THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

State of New Hampshire

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**POST-TRIAL BRIEF**

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The State of New Hampshire, by and through the Office of the Attorney General, files this post-trial brief in support of its request for the court to deny all merits relief and dismiss the case.

## I. The Plaintiffs Lack Standing To Maintain Their Claims.

The plaintiffs "seek a declaratory judgment that the money the State provides for the funding of adequacy is not nearly enough to cover the cost of delivering an adequate education" under Part II, Article 83. (Pls.' Pre-Trial Brief at 1.) The plaintiffs further allege that, "as a result, [school] districts must rely on local school taxes to bridge the gap," and seek a declaration that this violates Part II, Article 5 of the New Hampshire Constitution. *Id.*

The plaintiffs do not seek a declaration that a single statute is unconstitutional; they assert instead that the present public education funding scheme, which is comprised of many statutes, "does not currently guarantee funding sufficient to cover the cost of an adequate education" and ask the court to "direct[] the State to adopt a revised cost determination, which accounts for the full cost of providing constitutional adequacy to all school districts and amounts to no less than the average state expenditure per pupil, with allowances for demographic and geographic

diversity and that includes consideration of the costs of transportation, capital costs, and debt." (Pls.' Amended Compl. ¶¶ 80-82.)

The plaintiffs, several individuals who pay taxes, and two corporate entities that also pay taxes, lack standing to maintain these claims. "The doctrine of standing limits the judicial role, consistent with a system of separated powers, to addressing those matters that are traditionally thought to be capable of resolution through the judicial process." *Richard v. Governor*, 2024 N.H. 53, ¶ 7 (citing *Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362, 366 (2021)). "Because standing implicates the court's subject matter jurisdiction, it may be raised at any time in a proceeding." *Id.*

"In New Hampshire, standing in the traditional sense is grounded in Part II, Article 74 of the State Constitution, which provides: 'Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.'" *Id.* (internal quotations omitted). "Thus, while the respective branches of the legislature, the governor, and the executive council may request [the Supreme Court's] advisory opinion on important questions of law, other parties may not." *Id.*

"Typically, standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." *Id.* ¶8 (citing *Conduent State & Local Solutions v. N.H. Dep't of Transp.*, 171 N.H. 414, 418 (2018)). "When evaluating whether a party has standing to sue, [the Supreme Court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect." *Id.*

"Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest." *Id.* "Rather, the party must show that the party's own rights have been or will be directly affected." *Id.* A plaintiff must establish standing as to each claim in his or her complaint. *See id.* ¶¶ 9-24 (analyzing whether plaintiff had standing as to each claim and finding standing to advance two claims and a lack of standing as to the remaining four claims).

Persons seeking declaratory and injunctive relief regarding whether the system by which the State funds public education is constitutional in one or more respects proceeds necessarily under RSA 491:22. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 592-93 (1999).

In this case, the plaintiffs have failed to advance a concrete, personal injury that rises above a generalized grievance or their general status as taxpayers sufficient to obtain a declaration under RSA 491:22. They advance instead solely a shared interest among them that the State cost and fund public schools in a manner they believe would be proper and more in accordance with Part II, Article 83. Because "[e]very person in New Hampshire has an interest in the proper application of the Constitution and state laws," *Richard*, 2024 N.H. 53, ¶ 24, the plaintiffs' interests advance only "generalized wrong[s] allegedly suffered by the public at large," *Avery v. Comm'r, N.H. Dep't of Corr.*, 173 N.H. 726, 737 (2020), and "an abstract interest in ensuring that the State Constitution is observed," *id.* The plaintiffs therefore lack standing to maintain their remaining claims under RSA 491:22. *Richard*, 2024 N.H. 53, ¶ 24.

*Claremont School District v. Governor*, 138 N.H. 183 (1993) (*Claremont I*), does not create an exception to the statutory requirements of RSA 491:22. *See Baer v. N.H. Dept. of Educ.*, 160 N.H. 727, 731 (2010), superseded by statute as stated in *Duncan v. State*, 166 N.H.

630 (2014). The New Hampshire Supreme Court made this clear in *Baer* when it held: "*Claremont* did not create an exception to the statutory requirements of RSA 491:22. The petitioners must still allege a present legal or equitable right, which they have failed to do here." *Baer*, 160 N.H. at 731.

To meet this standard, the plaintiffs must prove a concrete, personal injury as distinguished from a generalized grievance suffered by all taxpayers or members of the public. *Duncan*, 166 N.H. at 645-46. They failed to do so in this case. The plaintiffs complain instead that "the money the State provides for the funding of adequacy is not nearly enough to cover the cost of delivering an adequate education . . . ," (Pls.' Pre-Trial Brief at 1), but have never explained how they have suffered a concrete, personal injury that will likely be remedied by a court order requiring the State to revise its education funding laws to pay more money to public schools. The only plaintiff who testified could not speak to this and could only speculate as to what might or could happen, and rightfully so. There is no guarantee that the legal revisions the plaintiffs seek or additional State funding will result in lower, as opposed to higher (or the same), property or other taxes for the plaintiffs.[1] Consequently, whether a court order in plaintiffs' favor requiring the State to revise its existing education costing and funding laws will remedy

[1] To the extent the plaintiffs allege a harm, it seems to be a harm suffered by municipalities that must allegedly use local education taxes to make up any shortfall in State adequacy payments. Notably, no municipality in this case has testified that it utilizes a local education property tax to meet or maintain a level of constitutional adequacy as opposed to raising those funds to provide their schools with money that goes beyond constitutional adequacy or to programs, items, or services that fall outside of constitutional adequacy. *See* RSA 198:43 ("School districts are authorized to develop educational programs beyond those required for an adequate education and to raise and appropriate amounts necessary for such programs."). Consequently, this alleged injury has not been factually proven in this case. Regardless, standing under RSA 491:22 cannot be satisfied by the plaintiffs here raising injuries allegedly suffered by third-parties. *See Avery*, 162 N.H. at 608-09 (explaining that, under RSA 491:22, a petitioner "will 'not be heard to question the validity of a law, or any part of it, unless [they] show[] that some right of [theirs] is impaired or prejudiced thereby.'") (quoting *Baer*, 160 N.H. at 730).

any personal harm to them is entirely undeveloped and speculative. *See Duncan*, 166 N.H. at 647.

Moreover, any "special interest" the plaintiffs may have in the public education system "does not constitute a definite and concrete injury sufficient to confer standing" under RSA 491:22, I. *Duncan*, 166 N.H. at 646 (internal quotations omitted). Consequently, the fact that the single plaintiff who testified has children in school or is concerned about education or how education tax rates affect other members of her community is not sufficient to confer standing.

The plaintiffs' alleged remaining Part II, Article 5 claim suffers from the same defect. The local education taxes they complain about are set by municipalities, not the State. *See* RSA 76:8, III ("Municipalities are authorized to assess local property taxes necessary to fund school district appropriations not funded by the education tax, by distributions from the education trust fund under RSA 198:39, or by other revenue sources."); RSA 198:43 ("School districts are authorized to develop educational programs beyond those required for an adequate education and to raise and appropriate amounts necessary for such programs."). The claim seems to be that municipalities are improperly or unconstitutionally raising local education property taxes to help fund the State's Part II, Article 83 obligation. That is really a Part II, Article 83 claim that the State is not raising enough money to support its adequate education obligation; it has nothing to do with whether the SWEPT rate or the local education property tax rate is "proportionate and reasonable, equal in valuation and uniform in rate, and just" under Part II, Article 5. *Eby v. State*, 166 N.H. 321, 328-29 (2014).

Moreover, the injury the plaintiffs allege in support of this claim is common to all taxpayers in their local taxing district and to all taxpayers across the State. To the extent any

entity is harmed, it would be the municipalities themselves, under a Part II, Article 83 theory, not a Part II, Article 5 theory, and the plaintiffs lack standing to raise harms suffered by third parties.

Additionally, the remedy the plaintiffs seek does not involve invalidating local property tax rates and stopping the collection of local education property taxes across the State, and could not do so because the State's municipalities have not been noticed as separate parties to this lawsuit and have not been properly brought before this court to litigate whether their local education tax rates are being used to fund legislatively-defined constitutional adequacy or expenses outside of or beyond legislatively-defined constitutional adequacy and be bound by any resulting judgment. Consequently, the plaintiffs lack standing to maintain their remaining Part II, Article 5 claim.

The plaintiffs also lack taxpayer standing under Part I, Article 8 of the New Hampshire Constitution because they have not asserted or proven that "the State . . . has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." They argue instead that the State is not spending *enough* money on public education under Part II, Article 83 and must increase the amount of funding it provides to municipalities for their public schools through revisions to its laws with the hope that municipalities will lower their local education property tax rates to some countervailing degree. (*See, e.g.*, Pls.' Pre-Trial Brief at 1, 9, 39-40.)

"Part I, Article 8, however, does not state that a plaintiff has standing to bring a declaratory judgment action 'about spending.'" *Carrigan*, 174 N.H. at 370. "The provision's language . . . does not empower courts to audit a governmental body to determine whether its policy decisions regarding the allocation of resources are prudent or sufficient to comply with legal requirements." *Id.* Yet, the plaintiffs here seek precisely that result: an audit of the State

through the court to determine whether its legislative policy decisions regarding the allocation of State money to public education are sufficient or whether more spending should be ordered. Part I, Article 8 does not confer standing to seek such a declaration.

## II. The Plaintiffs' Remaining Part II, Article 5 Claim Fails To State A Cognizable Claim For Relief And Is Duplicative Of Their Part II, Article 83 Claim.

