THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. SUPERIOR COURT

Contoocook Valley School District,
Winchester School District,
Mascenic School District,
Monadnock School District,
Myron Steere III, Richard Cahoon,
and Richard Dunning[1]

v.

State of New Hampshire, New Hampshire Department of Education,
Christopher T. Sununu, Individually and as Governor, and
Frank Edelblut, Individually and as Commissioner[2]

No. 213-2019-CV-00069

ORDER ON THE STATE'S MOTION TO DISMISS AND THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary

According to the Petitioners, the actual cost of an education—based on Department of Education data—is approximately $18,901 per student. In this case, the Petitioners are asking the Court to set the base adequacy amount at $9,929 per student for fiscal year 2020 and $10,843.60 for 2019. RSA 198:40-a,II(a) sets the current base adequacy aid award for all schools at $3,562.71 per student, based on a formula determined by a legislative committee in 2008. The parties agree that not a single school in the State of New Hampshire could or does function at $3,562.71 per student.

[1] Collectively referred to as "the Petitioners."
[2] Collectively referred to as "the State."

Because of the dearth of evidence in the legislative record to support such a determination, the Court finds RSA 198:40-a,II(a)—which is essentially the gateway to an adequate education in New Hampshire—unconstitutional as applied to the Petitioning school districts.

The opportunity to receive an adequate education is a fundamental right under the New Hampshire Constitution, thus, the Court applies strict scrutiny in examining how the Legislature arrived at its $3,562.71 figure and the costing formula that produced it. However, even under the more deferential "rational basis" standard of review, the Court would reach the same conclusion in this case.

As discussed below, the Court stops short of picking its own number as the appropriate cost for an adequate education—at this point. The impact of the Petitioners' request on the State budget is approximately a $1.6 billion increase. Such a decision should not rest in the hands of judges. However, as the Supreme Court has repeatedly warned in school funding cases: constitutional rights must be enforced or they cease to exist. Almost every constitutional challenge to the Legislature's attempts to define and provide funding for an adequate education has been successful. It has been more than twenty-five years since the New Hampshire Supreme Court first instructed the Legislature to comply with its exclusive obligation to define and provide funding for an adequate education. As explained below, in this Court's judgment, the Legislature is not there yet.

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 Petitioner's claim that the SWEPT is unconstitutional. When the Legislature adopts a

constitutional costing methodology that likely increases the base adequacy amount, the amount of SWEPT contributions, and therefore any claim it is disproportionate, will be ripe for adjudication.

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Introduction

This case challenges the sufficiency of the State's funding of an adequate education. The Petitioners assert facial and as-applied challenges to RSA 198:40-a, II(a), which sets the cost of adequate education on a per pupil basis. According to the Petitioners, the per pupil cost set forth in RSA 198:40-a, II(a) fails to sufficiently fund an adequate education as guaranteed by Part II, Article 83 of the New Hampshire Constitution. The result, the Petitioners allege, is that school districts are forced to increase their local taxes in order to fund an adequate education, which in turn violates Part II, Article 5. The Petitioners also challenge the Statewide Education Property Tax ("SWEPT"), asserting that, because of the State's insufficient aid, property-poor school districts are forced to raise their property taxes in order to compensate for the lack of State funding via the SWEPT while property-wealthy districts do no. This, the Petitioners allege, violates Part II, Article 5 of the New Hampshire Constitution.

The Court previously denied the Petitioners on their request for a preliminary injunction. See Contoocook Valley Sch. Distr., et al. v. State, et al., Cheshire Cty. Super. Ct., No. 213-2019-CV-00069 (April 5, 2019) (Order, Ruoff, J.). However, because the Petitioners raised valid concerns about sovereign immunity, the Court established an expedited schedule for the litigation to conclude before June 30, 2019, the end of the 2019 Fiscal Year. Subsequently, the State moved to dismiss the Second Amended Petition and the Petitioners filed an objection. Both parties have also filed motions for summary judgment and respective objections. This Order addresses all pending pleadings.

I. Second Amended Petition

A. Facts

The Contoocook Valley ("ConVal"), Winchester, Mascenic, and Monadnock school districts each provide education to the pupils in their districts. (2d Am. Pet. ¶¶ 17–22.) All of the petitioning school districts receive funds from the State in order to provide a constitutionally adequate education. (Id. at ¶¶ 23–26.) These funds, called base adequacy aid, are dispersed as a function of a statutory scheme enacted following a New Hampshire Supreme Court determination that the New Hampshire Constitution "imposes a duty on the State to education its citizens and support the public schools" and New Hampshire students have a corresponding fundamental right to a State-funded constitutionally adequate public education. See Londonderry Sch. Dist. SAU 12, et al. v. State of New Hampshire (Claremont XII), 154 N.H. 152, 160–63 (2006); Claremont Sch. Dist. v. Governor (Claremont II), 142 N.H. 462, 473 (1997); Claremont Sch. Dist. v. Governor (Claremont I), 138 N.H. 183, 188 (1993); RSA 193-E:1. The petitioning school districts currently receive base adequacy aid at the rate of $3,636.06 per pupil.[3] (2d Am. Pet. ¶¶ 26–28.)

The base adequacy aid amount was determined by the Joint Legislative Oversight Committee on Costing an Adequate Education ("the Joint Committee"). (Id. ¶ 29.) The Joint Committee's conclusions and findings are contained in its Final Report.[4] Following the issuance of the Final Report, the Legislature established the statutory

[3] This litigation solely concerns the base adequacy aid contained in RSA 198:40-a, II(a). The other figures in RSA 198:40-a, II(b)–(e), which provide funding for English language learners, special education learners, and other specific services, are not addressed.
does not concern additional differentiated aid, the Court only addresses this per-pupil figure.

[4] The Joint Committee's Final Report and Findings, attached to the State's Objection as Exhibit A, is hereinafter referred to and cited as the "Final Report."

scheme in place today, codified in RSA chapters 193-E and 198. (Final Report 3.) The Joint Committee was charged with studying "the cost of providing the opportunity for an adequate education and the educational needs and resources necessary to ensure its delivery to the public school children of the State." (Final Report 3.) The Joint Committee reported that it held eighteen meetings that totaled more than fifty hours of testimony and deliberations in which it considered state and national education policy, finance professionals' methodologies, policy considerations, briefings from New Hampshire Department of Education ("DOE") staff, and other materials on education finance. (Id.) Its determined cost, which was $3,450 per student, included amounts for teacher salary and benefits; principal and principal assistant salary and benefits; guidance counselors; library media specialists; technology coordinator; custodians; instructional materials; technology (e.g. computers); teacher professional development; facilities operation and maintenance; and transportation. (Id. ¶¶ 29–30, n. 3; 2d Am. Pet., Ex. A.)[5]

B. Claims Asserted

The Petitioners assert that the State's calculation suffers from several flaws and specifically challenge five areas of the Joint Committee's Final Report. (Id. at ¶ 32.) While the Petitioners' challenge is to the base adequacy aid, their specific arguments are to the cost determinations in the Joint Committee's Final Report.

The Petitioners first challenge the funding of transportation costs. (2d Am. Pet. ¶¶ 35–42.) The 2008 Spreadsheet incorporates a base universal transportation cost of $315 per pupil. (Id. ¶ 34; 2008 Spreadsheet.) The Petitioners have submitted a DOE

[5] The Petitioners' Exhibit A contains solely Appendix A of the Final Report. This exhibit is hereinafter referred to as the "2008 Spreadsheet."

document, titled "General Fund Transportation Expenditures," which reflects the actual transportation costs in each municipality in the State. (2d Am. Pet., Ex. B.) The Petitioners highlight that not one of the municipalities with ten or more pupils has transportation costs less than $400 per pupil and that the average per pupil transportation cost is $827.56, according to the DOE document. (2d Am. Pet. ¶¶ 35–37; id., Ex. B.) The DOE document depicts that ConVal's transportation cost is $914.60 per pupil; Winchester's is $962.73; Mascenic's is $619.81; and Monadnock's is $1,040.29. (Id. at ¶¶ 38–41; id., Ex. B.) The Petitioners assert that it costs substantially more to transport pupils to school in large rural districts as compared to compact urban districts.[6] (Id. ¶ 36.) The Petitioners further assert that providing transportation for pupils to attend school is part of the State's obligation to fully fund an adequate education pursuant to Part II, Section 83 of the New Hampshire Constitution. (Id. ¶ 42.)

The Petitioners next challenge the 2008 Spreadsheet's teacher-student ratio. (Id. ¶¶ 41–58.) The Joint Committee relied on a Board of Education regulation in selecting its ratio, which was "25 students to 1 teacher in kindergarten through grade two; and 30 students to 1 teacher in grades three through twelve." (Final Report 14.) The Petitioners state that these ratios are not based on actual teacher-student ratios but rather on maximum classroom size as established in Ed. 306.17(a)(1).[7] (2d Am. Pet. ¶ 46.) Teacher-student ratios are not the equivalent of classroom size, the Petitioners state, and the ratios are thus not accurate. (Id. ¶¶ 46–47.) The Second Amended Petition provides the example that in a school of thirty-one students, the regulation

[6] At the hearing on the motions for preliminary injunction, counsel for the Petitioners stated that ConVal buses cover about 3,000 miles each day as an illustration of ConVal's high transportation costs in contrast with more urban municipalities.

[7] The Court notes that Ed 306.17 does contain these ratios, but provision (a)(1) is limited to kindergarten; the other figures are contained in Ed 306.01(a)(2) and (3).

would require two teachers, thus creating a ratio of 1:15.5, not 1:30. (Id. ¶ 48.) The Petitioners also highlight that teachers are given time during the school day to plan their classes such that a teacher may not teach all four blocks in a four-block day and that teachers would usually teach five out of eight periods in other schools. (Id. ¶ 49.) Further, State regulations require teachers to be certified in the subjects that they teach, thereby precluding the complete maximization of class sizes. (Id. ¶ 50.)

The Petitioners assert that no school district in the State has teacher-student ratios of 1:25 or 1:30, and that the State is able to, and has in fact, computed the average teacher-student ratio for each year for the past ten years, citing to a DOE publication of statewide teacher-student ratios for 2007 to 2017. (Id. ¶¶ 51–53; id., Ex. C.) The DOE document computes teacher-student ratios by dividing the total number of students in the State by the total number of teachers, and the data for the most recent year available, 2015, indicates a ratio of 1:9.96. (Id. ¶ 53; id., Ex. C.) The Second Amended Petition cites to another DOE document from the DOE's Division of Education Analytics and Resources that analyzed teacher-student ratios for grades 1–12 and determined the statewide average for the 2017–2018 school year was 1:12.6, excluding preschool and kindergarten. (Id. ¶ 55; id., Ex. D.) No school district in the State has a teacher-student ratio higher than 1:17.5 and, in the past ten years, the statewide average teacher-student ratio never exceeded 1:12.6, according to the Second Amended Petition. (Id. ¶¶ 56–57; id., Ex. D.)

Third, the Petitioners challenge the 2008 Spreadsheet's failure to incorporate "the actual cost of providing benefits to teachers and other staff." (Id. ¶ 59.) The Petitioners point to the 2008 Spreadsheet, which presumes the total cost of teacher

benefits will be 33% of the first-year teacher's salary, or $11,728, per teacher. (2d Am. Pet. ¶ 60; 2008 Spreadsheet.) The Petitioners contend that this amount is insufficient because actual teacher benefits exceed $11,728 in every school district in the State. (Id. ¶ 53.) In explaining teacher benefits, the Petitioners cite four requirements placed on school districts: RSA 100-A:16, III, which contains the New Hampshire Retirement System and requires an employer contribution of 17.80% for 2019 through 2021 per teacher, (Id., Ex. E); federal employment taxes, which require school districts to pay 7.56%; workers compensation coverage and unemployment insurance, which totals at least $150 per teacher per year; and health insurance premiums. (Id. ¶¶ 63–67.) According to the Petitioners, "The portion of health insurance premiums paid by the school district for a teacher will alone total in excess of $17,000.00." (Id. ¶ 68.) As an illustration of health insurance costs, the Petitioners point to the State's compensation to its own employees, which total more than $26,700 in health insurance contributions and more than $31,800 in total benefit packages. (Id. ¶ 69; id., Ex. F.) Thus, providing funding that presumes teacher benefits packages cost only $11,728 per teacher fails to meet the State's constitutional mandate of providing funding for an adequate education. (Id. at ¶ 70.)

Fourth, the Petitioners challenge the 2008 Spreadsheet's calculus for failing to include several State-required services; specifically, nurse services, superintendent services, and food services. (Id. ¶¶ 71–89.) The Petitioners state that Ed. 306.12 requires the provision of a school nurse and that RSA 200:29 requires school nurses to have completed their nursing degrees and have three years of experience.[8] (Id. ¶¶ 73–

[8] The Second Amended Petition states that this statute, "as amended in 2016," contains this requirement. (2d Am. Pet. ¶ 75.) Prior to 2016, RSA 200:29 did not impose requirements on a

75.) Nurses that meet these requirements command salary and benefit packages in excess of $65,562, and the DOE's most recent survey of school nurses determined there is a statewide average of one school nurse for every 223 pupils. (Id. ¶¶ 76–77; id., Ex. G at 3.) The Petitioners assert that a constitutionally adequate education thus requires at least $294 per pupil for school nurse costs, yet school nurse costs are not part of the 2008 Spreadsheet. (Id. ¶¶ 78–79; 2008 Spreadsheet.)

