

THE STATE OF NEW HAMPSHIRE

Cheshire, SS.

Docket No. 213-2019-cv-00069

SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

PETITIONERS' TRIAL BRIEF

The State must *fully* fund an adequate education. This means that the State must fund a constitutionally adequate education in the real world. In the real world, no school district can provide a constitutionally adequate education while violating the law. The only evidence at trial about what it truly costs to provide the education defined in RSA 193-E:2-a¹ was from district witnesses, who unanimously testified that it costs more than \$9,900 per student, exclusive of transportation. Where the State is funding an adequate education at less than \$5,000 per student, pursuant to RSA 198:40-a, II(a), the State is failing to meet its constitutional obligation.

CONSTITUTIONAL STANDARD

“[T]he mandate of Part II, Article 83 imposes upon the State the *exclusive* obligation to fund a constitutionally adequate education. The State may not shift *any* of this constitutional responsibility to local communities.” *Opinion of the Justs.*, 145 N.H. 474, 476 (2000) (emphasis added). In its decision remanding this case, the Supreme Court once again recognized that “Part II, Article 83 of the State Constitution imposes a duty on the

¹ For students who do not have additional needs that qualify them for differential aid under RSA 198:40-a, II(b)-(e). *See* Order on Mot. in Limine, Index #232, at 15-16.

State to provide a constitutionally adequate education to *every educable child* in the public schools in New Hampshire and to guarantee adequate funding.” *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 156 (2021) (emphasis added) (quotation omitted).

State witnesses conceded that school districts need to comply with all applicable statutes and regulations, and that school districts must provide all of the cost components listed in Plaintiffs’ Exhibit 17. Nonetheless, at trial, the State argued that its constitutional obligation does not encompass all of the cost components (i.e., items, services, and personnel) required to provide an education to students. Instead, the State contended, its obligation begins and ends at the hypothetical minimum necessary components necessary to provide the “substantive educational program” set forth in a select number of minimum standards – the components of which the State declined to identify, much less cost. This argument has already been rejected by the Supreme Court. The cost of providing a constitutionally adequate education is the *full* cost of providing the education defined in RSA 193-E:2-a, including all of the components necessary (as a matter of fact, law, or both) to deliver that education. The Supreme Court remanded for this Court to “determine[e] the components of an adequate education and their costs.” *Contoocook Valley Sch. Dist.*, 174 N.H. at 166-67. This determination “presents a mixed question of law and fact . . .” *Id.*

I. Strict scrutiny is the applicable standard of review.

The districts unquestionably proved a deprivation of the fundamental right to a State-funded adequate education by a preponderance of the evidence. Dr. Kimberly Rizzo Saunders testified that a base adequate education could not be provided to the students in the State of New Hampshire in fiscal year 2019 for less than \$9,929 per pupil. Dr. Rizzo Saunders also specifically testified that a constitutionally adequate education could not be

provided in the ConVal school district for less than \$9,929 per pupil. Ms. Taylor testified that a constitutionally adequate education could not be provided to the elementary school students in the Winchester School District for less than \$14,000 per pupil, and Dr. Dassau testified that a constitutionally adequate education could not be provided to Winchester's high school students for less than the roughly \$14,000 tuition being paid for them to attend Keene High School.² Representatives from all 18 petitioner school districts all testified that a constitutionally adequate education could not be provided for less than the \$9,929 per pupil set forth in Plaintiffs' Ex. 1. In fact, the evidence showed that there is *nowhere* in the state that a K-12 education can be provided for less than \$14,000 per student. *See* Plaintiffs' Ex. 15.³ The evidence was also undisputed that the costs of providing additional services to students who qualify for differentiated aid greatly exceeds the amount provided by RSA 198:40-a, II(b)-(e). Witnesses from the petitioning school districts repeatedly testified that the special education costs in their district far exceeded the total of differential aid from all categories. Therefore, those amounts allocated in RSA 198:40-a, II(b)-(e) cannot be used to supplement the base adequacy amount in RSA 198:40-a, II(a).⁴

² In 2019, the general education tuition was \$14,023. It increased to \$15,637 for the 2022 to 2023 school year. Defendants' Ex. 280.

³ Plaintiffs' Ex. 15 identifies Auburn as the district with the lowest per-pupil cost. Auburn only operates an elementary school. In fiscal year 2022, Auburn's per pupil cost, for elementary students only, was \$14,233.89. In that year, Auburn's differential adequacy funding for special education, ELL, F & R and 3rd grade reading totaled approximately \$436.17 per pupil. Plaintiffs' Ex., at 695. Therefore, Auburn had a base cost of \$13,797.72 per pupil after subtracting differential costs for elementary students only. As Dr. Baker explained in his testimony, high school students cost more to educate. *See also* Plaintiffs' Ex. 114, at 33.

⁴ *See* Petitioners' Motion in Limine to Preclude Evidence of Funding other than Base Adequacy, Index #161, at ¶¶ 6-8.

Therefore, the burden of proof shifted to the State. The State presented no evidence whatsoever to support that an adequate education could be provided at a cost of less than \$5,000 per pupil.⁵ That failure alone is sufficient to warrant a verdict in Petitioners' favor.

But even under intermediate scrutiny or rational basis review, the districts prevail. There is no compelling, important, or even rational reason why the State would choose not to fund services it requires school districts to provide as part of a constitutionally adequate education.

"[I]ntermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective." *Cnty. Res. for Just., Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007). "The burden to demonstrate that the challenged legislation meets this test rests with the government[,]" and, "[t]o meet this burden, the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." *Id.* (quotations omitted). Under this standard, again, the State's failure to proffer any evidence in support of RSA 198:40-a, II(a), mandates judgment in Petitioners' favor.

In rational basis review, the court "inquire[s] only as to whether the legislature could reasonably conceive to be true the facts upon which it is based." *Cnty. Res. for Justice, Inc.*, 154 N.H. at 757. The districts at trial presented evidence that the legislature could not

⁵ The State did attempt to suggest in cross examination of Teresa Taylor, Winchester's business administrator, that the costs of teachers alone could be less than \$5,000 per pupil if the State were only responsible for the costs of teachers. First, Ms. Taylor testified that Winchester cannot provide just teachers in a vacuum but is both practically and required by law to provide all of the components listed in Plaintiffs Exhibit 17. Therefore, the costs of providing instruction is not limited to the cost of teachers but must include facilities, principal, school counselor, etc. Second, the language of RSA 193-E:2-a does not limit the provision of an opportunity for an adequate education to merely the provision of teachers. In order to provide instruction in the subject areas listed in the statute, all of the cost components listed in Plaintiffs' Exhibit 17 must be provided.

