THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF NEW HAMPSHIRE'S MOTION FOR SUMMARY JUDGMENT

Introduction

The plaintiffs contend that the State is failing to fund an adequate education in violation of Part II, Article 83 of the New Hampshire Constitution. Specifically, the plaintiffs contend that, because the amount the State provides school districts under RSA 198:40-a is less than the total amount they spend, the State is not meeting its constitutional obligation. *See* Am. Compl. ¶¶ 14, 16, 17, 18, 23, 45, 47, 50, 51, 82. They seek an order from this Court "directing the State to adopt a revised cost determination [that] . . . amounts to no less than the average state expenditure per pupil, with allowances for demographic and geographic diversity and that includes consideration of the costs of transportation, capital costs, and debt." *Id.* ¶ 82. The seek corresponding declaratory relief. *Id.* ¶ 80.

The plaintiffs' adequacy claim fails as a matter of law and undisputed fact. RSA 198:40-a was never designed to fund everything a school district spends money on. Rather, it is only designed to fund the substantive educational program that comprises an adequate education, as defined by the Legislature through RSA 193-E:2-a. That definition does not, as a matter of basic statutory and regulatory interpretation, encompass everything a school district spends money on. The plaintiffs' own experts acknowledge this. The plaintiffs accordingly cannot meet their heavy

burden of demonstrating that the current funding formula is in clear and substantial conflict with the Part II, Article 83. The Court should therefore enter summary judgment in the State's favor on the plaintiffs' adequacy claim.

Background

The plaintiffs bring two challenges to New Hampshire's education-funding system. First, they contend that the Statewide Education Property Tax ("SWEPT") violates Part II, Article 5. *See* Am. Compl. ¶¶ 1, 52, 80 The parties have separately cross-moved for summary judgment on that claim, and the matter is under consideration with the Court. It is not the subject of this motion.

The plaintiffs also contend that the State is violating Part II, Article 83 by failing to fully fund the cost of an adequate education. The plaintiffs contend that "the State sets an arbitrarily low level of state 'adequacy aid' that does not begin to approach the actual cost of a constitutionally adequate public education and pays for only about 28% of the cost of public education." Am. Compl. ¶ 14. The plaintiffs make clear that the "cost of public education" referred to in the last clause of this contention is the total cost of public education statewide. *See id.* (citing a New Hampshire Department of Education document that reflecting that state "Equitable Education Aid" comprises approximately 28% of total spending on public education in New Hampshire).

The plaintiffs specifically train their focus on RSA 198:40-a. *See id.* ¶¶ 15, 41, 42, Table B. Through this statute, the Legislature adopted a formula for determining the "cost of an adequate education," as defined in RSA 193-E:2-a. RSA 198:40-a, III. The plaintiffs contend the total amount per pupil school districts receive under this statute does not satisfy the State's constitutional funding obligation because the total average amount school districts spend per

pupil is significantly higher. *See id.* ¶¶ 17, 18. The plaintiffs contend that this requires municipalities to fund part of the cost of an adequate education through local taxes. *Id.* ¶ 23.

The plaintiffs "contend that the cost of a constitutionally adequate education should be derived from the average spending per pupil of schools across New Hampshire, with allowances for different student demographics and the geography of local school districts." *Id.* ¶ 47. They assert that "[t]he cost should also account for and include the cost of transportation, capital costs, and debt." *Id.* They ask this Court to declare, among other things, that "[t]he State does not currently guarantee funding sufficient to cover the cost of an adequate education." *Id.* ¶ 80. They "further seek an order, directing the State to adopt a revised cost determination [that] . . . amounts to no less than the average state expenditure per pupil, with allowances for demographic and geographic diversity and that includes consideration of the costs of transportation, capital costs, and debt." *Id.* ¶ 82.

The plaintiffs have disclosed two experts in support of their adequacy claim. One, Corinne E. Cascadden, Ed. D., served as superintendent for SAU #3 from 2009 through 2019 and then interim superintendent for SAU #84. Cascadden Dep. 28:9–29:14, July 14, 2023.[1] Dr. Cascadden is a member of the New Hampshire House of Representatives and served on the Commission that issued the recent education study report. *Id.* at 54:7–55:14. The other, John J. Freeman, Ph. D., was superintendent in Pittsfield and then, briefly, in Strafford, before retiring in 2022. Freeman Dep. 7:11 –17, 40:1–10, July 13, 2023.

