformity and equity in its property assessments. The Court disagrees and finds that a COD of 20 does not satisfy the constitutional requirements of part II, article 5. See Appeal of Andrews, 136

N.H. 61, 64 (1992)(discussing that a COD of 10 creates a ten percent differential in property values and results in disproportional taxation).

The State's experts, Mr. Wasserstein and Mr. Davis, testified that the COD is the measure used to determine how far the extreme variables for property values within a town are from the median property value within that town. Essentially, the COD creates an acceptable range of property values on which the DRA may assess a tax. See State Exhibit A-3 and State Exhibit R for DRA methods of calculating CODs. However, by taxing a range of property values equality in valuation can not be attained.[2]

The testimony indicates that 30% of towns in the State have CODs at or above 20, and that approximately 48% of the towns in the State have CODs over 16, which the State classifies as borderline to unacceptable equity in property value. This testimony alone demonstrates that at least 30% of the towns are being taxed at a disproportionate level and possibly more than 50% of the towns. The DRA also created charts, showing the median ratios and CODs for every town in each County, which illustrate even more clearly the different percentages and different ratios at which New Hampshire Taxpayers are being assessed this "uniform rate" tax. See State Exhibit P. For example, for the tax year 1998 in Belknap County, the median ratios for each town range from .80 to 1.04, while the CODs range from 8.33 to 24.69. See id. Similarly, here in Rockingham County in the tax year 1998, the median ratios for each town range from .41 to 1.11 while the CODs range from 8.68 to 21.15. See id.

The Court finds that these varying levels of ratios used across towns and these percentages of varying property values across towns within the State, can not satisfy the constitutional standards of "proportional and reasonable taxation" or of "equal in valuation and uniform in rate", and therefore violate part II, article 5 of the New Hampshire Constitution.

Moreover, the processes used by the local assessors and the DRA to determine property values and to assess the property tax, are so divergent and lacking in uniformity that they can never give an assurance of equally valued property. Ms. Kennedy testified that to perform the ratio study and the equalization process she relies heavily on the values reported to her by each municipality. However, she does nothing to verify the data that she receives or to validate the procedures that each town is using to determine its own property values. Each town has an inherent interest in the property values that it reports, because the property value will affect the rate of tax which is imposed.

Further, the testimony showed that each town uses different methods of arriving at its locally assessed property values, most using some form of trending or modified equalization process, similar to the process used by the DRA. The testimony also showed that this limited process can lead a town failing to value upwards of 15% of its taxable property, as has happened in the city of Keene. If 15% of the taxable property in every town in this State is missed during the DRA's equalization process, the tax burden of this property is obviously shifted to the other 85% of property in the State and at least 15% of taxpayers in the State are not paying their fair share.

> [N]o part of the share of one can be constitutionally exacted of another. And as any one's payment of less than his share leaves more than their shares to be paid by his neighbors, his non-payment of his full share is a violation of their constitutional right.

Rollins v. Dover, 93 N.H. 448, 450 (1945).

Finally, the evidence showed that the DRA uses no set procedures in its ratio study and in its equalization process. The DRA uses different ratios to equalize different towns, it uses different sales samples and sample sizes in its ratio study across towns, and it does not verify the data of property assessments across towns. These procedures vary from town to town, and this use of varying procedures will affect the tax rates imposed from town to town. As the Supreme Court has previously noted, no State tax that uses different methods or rates of taxation from town to town can ever pass muster under the New Hampshire Constitution. See Claremont v. Governor, 144 N.H. ___ (decided October, 15, 1999). The key premise that must be followed in a statewide tax is that all taxpayers statewide must be treated similarly. See id.

The focus must be equality and uniformity across all individuals in the entire taxing district, not only across all towns within the taxing district. This is where HB 999 does not meet constitutional standards. As Commissioner Arnold testified, the legislature did not have the time nor the resources to re-work the entire New Hampshire taxation system to comply with the Claremont mandate, so it adopted the past method of equalization that had been used for both the local and county tax systems, and applied a uniform rate.

Regardless of the difficulties involved, the constitutional rights of taxpayers do not lessen because of arguments of expedience or convenience to the State. See Curry v. Spencer, 61 N.H. 624, 626 (1885). During the Claremont litigation, the Court reminded the legislature that "[i]f modern conditions make ancient divisions or plans for distributing the tax burden inequitable, it would seem to be a plain legislative duty to enact such constitutional laws as would remedy the defect." Claremont II, 142 N.H. at 471 (quoting Opinion of the Justices, 84 N.H. at 581). The Court finds that HB 999 does not satisfy this duty and is therefore unconstitutional.

