THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-____

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

EXPEDITED MOTION TO STAY TRIAL COURT'S NOVEMBER 20, 2023 MERITS ORDER AND FEBRUARY 20, 2024 POST-TRIAL MOTIONS ORDER

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move to stay the trial court's November 20, 2023 merits order and February 20, 2024 post-trial motions order.[1] In support thereof, the defendants state as follows:

1. In *Londonderry School District SAU #12 v. State*, 154 N.H. 153, 161 (2006), this Court held that the General Court had to define "the substantive content of a constitutionally adequate education in such a manner that the citizens of this state can know what the parameters of that educational program are." This Court instructed that the definition of this "educational program" had to be "sufficiently clear to permit common understanding and allow for an objective determination of costs." *Id.* at 162. This Court further held that "[w]hatever the State identifies as comprising constitutional adequacy it must pay for." *Id.*

2. Following *Londonderry*, the General Court passed RSA 193-E:2-a, which contains "the specific criteria and substantive educational program that deliver[s] the opportunity for an adequate education." RSA 193-E:2-a, I(a). RSA 193-E:2-a defines the "educational program" the State has agreed to pay for to be only the "minimum standards

[1] The trial court's November 20, 2023 merits order is attached hereto as Exhibit A;
The defendants' motion to stay is attached hereto as Exhibit B;
The defendants' motion for reconsideration is attached hereto as Exhibit C;
The plaintiffs' objection to the defendants' motion to stay is attached hereto as Exhibit D;
The plaintiffs' objection to the defendants' motion for reconsideration is attached hereto as Exhibit E;
The trial court's February 20, 2024 post-trial motions order is attached hereto as Exhibit F.

for public school approval" for the areas identified in RSA 193-E:2-a, I that have been adopted by the state board of education through administrative rules. *See* RSA 193-E:2-a, IV(a) ("The 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, VI(a) ("'Minimum standards for public school approval' mean the applicable criteria that public schools and public academies shall meet in order to be an approved school, as adopted by the state board of education through administrative rules.").

3. The Board of Education has promulgated minimum standards for public school approval in N.H. Admin. R. CHAPTER Ed 306. Only specific regulations within N.H. Admin. R. CHAPTER Ed 306 correspond to the areas the General Court has detailed in RSA 193-E:2-a, I. *See, e.g.*, N.H. Admin. R. Ed 306.37 (English/Language Arts and Reading); N.H. Admin. R. Ed 306.43 (Mathematics); N.H. Admin. R. Ed 306.31 (Arts Education).

4. The General Court enacted RSA 198:40-a to fund "the opportunity for an adequate education as defined in RSA 193-E:2-a." RSA 198:40-a, I. In other words, the General Court did not pass RSA 198:40-a to fund everything a school district or school might need or desire to operate. It passed RSA 198:40-a to fund the specific educational program the General Court defined in RSA 193-E:2-a, I, and as defined further in the specific regulatory provisions applicable to the areas identified in RSA 193-E:2-a, I. RSA 198:40-a, II provides the formula for how that funding is determined. RSA 198:40-a, III specifies that "[t]he sum total calculated under paragraph II shall be the cost of an adequate education."

5. The plaintiffs have challenged only a component part of the funding methodology contained in RSA 198:40-a, II as unconstitutional under Part II, Article 83 of the New Hampshire Constitution. Specifically, the plaintiffs contend that the base amount of $4,100 per pupil contained in RSA 198:40-a, II(a) is unconstitutional.

6. The trial court rejected the defendants' argument below that the plaintiffs could not press this challenge as a matter of law because RSA 198:40-a, III specifies that

the sum total calculated under paragraph II shall be "the cost of an adequate education" as defined in RSA 193-E:2-a. (Exhibit A at 5-6.)

7. The trial court's merits order also failed to construe RSA 193-E:2-a, I and the specific N.H. Admin. Ed. 306 rules applicable to the areas identified in it to determine what items the General Court intended to pay for through RSA 198:40-a.

8. Instead, the trial court decided what items should be included in a constitutionally adequate education based predominately on the witness testimony of school districts. Many of the items the trial court identified are not part of the "educational program" the General Court defined and agreed to pay for under RSA 193-E:2-a as a matter of law. In doing so, the trial court overstepped its authority to construe the law and stepped into the role of the legislature defining for itself what a constitutionally adequate education should encompass.

9. As a result, the trial court's merits order does not read like an adjudication of the constitutionality of a statute based on the evidence and arguments presented by the parties and the established rules and principles governing such constitutional and statutory analyses, including that a legislative act like RSA 198:40-a is presumed constitutional and that what the legislature intended to fund through RSA 198:40-a must be discerned through an interpretation of the statute. *See, e.g.*, *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021) ("In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except on inescapable grounds."); *T.P. v. B.P.*, 171 N.H. 601, 603 (2018) (explaining that "the intent of the legislature" is "expressed in the words of the statute considered as a whole"). Rather, the trial court's merits order reads much like a legislative committee report crafted after a lengthy legislative hearing,[2] where the trial court is not interpreting the law, but is instead

[2] The trial court essentially concedes as much in footnote 16 of its merits order when it states "the process underlying the 2008 [Joint Committee] Report—a process Dr. Greene endorses—is strikingly similar to the Court's experience in presiding over the trial in this matter: i.e., considering substantial data from diverse sources and viewpoints in order to determine an appropriate amount of base adequacy aid." Exhibit A at 31. This admission is startling for at least two reasons. First, it reflects that the trial court believed its role was to sit as a substitute for a legislative committee, to craft its own committee report, and to impose the results of that report on the State. Second, it fails to acknowledge that trial courts are

engaged in one-sided legislative factfinding, adopting allegedly "conservative" monetary figures provided by plaintiff school district witnesses, applying percentage discounts of its own creation, blending figures using teacher-to-student ratios to calculate its own per-pupil teacher cost, and ultimately forming a new estimated base adequacy figure.

10. And even then, the trial court expressed the view that this new estimated figure is *unconstitutional*, not based on any evidence presented by the parties, but because the evidence the plaintiffs presented was *insufficient* to reach an actual, constitutional figure. (Exhibit A at 54 ("Although the evidence demonstrates that a base adequacy aid level of $7,356.01 would be constitutionally insufficient, the Court cannot set a higher threshold at this time. Such a step is precluded by the limitations of the evidence presented at trial, as well as the involvement of certain policy considerations.").)

11. The trial court's merits order then declares RSA 198:40-a, II(a) facially unconstitutional, requires the General Court via injunction to set a base adequacy amount that exceeds $7,356.01 per pupil, and grants the plaintiffs' request for attorney's fees.

12. The trial court's merits order is erroneous in several legal and factual respects and constitutes an egregious violation of the separation of powers.

13. The defendants timely moved to reconsider this merits order on separation of powers grounds, (Exhibit C), and to stay it, (Exhibit B).

14. The defendants requested the stay from the trial court for three reasons.

15. First, the defendants asserted that, absent a stay, the trial court's merits order declaring RSA 198:40-a, II(a) facially unconstitutional will go into effect immediately and render the Executive Branch unable to fund adequacy grants for schools. Adequacy grants for schools would not be able to resume until the General Court amends the statute or revises the statutory school funding mechanism, which this

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manifestly ill-equipped to perform the legislative function and that the data and witness testimony at trial did not come from "diverse" sources or viewpoints. It came only from school district plaintiffs. The many different viewpoints of members of the public who disagreed with the plaintiffs as a matter of policy, or who had different data to share or different viewpoints of the existing data to offer, did not have an opportunity to present that information to the trial court.

Court has historically given its co-equal branches of government the necessary time to do in similar contexts. *See, e.g.*, *Londonderry School District SAU #12*, 154 N.H. at 163; *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476-77 (1997). The defendants also suggested that the General Court may choose not to modify the statute while this case is pending reconsideration and appeal and might instead await further guidance from this Court regarding what remedial action, if any, it should ultimately take. The defendants therefore argued that a stay of the trial court's declaratory judgment order is necessary to prevent irreparable harm to New Hampshire's school funding system and to permit the Executive Branch to continue funding schools in accordance with the existing education funding formula until this matter is finally resolved on the merits, and the General Court has sufficient time to resolve any constitutional infirmities that may exist after appeal.

16. Second, the defendants asserted, both in their motion to stay and their motion for reconsideration, that the injunction contained in the trial court's merits order violates the separation of powers principles embodied in Part I, Articles 30 and 37 because it materially impairs the lawmaking power of the General Court. "The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be subject to the control or supervision of the other." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). New Hampshire thus follows "the rule which exempts the legislature from the control of the court." *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Court properly denied the injunction as it had no power to interfere with proposed legislative action.").

17. The General Court has the plenary power and authority to solve the education funding issue identified in the trial court's merits order in a myriad of ways, including by altering the definition of an adequate education or by creating an entirely new funding model for education. The General Court does not have to amend RSA 198:40-a, II to conform it to the monetary figure the trial court has identified and that the trial court has asserted is itself likely an unconstitutional figure. The General Court also

cannot be enjoined from conducting its own legislative study of the cost of an adequate education and endorsing a number produced from that process that may be different than the threshold figure the trial court has identified. *See City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (explaining that the "prevailing rule . . . under a tripartite form of government" is that "a court cannot enjoin the legislature from passing a law" even if "such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law") (internal quotations omitted).

18. The defendants asserted that the trial court's injunction essentially required the General Court to pursue legislation that meets or exceeds the trial court's preferred threshold figure. By doing so, the trial court has not merely interpreted the law; it has now set education fiscal policy for the State and is requiring the other co-equal branches of government to manage to that court-imposed policy on threat of civil contempt. The defendants argued that this result violates the separation of powers set forth in Part I, Article 37, and the speech and debate clause contained in Part I, Article 30. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005) (explaining that Part I, Article 30 protects "the legislature and individual legislators from incurring liability for 'any act generally done in a session of the [legislature] . . . in relation to the business before it" including voting on proposed legislation) (internal quotations omitted).

19. Finally, the defendants asserted that any litigation related to attorney's fees is premature at this juncture and should be stayed until the appeal in this matter has concluded. The defendants have preserved numerous issues for appeal in this relatively undeveloped area of the law, any one of which could result in the trial court's merits order being reversed. If that occurs, the plaintiffs will not be entitled to any attorney's fees.

20. On February 20, 2024, the trial court issued an order denying the defendants' motion to stay and for reconsideration. (Exhibit F.) In denying the motion for reconsideration, the trial court gave the defendants' separation of powers argument cursory treatment and leaned on this Court's *Claremont* jurisprudence to justify its

unprecedented injunction. (Exhibit F at 7.) In doing so, the trial court permitted an unprecedented injunction against two other co-equal branches of government to go into effect and abandoned the historic deference this Court has provided to its co-equal branches of government to resolve identified deficiencies in this area of the law in an orderly way to avoid governmental chaos and adversity.

21. In denying the motion for reconsideration, the trial court made clear the separation of powers violation it was imposing: "By setting a base adequacy aid funding threshold, the Court did not intend to suggest that the legislature cannot enact meaningful changes to the education funding scheme. Rather, the Court's intention was to ensure that if the legislature maintains the existing scheme in substantial part, the legislature will not repeat the constitutional violations of the past by funding base adequacy aid at a level the plaintiffs have already proven to be unconstitutional." (Exhibit F at 8.)

22. The trial court explained that: "[T]he threshold merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action. If the legislature's response to the Base Adequacy Aid Order falls short of the threshold, an aggrieved party may seek prompt declaratory relief without the need for further protracted litigation." (Exhibit F at 8-9). In other words, future legislation containing a lower figure will not come to the court with a presumption of constitutionality, as this Court's precedents require, but will be prejudged as unconstitutional and swiftly struck down because the legislature failed to follow the trial court's "minimum guidelines."

23. This injunction in no uncertain terms "subject[s]" the General Court "to the control or supervision" of the trial court, *Sherburne*, 72 N.H. at 541, a result that violates the separation of powers under our State Constitution.

24. The trial court further attempted to clarify that its injunction order "must not be construed as exposing legislators to civil contempt proceedings" because it "merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action." (Exhibit F at 8.) But if that were the case, then the trial court should have vacated the "injunction" and allowed merely its declaratory ruling to stand because an "injunction" is not merely guidance; an injunction is "[a] court order

commanding or preventing an action," Black's Law Dictionary at 855 (9th Ed. 2009), and, unlike advisory guidance, is enforceable through contempt proceedings.[3]

25. The trial court's post-trial motions order is also silent on whether *executive branch* officials would be subject to contempt proceedings for not complying with the order, even though "[p]ursuant to Part II, Article 56, the executive branch may expend public funds only to the extent, and for such purposes, as they have been appropriated by the legislature." *N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 387 (2011). Executive branch officials who expend public funds "for any other purpose than that for which they were appropriated, or expend any money or make any contract or bargain, or in any way bind the state in excess of the amount voted by the legislature," RSA 9:19, "shall be *personally liable* for the amount of the excess expended, contracted, or bargained above the appropriation," RSA 9:20 (emphasis added).

26. Instead, the trial court reaffirmed its injunction order and, in denying State's request for a stay pending appeal, took the extraordinary additional step of *directing* "the State" to make payments to public schools consistent with its previously chosen figure of $7,356.01 per pupil pending appeal, (Exhibit F at 10), which the trial court itself recognized in its merits order as "an increase of $537,550,970.95 in base adequacy aid to New Hampshire Schools." (Exhibit A at 1.) This new post-trial directive is clearly injunctive, and not merely guidance, and was entered without any inquiry into what economic impact it would have on the operations of State government and the public as a whole, nor any consideration of whether the executive branch could legally follow the order.

27. This new post-trial directive also results in an enormous, unconstitutional appropriation of taxpayer dollars. The trial court has the power and authority to interpret the law and declare a statute unconstitutional. It has no power to rewrite the fiscal policy of the State and force the other branches of government to pay for it.

[3] Moreover, the superior court lacks the authority to issue advisory opinions. *See Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Superior Court has no jurisdiction to give advisory opinions.").

28. As this Court recognized early on in the seminal case of *Merrill v. Sherburne*, 1 N.H. 199, 208-09 (1818),

> [T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. In other words that the union of these two powers is tyranny; or, as Mr. Madison observes, may justly be 'pronounced the very definition of tyranny' or in the language of Mr. Jefferson, 'is precisely the definition of despotic government.'

29. The Department of Education is required to make the next and last adequacy payment to school districts by April 1, 2024 for Fiscal Year 2024. It needs to have the adequacy calculation done by March 15, 2024 to ensure checks can issue on April 1, 2024. Thus, by March 15, 2024, the trial court's order could result in the State having to pay either an estimated additional $446,000,000, or an estimated additional $133,821,568, depending on how the payment statutes are ultimately interpreted,[4] and further assuming that state officials or employees will actually implement the order in the absence of a legislative appropriation.

30. If the trial court's order requires the State to pay an additional estimated $446 million, either as a one-time payment or under the distribution schedule set forth in RSA 198:42 while an appeal is pending, such a payment would exhaust the surplus in the education trust fund (approximately $182 million), and counsel for the defendants understand that the general fund has no projected surplus at this time capable of covering the remainder.

31. Counsel for the defendants understand that accessing the so-called rainy day fund, *see* RSA 9:13-e [Revenue Stabilization Reserve Account], or incurring a significant budget deficit could result in an immediate change to the State's credit outlook from a positive to a negative downgrade, and a negative downgrade could severely impact the fiscal condition of the State going forward. It is also not clear whether the rainy day fund could even be accessed mechanically before March 15, 2024.

[4] While executive branch officials will have to interpret the statutes in the first instance absent a stay, any definitive determination on how these statutes operate would have to come from this Court.

32. The trial court did not consider any of these factors in issuing its extraordinary order. No precedential decision from this Court endorses such an extreme and rash approach in Part II, Article 83 cases, particularly while the appellate process remains open and available to the State. Rather, this Court's previous education funding decisions have appropriately stayed or deferred final judicial action so the other co-equal branches of government could resolve whatever constitutional defects exist in an orderly manner. And lower court decisions in this area should be appropriately deferential to this Court's review process, which may result in the reversal, in whole or in part, of the trial court's merits order.

33. The defendants are also likely to succeed on the merits of their argument that the trial court's injunction order and subsequent direction to "the State" to immediately start paying millions of additional, unappropriated dollars to public schools pending appeal violates the separation of powers by dictating what the educational fiscal policy of the State should be pending appeal, by appropriating millions of taxpayer dollars in an unconstitutional manner, and by threatening to impair the operations of State government.

34. The State will also suffer irreparable harm if the trial court's orders are not stayed. If this Court reverses the trial court in whole or in part, even if it concludes solely that the trial court erred in picking a new funding figure and requiring the State to pay that amount pending appeal, and one or more state officials acquiesce to the trial court's direction, millions of dollars in unrecoverable taxpayer funds will have been lost.

35. Additionally, the trial court's suggestion that the extraordinary and unprecedent remedy it imposed is justified because, "with each passing school year, another class of public school children is permanently deprived of the fundamental right to a constitutionally adequate education," (Exhibit F at 10), is unsupported by the record. None of the plaintiffs in this case are students, and the trial court cited to no evidence in the trial record to support this statement. Indeed, every plaintiff school district conceded at trial that it provides a constitutionally adequate education to their student populations, if not an education that exceeds constitutional adequacy. The trial court's merits order

contains no factual findings to the contrary. (*See generally* Exhibit A.) Consequently, this case is not about students receiving an education below the constitutional floor that Part II, Article 83 and this Court's *Claremont* jurisprudence requires. Rather, the dispute in this case, though of constitutional magnitude, is purely economic and concerns solely the issue of whether the State should be paying more than it currently pays municipalities under RSA 198:40-a, II(a) so presumably the municipalities can lower the amounts they are required to raise and invest in their public schools through local taxes.

36. The issue presented is thus one of resource allocation, not one of actual harm to students.

37. Consequently, the irreparable harm that will result from the trial court's orders to the State alone justifies staying them.

38. This irreparable harm also shows definitively that the balance of the equities weighs in the defendants' favor and that the public interest is furthered by a stay pending appeal.

39. Finally, it makes little sense for the parties to brief and litigate the attorney's fees issue in the trial court while this matter remains pending on appeal with this Court. Attorney's fees litigation can be significant and complex and a pending appeal, if decided in the defendants' favor, would require reversal of the grant of attorney's fees. Moreover, the defendants cannot effectively engage in discussions to settle the attorney's fees issue until they know definitively whether attorney's fees have been properly awarded. Thus, the attorney's fee award portion of the trial court's decisions should similarly be stayed pending appeal.

40. Opposing counsel has been contacted for their assent to this motion and has indicated that they oppose it.

41. The defendants intend to file their notice of appeal in this matter within 30 days of the trial court's February 20, 2024 order on post-trial motions, or on or before March 21, 2024.

WHEREFORE, the defendants respectfully request that this Court enter an order:

A. Resolving this motion on an expedited basis on or before March 13, 2024;

B. Staying in full the trial court's November 20, 2023 merits order and February 20, 2024 post-trial motions order pending the outcome of the appeal of this matter; and

C. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE, DEPARTMENT OF EDUCATION, GOVERNOR CHRISTOPHER T. SUNUNU, AND COMMISSIONER FRANK EDELBLUT

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: February 28, 2024

By: /s/*Anthony J. Galdieri*

Anthony J. Galdieri, Bar # 18594
Solicitor General
Samuel R.V. Garland, Bar # 266273
Senior Assistant Attorney General
New Hampshire Dept. of Justice
1 Granite Place South
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 a copy of the foregoing motion to stay was sent via the Court's electronic filing system to counsel for all parties of record.

Date: February 28, 2024

/s/*Anthony J. Galdieri*

EXHIBIT A

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

No. 213-2019-CV-00069

"…it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country…" Part II, Article 83 N.H Constitution, June 2, 1784.

Summary

What is the base cost to provide the opportunity for an adequate education 239 years after that fundamental right was ratified in our Constitution? The short answer is that the Legislature should have the final word, but the base adequacy cost can be no less than $7356.01 per pupil per year and the true cost is likely much higher than that. At a minimum this is an increase of $537,550,970.95 in base adequacy aid to New Hampshire Schools. Thus, the current allocation of $4100 per pupil is unconstitutional.

ORDER ON THE MERITS

In this case, the plaintiffs challenge the constitutionality of RSA 198:40-a, II(a), contending that "local school districts require substantially more funding" to "deliver the opportunity for a constitutionally adequate education, as defined in RSA 193-E:2-a . . . ."

Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 157 (2021) ("ConVal"). The Court held a three-week bench trial on the matter in April of 2023. During trial, the State moved for a directed verdict. See Doc. 235; see also Doc. 236 (State's Dir. Ver. Mem.); Doc. 238 (Pls.' Obj. Doc. 235). The Court took that motion under advisement, conditionally allowing trial to proceed. Post-trial, the parties submitted legal memoranda. See Doc. 242 (State's Tr. Mem.); Doc. 244 (State's Sep. Powers Mem.); Doc. 245 (Pls.' Post-Tr. Mem.); see also Doc. 243 (State's Req. Findings & Rulings). The Court has carefully considered the evidence presented at trial, the parties' arguments, and the applicable law. After review, the Court finds and rules as follows.[1]

Background

Part II, Article 83 of the New Hampshire Constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) ("Claremont I"). To comply with that duty, the State must "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) ("Londonderry I") (quotation omitted). Pursuant to RSA 193-E:2-a, an adequate education requires instruction in:

> English/language arts and reading; mathematics; science; social studies, including civics, government, economics, geography, history, and Holocaust and genocide education; arts education, including music and visual arts; world languages; health and wellness education . . . ; physical education; engineering and technologies including technology applications; personal finance literacy, and computer science.

[1] The Court's findings and rulings are in narrative form in this Order. The State's requests for findings of fact and rulings of law are thus granted, denied, or deemed unnecessary, consistent with the following. See Geiss v. Bourassa, 140 N.H. 629, 632–33 (1996); Howard v. Howard, 129 N.H. 657, 659 (1987).

See RSA 193-E:2-a, I (cleaned up). RSA 193-E:2-a, IV(a), explains that the "minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education."

To fund this opportunity, the legislature enacted RSA 198:40-a, which provides for funding via "base adequacy aid" and "differentiated aid." RSA 198:40-a, II. School districts receive base adequacy aid for each pupil in the average daily membership in residence ("ADMR").[2] Id. By contrast, school districts only receive differentiated aid for each pupil in the ADMR that meets certain statutory criteria. Id.[3] Pursuant to RSA 198:40-a, III, the "sum total" of base adequacy aid and differentiated aid, if any, "shall be the cost of an adequate education."

Effective July 1, 2023, the legislature amended RSA 198:40-a to provide for base adequacy aid of $4,100 per pupil in the ADMR. See RSA 198:40-a, II(a) (2023). Before this amendment took effect, the statute set base adequacy aid at $3,561.27 per pupil, with that amount adjusted each biennium to reflect changes in the federal Consumer Price Index. See RSA 198:40-a, II(a) (2022). For the 2022 fiscal year, the adjusted base adequacy aid amount awarded under the then-existing version of the statute was just under $3,800. See Joint Ex. 248 (Doc. 83 – Pls.' 3rd Am. Compl.) ¶ 26.

Procedural History

At issue in this case is the funding amount set forth in RSA 198:40-a, II(a): i.e., the amount of base adequacy aid. See ConVal, 174 N.H. at 159; see also id. at 157

[2] Under prior versions of RSA 198:40-a, per pupil calculations considered average daily membership in attendance ("ADMA"), not ADMR. See Doc. 194 (Mar. 20, 2023 Order on Cross-Mots. Summ. J.) at 2–3.

[3] Prior to July 1, 2023, differentiated aid criteria included eligibility for free or reduced-price meals, English language learner status, receipt of special education services, and certain below-proficient test scores. See Laws 2023, 79:150. The 2023 amendment eliminated the test score criterion. See id.

(noting plaintiffs "do not challenge the constitutionality of the definition of an adequate education set forth in RSA 193-E:2-a"). In support of their claim that base adequacy aid is constitutionally insufficient, the plaintiffs highlight the costs of: employee salaries and benefits; transporting students to and from school; maintaining appropriate and realistic teacher-to-student ratios; providing food services; and facilities operation and maintenance. See Doc. 245. In response, the State questions whether and to what extent it must fund these cost-drivers. See Doc. 242. The State further questions the sufficiency of the plaintiffs' evidence concerning the relevant costs. See id.

Prior to the April 2023 trial, the parties filed two rounds of cross-motions for summary judgment. Upon review of the first round of motions, the Court concluded that the plaintiffs were entitled to partial summary judgment. See Doc. 51 (June 5, 2019 Order). In reaching this conclusion, the Court analyzed certain flaws in a 2008 report and accompanying spreadsheet generated by the Joint Legislative Oversight Committee on Costing an Adequate Education (the "2008 Report"). See ConVal, 174 N.H. at 158, 166; see also Pls.' Ex. 18 (2008 Report). Because the base adequacy aid figure initially set by the legislature matched the figure set forth in the 2008 Report, the Court reasoned that faulty costing determinations and rationale in the 2008 Report demonstrated the insufficiency of base adequacy aid. See Doc. 51.

On appeal, the Supreme Court concluded that this Court erred in basing its summary judgment ruling on the contents of the 2008 Report because that report is not incorporated by reference into RSA 198:40-a, II(a). See ConVal, 174 N.H. at 166. The Supreme Court explained that in order to "address the plaintiffs' costing argument," this Court would need to determine "what is required to deliver an adequate education as

defined in the statute." Id. at 166–67 (remanding case for trial, and noting determination of components and costs presents mixed question of law and fact). Following remand, the parties again moved for summary judgment. Citing the Supreme Court's observation that the reliability of and weight to be afforded certain data were necessarily trial determinations, the Court denied those motions. See Doc. 194 at 10 (citing ConVal, 174 N.H. at 167, n.1).

Nevertheless, the second round of summary judgment motions afforded the Court an opportunity to resolve a significant preliminary question: how, if at all, the Court should consider differentiated aid in ruling on the plaintiffs' claims. See id. at 6. Addressing this issue, the State argued that the correct inquiry is whether the total amount of funding (base adequacy aid plus differentiated aid) is constitutionally sufficient. See id. at 7. The Court disagreed, reasoning that "differentiated aid is intended to fund extra services for those pupils who meet the statutory criteria," and the State's approach could improperly divert differentiated aid funds to other purposes. See id. (citing RSA 198:40-a). The Court recognized, however, that "costs attributable to the extra services contemplated by" the differentiated aid scheme "cannot support the plaintiffs' challenge to the amount of base adequacy aid." Id. Accordingly, in analyzing the sufficiency of base adequacy aid, the Court clarified that it could not consider "costs attributable to additional services provided to students who qualify for differentiated aid." Id.; but see Doc. 232 (Apr. 6, 2023 Order on Mots. In Limine) at 18–19 (acknowledging questions regarding degree to which costs can be cleanly divided). In the Court's view, under the current statutory scheme, a school must be able to provide the opportunity for an adequate education if it had no students who qualified for differential aid. In fact, as

the evidence at trial clearly demonstrates, many schools receive very little differential aid.[4] Consistent with that clarification, the sole issue before the Court is the constitutional sufficiency of base adequacy aid. See Doc. 194 at 10.

