

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

**SURREPLY TO PLAINTIFFS' REPLY TO THE STATE'S OBJECTION TO  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

The defendant, the State of New Hampshire, by and through counsel, submits this surreply in support of its objection to the plaintiffs' motion for preliminary injunction. In support thereof, the defendant states as follows:

In their reply, the plaintiffs have substantially changed or clarified the nature of the preliminary injunctive relief they seek. Instead of seeking to enjoin the DRA Commissioner from "approving any final school district tax rate for the coming year pursuant to RSA 21-J:35, or other authority, at a tax rate less than \$00.00 per \$1000" and ordering her from refraining to "issu[e] a warrant . . . to the selectmen or assessors of each municipality directing them to assess and pay to the municipality any sum for the use of the school district or districts, as required by RSA 76:8, II," (*see* Pls.' Amended Proposed Order filed in support of their Mot. for Prelim. Inj.), they now seem to request in their reply an order enjoining the DRA Commissioner from permitting any revenue the SWEPT generates above the amount of a municipality's total education grant from being returned to the municipality (*see* Pls.' Reply at 2.)

While this proposed solution may sound simple on paper, the adverse impacts it would have on the State and on the municipalities affected by the injunction are both significant and

uncertain. Any injunction would require the Department of Revenue Administration (“DRA”) to stop the rate-setting process until the Department of Education could determine whether it needed recalculate the total education grants for any municipalities. Supplemental Affidavit of Bruce K. Kneuer ¶ 4. This, at a minimum, would delay the DRA in setting final rates, which in turn would delay municipalities in issuing their own tax warrants, sending tax bills, and collecting revenues. *Id.*

Once rate-setting was able to resume, the DRA would have to determine in which municipalities for which final rates had not yet been set the SWEPT would have generated revenues in excess of total education grants those municipalities would have received. *Id.* ¶ 5. The DRA would then have to eliminate any excess revenues generated by the SWEPT from the formula used to set the rate in that municipality. *Id.* This would result in the DRA setting a higher local education tax rate in that municipality to offset the amount of revenues eliminated as a result of the injunction. *Id.*

Moreover, as of the date of this filing, the DRA has already set final rates in sic of the municipalities identified as “Excess SWEPT Communities” by the plaintiffs in Table 1 attached to their reply. *Id.* ¶ 6. If any injunction the Court issued only extended to municipalities for which final rates would not have been set, then this would not remedy the constitutional violation the plaintiffs allege with respect to the SWEPT because some municipalities would still be able to retain excess revenues generated through the SWEPT. If, in contrast, the Court issued an injunction that was backward facing, then the potential impact would be uncertain. Many municipalities issue their warrants and send tax bills to taxpayers promptly upon receiving final rates from the DRA. *Id.* ¶ 8. Any injunction that required the DRA to re-set the tax rates in a municipality that had already issued its warrant and sent tax bills would likely require the

municipality to issue a second tax bill, communicate to taxpayers which bill they were required to pay, and determine how to credit or refund any taxes that were paid by each taxpayer on the original bill. *Id.* ¶ 7. This would lead to taxpayer confusion and create significant logistical challenges for the municipality in question. *Id.* It would also materially delay rate-setting, which would affect the municipality's ability to raise revenues for all local purposes, including obligations required by law that those municipalities have to their respective school districts and their respective counties. *Id.* If a tax rate were not set by year's end, this could also have consequences on, among other things, the deductions some individual taxpayers could claim on their federal income tax for the current year. *Id.* ¶ 8.

The State is not able to speak to the full extent of how the sudden, unanticipated loss of revenues would affect the many municipalities who have premised their local budgets on being able to use revenues generated by the SWEPT that would be eliminated through the injunction the plaintiffs seek or on the individual taxpayers in those municipalities. These interests are significant and sufficient to make the municipalities themselves necessary parties to this litigation. *See Porter v. Coco*, 154 N.H. 353, 357 (2006) (“The necessary parties to any proceeding, . . . are those . . . who have an interest in the subject-matter of the suit and whose rights may be concluded by the judgment.” (internal quotations omitted)).

