THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

THE STATE'S REPLY TO THE PLAINTIFFS' OBJECTION TO THE STATE'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 13A, the State submits this reply to the plaintiffs' objection to its motion for summary judgment:

1. The State has explained in detail in its underlying motion why the plaintiffs' adequacy claim fails as a matter of law. The plaintiffs attempt to resist this conclusion by morphing their legal theories, diminishing their burden of proof, and lobbing a series of gratuitous accusations at the State. These efforts only underscore the weakness of the plaintiffs' position. The State limits this reply to a handful of points raised in the plaintiffs' memorandum.

A. The plaintiffs cannot change their legal theory in an objection to a motion for summary judgment.

2. The plaintiffs do not dispute in their objection that the State is not required to pay for the total amount school districts actually spend on public education. Pls.' Mem. Supp. Obj. Mot. Summ. J. at 10. They contend, however, that their adequacy theory is not based on total expenditures. *See id.* at 1–2. They assert that the State's argument otherwise "mischaracterizes" their amended complaint and is "disingenuous and intentionally misleading." *Id.* at 1, 7. These accusations cannot be squared with what the amended complaint actually says.

3. To be sure, the plaintiffs pepper their amended complaint with general assertions that the State is failing to fund an adequate education, and that this failure has shifted the funding

burden to local taxpayers. The plaintiffs cite examples of some of these assertions in their memorandum. *See, e.g.*, Pls.' Mem. Supp. Obj. Mot. Summ. J. at 1–2. But the assertions themselves are legal conclusions as to an ultimate issue in the case. Even at the motion-to-dismiss stage, they would not be entitled to an assumption of truth. *See Automated Transactions, LLC v. Am. Bankers Ass'n*, 172 N.H. 528, 532 (2019). In other words, they do not provide either the State or the Court with notice "of the theory on which the plaintiff[s] [are] proceeding and the redress that the plaintiff[s] claim[] as a result of the [defendant's] actions." *Donald Toy v. City of Rochester*, 172 N.H. 443, 448 (2019). They are certainly insufficient to defeat a motion for summary judgment. *See New England Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 454 (1996).

4. To the extent the amended complaint does provide notice of the plaintiffs' legal theory, it comes through allegations that the State is failing to fully fund the total amount school districts spend on public education, at least on an average statewide basis. To this end, the plaintiffs allege 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 education and pays for only about 28% of the cost of a public education," Am. Compl. ¶ 14;

- "the State provided districts during the 2020-21 school year with approximately $4,597 per student to meet its constitutional responsibility to fund adequacy, while the average per pupil cost published by the New Hampshire Department of Education (NHDOE) for the same year was $18,434.21," *id.* ¶ 17 (internal citation and footnote omitted);

- "[w]hen accounting for the costs associated with capital expenses, transportation, debt service, tuition and construction costs, the average per pupil cost is $21,762.96 (approximately $3,300 higher)," *id.* ¶ 18;

- "the local education tax . . . is necessary to make up the huge shortfall between the level of State aid and the actual cost of education children in New Hampshire's public schools," *id.* ¶ 23;

- "[t]he State has never made payments to local school districts to support the funding of educational services in amounts that approach even one-third of the actual cost of providing public education in New Hampshire, non-capital and capital costs included," *id.* ¶ 50; and

- "no school district spends as little" as the per-pupil cost the State provides under RSA 198:40-a, *id.* ¶ 51.

5. Based on these allegations, 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 geography of local school districts," and that this cost "should also account for and include the cost of transportation, capital costs, and debt." *Id.* ¶ 47. They thus seek an order "directing the State to adopt a revised cost determination [that] . . . amounts to no less than the average state expenditures per pupil with allowances for demographic and geographic diversity and that includes consideration of the costs of transportation, capital costs, and debt." *Id.* ¶ 82.

6. The State cited all of these allegations and contentions in its memorandum, and directly quoted most of them. *See, e.g.*, State's Mem Supp. Mot. Summ. J. at 1, 2, 8, 9, 15, 17, 19. They form the only substantive articulation of the plaintiffs' adequacy theory contained in the amended complaint. For the plaintiffs to now contend, in response to a motion for summary judgment, that their adequacy theory is somehow *not* tethered to the total amount school districts spend on public education strains credulity.

7. This is not the first time the plaintiffs have used briefing to morph their legal theories in the face of potentially dispositive arguments. As this Court observed, the plaintiffs previously "amended their request for preliminary injunctive relief" through a reply brief. Dec. 5, 2022 Order at 5–6. This shift was "important because it b[ore] on the State's claim that the plaintiffs lack[ed] standing to pursue injunctive relief" in relation to the SWEPT. *Id.* at 6. Even

assuming for the sake of argument that such a shift can be excused in a relation to a request for preliminary injunctive relief made early in a case, the same cannot be said at the summary-judgment stage after discovery has close. Rather, courts have routinely held that a plaintiff cannot functionally amend its complaint by shifting its legal theory in opposition to summary judgment. *See, e.g.*, *Johnson v. Thibodaux City*, 887 F.3d 726, 736 (5th Cir. 2018) ("[T]he plaintiffs may not defeat summary judgment on the basis of a theory found nowhere in their complaint, at least without also moving to amend or absent trial by consent."); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) (same).

