

GRAFTON, SS.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Case No. 215-2022-CV-00167

Steven Rand, et al.,

v.

The State of New Hampshire

**PLAINTIFFS' REPLY TO THE STATE OF NEW HAMPSHIRE'S OBJECTION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

In the State of New Hampshire's (the "State") *Objection to Plaintiffs' Motion for a Preliminary Injunction* ("Obj."), the State still does not dispute the relevant facts. The current Statewide Education Property Tax (the "SWEPT") as administered permits towns to either (1) retain revenue generated in excess of adequacy or (2) set a negative local education tax rate to offset the SWEPT rate. Both of these mechanisms have been expressly rejected as unconstitutional by the New Hampshire Supreme Court. Unable to dispute the fact that the SWEPT is administered in a way that destroys uniformity in effective tax rates, the State asserts that even if Plaintiffs have a meritorious claim, this Court should deny relief for other reasons. The State's arguments are without merit.

First, the State argues that Plaintiffs' lack standing to obtain an injunction. However, the State has previously litigated this issue and lost. *See Claremont Sch. Dist. v. Governor (Claremont I)*, 138 N.H. 183, 184, 192 (1993); *Claremont Sch. Dist. v. Governor (Claremont II)*, 142 N.H. 462, 465 (1997). Further, Plaintiffs also have taxpayer standing under Part I, Article 8 of the New Hampshire Constitution because Plaintiffs are challenging specific actions of the Department of

Revenue Administration (“DRA”) in administering education taxes, which distinguishes Plaintiffs from the broad attack condemned for taxpayer standing in *Carrigan v. New Hampshire Department of Health and Human Services*, 174 N.H. 362 (2021).

Second, the State argues that Plaintiffs will not face irreparable harm as the statutory abatement process would provide an adequate and available remedy. However, the abatement process does not provide a remedy for systemic legal issues including unconstitutional taxes. *Gail C. Nadeau 1994 Trust v. City of Portsmouth*, 155 N.H. 810, 810 (2007) (hereinafter “Nadeau”).

Third, the State argues this Court should not enjoin SWEPT as it would prevent the State from distributing total education grants and imperil all school districts in the State. This Court should call the State’s bluff. If the conduct of DRA in permitting property wealthy communities to retain excess funds is enjoined, the solution is simple—the DRA commissioner can require municipalities to remit the excess funds as was required prior to 2011 and not allow towns to offset SWEPT with a negative-tax rate. Nothing in the current versions of R.S.A. 76:3 and 76:8 prevent this. The same approach is also available for negative rates, i.e. the State could discontinue the practice.

ARGUMENT

1. PLAINTIFFS HAVE DEMONSTRATED THEY HAVE STANDING TO OBTAIN AN INJUNCTION IN RELATION TO THE SWEPT

The State argues that Plaintiffs are not likely to succeed as they lack standing to enjoin the SWEPT. The State’s argument is without merit. Plaintiffs have standing to challenge the SWEPT under multiple legal doctrines.¹

¹ Also, as the State concedes, the question of whether standing is necessary for a preliminary injunction has not been addressed by the New Hampshire Supreme Court. The State cites no New Hampshire authority for this proposition. Obj. at 6.

A. *Claremont I* and *II* confer standing to challenge education tax schemes.

The State has already litigated and lost the issue as to whether taxpayers have legal standing to challenge education funding schemes. *See Claremont I*, 138 N.H. at 184, 192; *Claremont II*, 142 N.H. at 465. In *Claremont I*, taxpayer plaintiffs filed a petition for declaratory judgment alleging, among other claims, “that the heavy reliance on property taxes to finance New Hampshire public schools results in an unreasonable, disproportionate, and burdensome tax in violation of Part II, article 5 of the State Constitution.” *Claremont I*, 138 N.H. at 185 (hereinafter “Count Six”). Against challenges to the *Claremont* plaintiffs’ entire suit, the court allowed the tax claims to proceed. *Claremont I*, 138 N.H. at 186 (“With respect to [C]ount [S]ix, because petitioners have not had an opportunity to develop a record in support of their claim, we remand that count to the trial court for its further consideration.”). Plaintiffs’ claims here are identical to Count Six. The State argues that *Claremont I* does not grant taxpayer standing to challenge SWEPT because the *Claremont* court specified that Plaintiffs had standing as “[t]he right to an adequate education mandated by the constitution . . . is a right held by the public to enforce the State’s duty [and] [a]ny citizen has standing to enforce this right.” *Obj.* at 10 (quoting *Claremont I*, 138 N.H. at 192). Thus, the State argues, *Claremont I* only confers standing under Part II, Article 83 (right to an adequate education) and not Part II, Article 5 (disproportionate taxes).

However, the State’s challenge to Plaintiffs’ standing here ignores the fact that the *Claremont I* court did not address Count Six until *Claremont II*. *Claremont I*, 138 N.H. at 186. In *Claremont II*, the Court ruled in favor of petitioner taxpayers determining that to the extent property taxes were used to fulfill the state’s duty, under Article 83, to provide a constitutionally adequate education, such taxes must conform to Article 5’s requirements and “be administered in a manner that is equal in valuation and uniform in rate throughout the state.” *Claremont II*, 142 N.H. at 471. Accordingly, *Claremont II* connects Part II, Article 5 and Part II, Article 83 of the

Constitution to confer standing to taxpayers to challenge the funding scheme used by the State to fund an adequate education. And there is no dispute that the SWEPT is used by the State to help fulfill its duty to provide a constitutionally adequate education. *State's Answer to the Plaintiff's First Amended Complaint* ("Answer") ¶ 19. Since *Claremont I*, the New Hampshire Supreme Court has issued multiple decisions in favor of taxpayer plaintiffs determining that the State's education funding scheme is unconstitutional under Part II, Article 5. See *Claremont I*, 138 N.H. 183; *Claremont II*, 142 N.H. 462; *Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In)*, 144 N.H. 210 (1999). To hold that Plaintiffs in this case lack standing would contradict the judiciary's demonstrated effort to allow taxpayers to enforce their constitutional rights. *Id.*

B. Plaintiffs have taxpayer standing under Part I, Article 8 of the New Hampshire Constitution as they challenge specific components of SWEPT.

Even if *Claremont I* and *II* did not confer standing to taxpayers, which they did, Plaintiffs have standing under Part I, Article 8. The State argues that, under Part I, Article 8, taxpayer standing is only available for challenges to a specific spending action or spending approval. The State contends that Plaintiffs seek to enjoin the SWEPT tax in its entirety, and the tax itself is not a "spending action or spending approval within the meaning of Part I, Article 8." Obj. at 10. The State mischaracterizes Plaintiffs' injunction and its application under the law.

