

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2024-0138

Steven RAND et al.,

Plaintiffs-Appellees,

v.

STATE OF NEW HAMPSHIRE et al.

*Defendant-Appellant and
Intervenor-Appellant*

Rule 7 Mandatory Appeal from
Rockingham County Superior Court

COALITION COMMUNITIES' (APPELLANT'S) OPENING BRIEF

John-Mark Turner (#15610)
Abbygale S. Martinen (#272938)
Sheehan, Phinney, Bass & Green, PA
1000 Elm Street
Manchester, NH 03101
603.627.8143
jturner@sheehan.com
amartinen@sheehan.com

TABLE OF CONTENTS

Table of Contents	2
Table of Cases and Other Authorities.....	4
Questions Presented for Review.....	6
Text of Applicable Statutes.....	7
Statement of Case and Material Facts.....	9
Proceedings Below.....	9
The SWEPT’s Recent History.....	11
The Current Version of the SWEPT.....	13
Summary of Argument.....	13
Argument.....	14
I. Standard of Review.....	14
II. Plaintiffs’ Part II, Art. 5 Claim Fails Because the Challenged Law Is Not a “Tax” But a Constitutional Spending Decision.....	15
A. Plaintiffs’ Standing Is Premised on a Challenge to a Spending Decision.....	15
B. The Legislature Did Not Change the Law to Raise Revenue, but to Spend Tax Revenue on Local Schools.....	17
C. Plaintiffs’ Spending Challenge Would Fail Even if They Had Mounted One.....	19
D. Summary.....	20
III. The SWEPT Is Constitutional Under Part II, Art. 5.....	20

A.	Under This Court’s Long-Held Interpretation, Part II, Art. 5 Requires that the SWEPT Rate Be Uniform Among Taxpayers.....	20
B.	The SWEPT Rate Is Equal and Uniform Among Taxpayers and Thus Constitutional.....	22
1.	The Legislature Is Permitted to Change Its Mind About How Tax Revenue Is Spent.....	23
2.	Taxpayers Pay the Facially Uniform SWEPT Rate, Not an Artificial “Effective Rate”.....	23
C.	The <u>Claremont</u> Cases Do Not Create an Exception to Part II, Art. 5.....	25
IV.	Conclusion and Requested Relief.....	26
	Statement Regarding Oral Argument.....	27
	Certifications and Signature Block.....	27
	Addendum.....	28

TABLE OF CASES AND OTHER AUTHORITIES

Cases

<u>American Auto. Ass'n v. State</u> , 136 N.H. 579, 585-86 (1992).....	17
<u>Bettigole v. Assessors of Springfield</u> , 343 Mass. 223, 230 (1961).....	21
<u>Boston, C. & M. R.R. v. State</u> , 60 N.H. 87 (1880).....	21
<u>Carrigan v. N.H. Dep't of Health and Human Servs.</u> , 174 N.H. 362, 370 (emphasis added).....	16
<u>Claremont School District v. Governor</u> , 142 N.H. 462 (1997) (<u>Claremont II</u>).....	<i>passim</i>
<u>Claremont School Dist. v. Governor (SWEPT Phase-In)</u> , 144 N.H. 210, 212 (1999) (<u>Claremont III</u>).....	<i>passim</i>
<u>D'Antoni v. Comm'r</u> , 153 N.H. 655, 658 (2006).....	15, 17
<u>Felder v. Portsmouth</u> , 114 N.H. 573, 57-80 (1974).....	21
<u>Londonderry Sch. Dist. v. State</u> , 2006 N.H. Super. LEXIS 4, *39-40, 2006 WL 563120 (Hillsborough Super. Ct. Mar. 8, 2006).....	12
<u>Londonderry Sch. Dist. v. State</u> , 154 N.H. 153, 155 (2006).....	12
<u>Londonderry Sch. Dist. v. State</u> , 157 N.H. 734 (2008).....	12
<u>Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n</u> , 105 N.H. 17, 21 (1963).....	19, 23, 25
<u>N.H. Dept. of Env't'l Servs. v. Marino</u> , 155 N.H. 709, 714 (2007).....	14
<u>Opinion of Justices</u> , 4 N.H. 565 (1829).....	21
<u>Opinion of the Justices</u> , 85 N.H. 562, 563 (1931).....	19
<u>Opinion of Justices</u> , 84 N.H. 559, 571 (1930).....	21
<u>Opinion of the Justices</u> , 88 N.H. 500, 807 (1937).....	19

<u>Opinion of Justices</u> , 99 N.H. 525, 527 (1955).....	22
<u>Opinion of Justices</u> , 101 N.H. 549, 554 (1958).....	21
<u>Opinion of the Justices</u> , 110 N.H. 117 (1970).....	20
<u>Opinion of Justices (Sch. Financing Special Abatement)</u> , 142 N.H. 892, 902 (1998).....	<i>passim</i>
<u>School-District No. 1 in Walpole v. Prentiss</u> , 66 N.H. 145, 146 (1889).	19
<u>Sirrell v. State</u> , 146 N.H. 364, 371-72 (2001).....	<i>passim</i>
<u>State ex rel. Schenider v. Topeka</u> , 227 Kan. 115, 124 (1980).....	16
<u>State v. U.S. & Canada Express Co.</u> , 60 N.H. 219 (1880).....	21
<u>Williams v. State</u> , 81 N.H. 341 (1924).....	21
 <i>Constitutional Provisions and Statutes</i>	
N.H. Const. Part I, Art. 12.....	19-20
N.H. Const. Part II, Art. 5.....	<i>passim</i>
N.H. Const. Part II, Art. 6.....	19-20
2008 N.H. Laws 173:10.....	13
2011 N.H. Laws 258:6; :7; :9.....	<i>passim</i>
RSA 76:3.....	22
RSA 76:8.....	<i>passim</i>
RSA 198:46.....	13, 18
 <i>Other Authorities</i>	
Early State Papers of New Hampshire.....	20-21

QUESTIONS PRESENTED FOR REVIEW

1. Is the challenged law (2011 N.H. Laws 258:7; :9, II and RSA 76:8, II) a tax that may be challenged under Part II, Art. 5, or is it a constitutional exercise of the Legislature's spending power?
2. Do the Claremont line of cases constitute an exception to this Court's consistent interpretation of Part II, Art. 5, that a state tax, like the Statewide Educational Property Tax ("SWEPT"), is constitutional if all taxpayers in the state pay the same rate?

TEXT OF APPLICABLE STATUTES

1. *RSA 76:3*

76:3 Education Tax. – Beginning July 1, 2005, and every fiscal year thereafter, the commissioner of the department of revenue administration shall set the education tax rate at a level sufficient to generate revenue of \$363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F. The education property tax rate shall be effective for the following fiscal year. The rate shall be set to the nearest 1/2 cent necessary to generate the revenue required in this section.

2. *RSA 76:8, I and II*

76:8 Commissioner's Warrant. –

I. (a) The commissioner shall annually determine a municipality's tax base for the education tax by subtracting from the total equalized valuation of all property, as determined under RSA 21-J:3, XIII for the preceding year, property that was then taxable under RSA 82 and RSA 83-F. In determining the tax base, the value of any utility property that is included in the total equalized valuation upon which the statewide education property tax is computed, and is also taxable under RSA 83-F for that year, shall also be subtracted from the tax base, provided the sum value of the utility property represents at least 5 percent of the total equalized value of all property, except property taxable under RSA 82 or RSA 83-F in the preceding year.

(b) The commissioner shall calculate the portion of the education tax to be raised by each municipality by multiplying the uniform education property tax rate by the municipality's tax base.

II. The commissioner shall issue a warrant under the commissioner's hand and official seal for the amount computed in paragraph I to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or districts. Such sums shall be assessed at such times as may be prescribed for other taxes assessed by such selectmen or assessors of the municipality.

3. *2008 N.H. Laws 173:10:*

173:10 Excess Education Property Tax Payment. RSA 198:46, I is repealed and reenacted to read as follows:

I. A municipality in which education property tax revenue collected exceeds the amount necessary to fund the cost of an adequate education in a fiscal year, as

determined in RSA 198:40-a, shall collect and remit such excess to the department of revenue administration on or before March 15 of the tax year in which the excess occurs.

4. 2011 N.H. Laws 258:6

258:6 Application of Receipts. Amend RSA 6:12, I(b)(65) to read as follows:

(65) Money received under RSA 77-A, RSA 77-E, RSA 78, RSA 78-A, RSA 78-B, RSA 83-F, [RSA 198:46,] and from the sweepstakes fund, which shall be credited to the education trust fund under RSA 198:39.

5. 2011 N.H. Laws 258:7

258:7 Commissioner's Warrant. Amend RSA 76:8, II to read as follows:

II. The commissioner shall issue a warrant under the commissioner's hand and official seal for the amount computed in paragraph I to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or districts [~~and, if there is an excess education tax payment due pursuant to RSA 198:46, directing them to assess the amount of the excess payment and pay it to the department of revenue administration for deposit in the education trust fund~~]. Such sums shall be assessed at such times as may be prescribed for other taxes assessed by such selectmen or assessors of the municipality.

7. 2011 N.H. Laws 258:9, II

258:9 Repeal. The following are hereby repealed:

...

II. RSA 198:46, relative to excess education tax payments.

...

STATEMENT OF THE CASE AND MATERIAL FACTS

This appeal is from the Rockingham Superior Court's orders of November 20, 2023 and February 20, 2024, finding that certain aspects of the Statewide Educational Property Tax ("SWEPT") are unconstitutional under Part II, Art. 5 of the Constitution.

Proceedings Below

Plaintiffs are eight taxpayers residing in Plymouth, Concord, Hopkinton, and Newport. See First Amended Complaint ¶¶3-7 [Appx. Vol. I at 4-5].¹ They brought suit in Grafton County Superior Court, challenging three components of the educational funding system. See id. First, they sought a declaration that the State did not provide enough funding to provide a constitutionally adequate education, resulting in the use of disproportionate local school taxes. See id. ¶80 [Appx. Vol. I at 22]. Second, they challenged 2011 legislative changes that required SWEPT revenues to be paid to local school districts instead of remitted to the State. See id. ¶39 [Appx. Vol. I. at 13-14] Third, they challenged the Department of Revenue Administration's practice of setting a negative local education tax rate in rural or unincorporated locations to offset the SWEPT rate. See id. ¶¶35-37 [Appx. Vol. I at 13]. Plaintiffs alleged that the Commissioner's setting of negative rates and the municipal retention of SWEPT revenues above adequacy, resulted in "lower effective rates," in violation of Part II, Art. 5. Id. ¶39.

The Plaintiffs moved for a preliminary injunction. See Pl. Mot. for Prelim. Inj. [Appx. Vol. III at 92].² After the original assigned judge recused himself, the matter was

¹ Pursuant to Supreme Court Rule 17(1), the parties conferred about the contents of the appendix. The State's Appendix contains the portions of the record requested by Intervenor. Rather than file a duplicate appendix, the Coalition cites to the State's Appendix in this brief.

