THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

No. 213-2019-CV-00069

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

# DEFENDANTS' POST-TRIAL MEMORANDUM

## Introduction

Past education-funding challenges in New Hampshire have focused on the system writ large. In those cases, plaintiffs brought structural challenges to the school-funding regime itself. The plaintiffs here have charted a different course. They do not challenge the definition of an adequate education the Legislature adopted. Nor do they challenge the entirety of the Legislature's chosen education-funding mechanism.

Instead, the plaintiffs challenge a single part of a single statute: RSA 198:40-a, II(a). They contend that this specific provision violates Part II, Article 83 of the New Hamsphire Constitution because it does not fully fund a constitutionally adequate education. To prevail on such a challenge, the plaintiffs would have to demonstrate that it is inescapable and beyond any doubt that RSA 198:40-a, II(a) is in clear and substantial conflict with Part II, Article 83. After years of litigation and three weeks of trial, the plaintiffs have not come close to making this showing.

Indeed, the plaintiffs operate from a set of fatally flawed legal premises. By focusing solely on one variable in the State's[1] school-funding mechanism (and ignoring all other sources of funding schools receive from the State to ensure constitutional adequacy across the education system), the plaintiffs necessarily fail to demonstrate both as a matter of fact and law that the system itself is unconstitutional. The plaintiffs then compound this failure by advancing an untenable definition of an adequate education based not on what RSA 193-E:2-a actually says, but on what a series of plaintiff-affiliated school officials testified at trial they believe an adequate education should consist of. The plaintiffs thus operate from a doubly flawed legal foundation, and for this reason alone they are not entitled to judgment in this case.

But even if the plaintiffs were operating from correct legal premises, they have not presented competent, reliable evidence sufficient to meet their heavy burden of proof. None of the plaintiffs' witnesses employed any of the established analytical models that other courts have considered when adjudicating challenges to school-funding regimes. Instead, the plaintiffs principally rely on testimony from two experts—one retained and one non-retained—whose opinions on the cost of an adequate education are manifestly unreliable. Dr. Kimberly Rizzo Saunders premised her analysis on a series of arbitrary assumptions that are not borne out by the evidence in the record and are not the result of a wide-ranging, transparent, and deliberative process that might produce an empirically reliable cost figure. Dr. Bruce Baker's analysis was designed to convince the Legislature to adopt an entirely different funding regime (not aid a court in assessing whether the current regime is constitutional) and deviated from standard econometric practice to the point of unreliability. If endorsed, each analysis would lead to a scenario in which the Legislature cannot adopt an objectively determinable *cost* of an adequate

[1] Unless otherwise noted, the defendants are referred to collectively as "the State" throughout this memorandum.

education and must instead tether state education funding to what school districts choose to *spend*. Binding precedent rejects this approach.

The plaintiffs' remaining trial evidence consists of little more than a series of conclusory statements from school officials who conducted no independent analysis of what an adequate education, as defined by the Legislature, actually costs. These officials uniformly operated from an incorrect definition of an adequate education and often did not agree even on what that definition covers. Their testimony is also plainly insufficient to meet the plaintiffs' burden in this case, as it lacked the detail necessary to support the plaintiffs' claims and resulted in widely divergent estimates of what is required for "base adequacy." To the extent the plaintiffs called these witnesses to preserve their as-applied challenges to RSA 198:40-a, they did so in vain because no such cause of action exists under Part II, Article 83 or New Hampshire Supreme Court precedent.

Ultimately, the plaintiffs have failed to meet their burden of establishing a clear and substantial conflict between RSA 198:40-a and Part II, Article 83 of the State Constitution. For the reasons set forth in greater detail below, judgment should enter in the State's favor.

**Standard of Review**

The plaintiffs challenge the constitutionality of RSA 198:40-a, II(a). "In reviewing a legislative act," a court must "presume it to be constitutional and will not declare it invalid except on inescapable grounds." *Contoocook Valley Sch. Dist v. State*, 174 N.H. 154, 161 (2021). "This presumption requires that [a court] will hold a statute to be constitutional unless a clear and substantial conflict exists between it and the constitution." *Id.* "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.* Put differently, a court will "never declare a statute void unless the nullity and invalidity of the

act are placed, in [the court's judgment], beyond all reasonable doubt." *Hynes v. Hale*, 146 N.H. 533, 535 (2011) (citation and quotation marks omitted). The Supreme Court has already held in this case that the plaintiffs bear the burden of proving that RSA 198:40-a, II(a) is unconstitutional. *See Contoocook Valley Sch. Dist.*, 174 N.H at 161("The party challenging a statute's constitutionality bears the burden of proof.").

**Argument**

**I. The plaintiffs bear the burden of proof.**

The Supreme Court was unequivocal in its prior opinion *in this case* that "[t]he party challenging a statute's constitutionality bears the burden of proof." *Contoocook Valley Sch. Dist.*, 174 N.H at 161. This should have put to rest any suggestion that the initial burden of proof lies with the State. Yet the plaintiffs continue to contend—and did so during their closing argument—that the State somehow bears that burden because their claim concerns a fundamental right to which strict scrutiny attaches. The contention is meritless.

When a constitutional claim implicates a fundamental right, a plaintiff must demonstrate that the government has "impinge[d] upon [that] fundamental right" *before* the burden shifts to the government to justify the law under the strict scrutiny standard. *Akins v. Sec'y of State*, 154 N.H. 67, 71 (2006) (citing *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 472 (1997)). In the context of an as-applied challenge to a statute,

> the plaintiff has the burden of demonstrating that the statute has been, or is sufficiently likely to be, unconstitutionally applied to him or her and the trial judge and reviewing court have the particular facts and circumstances of the case needed to determine whether the statute has been, or is likely to be, applied in an unconstitutional manner.

*Contoocook Valley Sch. Dist.*, 174 N.H. at 167 (citing C.J.S. *Constitutional Law* § 243 (2015)). A plaintiff seeking to invalidate a statute on its face bears a greater burden still: it must

demonstrate that the law is unconstitutionally applied to the full extent of its reach. *See Doe v. Reed*, 561 U.S. 186, 194 (2010); *see also Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 622 (2019) ("A facial challenge is a head-on attack to a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications."). It is only *after* a plaintiff makes this threshold showing that the government has any burden to justify the challenged law under a particular level of scrutiny. *See Akins*, 154 N.H. at 71.

In arguing otherwise, the plaintiffs conflate their threshold obligation at the pleading stage of the case to state a claim for relief with their burden of proof at trial. It is true enough that the Supreme Court held that the allegations in the plaintiffs' second amended petition were "reasonably susceptible of a construction that would permit recovery." *Contoocook Valley Sch. Dist.*, 174 N.H. at 162 (citations and quotation marks omitted). But "[j]ust because a complaint states a . . . claim does not mean that the claimant has conclusively proven that claim." *APB Realty, Inc. v. Georgia-Pacific LLC*, 948 F.3d 37, 41 (1st Cir. 2020); *Jeppsen v. C.I.R.*, 128 F.3d 1410, 1421 (10th Cir. 1997) (Kelly, J., dissenting) ("[G]iven the uncertainty of trial and proof, there is a world of difference between pleading a claim, proving it and bringing it to judgment."). Indeed, the burdens of pleading and proving a constitutional claim are governed by materially different standards.

"New Hampshire is a notice pleading jurisdiction, and, as such, [courts] take a liberal approach to the technical requirements of pleading." *Donald Toy v. City of Rochester*, 172 N.H. 443, 448 (2019) (citation and quotation marks omitted). A complaint therefore "need not do more than state the general character of the action and put both the court and counsel on notice of the nature of the controversy." *Id.* (same omissions). At the pleading stage, the plaintiff receives

the benefit of the doubt: all well-pleaded facts in the complaint are assumed true and all reasonable inferences are construed in the light most favorable to the plaintiff. *Contoocook Valley Sch. Dist.*, 174 N.H at 161.