First, the Plaintiffs challenge two specific components of the administration of the SWEPT: the DRA's approval of negative tax-rates to offset the SWEPT and the retention of excess SWEPT generated funds.² Contrary to the State's claim that *Carrigan* should result in denial of the motion, *Carrigan* supports a finding that Plaintiffs have standing. In *Carrigan*, a taxpayer requested a declaration that the New Hampshire Department of Health and Human Services failed to meet its

² Plaintiffs also aver that to the extent the DRA commissioner allows municipalities to retain the excess SWEPT generated, the DRA commissioner separately is in violation of the SWEPT statute as the State is not collecting the total amount of SWEPT required by the statute.

statutory and constitutional duties as a result of “‘irresponsible’ spending decisions.” *Carrigan*, 174 N.H. at 364-65. The Court determined that Part I, Article 8 confers standing to challenge a specific governmental spending action or approval of spending, not a governmental body’s comprehensive response to a complex issue, such as child welfare, which encompasses many decisions to spend, approve to spend, or not spend or approve to spend. *See id.* at 370.

Unlike plaintiffs in *Carrigan*, Plaintiffs here challenge specific DRA administration actions and approvals. The decisions to allow municipalities to either retain the excess generated by SWEPT or to set negative tax rates to offset SWEPT directly impact the effective tax rate of SWEPT and are specific action for which Plaintiffs have standing to challenge SWEPT under Part I, Article 8.

The State further argues that Part I, Article 8 only confers standing for taxpayers to obtain declaratory, not injunctive relief. *Obj.* at 9; *see* N.H. Const. pt. 1, art. 8 (providing that any “individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State . . . has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision”). The State’s distinction between injunction and declaratory judgment is tenuous at best. Plaintiffs request that this Court grant an injunction as the SWEPT as currently administered is unconstitutional. The practical distinction between a declaratory judgment and injunctive relief is meaningless. If this Court so chooses to declare the SWEPT unconstitutional (as opposed to granting an injunction), the State cannot continue to legally administer the SWEPT with these two mechanisms in place.

C. Plaintiffs have demonstrated a concrete and personal injury as a result of the State’s unconstitutional tax scheme.

Next, the State argues that Plaintiffs lack standing because they have not demonstrated a cognizable injury. *Obj.* at 7 (citing *Duncan v. State*, 166 N.H. 630, 645-47 (2014)). However, as

discussed above, Plaintiffs have standing under *Claremont I, II* and Part I, Article 8, neither of which require Plaintiffs to demonstrate a separate cognizable injury.³ Moreover, Plaintiffs have a right to only pay taxes that meet the standards of Part II, Art. 5 of the New Hampshire Constitution. Plaintiffs' rights are impaired or prejudiced as they are now paying a tax that is not uniform in effective rate across the reach of the taxing district and from which some similarly situated taxpayers are given complete, but illegal exemption. See Exhibit A (Affidavit of Douglas Hall, Tables 1-4); see also *Duncan*, 166 N.H. at 638 (“[A] party questioning the validity of a law must show that ‘some right of his is impaired or prejudiced’ thereby.”) (quoting *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727, 730 (2010) (omitting internal quotes in *Baer* and emphasis in *Duncan*)).

Not only do Plaintiffs suffer injury due to the violation of their constitutional rights, there are also practical implications based on the legislature's decision to make the SWEPT unconstitutional. The State argues that any injury alleged by Plaintiffs is speculative. This is not true. The State overlooks the fact that if the SWEPT is held unconstitutional to the extent it allows municipalities to retain excess funds, the State must make a choice — either require municipalities to remit the excess back to the Education Trust Fund or reduce the value of the SWEPT to eliminate the generation of excess. Both would cure Plaintiffs' constitutional injury, but the latter would also reduce Plaintiffs' tax burdens. Indeed, the State itself concedes that the one-year reduction from \$363 million to \$263 million makes the harm Plaintiffs suffered “less severe than it was in previous tax years.” Obj. at 21. Accordingly, if the State does not wish to collect excess funds (as

³ Notably, Part I, Article 8 was amended in 2018 in direct response to *Duncan*. As amended, Part I, Article 8 provides: “[A]ny individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. ***In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.***” (emphasis added). Thus, as Plaintiffs' have taxpayer standing, they do not need to show separate injury.

it currently does not), its only solution would be to lower the total amount of SWEPT which will reduce the tax burden on Plaintiff taxpayers.

In any event, regardless of any impact on Plaintiffs' overall tax amount, the State's failure to collect the excess generated and approval of negative tax-rates effectively compels taxpayers from property-poor districts to pay a higher effective tax rate than their peers in property-wealthy towns — a concrete harm that has been repeatedly recognized by courts in New Hampshire. *See Claremont II*, 142 N.H. at 470-472; *see also Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 900 (1998); *Claremont (Statewide Property Tax Phase-In)*, 144 N.H. at 213; *Londonderry Sch. Dist. v. State*, 154 N.H. 153 (2006).⁴

Under the State's purported arguments, no Plaintiff would ever have standing to challenge an unconstitutional state education tax. This cannot be the case.

2. THE NEW HAMPSHIRE COURTS HAVE ALREADY HELD THAT DISPROPORTIONATE TAXES ARE ILLEGAL REGARDLESS OF WHETHER THEY ARE ASSESSED ON THE "FRONT END" OR "BACK END"

The State's argument that Plaintiffs' do not have a claim because they are allegedly challenging the distribution of the SWEPT funds once collected rather than its taxation on the front end is a distinction without a difference.⁵ The State argues that SWEPT is different than the abatement deemed unconstitutional in *Opinion of the Justices* because there, the abatement was subtracted from the calculation of the municipality's tax on the front end. However, the Court

⁴ The State repeatedly emphasizes that "only a small number of municipalities" retain the excess generated by the SWEPT and a "smaller number of rural districts," have set negative local tax rates as a result of the excess. The number of towns benefitting from the unconstitutional tax scheme is not at issue here. Moreover, to the extent there are only a small number of municipalities affected, it furthers the evidence that the State's burden to remedy the situation is minimal.

⁵ Plaintiffs also disagree with the State's characterization that Plaintiffs are allegedly challenging the distribution of revenues generated by the SWEPT and not SWEPT itself as a revenue-raising mechanism. To be clear, Plaintiffs are challenging the DRA's administration of SWEPT to the extent it violates Part II, Article 5.

explained that its conclusion would remain the same regardless of whether the abatement is applied *prior* to the taxpayer receiving a tax bill or *via reimbursement after* taxes were collected. *Op. of the Justices*, 142 N.H. at 899 (“We note that even if the bill provided for the actual collection of revenue raised through the uniform State education tax, and thereafter reimbursed certain qualifying taxpayers pursuant to the special abatement, our conclusions herein would remain unchanged.”).

The Court applied this logic in *Claremont (Statewide Education Tax Phase-In)* when it determined that “[t]he practical effect of this phase-in is that in fifty “property rich” towns across the State, the full rate of \$ 6.60 per thousand is imposed gradually over five years, while taxpayers in the remaining towns pay the full rate immediately.” 144 N.H. at 213. The SWEPT as currently administered has the same practical effect and the State has not contested otherwise.