[1] Given the timing of Dr. Cascadden's and Dr. Freeman's depositions, only rough deposition transcripts are currently available. The State is providing excerpts from those rough transcripts in conjunction with this motion. The State will file excerpts from the official transcripts as soon as they are available. To the extent this results in any changes to the citations in this motion, the State will promptly inform the Court of the correct citations.

Dr. Cascadden testified during her deposition that every school in New Hampshire is currently providing an education that exceeds constitutional adequacy. Cascadden Dep. 52:8–14. She acknowledged that the definition of an adequate education that the Legislature adopted through RSA 193-E:2-a does not cover everything a school district does or provides. *Id.* at 51:17–52:8. She further acknowledged that not every part of New Hampshire Administrative Rule Ed PART 306 ("Ed 306"), which sets forth the "minimum standards for public school approval," falls within the statutory definition of an adequate education the Legislature adopted. *Id.* at 51:19–22, 65:3–10, 66:3–8, 67:7–12. She acknowledged that school districts provide numerous programs that are not required under the definition of constitutional adequacy, including comprehensive psychological services, career education, business education, alternative programs, family and consumer science, administrative structure, safe and healthy buildings, athletics, athletic clubs, non-athletic clubs, and co-curricular clubs. *Id.* at 53:9–54:6. Dr. Cascadden also acknowledged that there are school districts in New Hampshire that spend less per pupil than the state average. *Id.* at 94:18–21. She acknowledged that these school districts are providing a constitutionally adequate education. *Id.* at 94:22–25.

Dr. Freeman similarly testified that at least some school districts in New Hampshire provide an education that exceeds constitutional adequacy. Freeman Dep. 168:6–15. He acknowledged that Ed 306 and other statutes impose requirements on school districts that do not fall within the definition of an adequate education the Legislature adopted in RSA 193-E:2-a. *Id.* at 39:4–20. He acknowledged that schools provide programs that are not required under the definition of constitutional adequacy. *Id.* at 138:2–9. He further acknowledged that he was unsure whether the average statewide expenditures per pupil reported by the Department of Education had any tie to constitutional adequacy. *Id.* at 80:14–19. He acknowledged it was not

his opinion that school districts spending less than the statewide average were failing to provide an adequate education. *Id.* at 182:24–183:3. He also acknowledged using statewide average per pupil expenditures to determine the cost of an adequate education would tether that cost to local school districts' spending decisions. *Id.* at 187:6–13.

Standard of Review

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is material if it affects the outcome of the litigation." *Porter v. City of Manchester*, 155 N.H. 149, 153 (2007). A dispute of fact is "genuine" if the evidence "is such that a reasonable fact finder could return a verdict for the nonmoving party." *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 739 (2005) (citation and brackets omitted). Conclusory assertions—even those made by an expert witness—will not satisfy the nonmoving party's burden in opposing summary judgment. *New England Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 454 (1996). "Mere denials or general allegations of expected proof are [also] not enough" to overcome a motion for summary judgment. *Blagbrough v. Town of Wilton*, 145 N.H. 118, 121 (2000) (citation omitted). Only admissible evidence may be considered by the court on such a motion. RSA 491:8-a, II.

Discussion

I. The plaintiffs bear the burden of proof on their adequacy claim.

The plaintiffs may argue in response to this motion that the State bears the burden of proof on their adequacy claim. If they do, this Court should reject the argument. In *Contoocook Valley School District v. State*, the New Hampshire Supreme Court reiterated the longstanding

and uncontroversial principle that "[t]he party challenging a statute's constitutionality bears the burden of proof." 174 N.H. 154, 161 (2021). That case, which, like this one, involves a challenge to the current adequacy formula set forth in RSA 198:40-a, should put to rest any suggestion that the State must *disprove* the plaintiffs' allegations.

