THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

State of New Hampshire

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

The State of New Hampshire, by and through the Office of the Attorney General, submits this reply to the plaintiffs' post-trial brief. The State has explained in its own post-trial brief why the plaintiffs lack standing to maintain their claims and why those claims fail as a matter of law and fact. The plaintiffs offer no convincing arguments to the contrary in their post-trial brief. The State limits this reply to the following points.

A. The State does not bear the burden of proof in this case.

The plaintiffs acknowledge in their post-trial brief that they "must demonstrate a deprivation of a fundamental right." Pls.' Post-Trial Br. at 7 (citing *State v. Lilley*, 171 N.H. 766, 776 (2019)). They further acknowledge that the burden only shifts to the government under the strict-scrutiny framework "[o]nce a plaintiff establishes that government action substantially burdens a fundamental right." *Id.* at 8 (citing *State v. Mack*, 173 N.H. 793, 815 (2020)). They nonetheless fault the State (as they have throughout this case) for not presenting its own evidence showing that the current amount of funding *is* sufficient. *See, e.g.*, Pls.' Post-Trial Br. at 5, 27, 40–41.

The State is under no obligation to present evidence of its own to disprove the plaintiffs' claims. This is manifestly not the State's burden. *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021) ("The party challenging a statute's constitutionality bears the burden of proof."). As discussed in the State's post-trial brief, the plaintiffs' claims are not legally viable and the evidence they presented is remarkably weak. The Court should resist any effort to excuse the legal and factual flaws in the plaintiffs' case by placing a burden on the State that does not exist under controlling law.

B. The Court's denial of the State's oral motion to dismiss was not a finding that the plaintiffs had met their burden of proof.

The plaintiffs contend that by denying the State's oral motion to dismiss at the close of their case-in-chief, the Court necessarily "found that Plaintiffs had met their burden . . . ." Pls.' Post-Trial Br. at 40. This is an incorrect statement of law. The case the plaintiffs rely on—*Renovest Company v. Hodges Development Corporation*—does not stand for the proposition that when a court denies a defendant's motion to dismiss during a bench trial, it is necessarily determining that the plaintiff has "'established the case by a preponderance of the evidence.'" Pls.' Post-Trial Br. at 40 (quoting 135 N.H. 72, 78 (1991)). Rather, the Supreme Court observed in *Renovest*:

> A motion to dismiss, made to the judge in a jury-waived trial at the close of the plaintiff's case, can challenge the plaintiff's case **in either of two ways**. . . . One, directed at the judge in his role as judge, is used to assess the legal sufficiency of the case, and is measured by the familiar *prima facie* standard, taking all evidence introduced and resolving all conflicts in the plaintiff's favor. The second, however, is a broader one, asking the judge as trier of facts, for an expedited disposition. On such a motion, the judge is permitted to render a verdict for the defendant, on the merits, at the close of the plaintiff's case. Should the judge choose to address the case on the merits at that time, the judge should make findings of fact and assess whether the plaintiff has carried his or her burden by a preponderance of the evidence.

135 N.H. at 76–77 (emphasis added).

The State's oral motion to dismiss raised the first type of challenge through assertions that the plaintiffs' evidence was insufficient to establish a violation of Part II, Article 83 and that the plaintiffs' purported Part II, Article 5 claim was not cognizable as a matter of law. The Court clearly contemplated that the State was making this type of challenge when it denied the motion. The Court concluded that the plaintiffs' evidence was minimally sufficient to survive dismissal, while noting on the record that whether the plaintiffs had met their burden of proof posed a different question that the Court was not reaching. The Court did not indicate that it was making any "findings of fact" when it denied the State's motion, nor did it suggest that it was finding that that the plaintiffs had "carried [their] burden by a preponderance of the evidence." *Id.* For their part, the plaintiffs did not move for a directed verdict once the State rested, which they presumably would have done if they truly believed the Court had already found that they had proved an infringement of a fundamental right. There is, in other words, no basis to conclude that anyone actually thought that the Court was finding that the plaintiffs had met their burden of proof when it denied the State's motion to dismiss.