reasonably conceive to be true that an adequate education costs less than \$4,000 per student. The data collected and published by the DOE demonstrates that there is not a single school district in the state that provides an adequate education for less than \$14,000 per student. Plaintiffs' Ex. 15. That same data has been provided to every legislative committee to study the issue of funding an adequate education and relied upon by each of those committees. Plaintiffs' Ex. 18, at 444 ("members of the Committee devoted a significant amount of time reviewing education cost data from New Hampshire"), 477-478 (listing "State Average Cost Per Pupil and Total Expenditures 2005-2006" and "DOE-25 for 2005-2006" in committee's bibliography), Plaintiffs' Ex. 19, at 497 ("In FY 2016, the Department of Education (DOE) calculated the state average cost per pupil to be \$15,311 excluding transportation."), Plaintiffs' Ex. 20, at 642 ("The source of the data used in this analysis came from NH Department of Education DOE 25 reports from 2008 to 2019."). As Winchester, Derry, and Hill's witnesses all described, those districts are unable to provide the education defined in RSA 193-E:2-a for less than what they presently pay to tuition their students elsewhere, between \$14,000 and \$17,000 per student. The DOE receives and the Commissioner reviews those tuition agreements. In short, there is no factual basis upon which the State could have concluded that an adequate education costs less than \$5,000 per student – as one witness described it, the idea is "laughable."

COMPONENTS OF AN ADEQUATE EDUCATION AND THEIR COSTS

In order to provide instruction in the substantive content areas of RSA 193-E:2-a, a public school district must comply with all applicable statutes and regulations. Those laws require school districts to provide: teachers; principals; administrative support services; guidance counselors; library media specialists; technology coordinators; custodians;

instructional materials; technology; teacher professional development; facilities operations and maintenance; transportation; food services; school nurse services; and superintendent services. *See* Plaintiffs' Ex. 17. With the exception of those witnesses who claimed not to know what components are required to provide an adequate education in this state, all of the witnesses, both from the districts and from the State, agreed that all of these components are required. And this Court can determine as a matter of law that they are all required pursuant to statute, regulation, or both.⁶

Moreover, each of those components is required as a practical matter. They are not required by statute or regulation merely to increase costs; on the contrary, those legal requirements exist because these components are vitally important to the provision of the education in the subject areas defined in RSA 193-E:2-a.

I. Teachers

Teachers are absolutely necessary to provide an adequate education, as even the State appeared to concede during closing argument. They are unquestionably required by law, *see, e.g.*, Ed. 306.15, and district witnesses unanimously testified that they are required as a practical matter to deliver the education described in RSA 193-E:2-a.

In order to provide teachers, districts must pay them a salary sufficient to recruit and retain them. A starting salary sufficient to recruit a teacher is approximately \$40,000 in this state.⁷ The average starting salary in 2021-2022 was \$40,478.90. Joint Ex. 481. As

⁶ Even under the State's erroneously restrictive view that the components of an adequate education are only those identified in select Ed. 306 regulations, each of these components is required.

⁷ Dr. Rizzo-Saunders' 2018 analysis used a salary of \$38,687 which was then supposed to correlate to a third-year teacher salary. Plaintiffs' Ex. 1, at 1, Plaintiffs' Ex. 4, at 1. Nevertheless, as Dr. Rizzo Saunders and numerous other witnesses testified, in the 2022-2023 school year, the beginning salary for a first-year teacher with no experience is closer to \$40,000.

Newport's superintendent explained, a starting salary less than \$38,000 makes it extremely difficult for districts to hire teachers. And school districts cannot hire only first-year teachers. As a practical matter, it is impossible to do so given that there are not enough first-year teachers to staff every school in the state each year. Thus, in the real world, base adequacy requires more than a starting salary. Dr. Rizzo Saunders testified that the average teacher salary exceeds \$60,000.

In addition, as a matter of law, certain benefits must be provided to teachers. These include health insurance, retirement benefits, FICA, and unemployment insurance.⁸ These benefits are not only legally required but are also necessary as a factual matter to recruit and retain teachers, who, as Dr. Rizzo Saunders explained, have historically accepted lower pay than what they would receive in the private sector in exchange for better benefits. As Dr. Rizzo Saunders explained, each of these benefits has a cost that, collectively, equals or exceeds \$27,418. Plaintiffs' Ex. 1; *see also* Ex. 5. Even if one were to quibble over subparts of a teacher's compensation package, a total compensation package of in excess of \$66,105 is necessary to recruit and retain teachers.⁹

The State does not appear to contest the amount of those benefits which are set by the state or federal government. School districts are required by federal law to contribute 7.65% of a teacher's salary to social security and Medicare and required by the State of New

⁸ Teachers must also receive professional development, Ed. 306.16, which the 2018 Legislative Committee costed at \$30 per student. As Dr. Rizzo Saunders explained, that is a conservative real-world cost for that requirement.

⁹ The State's expert, Dr. Jay Greene, agreed on cross examination that it would be appropriate to take the teacher compensation package from the 2008 Study Commission - \$47,267 - and increase it by the rate of inflation. Plaintiffs' Ex. 18, at 458. Dr. Greene further agreed that increasing that value by the rate of inflation would result in a figure greater than \$66,000.

Hampshire to contribute teacher retirement at 21.02% for the 2022 and 2023 fiscal years.¹⁰ Plaintiffs' Ex. 6. Therefore, required federal social security/Medicare and State teacher retirement is \$11,468 on a \$40,000 salary or \$17,202.00 on a \$60,000 salary – approximately \$1,500 to \$7,000 higher than used in Dr. Rizzo Saunders' 2018 analysis. Plaintiffs' Ex. 1.

The largest benefit cost is the provision of health insurance. Several witnesses testified that, where New Hampshire is a small state, there are not many health insurance options available, and the costs of premiums do not substantially vary between providers. Similarly, while the percentage of that premium that districts pay has some variability between districts, from approximately 80 to 100 percent, these variations are offset by the costs of other benefits such as dental insurance or life insurance or districts contributing to health insurance deductibles. Finally, any reduction in the districts' proportional share of the cost is frequently offset by the increase in premiums over time.

The greatest impact on the costs of health insurance are the demographics of the teachers. While the premium for a teacher's family plan was \$19,967.64 in 2019, the premium for a two-person plan was \$14,790.84. Plaintiffs' Ex. 5. These premiums are still substantially less than the health insurance premiums that the State is paying to recruit and retain its own employees. *See* Plaintiffs' Ex. 8. A state employee, such as Dr. Nate Greene,¹¹ can have 95% of his family health insurance premium paid by the State leaving an employee

¹⁰ The State more than doubled this percentage from 8.93% in 2008-09. Plaintiffs' Ex. 6. School districts have no control over these rates.

¹¹ Prior to becoming employed by the Department of Education, Dr. Nate Greene was a science teacher and then a principal.

contribution of only \$1,560.00. Plaintiffs' Ex. 8. School districts must compete against other employers, including the State Department of Education. Offering benefits substantially below what is offered by the State would result in school districts struggling to recruit and retain teachers.

