THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

215-2022-cv-00167

Steven Rand, *et al.*

v.

State of New Hampshire

DEFENDANTS' MOTION TO EXCLUDE
OPINIONS AND TESTIMONY OF DR. JOHN FREEMAN

NOW COMES, Defendant, the State of New Hampshire, by and through its counsel, the New Hampshire Department of Justice, and submits the following Motion to Exclude the Opinions and Testimony of Dr. John Freeman, Plaintiffs' non-retained expert. Dr. Freeman's testimony fails to comply with the requirements of NH R. Evid. 702 as (1) some portions are legal opinion, (2) some portions are based on theories that have been excluded from this case by the Court's April 24, 2024 Order on Case Status and Pending Motions, and (3) the opinions as a whole are not based on reliable principles and methods, not based on reliable facts or data, and are not the result of a reliable application. At base, Dr. Freeman's opinions will not assist a trier of fact in understanding the evidence or determining a fact issue. In further support, Defendant incorporates the memorandum of law attached and filed herewith.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

A. Exclude Dr. Freeman as an expert witness; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA

ATTORNEY GENERAL

Date: August 21, 2024

By: /s/ *Anthony J. Galdieri*

Anthony J. Galdieri, No. 18594
Solicitor General
Samuel Garland, No. 266273
Senior Assistant Attorney General
New Hampshire Department of Justice
1 Granite Place South
Concord, NH 03301
Phone: (603) 271-3658
E-mail: Anthony.j.galdieri@doj.nh.gov
samuel.rv.garland@doj.nh.gov

John R. Munich, (pro hac vice)
J. Nicci Warr (pro hac vice)
STINSON LLP
7700 Forsyth Blvd., Suite 1100
Clayton, MO 63105
Phone: (314) 863-0800
Email: john.munich@stinson.com
nicci.warr@stinson.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: August 21, 2024

/s/ *Samuel Garland*
Samuel RV Garland.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

215-2022-cv-00167

Steven Rand, *et al.*
v.

State of New Hampshire

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF JOHN FREEMAN

Defendants, through counsel, submit this memorandum of law in support of their motion to exclude the opinions of Plaintiffs' expert, Dr. John H. Freeman, pursuant to New Hampshire Rule of Evidence 702 and RSA 516:29-a. Dr. Freeman's opinions are not based in reliable principles and methods, and he has not reliably applied principles and methods to the facts. Thus, his testimony should be excluded as it will not help the Court understand the evidence or determine facts at issue.

FACTUAL BACKGROUND

Plaintiffs challenge RSA 198:40-a, II as unconstitutional, facially and as-applied, because it allegedly fails to provide sufficient funding to cover the cost of the adequate education program defined in RSA 193-E:2-a, I. Plaintiffs rely in part on Dr. Freeman's testimony to support their contention that the funding the State provides for both base adequacy aid and differentiated aid are deficient. *See* Pls.' Obj. Mot. Summ. J. at 4. However, Dr. Freeman fails to advance any opinions based in reliable principles and methods, and fails to tether his analysis to the definition of an adequate education. Thus, his opinions are not reliable and not relevant to the cost of adequacy.

Dr. Freeman's first opinion is twofold: that the State has not *funded* an adequate education; and that the State has not adequately *defined* an adequate education. *See* Ex. 1, Freeman Report at

1-2; *see also* Ex. 2, Freeman July 13, 2023 Dep. Tr. 6:13-18. Dr. Freeman does not propose a definition of adequate education or a method by which to reach a definition. Ex. 2 at 7:1-7. Likewise, he did not propose an amount necessary to fund an adequate education, nor did he propose a method to reach such an amount. *Id.* at 7:8-16. Aside from taking one graduate level course regarding school finance, Dr. Freeman has no formal education or training in the field of economics. *Id.* at 19:7-20:16. He does not hold a degree in economics or statistics, and he does not consider himself an expert in those fields. *Id.* at 20:17-21:5.

