

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2024-121

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
ROCKINGHAM COUNTY SUPERIOR COURT

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**BRIEF FOR THE APPELLANTS**

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THE STATE OF NEW HAMPSHIRE,  
NEW HAMPSHIRE DEPARTMENT OF EDUCATION,  
GOVERNOR SUNUNU, and COMMISSONER EDELBLUT

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(Fifteen Minute Oral Argument Requested)

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## ISSUES PRESENTED

1. Whether the court erred in denying the defendants' motion for summary judgment. (App.I 3-14.)<sup>1</sup>
2. Whether the court erred in denying the defendants' motion *in limine* to exclude the testimony of Dr. Rizzo-Saunders, Dr. Bruce Baker, and plaintiffs' non-retained experts. (App.I 15-35.)
3. Whether the trial court erred in granting the plaintiffs' request for declaratory judgment deeming RSA 198:40-a, II(a) facially unconstitutional. (App.I 36-91.)
4. Whether the trial court erred in granting injunctive relief "insofar as the Court has established a conservative minimum threshold of \$7,356.01 which base adequacy aid funding must exceed." (App.I 36-91.)
5. Whether the trial court erred by not interpreting RSA 193-E:2-a, I, and the specific regulations applicable to it to identify what cost items are not included in the statutory definition of an adequate education as a matter of law and legislative intent before determining as a matter of fact thereafter what cost items are included in that definition based on the statutory and regulatory language used. (App.I 36-91; App.III 199-257, 509-566.)
6. Whether a plaintiff can bring a Part II, Article 83 challenge to a single portion of a statutory education-funding methodology to the

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<sup>1</sup> Record citations are as follows: "App.I," "App.II," and "App.III" refer to Appendix Volumes I, II, and III. Volume I contains the appealed decisions. Volume II contains the relevant constitutional, statutory, and regulatory provisions. Volume III contains other relevant pleadings and filings. The transcript of the bench trial is cited "Tr."

exclusion of other portions of the same methodology and to the exclusion of other statutory funding mechanisms through which the State provides money to support public education. (App.I 36-91; App.III 199-257, 509-566.)

7. Whether the trial court erred in allowing the plaintiffs to challenge only RSA 198:40-a, II(a) as facially unconstitutional, as opposed to the entire costing formula in RSA 198:40-a, II, per RSA 198:40-a, III. (App.I 36-91; App.III 199-257, 509-566.)

8. Whether the plaintiffs presented sufficient evidence to show that RSA 198:40-a, II(a) is facially unconstitutional. (App.I 36-91; App. III 509-556.)

9. Whether the trial court's injunction order and subsequent direction that "the State" begin paying millions of unappropriated dollars to public school districts violates the separation of powers and this Court's education-funding decisions. (App.I 36-91; 92-104.)

10. If this Court's education funding decisions allow a single trial court judge to define and cost an adequate education under Part II, Article 83, and to impose that cost on state taxpayers, whether those decisions should be overruled as unworkable, non-justiciable, and a violation of the separation of powers. (App.III 196, 544-547.)

11. Whether the trial court erred in awarding the plaintiffs' reasonable attorney's fees. (App.I 89-91.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The relevant constitutional, statutory, and regulatory provisions are contained in Appendix Volume II.

## **STATEMENT OF THE CASE AND THE FACTS**

The plaintiffs, originally several school districts and three Contoocook Valley School District (“ConVal”) board members, sued the defendants in 2019 alleging that RSA 198:40-a, II(a) was unconstitutional on its face and as-applied under Part II, Article 83 of the State Constitution. The trial court expedited the proceeding, declared RSA 198:40-a, II(a) unconstitutional as-applied, and granted the plaintiffs summary judgment. The defendants appealed. This Court reversed and remanded. *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021) (“*Contoocook*”).

On remand, the plaintiffs amended their complaint to add additional school districts. App.III 3-29. Discovery followed. The parties cross-moved for summary judgment. The defendants argued that the plaintiffs could not bring a challenge under Part II, Article 83 only to a component part of a statutory education-funding methodology (the base per pupil amount, RSA 198:40-a, II(a)), but must challenge the entire methodology. App.III 198-229. The defendants also argued that the plaintiffs could not prove their claim because they developed no evidence showing that the per-pupil cost in RSA 198:40-a, II(a) fails to fund the statutory definition of the adequate educational program the Legislature adopted through RSA 193-E:2-a, I. App.III 198-229. The defendants argued that RSA 193-E:2-a must be interpreted using traditional statutory construction tools to discern what general cost items the Legislature intended to include in it before the cost of that definition could be discerned. App.III 198-229. The defendants also explained that RSA 198:40-a is clear that its formula costs only the adequate educational program defined in RSA 193-E:2-a, I.

The trial court denied the motion. App.I 3-14. It ruled that the plaintiffs could bring a constitutional challenge to just RSA 198:40-a, II(a), and that any additional amounts the State provided in funding were irrelevant to its analysis. App.I 3-14. It further ruled that questions of fact existed for the case to go to trial. App.I 3-14.

The defendants moved *in limine* to preclude the plaintiffs' experts from testifying at trial. App.III 454-493, 583-815. The defendants contended that none of these experts employed a methodology showing that RSA 198:40-a, II(a) fails to cost the adequate educational program the Legislature agreed to pay for through RSA 193-E:2-a. App.III 454-493, 583-815. Instead, one expert, Dr. Kimberly Rizzo-Saunders, superintendent of the ConVal school district, operated from cost inputs contained in a 2018 Joint Legislative Commission report related to a bill that was never enacted into law. App.III 478-493. Another expert, Dr. Bruce Baker, operated from a student-achievement model rather than an inputs-based analysis focused on the cost of the education program defined in RSA 193-E:2-a. App.III 454-477. And none of the other school district representatives who would purport to testify as experts grounded their testimony in the statutory definition contained in RSA 193-E:2-a. App.III 454-493, 583-815. The trial court denied these motions. App.I 15-35.

The trial court granted, however, the plaintiffs' motion *in limine* excluding the introduction at trial of evidence related to funding figures other than RSA 198:40-a, II(a), including funding figures contained in the other subparts of RSA 198:40-a, II. App.I 15-35. In that order, the trial court compared its function to that of a legislative committee, receiving

data and hearing testimony from various stakeholders to determine the cost of an adequate education. App.I 20.