The plaintiffs "seek a declaratory judgment that the money the State provides for the funding of adequacy is not nearly enough to cover the cost of delivering an adequate education" under Part II, Article 83. (Pls.' Pre-Trial Brief at 1.) The plaintiffs further allege that, "as a result, [school] districts must rely on local school taxes to bridge the gap," and seek a declaration that this violates Part II, Article 5 of the New Hampshire Constitution. *Id.*

Part II, Article 5 does not impose the type of spending restriction the plaintiffs' desire to read into it. Part II, Article 5 concerns only whether tax rates are "proportionate and reasonable, equal in valuation and uniform in rate, and just." *Eby v. State*, 166 N.H. 321, 328-29 (2014). It does not limit a municipality's authority to assess local property taxes under RSA 76:8, III, nor does it limit how a municipality may spend locally raised education tax dollars. And the plaintiffs are not seeking to invalidate all local education property taxes across the State and force municipalities to use local education property taxes only to raise money for their schools to fund amounts outside of or beyond what the Legislature has defined as constitutional adequacy.

Consequently, the plaintiffs' remaining Part II, Article 5 claim fails to state a claim for relief and is simply duplicative of their Part II, Article 83. It is merely a claim that the State is not meeting its duty to fund the legislatively defined substantive adequate educational program contained in RSA 193-E:2-a. It should therefore be dismissed.

## III. The Plaintiffs Bear A Heavy Burden of Proof To Demonstrate A Clear Conflict Between The State's Education Funding Statutes and Part II, Article 83.

The plaintiffs contend "that the money the State provides for the funding of adequacy is not nearly enough to cover the cost of delivering an adequate education, even under the State's own definition of an adequate education." (Pls.' Pre-Trial Brief at 1.) The plaintiffs have suggested throughout this case that the State bears the burden on this claim. Most recently, the plaintiffs contended in response to the State's motion for a directed verdict during trial that they had introduced sufficient evidence to create a "presumption" that the State is not fully funding the cost of an adequate education, and that the State bears the burden of overcoming this presumption. Any suggestion that the State bears the burden of proof or persuasion on the plaintiffs' claims is meritless.

Our Supreme Court recently made clear in *Contoocook Valley School District v. State* that, even in the context of an education funding claim, "[t]he party challenging a statute's constitutionality bears the burden of proof." 174 N.H. 154, 161 (2021). The Supreme Court has separately made clear that "[f]or limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of that right." *State v. Lilley*, 171 N.H. 766, 776 (2019). It is only "*when* governmental action impinges upon a fundamental right" that a claim is "entitled to judicial review under strict judicial scrutiny." *Akins v. Secretary of State*, 154 N.H. 67, 71 (2006) (citing *Claremont School District v. Governor*, 142 N.H.462, 472 (1997) (*Claremont II*)).

The first appeal in *Contoocook Valley* principally concerned the trial court's finding that RSA 198:40-a, II(a) was unconstitutional as applied to the plaintiff school districts. *See* 174 N.H. at 160–62. In reversing that decision, the Supreme Court parenthetically observed that

> in "an as applied" challenge to the constitutionality of a statute the plaintiff has the burden of demonstrating that the statute has in fact been, or is sufficiently likely to be, unconstitutionally applied to him or her and the trial judge and reviewing court have the particular facts and circumstances of the case needed to determine whether the statute has been, or is likely to be, applied in an unconstitutional manner

174 N.H. at 167 (citing C.J.S. *Constitutional Law* § 243 (2015)).

Here, in contrast, the plaintiffs assert a facial challenge to all of the education funding statutes because their challenge is not limited to any specific school district or student and instead concerns the sufficiency of the statewide education funding system. *See Lilley*, 171 N.H. at 722 (observing that a facial challenge is "a head-on attack to a legislative judgment" through "an assertion that the statute violates the Constitution in all, or virtually all, of its applications"). A facial challenge "is the most difficult challenge to mount successfully." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024). To prevail on a facial challenge, a plaintiff must do more than merely "demonstrate that the statute has in fact been, or is sufficiently likely to be, unconstitutionally applied to him or her." *Contoocook Valley*, 172 N.H. at 167. A plaintiff must instead demonstrate that the statute is unconstitutional to the full extent of its reach. *Doe v. Reed*, 561 U.S. 186, 194 (2010).

This is a "heavy burden." *State v. Ploof*, 162 N.H. 609, 614 (2011). To satisfy it, the plaintiffs were required to demonstrate that a "clear and substantial conflict exists between" the State's education funding statutes "and the constitution." *Contoocook Valley*, 174 N.H. at 171. The Court must presume all of those legislative enactments "to be constitutional" and may "not declare [them] invalid except on inescapable grounds." *Id.* Any doubts as to constitutionality "must be resolved in favor of . . . constitutionality." *Id; see also Hynes v. Hale*, 146 N.H. 533, 535 (2011) (a court must "never declare a statute void unless the nullity and invalidity of the act are placed . . . beyond all reasonable doubt." (citation and quotation marks omitted)); *Orr v.*

*Quimby*, 54 N.H. 590, 601 (1874) ("It is therefore incumbent upon those who deny the validity of a statute to show that it is a plain and palpable violation of constitutional right. If they fail to do so, or leave room for a reasonable doubt upon the question whether it is an infringement of any of the guarantees secured by the constitution, the presumption in favor of the validity of the act must stand." (citation and quotation marks omitted)).

The plaintiffs may attempt to evade their heavy burden by suggesting that under the Supreme Court's education funding jurisprudence, the State has a duty to "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." *Contoocook Valley*, 174 N.H. at 156–57 (citations and quotation marks omitted). The plaintiffs have made this argument before, and it is in keeping with their assertion at trial that they had generated a presumption of unconstitutionality that the State was required to overcome. But the fact that the State has a duty to do certain things through the law does not change who has the burden of proof when an individual challenges one of those laws as constitutional. Those concepts do not logically flow from one another and any argument to that effect should be rejected.

The Supreme Court expressly held in *Contoocook Valley* that "[t]he party challenging a statute's constitutionality" (in that case, an education funding statute specifically) "bears the burden of proof." *Id.* at 161. The Supreme Court, relying on *Claremont II*, has also made clear that strict scrutiny attaches "*when* governmental action impinges upon a fundamental right." *Akins*, 154 N.H. at 71 (emphasis added). These well-settled principles apply to plaintiffs in education funding cases like this—and should apply with particular rigor—because they are challenging a legislative funding system comprised of numerous different statutes. It is in no way anomalous (in fact, it is the norm) that the party seeking to mount such a constitutional

challenge, even where a duty is involved, would bear the burden of proof. *See, e.g.*, *Cluckey v. Town of Camden*, 894 F.3 25, 33 (1st Cir. 2018) (observing that in an action brought under 42 U.S.C. § 1983, "[t]he plaintiff must prove the alleged deprivation of [constitutional] rights" and "that the deprivation has resulted from a breach of a duty owed by the defendant"); *Rowe v. Public Serv. Co*, 115 N.H. 397, 399 (1975) (observing "the well established rules of law that a person asserting negligence has the burden of proof").

There is, in other words, no legal basis to suggest that the State bears the burden to disprove the plaintiffs' claims. To the contrary, the plaintiffs must prove a clear conflict between the State's education funding provisions and Part II, Article 83 before the burden shifts to the State to justify the system under strict scrutiny. Any contention otherwise should be rejected. And because the plaintiffs have failed to prove a clear conflict, their claims fail.

## IV. The Statutory Definition Of An Adequate Education Is Not As Broad As Plaintiffs Claim And Does Not Cover Everything They Contend It Covers.

The plaintiffs premise their challenge on an erroneously broad view of the legislative definition of an adequate education contained in RSA 193-E:2-a. To discern what this statutory definition covers, the court must interpret it using the ordinary tools of statutory construction. This statutory definition reveals a legislative intent to cover an educational program that consists of eleven learning areas, RSA 193-E:2-a, I(a), infused with computer use, digital literacy, logic, and rhetoric, RSA 193-E:2-a, I(b), and further reveals a legislative intention to pay for academic and applied instruction, materials, and assessment for that educational program by reference to the specific minimum standard regulations that apply to each of the eleven learning areas, RSA 193-E:2-a, IV(a).

### A. The Statutory Definition of an Adequate Education.

In *Londonderry Sch. Dist. v. State* ("*Londonderry*"), the Supreme Court required the Legislature to define an adequate education with specificity so the State's costing and funding obligation could be objectively determined. *See* 154 N.H. 153, 162 (2006) ("Whatever the State identifies as comprising constitutional adequacy it must pay for."). The Legislature complied by enacting RSA 193-E:2-a. In doing so, the Legislature "embraced its duty to define the opportunity for a constitutionally adequate public education for every child in the state." Laws 2007, 270:1, I. It found "that the opportunity for a constitutionally adequate education in New Hampshire consists of the substantive education programs from kindergarten through twelfth grade that deliver essential opportunities to acquire skills, competencies, and knowledge in the subject areas of English/language arts and reading, mathematics, science, social studies, the arts, world languages, technology, information and communication technologies, health, and physical education." Laws 2007, 270:1, II. The Legislature "found that an adequate education shall provide every child in New Hampshire with the opportunity to receive these substantive education programs in accordance with the specific criteria and high standards for such educational programs that are set forth in the applicable school approval standards." *Id.*

RSA 193-E:2-a exists in RSA chapter 193-E. Respecting New Hampshire's long tradition of community involvement," the Legislature passed RSA chapter 193-E: "to ensure that appropriate means are established to provide an adequate education through an integrated system of shared responsibility between state and local government." RSA 193-E:1, II; *see Claremont II*, 142 N.H. at 475-76 (recognizing that "local governments may be required, in part, to support public schools") (internal quotations omitted). "An adequate education" must "provide all students with the opportunity to acquire" certain skills, knowledge, and practices. RSA 193-E:2.

Under RSA 193-E:2-a, the substantive educational program that delivers the opportunity for an adequate education consists of the following eleven (11) "learning areas":

1. English/language arts and reading;
2. Mathematics;
3. Science;
4. Social studies, including civics, government, economics, geography, history, and Holocaust and genocide education;
5. Arts education, including music and visual arts;
6. World Languages;
7. Health and wellness education, including a policy for violations of RSA 126-K:8, I(a);
8. Physical education;
9. Engineering and technologies including technology applications;
10. Personal finance literacy;
11. Computer Science.

