THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

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

Introduction

The plaintiffs ask this Court to issue a particularly disfavored judicial remedy: a preliminary injunction that stops the assessment and collection of a state tax. The tax in question—the Statewide Education Property Tax (the "SWEPT")—is one of the principal funding mechanisms for the opportunity for an adequate education throughout New Hampshire. The plaintiffs contend that the SWEPT violates the uniformity and proportionality requirements of Part II, Article 5 of the State Constitution because it generates revenues in a small number of municipalities that exceed the amount the State provides in total education grants to those municipalities, and the municipalities retain those excess SWEPT revenues. The plaintiffs acknowledge that revenues generated by the SWEPT have been distributed in this way for over a decade.

The plaintiffs have not met their burden under any of the familiar preliminary-injunction factors. They are not likely to succeed on the merits of their SWEPT claim because they have not identified how the SWEPT has caused them any concrete, personal injury that would confer them with standing to obtain the injunction they seek. Nor would the plaintiffs' claim be likely to

succeed even if they had standing, because the plaintiffs ultimately do not challenge any act of taxation to which Part II, Article 5 applies, but rather how state revenues are distributed after they have been generated. While the former is subject to the proportionality and uniformity requirements under Part II, Article 5, the latter is not.

The plaintiffs have also failed to demonstrate that they face an immediate danger of irreparable harm absent an injunction or that they lack an adequate remedy at law. To the extent the plaintiffs attempt to tether these factors to a purported inability to individually recoup any SWEPT payments that they make while this litigation is pending, they overlook both the statutory abatement process and centuries of decisions confirming that it provides an adequate and available remedy. The plaintiffs also overlook the fact that the proper remedy in the event an education-funding mechanism is determined to be *facially* unconstitutional is a declaration to that effect, followed by an opportunity for the legislature to address the infirmity. The plaintiffs' suggestion that irreparable harm is inherent any time an unconstitutional tax is imposed is inconsistent with precedent. The plaintiffs' concerns about timing are undermined by the fact that the distribution of revenues generated by the SWEPT has operated the same way for over a decade and could have been challenged at any time.

The balance of the equities and the public interest also weigh decisively against granting the plaintiffs' motion. If the SWEPT were preliminarily enjoined, a material and essential component of how the State calculates total education grants under RSA 198:41, I(a) would be rendered inoperable. The New Hampshire Supreme Court has made clear that an education-funding regime cannot survive when a component "central to the legislature's purpose" in crafting that regime is rendered invalid. *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 218 (1999). Thus, if granted, the plaintiffs' proposed preliminary injunction may prevent the State

from distributing total education grants this year under RSA 198:41, I(a), an outcome that would imperil all school districts in the State. Such a result is transparently inequitable and against the public interest and could result in a temporary local tax system that in and of itself violates the State Constitution. Moreover, even if the State could distribute total education grants in the event the SWEPT were enjoined, this would result in an unprecedented and enormous revenue shortfall for the State, which would have to be absorbed elsewhere in the state budget and at a minimum would jeopardize important policy priorities that are scheduled to be paid for through non-appropriated funds. None of these outcomes are equitable or in the public interest.

For all of these reasons, and as further detailed below, the plaintiffs have not met their burden to obtain the extraordinary and extraordinarily disruptive preliminary injunctive relief they seek. The Court should therefore deny their motion for a preliminary injunction.

Background

The SWEPT is established under RSA chapter 76, which governs "Apportionment, Assessment, and Abatement of Taxes." RSA 76:3 provides in relevant part that "the commissioner of the department of revenue administration [DRA] shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." This amount has been lowered to $263 million for Fiscal Year 2023 only. Laws 2021, 91:332.

RSA 76:8 sets forth how the SWEPT is calculated. The Commissioner of the DRA first determines a municipality's tax base for education, then multiplies the equalized tax rate set under RSA 76:3 by that tax base to determine the total amount of revenue generated by the SWEPT in that municipality. RSA 76:8, I(a), (b). The Commissioner then "issue[s] a warrant

under [her] hand and official seal for the amount computed in [RSA 76:8, I] to the selectmen or assessors of each municipality . . . directing them to assess such sum and pay it to the municipality for the use of the school district or districts." RSA 76:8, II.

The amount each municipality generates for the State through the SWEPT factors into how the State calculates total education grants under RSA 198:41. Those grants are how the State provides municipalities with any additional amounts they may require to cover the cost of an opportunity for an adequate education in each municipality. *See* RSA 198:40-a, RSA 198:41, RSA 198:42. Under the formula used to calculate the grants, the Department of Education first determines the total cost of providing the opportunity for an adequate education in a municipality based on the per-pupil cost set forth in RSA 198:40-a. RSA 198:41, I(a). The Department of Education then subtracts from that total the amount of revenues generated in and paid to that municipality under RSA 76:8. RSA 198:41, I(b). The Department then adds certain additional aid provided under RSA 198:40-e [Relief Funding] and RSA 198:40-f [Extraordinary Need Grants]. RSA 198:41, I(d)–(e).

This amount is then distributed to the municipality across four payments through total education grants. *See* RSA 198:42, I. When the amount of state revenues generated in a municipality under RSA 78:6, II, offsets the total amount the State otherwise owes to the municipality under RSA 198:41, I(a), (d), and (e), then that municipality receives its adequate education funding solely from those revenues. Those revenues are paid directly "to the municipality for the use of the school district or districts" under RSA 78:6, II, regardless of whether they exceed the amount a municipality is entitled to through total education grants under RSA 198:41, I.

The plaintiffs here—five individual taxpayers and two businesses—take issue with this practice. They contend that the SWEPT violates the uniformity and proportionality requirements of Part II, Article 5 because in a small number of municipalities the amount of revenues the SWEPT generates exceeds the amount those municipalities would receive in total education grants, and those municipalities retain the excess SWEPT revenues. They seek to bolster this contention by pointing to the fact that an even smaller number of rural municipalities with few, if any, education-related expenses have negative local education tax rates.

The plaintiffs seek two related forms of injunctive relief. First, they ask this Court to enjoin the Commissioner of DRA "from approving any final school district tax rate for the coming year . . . at a rate less than $00.00 per $1,000—that is, approving a negative tax rate." Pls.' Proposed Order at 2. Second, they ask this Court to enjoin the Commissioner of DRA "from issuing a warrant under [her] hand and office seal to the selectmen or assessors of each municipality directing them to assess and pay to the municipality any sum for the use of the school district or districts, as required by R.S.A. 76:8, II." In their motion, they characterize these requests as "an injunction of the [SWEPT]." Pls.' Mot. Prelim. Inj. at 3.