As explained by Dr. Rizzo Saunders, the most conservative way to determine the cost of health insurance would be to take the costs of a family plan and two-person plan and average them to a health insurance cost of \$17,378.92 in 2019. *See* Plaintiffs' Ex. 5. Numerous superintendents and business administrators testified that they conduct analyses of the costs necessary to provide health insurance as part of their job of running a school district and that approximately \$17,000 per employee was a conservative health insurance cost. Even if the costs of health insurance could be lessened by districts paying less than the 95% of the premiums that the State pays for its employees, any decrease in the cost of health insurance would be offset by increases in the cost of teacher retirement.¹²

At trial, the State suggested that school districts could cut costs by only employing single teachers and/or only paying for health insurance for employees and not spouses or children. But, as numerous superintendents and business administrators testified, the school districts could not sufficiently staff their schools if they refused to provide health insurance to spouses or family members, particularly where school staff have exchanged a higher salary in the private sector for better benefits in the public sector.¹³

¹² For example, decreasing a district's contribution to a health insurance premium of \$20,000 from 88% to 80% would decrease costs to the district by \$1,600, while the State-mandated increase in teacher retirement from approximately 17% to 21% would increase costs to the district by \$1,600 for a first-year teacher earning \$40,000. *See* Plaintiffs' Ex. 6.

¹³ In addition to school districts needing to provide insurance for spouses and children as a matter of fact, school districts may also be lawfully required to provide spousal and family benefits. RSA

a. Student-teacher ratio

There must be a sufficient number of teachers to provide an adequate education.

The State sets forth by regulation the maximum classroom sizes. Pursuant to ED 306.17, the maximum class sizes are:

- (1) Kindergarten - grade 2, 25 students or fewer per educator, provided that each school shall strive to achieve the class size of 20 students or fewer per educator;
- (2) Grades 3 - 5, 30 students or fewer per educator, provided that each school shall strive to achieve the class size of 25 students or fewer per educator; and
- (3) Middle and senior high school, 30 students or fewer per educator. . .

....

(c) . . . [T]he maximum number of students in laboratory classes in such areas as science and career and technical education shall be determined by the number of work stations and the size and design of the area. In no case shall the number of students in laboratory classes exceed 24.

The maximum class size does not directly correspond with the number of teachers needed to staff a school. In sum, the number of teachers required to provide the education described in RSA 193-E:2-a will *always* exceed the number derived by simply dividing the student population by the maximum legal classroom size due to a number of factors.

First, public school districts cannot turn students away mid-year. Districts must accept whoever moves into their districts and must, therefore, have sufficient staff accommodate new students moving in. Districts cannot predict which grades new students

193:38 makes it illegal for school districts to discriminate in the provision of benefits based on marital status and familial status.

may move in to. Given that it is nearly impossible to hire teachers mid-year, districts must have space in their classrooms to accommodate mid-year transfer students.

Second, public school districts cannot turn students away to maintain perfect efficiency. Therefore, whether 30 first graders arrive on the first day of school or 44 first graders arrive, two first-grade teachers are required to comply with the maximum classroom size of 25. Ed. 306.17(a)(1). But the teacher-to-student ratio in those two situations varies significantly. If the school has 30 first graders, there would be a teacher-to-student ratio of 1:15. For 44 first graders, there would be a teacher-to-student ratio of 1:22.

Third, teachers cannot practically or lawfully teach all subjects. As a practical matter, a teacher with a background in French may not be able to teach chemistry. As a matter of law, teachers can only teach at the levels and in the subjects in which they possess certification from the State of New Hampshire.

Fourth, in addition to classroom teachers, elementary schools must also have reading specialists. Ed. 306.15(a)(3). These reading specialists may pull small groups of students out of the regular classroom or go into classrooms (as a second teacher in the room) in order to provide instruction in literacy. Learning how to read is critical to the success of the rest of a student's education, and a reading specialist is therefore required in order for students to receive an adequate education. Adding a reading specialist teacher to the regular classroom teachers will necessarily decrease the student teacher ratio.

Finally, teachers do not, and cannot, teach for every minute of the day. In order to recruit and retain teachers, teachers need time during the day to prepare their classes and to have a break. Several witnesses testified that it was common to have teachers teach 5 of 8 blocks. Therefore, if there were only 1 teacher for every 30 students and teachers taught 5

of 8 blocks, class sizes would have to be 48 students per class. Looking at it a different way, if each class had 25 students, and teachers taught 5 of 8 blocks, there would need to be 1 teacher for every 15.625 students. If, on the other hand, average class sizes needed to be smaller due to (1) the need to leave space for students who move in mid-year (2) the demographics of particular grade levels making perfect efficiency impossible (3) the need to have teachers certified in the subject areas that they teach and (4) the requirement to have an extra teacher, a reading specialist, in the elementary grades and the average class size¹⁴ was approximately 20 students,¹⁵ then a school that has teachers teach 5 of 8 blocks would need 1 teacher for every 12.5 students.

Plaintiffs' Exhibit 1 costs out an adequate education by using a student teacher ratio for grades 3 to 12 of 12.6. Using the common ratio of teachers teaching 5 of 8 blocks, a student teacher ratio of 12.6 would roughly translate to an average class size of 20.16. This is 15.7% lower and more conservative than the statewide average class size of 17.0 in grades 5 through 8. Joint Ex. 473. There is nowhere in the State where a school district can operate on a teacher student ratio of 1 to 30. *See* Plaintiffs' Ex. 11. As Teresa Taylor explained, even in Winchester, where taxpayers are unable or unwilling to pay for more staff than is absolutely necessary, the teacher-to-student ratio as of October 1, 2021, was 1 to 11.2, not as a matter of choice or policy, but as a matter of real-world circumstances beyond the district's control. Plaintiffs' Ex. 24, at 804. The average student-to-teacher ratios over a period of 10 years ranged from a low of 11.8 to a high of 12.6. *See* Plaintiffs' Ex. 11.

¹⁴ Average class size is, of course, just an average. There may be an English 9 class with 25 students and then an AP Chemistry class with 15 students and that would average out to 20 students.

¹⁵ The State-wide average class size as of October 1, 2021, was 16.2 for grades 1-2, 17.5 for grades 3-4, and 17.0 for grades 5-8. Joint Ex. 473, at 1.

More rural locations tended to have lower student teacher ratios. For example, in 2018, Pittsburg had a 5.6 student-to-teacher ratio as compared to Manchester's ratio of 13.1 *Id.*, at 81. But no district could practically or lawfully provide an adequate education with only 1 teacher for every 30 students.