Standard of Review and Burden of Proof

Although the Court has resolved the above-described preliminary question concerning the relevance of differentiated aid, there are additional preliminary questions the Court must now address. The first two concern the applicable standard of review and burden of proof. With respect to the standard of review, the State argues that the Court must presume RSA 198:40-a, II(a), is constitutional. See Doc. 242 at 3 (quoting ConVal, 174 N.H. at 161, for proposition that Court must not declare statute invalid "except on inescapable grounds"). Relying on such a presumption, the State further argues that the plaintiffs must establish "'a clear and substantial conflict . . . between [the statute] and the constitution.'" Id. (quoting ConVal, 174 N.H. at 161). The State acknowledges, however, that "the right to a State funded constitutionally adequate education" is a fundamental right. See id. at 4 (citing Akins v. Sec'y of State, 154 N.H. 67, 71 (2006), and Claremont Sch. Dist. v. Governor, 142 N.H. 462, 473 (1997) ("Claremont II")); see also Claremont II, 142 N.H. at 473 ("We hold that in this State a constitutionally adequate public education is a fundamental right."). Thus, as the State recognizes, if the plaintiffs establish such a clear and substantial conflict, then "the

[4] Even though the Court granted the plaintiff's Motion in Limine concerning differential aid, substantial evidence about differential aid was admitted at trial. Many of the plaintiff's financial spreadsheets contained accountings for the amounts of differential aid received. Thus, the Court allowed cross examination on those figures during trial. The only real impact of the Court's ruling was that it limited the scope of one expert's testimony concerning the total amount of differential aid provided to the schools. However, all the numbers and arguments based on them are before the Court.

burden shifts to the government to justify the law under the strict scrutiny standard." Doc. 242 at 5 (quoting Akins, 154 N.H. at 71).

The plaintiffs maintain that they have "proved a deprivation of the fundamental right to a State-funded adequate education," thereby shifting the burden to the State to justify the amount of base adequacy aid. See Doc. 245 at 2. The State disagrees. See Doc. 242 at 23–36. Indeed, both at summary judgment and at trial, the State took the position that the plaintiffs' evidence is so fundamentally flawed that it cannot satisfy their burden. See id. Relying on that view, the State's trial strategy was to criticize or otherwise attempt to undermine the plaintiffs' evidence, rather than presenting affirmative evidence defending the sufficiency of base adequacy aid. The State presented no evidence to justify the current base adequacy amount. As predicted by the Court in its prior order on summary judgment, the evidence at trial overwhelmingly established that no school could provide the opportunity for an adequate education if it had to rely solely on the base adequacy aid from the State.

For the reasons set forth below, the Court concludes that the plaintiffs have made the showing necessary to defeat any applicable presumption of constitutionality, thus shifting the burden of proof to the State. More specifically, the plaintiffs have established a clear and substantial conflict between the current amount of base adequacy aid funding, and Part II, Article 83 of the State Constitution. Accordingly, the Court will assume for the purposes of this Order that the above-described standard of review and burden of proof apply here. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (declining to reach arguments that would not alter court's conclusion).

Nature of Plaintiffs' Claim

The final preliminary question the Court must address is the appropriate scope of the plaintiffs' claim. This question arises because, though the plaintiffs have asserted both a facial challenge and an as-applied challenge to RSA 198:40-a, II(a), see Joint Ex. 248, the State argues that this statute cannot be challenged on an as-applied basis. See Doc. 242 at 39–40. As the State correctly notes, a facial challenge to a statute requires a much broader showing than an as-applied challenge. See id. at 4–5 (citations omitted). Indeed, an as-applied challenge "concedes" that the statute at issue "may be constitutional in many . . . applications, but contends that it is not constitutional under the particular circumstances of the case." Working Stiff Partners, LLC v. City of Portsmouth, 172 N.H. 611, 622 (2019). By contrast, a "facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." Id. The State argues that because RSA 198:40-a, II(a), establishes a "universal cost" figure, the plaintiffs cannot seek to invalidate that figure by establishing a unique entitlement to a greater amount of base adequacy aid as compared to other school districts. See Doc. 242 at 39–40. The State thus maintains that an as-applied challenge to the statute is improper.

For the reasons set forth below, the Court concludes that the plaintiffs have carried their burden with respect to their facial challenge to RSA 198:40-a, II(a). The Court further concludes that the plaintiffs would not be entitled to any greater relief arising out of an as-applied challenge as compared to their facial challenge. Accordingly, the Court need not reach the State's argument concerning the propriety or availability of an as-applied challenge in this context. See Canty, 146 N.H. at 156.

Questions Presented

Consistent with the rulings set forth above, and given the nature of the plaintiffs' claim, there are three inquires before the Court: (I) what are the necessary components or cost-drivers of a constitutionally adequate education, as defined by the legislature, exclusive of additional services provided to students eligible for differentiated aid?; (II) what funding is necessary for school districts to provide those components and cost-drivers?; and (III) how does that amount compare to the funding currently provided via base adequacy aid? As the third inquiry is a matter of simple mathematics, the evidence presented at trial largely focused on the first two inquiries.

Factual Findings

During trial, the Court heard testimony from twenty-seven witnesses, most of whom work (or worked) for one or more of the plaintiff school districts. Much of the testimony concerned amounts individual school districts actually spend on cost-drivers such as employee salaries, benefits, student transportation, and facilities operation and maintenance. In providing testimony on those topics, witnesses relied on personal knowledge as well as information contained in various financial reports, including annual reports submitted to the Department of Education (the "DOE") by each school district. See, e.g., Pls.' Ex. 60 (2017-18 annual DOE report ("DOE 25") for Fall Mountain Regional School District). The data contained in the financial reports was undisputed. Each plaintiff submitted five years of accounting data. There was no dispute at trial about how much school districts spent or received. The central issue for the Court was to discern the difference between the "costs" for an adequate education and "expenditures" contained in the evidence.

Throughout trial, the State attempted to undermine this testimony on two key fronts. First, the State emphasized that RSA 193-E:2-a defines a constitutionally-adequate education as including instruction in specific content areas. The State further emphasized that school districts could organize their financial ledgers in a manner that allocates expenses to individual content areas, but school districts generally have not done so. The State emphasized these points in support of its theory that the plaintiffs chose to gather the wrong kinds of evidence, and thus could not prove their claim.

In response to questioning about these points, the plaintiffs' witnesses testified that a content-based allocation of expenses would be impractical and imprecise because modern teaching methods incorporate a multi-disciplinary approach. Notably, DOE Commissioner Edelblut endorsed this instruction approach during his testimony, agreeing that interconnecting subject matter is a better educational model.[5] Because individual lessons often incorporate several RSA 193-E:2-a content areas, the plaintiffs' witnesses explained that there is no benefit to attempting to track expenses by content area, and any such benefit would be outweighed by the resulting cost. Some witnesses testified that such an endeavor would not be possible, especially in lower grades where one teacher teaches multiple subjects and where blended curriculum is the rule and not the exception.

Upon review, the Court concludes that this issue is largely immaterial. A content-based accounting system might have proven necessary had the evidence demonstrated that school districts devote substantial classroom resources to pursuits outside of the

[5] By way of example, a math lesson that incorporates word problems also improves a student's reading comprehension. Similarly, assignments involving historical literature (such as Thomas Paine's Common Sense) provide instruction in several content areas, including English, social studies, and history.

content areas delineated in RSA 193-E:2-a. However, the evidence establishes that with respect to classroom instruction, school districts devote at most a negligible amount of resources to such pursuits.

The lone possible exception concerns high school elective courses. See Pls.' Ex. 16 at 24–25 (Ed 306.27(m)) (requiring that high school students earn at least 20 credits to graduate, including 6 credits in "Open electives"). While the plaintiffs' witnesses opined that such courses fall within the delineated content areas, reasonable minds could disagree with respect to some specific offerings discussed at trial. Notably, however, the plaintiffs do not maintain that base adequacy aid should cover all school district expenses. Indeed, as explained in more detail below, the plaintiffs trial evidence took a conservative approach when identifying the costs associated with providing the opportunity for a constitutionally adequate education, seeking base adequacy aid funding at a level that is approximately half of statewide average expenditures. Given the manner in which the plaintiffs have calculated what they claim to be the requisite amount of base adequacy aid, any constitutional inefficiencies resulting from high school elective offerings do little to undermine the plaintiffs' overall position.

In summary, the Court finds that school districts devote few if any classroom instruction costs (i.e., teacher salaries and benefits, instructional materials, etc.) to pursuits that fall outside the content areas set forth in RSA 193-E:2-a. The Court further finds that the plaintiffs' conservative approach to calculating what they claim to be the requisite amount of base adequacy aid corrects for any such unrelated costs. The plaintiffs' evidence of "costs" significantly discounted the actual instructional expenditures. For these reasons, the Court concludes that the State's arguments

concerning the possibility of implementing a content area-specific accounting system are unavailing.

The second way in which the State attempted to undermine the plaintiffs' cost evidence was to emphasize that actual costs may not equate to necessary costs, because school districts could choose to spend more than the "bare minimum." For example, a school district could choose to pay higher teacher salaries in an effort to attract the most qualified candidates, or maintain lower teacher-to-student ratios in an effort to improve the quality of instruction. In the State's view, any resulting cost increase would be the product of local control, and would accordingly fall outside of the State's constitutional obligations.

In responding to questioning about this issue, the vast majority of the plaintiffs' witnesses rejected the premise that relevant actual costs are distinguishable from those that are constitutionally required. In particular, the witnesses explained that market forces require school districts to offer a certain caliber employment package—including salary, benefits, and working conditions—in order to recruit and retain qualified teachers and other employees. As was conclusively proven at the three-week trial: a school needs teachers to teach. Witnesses further explained that without such offerings, New Hampshire school districts would be unable to compete with other employers, including school districts in neighboring states. In addition, several witnesses noted that in some cases, actual existing employment packages have proven insufficient to recruit all necessary personnel, resulting in numerous vacancies.

To be sure, the evidence demonstrates that certain individual school districts (such as Oyster River) choose to spend more than is strictly necessary to educate their

students.[6] Nevertheless, the evidence overwhelmingly establishes that statewide (or regional) market forces give rise to a threshold level of employment package that school districts must provide in order to recruit and retain personnel. While school districts do not offer perfectly uniform employment packages, the Court finds that the costs reflected in the plaintiffs' aforementioned conservative calculations generally account for any minor differences in such offerings. For these reasons, the Court concludes that any discrepancies between the relevant actual costs and those that are constitutionally necessary do not meaningfully undermine the plaintiffs' position.

Having addressed the State's broader arguments concerning the sufficiency of the plaintiffs' evidence, the Court now turns to the specifics of that evidence. In brief, the evidence the plaintiffs offered at trial was intended to establish two points: (1) the existing amount of base adequacy aid is constitutionally insufficient; and (2) base adequacy aid funding must be increased to no less than $9,900 plus actual transportation costs. See Doc. 245 at 33–34. The plaintiffs offered three methodologies in support of these points. First, the plaintiffs presented calculations completed by Dr. Kimberly Rizzo Saunders, superintendent of schools for the Contoocook Valley School District ("ConVal"). See Pls.' Ex. 1 (spreadsheet reflecting calculations). Second, the plaintiffs presented a statistical analysis performed by Dr. Bruce Baker. See Pls.' Ex. 111 (Baker Report). Lastly, the plaintiffs presented evidence concerning the per pupil cost some school districts pay to educate their

[6] To be clear, Dr. Morse testified that he is fortunate enough to have voters in his SAU who support academics and the many various initiatives that function on the Oyster River School District. He also testified that his teacher salary costs are also attributable to competition in the employment market with several communities in Massachusetts – where teachers make considerably more money.

students in other districts. See Joint Ex. 248 ¶ 112 ("Winchester must pay tuition of $14,023 to . . . Keene"). The Court will address each methodology, in turn.

I. Calculations Performed by Dr. Rizzo Saunders

Prior to July 1, 2023, base adequacy aid funding was roughly equivalent to the cost figure established in the 2008 Report, adjusted for inflation. Compare Pls.' Ex. 2 (Compl. Ex. A – 2008 Report Spreadsheet) (reflecting base per pupil cost of $3,456) with RSA 198:40-a, II(a) (2009) (setting base adequacy aid at $3,450) and RSA 198:40-a, II(a) (2016) (setting base adequacy aid at $3,561.27, plus adjustments). To calculate what she characterizes as a more realistic base adequacy aid amount, Dr. Rizzo Saunders modelled her work after the 2008 Report, see Pls.' Ex. 2, as well as an updated 2018 Report completed by the legislature's Committee to Study Education Funding and the Cost of an Opportunity for an Adequate Education. See Pls.' Ex. 19 (2018 Report) at 17–19 (2018 Updated Spreadsheet and Explanations).[7] Dr. Rizzo Saunders explained at trial that after significant discussion with peers in the educational community and review of data gathered by or submitted to the DOE, she affirmatively assessed the validity of each cost figure included in the 2008 and 2018 Report spreadsheets. She then attempted to correct those figures she determined to be the least consistent with real world costs.[8] In light of the foregoing, although the 2008 and 2018 Reports were not incorporated into RSA 198:40-a, see ConVal, 174 N.H. at 166, both provide important context for Dr. Rizzo Saunders' work.

[7] As the Court ruled at trial, the exhibit was admitted for the limited purpose.
[8] Given Dr. Rizzo Saunders' credible testimony, to the extent she retained any 2008 or 2018 Report figures in her own calculations, the Court finds that she deemed such figures sufficiently realistic as to remain part of her conservative cost calculations.

Based on this work, Dr. Rizzo Saunders concluded that base adequacy aid should be funded at $9,929 excluding transportation. See Pls.' Ex. 4. The following spreadsheet contains the figures used in the 2008 Report and the 2018 Report, as well as the adjustments performed by Dr. Rizzo Saunders:

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TOTALS	2008		2018		Petitioners	
	K-2	3-12	K-2	3-12	K-2	3-12
Teachers	$2,269	$1,891	$2,470	$2,058	$7,694	$6,295
Principal	$202	$202	$223	$223	$262	$262
Admin. assistant	$84	$84	$96	$96	$115	$115
Guidance counselor	$130	$130	$141	$141	$182	$182
Library/media specialist	$95	$95	$102	$102	$123	$123
Technology coordinator	$39	$39	$106	$106	$121	$121
Custodian	$73	$73	$81	$81	$98	$98
Instructional materials	$250	$250	$300	$300	$300	$300
Technology	$75	$75	$100	$100	$100	$100
Prof. development	$20	$20	$30	$30	$30	$30
Facilities	$195	$195	$250	$250	$1,400	$1,400
Transportation	$315	$315	$315	$315	$[actual]	$[actual]
Food services	$0	$0	$0	$0	$66	$66
Nurse services	$0	$0	$0	$0	$294	$294
Superintendent services	$0	$0	$0	$0	$158	$158
Total per pupil universal cost	$3,747	$3,369	$4,214	$3,802	$11,213	$9,544
Blended per pupil cost	$3,456		$3,897		$9,929	

Id.; see Pls.' Exs. 1–3 (individual spreadsheets).[9]

A. Per Pupil Teacher Costs

As set forth below, in analyzing the per pupil cost of teachers, Dr. Rizzo Saunders used the total salary figure set forth in the 2018 Report, but adjusted the cost of benefits, as well as the teacher-to-student ratios used to derive a per pupil figure:

TEACHERS	2008			2018			Petitioners		
		K-2	3-12		K-2	3-12		K-2	3-12
Salary	$ 33,847			$ 36,845			$ 36,845		
+ 5% Salary Increase	$ 1,692			$ 1,842			$ 1,842		
= Total Salary	$ 35,539			$ 38,867			$ 38,867		
+ Benefits	$ 11,728			$ 12,767			$ 27,418		
= Total Teacher	$ 47,267			$ 51,454			$ 66,105		
1 / # Students		1:25	1:30		1:25	1:30		1:9.96	1:12.6
		$ 1,891	$ 1,576		$ 2,058	$ 1,715		$ 6,637	$ 5,246

Pls.' Ex. 4. As per pupil teacher costs dramatically impact the necessary funding level, the Court will address each component of the relevant calculations, in turn.

i. Teacher Salary

In discussing the $38,867 salary figure used in the 2018 Report and in her own calculations, Dr. Rizzo Saunders credibly characterized this as a realistic salary level for a first-year teacher. She explained, however, that school districts cannot staff schools with only first-year teachers, as such a staffing pattern would be impossible to maintain from a market perspective. Upon inquiry, Dr. Rizzo Saunders testified that statewide, the average teacher salary is "about $60,000." See Tr. Audio 04/10/2023 9:33:03 –

[9] The blended per pupil cost is derived from a simple mathematical formula: because there are 13 school years between kindergarten and grade 12, the formula weights the K–2 per pupil cost at 3/13, and the 3–12 per pupil cost at 10/13. See Pls.' Ex. 19 (2018 Report) at 16, n.2 ("'Blended' per pupil universal cost is a weighted average of the Grades K–2 cost and the Grades 3–12 cost based on 13 grades."). The Court finds that this is a logical and appropriate way to blend the respective figures.

9:33:10. She explained that she knows this because she reviews statewide data concerning teacher salaries at least every few years to assess the strength of the employment packages offered in ConVal. The Court finds that this testimony provides ample foundation for her credible claim as to the $60,000 average salary figure.[10] As explained below, the Court further concludes that in calculating the requisite amount of base adequacy aid, it is appropriate to use a teacher salary figure between $38,867 (approximate first-year salary) and $60,000 (approximate statewide average salary).

ii. Teacher Benefits

In her calculations, Dr. Rizzo Saunders used a substantially larger teacher benefits figure ($27,418) as compared to the 2018 Report ($12,767). See Pls.' Ex. 4. She explained at trial that RSA 100-A:16, III, requires school districts to contribute the equivalent of 17.80% of teacher salaries to the New Hampshire Retirement System ("NHRS"). See Pls.' Ex. 5 (detailing benefits calculations). School districts also pay 7.65% of a teacher's salary in federal income taxes ("FICA"). Id. Further, school districts pay unemployment insurance of at least $147.52 per teacher, per year. See id.

In addition, Dr. Rizzo Saunders explained that school districts generally pay for a significant portion of teachers' health insurance benefit premiums. As set forth above, the Court credits the substantial testimony presented at trial indicating this is a significant and essential component of the overall employment package school districts must offer to recruit and retain teachers. In calculating the cost of this benefit, Dr. Rizzo Saunders used actual costs and employer contribution levels from ConVal. She

[10] In particular, the Court finds that information school districts report to the DOE is credible. This data informs the level of funding school districts receive from the State, and school districts know that the DOE could audit their submissions. The school districts' compelling interest in reporting accurate data establishes the data's credibility.

credibly explained that because there are few health insurance providers in New Hampshire, the actual costs are quite uniform. She further explained that she reviewed collective bargaining agreements from other school districts to confirm that the 88% employer contribution level offered by ConVal is generally consistent with the percentage paid by other school districts. She acknowledged, however, that ConVal will be reducing its contribution level to 86% under its next collective bargaining agreement.

On cross-examination, the State asked Dr. Rizzo Saunders why her calculations used figures for family and two-person benefit plans[11] and did not account for single-person coverage or individuals who forego insurance benefits. In response, Dr. Rizzo Saunders explained that because affordable health insurance has become part of the requisite total employment package for teachers, few opt out of coverage. She elaborated that for most married teachers, it would be far more expensive to obtain coverage through a spouse's employer. Testimony offered by other school district employees echoed the notion that although some teachers may pursue a buy-out or single-person coverage, the vast majority obtain two-person or family plan coverage.

In light of the testimony presented at trial, and subject to the qualifications outlined below, the Court finds that the methodology employed by Dr. Rizzo Saunders in determining the requisite cost of providing necessary teacher benefits is reasonable and sound. In particular, the Court concludes that in calculating teacher benefits, it is reasonable and appropriate to include the cost of health insurance benefits, NHRS contributions, FICA payments, and unemployment insurance.

[11] Dr. Rizzo Saunders reports that at an employer contribution level of 88 percent, a school district's portion of the annual premium is $19,967.64 for a family plan, and $14,790.84 for a two-person plan. See Pls.' Ex. 5. Dr. Rizzo Saunders used an average of these two figures—$17,378.92—in her calculations.

iii. Teacher-to-Student Ratios

The next area in which Dr. Rizzo Saunders' approach substantially deviates from the 2008 and 2018 Reports is in calculating per pupil teacher costs. Because the DOE permits maximum class sizes[12] of 25 in grades K–2 and 30 in grades 3–12, the 2008 and 2018 Reports simply divided the total teacher costs by those numbers to derive grade range-specific per pupil costs. See Pls.' Ex. 4 (reflecting teacher ratios of 1:25 and 1:30 in 2008 and 2018 Report calculations). By contrast, Dr. Rizzo Saunders used ratios of 1:9.96 for grades K–2 and 1:12.6 for grades 3–12 in her calculations. See id. This issue necessarily has a dramatic impact on per pupil cost figures.

In an effort to justify her chosen ratios, Dr. Rizzo Saunders opined that maximum classroom size is not and cannot be equivalent to a teacher-to-student ratio. She explained that because public school districts must accept all eligible students, they cannot artificially fill every seat in every classroom. If a school district was somehow able to fill every seat, the addition of a single student would require that school district to create another class, thus reducing the overall teacher-to-student ratio. The evidence at trial established that this is the rule rather than the exception and that such a scenario occurs regularly. Schools must budget for it accordingly.

In addition, the Court heard considerable testimony about the need for teacher break or preparation periods during the day. The evidence demonstrates that at most, teachers are routinely scheduled to teach 75% of the school day (i.e., six out of eight blocks in an eight-block day, or three out of four blocks in a four-block day). The evidence further demonstrates that this is not the product of local control, but rather is

[12] As discuss at trial, "class size" is very different from "student to teacher ratio". It is very curious that the DOE regulations and rules use class size and not student to teach ratio as a metric.

necessary for teachers to perform their work and for school districts to recruit and retain teachers. At least one defense witness (a former teacher himself) agreed with this. In light of the foregoing, although the Court does not adopt Dr. Rizzo Saunders' ratios, the Court generally credits her rationale for reducing the ratios used in the 2008 and 2018 Reports.

B. Non-Teacher Employee Costs

In calculating the costs associated with the following non-teacher employees, Dr. Rizzo Saunders maintained the salary figures and student ratios set forth in the 2018 Report, but adjusted benefit costs in a manner similar to her work with teacher benefits:

	Principal	2008	2018	Petitioners
=	Total Salary	$ 78,917	$ 89,417	$ 89,417
+	Benefits	$ 22,097	$ 22,354	$ 41,404
=	Total	$ 101,014	$ 111,771	$ 130,821
	1 / # Students	1:500	1:500	1:500
	PER PUPIL	$ 202	$ 223	$ 262

	Administrative assistant	2008	2018	Petitioners
=	Total Salary	$ 31,712	$ 35,912	$ 35,912
+	Benefits	$ 10,465	$ 11,851	$ 21,477
=	Total	$ 42,177	$ 47,763	$ 57,389
	1 / # Students	1:500	1:500	1:500
	PER PUPIL	$ 84	$ 96	$ 115

	Guidance counselor	2008	2018	Petitioners
=	Total Salary	$ 38,998	$ 42,458	$ 42,458
+	Benefits	$ 12,869	$ 14,011	$ 30,334
=	Total	$ 51,867	$ 56,469	$ 72,792
	1 / # Students	1:400	1:400	1:400
	PER PUPIL	$ 130	$ 141	$ 182

	Library/media specialist	2008	2018	Petitioners
=	Total Salary	$ 35,539	$ 38,487	$ 38,487
+	Benefits	$ 11,728	$ 12,701	$ 22,835
=	Total	$ 47,267	$ 51,188	61,322
	1 / # Students	1:500	1:500	1:500
	PER PUPIL	$ 95	$ 102	$ 123

Technology coordinator	2008	2018	Petitioners
= Total Salary	$ 35,539	$ 39,718	$ 39,718
+ Benefits	$ 11,728	$ 13,107	$ 20,882
= Total	$ 47,267	$ 52,825	$ 60,600
1 / # Students	1:1,200	1:500	1:500
PER PUPIL	$ 39	$ 106	$ 121

Custodian	2008	2018	Petitioners
Total Salary	$ 27,540	$ 30,446	$ 30,446
Benefits	$ 9,088	$ 10,047	$ 18,592
Total	$ 36,628	$ 40,493	$ 49,038
1 / # Students	1:500	1:500	1:500
PER PUPIL	$ 73	$ 81	$ 98

See id. (cleaned up). As with teachers, the Court concludes that the benefit costs Dr. Rizzo Saunders used for these non-teacher employees are credible and generally conservative. It may be that Dr. Rizzo Saunders could have been more conservative in calculating the employer contribution (and associated cost) for some benefits offered to these professionals.[13] Nevertheless, given the highly conservative per pupil ratios she used for these employees, the Court finds that any potential overstatement of benefit costs has a negligible impact (if any) on the resulting per pupil costs.

Further, testimony provided by numerous witnesses compels the conclusion that the services provided by these professionals are essential to the provision of the opportunity for a constitutionally adequate education. Principals are necessary to keep a school building running and staffed with qualified teachers. Administrative assistants augment that work, and they also maintain student records and other critical information. Guidance counselors assist students in navigating the day-to-day

[13] At trial, the State questioned the necessity of certain benefits offered to principals under Dr. Rizzo Saunders' cost model. In response, Dr. Rizzo Saunders testified that the overall cost she assigned to the total principal employment package (salary and benefits) is a conservative figure demonstrating the minimum value school districts must offer to recruit and retain principals. Given the credible testimony offered by Dr. Rizzo Saunders, and the absence of contrary evidence on this point, the Court finds that the overall cost Dr. Rizzo Saunders assigned to principals is a credible, conservative figure.

requirements of the school setting, and in selecting the courses necessary to eventually fulfill graduation requirements. Both library/media specialists and technology coordinators are required for school districts to purchase and maintain necessary instructional materials and technological resources. Lastly, custodians are necessary in order to keep school buildings clean and otherwise appropriately maintained.

Consistent with the foregoing, the Court concludes that the per pupil costs Dr. Rizzo Saunders reports for the above-described cost-drivers are appropriately included in calculating the requisite amount of base adequacy aid.