Standard of Review

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *N.H. Dep't of Envt'l Servs. v. Mottolo*, 155 N.H. 57, 63 (2007) (citation omitted). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." *Id.* (citation omitted). To be entitled to preliminary injunctive relief, the Plaintiffs must show that: (1) they are likely to succeed on the merits of their claims; (2) there is an immediate danger that they will suffer irreparable harm absent injunctive relief; and (3) that there is no adequate remedy at law. *Id.* When determining

whether to grant injunctive relief, courts also consider the balance of equities, *see N.H. Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 786 (1987), and whether the public interest would be served by granting the injunction, *see UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987).

As the moving parties, the plaintiffs bear the burden of demonstrating that a preliminary injunction is warranted. *See Mottolo*, 155 N.H. at 63. While preliminary injunctive relief is always an "extraordinary remedy," *id.*, "some preliminary injunctions are disfavored and require a stronger showing by the movant . . . ." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). These include "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all of the relief that it could recover at the conclusion of a full trial on the merits." *Id.* at 723–24 (citations omitted).

Argument

I. The plaintiffs are not likely to succeed on the merits of their claims.

A. The plaintiffs have not demonstrated a likelihood that they have standing to obtain an injunction in relation to the SWEPT.

Though the New Hampshire Supreme Court has never specifically addressed the question, numerous federal courts of appeals have held that "'the 'merits' on which a plaintiff must show a likelihood of success encompass not only substantive theories, but also establishment of jurisdiction,' including standing." *Pietrangelo v. Sununu*, 2021 DNH 067, 2021 WL 1254560, at *4 (D.N.H. Apr. 5, 2021) (citing *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018), and collecting cases). Thus, "a party who seeks a preliminary injunction 'must show a substantial likelihood of standing.'" *Id.* (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015)). "This is so because an 'affirmative burden of showing a likelihood of success on the merits necessarily includes a

likelihood of a court's reaching the merits, which in turn depends on a likelihood that plaintiff has standing.'" *Id.* (ellipsis omitted) (quoting *Waskul*, 900 F.3d at 256 n.4).

"[A] party's standing is a question of subject matter jurisdiction, which may be addressed at any time." *Libertarian Party of New Hampshire v. Sec'y of State*, 158 N.H. 194, 195 (2008) (citation omitted). In most cases, "determining whether a party has standing to sue requires that [a court] focus on whether the party has alleged a legal injury against which the law was designed to protect." *Carrigan v. N.H. Dep't of Health & Hum. Servs.*, 174 N.H. 362, 367 (2021) (citation omitted). "A party must allege a concrete, personal injury, implicating legal or equitable rights, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress by a favorable decision." *Id.* (citation omitted). An injury that is speculative, as opposed to definite and concrete, is not sufficient to confer standing. *See Duncan v. State*, 166 N.H. 630, 646–47 (2014).

The plaintiffs have not demonstrated that they are likely to have standing to obtain the injunction they seek. Nowhere in their motion do the plaintiffs explain how they have suffered a concrete, personal injury due to the fact that some municipalities are able to retain excess SWEPT funds. Similarly, the plaintiffs do not explain how they are harmed by the fact that an even smaller number of rural districts with few, if any, education-related expenses have negative local tax rates. At most, the plaintiffs imply that their local education tax rates are higher than they might otherwise be because of these practices. They offer no competent evidence, however, to support this implication, and the implication alone is insufficient to confer the plaintiffs with standing to challenge the SWEPT.

Duncan v . State is instructive on this point. In that case, the plaintiffs challenged "a tax credit for business organizations and enterprises that contribute to scholarship organizations that

have been approved by the [DRA] to award scholarships to eligible students under the program." *Duncan*, 166 N.H. at 636. Students could use these scholarships "to attend (1) a nonpublic school or (2) a public school located outside of the student's school district, or to defray homeschool expenses." *Id.* at 636 (cleaned up). The plaintiffs—"eight individual New Hampshire residents and taxpayers and LRS Technology Services, LLC (LRS)," *id.* at 635—contended that the program violated Part II, Article 83 because it allowed "money raised by taxation" to flow to "schools or institutions of any religious sect or denomination," *id.* at 637. The trial court agreed and invalidated the program in part. *See id.*

On appeal, the New Hampshire Supreme Court vacated the trial court's decision, concluding that the plaintiffs lacked standing to maintain their claims. *Id.* at 635. After determining that then-recent amendments to RSA 491:22 providing for taxpayer standing were unconstitutional, *see id.* at 637–45, the Court concluded that none of the plaintiffs had demonstrated a sufficiently concrete, personal injury to establish standing under the traditional test, *see id.* at 925–28. As relevant here, the Court rejected an argument made by LRS that it had standing because it had "paid and continue[d] to pay business enterprise taxes or business profits taxes." *Id.* at 647. The Court concluded that this was "insufficient to show that LRS ha[d] suffered a personal injury as a result of the [challenged] program," because "there [was] no evidence [demonstrating] that by granting tax credits to other businesses, the program alters the amount of taxes LRS [was] or will be required to pay." *Id.*

The same is true here. The plaintiffs acknowledge that only a small number of municipalities retain excess revenues generated by the SWEPT. Pls.' Mot. Prelim. Inj. at 12. They offer no evidence as to how their own tax rates would be affected if those municipalities were not permitted to retain those funds. Nor, again, do they offer any evidence as to how they

are harmed by a smaller number of rural districts with few, if any, education-related expenses maintaining negative local education taxes. Rather, the plaintiffs at most speculate that ending these practices would have *some* effect on their tax rates. *See id.* As in *Duncan*, this speculation is far too hypothetical and conjectural to confer standing. *See* 166 N.H. at 646–47.

The plaintiffs may argue that they have taxpayer standing under Part I, Article 8 to seek to enjoin the SWEPT. This argument is not persuasive for at least two reasons. First, Part I, Article 8, by its plain terms, only permits a taxpayer to obtain declaratory, not injunctive relief. *See* N.H. Const. pt. I, art. 8 (allowing a taxpayer to "petition the Superior Court to *declare* whether" a spending action or spend approval violates the law (emphasis added)). When interpreting the State Constitution, courts "give the words in question the meaning they must be presumed to have had to the electorate when the vote to adopt them was cast." *Carrigan*, 174 N.H. at 369 (citation and quotation marks omitted). "The simplest and most obvious interpretation of the constitution, if sensible, is most likely that meant by the people in its adoption." *Id.* (citation and quotation marks omitted).

By the time Part I, Article 8 was amended in 2018 to provide for limited taxpayer standing, courts had long recognized that "[i]njunctions and declaratory judgments are different remedies," with a declaratory judgment being "a milder remedy [that] is frequently available in situations where an injunction is unavailable or inappropriate." *Ulstead Maritime, Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987). Given this recognized distinction, the "simplest and most obvious" reason why the 2018 amendment to Part I, Article 8 would specifically reference declaratory relief, but not injunctive relief, is that the electorate that adopted the amendment intended to allow taxpayers to obtain the former, but not the latter. *See Carrigan*, 174 N.H. at 369. This is in keeping with the New Hampshire Supreme Court's recognition that "[d]ecisions

concerning the raising and disposition of public revenues are particularly a legislative function." *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476 (1997) ("*Claremont II*"). Part I, Article 8 therefore does not confer the plaintiffs with taxpayer standing to seek to enjoin the SWEPT.