² The relief Plaintiffs sought was initially unclear. Plaintiffs' Motion for a Preliminary Injunction sought to enjoin the DRA Commissioner from setting the SWEPT rate for the upcoming year, effectively enjoining the collection of the tax. See Appx. Vol. III at 92. However, Plaintiffs' proposed order only mentioned an injunction against negative rate setting. See id. at 98. Later, in a Reply Memorandum, Plaintiffs changed their requested relief to seek only to enjoin "the conduct of DRA in permitting property wealthy communities to retain excess funds." See Pl. Reply Memo. at 2 [Appx. Vol. III at 100].

sent to Rockingham County Superior Court, which denied the preliminary injunction. See Super. Ct. Order on Inj. at 12 [Appx. Vol. III at 89]. The Parties then filed cross-motions for summary judgment regarding the constitutionality of the 2011 changes to the SWEPT.

The Superior Court granted Plaintiffs’ summary judgment motion and denied the State’s and the Intervenor Coalition Communities’ (“Coalition”)³ cross-summary judgment motions. See Nov. 20, 2023 Order on S.J. at 15-16 [contained in Addendum]. The court concluded that the “where education taxes like the SWEPT are intended to fulfill the State’s constitutional obligation to fund adequacy aid, the effective rate of such a tax is only uniform if all proceeds of the tax are directed to that purpose.” Id. at 15. The Superior Court issued the following injunction and declaration, ordering that, beginning with the budget cycle already underway,

the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated in excess of the adequacy aid to which any community is statutorily entitled must be remitted to the DRA, and thereafter used for the exclusive purpose of satisfying the State’s constitutional adequacy aid obligations.

Nov. 20, 2023 Order at 21.⁴

At the Preliminary Injunction hearing, Plaintiffs finally confirmed that they were not seeking to enjoin collection of the tax, but instead wanted the Commissioner to collect and hold in escrow any SWEPT funds in excess of adequacy. See Super. Ct. Order on Inj. at 6 [Appx. Vol. III at 83].

³ The Coalition is an association of towns and cities across the state that originally joined together prior to 2006 to oppose the “donor-receiver” educational funding model. The trial court permitted the Coalition to intervene below in opposition to Plaintiff’s challenge regarding the SWEPT. See Super. Ct. Order on Inj. at 12-14 [Appx. Vol. III at 89-91]. The Coalition did not intervene with respect to Plaintiffs’ claims concerning the State’s adequacy calculations and payments.

⁴ The Superior Court also enjoined the State from setting negative local tax rates in rural and unincorporated communities. The Coalition does not take any position on that portion of the Superior Court’s order.

In its February 20, 2024 order, the Superior Court denied the Coalition’s Motion for Partial Reconsideration on Remedy and the Coalition’s and State’s Motions to Stay. See Feb. 20, 2024 Order at 9 [contained in Addendum]. The court granted the State’s Motion pursuant to Superior Court R. 46(c) to treat its November 20, 2023 order as a final, appealable decision on the merits. See id.

This appeal followed. By order of this Court, the Superior Court’s injunction is currently stayed pending this appeal.

The SWEPT’s Recent History

In Claremont School District v. Governor, 142 N.H. 462 (1997) (Claremont II), the Court held that the State’s use of disparate local education taxes to fund its adequacy obligations violated Part II, Art. 5. The Legislature initially struggled to pass a constitutional replacement. Its first proposal imposed a statewide property tax using a uniform rate, but taxpayers received a “special abatement” corresponding to the amount of tax revenue raised in their towns in excess of the cost of an adequate education. See Opinion of Justices (Sch. Financing Special Abatement), 142 N.H. 892, 902 (1998). Because taxpayers in other towns without an abatement “would pay a far higher tax rate,” the Court held the proposal was unconstitutional.

The Legislature’s second attempt was also declared unconstitutional in Claremont School Dist. v. Governor (SWEPT Phase-In), 144 N.H. 210, 212 (1999) (Claremont III), because a uniform tax was phased in over a period of five years for fifty “donor” towns. Again, the result was taxpayers in those towns paying lower SWEPT rates than taxpayers in other towns. See Sirrell v. State, 146 N.H. 364, 371-72 (2001).

The Legislature thereafter eliminated the phase-in and enacted a uniform \$6.60 per \$1,000 statewide property tax. See id. at 367. In Sirrell, the Court upheld the constitutionality of the uniform tax from an as-applied challenge claiming some taxpayers’ properties were under-assessed, resulting in unequal tax burdens. The Court held that the Plaintiffs had provided inadequate evidence for an under-assessment claim, i.e., a “widespread scheme of intentional discrimination” and “systematic pattern of taxation that is not proportional and reasonable.” Id. at 373. Instead, “there was no

evidence that any municipality was assessed the tax at anything other than the uniform rate.”

The version of the SWEPT upheld in Sirrell required that revenues raised by communities in excess of that necessary to fund an adequate education be paid to the state education trust fund, which then distributed funds to communities that could not raise enough tax revenues to reach adequacy. See id. at 367. The Sirrell Court did not extensively address that provision nor did the Court hold that redistribution of “excess” SWEPT was constitutionally required, as Plaintiffs now claim and as the Superior Court held.

In 2005, the Legislature made extensive changes to its education funding laws, including changes to the SWEPT (then called the Statewide Enhanced Education Tax (“SEET”). See Londonderry Sch. Dist. v. State, 154 N.H. 153, 155 (2006). The law “all but eliminate[d] so-called ‘donor communities.’” Id. Under the law, only three communities transferred SEET revenue to the education trust fund; the rest transferred the money to their local school district as required by the law. See Londonderry Sch. Dist. SAU #12 v. State, 2006 N.H. Super. LEXIS 4, *39-40, 2006 WL 563120 (Hillsborough Super. Ct. Mar. 8, 2006).⁵

This Court has never assessed the constitutionality of the Legislature’s decision to direct “excess” SWEPT revenue to local school districts instead of the education trust fund. In Londonderry Sch. Dist. v. State, 154 N.H. at 162-63, the Court concluded the then-current law was unconstitutional because it failed to define an adequate education, but the Court stayed consideration of all other issues, including the Superior Court’s determination that the law violated Part II, Art. 5. See id. The Court later dismissed the case as moot because of intervening legislation. See Londonderry Sch. Dist. v. State, 157 N.H. 734 (2008). One of the change made by the new legislation was to again require

⁵ Specifically, “the municipalities [were] not required to remit any of the SEET revenue to the education fund unless the SEET to be raised by the municipality for fiscal year 2006 exceed[ed] the amount taxpayers spent in fiscal year 2003 through the combined payments of state and local educational property taxes.”

that “excess” SWEPT be sent to the education trust fund instead of to local school districts. See 2008 N.H. Laws 173:10 (promulgating new version of RSA 198:46, I).

The Current Version of the SWEPT

The relevant provisions of the SWEPT have been in place since 2011. As explained in more detail below, in 2011 the Legislature repealed the 2008 law requiring excess SWEPT be remitted to the DRA. See 2011 N.H. Laws 258:9, II (repealing RSA 198:46). Other sections of the law eliminated other references to the remission of SWEPT revenue or to RSA 198:46. See 2011 N.H. Laws 258:6 (eliminating references to 198:46 in education trust fund statute); id. 258:7 (eliminating reference to 198:46 and remission of excess in RSA 76:8, II). Thus, since 2011 all SWEPT revenue is required to be paid to local school districts in compliance with RSA 76:8, II.

SUMMARY OF ARGUMENT

1. Plaintiffs Are Challenging a Spending Decision, Not a Tax.

Part II, Art. 5 restricts the Legislature’s power to enact “assessments, rates, and taxes,” requiring that they be reasonable and proportionate – meaning uniform in rate. However, Part II, Art. 5 does not restrict the Legislature’s power to pass any other type of law, including laws directed at spending tax revenue.

The Superior Court erred by assuming the Plaintiffs were challenging a tax, without analyzing whether the challenged law was intended by the Legislature to raise revenue. Because the challenged provisions of the 2011 law were not intended to raise revenue and did not raise revenue, they are not a “tax” that can be challenged under Part II, Art. 5.

The Plaintiffs did not argue below that the Legislature’s 2011 decision to spend all SWEPT revenue on local school districts (instead of directing a portion to the education trust fund), violated any constitutional constraint on the Legislature’s spending powers. Even if they had, the challenge would fail. The Legislature has nearly unfettered discretion to decide how to spend tax revenue once raised. This Court has consistently held that while the Legislature may choose to spend tax revenue raised in

one town to offset the tax burden imposed on another town, such tax aid is not constitutionally required.

2. *The Challenged Law Is Constitutional Because It Imposes the Same Tax Rate on All Taxpayers. The Claremont Cases Do Not Alter Part II, Art. 5's Uniformity Requirement.*

The undisputed facts show that the SWEPT is taxed at a uniform rate across all eligible taxpayers across the State. The Superior Court erred when it held that the payment of all SWEPT revenues to local schools, created an unequal “effective” rate between taxpayers. The retention and use of SWEPT revenues to pay for schools in a local district does not create a lower “effective rate.” Taxpayers in “donor” communities pay the SWEPT at the same rate that taxpayers pay in “receiver” towns. For Part II, Art. 5 purposes, it does not matter to the taxpayers where the revenues are spent, only how the tax rate is assessed. Because a “donor town” taxpayer pays the SWEPT at the uniform statutory rate, regardless of whether her taxes pay for local schools or are sent to the DRA for redistribution to other schools, the tax is constitutional.

The Claremont decisions do not alter the long-established interpretation that Part II, Art. 5 only prohibits unequal tax rates. The Superior Court erred when it equated the current law’s requirement that SWEPT revenue be paid to local schools to the special abatement and SWEPT phase-in mechanisms that the Court had previously ruled were unconstitutional in Opinion of Justices (Sch. Financing Special Abatement), 142 N.H. 892 (1998), and Claremont III (SWEPT Phase-In), 144 N.H. 210 (1999). In both of those cases, the taxpayers actually received a reduction in the SWEPT rate they are paying. In this case, taxpayers pay the same SWEPT rate across the state and do not receive any abatement on their taxes or a rate reduction.

ARGUMENT

I. STANDARD OF REVIEW

Because the constitutionality of a statute is a question of law, this Court’s review of the Superior Court’s order is *de novo*. See N.H. Dept. of Env’tl Servs. v. Marino, 155 N.H. 709, 714 (2007). As this Court instructed in Sirrell, “the statewide property tax law,

like any legislative act, is presumed constitutional and will not be declared invalid except upon unescapable grounds.” 146 N.H. at 370. The relevant question is whether there is a “clear conflict with the Constitution.” Id.

II. PLAINTIFFS’ PART II, ART. 5 CLAIM FAILS BECAUSE THE CHALLENGED LAW IS NOT A “TAX” BUT A CONSTITUTIONAL SPENDING DECISION.

Plaintiffs’ challenge to the SWEPT is grounded solely on Part II, Art. 5 of the Constitution, which gives the Legislature the power “to impose and levy proportional, and reasonable assessments, rates, and taxes.” As this Court has previously instructed, the “threshold” issue in a Part II, Art. 5 case is whether the challenged law is an “assessment, rate, or tax.” D’Antoni v. Comm’r, 153 N.H. 655, 658 (2006). The Superior Court did not consider this threshold issue, but simply assumed Part II, Art. 5 applied because it had been applied in the Court’s previous Claremont decisions. See Nov. 20, 2023 Order at 13-14. The Superior Court erred. Plaintiffs are challenging the Legislature’s decision about how to spend tax revenue; they are not challenging the tax itself. Because Part II, Art. 5 does not constrain the Legislature’s spending powers, Plaintiffs claims fail as a matter of law.