The plaintiffs' argument also embeds another attempt to diminish their burden. The "preponderance of the evidence" standard that applies in normal civil cases does not apply when a plaintiff is challenging the constitutionality of a statute or statutes. Instead, the plaintiffs were required to demonstrate that "a clear and substantial conflict exists between" the State's education funding statutes "and the constitution." *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021). "When doubts exist as to the constitutionality of a statute, those doubts *must* be resolved in favor of its constitutionality." *Id.* (emphasis added). This standard is incompatible with a pure preponderance-of-the-evidence standard, under which "a fact may be found in accord with the preponderance of the evidence, and yet the mind may be left in doubt as

to its very truth." *Heacock v. Baule*, 216 Iowa 311, 314 (1933). Thus, even if the Court *had* found that the plaintiffs met their burden by a preponderance of the evidence (and it did not), this would not mean that the plaintiffs were entitled to judgment.

C. The plaintiffs are not entitled to any of the relief they seek.

In their post-trial brief, the plaintiffs seek a ruling in their favor consisting of: (1) several declarations; (2) injunctive relief; (3) "recommendations" to the Legislature; and (4) an award of attorney's fees. The plaintiffs are not entitled to any of this relief.

1. Declaratory relief.

In their amended complaint, the plaintiffs sought a declaration that:

> The State does not currently guarantee funding sufficient to cover the cost of an adequate education. As a result, New Hampshire must rely on local school taxes to bridge the gap. These local school taxes violate Part II, Article 5 of the New Hampshire Constitution because they are not uniform in rate.

Pls.' Amend. Compl. ¶ 80. In their pretrial brief, the plaintiffs indicated that they sought "a declaratory judgment that the money the State provides for funding of adequacy is not nearly enough to cover the cost of delivering an adequate education." Pls.' Pre-Trial Br. at 1. The plaintiffs thus did not seek a declaration that a single statute was unconstitutional; they instead asserted that the present funding scheme, which consists of many statutes, does not satisfy the State's obligations under Part II, Article 83.

In their post-trial brief, however, the plaintiffs specifically seek a declaration that RSA 198:40-a, II is unconstitutional. Pls.' Post-Trial Br. at 55. This reflects yet another shift in the plaintiffs' legal challenge, this time from a systems-based challenge to one focused on a specific statute. "It is well settled that a defendant is entitled to be informed of the theory on which the plaintiff is proceeding and the redress the plaintiff claims as a result of the defendant's actions." *Donald Toy v. City of Rochester*, 172 N.H. 443, 448 (2019). Generally speaking, courts will not

grant parties relief that they have not actually sought. *See, e.g.*, *Tirrell v. Edelblut*, __ F. Supp. 3d __, 2024 U.S. Dist. LEXIS 162185, at *60 (D.N.H. Sept. 10, 2024) ("The court will limit the scope of the preliminary injunction to what has been requested by the plaintiffs." (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The plaintiffs previously framed their challenge as one to a funding system as a whole. They cannot now, through post-trial briefing, seek to reshape that challenge.

As set forth in the State's post-trial brief, the plaintiffs' claim that the State is violating Part II, Article 83 because it is not fully funding the cost of an adequate education fails as a matter of law and fact. Likewise, the plaintiffs' assertion that the State is violating Part II, Article 5 because local taxes are being used to meet the State's funding obligation fails because it does not arise out of a separate, cognizable cause of action and is premised on the same insufficient evidentiary record. The plaintiffs are not entitled declaratory relief under either theory.

The plaintiffs also ask for the first time for this Court to declare that "[d]ifferentiated aid for children living in poverty is not duplicative of the differentiated aid for children who qualify for special education and related services." Pls.' Post-Trial Br. at 55. Because this is also a remedy the plaintiffs did not previously seek, it must be denied.