Second, the New Hampshire Supreme Court has recognized that taxpayer standing is only available under Part I, Article 8 for challenges to a "specific spending action or spending approval." *Carrigan*, 174 N.H. at 364. While the plaintiffs' reasoning for why the SWEPT is unconstitutional may relate to the manner in which revenues generated by the SWEPT are distributed, *see infra* section I(b), the injunction they seek is not so limited. Rather, the plaintiffs purport to seek to enjoin the SWEPT itself statewide. Pls.' Mot. Prelim. Inj. at 3; Pls.' Proposed Order at 2. The SWEPT is not a spending action or spending approval within the meaning of Part I, Article 8. It is a state tax that is used as in input to calculate the total education grant for each municipality under RSA 198:41, I. Thus, even if injunctive relief were permitted under Part I, Article 8, the specific injunction sought here extends beyond the scope of the limited taxpayer standing conferred under that provision. *Cf. Carrigan*, 174 N.H. at 370 ("Part I, Article 8 . . . does not state that a plaintiff has standing to bring a declaratory judgment action 'about spending.'").

The plaintiffs may also argue that they have standing to seek to enjoin the SWEPT under the first *Claremont* decision. There, the Supreme Court held that "[t]he right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty," which "[a]ny citizen has standing to enforce." *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) ("*Claremont I*"). This statement does not provide the plaintiffs with standing to obtain the preliminary injunction they seek in this case for several reasons.

First, the "right to an adequate education mandated by the constitution" flows from Part II, Article 83. *See id.* at 191–92. Here, the plaintiffs bring their challenge to the SWEPT under Part II, Article 5. Pls.' Mot. Prelim. Inj. at 13–14. The plaintiffs' Part II, Article 5 claim therefore does not seek to directly vindicate the right to an adequate education conferred under Part II, Article 83. The statement regarding standing in *Claremont I* is accordingly inapposite.

Second, the Supreme Court has rejected the notion that the statement regarding standing in *Claremont I* alters the general requirement that a party must identify a concrete, personal injury for standing to exist. Rather, the Court made clear in *Baer v. New Hampshire Department of Education* that "*Claremont* did not create an exception" to the general requirements for standing, and that a plaintiff "must still allege a present legal or equitable right." 160 N.H. 727, 731 (2010), *superseded by statute as stated in Duncan*, 166 N.H. at 638. Any argument that the plaintiffs can maintain their challenge to the SWEPT without identifying such an interest is accordingly misplaced. And as discussed, the plaintiffs have not identified such an interest.

Third, even if *Claremont I* conferred members of the public with standing to seek a declaration with respect to the lawfulness of the State's education-funding system, that hardly means that such standing extends to a request for injunctive relief like the one the plaintiffs make here. Again, "[i]njunctions and declaratory judgments are different remedies," the latter being "a milder remedy [that] is frequently available in situations where an injunction is unavailable or inappropriate." *Ulstead Maritime, Ltd.*, 833 F.2d at 1055. It was essentially for this reason that the Court in *Claremont II*, after concluding that "[t]he present system selected and crafted by the State to fund public education [was] unconstitutional," declined to "remand for consideration of remedies," and "instead stay[ed] all further proceedings until the end of the upcoming legislative session" so as to "permit the legislature to address the issues resolved in [the] case." 142 N.H. at

476–77. The Supreme Court recognized that "[d]ecisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported." *Id.* The Court thus emphasized that, while it was "mindful that [its] decision holding the present system of financing public education unconstitutional raises issues concerning the interim viability of the existing tax system," the proper course was to allow the "present funding system [to] remain in effect through the 1998 tax year" so that the legislature be given "a reasonable time to effect an orderly transition to a new system." *Id.* at 476–77. This discussion undermines any argument by the plaintiffs that the *Claremont* line of cases confers them with special standing to seek injunctive relief under Part II, Article 5.

For all of these reasons, the plaintiffs have failed to demonstrate a likelihood that they have standing to obtain the preliminary injunctive relief the request in their motion. They have consequently failed to demonstrate a likelihood of success on the merits, and for this reason alone their motion should be denied.

B. The plaintiffs are not likely to succeed on the merits of their claim under Part II, Article 5 because they premise that claim on how SWEPT funds are distributed once collected, not how the SWEPT is assessed on the front end.

Even if the plaintiffs could demonstrate that they have standing to obtain the injunction they seek, they are not likely to succeed on the merits of their Part II, Article 5 claim. "Establishing 'the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude must be left to the legislature on the subject.'" *Sirrell v. State*, 146 N.H. 364, 369 (2001) (quoting *Opinion of the Justices*, 77 N.H. 611, 615 (1915)). "In reviewing the statewide property tax, [a court] determine[s] only whether there is a 'clear conflict with the Constitution' in the tax as applied,

and do[es] not concern . . . [itself] with whether the tax is 'wise, reasonable, or expedient.'" *Id.* (quoting *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325-26 (1969)). A court's "task is neither to establish educational policy nor to determine the appropriate mechanism for its funding." *Id.* "The statewide property tax law, like any legislative act, is presumed constitutional and will not be declared invalid except upon 'unescapable grounds.'" *Id.* at 369-70 (quoting *Niemiec v. King*, 109 N.H. 586, 587 (1969)).

Part II, Article 5 "provides that the legislature has the power 'to impose and levy proportional and reasonable assessments, rates, and taxes, upon all of the inhabitants of, and residents within, said state.'" *Starr v. Governor*, 148 N.H. 72, 74 (2002) (quoting N.H. Const., pt. II, art. 5). "This article requires that all taxation be proportionate and reasonable[,] equal in valuation and uniform in rate, and just." *Id.* (cleaned up). The Supreme Court has held that the taxes levied to fund the opportunity for an adequate education are state taxes, and that the taxing district is therefore the State. *See Claremont II*, 142 N.H. at 469–70. Accordingly, if a "property tax is used . . . to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." *Id.* at 471; *see Sirrell*, 146 N.H. at 370 ("In order for a tax to be proportional, all property in the taxing district must be valued alike and taxed at the same rate.").

As previously discussed, the SWEPT is established under RSA chapter 76, which governs "Apportionment, Assessment, and Abatement of Taxes." RSA 76:3 provides in relevant part that "the commissioner of the [DRA] shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to

RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F."[1] RSA 76:8, I, sets forth how the SWEPT is calculated: the Commissioner of the DRA first determines a municipality's tax base for education, then multiplies the equalized tax rate set under RSA 76:3 by that tax base to determine the total amount of revenue generated by the SWEPT in that municipality. RSA 76:8, I(a), (b). The Commissioner then "issue[s] a warrant under [her] hand and official seal for the amount computed in [RSA 76:8, I] to the selectmen or assessors of each municipality . . . directing them to assess such sum and pay it to the municipality for the use of the school district or districts." RSA 76:8, II.