The Court must consider these interests by balancing them against the harm to the plaintiffs, which is non-existent. The money the plaintiffs seek to freeze and keep from these municipalities will not go to the plaintiffs. This money also will not go into any state fund because the legislature has not directed it to go into any state fund. In fact, in 2011, the legislature specifically repealed the statutes directing the excess revenues the SWEPT generates from being remitted to the education trust fund. *See RSA 198:46, I–II (2009), repealed by 2011*

Laws 258:9 (providing that “[a] municipality in which education property tax revenue collected exceeds the amount necessary to fund the cost of an adequate education in a fiscal year, as determined in RSA 198:40-a, shall collect and remit such excess to the department of revenue administration before March 15 of the tax year in which the excess occurs” and that “[t]he commissioner of the department of revenue administration shall collect from the municipality the excess tax and pay the excess tax over to the state treasurer for deposit in the education trust fund established by RSA 198:39”). An injunction that functionally rewrites state law is not an appropriate remedy for a purported constitutional violation. *See, e.g., Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (“Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.”); *State v. Lukas*, 164 N.H. 693, 694 (2013) (“We will not rewrite the statute; that is the province of the legislature.”); *State v. Johnson*, 134 N.H. 570, 578 (1991) (“Courts have no right to redraft legislation to make it conform to an intention not fairly expressed therein.”).

Consequently, under current law, the municipalities collect the SWEPT for the State and hold it so the State can determine the adequate education grant amount for the municipality. The State funds the adequate education grant utilizing revenues from the SWEPT and any additional revenues from the education trust fund that may need to be provided. The State then releases those revenues to the municipalities for them to be utilized to support their school districts. Under this arrangement, if the plaintiffs obtain their proposed injunction, the excess revenues the SWEPT generates would have to be held in constructive trust by the municipality, for the benefit of State, and could not be used by the municipality for any purpose. This result would freeze these funds in place and prevent the municipalities from using them as revenue for the year,

which would in inflict the harms described above on municipalities and local taxpayers without providing any benefit to the plaintiffs at all.

The plaintiffs' requested injunction would inflict these harms on municipalities and local taxpayers while ameliorating no harm to plaintiffs. Moreover, if the injunction issued, the harms could not be easily undone if a preliminary injunction is later determined to be unwarranted without placing significant financial and administrative burden on those municipalities and, ultimately, on the taxpayers within those municipalities. Thus, even as narrowed in the reply, the preliminary injunction the plaintiffs seek is not needed to prevent any irreparable harm to themselves and is manifestly inequitable and not in the public interest.

The plaintiffs claim irreparable harm in their motion for preliminary injunction, in part, on the ground that they could not recover the monetary amounts they will personally pay under the SWEPT. When the State raised the availability of the abatement process under RSA 76:16 as a remedy for that, the plaintiffs changed their theory in reply, asserting that the abatement process is not the proper place to raise their constitutional challenge to the SWEPT. Pls.' Reply at 9-10. The desire to obtain a declaration about a specific feature of how revenues generated by the SWEPT are distributed, however, does not demonstrate irreparable harm, particularly where the accompanying injunctive relief requested would result in no tangible benefit to the plaintiffs nor would it ameliorate any harm the plaintiffs face. If the plaintiffs are concerned about recouping funds, they have a statutory remedy available. If all they want is a determination as to the facial validity of the SWEPT, they have a remedy through a declaratory judgment. That they may not be able to seek both forms of relief through a single action does not constitute irreparable harm sufficient to warrant a preliminary injunction.

