

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' MOTION FOR RECONSIDERATION**

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move for reconsideration of this court's November 20, 2023 merits order. In support thereof, the defendants state as follows:

1. A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended ..." Super. Ct. Civ. R. 12(e).
2. The defendants respectfully submit the following points for reconsideration consistent with this standard:
  - a. The court's injunction requiring the General Court to "establish[] a conservative minimum threshold of \$7,356.01 which base adequacy aid funding must exceed" is unconstitutional in violation of the separation of powers because it materially impairs the lawmaking power of the General Court;
  - b. The court's order lacks an effective date and should not be made effective until one full legislative cycle (beginning July 1 and ending June 30) has passed after the reconsideration and appeal periods in this matter have expired; and
  - c. The court's attorney's fees award order is premature, particularly because the defendants intend to appeal the court's order in this matter; litigation of the attorney's fees issue should therefore be reserved until the appeal period has finally expired.

**I. The court’s injunction order violates the separation of powers because it materially impairs the lawmaking power of the General Court.**

3. In framing the New Hampshire Constitution, the people conferred on the General Court the legislative power to enact, amend, and repeal laws. N.H. Const. Pt. II, Arts. 2, 5.

4. This plenary lawmaking power is the most central, core, and essential power that the New Hampshire Constitution grants to the legislative branch of government.

5. This court’s injunction materially impairs that essential lawmaking function by mandating the General Court solve a complex policy issue in a particularized way, *i.e.*, by requiring the legislature to pass a new base adequacy amount that exceeds this court’s preferred number. The injunction allows this court to control the General Court, dictates the content of proposed legislation, and seemingly prevents legislators from voting for proposed legislation inconsistent with the court’s order on threat of civil contempt.

6. The separation-of-powers protections contained in Part I, Article 37 of the New Hampshire Constitution prevent the judicial branch of government from forcing the legislative branch to enact laws in a manner the judiciary prefers.

7. Part I, Article 37 is violated “only when one branch usurps an essential power of another.” *Petition of S. N.H. Med. Ctr.*, 164 N.H. 319, 327 (2012). “For this to occur, the offending branch must act to ‘defeat or materially impair the inherent functions’ of another branch.” *State v. Carter*, 167 N.H. 161, 166 (2014) (quoting *State v. Merrill*, 160 N.H. 467, 472 (2010)).

8. “The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be

subject to the control or supervision of the other.” *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904).

9. New Hampshire thus follows “the rule which exempts the legislature from the control of the court.” *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) (“The Court properly denied the injunction as it had no power to interfere with proposed legislative action.”).

10. This is the “prevailing rule . . . under a tripartite form of government” that “a court cannot enjoin the legislature from passing a law.” *City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (quoting *State ex rel. Morrison v. Sebelius*, 179 P.3d 366, 383 (Kan. 2008)).

11. “This is true whether such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.” *Id.* (quoting *State ex rel Morrison*, 179 P.3d at 383).

12. “The judiciary may not impede” the General Court’s “plenary power to enact laws.” *Id.* at 48; *see Magnus v. Carr*, 86 S.W.3d 867, 870 (Ark. 2002) (holding that circuit court lacked jurisdiction to enjoin the casting of a vote by a legislator); *Perdue v. Ferguson*, 350 S.E.2d 555, 559 (W.Va. 1986) (explaining that a municipal body, when acting or attempting to act in a legislative capacity, “is entitled to the same immunity from judicial interference with the exercise of legislative discretion as is the state legislature”); *McChord v. Louisville & Nashville Railroad Co.*, 183 U.S. 483, 495 (1902) (“the general rule is that legislative action cannot be interfered with by injunction”); *see also New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896) (“the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the [legislative] discretion with which municipal assemblies are invested . . .”).

13. This court’s injunction requires the legislature to fix the base adequacy amount contained in RSA 198:40-a, II(a) in one particular way—by raising that amount above \$7,356.01—and purports to enjoin the legislature from passing a base adequacy amount any lower.

14. It is beyond the power of this court to mandate that the General Court solve a complex policy like the funding of an adequate education in a particularized way. The General Court has broad discretion in determining how to deliver and fund an adequate public education and how to fix any constitutional defects with the existing funding regime. The General Court could seek to remedy the issue by, among other things, modifying the definition of an adequate education to exclude certain items expressly and thereby justify a different base number. The General Court could completely repeal RSA 198:40-a and replace it with an entirely new funding regime that does not utilize a “base adequacy amount.” The General Court could amend another statute that provides funds to schools and make it clear that those amounts must be counted toward “base adequacy.” And there are likely many other ways that the legislature could approach the complex policy issue of funding a constitutionally adequate education.

15. Additionally, the General Court has the authority to pass a new base adequacy amount that does not exceed \$7,356.01. Indeed, it has capabilities far beyond this court to engage in a robust legislative process capable of discerning a funding mechanism that ensures the delivery of a constitutionally adequate education. If such a process justifies a lower number than has been proffered by the court, it is within the General Court’s constitutional authority to pass it into law. A court injunction cannot force the General Court not to enact any particular law.