8. It was the plaintiffs' prerogative to plead their adequacy claim as they saw fit. The allegations in the amended complaint make clear that the plaintiffs tethered that claim to school districts' actual total expenditures, at least on an average statewide basis. As explained in the State's underlying memorandum, this theory fails as a matter of law and undisputed fact. The plaintiffs cannot defeat summary judgment by shifting their legal theory in their opposition papers.

B. The Court should reject the plaintiffs' attempts to diminish their burden of proof and shift it to the State.

9. According to the plaintiffs, they are under no obligation "to isolate what portion of a school district's total expenditures are attributable to providing a constitutional adequate education." Pls.' Mem. Supp. Mot. Summ. J. at 11. The plaintiffs contend that their "burden is only to demonstrate that based on [the State's] definition [of adequacy], adequacy funding is insufficient," at which point the burden shifts "to the State to disprove the claim or otherwise

demonstrate that adequacy funding is sufficient to meet its definition." *Id.* at 11–12. The argument lacks merit.

10. Notably, the plaintiffs' characterization of their burden in no way illuminates what they think that burden actually is. The only clues the plaintiffs provide as to their thinking on this question are citations, without any corresponding explanation, to the first two pages of two of their expert reports. *See id.* at 11 (citing Freeman Report at 1–2; Cascadden Report at 1–2). The opinions contained on those pages consist of conclusory assertions that the State is failing to fund an adequate education, disagreements with the methodology employed by the 2008 Joint Legislative Oversight Committee on Costing an Adequate Education, and comparisons of the amount of funding the State provides school districts per pupil under RSA 198:40-a and the total amount per pupil school districts spend. *See* Pls.' Mot. Summ. J., Attach. 4 at 1–2, Attach. 6 at 1–2.[1]

11. None of this is sufficient to overcome the State's motion for summary judgment. 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.*, 141 N.H. at 454. The Supreme Court has likewise made clear that "the methodology employed by the legislature in determining the cost of an adequate education under RSA 198:40-a is irrelevant" to a constitutional challenge to that cost. *Contoocook Valley Sch. Dist v. State*, 174 N.H 154, 166 (2021). The plaintiffs now acknowledge in their objection that the State is *not* required to fully fund the total amount school districts spend. Pls.' Mem. Supp. Mot. Summ. J. at 10. And the plaintiffs fail to explain how it is possible to determine the objective cost of an adequate education from a school district's total expenditures without *any* evidence of what portion of

[1] Dr. Freeman's "exercise," which the plaintiffs point to elsewhere in their memorandum, is not referenced on the first two pages of his expert report. Regardless, it is addressed below.

those expenditures are attributable to constitutional adequacy. In other words, the plaintiffs' expert reports neither shed any light on what the plaintiffs believe their burden is nor contain any competent evidence supporting the plaintiffs' contention that the State's "adequacy funding is insufficient." *Id.* at 11.

12. The plaintiffs also fail to meaningfully grapple with the Supreme Court's statement in *Contoocook Valley School District* 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. The plaintiffs suggest that it was "disingenuous" for the State to point to this statement in its underlying memorandum. Pls.' Mem. Supp. Mot. Summ. J. at 11. But, again, the plaintiffs no longer dispute that the State is not required to pay for everything a school district spends money on. Pls.' Mem. Supp. Mot. Summ. J. at 10. And the plaintiffs fail to explain why, despite bearing the burden to 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, they have *no* obligation to identify what portions of school districts' total expenditures are attributable to adequacy.

13. Instead, the plaintiffs contend, at least implicitly, that they can shift the burden to the State to disprove their adequacy claim solely on the force of their assertion that "adequacy funding is insufficient." Pls.' Mem. Supp. Mot. Summ. J. at 11. This argument, like the similar one raised in by the plaintiffs in *Contoocook Valley School District*, conflates the plaintiffs' threshold obligation at the pleading stage of the case to state a claim for relief with their ultimate burden of proof. At the pleading stage, a plaintiff merely must allege facts that, when taken as true, are "reasonably susceptible of a construction that would permit recovery." *Contoocook Valley Sch. Dist.*, 174 N.H. at 162 (citations and quotation marks omitted). "New Hampshire is a

notice pleading jurisdiction, and, as such, [courts] take a liberal approach to the technical requirements of pleading." *Donald Toy*, 172 N.H. at 448 (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). Furthermore, 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.

14. Doubts are no longer resolved in a 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 v. Hale*, 146 N.H. 533, 535 (2011). 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).