A. Plaintiffs’ Standing Is Premised on a Challenge to a Spending Decision.

In order to determine whether Plaintiffs are challenging a “tax,” the first step is to identify what law Plaintiff are challenging. Plaintiffs’ claims changed over the life of the case. Initially, Plaintiffs sought to enjoin “any aspect of this year’s SWEPT assessment or collection.” See Sup. Ct. Order on Prelim. Inj. at 5 [Appx. Vol. III at 82]. However, after the State questioned Plaintiffs’ standing, Plaintiffs sought only to challenge the use of the SWEPT revenue. They sought “to require that all municipalities actually collect SWEPT taxes . . . and hold excess amounts . . . in escrow pending the resolution of this matter.” Id. at 6. [Appx. Vol. III at 83]. Plaintiffs made this shift in order to claim taxpayer standing under Part I, Art. 8.

Such standing is limited to challenges to “specific governmental **spending** action or approval of spending,” Carrigan v. N.H. Dep't of Health and Human Servs., 174 N.H. 362, 370 (emphasis added). Below, Plaintiffs contended that they were challenging the “decisions to allow municipalities to either retain the excess SWEPT or to set negative tax rates to offset SWEPT,” both of which they claimed were specific governmental actions that could be challenged under Part I, Article 8. See Pl. Reply in Support of Prelim. Inj. at 5 [Appx. Vol. III at 103]. As Plaintiffs later confirmed in their summary judgment papers, “the taxes are what they are. The **only** issue is whether permitting certain localities to retain SWEPT funds generated in excess of adequacy . . . violates the proportional and reasonable clause as a matter of law.” See Pl. Memo. in Support of Summ. J. at 3 [Appx. Vol. I at 58] (emphasis added). The Superior Court agreed with Plaintiffs’ standing argument and found “the Commissioner’s decision⁶ to allow certain municipalities to retain excess SWEPT funds . . . constitutes a sufficiently-specific government action” to confer Part I, Art. 8 standing. See Order on Prelim. Inj. at 8 [Appx. Vol. III at 85].

Thus, according to the position they took below, Plaintiffs are not challenging the SWEPT itself or any other tax, but instead must be challenging “specific governmental **spending** actions” to have taxpayer standing. Those spending actions are 2011 N.H. Laws 258:7; :9, II, and RSA 76:8, II - the laws requiring the Commissioner to order municipalities to spend SWEPT revenue in local school districts. Because Plaintiffs are challenging what even they maintain are spending decisions, the Superior Court erred by treating their claims as a challenge to a “tax” and applying Part II, Art. 5. See State ex rel. Schenider v. Topeka, 227 Kan. 115, 124 (1980) (quoting “general rule” that “[c]onstitutional provisions requiring equality and uniformity do not relate to the

⁶ The Coalition believes the reference to the Commissioner’s actions was in error. There has never been any argument that the Commissioner somehow has discretion over what happens with SWEPT revenue in excess of adequacy. Instead, the Legislature mandated that the Commissioner issue a warrant to municipalities to collect the SWEPT and pay all of it to local school districts. See RSA 76:8, II. Thus, the Plaintiffs are challenging a statute, not the Commissioner’s independent decisions.

distribution or application of the revenue derived from taxation, and hence statutes relative to such matters cannot be held as violative”).

B. The Legislature Did Not Change the Law to Raise Revenue, but to Spend Revenue on Local Schools.

The legislative intent behind the challenged laws also shows they are not “taxes” that can be challenged under Part II, Art. 5. The question before the Superior Court was whether the Legislature intended to impose a “tax” - an “enforced contribution to raise revenue and not to reimburse the State for special services.” D’Antoni, 153 N.H. at 658. This Court described the required analysis in American Auto. Ass’n v. State, 136 N.H. 579, 585-86 (1992). “To determine the proper characterization of a statute, it is necessary to discover its basic purpose.” Id. at 585. Purpose is discerned from the “statute’s declared purpose as well as its ‘essential characteristics.’” Id. A tax’s “basic purpose” is to raise revenue. See id. at 586. In this case, the legislative history and undisputed facts before the Superior Court show that the challenged 2011 legislative changes (contained in 2011 N.H. Laws ch. 258) were not intended to and did not raise revenue. Therefore, it is not a “tax” that can be challenged under Part II, Art. 5.

First, the stated purpose of 2011 N.H. Laws ch. 258 does not relate to raising revenue but was instead “amending the calculation and distribution of adequate education grants, repealing fiscal capacity disparity aid, and providing stabilization grants to certain municipalities.” See 2011 ch. 258 [Appx. Vol. I at 203]. According to committee reports, the main purpose of the law was to maintain the level of school funding for a biennium, which the sponsors hoped would accomplish the “single most important aspect of state aid” – providing consistency in state funding from year to year. See March 10, 2011 House Committee Report [Appx. Vol. I at 208]. The bill also revised the state education funding formula in various ways, including changing the base cost per pupil as well as the State’s targeted aid. See id. However, there is no indication in the statement of legislative purpose in Chapter 258, or its legislative history, that the Legislature was trying to raise revenue.

Second, in addition to the Legislature’s declared purpose, the overall structure and “essential characteristics” of 2011 N.H. Laws ch. 258, show no evident intent to raise revenue. In fact, it is undisputed that the bill did not raise any revenue. See Pl. Resp. to Intervenor Statement of Facts ¶A3 [Appx. Vol. I at 12]. As the Fiscal Note to HB 337 explained, the “bill makes no changes” to the SWEPT. See HB 337 as Amended [Appx. Vol. I at 230]. The Note further assessed that the legislation would not increase any SWEPT revenues. See id. at 11. In fact, SWEPT revenues remained constant at \$363 million. See Intervenor Resp. to Statement of Facts ¶¶13-16 [Appx. Vol. I at 192]

Thus, the changes made to the SWEPT - to direct all SWEPT revenue to local school districts - had nothing to do with raising revenue. Instead, the Legislature’s overriding purpose in making this change was to bolster local control and “eliminate donor towns.” See 2011 House Committee Report [Appx. Vol. I at 208]. The bill’s sponsor testified that without the change “Donor towns will return with a vengeance,” with large payments coming due in the next year. See Hess Testimony [Appx. Vol. I at 233]. The Legislature heard testimony that, without the bill, the donor towns, unlike all other towns in the state, lacked control over the SWEPT revenue generated from their taxpayers. See id. The testimony in favor of the similar SB 183 made the same points – the legislation would (1) “stop the perpetuation of battles between ‘winning’ and ‘losing’ communities,” and (2) “tie[] our education dollars directly to the children they are meant to support.” See House Committee Testimony on SB183 (Testimony of Sen. Rausch) [Appx. Vol. I at 241]. In line with this purpose, the legislation changed the heading preceding RSA 198:46 from “Excess Education Property Tax Payment” to “*Local Control* and Alternative Kindergarten Programs.” See HB 337 As Amended § 7 [Appx. Vol. I at 226].

It does not matter for purposes of this litigation whether these were wise policy choices. All that matters is that the Legislature was not choosing to raise revenue. Because it was not, the Legislature’s decision to end the donor-receiver model is not a “tax,” and therefore Part II, Art. 5 imposed no constraints on that legislative decision. Plaintiffs’ challenge against the SWEPT is based only on Part II, Art. 5, and because that

claim fails, the Superior Court erred by granting partial judgment to Plaintiffs and denying partial summary judgment to the Intervenor and the State.

C. Plaintiffs' Spending Challenge Would Fail Even If They Had Mounted One.

Decisions on “the disposition of public revenues are particularly a legislative function,” even in the school funding realm. See Claremont II, 142 N.H. at 476. The Legislature is given “wide latitude in choosing the means by which public education is supported.” Id. The Legislature’s broad discretion is governed by Part I, Art. 12, and Part II, Art. 6, which require that legislative spending be for a “public purpose.” See Opinion of the Justices, 85 N.H. 562, 563 (1931).

Any claim based on these provisions should be rejected for two reasons. First, Plaintiffs did not argue below that 2011 N.H. Laws 258:7; :9, II, and RSA 76:8, II, violated Part I, Art. 12, or Part II, Art. 6, and thus waived any such claim or argument. Second, even if they had made such a claim, it would fail. The 2011 law undoubtedly had a public purpose, because it required that all SWEPT revenue be paid to local school districts. See Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n, 105 N.H. 17, 21 (1963) (school funding is a public purpose). The Legislature’s allocation of SWEPT revenues is thus constitutional.

Plaintiffs claim the Legislature is constitutionally required to use tax revenue generated by taxpayers in one town to alleviate the tax burden of taxpayers in other towns. Yet, this Court has consistently rejected similar arguments. “Neither the plaintiffs nor any taxpayer can complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use.” Id. at 21. The Legislature has discretion to allocate “part or all of a general or special tax” to any “particular use.” Id. The Legislature also has discretion to decide which taxpayers are benefitted by the expenditure of tax revenue. See School-District No. 1 in Walpole v. Prentiss, 66 N.H. 145, 146 (1889) (“[T]here is no constitutional provision that money raised by taxation must be appropriated in such a manner that the several tax-

payers, or districts of tax-payers, will be directly benefited in proportion to the amount of their taxes.”).

Thus, while the Court has held that the Legislature has the constitutional power to spend tax revenue to provide tax relief aid to certain communities, see Opinion of the Justices, 88 N.H. 500, 807 (1937), it is not a constitutional requirement, see Opinion of the Justices, 110 N.H. 117 (1970) (noting that payment of business tax revenues to municipalities to replace revenues from repealed taxes was constitutional, though not “constitutionally required”).

D. Summary

The Court does not need to reach the question of whether the current version of the SWEPT is disproportionate and therefore unconstitutional under Part II, Art. 5. Because Plaintiffs are challenging only the requirement that SWEPT revenue be spent on local schools, and not the SWEPT itself, they are not challenging a “tax” and thus Part II, Art. 5 is inapplicable. Plaintiffs are really challenging the Legislature’s decision on how to spend SWEPT revenue. Such a claim fails because the 2011 changes to the SWEPT were made for the public purpose of supporting education, and the Legislature has broad discretion over how to spend tax revenues.

II. THE SWEPT IS CONSTITUTIONAL UNDER PART II, ART. 5.

Even if one assumes for the sake of argument that the 2011 legislative changes constituted a “tax,” the Superior Court erred when it ruled that those changes violated Part II, Art. 5.

A. Under This Court’s Long-Held Interpretation, Part II, Art. 5 Requires that the SWEPT Rate Be Uniform Among Taxpayers.

The language of Part II, Art. 5 giving the Legislature the power to “levy proportional and reasonable assessments, rates, and taxes” is older than the United States, dating back to the Constitution of 1784. See 20 Early State Papers of New Hampshire 16

(A. Batchelor ed. 1891).⁷ That language was itself modeled on the language of Massachusetts' constitution, adopted four years earlier. In that state, "the expression 'proportional and reasonable' forbids the imposition of taxes upon one class of persons or property at a different rate from that which is applied to other classes. . . . This interpretation of these constitutional provisions has been unvarying from the early days of the Commonwealth to the present time." Bettigole v. Assessors of Springfield, 343 Mass. 223, 230 (1961) (emphasis added, citation omitted).

