STATE OF NEW HAMPSHIRE
Superior Court
Rockingham, ss.
Case No. 215-2022-CV-00167

Steven Rand, et al
Plaintiffs,

v.

The State of New Hampshire,
Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION TO STATE'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

In a case as important as this is to so many property taxpayers, school children, educators, and to the State's fiscal responsibility, it is unfortunate that the State seeks summary judgment by mischaracterizing Plaintiffs' Complaint and legal burden. In doing so, the State asks the Court to ignore Plaintiffs' plainly stated (and in some instances bolded) Causes of Action and Claims for Relief, that i*nter alia*, assert:

> Petitioners seek a declaratory judgment from this Court that finds and declares the following:
> The State does not currently guarantee funding sufficient to cover the cost of an adequate education. As a result, New Hampshire must rely on local school taxes to bridge the gap. These local school taxes violate Part II, Article 5 of the New Hampshire Constitution because they are not uniform in rate.

First Amended Complaint at ¶ 80 (Emphasis in original).

The complaint further asserts:

> Petitioners seek an order directing the State to revise its cost determination as described above, such that it will discontinue its reliance on local property taxes to meet the State's Article 83 responsibilities.

First Amended Complaint – Claims for Relief, C.

Plaintiffs' Complaint and evidence are grounded in the fact that the cost of an adequate education is inherently tied to real-world costs borne by districts in preparing students to become "participants and potential competitors in today's marketplace of ideas. *Claremont v. Governor*, 138 N.H. 183, 193-194 (1993) ("*Claremont I*"). The best evidence of these real-world costs is actual expenditures by districts. Accordingly, Plaintiffs have created a record demonstrating that no school district spends less than three times the State's identified cost of adequacy, along with expert testimony demonstrating that no school district could provide an adequate education[1] at the State's arbitrary cost level for adequacy. This testimony includes an analysis by Plaintiffs' expert, John Freeman, Ph.D., which shows that relying just on the State's assigned cost of adequacy alone, the Pittsfield school district budget would shrink to the point it could not provide even enough *teachers* (let alone any other educational expenses). The resulting district would also violate numerous state and federal laws, including RSA 193:E-2-a. Unlike the plaintiffs in the ConVal case, the Plaintiffs here also address the insufficiency of differentiated aid through expert and lay testimony. *See* RSA 198:40-a, II (b)-(e).[2]

Unable to challenge Plaintiffs' evidence on the merits, the State mischaracterizes the facts and law in its Motion for Summary Judgment.

[1] Plaintiffs and Plaintiffs' experts assume arguendo the State's interpretation of its definition of an adequate education in alleging that adequacy funding is insufficient. Additionally, as explained below, the Plaintiffs separately dispute that the State's interpretation in this litigation is a proper construction of its statutory regime.

[2] Plaintiffs here are also prepared to address recent changes to the base adequacy and differentiated aid amounts. The changes do not materially change Plaintiffs' arguments.

In addition to mischaracterizing Plaintiffs' case, the State incorrectly asserts that Plaintiffs have the burden to "demonstrate that everything school districts spend money on falls within the definition of an adequate education the Legislature adopted." State's Memo. Of Law at 9. Put correctly, Plaintiffs' burden is to demonstrate, in the first instance, that the current adequacy amounts (base and differentiated aid) are insufficient to meet the State's definition of an adequate education. Plaintiffs submit they have done so. The State's attempt to conflate Plaintiffs' burden for their claim (that adequacy funding is insufficient) with their burden on *one* of their suggested remedies is misleading.

The State also argues that Plaintiffs fail to meet that burden because they have made no effort to isolate what components of actual expenditures by districts are required for adequacy. *Id*. at 9, 19. This is not Plaintiffs' burden. However, even if it were, Plaintiffs have submitted an analysis which demonstrates that a district could not even afford sufficient qualified teachers — a cost indisputably necessary for adequacy — using the State's adequacy funding. *See* Freeman Report- Exhibit B (Attachment 4).

BACKGROUND

In this memorandum, Plaintiffs dispense with a full statement of the history of school funding litigation as the legal background for this litigation and that of the companion case involving the ConVal School District has often been repeated.