Dr. Freeman's opinion that the State does not properly define an adequate education is premised on his belief that, although RSA 193-E:2-a combined with the Ed. 306 regulations allow for a district to provide an adequate education, "they don't demand it because of the lack of specificity relative to curriculum." *Id.* at 27:20-28:4; Ex. 1 at 1-2. He provided one example, stating that greater specificity is needed "in terms of what students would be receiving in terms of the education in the [English Language Arts (ELA)] curriculum." Ex. 2 at 30:11-13. Yet his belief that the Ed. 306 definition for ELA lacks specificity is based only on anecdotal experience, specifically writing deficiencies he noticed in *some* undergraduate students he taught, as well as research he conducted at one high school. *Id.* at 30:14-32:23. Dr. Freeman did not investigate or analyze specific classes taken or skills gained by any of those students. *Id.* at 33:9-23. Moreover, Dr. Freeman has never created a school curriculum himself. *Id.* at 28:23-29:10. Ultimately, Dr. Freeman admitted that in his experience, New Hampshire schools provide an adequate education within the confines of the statute and regulations, as currently defined. *Id.* at 28:5-12.

It is also Dr. Freeman's opinion that to properly define adequacy, the regulations need more detail regarding specific skills students should gain through classwork. *Id.* at 34:22-35:5. However, he did not offer an opinion as to specifically how to achieve that level of detail. *Id.* at 35:7-10.

Even if he did offer such an opinion, it would appear to be one in search of a problem, since Dr. Freeman is not aware of any schools that actually fail to provide classes that teach the skills of which he speaks. *Id.* at 34:16-19. More generally, Dr. Freeman opined that "there are additional requirements in Ed 306 and in other places in the law in New Hampshire that place requirements on the schools that are not included in the RSA." *Id.* at 47:5-13. Yet rather than specify additional requirements, Dr. Freeman simply agreed that "*all requirements* imposed by the state need to be taken into account to determine the cost of an adequate education." *Id.* at 48:23-49:5.

Next, Dr. Freeman opined that although he is "not basing [his] report on outcome performance measures, the failure of [New Hampshire's] educational system to produce better and more equitable outcomes should be a consideration in determining acceptable funding levels." Ex. 1 at 2. Yet Dr. Freeman did not consider what proficiency level the State should target, and he did not have an opinion regarding whether certain tests are better measures of skill over others. Ex. 2 at 52:9-13; 52:20-53:1. Though he cites data in his report regarding proficiency levels based on whether a student received free or reduced priced lunch, he did no data analysis to determine whether additional inputs for students who are eligible for free or reduced priced lunch generally increases proficiency. *Id.* at 56:20-57:2. Ultimately, aside from his generic, unsupported opinion that "outcomes can inform the inputs," Dr. Freeman offers nothing more specific to support his opinion that outcomes should be a consideration in calculating funding levels. *Id* at 58:19-59:7.

Dr. Freeman also opined that the "rationale for the cost determinations" of adequacy aid and the "rationale for which costs were included as part of adequacy" are "unclear and arbitrary." Ex. 1 at 2. Dr. Freeman referenced one example to support his opinion—how teacher salaries and benefits are costed out—but he conducted no actual data analysis of teacher salaries or benefits across the state. Ex. 2 at 77:12-78:16. The only action he took for the specific purpose of reaching

this opinion was to review reports on the Department of Education (DOE) website relating to teacher salaries. *Id.* at 78:7-80:20. Ultimately, however, Dr. Freeman offered no opinions regarding what he might consider to be appropriate levels of teacher salaries and benefits to achieve an adequate education. *Id.* at 82:19-83:19. More broadly, he has no opinions regarding a specific amount necessary to achieve adequacy for any cost determinations he believes to be "unclear and arbitrary." *Id.* at 84:5-10. Nor does he have an opinion regarding a method that the State should adopt to make a new determination. *Id.* at 84:11-14.

Next, Dr. Freeman opined that "$3786.66 per pupil is insufficient to provide an adequate education in New Hampshire." Ex. 1 at 2. Dr. Freeman admitted that this figure did not include sources of state funding outside of base adequacy aid, including differentiated aid, and sources of federal funds. Ex. 2 at 85:2-21. In fact, Dr. Freeman is not aware of any schools that receive only base adequacy aid to educate its students. *Id.* at 85:19-87:1. Dr. Freeman supports his opinion on the basis that he is not personally aware of any school that provides an adequate education on $3786.66 or less. Ex. 1 at 2. But that conclusion is not based on any investigation or DOE data, but rather only his experience and informal conversations with colleagues. *Id.* at 87:2-88:14. Yet Dr. Freeman could not name one district with whom he spoke. *Id.* at 88:15-21. Dr. Freeman's report goes on to claim that the state's lowest spending district spends three times the base adequacy amount and that the state's average per-pupil spending is $21,000. Ex. 1 at 2. He thought he based those statement on a DOE report, but he did not know what years of data he examined; what categories of spending were included in the report; or even whether there is any connection between the report and constitutional adequacy. Ex. 2 at 88:22-92:7. Ultimately, Dr. Freeman's opinion is quite simply that constitutional base adequacy should equal the amount a school spends to educate students who do not qualify for differentiated aid. *Id.* at 92:15-94:1.