16. However, by dictating to the General Court that it must fix the base adequacy amount in RSA 198:40-a, II(a) and establish a new amount that exceeds \$7,356.01, this court has materially impaired the General Court’s lawmaking function in a manner that violates the separation of powers and is unconstitutional.

17. No New Hampshire Supreme Court case endorses the issuance of an injunction that requires the General Court to legislate in a particular way.

18. More specifically, in the education funding space, the New Hampshire Supreme Court has uniformly deferred to the General Court to fix an unconstitutionality unfettered by a court-imposed injunction forcing it to act or not act in one or more ways. *See, e.g., Londonderry v. State*, 154 N.H. 153, 163 (2006); *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160-61 (1998); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192-93 (1993).

19. This court’s injunction veers wide from this well-established New Hampshire precedent and from well-settled principles of separation of powers.

20. This court’s injunction also runs afoul of Part I, Article 30 of the New Hampshire Constitution, the Speech and Debate Clause.

21. Part I, Article 30 prevents the judiciary from requiring legislators to vote for certain laws over other laws.

22. The New Hampshire Supreme Court has construed Part I, Article 30 broadly to effectuate its purposes. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005). It protects “the legislature and individual legislators from incurring liability for ‘any act generally done in a session of the [legislature] . . . in relation to the business before it.’” *Id.* (quoting *Keefe v. Roberts*, 116 N.H. 195, 199 (1976)). “For instance, under the Speech and Debate Clause, voting, drafting committee reports and conduct at legislative committee hearings

‘may not be made the basis for a civil or criminal judgment against a [legislator] because that conduct is within the sphere of legitimate legislative activity.’” *Id.* (quoting *Doe v. McMillan*, 412 U.S. 306, 311 (1973)).

23. Yet, this court’s injunction appears to expose legislators to civil contempt proceedings for choosing to proceed in a manner inconsistent with the court’s order. In this way, the court’s injunction order seeks to dictate the content of proposed legislation and seeks to prevent legislators from voting on legislation inconsistent with the court’s injunction. Such a result is incompatible with Part I, Article 30 and the immunity accorded legislators to make policy free from fear of civil contempt liability for his or her legislative activity.

24. The General Court is tasked under the State Constitution with making the law. The judicial branch may intervene only after a legislative enactment has been passed and challenged in an action properly before it. The judicial branch may not, consistent with separation of powers principles, force the General Court to enact legislation that manages to a particularized court-imposed standard or preference.

25. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 order, vacate the injunction it has issued against the General Court in its entirety, and leave the issue fixing any constitutional deficiency with the General Court.

**II. This court should also set an effective date for its order so the order does not go into effect until this matter had been finally decided on the merits and the General Court has had an appropriate opportunity to fix any constitutional infirmity that thereafter may remain.**

26. The court’s order declares RSA 198:40-a, II(a) unconstitutional on its face raising the question of whether the Executive Branch may continue to make adequacy payments to schools while this court’s order remains subject to reconsideration and appeal and, if the judicial process determines a legislative remedy is needed, while the legislature addresses the issue.

27. The defendants are concurrently seeking a stay of this court's order pending reconsideration and appeal, but a better approach to alleviate uncertainty to the local education budget process and ensure that schools continue to receive adequacy payments would be to set an effective date for the court's order.

28. The defendants would propose the following effective date: "This merits order will go into effect only after it becomes a final judgment on the merits and only after one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter."

29. Such an effective date will ensure that schools continue to receive adequate education grants while the litigation of this matter remains open and ongoing and that the General Court has sufficient time to fix any constitutional infirmities, if necessary, that remain following the reconsideration and appellate process.

30. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 merits order to include an effective date like the date proposed in Paragraph 28 above.

**III. This court should defer further litigation on attorney's fees and costs until after this matter is finally resolved on the merits.**

31. The defendants are actively seeking reconsideration and plan ultimately to appeal this court's merits order. If the defendants are successful on appeal, the plaintiffs may not be entitled to an award of attorney's fees at all. If the defendants are unsuccessful, plaintiffs' counsel will undoubtedly generate additional attorney's fees during the appeal

32. Plaintiffs' counsel will undoubtedly generate additional attorney's fees during those processes and, if the defendants are successful on appeal, plaintiffs may not be entitled to an award of attorney's fees at all.

33. It is therefore premature to address the issues of attorney's fees in any detail at this time. Once the merits of the case are finally resolved on appeal, the issue of attorney's fees, if plaintiffs' counsel remain entitled to them, will be ripe and the precise amount of them may be appropriately addressed and litigated on remand at that time.

34. Accordingly, the defendants respectfully request that this court reconsider its November 20, 2023 attorney's fees order and delay any detailed litigation and entry of any substantive orders with respect to attorney's fees until this court's order is finally resolved on the merits after appeal.

WHEREFORE, the defendants respectfully request that this court enter an order:

- A. Granting this motion for reconsideration; and
- B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

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

By their attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: December 14, 2023

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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: December 14, 2023

/s/ Anthony J. Galdieri