II. Principals

Principals are required by Ed 306.15. And, as Dr. Rizzo Saunders explained, they are absolutely necessary to the provision of the education defined in RSA 193-E:2-a. Among their other duties, principals are required to keep the building running and ensure that there are qualified teachers available to instruct in all of the subject areas. *See, e.g.*, Ed 304. To provide a principal, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$89,417.¹⁶ In order to recruit and retain the necessary number of principals, principals must be provided benefits at a cost of approximately \$41,404. Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing one principal for every 500 students¹⁷ is \$262 per pupil. Ex. 1; Ex. 4.

III. Administrative support services

Administrative support services are required by Ed 306.10. And, as Dr. Rizzo Saunders explained, they are necessary as a practical matter to the provision of the

¹⁶ This Court cannot rely upon legislative history to construe RSA 198:40-a. *Contoocook Vall. Sch. Dist.*, 174 N.H. at 166. However, the fact that both the 2008 and 2018 Legislative Study Committees determined the same components necessary to the provision of an adequate education is evidence upon which this Court can rely that those components are, as a matter of fact, necessary. This Court can also rely on Dr. Rizzo Saunders education, experience, and review of Legislative Study Commissions. In addition, the Court has been provided with the salaries of all of the principals in the State of New Hampshire at Joint Ex. 480.

¹⁷ Pursuant to Ed 306.15, once the total number of students reaches 500, an associate principal must be employed. Therefore, a school larger or smaller than the most efficient size of 499 would have a greater cost per pupil than the \$262 per pupil set forth in Plaintiffs' Ex. 1.

education defined in RSA 193-E:2-a. There are numerous duties which the State imposes on school districts such as managing the student information system, filing student records, attendance records, etc. To provide those services, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$35,912. The benefits necessary for administrative support positions total \$21,477. Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing one administrative assistant for every 500 students is \$115 per pupil. Ex. 1; Ex. 4.

IV. Guidance counselors

Guidance counselors are required by Ed 306.15 and Ed. 306.39. And, as Dr. Leggett explained, they are necessary as a practical matter to the provision of the education defined in RSA 193-E:2-a. A school district cannot provide an education in any of the content areas listed in RSA 193-E:2-a without also providing counselors at the ratios set forth at Ed 306.15 and Ed. 306.39.¹⁸ To provide those services, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$42,458. The benefits necessary to recruit and retain guidance counselors total \$30,337. *See* Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing one guidance counselor for every 400 students¹⁹ is \$115 per pupil. Ex. 1; Ex. 4.

V. Library/media specialists

¹⁸ The cost of counselors is set forth in Plaintiffs' Ex. 1. Like the other cost components, the ratios assume the hypothetical most efficient size school of 500 students in an elementary school and 300 in a high school. *See* Ed 306.15; Ed. 306.39.

¹⁹ Ed. 306.15(b) requires the provision of 1 counselor per 500 students in each elementary school and 1 counselor per 300 students in each middle and each high school.

Library/media specialists are required by Ed 306.15. And, as Dr. Leggett explained, they are necessary as a practical matter to the provision of the education defined in RSA 193-E:2-a. To provide those services, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$38,487. The benefits necessary to recruit and retain a library/media specialist total \$22,835. Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing library/media specialist for every 500 students is \$123 per pupil. Ex. 1; Ex. 4.

VI. Technology coordinators

Technology coordinators are required by Ed 306.15 and Ed. 306.42. And, as Dr. Rizzo Saunders explained, they are necessary as a practical matter to the provision of the education defined in RSA 193-E:2-a. Technology is critical to the provision of an education. To provide those services, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$39,718. The benefits necessary to recruit and retain a technology coordinator total \$20,882. Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing a technology coordinator for every 500 students is \$121 per pupil. Ex. 1; Ex. 4.

VII. Custodians

Custodians are required by Ed 306.09 and RSA 189:24. And, as Dr. Rizzo Saunders explained, they are necessary as a practical matter to the provision of the education defined in RSA 193-E:2-a. To provide those services, the 2018 Legislative Committee determined, and Dr. Rizzo Saunders agreed, that a conservative real-world salary would be \$30,446. The benefits necessary to recruit and retain a custodian total \$18,592. Plaintiffs' Ex. 1. Altogether, the most conservative real-world cost of providing a custodian for every 500

students is \$98 per pupil. Ex. 1; Ex. 4. And, as Tim Ball explained, providing only one custodian per every 500 students is truly not sufficient to maintain a safe and healthy school environment.

VIII. Instructional materials

Numerous superintendents, the 2008 and 2018 Legislative Study Committees, and the State agree that instructional materials are part of an adequate education. The most conservative real-world cost of those materials is \$300 per student. Plaintiffs' Ex. 1; 4; 19, at 511.²⁰

IX. Technology

Technology is a critical part of providing an adequate education. No one at trial disagreed that technology is necessary to provide an adequate education in 2023, and the 2008 and 2018 Legislative Study Committees recognized that technology is part of an adequate education. It is, in practical fact, necessary to provide an adequate education in “[e]ngineering and technologies including technology applications” and “[c]omputer science” and to develop “skills” in “[c]omputer use and digital literacy.” RSA 193-E:2-a, I(a)(9), (11); RSA 193-E:2-a, 1(b)(1). The most conservative real-world cost of those materials is \$100 per student. Plaintiffs' Ex. 1; 4.

X. Facilities operations and maintenance

Public school districts must provide a physical setting in order to provide instruction in the subject areas listed in RSA 193-E:2-a. Though it should go without saying, to educate

²⁰ The State seemed to argue throughout the course of the trial that the cost of instructional materials must be allocated as between subject areas in order for them to be counted as part of the cost. But such allocation introduces administrative costs for no practical benefit because there are no courses being offered that are outside the content areas of RSA 193-E.

a child in a physical setting, as public school districts must, that physical setting must be safe. “A child while in school is deprived of the protection of his parents or guardian.

Therefore, the actor who takes custody of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.”

Marquay v. Eno, 139 N.H. 708, 717 (1995) (quotation, brackets, and ellipsis omitted); *see also Rallis v. Demoulas Super Markets, Inc.*, 159 N.H. 95, 99 (2009) (“ A premises owner owes a duty to entrants to use ordinary care to keep the premises in a reasonably safe condition. . .”). This requirement is reflected in RSA 189:24 and Ed. 306.07. The cost of maintaining and operating a safe facility in which children are educated is necessary to the provision of an adequate education. Education cannot take place in the dark, in the cold, or, as Teresa Taylor explained, in a field. Both the 2008 and 2018 Legislative Committees recognized this necessity. Plaintiffs’ Ex. 18, at 460; Plaintiffs’ Ex. 19, at 511. The cost of maintaining and operating a safe facility in 2019 – before the tremendous inflation of the last three years – was approximately \$1,400 per student.²¹ Plaintiffs’ Ex. 1. In 2022, the average amounts spent on facilities operation and maintenance was \$1,851.48 per pupil.²² Plaintiffs’ Ex. 12.