The plaintiffs do not contend that the manner in which the SWEPT rate is set or how the SWEPT is collected under RSA chapter 76 is disproportionate. Such a claim would not succeed because all property subject to the SWEPT is valued and taxed in a uniform and proportionate manner. *See* Affidavit of Bruce K. Kneuer ("Kneuer Aff.") ¶ 14. Rather, as discussed, the plaintiffs premise their challenge to the SWEPT on the fact that some municipalities generate revenues from the SWEPT that exceed the amount those municipalities receive from the State in total education grants under RSA 198:41 and :42, and that those municipalities are given those excess funds by the State. In other words, the plaintiffs' Part II, Article 5 claim arises out of what happens to the state revenues *after* they are generated by the SWEPT, not how those revenues are generated in the first place, which is the sole concern of a Part II, Article 5 claim. The plaintiffs' Part II, Article 5 claim therefore does not implicate reasonable and proportionate *taxation*, i.e., "the means by which the state obtains the revenue required for its activities,"

[1] The legislature lowered this amount to $263 million for Fiscal Year 2023, but did not alter how the Department of Revenue Administration sets the rate to generate that amount or how the tax is assessed or collected. Laws 2021, 91:332.

Taxation Definition, *Black's Law Dictionary* (11th ed. 2019); it implicates how funds generated by a proportionate and reasonable SWEPT are *distributed* once obtained.

Through RSA 76:8, II, the legislature has directed that revenues generated by the SWEPT in a municipality be paid directly "to the municipality for use of the school district or districts." RSA 76:8, II. The legislature has further set forth a formula by which the State calculates total education grants that are distributed to municipalities. *See* RSA 198:41. Under that formula, the Department of Education first determines the total cost of providing the opportunity for an adequate education in a municipality based on the per-pupil cost set forth in RSA 198:40-a. RSA 198:41, I(a). The Department of Education then subtracts from that total the amount of revenues generated by the SWEPT revenues generated in that municipality under RSA 76:8. RSA 198:41, I(b). The Department then adds certain additional aid provided under RSA 198:40-e [Relief Funding] and RSA 198:40-f [Extraordinary Need Grants]. RSA 198:41, I(d)–(e). This amount is then distributed to the municipality across four payments through total education grants. *See* RSA 198:42, I. When the amount of SWEPT funds generated in and paid to a municipality under RSA 78:6, II, offsets the total amount the State otherwise owes to the municipality under RSA 198:41, I(a), (d), and (e), then that municipality receives its total education grant solely from SWEPT revenues. Those revenues are paid directly "to the municipality for the use of the school district or districts" regardless of whether they exceed the amount a municipality is entitled to through total education grants under RSA 198:41, I.

In this case, the plaintiffs challenge the distribution of revenues generated by the SWEPT; they do not challenge the SWEPT itself, as a revenue-raising mechanism, as disproportionate or non-uniform in valuation or rate. The plaintiffs point to no authority for the proposition that the proportionality and uniformity requirements in Part II, Article 5 extend to

how revenues are used once they are generated by a tax. For its part, the Supreme Court has suggested that "a state tax at a uniform rate levied at the state level" can be "returned to the school districts of the state without regard to the proportions in which payments are made by taxpayers in those districts." *Opinion of the Justices*, 112 N.H. 32, 35 (1972).

This suggestion should not be surprising, as a requirement that revenues generated through a proportionate and uniform tax also be distributed and used in in a manner that is proportionate and uniform would be unworkable. In essence, this would require that every appropriation the legislature approved and every expenditure the executive branch made using tax revenues uniformly and proportionately operate to the benefit of the tax base from which those revenues were collected. Even setting aside the inherent difficulty in determining whether different people have uniformly and proportionately benefited from a government program (and the litigation around that question that would no doubt ensue), such a requirement would materially hamper the government's ability to fund services that are targeted to specific portions of the population, including those that provide services to underserved or underrepresented communities. It would also raise a question as to whether tax revenues could ever be used to fund programs for persons who are not taxpayers. The State has identified no support for the notion that Part II, Article 5 operates in this way.

Neither the *Opinion of the Justices*, 142 N.H. 892 (1998), nor *Claremont School District v. Governor*, provides that support. The special abatement at issue in the *Opinion of the Justices* was subtracted from the calculation of a municipality's tax on the front end, meaning that it "applie[d] before any taxpayer within a given town receive[d] a tax bill" 142 N.H. at 899. Similarly, *Claremont School District* concerned a five-year phase-in provision that decreased on the front end the amount of state education tax certain municipalities were required to collect,

resulting in the state education tax rate in those municipalities being lower than it was in municipalities that had to collect the full amount of the tax from the outset. *See* 144 N.H. at 213. In other words, both of these cases concerned a state education tax regime that lacked proportionality and uniformity in how the tax rate was set and how the tax was assessed and collected, not how funds that were generated through a proportionate and uniform tax were distributed after they were collected.

Indeed, the only case the plaintiffs cite that directly supports their theory is the trial court's decision in *Londonderry School District SAU #12 v. State*, No. 05-E-0406, 2006 WL 563120 (N.H. Super. Mar. 8, 2006).[2] There, the trial court concluded that allowing municipalities to retain excess funds generated by the state education tax violated Part II, Article 5. *Id.* at *14–15. But in reaching this conclusion, the trial court, like the plaintiffs here, improperly conflated whether the tax was levied in a proportionate and uniform rate on the front end with whether the revenue generated by that tax was distributed in a uniform and proportionate manner after it was assessed and collected. *See id.* On appeal, the Supreme Court never reached this issue, much less endorsed the trial court's analysis. *See Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 162 (2006) (declining to reach this issue); *Londonderry Sch. Dist. SAU #12 v. State*, 157 N.H. 734, 737 (2008) (dismissing the case as moot). The trial court's Part II, Article 5 analysis in *Londonderry* is not persuasive for the reasons previously stated.

In sum, the plaintiffs have failed to demonstrate in this case that the SWEPT rate is set and the SWEPT is assessed and collected in a manner inconsistent with Part II, Article 5. They instead improperly focus on how revenues generated by the SWEPT are distributed once the tax

[2] This was one of two decisions issued by the same judge on the same day concerning the education-funding system. *See City of Nashua v. State*, No. 05-E-0257, 2006 WL 563314 (N.H. Super. Mar. 8, 2006)

is assessed and collected. The uniformity and proportionality requirements of Part II, Article 5 do not extend to the distribution of government revenues after they generated. The plaintiffs are therefore unlikely to succeed on the merits of their Part II, Article 5 claim.