In regard to superintendent services, the Petitioners cite to RSA 194-C:4, Ed. 302.01, and Ed. 302.02, which require schools to have superintendent services and detail the necessary responsibilities of the superintendent's office, including all fiscal oversight of the district budget. (2d Am. Pet. ¶ 80.) The average salary and benefit package for a qualified superintendent, the Petitioners assert, exceeds $158,000. (Id. ¶ 82.) Larger districts require a business administrator and/or an assistant superintendent, and districts with more than 1,000 pupils require a second person in the superintendent's office. (Id. ¶¶ 83–84.) The 2008 Spreadsheet does not account for superintendent services. (2008 Spreadsheet.)

In regard to food services, the Petitioners state that Ed. 306.11's requirement that all public schools provide food services has resulted in an annual loss of $33,617,749, or roughly $200 per pupil, according to submitted DOE reports. (Id. ¶¶ 85–87; id., Ex. H.) As current education-funding statutes do not provide any funds to

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school nurse's qualifications beyond that he or she be a registered professional nurse licensed in New Hampshire. RSA 200:29 (1971) (amended 2016). The Court notes that both versions of the statute use the permissive term "may," but that the regulation cited, Ed 306.12, contains the mandatory term "shall," as it did in 2008, in requiring "qualified personnel to carry out appropriate school health-related activities." Ed. 306.12 (2008) (amended 2017); Ed. 306.12 (2019).

food services losses, the Petitioners state, the State is failing to meet its obligation to provide sufficient funds. (Id. ¶¶ 88–89.)

Fifth, the Petitioners address the 2008 Spreadsheet's failure to properly provide funding for facilities operation and maintenance. (Id. ¶¶ 90–100.) The Petitioners explain, "Children need lights and heat in their schools in order to learn and the driveways and parking lots need to be snowplowed so children can get to school." (Id. ¶¶ 92–91; 2008 Spreadsheet.) In ConVal, plant operations include approximately $500,000 in oil/gas, approximately $500,000 in electricity, and more than $160,000 in snowplowing; this results in a per-pupil cost for plant operations cost of $1,406.81. (Id. ¶ 95.) Monadnock has facilities operations and maintenance expenses of $2,271,633.86, which results in a per-pupil facilities and maintenance cost of $1,482.92. (Id. ¶ 98.) The funding formula contained in the 2008 Spreadsheet attributes $195 per pupil for facilities operation and maintenance. (Id. ¶ 97.) And, according to the DOE, the statewide average cost for plant operations is $1,462.66 per pupil, thus the $195 per pupil funding only covers 13% of actual expenses. (Id. ¶ 99.)[9] The Petitioners assert that, because the State has funded only 13% percent of the actual expenses for facilities operations and maintenance, according to the DOE's data, the State has failed to meet its constitutional mandate to fund an adequate education. (Id. ¶¶ 99–100.)

The Petitioners have submitted a calculus that includes the same data the Joint Committee used with the exceptions of corrected figures for the teacher-student ratio; corrected teacher and staff benefits to reflect actual levels; maintenance costs at $1,400

[9] The Petitioners calculated this figure by consulting a DOE report, titled "State Summary Revenue and Expenditures of School Districts 2017-2018," which reflects that plant operations cost $243,271,198; the Petitioners divided this figure by 166,321.18, which they state is the total number of pupils in the State. (Id. ¶ 89, n. 7; id., Ex. H (Doc. 13).)

per pupil; the superintendent, nurse, and food services figures included; and no transportation costs included. (2d Am. Pet., Ex. I.) For transportation costs, the Petitioners state the average cost for ConVal is $914.60 per pupil. (Id. ¶ 107.) Using this calculus, and including the proposed transportation cost, the Second Amended Petition asserts that the cost of providing a constitutionally adequate education to pupils in ConVal is $10,843.60 per pupil. (Id. ¶ 108.)

Winchester does not have its own public high school, thus Winchester pays tuition of $14,023 per pupil for its high school students to attend Keene High School, which does not include transportation. (2d Am. Pet. ¶¶ 112–13.) This tuition agreement was approved by the State Board of Education and is on par with other agreements the Board has approved. (Id. ¶¶ 114–15.) Transportation costs in Winchester are $962.73 per pupil. (Id. ¶ 109.) Thus, the Petitioners assert that, with an average transportation cost of $962.73 per pupil, the cost of providing an adequate education in Winchester is $10,891.73 per pupil. (Id. at ¶¶ 109–10.) The Second Amended Petition states that, when Winchester closed its high school and started paying tuition for its students to attend Keene High School, it resulted in cost savings of more than $1,000 per pupil, which exceeds its transportation costs. (Id. ¶ 117.) There are no high schools in the State where Winchester could send its students with $3,636.06 in tuition, as the base adequacy aid provides. (Id. ¶ 119.) Nor are there any high schools in reasonable geographic proximity to Winchester that Winchester could send its students for less than $10,000 per pupil. (Id. ¶ 120.)

The Petitioners assert that no school district can provide a constitutionally adequate education or meet the requirements of RSA 193-E:2-a on only $3,636.06, the

current base adequacy aid provided by the State, as "the State's own data" indicate the cost of providing a constitutionally adequate education, exclusive of transportation, is more than $9,929. (Id. ¶¶ 102–03; id., Ex. I.) Citing to the DOE's data of cost per pupil in 2017–2018, the Petitioners contend "there is not a single district in the [State] where the per pupil expenditures are less than $12,000." (Id. ¶ 105.)

In addition to their challenges to the Joint Committee's Final Report, the Petitioners have articulated that the insufficient base adequacy aid amount provided under RSA 198:40-a, II(a) results in an unconstitutional reliance on local taxes by function of the Statewide Education Property Tax ("SWEPT"). (Id. at ¶ 123.) The Petitioners state that the State obtains a majority of the funds used for the base adequacy aid through the SWEPT, collected pursuant to RSA 76:3. (Id. at ¶ 123.) The SWEPT was originally adopted at a uniform rate of $6.60 per thousand dollars in property value. (Id. at ¶ 124.) The SWEPT has since been decreased to $2.06 per thousand, less than one-third of its original rate. (Id. at ¶ 125.) State education aid now consists of a smaller percentage of total education expenditures than it had in 1999, and local communities have had to increase their tax rates to make up for the decreased or stagnant State aid with increasing educational expenditures. (Id. at ¶¶ 126–27.) The Petitioners assert that education property taxes vary greatly throughout the State, and communities such as Newington have a total education rate of $3.19 while Dublin has a combined local and state education tax rate of $16.46. (Id. ¶¶ 152–53; id., Ex. K.) Winchester has a combined local and state education tax rate of $22.65, New Ipswich has a combined education tax rate of $21.28, and Troy has a combined tax rate of $21.52. (Id. ¶¶ 154–56; id., Ex. K.) The difference between Newington and Troy, the

Second Amended Petition states, is 675%. (Id. ¶ 156; id., Ex. K.) The Petitioners assert that the State cannot fund education through tax rates that vary by more than 400%. (Id. ¶ 157.)

In regard to the 2019 Fiscal Year, the Second Amended Petition asserts that the State must provide base adequacy aid funding to ConVal of $22,164,318.40, or $10,843.60 for each of ConVal's 2,044 pupils, to ConVal. (Id. ¶¶ 128–29.) This amount would still only cover less than half of ConVal's approximately $48,000,000 education expenses each year. (Id. ¶ 130.) The Petitioners aver that, "A constitutionally adequate education cannot be provided to the approximately 2,044 students in the ConVal School District without more base adequacy funding than will be provided by the State pursuant to RSA 198:40-a(II)(a) as modified by RSA 198:40-d." (Id. ¶ 134.) For Winchester, the Petitioners assert that the State must provide base adequacy aid funding of approximately $5,892,752.68, or $10,891.73 for each of Winchester's 541.03 pupils. (Id. ¶¶ 136–38.) For Mascenic, the Petitioners assert that the State must provide base adequacy aid funding of approximately $10,357,560.07, or $10,548.81 for each of Mascenic's 981.87 pupils. (Id. ¶¶ 147–50.) The Second Amended Petition asserts that the petitioning school districts are forced to raise their local taxes to provide their students with a constitutionally adequate education. (Id. ¶¶ 135, 146, 151.)

In regard to Monadnock, the Petitioners assert that Monadnock cannot provide a constitutionally adequate education on only $3,636.06 per pupil, and that Monadnock's towns have had to raise additional funds via local taxation to provide a constitutionally adequate education. (Id. ¶¶ 145–46.) The Petitioners also state that Monadnock cannot provide the requirements of RSA 193-E:2-a and Ed. 306. (Id. ¶ 142.) The

Second Amended Petition does not provide an amount that Monadnock is allegedly owed by the State, but states that Monadnock has a student population of 1,531.86. (Id. ¶¶ 141–46.)

In regard to the 2020 Fiscal Year, the Petitioners assert that base adequacy aid will increase to $3,708.78 but that the State must provide no less than $9,929 plus actual transportation costs. (Id. ¶¶ 163–64.) The State's failure to fully fund adequate education, according to the Petitioners' calculations, will result in the local taxing authorities needing to raise the funds locally in the 2020 Fiscal Year. (Id. ¶ 165.)

The Second Amended Petition also names Governor Sununu and Commissioner Edelblut in their individual capacities, in that Governor Sununu is authorized to draw a warrant from the education trust fund to satisfy the State's obligation to fund constitutionally adequate education as per RSA 198:42, and Commissioner Edelblut is responsible for distributing adequate education grants as per RSA 198:42. (Id. ¶¶ 182–83.)

The Petitioners seek for this Court to issue a permanent injunction barring the State from violating Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution; to issue a declaratory judgment finding RSA 198:40-a, II(a) unconstitutional both on its face and as applied to the Petitioners; to award injunctive relief and equitable relief against Commissioner Edelblut and Governor Sununu in their individual capacities, if necessary; to award the Petitioners their reasonable costs and attorney's fees; and to grant such further relief as is reasonable and just. (Id. at 25.)

II. Motion to Dismiss

A. Standard of Review on Motion to Dismiss

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). When "ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiff's] pleadings are sufficient to state a basis upon which relief may be granted." Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014) (quoting Avery v. N.H. Dep't of Educ., 162 N.H. 604, 606 (2011)). "To make this determination, the court would normally accept all facts pled by the [plaintiff] as true, construing them most favorably to the [plaintiff]." Id. However, the Court will not "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." Snierson v. Scruton, 145 N.H. 73, 76 (2000), as modified (Nov. 22, 2000) (quotation and citation omitted).

B. State's Arguments for Dismissal

The State has raised several grounds for dismissal. First, the State seeks dismissal of Governor Sununu and Commissioner Edelblut in their individual capacities. (State's Mot. Dismiss 5–6.) The State then asserts that the relevant standard of review is rational basis and that this Court has an obligation to substantially defer to the Legislature on education funding matters. (Id. at 6–8.) Along with this theory, the State argues that the Petitioners bear the burden of proof in demonstrating that a fundamental

right has been violated; specifically, the State argues the Petitioners have failed to allege that RSA 198:40-a, II(a) results in delivery of a constitutionally inadequate education. (Id. at 8–11, 28–29.) The State argues that the Petitioners have not and cannot form such an allegation because the Legislature has clearly defined and provided what constitutes an "adequate education." The State asserts that because the State has provided the Petitioners with the content of the Legislature's definition of an "adequate education," the Second Amended Petition must be dismissed. (Id. at 11–20.)

The State has also asserted that the Petitioners' evidence, documents from the DOE, have no bearing on whether RSA 198:40-a, II(a) is unconstitutional as rational basis is the appropriate standard of review, a standard that does not permit the Court to inquire whether the Legislature could have or should have considered different evidence or data in forming its costing and funding mechanism. (Id. at 20.)

The State also seeks dismissal of the Petitioners' claim concerning the SWEPT because the Petitioners have not asserted that the SWEPT is applied disproportionately nor that it results in the delivery of a constitutionally inadequate education. (Id. at 28–29.)

And, the State denies that the Petitioners may receive the relief they seek, as the Petitioners seek what the State characterizes as a "mandatory injunction," akin to a writ of mandamus, which is an "extraordinary remedy" they are not entitled to without allegations that the State is providing an inadequate education. (Id. at 21–22.)

The Court first addresses the individual liabilities of Governor Sununu and Commissioner Edelblut. Infra Part II.C. Second, the Court addresses the State's challenge to the Petitioners' evidence. Infra Part II.D. Then, the Court determines

whether the Petitioners' allegations concern the deprivation of a fundamental right. Infra Part II.E. This analysis necessarily involves review of the legislative process and intent behind RSA 198:40-a, II(a). Infra Part E.4. Then, the Court reviews the Petitioners' claim concerning the SWEPT, followed by their request for injunctive relief. Infra Part II.F–G.