Doubts are no longer resolved in the plaintiff's favor when it comes time to *prove* that a statute is unconstitutional. The opposite is true. Legislative enactments are presumed to be constitutional. *Id.* Consistent with this presumption, any doubts that "exist as to the constitutionality of a statute . . . must be resolved in favor of its constitutionality." *Id.* This means that a plaintiff seeking to invalidate a statute must place "the nullity and invalidity of the act . . . beyond all reasonable doubt." *Hynes*, 146 N.H. at 535; *see also Orr v. Quimby*, 54 N.H. 590, 601 (1874) ("It is therefore incumbent upon those who deny the validity of a statute to show that it is a plain and palpable violation of constitutional right. If they fail to do so, or leave room for a reasonable doubt upon the question whether it is an infringement of any of the guarantees secured by the constitution, the presumption in favor of the validity of the act must stand." (citation and quotation marks omitted)). Put differently, a court "will not declare [a statute] invalid except on *inescapable* grounds." *Contoocook Valley Sch. Dist.*, 174 N.H at 161 (emphasis added). Thus, unlike at the pleading stage, a plaintiff bears a "heavy burden" when proving a statute is unconstitutional. *State v. Ploof*, 162 N.H. 609, 614 (2011).

The plaintiffs must satisfy this "heavy burden" to prevail in this case. To do so, they must present evidence sufficient to remove any "doubts" as to the constitutionality of RSA 198:40-a, II(a) and demonstrate that a "clear and substantial conflict exists between it and the constitution." *Contoocook Valley Sch. Dist.*, 174 N.H at 161. They must make this showing *before* the State is under any obligation to justify the challenged law. *Akins*, 154 N.H. at 71. The plaintiffs' repeated

suggestion that they have somehow met their heavy burden merely by pleading a claim for relief is wrong, and this Court should definitively reject it.

## II. The plaintiffs premise their claim on the incorrect per-pupil cost.

To the extent the plaintiffs have sought to meet their burden of proof here, they have done so by focusing on the wrong per-pupil cost. Rather than attempt to show that the total amount of adequacy funding the State provides is somehow insufficient to meet Part II, Article 83's broad-based obligation to fund an adequate education throughout the State, the plaintiffs focus solely on one variable of one education-funding mechanism established by the Legislature: the per-pupil cost set forth in RSA 198:40-a, II(a). The State acknowledges that the Court allowed the plaintiffs to pursue this path pretrial. The State maintains, however, this mode of proceeding is wrong and that Part II, Article 83 does not permit the plaintiffs to challenge only one variable in one education funding mechanism while ignoring all other sources of funding schools receive from the State to ensure constitutional adequacy across the education system. The relevant statutory text, Supreme Court precedent, and the evidence presented at trial all reveal why this is so.

The notion that the cost of an adequate education consists solely of the per-pupil cost set forth in RSA 198:40-a, II(a) is belied by the statutory text. RSA 198:40-a, III makes clear that "[t]he sum total calculated under [RSA 198:40-a,] II shall be the cost of an adequate education." RSA 198:40-a, III. This "sum total" consists not just of the base amount set forth in RSA 198:40-a, II(a), but also several categories of differentiated aid. *See* RSA 198:40-a, II(b)–(e). The undisputed evidence at trial showed that every school district in the state receives significantly more funding per pupil under this formula than the amount set forth in RSA 198:40-a, II(a).

It is also undisputed that RSA 198:40-a is not the only source of education funding the State provides. School districts may also receive significant amounts in additional, unrestricted funding through relief grants, *see* RSA 198:40-e, extraordinary need grants, *see* RSA 198:40-f, and stabilization grants, *see* RSA 198:41, IV. Municipalities also retain the full amount of any revenues generated through the Statewide Education Property Tax ("SWEPT") for use in their school districts even if that amount exceeds the total amount of adequacy funding the school district would otherwise receive under the formula set forth in RSA 198:41. On average, the total amount per pupil school districts receive in state funding is nearly twice as much as what they receive solely under RSA 198:40-a, II(a), and some school districts receive far more than that.

It is likewise undisputed that, other than the SWEPT, school districts receive the above funding in four lump-sum payments made throughout the year. *See* RSA 198:42, I. These payments do not differentiate between the statutory sources of the funding provided, whether it be the base amount under RSA 198:40-a, II(a), differentiated aid under RSA 198:40-a, II(b) through (e), or some other form of targeted aid provided under a different section of RSA 198:40 *et seq*. Moreover, it is undisputed that this funding is unrestricted, meaning that school districts can spend any amounts they receive as they choose. This is also true of any SWEPT revenues generated in a municipality.

It is simply wrong, then, to suggest that school districts are expected to operate solely on the amounts they receive under RSA 198:40-a, II(a). Rather, the Legislature has adopted an intricate funding regime under which funds are allocated, at least in substantial part, based on the circumstances and needs in a municipality. The Supreme Court has made clear 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." *Claremont Sch. Dist*, 142 N.H. at 476. The funding regime the Legislature has adopted is accordingly entitled to substantial deference and should be viewed in its totality in determining whether a violation of Part II, Article 83 exists.

Perhaps for this reason, the Supreme Court's school-funding jurisprudence has not contemplated constitutional challenges to component parts of the Legislature's chosen education-funding regime. For example, the Supreme Court's decisions concerning the definition of an adequate education have not focused on the sufficiency of specific components of the definition in question, but rather on whether the "definition crafted by the political branches" is "sufficiently clear to permit common understanding and allow for an objective determination of costs." *Londonderry School District SAU #12 v. State*, 154 N.H. 153, 162 (2006) ("*Londonderry*"). Likewise, the Supreme Court made clear in this case that "the methodology employed by the legislature in determining the cost of an adequate education in RSA 198:40-a is irrelevant to the plaintiffs' constitutional challenge." *Contoocook Valley Sch. Dist.*, 174 N.H. at 166.

Indeed, this appears to be the first New Hampshire school-funding case in which the plaintiffs challenge only part, but seemingly not all, of the education-funding apparatus. But in focusing their challenge solely on the per-pupil amount set forth in RSA 198:40-a, II(a), the plaintiffs miss the forest for the trees. Such a challenge does not speak to whether the funding system the Legislature adopted, writ large, satisfies the State's duty under Part II, Article 83 to fully fund an adequate education. The plaintiffs have presented no evidence that speaks to *that* question and have affirmatively stated that they are not making such a challenge.

In the absence of such evidence, the plaintiffs have necessarily failed to meet their "heavy burden" in this case. *Ploof*, 162 N.H. at 614. The plaintiffs have not placed "the nullity

and invalidity" of the current school-funding regime "beyond all reasonable doubt," *Hynes*, 146 N.H. at 535, because they have not presented any evidence that speaks to that question at all. They have thus failed to demonstrate that a "clear and substantial conflict exists" between how the State currently funds education and the requirements of Part II, Article 83. *See Contoocook Valley Sch. Dist.*, 174 N.H at 161. For this reason alone, they are not entitled to any relief, and judgment should enter for the State.

## III. The plaintiffs operate from a legally incorrect definition of an adequate education.

The plaintiffs also premise their challenge on an incorrect definition of an adequate education. The plaintiffs contend, in essence, that virtually everything a school district does (save for maybe athletics and co-curriculars, though there was no consensus even on that point) falls within the definition of an adequate education that the Legislature adopted in RSA 193-E:2-a. Relatedly, the plaintiffs contend that all of New Hampshire Administrative Rule Ed 306 rules are incorporated into RSA 193-E:2-a by reference. Some plaintiff witnesses also contended that any statute or regulation that imposes a requirement on a school district is necessarily subsumed within the definition of an adequate education. These contentions are all incorrect as a matter of law.

### A. The definition of an adequate education the Legislature adopted does not incorporate all of Ed 306.

In *Londonderry*, the Supreme Court emphasized that the political branches were required to define an adequate education in a manner that is "sufficiently clear to permit common understanding and allow for an objective determination of costs." 154 N.H. at 162. The Supreme Court observed that the "education rules and regulations, curriculum frameworks, and other statutes" adopted by the political branches "might provide some level of education beyond that of a constitutionally adequate education." *Id.* Based on this observation, the Supreme Court

expressed skepticism that the Legislature could have intended for every education statute, regulation, and standard to comprise constitutional adequacy. *Id.* The Supreme Court made clear that, unless this was in fact the Legislature's intent, the definition of an adequate education must identify the "point of demarcation" between adequacy and what exceeds adequacy. *Id.*

The Legislature heeded the Supreme Court's call. Following *Londonderry*, the Legislature enacted RSA 193-E:2-a, which sets forth "the substantive educational program to deliver the opportunity for an adequate education for kindergarten through twelfth grade." *Contoocook Valley Sch. Dist.*, 174 N.H. at 157 (citing RSA 193-E:2-a, I & II). As it currently stands, the Legislature has defined the substantive content of an adequate education to be "the school approval standards" in the following eleven learning areas:

(1) English/language arts and reading.