A. The State has Failed to Establish Standards that are Enforceable and Reviewable.

The definition of a constitutionally adequate education must be defined "in such a manner that the citizens of the state could know what the parameters of the educational program were." *Londonderry Sch. Dist. v. State*, 154 N.H. 153, 160-62 (2006). Accordingly, the Court held that the State is required to define adequacy with meaningful standards so that "cost" can be

"isolated," such that school districts, parents, and courts can understand "where the State's obligations to fund the cost of a constitutionally adequate education begin and end." *Id*. at 161-62. The Court determined that the definition "must be sufficiently clear to permit common understanding and allow for an objective determination of costs." *Id*. Otherwise its definition will be "impervious to meaningful judicial review." *Id*.

The State has defined adequacy in RSA 193-E:2-a by identifying 11 subject areas and provides in RSA 193-E:2-b that a cost shall be assigned to this definition. In RSA 198:40-a, the State assigns the costs at issue in this case. The State purports to flesh out the details of an adequate education through minimum standards codified as Ed Part 306 rules. None of these statutes or rules isolates cost elements.

Having failed to meet its duty as assigned in the *Londonderry* case, the State now tries to shift responsibility for identifying cost elements to the Plaintiffs. Plaintiffs reject this assignment and assert that they must show only that the arbitrarily low cost of base adequacy payments and differentiated aid adopted by the State are insufficient, which they have done. It is up to the State to then defend its determinations as to the cost of adequacy — a defense the State is unwilling or unable to make.

B. Plaintiffs' Disclosed and Deposed Experts

To prove that the State's base and differentiated aid cost levels are deficient, Plaintiffs retained two retired New Hampshire school superintendents, Corinne Cascadden, Ed.D. and John Freeman, Ph.D. who have issued detailed reports explaining the deficiency of the State's numbers. Freeman Report (Attachment 4); Cascadden Report (Attachment 6).[3]

[3] Both Dr. Freeman and Dr. Cascadden's expert reports were admitted as exhibits during their respective depositions. Freeman Dep. Tr. at 7:17–8:7; Cascadden Dep. Tr. 8:21–23.

Dr. Freeman opinions rely, in part, on an analysis he conducted in 2019 as superintendent of the Pittsfield School District, in which he determined that he could not fund the cost of teachers to legally operate the Pittsfield School District with the funds provided by the State as base adequacy and differentiated aid.[4] The Pittsfield study excluded all other costs that are obviously necessary to run schools (*e.g.*, personnel other than teachers, supplies, equipment, and buildings). The study also determined that if the district gave the State credit for funds in addition to adequacy (*e.g.*, Medicaid and Stabilization Aid), the district could fund the cost of teachers and barebones administration necessary to run schools. However, this budget would be double the State's adequacy amount, would still fail to provide programs required by RSA 193:E-2-a (*e.g.,* Art and Physical education), and would still provide students with *no resources* outside of teachers.

Dr. Freeman's study was provided to the New Hampshire Supreme Court in the appeal from summary judgment granted in the ConVal case by amici school districts represented by Natalie Laflamme and John Tobin. The State denigrated the ConVal plaintiffs by approvingly citing the Freeman study:

> Using that definition [from RSA 193-E:2-1], the plaintiffs could have isolated the costs they incur to fund the core educational program and compared them against the total per-pupil cost established in RSA 198:40-a. Indeed, this appears to be the type of analysis that, according to the *amici* school districts, two New Hampshire school districts have attempted to undertake. SAB 13-15.[6]

[4] Notably, Pittsfield has among the lowest average teacher salaries in the state. For the 2017-18 school year, the average teacher salary in the state was $58,278. Pittsfield's average teacher salary was $40,879. The only k-12 school district with a lower average teacher salary at the time was the Pelham School district at $37,625. The other school districts with lower average teacher salaries were elementary only districts employing less than 12 teachers. https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/teach_sal17-18.pdf (last viewed 8-22-23). Just two years later, the 2019-20 Pelham's average teacher salary increased to $52,230. The state average salary was $59,624.40. Pittsfield's average teacher salary was $43,233. https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/teach-sal19-20.pdf (last viewed 8-22-23).

> [6] The studies the *amici* school districts reference are not part of the record and were not tested through the adversarial process. This Court therefore cannot rely on them as evidence that the State is not meeting its funding obligation. They are telling in one respect, however: they suggest that the plaintiffs could have sought to prove their case by attempting to show that they spend more to deliver an adequate education than the State provides in funding. While the State certainly does not concede the soundness of that approach, the studies at least reflect a theoretical path available to the plaintiffs that they chose not to take.
>
> (Emphasis added).