C. Liability of Governor Sununu and Commissioner Edelblut

The Petitioners have included Commissioner Edelblut and Governor Sununu in their individual capacities under the theory that "[n]either Commissioner Edelblut nor Governor Sununu have yet complied with the New Hampshire Constitution by ensuring education is cherished and fully funded." (2d Am. Pet. ¶¶ 184–85.) Because both Governor Sununu and Commissioner Edelblut have acted contrary to their official obligations, the Petitioners allege, they have not acted in their official capacity but rather illegally and in their individual capacities, and they are thus implicated according to the established principle that "[w]hat is forbidden by the Constitution is outside the field of state activity . . . ." (Pet'rs' Obj. Mot. Dismiss 17 (quoting Conway v. N.H. Water Res. Bd., 89 N.H. 346 (1938)); 2d Am. Pet. ¶ 185.) Therefore, if there is no other remedy, a remedy must lie against Commissioner Edelblut and Governor Sununu in their individual capacities and sovereign immunity will not bar such a claim. (Id. ¶¶186–87.)

The State has moved for dismissal of Governor Sununu and Commissioner Edelblut as parties in their individual capacities. (State's Mot. Dismiss 5–6.) The State argues, "[e]ven assuming the plaintiffs are entitled to the relief they seek in their Amended Petition, . . . they have asserted no facts on which the Governor or the Commissioner could be found individually liable." (Id.) The State points to the

Petitioners' requested prospective declaratory and injunctive relief, which, if granted, "would extend solely to the Governor and Commissioner's rights and responsibilities in executing the State's laws." (State's Mot. Dismiss 5.) The Court agrees with the State.

Under the Ex parte Young doctrine, a suit against a state official in his official capacity seeking prospective equitable relief is permitted, while a suit requesting retroactive relief is considered to be a suit against the state. Frazier v. Simmons, 254 F.3d 1247, 1253 (10th Cir. 2001); Ex parte Young, 209 U.S. 123 (1908). When state officials are sued in their individual capacities, the Court analyzes whether the relief sought is related to their individual or official capacity. "Applying this principle [from Ex parte Young], an action is barred by the Eleventh Amendment, even though a state official is named as the defendant, 'if the state is the real, substantial party in interest. Whether the state is the real party in interest turns on the relief sought by the plaintiffs.'" Id. (emphasis added). When a state official's actions do not conform to the law, a court is empowered to issue declaratory judgment to prevent him or her from acting *ultra vires*. See O'Neil v. Thomson, 114 N.H. 155, 159 (1974).

Though the Petitioners have sought relief from Governor Sununu and Commissioner Edelblut under the theory that both have acted contrary to their official duties, and therefore illegally, their claims against both individuals are characterized by the relief sought. According to the Petitioners, the relief sought is for Governor Sununu and Commissioner Edelblut to act according to law that the Petitioners have not alleged is unconstitutional. If both individuals were ordered to act under the unchallenged law, as the Petitioners request, they would be acting in their official capacities. Furthermore, even if both Governor Sununu and Commissioner Edelblut have acted illegally in the

past as the Petitioners have alleged, the Petitioners do not seek a remedy for those past illegal actions, nor does their requested relief require a finding that they have acted illegally in the past. It instead requires a finding that they are obligated, prospectively, to act. It is thus clear that the Petitioners' concern with Governor Sununu and Commissioner Edelblut is in their official capacities. For the same reasons, it is not necessary for this Court to have Governor Sununu and Commissioner Edelblut before it in their individual capacities to determine whether they must act according to the law.

Also, notably, if Governor Sununu and Commissioner Edelblut are obligated to act as the Petitioners have theorized, thus leaving them without discretion, the Court's order for injunctive relief would be limited to their official capacities.[10] See Ex parte Young, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.").

In their objection to the State's Motion to Dismiss, the Petitioners have explained that the Second Amended Petition explicitly seeks relief against Governor Sununu and Commissioner Edelblut in their individual capacities, asking the Court "to prohibit Governor Sununu and Commissioner Edelblut from discharging their responsibilities unconstitutionally." (Pet'rs' Obj. Mot. Dismiss 17.) Characterizing the relief sought as a negative—an order to prevent action—does not change that the relief sought would be ordering Governor Sununu and Commissioner Edelblut to act according to the law,

[10] If it is otherwise, that the action sought concerns discretionary functions, then the Eleventh Amendment would preclude this Court from issuing the requested relief. See Ex parte Young, 209 U.S. at 158.

which necessarily would be an affirmative, prospective order carried out in their official capacities.

Therefore, Governor Sununu and Commissioner Edelblut, as parties in their individual capacities, are DISMISSED.

D. Petitioners' Evidence

In both its Motion to Dismiss and Motion for Summary Judgment, the State has asserted that the Petitioners' evidence, which consists mostly of DOE data, is inappropriate for this Court to consider. The State asserts that rational basis review is appropriate because of the historical deference New Hampshire courts have afforded the Legislature in developing school funding plans and statutes. (State's Mot. Dismiss 6–10, 20.) As such, the Court may not delve into the Legislature's justifications for codifying the Joint Committee's costing at RSAS 198:40-a, II(a) nor may consider the Petitioners' competing evidence of costs. (Id. at 20.)

On a motion to dismiss, the Court must accept all facts pled by the plaintiff as true. Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014). The State has insisted that the DOE data has no bearing on the Petitioners' allegations that RSA 198:40-a, II(a) is unconstitutional. (State's Mot. Dismiss 20.) At least at the motion to dismiss stage, the Court disagrees. The Petitioners have alleged both a facial and as-applied challenge to the statute, and the DOE data purports to depict how RSA 198:40-a, II(a) has funded, or failed to fund, New Hampshire school districts. On an as-applied challenge, it is appropriate for the Court to consider how a challenged law applies to the petitioning party. See State v. Lilley, No. 2017-0116, 2019 WL 493721, at *2 (N.H. Feb. 8, 2019) (discussing a facial versus as-applied challenge); Colo. Right To Life Comm., Inc. v.

Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007) ("[A]n as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case."); see also 16 C.J.S. Constitutional Law § 163. Without weighing the materiality of the DOE data, it is at least relevant to the Petitioners' as-applied challenge. Therefore, the Court will not exclude the Petitioners' evidence at this stage.

E. Deprivation of a Fundamental Right

1. *Scrutiny*

The State asserts that the Petitioners have failed to allege facts demonstrating that the State has fallen short of its constitutional duty to deliver an adequate education and therefore the Second Amended Petition must be analyzed under rational basis review rather than strict scrutiny, the level of review reserved for allegations concerning the deprivation of fundamental rights. (State's Mot. Dismiss 6–11, 25–29.) In order to determine whether the Petitioners have alleged a claim, the Court must also determine whether those allegations trigger strict scrutiny level of review.

The State asserts that the Petitioners "contend that [the State's current] funding remains constitutionally deficient because it does not cover the full amounts" of what the petitioning school districts have expended on the five allegedly flawed areas of the Joint Committee's costing decision. (State's Mot. Dismiss 25.) The State's articulation of the Petitioners' legal theory is inaccurate, in that the Petitioners do not assert that it is the State's duty to "cover the full amounts" of what the school districts have expended. (State's Mot. Dismiss 25.) Rather, the Petitioners assert that the State is obligated to fund an adequate education according to its own data. (2d. Am. Pet. 14.) Furthermore, the Petitioners have explained that the amount of base adequacy aid they have

requested according to their asserted costing "would still only cover less than half of ConVal's approximately $48,000,000 in educational expenses each year." (Pet'rs' Mot. Summ. J. 5, n. 1.)

The State is correct that the Petitioners have not alleged that they have been unable to provide an adequate education within their districts. Nonetheless, the Petitioners' allegations do not fall short of alleging that there has been a constitutional violation. The Petitioners' theory has consistently been that the petitioning school districts, in receiving the base adequacy aid provided via RSA 198:40-a, II(a), are not receiving sufficient funds to provide a State-funded adequate education. Specifically, the State is failing to sufficiently fund what the Legislature has determined it is obligated to fund according to its definition of an adequate education. While the Petitioners have not alleged that the proposed underfunding has resulted in the provision of something less than an adequate education, they have alleged that the underfunding forces the petitioning school districts to raise their local taxes to compensate for the insufficient funds and that this impinges on the students' fundamental right to a State-funded adequate education. The alleged constitutional violation, therefore, is not that the petitioning districts' students are being deprived of an adequate education entirely; they, rather, are alleging that the students have a fundamental right to a State-funded education, and that while they are receiving an adequate education, it has wrongfully been provided by municipalities picking up the funding where the State has left off.

School funding has frequently been challenged as disproportional taxes in violation of Part II, Article 5 of the New Hampshire Constitution. See Claremont Sch. Dist. v. Governor (Claremont VII), 144 N.H. 210, 214 (N.H. 1999); Opinion of the

Justices, 142 N.H. 892, 900 (1998). In those cases, rational basis scrutiny is applied, and a court examines whether the Legislature had "a just reason for the classification" resulting in a disproportional tax that "serve[s] the general welfare" and that may "not be arbitrary." Claremont VII, 144 N.H. at 214. However, if "an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny." Claremont II, 142 N.H. at 474; see State v. Hollenbeck, 164 N.H. 154, 160 (2012) ("[A] heightened standard of review applies when a fundamental right or protected liberty interest is at issue."). The fundamental right articulated in Claremont II encompasses more than simply receiving an education that meets the definition of adequate education; it is a right to a State-funded adequate education. Claremont II, 142 N.H. at 473 ("We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education.").

In City of Nashua v. State, strict scrutiny was applied when the City of Nashua alleged that HB 616[11] "violate[d] the State's constitutional duty to fund and adequate public education" because, "[b]y its nature," the duty to fund an adequate education was "inextricably linked to the public's fundamental right to a constitutionally adequate public education." No. 05-E-0257, 2006 WL 563314, at *2 (N.H. Super. Mar. 8, 2006) (Order, Groff, J.). Justice Groff explained that the Supreme Court had issued four mandates to the Legislature—"define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability"—as adopted in

[11] The House Bill at issue in City of Nashua—Laws 2005, Ch. 257 ("HB 616")—was also the bill at issue in Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII), in which the Supreme Court found that the Legislature had failed to define a constitutionally adequate education. 154 N.H. 153, 155 (2006).

Claremont II. City of Nashua, 2006 WL 563314, at *4; see also Claremont Sch. Dist. v. Governor (Accountability), 147 N.H. 499, 505 (2002) (stating the "four mandates"). With these four mandates, Justice Groff explained,

> the Supreme Court has made it clear in its decisions that the State's duty is not merely to provide and fund a constitutionally adequate education but that it must meet all of these four mandates as each one is an integral part of the duty of the State to provide a constitutionally adequate education.

City of Nashua, 2006 WL 563314, at *8. Indeed, in reiterating the constitutional duty, the New Hampshire Supreme Court had previously found that an earlier bill that would "rely, in part, upon local property taxes to pay for some of the cost of an adequate education" would "directly contradict the mandate of Part II, Article 83, which imposes upon the State the exclusive obligation to fund a constitutionally adequate education." Opinion of the Justices (Reformed Public School Financing System) (Claremont IX), 145 N.H. 474, 476 (2000) (emphasis added). The scope of the State's duty to provide an adequate education—and the scope of the fundamental right to an adequate education—must therefore also include the costing and funding. City of Nashua, 2006 WL 563314, at *6 ("The duty imposed on the Legislature by the Constitution, however, is not to 'adequately fund' education, but to *totally* fund 'a *constitutionally adequate education*.'"); see also Londonderry (Claremont XII),154 N.H. at 156 ("[T]hese four mandates comprise the State's duty to provide an adequate education."); Londonderry School Dist. SAU #12 v. State, No. 05-E-0406, 2006 WL 6161061, at 4 (N.H. Super. Mar. 07, 2006) (Order, Groff, J.) (applying strict scrutiny to review of HB 616).

Strict scrutiny is inappropriate when an actual deprivation of a right has not occurred. State v. Lilley, 204 A.3d 198, 208 (N.H. 2019) ("For limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of

the right."). On this motion to dismiss, the question is solely whether the Petitioners have alleged an actual deprivation. The Second Amended Petition unquestionably alleges a deprivation. (2d Am. Pet. ¶ 14.) Whether the Petitioners have demonstrated a deprivation is a separate question addressed infra. See infra Part III.C.

The Court finds that the Petitioners have alleged a constitutional violation and deprivation of a fundamental right. Upon such allegations, the Court will apply strict scrutiny. See Claremont II, 142 N.H. at 475 ("We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy."); see also Londonderry School Dist. Sau #1, 2006 WL 6161061, at 4 ("[I]n this case the petitioners claim that HB 616, which serves to implement the public's fundamental right to an adequate education, does, in fact, impinge that right. Thus, the Court finds and rules that the strict scrutiny standard applies in this case, and, as a result, the State must satisfy the heightened standard of review of strict scrutiny.").

While the State has insisted that the Petitioners must still "demonstrate that the amounts the State has actually appropriated for those costs components results in the delivery of an inadequate education," the Court finds that it would be improper to require such a showing on a motion to dismiss. (State's Mot. Dismiss 26.) Effectively, the State argues that the Petitioners cannot challenge the State's funding when the petitioning school districts have sufficiently raised local funds to provide an adequate education. The State asks this Court to preclude the Petitioners from seeking judicial review when the Petitioners have made efforts to raise taxes to provide their students

with an adequate education, an obligation that belongs to the State. The State's misplacement of that responsibility is the basis for the Petition. The Court agrees with the Petitioners that they "are not obligated to let their students be harmed by the State's failure to provide funding before they can seek redress with the courts." (Pet'rs' Obj. Mot. Dismiss 11.)