RSA 193-E:2-a, I(a). Academic and applied instruction must be used to teach these learning areas. RSA 193-E:2-a, I(b). The skills of computer use and digital literacy, and the skills of logic and rhetoric, must be integrated into the above learning areas. RSA 193-E:2-a, I(b)(1-2).

The Legislature specifically determined that not all minimum standards for public schools are part of an adequate education. Only "[t]he minimum standards for public school approval *for the areas identified in paragraph I* shall constitute the opportunity for an adequate education." RSA 193-E:2-a, IV(a) (emphasis added). "Public schools and public academies shall adhere to the standards identified in paragraph I." RSA 193-E:2-a. Changes to the minimum

standards applicable to the learning areas in paragraph I of the statute must be adopted by the Legislature before becoming effective, RSA 193-E:2-a, IV(a), because they set the metes and bounds of the State's funding obligation under Part II, Article 83. Other minimum standards may be set or changed without legislative approval as they do not dictate the scope of a constitutionally adequate education.

**1. The Specifically Applicable Ed 306 regulations.**

The following Ed 306 regulations apply to the eleven learning areas set forth in RSA 193-E:2-a, I(a): (1) English/Language Arts and Reading, **Ed 306.37**; (2) Mathematics, **Ed 306.43**; (3) Science, **Ed 306.45**; (4) Social studies, including civics, government, economics, geography, history, and Holocaust and genocide education, **Ed 306.46** & **Ed 306.49**; (5) Arts education, including music and visual arts, **Ed 306.31**; (6) World Languages, **Ed 306.48**; (7) Health Education, **Ed 306.40(b)**; (8) Physical Education, **Ed 306.41(b)**; (9) Engineering and technologies including technology applications, **Ed 306.47**; (10) Personal Finance Literacy, **Ed 306.33(a)(4)(c)**; and (11) Computer Science, **Ed 306.44**.

Nearly all of these regulations have titles that are identical or nearly identical to the statutory learning areas enumerated in RSA 193-E:2-a, I. *Cf. In re Petition of N.H. (State v. Fuchs)*, 174 N.H. 785, 792 (2022) ("While the title of a statute is not conclusive of its interpretation, it provides significant indication of the legislature's intent in enacting the statute.").[2] The text of each corresponding regulation also refers, often repeatedly, to the learning area by name. When considering the "plain and ordinary meaning of the words used"

[2] The only learning area that is not referenced in the title of a corresponding regulation is personal finance literacy, which falls within the regulation governing business education. *See* N.H. Admin. R. Ed 306.33. But that subsection does reference "personal finance" several times, requires one credit in personal finance, and describes what instruction in personal finance literacy should consist of. *See* N.H. Admin. R. Ed 306.33(a)(4)(C).

and the existence of these provisions within the "statutory and regulatory scheme as a whole," *Appeal of N.H. Div. of State Police*, 175 N.H. at 234, it is apparent that these specific regulations—and not the whole of Ed 306—define the services and items of the adequate educational program that the legislature intends to pay for.

All of these specific regulations address generally systematic and appropriate instruction, development of curricula, the opportunities that should be provided to students to develop skills and achieve competencies, and assessment methods, tools, and practices. The State will detail one of them below for illustrative purposes, recognizing that detailing all of them would render this memorandum extraordinarily lengthy.

**i. English/Language Arts and Reading, Ed 306.37**

The English/Language Arts and Reading Program consists of three regulatory subsections addressing elementary, middle, and high school respectively. Ed 306.37(a)-(c).

It explains that, "[p]ursuant to Ed 306.26[3], the local school board shall require that an English/language arts and reading program in each elementary school provides: (1) Systematic and continuous instruction which develops students' knowledge of language arts, including listening, speaking, reading, writing, and viewing; (2) Instruction which emphasizes how to clarify, order, interpret, and communicate experiences through the skillful use of language; (3) Opportunities for each student to exercise, with fluency and ease, oral and written skills and to become acquainted with others' interpretations of experiences through fiction and informational materials, film, television, and other media; (4) An environment which promotes the importance of reading; (5) Opportunities for each child to become literate; (6) Methods for assessing students for appropriate placement in the reading/language arts program, including

[3]Ed 306.26 addresses generally "Kindergarten Through Grade 8 School Curriculum."

diagnostic assessment for remediation; (7) Support for teachers on interpreting test results; (8) Continuous monitoring of each student's progress from grade to grade; (9) Early intervention or remediation; (10) Instruction for teachers in reading in the content areas; and (11) Training for instructional staff on methods for effectively meeting the language arts/reading needs of all students and on current developments in language arts/reading." N.H. Admin. R. Ed 306.37(a).

It explains that, "[p]ursuant to Ed 306.26, the local school board shall require that an English/language arts and reading program in each middle school provides: (1) Instruction which emphasizes the use of language to clarify, order, interpret, and communicate experiences including instruction in listening, speaking, reading, writing, and viewing; (2) Opportunities for each student to develop oral and written skills and to become acquainted with others' interpretations of experiences through fiction and informational materials, film, television, and other media; and (3) Systematic instruction and activities designed to enable student to: (a) Comprehend and produce progressively more complex oral and written language using various patterns of organization, such as narration, description, enumeration, sequence, cause/effect, comparison/contrast, and problem/solution; (b) Recognize and create literary elements, such as plot, character, setting and point of view in a variety of genres; (c) Apply the writing process, including choosing a topic, generating ideas and locating information, drafting, revising, and editing; (d) Increase vocabulary through semantics, use of the dictionary, structural analysis, including prefixes and suffixes, and other strategies; (e) Apply previously learned reading skills to content materials; (f) Acquire new reading skills and fluency through remedial, developmental, and enrichment programs; (g) Use appropriate reading techniques to acquire knowledge, including setting the purpose for reading, varying reading speed, and reading for comprehension at the literal, inferential, evaluative, critical, and analytical levels; (h) Read to

satisfy personal interests and recognize that fiction and informational materials can offer insight into life; and (i) Employ appropriate study skills, including the ability to locate materials, take notes, organize information, and use a variety of sources.

It further explains that, "[p]ursuant to Ed 306.27[4], the local school board shall require that an English/language arts program in each high school provides: (1) Opportunities for students to become familiar with the history, structure, and use of English as the basic medium of communication in our society; (2) Opportunities for students to develop proficiency and control in the use of language, an appreciation of a variety of literary forms, an understanding and appreciation of various aspects of past and present cultures as expressed in literature, and interests for lifelong learning; (3) Courses totaling at least 6 credits in English which shall be distributed as follows: (a) At least 4 credits required of all students and planned as a purposeful sequence of study which promotes: 1. The development of the basic language skills of listening, speaking, reading, writing, and viewing; 2. The acquisition of knowledge; and 3. The understanding of literature and our literary heritage; and (b) At least 2 elective credits designed to provide increased proficiency in the basic language skills and/or an expanded knowledge and understanding of literature and which may be met by such courses as advanced writing, public speaking, debating, dramatics, humanities, and world literature; and (4) Systematic instruction and activities designed to enable students to: (a) Develop effective listening and discussion techniques, distinguish fact from opinion, and identify the principle idea; (b) Write and present speeches for a variety of purposes and audiences; (c) Understand and apply the writing process by choosing a topic, generating ideas and locating information, drafting, revising, and editing in order to write well-organized, legible, well-supported papers; (d) Correctly use the conventions

[4] Ed 306.27 addresses generally "High School Curriculum, Credits, Graduation Requirements, and Cocurricular Program."

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

Ed 306.37(a)-(c), like the other regulations that apply to the specific "learning areas" detailed in RSA 193-E:2-a, I(a), when given their plain and ordinary meaning, reasonably covers systematic and appropriate instruction, development of curricula, the opportunities that should be provided to students to develop skills and achieve competencies, and assessment methods, tools, and practices. This statutory and regulatory legal regime objectively identifies and defines the substantive educational program that delivers the opportunity for an adequate education in sufficient detail for "the citizens of this state … [to] know what the parameters of that educational program are …." *Londonderry*, 154 N.H. at 161. "[T]he State's obligations to fund the cost of a constitutionally adequate education begin and end," *id.*, with this substantive educational program.

The plaintiffs' argument that Ed 306 provisions that apply to teachers, academic and applied instruction, computer use skills, and digital literacy skills should be read into the statutory definition of an adequate education is incorrect as a matter of law and should be rejected. (Pls.' Pre-Trial Brief at 13-14.) RSA 193-E:2-a, IV(a) makes clear that "[t]he minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education." RSA 193-E:2-a, I(a) itself specifically delineates the "learning areas" it covers. Computer science is not a specific learning area; consequently, the computer science education program, Ed 306.44, is not part of the statutory definition. Digital literacy is also not a specific "learning area"; consequently, the digital literacy program, Ed 306.42, is not part of the statutory definition. Rather, RSA 193-E:2-a, I(b) requires the "skills" of "computer use" and "digital literacy" to be "integrated" into the eleven "learning areas" the statute details.

The computer use program and digital literacy program, like other programs in the Ed 306 regulations[5], are programs that are outside of or go beyond the statutory definition the Legislature has agreed to pay for. And while the regulatory requirements generally applicable to teachers and academic and applied instruction would likely inform what the cost of the adequate educational program the legislature is paying for is, those requirements are not part of the statutory definition of an adequate education itself.

Although simply taking an average expenditure is not the appropriate way to determine the cost an adequacy input, it is notable that the plaintiffs have not even tendered such evidence. Plaintiffs tendered no evidence showing the current average cost is to employ a teacher in the

[5] Other programs that are not "learning areas" detailed in RSA 193-E:2-a, I(a) include: the Family and Consumer Science Education Program, Ed 306.38; the School Counseling Program, Ed 306.39; Career and Technical Education Programs, Ed 306.20.

State of New Hampshire in the eleven learning areas detailed in RSA 193-E:2-a, and at the different relevant levels (elementary, middle, and high school) or the average expenditure in New Hampshire to provide academic and applied instruction in the eleven learning areas detailed in RSA 193-E:2-a, I, at each level.