Dr. Freeman also opines that class sizes used in the state's funding formula are too large, and that even if the sizes were appropriate, the State's funding is inadequate. Report at 2; Dep. At 95:2-11. Dr. Freeman opines generally that class sizes should be lower, but does not offer an opinion on the magnitude of that change or the method by which size should be determined. *Id.* at 94:23-95:18. Moreover, his opinion that classes should be smaller is based only on his experience and conversations with parents and school boards. *Id.* at 95:19-96:13. He also admitted that school size "does create some deficiencies relative to spending," meaning that larger schools can be more efficient by spending less on certain items, but he has never looked into that question. *Id.* at 41:10-19. Similarly, Dr. Freeman was not sure whether school size has any effect on a school's ability to maintain a specific student-teacher ratio. *Id.* at 42:12-17. Ultimately, Dr. Freeman did not tie class size or student-teacher ratios to adequate funding. He could not point to a single district that fails to offer an adequate education due to class size or student-teacher ratio. *Id.* at 101:1-5. Likewise, he is not offering the opinion that districts with above-average class sizes or student-teacher ratios are failing to offer a constitutionally adequate education. *Id.* at 100:18-23; 101:15-19.

Dr. Freeman also opines that the State's allocation of differentiated aid is "insufficient to pay for the additional costs of students in the differentiated aid categories," pursuant to RSA 198:40-a Ex. 1 at 3. Dr. Freeman is "unaware of the methodology the State used to determine the amounts distributed as differentiated aid." *Id.* Dr. Freeman admits his opinion is "pretty simple," in that he simply "look[s] at the money that [is] coming in, and [he] look[s] at the money that it's costing [Pittsfield school district] . . . and there's a great disparity there." Ex. 2 at 170:13-17. He admits that for the Pittsfield district, adequate funding simply equals the amount of money the district spends. *Id.* at 171:6-11. But he cannot offer the same opinion with respect to the rest of the districts in the State, since he has not examined how they are spending their money. *Id.* at 171:11-

13; 172:20-173:6. In fact, he could not identify a single district that shouldn't be funded to cover all of its expenses. *Id.* at 173:7-12. Dr. Freeman has not done any formal analysis to support his opinion other than what is included in his written report, which examines differentiated aid only in the context of special education students. *Id.* at 175:16-176:20. Dr. Freeman testified that special education students must be analyzed individually to determine what amount is needed for an adequate education. See *id.* at 185:17-23. Moreover, Dr. Freeman does not have "an opinion as to specifically what differentiated aid should be" or whether "a base adequacy amount should be enough so that it does cover it all." *Id.* at 170:18-21. Rather, he simply opines that the Pittsfield school district spent roughly $32,000 per special education student, and therefore the funding provided by the State is not enough. Ex. 1 at 4. Dr. Freeman also opines that, "Local school districts should be relieved of the cost of paying for special education services that are not funded by the federal government." Ex. 1 at 7.

Dr. Freeman opines that "[t]he actual cost of providing an adequate education has risen substantially over the last 14 years, while the State's assessment of the cost of adequacy has not changed materially during that time." Ex. 1 at 5. In support, he opines that because base adequacy aid is inadequate, "the failure to increase that cost materially over time renders the State's estimate of the cost of providing an adequate education even more inadequate." *Id.* Dr. Freeman does not have an opinion regarding the magnitude by which the aid should be adjusted to reflect the supposed increased cost. Ex. 2 at 181:22-182:4. He believes that "any time the state imposes an obligation financially on the district it then needs to pay for that . . . under the adequacy statute." *Id.* at 183:19-185:1.