But the request also fails on the merits. RSA 198:40-a, II provides differentiated aid for students that are "eligible for a free and reduced price meal anytime during the determination year" and for students who are "receiving special education services." RSA 198:40-a, II(b), (d). At trial, multiple witnesses acknowledged that targeting aid to students who receive free and reduced price meals operates to target that aid to students living in poverty. There is no suggestion in the statutory text that municipalities cannot receive multiple sources of differentiated aid for the same student in the ADMR. At trial, Mark Manganiello testified that if

a student in the ADMR qualifies for multiple sources of differentiated aid, a municipality will receive differentiated aid from each of those sources.[1] There is accordingly no legal or factual basis for the Court to issue a declaration of the kind the plaintiffs seek, because the law and facts show that the current funding scheme already provides separate state funding for students who qualify for free and reduced price lunch and special education.

Yet even in the counterfactual scenario where state law *did* only allow for municipalities to receive one form of differentiated aid for any student in the ADMR, the plaintiffs would not be entitled to their requested declaration. The Legislature can choose to meet its obligations under Part II, Article 83 in myriad ways. The Legislature has chosen to do so in part through differentiated aid, but there is no requirement that it maintain this funding structure in the future. The Legislature could choose to enact additional or different forms of differentiated aid, or it could choose to adopt an entirely different funding structure. The plaintiffs cannot seek to implement their preferred education policy through a judicial decree. *Sirrell v. State*, 146 N.H. 364, 369 (2001) (the judiciary's "task is neither to establish educational policy nor to determine the appropriate mechanism for funding."); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 475 (1997) (judges are "not appointed to establish educational policy, nor determine the proper way to finance its implementation"). A request for a declaratory judgment that "[d]ifferentiated aid for children living in poverty is not duplicative of the differentiated aid for children who qualify for special education and related services" is a thinly veiled policy argument made in the wrong

[1] A previous version of RSA 198:40-a, II provided that a municipality would not receive differentiated aid for students who were not obtaining a proficient third-grade reading score if those students qualified for other forms of differentiated aid, but that provision was limited to this category of differentiated aid and is no longer in the statute.

forum. *See St. Onge v. Oberten, LLC*, 174 N.H. 393, 398 (2021) ("The plaintiff's public policy arguments are made to the wrong forum as matters of policy are reserved for the legislature.").[2]

2. Injunctive relief and "recommendations."

The plaintiffs ask the Court to "enjoin the State from using its current calculated cost of an adequate education, as set out in RSA 198:40-a, and from using non-uniform local education taxes to fund the cost of an adequate education, after March 31, 2026." Pls.' Post-Trial Br. at 55. They further ask this Court to order that "[w]ithin 90 days of the legislature adopting legislation implementing its updated calculation of the cost of an adequate education, Plaintiffs shall be able to challenge it." *Id.* at 55–56. They go on to provide a "non-exhaustive list" of eight factors that they ask the Court to "recommend the legislature consider in developing its new calculation of the cost of an adequate education." *Id.* at 56–57.

As previously discussed, the plaintiffs should not be permitted to shift their challenge from one focused on the funding system generally to one focused on a particular statute. Nor did the plaintiffs ask for any of the "recommendations" they now seek in their amended complaint. For these reasons alone, the plaintiffs are not entitled to the injunctive relief or "recommendations" they seek.

The plaintiffs are also not entitled to injunctive relief because their claims fail as a matter of law and fact. *Caroline T. v. Hudson Sch. Dist.*, 915 F.2d 752, 755 (1st Cir. 1990) (to obtain

[2] Even if the facts and law allowed for such a declaration, the plaintiffs would not be entitled the relief they seek because they have come nowhere close to meeting their burden to show what inputs are necessary for these students. At trial, the plaintiffs did not present any evidence of what types of inputs for the academic learning curriculum are necessary for students who qualify for free and reduced price lunch that are not required for other students. At best, the plaintiffs elicited vague testimony that students in poverty need more support. But that type of conclusory and non-specific testimony does not allow this Court to identify the inputs necessary or to determine an objective cost of those unidentified inputs. Moreover, the evidence at trial demonstrated that New Hampshire does quite well by its students in poverty. Dr. Shuls testified that New Hampshire has one of the lowest achievement gaps between students who qualify for free and reduced price lunch and other students across the entire nation.

permanent injunctive relief, "the movant must show actual success on the merits of the claim"). Additionally, if the Court were to declare that the current funding formula is unconstitutional (and if that decision were upheld on appeal), then the Legislature would be required to replace it. Thus, any injunctive would be unnecessary and duplicative.