C. Instructional Materials, Technology, and Professional Development

To determine the per pupil cost of instructional materials, technology, and professional development, Dr. Rizzo Saunders again used the same cost figures as those set forth in the 2018 Report:

INSTRUCTIONAL MATERIALS	2008	2018	Petitioners
PER PUPIL	$ 250	$ 300	$ 300
TECHNOLOGY			
PER PUPIL	$ 75	$ 100	$ 100
PROF. DEVELOPMENT			
PER PUPIL	$ 20	$ 30	$ 30

See id. Drawing on common sense and the testimony presented at trial, the Court concludes that these figures are both credible and highly conservative. See 1 NH Civil Jury Instruction 3.2 (2023) (instructing factfinder to "judge the case on the basis of the evidence and the inferences [factfinder] can reasonably draw from it," and explaining that "[a] reasonable inference is a deduction which common sense and reason lead [factfinder] to draw from the evidence"). The Court further concludes that these cost-drivers are essential to the provision of the opportunity for a constitutionally adequate

education. Instructional materials and technology are obvious necessities. See RSA 193-E:2-a, I(a)(11) (requiring instruction in computer science, among other things). With respect to professional development, the evidence demonstrates that school districts must provide these opportunities to maintain a viable job market to recruit and retain teachers and staff. Absent such a market, the public school system would eventually fail because schools need teachers to teach. The Court thus finds that a modest amount of professional development, such as that contemplated in Dr. Rizzo Saunders' model, is essential in this context. Accordingly, the Court concludes that the per pupil costs Dr. Rizzo Saunders reports for these cost-drivers are appropriately included in calculating the requisite amount of base adequacy aid.

D. Facilities

Facilities operation and maintenance is another cost-driver for which Dr. Rizzo Saunders reports a significantly higher per pupil figure ($1,400) than the 2008 ($195) or 2018 ($250) Reports.

	2008	2018	Petitioners
FACILITIES			
PER PUPIL	$ 195	$ 250	$ 1,400

See Pls.' Ex. 4. In justifying her figure, Dr. Rizzo Saunders noted at trial that utility costs such as heat and electricity have increased significantly over time. See Pls.' Ex. 12 (reflecting that statewide, per pupil average facilities costs increased by nearly $400 between 2017–18 and 2021–22 fiscal years). In addition, she noted that school districts must incur snow removal and other winter maintenance costs to keep schools open and safe. She further explained that these necessary costs are not funded by other State sources such as building aid.

In calculating the relevant costs, Dr. Rizzo Saunders omitted amounts attributable to athletics, which she conceded are not part of the State's base adequacy aid funding obligations. Nevertheless, on cross-examination, Dr. Rizzo Saunders acknowledged that she had not further reduced her figure to account for community use of school facilities (such as the use of schools as polling stations, or after-hours scout meetings in school cafeterias). Dr. Rizzo Saunders opined, however, that such uses are minimal and have little impact on overall costs. She further noted that her per pupil facilities cost figure of $1,400 is quite close to the $1,375 difference between State funding provided to in-person versus online charter schools, suggesting that difference is attributable to the need to operate and maintain facilities. She is right.

Again drawing on both common sense and the credible testimony offered at trial, see 1 NH Civil Jury Instruction 3.2, the Court concludes that the methodology Dr. Rizzo Saunders used to calculate facilities costs was generally reasonable and sound. The Court further concludes that facilities costs, including (but not limited to) heat, electricity, and winter maintenance, are essential to providing the opportunity for a constitutionally adequate education in this state. Accordingly, this cost-driver is appropriately included in calculating the requisite amount of base adequacy aid.

E. Transportation

Transportation is another cost-driver about which the plaintiffs presented substantial evidence. Specifically, Dr. Rizzo Saunders and numerous other witnesses credibly testified that the $315 per pupil figure used in the 2008 and 2018 Report spreadsheets is woefully inadequate. Indeed, although transportation costs vary amongst school districts—with rural school districts tending to incur higher costs—the

evidence demonstrates that many school districts incur per pupil transportation costs of over $1,000. See, e.g., Pls.' Ex. 29 (ConVal 2021 fiscal year DOE 25) (indicating ConVal spent $1,109.12 per elementary school pupil—$772,405.62 (total expenditure) / 696.41 (average daily membership)—on transportation costs in 2021); Pls.' Ex. 62 (Winchester 2021 fiscal year DOE 25) (indicating Winchester spent $1,619.51 per elementary school pupil—$595,980.11 / 368—on transportation costs in 2021). Given the range in costs, Dr. Rizzo Saunders recommends funding transportation at actual, district-specific levels:

	2008	2018	Petitioners
TRANSPORTATION			
PER PUPIL	**$ 315**	**$ 315**	**$ [actual]**

See Pls.' Ex. 4.

The Court credits Dr. Rizzo Saunders' testimony (which was supported by testimony from many other witnesses) that transportation is essential to the provision of the opportunity for a constitutionally adequate education, is a significant cost-driver, and necessarily gives rise to varying cost levels throughout the State. The Court thus concludes that it was reasonable for Dr. Rizzo Saunders to characterize these costs as a necessary component of base adequacy aid, but to leave these costs out of her reported figure, with the recommendation that they be addressed separately.

F. Cost-Drivers Added by Dr. Rizzo Saunders

In calculating what she characterizes as the minimum amount of base adequacy aid, Dr. Rizzo Saunders included three cost-drivers that were not included in the 2008 and 2018 Reports: food services, nurse services, and superintendent services:

2008 2018 Petitioners

FOOD SERVICES			
PER PUPIL	$ 0	$ 0	$ 66
NURSE SERVICES			
PER PUPIL	$ 0	$ 0	$ 294
SUPERINTENDENT SERVICES			
PER PUPIL	$ 0	$ 0	$ 158

See Pls.' Ex. 4. The Court will address each additional cost-driver, in turn.

i. Food Services

Emphasizing that hungry or malnourished students do not learn well, Dr. Rizzo Saunders and other witnesses reasonably opined that school districts must offer food services in order to provide students with the opportunity for a constitutionally adequate education. The evidence demonstrates, however, that some food service programs are able to operate in a self-funding manner. The evidence further demonstrates that the unreduced meal costs charged to paying students and staff is incredibly affordable. This suggests prices could be raised by some margin to reduce (if not eliminate) program deficits. The Court heard no evidence indicating such a shift was impossible. The Court takes no position as to the ultimate feasibility or prudence of such a step. On the record presented, however, the Court cannot conclude that food services must be funded via base adequacy aid. In other words, although the Court finds that food services are essential in this context, the evidence does not demonstrate such services are a cost-driver that must be funded via base adequacy aid. Despite the fact that RSA 189:11-a mandates all schools to provide food and nutritional programs, the Court

cannot conclude that it was reasonable for Dr. Rizzo Saunders to include food service costs in her reported base adequacy aid figure.[14]

ii. Nurse Services

With respect to nurse services, Dr. Rizzo Saunders and numerous other witnesses credibly testified to the practical reality that many students require medications that must be administered to them throughout the school day. Witnesses also credibly testified about the likelihood that illness or injury would necessitate nurse services during the school day, on an unpredictable schedule. The Court credits this testimony. Indeed, the recent worldwide pandemic demonstrates how quickly disease can spread, particularly in a population of young students. While school staff might be capable of administering medications or basic first aid, non-nurse staff cannot exercise appropriate medical judgment in determining whether, for example, a stomachache is the product of hunger or a contagious virus. Absent the prompt and accurate exercise of such judgment, illness spreads, temporarily depriving affected students of the opportunity for a constitutionally adequate education. For these reasons, the Court finds that nurse services are a necessary component of base adequacy aid. Though not germane to the Court's constitutional analysis, the Court notes that DOE regulations (Ed 306:12) require schools to provide nursing services. Such a nurse is regulated by the requirements of RSA 200:29.

The Court further finds that the $294 per pupil cost Dr. Rizzo Saunders attributes to these services is a reasonable, conservative figure. In calculating this figure, Dr.

[14] The Court notes that food services is also the largest cost per pupil of the differential aid categories. By finding that this should not be included as a cost driver, the State's argument concerning differential aid is deflated.

Rizzo Saunders relied on a 2014 survey of school nurses performed by the New Hampshire Department of Health and Human Services. See Pls.' Ex. 14. Among other things, this report indicates that nurse service needs vary throughout the state: a sentiment confirmed by the testimony presented at trial. See id. Of those schools that employ a full-time nurse, reported nurse-to-student ratios varied from 1:257 in the North Country to 1:528 in South Central New Hampshire. Id. at 13. The statewide average nurse-to-student ratio for all schools, including those employing part-time nurses, was reported to be 1:223. See id. at 3.

Multiplying Dr. Rizzo Saunders' per pupil cost of $294 by the statewide average number of students for whom a single nurse is responsible (223) leads to a product of $65,562. Thus, under average conditions, a school nurse's total employment package would need to cost school districts no more than $65,562. This demonstrates the conservative nature of Dr. Rizzo Saunders' per pupil figure. Indeed, like fuel costs, healthcare costs (and salaries) have risen dramatically since 2014. As a result, a total nurse cost figure of $65,562 is likely far too low.

Moreover, the Court heard considerable testimony at trial regarding the difficulty of sharing a nurse amongst schools, and the benefits of having a full-time on-site nurse at each school location. In light of that credible testimony, the Court cannot conclude that a funding model requiring schools to routinely share nurses would be constitutionally sufficient. As a result, to the extent more rural schools have lower nurse-to-student ratios, the Court is persuaded that such ratios are largely unavoidable.[15] On the other end of the spectrum, the fact that some schools have

[15] The Court is not prepared to say that the State must provide funding for a nurse in every school, regardless of size, as this issue implicates some amount of local decision making. Yet, there are some

historically maintained higher nurse-to-student ratios does not prove those ratios are constitutionally sufficient. As explained above, the realistic concern that emergency nurse services become necessary on an unpredictable basis renders a shared nurse model inadequate.

In addition, the Court concludes that although school nurses may provide services to students who qualify for differentiated aid, the entire $294 per pupil cost included in Dr. Rizzo Saunders' calculations is properly characterized as a necessary component of base adequacy aid. In reaching this conclusion, the Court relies on the fact that a hypothetical school with no differentiated aid-eligible students would still require nurse services to address illnesses, injuries, or medication issues throughout the school day. Such a school could include students who do not qualify for differentiated aid, but require daily medical assistance (such as blood sugar monitoring). Given the conservative nature of the $294 per pupil figure, and the need for nurse services in all schools, the Court concludes that it is appropriate to include all of this cost in base adequacy aid calculations.

iii. Superintendent Services

The Court takes a different view regarding superintendent services, the last cost-driver added by Dr. Rizzo Saunders. See Pls.' Ex. 4. Like nurse services, the evidence demonstrates that superintendents often perform services that are important to successful school operations. Though required by Ed. 302.01, the Court is not convinced these services fall entirely within the definition set forth in RSA 193-E:2-a. In particular, the evidence did not clearly define the degree to which work customarily

schools where a lower nurse-to-student ratio is a product of geography and population size, and could not be corrected without incurring substantial transportation costs.

performed by a superintendent could instead be performed by a school principal or other staff member. As a result, on the record presented, the Court has lingering doubts as to whether most school districts must employ a full-time superintendent, or whether they simply choose this approach. Accordingly, although Dr. Rizzo Saunders attributes a conservative per pupil cost to these services ($158), the Court cannot conclude that it was reasonable to include that cost in base adequacy aid calculations. In other words, the Court finds that some amount of superintendent services is necessary in this context, but the Court cannot ascertain the degree to which base adequacy aid must fund these services.

In so ruling, the Court is in no way finding that superintendent services are not essential to the functioning of a school district. To the contrary, they clearly are essential. The Court is simply making an assessment of the evidence before it.

G. *Impact of Criticisms Offered by Dr. Greene*

In an effort to undermine the credibility of Dr. Rizzo Saunders' work, the State presented expert testimony from Dr. Jay Greene. In brief, Dr. Greene juxtaposed Dr. Rizzo Saunders' process with that underlying the 2008 Report. See Doc. 242 at 26. He opined that the latter approach, which involved consideration of substantial data from diverse sources and viewpoints, was a reliable method for determining base adequacy aid.[16] He further opined that the release of the 2008 Report permitted others to analyze the underlying methodology. Because Dr. Rizzo Saunders relied on more limited data

[16] As the Court noted in ruling on the parties' motions in limine, see Doc. 232, the process underlying the 2008 Report—a process Dr. Greene endorses—is strikingly similar to the Court's experience in presiding over the trial in this matter: i.e., considering substantial data from diverse sources and viewpoints in order to determine an appropriate amount of base adequacy aid.

sources and did not draft a written report, Dr. Greene contends that her work is unreliable, incapable of sufficient review, and otherwise undeserving of weight.

Upon review, Dr. Greene's criticisms do not demonstrate that the work performed by Dr. Rizzo Saunders cannot, in conjunction with other evidence, carry the plaintiffs' burden of proof. The evidence presented at trial empowers the Court to effectively gauge the reasonableness of the input figures used by Dr. Rizzo Saunders. Thus, the absence of a written report explaining the genesis of those figures is not as problematic as Dr. Greene suggests. Moreover, although the Court does not adopt every figure Dr. Rizzo Saunders input into her methodology, any defects concerning those numbers are readily identifiable, and can either be excised or corrected based on other evidence. See Shaw's Supermarkets, Inc. v. Town of Windham, 174 N.H. 569, 573 (2021) ("As the trier of fact, the trial court may accept or reject any portion of the evidence as it finds proper, including that of expert witnesses."); see also 1 NH Civil Jury Instruction 3.2. For these reasons, any limitations of Dr. Rizzo Saunders' data sources or other aspects of her process criticized by Dr. Greene do not undermine the conclusions the Court reaches in partial reliance on Dr. Rizzo Saunders' work.

Consistent with the foregoing, the Court concludes that in calculating the minimum necessary level of base adequacy aid, Dr. Rizzo Saunders used a reliable and otherwise appropriate methodology: analyzing discrete cost-drivers and calculating relevant per pupil costs. The Court further finds that her input figures are generally credible and conservative. Although the Court does not conclude that all such costs should be included in base adequacy aid, any necessary adjustments are readily identifiable and supported by other evidence. Accordingly, the opinions offered by Dr.

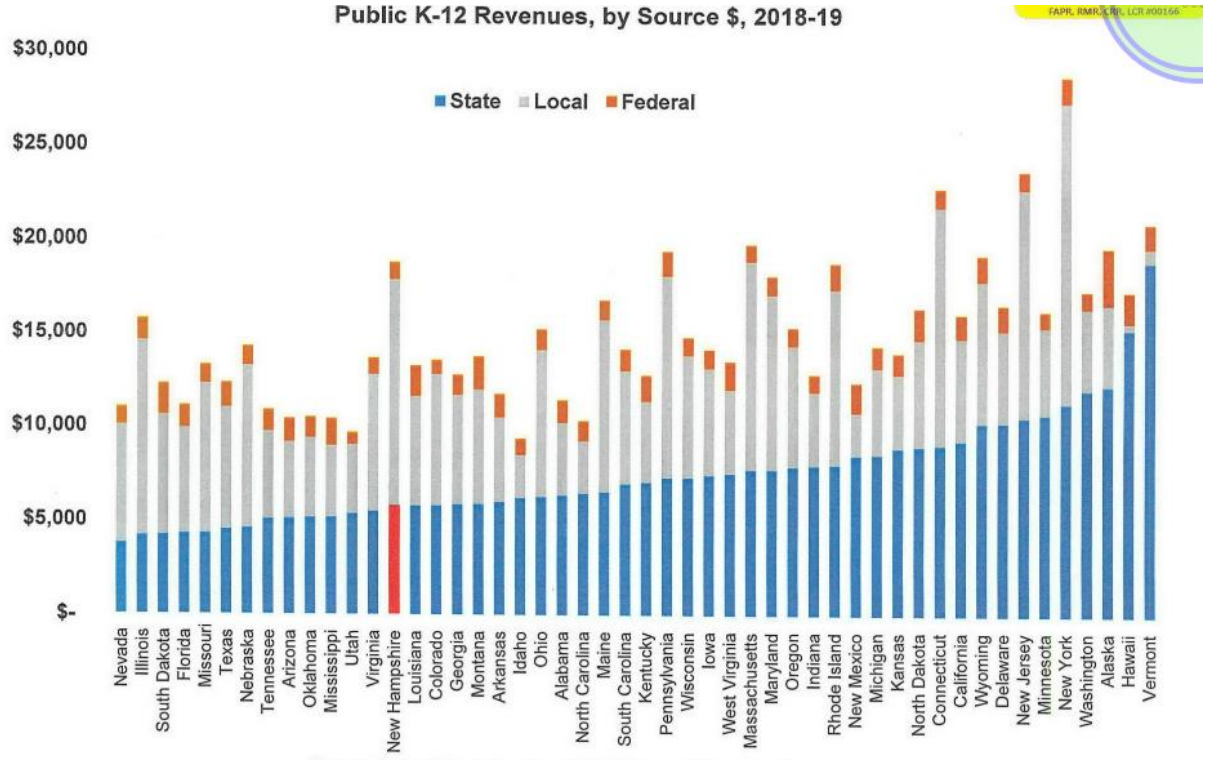
Rizzo Saunders, viewed in conjunction with the other evidence presented at trial, are capable of carrying the plaintiffs' burden of proof in this action.

II. Statistical Analysis Performed by Dr. Baker

In further support of their claim, the plaintiffs presented testimony from Dr. Bruce Baker. See Pls.' Ex. 111 (Baker Report). Dr. Baker described the process he used and conclusions he reached in connection with an outputs-based analysis he performed in 2020 at the request of the legislature's Commission to Study School Funding. See id. Based on this work, Dr. Baker concluded that the cost of an adequate education in a district of average size and grade-level distribution (without adjustments for students who qualify for differentiated aid) is $9,964 excluding transportation. See id. Dr. Baker explained that to arrive at this figure, he analyzed current spending and various risk factors or needs to determine the spending necessary to achieve certain outcome goals. He further explained that most of the data he used came from the DOE.

Dr. Robert Costrell, another expert witness retained by the State, testified to numerous criticisms of Dr. Baker's work. The evidence demonstrates that this is not the first time Dr. Baker and Dr. Costrell have testified as to their conflicting views on school funding. In this case, Dr. Costrell criticized various aspects of Dr. Baker's methodology, including choices he made in creating and applying his statistical models. Emphasizing that New Hampshire public school students achieve outcomes which exceed constitutional adequacy, Dr. Costrell opined that Dr. Baker's outcome-based analysis does not establish the costs necessary to achieve base adequacy, but rather something more. Dr. Costrell further noted that in 2019, New Hampshire had the eighth highest level of per pupil education expenditures in the nation, suggesting Dr. Baker's reliance

on actual spending gave rise to inflated cost figures. See Joint Ex. 235. Dr. Costrell acknowledged, however, that as of the 2018–19 school year, New Hampshire was on the lower end of the nationwide spectrum vis-à-vis state funding for public schools:



See Joint Ex. 237 (indicating New Hampshire had fourteenth lowest level of state funding for public education in 2018–19 school year).

To summarize, Dr. Baker and Dr. Costrell emphatically defended their respective positions as to whether, and if so how, certain aspects of Dr. Baker's methodology could undermine the reliability thereof. Ultimately, the Court need not resolve these differences of opinion at this time. Rather, upon reflection, the Court is persuaded that Dr. Baker's work was designed to answer a different question than that presented here: this case concerns the State's obligation to fund the opportunity for a constitutionally adequate education, whereas Dr. Baker analyzed the spending necessary to achieve a particular result. While the quality of instruction may be a significant factor impacting

actual student performance, it is not the only such factor. For this reason, the Court cannot conclude that Dr. Baker's work is directly applicable to the inquiry before the Court. Nevertheless, as explained below, it provides a helpful benchmark in measuring the plaintiffs' claim concerning the requisite level of base adequacy aid funding.

III. Tuition Agreements

The final method by which the plaintiffs attempted to prove their claim was to present evidence concerning the per pupil cost some school districts pay to educate their students in other districts. See Joint Ex. 248 ¶ 112 ("Winchester must pay tuition of $14,023 to have . . . students attend Keene High School."). Several witnesses credibly testified that school districts enter tuition agreements based on the conclusion that it would cost more to educate those students within the tuitioning (sending) school district. As a result, these witnesses opined that tuition figures constitute the lowest per pupil cost at which the school districts can educate those students. Via cross-examination, however, the State established that tuition figures generally include costs associated with athletics and other pursuits that fall outside of the State's base adequacy aid funding obligations. In addition, the plaintiffs' witnesses were unable to meaningfully refute the State's suggestion that some school districts choose to tuition students to academically strong districts when consolidating with other smaller districts might lower per pupil costs. On the record presented, the Court cannot conclude that tuition costs are necessarily the lowest achievable cost of delivering the opportunity for a constitutionally adequate education to the relevant students.

Analysis

I. Sufficiency of Plaintiffs' Evidence

Given the above-described standard of review and burden of proof, see Doc. 242 at 3 (quoting ConVal, 174 N.H. at 161, for proposition that Court must presume statute is constitutional and "'not declare it invalid except on inescapable grounds'"), and in light of the State's pending motion for a directed verdict, see Doc. 235, the Court's first task is to analyze whether the plaintiffs put forth sufficient evidence to demonstrate that the existing level of base adequacy aid is constitutionally insufficient "in all, or virtually all," of New Hampshire's school districts. See Working Stiff Partners, 172 N.H. at 622. Based on the evidence the plaintiffs presented at trial, the Court is persuaded that the costing methodology employed by Dr. Rizzo Saunders is a reliable way to determine the requisite level of base adequacy aid funding. Thus, as a preliminary step, the Court applies that methodology to those cost-drivers that are essential to educating students in the content areas set forth in 193-E:2-a.[17] In completing this task, the Court employs conservative figures that likely undervalue the requisite level of funding. In the Court's view, such a conservative approach best reflects the standard of review and burden of proof, particularly in the context of the plaintiffs' facial challenge. In addition, as discussed below, this approach affords appropriate deference to the legislature.

[17] As explained above, those cost-drivers include: teachers, principals, administrative assistants, guidance counselors, library/media specialists, technology coordinators, custodians, nurses, instructional materials, technology, professional development, transportation, and facilities operation and maintenance. Although some amount of superintendent services is also necessary, the Court cannot reliably quantify the corresponding level of necessary funding.

A. Per Pupil Teacher Costs

The first necessary cost-driver is teachers. To calculate an appropriate per pupil amount for this cost-driver, the Court must determine what salary figure and benefit costs should be input into Dr. Rizzo Saunders' model. The Court must then determine an appropriate teacher-to-student ratio.

i. Teacher Salary

As previously noted, in calculating a highly conservative per pupil teacher cost, Dr. Rizzo Saunders utilized a total salary figure of $38,867. See Pls.' Ex. 4. She credibly testified that this figure represents a realistic statewide average for a first-year teacher salary, see Joint Ex. 481 (chart depicting minimum starting teacher salaries for 2021–22 school year, and reflecting average starting salary of $40,478.90), whereas the statewide average teacher salary is approximately $60,000. As set forth above, the Court credits Dr. Rizzo Saunders' explanation as to why school districts cannot hire only first-year teachers. Thus, in calculating the requisite level of base adequacy aid, it is appropriate to use a figure higher than $38,867 as the teacher salary cost.

Nevertheless, the Court cannot conclude that it would be appropriate to use the statewide average teacher salary figure of $60,000. The Court credits evidence presented at trial indicating that at least one school district—Oyster River—chooses to pay teachers more than the bare minimum, a choice that necessarily raises the state average. See id. (reflecting first-year teacher salary in Oyster River of $43,864.00 for 2021–22 school year). On the other hand, the Court also credits testimony offered by numerous witnesses indicating that the vast majority of New Hampshire school districts keep costs as low as possible to minimize local property tax rates. Having weighed the

evidence, and drawing on the Court's common sense, see 1 NH Civil Jury Instruction 3.2, the Court concludes that an average teacher salary figure of $57,000—five percent less than the average figure reported by Dr. Rizzo Saunders—is a conservative estimate of the average statewide teacher salary level necessary to maintain an education market in New Hampshire, and to recruit and retain qualified teachers.[18] The evidence at trial clearly established that the school districts with low teacher salaries cannot retain teachers or recruit new ones to replace the ones that leave. Some of the plaintiff districts have had vacancies that have gone unfilled for years because they cannot compete with the salaries (or employment packages) of other districts. While the five percent reduction (from an already conservatively low number) is almost certainly an overcorrection in the State's favor, this is the most reasonable approach under the circumstances.

ii. Teacher Benefits

The Court's conclusion regarding teacher salary impacts the relevant benefit costs. As set forth above, the Court finds that in calculating teacher benefits, it is reasonable and appropriate to include the cost of health insurance benefits, NHRS contributions, FICA payments, and unemployment insurance. Using the above-described conservative average salary figure of $57,000 and given the contribution level of 17.80% of teacher salaries, see Pls.' Ex. 5, the average cost associated with NHRS benefits is $10,146. Applying that same approach to FICA payments, which total 7.65% of teacher salaries, see id., the average cost associated with FICA payments is $4,361.

[18] The 2008 Report, the 2018 Report, and Dr. Rizzo Saunders' calculations all included a 20% increase for "specialty teachers." See Pls.' Ex. 4. The Court has no basis to conclude such an adjustment is necessary when using a salary figure close to the statewide average. Accordingly, the Court will not make a similar adjustment in its own cost calculations.

Because the Court cannot discern whether an increased salary figure leads to a higher cost of unemployment insurance, the Court will maintain the $147.52 yearly figure used in Dr. Rizzo Saunders' calculations. Accordingly, the evidence demonstrates that $14,654.52 is a conservative average cost of teacher benefits excluding health insurance.

In calculating the cost of health insurance benefits, Dr. Rizzo Saunders used an average of the costs associated with a two-person plan and a family plan, funded at an employer contribution level of 88%. See Pls.' Ex. 5 (indicating school district portion of two-person plan is $14,790.84, and school district portion of family plan is $19,967.64, when funded at 88% level). As set forth above, however, there was evidence presented at trial indicating that some teachers opt for a single person plan, a buyout, or no health insurance coverage at all. Unlike teacher salary information, the record does not contain concrete information concerning the number of teachers pursuing each type of coverage. While the Court credits testimony reflecting that the vast majority of teachers avail themselves of two-person or family plans, the Court concludes that some adjustment to Dr. Rizzo Saunders' input figure is necessary.