15. This is not to say, as the plaintiffs suggest in their memorandum, that it is impossible to prove a constitutional challenge of the kind the plaintiffs bring here. The plaintiffs could, as the Supreme Court contemplated in *Contoocook Valley School District*, "first determin[e] what is required to deliver an adequate education as defined under the statute" and then cost that out. 174 N.H. at 166. Alternatively, the plaintiffs could seek to prove their claim under one of the other "basic analytical models" that some courts have turned to "for determining the cost of adequacy." *Londonderry Sch. Dist. SAU #12 v. State*, 154 N.H. 153, 168 (2005) (Duggan, J., concurring). The plaintiffs' assertion that the State is attempting "to further a

system designed to prevent anyone from defending their constitutional rights," Pls.' Mem. Supp. Obj. Mot. Summ. J. at 13, is therefore simply wrong.

16. Nevertheless, there can be no meaningful dispute that "[t]he party challenging a statute's constitutionality bears the burden of proof." *Contoocook Valley Sch. Dist.*, 174 N.H. at 161. There can be no meaningful dispute that this burden is a "heavy" one. *Ploof*, 162 N.H. at 614.There can be no meaningful dispute that to meet this burden, a plaintiff must demonstrate "a clear and substantive conflict exists between [the challenged statute] and the constitution." *Contoocook Valley Sch. Dist.*, 174 N.H. at 161. And there can be no meaningful dispute that these standards apply in school-funding cases brought under Part II, Article 83. *See id.*

17. In opposing summary judgment, the plaintiffs diminish these burdens and seek to shift them to the State. The Court should reject these efforts and analyze the plaintiffs' claims under the standards required by precedent.

C. The plaintiffs cannot meet their heavy burden through Dr. Freeman's "exercise."

18. The plaintiffs contend even if they are required to isolate what portions of school district expenditures are attributable to adequacy, they have done so through the "exercise" appended to Dr. Freeman's expert report. They are mistaken. Dr. Freeman's "exercise" suffers from many of the same fatal flaws as the plaintiffs' overarching adequacy theory and is therefore not competent evidence of the cost of an adequate education.

19. Contrary to the plaintiffs' suggestion, Dr. Freeman's "exercise" does not purport to be an attempt to isolate the portion of Pittsfield's expenditures attributable to adequacy. Dr. Freeman does not suggest, for instance, that he only included costs associated with the substantive educational program that comprises an adequate education, as defined by the Legislature through RSA 193-E:2-a. He does not suggest that he conducted any analysis on what

level of instruction is necessary in the eleven subject areas identified in RSA 193-E:2-a, I, to meet constitutional adequacy. Indeed, he does not tether his analysis to the definition of an adequate education at all. For this reason alone, Dr. Freeman's "exercise" is not probative as to the cost of an adequate education the Legislature chose to define.

20. Dr. Freeman also incorrectly assumes that the State is obligated to pay for anything school districts are required to provide under state or federal law. The Supreme Court has never endorsed such a view. 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. As set forth in the State's underlying memorandum, the definition of an adequate education the Legislature adopted does not encompass everything a school does or is required to spend money on. State's Mem. Supp. Mot. Summ. J. at 9–19. RSA 198:40-a is instead 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. That school districts may be subject to state or federal requirements beyond the definition of an adequate education the Legislature adopted does not mean the State is required to fund those requirements under Part II, Article 83. Dr. Freeman's "exercise" wholly ignores this.[2]

21. The plaintiffs' attempts to use the State's briefing in *Contoocook Valley School District* to bolster Dr. Freeman's "exercise" are unavailing. The State did not, as the plaintiffs' claim, cite Dr. Freeman's analysis "approvingly." Pls.' Mem. Supp. Obj. Mot. Summ. J. at 5.

[2] Because Dr. Freeman also conducted his exercise in 2018/2019, *see* Pls. Obj. Mot. Summ. J., Attach. 4, Ex. B at 1, he did not account for the increase in adequacy funding in the current version of RSA 198:40-a. His analysis therefore does not speak to whether Pittsfield, today, cannot provide an adequate education as defined by the Legislature with the current funding it receives from the State.

The State merely noted that, according to the school districts that appeared as *amici* on appeal, "two New Hamsphire school districts ha[d] *attempted* to undertake an analysis" that isolated the costs attributable to providing an adequate education. Pls.' Obj. Mot. Summ. J, Attach. 9 at 28 (emphases added). The State specifically noted that it "d[id] not concede the soundness of" the approach these school districts employed. *Id.* at 28 n.6. It is hard to fathom how, based on the express qualifications in the State's briefing, these statements could be viewed as an endorsement of Dr. Freeman's analysis.

D. At a minimum, the State is entitled to summary judgment on the plaintiffs' contention that adequacy should be set an amount at least equal to the statewide average of school districts' expenditures.

22. The State is entitled to summary judgment on the entirety of the plaintiffs' adequacy claim for the reasons stated in its underlying memorandum and above. At a minimum, though, the Court should enter summary judgment in the State's favor to the extent the plaintiffs contend 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. The plaintiffs concede that the State is not required to pay for the total amount school districts actually spend on public education. Pls.' Mem. Supp. Obj. Mot. Summ. J. at 10. There is accordingly no legal basis to issue declaratory or injunctive relief requiring that the cost of adequacy be set at a statewide average of districts' total expenditures.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

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Date: September 20, 2023

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Certificate of Service

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

Date: September 20, 2023

/s/ *Samuel Garland*
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