²¹ The State has, by statute, recognized that the costs of providing an education in a physical setting exceeds the costs of a fully virtual school by at least \$1,375 per pupil. For the 2019 fiscal year, RSA 194-B:11 provides, in addition to the adequacy funds under RSA 198:40-a, an additional \$2,036 to charter schools that are completely virtual and do not have facilities costs and \$3,411 to charter schools that do have facilities costs. $\$3,411 - \$2,036 = \$1,375$.

²² As Dr. Rizzo Saunders explained, athletic budgets constitute less than 2 percent of a district’s budget. If 2 percent of the facilities budget was spent on athletics, this would only be approximately \$37 per pupil. In addition, both Dr. Rizzo Saunders and Ms. Clark explained that the Hopkinton School District’s facilities, operation and maintenance, includes \$0 in athletic expenditures as Hopkinton does not own any fields at all and all maintenance is provided at no cost by the Town. In fact, Hopkinton’s roughly \$1,300 per pupil facilities costs in 2018 was artificially too low as Hopkinton has had many items of deferred maintenance which required a \$5 million bond and Hopkinton has basic maintenance such as snowplowing of parking lots, provided at no cost by the Town. Therefore, the actual costs of maintaining a school facility exceeds \$1400 per pupil.

The costs included in facilities operation and maintenance figures reported to the State and relied upon by Dr. Rizzo Saunders do not include the acquisition or construction of new facilities. Defendants' Ex. 14, at 175 (listing function code 2600 for "Operation and Maintenance of Plant"), 177 (listing function code 4000 for "Facilities Acquisition and Construction Services").

XI. Transportation

As many district witnesses explained, students must have access to transportation in order to have the opportunity to receive a constitutionally adequate education. The 2008 and 2018 Legislative Committees agreed. Plaintiffs' Ex. 18, at 460; Plaintiffs' Ex. 19, at 511. This is true in any number of circumstances: where safety concerns make walking to school an impossibility, where the distance between the student and the schoolhouse cannot be traversed by foot in a timely fashion, or where economic circumstances make it impossible for parents to transport their children. Transportation is necessary, regardless of the age of the student.

The State requires transportation be provided for students through grade 8. RSA 189:6. But the statute's exclusion of high school students does not mean that high school transportation is not required for the provision of an adequate education. As Donna Magoon, Newport's superintendent, explained, in working families where high school students do not have a car and parents are already at work before the school day begins, the failure to provide transportation results in that student being unable to access their education.

High school students have the same fundamental right to an adequate education as students in grades 1 through 8 under New Hampshire's constitution. "Clearly, this

fundamental right is meaningful only if school children are able to get to school.” *Collins v. Ritchie*, 351 S.E.2d 416, 418 (W. Va. 1986). Where New Hampshire’s constitution guarantees not only the substance of an education but also the opportunity to obtain it, the state is obligated to ensure that students are able to get to school. *See Consol. Sch. Dist. No. 1 of Tulsa Cty. v. Wright*, 261 P. 953, 955 (Okla. 1927) (“It is contended by plaintiff that the furnishing of transportation is purely ministerial. With this view we cannot agree. It is as necessary to make accessible to the children of the state the facilities of education as it is to furnish the facilities.”).

RSA 189:6 was originally adopted in 1885 when New Hampshire’s schools were more numerous and before the creation of regional consolidated school districts. In addition, when RSA 189:6 was adopted, school attendance was only compulsory through the 8th grade or age 14. The age of transportation was intended to match the age of compulsory attendance. *See State v. Hall*, 74 N.H. 61, 64 (1906). Compulsory attendance laws were later amended to require attendance through age 16 and, in 2007, were amended again to require attendance through age 18. *See RSA 193:1; 2007 NH Laws 350*. Although transportation and compulsory attendance were originally intended to match, RSA 189:6 was not amended to require the provision of transportation in line with RSA 193:1. Nevertheless, where the Supreme Court long ago recognized transportation must be provided to all those who are required to attend, transportation is required for high school students or the compulsory attendance laws will have no meaning. *See Hall*, 74 N.H., at 64 (concluding that, where no transportation was provided, compulsory attendance law did not apply to the 11 year old pupil).

Due to widely varying transportation costs, which are caused by circumstances outside of the districts' control (like distance to be traveled), the actual costs of transportation must be provided. As each district witness testified, the amounts that school districts spend on transportation are the actual costs of transportation. As several witnesses testified, even where a district elects to add extra stops along a route, those extra stops do not add extra costs because the main drivers of cost are fuel and the driver. Finally, providing only the average transportation costs²³ would result in some districts being more underfunded than other districts.²⁴

XII. Food services

Ed. 306.11 requires all public schools to provide food services regardless of the amount of loss to the school district – for good reason. As many educators testified, it is an accepted fact in the field of education that one must feed the child in order to teach the student. And permitting students to go hungry would arguably violate the district's duty of care to them. *See Marquay*, 139 N.H. at 717 (“[T]he actor who takes custody of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.” (quotation, brackets, and ellipsis omitted)). The State Department of Education has published reports indicating that although state-wide \$70,227,479 was

²³ State DOE employee Mark Manganiello testified that transportation costs were, on average, about \$1,000 per pupil in New Hampshire.

²⁴ As this Court recognized in its July 26, 2019, Order, “even with varying transportation costs in different school districts, it is not beyond question that the Legislature may fund transportation at a uniform, per-pupil rate that is so high that it would satisfy the transportation costs in a district with even the most expensive transportation costs.” Therefore, the State could fund all schools at in excess of \$11,929 per pupil, providing \$2,000 in transportation funding to all districts. Nevertheless, the Supreme Court in its remand order determined that the trial court should determine both the components and costs of an opportunity for an adequate education. The cost for transportation in each district is set forth in their DOE-25 reports.

spent on food service, only \$36,609,730 in food service revenue was collected resulting in a loss of \$33,617,749. Spread over the state's 166,321 pupils, this is an annual food service loss of roughly \$200 per pupil. Even when accounting for federal funding of food service programs, Dr. Rizzo Saunders explained that school districts still face the costs of absorbing losses of approximately \$66 per pupil. *See* Plaintiffs' Ex. 1.

XIII. School nurse services

Ed. 306.12 and Ed. 306.40 require the provision of a school nurse. As a practical matter, nurses are necessary in order to ensure that every student is able to attain an adequate education safely and effectively. As Dr. Rizzo Saunders explained, a student in a diabetic crisis cannot learn. Many students have medical conditions for which the provision of a school nurse is necessary to obtain an education. And, as Lisa Witte explained, if a child cannot attend school without receiving medication administered by a nurse, then the failure to provide a nurse effectively bars that student from school.

Nurses meeting New Hampshire state requirements command salary and benefit packages of in excess of \$65,562.00. According to the most recent survey of school nurses available in New Hampshire, there is a statewide average of 1 school nurse for every 223 pupils. Plaintiffs' Exhibit 14. A conservative, real-world cost of providing a school nurse is \$294 per student. Plaintiffs' Ex. 1.