(2) Mathematics.

(3) Science.

(4) Social Studies, including civics, government, economics, geography, history, and Holocaust and genocide education.

(5) Arts education, including music and visual arts.

(6) World languages.

(7) Health and wellness education.

(8) Physical education.

(9) Engineering and technologies including technology applications.

(10) Personal finance literacy.

(11) Computer science.

RSA 193-E:2-a, I(a).[2]

The phrase "minimum standards for public school approval" is defined within the statute. It means "the applicable criteria that public schools and public academies shall meet in order to be an approved school, as adopted by the state board of education through administrative rules." RSA 193-E:2-a, VI(a). The Legislature was careful to make clear, however, that not every minimum standard adopted by the Board of Education would be subsumed within the definition of an adequate education. Rather, *only* "[t]he minimum standards for public school approval for the [learning] areas identified in [RSA 193-E:2-a, I] shall constitute the opportunity for the delivery of an adequate education." RSA 193-E:2-a, IV(a).

The Board of Education promulgated the minimum standards for public school approval through Ed 306. The plaintiffs contend that, despite the clear limiting language in RSA 193-E:2-a, IV(a), *all* of Ed 306 is incorporated into the definition of an adequate education. In the plaintiffs' view, this means that everything a school district does that can be tethered to one or more Ed 306 subsection necessarily falls within the definition of constitutional adequacy. The argument fails for several reasons.

To determine which subsections of Ed 306 are incorporated into the definition of an adequate education, per RSA 193-E:2-a, IV(a), the Court must interpret Ed 306. "When interpreting both statutes and administrative rules," a court must "ascribe the plain and ordinary meanings of the words used, looking at the rule or statutory scheme as a whole." *Appeal of N.H. Div. of State Police*, 175 N.H. 229, 234 (2022).

Ed 306 contains subsections that, by their express terms, correspond with the learning areas set forth in RSA 193-E:2-a, I(a). Specifically,

[2] Computer use and digital literacy and logic and rhetoric must be integrated into instruction in these learning areas, but they are not themselves distinct learning areas. RSA 193-E:2-a, I(b).

- the learning area for English/Language Arts and Reading is contained in Ed 306.37;
- the learning area for Mathematics is contained in Ed 306.43;
- the learning area for Science Education is contained in Ed 306.45;
- the learning area for Social Studies is contained in Ed 306.46, and Holocaust and Genocide Education is contained in Ed 306.49;
- the learning area for the Arts Education Program is contained in Ed 306.31;
- the learning area for World Languages is contained in Ed 306.48;
- the learning area for Health Education is contained in Ed 306.40(b);
- the learning area for Physical Education is contained in Ed 306.41(b);
- the learning area for Technology and Engineering Program is contained in Ed 306.47;
- the learning area for personal finance literacy is contained in Ed 306.33(a)(4)(c); and
- the learning area for Computer Science is contained in Ed 306.44.

Nearly all of these subsections have titles that are identical or nearly identical to the learning areas set forth in RSA 193-E:2-a, I. *Cf. In re Petition of N.H. (State v. Fuchs)*, 174 N.H. 785, 792 (2022) ("While the title of a statute is not conclusive of its interpretation, it provides significant indication of the legislature's intent in enacting the statute.").[3] The text of the corresponding subsections also refers, often repeatedly, to the learning area by name. When considering the "plain and ordinary meaning of the words used" and the existence of these provisions within the "statutory and regulatory scheme as a whole," *Appeal of N.H. Div. of State Police*, 175 N.H. at 234, it is apparent that these specific subsections—and not the whole of Ed 306—define the contours of an adequate education via RSA 193-E:2-a, IV(a).

[3] The only learning area that is not referenced in the title of a corresponding regulation is personal finance literacy, which falls within the regulation governing business education. *See* N.H. Admin. R. Ed 306.33. But that subsection does reference "personal finance" several times, requires one credit in personal finance, and describes what instruction in personal finance literacy should consist of. *See* N.H. Admin. R. Ed 306.33(a)(4)(C).

Unlike other parts of Ed 306, the subsections that correspond with the learning areas in RSA 193-E:2-a, I, cannot be amended through traditional rulemaking. Rather, "[c]hanges made by the board of education to the school approval standards" for the areas identified in RSA 193-E:2-a, I(a) "shall not be included within the standards that constitute the opportunity for the delivery of an adequate education without prior adoption by the general court." RSA 193-E:2-a, IV(a). The Board of Education must "provide written notice to the speaker of the house of representatives, the president of the senate, and the chairs of the house and senate education committees of any changes to the school approval standards" for the learning areas identified in RSA 193-E:2-a, I(a). *Id.* By supplanting the normal rulemaking process with one that requires General Court approval for the minimum standards that correspond with the learning areas set forth in RSA 193-E:2-a, I(a), the Legislature has ensured that the definition of an adequate education would remain sufficiently stable and clear to "allow for an objective determination of costs." *Londonderry*, 154 N.H. at 162.[4]

Contrary to the plaintiffs' assertion, the subsections of Ed 306 identified above do not, on their face, purport to govern everything required to run a school district. Rather, they address, generally, systematic and appropriate instruction, development of curricula, the opportunities that should be provided to students to develop skills and achieve competencies, and sound assessment practices. For example, Ed 306.37, which contains the learning area for English/Language Arts and Reading, consists of three subparts: one governing elementary school, one governing middle school, and one governing high school. N.H. Admin. R. Ed 306.37(a), (b), (c). Each subpart describes the instruction that students should receive, the

[4] While it is clear from the language of Ed 306 which subsections correspond with the learning areas set forth in RSA 193-E:2-a, I(a), the Commissioner of the Department of Education also testified at trial that only the subsections identified above—and not the whole of Ed 306—would need to be submitted to the General Court for approval under RSA 193-E:2-a, IV(a).

opportunities that should be provided for students to develop skills, the skills students should be encouraged to develop, and how that development should be assessed. *See id.* The subsections of Ed 306 that correspond with the other learning areas set forth in RSA 193-E:2-a, I(a) reflect a similar focus.

"[T]he plain and ordinary meanings of the words used" in these subsections may arguably support the conclusion that the definition of an adequate education incorporates some quantum of instruction, supplies, and teacher development. *Appeal of N.H. Div. of State Police*, 175 N.H. at 234. But the plaintiffs have made no effort to identify what quantum of instruction, supplies, and teacher development is required to provide a constitutionally adequate education. Instead, the plaintiffs contend that essentially *all* instruction in *every* course they offer is necessary to provide a constitutionally adequate education. For several reasons, this contention is unsupported by the statutory and regulatory language and structure and runs counter to established school-funding jurisprudence.

As an initial matter, there are several educational programs contained in Ed 306 that plainly do not correspond with any learning area listed in RSA 193-E:2-a, I. "Career and technical education" is not listed in that statute and is governed by a subsection of Ed 306—Ed 306.20—that does not, on its face, purport to correspond with any of the learning areas listed in the statute. The same is true of "career education," *see* N.H. Admin. R. Ed 306.35, and "family and consumer science education," *see* N.H. Admin. R. Ed 306.38. Neither language nor the structure of RSA 193-E:2-a, I, and Ed 306 supports a conclusion that these educational programs fall within the definition of an adequate education the Legislature adopted.

At trial, the plaintiffs repeatedly asserted that any program that involves instruction in a learning area listed in RSA 193-E:2-a, I falls within the definition of an adequate education. This

assertion does not withstand scrutiny. Under such a theory, a driver's education class would fall within the English and language arts learning area because a student was required to read and comprehend road signs. *See* N.H. Admin. R. Ed 306.37(c). Athletics would similarly fall within the physical education learning area because they require student-athletes to, among other things, "[p]articipate regularly in physical activity." N.H. Admin. R. Ed 306.41(b)(1)(c). Notably, witnesses called by the plaintiffs at trial dispute that either driver's education or athletics fell within the definition of an adequate education. To conclude otherwise would render meaningless the express limitations the Legislature placed on the definition of an adequate education in RSA 193-E:2-a, IV(a) and distort that definition to the point of absurdity. The established rules of construction do not countenance such a result. *See Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 620 (2019) ("[I]t is a familiar principle of statutory construction that one should not construe a statute . . . to lead to an absurd result that the legislative body could not have intended."); *State v. Duran*, 158 N.H. 146, 155 (2008) ("[A]n interpretation that renders statutory language superfluous and irrelevant is not an improper interpretation.").

