

STATE OF NEW HAMPSHIRE
Superior Court
Rockingham, ss.
Case No. 215-2022-CV-00167

Steven Rand, et al., Plaintiffs

v.

The State of New Hampshire, Defendant

PLAINTIFFS' REPLY TO THE STATE'S POST-TRIAL BRIEF

I. STANDING

This Court determined nearly two years ago that Plaintiffs had legal standing to pursue their claims in this case. *See* Order on Mot. for Prelim. Injunctive Relief, Mot. to Intervene, and Mot. for TRO at 6-8, December 5, 2022, Doc. No. 48 [hereinafter Order of Dec. 5, 2022]. Nonetheless, the State, in its post-trial brief, has now decided to relitigate this issue. In doing so, the State relies in large part on the recent case of *Richard v. Governor*, 2024 N.H. 53. The legal principles from that case, however, actually reinforce this Court's prior conclusion that the six individual and two corporate property-owner plaintiffs have standing. Plaintiffs continue to suffer a clear "injury in fact" by being forced to pay education property tax rates at indisputably higher and disproportionate rates to help meet the State's constitutional obligation to pay for an adequate education for our state's public-school students. This injury is traceable to the actions of the State. Plaintiffs have "an actual, not hypothetical dispute, which is capable of legal redress." *Id.* ¶ 8 (citations omitted).

A substantial portion of the nominally “local” education taxes Plaintiffs pay are in fact state taxes that local school districts must impose to fill the gap between the State’s current adequacy funding and the actual cost of even the most frugally calculated adequate education. The imposition of these *de facto* state taxes at higher rates in Plaintiffs’ communities as part of the operation of the State’s school funding tax system causes the kind of manifest and incontrovertible legal and actual harm to Plaintiffs that Part II, Article 5 of the New Hampshire Constitution was intended to prevent.

Plaintiffs have standing under two overlapping bodies of New Hampshire law on this issue. First, they are individuals or LLCs that are taxpayers suffering from a specific flaw in the operation of the education property tax system that causes them to pay a higher, unequal and unfair tax burden, as comprehensively laid out in the *Claremont II* decision and other tax-related cases. Second, they have “taxpayer standing” beyond their individual status as taxpayers under Part I, Article 8, and the recent case law on standing, which permits challenges to some spending and policy decisions.

A. Plaintiffs Have Standing Because They Are Suffering Actual Continuing Harm From Paying Higher Tax Rates to Pay For Adequacy Than Taxpayers in Property Wealthy Towns.

“[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress.” *Teeboom v. City of Nashua*, 172 N.H. 301, 307 (2019) (citation omitted). “All that is required for standing purposes is that the alleged injury be ‘fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.’” *Id.* at 309 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs meet this standard. The State’s failure to reasonably fund

educational adequacy under RSA 198:40-a forces Plaintiffs to pay property taxes at higher rates to meet the State’s duty to fund a constitutionally adequate education than property owners in property-wealthy school districts. Thus, the actual injury suffered by Plaintiffs is fairly—in fact directly—traceable to the State’s actions. *See Teeboom*, 172 N.H. at 309 (“We conclude that [the plaintiff] has demonstrated the requisite causal connection between his injury — increased property taxes — and the claimed violation — the adoption of a budget based upon an impermissible spending cap calculation — sufficient to confer standing.”).

Like the school district plaintiffs in *Contoocook Valley Sch. Dist. v. New Hampshire*, No. 213-2019-cv-00069 (“*ConVal*”), Plaintiffs in this case challenge the constitutionality of the levels of state adequacy funding set out in RSA 198:40-a. As Plaintiffs proved at trial, the failure of the State to pay for the true cost of constitutional adequacy, which violates Part II, Article 83 of the New Hampshire Constitution, forces local school districts to make up the difference between the State’s adequacy funding and the actual cost of providing an adequate education.¹ Because property wealth per student varies greatly from district to district, taxpayers like Plaintiffs who live in districts with less property wealth must pay nominally “local,” but, in reality, *state* education property taxes at highly unequal rates to raise the funds needed to fill in the gap caused by the State’s chronic failure to meet its obligations.² Because these de facto state taxes are imposed at

¹ In *ConVal*, this Court has already held that the State’s base adequacy level set by RSA 198:40-a was so low that it violated the mandate of Part II, Article 83. *See* Order at 55, *ConVal*, No. 213-2019-cv-00069 (Super. Ct. Nov. 20, 2023). At the trial in this case, Plaintiffs made a similar showing.