XIV. Superintendent services

Ed. 302.01, Ed. 302.02, and RSA 194-C:4 require that schools have superintendent services and detail the various and necessary responsibilities of the superintendent's office, including oversight of the curriculum described in RSA 193-E:2-a. The average salary and benefit package for a qualified superintendent will, on average, exceed \$158,000. A school

district requires a second person in the superintendent's office after the pupil population exceeds 1,000 pupils. Therefore, mandatory and necessary superintendent services cost approximately \$158 per pupil. Plaintiffs' Ex. 1.

XV. The State's arguments support that the same components are required.

RSA 193-E:2-s sets forth the "substantive education content" of an adequate education. The statute does not list the costs components necessary to provide instruction in those subject areas. The State's construction of RSA 193-E:2-a as incorporating only cost components listed in a select number of Ed. 306 regulations is erroneous as a matter of statutory construction, but ultimately immaterial because those regulations the State accepts require nearly all of the same components.²⁵ Each of the regulations the State relies upon, *see* Index #236, at 4,²⁶ contemplates the presence of teacher. *See, e.g.*, Ed. 306.37(a) (requiring "[s]ystematic and continuous instruction[;]" "[s]upport for teachers on interpreting test results[;]" "[i]nstruction for teachers in reading in the content areas"). Teachers must be paid for their services, and benefits are a necessary part of their compensation. And teachers must, by law, receive professional development. Ed. 306.16. There must be enough teachers to implement each of the programs enumerated in RSA 193-E:2-a without exceeding the maximum class size. Ed. 306.17. In order for teachers to

²⁵ The sole exception is transportation, which is required by statute and which, even in the absence of any legal requirement, would be necessary for students to have the opportunity to attain an adequate education for the reasons explained *supra* §XII.

²⁶ Ed. 306.37; Ed. 306.43; Ed. 306.45; Ed. 306.46; Ed. 306.49; Ed. 306.31; Ed. 306.48; Ed. 306.40; Ed. 306.41; Ed. 306.47; Ed. 306.47; Ed. 306.33; and Ed. 306.44. (Without explanation or justification, the State attempts to limit some of these regulations to their subparts. There is no justification for doing so in the text of RSA 193-E, 193-E:2-a, Supreme Court precedent, or any other source of law.)

provide instruction, other personnel must also be provided. Ed 306.15. And there must be clean and appropriate spaces in which the subjects are taught.

In addition, Ed. 306.40 requires schools to provide:

- (1) Health education;
- (2) School health services;
- (3) Food and nutrition services;
- (4) A comprehensive guidance and counseling program;
- (5) Healthy school facilities; and
- (6) Family and community partnerships.

“School health services,” “food and nutrition services,” and “healthy school facilities” are defined by Ed. 306.12, Ed. 306.11, and 306.07(a)(1), respectively. “School health services” require a school nurse, Ed. 306.12, and “food and nutrition services,” require a meal be served at school, Ed. 306.11.5 Healthy school facilities are those that “[c]onsistent with RSA 189:24, [are] clean, healthy, and safe learning environments for all areas of the school building, grounds, and school-related activities.” Ed. 306.07(a)(1). RSA 189:24 provides, in relevant part: “[a] standard school is . . . maintained . . . in a suitable and sanitary building . . . with suitable provision for the care of the health and physical welfare of all pupils.” Basic facilities operation and maintenance sufficient to keep the schools “suitable and sanitary,” therefore, is included in Ed. 306.40.

Furthermore, the State’s list of regulations incorporated into RSA 193-E:2-a excludes one of the most important education regulations: Ed. 306.27, which establishes the requirements for graduation pursuant to the explicit direction of RSA 193-E:2-a, II. The costs of providing an adequate education is impacted by the State’s requirement that high

schools provide instruction in at least 43 courses spread over a variety of subject areas. See Defendants' Ex. 352, p. 27.²⁷

RELIEF

I. The districts are entitled to declaratory judgment that the cost of providing an adequate education exceeds \$9,900 per student excluding transportation.

The districts have proven by a preponderance of the evidence that the actual cost of providing an adequate education, as defined in RSA 193-E:2-a exceeds \$9,900 per student, exclusive of transportation.

a. Input method

The input method, which was used by both the 2008 and 2018 Legislative Study Committees, assigns a per-pupil cost to each necessary component of an adequate education and combines those costs into a universal per-pupil cost. Petitioners, utilizing the same methodology as two Legislative Study Committees, submitted Ex. 1, which details the cost components necessary for the provision of an adequate education and their costs, as described *supra*, §§I-XIV. Each item or service included in Ex. 1 is necessary for a constitutionally adequate education. Specifically, witnesses, both for the districts and for the State,²⁸ testified that the components in Plaintiffs' Ex. 1 are required, both legally and as

²⁷ As several witnesses testified, the necessity of providing courses in different subject areas decreases the efficiency of maximizing class sizes. For some districts, such as Winchester, it is less costly to tuition its 150 high school students to Keene at over \$14,000 per pupil than to staff and operate a high school for only 150 students that meets the requirements of Ed 306.27.

²⁸ The Commissioner of the Department of Education, Mr. Edelblut, testified that all of the components of Plaintiffs' Ex. 17 have to be provided, but the Commissioner quibbled with the wording of Plaintiffs' Ex. 17. For example, although Plaintiffs' Ex. 17 states that schools must provide custodians, the Commissioner testified that schools were only lawfully required to provide custodial services. Likewise, while Plaintiffs' Ex. 17 lists administrative assistants, the Commissioner testified that administrative services must be provided. Nevertheless, the

a practical matter, to provide an education in New Hampshire. And the universal per-pupil cost of \$9,929, exclusive of transportation, represents a conservative, real-world base adequacy cost.

That figure, as Dr. Rizzo Saunders and other witnesses explained, truly represents the most conservative real-world cost. For example, employer retirement contributions have increased by several percentage points since Dr. Rizzo Saunders conducted her 2018 analysis. Contributions for certified staff, including teachers, guidance counselors, principals, and library media specialists, have increased from 17.36% in 2018 to 21.02% in 2022 and 2023.²⁹ The contribution for non-certified staff has increased from 11.38% to

Commissioner conceded that regardless of nomenclature that these components have a cost. The State's expert witness, Dr. Jay Greene, testified that the components listed on Plaintiffs' Ex. 17 are all lawfully required components for a school district to provide a constitutionally adequate education but that while most of the components are constitutionally required, the three components not listed on the 2008 Legislative Study Commission's Spreadsheet (superintendents, food service and nursing services) are state imposed requirements that are not constitutionally mandated.