This argument is further belied by what RSA 198:40-a and RSA 193-E:2-a are designed to do. RSA 193-E:2-a is designed to identify a specific educational program that RSA 198:40-a is designed to pay for. The plaintiffs' argument would make it functionally impossible for the Legislature to ever identify what it needs to pay for and would leave funding decisions within the exclusive control of school districts by allowing them to simply deem any course or program falls within statutory learning. That is fundamentally not how RSA 193-E:2-a and RSA 198:40-a are intended to operate or how they operate in practice, and it runs counter to the Supreme Court's holding in *Londonderry* that the "definition crafted by the political branches" must be

"sufficiently clear to permit common understanding and allow for an objective determination of costs." 154 N.H. at 162.

It bears noting, too, that the Legislature tasked the Board of Education with promulgating rules governing the "*minimum* standards for public school approval." RSA 193-E:2-a, VI(a) (emphasis added). And it is only those "*minimum* standards . . . for the [learning] areas identified in [RSA 193-E:2-a, I]" that "shall constitute the opportunity for the delivery of an adequate education." RSA 193-E:2-a, IV(a) (emphasis added). The word "minimum," as it is commonly understood, means "[t]he least quantity assignable, admissible or possible in a given case as is opposed to maximum." *Minimum*, *Black's Law Dictionary* (6th ed. 1990); *see also Minimum*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/minimum (last visited June 28, 2023) (defining "minimum" as "the least quantity assignable, admissible, or possible"). In other words, the "minimum standards for public school approval" set a floor, not a ceiling.

The plaintiffs have not attempted to show that any school district in the State is providing a level of education that meets—but never exceeds—the minimum floor set by the Legislature. Indeed, many school-district witnesses rejected that premise at trial. For this reason, the plaintiffs have also failed as a matter of *fact* to demonstrate that *all* the instruction they provide, even in the learning areas listed in RSA 193-E:2-a, I, is necessary to ensure the delivery of an adequate education.

In resisting this conclusion, the plaintiffs argue, in essence, that the meaning of the word "minimum" in RSA 193-E:2-a, IV(a) fluctuates based on how a school district may choose to deliver its educational program. But a court should "construe [the] language [of a statute] as written according to its plain and ordinary meaning." *State v. Moore*, 173 N.H. 386, 390 (2020).

"The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." *Id.* Again, the Supreme Court specifically tasked the Legislature with crafting a definition of an adequate education that was "sufficiently clear to permit common understanding and allow for an objective determination of costs." *Londonderry*, 154 N.H. at 162. A construction of RSA 193-E:2-a, IV(a) that effectively reads the word "minimum" out of the statute and tethers the definition of an adequate education to a school district's own chosen expenditures is incompatible with both the established interpretive rules and the Supreme Court's school-funding jurisprudence.

There is, moreover, no way to read the subsections of Ed 306 that correspond with the learning areas set forth in RSA 193-E:2-a, I, to incorporate principal services, superintendent services, nursing services, custodial services, transportation, facilities operation and maintenance, guidance counselors, and food services into that definition. Many of these services and requirements are governed by entirely different regulatory parts. For example, the duties of school principals are set forth in Ed 304, the duties of superintendents are set forth in Ed 302, and school health services are set forth in Ed 311. Many others can be found in sections of Ed 306 that do not correspond with the minimum standards for the eleven learning areas listed in RSA 193-E:2-a, I and therefore would not be subject to General Court approval under RSA 193-E:2-a, IV(a). Indeed, custodial and maintenance services are set forth in Ed 306.09, the requirements for school facilities are set forth in Ed 306.07, the school counseling program is set forth in Ed 306.39, and food and nutrition services are set forth in Ed 306.11. That the Board of Education has promulgated separate regulations to govern these services without including them in the minimum standards for the learning areas set forth in RSA 193-E:2-a, I(a) is a clear indication that these services do not fall within the definition of an adequate education the

Legislature adopted. This Court may not read into either RSA 193-E:2-a, I, or the subsections of Ed 306 that correspond with the learning areas set forth in that provision language that neither the Legislature nor the Board of Education saw fit to include. *See Granite State Trade Sch. v. N.H. Mech. Licensing Bd.*, __ N.H. __, 2023 N.H. LEXIS 64, at *4 (May 2, 2023); *Contoocook Valley Sch. Dist.*, 174 N.H. at 163.

For all of these reasons, the plaintiffs' contention that the definition of an adequate education incorporates all of Ed 306 and covers essentially everything a school district does or provides is both legally and factually incorrect.

**B. The definition of an adequate education does not incorporate every statutory or regulatory requirement the State may impose on a school district.**

The plaintiffs' related contention that Part II, Article 83 obligates the State to fully fund any service or program that a school district is required to provide under any state statute or regulation is similarly unavailing. The Supreme Court has never endorsed this view in any school-funding case. In *Londonderry*, the Supreme Court was unwilling to accept the notion that the Legislature could have intended to adopt a definition of constitutional adequacy that incorporated every statute, rule, or regulation governing public education. 154 N.H. at 162. Rather, the Supreme Court contemplated that "the education rules and regulations, curriculum frameworks and other statutes" might "provide some level of education beyond that of a constitutionally adequate education." *Id.* The Supreme Court has also made clear that "local control plays a valuable role in public education" and that local governments may be required, in part, to support local schools. *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 475–76 (1997). RSA 193-E:2-a, I(a) and the corresponding sections of Ed 306 provide the "point of demarcation," missing at the time of *Londonderry*, between what the State is required to fund under Part II, Article 83 and what is outside of the scope of constitutional adequacy.

To the extent the plaintiffs contend that the State is failing to sufficiently fund statutory or regulatory requirements that fall beyond the "point of demarcation" the Legislature adopted, they proceed under the wrong legal theory. A different part of the State Constitution—Part I, Article 28-a—governs so-called unfunded mandates. The plaintiffs made clear during their closing argument that they deliberately did not pursue a claim under Part I, Article 28-a. They were free to make this choice. But a claim under Part I, Article 28-a does not convert into one under Part II, Article 83 simply because it concerns a statutory or regulatory requirement imposed on a school district. To the contrary, the New Hampshire Supreme Court has previously considered Part I, Article 28-a claims brought by school districts challenging requirements imposed by the State in relation to teacher retirement, *see City of Concord v. State*, 164 N.H. 130, 132–33 (2012), and the provision of special education to students in "residential schools" and correctional facilities, *see Nashua Sch. Dist. v. State*, 140 N.H. 457, 458 (1995). Each of these decisions reflects, at least implicitly, that the State *can* impose requirements on school districts that do not automatically fall within the definition of an adequate education. And there is no inkling in either decision that *Claremont I* or any subsequent school-funding case disrupted the traditional Part I, Article 28-a analysis for mandates imposed on school districts that do not fall within the definition of an adequate education the Legislature adopted.

### C. Transportation is not included within the definition of an adequate education the Legislature chose to adopt.

The plaintiffs also contend that transportation falls within the definition of an adequate education and therefore must be fully funded by the State. They cannot justify this contention under the language of RSA 193-E:2-a, I, because transportation is not referenced in that statute. They cannot justify it based on their incorrect view that all of Ed 306 is subsumed within the definition of an adequate education, because transportation is not addressed in Ed 306 either. Nor

can they justify it, at least in full, under their incorrect view that the State is required to fully fund anything it requires a school district to do, because RSA 189:6 does not impose a blanket requirement that school districts transport *all* students, but rather only students in kindergarten through eighth grade who live more than two miles from the school to which they are assigned. *See* RSA 189:6.