² Despite the State’s bold statement suggesting that municipalities are at fault for “improperly or unconstitutionally raising local education property taxes to help fund the State’s Part II, Article 83 obligation,” Plaintiffs’ injuries are directly traceable to the State, and not municipalities that are forced to fulfill the State’s obligation. *See* State’s Post-Trial Br. at 5.

higher rates, this system violates Part II, Article 5 of the State Constitution.³ See *Claremont v. Governor*, 142 N.H. 462, 468-470 (1997) (“*Claremont II*”) (holding that property taxes levied to meet the State’s duty under Part II, Article 83, are state taxes which must be imposed at uniform rates).

This harm to Plaintiffs is not “merely hypothetical” and it is not “abstract.” Instead, Plaintiffs and many other taxpayers in less property-wealthy communities across the state must pay “local” taxes to meet the State’s educational duty at higher rates than taxpayers in property-wealthy communities. Thus, a significant portion of these “local” taxes are, in truth, *state* taxes. In its *ConVal* ruling, this Court estimated that more than \$500 million in state revenue is needed to fill the gap in State adequacy funds, see Order at 1, *ConVal*, No. 213-2019-cv-00069 (Super. Ct. Nov. 20, 2023), which is now being met by these “local” property taxes assessed at unequal rates. As shown in the NH Department of Education’s 2022-2023 Spreadsheet “Valuations, Property Tax Assessments, and Tax Rates for School Districts,” Plaintiffs’ Exhibit 61-A, the disparate treatment (and financial harm) that the plaintiffs suffer from this unfair taxation is concrete and continuing:

- Plaintiff Steven Rand lives in Plymouth and paid “local” education taxes on his home and his business properties at the equalized rate of \$9.02 per thousand, while a property owner in nearby Holderness paid at a rate of \$4.57 per thousand.
- Plaintiff John Lunn paid an equalized “local” education tax on his home in Newport at the rate of \$10.66 per thousand while the rate in Hanover was \$7.19.
- Plaintiff James Lewis paid an equalized “local” education tax rate of \$14.37 per thousand on his home in Hopkinton, while a taxpayer in Sunapee paid an equalized “local” education rate of \$3.58 per thousand.
- Plaintiff Gabrielli Family Limited Partnership paid an equalized “local” education tax rate of \$12.49 on his family’s commercial property located in the Penacook

³ Contrary to the State’s implication in its Post-Trial Brief, at page 7, Plaintiffs do not challenge that portion of the local education tax rate that is assessed for educational expenses beyond adequacy.

section of Concord, while the rest of Concord paid a “local” education tax of \$10.22 per thousand.

- Plaintiffs Jessica Wheeler Russell and Adam Russell pay an equalized “local” education tax rate of \$12.49 on their home in Penacook, while a homeowner in Alton pays an equalized “local” education tax rate of \$3.20.⁴

The NH Department of Education Cost Per Pupil Report for 2022-2023, Plaintiffs’ Exhibit 56-A, shows that in each of these comparative examples, the property-wealthy district spent more per pupil on educating their children than the property-poor district, even though the tax rates were significantly higher in the property-poor district. For example, Hopkinton spent \$21,896 per pupil with an equalized local education tax rate of \$14.37, while Sunapee spent \$31,701 per pupil with an equalized local education tax rate of \$3.58. As part of the Merrimack Valley Regional School District, Penacook spent \$18,178 per pupil, with an equalized local education tax rate of \$12.49, but Alton spent \$24,795 with an equalized local education tax of \$3.20. It is clear, therefore, that the higher tax rates were not the result of higher spending, but a consequence of lower property wealth.

As these examples demonstrate, all local education taxes are raised with tax rates that are non-uniform and these rates are higher in the Plaintiffs’ school districts than in the higher-wealth districts in the state. *Any portion of adequacy* not paid with state funds is paid for through these nominally local taxes which are actually state taxes with disproportionately higher rates. Plaintiff Steven Rand in Plymouth paid an equalized local education tax rate of \$9.02, while taxpayers in the neighboring town of Holderness paid \$4.57. This means that for every dollar that the State’s

⁴ See the testimony of former Commissioner Kevin Clougherty who described in detail the equalization process and gave several examples of unequal tax rates.

calculation of the cost of adequacy is deficient, Steven Rand paid education taxes to pay for adequacy at nearly twice the rate as a Holderness taxpayer.