II. The plaintiffs have not demonstrated that they face an immediate danger of irreparable harm or lack an adequate remedy at law.

A. To the extent the plaintiffs claim a personal financial harm, they can individually seek relief from the SWEPT under RSA chapter 76.

The plaintiffs contend that they face an immediate danger of irreparable harm and they possess no adequate remedy at law because sovereign immunity will preclude them from recouping any SWEPT amounts unlawfully collected from them through a subsequent damages claim. *See* Pls.' Mot. Prelim. Inj. at 18. This argument necessarily fails, because the plaintiffs do have a well-established adequate remedy available to them to the extent they seek to recoup taxes that *they themselves* have paid: the abatement procedure set forth in RSA chapter 76.

Under RSA 76:8, II, the SWEPT is assessed and collected at the municipal level by the "selectmen or assessors of each municipality." RSA 76:16 provides that "[s]electmen or assessors, for good cause shown, may abate *any* tax, including prior years' taxes, assessed by them or their predecessors, including any portion of interest accrued on such tax." RSA 76:16, I(a) (emphasis added). It further provides that "*[a]ny* person aggrieved by the assessment of a tax by the selectmen or assessors and who has complied with the requirements of RSA 74, may, by March 1 following the date of notice of tax under RSA 76:1-a, and not afterwards, apply in writing . . . to the selectmen or assessors for the abatement of the tax." RSA 76:16, I(b). "Upon the receipt of an application under [RSA 76:16,] I(b), the selectmen or assessors shall review the application and shall grant, for good cause shown, or deny the application in writing by July 1 after notice of tax date under RSA 76:1-a." RSA 76:16, II.

If the selectmen or assessors decline to grant an abatement, then a taxpayer has two avenues for review. First, "*any* person aggrieved . . . may apply in writing to the board of tax and land appeals [BTLA]." RSA 76:16-a, I (emphasis added). If the BTLA issues a decision adverse to the taxpayer, then the taxpayer may "appeal pursuant to RSA 71-B:12." RSA 76:16-a, V. RSA chapter 541 governs such appeals, RSA 71-B:12, and provides for a rehearing procedure and review by the Supreme Court, *see* RSA 541:3, :6. Alternatively, "*any* person aggrieved . . . may, in lieu of appealing [to the BTLA], apply by petition to the superior court in the county, which shall make such order thereon as justice requires." RSA 76:17. A superior court's decision under RSA 76:17 may likewise be appealed to the Supreme Court. *See, e.g.*, *Shaw's Supermarkets, Inc. v. Town of Windham*, 174 N.H. 569, 570–71 (2021).

"Courts of equity will not restrain the collection of a tax illegally assessed, in a case where the party has a plain and adequate remedy at law." *Brooks v. Howland*, 58 N.H. 98, 100 (1877) (citation omitted). "If the tax is illegal, and the party makes payment, then he is entitled to recover back the amount." *Id.* (citations omitted). Here, the abatement procedure under RSA chapter 76 provides the plaintiffs with a mechanism to recoup any taxes that they believe were unlawfully assessed against them. The lack of a civil damages remedy to recover those funds therefore does not irreparably harm the plaintiffs, as they have an adequate alternative remedy under statute. *See Perley v. Dolloff*, 60 N.H. 504, 505 (1881) ("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.").

The plaintiffs may well contend that the abatement procedure does not provide them with an adequate mechanism to obtain the actual relief they seek with respect to the SWEPT: a judicial determination that the SWEPT violates Part II, Article 5. This notion finds some support

in precedent. *See, e.g.*, *Bretton Woods Co. v. Carroll*, 84 N.H. 428, 431 (1930). It does not follow, however, that a *preliminary injunction* is the appropriate way to obtain that relief. Rather, as discussed above, the New Hampshire Supreme Court has contemplated that a *declaration* is the proper mechanism to resolve the constitutionality of an education-funding scheme, followed by a reasonable opportunity for the legislature to address any infirmity. *See Claremont II*, 142 N.H. at 476–77. To be sure, a plaintiff must have standing, bring a cognizable cause of action, and meet its burden of proof to obtain such relief. *See supra* section I(a), (b). But the lack of an available damages remedy in no way forecloses a plaintiff who can meet these requirements from a judicial determination as to the facial validity of a taxing regime.

B. Neither the imposition of an allegedly unconstitutional tax nor the timing concerns the plaintiffs raise constitutes an immediate danger of irreparable harm sufficient to warrant an injunction.

The plaintiffs imply in their motion that merely being subject to an unconstitutional tax satisfies the irreparable-harm requirement of the preliminary-injunction analysis. The New Hampshire Supreme Court's discussion of remedies in *Claremont II* dispels any such notion. As discussed, while the Court in *Claremont II* concluded that the education-funding system at issue in *Claremont II* was unconstitutional, it allowed the unconstitutional funding system "to remain in effect though the 1998 tax year" so that the legislature would be given "a reasonable time to effect an orderly transition to a new system." 142 N.H. at 476–77. The Court chose this course despite acknowledging that its holding "raise[d] issues concerning the interim viability of the existing tax system." *Id.* at 476. That the Court allowed the funding scheme to remain in place even after determining on the *final merits* that the system was unconstitutional confirms that the mere imposition of an unconstitutional tax, without more, does not constitute the type of irreparable harm that would warrant a *preliminary* injunction like the one the plaintiffs seek here.

Cf. Shelton v. Platt, 139 U.S. 591, 600 (1891) (noting that while an unconstitutional tax may "confer no right, impose no duty, and support no obligation," its collection "cannot be restrained by injunction, where *irreparable injury* or other ground for equitable interposition is not shown to exist").

The timing concerns raised by the plaintiffs in their motion do not change this analysis. The plaintiffs appear to contend they can satisfy the immediacy requirement of the irreparable-harm prong by pointing to the fact that the assessment and collection of the SWEPT are imminent. The plaintiffs fail to explain, however, why this was not equally true during each of the past eleven years that revenues generated by the SWEPT were distributed in the manner the plaintiffs now challenge. If anything, the one-year reduction of the SWEPT from $363 million to $263 million makes any purported harm the plaintiffs face now less severe than it was in previous tax years. Furthermore, the plaintiffs acknowledge in their motion, relying on a 2019 DRA publication, that the DRA "sets the SWEPT rates and begins issuing warrants starting in late September through November, and towns collect the SWEPT taxes beginning in December." Pls.' Mot. Prelim. Inj. at 11 & n.6. The plaintiffs do not explain why, if they believed they would be irreparably harmed by the assessment and collection of revenues the SWEPT generates, they did not seek relief before this process commenced. *See Bretton Woods Co.*, 84 N.H. at 432 (petitions to enjoin an unlawful tax "must be seasonably filed"); *see also Fish*, 840 F.3d at 753 ("[D]elay in seeking preliminary relief cuts against finding irreparable injury." (citation and quotation marks omitted)).