The plaintiffs nonetheless argue that transportation falls within the definition of an adequate education by implication because they believe it is necessary to provide the opportunity to obtain an education. This is nothing more than a veiled request that this Court to rewrite the definition of an adequate education the Legislature adopted based on notions of equity and build into it everything that a school might believe it requires to operate. The request must be rejected. The Supreme Court has made clear both that the Legislature—not the Judiciary—is tasked in the first instance with defining an adequate education and that the definition may be limited solely to the substantive educational program. *Londonderry*, 154 N.H. at 161–62. The Legislature must fully fund only the definition it adopts. *Id.* at 162. There is no plausible argument, based on any established canon of statutory or regulatory construction, that the definition of an adequate education the Legislature adopted incorporates transportation of students. Courts do not have license to "rewrite [a] statute; that is the province of the legislature," *State v. Lukas*, 164N.H. 693, 694 (2013), particularly when the statute addresses an obligation that the Constitution reserves solely to the legislative branch.[5]

[5] Previously, the plaintiffs argued that transportation must be incorporated into the definition of an adequate education by virtue of the 2008 report of the Joint Legislative Oversight Committee on Costing an Adequate Education. *See* Pls.' Mot. Summ. J. at 12–13. This argument is a nonstarter, as the Supreme Court has made clear that "RSA 198:40-a and RSA 193-E:2-a set forth the applicable law, not the [Joint Committee's] Final Report and the 2008 Spreadsheet." *Contoocook Valley Sch. Dist.*, 174 N.H. at 166. The plaintiffs have also relied in the past on two out-of-state decisions that they contend support the view that transportation is part of an adequate education. *See* Pls.' Mot. Summ. J. at 13. These decisions neither apply New Hampshire's constitutional standard nor appear to reflect the majority (much less consensus)

### D. RSA 198:40-a, II(a) was never designed to fully fund everything a school district is required to do.

There is also a fundamental disconnect between the broad and legally incorrect definition of an adequate education for which the plaintiffs advocate and the funding provision they have chosen to challenge. The plaintiffs were emphatic both before and during trial that they are only challenging the per-pupil amount in RSA 198:40-a, II(a). This choice is fatal to their claim for the reasons previously discussed. But even if it were not, it bears reiterating that school districts are *not* required to meet all the requirements of state law based solely on the amount provided under RSA 198:40-a, II(a).

As previously discussed, school districts receive a considerable amount of additional funding from other state sources to help them operationalize their school districts and schools. Substantial amounts flow to school districts through differentiated aid. Many school districts receive various forms of relief and hold-harmless funding. Many receive stabilization grants. The State provides municipalities with the full amount of the SWEPT that they raise. On average, the amount per pupil that school districts receive in state funding is nearly twice as much as what they receive solely under RSA 198:40-a, II(a). Some school districts receive far more. And this is before factoring in additional amounts that school districts receive from the state and federal governments for, among other things, special education, food services, and Title I services.

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view. *See, e.g.*, *Hoagland v. Franklin Twp. Cmt. Sch. Corp.*, 27 N.E.3d 737, 745, 749 (Ind. 2015) (deferring tothe "sound legislative discretion of the General Assembly" to hold that "Indiana's Constitution does not mandate school corporations to provide public transportation to and from school"); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 825 P.2d 438, 444–45 (1992) (concluding that transportation costs do not fall within the California Constitution's "free school guarantee" because that guarantee only extends to "educational activities"); *Kadrmas v. Dickinson Pub. Sch.*, 401 N.W.2d 897, 902 (N.D. 1987), *aff'd*, 487 U.S. 450 (1988) ("We hold that Art. VIII, § 2, N.D. Const., does not require the state or school districts to provide free transportation for students to and from school."); *Sutton v. Cadillac Area Pub. Sch.*, 323 N.W.2d 582, 584 (Mich. App. 1982) ("We cannot say that transportation to and from school is an essential part of a system of free public education analogous to the books and school supplies at issue in [a previous case].").

RSA 198:40-a, II(a) is intended to pay for only a portion of the educational system—the substantive educational program set forth in RSA 193-E:2-a, I(a) and the corresponding sections of Ed 306 the set forth the parameters of that substantive program. It was not intended to cover or pay for anything else. The plaintiffs' contention that the amount set forth in RSA 198:40-a, II(a) must alone fund everything a school district is required or might choose to do improperly compares apples to oranges and runs counter to the intricate education funding system the Legislature has adopted to deliver both broad-based funding and targeted aid to municipalities that require it. A ruling from this Court in the plaintiffs' favor threatens to substantially interfere with and upend that intricate, multi-statute funding system.

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For these reasons, the plaintiffs operate from a fatally flawed definition of an adequate education that finds no support in the statutory or regulatory text. The plaintiffs do not challenge the definition that the Legislature actually adopted, and they cannot prevail on a legal theory that effectively asks this Court to rewrite that definition. The Supreme Court has made clear, time and again, that doing so is not the province of the Judiciary. Because the plaintiffs operate from an incorrect definition of an adequate education, their claims necessarily fail.

## IV. The plaintiffs have not met their burden of proof.

The plaintiffs have further failed to meet their burden of proof because they have not attempted to identify what the substantive educational program defined in RSA 193-E:2-a, I(a) and the corresponding portions of Ed 306 costs. Indeed, they have developed no evidence at all in relation to this issue.

The plaintiffs could have attempted to develop this evidence in one of several ways. They could have, for instance, identified what they spend on teachers, technology, books, and supplies

for each learning area identified in RSA 193-E:2-a, I(a). They could have then sought to isolate what amount of those total expenditures was necessary to achieve constitutional adequacy in each learning area. Alternatively, they could have attempted to demonstrate as a matter of fact that their total expenditures on just these learning areas are necessary to achieve adequacy. There is no meaningful dispute that the plaintiffs could set up their general ledgers to track learning area expenditures by subject area. Representatives of Nashua and Manchester testified that they already have done so, at least to some extent, and the New Hampshire Financial Accounting Handbook for Local Education Agencies sets forth in detail precisely how to do so. Defs.' Ex. 14. Witnesses from almost every plaintiff school district acknowledged utilizing the Accounting Handbook.

The plaintiffs protested at trial that keeping their general ledgers in this way would be too time-consuming or expensive. They contended that it would be impractical to have to apportion every expenditure that is not subject-area specific across each subject area. To be clear, it is not the State's position that they would have to do so. The plaintiffs could account for math teachers and supplies and technology associated with mathematics classes with the mathematics subject code, while accounting for other school services like administrative services, health services, or maintenance services using different codes. Assembling their proof in this way would have enabled them to show the Court how much they spend in each learning area identified in RSA 193-E:2-a and would have allowed them to apply basic accounting methods to add to those figures amounts for other non-learning-area services, accounted for using different codes, in the event it was determined that one or more of those services fell within the definition of adequacy. The plaintiffs reasonably could have assembled this type of proof for presentation to the Court

without having to apportion all expenditures across only subject-matter areas.[6] Instead, the plaintiffs offered no method of apportionment, whether by subject area or some other method, that would isolate what portions of their expenditures went toward constitutional adequacy.

The plaintiffs alternatively could have sought to prove their claim by retaining one or more experts to conduct the type of process or perform the type of analysis Dr. Jay Greene discussed during his testimony. Dr. Greene testified that a reliable process to determine the cost of an adequate education must be (1) wide-ranging; (2) transparent; (3) deliberative; and (4) incorporate a diverse range of perspectives. The plaintiffs could have retained experts who sought input from a wide-ranging number of stakeholders with diverse perspectives on the cost of an adequate education. This process could have been open and transparent, resulting in a report detailing the efforts undertaken to come to a "universal cost" figure. It could have been deliberative, allowing for feedback and consultation. As Dr. Greene testified, it could serve as a reliable, reasonable way to determine what the "universal cost" figure might be today for an adequate version of the education program specifically defined in RSA 193-E:2-a and the corresponding sections of Ed 306. But the plaintiffs did not pursue this path either.