2. *Presumption of Constitutionality and Deference to Legislature*

The State has pointed to case law expressing that a court will "generally defer to legislative enactments." (State's Mot. Dismiss 7 (citing City of Manchester v. Sec. of State, 163 N.H. 689, 696 (2012) ("[W]e must presume that the [law in question] is constitutional, and we will not declare it invalid except upon inescapable grounds." (quotation omitted)).)[12] This is especially true, the State asserts, when "the Constitution imposes a duty on the legislature to develop a plan in a complex area that requires reconciliation of various competing goals and policies." (Id. (citing City of Manchester, 163 N.H. at 697).)

> Generally, the Court's review of whether a legislative act is unconstitutional is premised on the rule that the constitutionality of a legislative act is to be presumed, and a statute is not to be held unconstitutional unless a clear and substantial conflict exists between it and the constitution. A statute will not be declared invalid except upon inescapable grounds.

City of Nashua, 2006 WL 563314, at *2 (quotations, brackets, and citations omitted).

[12] The Court does not refer to City of Manchester because the Supreme Court has otherwise established deference to the Legislature in school funding cases in ample precedent. However, the Court notes that the legislative deference demonstrated in City of Manchester included a weakened version of strict scrutiny applied to gun control legislation that was likened to the level of scrutiny applied when reviewing election law challenges and zoning cases. See City of Manchester, 155 N.H. at 698–99. There is currently no indication that the fundamental right to a State-funded adequate education should be similarly scrutinized.

Legislative deference cannot be reconciled with strict scrutiny, as strict scrutiny requires a compelling state interest for a restriction or impingement on the fundamental right at issue, rather than permitting the Court to defer to the Legislature. Akins v. Sec'y of State, 154 N.H. 67, 73 (2006) ("To comply with strict judicial scrutiny, the governmental restriction must 'be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.'" (quoting Follansbee v. Plymouth Dist. Ct., 151 N.H. 365 (2004)). Indeed, strict scrutiny carries a "presumption of unconstitutionality." Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 699 (2007); see City of Nashua, 2006 WL 563314, at *2 (citing to Claremont II and noting that, because "a constitutionally adequate public education is a fundamental right," despite the general rule that a court presume the constitutionality of a legislative act, strict scrutiny must be applied to challenge of school funding bill); see also 16 C.J.S. Constitutional Law § 252 ("The usual strong presumption in favor of constitutionality does not apply where rights, privileges, and immunities of citizens are involved or where a classification must meet a strict scrutiny test because it is inherently suspect.").

Furthermore, when the meaning of a statute is not in question, a court is not obligated to read legislation as presumptively constitutional as it is when there is a question of statutory construction. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, 159 N.H. 627, 640 (2010) ("In this case, however, there is no question of statutory interpretation. The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, we cannot avoid our obligation to say so." (quotation omitted)).

Nonetheless, New Hampshire courts have, with its litany of school funding cases, recognized that school funding involves crucial policy decisions that are only proper for the Legislature to determine. E.g. Londonderry (Claremont XII), 154 N.H. at 156 ("Since the inception of the education cases in 1993, we have consistently deferred to the legislature's prerogative to define a constitutionally adequate education."); Claremont Sch. Dist. v. Governor (Claremont XI), 147 N.H. 499, 518 (2002) ("The development of meaningful standards of accountability is a task for which the legislative branch is uniquely suited."); Claremont II, 142 N.H. at 475 ("[W]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government . . . ."); Claremont I, 138 N.H. at 192 ("We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."). Contra Londonderry (Claremont XII), 154 N.H. at 163 ("Respectful of the roles of the legislative and executive branches, each time this court has been requested to define the substantive content of a constitutionally adequate public education, we have properly demurred. Deference, however, has its limits. . . . . [T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."). However, this deference has been demonstrated not in construing a law but rather in limiting a judicial mandate to the other branches of government. The Court's review of constitutionality is thus not limited by any deference to the Legislature, but the Court notes that this established principle in school funding cases curtails its ability to provide injunctive relief. See Seymour v. Region One Bd. of

Educ., 803 A.2d 318, 326 (Conn. 2002) (stating, in review of state school funding costing, that "[s]imply because the legislature has passed a statute adopting a particular fiscal formula cannot mean that a court may not entertain a constitutional challenge to that formula"); infra Part IV.B.

3. *Burden of Proof*

The State further asserts that the Petitioners bear the burden of proof to "establish that the legislature's definition of an 'adequate education' embraces those ancillary, indirect costs they identify." (State's Mot. Dismiss 10.)

As found above, strict scrutiny is proper as the Petitioners have alleged a constitutional violation concerning a fundamental right. Under strict scrutiny, and in the absence of a presumption that the challenged law is valid, the State would bear the burden of proof to rebut the presumption that the law is unconstitutional. See Fisher v. Univ. of Tx. at Austin, 136 S. Ct. 2198, 2222 (2016) ("Strict scrutiny is a searching examination, and it is the government that bears the burden of proof."); 16 C.J.S. Constitutional Law § 259 ("[W]here fundamental rights are involved, and there is no presumption of validity, the government has the burden of proving beyond a reasonable doubt that the statute is constitutional."). Because the Second Amended Petition triggers strict scrutiny, the burden of proof at this stage in litigation is on the State.

4. *The Definition of "Adequate Education"*

The State argues that the New Hampshire Legislature has properly defined "adequate definition" and that the Petitioners' identified costs do not fall into this definition. (State's Mot. Dismiss 11–14.) Thus, the State argues, it has no constitutional obligation to fund those ancillary costs. (Id. at 14.) The State has argued

that the Legislature's definition of "adequate education" includes RSA 193-E:2-a as well as the Board of Education "Minimum Standards for Public School Approval" in Ed. 306. (State's Mot. Dismiss 12–14.) This is according to RSA 193-E:2-a, VI(a), which defines "Minimum standards for public school approval" as "the applicable criteria that public schools and public academies shall meet in order to be an approved school, as adopted by the state board of education through administrative rules." The State then has matched each section of the ten "school approval standards" areas in RSA 193-E:2-a, I with ten Board of Education regulations contained within Ed. 306, stating that those ten regulations "substantively define[]" the topics mandated by RSA 193-E:2-a. (State's Mot. Dismiss 13–14.)

The Petitioners have previously insisted that they are not challenging the first or fourth Claremont II mandates, that is, the mandates that the Legislature "define an adequate education, . . . and ensure its delivery through accountability fund it with constitutional taxes." Londonderry (Claremont XII), 154 N.H. at 155–56. The Petitioners rather intended to narrow their challenge to the second and third mandates, which are to "determine the cost" and "fund it with constitutional taxes." Id. Nonetheless, the Petitioners' theory and arguments hinge on whether the Legislature's definition includes the items the Joint Committee included in its "universal cost." (Pet'rs' Obj. Mot. Dismiss 8–9.) Significantly, the Petitioners' theory has assumed that the Legislature's definition of an "adequate education" already includes those cost items because the Joint Committee's 2008 Spreadsheet included them or because Board of Education regulations require them. The State has insisted on a narrower definition and that the 2008 Spreadsheet includes more than what makes up an "adequate education,"

according to the Legislature's definition. It is therefore impossible for this Court to address the Petitioners' costing argument without first determining what the Legislature included in its definition of "adequate education." Given the long history of interchange between the Legislature and the Judiciary, it is necessary for the Court to consider the legal evolution of school funding jurisprudence in New Hampshire.

a. "Adequate Education" in the Legislature

In 1993, Claremont I determined that the New Hampshire Constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in [this State] and to guarantee adequate funding." 138 N.H. 183, 184 (1993). Four years later, Claremont II animated that duty by articulating four specific mandates to the Legislature, the first of which was to "define an adequate education." Londonderry (Claremont XII), 154 N.H. at 155–56 (explaining four mandates from Claremont II). The Claremont II decision also highlighted seven criteria from the Supreme Court of Kentucky in "establishing general, aspirational guidelines for defining educational adequacy." Claremont II, 142 N.H. at 474–75.

In January 1998, Governor Jeanne Shaheen proposed a plan to address the Claremont II decision by creating "a working group to develop a standard of educational adequacy . . . ." Advancing Better Classrooms: Governor Proposes the ABC Plan to Address Claremont Decision, Office of the Governor, at 1–2 (Jan. 15, 1998). The first part of the governor's plan was to "determine[] a standard of adequacy for children's education." Id. at 1. The working group, called the Governor's Task Force on Educational Adequacy, submitted its findings on February 9, 1998. Recommendations Concerning the Implementation of the "A Better Classroom" Plan, Governor's Task

Force on Educational Adequacy (Feb. 9, 1998). In consideration of the Supreme Court decisions, descriptions, articles, and laws from other states implementing educational reform programs, and in consultation with "knowledgeable people from across the country," the Task Force formed a definition of an "adequate education." Id. at 2–3. The definition included eight points, which were nearly identical to the seven criteria Claremont II borrowed from the Supreme Court of Kentucky. Compare id. with Claremont II, 142 N.H. at 474–75. The Task Force also listed three proposed "Alternative Methods for Calculating the Cost of an Adequate Education," including a method based on the annual cost per pupil, one based on the annual statewide total revenues and expenditures for school districts, and one that would identify five school districts that met school approval standards and had a higher percentage of students than the statewide average achieving at the proficient and advanced levels on the state assessment and then divide by the total pupils in those five districts. Recommendations Concerning the Implementation of the "A Better Classroom" Plan, Governor's Task Force on Educational Adequacy, at 6 (Feb. 9, 1998).

Later that year, the Legislature codified what was essentially the Task Force's definition of "adequate education," narrowed to seven points, in RSA 193-E:2 and labeled them the "Criteria for an Adequate Education." Laws 1998, Ch. 389 (HB 1075-FN-A-LOCAL). Also that year, the Supreme Court issued an advisory opinion rejecting Governor Shaheen's education financing plan. See Opinion of the Justices (School Financing) (Claremont IV), 142 N.H. 892, 901 (1998).

Two years later, in Claremont IX, the Supreme Court declared a proposed targeted-aid plan unconstitutional. 145 N.H. 474 (2000). The Supreme Court was

unimpressed with RSA 193-E:2: Despite not having a question before it concerning the definition of an "adequate education," and despite RSA 193-E:2's codification, the Supreme Court stated "constitutional adequacy" had "yet to be defined," a task that had been assigned to the Legislature. 145 N.H. at 477; see Mosca, The Original Understanding of the New Hampshire Constitution's Education Clause, 6 Pierce L. Rev. 209, 245 (2007). The Legislature took no action in response.

As such, when the Supreme Court issued the first Londonderry (Claremont XII) opinion in 2006, the Legislature had failed to develop a more specific definition of "adequate education." The Supreme Court declared the State still had not developed "distinct substantive content" as to what constitutes "adequacy" such that the cost thereof could be isolated. 154 N.H. at 160. Thus, without more than RSA 193-E:2, for a court to assess whether a constitutionally adequate education is being provided, either a special master or "a trial judge would likely have to determine the levels of 'skill,' 'knowledge,' 'grounding' and 'sound wellness' to which an educable child is entitled." Id. Hoping to avoid such outcomes, the Supreme Court retained jurisdiction "with the expectation that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007." Id.

In 2007, the Legislature passed HB 927, which "[s]et[] forth the substantive educational content of an adequate education," "[r]equire[d] the establishment of criteria to identify schools with greater educational challenges for the provision of additional education aid," and established the Joint Committee. Laws 2007, Ch. 270 ("HB 927") (statement of purpose). In the bill's statement of purpose, it read, "The general court

embraces its duty to define a constitutionally adequate public education for every child in the state." HB 927, 270:1. The final bill stated:

> [T]he specific criteria and substantive educational program that deliver the opportunity for an adequate education shall be defined and identified as the school approval standards in the following areas:
>
> (a) English/language arts and reading.
>
> (b) Mathematics.
>
> (c) Science.
>
> (d) Social studies.
>
> (e) Arts education.
>
> (f) World languages.
>
> (g) Health education.
>
> (h) Physical education.
>
> (i) Technology education, and information and communication technologies.

HB 927, 270:2. These criteria went on to be codified at RSA 193-E:2-a.[13] In addition to this list, the bill's statement of purpose explained:

> In responding to its responsibility to determine the specific criteria and substantive education program that deliver the opportunity for an adequate education, the general court analyzed the current education delivery system established jointly through the legislative and executive branches. Specifically, the general court reviewed the standards for public school approval and the state's curriculum frameworks. As part of its review, the general court determined which of the standards and curriculum frameworks provide the opportunity for an adequate education. In analyzing the school approval standards and curriculum frameworks, the general court recognized that they were developed with the widespread participation of educators, business people, government

[13] Provision (i) was added via amendment in the House of Representatives. House Report, HB 927, at 4–10. Also, RSA 193-E:2-a has since been amended such that provision (i) is now "Engineering and technologies" and a provision (j) has been added to include "Computer science and digital literacy." Laws 2018, 274:1 (HB 1674).