C. FAILURE TO REVALUE PROPERTIES EVERY FIVE YEARS

The petitioners second constitutional challenge is to the State's failure to perform statewide property valuations every five years as mandated by part II, article 6 of the New Hampshire Constitution. The petitioners contend that the lack of recent property valuations causes individual taxpayer property to be valued at different percentages across the taxing district which is the State, and that this results in highly disproportional tax assessments. The State contends that the annual equalization process satisfies the constitutional property valuation requirement and assures proportional rates of taxation statewide. The Court finds that the varying CODs throughout the State show that the equalization process does not satisfy the constitutional mandate of "valuation of estates" to ensure proportionality. Additionally, all of the experts agree that equalization can never be an adequate substitute for full revaluation of property, and each expert witness recommended that a full revaluation of properties be performed every 4-10 years. In light of these standards and recommendations, the five year requirement in part II, article 6 seems completely reasonable.

The evidence showed that when some properties in a State have not been revalued for thirty years, such as in Keene, equalization does not ensure that all property values are being included or that all property values across the State are achieving any value near their actual fair market value. The evidence demonstrates that property in the City of Keene has not been revalued for thirty years and that at least 71 other municipalities in the State have not undergone full revaluations in at least six years. Moreover, the CODs which, based on 1998 values, vary statewide from a low of 2.05 in the Town of Benton to a high of 33.52 in the Town of Canaan, with an average across the State of 17.05, show that there are widely varying percentages of equity in property values across the State.

Contrary to the State's contention that equalization is a valid substitute for full revaluations of property, all of the cases in New Hampshire that have ever addressed the five year valuation provision of part II, article 6 contemplate a reappraisal of the properties within a taxing district. See eg. Bow v. Farrand, 77 N.H. 451, 452 (1915) (contemplating revaluation within a reasonable period of time); Thompson v. Kidder, 74 N.H. 89, 96 (1906) (contemplating frequent revaluations to ensure equality of assessments); State v. Griffin, 69 N.H. 1, 33 (1896)(finding a revaluation of estates required to ensure equality of assessments); Franklin St. Soc'y v. Manchester, 60 N.H. 342, 347 (1880) (contemplating revaluation of estates to ensure equal and proportional assessments on all individuals and estates); Boston, C.&M. R.R. v. State, 60 N.H. 87, 88 (1880)(finding that revaluation of estates to ensure proportionality is one of the limits placed on the taxing power of the government).

Accordingly, this Court finds that the equalization process does not satisfy the mandate of part II, article 6 that there "be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order." N.H. Const. pt.II, art.6. Without a full revaluation of all property within this State, no taxpayer can be assured that he is paying no more than his fair share of the tax burden based on the true value of his property.

D.APPROPRIATION AND DISTRIBUTION OF TAX REVENUE

The petitioners' final constitutional challenge is to the DRA's method of distributing its adequate education grants to the receiver towns. First, the petitioners contend that this distribution exceeds the State's taxing power. Second, the petitioners contend that it violates the equal protection clause in part I, article 12 of the New Hampshire Constitution.

The petitioners assert that they, as taxpayers in donor towns, are being treated differently than the taxpayers in receiver towns. Specifically, they allege that they have no vote or input on how the money in the adequate education grants is used. The argue that the receiver towns vote on how the grant is budgeted and spent, and that the local school districts also vote on how the grant is budgeted and spent. They argue that the State has no oversight or control over the grants, and that these receiver towns and school districts are voting to redistribute their other local funds that previously were used for education funding to local tax relief. They contend that either they, as the taxpayers funding the grant, should have input into how the grant is spent, or that the State should take complete control and oversee the spending so that the receiver towns can not use the grants for local tax relief.

It is undisputed that funding an adequate education is a valid public purpose. Moreover, there is no dispute that all citizens in the State must share the expense of all public burdens that benefit the entire State. See Opinion of the Justices, 137 N.H. 270, 278 (1993); see also N.H. Const. part I, article 12. Accordingly, this Court must only determine whether this distribution of education grants exceeds the State's taxing power and whether it deprives the petitioners of equal protection of the laws.