The plaintiffs also could have sought to employ one or more of the basic analytical models for determining the cost of an adequate education that Dr. Robert Costrell referenced during his testimony and Justice Duggan discussed in his concurrence in *Londonderry*. 154 N.H. at 168 (Duggan, J., concurring). "[F]our basic analytical models exist for determining the cost of adequacy": (1) the "successful schools" model; (2) the "predetermined level" model; (3) the "professional judgement" model; and (4) the "value added" model. *Id.* While these models are

[6] The evidence also makes clear that there are several ways in which the plaintiffs could apportion expenditures across different subject areas if they chose to do it this way. The Account Handbook addresses this as well. Defs.' Ex. 14.

not without their critics, including Dr. Costrell, other courts have considered them as reasonable methods by which to cost an adequate education. Their reasonableness and the soundness of how they were executed could have been tested through the normal adversarial process. But none of the plaintiffs' witnesses employed any of these models.

Instead, the plaintiffs principally relied on the testimony of two experts—Dr. Rizzo Saunders and Dr. Baker. For the following reasons, neither opinion should be credited.

**A. Dr. Rizzo Saunders**

Dr. Rizzo Saunders's opinion on the cost of an adequate education is insufficient to sustain the plaintiffs' burden of proof, and ultimately should not be credited at all. This is true for several reasons. First, as explained by Dr. Greene in his testimony, Dr. Rizzo Saunders did not conduct an analysis that was wide-ranging in function, transparent in the processes employed, deliberative involving feedback and consultation, and diverse in the perspectives included. Dr. Greene juxtaposed Dr. Rizzo Saunders's process with the one conducted by the Joint Legislative Oversight Committee on Costing an Adequate Education back in 2007 and 2008. That committee consisted of ten members of the legislature—five from the Senate and five from the House. J. Ex. 154. It was bipartisan, and its membership possessed diverse backgrounds and viewpoints. J. Ex. 154. The Joint Committee held 18 meetings, totaling over 50 hours. J. Ex. 154. It heard testimony from state and national education policy and finance professionals on the methodologies and policy decisions employed in education costing and the costing experiences of other States. J. Ex. 154. It received briefings from the New Hampshire Department of Education. J. Ex. 154. It received written and oral testimony from educators, administrators, and the public. J. Ex. 154. It reviewed education finance data and studies from around the country. J. Ex. 154. It discussed and deliberated over policies and costs to determine the cost of an adequate

education. J. Ex. 154. The Joint Committee issued a published report describing its work and explaining its findings. J. Ex. 154.

Dr. Rizzo Saunders's process bears little resemblance to the process employed by the Joint Committee.[7] She testified that she replaced certain inputs from the 2018 Joint Legislative Commission's report—which was generated in support of a bill that was not enacted into law—because she did not believe that those inputs reflected real-world conditions. In arriving at the numbers she used, however, she did not consider a wide-ranging and diverse set of viewpoints or employ a deliberative process. Rather, she testified that for many of the inputs she called a small number of other school officials she knew, all of whom are affiliated with school districts that are plaintiffs in this lawsuit, before ultimately choosing what ConVal does or would actually spend on each input because she believed ConVal's to be "the most conservative real-world costs." She did not publish any report (or in many instances provide any data at all) to support these conclusions.

Generally speaking, it was clear from Dr. Rizzo Saunders's testimony that she simply disagreed with the methodology employed and policy judgments made by the Joint Committee when it arrived at the cost of an adequate education. It is neither Dr. Rizzo Saunders's prerogative, nor this Court's, to audit the methodology used by the Joint Committee in arriving at the per-pupil cost reflected in RSA 198:40-a, II. *See Contoocook Valley Sch. Dist.*, 174 N.H. at 166 ("[T]he methodology employed by the legislature in determining the cost of an adequate

[7] And even if it did, there are significant separation-of-powers problems in permitting a plaintiff to engage in its own legislative process to come up with its own funding figure and for the Court to adopt that figure, as discussed in the State's separate memorandum filed simultaneously with this filing. Such a procedure would effectuate an end-run around the legislative power to determine education policy and the appropriations necessary to fund it. *See Claremont Sch. Dist*, 142 N.H. at 476 ("Decisions 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.").

education in RSA 198:40-a is irrelevant to the plaintiffs' constitutional challenge."). Nor is it the judicial function to second-guess policy judgments made by the Legislature when enacting a statute. *See CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 591 (2015) ("matters of public policy are reserved for the legislature" (bracketing omitted)). That an advocate may disagree with the policy choices underpinning a legislative enactment is not evidence that the enactment is unconstitutional.

It is also clear from the evidence in this case that ConVal's expenditures are not, in fact, the most conservative even among the school districts who have brought this lawsuit. For instance, a significant driver of Dr. Rizzo Saunders's opinion on the cost of an adequate education was the inputs she used for benefits. In determining those inputs, Dr. Rizzo Saunders excluded single-person health insurance plans, which she acknowledged would be less expensive than two-person and family plans. At the same time, she did not exclude from her benefits calculation any amount for employees who opt out of district health plans. She likewise did not conduct any market analysis to determine whether the amount any school district may choose to pay for employee benefits reflects the true minimum cost of those benefits. She also did not factor into her analysis that other school districts—including school districts that are plaintiffs in this case—pay a smaller percentage of their employees' health insurance premiums than ConVal does. All these choices appear to be arbitrary, and each demonstrates that Dr. Rizzo Saunders's model is not, as she professes, based on anything approaching the most conservative real-world costs.

Dr. Rizzo Saunders's model also deviates substantially from the methodology employed by the Joint Committee in the student-teacher ratios she uses. Dr. Rizzo Saunders acknowledged at trial—and simply math confirms—that, all else being equal, the student-teacher ratios she used

resulted in her per-pupil cost for teachers being more than 2.5 times higher than the corresponding per-pupil cost in the 2008 Joint Committee report. Pls.' Ex. 4. This remains the most significant driver of the difference between the Joint Committee's final per-pupil cost and Dr. Rizzo Saunders's. Dr. Rizzo Saunders rejected the ratios used in the Joint Committee report based on a belief that they reflect class-size limits under Ed 306.17, and not actual student-teacher ratios. In her view, using student-teacher ratios better reflects "real-world conditions."

Even assuming that Dr. Rizzo Saunders is correct that the Joint Committee used maximum class sizes rather than student-teacher ratios, there is nothing aberrational about that decision. To the contrary, the evidence in the record reflects that the values used by the Joint Committee are wholly in keeping with "real-world conditions." For instance, class-size data as of October 1, 2021, shows that ConVal's middle school had an *average* class size of 28.3 students. J. Ex. 476. That same data shows that Manchester's elementary and middle schools consistently had average class sizes in the mid-to-high 20s. J. Ex. 476. Likewise, Windham's average class sizes were 22.4 for grades 1 and 2, 23.2 for grades 3 and 4, and 24.9 for grades 5 through 8. J. Ex. 476. These values demonstrate that actual school districts, including school districts that are plaintiffs in this case, can achieve average class sizes approaching the limits reflected in Ed 306.17 under real-world conditions. Dr. Rizzo Saunders's assertion otherwise, and her contention that the drastically lower values she uses are somehow "conservative," are both demonstrably false.

Dr. Rizzo Saunders also acknowledged that schools may choose to target smaller class sizes or student-teacher ratios even if doing so would correspondingly increase per-pupil costs. The evidence at trial demonstrates that such a decision is not merely theoretical, and that many school districts do in fact choose to impose their own class-size limits that are lower than those

imposed through Ed 306.17. Yet Dr. Rizzo Saunders made no attempt to identify how these decisions affected the ratios she used in her model. This, too, undermines any suggestion that Dr. Rizzo Saunders's model is based on conservative inputs.

Finally, to the extent student-teacher ratios, instead of maximum class sizes, were for some reason the proper input, Dr. Rizzo Saunders still did not establish that the inputs she used were reliable. She used average ratios from a single year, which she acknowledged during her testimony could be affected by, among other things, how efficiently a school district is being run or what priorities a school district chooses to pursue. She testified the ConVal school district could be run more efficiently, but that efforts to consolidate elementary schools had been rejected at a local level. She testified that she did not conduct any statewide efficiency analysis. As Dr. Greene pointed out, Dr. Rizzo Saunders's use of averages necessarily meant that a significant number of districts had student-teacher ratios that were higher than those Dr. Rizzo Saunders used. She thus did not come close to establishing that the ratios she built into her model reflect anything close to the most conservative values that could be used to deliver a constitutionally adequate education.