Lastly, as the State concedes, the trial court in *Londonderry* concluded that allowing municipalities to retain excess funds generated by the state education tax violated Part II, Article 5. Obj. at 17; *see also Londonderry School District SAU #12 v. State*, No. 05-E-0406, 2006 WL 563120, at *14-15 (N.H. Super. Mar. 8, 2006). However, the State argues that the Court should ignore *Londonderry* because the Supreme Court did not review this issue. As described further in the *Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction* (“Mem.”), the Supreme Court did not reach this issue because it determined that the State, after fourteen years, had still failed to define an adequate education as mandated in *Claremont I*. Mem. at 17. By the time the case reached the Supreme Court a second time, the State had revised the taxing statute to expressly require that municipalities remit the excess funds—consistent with *Londonderry’s* mandate. *Id.* The State provides no legitimate basis as to why *Londonderry* is not the controlling law.

3. PLAINTIFFS FACE AN IMMEDIATE DANGER OF IRREPARABLE HARM AND LACK AN ADEQUATE REMEDY AT LAW

The State's argument that the abatement procedure under RSA 76:16 provides an adequate remedy at law is fundamentally flawed.⁶ First, as the State admits, the abatement procedure cannot provide Plaintiffs with full relief as Plaintiffs request a judicial determination that the SWEPT as currently administered violates Part II, Article 5. *See* Obj. at 19; *see also Perley v. Dolloff*, 60 N.H. 504, 505 (1881) (holding a complaint that an assessment was illegal as a whole was no ground for granting a petition for abatement). Nor can it provide a proper remedy under *Claremont II* and *Op. of the Justices* which require that *all taxpayers* regardless of whether there are any students in their municipality pay into statewide education adequacy.⁷ *See Claremont II*, 142 N.H. at 471 (holding it is unjust to tax real estate in one town at four times the rate that of a similar property in another town to fulfill the same purpose of meeting one of the State's constitutional obligations); *see also Op. of the Justices*, 142 N.H. at 901 (holding “. . .to the extent that a property tax is used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional . . . [w]hile good cause or just reasons [may exist] . . . public policy cannot undermine the constitutional requirement of proportionality”).

The abatement process is designed to resolve individualized issues of fact such as a change or dispute in the valuation of property that the tax is levied on. *See e.g., Soc'y Hill at Merrimack*

⁶ The abatement process is the only apparent solution offered in the State's Objection. The State does not directly address whether sovereign immunity would bar the Plaintiffs' claim against the State, which would result in irreparable harm.

⁷ The term “abate” means that a liability will be reduced or eliminated to some extent. *See* Abate, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/abate> (last visited Oct. 29, 2022) (defining “abate” to mean, inter alia, “to decrease in value or amount,” “to make less,” and “deduct, omit”); Abatement, Black's Law Dictionary (10th ed. 2009) (defining abate to mean, inter alia, “the act of lessening or moderating; diminution in amount or degree”). An abatement is therefore an inadequate remedy at law because it would not mandate that negative-tax setting municipalities pay their fair share of taxes. *Id.* If anything, it would require that all taxpayers SWEPT tax be abated to “zero” to comply with Part II, Article 5.

Condo. v. Town of Merrimack, 139 N.H. 253, 254-55 (1994) (to succeed in abatement plaintiffs “must show that ‘[their] assessment was disproportionately higher in relation to [their] true value than was the case as to other property in the [town]’”); *Appeal of Lakeshore Estates*, 130 N.H. 504, 505 (1988). It is not designed to resolve systemic legal issues of an unconstitutional tax. As held by this State’s Supreme Court, “a complaint that the assessment [is] illegal as a whole [is] no ground for granting a petition for abatement.” *Bretton Woods Co. v. Carroll*, 84 N.H. 428, 431 (1930) (quoted in *Appeal of City of Berlin*, 174 N.H. 733, 742 (2022)). Summarizing abatement case law, the New Hampshire Practice Series explains:

The assessment of an illegal tax or an illegal appropriation is a wrong committed against all of the taxpayers of the municipality. It should not be dealt with through an abatement, which is to resolve the individual complaint of one taxpayer. If the assessment is illegal or the expenditure is unauthorized, the litigation attacking it should benefit all and not just one taxpayer. The proper method for dealing with the assessment of an illegal tax or an improper expenditure is a petition for an injunction.

16 NH Prac. Series: Municipal Taxation & Road Law § 23.03.

Accordingly, New Hampshire courts decline to view relief from unconstitutional taxes as “an abatement because it does not limit tax relief to ‘persons aggrieved’ by the assessment of a tax.” *Claremont (Statewide Property Tax Phase-In)*, 144 N.H. at 213. *Nadeau* is demonstrative. In *Nadeau*, the trial court determined that an abatement was warranted as petitioners had demonstrated the tax at issue was “unconstitutionally disproportionate.” *Nadeau*, 155 N.H. at 810. The New Hampshire Supreme Court overruled the decision determining that “the superior court in an abatement proceeding shall make such order thereon as justice requires . . . [which requires] more than simply determining that a tax is unlawful because that would merely shift the plaintiff’s tax burden to other taxpayers.” *Nadeau*, 155 N.H. at 812 (citations omitted); *see also Bretton Woods*, 84 N.H. at 431. Likewise here, because the total amount to be raised by the SWEPT is a fixed amount, if a petitioner challenges the legality of the SWEPT individually through the

abatement, it would simply result in the burden of shifting that particular petitioners' tax burden to non-challenging taxpayers, which would perpetually render the SWEPT disproportionate and therefore unconstitutional. As the court made clear in *Nadeau*, an abatement would not be an available legal remedy. Thus, an injunction is the proper remedy.⁸

Lastly, the State argues that Plaintiffs' alleged delay in filing of this injunction demonstrates a lack of irreparable harm. Obj. at 21. This ignores the fact that Plaintiffs could not have filed this injunction any sooner. The data required to determine whether or not the SWEPT as currently administered at \$263 million is unconstitutional would not be available until June 2023. Plaintiffs initially believed that the reduction in the SWEPT from \$363 million to \$263 million for the 2022-2023 fiscal year solved the unconstitutionality of the tax for that fiscal year by eliminating any excess funds municipalities. The State, nor the Legislature, has provided any indication as to why the SWEPT was reduced other than to reduce the excess generated. However, upon receiving the State's Answer, Plaintiffs were alerted to the fact that this decrease in the SWEPT had, in fact, not eliminated the excess revenue in all towns. *See Answer* ¶ 21 ("The State admits that it provided school districts with adequacy aid in an amount of \$4,597.82 per pupil during the 2020-2021 school year and that in some communities the amount raised by the SWEPT

⁸ Notably, the State has cited to no legal authority demonstrating that abatement is an adequate vehicle to challenge constitutional taxes. As the State admits, however, there is precedent that an abatement procedure does not serve as an adequate mechanism to obtain an injunction or declaration that a particular tax is unconstitutional. Obj. at 19–20. As abatement is not an adequate remedy at law, the cases relied upon by the State are inapposite. *See Brooks v. Howland*, 58 N.H. 98, 100 (1887) (citations omitted) (arguing that that an injunction is unavailable because "[c]ourts of equity will not restrain the collection of a tax illegally assessed" where that party otherwise has "***a plain and adequate remedy at law.***") (emphasis added). *See also Perley*, 60 N.H. at 505 ("If the assessment as illegal, a plain and adequate remedy at law was afforded the plaintiff by a petition under the statute for an abatement of his tax.")