But even if *Contoocook Valley School District* were not explicit on this point, there is no support for the notion that the State bears the initial burden of proof. To the contrary, the New Hampshire Supreme Court has made clear that "[f]or limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of that right." *State v. Lilley*, 171 N.H. 766, 776 (2019). In other words, 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.

The plaintiffs may argue that the burden of proof lies with the State because, under the New Hampshire Supreme Court's school-funding jurisprudence, the State has a duty to "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." *Contoocook Valley Sch, Dist.*, 174 N.H. at 156–57 (citations and quotation marks omitted). But the existence of a duty does not bring with it a corresponding burden to disprove a plaintiff's claim. In the tort context, for instance, a plaintiff still bears the burden of proof even though the defendant has a duty of care. *See Rowe v. Public Serv. Co.*, 115 N.H. 397, 399 (1975) (noting "the well established rules of law that a person asserting negligence has the burden of proof"). This is true even of constitutional torts brought under 42 U.S.C. § 1983 to enforce rights explicitly conferred in the Federal Constitution. *See Cluckey v. Town of Camden*, 894 F.3d 25, 33 (1st Cir. 2018) (observing that in an action brought under § 1983, "[t]he plaintiff must prove the alleged deprivation of [constitutional] rights" and "that the deprivation ahs resulted from the breach *of a duty owed by the defendant*" (emphasis added)).

The State, through RSA 198:40-a, has costed an adequate education. To obtain a decree that these efforts fall short of what the State Constitution requires, the plaintiffs must demonstrate that a "clear and substantial conflict exists between [RSA 198:40-a] and the constitution." *Contoocook Valley Sch. Dist.*, 174 N.H at 161. The Court must "presume [RSA 198:40-a] to be constitutional and will not declare it invalid except on inescapable grounds." *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); *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)).

The plaintiffs thus bear a "heavy burden" to prevail on their adequacy claim. *State v. Ploof*, 162 N.H. 609, 614 (2011). This Court should reject any attempt by the plaintiffs to diminish that burden or shift it to the State.

II. The plaintiffs have failed to meet their "heavy" burden as a matter of law.

The plaintiffs base their adequacy claim on a contention that Part II, Article 83 obligates the State to pay for the total amount school districts actually spend on public education. *See* Am. Compl. ¶¶ 14, 16, 17, 18, 23, 45, 47, 50, 51, 82. They assert that the amount the State provides school districts under RSA 198:40-a is "arbitrarily low" because it amounts to "only about 28% of the [total] cost of a public education." *Id.* ¶ 14; *see also id.* ¶¶ 17, 18. The plaintiffs "contend that the cost of a constitutionally adequate education should be derived from the average spending per pupil across New Hampshire, with allowances for different student demographics and the geography of local school districts," and that this amount "should also account for and include the cost of transportation, capital costs, and debt." *Id.* ¶ 47. The plaintiffs seek an order from this Court "directing the State to adopt a revised cost determination" that "amounts to no less than" this average. *Id.* ¶ 82. This theory fails both as a matter of law and undisputed fact.

A. The plaintiffs cannot prevail on their adequacy claim because they have not identified what portions of total average school district expenditures fund an adequate education.

As a threshold matter, the plaintiffs have made no attempt to isolate what portions of a school district's total expenditures are attributable to providing a constitutionally adequate education, as defined in RSA 193-E:2-a, I. In *Contoocook Valley School District*, the Supreme Court observed that "it [was] impossible to address the plaintiffs' costing argument without first determining what is required to deliver an adequate education as defined under the statute." 174 N.H. at 166. Because the plaintiffs have not undertaken this effort, it is likewise "impossible" for this Court to address whether the current funding formula presents a "clear and substantial conflict" with Part II, Article 83. The plaintiffs have accordingly failed to meet their "heavy burden" in this case.

B. The definition of an adequate education the Legislature adopted does not encompass everything a school district spends money on.