This is exactly the harm to taxpayers that the Supreme Court described in detail in *Claremont II* and found to be a violation of Part II, Article 5. *See Claremont II*, 142 N.H. at 467, 470. There can be no question that the ongoing disparate and unconstitutional treatment of taxpayers like Plaintiffs is a serious, continuous, and unjustifiable injury that gives rise to the legal standing to mount the legal challenge that this case embodies. Clearly the specific injury the Plaintiffs suffer in the instant case—injury that only those taxpayers from low-wealth districts in the state suffer—is wholly different than the “generalized wrong[s]” alleged in *Richard*, 2024 N.H. 53 at ¶ 24.

The State’s argument against Plaintiffs’ standing fails to recognize the interconnectedness of the Plaintiffs’ Article 83 claim (adequacy) and their Article 5 claim (tax). The State’s assertion that Plaintiffs “advance instead solely a shared interest among them that the State cost and fund public schools in a manner they believe would be proper and more in accordance with Part II, Article 83,” State’s Post-Trial Br. at 3, is incorrect, in part because an Article 83 claim is a prerequisite to an Article 5 claim. Multiple courts when reviewing these issues have explained that they cannot determine or even reach a plaintiff’s tax claim until adequacy is costed or defined. *See, e.g., Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 162 (2006) (“Because the definition of a constitutionally adequate education is essential to all other issues, including the cost of a constitutionally adequate education and the method by which to raise the necessary funds, we stay that portion of the case containing the trial court’s findings that the legislature has failed to determine the cost, failed to satisfy the requirement of accountability and established a non-uniform tax rate.”); Order on the State’s Motion to Dismiss and The Parties’ Cross-Motions for

Summary Judgment at 2, *ConVal*, No. 213-2019-CV-00069 (Super. Ct. July 6, 2019) (“Because the Court invalidates RSA 198:40-a, II(a), which is the starting point for the determination of the SWEPT contribution, the Court does not reach the merits of the Petitioners’ claim that the SWEPT is unconstitutional.”). Denying Plaintiffs standing to challenge the adequacy of state school funding would effectively preclude their ability to challenge the constitutionality of their tax rates. Such a result would render the constitutional protections of Part II, Article 5 hollow and completely unenforceable.

B. Plaintiffs Have Standing Under Part I, Article 8.

In recent years the right of taxpayers to challenge governmental decisions in court has been the subject of repeated litigation and an amendment to Part I, Article 8 of the New Hampshire Constitution. That provision now reads in relevant part:

The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

This Court relied on this provision in its earlier order determining that the Plaintiffs have standing. Citing the Supreme Court’s decision in *Carrigan v. N.H. Dep’t of Health & Hum. Servs.*, 174 N.H. 362, 372 (2021), this Court noted that “. . . the *Carrigan* court concluded ‘that a plaintiff relying upon Part I, Article 8 to establish standing must challenge a specific governmental action’ rather than a broad policy. *Id.* at 372.” Order of December 5, 2022 at 7. This Court ruled that the Commissioner of Revenue’s decisions to allow certain municipalities to retain excess SWEPT funds and to offset the SWEPT rate through negative local education tax rates constituted

“sufficiently-specific governmental action as to support a finding of standing under Part I, Article 8.” Order of December 5, 2022 at 8 (citing *Carrigan*, 174 N.H. at 372).

Beyond the SWEPT issues, Plaintiffs also have standing under Part I, Article 8 as interpreted in *Carrigan* to seek redress for injury they are suffering because they are required to pay higher tax rates than taxpayers in other towns to pay for the cost of adequacy. As this Court held when it considered the SWEPT claims, the facts in this case are readily distinguishable from those in *Carrigan*. That case was a broad-brush attack on the State’s entire policy and fiscal response to the problem of neglected or abused children. The plaintiff in that case did not assert that she suffered any personal harm and she did not challenge “the legality of any specific acts of [government] spending.” *Carrigan*, 174 N.H. at 374. In contrast, this case is not a broad challenge to the State’s substantive educational policy or the revenue sources the Legislature has chosen to fund a constitutionally adequate education. Instead, the Plaintiff taxpayers challenge the State’s deficient provision for the cost of adequacy pursuant to RSA 198:40-a, which leads to the imposition, on them as individuals, of disproportionately higher education tax rates, while other taxpayers in property-wealthy communities benefit from much lower rates in the funding of the State’s constitutional duty. The imposition of these unequal taxes is caused by one statute, RSA 198:40-a, which, as noted above sets a woefully insufficient adequacy cost, thereby forcing local school districts to pay for unpaid portion of adequacy cost through unequal “local” taxes. Plaintiffs are not challenging all aspects of the school funding system, but are focused on one unconstitutional statute which violates Part II, Article 83, and also precipitates a second constitutional violation, disproportionate tax rates, contrary to Part II, Article 5, that causes actual harm to the Plaintiffs.