The input Dr. Rizzo Saunders used for facilities costs was similarly not reliable. She picked a number that is $1,150 per pupil higher than the amount used in the 2018 Study Committee's spreadsheet. Pls.' Ex. 4. In arriving at this number, she did not conduct any transparent, wide-ranging analysis, but rather simply called a handful of contacts she had at other plaintiff school districts and ultimately eyeballed a number of $1,500 per pupil. She subtracted from that number $100 per pupil, an amount she testified was essentially an estimate of the amount ConVal spends on facilities used for athletics and co-curriculars. She testified that these are the only two uses of school facilities that do not fall within the definition of an adequate

education. She also did not back out from her number, or even seek to identify, any expenses attributable to community use or private events. She acknowledged that some school districts do not maintain their own grounds but did not factor this into her analysis. This input, like the inputs is once again not based on any coherent, replicable empirical analysis that would make it reliable evidence of the cost of an adequate education.

The same is true of Dr. Rizzo Saunders's inputs for food services, school nurse services, and transportation costs. The input she used for food services was ConVal's number, which again was not the most conservative number even among the school districts that are plaintiffs in this case. Dr. Rizzo Saunders did not subtract from this number any food services school districts provide beyond just lunch. She did not factor in the extent to which a school district charging additional amounts for students who do not qualify for free and reduced lunch or teachers and other staff would affect her food services input. For her school nurse input, Dr. Rizzo Saunders picked a salary without conducting any sort of market analysis and then divided that salary by a nurse-to-student ratio found in a 2014 survey. There is no law or regulation that caps the number of students per nurse at the ratio Dr. Rizzo Saunders used. And Dr. Rizzo Saunders testified that she did not believe there was any way to come up with a universal number for transportation costs. Instead, she operated from the premise that the State should reimburse school districts for their actual expenditures for transportation without backing out from those actual expenditures any transportation costs that are not required by RSA 189:6 or explaining why a school district's actual expenditures is actually the most conservative real-world cost of providing transportation. These inputs are therefore also not reliable.[8]

[8] In focusing on these inputs, the State does not concede that the other inputs used in Dr. Rizzo Saunders's model are somehow reliable. Essentially all of them suffer from the same basic infirmities discussed above. But the above inputs are the most significant drivers of Dr. Rizzo Saunders's inflated

Ultimately, most—if not all—of the cost inputs that Dr. Rizzo Saunders used appear to be arbitrary. She did not select those inputs as part of a wide-ranging analysis that was deliberative, involved feedback and consultation, took into consideration a diverse set of perspectives, and generated a report that described the process and explained the work performed. As Dr. Greene noted, there is no meaningful way to replicate Dr. Rizzo Saunders's analysis. Her opinion is instead based on policy disagreements with the methodology employed by the Legislature and assumptions that are at the very least unfounded, and often contrary to the evidence in the record.

Considering all its shortcomings, Dr. Rizzo Saunders's opinion is not reliable at all. It certainly does not place the "nullity and invalidity" of RSA 198:40-a, II(a) "beyond all reasonable doubt," *Hynes*, 146 N.H. at 535, or lead to the "inescapable" conclusion that the statute is unconstitutional, *Contoocook Valley Sch. Dist.*, 174 N.H. at 161. It does not come close to satisfying the plaintiffs' "heavy burden" of proof. *Ploof*, 162 N.H. at 614.

**B. Dr. Baker**

Dr. Baker's opinion is likewise insufficient to meet the plaintiffs' heavy burden and should ultimately be given no weight. As an initial matter, Dr. Baker did not tether his analysis to the inputs required to provide an adequate education under the definition in RSA 193-E:2-a, I. Instead, he conducted his analysis using student outputs—*i.e.*, average student achievement, attendance, and graduation metrics. Average output metrics, however, are not how the Legislature has chosen to define an adequate education; the Legislature chose an input-based method. As to achievement, Dr. Baker acknowledged that New Hampshire students do well nationally. On the more granular level, Dr. Baker admitted that the statewide assessment that he used as an output metric demonstrated that the average New Hampshire student generally was

per-pupil cost. That they are inherently unreliable demonstrates that Dr. Rizzo Saunders's opinion as to the cost of an adequate education cannot sustain the plaintiffs' heavy burden in this case.

achieving far above state proficiency. In other words, by using average achievement as a metric for adequacy, Dr. Baker artificially inflated the "goal" far above state standards.

Dr. Baker's analysis also assumed that everything school districts spend on education is deigned to achieve adequacy; he did not attempt to review the curriculum, programs, or expenditures to determine which were necessary to meet the statutorily prescribed definition. Dr. Baker's analysis is thus irrelevant under the Supreme Court's precedent. At base, Dr. Baker's analysis is unmoored from the legal issues in this case, which is not surprising given that his analysis was created for an unsuccessful attempt to convince the Legislature to adopt a different funding formula targeted at achieving equity of educational outcomes, not to address the plaintiffs' claims in this Court. Indeed, Dr. Baker did no new analysis for this case. For this reason alone, Dr. Baker's analysis should be given no weight.

Even setting aside these flaws, Dr. Baker's analysis does not support the plaintiffs' burden of proof because it is fundamentally unreliable. As Dr. Costrell explained, Dr. Baker's analysis deviates so substantially from standard econometric practice that his results reflect an expense function, not a cost function. In other words, it does not tell you what each specific output costs; it simply tells you what districts expend to achieve those outputs. Dr. Baker's analysis thus reflects a tautology: the average expenditure produces the average output.

His methodology also so deviates from standard econometric practice as to render his results unreliable. Dr. Baker ran his model numerous different ways to attempt to find a model that would approach statistical significance. Dr. Baker settled on an analysis he used He used inconsistent weighted and unweighted variables, which is unusual and for which Dr. Baker had no good explanation. until he achieved a result approaching statistical significance. When weighted variables were consistently applied, Dr. Baker's results fell to a level of statistical

significance—36%—that is miles away from any scientifically acceptable standard of reliability. Additionally, many of Dr. Baker's results fail to meet the 0.5 P-value that statisticians consider the most reliable and rigorous test of statistical significance. Dr. Baker also failed to perform appropriate robustness checks on his model, and the single robustness check he did run showed unexpected relationships that indicate a flawed model. While Dr. Baker hypothesized that these unexpected relationships could have been the result of regional anomalies in the date, he did nothing to test this speculation. At bottom, Dr. Baker engaged in a statistically suspect practice called p-hacking in order to try to validate his desired results. His model is fundamentally unreliable and should be disregarded.

Finally, Dr. Baker's opinion, if adopted, would also lead to absurd results. Dr. Baker admitted that his own model would require the State to provide over $60,000 per student in adequacy funding for ***every*** special education student (regardless of disability). In addition, Dr. Baker claims that there is a causal relationship between spending and achievement at all levels of spending. If true, the additional money provided under his model would cause average achievement to rise, which would then require additional spending to bring the below-average districts up to average, which would then again cause average achievement to rise. This never-ending feedback cycle would result in there being a continually increasing obligation to provide additional educational funding with no conceivable stopping point instead of a stable, objectively identifiable metric. In fact, because Dr. Baker tethers adequacy to average student achievement, the State would *always* be failing to provide half New Hampshire's public-school students with an adequate education under his model. This is a false picture of the outcomes achieved by New Hampshire's public-school students.

**C. Other evidence**

Nearly all the remaining evidence the plaintiffs presented was nothing more than a cumulative series of conclusory statements from officials who operated from an incorrect understanding of what the statutory definition of an adequate education encompasses and often did not agree on what fell within that definition or what an adequate education might actually cost. Virtually every school district official testified, in wholly conclusory fashion, that they could not provide an adequate education on the per-pupil amount provided by the State under RSA 198:40-a, II(a). They justified this view through amorphous references to their experience as school administrators. But none of them conducted any independent analyses of the cost of an adequate education. Some relied on Dr. Rizzo Saunders's model, while others appeared to disagree with the inputs she used in that model. None had any independent knowledge of how Dr. Rizzo Saunders's arrived at her opinion. Unsupported and conclusory statements are insufficient to meet the plaintiffs' heavy burden in this case. *Cf. Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991) ("[P]etitioner's unsupported and conclusory averments are insufficient to sustain his burden of establishing a violation of his sixth amendment right to effective assistance of counsel."); *United States v. Beery*, 678 F.2d 856, 863 (10th Cir. 1982) ("The Government bears a 'heavy burden' in making the required proof. While the prosecuting attorney made general denials, these conclusory statements are simply not enough to carry the burden.").