Finally, Dr. Freeman opines that "a fair estimate of the cost of providing an adequate education in New Hampshire is the average cost per pupil across the state, plus the cost per pupil

of transportation, plus the cost of capital expenditures on a per pupil basis," and that that amount is $21,000 per pupil. Ex. 1 at 7. Dr. Freeman explains that "what is provided in adequacy clearly is not enough . . . it seems as though the average would be – the approximate average would be a realistic place to start." *Id.* at 203:16-23. He further claimed that a district's geography "might" mean it should receive more than $21,000 per pupil, but he could not be certain without conducting further analysis. *Id*. at 205:20-206:16. Ultimately, Dr. Freeman wasn't sure whether districts would receive the same amount per pupil: "They may not. I don't know." *Id.* at 207:13-15.

STANDARD OF REVIEW

The New Hampshire Rules of Evidence allow a party to proffer opinions from a witness who is a qualified expert if the opinions sought to be introduced involve scientific, technical, or other specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue. N.H. R. Evid. 702. To be admissible, however, expert testimony must cross a threshold of reliability. *Stachulski v. Apple New England, LLC*, 171 N.H. 158, 163, 191 A.3d 1231 (2018). To determine the reliability of expert testimony, the trial court must apply RSA 516:29-a, portions of which codify principles outlined by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Id.*; *see also Baker Valley Lumber v. Ingersoll-Rand*, 148 N.H. 609, 614-16, 813 A.2d 409 (2002) (applying the *Daubert* framework to evaluate the reliability of expert testimony under Rule 702). RSA 516:29-a provides:

> I. A witness shall not be allowed to offer expert testimony unless the court finds:
>
> (a) Such testimony is based upon sufficient facts or data;
>
> (b) Such testimony is the product of reliable principles and methods; and
>
> (c) The witness has applied the principles and methods reliably to the facts of the case.

> II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:
>
> (1) Have been or can be tested;
>
> (2) Have been subjected to peer review and publication;
>
> (3) Have a known or potential rate of error; and
>
> (4) Are generally accepted in the appropriate scientific literature.
>
> (b) In making its findings, the court may consider other factors specific to the proffered testimony.

When applying these factors, the trial court "functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." *Stachulski*, 171 N.H. at 164, 191 A.3d 1231 (quotation omitted). The proponent of expert testimony bears the burden of proving its admissibility. *Id.* "'Rule 702 has been interpreted liberally in favor of the admission of expert testimony.'" *Id.* (quoting *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 78 (1st Cir. 2006)). The overall purpose of Rule 702 and RSA 516:29-a is to ensure that a fact-finder is presented with reliable and relevant evidence, not flawless evidence. *Osman v. Lin*, 169 N.H. 329, 335, 147 A.3d 864 (2016).

"When evaluating the basis of proffered expert testimony, one factor courts 'shall consider, if appropriate to the circumstances,' is 'whether the expert's opinions were supported by theories or techniques that . . . [a]re generally accepted in the appropriate scientific literature.'" *Moscicki v. Leno*, 238 A.3d 1036, 1040 (N.H. 2020) (quoting RSA 516:29-a, II, II(b)). RSA 516:29-a, II requires courts to consider whether the proffered testimony is based upon theories or techniques that are generally accepted; it does not require courts to exclude testimony where the testimony is not supported by the theory or technique that has the most acceptance. *Id.* "Indeed, while '[w]idespread acceptance can be an important factor in ruling particular evidence admissible,'

[citation omitted], it is not the only factor." *Id.* (quoting *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786). "Scientific conclusions are subject to perpetual revision," and a court's role is not to rubber-stamp a scientific methodology merely because it enjoys widespread acceptance at the present time. *Id.* (quoting *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786). "For this reason, courts must look to the methodology employed by experts in each specific case to determine whether an expert opinion is 'the product of reliable principles and methods,' RSA 516:29-a, I(b), which, as the *Daubert* Court emphasized, is a 'flexible' inquiry." *Id.* (citing *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786). Furthermore, a court must examine the reasonableness of an expert's approach, "along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant." *Osman v. Wen Lin*, 147 A.3d 864, 870 (N.H. 2016) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

ARGUMENT

I. Dr. Freeman's Opinions Are Not the Product of Reliable Principles and Methods, and He Has Not Reliably Applied the Principles and Methods to the Facts of this Case.

Dr. Freeman's opinions regarding the per-pupil cost of an adequate education are not the product of reliable principles and methods, nor has he reliably applied the principles and methods to the facts of this case. *See* RSA 516:29-a, I(b). Ultimately, Dr. Freeman's opinions fail to offer a reasonably reliable method to determine the cost of a constitutionally adequate education.