For these additional reasons, the plaintiffs have not met their burden to establish that they face an immediate danger of irreparable harm absent an injunction.

III. The balance of the equities and the public interest weigh decisively against disrupting the status quo.

If more reason were needed to deny the plaintiffs' motion, it can be found under the balance-of-the-equities and public-interest components of the preliminary-injunction analysis. The plaintiffs seek an injunction that would preclude the State from generating $263 million in revenue to support the State's education system two months into a new school year and at a time when the state and municipal budgets have already been set. The State is not aware of any previous instance in which $263 million was wiped from the state budget through a single judicial act, and it is hard to predict in the abstract the full extent of the disruption such an injunction would cause. What is not hard to see, however, is that that any of the most likely potential outcomes that would flow from such an injunction would be plainly inequitable and against the public interest.

One potential outcome is that the mechanism by which the State provides municipalities with total education grants would fail in its entirety. At discussed above, SWEPT revenues factor directly into the calculation of total education grants under RSA 198:41. *See* RSA 198:41, I(a)–(f). If the SWEPT were preliminarily enjoined, then a material and essential component of RSA 198:41—RSA 198:41, I(b)—would be rendered inoperable until this Court resolved the merits of the plaintiffs' Part II, Article 5 claim. The Supreme Court has made clear that when a component of the education-funding system "central to the legislature's purpose" is deemed unconstitutional, the remedy for that unconstitutionality cannot be to "give[] the statute a meaning that the legislature did not intend, either by addition or subtraction from its terms." *Claremont Sch. Dist.*, 144 N.H. at 218. A preliminary injunction that rendered inoperable a material and essential component of the formula for calculating education grants would leave that formula unable to operate for the duration of time the injunction was in place.

If the State cannot generate and distribute total education grants, then that funding will have to come from some other source, or else schools will have to shutter. Under the municipal budget law, "[a]ll appropriations in municipalities . . . shall be made by vote of the legislative body of the municipality at the annual or special meeting." RSA 32:6. "[W]ithin 20 days of the close of the meeting," the municipality shall file a report with the DRA "certify[ing] the appropriations." RSA 21-J:34, II. By September 1 of each year, each municipality shall also file reports with the DRA that "certify the number of residents and total valuation of each class of property included in the inventory of residents and ratable estates" and "revise all estimated revenues for the year." RSA 21-J:34, I & III. Municipalities complete the submission of these reports to the DRA by October of each year. *See* Kneuer Aff." ¶ 8. The Commissioner of DRA uses these reports "[t]o compute and establish the tax rates of towns." RSA 21-J:34, II.

Any total education grant that a municipality receives under RSA 198:41 is a revenue source that is factored in when setting a municipality's local education tax rate. *See* Kneuer Aff. ¶ 16. If the State were not able to generate and distribute any total education grants this year due to a preliminary injunction, then the Commissioner of DRA would likely have to remove that amount from the municipality's estimated revenues before setting the local education tax rate for that municipality. *See* RSA 21-J:35, IV; Kneuer Aff. ¶¶ 16, 19, 23. To avoid the need for a municipality to redo its budget, the amount of revenue that would otherwise have been generated by the total education grant would likely have to be subsumed in the municipality's local tax rate. Kneuer Aff. ¶¶ 19, 23. Were this to happen statewide, then the end result of this process would be a public-education system funded entirely through local taxes, which is incompatible with *Claremont II*. *See* 142 N.H. at 469–71.

In reality, however, the Commissioner of DRA has already set final state and local tax rates for 23 municipalities as of the date of this filing and preliminary rates for 33 municipalities. Kneuer Aff. ¶ 10. If any preliminary injunction issued in this case operated prospectively, then this would result in SWEPT being levied in some municipalities but not others, *id.* ¶ 20, which would violate Part II, Article 5, *see Claremont II*, 142 N.H. at 469–71. If the preliminary injunction instead operated to alter the status quo and require the Commissioner of DRA to start the rate-setting process anew for all municipalities, then this would still result in an unconstitutional tax scheme for the reasons stated in the preceding paragraph, while also materially delaying the rate-setting process statewide to the detriment of municipalities collecting revenues to fund vital services and to the confusion of taxpayers who have already received tax bills. *See* Kneuer Aff. ¶ 19. Neither result is equitable or in the public interest.

If total education grants could be generated and distributed even if RSA 198:41, I(b) was inoperable, then this would present a different set of problems. Under that scenario, the State would not be able to offset those grants with revenues generated by the SWEPT and would instead have to pay the full grant amounts out of the education trust fund. *See* Affidavit of Charles M. Arlinghaus ("Arlinghaus Aff.") ¶ 9; *see also* RSA 198:42, I. Because the education trust fund would not have sufficient funds to cover a $263 million shortfall, the bulk of that amount would have to be transferred from the general fund under RSA 198:42, II. Arlinghaus Aff. ¶ 10.

This result would be unprecedented and extraordinarily disruptive to the normal and orderly functioning of state government across all branches of the government and all agencies. *Id.* ¶¶ 10, 11. To the best of the knowledge of the current Commissioner of the Department of Administrative Services, the State has never faced an unanticipated, unplanned revenue shortfall

of $263 million during a single fiscal year. *Id.* ¶ 11. Such a shortfall would likely require the Governor to issue an Executive Order directing state agencies to cut spending. *Id.* It would also likely eliminate funding for budget priorities that the legislature has funded through non-appropriated funds. *Id.* Those priorities can only be funded in the event of a budget surplus sufficient to cover the cost of those priorities. *Id.* ¶ 4. Examples of budget priorities passed by the current legislature that are funded through non-appropriated funds are $3 million for the Lead Hazard Remediation Fund, $26.5 million for municipal employee retirement contributions, $5 million in nursing home reimbursements, $500,000 for an Office of Special Education Advocate, $25 million in PFAS remediation loans, and $42 million for emergency fuel assistance. *Id.* ¶ 11.

This result is not consistent with the legislative purpose or intent of RSA 198:41, which contemplated the SWEPT as a principal funding mechanism for total education grants. Rather, all of the above scenarios help illustrate the wisdom of the Supreme Court's observation in *Claremont II* that "[d]ecisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported." 142 N.H. at 462. These scenarios likewise demonstrate why courts have long recognized that enjoining the collection of taxes is a particularly disfavored judicial activity. *See, e.g., Perley,* 60 N.H. at 505 (observing that a "court of equity will not ordinarily assume" to "prevent the payment of a tax by injunction"); *Dows v. City of Chicago,* 78 U.S. 109, 110 (1870) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious

detriment to the public."). Thus, even if the plaintiffs were likely to succeed on the merits of their challenge to the SWEPT, *Claremont II* contemplates that the proper remedy is not for a court to issue a preliminary or permanent injunction, but rather to issue a declaration and to leave the SWEPT in place so as to give the legislature "a reasonable time to effect an orderly transition to a new system." 142 N.H. at 476–77.