The plaintiffs also seem to imply in their pretrial brief that, because the specific regulations applicable to the eleven learning areas in RSA 193-E:2-a, I begin with "pursuant to" Ed. 306.26 or Ed 306.27, they incorporate into the statutory definition all of the requirements of Ed. 306.26 and Ed 306.27. (Pls.' Pre-Trial Brief at 14-15.) That is not how the regulations read. Ed 306.26 and Ed 306.27 each reference the specific statutorily identified learning areas as part of the entire elementary, middle, and high school programs. Each specific learning area program regulation makes clear that, pursuant to either Ed. 306.26 or Ed. 306.27, the local school board must implement each of those specific learning area programs and then details the type of instruction, opportunities for skill development, materials, and assessment for each specific learning area program that should be provided. The references to Ed 306.26 and Ed 306.27 do not import into the statutory definition of an adequate education everything referenced in them.

The plaintiffs also appear to argue that everything contained in the Health Education Program regulation, Ed. 306.40, is contained in the statutory definition of an adequate education. The plaintiffs are incorrect. RSA 193-E:2-a, I, makes clear the legislature's intent to pay for instruction, opportunities to develop skills and competencies, materials, and assessment in specific "learning areas," including the "learning area" of "Health and wellness education . . . ." RSA 193-E:2-a, I(a)(7). Under the regulations, the Health Education Program is broken down into: (1) Health education; (2) School health services; (3) Food and nutrition services; (4) A comprehensive guidance and counseling program; (5) Healthy school facilities; and (6) Family

and community partnerships. Ed 306.40(a). The only "learning area" referenced in this regulation is Health Education, which aligns with the statutory learning area referenced in RSA 193-E:2-a, I(a)(7). Ed 306.40(b) then details the "health education program" in the same ways as the other regulations that relate to the other statutory learning areas.

In other words, RSA 193-E:2-a, I defines a substantive educational program and details the "learning areas" it intends to cover within that program. RSA 193-E:2-a, I does not encompass school health services, food and nutrition services, a comprehensive guidance and counseling program, healthy school facilities, or family and community partnerships. Those are not "learning areas" and go beyond what the legislature intends to pay for under RSA 193-E:2-a.[6]

The plaintiffs' argument that other provisions of Ed 306 should be read into the statutory definition because in their view they must be complied with to deliver the substantive educational program defined in RSA 193-E:2-a is also incorrect and premised on a misreading of RSA 193-E:2-a. (Pls.' Pre-Trial Brief at 18-19.) It is simply another invitation for the Court to depart from the plain language of RSA 193-E:2-a, the legislative intent of that enactment, and Supreme Court precedent. The Supreme Court has been clear that the Legislature may define the substantive educational program it wishes to pay for and is required only to pay for that program. The Supreme Court has never held that the Legislature is required to pay for what it defines ***and*** anything required or needed to deliver or operationalize what it defines. That would be the equivalent of someone agreeing to pay for another person to have Microsoft Word, and then that

[6] In any event, the plaintiffs tendered no evidence showing what school districts presently spend on their health education, school health services, food and nutrition services, their guidance and counseling program, "healthy school facilities," or family and community partnerships. Thus, even if all of these services were included in the statutory definition of an adequate education, the plaintiffs developed and presented no evidence that even could inform the cost to provide such services, much less have they established the cost of those services for every school district across the State.

person asserting that this agreement also extends to purchasing the person a computer, a keyboard, and a mouse to operationalize it. RSA 193-E:2-a does not reflect an intention to pay for anything and everything districts utilize to deliver or operationalize the substantive adequate educational program it defines. It simply defines the substantive educational program that delivers the opportunity for an adequate education to students, and, through RSA 198:40-a, reflects an intention to pay only for that substantive educational program. The plain language of RSA 193-E:2-a, I does not support extending the statutory definition of what is specifically covered to include everything required, needed, or desired to deliver the substantive educational program the legislature intends to cover under the statute.

The plaintiffs also go through a host of regulatory provisions that they say are incorporated into RSA 193-E:2-a. (Pls.' Pre-Trial Br. at 24-30.) The plaintiffs put on no evidence at trial to show how or whether or to what extent any of these items or services are included, or should be included, in the statutory definition of an adequate education. Many of these items and services are not included as a matter of law in the statutory definition, including guidance counselors, meal service, facilities, custodial and maintenance services, administrative and personnel, superintendent services, and principal services. (Pls.' Pre-Trial Br. at 28-30.) Regardless, the plaintiffs failed to produce evidence to show whether and to what extent these other items and services are included in the definition and what an adequate version of those items and services for the eleven learning areas detailed in the statute at each level, elementary, middle, and high school, costs. The plaintiffs are challenging the statutes that fund a constitutionally adequate education as unconstitutional. That existing legal framework is presumed constitutional, and it is the plaintiffs' heavy burden to demonstrate that, as presently constituted, this legal framework clearly conflicts with the state constitution. They have failed

entirely in this regard to meet their burden of proof and have presented no evidence directed at or tailored to the items and services they believe are included in an adequate education and what their actual, current cost is.

Accordingly, RSA 193-E:2-a, I defines the substantive educational program the Legislature intends to pay for. Its payment obligation is limited only an educational program that consists of eleven learning areas, RSA 193-E:2-a, I(a), infused with the skills of computer use, digital literacy, logic, and rhetoric, RSA 193-E:2-a, I(b), that encompass academic and applied instruction, materials, and assessment. Municipalities may properly share the costs associated with the public school system beyond that and may be required to pay for other items and services. *See Claremont II*, 142 N.H. at 475-76 (recognizing that "local governments may be required, in part, to support public schools") (internal quotations omitted).

It was the plaintiffs' burden at trial was to prove as a factual matter what items and services fall within the statutory definition and to establish their current cost statewide. They entirely failed to meet that burden, relying instead on aggregate expenditure data that does not disaggregate spending related to the statutorily-defined adequate education program contained in RSA 193-E:2-a and all other expenses that lie outside of that statutory definition or go beyond it. They presented no competent expert testimony on this point, nor any other testimony capable of establishing those figures.

**2. RSA 193-E:2-a Does Not Include Transportation, Facilities, Custodial Services, Nurse Services, Superintendent Services, Principal Services, or Administrative Assistant Services.**

RSA 193-E:2-a, I(a) and the specific regulations in Ed 306 that apply to each statutory learning area, when given their "plain and ordinary meaning," *Caron*, 175 N.H. at 544, do not cover, as a matter of law, transportation, facilities operation and maintenance, and administrative

items like nursing services, superintendent services, principal services, administrative assistant services, and custodial services. These items are not referenced in RSA 193-E:2-a, I, or the specifically applicable regulatory text, but rather in *other* statutes or regulations.

Transportation is addressed in RSA 189:6. Under this statute, school districts must "furnish transportation to pupils in kindergarten through grade 8 who live more than 2 miles from the school to which they are assigned," while leaving it to school-district discretion whether to "furnish transportation" for other pupils. RSA 189:6.

School building aid is addressed in RSA 198:15-a through :15-hh; kindergarten construction aid in RSA 198:15-r through :15-t; public school infrastructure grants in RSA 198:15-y; cooperative school district aid in RSA 198:18; area school aid in RSA 198:19; and special aid to small area school in RSA 195-A:11. The requirements for school facilities are set forth in Ed 306.09 and custodial and maintenance services are addressed in Ed 306.07. Neither of these provisions corresponds with the learning areas listed in RSA 193-E:2-a, I.

No state statute or regulation requires a school district to employ a school nurse; the decision is local and discretionary. *See* RSA 200:27 ("The local board in each school district may provide school health services to include school nurse services and school physician services to every child of school age in the district as hereinafter provided."). School health services are addressed in RSA 200:27-:41. The State Board has addressed school health services through Ed 306.12 and Ed 311.

Superintendent services are addressed in RSA 194-C:5, the duties of school principals are set forth in Ed 304, and no statute or regulation addresses administrative assistants.

As a matter of basic statutory and regulatory construction, the definition of an adequate education the Legislature adopted in RSA 193-E:2-a does not incorporate any of these items or

services. And they are the types of services and infrastructure choices best left to localities to engage and fund based on the particular needs of their communities and the families that live there. Thus, to the extent the plaintiffs contend that these items and services are included in the statutory definition of an adequate education, the argument should be rejected.

### 3. The Plaintiffs Presented No Evidence, Expert Or Otherwise, Detailing What Items And Services Are Covered By RSA 193:2-a, I And The Cost Of Those Items And Services.

The plaintiffs shouldered the burden in this case to prove that all of the money the State provides to municipalities for their schools is insufficient to fund the substantive educational program the legislature intends to pay for under RSA 193-E:2-a. For the reasons stated above, and for the reasons detailed in further sections of this post-trial brief, the plaintiffs have entirely failed to meet that heavy burden. Accordingly, the plaintiffs should be denied the relief they request on the merits of this case, judgment should enter for the State, and the matter dismissed.

## V. The Plaintiffs Operate From Fatally Flawed Legal Theories

In addition to failing to adhere to the definition of an adequate education the Legislature prescribed, the plaintiffs also premise their claims on two flawed legal premises. They contend that so-called "base adequacy" should be determine based on school districts' actual or average expenditures.[7] They further contend that the State is required to cover the full amount school districts expend to provide a free and appropriate public education ("FAPE") under the federal Individuals with Disabilities Education Act ("IDEA"). Both theories are erroneous and should be rejected.

[7] So-called "base adequacy" is a subcomponent of a single education costing methodology. RSA 198:40-a, II(a). Though the plaintiffs challenge the education funding system as a whole, their case is wholly devoid of evidence relating to certain education funding statutes, including extraordinary needs grants, RSA 198:40-f; RSA 198:41, and how they impact the system.