A. Dr. Freeman's opinion that RSA 193-E:2-a lacks sufficient detail to reliably determine the cost of an adequate education is a legal opinion, not supported by any principles or methods, and is not tethered to the facts.

Dr. Freeman's opinion that the State has not adequately defined an adequate education is a legal opinion that he is unqualified to give. "[I]t is firmly established that an expert may not testify as to legal issues or express legal opinions." *Stock v. Gray*, No. 22-cv-04104, 2024 WL 2402116,

at *1 (W.D. Mo. May 23, 2024); citing *Batiste v. Titan Med. Grp. LLC*, No. 22-cv-190, 2023 WL 5105170 at *2 (D. Neb. Aug. 9, 2023). Dr. Freemen has not attempted to calculate the cost of an adequate education under RSA 193-E:2-a and his opinion is based on nothing more than his own say so. Dr. Freeman should not be allowed to offer his unsupported opinion that goes directly to the legal issue that this Court (and potentially higher courts) must answer.

In addition, Dr. Freemen's opinion is not supported by any scientific methodology whatsoever, much less one that is comprised of reliable principles and methods grounded in fact. Dr. Freeman conduced no formal investigation or analysis of relevant facts or data to reach his sweeping conclusion. Rather, he relies primarily on his experience as an educator (he has no expertise in economics or statistics). Dr. Freeman's experience actually belies his own opinion. He admits that in his experience, New Hampshire schools provide an adequate education within the confines of the statute and regulations, as they are currently defined. Ex. 2 at 28:5-12. On that basis alone, his opinion is unreliable.

Dr. Freeman's report offers no basis or explanation for the opinion. The reasoning he gave in his deposition is that the statute and corresponding Ed. 306 regulations do not provide enough "specificity" in terms of the curriculum necessary to receive an adequate education. *Id.* at 27:20-28:4; 30:11-13. Ironically, Dr. Freeman, who has never created a curriculum himself, provided no specificity in terms of an analysis that would allow him to reach such a conclusion. He mentioned anecdotally that his belief is based in part on his experience teaching undergraduate students, *some* of whom he claimed had writing deficiencies that *could* be connected to a lack of specificity in the statute or regulations. *Id.* at 30:14-32:23. But he never investigated what classes they took in high school, and he offered no further detail or analysis. Dr. Freeman's "method" of relying on

anecdotal, output-based measures is also belied by his own report, in which he claims he is "not basing [his] report on outcome performance measures." Ex. 1 at 2.

Even if Dr. Freeman's opinion could reliably be based *only* on his own experience (and it cannot), he fails to connect his experience to any deficiency in the State's definition of adequacy. Plus, the opinion is not grounded in the facts. Dr. Freeman admits he has never encountered a school district that failed to provide an adequate education under the current definition of the statute and regulations. Ex. 2 at 28:5-12. In other words, Dr. Freeman's own experience—which forms the only basis for his opinion—belies his conclusion that the State has not adequately defined an adequate education, and thus it is not reliable.

Dr. Freeman also opined that "there are additional requirements in Ed 306 and in other places in the law in New Hampshire that place requirements on the schools that are not included in the RSA." *Id.* at 47:5-13. But when pressed to identify the specific requirements, Dr. Freeman simply agreed that "*all requirements* imposed by the state need to be taken into account to determine the cost of an adequate education." *Id.* at 48:23-49:5. This kind of "kitchen sink" approach is unworkable. It amounts to a mere conclusion without a method. It is not grounded in any scientific methods or economic principles. And it fails to draw any rational relation between adequacy funding and a potentially limitless list of requirements. The opinion is rendered even more unreliable by Dr. Freeman's testimony that the way he determines whether a service is required for adequacy is by "try[ing] to go strictly by the RSA and the Ed. 306 requirements," which he admits is a subjective determination." *Id.* at 189:7-188:7-190:5. Dr. Freeman proposes no alternative definition of adequacy or a method by which to reach a definition, *Id.* at 7:1-7, and thus his opinion cannot be helpful to a fact finder and should be excluded.

B. Dr. Freeman's opinion that the State fails to fund a constitutionally adequate education is not supported by reliable principles or methods and is not tethered to the facts.