The Constitution grants the sovereign power of taxation and control over the taxing process solely to the legislature. See N.H. Const. part II, art. 2. The legislature has broad powers of apportionment and distribution, with which this Court will not interfere unless there is no rational basis for the legislative action. For example:

> The legislature may annex a poor municipality to a rich one, and thus increase the tax burden in the latter; or it may abolish all municipal division as to taxes, and make the tax levy equal throughout the state and for all purposes. It may do this for one governmental purpose, or as to many or as to all. In none of these cases has any individual taxpayer any legal cause for complaint. Having this power to compel the rich municipality to assume a full share of the overburden of the poor municipality, it can give like relief to a lesser degree.

Opinion of the Justices, 84 N.H. 559, 578 (1930).

Once the revenue from a valid tax has been paid into the State Treasury, the power to distribute is purely legislative, and it is within the legislative power to make a reasonable division of the burden. See Opinion of the Justices, 137 N.H. at 278 (citing Keene v. Roxbury, 81 N.H. 332, 337 (1924)). This distribution may be placed upon different towns in differing degrees, as long as the distribution is reasonable. See Opinion of the Justices, 84 N.H. at 580. The Supreme Court has likened the distribution of state education funds to highway funds and utility services, stating:

> In this aspect, the relief granted is very like that as to school money. Certain public duties are imposed on all towns, but the state aids the poorer ones in the discharge of some of those obligations. So long as such aid is distributed upon a fair and equitable basis, it is merely an exercise of the legislative function of determining where, in the aggregate, the burden incident to public performance should rest.

Opinion of the Justices, 84 N.H. at 580.

The petitioners have presented no evidence to show that the present system of distribution of the education grants is not rationally related to a valid public purpose, nor have they presented any credible substantive evidence that any receiver town or school district is using its grant for anything other than educational purposes. See Opinion of the Justices, 145 N.H. at ___. The only evidence presented shows that the legislature has apportioned the public burden of education across the State and that the tax revenue is being distributed to

school districts to satisfy this burden. Therefore, the Court can not find that this State has exceeded its taxing power.

To prevail on an equal protection challenge to the distribution aspect of a tax scheme, "absent a showing that a suspect class is involved, economic classifications are typically subject to the rational basis test, and the burden is on the [petitioners] to prove that whatever classification is promulgated is arbitrary and without some reasonable justification." Petition of State Employees' Assoc., 129 N.H. 536, 540 (1987) (internal citations omitted); see also Opinion of the Justices, 137 N.H. at 276. The petitioners have presented no evidence or argument to show that they are a recognized suspect class. Because the taxing scheme in HB 999 deals with economic classifications, the Court will apply the rational basis test and will determine whether the petitioners have presented evidence showing that HB 999 is not rationally related to a valid public purpose.

The Court notes that the legislature has always had discretion in distributing the revenue of a valid tax, as long as the tax is used for a valid public purpose. See Manchester Fed. Sav. and Loan Ass'n v. State Tax Comm'n, 105 N.H. 17, 21 (1963).

The only testimony at trial presented to address the equal protection claim, came from Assistant Commissioner of Revenue Administration Reid and former Commissioner of Education Twomey. Assistant Commissioner Reid explained the DRA procedure for appropriating adequate education grants to each school district, and explained the DRA procedures and State statutes in place for reviewing school district budgets and revoking the grants for improper appropriations. The petitioners do not dispute that all of the money in the education trust fund is being distributed to the school districts.

Commissioner Twomey additionally testified about the school district budgets, and added that the Department of Education will not interfere with the local school district use of the grants because school districts are in the best position to determine their own educational needs.

The petitioners did present evidence, over objection, of the surveys that Commissioner Twomey sent to each of the school districts, in an attempt to show that the school districts were using the funds for purposes other than education. However, the Court agrees with the State, and with Commissioner Twomey, that these surveys lack reliability in their form and credibility in their answers. Further, the Court finds that the petitioners did not meet their burden of showing that this statute's revenue distributions go anywhere other than to the school districts. The only evidence presented shows merely that all funds are being used for different educational purposes within these districts. The statutory scheme allows the local school districts to independently determine how they operate and how they spend their budgets, as long as their budgets are spent for educational purposes. See RSA 198:48 (Supp. 2000); Opinion of the Justices, 145 N.H. ___ (decided December 7, 2000).

In Claremont II, the Court noted the differing educational needs of school districts by stating:

> We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education. It is not the right to horizontal resource replication from school district to school district. The substance of the right may be achieved in different schools possessing, for example, differing library resources, teacher-student ratios, computer software, as well as the myriad tools and techniques that may be employed by those in on-site control of the State's public elementary and secondary school systems.