Once again taking an overly conservative view of the evidence, the Court concludes that in gauging the sufficiency of base adequacy aid, it is appropriate to consider the cost associated with a two-person health insurance plan. Again drawing on common sense and the evidence presented at trial, see 1 NH Civil Jury Instruction 3.2, the Court concludes that this approach will overcorrect for Dr. Rizzo Saunders' failure to account for the minority of teachers who obtain single-person or no health insurance coverage. In light of the Court's overarching conservative approach, the

Court also concludes that it is appropriate to calculate health insurance costs using the 86% funding level included in ConVal's forthcoming collective bargaining agreement, rather than the present 88% funding level used by Dr. Rizzo Saunders. As a result, the evidence demonstrates that $14,454.68[19] is a conservative average cost of teacher health insurance benefits. Adding this figure to the aforementioned $14,654.52 cost of other benefits and the $57,000 salary figure leads to a conservative per teacher cost of $86,109.20.

iii. Teacher-to-Student Ratios

The Court must next convert this figure into a per pupil cost. As previously explained, the 2008 and 2018 Reports used maximum class sizes of 25 (for grades K–2) and 30 (for grades 3–8) to derive per pupil costs, whereas Dr. Rizzo Saunders used much lower teacher-to-student ratios. At this stage of the analysis—i.e., determining whether the plaintiffs have met their initial burden of proof—the Court need not determine precisely what ratio is appropriate. It is sufficient to state that using a ratio of 1:25 leads to a per pupil teacher cost of $3,444.37, whereas a ratio of 1:30 leads to a per pupil cost of $2,870.30. Blending these numbers in the manner described above (i.e., a weighted average) results in a per pupil teacher cost of $3,157.34.

B. Other Necessary Costs

As set forth above, the Court credits Dr. Rizzo Saunders' per pupil cost figures for principals ($262), administrative assistants ($115), guidance counselors ($182), library/media specialists ($123), technology coordinators ($121), custodians ($98), and nurse services ($294), totaling $1,195. See Pls.' Ex. 4. In addition, the evidence

[19] Since $14,790.84 constitutes 88% of the two-person premium cost, the total cost must be $16,807.77 ($14,790.84 divided by 0.88). 86% of the total figure is thus $14,454.68.

demonstrates that like teachers, these employees are essential to the delivery of the opportunity for a constitutionally adequate education. Adding these $1,195 in costs to the aforementioned blended per pupil cost of $3,157.34 leads to a running total of $4,352.34: $252.34 more than the 2023 level of base adequacy aid funding. See Laws 2023, 79:150 (setting amount at $4,100). Adding the per pupil costs of instructional materials ($300) and technology ($100) leads to a running total of $4,752.34—thus demonstrating the insufficiency of the $4,100 base adequacy aid figure set in 2023. See id.; Pls.' Ex. 4.[20]

Notably, the foregoing calculations do not include costs attributable to professional development, facilities operation and maintenance, or transportation. These cost-drivers were included in the 2008 and 2018 Reports, and the evidence demonstrates that they are essential to the provision of the opportunity for a constitutionally adequate education. While the evidence reflects a minimum per pupil professional development cost of only $30, per pupil facilities and transportation costs often must exceed $1,000 each. These realities further demonstrate the insufficiency of the $4,100 base adequacy aid figure set in 2023.

Consistent with the foregoing, the Court concludes that the plaintiffs have defeated any applicable presumption that the current level of base adequacy aid funding is constitutionally sufficient. See Doc. 242 at 3 (quoting ConVal, 174 N.H. at 161). Indeed, the plaintiffs have proven a "clear and substantial conflict" between the current level of base adequacy aid funding and the amount necessary to fulfill the

[20] It bears repeating that because the per pupil costs attributed to these cost-drivers were derived using highly conservative ratios, the Court is confident that the reported costs are not inflated by the heightened needs of students who qualify for differentiated aid. Rather, these cost figures reflect the minimum costs that would be incurred by a hypothetical school district in which no students qualify for differentiated aid.

State's constitutional obligations "in all, or virtually all," of New Hampshire's school districts. See id. (quoting ConVal, 174 N.H. at 161); see also Working Stiff Partners, 172 N.H. at 622. Accordingly, the burden shifts to the State to justify the law under the strict scrutiny standard. See Akins, 154 N.H. at 71. As explained above, the State did not offer affirmative evidence justifying the sufficiency of the current funding level, instead seeking to undermine the sufficiency of the plaintiffs' evidence. Because the Court concludes that the plaintiffs offered sufficient evidence to carry their burden, the State's mid-trial motion for a directed verdict is **DENIED**. See Doc. 235. Further, in light of the explanations and analysis set forth above, the plaintiffs' request for a declaratory judgment declaring RSA 198:40-a, II(a), unconstitutional on its face is **GRANTED**. See Doc. 83 at 26.

II. Separation of Powers Considerations

Prior to trial, the Court repeatedly resisted the plaintiffs' requests for an affirmative determination as to the necessary level of base adequacy aid funding. See, e.g., Doc. 51 at 92–94 (denying request for injunctive relief requiring particular level of funding). This resistance stemmed from the Court's appreciation of the great burden school funding imposes on the legislature, as well as the legislature's role in defining an adequate education. See id. at 92–96. In reflecting on the evidence presented at trial, however, the Court's position on this issue has shifted.

To be sure, the Court remains concerned about respecting the legislature's role in this process. Indeed, as the State correctly points out, the Claremont I court expressly declined to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."

138 N.H. at 192. Since then, the Supreme Court has repeatedly emphasized the significance of the legislature's role in this context. See Claremont II, 142 N.H. at 476–77 (permitting existing funding mechanism to remain in effect for set period so legislature had "reasonable time to effect . . . a new system"); Londonderry I, 154 N.H. at 163 (indicating Supreme Court's respect of legislature's role has led it to "demure[]" each time it "has been requested to define the substantive content of a constitutionally adequate public education"). As set forth above, the parties' trial presentations leave the Court with lingering doubts as to whether the legislature intended for base adequacy aid to fund all of the costs included in Dr. Rizzo Saunders' analysis. For this reason, the Court agrees with the State that "a judicial determination of the exact per-pupil amount of funding necessary to provide for base adequacy would infringe the constitutionally committed responsibilities of the political branches and embroil the courts in weighty policy decisions . . . ." Doc. 244 at 1 (emphasis added).

Notwithstanding the foregoing, the Court is mindful that "the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential." Londonderry I, 154 N.H. at 163 (citing Petition of Below, 151 N.H. 135 (2004)); cf. Norelli v. Sec'y of State, 175 N.H. 186, 200 (2022) (rejecting State's position that despite unconstitutionality of existing congressional districting statute, judicial non-intervention was "more important than protecting the voters' fundamental rights"). The Court is likewise cognizant that school funding is a complicated and politically-charged issue, with a history that suggests some level of judicial intervention is now necessary. Among other things, though the legislature hired Dr. Baker to analyze school funding

issues and provide an informed recommendation, base adequacy aid is currently funded at less than half of his recommended level. This is just one example that calls into question whether the politics of this issue are impeding the State's constitutional obligation to fully find the opportunity for children in this state to receive and adequate education. That ends today.

Given the history and significance of this issue, see Claremont II, 142 N.H. at 473 (holding constitutionally adequate public education is a fundamental right), the Court concludes that it is both necessary and appropriate to grant the plaintiffs a measure of additional relief at this juncture. Specifically, although the Court declines to set a definitive level of base adequacy aid funding, it is now appropriate to establish a conservative minimum threshold such funding must exceed. In the Court's view, this approach strikes the appropriate balance between the competing interests involved.

III. Conservative Threshold for Base Adequacy Aid Funding

Drawing on the credible evidence presented at trial, the Court's next task is to determine a minimum funding level for those cost-drivers that are indisputably part of the State's base adequacy aid funding obligations. Cf. O'Malley v. Little, 170 N.H. 272, 275 (2017) (citing Jesurum v. WBTSCC Ltd. P'ship, 169 N.H. 469, 476 (2016) for proposition that following a trial on the merits, trial court's "judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence" are entitled to deference). In reaching such a determination, the Court again employs conservative figures that likely undervalue the requisite costs. Such a conservative approach best aligns with the plaintiffs' facial challenge, and affords appropriate deference to the legislature. It also

takes in to account the gravamen of the State's theory of defense: that actual expenditures are not the same as "costs" in this context. However, costs are a recursive set within expenditures.

A. Per Pupil Teacher Costs

Once again, the Court begins the analysis with teachers. As explained above, the Court finds that this cost-driver must be funded at a per teacher level of at least $86,109.20. To reiterate, this figure is derived from a statewide average teacher salary of $60,000, discounted by 5% to correct for those rare school districts that opt to pay more than the market strictly demands. At trial, the Court heard evidence of only a single school district falling into this category. Thus, the Court is confident that a 5% reduction more than corrects for this issue.

Teacher benefits, including NHRS contributions, FICA payments, unemployment insurance, and health insurance, make up the remainder of the $86,109.20 figure. As explained above, the Court has calculated the cost of health insurance benefits using the price of a two-person plan, funded at an 86% employer contribution level. Given the evidence presented at trial, the Court is confident that excluding the cost of family plans more than corrects for those few teachers who opt for single person or no coverage, particularly given testimony indicating many "no coverage" teachers receive a buyout.

As above, the Court must next convert the $86,109.20 teacher cost into a per pupil amount. The evidence demonstrates that it is inappropriate to use maximum class sizes in this conversion, as school districts cannot fill every classroom to maximum capacity. In addition, in light of market demands and the requirements of a teaching position, teachers must be afforded preparation and break periods. The evidence

demonstrates that although some teachers provide classroom instruction for only 62.5% of the school day (five out of eight blocks), others provide instruction for 75% of the school day (six out of eight or three out of four blocks). Given the conservative inquiry at issue, the Court uses the 75% model to calculate per pupil costs.

Based on a 75% model, each teacher can provide three blocks of instruction in a four-block day. Filling the remaining 25% would use up one third of a second teacher's teaching capacity (i.e., one of the second teacher's three daily teaching blocks). Thus, even if a school district could fill every seat in every classroom, one and one-third teachers would be needed to provide instruction in each classroom for an entire school day. For this reason, in calculating per pupil teacher costs, maximum class sizes must be reduced to account for this reality. This results in teacher-to-student ratios of 1:18.75 for grades K–2 (25 divided by 1 1/3), and 1:22.50 for grades 3–8 (30 divided by 1 1/3), for a blended ratio of 1:21.63.[21]

Although this ratio does not account for the reality that school districts cannot fill every seat in every classroom, the evidence presented at trial does not provide the Court with a reliable way to correct for this. In the Court's view, actual teacher-to-student ratios do not provide meaningful guidance because they are impacted by factors such as the heightened needs of students who qualify for differentiated aid: an issue which, as explained above, the Court has excluded from this inquiry. Moreover, although the DOE encourages school districts to keep certain class sizes below the maximum, the Court concludes that the legislature should determine how, if it all, funding should account for that guidance. For these reasons, in setting a threshold for

[21] The following calculation determines the blended ratio: ((3 x 18.75) + (10 x 22.50)) / 13.

base adequacy aid, the Court employs a highly conservative per pupil teacher cost of $3,981.01 ($86,109.20 divided by 21.63).

B. Non-Teacher Employee Costs

In addition to teachers, the Court finds that the services provided by principals, administrative assistants, guidance counselors, library/media specialists, technology coordinators, and custodians are all essential to the provision of the opportunity for a constitutionally adequate education. For the reasons articulated above, the Court credits the conservative per pupil cost figures adopted by Dr. Rizzo Saunders with respect to these cost-drivers. These per pupil costs total $901.[22]

C. Instructional Materials, Technology, and Professional Development

The evidence further demonstrates that instructional materials, technology, and professional development costs are inherent in and essential to the provision of the opportunity for a constitutionally adequate education. For the reasons articulated above, the Court credits the conservative per pupil cost figures adopted by Dr. Rizzo Saunders with respect to these cost-drivers. These per pupil costs total $430.[23]

D. Facilities

The Court further finds that facilities operation and maintenance is also essential in this context. The 2008 Report funded this cost-driver at $195 per pupil, the 2018 Report funded it at $250 per pupil, and Dr. Rizzo Saunders argues it should be funded at $1,400 per pupil. See Pls.' Ex. 4. Upon review, the Court concludes that none of

[22] Component costs include $262 for principals, $115 for administrative assistants, $182 for guidance counselors, $123 for library / media specialists, $121 for technology coordinators, and $98 for custodians.

[23] Component costs include $300 for instructional materials, $100 for technology, and $30 for professional development. See Pls.' Ex. 4. The Court speculates that a per pupil technology cost of $100 is likely low, but the evidence in the record does not empower the Court to set a higher, more realistic number.

these funding levels are fully supported. Because facilities operation and maintenance includes things like heat, electricity, and winter maintenance, the Court is convinced that the funding levels set forth in the 2008 and 2018 Reports are far too low. This is established by, among other things, the fact that utility and fuel costs (as recorded in the financial reports) have risen sharply in recent years. On the other hand, the State persuasively argued at trial that not all costs included in Dr. Rizzo Saunders' calculations fall within the State's base adequacy aid obligations. The plaintiffs' evidence did not fully refute that argument.

Although the plaintiffs' witnesses opined that community use of school facilities has a negligible impact on costs, the Court has no reliable way to precisely adjust for that reality. Accordingly, the evidence presented at trial does not empower the Court to set a definitive cost figure that excludes unnecessary components, but includes all necessary ones. In addition, the Court perceives that funding this cost-driver involves locally controlled policy determinations: for example, whether to fund air conditioning to prevent school closings on unusually warm days; or whether the local town will cover the costs of snow removal.

Drawing on the evidence presented at trial and the Court's common sense, however, see 1 NH Civil Jury Instruction 3.2, the Court concludes that facilities operation and maintenance must be funded at an amount over $1,000 per pupil: $400 less than the $1,400 figure used in Dr. Rizzo Saunders' calculations.[24] The evidence demonstrates that although some portion of Dr. Rizzo Saunders' $1,400 figure may be attributable to athletics, community use, or other uses which implicate questions of

[24] As noted above, $1,000 is less than the $1,375 difference in funding the State provides to in-person charter schools as compared to virtual charter schools.

policy, the associated costs account for less than 25% of her figure. Accordingly, reducing that figure by $400—28.57%—overcorrects for any such issues. However, based on the limitations of the evidence presented at trial, the policy determinations involved, and the conservative nature of the Court's inquiry, the Court cannot reliably define the requisite funding level to any greater degree.

E. Transportation

The next essential cost-driver is transportation. As explained above, the Court concludes that base adequacy aid must include funding for student transportation. New Hampshire is a rural state, and students cannot access the opportunity for a constitutionally adequate education without getting to school. Issues like poverty or parental work schedules cannot be permitted to interfere with such access. Thus, some level of transportation services is undoubtedly essential.

Like facilities costs, however, the Court's ability to define the requisite funding level for transportation is limited. The evidence amply demonstrates that the $315 funding level included in the 2008 and 2018 Reports is woefully inadequate. Indeed, as noted above, the evidence indicates transportation costs often exceed $1,000 per pupil. See, e.g., Pls.' Ex. 29 (indicating ConVal spent $1,109.12 per elementary school pupil on transportation costs during 2021 fiscal year); Pls.' Ex. 62 (indicating Winchester spent $1,619.51 per elementary school pupil on transportation costs during 2021 fiscal year). Yet, as Dr. Rizzo Saunders acknowledges, it is difficult to determine a reliable, universal figure for this cost-driver, as urban areas will have lower transportation costs than rural ones. Moreover, there are once again policy determinations at play: whether to fund transportation through 12th grade when existing statutes only expressly require

transportation through 10th grade. Resolution of this issue could have a substantial impact on the requisite level of funding. The legislature should have the opportunity to address this issue in the first instance. See Claremont I, 138 N.H. at 192. However, there must be a floor to this figure given the recursive nature between transportation costs and expenditures. Based on the evidence submitted at trial, the Court finds that approximate mid-point between the costs identified in the 2008 and 2018 Legislative Reports and the actual expenditures is an appropriate – albeit very conservative – figure.

Again drawing on both common sense and the testimony presented at trial, see 1 NH Civil Jury Instruction 3.2, the Court concludes that transportation must be funded at a level that exceeds $750: slightly more than double the figures used in the 2008 and 2018 Reports, but substantially less than actual per pupil costs incurred by many school districts. Like the above-described threshold for facilities costs, the evidence demonstrates that funding transportation costs at this level would be constitutionally insufficient. However, based on the limitations of the evidence presented at trial, the policy determinations involved with respect to this cost-driver, the wide range of costs incurred in each district, and the conservative nature of the Court's inquiry, the Court cannot reliably define the requisite funding level with any greater specificity, but there is no doubt that it cannot be lower than $750.

F. Cost-Drivers Added by Dr. Rizzo Saunders

For the reasons articulated above, the Court concludes that nurse services is an essential component of providing the opportunity for a constitutionally adequate education. The Court further finds that in light of the relevant facts and circumstances,

including the practical reasons why a dedicated nurse for each school is far superior to a shared-nurse model, the $294 per pupil cost assigned by Dr. Rizzo Saunders is a reasonable, conservative figure. Moreover, because schools without differentiated aid-eligible students would still need nurse services, the Court concludes that it is appropriate and necessary to fund the entire $294 per pupil cost via base adequacy aid.

Although the plaintiffs also urge the Court to require additional funding for food and superintendent services, the Court declines to include these amounts in setting a minimum funding level. As explained above, the evidence demonstrates that some food service programs are self-funding, and that others could potentially become self-funding (or closer to it) by raising meal costs charged to paying customers. Thus, although the legislature may conclude that funding food service programs is necessary or otherwise appropriate, the Court declines to impose such a requirement at this juncture.

Similarly, although the Court finds that some amount of superintendent services is essential, the Court is not convinced that all costs associated with those services fall within the legislature's definition of the opportunity for a constitutionally adequate education. For example, schools require some amount of oversight to secure and pay for necessary staff, materials, and other services, but the evidence does not rule out the possibility that such tasks can be completed by principals and administrative assistants, the costs of which the Court already accounted for in reaching its conclusion. Thus, while school districts may need superintendent services as a practical matter, the Court cannot conclude from the evidence presented that it is appropriate to require a particular level of base adequacy aid funding in connection with those services.[25]

[25] To the extent the legislature intended to fund these services via base adequacy aid, or otherwise elects to do so, the Court finds that the $194 per pupil costs calculated by Dr. Rizzo Saunders is a reasonable

* * *

To summarize, the evidence presented at trial demonstrates that the following cost-drivers, and associated per pupil minimum funding levels, are essential to the provision of the opportunity for a constitutionally adequate education, as defined by the legislature: teachers ($3,981.01); principals, administrative assistants, guidance counselors, library/media specialists, technology coordinators, and custodians ($901); instructional materials, technology, and professional development ($430); facilities operation and maintenance ($1,000); transportation ($750); and nurse services ($294). Combined, these amounts establish that base adequacy aid funding must exceed $7,356.01 per pupil: over $3,200 more than the current funding level of $4,100. See Laws 2023, 79:150.

As emphasized above, this $7,356.01 threshold figure is the product of conservative calculations designed to overcorrect for any conflicts or ambiguities in the evidence, as well as any unresolved policy determinations. The Court's calculations include a $3,000 (5%) reduction in average teacher salary from that proposed by the Dr. Rizzo Saunders, which in turn reduces NHRS and FICA payments. Further, to overcorrect for the absence of concrete data concerning the number of teachers who opt for single-person or no health insurance coverage, the Court adjusted Dr. Rizzo Saunders' benefits calculations to rely solely on the cost of two-person coverage (whereas Dr. Rizzo Saunders relied on an average of two-person coverage costs and family plan coverage costs). In addition, to establish the ratio used in calculating per pupil teacher costs, the Court relied on a 6 out of 8 (or 3 out of 4) block model, despite

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and conservative figure for funding a full time superintendent position. See Pls.' Ex. 4. Adding that amounts to the threshold figure described above results in a per pupil total of $7,550.01.

evidence that some teachers only instruct for 5 out of 8 blocks each day. Moreover, the Court did not adjust the ratio to reflect the reality that schools cannot fill every seat in every class.[26] In assigning a facilities cost, the Court reduced Dr. Rizzo Saunders' number by $400 (28.57%) despite the absence of concrete evidence indicating even 25% of her cost figure could be attributable to unrelated uses. Lastly, although the evidence indicates that transportation costs often exceed $1,000 per pupil, the Court used a conservative figure of only $750 in calculating the minimum threshold level set here.

In total, these conservative choices and overcorrections demonstrate that a base adequacy aid figure of $7,356.01 would in actuality be far too low and would likely not survive scrutiny. Indeed, at the conclusion of this trial the Court felt confident that the requisite level of base adequacy aid funding is quite close to the $9,929 figure set forth in Dr. Rizzo Saunders' calculations. See Pls.' Ex. 4. That figure is remarkably similar to Dr. Baker's number of $9,964 which, like Dr. Rizzo Saunders' number, does not include the cost of transportation. See Pls.' Ex. 111 (Baker Report). That figure is also remarkably similar to the results of an analysis Dr. Costrell previously performed to determine the base cost of an adequate education in Massachusetts: an analysis which, adjusted for inflation, suggests that cost would exceed $10,000 in 2023.[27] It is also closer to the near-unanimous testimony of every school administrator who testified at trial.

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[26] The Court's use of such conservative ratios eliminates any potential impact of increased costs attributable to students who qualify for differentiated aid.

[27] As a matter of interest, the Court observes that in 2023, the legislature considered but ultimately rejected an education funding model that would have eliminated base adequacy and differentiated aid, opting instead to fund public education at half of certain statewide average expenditures. See House Bill 334 (2023). Based on DOE estimates for fiscal year 2022, this would have resulted in a funding level of $9,517.04 per pupil. See id.

Although the evidence demonstrates that a base adequacy aid level of $7,356.01 would be constitutionally insufficient, the Court cannot set a higher threshold at this time. Such a step is precluded by the limitations of the evidence presented at trial, as well as the involvement of certain policy considerations. The Court is confident, however, that the guidance offered here will empower the legislature to meaningfully consider and appropriately respond to the relevant issues. In light of the compelling evidence presented at trial, the Court trusts that the legislature will set a base adequacy aid figure meaningfully higher than the $7,356.01 threshold: a figure that will fulfill the State's obligation to fund the opportunity for a constitutionally adequate public education. See Claremont II, 142 N.H. at 473.

Consistent with the foregoing, the plaintiffs' request for injunctive relief is **GRANTED IN PART** and **DENIED IN PART**. See Doc. 83 at 25.

Attorney's Fees

Before concluding, the Court must address the plaintiffs' request for an award of attorney's fees. See Doc. 83 at 26; see also Doc. 245 at 33. The State's post-trial filings do not meaningfully address this issue. As explained in the Court's June 5, 2019 Order, the Supreme Court has previously awarded attorney's fees in the school funding context under the substantial benefit theory. See Doc. 51 at 94 (citing Claremont Sch. Dist. v. Governor (Costs and Attorney's Fees) ("Claremont VIII"), 144 N.H. 590, 595–99 (1999)). This theory permits cost shifting when a particular action confers a "substantial benefit" on the public at large. See id. (citation omitted). The intent of the theory is not to penalize the opposing party, but to compensate plaintiffs for efforts undertaken on behalf of the public. See id. (citation omitted).

The plaintiffs brought this action in an effort to hold the State accountable for the school funding obligations imposed by Part II, Article 83 of the New Hampshire Constitution. In doing so, the plaintiffs sought to safeguard the fundamental right held by New Hampshire children to "a constitutionally adequate public education . . . ." Claremont II, 142 N.H. at 473. As set forth above, the plaintiffs have successfully demonstrated that the current amount of base adequacy aid funding is constitutionally insufficient, and must be increased to more than $7356.01 per pupil. Thus, like the plaintiffs in Claremont VIII, the plaintiffs in this action "have contributed to the vindication of important constitutional rights," thereby conferring "a significant benefit upon the general public," which "would have had to pay the fees incurred if the general public had brought the suit." 144 N.H. at 598. The Court thus concludes that this is "an appropriate, if not compelling, case in which to exercise [the Court's] inherent equitable powers and award reasonable attorney's fees to the plaintiff school districts . . . ." Id.

Consistent with the foregoing, the plaintiffs' request for an award of reasonable attorney's fees is **GRANTED**. The plaintiffs are directed to file a detailed affidavit of fees **within thirty (30) days** of the date on the Clerk's Notice of Decision accompanying this Order. See Scheele v. Vill. Dist. of Eidelweiss, 122 N.H. 1015, 1020–21 (1982) (explaining party requesting fees must submit an affidavit "outlining in reasonable detail the actual time spent . . . and setting forth a rate for that person who performed the work"); In re Metevier, 146 N.H. 62, 64 (2001) (explaining that when determining reasonableness of requested attorney's fees, courts consider "the amount involved, the nature, novelty, and difficulty of the litigation, the attorney's standing and the skill employed, the time devoted, the customary fees in the area, the extent to which the

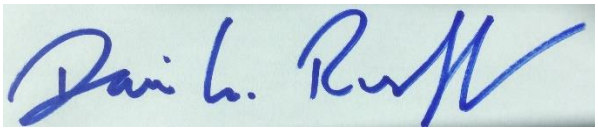
attorney prevailed, and the benefit thereby bestowed on his clients"). The State will thereafter be afforded a period of twenty (20) days to file a response, if any.

Conclusion

For the same reasons articulated in the Court's June 5, 2019 Order, see Doc. 51 at 96, the Court does not take the decisions outlined here lightly. Moreover, the Court recognizes the significant implications of this Order, and the potential for political strain. However, the Court cannot ignore the substantial evidence put forth by the plaintiffs: evidence that amply demonstrates the insufficiency of the existing base adequacy aid figure. In light of that evidence, the State's mid-trial motion for a directed verdict is **DENIED**, see Doc. 235, and the plaintiffs' request for a declaratory judgment deeming RSA 198:40-a, II(a), unconstitutional on its face is **GRANTED**. See Doc. 83 at 26. The plaintiffs' request for injunctive relief is also **GRANTED** insofar as the Court has established a conservative minimum threshold of $7,356.01 which base adequacy aid funding must exceed, but is otherwise **DENIED**. See id. at 25. Lastly, the plaintiffs' request for an award of reasonable attorney's fees is **GRANTED**. See id. at 26.

Lastly, given the timing of this Order and the fact that the Court is contemporaneously releasing an order in Rand v State of New Hampshire finding the State's administration of the Statewide Education Property Tax (SWEPT) unconstitutional, the deadline to file a Motion to Reconsider is extended to 30 days.

SO ORDERED.



Date: November 20, 2023

Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 11/20/2023

EXHIBIT
B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

No. 213-2019-CV-00069

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

DEFENDANTS' MOTION TO STAY NOVEMBER 20, 2023 MERITS ORDER

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move to stay the court's November 20, 2023 merits order. In support thereof, the defendants state as follows:

1. The court's November 20, 2023 merits order declares RSA 198:40-a, II(a) facially unconstitutional, requires the General Court via injunction to set a base adequacy amount that exceeds $7,356.01, and grants the plaintiffs' request for attorney's fees.

2. The defendants respectfully request a stay of this court's merits order until it becomes a final judgment on the merits and one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter so the General Court has the opportunity to fix any constitutional infirmities that may remain following appeal.