This Court has long agreed with the Massachusetts Supreme Judicial Court's interpretation that the Constitution requires equal, uniform rates. In Opinion of Justices, 4 N.H. 565 (1829), the Court explained that "[t]he equality, here intended, is, that the same tax shall be laid, upon the same amount of property, in every part of the state, so that each man's taxable property shall bear its due portion of the tax according to its value." Id. In each Part II, Art. 5 case since that time, the Court has required uniformity in the tax rate imposed upon taxpayers in the same taxing district. See, e.g., Boston, C. & M. R.R. v. State, 60 N.H. 87 (1880) ("Taxation requires a uniform valuation and a uniform rate."); State v. U.S. & Canada Express Co., 60 N.H. 219 (1880) ("[I]f the tax is for the general purposes of the state, the rate should be the same throughout the state"). The general rule is that Part II, Art. 5 "requires a uniform valuation and a uniform rate throughout the district by which the tax is levied. In other words a state tax must be uniform throughout the state, a county tax throughout the county, a town tax throughout the town" Opinion of Justices, 101 N.H. 549, 554 (1958) (citation omitted).

The equality requirement is rigorously enforced. This Court has regularly struck down taxes that are "graduated," i.e., those that are progressive, see, e.g., Williams v. State, 81 N.H. 341, 350 (1924) (invalidating inheritance tax with rates depending on size of estate); Opinion of Justices, 84 N.H. 559, 571 (1930) (rejecting proposed personal exemption for lower income residents because a "tax levy cannot be sustained here upon

⁷ UNH offers digitized version of the Early State Papers, available at <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1019&context=propapers>.

any theory that the richer one is the higher his tax rate should be”); Opinion of Justices, 99 N.H. 525, 527 (1955) (rejecting proposed tax of 10 percent on federal income tax paid, since the federal tax was progressive). The Court has also struck down regressive taxes. See Felder v. Portsmouth, 114 N.H. 573, 57-80 (1974) (invalidating exemption that “discriminated” against the poor).

B. The SWEPT Rate Is Equal and Uniform Among Taxpayers and Thus Constitutional.

The undisputed facts developed below demonstrate that the SWEPT rate is the same for all taxpayers across the state. In 2021, the rate was \$1.825 per \$1,000 and \$1.24 per \$1,000 in 2022, for all eligible taxpayers. See Pl. Resp. to Intervenor Statement of Facts ¶¶7-8 [Appx. Vol. I at 166]; see also RSA 76:8, I(b) (requiring DRA to determine municipality’s SWEPT liability by “multiplying the *uniform* education property tax rate” by the municipality’s adjusted tax base). Moreover, the structure of the tax ensures uniformity among taxpayers. RSA 76:3 requires the Commissioner to set the SWEPT at a single rate sufficient to generate \$363 million from all taxpayers. Thus, under this Court’s long-standing jurisprudence, the tax is constitutional because all taxpayers pay the same uniform rate.

The Superior Court disagreed. Instead, it accepted Plaintiffs’ argument that “although the SWEPT rate is uniform on its face, . . . any scheme which diverts SWEPT funds to purposes other than adequacy aid lowers the effective SWEPT rate paid by certain communities.” Nov. 20, 2023 Order on S.J. at 13. The theory is that “excess communities” pay only a portion of the collected SWEPT toward adequacy, while other communities pay the entire collected SWEPT amount toward adequacy. See id. at 15. Thus, according to the Superior Court, because the SWEPT is “meant” to fund adequacy, the smaller percentage of SWEPT going toward adequacy in the excess communities means those communities pay a lower SWEPT rate. See id. at 15 (“[W]here education taxes like the SWEPT are intended to fulfill the State’s constitutional obligation to fund adequacy aid, the effective rate of such a tax is only uniform if all proceeds of the tax are directed to that purpose.”).

The Superior Court's reasoning is based on two flawed assumptions.

1. *The Legislature Is Permitted to Change Its Mind About How Tax Revenue Is Spent*

First, the court assumed that revenue from the SWEPT can only ever be used to fund the State's adequacy obligations. That is wrong. Even if the original legislative purpose behind the SWEPT was to help fund the State's adequacy obligations in response to Claremont II, the Constitution does not prohibit the Legislature from deciding to use the tax revenues for other public purposes as well.

The Legislature changed the law in 2011 because of problems attendant to the donor-receiver model, such as the undesirable "battles between 'winning' and 'losing' communities." [Appx. Vol. I at 241]. The Constitution gives the Legislature the task of establishing educational policy and determining "the appropriate mechanism for its funding." See Sirrell, 146 N.H. at 369. That means the Legislature has the freedom to decide that its chosen way to fund an adequate education should be modified when negative consequences appear. The Legislature is also free to authorize "local school districts to dedicate additional resources to their schools or to develop educational programs beyond those required." Claremont II, 142 N.H. at 475.

Yet, the Superior Court's order freezes the legislative process in place. Once the Legislature passes a tax to help fund an adequate education, the Legislature is required to dedicate "all proceeds of the tax to that purpose," or the tax becomes unconstitutional. This Court has never endorsed such tight judicial control over the Legislature's spending. Instead, it has held that taxpayers may not "complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use." Manchester Fed. Sav. & Loan Ass'n, 105 N.H. at 21.

2. *Taxpayers Pay the Facially Uniform SWEPT Rate, Not an Artificial "Effective Rate."*

The Superior Court's second error is that it relies on the wrong taxing district, focusing on municipalities instead of taxpayers. Because the SWEPT is a state tax

raising revenue for education, the taxing unit is the entire state. See Claremont II, 142 N.H. at 470. Thus, the operative question under Part II, Art. 5 is whether the SWEPT rate is uniform among all taxpayers in the state. Under the current SWEPT, Plaintiffs do not dispute that taxpayers in “donor” communities are assessed and pay SWEPT at the same rate as taxpayers in other communities. See Pl. Resp. to Intervenor Statement of Facts ¶¶7-8 [Appx. Vol I. at 166].

The Superior Court’s “effective tax rate” theory is based on the trial court’s decision in the Londonderry case, which ruled “the retention of surplus education tax funds violated Part II, Article 5 because it allowed property-rich municipalities to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children.” Nov. 20, 2023 Order at 14. The problem with this rationale is that municipalities do not pay the SWEPT; taxpayers do. A taxpayer does not avoid payment of his SWEPT bill just because his town pays all of its SWEPT revenue to the local schools. The taxpayer still receives regular tax bills every year assessing SWEPT at the same uniform rate assessed on all taxpayers in the state, and the taxpayer is obligated to pay the assessed amount. From a taxpayers’ perspective, it is immaterial whether the money he or she pays is then sent to the education trust fund in Concord or sent to the local school district. The taxpayer’s rate is the same in either case, and is equal to the rate paid by all other taxpayers in the state.

The same problem is evident in the affidavit the Superior Court relied upon to conclude “there can be no meaningful dispute that allowing communities to retain SWEPT funds lowers the effective SWEPT rate paid by those communities.” Id. at 15. The Hall Affidavit summarized various publicly available records concerning the SWEPT. See Appx. Vol. III. at 118. In table 1, the table relied upon by the Superior Court, Mr. Hall purports to show the “Effective Equalized SWEPT Rate for Adequacy” for various communities. Id. at 120. His table generally shows that the “Excess SWEPT Communities” pay a lower “effective” SWEPT rate than the Plaintiffs’ communities. Id. However, the “effective” rates he calculates, and which the Superior Court relied upon,

bear no relation to the rates taxpayers in those communities pay. Instead, as Mr. Hall testifies, he calculated the “effective” rate by multiplying the facially uniform SWEPT rate by a ratio. See Hall. Aff. ¶6 [Appx. Vol III at 118]. The ratio is the town’s adequacy cost divided by the town’s collective SWEPT revenue. Id. In other words, if half of a town’s SWEPT revenue was sufficient to pay for adequacy, Mr. Hall would multiply the facially uniform SWEPT rate by 50% to get the “effective” rate.

But the taxpayers in those towns do not pay the discounted, “effective rate.” They pay the higher, facially uniform SWEPT rate. Part II, Art. 5 is not concerned with what percentage of a taxpayer’s taxes go to a particular purpose. Instead, the Legislature can choose to allocate “part or all of a general or special tax” to any “particular use” without violating the Constitution. See Manchester Fed. Sav. & Loan Ass’n, 105 N.H. at 21. Because all taxpayers in the state pay the same SWEPT rate, not a variable, discounted, “effective rate,” the tax is constitutional.

C. The Claremont Cases Do Not Create an Exception to Part II, Art. 5.

The Superior Court erroneously relied on this Court’s Claremont decisions as “substantial support” for finding the facially uniform SWEPT unconstitutional because of how the tax revenue is spent. In doing so, the Superior Court misinterpreted Opinion of Justices (Sch. Financing Special Abatement), 142 N.H. 892 (1998), and Claremont III (SWEPT Phase-In), 144 N.H. 210 (1999).

In Opinion of Justices (Sch. Financing Special Abatement), the proposed statewide property tax was facially uniform, but the proposal included a “special abatement” for any education tax revenue generated in excess of adequacy. See 142 N.H. at 899. The Commissioner subtracted the special abatement (equal to excess SWEPT revenue over adequacy) when calculating each town’s tax rate, resulting in “donor” town taxpayers paying SWEPT at a lower tax rate than the uniform rate applied in other towns - a classic Part II, Art. 5 problem. See id. The Court noted that the mechanism would also be unconstitutional if the taxpayers had paid at a uniform rate but then received an abatement back to reduce their taxes. See id. at 902.

The 2011 legislative changes challenged by Plaintiffs are very different than the special abatement. The 2011 law requires towns to pay their SWEPT excess to local schools. It does not allow the Commissioner to use that excess to recalculate any taxpayer's SWEPT rate, nor does the law allow the retained SWEPT excess to be used to provide an abatement back to taxpayers in excess towns. Thus, because the SWEPT excess must be paid to local schools and not to local taxpayers, it cannot affect the tax rates of taxpayers and thus does not violate Part II, Art. 5.

The other case cited by the Superior Court, Claremont III (SWEPT Phase-In) is distinguishable for the same reason. In response to Opinion of Justices (Special Abatement Sch. Financing), the Legislature jettisoned the special abatement for excess SWEPT, and instead required towns to remit any SWEPT excess to the DRA. However, the law was phased in over five years, such that towns were required to collect only a percentage of the excess from their taxpayers. See id. at 213. That meant that excess towns assessed and collected only a portion of the SWEPT from their taxpayers, while the other towns assessed and collected the full SWEPT from their taxpayers. The Supreme Court held that the phase-in violated Part II, Art. 5 because it created lower tax rates for taxpayers in excess communities during the phase-in period. See id. Again, this case is different. Municipalities that generate SWEPT over adequacy do not forego assessment and collection of a portion of the "excess" SWEPT, as they would have in the phase-in case. Instead, RSA 76:8, II, requires all towns throughout the state to collect the full SWEPT from their taxpayers and pay it to the local school district.

Thus, this Court's Claremont cases have involved a straightforward application of Part II, Art. 5's centuries' old uniformity requirement. When taxpayers around the state pay SWEPT at different rates, the SWEPT is unconstitutional. When taxpayers around the state pay SWEPT at the same rate, as is undisputed in this case, the tax is constitutional. There is no special Claremont rule for taxes and this Court has never endorsed what the Superior Court held here, that a tax's constitutionality is determined by how the tax revenue is spent.

IV. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Coalition asks the Court to reverse the Superior Court and remand for entry of judgment in the Coalition's and State's favor on Plaintiffs' SWEPT claims.

STATEMENT REGARDING ORAL ARGUMENT

The Coalition requests oral argument.