### A. Actual expenditures and state averages do not as a matter of law establish the cost of an adequate education.

In their amended complaint, the plaintiffs relied on statewide averages to assert that the State was failing to fully fund an adequate education. *See, e.g.*, Am. Compl. ¶¶ 17, 18, 48. They sought an order "directing the State to adopt a revised cost determination [that] . . . amounts to no less than the average state expenditure per pupil, with allowances for demographic and geographic diversity and that includes consideration of the costs of transportation, capital costs, and debt." *Id.* ¶ 82. The State moved for summary judgment, arguing that the plaintiffs could not prevail on an adequacy claim tethered solely on what school districts actually spend and statewide averages because actual expenditures and averages do not differentiate between what schools spend money on to provide an adequate education and what school districts spend money on that falls outside adequacy or exceeds adequacy.

The Court granted the motion to the extent the plaintiffs sought injunctive relief based solely on the average amount school districts spend, observing that "the plaintiffs acknowledge . . . that not all school district expenditures are constitutionally required." April 25, 2024 Order at 8. The Court otherwise denied the State's motion, concluding "that the plaintiffs pled their school funding claims more broadly than the State's summary judgment filings suggest" and expressing the view that the amended complaint "put the State on notice that the plaintiffs were generally contesting the sufficiency of school funding." *Id.* at 6, 7.

Undeterred, the plaintiffs contend in their pretrial brief that "[c]onsidering the average expenditures across the State is a rational approach to approximate the cost of providing an adequate education." Pls.' Pre-Trial Brief at 30. At trial, the plaintiffs relied entirely on evidence reflecting certain school districts' actual expenditures and statewide and school-district averages. Specifically, the plaintiffs relied on budget documents, annual reports, and capital improvement

plans from Pittsfield and Berlin; reports of average salaries for teachers and other school officials; DOE-25s containing aggregated, self-reported data on total school district expenditures; reports of average and total expenditures by school district and statewide; and average class size and teacher-student ratio documents. The plaintiffs' experts based their opinions on what their school districts spent at certain points in the past either on certain services or more generally to run their schools.

None of this data or testimony distinguishes between what school districts currently spend or do to provide an adequate education, as defined in RSA 193-E:2-a, and what they currently spend or do that is not constitutionally required. The plaintiffs nonetheless appear to contend that they can generate a "presumption" of unconstitutionality, and thereby shift the burden to the State, merely noting the difference between what the State provides schools in funding and what schools actually spend or spend on average. This contention is fundamentally flawed for several reasons. Data or testimony that reflects actual or average expenditures without isolating only the portion of those expenditures that funds the constitutionally-require adequate educational program is not probative of the cost of an adequate education; it is instead affirmatively misleading as to the cost and overinflates it. As the State noted in its brief in the original *Contoocook Valley* appeal, it is like trying to isolate the cost to build an engine only from the sticker price of a car. It simply cannot be done.

This is important because, as the Court has recognized, "the plaintiffs acknowledge . . . that not all school district expenditures are constitutionally required." April 25, 2024 Order at 8. Consequently, tethering the cost of an adequate education to state averages or actual expenditures necessarily absorbs things that are not constitutionally required. Likewise, unless every school district in the State is spending the same amount—and the evidence presented in

this case dispels that—then there are necessarily schools that *can (and do) operate* for less than the state average. This, in turn, necessarily means that school districts *can (and do)* provide the substantive curricular program comprising adequacy for less than what they actually spend or what is spent on average statewide.

Moreover, even if the plaintiffs had isolated only those actual or average expenses that school districts use to fund the substantive educational program defined in RSA 193-E:2-a (and they have not), they offered no evidence demonstrating that actual expenditures reflect the "objective" cost of providing that program. *Londonderry*, 154 N.H. at 162. The State's experts and Mark Manganiello testified that expenditures and costs are not the same thing. There are many factors that could cause a school district to spend more than is strictly necessary to provide adequacy, even on services that are required under the definition of adequacy. The plaintiffs offered no evidence demonstrating that school districts' actual or average expenditures on services reflect what those services objectively cost.

Consequently, evidence of actual or average school district expenditures is insufficient to demonstrate a clear conflict between the State's current funding regime and Part II, Article 83. The Court must presume that the current regime is constitutional and resolve all doubts in favor of constitutionality. *Contoocook Valley*, 174 N.H. at 171. The mere fact that school districts spend more than then State provides them in funding does not demonstrate "beyond all reasonable doubt" that the current amount of state funding is insufficient. *Hynes*, 146 N.H. at 535. The plaintiffs' improper attempt to shift the burden to the State based on a "presumption" of unconstitutionality is tacit acknowledgement that they have not met their burden.

That the Department of Education collects actual expenditure data from school districts and generates reports using that data in no way alters this conclusion. The Department of

Education has not been tasked with determining the cost of an adequate education. Rather, the Legislature has done that by statute. The Department of Education is required to generate certain reports under state and federal law, but none of those reports purport to independently determine the cost of an adequate education. The notion, then, the State "relies" on school districts' reported expenditures "for a variety of uses, including making determinations regarding special education funding eligibility and submitting data to the government in compliance with federal requirements," (Pls' Pre-Trial Br. 31–32), in no way demonstrates that this data can also be relied on to demonstrate the cost of an adequate education. The plaintiffs' contention otherwise is non sequitur.

The Court should also reject any suggestion that the State's experts endorsed using actual or average expenditures in the way the plaintiffs try to do here. Dr. Greene did testify that it can be reasonable to averages for certain inputs as part of the "professional judgment" method for determining the cost of an adequate education. He further testified that this was essentially the process that the Legislature engaged in in 2008. He noted, however, that Dr. Freeman did not engage in anything resembling a "professional judgment" analysis. He noted, too, that Dr. Freeman's analysis did not bear any of the hallmarks of a reliable analysis because it was not wide-ranging, transparent, or deliberative, and it did not incorporate a diverse range of perspective. The State's experts also testified that there are fundamental differences between a cost and an expenditure such that the latter cannot be reliably substituted for the former. The testimony of the State's experts in no way rehabilitates the plaintiffs' faulty reliance on actual and average expenditures in support of their claim.

Finally, the plaintiffs' assertion that it would be "rational" to rely on average expenditures "to approximate the cost of providing an adequate education," *id.* at 30, is a policy

argument made in the wrong forum. The Legislature has not tethered the cost of an adequate education to school districts' actual expenditures or statewide average expenditures. If the plaintiffs think that the cost of an adequate education should be determined in this way, they are free to ask the Legislature to amend the current statutory scheme. They cannot seek to effect such a policy change through this Court. *See St. Onge v. Oberten, LLC*, 174 N.H. 393, 398 (2021) ("The plaintiff's public policy arguments are made to the wrong forum as matters of policy are reserved for the legislature."). [8]

**B. A FAPE and a constitutionally adequate education are not equivalent.**

The plaintiffs further contend that the State is required to cover all costs associated with educating a student with disabilities that are not funded by the federal government. This contention flows from the proposition that a FAPE in the least restrictive environment, as defined under federal law, is the same thing as an adequate education. This argument is fatally flawed because there is no legal support for the assertion that FAPE is equivalent to constitutional adequacy. At trial, the plaintiffs failed to present any evidence to remedy their unsupported leap in logic. In fact, the history and purpose of, and procedures associated with, New Hampshire's constitutional adequacy requirement and the IDEA demonstrate that they address different regimes that are not equivalent and should not be conflated.

[8] Plaintiffs' policy argument is also mathematically nonsensical. The average, by definition, means that many school districts in New Hampshire will be spending less than the average (unless every school district spends the exact same amount). When the lower-spending school districts are given additional funds from the State (as would occur under plaintiffs' proposal), those funds will be spent, almost assuredly raising the average the following year. At any point when the average is reassessed, the mere use of the average as the measure of cost will, therefore, drive up the "cost" of adequacy with no backstop.

### 1. History of IDEA and New Hampshire's implementation of the Act.

The IDEA is a non-discrimination statute meant to provide individual students with disabilities (and their parents) specific support aimed at addressing the individual student's "unique" needs. *See* 20 U.S.C. § 1400(d)(1)(A). The IDEA "provides federal funds to assist states in educating children with disabilities 'and conditions such funding upon a State's compliance with extensive goals and procedures.'" *Roe v. Healey*, 78 F.4th 11, 15 (1st Cir. 2023) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006)) (citation omitted). In order to receive these federal funds, New Hampshire "must agree to guarantee to all children with disabilities a free and appropriate public education," which "encompasses both special education and related services." *Id*. at 15–16 (citing 20 U.S.C. §§ 1400(d)(1)(A), 1401(9),1412(a)(1)(A)).

RSA chapter 186–C "implements" the IDEA, and "[i]ts policy and purpose is as unequivocal as that of the federal Act." *Timothy W. v. Rochester, N.H., Sch. Dist*., 875 F.2d 954, 973 (1st Cir. 1989). Under the IDEA and RSA chapter 186-C, special education means "instruction specifically designed to meet the unique needs of a child with a disability." RSA 186-C:2(IV); *see also* 20 U.S.C. § 1401(29). The Ed 1100 provisions were enacted by the New Hampshire Board of Education in order to further implement the IDEA. *See, e.g.*, N.H. Ed 1101.01 ("The purpose of Ed 1100, adopted by the state board of education, is to ensure that all children with disabilities have available to them a free, appropriate, public education pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C 1400, et seq., as amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) and the implementing regulations found in 34 CFR 300 et seq. and RSA 186-C.").

Through RSA chapter 186-C, New Hampshire is able to ensure compliance with the IDEA and its requirements for receiving federal funding for special education. *See Petition of Milan Sch. Dist.*, 123 N.H. 227, 231, 459 A.2d 270, 273 (1983). The purpose of the implementing statute is to provide a FAPE, as expressly stated in RSA chapter 186-C: "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." RSA 186-C:1. "These laws promote the education of handicapped children by designing a comprehensive administrative scheme to identify and provide services for them." *In re Todd P.*, 127 N.H. 792, 795 (1986). "All expenses incurred by a school district in administering [RSA chapter 186-C] and related services shall be paid by the school district where the child resides." RSA 186-C:13.