> officials, community representatives, and parents. As a result of the quality of both the standards and the frameworks, the general court identifies the standards in RSA 193-E:2-a and the curriculum frameworks that support those standards as the specific criteria for an adequate education.

H.B. 927, 270:1, IV (emphasis added).

Minority members of the Education Committee voiced concerns about whether the Joint Committee would be developing a definition of "adequate education" apart from assessing associated costs. See House Report, HB 927-FN, at 109–11 (Minority of the Committee on Education Report, March 22, 2007) ("It is the position of the minority of the committee that the Legislature must define adequacy, but that we must also determine the cost, fund it in a constitutional manner and ensure its delivery."). The minority of the Education Committee also opposed an amendment to HB 927 that included mandatory kindergarten "as a component of adequacy," which "the courts have never weighed in on, nor suggested should be part of adequacy." Id. at 109 (statement of Rep. Stiles).

The Senate Committee on Education held a hearing on HB 927 that included testimony from members of the House Committee on Education explaining that the creators of the bill struggled to develop a definition of adequate education without considering the associated costs. See Senate Report, HB 927 (Senate Education Committee Hearing, May 14, 2007), at 40 (statement of Rep. Rous) ("This bill is an attempt to recognize that there is a fine line between determining adequacy and determining cost and that is why it includes general wording."); id. ("The committee had to repeatedly remind themselves not to talk about the funding portion.").[14]

[14] Transcription of the Education Committee's hearing is located within the Senate Report for HB 927 at pages 43–71.

Also at this hearing, House representatives explained the definition of "adequate education" and what it included and excluded, recognizing "the State is responsible for whatever is included in the definition of adequacy." Id. at 48 (questioning of Rep. Rous). Representative Rous stated:

> The discussion about definition versus cost was always, we were always kind of treading a fine line between these two categories and I think that you will find that as you talk about this bill and this definition. So, this language was an attempt on House Education's part to say that we recognize that there are services that required [sic] in order to provide the instructional areas that we have set forth, but without being extremely specific about what they were because it was felt that that was beginning to list cost items, we talked about it in a general way. We did include credentialed teachers as one of those education supports and we were specific about that.

Id. at 44.

Ultimately, a House representative explained, the bill included less in the definition of "adequate education" than could have been articulated and less than some representatives wanted:

> [I]f I had my druthers, that I would include many more things. . . . [Preceding bills] put[] in perhaps more than what we finally wound up with. We were very conservative. It was a struggle on the subcommittee not to put more things in and, as you have already heard, it was a struggle not to mention finance.

Id. at 61 (statement of Rep. O'Niel). A House representative also expressed that the bill included items that they did not know how they could be funded, but included them anyway, such as credentialed teachers: "[P]erhaps the State needs to take over some part of teacher pay. I don't know what part that would be. I don't know how that would be worked out. But, it is in here and it is in here for a reason." Id. at 53 (questioning of Rep. Dunn).

The Joint Committee, charged by HB 927, completed its findings and issued its Final Report on February 1, 2008. The Joint Committee was charged with "review[ing] and study[ing] the analytical models and formulae for determining the cost of an adequate education and the educational needs and resources needed to deliver an adequate education for children throughout the state." HB 927, 270:2. In regard to the definition of an "adequate education" that the Joint Committee considered, the Final Report's explanation of the "universal cost calculation" states that the Joint Committee "reviewed the statutory definition of an adequate education" as defined in RSA 193-E:2-a, which included "the New Hampshire school approval standards in nine[15] specific content areas." (Id. at 13.) The Joint Committee's definition also cited RSA 193-E:2-a, II, and the Final Report stated:

> The standards shall cover kindergarten through twelfth grade and shall clearly set forth the opportunities to acquire the communication, analytical and research skills and competencies, as well as the substantive knowledge expected to be possessed by students at the various grade levels, including the credit requirement necessary to earn a high school diploma.

(Final Report 13.) The Final Report states, "As the definition is based on the New Hampshire school approval standards, the [Joint] Committee reviewed the school approval standards and relied on the relevant parts of those standards to calculate the universal cost." (Id.)

The Joint Committee's findings were adopted in SB 539 in early 2008. See Laws 2008, Ch.173 ("SB 539"). The Senate Committee on Education held a hearing on the bill that included testimony from Senator Estabrook, co-chair of the Joint Committee with Representative Rous. Senate Report, SB 539 (Senate Committee on Education

[15] The statute currently contains ten content areas, but the tenth, RSA 193-E:2-a(I)(j), was only added in 2018. See supra Note 13.

Hearing, March 4, 2008), at 49; (Final Report 6, 8). In explaining the Joint Committee's Final Report, Senator Estabrook stated that the Joint Committee "worked within the constraints of the court's unique rulings to pay first and last dollar of adequacy, and to avoid any consideration of property wealth." Senate Report, SB 539 (Senate Committee on Education Hearing, March 4, 2008), at 49. Representative Rous also provided a statement, and concluded saying, "I believe that the [Joint] Committee acted thoughtfully and responsibly and has met the Court's order to define and cost an adequate education and I urge the Senate to pass this bill and send it to the House." Id. at 63.

Speakers at the hearing voiced disagreements with the Joint Committee's costing. Representative Stiles pointed to the Final Report's statement that while the Joint Committee was school and curriculum based, the Joint Committee had "included a few positions that are not directly correlated with learning as much as nutrition is." Id. at 65. Representative Stiles referenced the "minimum standards for public school approval" and Ed. 306.11, "which states that the local school board shall require that each school makes a meal available during the hours to every student under its jurisdiction in accordance with RSA 189:11-a, [] I and II." Id. at 66. Representative Stiles pointed out that this regulation was "on the same page as the custodial and secretarial services which you have included in your universal cost . . . ." Id. She took issue with the Joint Committee's report, which stated that the basis for its decision in regard to food services was that "most food service programs are self-supporting" and thus as "beyond the scope of definition and need not be included in the universal cost." Id.

Then, Nate Greenberg, the then-Superintendent of Schools for SAU No. 12, testified that his main disagreement with SB 539 was the per-pupil universal cost of $3,450:

> This amount is significantly less than the cost of adequacy. Among the reasons why, and likely one of the most important reasons, is the student-teacher ratios it uses are too high. The ratios do not reflect the situation of New Hampshire schools today . . . . While the Committee's reliance on the school approval standards is generally defensible, in this instance, it is not. I say this because the actual number of classroom teachers indicates that the student-teacher ratios are far lower than twenty-five to one and thirty to one.

Id. at 79–80. Mr. Greenberg's written statements reference DOE data that indicated the 2006–2007 actual average statewide student-teacher ratio was 16 to 1. Id., Attachment 9. He also said that it was worth noting that the "school approval standard that sets these ratios is actually stated in terms of '25 *or fewer* students' and '30 *or fewer* students.'" Id.

In the Education Committee's Hearing Report provided to the Senate, it is noted that Senator Foster asked Mr. Greenberg, "if these numbers are wrong, then what is the cost." Id. at 46. Mr. Greenberg responded that he did not have a number, but that "$3,400 is significantly lower than the actual costs," that "one cannot put 35 students in a high school English class," and that, "with lower class sizes, we can prevent learning problems." Id. Then, the Hearing Report reflects that Senator Foster "reminded everyone that the Committee's job was to define an adequate education," and "that with all that has been said today, Mr. Greenberg still does not have a number." Id. at 46–47.

The Senate Education Committee also heard testimony from Representative Lyman, who was the legislative representative of the Monadnock Regional School District Board of Education. Id. at 71. Mr. Lyman stated, "[T]he fact that you are

considering a per pupil cost of $3,450. This seems ludicrous in a district that is spending over $11,000 per student at our high school." Id.

Rick Trombly of the National Education Association of New Hampshire ("NEA-NH") also testified to the committee. Id. at 74, Attach. 8. Mr. Trombly's written statement's said:

> Last September NEA-NH was pleased to appear before the Joint Legislative Oversight Committee on Costing an Adequate Education to offer its opinion as to how that Committee should discharge its obligations. Our suggestion was to utilize the expertise of the stakeholders: community leaders, education experts, legislatures and parents, and in particular experts who have done studies like this before. The Committee elected to use a different model for this process. The result of the Committee's work is contained in Senate Bill 539. While we applaud the diligence of the Committee, w[e] cannot agree with its conclusions. We have another concern. Because the Committee's dollar amounts are so close to the actual amounts appropriated in recent years, some will question how the Committee arrived at those dollar amounts.[16] Our position is that any costing formula must be based on the real needs of schools. Only then can the state meet its obligation to fund an adequate education for our children.

Id. Mr. Trombly also cautioned against using "the State's standards on class size," since they did not consider school districts that have a smaller population and did not meet those class sizes. Id. at 75. He also stated, "[O]ur underlying problem is that those items that were costed, some were low-balled and those items that were not costed that are critical to delivering an adequate education, that's where we come from." Id. at 76–77.

[16] The Court interprets this to suggest—very plausibly—that the Joint Committee had reverse-engineered the costing formula and figure; that it had tacitly adapted the definition, formula multipliers, and cost amounts to comply with the previous year's budget appropriation. If this is true, it squarely undercuts the behest in Claremont II and its progeny that the Legislature determine the cost of an adequate education and then fund it. Taking a specific final budget figure and then twisting the costing process to mathematically result in it does not adhere to Claremont II's constitutional directive.

b. Judicial Review of Legislature's Efforts

Later in 2008, the Supreme Court addressed HB 927. See Londonderry Sch. Dist. SAU #12 v. State (Claremont XIII), 157 N.H. 734, 735 (2008). The Supreme Court, having retained jurisdiction over the matter after invalidating HB 616, requested the parties file briefs in light of the Legislature's efforts to define and cost an adequate education. Id. at 735–36. The petitioners and the NEA-NH as *amicus curiae* alleged several infirmities with the Legislature's efforts to define an "adequate education": "In addition to highlighting that the accountability requirement has yet to be met, they claim insufficiency in the universal cost per pupil, the allocated differentiated aid and the student-teacher ratio." Id. at 736. The State argued that the action was moot because HB 616 was no longer before the Supreme Court and that HB 927 had not been subjected to a factual inquiry before a trial court. Id. The Supreme Court agreed with the State that the action was moot, finding there was no substantial similarity between HB 616 and HB 927. Id. at 736–37. "Although we are mindful of the petitioners' claims that the new legislation presents new problems, it is precisely for this reason that the controversy before this court is now moot." Id. at 737.

Two justices concurred with the majority opinion, authored by Justice Hicks, while Chief Justice Broderick and Justice Duggan dissented. Id. at 737–45. Chief Justice Broderick highlighted the history of school-funding litigation, pointing out that the Supreme Court had declined to appoint a master to take evidence and make recommendations to the Supreme Court regarding accountability because the State had represented that "it was making progress in developing a delivery and accountability system . . . ." Id. at 738–39 (Broderick, J., dissenting). "In so doing, we intended that

the political branches have an unimpeded opportunity to fulfill their constitutional responsibilities." Id. at 739. Concluding his review of school funding's legislative and judicial journey, Chief Justice Broderick stated:

> It is readily apparent that despite its near decade long assurances that our public education system would contain the requisite controls to ensure the delivery of a constitutionally adequate education, the State has not met its acknowledged obligation. This court, for the past fifteen years, has repeatedly, respectfully and appropriately deferred to the political branches to resolve the critical issues the numerous school funding decisions have identified. . . . . Deference, however, has its limits. Constitutional rights must be enforced or they cease to be rights.

Id. at 740 (citations omitted). Chief Justice Broderick encouraged the political branches to "complete their unfinished work in funding, providing for, and ensuring a constitutional adequate education for each public school student in our state so that the long unfulfilled promise of our State Constitution can finally be realized." Id. at 740–41.

Justice Duggan echoed Chief Justice Broderick's sentiment that it was the Supreme Court's role to "uphold and implement the New Hampshire Constitution." Id. at 745 (Duggan, J., dissenting) (quoting Claremont II, 142 N.H. at 475). He also addressed the petitioners' concerns with HB 927 and the Joint Committee's determination of a cost of an adequate education. Id. at 743–44. The petitioners argued the universal cost per pupil was insufficient, arguing that the Legislature had factored in "unreasonably high student-teacher ratios, low teachers' salaries, and insufficient funding for special needs students" in determining cost. Id. at 743. Justice Duggan also noted NEA-NH's arguments that the student-teacher ratio was miscalculated and that too few provisions were made for classroom aides, substitute teachers, and school administrators. Id. Both the petitioners and the NEA-NH requested the Supreme Court retain jurisdiction over the matter until the Legislature met

its remaining obligations. Id. The State's response, Justice Duggan noted, was that "it is apparent that there would need to be in-depth fact-finding before the plaintiffs could prove their assertions that these legislative decisions do not meet constitutional muster." Id. at 744.

Justice Duggan first disagreed with the majority regarding mootness in that he believed the matter was of pressing public interest and thus appropriate for the Supreme Court to retain. Id. at 744–45. He then discussed the Supreme Court's responsibility in light of "the role of the political branches" and the sentiment in Claremont II that the Judiciary was "not appointed to established education policy, nor determine the proper way to finance its implementation." Id. (quoting Claremont II, 142 N.H. at 475).