At trial, the plaintiffs relied on testimony from Dr. Rizzo-Saunders and Dr. Baker. Tr.26-487. Dr. Rizzo Saunders opined on the cost of an adequate education by replacing the cost values for certain inputs included in a 2018 Joint Legislative Commission report with cost values of her own. *See, e.g.*, Tr. 301-302, 313-315. She testified that she did not believe the cost units in the report reflected real-world conditions. Tr. 15-16, 39-41, 46-49, 286, 289-290, 302-303, 364, 444. She testified that she arrived at her own cost values by calling a small number of plaintiff-affiliated school officials that she personally knew before ultimately choosing ConVal's own actual expenditures for each input because she believed they reflected "the most conservative real-world cost." Tr. 324-337, 426-434. Dr. Rizzo-Saunders did not provide an expert report to support her analysis. Tr. 52-53, 189. Dr. Rizzo-Saunders opined that the cost of an adequate education is \$9,929 per pupil excluding transportation costs. Tr. 147.

Dr. Baker also offered an opinion on the cost of an adequate education. Tr. 878-1026. Dr. Baker conducted his analysis in support of an unsuccessful attempt to convince the Legislature to adopt a new funding methodology different from RSA 193-E:2-a, I. Tr. 894-896. Dr. Baker testified that he conducted an outputs-based analysis focused on student achievement rather than an inputs-based analysis focused on the cost of an adequate education as defined in RSA 193-E:2-a. Tr. 942-944, 993-997. Dr. Baker acknowledged that New Hampshire students do well nationally and that the statewide assessment he used to generate his opinion showed that the average New Hampshire student generally achieved above state

proficiency. Tr. 972-974. Dr. Baker did not attempt to review the curriculum, programs, or expenditures of New Hampshire schools to determine whether schools are providing instruction or other services beyond what the State Constitution or state law requires. Tr. 973-974. Dr. Baker opined that the cost of an adequate education is \$9,964 per pupil excluding transportation. App. 910.

Nearly all the plaintiffs' other witnesses were current or former school-district officials affiliated with the plaintiffs. None of them testified that their school districts were failing to provide an adequate education, and many acknowledged that they were providing an education that exceeded constitutional adequacy. *See, e.g.*, Tr. 224, 231, 402, 545, 1061-1062, 2155. While these witnesses generally expressed a view that the cost of an adequate education is what a school district actually spends, they did not agree, however, on what falls within the definition of an adequate education, with some witnesses taking the view that everything a school district does falls within the definition and others testifying that certain programs such as driver's education and athletics are not within the definition. *See, e.g.*, Tr. 769-770, 816-817, 828, 836, 860, 1521, 1637-1638, 1667, 1674-1675, 1677-1678, 1700, 1733-1735, 1782, 1790, 1927, 1958-1959, 2346-2347, 2349. Nearly all these witnesses testified that they could not provide an adequate education, as they defined it, solely on the base per-pupil amount in RSA 198:40-a, II(a). *See, e.g.*, Tr. 178, 495, 687, 705, 770, 1029, 2099-2100. None of these witnesses conducted any independent analysis to support their conclusions; some relied on Dr. Rizzo-Saunders's model, others disagreed with the inputs Dr. Rizzo-Saunders used in that model, and none had any independent knowledge of how Dr. Rizzo-

Saunders arrived at her opinion, *See, e.g.*, Tr. 787, 816-817, 850, 1461-1462, 1530-1531, 1790-1791, 2045, 2205, 2304, 2354, 2372.

On cross-examination, none of these school district witnesses could identify what their school district spent on the individual learning areas set forth in RSA 193-E:2-a, I. *See, e.g.*, Tr. 588-598, 746-747, 796-803, 810, 814, 827-828, 836, 1044-1045, 1576, 2019-2020, 2055. Rather, they consistently testified that they do not maintain their books and records in this way.

The defendants called witnesses from the Department of Education to explain how the State's education-funding system works. Mark Manganiello of the Bureau of Finance Administration discussed the various sources of funding that school districts receive and explained that all this funding is unrestricted. Tr. 1398-1411. He also testified that school districts *could* set up their general ledgers to track expenditures by subject area, and that the New Hampshire Financial Accounting Handbook for Local Education Agencies explains how to do so. Tr. 1421-1438. Commissioner Frank Edelblut testified about the Minimum Standards for Public School Approval set forth in N.H. Admin. R. PART 306 ("Ed 306") and explained that only those portions of Ed 306 that correspond with the specific learning areas in RSA 193-E:2-a, I(a) require General Court approval under RSA 193-E:2-a, IV(a). Tr. 1078-1181, 1351-1385.

The defendants also called two experts—Dr. Robert Costrell and Dr. Jay Greene. Dr. Costrell is a Professor of Education Reform and Economics and holds the Endowed Chair in Education Accountability at the University of Arkansas. Tr. 1189. He has extensively conducted research and published on school funding, and from 1999 to 2006 he served for three

governors of Massachusetts, including as policy research director and chief economist. Tr. 1189-1199. Dr. Greene is a Senior Research Fellow in the Center for Education Policy at the Heritage Foundation, which he joined after many years in academia. Tr. 2223. He likewise has extensively researched and published papers and books related to education policy, including education funding. Tr. 2225-2233.

Dr. Costrell testified that there are four recognized models for determining the cost of an adequate education. Tr. 1211-1218. He testified that he did not believe these models to be reliable, but noted that some courts had recognized and employed them. Tr. 1211-1218. He testified that Dr. Baker's analysis was ostensibly based on the "cost-function" model, considered to be the least reliable of the four models. Tr. 1216-1218. He explained in detail why Dr. Baker's analysis deviated so far from standard econometric practice that it resulted in nothing more than an assessment of what school districts spend to achieve certain results, not what those results cost. Tr. 1216-1297. He further explained how Dr. Baker engaged in a process called "p-hacking," a process by which a model is run in different ways in an effort to produce a result with a statistical significance that corresponds with the accepted standard of reliability. Tr. 1221-1222, 1244-1245.

Dr. Greene testified that Dr. Rizzo-Saunders's opinion was not reliable because it was not the result of a wide-ranging, transparent, deliberative process that incorporated a diverse range of perspectives. Tr. 2237-2238. Dr. Greene observed that Dr. Rizzo-Saunders's process bore little resemblance to the process the Joint Legislative Oversight Committee on Costing an Adequate Education conducted in 2007 and 2008. Tr. 2240-

2251. Dr. Greene further observed that there was no meaningful way to replicate Dr. Rizzo-Saunders's analysis, Tr. 2285, and that there was no basis to conclude that the inputs she used reflected the minimum values necessary to achieve constitutional adequacy, Tr. 2240-2258.

The parties submitted post-trial briefing and argument. App.III 509-566. In their brief, defendants reiterated that the plaintiffs could not bring a challenge under Part II, Article 83 only to RSA 198:40-a, II(a). App.III 515-518. The defendants also contended that the plaintiffs had failed to prove their claim as a matter of law because none of their witnesses tethered their opinions or testimony to the definition of an adequate education the Legislature adopted in RSA 193-E:2-a. App.III 518-544. The defendants argued that, if the plaintiffs wanted to bring cost items that were not in RSA 193-E:2-a into the case, then the trial court had to consider funding sources beyond RSA 198:40-a, like extraordinary need grants, RSA 198:41, I(c), because RSA 198:40-a is clear that it is costing only the substantive education program defined in RSA 193-E:2-a. App.III 518-544. The defendants also argued that granting the plaintiffs the relief they should would violate the separation of powers. App.III 544-566.