The only other evidence the plaintiffs provided in support of their claim was evidence of what some school districts pay to tuition their students to other districts. This evidence, though, suffered from the same infirmities as the plaintiffs' other evidence. The plaintiffs made no effort to distill from the total amount a school district might pay per pupil in a tuition agreement the amount that is attributable to constitutional adequacy. They offered no analysis of the ways in which market pressures and respective bargaining positions could affect—and likely inflate—

tuition agreement amounts. They offered no comparison of what school districts pay in tuition agreements and what they receive in total state funding for education. They simply doubled down on the notion that basically everything a school district provides falls within the definition of constitutional adequacy and that all of this must be covered by RSA 198:40-a, II(a) for the statute to be constitutional. This line of reasoning is fatally flawed for the reasons already stated. None of the evidence of tuition agreements presented by the plaintiffs at trial leads to the inescapable conclusion that RSA 198:40-a, II(a) is unconstitutional.

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The plaintiffs' evidence does not come close to sustaining their burden of proof even if the plaintiffs were operating from a correct legal framework. Judgment should enter for the State for this reason as well.

## V. Ruling in the plaintiffs' favor based on the evidence presented at trial would violate the separation-of-powers doctrine.

The State has set forth in a separate, contemporaneously filed memorandum why this Court cannot, consistent with the separation-of-powers doctrine, pick its own number for the cost of an adequate education or otherwise grant the plaintiffs' request for injunctive relief. It nonetheless bears emphasizing here that *any* ruling in the plaintiffs' favor based on the evidence presented at trial is also incompatible with the constitutional separation of powers.

The plaintiffs' entire legal theory is premised on a definition of an adequate education that finds no support in the statutory or regulatory text and is incompatible with the Supreme Court's school-funding jurisprudence. The Supreme Court has emphasized that "[d]etermining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch." *Londonderry*, 154 N.H. at 160. As discussed at length above, the Legislature has crafted

a narrow definition of an adequate education and costed it through RSA 198:40-a. The plaintiffs do not challenge the definition the legislature adopted, and the legislature's decision is entitled to substantial deference. Plaintiffs simply disagree with the decisions the legislature made. Any ruling in this case that reads into the definition of an adequate education services or components that the legislature did not include would usurp the legislative function in a manner the State Constitution does not permit.

The separation-of-powers doctrine likewise does not permit this Court to fill the void left by the plaintiffs' lack of proof by conducting its own analysis of the cost of an adequate education. This Court's role is to assess the evidence the plaintiffs marshalled, not construct its own cost of an adequate education or come to its own determination as to what should be in the baseline adequacy figure and what should not be in that figure. Those are precisely the "policy decisions" the Supreme Court identified in *Londonderry* as residing within the legislature's discretion to make. *Londonderry*, 154 N.H. at 160. A trial court hearing evidence in an adversarial proceeding cannot take over the Legislature's role in shaping educational and fiscal policy. Rather, it must simply adjudicate whether the plaintiffs have met their burden to show what the "universal cost" figure should be today and whether that figure is in clear conflict with the State Constitution based on the evidence and analyses the plaintiffs chose to present.

Relatedly, a ruling in the plaintiffs' favor would also be in direct tension with the justiciability doctrine. A claim is nonjusticiable when, among other things, a court cannot resolve it without making an initial policy determination of the kind clearly for nonjudicial discretion or without expressing lack of the respect due to the coordinate branches of government. *Richard v. Speaker of the House of Representatives*, 175 N.H. 262, 267–68 (2022). The plaintiffs, in essence, ask this Court to supplant the carefully crafted definition of an adequate education the

legislature adopted with one of their own choosing. They ask this Court to make policy judgments as to what is in and what is out of the definition of an adequate education, not based on the language of RSA 193-E:2-a or the corresponding subsections of Ed 306, but rather on what they think that definition should include. But, again, the Supreme Court has made clear that "[d]etermining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch." *Londonderry*, 154 N.H. at 160.

A claim is also nonjusticiable when there is a lack of judicially discoverable and manageable standards for resolving it. Ruling in the plaintiffs' favor based on the evidence they have presented would strip the State of control over how to define and cost an adequate education and vest that control in the school districts. The cost of an adequate education would no longer reflect an objective measure of what is required in New Hampshire to fund an adequate version of the substantive educational program the legislature adopted. It would instead turn on what school districts individually choose to spend on anything they are arguably required to do under any state statue or regulation. The cost of an adequate education would depend on, among other things, the market competition that a school district faces, the facilities a school district chooses to have, how many teachers and staff a school district chooses to hire, what a school district chooses to pay those teachers and staff, what a school district chooses to pay its administration, what benefits a school district chooses to offer, what portion of those benefits a school district chooses to fund, and what class size minimums and maximums a school district chooses to impose. The evidence presented in this case demonstrates that these determinations are school-district specific and highly individualized, subject to local choice and accountability.

There is no judicially discoverable and manageable standard for determining the cost of an adequate education based on such highly individualized factors.

Accordingly, the Court should be extraordinarily careful in this area to hew closely and precisely to the legislative definition of an adequate education contained in RSA 193-E:2-a, I, and to measure the constitutionality of RSA 198:40-a, I(a) against only the substantive educational program precisely delineated in that definition.

## VI. The plaintiffs' as-applied claims should be dismissed.

The plaintiffs are not entitled to judgment in this case at all for the reasons already stated. At a minimum, however, their as-applied claims should be dismissed. Both Part II, Article 83 of the New Hampshire Constitution, and the New Hampshire Supreme Court's precedent, create a cause of action for plaintiffs to challenge whether the State has met its general, constitutional obligation to define, cost, fund, and deliver an adequate education throughout the entire State. This cause of action does not contemplate that individual school districts might challenge RSA 198:40-a, II(a)'s "universal cost" figure as unconstitutional on an as-applied basis because it fails to provide them with the precise base cost figure to which they believe themselves to be entitled. Such a result would be unworkable and would deny the State the ability to set a "universal cost" figure to satisfy its costing and funding obligations under the State Constitution. Neither *Claremont I* nor its progeny recognize such as-applied constitutional challenges for the benefit of individual school districts, and the manifest unworkability of such claims counsels their dismissal. *See Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) ("The 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."); *Fogg v. Bd. of Educ.*, 76 N.H. 296, 300 (1912) (explaining that "the fundamental purpose of the

public-school system is the protection and improvement of the state as a political entity" and holding that this statewide interest should not be unduly or unreasonably sacrificed or impaired to meet the particular needs of a single individual).

None of the individual school districts have provided sufficient testimonial and documentary evidence capable of proving the "universal cost" figure for their particular school district. Rather than performing the appropriate and nuanced inquiry into the necessary costs for meeting the minimum standards for school approval in the learning areas covered by RSA 193-E:2-a, the districts have instead testified that nearly all of their actual expenditures, save athletics and co-curricular activities, are required for constitutional adequacy in their respective school district. They have made no attempt to identify what expense items are in and out of the statutory definition and have made no attempt, quantitatively and qualitatively, to determine what portion of their spend on services or items that fall within the statutory definition exceeds constitutional adequacy and to then exclude those amounts from their evidence. Because they have failed to provide evidence as to their specific, necessary expenditures to meet the minimum standards for the learning areas identified in RSA 193-E:2-a, the Court lacks sufficient evidence that would support a finding that the "universal cost" figure contained in RSA 198:40-a, II(a) is incapable of covering those necessary expenditures, and is therefore unconstitutional as applied to any plaintiff school district.

**Conclusion**

The plaintiffs have failed to meet their "heavy burden" in this case. They improperly attempt to shift the burden of proof to the State, challenge the wrong cost figure, operate from an incorrect definition of an adequate education, and offer no competent evidence that would otherwise support their claim. A ruling in their favor would violate the separation-of-powers

doctrine and result in a standard that the State would be hard-pressed to ever satisfy. For all of these reasons, and those stated above, the Court should enter judgment for the State.

Respectfully submitted,

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

By their attorney,

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Date: June 30, 2023

By: /s/ *Samuel Garland*

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**CERTIFICATE OF SERVICE**

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

Date: June 30, 2023

/s/ *Samuel Garland*
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