> The Joint Committee held eighteen meetings and heard testimony from the public, educators, administrators, education stakeholders, and state as well as national education policy and finance professionals. Following the Joint Committee's report of its findings and recommendations, the plaintiffs disputed the base numbers used to determine the universal cost per pupil as well as the construction of the formula used to reach that figure. The submitted memoranda demonstrate disagreement over, for example, student-teacher ratios, teachers' salaries, and who makes up necessary personnel. These are fact-driven disputes that are normally decided by a trial court. I agree with the Chief Justice that there exist other unresolved issues as to whether the legislature has complied with the mandate to provide a constitutionally adequate education, but these issues should be resolved in the first instance by the superior court. I, therefore, would dismiss this appeal without prejudice and remand to the superior court.

Id. at 745.

c. Analysis of the Present Definition of an "Adequate Education"

This Court now picks up where the Supreme Court left off in 2008: review of HB 927 and the Legislature's latest effort to define, cost, fund, and account for an adequate education. See Londonderry (Claremont XIII), 157 N.H. at 736–37.

The purpose of HB 927 was "to define the opportunity for a constitutionally adequate public education for every child in the state," while the Joint Committee was created solely to "complete the determination of the cost of an adequate education in accordance with the provisions of this chapter . . . ." HB 927, 270:2; RSA 192-E:2-b, III (repealed by Laws 2009, Ch. 198 (SB 180-FN)). It is clear from the legislative history above that the Legislature struggled with defining "adequate education" separate from its costing. It is also clear that the Joint Committee was effectively put in a position to define an "adequate education" beyond the definition provided in HB 927. The Joint Committee, in various places throughout its Final Report, explained what it determined was and was not part of the definition of adequate education, but did not delineate those items in the 2008 Spreadsheet, which includes all items within the universal cost and became codified at RSA 193-E:2-a as the "Substantive Educational Content of an Adequate Education."

The items that the Joint Committee expressly called part of the definition of an "adequate education" are as follows: salaries and benefits for "personnel," which included teachers, specialty teachers, principals, administrative assistants, guidance counselors, library media specialists, technology coordinators, and custodians, (Final Report 14–21); and "non-personnel costs," which included instructional materials and supplies, technology, teacher professional development, and facilities operation and

maintenance, (id. at 21–22). Then, the Joint Committee explicitly stated that school central offices, district administrative staff, school nurses, teacher aids, and food service personnel were not "included in the calculation of the universal cost" because "the definition of the opportunity for an adequate education is school and curriculum based." (Id. at 17.) The Joint Committee also "recognized that neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy," but nonetheless included transportation costs in the universal cost calculations because it was "an important consideration for students to have the opportunity for an adequate education." (Id. at 23.) All of the items in the universal cost, whether part of the definition of an "adequate education" or not, were listed on the 2008 Spreadsheet without notation. (See 2008 Spreadsheet.)

Meanwhile, the Final Report woefully lacks meaningful explanation for the Joint Committee's conclusions. The Joint Committee explained that, "[d]uring its meetings, the Committee deliberated on the components of costing an adequate education, the relevant data related to that costing and the policy choices involved in determining those costs." (Final Report 10.) Yet, the Final Report does not include any of that "relevant data" it considered nor information on the internal "motions" made and "straw polls" it took. (Id.) While a list of the Joint Committee's meetings and their subject matters was attached to the Final Report, no documents from those individual meetings have been provided or located. (Id., App. A.) Thus, when the Joint Committee's Final Report states a conclusion or finding, the only explanation for that finding is the Joint Committee's brief statements labeled, "Basis for decision," within the Final Report. (Final Report 14.) That is not enough.

The items the Joint Committee determined were part of the definition of an "adequate education" were typically supported by a citation to a Board of Education regulation in the item's "Basis for decision" section. Others, however, were not, and were either included without explanation or by the simple statement that "the definition of an adequate education includes" that item. (See id. at 14.) For example, principals, library media specialists, and guidance counselors were included according to Ed. 306.15(a)(1), and administrative assistants were included according to Ed. 306.10. (Id. at 15–16.) Yet, technology coordinators were included because they were "needed to provide the opportunity for an adequate education as defined by RSA 193-E:2-a," which "includes the substantive educational program as provided in the school approval standards in technology education, and information and communication technologies" and "requires 'opportunities to acquire the communication, analytical and research skills' and competencies in addition to the substantive knowledge expected to be possessed." (Id. at 16–17.) "The Committee determined that central to those opportunities are the availability of computers and other technological tools. In order to provide these tools, schools need a technology coordinator to set up and maintain computers, and other technology equipment." (Id. at 17.) The Joint Committee did not cite to a Board of Education regulation, though the State points the Court to Ed. 306.42, which concerns "Information and Communication Technologies Program" requirements. Ed. 306.42; (State's Mot. Dismiss 13.)

The best that can be inferred from the Final Report is that the Joint Committee deemed certain items to be part of an "adequate education" solely on its own judgment of what items were "based on substantive curriculum areas and associated skills" or

were within "the educational components of the school." (Final Report 17 (explaining why certain personnel were not included).) Indeed, in SB 539's statement of purpose, the Legislature reiterated the Joint Committee's role: "The individual components of the cost were selected on the basis of their effectiveness in delivering educational opportunity and after extensive review, debate and discussion by the [Joint Committee] and the general court." SB 539, 173:1, II. Thus, the Joint Committee's judgment did not strictly align with HB 927's definition of "adequate education" but rather included sporadic Board of Education requirements or no regulation at all; what the Joint Committee costed was according to its own, unexplained decision.

The Final Report states, "As the definition [of an adequate education] is based on the New Hampshire school approval standards, the [Joint] Committee reviewed the school approval standards and relied on the relevant parts of those standards to calculate the universal cost." (Id.) The Joint Committee determined which "parts of those standards" were "relevant" to the definition. Though the Petitioners have stated that they do not challenge the Legislature's definition of an "adequate education," it is apparent to the Court that the Legislature failed to clearly identify what exactly goes into its definition.

The Joint Committee's decision-making process and related conclusions raise significant constitutional concerns. First, it has made its costing, and RSA 198:40-a, II(a), impervious to judicial review. The State has proposed that the Joint Committee chose to include cost items that were outside of the definition, and this assertion is supported by the Final Report's explanations of why it included transportation, something it considered to be "an important consideration for students to have the

opportunity for an adequate education" even though outside the definition. (Final Report 23.) The Supreme Court has affirmed that the Legislature may include items that "far exceed the constitutional standard of adequacy," though the Court only accepted that premise "[f]or the purposes of [that] appeal." Londonderry (Claremont XII), 154 N.H. at 160. Yet, the same issue that arose in that case arises here:

> If the statutory scheme that is in place provides for more than constitutional adequacy, then the State has yet to isolate what parts of the scheme comprise constitutional adequacy. More specifically, under the statutory scheme there is no way a citizen or a school district in this State can determine the distinct substantive content of a constitutionally adequate education. Consequently, its cost cannot be isolated. Such a system is also impervious to meaningful judicial review.

Id. (emphasis added). Here, according to the State's theory, RSA 198:40-a, II(a) includes a cost for things beyond the definition of an "adequate education." (State's Mot. Dismiss 17.) As the statute, the Joint Committee, and the 2008 Spreadsheet fail to provide a cost of an adequate education alone, RSA 198:40-a, II(a) is also "impervious to judicial review." Londonderry (Claremont XII), 154 N.H. at 160. The costs that the Joint Committee reached as its universal cost were codified into RSA 198:40-a, II(a). (Pet'rs' Obj. Mot. Dismiss 8.) In that way, the Legislature effectively codified a "Cost of an Opportunity for an Adequate Education" that included things the State argues are not part of an "adequate education." RSA 198:40-a (provision title). The act of codifying the Joint Committee's universal cost without distinguishing how much an adequate education costs raises the same issues that arose in Londonderry (Claremont XII). Accepting the State's assertion that the Joint Committee included more than was required, yet failing to isolate what is constitutionally required, is alone sufficient to invalidate RSA 198:40-a, II(a).

Even beyond this point, it is clear that the Joint Committee's costing failed to adhere to the State's proposed litany of Board of Education regulations or to cost items that other regulations require. The State argues that the Legislature sufficiently defined an "adequate education" and that the Joint Committee properly abided by that definition. The State insists that the "statutes and regulations" it identifies in its Motion to Dismiss "objectively and precisely identify and define an 'adequate education' in sufficient detail" according to the Supreme Court's mandate in Londonderry (Claremont XII). (State's Mot. Dismiss 11–14.) These regulations are, according to the State: Ed 306.31, 306.37, 306.40, 306.41, 306.42, 306.43, 306.45, 306.46, 306.47, and 306.48. (Id. at 13–14.) The Final Report reveals otherwise. Rather than selecting items only according to the ten cited Board of Education regulations that the State has matched with RSA 193-E:2-a's definition, the Joint Committee included items within its universal cost—and explicitly determined that those items were part of an "adequate education"—that are required by other Board of Education regulations. For example, none of the State's cited regulations explicitly provide for the Joint Committee's cost items such as teacher salaries and benefits (Final Report 14 (citing Ed. 306.17(a)(1))); guidance counselors (id. at 15–16 (citing Ed. 306.39(d)(4) & (f))); instructional materials (id. at 21–22 (citing Ed. 306.09(a)(1))); teacher professional development (id. at 22 (citing Ed. 306.15(a)(2))); or facilities operations and maintenance costs (id. at 23 (citing Ed. 306.07(a)(1))). Though common sense perhaps demands such costs be included in providing an "adequate education," the Joint Committee clearly did not adhere to an "objective[] and precise[]" definition of an "adequate education" that can be illustrated with only the State's proposed selection of Board of Education regulations. (State's Mot. Dismiss 14.)

Furthermore, as both the Petitioners and representatives during the Senate Education Committee hearing have expressed, the Joint Committee did not include other items that the Board of Education regulations mandate for school approval. Representative Stiles noted that the Joint Committee refused to fund food and nutrition services despite Ed. 306.11, which states, "The local school board shall: (1) Require that each school makes a meal available during school hours to every student under its jurisdiction, in accordance with RSA 189:11-a, I-II; . . . ."[17] And, the Petitioners have pointed to Ed. 306.12, which states, "the local school board shall require that each school provides qualified personnel to carry out appropriate school health-related activities," specifically nurses. Ed. 306.12(a) & (b). The Final Report notes that, though the Joint Committee "considered whether other positions should be included in the universal costs," including "school nurses, teacher aides and food service personnel," it ultimately concluded that "since the definition of the opportunity for an adequate education is school and curriculum based, ... a school nurse who provides health care services, rather than educational or educationally related services [was] beyond the scope of the universal cost." (Final Report 17.) Thus, even assuming that the State's argument can be construed to mean that the entirety of Board of Education regulations Ed. 306 provides the definition of an "adequate education," as stated above, the Joint Committee did not include all of the items contemplated in Ed. 306 that are, at least arguably, as much educational components as the items that were included. From the Final Report, there is no explanation of why the Joint Committee included a custodian but not school nurses, especially since the mandate the Joint Committee

[17] According to the Final Report, food services were not included because "most food services programs are self-supporting and furthermore outside the educational components of the school . . . ." (Final Report 17.)

cited to support costing a custodian—Ed. 306.07(a)(1)—calls for a "a clean, healthy, and safe learning environment." (Final Report 17 (emphasis added).) Nor does the Joint Committee explain why it included facilities operation and maintenance but not transportation;[18] or teacher professional development but not superintendent services, which are required by RSA 194-C:4 and are assumed present in schools by several Board of Education regulations. (Ed. 306.04; Ed. 306.15; Ed. 306.28; Ed. 306.29; Ed. 306.30). The Petitioners have also pointed out that the Joint Committee included some items required by RSA 189:24, a statute providing the State Board of Education approval for a "Standard School," but not superintendent services that it requires:

> A standard school is one approved by the state board of education, and maintained for at least 180 days in each year . . . in a suitable and sanitary building, equipped with approved furniture, books, maps and other necessary appliances, taught by teachers, directed and supervised by a principal and a superintendent, each of whom shall hold valid educational credentials issued by the state board of education, with suitable provision for the care of the health and physical welfare of all pupils.

RSA 189:24 (emphasis added); (Pet'rs' Obj. Mot. Dismiss 9, n.7).