**2. Neither RSA chapter 186-C nor the IDEA is incorporated into nor sets forth the definition of an adequate education.**

The plaintiffs contend that the definition of an adequate education incorporates the requirements of the IDEA. The argument lacks merit. "The legislature's intent to incorporate by reference must be clear." *Contoocook Valley*, 174 N.H. at 165. RSA 193-E:2-a makes no reference to RSA chapter 186-C or the IDEA, despite both statutes existing at the time RSA 193-E:2-a was enacted. Likewise, RSA chapter 186-C makes no mention of RSA 193-E:2-a and contains no language that even suggests, much less clearly states, that it prescribes the contours of a constitutionally adequate education for students with disabilities.

Moreover, RSA chapter 186-C specifically contemplates that, with limited exceptions not relevant here, "[a]ll expenses incurred by a school district in administering the relation to the children with disabilities in need of special education and related expenses shall be paid by the

school district where the child resides." RSA 186-C:13 I.[9] In *Londonderry*, the Supreme Court made clear that "[w]hatever the State identifies as comprising constitutional adequacy it must pay for." 154 N.H. at 162. The Legislature has notably never amended RSA chapter 186-C to shift the funding obligation to the State. This is a clear indication that the Legislature does not understand RSA chapter 186-C to define constitutional adequacy.

For its part, the Supreme Court has recognized—in a decision that postdates *Claremont I*—that RSA chapter 186-C provides for a "right to receive special education to assist with essential learning needs *at the expense of the school district*." *Ashland Sch. Dist. v. New Hampshire Div. for Child., Youth, & Fams.*, 141 N.H. 45, 49 (1996) (emphasis added). The Supreme Court noted that "federal law leaves to each State the decision where responsibility for funding that education lies." *Id.* at 50 (citing 20 U.SC. § 1412(2)(B)(1994). The Supreme Court further noted that in New Hampshire, "the legislature has chosen to rest the burden on the local school district." *Id.* Far from suggesting that this violated Part II, Article 83, the Supreme Court emphasized that "[w]hether to transfer that burden elsewhere . . . is a question for the legislature." *Id.* (citation and quotation marks omitted).

Finally, it is also telling that legislation recently proposed in the New Hampshire House of Representatives—2023 House Bill No. 1670—would amend the "purpose" provision of RSA chapter 186-C to provide that: "The provision of a free appropriate public education under this chapter shall be considered a part of the state's duty to provide every child with a constitutionally

[9] This is in keeping with the IDEA, which provides that states, local educational agencies, and educational service agencies are "primarily responsible" for providing a FAPE, while the federal government has a "supporting role in assisting state and local efforts," 20 USC § 1400(c)(6), and anticipates local educational agencies using state and local funds to provide for a FAPE. *See* 20 USC §1411 ("If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by that local educational agency with State and local funds . . . .").

adequate education." This further confirms that New Hamsphire law does not currently consider the provision of a FAPE to be part of the State's requirement that every child be provided a constitutionally adequate education.

### 3. RSA chapter 186-C and RSA 193-E:2-a serve different purposes and impose different standards.

The plaintiffs' attempt to conflate the requirements of RSA chapter 186-C with the definition of an adequate education in RSA 193-E:2-a is also belied by the fact that the statutes serve different purposes and impose different standards. The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 23 (1st Cir. 2004) ("The primary purpose of the IDEA is to guarantee a free and appropriate public education."); *Petition of Milan Sch. Dist*., 123 N.H. 227, 230, 459 A.2d 270, 272–73 (1983); *Garrity v. Gallen*, 522 F. Supp. 171, 219 (D.N.H. 1981). As explained, this is an individual right for children with disabilities.

In contrast, the Supreme Court has made clear that the definition of an adequate education must allow "for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the State's obligations to fund the cost of a constitutionally adequate education begin and end." *Londonderry,* 154 N.H. at 161. "Any definition of constitutional adequacy crafted by the political branches must be sufficient clear to permit common understanding and allow for an objective determination of costs." *Id.* at 162. The definition of an adequate education is therefore not tethered to any individual student's "unique" needs. 20 U.S.C. § 1400(d)(1)(A).

The statutes also impose different standards. At its core, a FAPE consists of "special education and related services." 20 U.S.C. § 1401(9). "Special education" is defined as "specially designed instruction" that "meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). It may include instruction conducted in both academic and nonacademic settings, including in the classroom, in the home, or in hospitals or institutions, or other settings, as well as instruction in physical education. *Id*. "Related services" are defined as "supportive services . . . required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). Related services may include transportation, speech-language pathology and audiology services, psychological services, physical and occupational therapy, interpreting services, recreation, counseling services, social work services, and school nurse services, among other services. 20 U.S.C. § 1401(26). The IDEA generally governs services for qualified children from the ages of 3 through age 21. 20 U.S.C. § 1412(a)(1)(A).

In order to provide a FAPE, schools must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District*, 580 U.S. 386, 399 (2017). The precise makeup of a FAPE depends on each child's individual circumstances, and "the IDEA cannot and does not promise any particular [educational] outcome." *Id*. at 397–99, 402–04 (citations omitted). The U.S. Supreme Court has held that a child has received a FAPE "if the child's IEP sets out an educational program that is reasonably calculated to enable the child to receive educational benefits." *Id*. at 394 (quotation omitted). "For children receiving instruction in the regular classroom, this would generally require an IEP reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id*. For some students, however, regular advancement through a

curriculum may not be possible, and in those situations an IEP must still be "appropriately ambitious" and allow such students "the chance to meet challenging objectives." *Id*. at 402.

These requirements are significant broader than those in RSA 193-E:2-a. As discussed, the latter statute sets forth the core curricular program school districts must deliver to provide the opportunity for an adequate education. This definition does not incorporate everything a school district needs or chooses to do. It does not include every service that might arguably support the delivery of an education. Those services may be prescribed in other statutes—including RSA chapter 186-C—or left to local control. What is more, the Legislature has specifically defined an adequate education to apply only to children in kindergarten through grade 12, not ages 3 through 21.

### C. The cost of providing a FAPE is inherently subjective, has numerous upward pressures, and does not reflect the cost of delivering constitutional adequacy.

The delivery of a FAPE is primarily accomplished through the promulgation of individualized education programs (IEPs). *Roe v. Healey*, 78 F.4th 11, 15–16 (1st Cir. 2023) (citing 20 U.S.C. § 1414(d)); *see also Petition of Milan Sch. Dist*., 123 N.H. 227, 230 (1983) ("A 'free appropriate public education' is designed to meet the unique needs of the handicapped child by means of an individualized educational program (IEP) developed through a consultative process involving the local education agency, the teacher, and the parents."). An IEP is a written plan developed by a specific group of knowledgeable individuals (the IEP team) setting forth, among other things, a functional assessment of the child, their educational goals, and services the child will receive. 20 U.S.C. § 1414(d). "The school district identifies an educationally handicapped child, and is responsible for developing an IEP with the participation of the child's parents or guardian." *In re Todd P.*, 127 N.H. 792, 795 (1986) (citing RSA 186–C:7).

The IDEA also requires states to establish certain procedural safeguards, which ensure that students and parents receive the rights guaranteed under the IDEA. 20 U.S.C. §§ 1412(a)(6), 1415. These procedures must include opportunities for parents to participate as part of the IEP team, written notice to parents when an educational agency proposes changes to the IEP, and procedures for complaints to be filed and due process hearings to take place. 20 U.S.C. § 1415(b). The parents or guardian of the child have the right to appeal school district decisions to the State Board of Education, RSA 186–C:7, II (Supp.1985), and, if still dissatisfied, may bring an action in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(e)(2).

Every individualized IEP must include a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 U.S.C. § 1414(d)(1)(A), which lists the components necessary for every IEP. *See* 20 U.S.C. § 1414(d)(1)(A). At a minimum, every IEP must include, among other things: a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals, including academic and functional goals; a description of how the child's progress toward meeting the annual goals will be measured; a statement of the special education and related services and supplementary aids and services to be provided to the child; a statement of the program modifications or supports for school personnel that will be provided for the child; an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular class and in certain activities; and a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments. *Id*.

Thus, in this iterative process of developing IEPs, the IEP teams in every school district are deciding how to meet the unique, individualized needs of their special education students with input from a variety of stakeholders. In doing so—from the point of identifying students with disabilities through the point of providing individualized programming and evaluating a student's progress—the IEP team is providing services to allow for the delivery of a FAPE. Thus, the focus of the IDEA is not the academic standards or the curriculum that states and local educational agencies develop when designing their education policies. Rather, it is the services that specifically target each student's needs so that they may access a school's academic programs. These needs will inherently vary by student and across every school district in the state, and they include *all* services necessary for students to be provided a FAPE, not just services needed to provide an academic curriculum. *See Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) ("We have likewise held that the IDEA entitles qualifying children to services that target all of [their] special needs, whether they be academic, physical, emotional, or social.") (internal quotation omitted). All of these services must be documented in an IEP, which is revisited as students' needs are regularly documented and reevaluated. Moreover, compliance with the IDEA requires the provision of procedural due process safeguards for parents and the child. Thus, the scope of services involved in providing for a FAPE through the development and administration of IEPs is broad, individualized, and subject to change.

The costs of providing a FAPE through an IEP are therefore inherently subjective and student specific. They will depend on a particular student's circumstances and what that student's IEP team believes is appropriate. Indeed, at trial, the plaintiffs' own witnesses acknowledged that different IEP teams make come to different recommendations for the same

student. A student' parents or guardians also provide input in what services a student should receive and can seek review of the IEP team's decision. The plaintiffs' witnesses acknowledged at trial that this can increase the costs of providing IEP services beyond what even the IEA team recommended.

IEP services are also broader than just curricular services. Yet the plaintiffs identified no witness who could testify as to any specific student's IEP, much less what portion of the services provided through that IEP delivered constitutional adequacy as defined by the Legislature and what services did not. Once again, the plaintiffs rely entirely on actual expenditures without offering any testimony that would establish that this is the minimum it would cost to provide the services in question. And they again operated from the flawed assumption that the State must simply pay for anything a school district provides that, in the school district's estimation, helps operationalize its educational program, or, in the case of special education students, achieve FAPE.