CERTIFICATIONS REGARDING APPEALED DECISIONS, BRIEF LENGTH AND SERVICE

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the appealed decisions are included within the attached Addendum.

I also certify that this brief was written in 13 point font using Microsoft Word and contains less than 9,500 words as calculated by Word's word count feature, exclusive of the sections excluded per Rule 16(11).

I also certify that this brief was delivered to all parties of record pursuant to this Court's electronic filing and service system.

August 14, 2024

/s/ John-Mark Turner
John-Mark Turner

Respectfully submitted,

COALITION COMMUNITIES

By its attorneys,
Sheehan Phinney Bass & Green PA

August 14, 2024

By /s/ John-Mark Turner
John-Mark Turner (#15610)
Abbygale Martinen (#272938)
Sheehan Phinney Bass & Green PA
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 627-8143
jturner@sheehan.com

ADDENDUM

1.	Nov. 20, 2023 Order on Motions for Summary Judgment....	29
2.	Feb. 20, 2024 Order.....	50

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT¹

In this case, the plaintiffs challenge the manner in which the State carries out certain education-related obligations imposed by the State Constitution. See Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) (“ConVal”); see also Doc. 17 (Pls.’ Am. Compl.). The parties now cross-move for partial summary judgment regarding the plaintiffs’ claim that the State administers the Statewide Education Property Tax (“SWEPT”) in an unconstitutional fashion. See Doc. 49 (Pls.’ Mot. Summ. J. – SWEPT); Doc. 56 (State’s Obj. & Cross-Mot. – SWEPT); Doc. 53 (Coalition’s² Obj. & Cross-Mot.); see also Doc. 17. The Court held a hearing on the motions on July 12, 2023. For the reasons that follow, the plaintiffs’ motion is **GRANTED**, and the cross-motions filed by the State and the Coalition are **DENIED**.

¹ The Court intentionally delayed issuing this Order so that it could be issued contemporaneously with the order in Contoocook Valley School District, et al. v. State of New Hampshire, docket no. 213-2019-CV-00069. The Court did this to afford the parties an opportunity to assess how or if that order impacts the procedure in this case. The SWEPT issue in that case was withdrawn by the plaintiff. To the extent the delay has frustrated any of the parties, the Court apologizes but remains convinced it was in the best interest of justice to do so.

² The Coalition represents a group of New Hampshire cities and towns that oppose the plaintiffs’ challenge to the SWEPT. See Doc. 48 (Dec. 5, 2022 Order). On December 5, 2022, the Court allowed the Coalition to intervene solely as to this aspect of the case. See id.

Standard of Review

“In considering . . . cross-motions for summary judgment, [courts] consider the evidence in the light most favorable to each party in its capacity as the non-moving party.” ConVal, 174 N.H. at 162–63. Summary judgment shall be granted where “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. As the parties acknowledged during the July 12, 2023 hearing, the facts underlying the plaintiffs’ Part II, Article 5 challenge to the SWEPT are undisputed. Rather, the relevant dispute centers on the proper interpretation of our State’s education funding jurisprudence, and how the law applies to the existing education funding and tax scheme.

Education Funding Jurisprudence

“Under our education funding jurisprudence, Part II, Article 83 of the State Constitution ‘imposes a duty on the State to provide a constitutionally adequate education . . . in the public schools in New Hampshire and to guarantee adequate funding.’” ConVal, 174 N.H. at 156 (quoting Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) (“Claremont I”)). “To comply with that duty the State must ‘define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.’” Id. at 156–57 (quoting Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) (“Londonderry I”). Under Part II, Article 5 of the State Constitution, “constitutional taxes” must “be proportionate and reasonable—that is, equal in valuation and uniform in rate.” Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) (“Claremont II”) (citations and quotations omitted)).

Over time, the legislature has crafted several tax schemes aimed at complying with the above-described constitutional obligations. As of December 17, 1997, properties located within a particular school district were taxed at whatever rate was necessary to “meet the obligations of the school budget” within that district. See Claremont II, 142 N.H. at 467 (explaining Department of Revenue Administration (“DRA”) set unique tax rates for properties in each school district). In Claremont II, a group of school districts, students, taxpayers, and parents successfully challenged this tax scheme. See id. at 465. The Claremont II plaintiffs argued (as relevant here) “that the school tax is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education” and thus “is a State tax that should be imposed at a uniform rate throughout the State.” Id. at 467. The State countered that setting district-specific tax rates was constitutionally appropriate, characterizing the school tax as “a local tax determined by budgeting decisions made by the district’s legislative body and spent only in the district” Id. at 467–68 (noting State’s argument that this practice allowed each school district “to decide how to organize and operate their schools”). The Claremont II court concluded that because “the purpose of the school tax” was “overwhelmingly a State purpose”—i.e., fulfilling the State’s duty “to provide a constitutionally adequate education . . . and to guarantee adequate funding”—it constituted a State tax. Id. at 469.

Having resolved that issue, the Claremont II court next analyzed whether the tax scheme was “proportional and reasonable throughout the State in accordance with” Part II, Article 5. Id. at 470; see also id. at 468 (“Part II, article 5 of the State Constitution provides that the legislature may ‘impose and levy proportional and reasonable

assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.”). Citing evidence that the equalized tax rate for the 1994–95 school year was approximately four times higher in Pittsfield than in Moultonborough, the court concluded that the tax was disproportionate and unreasonable. Id. at 470–71. In reaching this conclusion, the court emphasized that “because the diffusion of knowledge and learning is regarded by the State Constitution as ‘essential to the preservation of a free government,’ N.H. CONST. pt. II, art. 83, it is only just that those who enjoy such government should equally assist in contributing to its preservation.” Claremont II, 142 N.H. at 470–71. Given these conclusions, the court explained that “[t]o the extent . . . the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.” Id.

In response to Claremont II, the legislature solicited an advisory opinion from the Supreme Court regarding the legality of an alternative tax scheme. See Opinion of the Justices (School Financing), 142 N.H. at 892–97. As relevant here, the proposed scheme “purport[ed] to establish a uniform State education tax rate based upon the equalized value of all taxable real property in the State.” Id. at 899. However, the scheme included “a ‘special abatement’ for ‘the amount of state education tax apportioned to each town in excess of the product of the statewide per pupil cost of an adequate education times the average daily membership in residence for the town.’” Id. (cleaned up). Under the proposed scheme, the DRA would “calculate each town’s tax by multiplying the State education tax rate by the total equalized value of the property within it, less any special abatement.” Id. (cleaned up). “Thus, the special abatement

applie[d] before any taxpayer within a given town receive[d] a tax bill.” Id. (expressing Supreme Court’s view that substantive legal issues would “remain unchanged” if proposed scheme provided for actual collection of revenue raised through uniform State education tax, and thereafter reimbursed taxpayers pursuant to the special abatement).

Ultimately, the Supreme Court concluded that the proposed scheme would not pass constitutional muster. See id. at 902. The court explained that as a result of the special abatement, “the effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined ‘adequate education’ for its children:”

For example, in those towns where there are no children, the special abatement reduces the effective tax rate to zero. Meanwhile, in any town where the property value is insufficient to support the revenue required to educate local children adequately at the uniform State education tax rate, the effective rate remains equal to the uniform State education tax rate. Those towns receive a grant from the State to meet the otherwise unfunded cost of an adequate education. Although such towns would be fully funded, the owners of property therein would pay taxes at a higher rate than those in towns with a surplus of revenue, which would receive the special abatement.

Id. at 899–900.

Recognizing that tax abatements and exemptions “necessarily result in a disproportionate tax burden,” the Supreme Court explained that such an outcome is permissible under Part II, Article 5 only when abatements are “supported by good cause and exemptions by just reasons.” Id. at 900. The court concluded that the above-described special abatement would not meet that standard:

Proponents . . . assert that the special abatement is designed to protect towns from financially contributing to the adequate education of children in other towns or school districts. Essentially, the proponents seek to measure proportionality and fairness on a municipality-by-municipality or district-by-district basis, rather than statewide. But, to the extent that a property tax is

used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional across the State

Id. at 901 (also explaining that possibility of “social unrest cannot be a factor in . . . constitutional review” of proposed tax scheme). In addition, the court again emphasized the statewide benefits arising out of public education:

Because the diffusion of knowledge and learning is regarded by the State Constitution as essential to the preservation of a free government, it is only just that those who enjoy such government should equally assist in contributing to its preservation This obligation cannot be avoided or lessened by the mere circumstance of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry.

It should not be forgotten that New Hampshire is not a random collection of isolated cities and towns The benefits of adequately educated children are shared statewide

Id. at 901–02 (cleaned up). In light of the foregoing, the court concluded that because property owners who did not benefit from the special abatement would bear “an increased tax burden,” and “such disproportionality [wa]s not supported by good cause or a just reason,” the proposed education funding scheme would violate “both the plain wording of Part II, Article 5 and the express language of Claremont II.” Id. at 902.

After receiving the Supreme Court's guidance, “the legislature passed an act in April 1999 ‘establishing a uniform education property tax’” and omitting any special abatement. See Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999) (“Claremont III”) (citation omitted). Pursuant to the act, “[i]n each municipality in which the education property tax exceed[ed] the amount necessary to fund an adequate education, the excess” was to be “remitted” to the DRA. Id. at 213 (citation omitted). Notably, however, the act included a “phase-in” provision which provided that in certain property-rich towns, the full tax rate would be “imposed

gradually over five years, while taxpayers in the remaining towns [would] pay the full rate immediately.” Id.

In Claremont III, the plaintiffs challenged (among other things) the constitutionality of the phase-in provision. See id. at 212. Although the State “acknowledged . . . that facially the phase-in perpetuate[d] a disproportionality for five years,” the State nevertheless argued that the phase-in could “be viewed as a partial abatement” or a “partial exemption” of the tax liability in property-rich towns. See id. at 213. The Supreme Court summarily dismissed the State’s abatement argument, explaining the phase-in did not constitute a permissible abatement because it did “not limit relief to persons aggrieved by the assessment of a tax.” Id. (citation omitted). Further, the court concluded that the phase-in was not a valid tax exemption because it did not serve the general welfare. See id. at 212–14. In reaching this conclusion, the court reasoned that although the phase-in was intended to “ameliorate the possibility of foreclosures, bankruptcies, or similar adverse economic consequences that could occur” in the property-rich communities, “[t]he classification created by the phase-in encompassed taxpayers who did not merit special tax treatment in accordance with the just reasons offered by the legislature” Id. at 213–16.

Before considering whether the phase-in provision could be severed from the act (and ultimately concluding that it could not), the Supreme Court took the opportunity to emphasize and clarify important aspects of our State’s taxation jurisprudence:

[W]e give heed to the words of Chief Justice Doe written more than one hundred years ago: “A state law selecting a person or class or municipal collection of persons for favors and privileges withheld from others in the same situation . . . is at war with a principle which this court is not authorized to surrender.” . . . In the field of taxation, the principle of uniformity and equality of rights is of paramount importance and has been embodied in the

“proportional and reasonable” language of Part II, Article 5 of our State Constitution since June 2, 1784.

In this case, the classification at issue imposes a State tax on property at different rates for five years based solely on the location of the property. We can find no case where different rates of taxation exist in a State tax from one municipality to another. We can conceive of none that would pass muster under the words of Chief Justice Doe or the provisions of Part II, Article 5 our language on taxes requiring uniformity and equality is not something invented in the Claremont cases, but is the far-reaching language of constitutional mandate which has guided every tax decision of this court for over two hundred years.