For all of the foregoing reasons, the balance of the equities and the public interest weigh decisively against granting the plaintiffs' motion.

Conclusion

The plaintiffs lack standing to maintain their claims and have not met their burden under any of the traditional preliminary-injunction factors. The Court should therefore deny their motion for a preliminary injunction.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: October 28, 2022

/s/ *Samuel Garland*

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Certificate of Service

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

Date: October 28, 2022 /s/ *Samuel Garland*
Samuel R.V. Garland.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

AFFIDAVIT OF CHARLES M. ARLINGHAUS, COMMISSIONER OF THE NEW HAMPSHIRE DEPARTMENT OF ADMINISTRATIVE SERVICES

I, Charles M. Arlinghaus, being over the age of 18, swear as follows:

1. I currently serve as the Commissioner for the New Hampshire Department of Administrative Services. I have held that position since July 2017. Before that, I held the position of Budget Director in the Officer of the Governor from January 2017 to June 2017. From 2003 until June 2017, I served as President and CEO of the Josiah Bartlett Center, a policy and research organization that analyzes state government finances and operations.

2. As Commissioner of the Department of Administrative Services, I serve as the chief fiscal planning and control officer of the State. The Department of Administrative Services' role includes managing and analyzing the financial, administrative, and operational functions of the State, including the state budget, accounting and reporting, financial and human resources systems, procurement, property, facilities, fleet management, public works design and construction of major state projects,

risk management, health care plans, personnel administration, and other administrative services.

3. Through its biennial budget, the State sets expenditures across a two-year period divided into two fiscal years. A new fiscal year begins on July 1 of each year and ends on June 30 the following year. The current fiscal year—Fiscal Year (FY) 2023—began on July 1, 2022, and ends on June 30, 2023.

4. Expenditures set in the state budget are funded through state revenues. In funding its spending priorities, the legislature can appropriate specific funds to pay for those priorities or can fund those priorities through non-appropriated funds. Non-appropriated funds come from surplus revenues generated in excess of those revenues required to fund legislative priorities for which specific appropriations have been made in the budget. Budget priorities funded through non-appropriated funds can only be funded when there is, in fact, a budget surplus sufficient to fund those services.

5. During times when there is a budget deficit—meaning the revenues generated during a budget period are less than what was appropriated in expenditures in the budget—the Governor can issue an Executive Order directing state agencies to cut spending. In the past, Governors have had to issue Executive Orders of this nature in the face of revenue shortfalls.

6. RSA 198:41 sets forth the formula under which the State calculates the education grants municipalities receive from the State during a given fiscal year. Under that formula, education grants are calculated by first totaling the amount of adequacy aid a municipality is entitled to under RSA 198:40-a, I through II, then subtracting from that total the amount of revenue generated in the municipality through the Statewide

Education Property Tax ("SWEPT"), and then adding certain additional amounts the municipality might be entitled to under RSA 198:40-d and RSA 198:40-e. *See* RSA 198:41, I(a)–(e).

7. Education grants calculated under this formula are distributed to municipalities out of the education trust fund in four installments. RSA 198:42, I. Payments are made regardless of the balance of funds available in the education trust fund. RSA 198:42, II. If the balance of the education trust fund is less than zero after the Governor draws a warrant from the education trust fund to fund education grants, funds are transferred into the education trust fund from the general fund to eliminate the deficit. RSA 198:42, II.

8. The SWEPT is the principal revenue source for funding education grants under RSA 198:41 and RSA 198:42. If the SWEPT were not assessed for a particular tax year, it is not clear to me whether the State could calculate education grants under RSA 198:41 and subsequently distribute those grants under RSA 198:42. If the State could not calculate those grants, schools may not receive education grants so long as the injunction remains in effect. To the best of my knowledge, this question has never arisen before, as the SWEPT has always been collected during the period the formula set forth in RSA 198:41 has been in effect.

9. By statute, the SWEPT rate is annually set at a level sufficient to generate revenue of $363 million. RSA 76:3. For FY 2023 only, the legislature lowered this amount to $263 million. If the SWEPT not assessed during the next tax year but, but the State still had to distribute education grants under RSA 198:41 and :42, the $263 million

dollars the SWEPT would have generated would have to have to come from somewhere else in the State budget.

10. The education trust fund would not have sufficient funds to cover the $263 million shortfall. Rather, the bulk of that amount would have to be transferred from the general fund under RSA 198:42, II. This would be extraordinarily disruptive to the normal and orderly functioning of state government across all branches of government and all state agencies. It would likely require the Governor to issue an Executive Order directing state agencies to cut spending dramatically to the detriment of other important state programs and priorities. It is also likely that budget priorities funding through non-appropriated funds would not get funded. According to information kept by the Legislative Budget Assistant, examples of budget priorities funded through non-appropriated funds include $3 million for the Lead Hazard Remediation Fund, $26.5 million for municipal employee retirement contributions, $5 million in nursing home reimbursements, $500,000 for an Office of Special Education Advocate, $25 million in PFAS remediation loans, and $42 million for emergency fuel assistance.

11. Such a result would be unprecedented, harmful to the operations of the state government, and, ultimately, harmful to the public interest. To the best of my knowledge the State has never faced an unanticipated, unplanned revenue shortfall of $263 million during a single fiscal year. Nor, to the best of my knowledge, has a Governor ever had to issue an Executive Order directing anything approaching $263 million in spending cuts.

[Remainder of page left intentionally blank]

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

Executed on this 28th day of October 2022.

Dated: October 28, 2022

Charles M. Arlinghaus

THE STATE OF NEW HAMPSHIRE
MERRIMACK COUNTY

Before me, personally appeared Charles M. Arlinghaus, and acknowledged the foregoing to be true an accurate to the best of his knowledge or belief.

Dated: October 28, 2022

Notary Public/Justice of the Peace

STATE OF NEW HAMPSHIRE NOTARY PUBLIC
OFFICIAL SEAL
DAWN P. HOWE
NOTARY PUBLIC – NEW HAMPSHIRE
My Comm. Expires June 6, 2023

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

AFFIDAVIT OF BRUCE K. KNEUER

I, Bruce K. Kneuer, being duly sworn, do hereby attest to the following statements of fact of which I have personal knowledge:

1. My name is Bruce K. Kneuer, I am above the age of 18 years of age, I am an employee of the State of New Hampshire Department of Revenue Administration ("DRA"), and my business address is 109 Pleasant Street, Concord, New Hampshire.

2. I presently serve as a Supervisor in the Municipal and Property Division of the DRA ("Division").

3. I have been employed by DRA for six years and have held my current position since May 2016.

4. Among my duties is to supervise and oversee the setting of municipal tax rates by the DRA under authority delegated by the Commissioner to the Division.