On November 20, 2023, the trial court issued its merits order, declaring RSA 198:40-a, II(a) facially unconstitutional. App.I 36-91. In its order, the trial court did not interpret RSA 193-E:2-a, I; it merely cited the statute and then determined what items it believed were part of an adequate education based on its view of the evidence. App.I 36-91. The trial court also entered injunctive relief. App.I 36-91. It determined that an adequate education costs at least \$7,356.01 per pupil as a base figure—a total increase of \$537,550,970.95 per year in state funding—while suggesting

that amount itself was likely unconstitutional. App.I 36-91. The trial court also granted the plaintiffs attorneys' fees under the substantial-benefit theory. App.I 36-91.

The trial court declined to reconsider or stay its order pending appeal, clarifying instead that it was directing "the State" to pay the additional amounts it had ordered while this appeal was pending. App.I 92-104. This Court subsequently stayed the trial court's order, and the defendants timely appealed.

## **SUMMARY OF THE ARGUMENT**

This Court's precedents do not contemplate allowing litigants to challenge a subpart of an education costing or funding methodology as unconstitutional under Part II, Article 83. Part II, Article 83 is concerned holistically with whether the children in this State are receiving an adequate education, which the evidence indicates they are. RSA 198:40-a also specifies that it is intended to cost the adequate educational program defined in RSA 193-E:2-a and that the figures it generates, not just the figure in RSA 198:40-a, II(a), are intended to cost that obligation. RSA 198:40-a, III. By permitting the plaintiffs to challenge solely RSA 198:40-a, II(a) as unconstitutional, the trial court ignored this Court's precedents, ignored RSA 198:40-a, III, and improperly inserted itself into the Legislature's policymaking function.

The trial court compounded this error by failing to interpret RSA 193-E:2-a and the specific Part Ed 306 regulations that apply to it to determine as a matter of law what cost items the statutory definition includes and excludes, before determining as a matter of fact what the cost of the included cost items are. The trial court relied instead entirely on what a series of school-officials testified that their districts paid for and what they consequently felt or believed the definition of an adequate education should encompass. The problem with this approach is that the Legislature, not the school districts, get to define an adequate education, and the State must pay only for what the Legislature has defined.

The trial court's approach resulted in the trial court comparing an unsustainably narrow amount of state funding—only the funding

appropriated under RSA 198:40-a, II(a)—against a broad concept of adequacy untethered from the legislative definition. It resulted in the trial court admitting expert testimony it should have excluded because none of that expert testimony operated from the statutory definition of an adequate education and unreliable. On this basis, the trial court declared RSA 198:40-a, II(a) facially unconstitutional. And from this foundation, the trial court built its own funding structure and imposed it on the State through a mandatory injunction that the trial court acknowledged would require an additional \$537,550,970.95 in unappropriated funding.

This result constitutes an egregious violation of the separation-of-powers doctrine. If upheld by this Court, this ruling would constitute an unprecedented transfer of power from the Legislature to the Judiciary by allowing a single trial judge to effectively define an adequate education and through an injunction appropriate and spend more than half-a-*billion* dollars in state taxpayer funds without any approval or oversight. The trial court's ruling finds no support in this Court's precedents or the structure of our State Constitution. Indeed, if those precedents support what the trial court did here, then the right to an adequate education is nonjusticiable and should be declared as such in this case.

This Court should therefore reject the trial court's analysis and reverse its judgment.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN FINDING RSA 198:40-A, II(A) FACIALLY UNCONSTITUTIONAL.**

The plaintiffs challenge the constitutionality of RSA 198:40-a, II(a), a single variable in one part of the education-funding methodology the State uses to meet its constitutional obligations under Part II, Article 83.

The constitutionality of a statute “is a question of law” that this Court reviews *de novo*. *Contcoocook*, 174 N.H. at 161. “In reviewing a legislative act,” this Court “presume[s] it to be constitutional and will not declare it invalid except on inescapable grounds.” *Id.* This Court “will hold a statute to be constitutional unless a clear and substantial conflict exists between it and the constitution.” *Id.* “When doubt exists as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.” *Id.* “The party challenging a statute’s constitutionality bears the burden of proof.” *Id.*

Part II, Article 83 “imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding.” *Contoocook*, 174 N.H. at 156 (quoting *Claremont School District 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.* (internal quotations omitted).

**A. The Trial Court Erred in Considering The  
Constitutionality of Only One Variable of a Single  
Education-Funding Methodology.**

Adequate education grants are funded in accordance with RSA 198:41. Under this statute, an adequate education grant is computed as follows:

- (a) Add the per pupil cost of providing the opportunity for an adequate education for which each pupil is eligible pursuant to RSA 198:40-a, I-III, and from such amount;
- (b) Subtract the amount of the [statewide education property tax (“SWEPT”)] ... for the next tax year; and
- (c) Add the municipality’s extraordinary need grant pursuant to RSA 198:40-f.

RSA 198:40-a is but one variable in this funding methodology. And the statute challenged here—RSA 198:40-a, II(a)—is but one variable in *RSA 198:40-a’s* costing methodology.

RSA 198:40-a is designed to determine only “the annual cost of providing the opportunity for an adequate education as defined in RSA 193-E:2-a.” RSA 198:40-a, II(a)-(d) contains a formula for determining the cost of the educational program contained in RSA 193-E:2-a. “The sum total calculated under [RSA 198:40-a, II] shall be the cost of an adequate education.” RSA 198:40-a, III. This total is increased by two percent annually. RSA 198:40-d, I.

In their motion for summary judgment and their post-trial memorandum, the defendants argued that the plaintiffs could not bring a challenge under Part II, Article 83 to just RSA 198:40-a, II(a), while

ignoring the other unrestricted funds school districts receive through their adequate education grant, the other subparts of RSA 198:40-a, II, and other statutes. The trial court disagreed, granted a motion *in limine* to preclude evidence of other funding, and ultimately declared “RSA 198:40-a, II(a) unconstitutional on its face.” App.I 15-35, 91.