²⁹ For teachers, required federal social security/Medicare and State teacher retirement is \$11,468 on a \$40,000 salary, or \$17,202.00 on a \$60,000 salary – approximately \$1,500 to \$7,000 higher than used in Dr. Rizzo Saunders' 2018 analysis. Plaintiffs' Ex. 1.

For principals, at the \$89,417 salary, the State-mandated teacher retirement of 21.02% and federally mandated social security and Medicare of 7.65% is \$25,635.85. Adding unemployment insurance of \$147.52 and health insurance at a cost of \$17,378.92 (*see* Plaintiffs' Ex. 5) would actually be \$43,162.29.

For guidance counselors earning \$42,458, State-mandated retirement of 21.02% and federally mandated Social Security and Medicare of 7.65% is \$12,172.71. Adding unemployment insurance of \$147.52 and health insurance at a cost of \$17,378.92 (*see* Plaintiffs' Ex. 5) would actually be \$29,699.15.

For library/media specialists, State-mandated teacher retirement of 21.02% and federally mandated Social Security and Medicare of 7.65% is \$11,034.22. Adding unemployment insurance of \$147.52 and health insurance at a cost of \$17,378.92 (*see* Plaintiffs' Ex. 5) would actually be \$28,566.66.

14.06% in that same time period.³⁰ Facilities costs have also increased from \$1,462.66 per pupil to more than \$1,850 per pupil. Plaintiffs' Ex. 12. And Dr. Rizzo Saunders' analysis assumes the most perfectly efficient hypothetical school for the purposes of calculating the costs of principals, administrative assistants, guidance counselors, library/media specialists, technology coordinators, and custodians.

b. Output method

Dr. Baker and a team of four other researchers were hired by the 2020 Legislative Commission to Study School Funding to determine the cost of an adequate education. Using an output method, based on outcomes the State uses to determine whether an adequate education has been delivered, RSA 193-E:3,³¹ Dr. Baker calculated the cost of an adequate education in an average-sized school district to be \$9,964 per student, exclusive of transportation. *See* Plaintiffs' Exhibit 118; *see also* Plaintiffs' Exhibits 20, 111, 114, 116.

Dr. Costrell was hired by the State to undermine Dr. Baker and his team's analysis, as Dr. Costrell has done in every state where he has been retained. Consistent with his personal conviction that there is no way, using statistical methods, to determine the cost of an adequate education, he opined that Dr. Baker and his team's analysis was flawed. To do so, he spent the vast majority of a 50-hour period scrutinizing the analysis and ultimately found two flaws: 1. That the model uses both weighted and unweighted regressions, and 2. That a Poisson regression was improperly used. Based on those two alleged flaws, Dr.

³⁰ This results in increased costs to districts for all non-certified staff. For example, State-mandated retirement and federally mandated Social Security and Medicare would cost a district \$4,646.25 for an administrative assistant earning \$35,912.

³¹ Substantially similar output or performance-based measures of accountability are also reflected in RSA 193-E:3-b, II, RSA 193-E:3-c, and RSA 193-E:3-d.

Costrell opined that Dr. Baker had engaged in p-hacking and the analysis was unreliable. But Dr. Costrell freely admitted that he does not stay abreast of the current literature in cost modeling and has no idea whether using both weighted and unweighted regressions is consistent with the predominant practice in the field. And, although he proclaims that the Poisson regression was improperly used, he was unable to describe how that allegedly improper use impacted the outcome of the analysis.

On the other hand, five well-qualified researchers, selected by the 2020 legislative study committee, who regularly work and publish in the field, endorsed the method that Dr. Baker presented at trial. Ultimately, Dr. Costrell's criticism of the analysis Dr. Baker and his team conducted amounts to a criticism of the idea that a cost can be determined rather than a criticism of the actual methods used. But the 2020 Legislative Commission, a number of other states, and the Supreme Court of New Hampshire have rejected the premise that, because a perfect determination cannot be made, no determination should be made. And the 2020 Legislative Commission accepted and adopted Dr. Baker and his team's analysis.

c. Tuition

Winchester's former superintendent, Dr. Ken Dassau, testified that running a high school that provides the bare minimum would cost more than what Winchester pays in tuition to Keene, \$14,000. Similarly, Dr. Austin Garofalo testified that to run a high school in Derry would cost more than what Derry pays in tuition to Pinkerton Academy, approximately \$15,000. Hill School District cannot tuition its students for less than \$14,000. Where it is not possible to pay less for an adequate education in those districts, the cost of tuition comprises the cost of an adequate education. Even Dr. Costrell had to agree that was reasonable.

d. State's Experts

Dr. Costrell testified that he had no opinion as to the cost of an adequate education in New Hampshire in 2023. Nevertheless, Dr. Costrell had determined the base costs of an adequate education in Massachusetts in 2001-2002 to be approximately \$6,320. Dr. Costrell further testified that applying the rate of inflation to that number results in a 2023 cost of more than \$10,000. Dr. Greene, likewise, had no opinion as to the cost of an adequate education in New Hampshire. Finally, Commissioner Edelblut testified at trial that he did not know how much it costs for school districts to provide a constitutionally adequate education. Nevertheless, he did testify that charter schools also provide a constitutionally adequate education and conceded that his 2019 analysis was that charter schools operate at a cost less than district schools. *See* Joint Exhibit 170 and 171. In particular, Commissioner Edelblut asserted that districts costs (not including special education costs) were \$15,049 compared to charter school costs of \$9,473. *See* Joint Exhibit 171, p. 5-6. While district schools received base adequacy of \$3,709, charter schools received base adequacy of \$7,188 according to Commissioner Edelblut's 2019 analysis. Joint Exhibit 171, p. 2.³²

II. This Court must issue a declaratory judgment setting forth the components and the costs of an adequate education.

The Supreme Court made clear that, on remand, this Court's obligation is to apply the facts and the law to determine the components and costs of an adequate education. In

³² The Court can take judicial notice that, effective July 1, 2023, districts will receive base adequacy of \$4,100 per pupil while charter schools will receive an additional \$4,900 for base adequacy of \$9,000 per pupil for charter schools. *See* 2023 NH Laws 79 at 79:150, II(a) and 79:157 (A)(p. 41, line 9 and pages 45-46, lines 36 to 2.)

particular, the Supreme Court held that “determining the components of an adequate education and their costs presents a mixed question of law” and determining “precisely which costs are constitutionally mandated, are issues that *the trial court must address* in the first instance.” *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 166-167 (2021) (emphasis added). Whether certain services are required to provide an adequate education is a “fact-driven dispute [and] is a prerequisite for determining whether the amount of funding set forth in RSA 198:40-a, II(a) is sufficient to deliver the opportunity for an adequate education.” *Id.*, at 167. To determine whether the amount in RSA 198:40-a, II(a) is sufficient to deliver the opportunity for an adequate education, the Court must necessarily determine the cost of the services required to provide that education.