The *Carrigan* court noted that the grant of standing was appropriate in a tax rate case similar to this one, in which Maine residents paying taxes on income earned in New Hampshire challenged the constitutionality of New Hampshire’s Commuters Income Tax. *See Carrigan*, 174 N.H. at 371 (citing *Austin v. State Tax Comm’n*, 114 N.H. 137, 138-39 (1974) (*rev’d on other grounds sub nom. Austin v. New Hampshire*, 420 U.S. 656 (1975))). Resolving Plaintiffs’ tax claims in this case does not require “[s]crutinizing the entire realm of a governmental body’s spending activity, on the other hand, to determine what aspects of its spending decisions, if any, are causing injury.” *Carrigan*, 174 N.H. at 374. Contrary to the absurd contention in the State’s Post-Trial Brief (at 6–7), Plaintiffs do not seek an “audit of the State through the court,” but rather relief from two specific constitutional violations that cause them continuing actual harm that stems from the State’s single decision to adopt a ridiculously deficient calculation of the cost of adequacy.

II. REBUTTAL TO CRITICISMS OF DR. FREEMAN’S TESTIMONY

In addition to its standing argument, the State puts forward several mischaracterizations that Plaintiffs have addressed on the record at trial and in Plaintiffs’ pre- and post-trial briefs; nevertheless, in the interests of accurately preserving their disputes with said arguments, Plaintiffs briefly correct the following.

A. Dr. Freeman’s Pittsfield Study is timely.

The State attempts to discredit Dr. Freeman’s Pittsfield Study and his trial testimony regarding that analysis by calling it a “six-year-old thought experiment.” *See State’s Post Trial Br.* at 41; *accord* at 43. The fact that it is six years old only strengthens its conclusions. Not only did Dr. Freeman conclude the minimal increase in Adequacy Funding would not have bridged the gap between his skeleton budget and adequacy, but the increase in funding does not come close to the increased costs districts have faced since 2018–19. Ergo, the increase in funding does not even

bridge the gap in the 2018–19 budget let alone what current costs would reflect. *See* Plaintiffs’ Post-Trial Br. at 13. Dr. Freeman confirmed that the general costs of operating a district (such as teacher salaries, energy costs, and HVAC costs) have increased and, as a general matter, continue to increase over time. *Compare, e.g.,* Plaintiffs’ Exs. 10-F with 10-A. Indeed, the average teacher salary in 2018-19 was \$59,198.2 and in 2023–2024 is \$67,096.40. *Id.* Inflation also plays a role in the increase in costs. Moreover, districts are further burdened by the State shifting more of the responsibility for teacher benefits back to districts. For example, the State increased districts’ mandatory contribution to the New Hampshire retirement system for teachers from 17.36% in 2018-19 to 19.64% in 2024-25. Accordingly, the State drives the cost of teachers beyond what it is willing to provide for adequacy, yet blames the increased spending on “salary discretion.”

B. State Adequacy Funds are required to cover the costs of adequacy components.

The State further argues that Dr. Freeman’s budget analysis “was based on the faulty premise that a locality should be able to operate its entire school system solely on the money the State provides to it to support the entirety of public education.” *See* State’s Post-Trial Br. at 41. A school district should be able to fund adequacy components (as defined by the legislature) solely on the Adequacy Funds the State provides to it; Plaintiffs are not arguing that the entirety of a school district’s budget must be funded by Adequacy Funding. In fact, at trial Dr. Freeman outlined and tabulated many of the items included in his budget that are disputed adequacy inputs such as co-curriculars (including athletics), CRTC costs, Pre-K teacher salary and benefits, math interventionist salary and benefits, school board expenses including legal and audit costs, etc. (which he estimated was less than 10% of his entire budget). Regardless, his skeleton budget which cost *double* the Adequacy Funding did not include basic components that are necessary for an adequate education (e.g., art programs, technology, textbooks, professional development, nurses,