3. The defendants request this stay for three significant reasons.

4. First, absent a stay, this court's order declaring RSA 198:40-a, II(a) facially unconstitutional will go into effect immediately and render the Executive Branch unable to fund adequacy grants for schools. Adequacy grants for schools will not resume until the General Court fixes the statute. The General Court may not act to fix the statute while this case is pending reconsideration and appeal, and may await further guidance from the New Hampshire

Supreme Court before taking remedial action. In the meantime, payments for schools will likely come due before the General Court fixes the statute. Accordingly, a stay of this court's declaratory judgment is necessary to prevent irreparable harm to New Hampshire's school funding system and to permit the Executive Branch to continue funding schools until this matter is finally resolved on the merits, and the General Court has sufficient time to fix any constitutional infirmities that may exist after appeal.

5. Second, and for the reasons stated in further detail in the Defendants' Motion for Reconsideration, this court's injunction violates the separation of powers principles embodied in Part I, Articles 30 and 37 because it materially impairs the lawmaking power of the General Court. "The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be subject to the control or supervision of the other." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). New Hampshire thus follows "the rule which exempts the legislature from the control of the court." *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Court properly denied the injunction as it had no power to interfere with proposed legislative action.").

6. The General Court has the plenary power and authority to solve the issue identified in this court's merits order in a myriad of ways, including by altering the definition of an adequate education or by creating an entirely new funding model for education. The General Court also cannot be enjoined from conducting its own further legislative study of the cost of an adequate education and endorsing a number produced from that process lower than the threshold figure this court has identified. *See City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (explaining that the "prevailing rule . . . under a tripartite form of government" is that "a court

cannot enjoin the legislature from passing a law" even if "such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law") (internal quotations omitted).

7. The court's injunction allows the court to control the General Court, dictates the content of proposed legislation, and seemingly prevents legislators from voting for proposed legislation inconsistent with the court's order on threat of civil contempt. This result violates the separation of powers set forth in Part I, Article 37, and the speech and debate clause contained in Part I, Article 30. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005) (explaining that Part I, Article 30 protects "the legislature and individual legislators from incurring liability for 'any act generally done in a session of the [legislature] . . . in relation to the business before it" including voting on proposed legislation) (internal quotations omitted).

8. Accordingly, the court's injunction order, if it is not vacated on reconsideration, is likely to be vacated on appeal as a violation of these constitutional provisions and an unprecedented encroachment by the judiciary on the powers of the General Court.

9. Third, any further litigation related to attorney's fees is premature at this juncture and should be stayed. The defendants are moving for reconsideration and plan to appeal. They have preserved numerous legal issues for appeal in a relatively undeveloped area of the law, any one of which could result in this court's merits order being entirely reversed. If that occurs, the plaintiffs will not be entitled to attorney's fees. Consequently, until the court's merits order becomes a final judgment on the merits, the court's order as it relates to attorney's fees should be stayed. If, following appeal, the plaintiffs remain entitled to an award of attorney's fees, the parties may properly litigate those fees on remand.

10. The defendants have sought the position of the plaintiffs, through counsel, but have not received a response as of the time of this filing.

WHEREFORE, the defendants respectfully request this court enter an order:

A. Staying the effective date of this Court's November 20, 2023 merits order until it becomes a final judgment on the merits and one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter;

B. Staying the effective date of this Court's November 20, 2023 attorney's fees order until it becomes a final judgment on the merits so the parties may litigate the proper amount of any attorney's fees, if any, owed at a later date on remand; and

C. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE, DEPARTMENT OF EDUCATION, GOVERNOR CHRISTOPHER T. SUNUNU, AND COMMISSIONER FRANK EDELBLUT

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: December 14, 2023

By: /s/ Anthony J. Galdieri

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

and

STINSON LLP
John R. Munich (admitted pro hac vice)
J. Nicci Warr (admitted pro hac vice)
Christina J. Hansen (admitted pro hac vice)
Zachary Buchheit (admitted pro hac vice)
7700 Forsyth Blvd., Suite 1100
St. Louis, MO 63105-1821
(314) 863-0800
john.munich@stinson.com
nicci.warr@stinson.com
zachary.buchheit@stinson.com
christina.hansen@stinson.com

CERTIFICATE OF SERVICE

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

Date: December 14, 2023 /s/ Anthony J. Galdieri

EXHIBIT C

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

No. 213-2019-CV-00069

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

DEFENDANTS' MOTION FOR RECONSIDERATION

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move for reconsideration of this court's November 20, 2023 merits order. In support thereof, the defendants state as follows:

1. A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended …" Super. Ct. Civ. R. 12(e).

2. The defendants respectfully submit the following points for reconsideration consistent with this standard:

a. The court's injunction requiring the General Court to "establish[] a conservative minimum threshold of $7,356.01 which base adequacy aid funding must exceed" is unconstitutional in violation of the separation of powers because it materially impairs the lawmaking power of the General Court;

b. The court's order lacks an effective date and should not be made effective until one full legislative cycle (beginning July 1 and ending June 30) has passed after the reconsideration and appeal periods in this matter have expired; and

c. The court's attorney's fees award order is premature, particularly because the defendants intend to appeal the court's order in this matter; litigation of the attorney's fees issue should therefore be reserved until the appeal period has finally expired.

I. The court's injunction order violates the separation of powers because it materially impairs the lawmaking power of the General Court.

3. In framing the New Hampshire Constitution, the people conferred on the General Court the legislative power to enact, amend, and repeal laws. N.H. Const. Pt. II, Arts. 2, 5.

4. This plenary lawmaking power is the most central, core, and essential power that the New Hampshire Constitution grants to the legislative branch of government.

5. This court's injunction materially impairs that essential lawmaking function by mandating the General Court solve a complex policy issue in a particularized way, *i.e.*, by requiring the legislature to pass a new base adequacy amount that exceeds this court's preferred number. The injunction allows this court to control the General Court, dictates the content of proposed legislation, and seemingly prevents legislators from voting for proposed legislation inconsistent with the court's order on threat of civil contempt.

6. The separation-of-powers protections contained in Part I, Article 37 of the New Hampshire Constitution prevent the judicial branch of government from forcing the legislative branch to enact laws in a manner the judiciary prefers.

7. Part I, Article 37 is violated "only when one branch usurps an essential power of another." *Petition of S. N.H. Med. Ctr.*, 164 N.H. 319, 327 (2012). "For this to occur, the offending branch must act to 'defeat or materially impair the inherent functions' of another branch." *State v. Carter*, 167 N.H. 161, 166 (2014) (quoting *State v. Merrill*, 160 N.H. 467, 472 (2010)).

8. "The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be

subject to the control or supervision of the other." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904).

9. New Hampshire thus follows "the rule which exempts the legislature from the control of the court." *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Court properly denied the injunction as it had no power to interfere with proposed legislative action.").

10. This is the "prevailing rule . . . under a triparte form of government" that "'a court cannot enjoin the legislature from passing a law.'" *City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (quoting *State ex rel. Morrison v. Sebelius*, 179 P.3d 366, 383 (Kan. 2008).

11. "'This is true whether such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.'" *Id.* (quoting *State ex rel Morrison*, 179 P.3d at 383).

12. "The judiciary may not impede" the General Court's "plenary power to enact laws." *Id.* at 48; *see Magnus v. Carr*, 86 S.W.3d 867, 870 (Ark. 2002) (holding that circuit court lacked jurisdiction to enjoin the casting of a vote by a legislator); *Perdue v. Ferguson*, 350 S.E.2d 555, 559 (W.Va. 1986) (explaining that a municipal body, when acting or attempting to act in a legislative capacity, "is entitled to the same immunity from judicial interference with the exercise of legislative discretion as is the state legislature"); *McChord v. Louisville & Nashville Railroad Co.*, 183 U.S. 483, 495 (1902) ("the general rule is that legislative action cannot be interfered with by injunction"); *see also New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896) ("the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the [legislative] discretion with which municipal assemblies are invested . . . .").

13. This court's injunction requires the legislature to fix the base adequacy amount contained in RSA 198:40-a, II(a) in one particular way—by raising that amount above $7,356.01—and purports to enjoin the legislature from passing a base adequacy amount any lower.

14. It is beyond the power of this court to mandate that the General Court solve a complex policy like the funding of an adequate education in a particularized way. The General Court has broad discretion in determining how to deliver and fund an adequate public education and how to fix any constitutional defects with the existing funding regime. The General Court could seek to remedy the issue by, among other things, modifying the definition of an adequate education to exclude certain items expressly and thereby justify a different base number. The General Court could completely repeal RSA 198:40-a and replace it with an entirely new funding regime that does not utilize a "base adequacy amount." The General Court could amend another statute that provides funds to schools and make it clear that those amounts must be counted toward "base adequacy." And there are likely many other ways that the legislature could approach the complex policy issue of funding a constitutionally adequate education.

15. Additionally, the General Court has the authority to pass a new base adequacy amount that does not exceed $7,356.01. Indeed, it has capabilities far beyond this court to engage in a robust legislative process capable of discerning a funding mechanism that ensures the delivery of a constitutionally adequate education. If such a process justifies a lower number than has been proffered by the court, it is within the General Court's constitutional authority to pass it into law. A court injunction cannot force the General Court not to enact any particular law.

16. However, by dictating to the General Court that it must fix the base adequacy amount in RSA 198:40-a, II(a) and establish a new amount that exceeds $7,356.01, this court has materially impaired the General Court's lawmaking function in a manner that violates the separation of powers and is unconstitutional.

17. No New Hampshire Supreme Court case endorses the issuance of an injunction that requires the General Court to legislate in a particular way.

18. More specifically, in the education funding space, the New Hampshire Supreme Court has uniformly deferred to the General Court to fix an unconstitutionality unfettered by a court-imposed injunction forcing it to act or not act in one or more ways. *See, e.g.*, *Londonderry v. State*, 154 N.H. 153, 163 (2006); *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160-61 (1998); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192-93 (1993).

19. This court's injunction veers wide from this well-established New Hampshire precedent and from well-settled principles of separation of powers.

20. This court's injunction also runs afoul of Part I, Article 30 of the New Hampshire Constitution, the Speech and Debate Clause.

21. Part I, Article 30 prevents the judiciary from requiring legislators to vote for certain laws over other laws.

22. The New Hampshire Supreme Court has construed Part I, Article 30 broadly to effectuate its purposes. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005). It protects "the legislature and individual legislators from incurring liability for 'any act generally done in a session of the [legislature] . . . in relation to the business before it.'" *Id.* (quoting *Keefe v. Roberts*, 116 N.H. 195, 199 (1976)). "For instance, under the Speech and Debate Clause, voting, drafting committee reports and conduct at legislative committee hearings

'may not be made the basis for a civil or criminal judgment against a [legislator] because that conduct is within the sphere of legitimate legislative activity.'" *Id.* (quoting *Doe v. McMillan*, 412 U.S. 306, 311 (1973)).

23. Yet, this court's injunction appears to expose legislators to civil contempt proceedings for choosing to proceed in a manner inconsistent with the court's order. In this way, the court's injunction order seeks to dictate the content of proposed legislation and seeks to prevent legislators from voting on legislation inconsistent with the court's injunction. Such a result is incompatible with Part I, Article 30 and the immunity accorded legislators to make policy free from fear of civil contempt liability for his or her legislative activity.

24. The General Court is tasked under the State Constitution with making the law. The judicial branch may intervene only after a legislative enactment has been passed and challenged in an action properly before it. The judicial branch may not, consistent with separation of powers principles, force the General Court to enact legislation that manages to a particularized court-imposed standard or preference.

25. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 order, vacate the injunction it has issued against the General Court in its entirety, and leave the issue fixing any constitutional deficiency with the General Court.

II. This court should also set an effective date for its order so the order does not go into effect until this matter had been finally decided on the merits and the General Court has had an appropriate opportunity to fix any constitutional infirmity that thereafter may remain.

26. The court's order declares RSA 198:40-a, II(a) unconstitutional on its face raising the question of whether the Executive Branch may continue to make adequacy payments to schools while this court's order remains subject to reconsideration and appeal and, if the judicial process determines a legislative remedy is needed, while the legislature addresses the issue.

27. The defendants are concurrently seeking a stay of this court's order pending reconsideration and appeal, but a better approach to alleviate uncertainty to the local education budget process and ensure that schools continue to receive adequacy payments would be to set an effective date for the court's order.

28. The defendants would propose the following effective date: "This merits order will go into effect only after it becomes a final judgment on the merits and only after one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter."

29. Such an effective date will ensure that schools continue to receive adequate education grants while the litigation of this matter remains open and ongoing and that the General Court has sufficient time to fix any constitutional infirmities, if necessary, that remain following the reconsideration and appellate process.

30. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 merits order to include an effective date like the date proposed in Paragraph 28 above.

III. This court should defer further litigation on attorney's fees and costs until after this matter is finally resolved on the merits.

31. The defendants are actively seeking reconsideration and plan ultimately to appeal this court's merits order. If the defendants are successful on appeal, the plaintiffs may not be entitled to an award of attorney's fees at all. If the defendants are unsuccessful, plaintiffs' counsel will undoubtedly generate additional attorney's fees during the appeal

32. Plaintiffs' counsel will undoubtedly generate additional attorney's fees during those processes and, if the defendants are successful on appeal, plaintiffs may not be entitled to an award of attorney's fees at all.

33. It is therefore premature to address the issues of attorney's fees in any detail at this time. Once the merits of the case are finally resolved on appeal, the issue of attorney's fees, if plaintiffs' counsel remain entitled to them, will be ripe and the precise amount of them may be appropriately addressed and litigated on remand at that time.

34. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 attorney's fees order and delay any detailed litigation and entry of any substantive orders with respect to attorney's fees until this court's order is finally resolved on the merits after appeal.

WHEREFORE, the defendants respectfully request that this court enter an order:

A. Granting this motion for reconsideration; and

B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE, DEPARTMENT OF EDUCATION, GOVERNOR CHRISTOPHER T. SUNUNU, AND COMMISSIONER FRANK EDELBLUT

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: December 14, 2023

By: /s/ Anthony J. Galdieri

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

and

STINSON LLP
John R. Munich (admitted pro hac vice)
J. Nicci Warr (admitted pro hac vice)
Christina J. Hansen (admitted pro hac vice)
Zachary Buchheit (admitted pro hac vice)
7700 Forsyth Blvd., Suite 1100
St. Louis, MO 63105-1821
(314) 863-0800
john.munich@stinson.com
nicci.warr@stinson.com
zachary.buchheit@stinson.com
christina.hansen@stinson.com

CERTIFICATE OF SERVICE

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

Date: December 14, 2023 /s/ Anthony J. Galdieri

EXHIBIT
D

THE STATE OF NEW HAMPSHIRE

Rockingham, SS. **Docket No. 213-2019-cv-00069** SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

PETITIONERS' OBJECTION TO STATE'S MOTION FOR RECONSIDERATION

The Court's Order appropriately balances the roles of all three branches of government while protecting the fundamental right to a constitutionally adequate education. The State's argument to the contrary is largely based on an erroneous assumption that the State's duty belongs solely to the legislature.

But New Hampshire's duty to provide a constitutionally adequate education is not the obligation of the legislature alone. The obligation is borne by all three branches of government: legislative, executive, and judicial.

> [I]t shall be the duty of the *legislators and magistrates*, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country . . .

Part II, Art. 83, N.H. Constitution (emphasis added).

The Supreme Court has recognized this shared obligation repeatedly over the course of the last thirty years:

> "We do not define the parameters of the education mandated by the constitution as that task is, *in the first instance*, for the legislature *and the Governor*." *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) (emphasis added).

> "[W]hen an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny[,]" even though the Court was "not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave

> such matters, consistent with the Constitution, to the two co-equal branches of government . . . ." *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 474-75 (1997).
>
> The judiciary "has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but *essential*." *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 163 (emphasis added).
>
> "[D]etermining the components of an adequate education and their costs presents a mixed question of law" and determining "precisely which costs are constitutionally mandated, are issues that the *trial court must address in the first instance*." *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 166-167 (2021) (emphasis added).

Because the duty to provide a constitutionally adequate education has not been committed solely to the legislature,[1] *see* Petitioners' Supplemental Briefing on the Separation of Powers,[2] Index #230, at ¶ 10, Petitioners did not seek, and this Court did not grant, an injunction solely aimed at the legislative branch of government. Index #83, Third Amended Petition, at 25-26; Index #245, Trial Brief, at 32; Index #246, Order, at 54. Instead, Petitioners sought, and the Court granted, an injunction to prevent the State, as a whole, from continuing its decades-long practice of downshifting the costs of constitutional adequacy to local taxpayers. Either the

[1] Even if it had been committed solely to the legislature, the "conclusion that the constitution commits to the legislature such exclusive authority ... does not end the inquiry into justiciability." *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 526 (2020) (quotation and brackets omitted). "While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, *it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation*." *Id*. (quotation omitted) (emphasis added).

[2] Petitioners hereby incorporate that brief in full by reference.

legislative or the executive branch may take action to remediate the unconstitutional underfunding of adequate education. *See, e.g.*, RSA 198:42, II; RSA 9:16-a.[3]

In its Motion for Reconsideration, however, the State argues only that this Court's Order unconstitutionally interferes with the legislature's sole prerogatives. The State does not dispute any of the Court's findings regarding the components and costs of a constitutionally adequate education under Part II, Article 83 of the New Hampshire Constitution – findings which the Supreme Court explicitly remanded for this Court to make. The Court's Order is an appropriate and critically necessary exercise of the Court's jurisdiction, and the State's Motion should be denied.

I. The Court's exercise of authority to enjoin the State from continuing to underfund adequate education is necessary.

The Court unquestionably has the authority to enjoin the State from funding constitutionally adequate education at less than $7,356.01. "[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential." *Id*. at 163. "[W]here the plaintiffs seek a declaratory judgment that actions taken by the State are unconstitutional, 'the court ha[s] jurisdiction to grant equitable relief.'" *Lorenz v. New Hampshire Admin. Office of the Courts*, 152 N.H. 632, 635 (2005), as modified (Feb. 16, 2006) (quoting *Claremont Sch. Dist. (Costs and Attorney's Fees)*, 144 N.H. at 593).

> The Court has broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation. A court of equity will order to be done that which in fairness and good conscience ought to be or should have been done. It is the practice of courts of equity, having jurisdiction, to administer *all relief* which the nature of the case and facts demand.

[3] It bears noting that the combined surplus of the Education Trust Fund and General Fund for fiscal year 2025 is estimated to be $458.2 million, according to the December 10, 2023, fiscal note for HB 1583-FN-A. *See* https://www.gencourt.state.nh.us/bill_Status/pdf.aspx?id=23152&q=billVersion.

Claremont Sch. Dist., 144 N.H. at 594 (quotations, citations, brackets, and ellipses omitted) (emphasis added).

These broad principles are plainly applicable to Part II, Art. 83, cases. For example, in 2006, the Supreme Court ruled that, should the political branches fail to "define with specificity the components of a constitutionally adequate education[,]" the Court would "be required to take further action to enforce the mandates of Part II, Article 83[,]" including:

> (1) invalidating the funding mechanism established in House Bill 616 as set forth in the concurring opinion of Justice Galway;
>
> (2) appointing a special master to aid in the determination of the definition of a constitutionally adequate education; or
>
> (3) implementing the remedy outlined in the concurring opinion of Justice Duggan and remanding the case to the trial court for further factual development and a determination of whether the State is providing sufficient funding to pay for a constitutionally adequate education.

Londonderry Sch. Dist. SAU No. 12 v. State, 154 N.H. 153, 162–63 (2006) (quotations and citations omitted).

The Court's Order stays well within the bounds of its equitable jurisdiction. Contrary to the State's argument, the Court has not issued an order that requires the legislature to "solve a complex policy issue in a particularized way," or set the minimum threshold based on the Court's "preferred number." Mot. to Recon., Index #247, at ¶ 5. The Court has, *pursuant to the Supreme Court's instructions*, "determine[ed] the components of an adequate education and their costs" and "precisely which costs are constitutionally mandated . . . ." *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 166-167 (2021). Those determinations were made based on the definition of adequacy passed by the legislature, which embodies the legislature's policy decisions. *See, e.g.*, Order, Index #246, at 11. The Court simply evaluated whether the funding provided for base adequacy was sufficient to provide the education defined by the legislature; it

expressly avoided making policy determinations, *see, e.g.*, Order, Index #246, at 52, and based its order on the evidence presented at trial.[4]

As set forth in Petitioners' Supplemental Briefing on the Separation of Powers, Index #230, at §III, against the backdrop of more than half a century of the legislative and executive branches' failure to fulfill their constitutional duty to the students and taxpayers of New Hampshire, this Court's Order is not only appropriate, but critically necessary.

II. The Court's Order should be effective immediately to safeguard the constitutional rights of New Hampshire's citizens.

As set forth in Petitioners' Objection to the State's Motion to Stay,[5] the Court's Order should go into effect immediately, regardless of whether the State intends to appeal.

Students and taxpayers have been deprived of a state-funded, constitutionally adequate education for decades, and even the State does not argue that the current base adequacy level is sufficient to fulfill its obligation. Threatening to cease *all* adequacy funding during the pendency of its appeal because the legislature "may not act" is inapt because, as explained above, the executive branch has the authority to act, in the event the legislature does not. *Supra*, at 1-2; Mot. to Stay, Index #248, at ¶ 4. The threat is also disingenuous, as the only question is whether the current amount set by RSA 198:40-a, II(a), is enough – there is no question the State must pay *at least* that amount. The State's suggestion that it intends to fund *even less* of an adequate education – to act even more unconstitutionally – should be rejected. *See, e.g.*, *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 193 (1993) ("We are confident that the legislature and the Governor will fulfill their responsibility . . . .").

[4] The State's strategic choice to present no affirmative evidence whatsoever about the cost of providing an adequate education is one with which it must live. Order, Index #246, at 7.

[5] Petitioners hereby incorporate that Objection in full by reference.

The full amount of base adequacy aid as set forth in the Court's November 20, 2023, Order should be provided now. Nothing in the Court's Order exempts the Governor and the Commissioner from making adequacy payments pursuant to the statutory schedule. The Court has declared that funding less than $7,356.01 in base adequacy would be unconstitutional, and RSA 198:42 requires 30% of the adequacy payment to be made to the schools by April 1st. Therefore, the Executive Branch is constitutionally obligated to provide that 30% payment by the April 1st deadline.

That the legislature may seek to comply with the Court's Order by some other means than simply increasing the funding in RSA 198:40-a, II(a), is no reason to delay the injunction. The legislature may continue its work to change the law while increasing base adequacy funding to nearer constitutional levels under the current law in the meantime. There is no reason that yet more students should continue to be deprived of their constitutional right to a state-funded, adequate education while the legislature determines whether and how to change the relevant statutes to fulfill the State's constitutional obligation.[6] *See, e.g.*, Ex. 1, *Verrill v. State*, Docket 217-2020-CV-00382, Index #35, at 6 (Oct. 26, 2021) (Kissinger, J.) (denying stay pending appeal despite argument State would have to "provide services that are not currently funded but that would not be required if successful in its appeal" because staying the order would ""deny . . . important benefits to the public.").

Similarly, there is no reason for the Court to defer making determinations about Petitioners' attorneys' fees at this juncture. Attorneys' fees are routinely determined prior to

[6] Changing the definition of an adequate education, despite the State's insinuations to the contrary, does not necessarily change the cost of that education. As the Court correctly concluded, after hearing evidence from nearly 30 witnesses, teachers, other staff, instructional materials, technology, facilities, transportation, and nursing are all essential to the provision of an adequate education, and, whatever the content of an adequate education, those costs will persist.

appeal, and for good reason. *See, e.g.*, *Town of Barrington v. Townsend*, 164 N.H. 241, 248-49 (2012) (deciding merits issue and proceeding to analyze respondent's argument about amount of attorney's fees). If the State wishes to appeal the attorneys' fees determination, it is more efficient for the State to appeal the entirety of the Court's rulings at one time.

CONCLUSION

The State's Motion for Reconsideration raises no "points of law or fact that the court has overlooked or misapprehended . . . ." N.H. Super. Ct. Civ. R. 12(e). It simply evinces the State's desire to immunize itself from any accountability for fulfilling its constitutional obligations. The motion should be denied.

Respectfully submitted,

CONTOOCOOK VALLEY SCHOOL DISTRICT,
MASCENIC REGIONAL SCHOOL DISTRICT,
MONADNOCK REGIONAL SCHOOL DISTRICT,
WINCHESTER SCHOOL DISTRICT,
FALL MOUNTAIN SCHOOL DISTRICT,
CLAREMONT SCHOOL DISTRICT,
NEWPORT SCHOOL DISTRICT,
HILLSBORO-DEERING SCHOOL DISTRICT,
GRANTHAM SCHOOL DISTRICT,
MANCHESTER SCHOOL DISTRICT,
WINDHAM SCHOOL DISTRICT,
DERRY COOPERATIVE SCHOOL DISTRICT,
HILL SCHOOL DISTRICT,
MASCOMA VALLEY REGIONAL SCHOOL DISTRICT,
NASHUA SCHOOL DISTRICT,
LEBANON SCHOOL DISTRICT,
HOPKINTON SCHOOL DISTRICT, AND
OYSTER RIVER COOPERATIVE SCHOOL DISTRICT

By their attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

By:/s/ Elizabeth E. Ewing
Date: December 22, 2023
Michael J. Tierney – NHBA #17173
Elizabeth E. Ewing–NHBA #269009
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com
eewing@wadleighlaw.com

& Co-Counsel for only the Nashua School District
Steven A. Bolton, Esq. NHBA #67
Nashua School District
229 Main Street
Nashua, NH 03061
boltons@nashuanh.gov

CERTIFICATION OF SERVICE

I hereby certify that a copy of this filing has this day been served via email on all parties via the Court's electronic case filing system.

/s/ Elizabeth E. Ewing
Elizabeth E. Ewing

Exhibit 1

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

JANESSA VERRILL,
by and through her guardian,
LISA VERRILL

v.

COMMISSIONER LORI SHIBINETTE, and the
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.: 217-2020-CV-00382

ORDER

The petitioner, Janessa Verrill ("Ms. Verrill"), by and through her guardian, Lisa Verrill, has brought an action seeking declaratory judgment, injunctive relief, and attorney's fees, for violations of RSA 171-A. The respondents, Lori Shibinette and the New Hampshire Department of Health and Human Services (collectively, the "Department"), previously moved for summary judgment and were denied as to Count II of Ms. Verrill's Complaint. Ms. Verrill's cross-motion for summary judgment as to Count II was granted. The parties have since briefed their positions on the remaining Counts. In addition, the Department has requested the Court stay its orders pending appeal to the New Hampshire Supreme Court. The Court held a hearing on these issues on October 18, 2021. For the following reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, her request for injunctive relief is DENIED, and the Department's request to stay is DENIED.