exceeds the total amount of adequacy aid provided to those communities.”⁹ It was this revelation that prompted Plaintiffs to seek injunctive relief by filing their Motion less than a month later.¹⁰

4. THE STATE WILL FACE NO HARM IF AN INJUNCTION IS ISSUED WHILE TAXPAYERS WILL HAVE NO ADEQUATE REMEDY AT LAW ABSENT AN INJUNCTION

The State argues that even if Plaintiffs demonstrate that the SWEPT as currently administered violates taxpayers’ constitutional rights, this Court should not issue a remedy because it would be too burdensome to fix. The fact that the State must bear a burden to remedy its intentional decision to impose an unconstitutional tax is not grounds to allow the State to circumvent its constitutional obligations. The State also mischaracterizes the potential burden resulting from an injunction.

The minimal harm that the State faces from the issuance of a preliminary injunction is self-inflicted. The New Hampshire Supreme Court’s previous rulings provided the State with ample notice that the SWEPT tax is unconstitutional. *See* Mem. at 20 (citing *Claremont II*, 142 N.H. 462 (1997); *Op. of the Justices*, 142 N.H. 892 (1998); *Londonderry*, 154 N.H. 153 (2006)). The State also received explicit notice of the SWEPT’s unconstitutionality in 2021. The House Ways and Means Committee (the “Committee”) reviewed a proposed amendment to the SWEPT that would require all municipalities to remit excess SWEPT funds to the education trust fund. Proponents of the bill urged the Committee to consider this proposal to remedy the same constitutional concerns that Plaintiffs now request this court to enjoin. Proponents further warned that “leaving current law unchanged — involves significant risk that the State could be exposed to material financial remedies arising from unconstitutional disproportionate taxation.” *See Exhibit B* (Letter from

⁹ The State’s Answer also confirmed that a small number of towns were still being permitted to set negative SWEPT tax rates. *See* Answer ¶ 35 (“The State admits that a small number of towns have set negative local education tax rates.”).

¹⁰ After plaintiffs’ counsel received this information, the parties’ counsel met and conferred numerous times during the next month to discuss Plaintiffs’ filing of an injunction.

William F. J. Ardinger to Rep. Norman Major, Chair, House Ways and Means Comm. (Sept. 15, 2021)). The amendment was not adopted. The State has made clear it will not revise the SWEPT absent intervention from this Court.

Further, the State's portrayal of an injunction's potential effect on the education funding system is overblown. The State argues that the issuance of an injunction would render the entire education funding system inoperable, leading to the shutdown of schools, a redo of State and municipality budgets, and a liquidation of the Education Trust Fund, and a massive shortfall from the State's general fund. Obj. at 22-25. This doomsday scenario is not based in reality. First, at issue here is approximately \$16 million in funding that is illegally withheld by certain municipalities — and does not factor into the State's budget or the Education Trust Fund. More importantly, the decision to allow municipalities to retain the excess generated funds or offset SWEPT with a negative tax-rate rests exclusively with the DRA commissioner. Nowhere in the statute does the SWEPT require these two mechanisms. Accordingly, an injunction would not render the SWEPT inoperable, let alone render RSA 198:41(the state education funding statute), an entirely separate statute, inoperable. The solution to the injunction is simple—the DRA commissioner can require municipalities to remit the excess funds as was required prior to 2011 and not allow towns to offset the SWEPT with a negative-tax rate.¹¹ This remedy would create no friction in the education funding system or have any impact on the State's budget but would ensure all parties rights are adequately protected pending a final resolution of this claim.

¹¹ An injunction is in the public interest because, as explained above and in the Motion, taxpayers would have no adequate remedy if they ultimately succeed on the merits. Additionally, the unconstitutionality of the SWEPT is one part of Plaintiffs' claims that the current education funding scheme violates Article II, Part 5. If Plaintiffs succeed on the merits of their claim, the State may be required to increase the amount of adequate education funding provided. This funding is pulled from the Education Trust Fund – the same fund where excess SWEPT should be remitted. If Plaintiffs succeed on the merits, the Trust Fund will still be short \$16 Million absent an injunction and there is no remedy that can address this shortfall.

Lastly, the State requests that if Plaintiffs succeed on the merits of their *Motion for Preliminary Injunction* that this Court eschew an injunction in favor of a declaratory judgment that would leave the SWEPT in place to give the legislature a time to transition to a new system. Obj. at 9-12. The State’s purported harm is not exclusive to the remedy of an injunction. If this case proceeds to a trial on the merits, the State would be facing the same issue next year. The New Hampshire Courts have provided deference to the State to resolve education adequacy and funding issues for over nearly thirty years. Each time, the State has ignored the Court’s mandate and when called upon to fix it, requested deference. The cycle must come to an end. The State cannot intentionally issue an unconstitutional tax in light of the New Hampshire Supreme Court’s express mandates hoping that new Plaintiffs do not challenge the system and anticipating the only repercussion is to go back to the drawing board a year later. As the Court forewarned in Londonderry, “[d]eference, however, has its limits.”¹² And that limit has been reached. It is time for the judiciary to fulfill its “responsibility to ensure that constitutional rights not be hollowed out[.]”¹³

¹² 154 N.H. at 163.

¹³ *Id.*; cf. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 438 (1968) (In determining whether deference to resolve constitutional issues is appropriate “it is relevant that this first step did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a ‘prompt and reasonable start.’ This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for ‘the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.’” (internal citations omitted)).

Dated: Concord, New Hampshire
October 31, 2022

Respectfully submitted,

/s/ Natalie J Laflamme

Natalie Laflamme, NH Bar No. 266204
Laflamme Law, PLLC
100 N. Main St, Suite 512
Concord, NH 03301
(603) 937-5434
natalie@laflammelaw.com

Andru Volinsky, NH Bar No. 2634
160 Law, PLLC
P.O. Box 1181, Concord, NH 03302
(603) 491-0376
andruvolinsky@gmail.com

John E. Tobin, Jr., NH Bar No. 2556
60 Stone Street
Concord, NH 03301
(603) 568-0735
jtobinjr@comcast.net

Gregory Little*
Education Law Center
60 Park Place
Suite 300
Newark, NJ 07102
(973) 624-1815
glittle@edlawcenter.org

Joshua D. Weedman
Michael-Anthony Jaoude
Morgan Brock-Smith*
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200

**pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply has been served upon the State of New Hampshire this 31st day of October 2022, by way of the court's electronic filing system.

/s/ Natalie Laflamme
Natalie Laflamme

EXHIBIT A

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

Steven Rand and Randvest, Inc.,

*Dr. Robert Gabrielli and the
Gabrielli Family Ltd. Partnership,*

Jessica Wheeler Russell and Adam Russell,

James Lewis, and

John Lunn

Plaintiffs,

v.