The plaintiffs appear to contend that everything school districts spend money on, including transportation, capital costs, and debt, is part of constitutional adequacy that the State must pay for. *See* Am. Compl. ¶¶ 47, 82. The Supreme Court has made clear, however, that the duties imposed by Part II, Article 83 "do[] not prevent the legislature from authorizing local school districts to dedicate additional resources to their schools or to develop educational programs beyond those required for a constitutionally adequate education." *Claremont Sch. Dist.*, 142 N.H. at 475. To this end, RSA 198:43 specifically provides that "[s]chool districts are authorized to develop educational programs beyond those required for an adequate education and to raise and appropriate amounts necessary for such programs." Thus, to prevail on their theory, the plaintiffs must demonstrate that everything school districts spend money on falls within the definition of an adequate education the Legislature adopted.

The plaintiffs are unable to make this showing. The definition of an adequate education the Legislature adopted does not, on its face, purport to cover everything a school district is required to provide or may choose to deliver. The Legislature defined an adequate education through 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]

[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 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. 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,

- 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). It is thus apparent that the definition of an adequate education the Legislature adopted does not encompass *everything* a school district spends money on to run its program (*i.e.*, its total actual costs). Because the plaintiffs' adequacy claim is based on a contrary assumption, it fails as a matter of law.

To the extent the plaintiffs might argue that everything a school district provides necessarily falls within the subsections of Ed 306 that correspond with the learning areas set

[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).

forth in RSA 193-E:2-a, I, the argument lacks legal merit. The subsections of Ed 306 at issue 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 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 there is no good-faith way to read these provisions to cover everything else a school district may be required, or may choose, to do to operationalize its school district in the manner its voters prefer.

Looking to the whole of Ed 306 only confirms this, as 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. Any expenditures associated with these programs would, however, fall within the "total expenditures" upon which the plaintiffs premise their adequacy claim.

Other services that schools provide are likewise addressed in sections of Ed 306 that do not correspond with the minimum standards for public school approval for the eleven learning areas listed in RSA 193-E:2-a, I. These include custodial and maintenance services, *see* N.H. Admin. R. Ed 306.09, requirements for school facilities, *see* Ed 306.07, school counseling, *see* Ed 306.39, and food and nutrition, *see* Ed 306.11. Then there are services that are not addressed in different regulations altogether. For instance, principal services are set forth in Ed 304, superintendent services are set forth in Ed 302, and school health services are set forth in Ed 311. 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.

Furthermore, transportation services are governed by an entirely different statute—RSA 189:6. Notably, this statute does not purport to require school districts to provide transportation to all students, but rather those students in kindergarten through eighth grade who live more than two miles from the school to which they are assigned. RSA 189:6. The plaintiffs nevertheless contend that the cost of an adequate education must cover school districts' actual costs for

transportation. Am. Compl. ¶¶ 47, 82. The Supreme Court has made clear, however, 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 Sch. Dist. SAU #12 v. State*, 154 N.H. 153, 161–62 (2006). 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*, 164 N.H. 693, 694 (2013), particularly when the statute addresses an obligation that the Constitution reserves solely to the legislative branch.

The plaintiffs' theory 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 determining the cost of an adequate education to local school districts based on what they actually spend to operate their entire school district. This separate duty to define an adequate education would be rendered a nullity by such a result. 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 "the legislature is obligated to give *specific substantive content* to the word [education] and to the program it deems necessary to provide that 'education,'" ." 154 N.H. at 156 (emphasis in original), and that the "definition crafted by the political branches" must be "sufficiently clear to permit common understanding and allow for an objective determination of costs," *id.* 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 July 26, 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, and RSA 193-E:2-a and RSA 198:40-a implicate only *certain* minimum standards, not all of them.

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 directed the Legislature "to give *specific substantive content* to the word [education] and to the program it deems necessary to provide that 'education,'" *Londonderry*, 154 N.H. at 156 (emphasis in original), and to craft a definition of an adequate education that was "sufficiently clear to permit common understanding and allow for an objective determination of costs," *Id.* 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 on everything it spends

money on is incompatible with both the established interpretive rules and the Supreme Court's school-funding jurisprudence.

In short, RSA 198:40-a is intended to pay for only a portion of the public education system—the substantive educational program set forth in RSA 193-E:2-a, I(a) and the corresponding sections of Ed 306 that set forth the parameters of that substantive program. It was not intended to cover or pay for everything else. The plaintiffs' contention that the State is obligated under Part II, Article 83 to fully fund an amount "no less than the average state expenditure per pupil . . . that includes consideration of the costs of transportation, capital costs, and debt," Am. Compl. ¶ 82, is therefore incorrect as a matter of law. Because the plaintiffs premise their adequacy claim on that legally erroneous contention, they necessarily fail to meet their "heavy burden" of proof.