I. Background

The Court recounts the undisputed facts described in its March 1, 2021 Order as they remain unchanged at this stage. See Janessa Verrill v. Comm'r Lori Shibinette et al., No. 217-2020-CV-382 Court Doc. 19 (Mar. 1, 2021) (Kissinger, J.) Ms. Verrill is a high school student in Gilford over the age of 18 who suffers from a developmental disability. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 10–11; Pet'r's Mot. Summ. J. ¶ 3.) Though she currently lives with her family, Ms. Verrill "can no longer be supported in her family's home." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 12.) As a result, Ms. Verrill applied for "home and community-based services" pursuant to RSA 171-A. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 13, 17.) Lakes Region Community Services, an "area agency" for purposes of the statute, determined that Ms. Verrill is "eligible for and in need of developmental services," including "home and community-based services," pursuant to RSA 171-A and administrative rules He-M 503.03, 503.05, and 517. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 18.) The Department, however, disagreed with the agency's assessment, noting that Ms. Verrill is still in high school and "home and community-based services are not available to anyone who is still in school." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 19.)

On March 1, 2021, the Court issued an Order granting Ms. Verrill judgment as a matter of law on Count II of the Complaint which sought declaratory judgment that "the purported practice [of] denying [her] benefits because she is still in school interferes with or impairs legal rights and privileges to which she is entitled under RSA 171-A." Verrill, No. 217-2020-CV-382, at 3, 8. The Department moved for reconsideration which the Court denied on May 3, 2021. See Janessa Verrill v. Comm'r Lori Shibinette et al., No.

217-2020-CV-382 Court Doc. 23 (May 3, 2021) (Kissinger, J.) The Court now considers the remaining Counts of the Complaint and the Department's request to stay.

II. Analysis

Count I - Declaratory Judgment

For context, the Court describes the statutory scheme at issue in this case. The express purpose of RSA 171-A is to "establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons." RSA 171-A:1. "Such services must be based upon the participation of disabled individuals 'and their families in decisions concerning necessary, desirable, and appropriate services, recognizing that they are best able to determine their own needs.'" Petition of Guillemette, 171 N.H. 565, 569 (2018) (citing RSA 171-A:1, I). "They must also be 'based on individual choice, satisfaction, safety, and positive outcomes' . . . [and] be 'relevant to the individual's age, abilities, and life goals.'" Id. at 570 (citing RSA 171-A:1, IV–V). The statute makes it the explicit "policy of this state . . . for persons with developmental disabilities and their families [to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention." RSA 171-A:1. The specific provision of RSA 171-A at issue reads as follows:

> For persons in school and already eligible for services from the area agencies, funds shall be allocated to them 90 days prior to their graduating or exiting the school system or earlier so that any new or modified services needed are available and provided upon such school graduation or exit.

RSA 171-A:1-a, I(a).

Count I of the Complaint seeks a declaration that Ms. Verrill is entitled to home and community-based services and that the Department's rationale for refusing such

services to Ms. Verrill is invalid and unlawful. (See Compl. ¶¶ 25, 27.) The Court previously found that "nothing in the language of RSA 171-A:1-a, I(a) bars the provision of services to otherwise eligible individuals on account of their enrollment in school." Verrill, No. 217-2020-CV-382 (Mar. 1, 2021), at 5. As such, the Department was generally misapplying RSA 171-A by denying services to eligible individuals due to their enrollment in school. Accordingly, the Department was also misapplying RSA 171-A to Ms. Verrill as an eligible individual enrolled in school. For the reasons discussed in its previous Order regarding Count II of the Complaint, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. Thus, Ms. Verrill's request for declaratory judgment in Count I is GRANTED.

Count III - Permanent Injunctive Relief

Count III of the Complaint seeks permanent injunctive relief ordering that the Department may not continue to deny Ms. Verrill services because she is still in school. (See Compl. ¶ 39.) The Court "has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm." Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Pike v. Deutsche Bank Nat'l Tr. Co., 168 N.H. 40, 45 (2015). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law, and the party seeking an injunction is likely to succeed on the merits." Id. The Court "retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id.

Here, the Department has represented to the Court that it intends to comply with the Court's declaration that the Department cannot deny home and community-based services to Ms. Verrill under RSA 171-A due to school enrollment. (See Def. Mem. Remaining Issues And Req. Stay at 1–2.) Accordingly, the Court expects the Department to render appropriate home and community-based services to Ms. Verrill as soon as practicable after issuance of this Order. As such, Ms. Verrill is not facing immediate danger of irreparable harm if the Court does not issue the requested injunction. Thus, Ms. Verrill's request for injunctive relief is DENIED. However, the Court may re-open the case and reconsider injunctive relief should the Department fail to live up to its representations.

Count IV - Attorney's Fees

Count IV of the Complaint alleges that because a declaration that the Department's practice of denying services to individuals due to their enrollment in school is unlawful substantially benefits all individuals who are still enrolled in school, and who need home and community-based services, an award of attorney's fees is justified. (Compl. ¶¶ 44–45.) "Although each party to a lawsuit normally bears the expense of its own attorney's fees, there are judicially-created and statutory exceptions to this rule." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010). One such judicially-created exception is the "substantial benefit" theory. Id. "Under the 'substantial benefit' theory . . . attorney's fees may be awarded when a litigant's action confers a 'substantial benefit' upon the general public." Id.

The Court finds that Ms. Verrill's successful action confers a substantial benefit upon the general public. By obtaining a declaratory judgment that the Department's

practice of denying services to eligible individuals is unlawful, the public is directly benefited. Eligible individuals enrolled in school will now be able to properly receive appropriate services as contemplated by RSA 171-A. In particular, the explicit policy that "persons with developmental disabilities and their families [are to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention" is served due to Ms. Verrill's successful action. RSA 171-A:1.

Accordingly, the Department shall pay Ms. Verrill's reasonable attorney's fees to be established after appeal, or after this Order becomes final, whichever occurs first.

Request for Stay

The Department intends to appeal this Court's orders to the New Hampshire Supreme Court. As such, the Department requests that the Court stay its orders and judgment while the Department's appeal is pending. The Department argues that absent a stay, it will be in an untenable position of determining how to provide services that are not currently funded but that would not be required if successful in its appeal. (See Def. Mem. Remaining Issues And Req. Stay at 16.) The Court does not find this to be a valid justification to stay its rulings. As discussed above, the Court's rulings confer a substantial benefit to others similarly situated to Ms. Verrill. Granting the Department's request to stay would deny these important benefits to the public. As such, the importance of the Court's rulings on this matter to Ms. Verrill, and others similarly situated, justifies denying the Department's request to stay. Accordingly, the Department's request to stay is DENIED.

In sum, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. As such, Ms. Verrill's request for declaratory judgment is GRANTED. The Court finds that Ms. Verrill's action confers a substantial benefit upon the general public, and thus her request for attorney's fees is GRANTED. In light of the Department's representation that it will comply with this Court's orders, Ms. Verrill is not facing immediate danger of irreparable harm, and thus her request for injunctive relief is DENIED. Finally, because there are no valid justifications for staying the Court's rulings, and because a stay would potentially deny Ms. Verrill services that she, and others similarly situated, are lawfully entitled to, the Department's request to stay is DENIED.

III. Conclusion

For the foregoing reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, and her request for injunctive relief is DENIED. The Department's request to stay is DENIED.

SO ORDERED.

10/26/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/28/2021

EXHIBIT
E

THE STATE OF NEW HAMPSHIRE

Cheshire, SS. **Docket No. 213-2019-cv-00069** SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

PETITIONERS' OBJECTION TO STATE'S MOTION TO STAY

Over the course of the last four years, the State has not produced a single shred of evidence that the amount set in RSA 198:40-a, II(a) is sufficient to fund a constitutionally adequate education for *any* student *anywhere* in the State. In fact, the State has never even suggested that it is possible to provide a constitutionally adequate education with that amount.

Nonetheless, the State defendants seek to stay this Court's Order enjoining the State of New Hampshire, Commissioner Frank Edelblut, Governor Chris Sununu, and the New Hampshire Department of Education[1] from funding base adequacy aid at less than $7,356.01 per pupil, arguing that they ought to be able to continue to deprive New Hampshire citizens of their fundamental constitutional rights for the duration of the appeal and a full *additional* fiscal year after that appeal concludes. Otherwise, they threaten, they will cease funding base adequacy *entirely* for that period.

[1] For the reasons set forth more fully in Petitioners' Objection to the State's Motion for Reconsideration, incorporated here in full by reference, the legislature is not the only governmental entity with the authority to provide funding at a constitutional level: the executive branch not only has the ability to do so, but it is constitutionally obligated to do so.

In other words, the State proposes to either underfund constitutionally adequate education by at least $3,200 per student or to cease funding it entirely for at least two-and-a-half more years.[2] Petitioners object.

PROCEDURAL POSTURE

The State's Motion to Stay is a necessary prerequisite to seeking a stay from the New Hampshire Supreme Court pursuant to N.H. Supreme Ct. R. 7-A. That rule provides an avenue for the Supreme Court to review a denial of the State's Motion to Stay long before reaching the merits of the appeal. Supreme Court Rule 7-A(1) (permitting a party to seek a stay of "an order or judgment of a lower tribunal" after "unsuccessfully" seeking similar relief from the lower tribunal); *see also Gray v. Kelly*, 161 N.H. 160, 167 (2010) (describing that rule as "providing a procedural mechanism to stay the judgment of a lower tribunal that is not stayed by the filing of a timely appeal"). Recently, for example, the Supreme Court issued an order on a Rule 7-A motion within less than 30 days of the filing date of the appeal and Rule 7-A motion. *See* Ex. 1, Sept. 20, 2023, Rule 7-A Order; Ex. 2, Aug. 24, 2023, Rule 7-A Mot. to Stay.[3]

ARGUMENT

The State must remedy its constitutional violation for this fiscal year before the conclusion of an appeal; else, it will surely argue, as it consistently has in this matter, that sovereign immunity bars any remedy for those it has deprived of a constitutionally adequate education this year. The Court should, therefore, deny the State's Motion to Stay and make its Order effective immediately.

---

[2] Were the State to appeal to the Supreme Court in January 2024, and the Supreme Court to issue a decision in September 2024, the State's requested stay would continue until July 1, 2026.

[3] It is unclear whether Rule 7-A would provide a similar avenue for the Supreme Court to review an issuance of a stay.

I. This Court has the authority to make the Order immediately effective.

"[W]hile filing a timely appeal prevents a judgment from becoming final, a judgment is nonetheless effective from the time it is rendered unless a party files an appeal or obtains a stay." *Gray v. Kelly*, 161 N.H. 160, 167–68 (2010). Even an appeal to the Supreme Court "does not necessarily stay all further proceedings in the trial court, nor does it strip said court of all power over the proceeding in which the appeal has been taken." *Boynton v. Figueroa*, 154 N.H. 592, 609 (2006) (quotation omitted). "In addition to other things, the trial court may make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal[,]" and "[e]ven after an appeal has been perfected, the trial court has adequate authority and jurisdiction to preserve the status quo." *Id*. (quotations and citations omitted).

Pursuant to this authority, the Supreme Court has affirmed lower courts' orders that required, for example, a payment of $2.6 million before a divorce decree became final to "prevent further dissipation of assets," *In re Nyhan*, 151 N.H. 739, 746 (2005), and "a bond sufficient to cover the damage award" after a jury trial, *Boynton*, 154 N.H. at 608-09. *See also In the Matter of Hampers & Hampers*, 154 N.H. 275 (2006) (upholding trial court's order requiring petitioner to pay respondent $500,000 in the event of an appeal to permit her to secure suitable housing for her and the parties' child). In 2021, Judge Kissinger denied a motion to stay by the New Hampshire Department of Health and Human Services, even though the State argued that "absent a stay, it will be in an untenable position of determining how to provide services that are not currently funded but that would not be required if successful in its appeal." Ex. 3, *Verrill v. State*, Docket 217-2020-CV-00382, Index #35, at 6 (Oct. 26, 2021) (Kissinger, J.). The Court found the argument unpersuasive because staying its Order would "deny . . . important benefits to the public. As such, the importance of the Court's rulings on this matter to [the petitioner], and others similarly situated, justifies denying the Department's request to stay." *Id*.

Where this Court has the authority to make its Order immediately effective, time is of the essence to preserve the constitutional rights of New Hampshire's citizens for this year, and there exists a mechanism for the Supreme Court to stay the case, should it disagree with this Court's determination about the effective date, Petitioners request that the Court make its order effective immediately.

II. The Court's Order should go into effect immediately to prevent further irreparable harm.

The Supreme Court has said that, when the constitutionality of a statute is at issue, "[a] proper regard for the power and authority of the legislative branch of the government demands" that "no restraining order should issue until the subject has been passed upon by the court of last resort" – unless, that is, "irreparable loss will be caused[.]" *Musgrove v. Parker*, 84 N.H. 550 (1931) (cited by *Dover News, Inc. v. City of Dover*, 117 N.H. 1066, 1071 (1977)).

There can be no question that irreparable harm will be caused, not only to Petitioners, but to nearly every citizen in New Hampshire if the Court's Order is stayed. It has been the State's position throughout this litigation that sovereign immunity bars any funding for fiscal years that have passed,[4] and it was on that basis that Petitioners[5] first sought a preliminary injunction. *See, e.g.*, Order on Exp. Mot. to Strike, Index #24, at 10, n.4; Order on Mot. for Prelim. Inj., Index #14, at 17-19. Since this suit was first filed in 2019, five fiscal years have passed, during which the State repeatedly failed to fulfill its constitutional obligations.[6] For many years before that, the

[4] Petitioners do not agree, but, given this Court's prior statement that "sovereign immunity bars a retrospective award for constitutional wrongdoing," Petitioners must act to protect their rights. Order on Mot. for Prelim. Inj., Index #14, at 18.

[5] At the time, the only petitioning school districts were Contoocook Valley School District and Winchester School District.

[6] Fiscal year 2019 ended on June 30, 2019. Fiscal year 2023 ended on June 30, 2023, and the mid-point of fiscal year 2024 is rapidly approaching.

State's base adequacy funding was constitutionally insufficient. *See, e.g.*, Order, June 5, 2019, Index #51, at 40-41. According to the State, there can be no remedy for any of those years. In other words, Petitioners have already suffered irreparable loss. Staying the Court's Order during the pendency of the appeal, much less during the subsequent legislative budget cycle, will only exacerbate the damage. Fiscal year 2024 ends on June 30, 2024, and an appeal, if taken by the State, is unlikely to have been concluded by that point. To preserve the constitutional rights at issue in this case, therefore, the Court's Order should be effective immediately.

III. The State's arguments in support of a stay are erroneous, inadequate, and unpersuasive.

The State proffers three reasons for why a stay should be granted, despite the imminent constitutional harm it would cause. None of those reasons justify the relief the State seeks.

First, the State says, the Court's conclusion that the amount of funding in RSA 198:40-a, II(a), must exceed $7,356.01 renders "the Executive Branch unable to fund adequacy grants for schools" because the legislature "may not act to fix the statute" during the pendency of an appeal.[7] Mot. to Stay, Index #248, at ¶ 4. As Judge Kissinger correctly determined in *Verrill*, that argument does not justify a stay. Ex. 3, *Verrill*, Docket 217-2020-CV-00382, at 6. Moreover, the State's own proposed inaction in response to the Court's Order cannot form the basis for the "irreparable harm" that the State seeks to prevent with a stay. That inaction is not an inevitability, but a choice. For example, the legislature could act to increase funding temporarily during the pendency of the appeal. Or the executive branch could apply the surplus in the State's Educational Trust Fund or General Fund to fund base adequacy pursuant to the Court's Order.[8]

[7] Puzzlingly, this argument assumes that the legislature would prefer to make New Hampshire's students suffer rather than begin work.

[8] As set forth in Petitioners' Objection to the State's Motion to Stay, the legislature is not the only governmental body responsible for constitutionally adequate education. The executive branch has the

RSA 198:42, II ("The governor is authorized to draw a warrant from the education trust fund to satisfy the state's obligation under this section. Such warrant for payment shall be issued regardless of the balance of funds available in the education trust fund.").

Second, the State argues that a stay is warranted because it disagrees with the Court's Order. It cites no authority for the proposition that such a disagreement warrants a stay. It does not – particularly when weighed against the irreparable loss contemplated by the *Musgrove* Court. *Musgrove*, 84 N.H. 550. And, as set forth in Petitioners' Objection to the State's Motion to Reconsider, the State's arguments against the Court's Order are simply wrong.

Finally, the State says, litigation related to attorneys' fees at this juncture is premature. Mot. to Stay, at ¶ 9. Attorneys' fees are routinely determined prior to appeal, and for good reason. *See, e.g.*, *Town of Barrington v. Townsend*, 164 N.H. 241, 248-49 (2012) (deciding merits issue and proceeding to analyze respondent's argument about amount of attorney's fees). If the State wishes to appeal the attorneys' fees determination, it is more efficient for the State to appeal the entirety of the Court's rulings at one time.

In sum, the State has not, and cannot, offer a single concrete reason that a stay is necessary. Petitioners, on the other hand, stand to lose at least another year, waiting for the State to finally do what the Constitution requires.

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authority, and the constitutional obligation, to issue a constitutional amount of funding for an adequate education.

IV. At a minimum, the Court should issue an order that provides New Hampshire citizens security during the pendency of the appeal.

Given the history of this litigation since 2019, the repeated failures of the State to live up to its constitutional obligation to fund an adequate education since *Claremont I*,[9] the irreparable harm already suffered, and the irreparable loss that will ensue in the absence of some form of relief, if the Court is unwilling to make its Order effective immediately, Petitioners request that the Court fashion some other equitable relief to "protect[] and preserv[e] the subject matter of the appeal." *Boynton*, 154 N.H., at 609. "The trial court has broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation[,]" including the "inherent equitable authority to require [a party] to post security" pending appeal. *Id*. at 608 (quotation omitted).

For example, the Court could order that the surplus in the General Fund and Education Trust Fund for fiscal year 2024, and any subsequent fiscal years during which an appeal in this matter is pending, be held as security,[10] prohibit the State from asserting sovereign immunity to avoid payment of increased base adequacy for fiscal years 2024 onward, and order that the State continue making base adequacy payments as described in RSA 198:40-a, II(a), during the pendency of the appeal, as the State has never argued that the amount set forth in the statute is more than constitutionally necessary.

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[9] Since the Supreme Court's first *Claremont* decision in 1993, there have been *eleven* Supreme Court decisions holding that the State's education plans unconstitutional and several more Superior Court decisions that were not appealed or mooted. *See* Petitioners' Supplemental Briefing on the Separation of Powers, Index #230, at ¶ 22.

[10] There is an estimated $458.2 million in surplus reserves for fiscal year 2025, according to the December 10, 2023, fiscal note for HB1583, which proposes to raise base adequacy to $10,000 per pupil. *See* https://www.gencourt.state.nh.us/bill_Status/pdf.aspx?id=23152&q=billVersion.

CONCLUSION

The State's Motion to Stay should be denied. Petitioners will suffer further irreparable harm if the Court's Order is stayed without adequate provision to protect their rights.

Petitioners therefore request that the Court:

A. Deny the State's Motion to Stay; or

B. Exercise its equitable powers to protect the constitutional rights at stake while the State's appeal is pending; and

C. Grant such other relief as may be just.

Respectfully submitted,

CONTOOCOOK VALLEY SCHOOL DISTRICT,
MASCENIC REGIONAL SCHOOL DISTRICT,
MONADNOCK REGIONAL SCHOOL DISTRICT,
WINCHESTER SCHOOL DISTRICT,
FALL MOUNTAIN SCHOOL DISTRICT,
CLAREMONT SCHOOL DISTRICT,
NEWPORT SCHOOL DISTRICT,
HILLSBORO-DEERING SCHOOL DISTRICT,
GRANTHAM SCHOOL DISTRICT,
MANCHESTER SCHOOL DISTRICT,
WINDHAM SCHOOL DISTRICT,
DERRY COOPERATIVE SCHOOL DISTRICT,
HILL SCHOOL DISTRICT,
MASCOMA VALLEY REGIONAL SCHOOL DISTRICT,
NASHUA SCHOOL DISTRICT,
LEBANON SCHOOL DISTRICT,
HOPKINTON SCHOOL DISTRICT, AND
OYSTER RIVER COOPERATIVE SCHOOL DISTRICT

By their attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

By:/s/ Elizabeth E. Ewing
Date: December 22, 2023
Michael J. Tierney – NHBA #17173
Elizabeth E. Ewing–NHBA #269009
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com
eewing@wadleighlaw.com

& Co-Counsel for only the Nashua School District
Steven A. Bolton, Esq. NHBA #67
Nashua School District
229 Main Street
Nashua, NH 03061
boltons@nashuanh.gov

CERTIFICATION OF SERVICE

I hereby certify that a copy of this filing has this day been served via email on all parties via the Court's electronic case filing system.

/s/ Elizabeth E. Ewing
Elizabeth E. Ewing

Exhibit 1

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2023-0488, Petition of Jacob Solomon Mason & a., the court on September 20, 2023, issued the following order:

The petitioners' motion to stay order pending the outcome of this Rule 11 petition, to which the New Hampshire Department of Health and Human Services ("DHHS") has not responded, and to which The Moore Center, Inc. and Lakes Region Community Services partially assent, is granted as follows. The DHHS Commissioner's July 25, 2023 final decision is stayed during the pendency of this Rule 11 petition, during which time the petitioners shall continue to receive, and DHHS shall pay for, the services provided by the Judge Rotenberg Educational Center, Inc.

This order is entered by a single justice (Hantz Marconi, J.). See Rule 21(7).

Timothy A. Gudas,
Clerk

Distribution:
New Hampshire Department of Health and Human Services,
Administrative Appeals Unit, 2022-0657; 2022-0658; 2022-0659; 2022-0660; 2022-0661
Dean B. Eggert, Esq.
Elizabeth E. Ewing, Esq.
Michael P. Flammia, Esq.
Christian B.W. Stephens, Esq.
Tracy M. Culberson, Esq.
Michael A. Delaney, Esq.
Wilbur A. Glahn, III, Esq.
Rebecca S. Walkley, Esq.
Anne M. Edwards, Esq.
Robyn A. Guarino, Esq.
Melissa M. Nemeth, Esq.
Attorney General
File

Exhibit 2

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No.

APPEAL OF JACOB SOLOMON MASON,
KAYODE MASON (individually and as guardian of Jacob Solomon Mason),
MATTHEW HALLE,
CHERYL HOITT (individually and as guardian of Matthew Halle),
TYLER JEROME,
TAMMY JEROME (individually and as co-guardian of Tyler Jerome),
RICHARD JEROME (individually and as co-guardian of Tyler Jerome),
DAEVON SOTO,
VENUS BARRETO (individually and as guardian of Daevon Soto),
TIMOTHY DOUGLAS MCDONALD, and
OFFICE OF PUBLIC GUARDIAN (individually and as guardian of Timothy McDonald)

PETITIONERS' MOTION TO STAY ORDER PENDING APPEAL

In accordance with Sup. Ct. R. 7–A(1), Petitioners[1] move the Court to stay the New Hampshire Department of Health and Human Services ("DHHS") Commissioner Lori Weaver's ("Commissioner"), July 25, 2023, final decision in Petitioners' administrative appeals.

In support, Petitioners state as follows:

1. On August 17, 2022, Petitioners appealed the New Hampshire Bureau of Developmental Services' ("BDS") termination of their specialized services to the DHHS Administrative Appeals Unit ("AAU").

2. On August 26, 2022, Area Agencies the Moore Center and Lakes Region Community Services ("Lakes Region") moved the AAU to preserve the legal status quo

[1] Petitioners are Daevon Soto ("Daevon"), Venus Barreto (individually and as guardian of Daevon Soto), Matthew Halle ("Matthew"), Cheryl Hoitt (individually and as guardian of Matthew Halle), Jacob Solomon Mason ("Solomon"), Kayode Mason (individually and as guardian of Jacob Solomon Mason), Tyler Jerome ("Tyler"), Tammy Jerome (individually and as co-guardian of Tyler Jerome), Richard Jerome (individually and as co-guardian of Tyler Jerome), Timothy Douglas McDonald ("Timothy"), and Office of Public Guardian (individually and as guardian of Timothy McDonald).

by requiring BDS to continue funding Petitioners' specialized services during the administrative appeals.

3. On October 5, 2022, Lori Shibinette, then the DHHS Commissioner, issued a status-quo order ruling that DHHS regulations, due process, and protecting Petitioners, their families, and society from grievous harm required BDS to continue funding Petitioners' services throughout their administrative appeals in accordance with He–M 503.17(g)(1) ("October 5 Order"), which obligates BDS to continue funding services until 30 days after a final administrative-appeal decision. *See* Ex. A (October 5 Order).

4. On March 17, 2023, despite the administrative appeals remaining ongoing and the October 5 Order remaining undisturbed, BDS stopped funding Petitioners' services in direct contravention of the October 5 Order.

5. On April 5, 2023, Petitioners moved the AAU on an emergency basis to schedule a hearing and order BDS to comply with the October 5 Order ("Motion to Enforce"). *See* Ex. B (Motion to Enforce).

6. On July 25, 2023, the Commissioner issued a final decision on a dispositive motion filed by BDS, dismissing Petitioners' administrative appeals before a pre-deprivation evidentiary hearing on the merits ("Final Decision"). *See* Ex. C (Final Decision).[2]

7. The Final Decision expressly left the October 5 Order intact: "[This final decision does not] determine whether it was correct in providing funding for [Petitioners'] services during the pendency of the appeal." Ex. C, p. 12.

8. Per He–M 503.17(g)(1), unless the Final Decision is stayed, the October 5 Order expires 30 days after the Final Decision — *i.e.*, August 24, 2023 (the date of this filing) — despite Petitioners' vital need for continued services.

9. On August 4, 2023, Petitioners moved the Commissioner to reconsider her Final Decision, stay its effects pending a rehearing (if necessary), and again requested the

[2] The Final Decision incorporates and appends the Commissioner's March 28, 2023, proposed decision on BDS's dispositive motion.

Commissioner to enforce the October 5 Order ("Motion for Reconsideration"). *See* Ex. D (Motion for Reconsideration).

10. Neither the Commissioner nor the AAU has taken any action on Petitioners' Motion to Enforce or Motion for Reconsideration. By inaction, the Commissioner and AAU have denied the relief that Petitioners seek through this motion.

11. Petitioners now seek a stay of the Final Decision and enforcement of the October 5 Order pending this appeal to restore and preserve the legal status quo as of August 17, 2022, the date that Petitioners filed these appeals, as He–M 503.17(g)(1) and the October 5 Order require.

12. Without a stay restoring and preserving the legal status quo, Petitioners will suffer immediate, irreparable, and potentially life-threatening harm.

13. Petitioners are adult men with severe developmental and intellectual disabilities, [redacted] The Judge Rotenberg Educational Center, Inc. ("JRC") in Canton, Massachusetts, has been able to manage Petitioners' dangerous behaviors, effectively treat them, keep them and others safe, and provide them with a quality of life, independence, and community integration. Matthew, Tim, and Daevon have transitioned from JRC to alternative programs. JRC, however, continues to be called upon to provide critical transition services. For Tyler and Solomon, no program other than JRC is ready, willing, and able to service them.