Importantly, the Supreme Court has addressed the idea of relying on Board of Education regulations to fulfill the constitutional mandate to define an adequate education. In Londonderry (Claremont XII), the State argued that RSA 193-E:2 provided a constitutionally sufficient definition of adequacy, and that "the Legislature has delegated to the State Board [of Education] the authority and the duty to prescribe

[18] While the Joint Committee did include transportation, it explicitly stated that "neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy." (Final Report 23.) And though there is no Board of Education regulation requiring transportation, the Petitioners have highlighted that providing transportation is at least an arguable part of providing the opportunity for an adequate education, as is supported by the Joint Committee's decision to cost transportation. Also, the Joint Committee did cite to a statute when determining to contribute to transportation costs: RSA 189:6, which requires school districts to "provide transportation to all pupils in grade 1 through 8 who live more than 2 miles from the school to which they are assigned." (Final Report 23.)

uniform standards for all public schools in New Hampshire." 154 N.H. at 161 (brackets omitted). The State pointed to Board of Education regulations contained in Ed. 306 and to RSA 186:5 & 8, which require local school boards to "comply with the rules and regulations of the state board." Id. The State argued:

> The school approval standards are very detailed and demanding; they govern nearly every facet of a school's operation. The standards prescribe how schools must be organized and staffed as well as the particular educational content of each subject taught. See, e.g., Ed 306.17 (setting forth maximum class sizes); Ed 306.37 (detailing requirements for English program). These standards are monitored by DOE, which grades individual schools on their compliance with the standards. Ed 306.40(b)(1)-(4).

Id. The Supreme Court responded:

> If it is the State's position that RSA 193–E:2 together with the education rules and regulations, curriculum frameworks and other statutes define a constitutionally adequate education, we defer to the legislature's judgment. We note, however, that if the current system of delivery in combination with the statutory definition establishes a constitutionally adequate education, there would be no need for any local education taxes as the State would be required to pay for implementing the entire statutory scheme. Indeed, if that is the case, we question whether $837 million, the amount currently allotted for public education under House Bill 616, is facially sufficient to fund the school system as required by that statutory scheme. Alternatively, if, as the State asserts, the education rules and regulations, curriculum frameworks and other statutes provide some level of education beyond that of a constitutionally adequate education, the point of demarcation cannot currently be determined. . . . Whatever the State identifies as comprising constitutional adequacy it must pay for.

Id. at 162–63 (emphasis added). Therefore, the Petitioners' and Representative Stiles' objection to funding some required items and not others is a sentiment shared by the Supreme Court: if the State is to rely on Ed. 306 to define "adequate education," the State must fund everything that part requires of a school. And, if the Legislature intended for all of Ed. 306 to be included in its definition of an "adequate education,"

then the Joint Committee wrongfully excluded a significant amount of cost items that are required by Ed. 306.

The Joint Committee's unexplained, potentially unintended, costing methodology and conclusions effectively defined an adequate education without proper precision and with inconsistent adherence to Board of Education regulations and questionable judgment. This taints the result. There is also the concern that a costing committee may not be capable of objectively defining an adequate education apart from considering those items' costs such that cost consideration may discourage inclusion of essential items. In any event, the Court can only conclude that the Joint Committee's costing of an "adequate education" did not comport with the State's definition of an "adequate education" nor with other interpretations of RSA 193-E:2-a. For the purposes of this analysis, the Court only finds that the State's proposed interpretation of an "adequate education" fails and the State's Motion to Dismiss is rejected.

5. *Petitioners' Claims*

While this Order contains the Court's decision on the parties' cross-motions for summary judgment, the Court addresses here why it denies, in part, the State's Motion to Dismiss. The State has ultimately moved for dismissal by alleging that the Petitioners have failed to allege that the State's actions have resulted in "the delivery of an inadequate education." (State's Mot. Dismiss 26.)

As the Court has articulated above in its discussion of the fundamental right to a State-funded adequate education, the Petitioners have already alleged that the State is failing to fulfill its constitutional duty by failing to provide a State-funded adequate education. Infra Part II.E.1. And, though the State is correct that the Petitioners have

not alleged that students in their districts are receiving anything less than an "adequate education," the Petitioners have alleged that their delivery of an "adequate education" has not been enabled by State funding, an integral part of the fundamental right. See City of Nashua, 2006 WL 563314, at *4. The Court construes the fundamental right at issue as a right to the opportunity to a fully State-funded adequate education. As the Petitioners have alleged that the adequate education their students are receiving is not fully State-funded, and as that is an integral part of the right, the Petitioners have successfully alleged a constitutional violation against the State. Their claims are therefore not dismissed and the Motion to Dismiss, insofar as it requests such, is DENIED.

F. SWEPT

The State also argues the Petitioners have failed to state a claim related to SWEPT. (Id. at 28–29.) The Petitioners have asserted that the SWEPT, in concert with RSA 198:40-a, II(a), violates Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution because it has caused "communities, like ConVal, Winchester, Monadnock, and Mascenic, . . . to increase their tax rates to make up for decreased or stagnant state aid with increasing educational expenditures," and "[t]he State cannot constitutionally fund education through tax rates that vary by more than 400% throughout the state." (2d Am. Pet. ¶¶ 123–57; pg. 25.) The Second Amended Petition compares the "total education tax rate" in Newington, which is $3.19, with Dublin, which is $16.46. (Id. ¶ 153; id., Ex. K.) And, the Petitioners highlight that the combined local and state tax education rate in Winchester is $22.65, $21.28 in New Ipswich, and $21.52 in Troy. (Id. ¶¶ 154–56.) Thus, the Petitioners allege, RSA 198:40-a, II(a),

which contains the base adequacy aid amount determined by the Joint Committee and approved by the Legislature, is unconstitutional both facially and as applied. (Id. ¶ 158.)

The State has argued that the Petitioners have not alleged that the SWEPT is applied unequally throughout the State nor that the SWEPT results in the delivery of a constitutionally inadequate education, thus the Petitioners have not alleged a violation of either article. (State's Mot. Dismiss 28–29.)

Article 83 of the New Hampshire Constitution, the "Encouragement of Literature" provision, is the basis of the Claremont II determination that the State has an affirmative duty to provide a State-funded adequate education. Claremont II, 142 N.H. *passim*. As explained above, the Supreme Court has determined that this affirmative duty contains four mandates: "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." City of Nashua, 2006 WL 563314, at *4; see also Claremont (Accountability), 147 N.H. at 505 (stating the "four mandates"). Article 5 of the New Hampshire Constitution provides that the Legislature may "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state." See Claremont II, 142 N.H. at 468. It "requires that 'all taxes be proportionate and reasonable—that is, equal in valuation and uniform in rate.'" Id. (quoting Opinion of the Justices, 117 N.H. 749, 755 (1977)). "[T]he test to determine whether a tax is equal and proportional is to inquire whether the taxpayers' property was valued at the same per cent of its true value as all the taxable property in the taxing district." Claremont II, 142 N.H. at 468 (quoting Bow v. Farrand, 77 N.H. 451, 451–52 (1915)).

The SWEPT is codified in RSA 76:3, which states, "the commissioner of the department of revenue administration shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8 . . . ." Municipalities collect the SWEPT, retain the funds, and report the amounts raised to the State. The State then provides each municipality with the difference between the amount raised and what is necessary to fulfill the base adequacy aid amount due to that municipality. See RSA 76:3; RSA 76:8.

The Petitioners allege that property-wealthy municipalities naturally raise funds via the SWEPT that exceed their needs for funding an adequate education and are permitted to retain the excess funds. (2d Am. Pet. 21, n.10.) Meanwhile, property-poor municipalities do not raise enough via the SWEPT to fund an adequate education, requiring the State to provide funds to reach the necessary base adequacy aid. This results in the disproportionate per-pupil amounts in school districts, where property-wealthy districts raise and retain excessive funds via the SWEPT, while property-poor districts only receive funds up to the amount of the base adequacy aid. Also, the Petitioners claim that the Supreme Court has already found that allowing property-wealthy municipalities to retain the SWEPT is unconstitutional. (Id. (citing Opinion of the Justices, 142 N.H. 892, 900 (1998)).)

In Claremont II, the Supreme Court considered a school-funding tax scheme in which "[l]ocally raised real property taxes [were] the principal source of revenue for public schools," and direct legislative appropriates accounted for the remainder. Claremont II, 142 N.H. at 466. At the time, the responsibility for providing elementary and public education was placed on the local school districts. Id. Under this tax

scheme, municipalities would assess an annual tax of $3.50 per thousand of property value "for the support of that district's schools," and would then "produce[] a budget that specifie[d] the additional funds required to meet the State's minimum standards." Id. at 467. Then, a "sum sufficient to meet the approved school budget" would be assessed on the taxable real property in that district, and the commissioner of revenue administration would compute a property tax rate for school purposes in each district. Id. That rate would then be levied by city and town officials "to provide the further sum necessary to meet the obligations of the school budget." Id. Therefore, the total value of property subject to taxation varied among municipalities. Id.

The plaintiffs in Claremont II argued that the tax was a State tax and therefore had to be proportional according to Article 5 of the New Hampshire Constitution. Id. at 467–68. The Supreme Court agreed that the purpose of the tax was "overwhelmingly a State purpose" and that even though "the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax." Id. at 469. "Although the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution." Id. Therefore, because the tax was disproportionate, it was found unreasonable. Id.

> There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable .

Id. at 471.

In 1998, the Supreme Court issued an advisory opinion on a new school-funding allocation formula and a property tax abatement scheme. Opinion of the Justices (School Financing), 142 N.H. 892, 898 (1998). The proposed bill purported to establish a uniform State education tax rate based upon the equalized value of all taxable real property in the State. Id. at 899. However, the bill also authorized a "special abatement" for "[t]he amount of state education tax apportioned to each town . . . in excess of the product of the statewide per pupil cost of an adequate education . . . times the average daily membership in residence for the town." Id. (omissions in original). Logistically, in accounting for the special abatement, the commissioner of revenue administration would calculate each municipality's tax by multiplying the State education tax rate by the total equalized value of property within it, then subtracting the special abatement. Id. Thus, the special abatement would apply before a tax bill was issued to taxpayers. Id. The effect of this scheme, the Supreme Court noted, was that the "the effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children." Id. Though the proposed bill initially would have an equalized valuation and uniform rate, the abatement effectively required some taxpayers to pay "a far higher tax rate in furtherance of the State's obligation to fund education than others." Id. at 902. The issue for the Supreme Court was the special abatement and the disproportionate State-tax rates that resulted. Id. at 900–01. The abatement was not supported by good cause or just reasons, and, "to the extent that a property tax is used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional across the State." Id. at 901.

The goal of the bill in Opinion of the Justices (School Financing) was to prevent municipalities from financially contributing to the adequate education of children in other towns or school districts. Id. at 901. However, "the purpose of an abatement or an exemption can never be to achieve disproportionality for disproportionality's sake." Id. And, the Supreme Court highlighted that "[t]he benefits of adequately educated children are shared statewide." Id. at 902.

The State is correct that an Article 5 challenge to a tax scheme will not stand when the challenged tax is applied proportionally. Unlike in Claremont II or Opinion of the Justices (School Funding), there has not been an allegation that the State has levied the SWEPT or any other education tax in different proportions or unequally throughout the State. Nonetheless, the Court cannot construe the Petitioners' tax argument separate from its constitutional challenge to RSA 198:40-a because the Petitioners have alleged that, as the SWEPT functions, the State is failing to fulfill its obligation to fully fund an adequate education. As the Supreme Court has established, shifting public school funding to local school districts is the equivalent of a State tax. See Claremont II, 142 N.H. at 703. By alleging that the State is relying on local taxation to fund an adequate education and that local school districts are forced to raise that amount at different tax rates depending on their property wealth, the Petitioners have alleged that the State imposes disproportionate taxes. This is clearly a concern raised in Opinion of the Justices (School Funding) and Claremont II. See Opinion of the Justices (School Funding),142 N.H. at 901; Claremont II, 142 N.H. at 902 (invalidating tax scheme that imposed disproportionate taxes on school districts to fund adequate education).

This was also a concern raised at the trial court in Londonderry School Dist. SAU #12, 2006 WL 6161061, at *25. The trial court found that HB 616 resulted in disproportional taxes because "a significant amount of the funds raised by the [SWEPT] in many of the 'property-rich' municipalities would likely exceed the cost of providing a State defined adequate education," resulting in "many 'property-rich' municipalities retaining [SWEPT] proceeds in excess of the cost of an adequate education" while "'property-poor' municipalities will be required to use the full amount of [SWEPT] assessment revenues collected to support the cost of an adequate education."[19] Id. at 28–29. Thus, the trial court found that HB 616 "create[d] a non-uniform tax rate" without a constitutional justification "to permit the retention of those excess funds by the 'property-rich' municipalities." Id. at 29. The Supreme Court did not address the trial court's finding concerning the education tax scheme, as it only affirmed the trial court's determination that the State had failed to define a constitutionally adequate education; its remaining findings, including that on the tax scheme proposed in HB 616, were stayed. See Londonderry (Claremont XII), 154 N.H. at 155.

The Court determines the Petitioners' challenge to RSA 198:40-a infra, and that decision's effect on the SWEPT challenge is discussed infra. See infra Part III.D. At this stage, however, the Court finds the Petitioners have sufficiently alleged a constitutional challenge to the SWEPT. Thus, the State's Motion to Dismiss in regard to the Petitioners' SWEPT argument is DENIED.

[19] HB 616 concerned the Statewide Enhanced Education Tax ("SEET"), which is the same tax as the SWEPT. The SEET was codified in RSA 76:3, and the statute was amended in 2008, changing "statewide enhanced education tax" to "education tax," or SWEPT. See SB 539, 173:15.