Dr. Freeman's opinion that "$3786.66 per pupil is insufficient to provide an adequate education in New Hampshire," Ex. 1 at 2, is not based on any reliable principles or methods and is not grounded in fact. It is ultimately undermined by the arbitrary alternative funding mechanism proposed by Dr. Freeman—that adequacy funding should simply equal the amount a school spends to educate its student, except those who qualify for differentiated aid..

Dr. Freeman premises his opinion on a series of conclusory statements that are not supported by any factual record, investigation, or analysis. First, he claims he is not personally aware of any school that provides an adequate education on $3786.66 or less. Ex. 1 at 2. Yet Dr. Freeman's conclusion is based on only his experience and informal conversations with colleagues, and he could not identify a single school district that he investigated. *Id.* at 87:2-88:21. Further, his opinion does not take into account sources of state funding outside of base adequacy aid, including differentiated aid, and sources of federal funds. *Id.* at 85:2-21. Dr. Freeman tacitly admits these other categories of funding should be considered, since he is not aware of any schools that receive only base adequacy aid to educate its students. *Id.* at 85:19-87:1. When pressed to explain the basis for his belief that $3786.66 per pupil is not adequate, he falls back on some DOE reports. But he did not know what years of data he examined; what categories of spending were included in the report; or even whether there is any connection between the report and constitutional adequacy. *Id.* at 88:22-92:7. Ultimately, Dr. Freeman's opinion is quite simply that constitutional base adequacy should equal the amount a school spends to educate students who do not qualify for differentiated aid because he believes that is the right standard. *Id.* at 92:15-94:1. This Court, however, has already agreed that it is not. *See* April 25, 2024 Order on Case Status and Pending

Motions, p. 11 (granting summary judgment to the State to the extent Plaintiffs request an injunction requiring the State to pay a funding level derived from the statewide per-pupil average).

Dr. Freeman also opined that the "rationale for the cost determinations" of adequacy aid and the "rationale for which costs were included as part of adequacy" are "unclear and arbitrary." Ex. 1 at 2. But this opinion is a legal opinion, and it has no support, either in fact or in reliable methodology. Dr. Freeman does not identify the specific costs or cost determinations that he claims are not clearly and logically connected to adequacy. He offers no explanation for his broad, generic claim. Instead, Dr. Freeman offers ***one*** example—teacher salaries and benefits. He claims that using salaries for teachers with three years of experience and benefits equal to 33 percent of salary is "not practical" and "not sufficient." Ex. 2 at 77:12:78:6. But these opinions are mere beliefs without any basis, as Dr. Freeman conducted no actual data analysis of teacher salaries or benefits statewide. *Id.* at 78:7-16. Rather, he only reviewed DOE reports comparing average teacher salaries to those of new teachers. *Id.* at 78:7-80:20. Ultimately, however, Dr. Freeman does not have an opinion as to the levels of teacher salaries and benefits necessary to achieve an adequate education. *Id.* at 82:19-83:19. More broadly, he has no opinions regarding a specific amount necessary to achieve adequacy for *any* cost determinations he believes to be "unclear and arbitrary." *Id.* at 84:5-10. Nor does he have an opinion regarding a method that the State should adopt to make a new determination. *Id.* at 84:11-14. Without more, Dr. Freeman's opinion that certain costs included in adequacy are "unclear and arbitrary" simply because he believes they are not "practical" or "sufficient" amounts to a mere conclusion without a basis in fact or reliable principles and scientific methodology.

C. Dr. Freeman's opinion that class sizes used in the State's funding formula are too large is not based in any reliable methods and is not grounded in fact.

Dr. Freeman also opines that class sizes used in the state's funding formula are too large, and that even if the sizes were appropriate the State's funding is inadequate. Report at 2; Dep. At 95:2-11. Dr. Freeman opines generally that class sizes should be lower but does not offer an opinion on the magnitude of that change or the method by which size should be determined. *Id.* at 94:23-95:18. Moreover, his opinion that classes should be smaller is based only on his experience and conversations with parents and school boards—not on any scientific literature or studies. *Id.* at 95:19-96:13. Parental and school board ***preferences*** are not a part of constitutional adequacy. Dr. Freeman also admitted that school size "does create some deficiencies relative to spending," meaning that larger schools can be more efficient by spending less on certain items, but he has never looked into that question. *Id.* at 41:10-19. Similarly, Dr. Freeman was not sure whether school size has any effect on a school's ability to maintain a specific student-teacher ratio. *Id.* at 42:12-17. Ultimately, Dr. Freeman did not tie class size or student-teacher ratios to adequate funding. He could not point to a single district that fails to offer a constitutionally adequate education due to class size or student-teacher ratio. *Id.* at 101:1-5. Likewise, he is not offering the opinion that districts with above-average class sizes or student-teacher ratios are failing to offer a constitutionally adequate education. *Id.* at 100:18-23; 101:15-19.