counselors, etc.). Nor did it include anything that was not necessary for adequacy. His skeleton budget merely included a subset of his teaching staff, a principal, limited superintendent administrative services (including finance and HR), special education tuition and transportation, and facilities. A school district running on those inputs alone would violate a host of state and federal laws, including RSA 193 E:2-a and special education laws. A similar conclusion was reached in the *ConVal* case, wherein the cost of teachers virtually eclipsed the cost of Adequacy Funding. *See* Order at 46–47 *ConVal*, No. 213-2019-cv-00069 (Super. Ct. Nov. 20, 2023) (“[I]n setting a threshold for base adequacy aid, the Court employs a highly conservative per pupil teacher cost of \$3,981.01.”).

C. Dr. Freeman reviewed statewide data and used it to form his opinion that Pittsfield is a good barometer for other school districts statewide.

The State contends that “Dr. Freeman did not testify that he collected and reviewed current statewide data from the State or the school districts around the State in order to form the opinions and conclusions he reached in this case.” *See* State’s Post-Trial Br. at 43. That contention is inconsistent with Dr. Freeman’s testimony. Considering statewide expenditures was part of his job as a superintendent for fifteen years; Dr. Freeman reviewed statewide data while drafting the district budget each year, including data on teacher salaries and special education costs. There is no dispute that the data backs up Dr. Freeman’s conclusions. Dr. Freeman testified that Pittsfield has some of the lowest teacher salaries in the state; the State’s public data confirms this. *See, e.g.*, Plaintiffs’ Exs. 10-F (Teacher Average Salary in Public School Districts for School Year 2018–2019 (inclusive of all districts)) and 079-F (Report titled “Minimum Starting Teacher Salary 2018–2019”). Indeed, it was the State’s expert, Dr. Greene, who did not look at any statewide data to confirm whether any of Dr. Freeman’s conclusions regarding salaries were backed by the data.

During trial, Dr. Greene was presented with, for the first time, the data demonstrating Pittsfield's teacher salaries were the second to lowest in the State. Simply put, Dr. Greene argues that he can critique Dr. Freeman's analysis without doing any work of his own, but in the same breath claims that Dr. Freeman cannot critique the State's purported number or offer counter evidence absent a "professional judgment" analysis. *See State's Post-Trial Br. at 29.*

Given that Pittsfield was spending at the average based on statewide data, Dr. Freeman testified that Pittsfield is a good barometer for other school districts statewide. If he could not provide adequacy with Adequacy Funding alone using some of the lowest teacher salaries, he concluded no district could. The State did not challenge this conclusion by offering *any* evidence that it is possible to do so.

D. Constitutional adequacy requires overhead costs to provide the mandated areas of study.

The State argues that in his Pittsfield Study, "Dr. Freeman kept in . . . items that are clearly not within the ambit of the Legislature's definition of an adequate education, such as principle [sic] and superintendent services." *See State's Post-Trial Br. at 44.* Yet the State acknowledges that it must pay for "the substantive educational program detailed in RSA 193-E:2-a, I(a) and the specific Ed 306 regulations that apply to each of the learning areas detailed in that statute." *Id. at 43.* The State insinuates that all a school district needs to provide instruction in those subject areas to students are teachers. However, no school can function without overhead costs, which include at the bare minimum some level of administrative services (e.g., a principal and superintendent) and facilities. In fact, the State references such inputs in the Ed. 306 regulations, which Dr. Freeman testified to extensively. *See Plaintiffs' Post-Trial Br. at 23–33; see, e.g., id. at 30* (noting Ed. 306.45 requires science laboratories). The State cannot both contend that students must receive

instructions in science laboratories as part of adequacy and at the same time argue laboratory costs are not part of adequacy. Dr. Freeman included certain inputs in his budget exercise because a school could not provide instruction in the adequacy subject areas without them. Moreover, Dr. Freeman did not even consider these additional services until he included a subset of his teaching staff (after removing programs necessary for adequacy such as art, music, and physical education), and by then he had already run out of the State's Adequacy Funding. It was only when he included additional state and federal funding sources that he was able to allocate for the services the State now claims are unnecessary for adequacy. *See* Plaintiffs' Post-Trial Br. at 10–11. Accordingly, the State's concern about overhead costs is moot.