The State of New Hampshire,

Defendant.

Affidavit of Douglas Hall

Now comes, Douglas Hall, under the pains and penalties of perjury, and states as follows.

1. I have worked with the attorneys on the Plaintiffs' legal team and gathered data that is being presented to the Court in support of Plaintiffs' Motion for Preliminary Injunction. I gathered the relevant data, completed the calculations and compiled the tables that are attached to this Affidavit in support of Plaintiffs' Reply Memorandum (the "tables").

2. My relevant training and experience to perform the functions outlined in paragraph 1 are as follows.

- A. Early in my career I was USAID Science Education Advisor to the Government of Nepal and managed research funded by UNICEF and the Ministry of Education related to school finance and management.
- B. In 1986-1993 I was a member of the NH House of Representatives. For six years I was a member of the House Appropriations Committee subcommittee that included responsibility for allocating State funds for “foundation aid” and other school aid programs. I chaired that subcommittee for four years.
- C. Subsequently, I was a researcher at the UNH Institute for Policy and Social Science Research and later the founding Executive Director of the NH Center for Public Policy Studies. During this period, 1995-2006, I conducted more than 40 data analysis and research projects related to NH schools, educational achievement, school finance, and history of school funding in NH.
- D. Shortly after the NH Supreme Court's ruling in the Claremont II case, I organized and convened the symposium on “Defining Educational Adequacy in Ways that Can Be Costed.” With other sponsoring organizations, we provided NH policy-makers comparative information from other states to support their efforts.
- E. For the NH Department of Education in 2002 I created the spreadsheet that automatically aggregates all school district annual financial reports (DoE-25) into a single worksheet and creates statewide totals. The file is still in use. I also assisted legislative sponsors of the bill that finally required the creation of the first statewide student data system to better track our students.
- F. I served one term on the Chichester School Board and seventeen years as Town Moderator in Chichester NH.
- G. More recently, in retirement, I became one of the founding members of the NH School Funding Fairness Project. For that organization I have authored research papers on sports in NH high schools, graduation rates and funding history. I have also authored papers and given presentations in dozens of towns and school districts that answer key questions about school funding in their community in the statewide context.

3. The original data in the tables comes from downloadable Excel data files maintained on the websites of the New Hampshire Department of Education (“NHDOE”) and the New Hampshire Department of Revenue Administration (“NHDRA”).

4. Plaintiffs' table entitled, "2021-2022 SWEPT Taxes" is populated with the following data from the indicated sources. See attached Exhibit 1. Columns A and B in this table come from the "Alpha order" worksheet columns N and P in the following NHDRA file: <https://www.revenue.nh.gov/mun-prop/property/equalization-2021/documents/tax-rate-comparison.xlsx>. Columns C and D in this table come from the NHDOE "FY2022 Muni Rpt" worksheet data in columns Z and AA in the following NHDOE file: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy-22-muni-summary.xlsx>

5. The "SWEPT in Excess of Adequacy" in column E in Exhibit 1 is calculated by simply subtracting the number in column C from the number in column D for those where there is an excess. For the plaintiffs' communities there is no excess and the amount is \$0.

6. If there is an excess in Column E, the "Effective Equalized SWEPT Rate for Adequacy" in column F in Exhibit 1 is calculated by multiplying the tax rate in column B by the ratio of column C to column D. If there is no excess in column E, then the entire tax rate in column B is for SWEPT and the amount in column B is entered in Column F.

7. Plaintiffs' table entitled, "2022-2023 SWEPT Taxes" is populated with the following data from the indicated sources. See attached Exhibit 2. Columns A and B in Exhibit 2 are blank because the NHDRA has not yet released its report with this data that is comparable to their file for 2021-2022. Columns C and D in Exhibit 2 come from the columns U and V in NHDOE "FY2023 Muni Rpt" worksheet data in the following NHDOE file: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy23-muni-estimate-summary.xlsx>.

8. The "SWEPT in Excess of Adequacy" in column E in Exhibit 2 is calculated by simply subtracting the number in column C from the number in column D for those where there is an excess. For the plaintiffs' communities there is no excess and the amount is \$0.

9. The "Effective Equalized SWEPT Rate for Adequacy" in column F in Exhibit 2 table is blank because the data for column B has not yet been released by NHDRA.

10. Plaintiffs' table entitled, "2021-2022 Negative Tax Rate Communities" is populated with the following data from the indicated sources. See attached Exhibit 3. Columns A through G in this table come from the "Alpha order" worksheet columns N, O, P, R, I, J, and L in the following NHDRA file: <https://www.revenue.nh.gov/mun-prop/property/equalization-2021/documents/tax-rate-comparison.xlsx>. Column I in