The trial court’s orders ignored the unambiguous text of RSA 198:40-a, III. And rather than analyze whether the total amount of funding the State provides underwrites the cost of an adequate education, it instead used Part II, Article 83 to micromanage a legislative costing formula. RSA 198:40-a, III makes clear that the *total* amount provided to a school district under RSA 198:40-a, II(a)-(d) is meant to cost the adequate educational program defined in RSA 193-E:2-a. RSA 198:40-a, II(a) does not purport to fund the educational program contained in RSA 193-E:2-a, I, on its own. Furthermore, extraordinary need grants are used to help meet the State’s adequate education funding obligations under RSA 198:41, I, and those targeted funds are provided to municipalities “[i]n addition to aid for the cost of the opportunity for an adequate education provided under RSA 198:40-a.” RSA 198:40-f, I.

The trial court instead expressed a view that the Legislature *must* appropriate a single per-pupil amount of “base adequacy” that covers the cost of an adequate education statewide. *See, e.g.*, App.I 40-41. This approach amounts to judicial policymaking. *See Sirrell v. State*, 146 N.H. 364, 369 (2001) (explaining that the judiciary’s “task is neither to establish educational policy nor to determine the appropriate mechanism for its funding”). This Court has “never ruled that constitutional adequacy requires a uniform expenditure per pupil throughout the State.” *Opinion of the*

*Justices (Reformed Pub. Sch. Fin. Sys.)*, 145 N.H. 474, 478 (2000). To the contrary, this Court has observed that “the cost of a constitutionally adequate education may not be the same in each school district” and that “[t]he constitution mandates statewide adequacy—not statewide equality.” *Id.*

The trial court suggested that even if it considered the additional amounts provided to school districts under RSA 198:40-a, II(b)-(d), these amounts would not meaningfully affect its analysis. App.I 40-41 & n.4. This conclusion is unsound, lacks sufficient evidence, is dictum, and should carry no weight. The trial court permitted the plaintiffs to challenge only RSA 198:40-a, II(a). The trial court then *precluded* the parties from fully introducing into evidence funding that school districts receive from other sources. This shaped how the parties prepared for and tried the case, the evidence they introduced, and the arguments they made. While some evidence of funding beyond RSA 198:40-a, II(a) seeped into evidence, the trial court had already ruled that this funding was not “relevant” to its analysis. App.I 38-31. The parties therefore were precluded from having a full and fair opportunity to develop this issue in a way that would permit proper resolution of the issue.<sup>2</sup>

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<sup>2</sup> The trial court’s suggestion that any additional amounts school districts received would be *de minimis* is also in tension with the evidence that was presented. For example, there was evidence presented that, during FY2021, Berlin received \$12,071,097.80 in total education grants from the State and that it had an average of 1,013.46 students in the ADMR. *See* Pls.’ Ex. 678 at 1, 12. This equates to a total per-pupil amount of \$11,910.78 in state funding, which is nearly three times the amount provided under only RSA 198:40-a, II(a).

The plaintiffs' sole focus on the validity RSA 198:40-a, II(a) was therefore misplaced. Because the plaintiffs proceeded only on this theory, their claim fails as a matter of law, and the defendants' motion for summary judgment should have been granted. Failing that, the trial court should have entered judgment for the defendants at the close of the plaintiffs' case-in-chief or after trial. The trial court's refusal to do either was legal error, and for this reason alone its judgment for the plaintiffs should be reversed.

**B. The Trial Court Failed to Interpret The Statutory Definition of an Adequate Education Under RSA 193-E:2-a.**

In *Londonderry Sch. Dist. v. State* (“*Londonderry*”), this Court required the Legislature to define an adequate education with specificity so the State's costing and funding obligation could be objectively determined. *See* 154 N.H. 153, 162 (2006) (“Whatever the State identifies as comprising constitutional adequacy it must pay for.”). The Legislature complied by enacting RSA 193-E:2-a. In doing so, the Legislature “embraced its duty to define the opportunity for a constitutionally adequate public education for every child in the state.” Laws 2007, 270:1, I. It found “that the opportunity for a constitutionally adequate education in New Hampshire consists of the substantive education programs from kindergarten through twelfth grade that deliver essential opportunities to acquire skills, competencies, and knowledge in the subject areas of English/language arts and reading, mathematics, science, social studies, the arts, world languages, technology, information and communication technologies, health, and physical education.” Laws 2007, 270:1, II.

The Legislature “found that an adequate education shall provide every child in New Hampshire with the opportunity to receive these substantive education programs in accordance with the specific criteria and high standards for such educational programs that are set forth in the applicable school approval standards.” *Id.* In this regard, “[t]he opportunity for an adequate education includes a range of services, educational supports, and instructional resources.” *Id.*

The Legislature “reviewed the standards for public school approval and the state’s curriculum frameworks.” Laws 2007, 270:1, IV. “As part of its review,” the Legislature “determined which of the standards and curriculum frameworks provide the opportunity for an adequate education.” *Id.* “In analyzing the school approval standards and curriculum frameworks,” the Legislature “recognized that they were developed with the widespread participation of educators, business people, government officials, community representatives, and parents.” *Id.* “As a result of the quality of both the standards and the frameworks,” the Legislature “identifie[d] the standards in RSA 193-E:2-a and the curriculum frameworks that support those standards as the specific criteria for an adequate education.” *Id.*

RSA 193-E:2-a currently sets forth the following “specific criteria and substantive educational program that deliver the opportunity for an adequate education”:

- (1) English/language arts and reading.
- (2) Mathematics.
- (3) Science.

- (4) Social studies, including civics, government, economics, geography, history, and Holocaust and genocide education.
- (5) Arts education, including music and visual arts.
- (6) World languages.
- (7) Health and wellness education, including a policy for violations of RSA 126-K:8, I(a).
- (8) Physical education.
- (9) Engineering and technologies including technology applications.
- (10) Personal finance literacy.
- (11) Computer Science.

RSA 193:2-a, I(a). The statute requires teachers to “use academic and applied instruction to teach the learning areas” identified above and to integrate “(1) Computer use and digital literacy”; and (2) “Logic and rhetoric” into the learning areas. RSA 193:2-a, I(b).

RSA 193-E:2-a, IV(a) provides that “the minimum standards for public school approval<sup>3</sup> for the areas identified in [RSA 193-E:2-a, I] shall constitute the opportunity for the delivery of an adequate education.” The State Board of Education (“State Board”) has promulgated the “Minimum Standards for Public School Approval” through Ed 306. That regulation

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<sup>3</sup> The statute defines “minimum standards for public school approval” to mean “the applicable criteria that public schools and public academies shall meet in order to be approved schools, as adopted by the state board of education through administrative rules.” RSA 193-E:2-a, VI(a).

contains the “minimum standards for public school approval” for each of the specific learning areas identified in RSA 193-E:2-a, I(a):

- (1) English/language arts and reading is substantively defined in N.H. Admin R. Ed. 306.37;
- (2) Mathematics is substantively defined in N.H. Admin. R. Ed 306.43;
- (3) Science is substantively defined in N.H. Admin. R. Ed. 306.45;
- (4) Social Studies instruction is substantively defined in N.H. Admin. R. Ed. 306.46;
- (5) Arts education is substantively defined in N.H. Admin. R. Ed. 306.31(a);
- (6) World languages is substantively defined in N.H. Admin. R. Ed. 306.48;
- (7) Health education is substantively defined in N.H. Admin. R. Ed 306.40(b);
- (8) Physical education is substantively defined in N.H. Admin. R. Ed. 306.41(b);
- (9) Engineering and technologies is substantively defined in N.H. Admin. R. Ed. 306.47;
- (10) Personal finance literacy is substantively defined in N.H. Admin. R. Ed. 306.33(a)(4)(c); and
- (11) Computer science is substantively defined in N.H. Admin. R. Ed 306.44.