The Supreme Court's jurisprudence does not contemplate the cost of an adequate education being determined in this way. Under the plaintiffs' formulation, the State is required to pay for every expense a school district incurs related to a student's IEP. The Supreme Court has contemplated, however, that local school districts can and do provide services that exceed adequacy. *Londonderry,* 154 N.H. at 161. And they may provide items and services that fall outside constitutional adequacy. The Court has also emphasized that the definition of an adequate education must allow for "an objective determination of costs." *Id.* at 162. Tethering the cost of adequacy for students with IEPs to the total amount a school district actually spends to deliver that IEP unmoors the cost of an adequate education from any legislative definition that allows for an "objective" determination of costs and places it entirely within the authority of a

local school district. Nothing in the established education funding jurisprudence contemplates or countenances such a result. The State is not aware of a single court across the country that has allowed local school districts (or, more accurately, individual IEP teams) to essentially define the cost of an adequate education by making student-specific determinations.

## VI. The Plaintiffs Have Failed To Present Any Competent, Reliable Expert Testimony In Support Of Their Claims.

Even if the plaintiffs were not operating from flawed legal theories, they offer no competent expert testimony to support their claims. Expert testimony is required in cases "where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Yager v. Clauson*, 166 N.H. 570, 573 (2014) (quoting *Estate of Sicotte v. Lubin & Meyer, P.C.*, 157 N.H. 670, 673-74 (2008)). The costing and funding of a constitutionally adequate education is a matter distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson. *See Londonderry*, 154 N.H. at 167-69 (2006) (*Duggan*, J., concurring) (explaining that, in determining the cost of an adequate education, "the facts necessary to make a determination would come "from experts and other witnesses' testimony" and setting forth four recognized analytical models in the field of education finance). Consequently, competent, reliable expert testimony from a witness qualified in education finance is required to succeed on a claim challenging the costing and funding of an adequate education under Part II, Article 83.

### A. Plaintiffs Cannot Prove Their Case Without Expert Testimony In The Area Of Education Financing.

Dr. Freeman and Dr. Cascadden did not provide expert testimony in the area of education finance, and they employed no recognized analytical model in the area of education finance to reach their opinions and conclusions in this case. They were qualified as experts solely in school

operations based on their experience as superintendents and provided outdated testimony about two school districts in the State, Pittsfield and Berlin.

Dr. Freeman offered testimony about a six-year-old thought experiment that he conceded was wholly subjective, arbitrary, and idiosyncratic to Pittsfield. It operated from the incorrect legislative definition of an adequate education and was based on the faulty premise that a locality should be able to operate its entire school system solely on the money the State provides to it to support the entirety of public education.

Dr. Cascadden broadly opined that adequacy funding was insufficient to meet the State's constitutional funding obligations. But the support for her testimony was only a single story of how Berlin in a single, previous year, before the amounts in RSA 198:40-a had been raised and before the addition of extraordinary need grants, RSA 198:40-f, designed to provide increased, targeted differential aid to communities just like Berlin, could not operate an entire school system solely on the money the State provided. This testimony similarly rests on the faulty premise that a locality should be able to operate its entire school system solely on the money the State provides to it to support public education.

The plaintiffs' proffered "expert" testimony is plainly insufficient to meet the basic requirement that expert testimony in statewide education costing/funding be presented in this type of case. Justice Duggan identified the analytical models that exist in the area of public education finance in his concurring opinion in *Londonderry*, 154 N.H. at 168-69. While each methodology may be subject to its own critiques and criticisms, the existence of these models demonstrates that it is possible to develop and present expert evidence to a court regarding the cost of an adequate education. The plaintiffs' failure to present any such evidence in this case requires this Court find that they have failed to meet their burden of proof.

**B. Dr. Freeman's and Dr. Cascadden's expert testimony should also be wholly excluded because the plaintiffs have failed to show that it is supported by sufficient facts and data, that such facts and data are the product of reliable principles and methods, and that the witness applied the principles and methods reliably to the facts of the case.**

Dr. Freeman's and Dr. Cascadden's expert testimony also fails to meet the requirements for the admissibility of expert testimony and, on that basis, should be wholly excluded from consideration in this case.

RSA 516:29-a governs the testimony of expert witnesses. It is clear that a witness shall not be allowed to offer expert testimony unless the court finds that: (a) such testimony is based upon sufficient facts or data; (b) such data 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. RSA 516:29-a, I. In evaluating the basis for the proffered expert testimony, the court considers, 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. RSA 516:29-a, II(a). While the court may consider other factors specific to the proffered testimony, the plaintiffs must still meet their burden of showing that the testimony is based on sufficient facts or data and that the testimony is the product of reliable principles and methods. *State v. Keller*, 2024 N.H. 42, ¶ 30.

As mentioned above, there are recognized analytical models in the field of statewide public education financing for determining a State's adequate education funding obligation. *See Londonderry*, 154 N.H. at 168-69 (Duggan, J. concurring).

Dr. Freeman did not present such an analytical model and his testimony was not predicated on sufficient facts or data nor was it predicated on any reliable principles or methods.

The plaintiffs challenge the entire system of public school financing in this case as unconstitutional because it supposedly presently fails to cost and fully fund the State's constitutional duty to pay for the adequate educational program it has legislatively defined. Dr. Freeman did not testify that he collected and reviewed current statewide data from the State or the school districts around the State in order to form the opinions and conclusions he reached in this case.

Instead, Dr. Freeman relied on outdated facts and data from the 2018-2019 school year related solely to Pittsfield. As a thought experiment, he first attempted to build a school district budget for his school system solely from the amount of money Pittsfield received in adequacy payments, while ignoring all other state money provided to Pittsfield for the education and support of its students. He did not conduct this same analysis by including all of the money the State provided to Pittsfield that year for the support of its educational program and students, including stabilization grant money, special education act money, and Medicaid funds.

When he could not fund his school on the State's adequacy funding alone, he attempted to build a school district budget for the operations of the Pittsfield school system utilizing all of the money the State provided to him, with some exceptions (like excluding of building aid). Unsurprisingly, he could not do this because the money the State provides to localities in public education funding is not intended to pay for everything a school system needs to operate. As the Supreme Court's precedents and RSA 193-E:2-a make clear, the legislature may define the contours of its payment obligation to municipalities and has agreed to pay only for the substantive educational program detailed in RSA 193-E:2-a, I(a) and the specific Ed 306 regulations that apply to each of the learning areas detailed in that statute. While Dr. Freeman testified that he relied on these authorities in trying to build his budgets, he further testified that

they did not provide sufficient information from which one could discern what the State's payment obligations were. And, in fact, Dr. Freeman kept in his thought experiment items that are clearly not within the ambit of the Legislature's definition of an adequate education, such as principle and superintendent services.

Dr. Freeman also testified that his analysis was subjective, premised on "arbitrary" decision-making, and premised on conditions or employees unique to Pittsfield. Indeed, he characterized the decisions that went into his thought experiment as "arbitrary" on more than one occasion (and on direct examination, not cross). He testified that when he was conducting his thought experiment, he did not think that it would ever be used in a court of law. He further testified that he did not update his thought experiment after he first conducted it in 2018. As the school funding statutes in New Hampshire have significantly changed since 2018, Dr. Freeman's thought experiment does not show that the State is currently not providing sufficient funds to provide an adequate education even for only the Pittsfield school district.

While Dr. Freeman offered the wholly conclusory opinion that the results of his subjective, arbitrary, and idiosyncratic thought experiments could be "extrapolated" across all of the school districts in the State and could be "extrapolated" to the present time despite material changes to State funding for public education, that is not true. On cross-examination, Dr. Freeman conceded that nearly every part of his analysis might change or produce different results in different school districts and that Pittsfield differed from other New Hampshire districts in material ways. Moreover, Dr. Freeman did not review statewide school district budget data for all school districts and attempt to perform his analysis with respect to any of them. His sample base was not randomly selected and his sample size (one school district) is simply not large enough from which to extrapolate a statewide conclusion.

Dr. Freeman also never explained what principles and methods he applied to whatever statewide data he viewed to reach his statewide extrapolation conclusion because he evidently did not employ any principles or methods to reach that conclusion, he is not an expert in economics or statistics or education finance, and he employed no discernable method to reach his conclusory opinion.

In short, Dr. Freeman's theories or techniques have not and cannot be tested, have never been subject to peer review and publication, have no known or potential error rate, and are not grounded in any accepted appropriate scientific literature. His opinions and conclusions are not reproducible, are entirely subjective and arbitrary, and are effectively immune from meaningful cross-examination to challenge. The plaintiffs entirely failed to prove that Dr. Freeman's testimony is based on sufficient facts or data, that his testimony was the product of any reliable principles and methods, and that whatever principles and methods Dr. Freeman did use were applied reliably to the facts of this case. RSA 516:29-a, I. Dr. Freeman's expert testimony therefore fails to meet the requirements of Rule of Evidence 702 and RSA 516:29-a and should be wholly excluded and given no weight by this Court in its merits analysis. Dr. Freeman's testimony is simply not reliable or probative of whether today the State is failing to fund its constitutional obligations under Part II, Article 83 based on all of the money the State provides for public school education.

Dr. Cascadden's testimony must also be entirely excluded. Dr. Cascadden conducted no analysis, let alone an analysis grounded in an actual recognized education financing methodology. She offered a bare conclusion that adequacy funding is insufficient on a statewide basis, and then provided outdated fact testimony about the difficulties Berlin faced in forming one budget approximately four years ago. Her opinions regarding adequate funding statewide

were consequently not shown to be the product of sufficient facts or data nor was the data shown to be premised on any reliable principles and methods that could be tested, were ever subjected to peer review or publication, that have a known or potential error rate, or that are generally accepted in the scientific literature or literature related to statewide education funding. No other testimony was entered showing that whatever principles and methods Dr. Cascadden utilized were reliable. Dr. Cascadden did not attempt to build other school district budgets, has performed no extrapolation analysis, and her testimony is premised on the faulty notion that everything a public school system needs to operate must be paid for by the State.