14. Forcing Tyler and Solomon to leave their safe and successful placements at JRC with no other option but to live with their families — who are not qualified or equipped to provide them with the intensive care and treatment that they require — and BDS forcing JRC to not be able to provide critical transition support to all Petitioners when it is called upon to do so will cause Petitioners irreparable physical and psychological harm and potential death and eviscerate the remarkable progress that they have made at JRC. [redacted]

[redacted]

15. Despite the October 5 Order and its independent statutory obligations, BDS continues to refuse to fund Petitioners' services at JRC during the pendency of their appeal rights, including critical transition services. JRC — a nonprofit organization — cannot support Petitioners' services and transitions indefinitely without funding from BDS. And BDS owes JRC large amounts for services that it continues to provide to Petitioners. The Commissioner's refusal to enforce the October 5 Order has forced Petitioners to unreasonably and untenably rely on JRC to provide necessary services without payment.

16. Granting a stay will not harm BDS. A stay will only restore and preserve the legal status quo, which BDS has been obligated to do since Petitioners filed these appeals on August 17, 2022, per He–M 503.17(g)(1) and the October 5 Order.

17. Generally, timely appealing a final order automatically stays its effect. *Matter of Sanborn*, 174 N.H. 343, 351 (2021) ("[T]he general rule remains that timely appealing a trial court's final order stays it from taking effect."); *see also* Sup. Ct. R. 7–A(1) cmt. ("[A] decree does not go to final judgment if a timely appeal is taken to the supreme court.").

18. Staying a final order preserves the legal status quo, including keeping any temporary or interlocutory orders in effect. *Matter of Obrey*, 2015 WL 11071597, at *4 (N.H. 2015) ("[A] timely appeal will prevent the trial court's final decree from going into effect, and the temporary decree would remain in effect while the appeal is pending." (quoting Sup. Ct. R. 7–A(1) cmt.)).

19. Petitioners incorporate by reference the statements made in their petition for writ of certiorari filed contemporaneously with this motion.

20. In accordance with Sup. Ct. R. 7–A, Petitioners certify that they have:

a. Unsuccessfully petitioned the Commissioner and AAU for the relief sought herein;

b. Attached a copy of their Motion to Enforce as Exhibit B;

c. Attached a copy of BDS' objection to the Motion to Enforce as Exhibit E;

d. Attached a copy of the Final Decision — the order that Petitioners seek to have stayed — as Exhibit C;

e. Attached a copy of the Motion for Reconsideration as Exhibit D; and

f. Attached a copy of BDS' objection to the Motion for Reconsideration as Exhibit F.

WHEREFORE, Petitioners respectfully request the Court to:

(1) Stay the effect of the Commissioner's July 25, 2023, Final Decision during the pendency of this appeal;

(2) Issue an order declaring the AAU's October 5, 2022, Order requiring BDS to continue funding Petitioners' specialized services, still in effect during the pendency of this appeal;

(3) Issue an order requiring BDS to immediately comply with the AAU's October 5, 2022, Order and fund Petitioners' current and past services at JRC, including any and all transition services;

(4) Issue an order requiring BDS to immediately reimburse the Moore Center, Lakes Region, and JRC for any service payments that BDS has withheld in violation of the AAU's October 5, 2022; and

(5) Grant such other and further relief as is just and necessary.

Respectfully submitted,
JACOB SOLOMON MASON, KAYODE MASON (individually and as guardian of Jacob Solomon Mason), MATTHEW HALLE, CHERYL HOITT (individually and as guardian of Matthew Halle), TYLER JEROME, TAMMY JEROME (individually and as co-guardian of Tyler Jerome), RICHARD JEROME (individually and as co-guardian of Tyler Jerome), DAEVON SOTO, VENUS BARRETO (individually and as guardian of Daevon Soto)
By their attorneys,

/s/ Elizabeth E. Ewing
Dean B. Eggert (NHBA # 746)
Elizabeth E. Ewing (NHBA # 269009)
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
(603) 669–4140
deggert@wadleighlaw.com
ewing@wadleighlaw.com

Michael P. Flammia (MA BBO # 552104)
Pro hac vice admission forthcoming
Christian B.W. Stephens (MA BBO #666097)
Pro hac vice admission forthcoming
Christopher E. Torkelson (NJ ID # 022961996)
Pro hac vice admission forthcoming
Nicholas J. Schneider (MA BBO # 688498)
Pro hac vice admission forthcoming
Eckert Seamans Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
(617) 342–6800
mflammia@eckertseamans.com
cstephens@eckertseamans.com
ctorkelson@eckertseamans.com
nschneider@eckertseamans.com

TIMOTHY DOUGLAS MCDONALD and OFFICE OF PUBLIC GUARDIAN (individually and as guardian of Timothy McDonald)
By their attorney,

/s/ Tracy M. Culberson
Signed by Elizabeth E. Ewing with permission of Tracy M. Culberson
Tracy M. Culberson (NHBA # 16430)
2 Pillsbury Street, Suite 400
Concord, NH 03301
(603) 224–8041
tculberson@opgnh.org

Dated: August 24, 2023

CERTIFICATE OF SERVICE

I certify that on August 24, 2023, I served this document to all parties by providing copies to the following counsel through the court's electronic filing system:

Counsel for Petitioners Timothy Douglas McDonald and The Office of Public Guardian:
Tracy M. Culberson (NHBA # 16430)
Office of Public Guardian
2 Pillsbury Street, Suite 400
Concord, NH 03301
tculberson@opgnh.org

Counsel for Respondents The Moore Center and Lakes Region Community Services:
Michael Delaney, Esq.
Wilbur Glahn, III, Esq.
Rebecca Walkley, Esq.
McLane Middleton, Professional Association
900 Elm Street
Manchester, NH 03101
michael.delaney@mclane.com
bill.glahn@mclane.com
rebecca.walkley@mclane.com

Counsel for Respondents The New Hampshire Bureau of Developmental Services:
Associate Attorney General Anne Edwards
Assistant Attorney General Robyn Guarino
State of New Hampshire
Department of Justice
33 Capitol Street, Room 336
Concord, NH 03301
anne.m.edwards@doj.nh.gov
robyn.a.guarino@dhhs.nh.gov

Melissa M. Nemeth, Esq.
Director, Office of Client and Legal Services
Department of Health and Human Services
105 Pleasant Street
Concord, NH 03301
Melissa.M.Nemeth@dhhs.nh.gov

/s/ Elizabeth E. Ewing
Elizabeth E. Ewing

Exhibit 3

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

JANESSA VERRILL,
by and through her guardian,
LISA VERRILL

v.

COMMISSIONER LORI SHIBINETTE, and the
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.: 217-2020-CV-00382

ORDER

The petitioner, Janessa Verrill ("Ms. Verrill"), by and through her guardian, Lisa Verrill, has brought an action seeking declaratory judgment, injunctive relief, and attorney's fees, for violations of RSA 171-A. The respondents, Lori Shibinette and the New Hampshire Department of Health and Human Services (collectively, the "Department"), previously moved for summary judgment and were denied as to Count II of Ms. Verrill's Complaint. Ms. Verrill's cross-motion for summary judgment as to Count II was granted. The parties have since briefed their positions on the remaining Counts. In addition, the Department has requested the Court stay its orders pending appeal to the New Hampshire Supreme Court. The Court held a hearing on these issues on October 18, 2021. For the following reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, her request for injunctive relief is DENIED, and the Department's request to stay is DENIED.

I. Background

The Court recounts the undisputed facts described in its March 1, 2021 Order as they remain unchanged at this stage. See Janessa Verrill v. Comm'r Lori Shibinette et al., No. 217-2020-CV-382 Court Doc. 19 (Mar. 1, 2021) (Kissinger, J.) Ms. Verrill is a high school student in Gilford over the age of 18 who suffers from a developmental disability. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 10–11; Pet'r's Mot. Summ. J. ¶ 3.) Though she currently lives with her family, Ms. Verrill "can no longer be supported in her family's home." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 12.) As a result, Ms. Verrill applied for "home and community-based services" pursuant to RSA 171-A. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 13, 17.) Lakes Region Community Services, an "area agency" for purposes of the statute, determined that Ms. Verrill is "eligible for and in need of developmental services," including "home and community-based services," pursuant to RSA 171-A and administrative rules He-M 503.03, 503.05, and 517. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 18.) The Department, however, disagreed with the agency's assessment, noting that Ms. Verrill is still in high school and "home and community-based services are not available to anyone who is still in school." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 19.)

On March 1, 2021, the Court issued an Order granting Ms. Verrill judgment as a matter of law on Count II of the Complaint which sought declaratory judgment that "the purported practice [of] denying [her] benefits because she is still in school interferes with or impairs legal rights and privileges to which she is entitled under RSA 171-A." Verrill, No. 217-2020-CV-382, at 3, 8. The Department moved for reconsideration which the Court denied on May 3, 2021. See Janessa Verrill v. Comm'r Lori Shibinette et al., No.

217-2020-CV-382 Court Doc. 23 (May 3, 2021) (Kissinger, J.) The Court now considers the remaining Counts of the Complaint and the Department's request to stay.

II. Analysis

Count I - Declaratory Judgment

For context, the Court describes the statutory scheme at issue in this case. The express purpose of RSA 171-A is to "establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons." RSA 171-A:1. "Such services must be based upon the participation of disabled individuals 'and their families in decisions concerning necessary, desirable, and appropriate services, recognizing that they are best able to determine their own needs.'" Petition of Guillemette, 171 N.H. 565, 569 (2018) (citing RSA 171-A:1, I). "They must also be 'based on individual choice, satisfaction, safety, and positive outcomes' . . . [and] be 'relevant to the individual's age, abilities, and life goals.'" Id. at 570 (citing RSA 171-A:1, IV–V). The statute makes it the explicit "policy of this state . . . for persons with developmental disabilities and their families [to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention." RSA 171-A:1. The specific provision of RSA 171-A at issue reads as follows:

> For persons in school and already eligible for services from the area agencies, funds shall be allocated to them 90 days prior to their graduating or exiting the school system or earlier so that any new or modified services needed are available and provided upon such school graduation or exit.

RSA 171-A:1-a, I(a).

Count I of the Complaint seeks a declaration that Ms. Verrill is entitled to home and community-based services and that the Department's rationale for refusing such

services to Ms. Verrill is invalid and unlawful. (See Compl. ¶¶ 25, 27.) The Court previously found that "nothing in the language of RSA 171-A:1-a, I(a) bars the provision of services to otherwise eligible individuals on account of their enrollment in school." Verrill, No. 217-2020-CV-382 (Mar. 1, 2021), at 5. As such, the Department was generally misapplying RSA 171-A by denying services to eligible individuals due to their enrollment in school. Accordingly, the Department was also misapplying RSA 171-A to Ms. Verrill as an eligible individual enrolled in school. For the reasons discussed in its previous Order regarding Count II of the Complaint, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. Thus, Ms. Verrill's request for declaratory judgment in Count I is GRANTED.

Count III - Permanent Injunctive Relief

Count III of the Complaint seeks permanent injunctive relief ordering that the Department may not continue to deny Ms. Verrill services because she is still in school. (See Compl. ¶ 39.) The Court "has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm." Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Pike v. Deutsche Bank Nat'l Tr. Co., 168 N.H. 40, 45 (2015). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law, and the party seeking an injunction is likely to succeed on the merits." Id. The Court "retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id.

Here, the Department has represented to the Court that it intends to comply with the Court's declaration that the Department cannot deny home and community-based services to Ms. Verrill under RSA 171-A due to school enrollment. (See Def. Mem. Remaining Issues And Req. Stay at 1–2.) Accordingly, the Court expects the Department to render appropriate home and community-based services to Ms. Verrill as soon as practicable after issuance of this Order. As such, Ms. Verrill is not facing immediate danger of irreparable harm if the Court does not issue the requested injunction. Thus, Ms. Verrill's request for injunctive relief is DENIED. However, the Court may re-open the case and reconsider injunctive relief should the Department fail to live up to its representations.

Count IV - Attorney's Fees

Count IV of the Complaint alleges that because a declaration that the Department's practice of denying services to individuals due to their enrollment in school is unlawful substantially benefits all individuals who are still enrolled in school, and who need home and community-based services, an award of attorney's fees is justified. (Compl. ¶¶ 44–45.) "Although each party to a lawsuit normally bears the expense of its own attorney's fees, there are judicially-created and statutory exceptions to this rule." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010). One such judicially-created exception is the "substantial benefit" theory. Id. "Under the 'substantial benefit' theory . . . attorney's fees may be awarded when a litigant's action confers a 'substantial benefit' upon the general public." Id.

The Court finds that Ms. Verrill's successful action confers a substantial benefit upon the general public. By obtaining a declaratory judgment that the Department's

practice of denying services to eligible individuals is unlawful, the public is directly benefited. Eligible individuals enrolled in school will now be able to properly receive appropriate services as contemplated by RSA 171-A. In particular, the explicit policy that "persons with developmental disabilities and their families [are to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention" is served due to Ms. Verrill's successful action. RSA 171-A:1.

Accordingly, the Department shall pay Ms. Verrill's reasonable attorney's fees to be established after appeal, or after this Order becomes final, whichever occurs first.

Request for Stay

The Department intends to appeal this Court's orders to the New Hampshire Supreme Court. As such, the Department requests that the Court stay its orders and judgment while the Department's appeal is pending. The Department argues that absent a stay, it will be in an untenable position of determining how to provide services that are not currently funded but that would not be required if successful in its appeal. (See Def. Mem. Remaining Issues And Req. Stay at 16.) The Court does not find this to be a valid justification to stay its rulings. As discussed above, the Court's rulings confer a substantial benefit to others similarly situated to Ms. Verrill. Granting the Department's request to stay would deny these important benefits to the public. As such, the importance of the Court's rulings on this matter to Ms. Verrill, and others similarly situated, justifies denying the Department's request to stay. Accordingly, the Department's request to stay is DENIED.

In sum, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. As such, Ms. Verrill's request for declaratory judgment is GRANTED. The Court finds that Ms. Verrill's action confers a substantial benefit upon the general public, and thus her request for attorney's fees is GRANTED. In light of the Department's representation that it will comply with this Court's orders, Ms. Verrill is not facing immediate danger of irreparable harm, and thus her request for injunctive relief is DENIED. Finally, because there are no valid justifications for staying the Court's rulings, and because a stay would potentially deny Ms. Verrill services that she, and others similarly situated, are lawfully entitled to, the Department's request to stay is DENIED.

III. Conclusion

For the foregoing reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, and her request for injunctive relief is DENIED. The Department's request to stay is DENIED.

SO ORDERED.

10/26/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/28/2021

Exhibit 1

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2023-0488, Petition of Jacob Solomon Mason & a., the court on September 20, 2023, issued the following order:

The petitioners' motion to stay order pending the outcome of this Rule 11 petition, to which the New Hampshire Department of Health and Human Services ("DHHS") has not responded, and to which The Moore Center, Inc. and Lakes Region Community Services partially assent, is granted as follows. The DHHS Commissioner's July 25, 2023 final decision is stayed during the pendency of this Rule 11 petition, during which time the petitioners shall continue to receive, and DHHS shall pay for, the services provided by the Judge Rotenberg Educational Center, Inc.

This order is entered by a single justice (Hantz Marconi, J.). See Rule 21(7).

Timothy A. Gudas,
Clerk

Distribution:
New Hampshire Department of Health and Human Services,
Administrative Appeals Unit, 2022-0657; 2022-0658; 2022-0659; 2022-0660; 2022-0661
Dean B. Eggert, Esq.
Elizabeth E. Ewing, Esq.
Michael P. Flammia, Esq.
Christian B.W. Stephens, Esq.
Tracy M. Culberson, Esq.
Michael A. Delaney, Esq.
Wilbur A. Glahn, III, Esq.
Rebecca S. Walkley, Esq.
Anne M. Edwards, Esq.
Robyn A. Guarino, Esq.
Melissa M. Nemeth, Esq.
Attorney General
File

Exhibit 2

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No.

APPEAL OF JACOB SOLOMON MASON,
KAYODE MASON (individually and as guardian of Jacob Solomon Mason),
MATTHEW HALLE,
CHERYL HOITT (individually and as guardian of Matthew Halle),
TYLER JEROME,
TAMMY JEROME (individually and as co-guardian of Tyler Jerome),
RICHARD JEROME (individually and as co-guardian of Tyler Jerome),
DAEVON SOTO,
VENUS BARRETO (individually and as guardian of Daevon Soto),
TIMOTHY DOUGLAS MCDONALD, and
OFFICE OF PUBLIC GUARDIAN (individually and as guardian of Timothy McDonald)

PETITIONERS' MOTION TO STAY ORDER PENDING APPEAL

In accordance with Sup. Ct. R. 7–A(1), Petitioners[1] move the Court to stay the New Hampshire Department of Health and Human Services ("DHHS") Commissioner Lori Weaver's ("Commissioner"), July 25, 2023, final decision in Petitioners' administrative appeals.

In support, Petitioners state as follows:

1. On August 17, 2022, Petitioners appealed the New Hampshire Bureau of Developmental Services' ("BDS") termination of their specialized services to the DHHS Administrative Appeals Unit ("AAU").

2. On August 26, 2022, Area Agencies the Moore Center and Lakes Region Community Services ("Lakes Region") moved the AAU to preserve the legal status quo

[1] Petitioners are Daevon Soto ("Daevon"), Venus Barreto (individually and as guardian of Daevon Soto), Matthew Halle ("Matthew"), Cheryl Hoitt (individually and as guardian of Matthew Halle), Jacob Solomon Mason ("Solomon"), Kayode Mason (individually and as guardian of Jacob Solomon Mason), Tyler Jerome ("Tyler"), Tammy Jerome (individually and as co-guardian of Tyler Jerome), Richard Jerome (individually and as co-guardian of Tyler Jerome), Timothy Douglas McDonald ("Timothy"), and Office of Public Guardian (individually and as guardian of Timothy McDonald).

by requiring BDS to continue funding Petitioners' specialized services during the administrative appeals.

3. On October 5, 2022, Lori Shibinette, then the DHHS Commissioner, issued a status-quo order ruling that DHHS regulations, due process, and protecting Petitioners, their families, and society from grievous harm required BDS to continue funding Petitioners' services throughout their administrative appeals in accordance with He–M 503.17(g)(1) ("October 5 Order"), which obligates BDS to continue funding services until 30 days after a final administrative-appeal decision. *See* Ex. A (October 5 Order).

4. On March 17, 2023, despite the administrative appeals remaining ongoing and the October 5 Order remaining undisturbed, BDS stopped funding Petitioners' services in direct contravention of the October 5 Order.

5. On April 5, 2023, Petitioners moved the AAU on an emergency basis to schedule a hearing and order BDS to comply with the October 5 Order ("Motion to Enforce"). *See* Ex. B (Motion to Enforce).

6. On July 25, 2023, the Commissioner issued a final decision on a dispositive motion filed by BDS, dismissing Petitioners' administrative appeals before a pre-deprivation evidentiary hearing on the merits ("Final Decision"). *See* Ex. C (Final Decision).[2]

7. The Final Decision expressly left the October 5 Order intact: "[This final decision does not] determine whether it was correct in providing funding for [Petitioners'] services during the pendency of the appeal." Ex. C, p. 12.

8. Per He–M 503.17(g)(1), unless the Final Decision is stayed, the October 5 Order expires 30 days after the Final Decision — *i.e.*, August 24, 2023 (the date of this filing) — despite Petitioners' vital need for continued services.

9. On August 4, 2023, Petitioners moved the Commissioner to reconsider her Final Decision, stay its effects pending a rehearing (if necessary), and again requested the

[2] The Final Decision incorporates and appends the Commissioner's March 28, 2023, proposed decision on BDS's dispositive motion.

Commissioner to enforce the October 5 Order ("Motion for Reconsideration"). *See* Ex. D (Motion for Reconsideration).

10. Neither the Commissioner nor the AAU has taken any action on Petitioners' Motion to Enforce or Motion for Reconsideration. By inaction, the Commissioner and AAU have denied the relief that Petitioners seek through this motion.

11. Petitioners now seek a stay of the Final Decision and enforcement of the October 5 Order pending this appeal to restore and preserve the legal status quo as of August 17, 2022, the date that Petitioners filed these appeals, as He–M 503.17(g)(1) and the October 5 Order require.

12. Without a stay restoring and preserving the legal status quo, Petitioners will suffer immediate, irreparable, and potentially life-threatening harm.

13. Petitioners are adult men with severe developmental and intellectual disabilities, [redacted] The Judge Rotenberg Educational Center, Inc. ("JRC") in Canton, Massachusetts, has been able to manage Petitioners' dangerous behaviors, effectively treat them, keep them and others safe, and provide them with a quality of life, independence, and community integration. Matthew, Tim, and Daevon have transitioned from JRC to alternative programs. JRC, however, continues to be called upon to provide critical transition services. For Tyler and Solomon, no program other than JRC is ready, willing, and able to service them.

14. Forcing Tyler and Solomon to leave their safe and successful placements at JRC with no other option but to live with their families — who are not qualified or equipped to provide them with the intensive care and treatment that they require — and BDS forcing JRC to not be able to provide critical transition support to all Petitioners when it is called upon to do so will cause Petitioners irreparable physical and psychological harm and potential death and eviscerate the remarkable progress that they have made at JRC. [redacted]

[redacted]

15. Despite the October 5 Order and its independent statutory obligations, BDS continues to refuse to fund Petitioners' services at JRC during the pendency of their appeal rights, including critical transition services. JRC — a nonprofit organization — cannot support Petitioners' services and transitions indefinitely without funding from BDS. And BDS owes JRC large amounts for services that it continues to provide to Petitioners. The Commissioner's refusal to enforce the October 5 Order has forced Petitioners to unreasonably and untenably rely on JRC to provide necessary services without payment.

16. Granting a stay will not harm BDS. A stay will only restore and preserve the legal status quo, which BDS has been obligated to do since Petitioners filed these appeals on August 17, 2022, per He–M 503.17(g)(1) and the October 5 Order.

17. Generally, timely appealing a final order automatically stays its effect. *Matter of Sanborn*, 174 N.H. 343, 351 (2021) ("[T]he general rule remains that timely appealing a trial court's final order stays it from taking effect."); *see also* Sup. Ct. R. 7–A(1) cmt. ("[A] decree does not go to final judgment if a timely appeal is taken to the supreme court.").

18. Staying a final order preserves the legal status quo, including keeping any temporary or interlocutory orders in effect. *Matter of Obrey*, 2015 WL 11071597, at *4 (N.H. 2015) ("[A] timely appeal will prevent the trial court's final decree from going into effect, and the temporary decree would remain in effect while the appeal is pending." (quoting Sup. Ct. R. 7–A(1) cmt.)).

19. Petitioners incorporate by reference the statements made in their petition for writ of certiorari filed contemporaneously with this motion.

20. In accordance with Sup. Ct. R. 7–A, Petitioners certify that they have:

a. Unsuccessfully petitioned the Commissioner and AAU for the relief sought herein;

b. Attached a copy of their Motion to Enforce as Exhibit B;

c. Attached a copy of BDS' objection to the Motion to Enforce as Exhibit E;

d. Attached a copy of the Final Decision — the order that Petitioners seek to have stayed — as Exhibit C;

e. Attached a copy of the Motion for Reconsideration as Exhibit D; and

f. Attached a copy of BDS' objection to the Motion for Reconsideration as Exhibit F.

WHEREFORE, Petitioners respectfully request the Court to:

(1) Stay the effect of the Commissioner's July 25, 2023, Final Decision during the pendency of this appeal;

(2) Issue an order declaring the AAU's October 5, 2022, Order requiring BDS to continue funding Petitioners' specialized services, still in effect during the pendency of this appeal;

(3) Issue an order requiring BDS to immediately comply with the AAU's October 5, 2022, Order and fund Petitioners' current and past services at JRC, including any and all transition services;

(4) Issue an order requiring BDS to immediately reimburse the Moore Center, Lakes Region, and JRC for any service payments that BDS has withheld in violation of the AAU's October 5, 2022; and

(5) Grant such other and further relief as is just and necessary.

Respectfully submitted,
JACOB SOLOMON MASON, KAYODE MASON (individually and as guardian of Jacob Solomon Mason), MATTHEW HALLE, CHERYL HOITT (individually and as guardian of Matthew Halle), TYLER JEROME, TAMMY JEROME (individually and as co-guardian of Tyler Jerome), RICHARD JEROME (individually and as co-guardian of Tyler Jerome), DAEVON SOTO, VENUS BARRETO (individually and as guardian of Daevon Soto)
By their attorneys,

/s/ Elizabeth E. Ewing
Dean B. Eggert (NHBA # 746)
Elizabeth E. Ewing (NHBA # 269009)
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
(603) 669–4140
deggert@wadleighlaw.com
ewing@wadleighlaw.com

Michael P. Flammia (MA BBO # 552104)
Pro hac vice admission forthcoming
Christian B.W. Stephens (MA BBO #666097)
Pro hac vice admission forthcoming
Christopher E. Torkelson (NJ ID # 022961996)
Pro hac vice admission forthcoming
Nicholas J. Schneider (MA BBO # 688498)
Pro hac vice admission forthcoming
Eckert Seamans Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
(617) 342–6800
mflammia@eckertseamans.com
cstephens@eckertseamans.com
ctorkelson@eckertseamans.com
nschneider@eckertseamans.com

TIMOTHY DOUGLAS MCDONALD and OFFICE OF PUBLIC GUARDIAN (individually and as guardian of Timothy McDonald)
By their attorney,

/s/ Tracy M. Culberson
Signed by Elizabeth E. Ewing with permission of Tracy M. Culberson
Tracy M. Culberson (NHBA # 16430)
2 Pillsbury Street, Suite 400
Concord, NH 03301
(603) 224–8041
tculberson@opgnh.org

Dated: August 24, 2023

CERTIFICATE OF SERVICE

I certify that on August 24, 2023, I served this document to all parties by providing copies to the following counsel through the court's electronic filing system:

Counsel for Petitioners Timothy Douglas McDonald and The Office of Public Guardian:
Tracy M. Culberson (NHBA # 16430)
Office of Public Guardian
2 Pillsbury Street, Suite 400
Concord, NH 03301
tculberson@opgnh.org

Counsel for Respondents The Moore Center and Lakes Region Community Services:
Michael Delaney, Esq.
Wilbur Glahn, III, Esq.
Rebecca Walkley, Esq.
McLane Middleton, Professional Association
900 Elm Street
Manchester, NH 03101
michael.delaney@mclane.com
bill.glahn@mclane.com
rebecca.walkley@mclane.com

Counsel for Respondents The New Hampshire Bureau of Developmental Services:
Associate Attorney General Anne Edwards
Assistant Attorney General Robyn Guarino
State of New Hampshire
Department of Justice
33 Capitol Street, Room 336
Concord, NH 03301
anne.m.edwards@doj.nh.gov
robyn.a.guarino@dhhs.nh.gov

Melissa M. Nemeth, Esq.
Director, Office of Client and Legal Services
Department of Health and Human Services
105 Pleasant Street
Concord, NH 03301
Melissa.M.Nemeth@dhhs.nh.gov

/s/ Elizabeth E. Ewing
Elizabeth E. Ewing

Exhibit 3

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

JANESSA VERRILL,
by and through her guardian,
LISA VERRILL

v.