Claremont II, 142 N.H. at 473-74.

The Court finds that the method of distributing the adequate education grants is reasonable. Moreover, there is no evidence to show that the petitioners' equal protection rights have been violated, or that any of the education grants are not going directly to school districts for funding an adequate education. The towns are free to manage their own public school systems and this Court will not interfere to the extent that the school districts are funded by a valid tax. See Manchester Fed. Sav. and Loan Ass'n, 105 N.H. at 21.

IV.CONCLUSION

The evidence presented at trial clearly shows that New Hampshire's property taxation system is constitutionally flawed.

HB 999 was the legislature's response to the Claremont litigation, and in that case the Supreme Court cautioned the legislature that "to the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate." Claremont II, 142 N.H. at 471.

The Claremont litigation also expanded the taxing district for school funding from the localities to the State. Accordingly, to continue to meet constitutional requirements, the administrative system for any property tax must also change to correspond to the applicable taxing district. However, the evidence in this case shows that the legislature adopted this system of equalization, which attempts to establish equality across towns, but clearly does not establish equality across taxpayers. The fatal constitutional flaw of HB 999 is the State's failure to acknowledge that the taxing district is the State, and that all of the taxpayers in the State must have their property valued equally, rather than just the total property valuations being equalized across the towns. Equality across individual taxpayers is required to allow the present system to meet the Claremont mandates, that any property tax imposed be both "proportional and reasonable" and "equal in valuation and uniform in rate."

The State chose the equalization system, according to Commissioner Arnold, because it found that it was impracticable to re-work the entire State property tax system. However, equalization of property values across towns does not meet constitutional requirements when individual taxpayers are being taxed at different rates due to unequal property valuations. Equality across all taxpayers in any given class in a taxing district is required for the State education property tax.

The evidence shows that localities are all using different methods of assessing properties and of submitting data to the DRA, that significantly disproportional property assessments exist across the State, that large percentages of property are likely not being taxed at all under this system, and that individual taxpayers have no adequate remedies at law to correct these problems when they arise from either the undervaluation of other properties or when they arise across town lines. These problems all show that an individual taxpayer in New Hampshire is not having his property equally valued or being proportionally and reasonably taxed under the equalization system in place.

Moreover, the evidence indicates that the entire equalization process across towns is constitutionally infirmed, due to the lack of uniformity of the data on which the equalization process and ratio studies are based. As noted by several of the expert witnesses, bad data processed in a bad system leads to bad results.

The evidence presented and the language of the New Hampshire Constitution further confirm that the equalization process, as applied, does not satisfy part II, article 6 of the New Hampshire Constitution. This provision mandates a full statewide valuation of the estates every five years to maintain proportionality across taxpayers. This constitutional mandate is clear, and the evidence shows that at least 71 out of 259 towns participating in the present equalization process have not had revaluations of their property in at least six years. This lack of revaluations is a direct violation of the mandate in part II, article 6 of the New Hampshire Constitution.

The Court finds that without a full revaluation of statewide property there can not be an equal and proportional base of property values on which to assess a tax, and no guarantees of equal valuations of property across taxpayers. Once a proportional taxing base is established, uniform procedures must be put in place to maintain current and accurate property values. Uniform standards and regulations become even more important when the significant responsibility for administering a statewide tax is shared between assessing officials in 259 different towns. Efficiency and convenience to a taxing system will never waive the constitutional requirements of fundamental fairness, equality, proportionality, and uniformity across taxpayers.

Because the petitioners have met their burden of proof by showing that property assessments are not proportional and reasonable, that the statewide property tax is not equal in valuation or uniform in rate, and that at least 71 towns are not revaluing properties in a constitutionally timely manner, the Court finds that they have suffered a constitutional harm by being taxed under HB 999. Accordingly, the Court finds that HB 999 is unconstitutional as applied for violating part II, articles 5 and 6 of the New Hampshire Constitution.

However, the petitioners equal protection claim regarding the appropriation and distribution of tax revenue must fail. Education funding is a valid public purpose and the petitioners have presented no credible substantive evidence to show that any town in the State is using its education adequacy grant for any purpose other than education. There also has been no evidence presented that receiver towns are lowering their own local tax burdens or spending the money on items not included in the school budget.