Consequently, Dr. Cascadden's testimony, like Dr. Freeman's testimony, is not reproducible, is subjective and arbitrary, is not taken from any meaningful sample size, and is effectively immune from meaningful cross-examination. It relies on woefully insufficient facts and data to support the type of conclusion rendered, is premised on no reliable principles or methods, and has not applied any principles and methods reliably to the facts of the case. The plaintiffs bear the burden to prove that the proffered expert testimony meets these criteria, and they have failed to do so. *See Keller*, 2024 N.H. ¶ 30 ("Although 'a methodology may be reliable even if it fails to meet one or more of [the Daubert] factors,' *Baker Valley Lumber*, 148 N.H. at 616, the State must still prove that the expert's testimony is 'the product of reliable principles and methods,' RSA 516:29-a, I(b)."). Indeed, the majority of Dr. Cascadden's testimony related to building maintenance expenditures, which are not included in the Legislature's definition of adequacy.

Dr. Cascadden's expert testimony therefore fails to meet the requirements of Rule of Evidence 702 and RSA 516:29-a and should be wholly excluded and given no weight by this Court in its merits analysis. Dr. Cascadden's testimony is simply not reliable or probative of

whether today the State is failing to fund its constitutional obligations under Part II, Article 83 based on all of the money the State provides for public school education.

## VII. The Plaintiffs Remaining Evidence Is Insufficient To Prove That The State's Financing System For Public Education Is Unconstitutional.

The plaintiffs have presented no evidence in this case showing that New Hampshire students are not receiving an adequate education. They contend instead that the State is paying too little toward constitutional adequacy leaving municipalities to make up the difference through local education taxes. The evidence the plaintiffs have presented is manifestly insufficient to prove this claim.

Part II, Article 83 is "a statement of general principles and not a specification of details." *Hancock v. Comm. Of Educ.*, 822 N.E.2d 1134, 1146 (Mass. 2005) (Marshall, C.J., concurring) (construing substantially similar language in the Massachusetts Constitution). The State's present costing and funding system for public education, consisting of various statutes and legislative acts, is presumptively constitutional, and the plaintiffs bear a heavy burden of proving that it is in clear conflict with Part II, Article 83. Since the *Londonderry* decision in 2006, the Legislature has acted to define, cost, and fund a constitutionally adequate educational program and has put in place a system to ensure the delivery of a constitutionally adequate education through accountability. *See generally* RSA 193-E. The plaintiffs have not offered any competent evidence to demonstrate a clear conflict between how the State has chosen to fund an adequate education and Part II, Article 83. Consequently, this is not a case where it can be said that the Legislature has neglected or avoided the constitutional duty Part II, Article 83 imposes.

Dr. Freeman's thought exercise is not competent to show this for several reasons. That exercise was, by Dr. Freeman's own acknowledgement, based on an entirely arbitrary set of inputs. Dr. Freeman admitted that he never thought this exercise was used in a court of law. The

inputs were based entirely on Pittsfield's own actual expenditures, and Dr. Freeman did not attempt to isolate whether any part of those expenditures went toward services that exceed constitutional adequacy. Dr. Freeman also included inputs in his exercise that do not, as a matter of law, fall within the definition of an adequate education that the Legislature adopted. Dr. Freeman also conducted his thought exercise six years ago, and admitted that he had not updated it to reflect current funding amounts, which include increased amounts under RSA 198:40-a and extraordinary need grants. And Dr. Freeman offered no coherent explanation for why his exercise—which is based on a single year in a single school district—could be extrapolated out to the present time and over the numerous and varied school districts across the entire State.

Dr. Cascadden's testimony was similarly insufficient to demonstrate that the State is currently failing to fund an adequate education. She testified solely about the difficulty that Berlin faced in forming one budget in one year. She did not isolate what portions of that budget go to items or services that are constitutionally required and what portions do not. Her testimony, too, operated on a faulty premise that a school district should be able to operate its entire school system solely on money provided by the State. Dr. Cascadden's testimony also concerned a period a time before the amounts in RSA 198:40-a were raised and before the addition of extraordinary need grants. And she also failed to explain how she could competently conclude that the State is failing to fund an adequate education statewide based solely on her experiences during a single year in a single school district.

To the extent the plaintiffs' remaining witnesses offered any testimony on the cost of an adequate education, that testimony similarly assumed that the State is required to pay for what school districts actually spend to run their schools or for the total amount school districts spend to provide special education services. As previously discussed, however, the mere fact that a

school district spends more than the State provides in education funding does not demonstrate that state funding is deficient. Nor is the State required, as a matter of law, to fund the full amount of IEP services. Any testimony that embeds these flawed assumptions cannot satisfy the plaintiffs' burden.

It is notable that, despite telling the Court that this case is different from ConVal because it includes challenges to the differentiated aid portions of the State's funding formula, the plaintiffs presented no evidence about the inputs generally needed for students who qualify for free and reduced price lunch, English language learners, or any other category of students aside from special education. The Plaintiffs also failed to provide any evidence about the objective costs of any such inputs. And with regard to special education, the plaintiffs' evidence is flawed because it rests on the false legal premise that FAPE is equivalent to constitutional adequacy.

The documentary evidence the plaintiffs submitted en mass without testimony is also not sufficient to cure their evidentiary failures. As discussed above, that evidence largely consisted of budget documents, annual reports, and capital improvement plans from Pittsfield and Berlin; reports of average salaries for teachers and other school officials; DOE-25s containing disaggregated, self-reported data on total school district expenditures; reports of average and total expenditures by school district and statewide; and average class size and teacher-student ratio documents. None of these documents purport to isolate what school districts spend to deliver the substantive educational program defined in RSA 193-E:2-a, and the plaintiffs offered no testimony on that issue. These documents are therefore also insufficient to meet the plaintiffs' burden in this case.

Accordingly, the plaintiffs have holistically failed to prove their case. Their evidence is wholly insufficient to establish that the State's entire education funding system is clearly in conflict with Part II, Article 83.

## VIII. Even If The Evidence Could Be Construed As Technically Sufficient To Meet Plaintiffs' Burden, Any Judgment In the Plaintiffs Favor Would Be Against The Weight Of The Evidence.

The plaintiffs make a broad-based constitutional challenge to the entire education financing system for public schools in this State. In doing so, they have not called an expert in economics, statistics, or even education funding. They have called two alleged experts whose opinions and conclusions are not based on sufficient facts or data, have not employed reliable principles and methods, and have not been able to apply reliable principles and methods to the facts of this case. Their opinions and conclusions should be entirely excluded from evidence, but to the extent they are admitted for consideration, they are extraordinarily weak and lacking in the specific type of information required to make the broad-based economic assessment the plaintiffs' claim requires.

The plaintiffs' fact witnesses fare no better. They simply contend that the public education financing system does not sufficiently fund everything they contend or believe should fall within the State's obligation to fund.

The state witness testimony and documents the plaintiffs have put into evidence also fail to establish that the State's financing system for public education does not meet constitutional requirements. The documents reflect in the aggregate what school districts across the State spend on public education based on their own decisions about how to structure and provide programs that fall within the definition of adequacy as well as those that do not. They do not reflect what the cost of an adequate version of the educational program contained in RSA 193-

E:2-a is. The plaintiffs have not done the work necessary in this case to back out from those aggregate spending figures all spending that is outside of, and goes beyond, the definition of constitutional adequacy under RSA 193-E:2-a. They rest instead on the inference that the statewide average expenditure is a fair approximation of the cost of the educational program defined in RSA 193-E:2-a, even if that statewide average includes spending on items outside of, and that go beyond, the definition of constitutional adequacy that the Legislature has agreed to pay for under RSA 193-E:2-a.

Notably, no qualified economic or school funding expert has offered such an opinion or conclusion in this case, and, contrary to the plaintiffs' unsubstantiated assertions, such a mode of analysis in this case is not "rational." Rather, such a mode of analysis is manifestly irrational given the precedents, statutes, and regulations, and the obligation on litigants to actually prove their claims, that apply in a court of law to the type of claim the plaintiffs have brought. In other words, while there is at least an argument that it might be "rational" for a legislative body to adopt the plaintiffs approach, it would be manifest legal error for this court to adopt that approach in this case, given the legal framework involved and the lack of evidence showing that the statewide average expenditure even approximates the cost of providing an adequate version of the education program defined in RSA 193-E:2-a.[10]

Furthermore, the evidence the plaintiffs introduced reflects that approximately half of Pittsfield's and Berlin's school budgets are covered by state funds. That evidence further reflects that only a little more than a third of Pittsfield's budget is covered by local appropriations and only a little more than a quarter of Berlin's budget is covered by local appropriations. The evidence also demonstrated that Legislature is providing significant sums of targeted aid through

[10] There are much stronger arguments that it is not rational even for the Legislature to simply take the average expenditure as the cost to provide an adequate education.

extraordinary need grants, and that this aid is going to increase substantially on July 1, 2025. The plaintiffs offered no evidence sufficient to demonstrate that a school funding system that covers nearly half of some districts' school budgets, for which the local school district covers so little itself, is in clear conflict with Part II, Article 83.

Accordingly, even if the evidence were technically sufficient, the weight of the evidence is so lacking in probative value in this case that no reasonable factfinder could return a decision in their favor. *See Cook v. Sullivan*, 149 N.H. 774, 780 (2003) (explaining that appellate court will review the trial court's findings and rulings and evaluate "whether a reasonable person could have reached the same decision that the trial court reached based upon the same evidence").

**Conclusion**

For the reasons stated above, the Court should dismiss the plaintiffs' claims. Failing that, the Court should deny the plaintiffs' requests for relief in their entirety and enter judgment for the State.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
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Date: November 15, 2024

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**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: November 15, 2024

/s/ *Samuel Garland*
Samuel Garland.