5. I supervise three Division employees who review the reports submitted by each municipal entity and develop tax rates using the criteria set forth in RSA 21-J:35 and RSA 76:8. I advise the Division Director and the Commissioner regarding the setting of tax rates.

6. Among the tax rates set for each municipal entity are the Statewide Education Property Tax Rate ("SWEPT Rate"), and the local education property tax rate ("Local Education Rate").

7. The Division sets a variety of tax rates for 259 cities, towns, and unincorporated towns.

8. The process begins in October when the municipal entities complete the submittal of various forms and reports to the Division pursuant to RSA 21-J:34, and the Division receives certain reports from the Department of Education, the State Treasury, the New Hampshire Department of Transportation, and the New Hampshire Department of Environmental Services concerning various sources of revenue, including the Education Grant Amounts, that will be provided to the municipalities. The Division generally sets all rates promptly after October 1 so that municipal entities can start the billing and collection process before the end of the calendar year.

9. In the past five years the Division set final rates for between 51 and 136 municipal entities in October, final rates for between 86 and 167 municipal entities in November, and final rates for between 5 and 39 municipal entities in December. On two occasions in the past five years the Division set rates for 1 municipal entity after December.

10. As of October 28, 2022, the Division has set final rates for 23 municipal entities, and preliminary rates for 33 municipal entities.

11. After a rate is set, notification thereof is provided to the municipality via a web portal following which the municipality has ten (10) days to request an oral hearing before the Commissioner to contest the rate.

12. Each municipal entity gets its own SWEPT Rate and its own Local Education Rate. For the sake of clarity we will consider the municipality-specific SWEPT Rates being calculated starting in October of 2022.

13. On November 3, 2021, in accordance with RSA 76:8 the Division issued a 2022 Commissioner's Warrant to each municipal entity (each a "2022 Commissioner's Warrant"). Each Commissioner's Warrant includes a specific apportionment of SWEPT which local officials must assess (the "SWEPT Amount") and a Uniform SWEPT Rate. True copies of the 2022 Commissioner's Warrants are attached hereto as Exhibit A.

14. The Division is currently in the process of setting municipality-specific SWEPT Rates. These rates are calculated by taking a municipality's SWEPT Amount (i.e., its share of the total amount of SWEPT that must be generated in a specific year) and dividing it by that municipality's "Net Valuation without Utilities," which the municipality reports to the Division under RSA 21-J:34.

15. The 2023 Commissioner's Warrants were issued on September 30, 2022. A true copy of the 2023 Commissioners Warrants are attached hereto as Exhibit B.

16. To calculate a Local Education Rate, the Division reviews the reports filed by the municipalities and school districts under RSA 21-J:34, including voter approved appropriations and anticipated sources of revenue. In accordance with RSA 21-J:35, the Division may delete unlawful appropriations and adjust revenues that are inaccurate or inappropriate. The Division then determines a "Net Assessment" by subtracting the approved total of revenues and credits from the approved total of voted appropriations. The Division then subtracts the Education Grant Amount that will be provided to each school district pursuant to RSA 198:41, as calculated by the Department of Education, and the SWEPT Amount. This final sum, the "Net Required Local Education Tax Effort" is DIVIDED by the "Net Valuation Adjusted to Remove TIF Retained Value and Commercial/Industrial Construction Exemption" as found on the MS-1 "Summary Inventory of Valuation" Report to yield the Local Education Rate.

17. I am aware of a request by the plaintiffs in this case for the court to enjoin the DRA from issuing the Commissioner's Warrant pursuant to RSA 76:8, II which they appear to believe directs the "selectmen or assessors of each municipality … to assess and pay to the municipality" any SWEPT assessments, and, from setting any negative Local Education Rates (the "SWEPT Injunction" and the "Local Education Rate Injunction" respectively).

18. A negative Local Education Rate may occur in a very limited set of circumstances when a municipal entity, generally an unincorporated place, has minimal or no public education responsibilities within its boundaries, i.e. no, or very small school budget. In such a situation there are few or no students to educate and this then requires the school district to seek a minimal dollar amount of appropriations. As noted above, the calculation of the Local Education Rate includes the subtraction of the SWEPT Amount from the Commissioner's Warrant. When the SWEPT Amount is greater than the "Net Assessment" of the school district, the result is a negative value (for calculation purposes) of the "Net Required Local Education Tax Effort". This negative result when divided by the "Net Valuation Adjusted to Remove TIF Retained Value and Commercial/Industrial Construction Exemption" results in a negative value for the Local Education Rate.

19. If the SWEPT Injunction is entered by the court it is likely that DRA will set Local Education Rates to cover all of the amounts budgeted by the various school districts for public education, including the portion that would have been covered by the taxes

assessed using the SWEPT Rate. However, this effort will be complicated by the interplay between the $0 SWEPT and the Education Grant Amount which could delay the setting of rates which are necessary for municipal entities to issue tax bills and collect needed revenue for local purposes including education as well as public health and safety because the Department of Education will need to re-calculate Education Grant Amounts.

20. The SWEPT Injunction will also result in nonuniform taxation among municipal entities as between those municipalities for which rates were set before the SWEPT Injunction and those for which SWEPT was enjoined by the court. Two hypothetical towns with the same tax base and the same "Net Assessment" will see different Local Education Rates and different Education Grant amounts depending on whether or not the DRA set their respective rates before the injunction.

21. If SWEPT is enjoined, then most previously calculated negative local rates would result in a $0.00 Local Education Rate and no education tax dollars would be raised for that district. However, in certain cases the absence of the SWEPT Amount could result in a positive Local Education Rate.

22. If the SWEPT rate is *not* enjoined, but negative Local Education Rates are enjoined, then those districts that would have had a calculated negative rate but for the injunction, would need to be given a $0.00 rate. While this could result in zero tax dollars being raised for the school district, it would not address the raising of SWEPT and the requirement that the collecting municipality forward SWEPT to the school district.

23. If both the SWEPT Rate and the negative Local Education Rate are enjoined there are two likely outcomes. First, the Local Education Rate calculation will not subtract any SWEPT Amount in deriving the total dollars to be assessed via the Local Education Rate. In addition, the Local Education Rate would increase in order to bear the additional Net Required Local Education Tax Effort that without the injunction would have been covered by SWEPT. Second, the Local Education Rate calculation would need to receive any changes in the amount of Education Grant funding directed to a school district, caused by the cessation of SWEPT. These changes would need to be determined by the Department of Education and communicated to DRA.

Further the affiant sayeth not.

SIGNED AND SWORN TO UNDER THE PAINS AND PENALTIES OF PERJURY THIS 28TH DAY OF OCTOBER, 2022.

Bruce K. Kneuer

Bruce K. Kneuer

MERRIMACK, ss.

Subscribed and sworn to before me, in my presence, this 28th day of October, 2022.

Notary Public/~~Justice of the Peace~~

MY COMMISSION EXPIRES 1/23/2024