State's Answering Brief in *Contoocook Valley School District v. State*, (June 26, 2020) (Attachment 9). The State now attempts to avoid and ignore this analysis in the context of its summary judgment motion.

The opinions submitted by Plaintiffs' experts rely upon the State's proffered definition of adequacy, even though the experts disagree with those definitions. At trial, Plaintiffs are prepared to accept the minimum standards assigned by the State as definitional. However, Plaintiffs will argue that the definition should be based on the entirety of RSA 193:E-2-a's identified Ed 306 rules, including sections that incorporate other rules by reference.[5]

C. Defendants' Disclosed and Deposed Experts

The State retained two experts: Drs. Jay Greene and James Shuls. Neither expert offers an opinion as to whether the level of adequacy funding provided by the State is sufficient. Greene Dep. Tr. 82:22–83:4; Shuls Dep. Tr. 193:23–194:4; *see also* Greene Dep. Tr. 107:13–18. Nor is either expert offering an opinion as to the State's definition of adequacy, Greene Dep. Tr. 242:5–8; Shuls Dep. Tr. 193:8–10, 15–18, or which standards fall within adequacy, Greene Dep. Tr.

[5] The State's entire motion rests on the assumption that Plaintiffs' experts concede that the State's definition of adequacy does not include the entirety of Ed 306. However, this is not a concession. Plaintiffs' experts accept the State's definition for purposes of concluding that the State is failing to provide sufficient funds *for its own definition*. Accordingly, Plaintiffs experts testified that their opinion does not assume the entirety of Ed 306 is part of adequacy. Cascadden Dep. 51:19–22, 65:3–10, 66:3–8, 67:7–12; Freeman Dep. 39:4–20.

242:9–12; Shuls Dep. Tr. 193:11–14. While the State's experts might disagree with Drs. Freeman and Cascadden's methodology on the basis that the use of actual expenditures (whether they are below average or not) is not a reasonable or appropriate method of objectively measuring cost of a specific cost component, Dr. Greene asserts that the 2008 Legislative Committee's approach to determine cost was a reasonable and appropriate method. Greene Dep. Tr. 175:10–18; *see also* Greene Dep. Tr. 182:3–14. This is not withstanding the fact that the 2008 Legislative Committee itself determined the cost of a teacher (and other personnel it deemed necessary to provide an adequate education) to be the actual average expenditure of a third-year teacher statewide. The State has disclosed no other fact witnesses, including no witnesses from the Department of Education. The State has provided no evidence regarding the proper cost of adequacy.

ARGUMENT

Because there is no dispute that the local education tax rates vary, the only fact Plaintiffs must prove to prevail is that adequacy funding (base and differentiated aid) is insufficient to meet the State's definition of adequacy.[6] Accordingly, the State's argument that Plaintiffs need to demonstrate "that everything school districts spend money on falls within the definition of an adequate education the Legislature adopted," State's Memo. of Law, at 9, is disingenuous and intentionally misleading.[7]

[6] As there is no dispute that the local education tax rates vary, to the extent this Court determines that the *ConVal* Plaintiffs have demonstrated that adequacy funding is insufficient, partial summary judgment is warranted in favor of the *Rand* Plaintiffs. The only remaining issue for trial will be whether differentiated aid is sufficient to provide the additional services necessary for applicable students.

[7] For this very reason, Plaintiffs experts agree that not everything spent by a school district falls within adequacy. Cascadden Dep. 51:17–52:8; Freeman Dep. 39:4–20.

The Supreme Court has already determined that whether the level of adequacy funding provided by the State is sufficient to pay for the components of adequacy is inappropriate for summary judgment as it is a mixed question of law and fact. *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 166-167 (2021).

I. The Court Should Not Grant Summary Judgment as there is Competent Evidence in the Record Demonstrating That the State's Adequacy Funding is Insufficient to Deliver the Opportunity for an Adequate Education.

Summary judgment is only warranted when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *JMJ Properties v. Town of Auburn*, 168 N.H. 127, 129-30 (2015). A dispute of fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 739 (2005) (quotation and backets omitted). The Court must consider the evidence in the light most favorable to the non-moving party. *See id*. at 735. The Court cannot assess credibility when ruling on a motion for summary judgment. *See Iannelli v. Burger King Corp*., 145 N.H. 190, 193 (2000).