E. Due to insufficient Adequacy Funding, Dr. Freeman was forced to make judgment calls to cut adequacy spending.

The State notes that “Dr. Freeman also testified that his analysis was subjective, premised on ‘arbitrary’ decision-making, and premised on conditions or employees unique to Pittsfield.” *See* State's Post-Trial Br. at 44. When Dr. Freeman described his decisions as “arbitrary,” he meant that he made judgment calls as to which inputs necessary to adequacy should be kept and which ones necessary to adequacy must be cut due to State Adequacy Funding constraints. For example, he (as the State phrases it) “arbitrarily” determined that retaining sufficient teachers to teach the core four subjects (English, Math, Science, and Social Studies) was a better use of funds than retaining an arts program. *See* Plaintiffs' Post-Trial Br. at 11. Dr. Freeman could not have kept all the inputs necessary for adequacy, therefore he had to engage in triage. The fact that Dr. Freeman had to make choices—that were based on his extensive experience as a school superintendent—does not mean that Pittsfield could have paid for adequacy inputs without additional funding. Nor does the State provide any concrete guidance on how to allocate funding. Thus, Dr. Freeman could

not rely on anything other than his judgment as to which inputs related to adequacy should be funded over others. The State twists Dr. Freeman’s words, but Adequacy Funding is insufficient, plain and simple.

III. REMEDY

A. Plaintiffs’ remedy is narrowly tied to the evidence presented.

The State conflates the relationship between Plaintiffs’ use of statewide average data and the remedy sought. The State insists that Plaintiffs’ claim depends on its use of state averages to show the State’s failure to fully fund an adequate education. *See* State’s Post-Trial Br. at 26–30. From the onset of this case, Plaintiffs have requested a declaratory judgment that the State’s Adequacy Funding is insufficient. Plaintiffs do not contend that the cost of an adequate education is the average per-pupil spending in New Hampshire. Rather, Plaintiffs argue that the cost of adequacy should be calculated using the real-life costs of adequacy inputs—of which the average spending on *those inputs* is an accurate barometer. Plaintiffs’ Post-Trial Br. at 38. Plaintiffs make use of statewide average data for the assertion that if no district is spending an amount even remotely close to the current Adequacy Funding, then there is good cause to find the State’s funding is severely lacking. *See* Plaintiffs’ Post-Trial Br. at 34–38; Plaintiffs’ Pre-Trial Br. at 30–32. Plaintiffs’ thematic assertion is bolstered by concrete evidence and analysis. Dr. Freeman testified that Pittsfield’s average cost per pupil is close to the statewide average. *See, e.g.*, Plaintiffs’ Ex. 056-A. Dr. Freeman demonstrated on an input-by-input basis what a district would look like relying on Adequacy Funding alone. By showing that Pittsfield’s Adequacy Funding was woefully insufficient to fund a district with average costs, Dr. Freeman concluded that it is unlikely any district could do so. Dr. Freeman’s conclusions did not come down to a difference in salary structure or school offerings. The margin between Adequacy Funding and the inputs necessary for

an adequate education in Dr. Freeman’s average spending district was a multiple of *at least three times*. The remedy Plaintiffs seek includes a declaratory judgment that the current level of Adequacy Funding is insufficient. In remedying funding levels, looking to Dr. Freeman’s conclusions and state data introduced at trial, those pieces of evidence collectively demonstrate that any funding provided should be a significant multiplier (at least two times). *See* Plaintiffs’ Post-Trial Br. at 14. However, Plaintiffs have not specified what that total number must be to provide an adequate education.

Further, Plaintiffs request that the Court provide guidance to the legislature on what inputs are necessary as part of adequacy. The fact that even now the State is still denying that basic components of a school system, such as facilities, are part of adequacy, is exactly why the Court should consider which inputs are sufficient. *See Contoocook Valley School District v. New Hampshire*, 174 N.H. 154, 166-67 (2021). Absent these recommendations, the legislature’s revised costs will likely fall significantly short. *See* Plaintiffs’ Post-Trial Br. at 56-57. Plaintiffs’ remedies are narrowly tailored, respect the State’s alleged concern of separation of powers, and are supported by the evidence at trial.