The plaintiffs also seem to suggest that the abatement process does not provide them with an adequate remedy at law because they cannot obtain a declaration through it. It bears emphasis that the plaintiffs cannot obtain a declaration on a motion for preliminary injunction either. A declaration is a form of final merits relief. Consequently, this argument is irrelevant in this context. An adequate remedy at law is sufficient to defeat a request for preliminary injunction if it alleviates any immediate irreparable harm the plaintiffs contend that they face. The plaintiffs have identified no immediate irreparable harm that a preliminary injunction freezing excess SWEPT revenues in place will remediate.

Finally, the plaintiffs argue in their reply that they have taxpayer standing under Part I, Article 8 because they do challenge a specific spending decision: the ability of municipalities to retain revenues generated by the SWEPT in excess of the amounts those municipalities receive in adequacy grants. While this shift in focus may well bolster the plaintiffs' claim to taxpayer standing, it undermines their request for a preliminary injunction in at least two material respects. First, it confirms that the plaintiffs really challenge how tax revenues are distributed once generated, not how the SWEPT is levied in the first place, which places their claim beyond the scope of Part II, Article 5 for the reasons stated in the State's underlying objection. Second, even if the plaintiffs have taxpayer standing to challenge how revenues generated by the SWEPT are distributed, the only relief they can obtain under the plain language of Part I, Article 8 is a declaration, not a preliminary or permanent injunction, as also discussed in the State's objection. The plaintiffs' arguments for why they have taxpayer standing therefore do not get them any closer to obtaining the extraordinary relief they seek.

For all of the above reasons, and those stated in the State's underlying objection, the plaintiffs' request for a preliminary injunction should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: November 3, 2022

/s/ Samuel R.V. Garland  
Anthony J. Galdieri, Bar #18594  
Solicitor General  
Samuel R.V. Garland, Bar # 266273  
Assistant Attorney General  
New Hampshire Dept. of Justice  
Civil Bureau  
33 Capitol Street  
Concord, NH 03301  
(603) 271-3650  
anthony.j.galdieri@doj.nh.gov  
samuel.r.v.garland@doj.nh.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of November, a copy of the foregoing was served via the court's electronic filing system to all counsel of record.

/s/ Samuel R.V. Garland  
Samuel R.V. Garland

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

---

**SUPPLEMENTAL AFFIDAVIT OF BRUCE K. KNEUER**

---

I, Bruce K. Kneuer, being over the age of 18, swear as follows:

1. I previously supplied an affidavit in this case in relation to the State of New Hampshire's objection to the plaintiffs' motion for a preliminary injunction.
2. I am aware that the plaintiffs have filed a reply to the State's objection, which I understand to modify or clarify the preliminary injunction the plaintiffs seek in this case. I understand that the plaintiffs now seek to enjoin the State from allowing municipalities to retain or use Statewide Education Property Tax ("SWEPT") revenues where those revenues are in excess of what those municipalities receive in total Education Grants under RSA 198:41 and :42 ("Excess SWEPT").
3. Such an injunction would have a number of potential ramifications on DRA's rate-setting process.
4. First, the DRA is unable to set tax rates in a municipality until it receives a final determination from the Department of Education as to the total amount that municipality will receive in total Education Grants pursuant to RSA 198:41. Accordingly, if the injunction the plaintiffs seek issued in this case, then the rate-setting process would

have to be put on hold until the Department of Education determined whether the injunction required it to recalculate total Education Grants for any municipalities. This would delay the DRA in setting preliminary or final rates for any municipalities in which rates have not yet been set, which, in turn, would delay municipalities in issuing their own tax warrants, sending tax bills, and collecting taxes.

5. Second, even if the Department of Education determined that the injunction the plaintiffs seek did not require it to recalculate the Education Grant Amounts to which each municipality was entitled, the DRA would still have to identify whether Excess SWEPT would result for any municipality in which rates had not been set at the time the injunction issued. For any municipality in which Excess SWEPT resulted, because there is no mechanism for the Department to recover those funds from municipalities once assessed and collected, any Excess SWEPT would have to be removed from the rate-setting formula described in paragraph 16 of my original affidavit when rates were set in that municipality. This would result in the DRA setting a higher Local Education Rate in that municipality to offset the amount of the revenues eliminated as a result of the injunction. This exercise would also be in contravention of RSA 76:8 and the Commissioner's Warrants which have already set the SWEPT Amount.