Summary judgment is not warranted here because the record contains competent evidence, which if viewed in the light most favorable to Plaintiffs, demonstrates that the amount of funding the State provides pursuant to RSA 198:40-a (base adequacy and differentiated aid) is insufficient to deliver the opportunity for an adequate education. The record includes, among other things, a financial analysis by Dr. Freeman that the Pittsfield School District could not afford a sufficient number of qualified teachers to meet the State's minimum standards relying solely on adequacy aid.[8] Freeman Report- Exhibit B (Attachment 4) (relying purely on state

[8] Plaintiffs further refer the court to the statement of additional undisputed facts, which highlights additional evidence. Plaintiffs' Statement of Additional Facts, ¶¶ 16-37. This evidence also includes Drs. Freeman and Cascadden's testimony that as former superintendents they could not provide an adequate education as defined by the State exclusively with adequacy aid and are unaware of any other school

adequacy funding results in the elimination of all non-teaching resources and a 60-to-1 student teacher ratio). This alone is sufficient to defeat summary judgment.

Dr. Freeman also opined in his report that the average special education cost for a child in the Pittsfield school system was $32,000, establishing that the State's corresponding differentiated aid amount of approximately $2,000 per child is woefully deficient. *See* RSA 198:40-a, II, (b). The fact that differentiated aid is designed to fund adequacy for children who qualify for special education, however, is an admission that paying for these costs is a part of adequacy. *See also* RSA 186-C:1 ("It is the purpose of this chapter to ensure that all children with disabilities have available to them a free appropriate public education in the least restrictive environment that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.").

The State misleads the Court in its summary judgment motion and memorandum by failing to address Dr. Freeman's analyses *at all*. Instead, the State misstates the law and facts by pointing to undisputed testimony from Plaintiffs' experts that districts expenditures include spending on items that are not within the State's definition of adequacy. The argument is a red herring.

Nothing in New Hampshire jurisprudence requires that Plaintiffs identify what portion of a school district's total expenditures are attributable to providing a constitutionally adequate education, nor is it germane to the issues at hand. Plaintiffs are not required to specifically define or identify these costs at the summary judgment phase. *See* Order on Cross Motions for Summary Judgment in Contoocook Valley School District v. State, March 20, 2023, at 9.

district in the state that could do so. Freeman Report at 2, 3 (Attachment 4); Cascadden Dep. Tr. 76:3–20 (Attachment 5); Cascadden Report at 2 (Attachment 6).

Nonetheless, Plaintiffs have identified a specific cost component that exceeds the State's cost of adequacy. Dr. Freeman's analysis concluded that the Pittsfield School District could not afford enough teachers relying purely on state adequacy funding. While the parties dispute the full catalog of what cost components are required to deliver an adequate education, at a minimum, it must require teachers. As this Court acknowledged, and the State concedes, it likely requires more. *See id*. ("It is not reasonable to infer that schools can provide the opportunity for an adequate education without incurring costs beyond those attributable to teachers and other supervisory staff. For example, teachers need materials such as books and computers in order to instruct students on the subjects listed in RSA 193-E:2-a, I."); *see* State's Memo. Of Law at 13.[9]

Lastly, Plaintiffs' experts' testimony that districts spend on cost elements beyond adequacy, or that districts that spend less than the average may be providing adequacy, does not equate to an undisputed finding that Plaintiffs have failed to demonstrate adequacy funding is insufficient, as the State incorrectly suggests.[10] The parties do not dispute that some districts provide services or programs beyond adequacy. The parties disagree whether the State's current adequacy funding is sufficient to provide adequacy under the State's definition. Plaintiffs, through the Pittsfield study and other evidence, have shown it is not. At the very least, the analysis raises a genuine issue of material fact.

[9] The State's admission that the plain and ordinary meaning arguably supports a conclusion that adequate education incorporates instruction, supplies, and development proves that summary judgment is inappropriate. *Id.* The specific inputs needed to provide what is listed in the statute is unclear and exactly the type of question appropriate for trial.

[10] It is important to note that even the lowest spending school district spends over *three times* as much as the State's adequacy amount. *See* Defendant's Response to Plaintiffs' First Request for Admissions ¶ 7. Accordingly, even if districts spend on some items above and beyond adequacy, the discrepancy is telling.

II. The Plaintiffs' Burden is to Demonstrate that Adequacy Funding is Insufficient, Not to Define and Isolate the Costs of Adequacy.