Id. at 217 (citations omitted) (quoting State v. Griffin, 86 N.H. 609, 614 (1894)).

In response to Claremont III, the legislature “reenacted the statewide property tax without the phase-in” Sirrell v. State, 146 N.H. 364, 367 (2001). Under that tax scheme, communities which raised funds “beyond that necessary to fund an adequate education for their students” were “required to pay the excess . . . to the education trust fund for distribution to communities unable to raise sufficient funds to meet their cost of adequacy.” See id. By 2006, however, the legislature had again modified the education tax scheme. See Londonderry Sch. Dist. SAU #12 v. State, No. 226-2005-EQ-00406, 2006 WL 563120 (N.H. Super. Mar. 8, 2006) (Groff, J.) (“Londonderry”) at *6–7 (describing changes to tax scheme arising out of House Bill 616). As relevant here, the legislature eliminated the requirement that excess education funds be remitted to the State, instead permitting property-rich communities to “retain all the revenue they raise[d]” under the education tax scheme “in excess of what [wa]s needed to support the cost of an adequate education.” Id. at *13. In Londonderry, a group of school districts, School Administrative Units and towns argued that this change “violate[d] Part II, Article 5” because it resulted “in some ‘property poor’ communities bearing a disproportional share of educational expenses through local taxes.” Id.

Citing the jurisprudence discussed above, Judge Groff agreed with the plaintiffs:

Under HB 616, the real effect of having the “property-rich” municipalities retain excess [education tax] proceeds is to permit these municipalities to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children. At the same time, “property-poor” municipalities will be required to use the full amount of the statewide enhanced education tax assessment revenues collected to support the cost of an adequate education. Therefore, HB 616 creates a non-uniform tax rate and the Court finds that no constitutional justification can be articulated to permit the retention of those excess funds by the “property-rich” municipalities.

Id. at *15 (noting “special abatement” and phase-in provisions of prior proposed legislation were deemed unconstitutional because they permitted municipalities to avoid payment of statewide education property tax which exceeded the amount necessary to provide an “adequate education” within relevant school district).

On appeal, the Supreme Court concluded that it could not analyze whether the State was funding public education in a constitutional manner until the legislature appropriately defined the scope of a constitutionally adequate education. See Londonderry I, 154 N.H. at 162. In response, the legislature enacted sweeping changes to the public education laws, including the funding scheme. See Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734, 735 (2008) (“Londonderry II”). As a result, the Supreme Court determined that the remaining challenges to House Bill 616 had become moot. See id. at 736. Thus, the Supreme Court has not definitively determined whether allowing a municipality to retain excess education funds—that is, funds generated under a statewide education tax scheme which exceed the cost of providing the opportunity for a constitutionally adequate education to the public school students living in that municipality’s school district—runs afoul of Part II, Article 5.

Existing Education Funding and Tax Scheme

Today, RSA 198:40-a, II, sets forth the annual per-pupil cost of providing the opportunity for a constitutionally adequate education (hereinafter “adequacy aid”). The State raises adequacy aid funds via the SWEPT. See ConVal, 174 N.H. at 159. Specifically, RSA 76:3 requires that the DRA “set the education tax rate at a level sufficient to generate” a statutorily-defined total “when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F.” Funds raised via this tax are “collected and distributed at a local level and . . . used to meet the cost of an adequate education.” See Doc. 18 (State’s Am. Answer 1st Am. Compl.) ¶ 19.

“The State admits that since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid [to that community] by the State have been permitted to retain the excess” Id. ¶ 22; see also Laws 2011, 258:7 (eff. July 1, 2011) (eliminating requirement that excess SWEPT funds be paid to DRA “for deposit in the education trust fund”). The State further acknowledges that for certain areas in New Hampshire, the DRA has “set negative local education tax rates” which mathematically offset most if not all of the applicable equalized SWEPT rate. See Doc. 18 ¶ 35; Doc. 59 (Aff. Bruce Kneuer) ¶ 18 (“A negative Local Education Rate may occur . . . when a municipal entity . . . has minimal or no public education responsibilities within its boundaries”). For example, for the 2020–21 school year, the DRA set a local education tax rate for Hale’s Location of negative \$1.84 / \$1000, whereas the equalized SWEPT rate for that same area was \$1.85 / \$1000. See Doc. 18 ¶ 36.

Analysis

The plaintiffs argue that because the State allows communities to retain excess SWEPT funds or offsets the equalized SWEPT rate via negative local education rates, the SWEPT is not being administered in a manner that is “uniform in rate,” as required by Part II, Article 5. See Doc. 50 (Pls.’ Mem Law) at 3, 14. The parties now cross-move for summary judgment with respect to this issue. Compare Doc. 49 with Docs. 53 and 56. Before turning to the merits of the parties’ arguments, the Court must address two preliminary matters. First, in support of their cross-motions for summary judgment, the State and the Coalition maintain that the SWEPT should be presumed constitutional, and that the plaintiffs bear the burden of establishing a “clear and substantial conflict” between the SWEPT and the State Constitution. See Doc. 53 at 3 (citing ConVal, 174 N.H. at 161, for proposition that Court may only declare SWEPT unconstitutional “upon ‘inescapable grounds’”); accord Doc. 57 (State’s Mem. Law) at 6. For the reasons outlined below, the Court concludes that if the State and the Coalition have appropriately framed the relevant standards, the plaintiffs have overcome the presumption of constitutionality and met their burden of showing a clear and substantial conflict. Accordingly, the Court will assume, without deciding, that those standards apply here. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (declining to reach arguments that would not alter court’s conclusion).

Second, in support of their motion for partial summary judgment, the plaintiffs have submitted data tables generated by Douglass Hall. See Doc. 51 (Pls.’ State. Mat. Facts) Ex. A (Aff. Douglass Hall) (“Hall Aff.”). These tables indicate which New Hampshire communities generated “SWEPT in Excess of Adequacy” in certain tax

years, and they also reflect Hall’s calculations as to what the SWEPT rate would have been had such communities only collected the funds necessary to cover their own adequacy aid needs. See id. ¶¶ 4–9. The tables contain similar information concerning communities for which the DRA has set negative local tax rates. See id. ¶¶ 10–13.

The Coalition suggests Hall’s work deserves little weight. Doc. 53 at 14 n.3 (noting Hall’s affiliation with N.H. School Funding Fairness Project, and that Hall did not “explain why he selected” data points reflected in tables). Notably, however, the Coalition concedes that Hall’s tables were “created from State data,” and the Coalition does not suggest that Hall misreported the data, or that the data is otherwise unreliable. See id. Nor does the Coalition assign error to Hall’s calculations. See id. As there is no dispute regarding the validity of the data underlying his work, the Court concludes that it is appropriate to substantively consider Hall’s calculations, as reported in the tables, in ruling on the parties’ cross-motions for summary judgment.

The Court now turns to the substance of the parties’ cross-motions. As the parties raise somewhat distinct arguments concerning “excess” SWEPT communities and “negative tax rate” communities, the Court will address each category, in turn.

I. Excess SWEPT Communities

Relying on the caselaw discussed above, the plaintiffs argue that allowing municipalities to retain “excess” SWEPT funds beyond those needed to meet local adequacy aid requirements is the functional equivalent of the special abatement and phase-in schemes which the Supreme Court previously deemed unconstitutional. See Doc. 50 at 14. In particular, the plaintiffs argue that property-poor communities which do not generate excess SWEPT funds are effectively paying a higher SWEPT rate than

those which do generate and are allowed to retain excess funds. See id. at 15. As a result, the plaintiffs argue that the SWEPT is being administered in a manner which is not “uniform in rate,” as required under Part II, Article 5. See id. at 15–18. In response, the State and the Coalition argue that the legislature’s decision to permit retention of excess SWEPT funds constitutes a spending decision and not a tax, rendering the prior school funding cases distinguishable. See Doc. 57 at 1–2; Doc. 53 at 2. The State and the Coalition thus assert that the plaintiffs’ Part II, Article 5 challenge to the SWEPT must fail. See Doc. 57 at 2; Doc. 53 at 2.

Upon review, the Court agrees with the plaintiffs’ characterization of this issue. The plaintiffs do not challenge the amount of money the State spends on education in one community versus another. Rather, as in Claremont II, the plaintiffs in this case emphasize that the SWEPT “is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education.” See Claremont II, 142 N.H. at 467; see also Doc. 61 (Pls.’ Reply – SWEPT) at 1–2 (noting in a footnote that SWEPT “is not a generic tax for education” but “a specific state tax to pay for the State’s constitutional duty to fund adequacy”). The plaintiffs thus contend that by allowing property-rich communities to retain excess SWEPT funds, the State is administering the SWEPT in a manner which effectively reduces the SWEPT rate paid by those communities. In other words, although the SWEPT rate is uniform on its face, the plaintiffs argue that any scheme which diverts SWEPT funds to purposes other than adequacy aid lowers the effective SWEPT rate paid by certain communities, thus running afoul of Part II, Article 5.

As set forth above, the plaintiffs' contention finds substantial support in our State's education funding jurisprudence. Indeed, the Claremont II court expressly noted that "[t]o the extent . . . the property tax is used . . . to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." 142 N.H. at 470 (emphasis added). The court's broader discussion of the administration of such a tax, rather than just the facial tax rate, aligns with the plaintiffs' position. See id. Similarly, in Opinion of the Justices (School Financing), the Supreme Court concluded that the proposed "special abatement" impermissibly resulted in a lower "effective" education tax rate for certain communities. See 142 N.H. at 902. While recognizing that the proposed tax would be uniform on its face, the Supreme Court concluded that the proposed tax would violate Part II, Article 5 because "[a]pplication of the special abatement [would] guarantee[] that property owners paying the full rate [bore] an increased tax burden" Id. at 901–02 (explaining that "effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children"); see also id. at 899 (noting court's conclusions "would remain unchanged" if proposed scheme had provided for actual collection of revenue, then reimbursed taxpayers pursuant to special abatement).

Relying on this reasoning, Judge Groff determined in Londonderry that the retention of surplus education tax funds violated Part II, Article 5 because it allowed property-rich municipalities "to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children." 2006 WL 563120, at *15. While Judge Groff's holding on this issue and

other aspects of the jurisprudence discussed above do not constitute binding precedent, the Court is persuaded by the reasoning set forth therein. As Judge Groff noted, where education taxes like the SWEPT are intended to fulfill the State's constitutional obligation to fund adequacy aid, the effective rate of such a tax is only uniform if all proceeds of the tax are directed to that purpose. See id.

In this case, the existing education funding and tax scheme permits communities to retain surplus SWEPT funds which exceed local adequacy aid needs. As a result, such funds are not remitted to the State for use in meeting the adequacy aid needs of other communities where SWEPT revenues fall short of adequacy. While communities which retain excess SWEPT funds must use those funds for education, the excess funds are not used to satisfy the State's adequacy aid obligations.³ By contrast, communities which do not generate such an excess must use all collected SWEPT revenue to satisfy the State's adequacy aid obligations. In short, communities which do not generate excess SWEPT funds use all revenues generated under the facial SWEPT rate for adequacy aid purposes, and excess SWEPT communities do not.