The appropriate remedy for the constitutional violations found in HB 999 as applied, has already been agreed to by the State. The State agreed, by objecting to the request for interpleader of the tax funds, that if the tax was declared unconstitutional or otherwise invalid, they would repay all of the taxes already collected. See City of Portsmouth v. State of New Hampshire, Rockingham Co. Super. Ct. Docket No. 00-E-136 (decided April 2000) (Galway, J.). Therefore, this Court orders that the State of New Hampshire, in accordance with the agreement, reimburse all towns for the tax dollars paid and collected since the enactment of HB 999.

Finally, each party has submitted requests for findings of fact and rulings of law. The Court notes that the requests propounded by the State totaled 191. Many of these requests were either incomplete statements, confusing statements, statutory statements, non-contextual statements, multiple-issue statements, or statements irrelevant to this decision.

All of the Court's relevant findings and rulings are embodied in the text of this Order and control over any individual request. Therefore, the Court rules on the requests as follows:

The Court rules on the petitioners' requests for findings of fact as follows:

GRANTED: 1-4, 7, 8, 10, 12;

DENIED: 13, 14;

NEITHER GRANTED NOR DENIED AS WORDED: 5, 6, 9, 11.

The Court rules on the petitioners' proposed conclusions of law as follows:

GRANTED: A-G, K-L;

DENIED: M;

NEITHER GRANTED NOR DENIED AS WORDED: H, I, J (see decision).

The Court rules on the State's requests for findings of fact as follows:

GRANTED: 1-8, 11-12, 16-18, 20, 28, 30, 35-38, 40, 47, 49, 52-55, 61, 74-79, 82, 83, 86, 95, 97- 100, 112, 116, 118-131, 133, 135-137, 139-144, 146-152, 155-158;

DENIED: 13, 19, 21, 27, 42, 56, 69;

NEITHER GRANTED NOR DENIED AS WORDED: 9, 10, 14, 15, 22-26, 29, 31-34, 39, 41, 43-48, 50, 51, 57-60, 62-68, 70-73, 80, 81, 84, 85, 87-94, 96, 99, 101-111, 113-115, 117, 132, 134, 138, 145, 153, 154, 159-161.

The Court rules on the State's requests for conclusions of law as follows:

GRANTED: 162, 171-172, 182, 183;

DENIED: 163-165, 167-170, 176, 180, 181, 186, 188-191;

NEITHER GRANTED NOR DENIED AS WORDED: 166, 173-175, 177-179, 184, 185, 187.

So ORDERED.

RICHARD E. GALWAY

Presiding Justice

[1] The Court notes that this definition is at odds with the definition of COD used by the expert witnesses at trial, with the subsequent examples of COD interpretation used by the DRA, and with the Supreme Court's only interpretation of the definition of a COD. See Appeal of Andrews, 136 N.H. 61, 63 (1992)(interpreting COD as a measure of how far the most extreme variables [in assessed property values] are from the center of the equalized [assessed property] valuations [in the] averaging process). However, the Court defers to the DRA definition and application of CODs in its ratio study, because the DRA is the administrative body administering the tax at issue in this case.

[2] A letter from the DRA to the Selectmen in the Town of Grafton about Grafton's unacceptable CODs precisely illustrates the disparities created by any range of acceptable property values:

> The C.O.D. is the average percentage of deviation of your appraisals from the median ratio, which means that if your town has a C.O.D. of 25%, then 50% of the properties come within 25% of the median ratio, both above and below. The other 50% of the properties are even further away from the median. For example if you have 100,000 dollar properties, 50% of the assessments will range from 75,000 to 125,000 dollars and the other 50% will vary even more. Using the state average tax rate which is 25.10 per thousand dollars assessed for the 75,000 to 125,000 properties, the property tax bills for similar 100,000 dollar properties would range from $1882.50 to $3137.50 a difference of $1255.00 dollars, the other 50 % would vary even more. As you can see this figure measures the inequities in your town and should be looked at very carefully.

Pet'rs Exh. 16, DRA Let. of Dec. 3, 1996 to Town of Grafton Selectmen.

While the Court notes that this letter pre-dates the Claremont litigation and that the tax rates differ, the DRA's process of calculating the CODs has not changed nor has the DRA's use of this calculation to measure inequities in towns. Ms. Kennedy testified that this is the process used to calculate each town's CODs and that this shows the difference in potential taxes assessed on properties within a town. Moreover, this letter shows the extreme inequities that occur within a single town, and that the problem is exacerbated when it is spread statewide.