COMMISSIONER LORI SHIBINETTE, and the
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.: 217-2020-CV-00382

ORDER

The petitioner, Janessa Verrill ("Ms. Verrill"), by and through her guardian, Lisa Verrill, has brought an action seeking declaratory judgment, injunctive relief, and attorney's fees, for violations of RSA 171-A. The respondents, Lori Shibinette and the New Hampshire Department of Health and Human Services (collectively, the "Department"), previously moved for summary judgment and were denied as to Count II of Ms. Verrill's Complaint. Ms. Verrill's cross-motion for summary judgment as to Count II was granted. The parties have since briefed their positions on the remaining Counts. In addition, the Department has requested the Court stay its orders pending appeal to the New Hampshire Supreme Court. The Court held a hearing on these issues on October 18, 2021. For the following reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, her request for injunctive relief is DENIED, and the Department's request to stay is DENIED.

I. Background

The Court recounts the undisputed facts described in its March 1, 2021 Order as they remain unchanged at this stage. See Janessa Verrill v. Comm'r Lori Shibinette et al., No. 217-2020-CV-382 Court Doc. 19 (Mar. 1, 2021) (Kissinger, J.) Ms. Verrill is a high school student in Gilford over the age of 18 who suffers from a developmental disability. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 10–11; Pet'r's Mot. Summ. J. ¶ 3.) Though she currently lives with her family, Ms. Verrill "can no longer be supported in her family's home." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 12.) As a result, Ms. Verrill applied for "home and community-based services" pursuant to RSA 171-A. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶¶ 13, 17.) Lakes Region Community Services, an "area agency" for purposes of the statute, determined that Ms. Verrill is "eligible for and in need of developmental services," including "home and community-based services," pursuant to RSA 171-A and administrative rules He-M 503.03, 503.05, and 517. (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 18.) The Department, however, disagreed with the agency's assessment, noting that Ms. Verrill is still in high school and "home and community-based services are not available to anyone who is still in school." (Resp't's Mot. Summ. J. ¶ 9; Compl. ¶ 19.)

On March 1, 2021, the Court issued an Order granting Ms. Verrill judgment as a matter of law on Count II of the Complaint which sought declaratory judgment that "the purported practice [of] denying [her] benefits because she is still in school interferes with or impairs legal rights and privileges to which she is entitled under RSA 171-A." Verrill, No. 217-2020-CV-382, at 3, 8. The Department moved for reconsideration which the Court denied on May 3, 2021. See Janessa Verrill v. Comm'r Lori Shibinette et al., No.

217-2020-CV-382 Court Doc. 23 (May 3, 2021) (Kissinger, J.) The Court now considers the remaining Counts of the Complaint and the Department's request to stay.

II. Analysis

Count I - Declaratory Judgment

For context, the Court describes the statutory scheme at issue in this case. The express purpose of RSA 171-A is to "establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons." RSA 171-A:1. "Such services must be based upon the participation of disabled individuals 'and their families in decisions concerning necessary, desirable, and appropriate services, recognizing that they are best able to determine their own needs.'" Petition of Guillemette, 171 N.H. 565, 569 (2018) (citing RSA 171-A:1, I). "They must also be 'based on individual choice, satisfaction, safety, and positive outcomes' . . . [and] be 'relevant to the individual's age, abilities, and life goals.'" Id. at 570 (citing RSA 171-A:1, IV–V). The statute makes it the explicit "policy of this state . . . for persons with developmental disabilities and their families [to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention." RSA 171-A:1. The specific provision of RSA 171-A at issue reads as follows:

> For persons in school and already eligible for services from the area agencies, funds shall be allocated to them 90 days prior to their graduating or exiting the school system or earlier so that any new or modified services needed are available and provided upon such school graduation or exit.

RSA 171-A:1-a, I(a).

Count I of the Complaint seeks a declaration that Ms. Verrill is entitled to home and community-based services and that the Department's rationale for refusing such

services to Ms. Verrill is invalid and unlawful. (See Compl. ¶¶ 25, 27.) The Court previously found that "nothing in the language of RSA 171-A:1-a, I(a) bars the provision of services to otherwise eligible individuals on account of their enrollment in school." Verrill, No. 217-2020-CV-382 (Mar. 1, 2021), at 5. As such, the Department was generally misapplying RSA 171-A by denying services to eligible individuals due to their enrollment in school. Accordingly, the Department was also misapplying RSA 171-A to Ms. Verrill as an eligible individual enrolled in school. For the reasons discussed in its previous Order regarding Count II of the Complaint, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. Thus, Ms. Verrill's request for declaratory judgment in Count I is GRANTED.

Count III - Permanent Injunctive Relief

Count III of the Complaint seeks permanent injunctive relief ordering that the Department may not continue to deny Ms. Verrill services because she is still in school. (See Compl. ¶ 39.) The Court "has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm." Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Pike v. Deutsche Bank Nat'l Tr. Co., 168 N.H. 40, 45 (2015). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law, and the party seeking an injunction is likely to succeed on the merits." Id. The Court "retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id.

Here, the Department has represented to the Court that it intends to comply with the Court's declaration that the Department cannot deny home and community-based services to Ms. Verrill under RSA 171-A due to school enrollment. (See Def. Mem. Remaining Issues And Req. Stay at 1–2.) Accordingly, the Court expects the Department to render appropriate home and community-based services to Ms. Verrill as soon as practicable after issuance of this Order. As such, Ms. Verrill is not facing immediate danger of irreparable harm if the Court does not issue the requested injunction. Thus, Ms. Verrill's request for injunctive relief is DENIED. However, the Court may re-open the case and reconsider injunctive relief should the Department fail to live up to its representations.

Count IV - Attorney's Fees

Count IV of the Complaint alleges that because a declaration that the Department's practice of denying services to individuals due to their enrollment in school is unlawful substantially benefits all individuals who are still enrolled in school, and who need home and community-based services, an award of attorney's fees is justified. (Compl. ¶¶ 44–45.) "Although each party to a lawsuit normally bears the expense of its own attorney's fees, there are judicially-created and statutory exceptions to this rule." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010). One such judicially-created exception is the "substantial benefit" theory. Id. "Under the 'substantial benefit' theory . . . attorney's fees may be awarded when a litigant's action confers a 'substantial benefit' upon the general public." Id.

The Court finds that Ms. Verrill's successful action confers a substantial benefit upon the general public. By obtaining a declaratory judgment that the Department's

practice of denying services to eligible individuals is unlawful, the public is directly benefited. Eligible individuals enrolled in school will now be able to properly receive appropriate services as contemplated by RSA 171-A. In particular, the explicit policy that "persons with developmental disabilities and their families [are to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention" is served due to Ms. Verrill's successful action. RSA 171-A:1.

Accordingly, the Department shall pay Ms. Verrill's reasonable attorney's fees to be established after appeal, or after this Order becomes final, whichever occurs first.

Request for Stay

The Department intends to appeal this Court's orders to the New Hampshire Supreme Court. As such, the Department requests that the Court stay its orders and judgment while the Department's appeal is pending. The Department argues that absent a stay, it will be in an untenable position of determining how to provide services that are not currently funded but that would not be required if successful in its appeal. (See Def. Mem. Remaining Issues And Req. Stay at 16.) The Court does not find this to be a valid justification to stay its rulings. As discussed above, the Court's rulings confer a substantial benefit to others similarly situated to Ms. Verrill. Granting the Department's request to stay would deny these important benefits to the public. As such, the importance of the Court's rulings on this matter to Ms. Verrill, and others similarly situated, justifies denying the Department's request to stay. Accordingly, the Department's request to stay is DENIED.

In sum, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. As such, Ms. Verrill's request for declaratory judgment is GRANTED. The Court finds that Ms. Verrill's action confers a substantial benefit upon the general public, and thus her request for attorney's fees is GRANTED. In light of the Department's representation that it will comply with this Court's orders, Ms. Verrill is not facing immediate danger of irreparable harm, and thus her request for injunctive relief is DENIED. Finally, because there are no valid justifications for staying the Court's rulings, and because a stay would potentially deny Ms. Verrill services that she, and others similarly situated, are lawfully entitled to, the Department's request to stay is DENIED.

III. Conclusion

For the foregoing reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, and her request for injunctive relief is DENIED. The Department's request to stay is DENIED.

SO ORDERED.

10/26/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/28/2021

EXHIBIT F

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

No. 213-2019-CV-00069

ORDER ON STATE'S POST-TRIAL MOTIONS

In this case, the plaintiffs challenge the constitutionality of RSA 198:40-a, II(a), contending that "local school districts require substantially more" base adequacy aid funding to "deliver the opportunity for a constitutionally adequate education . . . ." Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 157 (2021) ("ConVal"). Following a three-week bench trial, the Court granted the plaintiffs' request for a declaratory judgment deeming RSA 198:40-a, II(a), unconstitutional. See Doc. 246 (Nov. 20, 2023 Order on the Merits (the "Base Adequacy Aid Order")) at 56. In addition, the Court partially granted the plaintiffs' request for injunctive relief, establishing a conservative threshold that base adequacy aid funding must exceed. See id. The Court also awarded the plaintiffs their reasonable attorney's fees. See id. The State now moves for partial reconsideration, see Doc. 247 at 1, and for a stay of the Base Adequacy Aid Order until one full legislative cycle has passed post appeal. See Doc. 248; see also Doc. 247 at 1 (seeking same outcome via delayed effective date of Base Adequacy Aid Order). Id. The plaintiffs object to each of the State's requests. See Doc. 250 (Obj. Doc. 247); Doc. 254 (Obj. Doc. 248). After review, the Court finds and rules as follows.

Background

Part II, Article 83 of the New Hampshire Constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) ("Claremont I"). To comply with that duty, the State must "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) ("Londonderry I") (quotation omitted). Pursuant to RSA 193-E:2-a, an adequate education requires instruction in:

> English/language arts and reading; mathematics; science; social studies, including civics, government, economics, geography, history, and Holocaust and genocide education; arts education, including music and visual arts; world languages; health and wellness education . . . ; physical education; engineering and technologies including technology applications; personal finance literacy, and computer science.

See RSA 193-E:2-a, I (cleaned up). RSA 193-E:2-a, IV(a), explains that the "minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education."

To fund this opportunity, the legislature enacted RSA 198:40-a, which provides for funding via "base adequacy aid" and "differentiated aid." RSA 198:40-a, II. While school districts receive base adequacy aid for each pupil in the average daily membership in residence, they only receive differentiated aid for pupils who meet certain statutory criteria. Id.[1] Effective July 1, 2023, the legislature amended RSA 198:40-a to provide for base adequacy aid of $4,100. See RSA 198:40-a, II(a) (2023).

[1] Prior to July 1, 2023, differentiated aid criteria included eligibility for free or reduced-price meals, English language learner status, receipt of special education services, and certain below-proficient test scores. See Laws 2023, 79:150. The 2023 amendment eliminated the test score criterion. See id.

Before this amendment took effect, the statute set base adequacy aid at $3,561.27 per pupil, with that amount adjusted each biennium to reflect changes in the federal Consumer Price Index. See RSA 198:40-a, II(a) (2022). For the 2022 fiscal year, the adjusted base adequacy aid amount awarded under the then-existing version of the statute was just under $3,800. See Joint Ex. 248 (Doc. 83 – Pls.' 3rd Am. Compl.) ¶ 26.

Procedural History

The plaintiffs filed this action on March 13, 2019, seeking declaratory and injunctive relief in connection with their claim that existing base adequacy aid funding levels are constitutionally insufficient. See Doc. 1 (Compl.). Shortly thereafter, the State moved to dismiss, arguing (as relevant here) that the plaintiffs' requested relief would be "incompatible with separation-of-powers principles." See Doc. 15 at 22. The State reiterated these arguments in connection with the parties' April 2019 cross-motions for summary judgment. See Doc. 37 (State's Obj. Pls.' 1st Mot. Summ. J.) at 13–14; see also Doc. 26 (State's 1st Mot. Summ. J.).

By Order dated June 5, 2019, the Court denied portions of the State's motion to dismiss, including that portion seeking dismissal on separation of powers grounds. See Doc. 51. In addition, the Court denied the State's first motion for summary judgment, and granted portions of the plaintiffs' cross-motion. See id. Thereafter, the State moved for reconsideration, arguing that the Court "fail[ed] to pay appropriate deference to" the legislature and "violated the separation-of-powers doctrine[.]" See Doc. 54 at 16; see also id. at 21 (arguing Court "fashioned standards that result in the judiciary serving as a super-legislature" in connection with school funding review).

In September of 2019, the parties filed cross-appeals of the June 5, 2019 Order. See Docs. 66, 68 (Notices of Appeal). As relevant here, the State's Notice of Appeal questioned "[w]hether the trial court erred in denying the . . . motion to dismiss." See Doc. 66 at 3. Upon review, the ConVal court affirmed this Court's denial "of the State's motion to dismiss for failure to state a claim . . . ." 174 N.H. at 156. Notably, however, the ConVal court concluded that this Court erred in partially granting the plaintiffs' summary judgment motion, determining questions of fact precluded the entry of summary judgment. See id. at 166. In vacating this aspect of the June 5, 2019 Order and remanding the matter for trial, the ConVal court explained that to "address the plaintiffs' costing argument," this Court would need to determine "what is required to deliver an adequate education as defined in the statute." Id. at 166–67.

Following remand, the parties filed another round of cross-motions for summary judgment. See Doc. 122 (State's 2nd Mot. Summ. J.); Doc. 126 (Pls.' 2nd Mot. Summ. J.). Citing the ConVal court's observation that the reliability of and weight to be afforded certain data were necessarily trial determinations, the Court denied those motions. See Doc. 194 (March 20, 2023 Order) at 10 (citing ConVal, 174 N.H. at 167, n.1). In response to the plaintiffs' renewed request for injunctive relief, see Doc. 126 ¶ 1, the Court explained that to obtain such relief, the plaintiffs would need to convince the Court it has the requisite "constitutional authority[.]" See Doc. 194 at 12. Accordingly, shortly before the April 2023 bench trial, the plaintiffs submitted a supplemental memorandum addressing that issue. See Doc. 230.

After the three-week bench trial concluded, the State submitted a memorandum outlining its position as to the separation of powers issue. See Doc. 244. In that filing,

the State argued that "a judicial determination of the exact per-pupil amount of funding necessary to provide for base adequacy would infringe the constitutionally committed responsibilities of the political branches and embroil the courts in weighty policy decisions belonging to the people's representatives." Id. at 1; see also id. at 2 (invoking Part I, Article 37 of New Hampshire Constitution); see also Doc. 243 (State's Prop. Findings & Conclusions) ¶ 185 (asserting "this is not a situation that warrants the Court imposing its own" base adequacy aid figure). The State further argued that "Part II, Article 83 plainly commits the duty to 'cherish' education to the executive and legislative branches," and thus, in the State's view, injunctive relief defining the cost of providing the opportunity for a constitutionally adequate education would be improper. See Doc. 244 at 3; Doc. 242 (State's Tr. Mem.) at 36–39 (raising similar arguments and asserting plaintiffs' injunctive relief claim is nonjusticiable).

In issuing the Base Adequacy Aid Order, the Court carefully considered and responded to the State's separation of powers concerns. See Doc. 246 at 42–44. Specifically, the Court noted that prior to trial, the Court was resistant to the plaintiffs' request for an affirmative determination as to the necessary level of base adequacy aid funding precisely because of the weighty separation of powers concerns implicated here. Id. at 42. The Court further explained that because the Court remained concerned about those issues, the Court "agree[d] with the State that 'a judicial determination of the exact per-pupil amount of funding necessary to provide for base adequacy would infringe the constitutionally committed responsibilities of the political branches and embroil the courts in weighty policy decisions[.]'" Id. (citation omitted).

The Court explained, however, that given the relevant history—including the fact that after hiring an expert to analyze school funding, the legislature set base adequacy aid at less than half of its own expert's recommended funding level—and the significance of the school funding issue, it would be inappropriate for the Court to simply strike the existing base adequacy aid funding level. See id. at 43–44 (noting relevant history "calls into question whether the politics of this issue are impeding" fulfillment of State's constitutional obligations). Rather, in satisfaction of the judiciary's "responsibility to ensure that constitutional rights not be hollowed out," the Court concluded that a further judicial remedy was "not only appropriate but essential" here. See id. (citations omitted). Accordingly, the Court established a highly conservative base adequacy aid threshold intended to leave space for the legislature to fulfill its function, while ensuring that after devoting years to this litigation and ultimately proving that the existing level of base adequacy aid was woefully inadequate, the plaintiffs would obtain meaningful relief. See id. at 44.

Analysis

I. State's Request For Reconsideration of Base Adequacy Aid Threshold

The State now moves for reconsideration as to the above-described base adequacy aid threshold. See Doc. 247. In support of that request, the State renews its separation of powers argument, contending the threshold "materially impairs" the "lawmaking function by mandating the General Court solve a complex policy issue in a particularized way." See id. ¶ 14 (suggesting legislature might wish to modify definition of adequate education, institute new funding scheme, or clarify that other State funding counts toward base adequacy aid, and arguing Base Adequacy Aid Order precludes

such actions). In addition, the State contends that the Base Adequacy Aid Order "runs afoul of . . . the Speech and Debate Clause" because individual legislators may fear civil contempt proceedings if they support legislation that is inconsistent with the Base Adequacy Aid Order. See id. ¶¶ 20–25.

Upon review, the Court is not persuaded by the State's arguments. As explained above, the Court carefully considered the relevant separation of powers concerns when issuing the Base Adequacy Aid Order. Ultimately, the Court concluded that those concerns must be balanced against the reality that the right to "a constitutionally adequate public education is a fundamental right." See Claremont Sch. Dist. v. Governor, 142 N.H. 462, 473 (1997) ("Claremont II"). In addition, given the relevant history, the Court felt compelled to establish a threshold level of base adequacy aid funding to avoid further unnecessary "delay in achieving a constitutional system[.]" See Claremont III, 143 N.H. 154, 158 (1998) ("Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable."). To the extent each of the separation of powers arguments raised in the State's motion for reconsideration are properly before the Court at this juncture, but see infra at 3–6 (outlining relevant procedural history), those arguments do not undermine the Court's conclusions on these fronts.

Notwithstanding the foregoing, given the nature of the State's arguments, some clarification is warranted. In the Base Adequacy Aid Order, the Court recognized that the legislature recently considered creative solutions to education funding. See Doc. 246 at 53 n. 27 (noting in 2023, legislature "considered but ultimately rejected an education funding model that would have eliminated base adequacy and differentiated aid, opting instead to fund public education at half of certain statewide average

expenditures"). By setting a base adequacy aid funding threshold, the Court did not intend to suggest that the legislature cannot enact meaningful changes to the education funding scheme. Rather, the Court's intention was to ensure that if the legislature maintains the existing scheme in substantial part, the legislature will not repeat the constitutional violations of the past by funding base adequacy aid at a level the plaintiffs have already proven to be unconstitutional.

In other words, the threshold set forth in the Base Adequacy Aid Order does not prohibit the legislature from meaningfully altering the education funding scheme, so long as such alterations provide New Hampshire children with the opportunity for a constitutionally adequate public education. Instead, the threshold establishes a minimum level of per-pupil funding—exclusive of the additional costs attributable to the heightened needs of students who qualify for differentiated aid—under the existing funding model. See id. at 44–51 (explaining why conservative calculations exclude additional costs attributable to students who qualify for differentiated aid).

To the extent the legislature considers or enacts legislation that funds education at a level below the aforementioned threshold, the Court further clarifies that the Base Adequacy Aid Order must not be construed as exposing legislators to civil contempt proceedings. Cf. MacDonald v. Jacobs, 171 N.H. 668, 679 (2019) (explaining injunctive relief is equitable in nature, and Superior Court has "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation"). Instead, the threshold merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action. If the legislature's response to the Base Adequacy Aid Order falls short of the threshold, an aggrieved party may

seek prompt declaratory relief without need for further, protracted litigation. Given the historical difficulties in the school funding context, and in recognition of the plaintiffs' substantial investment of time and resources in litigating this action, the Court maintains the view that establishing a clear guideline by which future legislative action can readily be measured is not only permissible, but essential.[2]

Consistent with the foregoing, the State's motion for reconsideration is **DENIED** vis-à-vis the injunctive relief set forth in the Base Adequacy Aid Order and clarified here.

II. State's Request For Stay or Deferral of Base Adequacy Aid Order

The State also moves for a stay of the Base Adequacy Aid Order until one full legislation cycle has passed post appeal. See Doc. 248. Alternatively, the State urges the Court to defer the effective date of the Base Adequacy Aid Order for the same duration. See Doc. 247 at 1. In support of these requests, the State contends that because the Court has declared RSA 198:40-a, II(a), unconstitutional, it is unclear "whether the Executive Branch may continue to make adequacy payments to schools while" the Base Adequacy Aid Order "remains subject to . . . appeal[.]" Doc. 247 ¶ 26.

The Court is unpersuaded. To the extent necessary, the Court clarifies that during the appellate period and pending further legislative action to address this issue, the State not only may continue to provide education funding to public school districts, the State is constitutionally bound to do so. See Claremont II, 142 N.H. at 473

[2] The Court sincerely hopes that the legislature will respond to the Base Adequacy Aid Order in a manner that honors and effects the State's constitutional school funding obligations. Yet, if the Court simply struck the existing funding level without establishing a threshold, the legislature might inadvertently increase funding to a level the plaintiffs have already proven to be unconstitutional. In the Court's view, additional relief is warranted to protect the plaintiffs from such an outcome. The State's suggestion that such protections are not necessary brings to mind the fable of the Wolves and the Sheep. See The Æsop for Children, The Wolves and The Sheep, available online from the Library of Congress at: https://www.read.gov/aesop/144.html (last accessed February 16, 2024).

(explaining right to "constitutionally adequate public education is a fundamental right"). Within that window, however, the Court concludes that it would be inappropriate to continue funding base adequacy aid at the $4,100 level plaintiffs have proven to be woefully inadequate, and thus, unconstitutional. In reaching this conclusion, the Court observes that although the issues implicated here may seem like a simple matter of dollars and cents to some, the reality is that with each passing school year, another class of public school children is permanently deprived of the fundamental right to a constitutionally adequate public education. See Claremont II, 142 N.H. at 473. In light of this reality, and given the overwhelming evidence the plaintiffs presented at trial, the Court cannot endorse the State's request to perpetuate the egregious underfunding of public education pending appeal.

Rather, pending resolution of any appeal or further legislative action, the Court **DIRECTS** the State to make base adequacy aid payments equal to the conservative $7,356.01 threshold set forth in the Base Adequacy Aid Order. See Doc. 246 at 56. The Court notes that this funding level is far less than the plaintiffs requested and, as explained in the Base Adequacy Aid Order, the plaintiffs have proven that this funding level is also constitutionally insufficient. See id. at 54; see also Doc. 245 (Pls.' Tr. Mem.) at 33 (seeking base adequacy aid funding of $9,900 plus actual transportation costs). As a result, temporarily funding base adequacy aid at the threshold level will still result in a regrettable "delay in achieving a constitutional system.[.]" See Claremont III, 143 N.H. at 158. Yet, under the "extraordinary circumstances" presented here, the Court concludes that this compromise strikes an appropriate balance between the

parties' competing interests while the State pursues appellate relief or further legislative action. See MacDonald, 171 N.H. at 679.

Consistent with the foregoing, the State's requests to stay or defer the effective date of the Base Adequacy Aid Order are each **DENIED**.

III. State's Request For Reconsideration of Attorney's Fee Award

Lastly, the State moves for reconsideration with respect to the Court's award of the plaintiffs' reasonable attorney's fees. See Doc. 247 ¶¶ 31–34. Specifically, the State contends that it is "premature to address the issues of attorney's fees in any detail" because the plaintiffs may not be entitled to such fees if the State prevails on appeal, and the plaintiffs may incur additional fees during the appellate process. See id.

Upon review, the Court concludes that the interests of justice are best served by promptly litigating the reasonableness of the attorney's fees the plaintiffs have incurred to date. See Super. Ct. R. 1(b) (providing that "rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action"). When determining the reasonableness of attorney's fee requests, the Court considers, among other things, the "difficulty of the litigation, the attorney's standing and the skill employed, the time devoted, . . . the extent to which the attorney prevailed, and the benefit thereby bestowed on his clients." In re Metevier, 146 N.H. 62, 64 (2001) (citation omitted). As a result, the Court is better positioned to determine the reasonableness of a fee request close in time to the events underlying that request, including (as is true here) counsel's performance during a lengthy trial. Cf. City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502, 508 (2016) (explaining statutes of limitations "reflect the fact that it becomes more difficult . . . to try claims as evidence

disappears and memories fade with the passage of time" (citation omitted)). For this reason, the State's motion for reconsideration is **DENIED** as it relates to the issue of attorney's fees. The Court will entertain a motion to stay payment of the plaintiffs' attorney's fees pending appeal, but the Court concludes that determining the reasonableness of the plaintiffs' fee request is best performed in the immediate future.

While the State's motion for reconsideration remained pending, the State understandably did not file a substantive response to the plaintiffs' affidavit of fees. See Doc. 249 (Pls.' Dec. 15, 2023 Aff. Fees); see also Doc. 252 (State's Resp. Doc. 249). Rather, citing the level of detail included in the plaintiffs' affidavit, the State requested an additional 60 days in which to file a substantive response in the event that the Court denied the relevant portion of the State's motion for reconsideration. See Doc. 249 ¶ 11. The plaintiffs have not objected to this reasonable request for additional time. Accordingly, the State's request for additional time is **GRANTED**.

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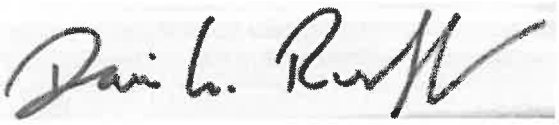
Conclusion

Consistent with and subject to the clarifications outlined above, the State's motion for partial reconsideration of the rulings set forth in the Base Adequacy Aid Order is **DENIED**. See Doc. 247. The State's motion to stay or defer the relief granted within the Base Adequacy Aid Order is also **DENIED**. See Doc. 248. As explained above, pending resolution of any appeal or further legislative action, the Court **DIRECTS** the State to make base adequacy aid payments in an amount equal to the $7,356.01 conservative threshold established in the Base Adequacy Aid Order. Finally, the State's request for additional time in which to respond to the plaintiffs' attorney's fee affidavit is **GRANTED**. See Doc. 252. The State shall file a substantive response **within sixty (60) days** of the date on the Notice of Decision accompanying this Order.

SO ORDERED.

Date: February 20, 2024



Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 02/20/2024