Given the unique nature of the SWEPT—a State tax meant to generate the funding necessary to meet the State's constitutional adequacy aid obligations, see Claremont II, 142 N.H. at 467—there can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities. See Hall. Aff. Table 1. Accordingly, the Court concludes that allowing some communities to retain excess SWEPT funds impermissibly results in a

³ In the event the amount of adequacy aid is increased in the future, such a change would not undermine the conclusion that a community's retention of SWEPT funds generated in excess of adequacy aid effectively reduces the SWEPT rate for that community, in violation of Part II, Article 5.

disproportionate tax rate, in violation of Part II, Article 5. See Claremont II, 142 N.H. at 467; see also Opinion of the Justices (School Financing), 142 N.H. at 902; Londonderry, 2006 WL 563120, at *15. In light of the foregoing, the plaintiffs have overcome any applicable presumption of constitutionality regarding the retention of excess SWEPT funds, and have further established a “clear and substantial conflict” between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs’ motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

II. Negative Tax Rate Communities

The plaintiffs similarly argue that by setting negative local education tax rates in communities with little to no education expenses, the State is impermissibly reducing the effective SWEPT rate for those communities. See Doc. 50 at 16 (arguing this scheme is “virtually identical” to the special abatement scheme deemed unconstitutional in Opinion of the Justices, 142 N.H. at 899); see also Hall Aff. Table 3. In response, the State contends that the communities at issue, which are generally “unincorporated places,” are not and need not be part of the SWEPT tax base. See Doc. 57 at 14–18.⁴ In other words, the State does not deny that negative local education tax rates effectively reduce or eliminate SWEPT liability, but argues this outcome is contemplated by the relevant statutory scheme and is constitutionally permissible. See id.

Upon review, the Court again agrees with the plaintiffs. As the Supreme Court has repeatedly emphasized, the public education system benefits the entire State, not

⁴ The Coalition does not directly address the negative local education tax rate issue in their filings. See Docs. 53; 63 (Coalition’s Reply).

merely those communities in which publicly-educated children reside. See Claremont II, 142 N.H. at 470 (“[B]ecause the diffusion of knowledge and learning is regarded by the State Constitution as ‘essential to the preservation of a free government’ . . . it is only just that those who enjoy such government should equally assist in contributing to its preservation.”); Opinion of the Justices (School Financing), 142 N.H. at 901–02 (“The benefits of adequately educated children are shared statewide . . .”). Of particular relevance here, even property owners in uninhabited locations benefit from the preservation of our State’s government, without which their property interests would be put in jeopardy. See Claremont II, 142 N.H. at 470. Accordingly, the fact that few if any publicly-educable children reside within some unincorporated places does not constitute a “just reason[]” for reducing or eliminating SWEPT liability in those locations. See Opinion of the Justices (School Financing), 142 N.H. at 900 (explaining Part II, Article 5 requires that tax exemptions be “supported by . . . just reasons”).

In light of this conclusion, the Court is not persuaded by the State’s proffered interpretation of the term “municipalities,” as used in RSA 76:3 and 76:8. See Doc. 57 at 14–15 (arguing “municipalities,” as used in relevant statutes, does not include unincorporated places). It is well settled that New Hampshire courts “must construe a statute to avoid a conflict with constitutional rights whenever reasonably possible.” Bellevue Properties, Inc. v. 13 Green St. Properties, LLC, 174 N.H. 513, 517 (2021) (citation and quotations omitted). For the reasons outlined above, if the legislature intended to exempt unincorporated places from contributing to the State’s education funding obligations, such an exemption would not be supported by the requisite “just reasons.” See Opinion of the Justices (School Financing), 142 N.H. at 900.

Accordingly, the Court cannot construe the term “municipalities” as excluding unincorporated places in this context. See Bellevue Props., 174 N.H. at 517.⁵

For the reasons outlined above, the Court concludes that the setting of negative local education tax rates which offset the SWEPT to any degree runs afoul of Part II, Article 5. Accordingly, the plaintiffs have overcome any applicable presumption of constitutionality regarding the offsetting of SWEPT rates via negative local tax rates, and have further established a “clear and substantial conflict” between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs’ motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

III. Remedy

Having found that the plaintiffs are entitled to judgment as a matter of law regarding their Part II, Article 5 challenge to the administration of the SWEPT, the Court must now determine the appropriate remedy. As noted in the Court’s December 5, 2022 Order on the plaintiffs’ motion for preliminary injunctive relief, “[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” Doc. 48 at 8 (quoting N.H. Dept. Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007)). Moreover, “the granting of an injunction ‘is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity.’” Id. (citing UniFirst Corp. v. City of

⁵ Although the State’s Reply identifies other property types which are not subject to the SWEPT under the existing scheme, see Doc. 64 at 3, the State does not cite (and the Court is not aware of) any legal basis for rejecting a valid Part II, Article 5 challenge because the relevant tax may also run afoul of the constitution in other respects.

Nashua, 130 N.H. 11, 14 (1987) for proposition that courts may consider public interest in evaluating requests for injunctive relief).

Given the lengthy history of constitutional violations arising out of the State's various education tax schemes, the plaintiffs urge the Court to act swiftly in curing the above-described constitutional infirmities. See Doc. 50 at 18–19 (quoting Claremont III, 143 N.H. at 158, for proposition that “[a]bsent extraordinary circumstances, delay in achieving a constitutional system is inexcusable”); see also Doc. 61 at 12–14 (noting plaintiffs first sought preliminary injunctive relief in October 2022). For its part, the State urges the Court not to “impose any remedy that disrupts the current municipal budget cycle,” arguing that if any remedy is warranted, “it would be far less disruptive for the remedy to become effective with the next budget cycle, which will commence in late-2023 and culminate in budget votes in March or April 2024.” Doc. 57 at 20. In addition, the State maintains that because the legislature repealed any statutory authority for remitting excess SWEPT revenues to the education trust fund, the Court should order those funds held in escrow pending further legislative action. See id.⁶

The parties' arguments implicate important considerations regarding the roles of the respective branches of State government. See Londonderry I, 154 N.H. at 163. The Supreme Court's respect of those roles has led it to “demure[]” each time the court “has been requested to define the substantive content of a constitutionally adequate public education” Id. However, as the Londonderry I court recognized, “the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and,

⁶ The Coalition's filings do not directly address the issue of an appropriate remedy. See Docs. 53; 63.

in the absence of action by other branches, a judicial remedy is not only appropriate but essential.” Id. (citing Petition of Below, 151 N.H. 135 (2004)).

In light of the substantial guidance that can be gleaned from the jurisprudence discussed above, the plaintiffs are understandably frustrated by the manner in which the State is currently administering the SWEPT. However, any immediate remedy which impacts the current budget cycle will necessarily have a far greater impact on the Coalition’s members and other similarly-situated communities than on the State. See Doc. 60 (Aff. Lindsey Stepp) ¶ 20 (explaining prospective remedy would allow affected communities to consider this change “when building their next budgets”). While those communities also could have benefitted from the guidance discussed above, the Court recognizes that it may have been impractical or imprudent for communities to collect a surplus of tax revenue before the Court ruled on the merits of the relevant constitutional issues. On the other hand, the Court is mindful that communities which do not generate excess SWEPT funds or offset the SWEPT with negative local tax rates continue to shoulder an unfair burden as it relates to the State’s adequacy aid obligations.

Having considered all of the relevant facts and circumstances, the Court concludes that the following remedy strikes the appropriate equitable balance:

Beginning with the upcoming budget cycle (i.e., the budget cycle the State characterizes as commencing “in late-2023” and culminating in “budget votes in March or April 2024,” Doc. 57 at 20), the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated by a community which exceed the amount of adequacy aid to which that community is statutorily entitled must be remitted to the

DRA. While the Court declines to direct that the State place such revenue in a particular fund, the Court reiterates that such funds must be used for the exclusive purpose of satisfying the State's adequacy aid obligations.

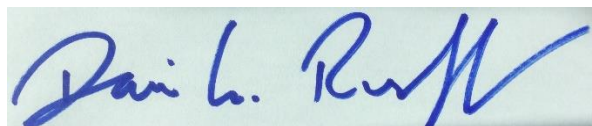
Conclusion

Consistent with the foregoing, the Court concludes that by administering the SWEPT in a manner which allows communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates, the State has violated Part II, Article 5 of the State Constitution. Accordingly, the plaintiffs' motion for partial summary judgment as to this issue (Doc. 49) is **GRANTED**, and the cross-motions filed by the State (Doc. 56) and the Coalition (Doc. 53) are **DENIED**. Beginning with the budget cycle commencing in late-2023 and culminating in budget votes in March or April 2024, the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated in excess of the adequacy aid to which any community is statutorily entitled must be remitted to the DRA, and thereafter used for the exclusive purpose of satisfying the State's constitutional adequacy aid obligations.

Lastly, given the timing of this Order and the fact that the Court is contemporaneously releasing an order in Contoocook Valley School District, et al. v State of New Hampshire, finding the current base adequacy amount unconstitutional, the deadline to file a Motion to Reconsider is extended to 30 days.

SO ORDERED.

Date: November 20, 2023



Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 11/20/2023

21

49

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON PENDING MOTIONS CONCERNING SWEPT CLAIMS

In this case, the plaintiffs challenge the manner in which the State carries out education-related obligations imposed by the State Constitution. See Doc. 17 (Pls.' Am. Compl.). On November 20, 2023, the Court granted the plaintiffs' motion for partial summary judgment, concluding that certain practices concerning the Statewide Education Property Tax ("SWEPT") are unconstitutional, and enjoining the State from continuing those practices "[b]eginning with the budget cycle commencing in late-2023 and culminating in budget votes in March or April 2024[.]" See Doc. 86 (the "SWEPT Order"). The State now moves for a stay of the SWEPT Order pending appeal. See Doc. 91. To expedite the appellate process, the State also seeks a ruling that the SWEPT Order constitutes a final decision on the merits. See Doc. 92 (the "Rule 46(c) Request"); see also Super. Ct. R. 46(c). The Coalition, an intervenor representing certain New Hampshire cities and towns, joins in the State's motions, see Doc. 93, and moves for partial reconsideration of the SWEPT Order, see Doc. 94. The plaintiffs object to reconsideration and the requested stay, but assent to the Rule 46(c) Request. See Doc. 95. After review, the Court finds and rules as follows.

Background

The SWEPT Order includes a detailed summary of New Hampshire’s education funding jurisprudence. See Doc. 86 at 2–9. To the extent relevant, that summary is incorporated by reference here. By way of brief background, “Part II, Article 83 of the State Constitution imposes a duty on the State to . . . define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.” Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) (“ConVal”) (citations and quotations omitted). Pursuant to Part II, Article 5 of the State Constitution, “constitutional taxes” must “be proportionate and reasonable—that is, equal in valuation and uniform in rate.” Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) (“Claremont II”) (citations and quotations omitted)).

Over time, the legislature has crafted several tax schemes aimed at complying with the above-described constitutional obligations. See, e.g., id. In resolving questions regarding those tax schemes, the New Hampshire Supreme Court has also clarified the nature of the State’s constitutional obligations. In Claremont II, for example, the court explained that because taxes intended to raise education funds serve a “State purpose”—i.e., fulfilling the State’s duty “to provide a constitutionally adequate education . . . and to guarantee adequate funding”—such taxes must be “proportional and reasonable throughout the State in accordance with” Part II, Article 5. Id. at 469–70 (emphasis added). The supreme court reaffirmed this ruling in Opinion of the Justices (School Financing), concluding that a proposed “special abatement” intended to offset excess tax revenues—that is, education tax revenues generated by a given community above the amount necessary for that same community “to provide the legislatively

defined ‘adequate education’ for its children”—would run afoul of Part II, Article 5. 142 N.H. 892, 899–902 (1998). One year later, the Supreme Court tripped down on the requirement that education tax schemes be uniformly applied, concluding that the State could not perpetuate the unconstitutional application of such a tax via a five-year phase-in of the uniform tax rate. Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999) (“Claremont III”).