The Court should also reject the plaintiffs' proposed compliance deadline. If the Court determines that the current funding structure is unconstitutional, and the Supreme Court upholds that decision, then the Legislature must be allowed "a reasonable time to effect an orderly transition to a new system." *Claremont II*, 142 N.H. at 476–77. Because the State would have the right to appeal any decision this Court issues, the "reasonable time" should run from the date the Supreme Court issues its mandate, not from the time this Court issues its decision. *See id.* (allowing reasonable time from Supreme Court's decision); *see also Londonderry Sch. Dist. v. State*, 154 N.H. 153, 162 (2006) (same). If a reasonable period of time does not run from the Supreme Court's mandate, then this creates the possibility that the current funding system would be enjoined without any replacement or revision in place.

The plaintiffs have also failed to explain how an injunction running to "the State" would operate. "[A]n American State can only act through its officials." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n. 25 (1984). The plaintiffs have not named any officials as defendants in this case. It is clear, though, that any replacement or modification of the current funding system would have to be enacted by the Legislature. New Hampshire follows "the rule which exempts the legislature from control of the court." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). The separation-of-powers doctrine does not permit the judicial branch to superintend the Legislature by telling it how it must or should act. *See id.*; *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.").

For similar reasons, the Court is not permitted to issue "recommendations" to the Legislature, as the plaintiffs request. Likewise, any order "recommending" how the Legislature should calculate the cost of an adequate education would be an advisory opinion as to what any legislation must or should include to comport with Part II, Article 83. Consistent with the separation of powers, private parties may not request advisory opinions, and the superior court may not issue them. *See Carrigan v. N.H. Dep't of Health & Hum. Servs.*, 174 N.H. 362, 366–67 (2021).

The recommendations are also a transparent attempt to improperly inject this Court into the Legislature's policymaking function. The plaintiffs do not challenge the definition of an adequate education the Legislature adopted through RSA 193-E:2-a. Yet the plaintiffs ask this Court to "recommend" that the Legislature choose to fund services that are not, as a matter of law and fact, part of the current definition. The plaintiffs also ask this Court to "recommend" that the Legislature tether funding to average and actual school district expenditures, even though doing so is not required by the State Constitution for the reasons explained in the State's post-trial brief.[3] The plaintiffs likewise ask this Court to "recommend" that the Legislature target aid in certain ways, even though the State Constitution does not require this either and the Supreme Court has made clear 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.[4]

[3] The plaintiffs have not identified a single court or legislature that uses the average expenditures as its measure of adequacy. Moreover, even if this Court had the authority to make advisory "recommendations" to the Legislature (it does not), the plaintiffs' request should be denied as it is unworkable from a practical perspective, as the State has previously explained.

[4] Here again, the plaintiffs have wholly failed to create a factual record to support the policy recommendations that they now ask this Court to make to the Legislature. Despite the fact this case was

"The wisdom, effectiveness, and economic desirability of a statute is not for [the judiciary] to decide. Nor may [the judiciary] substitute [its] own judgment for that of the legislature." *Appeal of Town of Lincoln*, 172 N.H. 244, 253 (2019) (citation and quotation marks omitted). If the plaintiffs believe that their policy preferences would make for a better education-funding system, they are free to ask the Legislature to enact them. The Constitution does not permit this Court to "recommend" those policy preferences through a merits order at the end of an adjudicative proceeding.

The plaintiffs' references to "history" and the "historical context" in no way change this. *See* Pls.' Post-Trial Br. at 5, 56. This case is not, as the plaintiffs suggest, a linear offshoot from the *Claremont* and *Londonderry* decisions. The present education funding regime was enacted in 2008 and remained in place for more than a decade without challenge until the *Contoocook Valley* case was initiated in 2019. There was apparent historic satisfaction with the 2008 process and the result it produced, at least as a general matter, during this period. There is no basis for the Court to assume that the system was unconstitutional during a decade in which it went unchallenged, particularly when statutes are presumed to be constitutional. Further, the Supreme Court's decision in *Contoocook Valley* was the first time the Supreme Court ever addressed a costing-challenge under Part II, Article 83. The notion that the State has not taken its funding obligations seriously or has somehow ignored the Supreme Court's funding directives is thus factually incorrect, and it is certainly not a persuasive basis to ignore or distort established constitutional limits on the judicial role.

supposed to focus on differentiated aid, the plaintiffs did not establish what, if any, inputs are necessary to support the groups of students that they believe money should be targeted toward and did not present evidence about the objective costs of those inputs. In fact, the testimony at trial barely discussed students in poverty or English language learners.