The language of these subsections of Ed 306, when given its plain and ordinary meaning, reasonably covers instruction and assessment,

materials and supplies including technology, and teacher development as a matter of law. For example, Ed 306.37, which defines the learning area for English/Language Arts and Reading, contains three subparts governing elementary, middle, and high school. N.H. Admin. R., Ed. 306.37(a)-(c). Each subpart describes the instruction that students should receive, the opportunities that should be provided for students to develop skills, the skills students should be encouraged to develop, and how the development should be assessed. *See id.* These regulations become more particularized at the high school level. *See id.* The subsections of Ed 306 that correspond with the other learning areas set forth in RSA 193-E:2-a, I(a) reflect a similar focus and particularization.

This legal regime objectively identifies and defines the substantive educational program that delivers the opportunity for an adequate education in sufficient detail for “the citizens of this state ... [to] know what the parameters of that educational program are ...” *Londonderry*, 154 N.H. at 161. “[T]he State’s obligations to fund the cost of a constitutionally adequate education begin and end,” *id.*, with this substantive educational program.

It is this substantive educational program that the Legislature has funded through RSA 198:40-a. Yet, the trial court never conducted this threshold legal analysis to determine what items are in and out of the legislative definition as a matter of law so it could then determine as a matter of fact the cost of the instruction and assessment, the materials and supplies including technology, and the teacher development for the learning areas in the statute.

The trial court instead determined what falls within an adequate education based on the testimony of school-district witnesses. The trial court found as a matter of fact “that school districts devote few if any classroom instruction costs (i.e., teacher salaries and benefits, instructional materials, etc.) to pursuits that fall outside the content areas set forth in RSA 193-E:2-a.” App.I 45-46. The trial court likewise concluded that there is no material difference between “relevant actual costs” that school districts spend “and those that are constitutionally necessary.” App.I 47-48. The trial court found that the State is required under Part II, Article 83 to pay for facilities, transportation, nurse services, principal services, and custodial services, App.I 36-91, though none of those can be found in RSA 193-E:2-a or the regulations associated with the learning areas listed therein.

This Court’s precedents make clear that these conclusions cannot be reached without first determining what the Legislature intended RSA 193-E:2-a to cover. In *Londonderry*, this Court explained that without “a substantive definition of constitutional adequacy,” it is “impossible ... to know where the State’s obligations to fund the cost of a constitutionally adequate education begin and end.” 154 N.H. at 161. Likewise, in *Contoocook*, this Court observed that “it is ‘impossible’ to address the plaintiffs’ costing argument without first determining what is required to deliver an adequate education as *defined in the statute.*” 174 N.H. at 166 (emphasis added).

The trial court eschewed this necessary threshold statutory and regulatory analysis because it assumed that there is a meaningful distinction between the substantive educational program defined in RSA 193-E:2-a

and the *opportunity* for an adequate education. The assumption is incorrect. The educational program defined in RSA 193-E:2-a is what delivers the opportunity for an adequate education to students. The use of the term “opportunity” in the statutes reflects this. *See* RSA 193-E:1-:2-b, :3-a-:3-e. This Court has referred to the “opportunity for an adequate education” in the same way. In *Londonderry*, this Court observed that “developing the specific criteria of an adequate education” requires the Legislature “to decide what is to be *taught* in the public schools in order to provide the *opportunity* to acquire” the skills then mandated by statute. 154 N.H. at 160 (emphasis added). The Court observed that the Legislature must adopt a definition of an adequate education that is sufficiently clear “to determine the adequacy of the ‘opportunity’ being afforded.” *Id.* Likewise, this Court in *Contoocook* observed that the Legislature enacted RSA 193-E:2-a, “setting forth the substantive educational program to deliver the opportunity for an adequate education in kindergarten through twelfth grade.” 174 N.H at 157.

The word “opportunity” to describes the substantive educational program that provides an “opportunity” for students to obtain an adequate education if they apply themselves. It has *not* been used to suggest that the State’s funding obligations extend beyond the legislatively defined educational program to reach any ancillary items that a school district might need to operate a school. The trial court’s apparent assumption otherwise was error.

**C. RSA 193-E:2-a Does Not Include Transportation, Facilities, Custodial Services, Nurse Services, Superintendent Services, Principal Services, or Administrative Assistant Services.**

The trial court found that Part II, Article 83 requires the State to pay for transportation, facilities, custodial services, nurse services, principal services, and administrative assistant services. App. I 52-65. The trial court suggested that Part II, Article 83 may also require superintendent services but could not reach a conclusion based on the evidence presented. App. I 65-66. None of these costs fall within RSA 193-E:2-a.

RSA 193-E:2-a, I(a) and the relevant subsections of Ed 306, when given their “plain and ordinary meaning,” *Caron*, 175 N.H. at 544, do not cover, as a matter of law, transportation, facilities operation and maintenance, and administrative items like nursing services, superintendent services, principal services, administrative assistant services, and custodial services. These items are not referenced in RSA 193-E:2-a, I, or the relevant regulatory text, but rather in *other* statutes or regulations.

Transportation is addressed in RSA 189:6. Under this statute, school districts must “furnish transportation to pupils in kindergarten through grade 8 who live more than 2 miles from the school to which they are assigned,” while leaving it to school-district discretion whether to “furnish transportation” for other pupils. RSA 189:6.

School building aid is addressed in RSA 198:15-a through :15-hh; kindergarten construction aid in RSA 198:15-r through :15-t; public school infrastructure grants in RSA 198:15-y; cooperative school district aid in RSA 198:18; area school aid in RSA 198:19; and special aid to small area

school in RSA 195-A:11. The requirements for school facilities are set forth in Ed 306.09 and custodial and maintenance services are addressed in Ed 306.07. Neither of these provisions corresponds with the learning areas listed in RSA 193-E:2-a, I.

No state statute or regulation requires a school district to employ a school nurse; the decision is local and discretionary. *See* RSA 200:27 (“The local board in each school district may provide school health services to include school nurse services and school physician services to every child of school age in the district as hereinafter provided.”). School health services are addressed in RSA 200:27-:41. The State Board has addressed school health services through Ed 306.12 and Ed 311.