2021-2022 SWEPT Taxes

Table 1

Sources of data >	A NH DRA	B NH DRA	C NH DOE	D NH DOE	E Calculation	F Calculation
Municipalities	Equalized SWEPT Taxable Property Value	Equalized SWEPT Tax Rate	Total Calculated Cost of an Adequate Education	Statewide Education Property Tax (SWEPT)	SWEPT In Excess of Adequacy	Effective Equalized SWEPT Rate for Adequacy
EXCESS SWEPT COMMUNITIES						
Alton	\$2,615,908,160	\$1.38	\$2,856,768	\$3,602,058	\$745,290	\$1.09
Bartlett	\$1,741,642,919	\$1.30	\$1,204,464	\$2,261,385	\$1,056,921	\$0.69
Bridgewater	\$625,362,136	\$1.22	\$400,848	\$761,930	\$361,082	\$0.64
Carroll	\$155,603,410	\$1.40	\$273,354	\$694,873	\$421,519	\$0.55
Center Harbor	\$717,205,779	\$1.30	\$421,610	\$932,360	\$510,750	\$0.59
Easton	\$104,378,656	\$1.32	\$124,139	\$137,664	\$13,525	\$1.19
Eaton	\$148,183,711	\$1.40	\$123,348	\$206,754	\$83,406	\$0.84
Errol	\$113,628,450	\$1.28	\$75,631	\$145,440	\$69,809	\$0.67
Franconia	\$429,641,756	\$1.39	\$466,021	\$595,288	\$129,267	\$1.09
Freedom	\$876,376,288	\$1.25	\$481,591	\$1,093,545	\$611,954	\$0.55
Hale's Location	\$96,305,287	\$1.53	\$3,787	\$147,484	\$143,697	\$0.04
Hampton	\$4,969,659,393	\$1.45	\$6,895,423	\$7,202,600	\$307,177	\$1.39
Harrisville	\$319,054,924	\$1.24	\$381,830	\$396,687	\$14,857	\$1.19
Hart's Location	\$23,706,209	\$1.45	\$20,970	\$34,406	\$13,436	\$0.88
Hebron	\$410,082,254	\$1.40	\$236,296	\$572,472	\$336,176	\$0.58
Holderness	\$1,061,557,696	\$1.45	\$971,743	\$1,536,970	\$565,227	\$0.92
Jackson	\$627,246,361	\$1.38	\$380,950	\$863,513	\$482,563	\$0.61
Lincoln	\$1,268,436,733	\$1.46	\$645,322	\$1,855,168	\$1,209,846	\$0.51
Meredith	\$3,283,198,418	\$1.29	\$3,596,481	\$4,239,607	\$643,126	\$1.09
Moultonborough	\$4,642,281,723	\$1.40	\$2,053,055	\$6,520,888	\$4,467,833	\$0.44
New Castle	\$1,114,507,955	\$1.31	\$316,925	\$1,461,482	\$1,144,557	\$0.28
New London	\$1,685,372,489	\$1.42	\$1,424,334	\$2,387,037	\$962,703	\$0.85
Newbury	\$1,096,273,096	\$1.51	\$889,806	\$1,655,815	\$766,009	\$0.81
Newington	\$770,060,593	\$1.43	\$309,366	\$1,103,024	\$793,658	\$0.40
North Hampton	\$1,633,697,589	\$1.42	\$2,106,229	\$2,324,606	\$218,377	\$1.29
Pittsburg	\$440,534,953	\$1.31	\$225,630	\$576,820	\$351,190	\$0.51
Portsmouth	\$7,923,930,153	\$1.52	\$9,956,106	\$12,043,851	\$2,087,745	\$1.26
Rye	\$3,181,416,817	\$1.45	\$2,269,789	\$4,611,845	\$2,342,056	\$0.71
Sandwich	\$588,686,090	\$1.39	\$600,894	\$815,639	\$214,745	\$1.02
Sugar Hill	\$267,356,897	\$1.13	\$293,336	\$302,615	\$9,279	\$1.10
Sunapee	\$1,860,051,495	\$1.45	\$1,711,668	\$2,688,500	\$976,832	\$0.92
Tuftonboro	\$1,680,674,511	\$1.29	\$1,183,710	\$2,166,667	\$982,957	\$0.70
Waterville Valley	\$435,803,386	\$1.38	\$277,287	\$602,993	\$325,706	\$0.63
Wolfeboro	\$3,130,674,895	\$1.36	\$3,188,805	\$4,244,568	\$1,055,763	\$1.02
TOTAL	\$50,038,501,182		\$46,367,514	\$70,786,554	\$24,419,040	
PLAINTIFFS' COMMUNITIES						
Hopkinton	\$969,693,285	\$1.48	\$3,857,552	\$1,025,173	\$0	\$1.48
Newport	\$617,503,168	\$1.35	\$3,889,289	\$605,418	\$0	\$1.35
Penacook	?	?	\$3,401,573	\$534,984	\$0	?
Plymouth	\$601,379,000	\$1.56	\$2,645,193	\$644,104	\$0	\$1.56

Data sources

<https://www.revenue.nh.gov/mun-prop/property/equalization-2021/documents/tax-rate-comparison.xlsx>

<https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy-22-muni-summary.xlsx>

2022-2023 SWEPT Taxes

Table 2

Sources of data >	A NH DRA	B NH DRA	C NHDOE	D NH DOE	E Calculation	F Calculation
Municipalities	Equalized SWEPT Taxable Property Value	Equalized SWEPT Tax Rate	Total Calculated Cost of an Adequate Education	Statewide Education Property Tax (SWEPT)	SWEPT In Excess of Adequacy	Effective Equalized SWEPT Rate for Adequacy
EXCESS SWEPT COMMUNITIES						
Bartlett			\$1,081,268	\$1,733,107	\$651,839	
Bridgewater			\$383,713	\$568,297	\$184,584	
Carroll			\$249,336	\$528,925	\$279,589	
Center Harbor			\$372,470	\$705,855	\$333,385	
Errol			\$67,538	\$109,442	\$41,904	
Franconia			\$410,661	\$435,991	\$25,330	
Freedom			\$427,654	\$768,313	\$340,659	
Hale's Location			\$0	\$102,556	\$102,556	
Hart's Location			\$21,179	\$26,016	\$4,837	
Hebron			\$219,581	\$375,535	\$155,954	
Holderness			\$909,816	\$1,234,705	\$324,889	
Jackson			\$355,049	\$619,389	\$264,340	
Lincoln			\$598,027	\$1,379,320	\$781,293	
Moultonborough			\$2,010,580	\$4,698,493	\$2,687,913	
New Castle			\$224,348	\$1,139,881	\$915,534	
New London			\$1,403,322	\$1,766,871	\$363,549	
Newbury			\$910,878	\$1,192,291	\$281,413	
Newington			\$334,413	\$788,247	\$453,834	
Pittsburg			\$235,731	\$406,777	\$171,046	
Rye			\$2,226,169	\$3,344,277	\$1,118,108	
Sandwich			\$584,915	\$607,555	\$22,640	
Sunapee			\$1,549,775	\$1,812,575	\$262,800	
Tuftonboro			\$1,083,819	\$1,624,383	\$540,564	
Waterville Valley			\$245,554	\$427,471	\$181,917	
Wolfboro			\$2,772,244	\$3,171,553	\$399,309	
TOTAL			\$18,678,037	\$29,567,825	\$10,889,788	
PLAINTIFFS' COMMUNITIES						
Hopkinton			\$3,857,552	\$1,025,173	\$0	
Newport			\$3,889,289	\$605,418	\$0	
Penacook			\$3,401,573	\$534,984	\$0	
Plymouth			\$2,645,193	\$644,104	\$0	

Data Sources

2022 DRA data not yet available on the DRA website

<https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy23-muni-estimate-summary.xlsx>