Petitioners are asking for a declaratory judgment that the components listed in Plaintiffs’ Exhibit 17 are all required to provide an adequate education and that the base cost of providing an adequate education is at least \$9,929 per pupil plus transportation costs. Issuing declaratory judgments is squarely within the judicial purview. RSA 491:22. Declaring that the provision of an adequate education costs \$9,929 and the State’s failure to provide funding in the amount of \$9,929 is unconstitutional would not violate the separation of powers. “The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government.” *Petition of Smart*, No. 2022-0198, 2023 WL 2668478, at *2 (N.H. Mar. 29, 2023) (quotation omitted). As set forth more fully in Petitioners’ Supplemental Brief regarding the separation of powers, Index #230, this case and the determinations the Supreme Court identified as necessary on remand do not implicate the justiciability doctrine and do not violate the separation of powers.

The text of Article 83 requires judicial involvement. The Constitution states that “it shall be the duty of the legislature *and magistrates*” to ensure that the State’s obligation to fully fund an adequate education is carried out. (Emphasis added.) Structurally, Article 83 is not grouped with sections particular to one of the three branches; it is, instead, in its own section: “Encouragement of Literature, Trades, Etc.” Thus, unlike other constitutional provisions that allocate responsibility and discretion to solely one branch of government, the education clause is a duty of the State to be met by all branches of the State’s government. There are judicially discoverable and manageable standards for resolving the questions presented to the Court. The State has defined an adequate education, making the initial policy decisions;³³ the question now is what the components and their costs are – a mixed question of law and fact that the Supreme Court has deemed appropriate for judicial determination. Making those determinations does not “demonstrate lack of respect due the legislative branch of government.” *Baines v. New Hampshire Senate President*, 152 N.H. 124, 129 (2005). “Legislative consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law’s constitutionality.” *Id.* (quotation omitted).

The Supreme Court has recently reiterated that, “[w]hen the question presented is whether or not a violation of a mandatory constitutional provision has occurred, it is not only appropriate to provide judicial intervention, we are mandated to do no less.” *Petition of Smart*, No. 2022-0198, 2023 WL 2668478, at *2 (N.H. Mar. 29, 2023) (quoting *Richard v.*

³³ As an example, if the legislature defined an adequate education to be English and social studies only and the plaintiffs were arguing for the necessity of math and science or arts or engineering, that request would be asking the judiciary to make a policy choice as to what is and is not included as part of an adequate education. Nevertheless, the legislature has chosen to broadly define RSA 193-E:2-a to include all the subjects taught in New Hampshire school districts. Neither the districts nor the State argue that the subject areas need to be any broader.

Speaker of House of Representatives, 175 N.H. 262, 268 (2022)). The Supreme Court, in interpreting Article 83, has recognized “the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but *essential*.” *Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 163 (2006) (emphasis added).

This Court cannot know whether the State is meeting its obligation to fully fund an adequate education without first determining the components of that education and what those components cost, and the fundamental right to an adequate education is hollow if the judiciary is powerless to make those determinations. This Court should issue a declaratory judgment that the base cost of an adequate education, for those students who do not meet the differential criteria of RSA 198:40-a, II(b)-(e), is at least \$9,929 per pupil, plus the actual cost of transportation.

III. The separation of powers doctrine does not foreclose this Court from issuing injunctive relief regarding the cost of an adequate education.

In addition, the Court can – and should – exercise its equitable authority to award injunctive relief to the parties in this case. “[W]here the plaintiffs seek a declaratory judgment that actions taken by the State are unconstitutional, ‘the court ha[s] jurisdiction to grant equitable relief.’” *Lorenz v. New Hampshire Admin. Office of the Courts*, 152 N.H. 632, 635 (2005), as modified (Feb. 16, 2006) (quoting *Claremont Sch. Dist. (Costs and Attorney's Fees)*, 144 N.H. 590, 593 (1999)).

As the Court clearly explained in its April 6, 2017, Order in the case of *Bedford School District v. State*, a superior court has the equitable authority to order the State to make payment of a specific amount of adequate education funds that have been unconstitutionally withheld. In the *Bedford* case, the Court ordered payment of over \$4

million within 30 days. In response to the Superior Court's Order, the legislature quickly appropriated funds for Bedford and all of the other affected districts within 21 days of the Court's Order. *See* NH Laws 2017, 28:1. The legislature essentially mooted out the Court's Order to pay Bedford by appropriating funds for Bedford and others. But neither the State's attorneys nor the Supreme Court suggested that the Superior Court exceeded its powers in ordering that the payments to Bedford be made.

Likewise, although the issue was briefed on the appeal in this case, the Supreme Court declined to address the necessity of granting injunctive relief before this Court determined the costs and components of an adequate education. "[W]e need not address the plaintiffs' arguments regarding the trial court's failure to find that the State's system of funding education violates Part II, Article 5, or that the court erred in denying their request for injunctive relief." *Contoocook Valley Sch. Dist.*, 174 N.H. at 167.

Almost 25 years ago, the Supreme Court remarked that "delay in achieving a constitutional system is inexcusable. The legality of the education funding system in this State has been questioned for at least the past twenty-seven years." *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 158 (1998). This Court "has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but *essential*." *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 163 (emphasis added). This Court must enjoin the State from providing less than \$9,929 per pupil in the 2024 fiscal year and exercise its equitable authority to award the petitioning school districts the amounts unconstitutionally withheld in previous years.

IV. Petitioners are entitled to attorneys' fees.

Petitioners are entitled to attorneys' fees under the substantial benefit theory and under *Harkeem*. "Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." *Harkeem v. Adams*, 117 N.H. 687, 691 (1977). "[A]ttorney's fees may [also] be awarded when a litigant's action bestows a substantial benefit not only on the party who litigated the action, but on the public as well." *Sivalingam v. Newton*, 174 N.H. 489, 499 (2021). There is no serious question that providing an adequate education costs more than the State provides for that purpose – and the State did not attempt to argue otherwise. Instead of mounting a defense on the merits, the State has argued that Petitioners should have spent yet more money and more time on experts and analysis and litigation to vindicate the constitutional right that was first described more than 25 years ago: the right to a State-funded adequate education. That right belongs to each and every student in the state of New Hampshire, and this case vindicates each and every one of those students' fundamental rights. An award of attorneys' fees is appropriate.

CONCLUSION

The evidence at trial was that there is nowhere in the state that an adequate education, as defined in RSA 193-E:2-a can be provided for less than \$9,900, exclusive of transportation. This is true in the petitioning districts and in every other public school district in the state. Petitioners are therefore entitled to declaratory judgment on their facial and as-applied challenges, a declaratory judgment that funding adequacy at less than

\$9,900 and actual transportation costs would be unconstitutional, injunctive relief, and an award of attorneys' fees.

Respectfully submitted,

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

By their attorneys,
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CERTIFICATION OF SERVICE

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

/s/ Michael J. Tierney
Michael J. Tierney