Superintendent services are addressed in RSA 194-C:5, the duties of school principals are set forth in Ed 304, and neither the plaintiffs nor the trial court ever identified any statute or regulation addressing administrative assistants.

As a matter of basic statutory and regulatory construction, the definition of an adequate education the Legislature adopted in RSA 193-E:2-a does not incorporate any of these items. The trial court erred in concluding otherwise.

**D. The Trial Court Erred in Not Excluding The Plaintiffs’ Expert Opinions.**

Before trial, the defendants moved *in limine* to exclude all of the plaintiffs’ disclosed experts. App.III 454-493; 583-815. The trial court denied these motions, App.I 15-35, and then credited those experts’ opinions as to the cost of an adequate education in ruling for the plaintiffs, App.I 36-91. This was error.

“To be admissible, ... expert testimony must cross a threshold of reliability.” *State v. Keller*, 2024 N.H. 43, ¶ 19. “To determine the reliability of expert testimony, the trial court must apply RSA 516:29-a,” which “codifies the four ... factors” set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Keller*, 2024 N.H. 43, ¶ 19. Under the first factor, a court must determine “whether the expert’s opinions were supported by theories or techniques that have been or can be tested.” *Id.* ¶ 23 (cleaned up). Next, a court must determine “whether the expert’s methodology has been subjected to peer review and publications.” *Id.* ¶ 27. Third, a court must determine “whether the expert’s theories or techniques have a known or potential rate of error.” *Id.* ¶ 29 (cleaned up). Finally, a court must determine “whether the expert’s theories or techniques are generally accepted in the appropriate scientific literature.” *Id.* ¶ 31.

The trial court should have excluded all of the plaintiffs’ experts because none of them tethered their opinions to the definition of an adequate education the Legislature adopted through RSA 193-E:2-a. “[W]hen an expert witness’ statement of the law is incorrect, that view of the law cannot be relied upon to support the verdict.” *Integra Lifesciences I, Ltd. v. Merck KGaA*, 496 F.3d 1334, 1342 (Fed. Cir. 2007).

Dr. Rizzo-Saunders based her expert opinion on a calculation of the cost of an adequate education incorporating numerous items—including superintendents, principals, administrative assistants, nurses, facilities, and transportation, App.I 49-65—that do not fall within RSA 193-E:2-a.

Dr. Baker did not base his analysis on RSA 193-E:2-a; whereas the Legislature adopted an inputs-based method to define and cost an adequate education under RSA 193-E:2-a and RSA 198:40-a, Dr. Baker conducted

an outputs-based calculation focused on student achievement, attendance, and graduation metrics and then assumed that everything a school district spends money on is designed to achieve adequacy. Tr. 942-944, 993-997.

The plaintiffs' remaining "non-retained" experts offered nothing more than a cumulative series of conclusory statements as to what they believed should comprise an adequate education without regard for the statutory definition or regulatory language.

Because none of these experts operated from the legislative definition of an adequate education, their testimony was necessarily unreliable and not methodologically sound, and should have been excluded.

Similarly, none of the plaintiffs' experts employed "theories or techniques [that] are generally accepted in the appropriate scientific literature." *Keller*, 2024 N.H. 43, ¶ 31. Dr. Costrell testified that there are four recognized methods for determining the cost of an adequate education. Tr. 1211-1218. Justice Duggan recognized the existence of these methods in his concurrence in *Londonderry*. 154 N.H. at 168 (Duggan, J., concurring). In this case, however, only Dr. Baker conducted an analysis that was ostensibly based on one of these models, and Dr. Costrell testified that the model he employed is considered to be the least reliable of the four models before explaining in detail how Dr. Baker engaged in p-hacking and ultimately conducted an analysis that deviated so far from standard econometric practice that it resulted in nothing more than an assessment of what school districts spend to achieve certain results, not what those results actually cost. Tr. 1216-1297. The trial court did not credit Dr. Baker's testimony in its merits order beyond viewing it as a "useful benchmark."

App.I 68-70. And of the other experts even purported to employ one of these recognized models.

Dr. Rizzo-Saunders opinion was also unreliable because she based several of the cost values used in her calculation on ConVal's own costs, which she simply decided were "the most conservative real-world costs" after calling a small number of plaintiff-affiliated school officials. Tr.324-337, 426-434. She produced no report and acknowledged that her methodology had not been peer reviewed. Tr. 52-53, 189. The plaintiffs never offered any known or potential rate of error for her theories or techniques. Moreover, as Dr. Greene testified, Dr. Rizzo-Saunders's analysis was not reliable and could not be meaningfully replicated because it was not the result of a wide-ranging, transparent, deliberative process that incorporated a diverse range of perspectives. Tr. 2237-2238, 2240-2251, 2285.

None of the plaintiffs' other non-retained "experts" conducted any independent analysis, let alone one that satisfies the *Daubert* factors.

The trial court therefore erred in not precluding the plaintiffs' experts from testifying at trial.

**E. The Plaintiffs Failed to Prove That RSA 198:40-a, II(a) is in Clear Conflict With The Constitution.**

The plaintiffs also failed to prove a clear conflict between RSA 198:40-a, II(a) and the State Constitution. In its order, the trial court assigned the following per-pupil costs to items it believed the State must fund:

- Teachers (including salary and benefits): \$3,157.34 per pupil;

- Principals: \$262 per pupil;
- Administrative assistants: \$115 per pupil;
- Guidance counselors: \$182 per pupil;
- Library/media specialists: \$123 per pupil;
- Technology coordinators: \$121 per pupil;
- Custodians: \$98 per pupil;
- Nurse services: \$294 per pupil;
- Instructional materials: \$300 per pupil; and
- Technology: \$100 per pupil.

App.I 71-77. The trial court concluded the plaintiffs had defeated any presumption that RSA 198:40-a, II(a) is constitutional because the sum of these amounts—\$4,752.34 per pupil—exceeds the \$4,100 per pupil provided under the statute. App.I 76-77.

But the trial court’s calculation includes several items—principals, administrative assistants, custodians, and nurses—that are not within RSA 193-E:2-a for the reasons discussed above. When those items are removed, the total is instead \$3,988.34 per pupil, and any conflict between RSA 198:40-a, II(a) and Part II, Article 83 vanishes.

The separate calculation the trial court conducted when determining the amount of “base adequacy funding” to impose upon the State does not change this outcome. In that calculation, the trial court used a per-pupil teacher cost of \$3,981.01 instead of \$3,157.34. App.I 79-89. The difference in these amounts is attributable to the trial court’s rejection of student-teacher ratios the Legislature found to be appropriate in 2008. App.I 81-82. Whereas the Legislature adopted class sizes of 1:25 for kindergarten

through second grade and 1:30 for third grade through eighth grade, the trial court determined that these ratios should instead be 1:18.75 and 1:22.50 based on a view that “it is inappropriate to use maximum class sizes” in its calculation because “school districts cannot fill every classroom to maximum capacity,” and due to “market demands,” and “the requirements of a teaching position.” App.I 81-82.