2021-2022 Negative Tax Rate Communities

Table 3

Sources of data ----->	A NH DRA	B NH DRA	C NH DRA	D NH DRA	E NH DRA	F NH DRA	G NH DRA	H Calculated	I NH DOE
Locations	Equalized SWEPT Taxable Property Value	Locally Stated SWEPT Tax Rate	Equalized SWEPT Tax Rate	Amount Raised by SWEPT	Locally Stated Local School Tax Rate	Equalized Local School Tax Rate	Amount Raised by Local School Tax	Net Amount Raised for Schools (SWEPT+Local)	Total Calculated Cost of an Adequate Education
Atkinson & Gilmanton Academy Grant	\$996,035	\$1.95	\$1.66	\$1,652.00	-\$1.95	-\$1.66	-\$1,652.00	\$0.00	\$0.00
Bean's Grant	\$0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Bean's Purchase	\$0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Cambridge	\$11,097,430	\$2.01	\$1.68	\$18,653.00	-\$1.64	-\$1.37	-\$15,653.00	\$3,000.00	\$0.00
Chandler's Purchase	\$44,424	\$2.11	\$1.76	\$78.00	-\$1.97	-\$1.64	-\$78.00	\$0.00	\$0.00
Crawford's Purchase	\$275,456	\$2.11	\$1.76	\$485.00	-\$2.11	-\$1.76	-\$485.00	\$0.00	\$0.00
Dix's Grant	\$1,267,208	\$1.91	\$1.62	\$2,047.00	-\$1.91	-\$1.62	-\$2,047.00	\$0.00	\$0.00
Dixville	\$10,132,547	\$1.92	\$1.61	\$16,276.00	-\$1.88	-\$0.49	-\$16,276.00	\$0.00	\$0.00
Erving's Location	\$69,382	\$1.59	\$1.38	\$96.00	-\$1.59	-\$1.38	-\$96.00	\$0.00	\$0.00
Green's Grant	\$9,595,397	\$2.09	\$1.73	\$16,572.00	-\$2.05	-\$1.70	-\$16,572.00	\$0.00	\$0.00
Hale's Location	\$96,305,287	\$1.82	\$1.53	\$147,484.00	-\$1.82	-\$1.52	-\$147,484.00	\$0.00	\$3,786.66
Kilkenny	\$0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Livermore	\$136,600	\$1.82	\$1.82	\$249.00	-\$1.82	\$0.00	-\$249.00	\$0.00	\$0.00
Martin's Location	\$0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Millsfield	\$10,420,678	\$2.13	\$1.78	\$18,572.00	-\$2.06	-\$0.19	-\$18,355.00	\$217.00	\$19,077.07
Odell	\$3,450,091	\$2.50	\$1.67	\$5,772.00	-\$2.50	-\$1.67	-\$5,772.00	\$0.00	\$0.00
Pinkham's Grant	\$4,983,267	\$3.02	\$1.69	\$8,438.00	-\$2.80	-\$1.61	-\$8,438.00	\$0.00	\$0.00
Sargent's Purchase	\$2,264,424	\$2.11	\$1.76	\$3,984.00	-\$2.11	-\$1.76	-\$3,984.00	\$0.00	\$0.00
Second College Grant	\$1,823,706	\$1.80	\$1.53	\$2,796.00	-\$1.80	-\$1.53	-\$2,796.00	\$0.00	\$0.00
Success	\$15,451,984	\$2.17	\$1.72	\$26,594.00	-\$2.15	-\$1.71	-\$26,594.00	\$0.00	\$0.00
Thompson & Meserve's Purchase	\$7,952,944	\$1.91	\$1.51	\$11,988.00	-\$1.90	-\$1.50	-\$11,988.00	\$0.00	\$0.00
Wentworth's Location	\$9,188,145	\$2.06	\$1.72	\$15,813.00	-\$2.02	-\$1.69	-\$15,813.00	\$0.00	\$0.00
TOTAL	\$185,455,005			\$297,549.00			-\$294,332.00	\$3,217.00	\$22,863.73

Data sources

<https://www.revenue.nh.gov/mun-prop/property/equalization-2021/documents/tax-rate-comparison.xlsx>

<https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy-22-muni-summary.xlsx>

2022-2023 Potential Negative Tax Rate Communities

Table 4

Sources of data ----->	A	B	C	D	E	F	G	H	I
	NH DRA	NH DRA	NH DRA	NH DOE	NH DRA	NH DRA	NH DRA	Calculated	NH DOE
Locations	Equalized SWEPT Taxable Property Value	Locally Stated SWEPT Tax Rate	Equalized SWEPT Tax Rate	Amount Raised by SWEPT	Locally Stated Local School Tax Rate	Equalized Local School Tax Rate	Amount Raised by Local School Tax	Net Amount Raised for Schools (SWEPT+Local)	Total Calculated Cost of an Adequate Education
Atkinson & Gilmanton Academy Grant				\$1,097.00					\$0.00
Bean's Grant				\$0.00					\$0.00
Bean's Purchase				\$0.00					\$0.00
Cambridge				\$12,787.00					\$0.00
Chandler's Purchase				\$52.00					\$0.00
Crawford's Purchase				\$324.00					\$0.00
Dix's Grant				\$1,416.00					\$0.00
Dixville				\$11,762.00					\$0.00
Erving's Location				\$71.00					\$0.00
Green's Grant				\$11,285.00					\$0.00
Hale's Location				\$102,556.00					\$0.00
Kilkenny				\$0.00					\$0.00
Livermore				\$168.00					\$0.00
Martin's Location				\$0.00					\$0.00
Millsfield				\$11,787.00					\$12,779.97
Odell				\$3,880.00					\$0.00
Pinkham's Grant				\$5,612.00					\$0.00
Sargent's Purchase				\$2,667.00					\$0.00
Second College Grant				\$1,966.00					\$0.00
Success				\$17,880.00					\$0.00
Thompson & Meserve's Purchase				\$8,014.00					\$0.00
Wentworth's Location				\$10,736.00					\$0.00
TOTAL	\$0			\$204,060.00			\$0.00	\$0.00	\$12,779.97

Data Sources

DRA data not yet available; tax rates are currently being set

<https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy23-muni-estimate-summary.xlsx>

EXHIBIT B

William F. J. Ardinger
30 Westbourne Road
Concord, New Hampshire 03301
bill.ardinger@gmail.com

September 15, 2021

VIA E-MAIL to norman.major@leg.state.nh.us

Representative Norman Major
Chair, House Ways and Means Committee
State Legislative Office Building, Room 202
33 N. State Street
Concord, NH 03301

Re: Comment with Respect to HB 504 –
Potentially Significant Constitutional Risk Arising From the Current State
Education Property Tax

Dear Chair Major,

I understand that the House Ways and Means Committee is continuing to review HB 504, including conducting a work session on HB 504 scheduled for September 16, 2021. My comment below relates to this bill, and the state education property tax as it is currently administered. I request that you consider including this letter in the record of the Committee's work on HB 504.

Preliminary Background and Disclosures

For the record, I am an attorney with the law firm Rath, Young and Pignatelli, P.C. The principal focus of my 36-year career has been on federal and state tax matters. At times, I have represented clients in connection with tax policy matters, and in such cases, I have been registered from time to time as a lobbyist. My law firm, and my excellent colleagues, regularly represent clients on policy matters that often require lobbyist registrations.

In addition, I disclose that I recently served as a member of the Commission to Study Public Education Funding (the "Commission"), which was established by the Legislature in 2019 when it enacted RSA 193-E:2-e. I served as the appointed member of the Governor. I enjoyed my service on the Commission, including service with Representative Dick Ames and others.

With respect to this letter, I am commenting solely in my personal capacity as an individual, and I do not have any client with an interest in the subject of this letter. My comments below represent solely my personal views and do not represent the views of Rath,

Young and Pignatelli, any of our clients or professionals, any of my colleagues who served with me on the Commission, or any other person.

Potentially Significant Constitutional Risk Arising From the Current State Education Property Tax

One important aspect of HB 504 is a proposal to require all municipalities to collect and remit the entire amount of the state education property tax to the Department of Revenue Administration (“DRA”) for deposit into the education trust fund, less an amount to cover costs of administering this collection and remission requirement.¹ This potential change to current law was discussed before the Commission in its review of various components of New Hampshire’s current education funding system. I urge the Ways and Means Committee to consider this proposal carefully, especially because it represents one possible method to address the potentially significant constitutional risk of current law described below.