Today, RSA 198:40-a, II, sets forth the annual per-pupil cost of providing the opportunity for a constitutionally adequate education (“adequacy aid”). The State raises adequacy aid funds via the SWEPT. See ConVal, 174 N.H. at 159. Since 2011, the State has allowed communities that raise SWEPT revenues above their respective adequacy aid levels to retain the excess. See Laws 2011, 258:7 (eff. July 1, 2011) (eliminating requirement that communities pay excess SWEPT funds to Department of Revenue Administration (“DRA”) for deposit in education trust fund). For certain other locations, the DRA has set negative local education tax rates to offset the applicable SWEPT rate. See Doc. 86 at 10. In December of 2022, the plaintiffs successfully moved for summary judgment with respect to their claim that both practices result in an effective SWEPT tax rate that is not uniform, in violation of Part II, Article 5. See Doc. 50 (Pls.’ Mem. Law) at 3, 14; Doc. 86 (SWEPT Order) at 15–16 (“[T]here can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities”); id. at 16–18 (emphasizing that public education system benefits entire State, and concluding that “setting of negative local education tax rates which offset the SWEPT . . . runs afoul of Part II, Article 5”). As a result, the Court enjoined the State from continuing either practice. See id. at 21.

Analysis

As noted at the outset, the State and the Coalition have filed several motions concerning the SWEPT Order. See, e.g., Doc. 94. The Court will first address the Coalition's motion for partial reconsideration. See id. Notably, this motion does not challenge the substance of the legal rulings set forth in the SWEPT Order, but rather the remedy provided in response to those rulings. See id. In particular, the Coalition suggests that an immediate suspension of the practices at issue—i.e., allowing communities to retain excess SWEPT funds or to avoid such an excess via negative tax rates—will cause substantial hardship to those communities that have benefitted from these unconstitutional practices for the past twelve years. See id. at 2. In addition, the Coalition argues that it would be too disruptive to adjust local budgets in response to the SWEPT Order at the current stage of that process. See id. at 3–6 (arguing this shift will result in voter confusion and prevent communities from completing important projects). Given these concerns, the Coalition argues that the “public interest and balance of harms” weigh against injunctive relief. See id. at 7–8 (noting excess SWEPT funds would be held in escrow pending appeal, and citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 534 (1987) in support of claim that if enjoined party “would suffer injury” and injunction “does not remedy” plaintiffs’ harm, “injunction should be denied”).

This is not the first time the Coalition has raised these concerns. Rather, the Coalition voiced substantially similar concerns in connection with a November 28, 2022 hearing on the plaintiffs’ request for preliminary injunctive relief. See Doc. 41 (Coalition’s Obj. Pls.’ Mot. TRO & Prelim. Injunct.). At that stage of the proceedings, the Coalition argued that the “mere” fact that the plaintiffs’ “constitutional rights . . . have

been allegedly violated” did not amount to irreparable harm. See id. at 4. Moreover, in comparing the plaintiffs’ claimed injuries to the potential fiscal impact on Coalition members, the Coalition took the position that the relevant harms were “obviously one-sided[.]” Id. at 6. Significantly, however, that view was premised on the Coalition’s perception that preliminary injunctive relief would put “dozens of communities in ‘crisis’ and facing a million-dollar deficit in sixty days.” Id.

In denying the plaintiffs’ request for preliminary injunctive relief, the Court was persuaded by the Coalition’s time-based arguments, noting:

The Court in no way wishes to minimize the significance of the plaintiffs’ claimed constitutional injuries. Nevertheless, the Court cannot ignore the substantial, immediate, and concrete harm that the Coalition members and their constituents would suffer if the Court were to grant the plaintiffs’ request for preliminary injunctive relief. Because the Commissioner [of the DRA] is responsible for carrying out the State’s education funding scheme, the Court cannot fault the Coalition members for relying on the Commissioner’s years-long practice of allowing them to retain excess SWEPT funds or offset their respective SWEPT rates.

Doc. 48 (Dec. 5, 2022 Order) at 11; see UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (explaining that in exercising discretion concerning requests for injunctive relief, courts consider circumstances of each case and apply principles of equity).

In the Court’s view, however, the equitable scales have shifted. As an initial matter, the Court remains both unpersuaded and deeply troubled by the characterization of the plaintiffs’ injuries as a “mere” violation of their constitutional rights. See Doc. 41 at 4; see also Doc. 94 at 7–8 (arguing plaintiffs “will not gain any benefit from” injunction because excess SWEPT revenues will be held in escrow pending appeal). New Hampshire Supreme Court Rule 42E requires that every attorney admitted to practice law in New Hampshire “take and subscribe an oath to

support the constitutions of New Hampshire and of the United States.” Further, as the Claremont III court recognized, “[t]he New Hampshire Constitution is the supreme law of this State,” and “[e]very person chosen governor, councilor, senator, or representative in this State is solemnly committed by oath taken pursuant to Part II, Article 84 to ‘support the constitutions’ of the United States and New Hampshire.” 143 N.H. at 158. Against that backdrop, the Court concludes that although the plaintiffs will not sustain an immediate fiscal benefit from the disgorged funds, they will derive significant benefit from injunctive relief that cures the above-described constitutional violations.

In weighing that benefit against the concerns raised by the Coalition, the Court notes that the Coalition has now been involved in this litigation for well over a year. In addition, having reached the merits of the plaintiffs’ Part II, Article 5 SWEPT claims, the Court is persuaded that the clarity of the relevant legal landscape should have inspired Coalition members to plan for the fiscal impacts of the SWEPT Order during the pendency of this action. See, e.g., Opinion of the Justices (School Financing), 142 N.H. at 899–902 (concluding “special abatement” intended to offset excess education tax revenues would run afoul of Part II, Article 5). As the Court previously recognized, it might have been imprudent or impractical for communities to collect additional tax revenues during prior budget cycles in anticipation of the rulings set forth in the SWEPT Order. See Doc. 86 at 20. Given the substantial jurisprudence supporting the plaintiffs’ claims, however, it would have been both prudent and practical for those communities to consider the fiscal impact of the plaintiffs’ SWEPT claims when planning for this budget year. See Doc. 50 at 1–3 (explaining plaintiffs moved for partial summary judgment in December of 2022 so communities could plan for “next property tax year”).

In the Court's view, any failure to prepare for the foreseeable suspension of unconstitutional practices does not justify the continuation of those practices. See Claremont III, 143 N.H. at 158 ("Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable. The legality of the education funding system in this State has been questioned for at least the past twenty-seven years The controlling legal principles are plain."); see also Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1270 (11th Cir. 2012) (citing Aesop, "The Ant and the Grasshopper," Aesop's Fables Together with the Life of Aesop 115 (Rand McNally 1897) in support of proposition that if people are "wise like Aesop's ant, during the summer and autumn of their lives they store up something for the winter"). Accordingly, the Coalition's motion for partial reconsideration is **DENIED**.

In moving for a stay of the injunctive relief set forth in the SWEPT Order, the State and the Coalition raise similar arguments concerning the wisdom of directing the DRA to collect excess SWEPT funds and hold them in escrow pending appeal. See Docs. 91, 93. For the reasons outlined above, those arguments are unavailing. In addition, the State also maintains that holding excess SWEPT funds in escrow will prove overly complicated. See Doc. 91 ("The DRA will have to segregate those excess funds by local jurisdiction and . . . account for excess SWEPT that municipalities were unable to collect"). The Court is, again, unpersuaded. The DRA is well-versed in determining tax revenues to be collected from individual communities, and tracking amounts collected and owed. The Court is thus confident that the DRA can readily devise a system for recording the amount of excess SWEPT revenues generated by and collected from individual communities while this matter is pending appeal. To the

extent any communities fail to remit the requisite level of excess SWEPT revenues, the Court is similarly confident that the DRA can follow existing protocols to obtain the missing amounts or offset them through other means.¹

Consistent with the foregoing, the motions seeking a stay of the remedy set forth in the SWEPT Order pending appeal are **DENIED**.

The final pending SWEPT motion is the State's Rule 46(c) Request. See Doc. 92; see also Super. Ct. R. 46(c). Rule 46(c)(1) provides:

When, in a civil action that presents more than one claim for relief . . . , the court enters an order that finally resolves the case as to one or more, but fewer than all, claims . . . , the court may direct that its order . . . be treated as a final decision on the merits as to those claims . . . if the court:

- (A) explicitly refers to this rule;
- (B) identifies the specific order or part thereof that is to be treated as a final decision on the merits;
- (C) articulates the reasons and factors warranting such treatment; and
- (D) finds that there is an absence of any just reason for delay as to the party or claim that is to be severed from the remainder of the case.

As noted at the outset, all parties assent to the State's Rule 46(c) Request. See Docs. 93–94. Upon review, the Court agrees that the relief requested in that filing is warranted. In particular, while the SWEPT Order pertains to the manner in which the DRA collects education tax revenues from local communities, see Doc. 92 ¶ 2, the plaintiffs' remaining claims concern the sufficiency of the education funding the State provides to local communities. See id. ¶¶ 2–3. Those issues implicate distinct legal

¹ The State and the Coalition seemingly suggest that the DRA cannot compel communities to collect or remit excess SWEPT revenues. The Court views this suggestion with extreme skepticism. Though the Court has heard no evidence concerning this issue, the Court would be surprised to learn that communities collect and remit State taxes on a purely voluntary basis. Rather, common sense suggests that the DRA has mechanisms in place to enforce the tax scheme, perhaps by offsetting uncollected or improperly retained amounts via a reduction in State grants or aid. If the State wishes to further contest the DRA's authority in this context, it may file a timely motion for reconsideration, following which the Court will schedule an evidentiary hearing regarding this narrow issue.

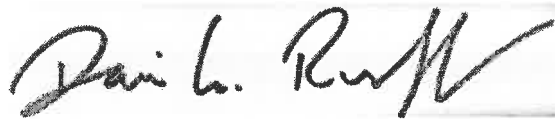
questions. Moreover, given the compelling interests involved, there is no just reason to delay appeal of the SWEPT Order. Accordingly, the State's Rule 46(c) Request is **GRANTED**. See Doc. 92. The Court thus directs that the SWEPT Order is to be treated as a final decision on the merits with respect to the plaintiffs' Part II, Article 5 challenge to the administration of the SWEPT. See Super. Ct. R. 46(c)(1).

Conclusion

Consistent with the foregoing, the Coalition's motion for partial reconsideration is **DENIED**. See Doc. 94. The State's motion for a stay of the injunctive relief set forth in the SWEPT Order, see Doc. 91, and the Coalition's joinder in that motion, see Doc. 93, are also **DENIED**. As set forth above, if the State wishes to contest the DRA's authority to enforce the relevant aspects of the tax scheme, it may file a timely motion for reconsideration, following which the Court will schedule an evidentiary hearing concerning that narrow issue. Finally, the State's Rule 46(c) Request is **GRANTED**. See Doc. 92.

SO ORDERED.

Date: February 20, 2024



Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 02/20/2024