D. Dr. Freeman's opinion that differentiated aid is insufficient is not rooted in any reliable methodology.

Dr. Freeman also opines that the State's allocation of differentiated aid is "insufficient to pay for the additional costs of students in the differentiated aid categories," pursuant to RSA 198:40-a Ex. 1 at 3. First, Dr. Freeman is not challenging the methodology the State uses to calculate differentiated aid, because he cannot. He admits he is "unaware of the methodology the State used to determine the amounts distributed as differentiated aid." *Id.* Similar to his analysis

regarding base adequacy aid, Dr. Freeman's opinion is that the amount of differentiated aid is insufficient simply because no school or district of which he is aware is able to provide a constitutionally adequate education with base aid plus differentiated aid. Basically, his opinion is that if those schools haven't been able to provide an adequate education, then it must mean the entire funding mechanism is unconstitutional. Dr. Freeman never identifies the schools or districts that supposedly support his opinion, much less provide details about their qualifying student population or explain why they aren't able to provide an adequate education under the State's formula.

Dr. Freeman admits his opinion is "pretty simple," in that he simply "look[s] at the money that [is]coming in, and [he] look[s] at the money that it's costing [Pittsfield school district] . . . and there's a great disparity there." Ex. 2 at 170:13-17. He admits that, in his opinion, for the Pittsfield district, adequate funding simply equals the amount of money the district spends. *Id.* at 171:6-11. This opinion is contrary to the legal standard of constitutional adequacy, which is not what a school district spends writ large but the costs of providing those components that comprise the legislative definition of an adequate education in RSA 193-E:2-a. In addition, Dr. Freeman cannot offer the same opinion with respect to the rest of the districts in the State, since he has not examined how they are spending their money. *Id.* 171:11-13; 172:20-173:6. In fact, he could not identify a single district that shouldn't be funded to cover all of its expenses. *Id.* at 173:7-12. Dr. Freeman admitted he has not done any formal analysis to support his opinion other than what is included in his written report, which examines differentiated aid only in the context of special education students. *Id.* at 175:16-176:20. Yet Dr. Freeman testified that special education students must be analyzed individually to determine what amount is needed for an adequate education. *See id.* at 185:17-23. But he hasn't done that analysis here, and thus he cannot reasonably claim that the amount

provided is not enough. It could be enough or more than enough or close to enough to require deference to the legislative judgment. But we don't know because Dr. Freeman has not performed the analysis he himself says is necessary to determine adequacy.

Moreover, Dr. Freeman does not have "an opinion as to specifically what differentiated aid should be" or whether "a base adequacy amount should be enough so that it does cover it all." *Id.* at 170:18-21. Rather, he simply opines that the Pittsfield school district spent roughly $32,000 per special education student, and therefore the funding provided by the State is not enough. Ex. 1 at 4. Again, Dr. Freeman's analysis fails to connect the district's expenditures to adequacy. The "analysis" is simple addition without any explanation for why the underlying services included in the $32,000 are necessary for an adequate education. Similarly, Dr. Freeman provides no analysis demonstrating that the district is spending those dollars in an efficient manner. A fact finder is left only to assume and trust—without any reliable methodology or application to evidence—that every single cent is necessary for adequacy simply because one school district says so.

Dr. Freeman also opines that "Local school districts should be relieved of the cost of paying for special education services that are not funded by the federal government." Ex. 1 at 7. Aside from being a legal opinion and the glaring omission of any reliable principles or methods to support this opinion, it is problematic because Dr. Freeman offers two polar opposite opinions on the subject at deposition. First, he agrees that "school districts should not have to pay for any costs associated with special education students." *Id.* at 187:13-17. But in the next breath, Dr. Freeman admits there are some costs that the local district should bear. *Id.* at 187:18-188:4.

D. Dr. Freeman's opinion that the cost of providing an adequate education has risen substantially, while the State's assessment of that cost has not materially changed, is not based in reliable principles or methods and is not based in fact.