1. Current Law: Tax Rate and Taxpayers.

The current state education property tax is imposed under RSA 76:3 and RSA 76:8. These statutes, by their terms, require every owner of real property in New Hampshire, except for certain property owned by railroads and utilities, to pay state education property tax. The statute requires that the Commissioner of the DRA to set the tax rate “at a level sufficient to generate revenue of \$363,000,000.” Sections 322 of the recently-enacted HB 2 altered this statutory requirement by lowering the required revenue target to \$263,000,000. This alteration is effective for “tax periods beginning on or after April 1, 2022.”

For all purposes, the state education property tax is a state tax. It is not a local property tax. The state education property tax is accounted for by the state for all purposes as a state revenue source. The state education property tax is imposed on all taxpayers throughout the state. The tax is not imposed on municipalities. Cities or towns, therefore, are not “taxpayers” under these rules. The state education property tax revenues collected by cities and towns are not the property of the cities or towns, but rather are the property of the State of New Hampshire.

2. Current Law: Collection and Remission of State Education Property Tax.

RSA 76:8 requires municipalities to assess and collect the state education property tax. Specifically, RSA 76:8, II requires the Commissioner of DRA to “issue a warrant under the commissioner's hand and official seal for the amount computed in paragraph I to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or districts.”

By its terms, this statutory provision appears to require collection of state education property tax from every taxpayer who owns taxable property. However, during a hearing before the Commission, several persons suggested that tax administrators may be interpreting these

¹ Section 1 of HB 504.

statutes in a manner that does not require collection of the state education property tax in certain circumstances.

These suggestions referred to amendments made in 2011. Prior to these amendments, RSA 198:46 required municipalities that collect education property tax in excess of the amount necessary to fund the adequate education cost and remit such excess among to the DRA. I refer to these municipalities as “Impacted Municipalities.”

Specifically, prior to 2011, RSA 198:46 stated as follows:

Section 198:46 Excess Education Tax Payment.

I. A municipality in which education property tax revenue collected exceeds the amount necessary to fund the cost of an adequate education in a fiscal year, as determined in RSA 198:40-a, shall collect and remit such excess to the department of revenue administration on or before March 15 of the tax year in which the excess occurs. For fiscal years 2010 and 2011, the version of RSA 198:41, II effective for the fiscal year ending June 30, 2009 shall be used to determine excess.

II. The commissioner of the department of revenue administration shall collect from the municipality the excess tax and pay the excess tax over to the state treasurer for deposit in the education trust fund established by RSA 198:39.

III. The amount of such excess to be remitted shall not include any income derived from the investment of funds by the municipal treasurers under RSA 41:29 and RSA 48:16. Any funds remaining after full payment of the excess tax required in paragraph I shall become available for unrestricted use by the municipality.

In 2011, HB 337, enacted as Chapter 258 of 2011 N.H. Laws, repealed RSA 198:46 in its entirety. Accordingly, there is currently no clear provision that expressly requires Impacted Municipalities to collect and remit state education property tax payments to the DRA or any other agency of the State. The testimony heard by the Commission indicated that state and municipal tax administrators are interpreting these 2011 amendments in a manner that effectively relieves taxpayers in Impacted Municipalities from paying the state education property tax at the full rate paid by other taxpayers throughout the State.

3. State Constitutional Concern.

The New Hampshire Supreme Court has many times held that our State Constitution mandates that all taxes must be imposed at a uniform rate throughout the taxing district.² A

² See, for example: Opinion of the Justices, 95 N.H. 537 (1949)(holding that the State Constitution prohibits a personal income tax with differential, graduated tax rates -- “*The varying rates of taxation upon gross income provide for in [the proposed bill] make it conflict with the constitutional requirements in this jurisdiction. The bill results in classification of recipients of gross income for taxation at different rates and so is forbidden.*”); see also, Claremont Sch. Dist. v. Governor (Claremont II), 142 N.H. 462 (N.H. 1997)(“*Part II, article 5 of the State Constitution provides that the legislature may ‘impose and levy proportional and reasonable assessments, rates, and*

complete analysis of these holdings is beyond the scope of this letter. However, I believe it is safe to say that these precedents would prohibit a taxing scheme that imposed a state property tax (or any other form of state tax) at one rate for taxpayers located in some municipalities and at another different rate for taxpayers located in other municipalities.

In my view, if the current statutes imposing the collection and remission of state education property tax effectively provide for such differential tax rates on the same class of taxable property, then such differential tax rates would likely violate the New Hampshire Constitution.

If a Court were to hold that such a differential tax rate system violates the Constitution, the issue of what remedy would be owed to taxpayers who suffered unlawful discrimination would need to be examined. Among the potential remedies would be to eliminate the adverse discriminatory impacts by refunding to taxpayers the amount of state education property tax paid in prior years.³ Another possible remedy could be to impose tax at the statutory rate on taxpayers who had benefitted from the unlawful lower rate.⁴ It is beyond the scope of this letter to attempt a full analysis of possible remedial options or to quantify the financial impacts of such a remedy. However, given the significant amount of the state education property tax revenues (approximately \$363,000,000 annually), the scope of such financial impacts would likely be substantial.

Conclusion

As noted above, section 1 of HB 504 proposes to amend current law so that all municipalities would be required to collect and remit state education property tax revenues from all taxpayers to the DRA. This proposal would eliminate the problem of differential, non-uniform tax rates identified above. Accordingly, HB 504's proposal offers one option that would eliminate the risks of unconstitutional taxation.

Of course, there are other avenues to eliminating the current law problem of differential, non-uniform tax rates that need not involve HB 504's method of uniform collection and remission to DRA. My intent in providing this letter is to indicate to members of the House Ways and Means Committee that doing nothing – that is, leaving current law unchanged – involves significant risk that the State could be exposed to material financial remedies arising from unconstitutional disproportionate taxation.

taxes, upon all the inhabitants of, and residents within, the said state” and “requires that ‘all taxes be proportionate and reasonable – that is, equal in valuation and uniform in rate.’”

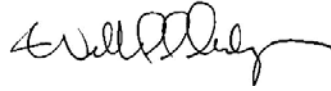
³ See *Smith v. N.H. Dept. of Rev.*, 141 N.H. 681 (1997)(citing federal case law requiring states to provide “meaningful backward-looking relief to rectify any unconstitutional deprivation” and quoting the following statement: “[A] State might refund the additional taxes imposed upon the victims of its discrimination or, to the extent consistent with other constitutional provisions (notably due process), retroactively impose equal burdens on the tax's former beneficiaries. A State may also combine these two approaches.”)

⁴ Such retrospective taxation could run afoul of other provisions of our State Constitution which generally prohibit retrospective laws. See Part I, Article 23 (“*Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.*”)

Representative Norman Major, Chair
September 15, 2021
Page 5

Thank you very much for allowing me to provide this letter to you and the Committee as you consider HB 504.

Sincerely,

A handwritten signature in black ink, appearing to read "William F. J. Ardinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William F. J. Ardinger

cc: Representative Richard Ames (a member of the Study Commission) by e-mail to amesinjaffrey@gmail.com