6. Third, as of the date of this affidavit, the DRA has set final rates for 6 of the municipalities identified as "Excess SWEPT Communities" by the plaintiffs in Table 1 attached to their reply dated October 31, 2022. I have not independently determined which, if any, of the communities listed will in fact have Excess SWEPT. If the injunction did not apply to any final rates that were set before the injunction issued, then this would still result in some municipalities—those in which the rates were set before the

injunction—retaining Excess SWEPT. If the injunction were backward facing and applied to municipalities in which final rates had already been set, then the impact of the injunction would be hard to predict. For municipalities that had not yet issued their own warrants and sent out their tax bills to taxpayers, it might be possible to re-set the tax rates in the manner described in the preceding paragraph. This would still result in the Local Education Rates increasing in those municipalities and would delay the rate-setting process. To date the Division has set 79 preliminary municipal tax rates of which 41 have been finalized.

7. If, however, a municipality had already issued its own warrant and sent out tax bills, then it is unclear how that process could realistically be unwound. Taxpayers would receive two tax bills—one in which excess revenues generated by the SWEPT were factored into the rate-setting formula and one in which those revenues were excluded from the calculation. Municipalities would have to communicate to taxpayers which bill they were required to pay and would have to determine how to credit or refund any taxes that were improperly paid by each taxpayer on the first tax bill. This would likely lead to significant taxpayer confusion and create substantial logistical challenges for the municipality. It would also materially delay the rate-setting process in the manner described above, and in turn the municipality's ability to generate revenues for all local purposes, including obligations required by law that those municipalities have to their respective school districts and their respective counties.

8. The full extent of the impact that any of the above scenarios would have on the municipalities affected by the injunction the plaintiffs seek is not known to me. I understand, though, that once municipalities receive final rates from the DRA, many

promptly issue tax warrants and start sending tax bills. I further understand that municipalities desire to have final rates set as quickly as possible, as any delay in the rate-setting process generates a corresponding delay in municipalities' ability to generate needed tax revenues. I also understand that if municipalities are unable to send their tax bills by the end of the calendar year, then this can have consequences on, among other things, the deductions some individual taxpayers can claim on their federal income tax returns for the current year.

9. I have also reviewed the Affidavit of Douglas Hall and tables contained in Exhibit A to that affidavit, which are attached to the plaintiffs' reply. I have no reason to dispute, as a factual matter, the numerical values contained in columns A, B, C, and D of Table 1; columns C and D of Table 2; columns A, B, C, D, E, F, G, and I of Table 3; and columns D and I of Table 4. I also do not have reason to dispute, as a factual matter, that the values contained in columns E and F of Table 1, column E of Table 2, and column H of Table 3 have been accurately calculated as described in the body of Mr. Hall's affidavit. However, I have not independently confirmed Mr. Hall's computations or the accuracy of his reporting of the Department of Education's figures.

10. I do, however, dispute that the values contained in columns B and F of Table 1 reflect tax rates that the DRA sets as part of its rate-setting process, that the DRA conducts the calculations reflected in columns B and F of Table 1 as part of its rate-setting process, or that the values contained in columns B and F of Table 1 are the product of an appropriate tax rate-setting methodology.

I DECLARE under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 3rd day of November 2022.

Dated: November 3, 2022

Bruce K. Kneuer  
Bruce K. Kneuer

THE STATE OF NEW HAMPSHIRE  
MERRIMACK COUNTY

Before me, personally appeared Bruce K. Kneuer, and acknowledged the foregoing to be true and accurate to the best of his knowledge or belief.

Dated: November 3, 2022

Dr. Samuel  
Notary Public/Justice of the Peace  
MY COMMISSION EXPIRES 11/23/2024