B. Plaintiffs’ evidence is sufficient to show the State’s Adequacy Funding is inadequate.

The State in its post-trial brief repeatedly alleges the Plaintiffs’ evidence is insufficient to support its claims. *See, e.g.*, State’s Post-Trial Br. at 29, 42-45, 47-49. The State’s argument is based on the false presumption that Plaintiffs are trying to impose a set cost of adequacy. Here, Plaintiffs are challenging the amount of Adequacy Funding as set by the State as insufficient; Plaintiffs are not affirmatively demonstrating what the cost of adequacy is, as the State purports is

necessary. *See id.* at 21 n.6, 22–23. Nor are they required to do so—indeed, this is the State’s job.⁵ *See* Plaintiffs’ Post-Trial Brief at 14 n.6. Demonstrating that adequacy is insufficient logically requires a less detailed analysis than what would be required to affirmatively determine the cost of adequacy. As Dr. Greene testified, “sometimes a very simple method can show that something else is insufficient.” Here, Plaintiffs have done exactly that.

Plaintiffs thus shifted the burden by sufficiently demonstrating that Adequacy Funding is insufficient. For example, Dr. Freeman *doubled* the base Adequacy Funding amount in his analysis and found even that to be insufficient to cover adequacy. *See id.* at 21. If the State’s adequacy number was justifiable, the State would have defended it at trial—but the State did not do so.

C. Preliminary order

With respect to Plaintiffs’ requested relief in its Post-Trial Brief (*see* brief at 56–57), Plaintiffs respectfully also request the Court consider issuing a brief preliminary order stating its conclusions before January 2025 to guide the legislature in budget deliberations when it convenes in that month.⁶ The Court could then issue a more detailed final order or findings of fact and conclusions of law in due course. *See, e.g., Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*) (issuing preliminary order before more detailed findings of fact and conclusions of

⁵ Furthermore, the State is trying to deflect the Court’s attention from the inadequacy of state Adequacy Funding by insinuating it has gone through the motions of calculating a cost for education through various statutes and legislative acts. *See* State’s Post-Trial Br. at 47. A hollow calculation exercise is insufficient—the New Hampshire Constitution mandates that the result of that calculation be adequate funding.

⁶ Such guidance would be useful to the newly formed education finance committee in the New Hampshire House of Representatives. *See* Paula Tracy, *NH House to Get 2 New Standing Committees—on Housing and Education Finance*, InDepthNH (Nov. 20, 2024), <https://indepthnh.org/2024/11/20/nh-house-to-get-2-new-standing-committees-on-housing-and-education-finance/>.

law), *subsequent mandamus proceeding*, 804 S.W.2d 491 (Tex. 1991); *see also* Albert H. Kauffman, *Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution*, 22 St. Mary's L.J. 69, 73 & n.19 (1990). In *Claremont School District v. Governor*, the Court faced a similar situation that may be instructive here. In that case, the State sought a two-year extension to comply with the Court's *Claremont II* order, and the legislature was about to convene. The Court denied the requested extension and wrote: "This court is well aware that the new legislative session is scheduled to begin next week. We have worked expeditiously to rule on these motions in order to return this opinion by the organizing date for the new legislature. It is apparent that time is now of the essence." 143 N.H. 154, 160 (N.H. 1998).

Dated: November 22, 2024
Concord, New Hampshire

Respectfully submitted,

Counsel for Plaintiffs

/s/ Natalie Laflamme

Natalie Laflamme, NH Bar No. 266204
Laflamme Law, PLLC
100 N. Main St, Suite 512
Concord, NH 03301
(603) 937-5434
natalie@laflammelaw.com

John E. Tobin, Jr., NH Bar No. 2556
60 Stone Street
Concord, NH 03301
(603) 568-0735
jtobinjr@comcast.net

Andru Volinsky, NH Bar No. 2634
160 Law, PLLC
P.O. Box 1181
Concord, NH 03302
(603) 491-0376
andruvolinsky@gmail.com

Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(203) 536-7567
wlecker@edlawcenter.org

Michael-Anthony Jaoude*
Harter Secrest & Emery LLP
50 Fountain Plaza, Suite 1000
Buffalo, NY 14202-2293
mjaoude@hselaw.com

Alice Tsier*
Kim King*
Kelsey Greenagel*
Zhenyan Zhong*
Zoe Mitrofanis*
Stephanie Gusching*
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200
alice.tsier@whitecase.com
kim.king@whitecase.com
kelsey.greenagel@whitecase.com
lance.zhong@whitecase.com
zoe.mitrofanis@whitecase.com
stephanie.gusching@whitecase.com

* *admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been served on all parties of records, on this 22nd day of November, 2024, by way of the Court's electronic filing and service system.

/s/ Natalie Laflamme
Natalie Laflamme, NH Bar No. 266204