Dr. Freeman opines that "[t]he actual cost of providing an adequate education has risen substantially over the last 14 years, while the State's assessment of the cost of adequacy has not changed materially during that time." Ex. 1 at 5. The basis for his opinion is simply that because he believes base adequacy aid is inadequate, "the failure to increase that cost materially over time renders the State's estimate of the cost of providing an adequate education even more inadequate." *Id.* Dr. Freeman does not tie, and makes no attempt to tie, his analysis to the definition of an adequate education contained in RSA 193-E:2-a (perhaps because he believes that statutory definition is inadequate), and he does not have an opinion regarding the magnitude by which the aid should be adjusted to reflect the supposed increased cost. Ex. 2 at 181:22-182:4. Quite simply, Dr. Freeman believes that "any time the state imposes an obligation financially on the district it then needs to pay for that . . . under the adequacy statute." *Id.* at 183:19-185:1. This is not the law. Dr. Freeman's opinion is untethered from the law, not grounded in any independent investigation or analysis, and is not reliably tied to any evidence, and therefore it should be excluded.

E. Dr. Freeman's opinion that the State should pay school districts $21,000 per pupil to fully fund adequacy is not based in reliable principles and methods.

Finally, Dr. Freeman opines that "a fair estimate of the cost of providing an adequate education in New Hampshire is the average cost per pupil across the state, plus the actual cost per pupil of transportation, plus the actual cost of capital expenditures on a per pupil basis," and that that amount is $21,000 per pupil. Ex. 1 at 7. Like all of Dr. Freeman's opinions, this one is not based in any reliable principles or scientific methodology—most obviously, his explanation for using the average expenditures across the state to determine adequacy. Dr. Freeman simply says, "what is provided in adequacy clearly is not enough . . . it seems as though the average would be

– the approximate average would be a realistic place to start." *Id.* at 203:16-23. Of course, the opinion cannot hold water because as soon as one district changes expenditures, the average changes, and thus the required adequacy funding would change for every district, regardless of whether they have changed any expenditures. In fact, this Court has already held that "it would be inappropriate to set an education funding level based solely on the simple mathematical exercise of determining statewide per pupil average of all school district expenditures," April 25, 2024 Order on Case Status and Pending Motions, p. 8, and has excluded that theory from this case

Dr. Freeman's testimony illustrates just how unworkable his theory would be. First, he says even if a district spends below the average, the district might still be providing an adequate education. *Id.* at 204:1-5. Yet, he cannot say whether the average would cover adequacy for districts spending more than average. *Id.* at 204:6-10. He claimed a district's geography "might" mean it should receive more than $21,000 per pupil, but he could not be certain without conducting further analysis that he did not do. *Id.* 205:20-206:16. Ultimately, Dr. Freeman backed off his figure, testifying that he wasn't sure whether districts would receive the same amount per pupil: "They may not. I don't know." *Id.* at 207:13-15. Thus, Dr. Freeman's opinion is not grounded in any independent investigation or analysis, is not based in any reliable principles or methods, and is contrary to this Court's holdings in this case. Therefore, it should be excluded.

CONCLUSION

Dr. Freeman's opinions are not the product of reliable principles and methods, he has not reliably applied the principles and methods to the facts of the case, and his testimony will not help the Court to understand the evidence or to determine a fact in issue. Some of Dr. Freeman's opinions are also legal opinions that he is unqualified to give and contrary to the Court's orders in

this case. Accordingly, the Court should exclude Dr. Freeman's opinions and testimony from being used for any purpose at trial.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA

ATTORNEY GENERAL

Date: August 21, 2024

By: /s/ *Anthony J. Galdieri*

Anthony J. Galdieri, No. 18594
Solicitor General
Samuel Garland, No. 266273
Senior Assistant Attorney General
New Hampshire Department of Justice
1 Granite Place South
Concord, NH 03301
Phone: (603) 271-3658
E-mail: Anthony.j.galdieri@doj.nh.gov
samuel.rv.garland@doj.nh.gov

John R. Munich, (pro hac vice)
J. Nicci Warr (pro hac vice)
STINSON LLP
7700 Forsyth Blvd., Suite 1100
Clayton, MO 63105
Phone: (314) 863-0800
Email: john.munich@stinson.com
nicci.warr@stinson.com
nicci.warr@stinson.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was sent via the Court's electronic filing system to all parties of record.

Date: August 21, 2024

/s/ *Samuel Garland*
Samuel Garland