Rather than address the fact that the Plaintiffs put forth evidence that State adequacy funding is insufficient, the State instead attempts to impose an additional burden of proof on the Plaintiffs. The State argues that, as a threshold matter, that Plaintiffs have failed to isolate what portions of a school district's total expenditures are attributable to providing a constitutionally adequate education and, therefore, Plaintiffs have failed to meet their burden.[11] This is not the law. The State disingenuously cites to the Supreme Court's decision in *Contoocook Valley School District* for this proposition. First, nowhere in the case does the Court hold that plaintiffs challenging adequacy must "isolate what portions of a school district's total expenditures are attributable to providing a constitutionally adequate education." State's Memo. Of Law at 9. The case simply held that to determine whether adequacy funding is sufficient, the Court must first determine what is required to deliver an adequate education as defined under the statute and then determine whether the cost is sufficient. Plaintiffs do not dispute this. As the State admits, the definition of an adequate education is the State's responsibility — not Plaintiffs. *See id*. at 15-16. Plaintiffs burden is only to demonstrate that based on that definition, adequacy funding is insufficient. There can be no dispute that Drs. Freeman and Cascadden's determination that adequacy funding is insufficient is *based on the State's definition*. Freeman Report at 1–2 (Attachment 4); Cascadden Report at 1–2 (Attachment 6). The burden is now on the State to disprove the claim or otherwise demonstrate that adequacy funding is sufficient to meet its

[11] And, as explained above, even if this were the law (which it is not), the Pittsfield study does identify a portion of expenditures that is attributable to adequacy (teachers) and that portion exceeds the State's total amount. It is unnecessary to further isolate components when the most basic requirement for providing an education cannot be funded.

definition. The State has provided no evidence of the latter and failed to do so at the ConVal trial.

III. The State's Definition of Adequacy is Arbitrary.

As noted above, the Plaintiffs' experts have adopted *arguendo* the State's interpretation of its definition of adequacy. However, because the State mischaracterizes Plaintiffs' experts' testimony and this issue will be relevant at trial (particularly in the remedy stage), Plaintiffs submit that they also dispute the State's *interpretation* of the State's definition primarily because the State interprets the Ed 306 rules it has identified as defining adequacy to exclude other rules expressly identified by reference. For example, Ed. 306.37 (English Language Arts and Learning) which is identified by the State as definitional notes that "[p]ursuant to Ed. 306.26, the local school board shall require that an English/language arts and reading program in each elementary school that provides certain types of instruction, skills, and opportunities."[12] Yet the State interprets the adequacy definition to not include these requirements. These include specific curriculum requirements, instructional programs, and evaluations. *See* Ed. 306.26

Similarly, Ed 306.40(a) (titled "Health Education Program"), begins with "[p]ursuant to Ed. 306.26 and Ed 306.27, the local school board shall require that a school health education program for grades 1-12…." *See,* RSA 193 E:2-a (definition of adequacy includes "health education"). While acknowledging the need for health education services, the State attempts to exclude the comprehensive guidance and counseling programs and food and nutrition services also referenced in the rule, but that are separately defined in 306.39 ("School Counseling

[12] Ed. 306.37 similarly notes the requirements for high school students with identical language. These are codified in Ed 306.27 and requires districts, among other things, to develop local policies to "identify how the district shall engage students in creating and supporting extended learning opportunities that occur outside of the physical school building and outside of the usual school day . . ."

Program"), 306.11 ("Food and Nutrition Services). Accordingly, there is a dispute to the correct interpretation of the State's definition that this Court will be required to resolve.

CONCLUSION

The New Hampshire Supreme Court has ruled that whether adequacy funding is sufficient is a mixed question of law and *fact*. The record shows competent evidence that, when viewed in a light most favorable to Plaintiffs, could lead a reasonable fact finder to determine the State is failing to provide sufficient funding to meet its constitutional obligations. What the record also shows is that there is no evidence or empirical analysis provided by the State demonstrating the contrary. By not challenging Plaintiffs on the merits, the State seeks to further a system designed to prevent anyone from defending their constitutional rights. This cannot be what *Claremont* intended. Plaintiffs are entitled to prove their case at trial.

Dated: Concord, New Hampshire
August 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum of Law has been served via the court's electronic filing system to all parties of record on this 28th day of August, 2023.

/s/ Natalie Laflamme
Natalie Laflamme