The trial court’s reasoning does not justify its lack of deference to the Legislature. The question is not whether, as a matter of public policy, the ratios used by the Legislature should better reflect the “reality” of day-to-day operations of a school, but rather whether the plaintiffs have demonstrated that it is impossible to deliver the substantive educational program comprising constitutional adequacy using the ratios the Legislature adopted. Under this proper framing, the plaintiffs did not come close to meeting their burden.

The undisputed evidence demonstrated that several school districts operate with *average* class sizes in line with the ratios the Legislature used. J. Ex. 476. The evidence also reflected that school districts do not uniformly make choices to maximize their class sizes or student-teacher ratios and that many choose to impose their own class-size limits below the limits set in Ed 306.17. *See, e.g.*, Tr. 403-406. The evidence further reflected that many districts—including ConVal, which as of October 21, 2021 had an *average* class size of 28.3 students, J. Ex. 476—could increase their average class sizes or student-teacher ratios by consolidating elementary schools or implementing other efficiencies, but have chosen not to do so at a local level. Tr. 403-406, 414-415. There was therefore no evidentiary basis for the trial court to conclude that the State Constitution

*requires* lower class sizes or student-teacher ratios than what the Legislature adopted in 2008.

Nor is it clear that a conflict exists between RSA 198:40-a, II(a) and Part II, Article 83, even using the trial court's preferred ratios. When those ratios are used to generate an increased per-pupil teacher cost, but all infrastructure and administrative items that do not fall within the definition are excluded, the total amount is \$4,807.01 per pupil. But this amount does not *exclude* any instruction and materials in learning areas that are not part of the statutory definition of an adequate education, including career and technical education, *see* N.H. Admin R. Ed 306.20; "career education," N.H. Admin R. Ed. 305.35; "family and consumer science education," N.H. Admin R. Ed. 306.38, or in electives that the trial court recognized may go beyond adequacy, App.I 46-47. It also incorporates the cost of a two-person health plan even though single-person plans exist and some teachers opt out of the health plan altogether. Tr. 330-339, 361-366. And it assumes an 86% employer contribution to health premiums even though there was no evidence presented at trial that this was the lowest percent contribution a school district could make to provide an adequate education.

In other words, this calculation is not the lowest adequate figure the trial court could have found. The trial court did not identify, and the record does not reveal, what portion of this calculation covers things that are not constitutionally mandated. Thus, even under the plaintiffs' own framing of their claim, it is not "beyond all reasonable doubt," *Hynes v. Hale*, 146 N.H. 533, 535 (2011), that a "substantial conflict exists between [RSA 198:40-a, II(a)] and the constitution." *Contoocook*, 174 N.H. at 161.

## II. THE TRIAL COURT’S RULING VIOLATES THE SEPARATION OF POWERS.

The trial court declared RSA 198:40-a, II(a) facially unconstitutional and granted the plaintiffs’ request for injunctive relief “insofar as the [trial court] established a conservative minimum threshold of \$7,356.01 which base adequacy funding must exceed.” App.I 91. The trial court subsequently directed the State to pay that amount—more than half-a-billion dollars in annual unappropriated funds—immediately. App.I 92-104. These rulings violate the separation-of-powers doctrine.

The separation of powers is violated when “the power exercised [by one branch] so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.” *N.H. Health Care Ass’n v. Governor*, 161 N.H. 378, 394 (2011) (citation and quotation marks omitted). “The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be subject to the control or supervision of the other.” *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904).

In declaring RSA 198:40-a, II(a) facially unconstitutional, the trial court usurped the Legislature’s policymaking function. It ignored the clear statutory directive that “[t]he sum total calculated under [RSA 198:40-a, II] shall be the cost of an adequate education.” RSA 198:40-a, III. It also failed to interpret and apply RSA 193-E:2-a—the statutory definition of an

adequate education. Instead, by its own admission,<sup>4</sup> the trial court believed it could act as a legislative committee of one and create a new definition of an adequate education based solely on what school district witnesses believe is required to run a school. This Court has made clear, however, that judges are “not appointed to establish educational policy, nor determine the proper way to finance its implementation.” *Claremont II*, 142 N.H. at 475.

The trial court’s mandatory injunction is even more egregious. New Hampshire follows “the rule which exempts the legislature from the control of the court.” *Sherburne*, 72 N.H. at 541. “The New Hampshire Constitution specifically charges the legislative branch with appropriating and the executive branch with spending state revenue ....” *N.H. Health Care Ass’n.*, 161 N.H. at 387. The trial court’s injunction plainly “subject[s]” the Legislature “to the control or supervision” of the court. *Sherburne*, 72 N.H. at 541.

The trial court explained that its injunction “establishes clear, minimum guidelines by which courts can swiftly measure future legislative action. If the legislature’s response ... falls short of the threshold, an

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<sup>4</sup> The trial court observed that “the process underlying the 2008 [Joint Committee] Report ... is strikingly similar to the Court’s experience in presiding over the trial in this matter: i.e., considering substantial data from diverse sources and viewpoints in order to determine an appropriate amount of base adequacy aid.” App.I 66 n.16. This statement fails to appreciate that an adversarial judicial proceeding where the presentation of facts is fiercely guarded by advocates and controlled by the Rules of Evidence differs starkly from the legislative process. The trial here bears no resemblance to the legislative process under which the current education-funding regime was developed and adopted. *See* App.III 534-535 (detailing that process).

aggrieved party may seek prompt declaratory relief without the need for protracted litigation.” App.I 99-100. In other words, future legislation containing a lower figure would not come to court with the requisite presumption of constitutionality and will instead be prejudged as unconstitutional because the Legislature failed to follow the trial court’s “minimum guidelines.” The separation-of-powers doctrine does not permit the Judiciary to superintend the Legislature in this way. *See Sherburne*, 72 N.H. at 541; *see also Piper v. Meredith*, 109 N.H. 328, 330 (1969) (“The Court properly denied the injunction as it had no power to interfere with proposed legislative action.”).