3. Attorney's fees.

Because the plaintiffs lack standing and their claims fail as a matter of law and fact, they are not entitled to an award of fees. Even if the plaintiffs were able to prevail, however, they have not demonstrated that they are entitled to fees under either *Harkeem v. Adams*, 117 N.H. 687 (1977), or the substantial-benefit theory.

The Supreme Court recognized in *Harkeem* that "the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser" based on "the principle that no person should be penalized for merely defending or prosecuting a lawsuit." 117 N.H at 690. The Supreme Court carved out a narrow exception to this rule for circumstances where "one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigants conduct can be characterized as unreasonably obdurate, and where it should have been unnecessary for the successful party to have brought the action." *Id.* at 690–91 (cleaned up).

The plaintiffs appear to contend that it should not have been necessary for them to bring this action. Pls.' Post-Trial Br. at 57. They offer no support for this contention. They do not contend (nor could they) that the State has ignored its obligation to fund an adequate education. They simply disagree with the amount of funding the Legislature has chosen to provide to cover the items the Legislature identified as constituting an adequate education. Their suggestion that they "should not have to seek judicial redress to secure" the right to an adequate education, *id.*, is basically just a rhetorical plea wholly incompatible with the burden of proof they bear to establish a constitutional violation.

The plaintiffs also supplied no evidence at trial that the children of this State are not receiving an adequate education. They are seeking instead to rearrange governmental funding with the public education system in a manner that they believe is more equitable and better aligns

with Part II, Article 83. It is far from clear that Part II, Article 83 supplies them with a cause of action to do this. It is far more likely that this type of political funding dispute, which is really between the State and its municipalities, presents a nonjusticiable political question. Regardless, there is no basis to conclude that choosing to bring this lawsuit, and as a consequence being required to marshal evidence sufficient to prove a constitutional violation under controlling law to prevail, justifies an award of fees under *Harkeem*.

"Under the substantial benefit theory, attorney's fees may be awarded when a litigant's action bestows a substantial benefit not only on the party who litigated the action, but on the public as well." *Sivalingam v. Newton*, 174 N.H. 489, 499 (2021). Even if the plaintiffs were able to prevail here, any benefit this action conferred on the public would depend on the outcome of the appeal in *Contoocook Valley*. If the Supreme Court affirms the merits decision in that case, then the Legislature will be required to replace, modify, or revise the current funding formula to comply. This is, in essence, the same remedy the plaintiffs seek in this case. If *Contoocook Valley* is affirmed, a ruling for the plaintiffs in this case would be superfluous and would confer no additional benefit on the public.[5]

D. Conclusion

For these reasons, and those stated in the State's post-trial brief, the Court should dismiss the plaintiffs' claims. Failing that, the Court should deny the plaintiffs' requests for relief in their entirety and enter judgment for the State.

[5] Indeed, it was for this very reason that the State sought to stay this action until the Supreme Court issues its opinion in the *Contoocook Valley* appeal. The plaintiffs objected, arguing that this case concerned differentiated aid, and should therefore be allowed to go forward. Yet much of the plaintiffs' case focused on so-called "base adequacy," their evidence barely touched on two categories of differentiated aid (free and reduced lunch and English language learner students), and their legal theory for the third (special education) rested entirely on a faulty premise. The plaintiffs should not be awarded attorneys' fees for pursuing duplicative and potentially unnecessary litigation.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

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CERTIFICATE OF SERVICE

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

Date: November 22, 2024

/s/ *Samuel Garland*
Samuel Garland.