C. The plaintiffs' own experts agree that the definition of an adequate education the Legislature adopted does not cover everything a school district spends money on.

The plaintiffs' legal theory fails as a matter of statutory and regulatory interpretation for the reasons explained above. To the extent, however, "determining the components of an adequate education and their costs presents a mixed question of law and fact," *Contoocook Valley Sch. Dist*, 174 N.H. at 166–67, it is also undisputed as a matter of fact both that the definition of an adequate education the Legislature adopted does not cover everything a school district may spend money on and that school districts do provide services that exceed constitutional adequacy.

The plaintiffs support their adequacy claim with only two expert opinions. Each expert testified that school districts in New Hampshire provide an education that exceeds what the constitution requires. Cascadden Dep. 52:8–14; Freeman Dep. 168:6–15. Each expert

acknowledged that the definition of an adequate education the Legislature adopted through RSA 193-E:2-a does not cover everything a school district is required to or does provide. Cascadden Dep. 51:17–52:8; Freeman Dep. 39:4–20. Dr. Cascadden specifically acknowledged that not every part of Ed 306 is absorbed into the definition of an adequate education set forth in RSA 193-E:2-a. Cascadden Dep. 51:19–22, 65:3–10, 66:3–8, 67:7–12. Both Dr. Cascadden and Dr. Freeman acknowledged that schools provide numerous programs that are not required under the definition of constitutional adequacy. *Id.* at 53:9–54:6; Freeman Dep. 138:2–9

Each expert also acknowledged that school districts that spend less than the statewide average per pupil still provide a constitutionally adequate education. Cascadden Dep. 94:22–25; Freeman Dep. 182:24–183:3. Dr. Freeman acknowledged that he was unsure whether the statewide averages reported by the Department of Education had any tie to constitutional adequacy. Freeman Dep. 80:14–19. Dr. Freemen further acknowledged that using statewide average per pupil expenditures to determine the cost of an adequate education would tether that cost to local school districts' spending decisions. *Id.* at 187:6–13.

Based on this testimony, it is undisputed as a matter of fact that the definition of an adequate education adopted by the Legislature does not cover everything a school district spends money on. It is undisputed as a matter of fact that not all of Ed 306 falls within the statutory definition of an adequate education. It is undisputed as a matter of fact that school districts do, in fact, spend money on things that do not fall within the statutory definition. It is likewise undisputed as a matter of fact that school districts can provide a constitutionally adequate education for less than the statewide average per pupil expenditures reported by the Department of Education.

In other words, the testimony of the plaintiffs' own experts makes clear that a statewide average of school districts' total expenditures necessarily includes spending on things that fall outside of the definition of an adequate education. As previously discussed, the plaintiffs have made no effort to isolate what part of school districts' total expenditures goes toward constitutional adequacy so that this amount can be compared to the funding school districts receive under RSA 198:40-a. Instead, the plaintiffs premise their adequacy claim a theory "that the cost of a constitutionally adequate education should be derived from the average spending per pupil of schools across New Hampshire, with allowances for different student demographics and the geography of local school districts," and that this amount "should also account for and include the cost of transportation, capital costs, and debt." Am. Compl. ¶ 47. This theory, in addition to being incorrect as a matter of law, is also belied by the undisputed facts.

Conclusion

The plaintiffs premise their adequacy claim on a theory that Part II, Article 83 requires the State to provide school districts with funding in an amount equal to or greater than the average total amount school districts spend per pupil statewide. Am. Compl. ¶¶ 4, 82. Because this theory fails both as a matter of law and undisputed fact, the plaintiffs cannot meet their heavy burden of demonstrating that the current funding formula is in clear and substantial conflict with Part II, Article 83. The State is accordingly entitled to summary judgment on the plaintiffs' adequacy claim.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

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Date: July 27, 2023

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Certificate of Service

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

Date: July 27, 2023

/s/ *Samuel Garland*
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