The trial court’s injunction also constitutes an enormous, unconstitutional appropriation of taxpayer dollars. The trial court itself appropriated more than \$500 million *annually* and the State to execute it. The Judiciary does not have the authority to appropriate state revenues; that power lies with the Legislature. *N.H. Health Care Ass’n.*, 161 N.H. at 387. By directing that “the State” spend more than \$500 million annually in a particular way for a particular purpose, the trial court plainly usurped the Legislature’s power over the purse. The Judiciary also lacks the authority to spend State money and cannot compel the Governor to exercise that power with respect unappropriated taxpayer revenue under the State Constitution. N.H. Const. Pt. II, Art. 56; *see N.H. Health Care Ass’n.*, 161 N.H. at 387 (“Pursuant to Part II, Article 56, the executive branch may expend public funds only to the extent, and for such purposes, as they may have been appropriated by the legislature.”).

This Court’s school-funding precedents do not countenance anything like what the trial court did here. In *Claremont II*, this Court recognized

that “[d]ecisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing a means by which public education is to be supported.” *Id.* at 476-77. Thus, even though the Court found the funding system at issue in that case to be unconstitutional, it let the system “remain in effect through the 1998 year” so the legislature could be given “a reasonable time to effect an orderly transition to a new system.” *Id.* This Court took a similar approach in *Londonderry*, providing the Legislature until the end of the 2007 fiscal year to define an adequate education. 154 N.H. at 162.

The trial court should have taken the same approach here. The present education funding regime was enacted in 2008 and remained in place for a decade without challenge until this lawsuit in 2018. This lawsuit constitutes the first challenge to a subpart of a particular costing formula. At its core, this case is not about students failing to receive an adequate education. The school districts are providing at least, if not more than, an adequate education. New Hampshire’s education rankings reflect this as well. This case is instead about the proper allocation of funding between the State and its municipalities, an inherently political issue that the Legislature may resolve in a myriad of different ways. Deference under this circumstance should have been the rule, and the trial court erred in acting otherwise.

### **III. THE TRIAL COURT’S ANALYSIS RENDERS CLAIMS UNDER PART II, ARTICLE 83 NONJUSTICIABLE.**

The justiciability doctrine requires that a court be able to resolve a claim without making initial policy determinations of the kind left beyond

judicial discretion or without expressing a lack of due respect to the coordinate branches of government. *Richard v. Speaker of the House of Representatives*, 175 N.H. 262, 267-68 (2022). There must also be a judicially discoverable and manageable standard for resolving the claim. *Id.*

After concluding in *Claremont I* that Part II, Article 83 places an affirmative duty on the State to provide an adequate education, this Court declined to “define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor.” 138 N.H. at 192. In *Claremont II*, this Court observed that, “in the first instance, it is the legislature’s obligation ... to establish educational standards that comply with constitutional requirements.” 142 N.H. at 472. In *Londonderry*, this Court observed that “without a substantive definition of constitutional adequacy, it will remain *impossible* for ... courts ... to know where the State’s obligations to fund the cost of a constitutionally adequate education begin and end.” 154 N.H. at 161 (emphasis added)

These statements at least implicitly reflect that without clear standards governing the parameters of the right to an adequate education, claims under Part II, Article 83 are not justiciable. The trial court’s analysis here is incompatible with this Court’s precedents for the reasons already discussed and should be reversed. If, however, those precedents contemplate what the trial court did in this case, then they should be overruled as contrary to the justiciability doctrine.

The trial court sat as a de facto single-person legislative committee and determined what the State must fund and how much funding it must provide based solely on its view of interested witness testimony. It then took the extraordinary step of imposing those determinations on its co-

equal branches of government through a mandatory injunction, which it refused to stay pending legislative action or this appeal. At each of these steps, the trial court engaged initial policymaking determinations that this Court has left to the Legislature and failed to properly respect the Legislature's choices in favor of its own.

The trial court also adopted a boundless and unworkable standard. By failing to construe and apply the statutory definition of an adequate education the Legislature adopted, the trial court made the cost of an adequate education dependent on the beliefs of self-interested school district witnesses and the vagaries of litigation. The trial court's own merits order reflects this. While the trial court found the plaintiffs had proven that several items (including facilities maintenance and operations and transportation) were part of an adequate education, it faulted the plaintiffs for failing to present sufficient evidence to demonstrate that superintendent services and food services fall within that definition. App.I 65-66. Likewise, while the trial court expressed skepticism that \$7,356.01 is enough to fund an adequate education, it concluded that the plaintiffs had not presented sufficient evidence to justify a higher amount. App.I 88-89.

The trial court's approach completely untethers the right to an adequate education from any objective, definitional standard. This threatens to embroil the judicial branch in a perpetual cycle of school-funding litigation. It also leaves it "impossible for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the State's obligations to fund the cost of a constitutionally adequate education begin and end." *Londonderry*, 154 N.H. at 161.

The defendants do not read this Court's precedents to support (much less compel) the analytical approach the trial court adopted in this case. If they do, however, then there is no judicially discoverable and manageable standard against which to assess the right to an adequate education, and this Court's education-funding jurisprudence should be overruled as nonjusticiable.

The doctrine of *stare decisis* is "not binding on a constitutional question" and is only "compelling when [an] earlier case: (1) was joined by a strong majority of the court; (2) has been repeatedly and consistently accepted and applied by the court that decided it; and (3) was considered with special care." *Brannigan v. Usitalo*, 134 N.H. 50, 53 (1991) (cleaned up). No decision from this Court has yet endorsed the trial court's analysis, has repeatedly or consistently accepted or applied the trial court's approach, or considered that approach with special care. *Stare decisis* thus poses no obstacle to concluding that the trial court's approach is nonjusticiable. Nor would it pose any obstacle to overruling this Court's education-funding jurisprudence more generally if the Court determines for the first time in this appeal that its existing case law requires a trial court usurp the legislative and executive functions in the manner the trial court did here.

#### **IV. THE TRIAL COURT ERRED IN AWARDING THE PLAINTIFFS ATTORNEYS' FEES.**

The trial court awarded the plaintiffs attorneys' fees under the substantial-benefit theory. Because the trial court erred in ruling for the plaintiffs on the merits, its award of fees was also error.

## **CONCLUSION**

For the reasons stated above, this Court should reverse the trial court's judgment in its entirety.

**ORAL ARGUMENT REQUEST & CERTIFICATION**

The State respectfully requests a 15-minute oral argument in this case to be provided by Solicitor General Anthony J. Galdieri.

A copy of the superior court orders appealed from are contained in Appendix Volume I of this brief.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE,  
NEW HAMPSHIRE DEPARTMENT  
OF EDUCATION, GOVERNOR  
SUNUNU, and COMMISSIONER  
EDELBLUT

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**CERTIFICATE OF COMPLIANCE**

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,500 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 19<sup>th</sup>, 2024

/s/ Anthony J. Galdieri  
Anthony J. Galdieri

**CERTIFICATE OF SERVICE**

I, Anthony J. Galdieri, hereby certify that a copy of the State's brief shall be served on, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 19<sup>th</sup>, 2024

/s/ Anthony J. Galdieri  
Anthony J. Galdieri