G. Injunctive Relief

Similarly, as the Petitioners' request for injunctive relief is addressed in the Court's determination of the parties' motions for summary judgment, the Court need not reach the State's request to dismiss the Petitioners' requests for injunctive relief. As discussed infra, the Court does not grant the Petitioners injunctive relief. See infra Part IV.B.

III. Cross-Motions for Summary Judgment

A. Standard of Review

A motion for summary judgment should be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In ruling on cross-motions for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." JMJ Properties, LLC v. Town of Auburn, 168 N.H. 127, 129–30 (2015). Where "no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." N.H. Ass'n of Counties v. State, 158 N.H. 284, 287–88 (2009). To defeat summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue [of material fact] for trial." Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citing RSA 491:8-a, IV). A fact is material if it affects the outcome of the litigation. See Bond v. Martineu, 164 N.H. 210, 213 (2012).

B. Petitioners' Evidence

As with its Motion to Dismiss, the State has objected to the Petitioners' evidence. (State's Mot. Summ. J., *passim*.) The State's Motion for Summary Judgment does not address the merits of this litigation beyond its objection to the Petitioners' evidence.

In regard to the State's Motion for Summary Judgment, the Court does not weigh the DOE data for two reasons. First, the Court may wholly adjudicate the constitutional questions raised in the Second Amended Petition even without the DOE data, as demonstrated infra. See infra Part III.C. Second, the standard for a motion for summary judgment does not permit consideration of evidence that is in dispute. The DOE data is not factually disputed; the State does not allege that the DOE data is false. But, the weight of the evidence and its materiality are disputed. Even though the data may abstractly represent how RSA 198:40-a, II(a) has impacted the Petitioners, the State has raised questions of its reliability when the DOE receives its data from New Hampshire school districts themselves. (State's Mot. Summ. J. 2.) This fact might not fully discredit the data's accuracy, but because the Court has received affidavits from the petitioning school districts' superintendents with more specific and undisputed allegations, the Court need not fully address this issue. The Court therefore accepts the Petitioners' evidence for a limited purpose: it reflects the State's capability to gather information from the school districts that pertains to the State's obligation to provide an adequate education.[20]

[20] It is not apparent that consideration of the DOE data would be improper when this litigation thoroughly concerns legislative actions and decisions. The State has not provided any alternative evidence of what the Legislature has considered in making its decisions nor has it asserted that the Legislature would not rely on the same DOE data the Petitioners have provided. In fact, the Legislature expressly did rely on previous versions of the same DOE data in making many of the decisions in the Final Report.

As far as the DOE data that potentially reflects RSA 198:40-a, II(a)'s impact on the petitioning school districts, the Court relies instead on the affidavits provided by their superintendents and the specific, attested-to facts they have provided. See infra Part III.C.

C. Scrutiny

As established above, the Petitioners have alleged that the State is failing to fulfill its constitutional mandate to sufficiently fund an "adequate education." For this reason, in the analysis of the State's Motion to Dismiss, strict scrutiny was proper. In determining whether strict scrutiny is proper on the parties' motions for summary judgment, the Court must consider the principle that "[f]or limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of the right." Lilley, 204 A.3d at 208. It is beyond question that the Petitioners are receiving base adequacy aid in the amount set out in RSA 198:40-a, II(a). However, the Petitioners have argued that the funding is insufficient to provide a State-funded adequate education. Therefore, the Court's inquiry is whether the amount of the base adequacy aid as provided in RSA 198:40-a, II(a) results in an actual deprivation of the fundamental right to a State-funded adequate education.

In arguing a deprivation has occurred, the Petitioners have alleged facial and as-applied challenges to RSA 198:40-a, II(a). Their facial challenge fails because the statute does not deprive the Petitioners of a fundamental right on its face. While the underlying calculus upon which the base adequacy aid was determined may be questionable, or even obviously illogical, the statute and its text are not. See Hollenbeck, 164 N.H. at 158 ("To prevail on a facial challenge to a statute, 'the

challenger must establish that no set of circumstances exists under which the Act would be valid.'" (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))). Indeed, though the Petitioners have alleged that no school district in the State may provide a constitutionally adequate education on RSA 198:40-a, II(a)'s base adequacy aid alone, it is not apparent on the statute's face that it could not, in some circumstance, provide sufficient funding. Id. ("A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." (quoting United States v. Carel, 668 F.3d 1211, 1217 (10th Cir. 2011)). Moreover, even if the base adequacy aid provided in RSA 198:40-a, II(a) may demonstrably be insufficient to fund an adequate education in any school under any circumstances, this would require consideration of extrinsic evidence, which is not permitted on a facial challenge. 16 C.J.S. Constitutional Law § 163. Thus, to determine whether a deprivation has occurred, the Court must analyze RSA 198:40-a, II(a)'s application to the Petitioners. If the petitioning school districts have received base adequacy aid that fails to meet the State's obligation, strict scrutiny will be applied to the statute, in which case the State must demonstrate that the Legislature had a compelling government interest in its calculation of the base adequacy aid figure contained in RSA 198:40-a, II(a). Lilley, 204 A.3d at 205 (stating that strict scrutiny requires the government to show that the challenged legislation "is necessary to achieve a compelling government interest and is narrowly tailored."); Claremont II, 142 N.H. at 472 ("When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny."); City of Nashua, 2006 WL 563314, at *2.

An as-applied challenge concedes that the statute may be constitutional in many of its applications but contends that it is not so under the particular circumstances of the case.[21] Lilley, 204 A.3d at 205. The Petitioners' alleged deprivation of a fundamental right is specific. They do not allege that the students are being deprived of an adequate education but rather that the State has not sufficiently funded that education. A demonstration of this allegation therefore requires comparison between what the State is providing and what Part II, Article 83 of the New Hampshire Constitution requires the State to provide. The State's constitutional obligation, as repeatedly stated supra, was made unclear by the Legislature's adoption of the Joint Committee's costing. As the Petitioners have challenged the Legislature's costing rather than definition, they have alleged a constitutional deprivation of funds the Legislature is obligated to provide according to its own definition. The Court finds the most appropriate way to determine whether the Petitioners have alleged an actual deprivation is to analyze each "flaw" that the Petitioners have highlighted in the 2008 Spreadsheet. If the alleged flaws in the Joint Committee's costing resulted in funding that falls short of what the Legislature has defined as an adequate education, then the Petitioners, as recipients of the base adequacy aid provided according to the Joint Committee's calculations, will have demonstrated an actual deprivation and strict scrutiny will be applied. This inquiry maintains appropriate deference to the Legislature's role in defining an "adequate education" while also fulfilling the Court's role of ensuring constitutional guarantees. See Londonderry (Claremont XII), 154 N.H. at 163 ("[T]he judiciary has a responsibility

[21] It is possible that a challenge to RSA 198:40-a,II(a), as currently written, could only be sustained, or exist, as an "as applied" challenge because it involves the costing process that underlies it. In other words, the statute can only be interpreted in the context of how it is applied to the school districts.

to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 785 (Tex. 2005) ("It would be arbitrary, for example, for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals.").

1. *Teacher-Student Ratios*

The Petitioners allege that, because the teacher-student ratio used in the Joint Committee's calculation of a universal cost was based on maximum class sizes rather than a proper ratio, they have been deprived of their fundamental right to an adequate education funded by the State. According to the Petitioners, "[n]o school district in the State has teacher student ratios of 1:25 or 1:30." (2d Am. Pet. ¶ 51.) Winchester Superintendent Kenneth Dassau has stated in his affidavit that Winchester has thirty-two students in the eighth grade, a figure that, by regulation, requires two teachers and results in a student-teacher ratio of 1:16. (Dassau Aff. ¶ 22; Pet'rs' Mot. Summ. J. 9.)[22] The Petitioners do not seek for the State to fund whatever number of teachers that school districts choose to have but rather ask that the State provide a constitutionally adequate education by using a costing method with an accurate teacher-student ratio. The Petitioners allege that RSA 198:40-a, II(a)'s base adequacy aid—as a product of Joint Committee's chosen student-teacher ratio—results in a deprivation of the fundamental right to a State-funded adequate education. (2d Am. Pet. ¶ 58.) The Court agrees.

[22] The Petitioners have not otherwise focused on their individual ratios but have pointed to DOE data the Petitioners have submitted. (2d Am. Pet. ¶ 53.) As stated above, the Court need not consider the DOE data to address this issue. See supra Part III.A.

In explaining its "Universal Cost Calculation," or how it reached its figure for the base adequacy aid, the Joint Committee made a specific finding that "the student teacher ratio necessary to provide the opportunity for an adequate education in New Hampshire is 25 students to 1 teacher in kindergarten through grade two; and 30 students to 1 teacher in grades three through twelve." (Final Report 14.) Its basis for this decision, the Final Report states, was that "the New Hampshire minimum standards for public school approval," contained in Board of Education regulation Ed. 306.17(a), "reflect the student-teacher ratios that are adequate in the state." (Id.)

Ed. 306.17(a) sets a ceiling for class sizes rather than a requirement of teachers employed and the figures it contains clearly do not set a required ratio or a school employment requirement. It states:

> (a) Class size for instructional purposes, in each school shall be:
>
> (1) Kindergarten - grade 2, 25 students or fewer per educator, provided that each school shall strive to achieve the class size of 20 students or fewer per educator;
>
> (2) Grades 3 - 5, 30 students or fewer per educator, provided that each school shall strive to achieve the class size of 25 students or fewer per educator; and
>
> (3) Middle and senior high school, 30 students or fewer per educator.
>
> (b) These class size requirements may be exceeded for study halls, band and chorus, and other types of large group instruction, including but not limited to, lectures, combined group instruction, and showing of educational television and films.
>
> (c) In the interest of safety, the maximum number of students in laboratory classes in such areas as science and career and technical education shall be determined by the number of work stations and the size and design of the area. In no case shall the number of students in laboratory classes exceed 24.

Ed. 307.17 (emphasis added). The regulation provides the maximum number of students to one teacher, clearly suggesting that a school with such ratios will be functioning at the maximum capacity permitted for school approval. Indeed, Ed. 307.17(c) appears to prohibit a laboratory class size at the amount the Joint Committee costed and, effectively, incentivizes schools to have.

By calculating the universal cost with the ratio of 1 to 25 for kindergarten through grade 2 and 1 to 30 for grades 3 through 12, the Joint Committee must have assumed that all school districts will function at the maximum capacity—by choosing to calculate costs according to the classroom maximum capacity, the Joint Committee's ratio effectively does not permit for a school to have any classroom with fewer students than the maximum. For example, a high school may have 300 students and a dozen classrooms with 25 students each. This would call for a dozen teachers, yet the Joint Committee has calculated that only 10 teachers are necessary. Also, Ed. 306.17(a)(1) prevents classrooms from having more than 30 students in a classroom, and if a school district decides to have fewer than 30 students in any class, it is prohibited from having another classroom with more than 30 to average its proportions and match the ratio that the Joint Committee selected.

Aside from the DOE data, the Petitioners have provided the Court with Winchester's student-teacher ratio. Because the Petitioners challenge the Joint Committee's funding as applied to them, they only need to demonstrate the Joint Committee's calculation was flawed and that the petitioning districts received base adequacy aid according to this flawed calculation. As the Court has determined the Joint Committee's selected ratio has computed aid for fewer teachers than the

Petitioners have, and the Court finds the Petitioners' showing sufficient. Therefore, RSA 198:40-a, II(a), as applied to the petitioning school districts, results in an actual deprivation of the fundamental right to a State-funded adequate education. This conclusion is sufficient to trigger strict scrutiny.

The Court finds that the State lacks a compelling government interest to support the Joint Committee's teacher-student ratio that was used in calculating the base adequacy aid in RSA 198:40-a, II(a). The Joint Committee failed to explain why a school should be expected to function at maximum capacity—and exactly at maximum capacity, rather than allowing for anything less—in providing an adequate education or why the regulation's ceiling provides an appropriate basis for determining costing. It is accepted that a school district may locally control its number of teachers and thus vary from the Joint Committee's projected ratio, yet the Joint Committee's selected teacher-student ratio does not provide for local control when it presumes all classrooms will function at exactly maximum capacity. Claremont II, 142 N.H. at 475 ("We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy."); see infra Part IV.A.

Furthermore, the legislative history behind SB 539, which codified the Joint Committee's universal cost as the base adequacy aid, reveals the flawed ratio has been protested since its inception, yet the Legislature codified a school funding statutory scheme that entirely relied on the flawed ratio. There is no evident government interest in using a faulty ratio nor can the Court conjure one. See Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 782 (Md. 1983) (stating that heighted scrutiny in review of

school funding system "does not tolerate random speculation concerning possible justification for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose").

It is possible that the base adequacy aid amount would remain the same if the Joint Committee used a more appropriate ratio for computing teacher salaries and benefits. However, a more appropriate figure is not before this Court. It has been demonstrated that the base adequacy aid contained in RSA 198:40-a, II(a) results in insufficient funding as applied to the Petitioners. See Londonderry School Dist. Sau #12, 2006 WL 6161061, at *11 ("In order for the State to fulfill its duty to provide a constitutionally adequate education, the Legislature must, in addition to specifically and substantially defining an adequate education, provide a reasonable method to determine what an adequate education will cost."). Also, there is no indication that the Joint Committee considered any other information concerning student-teacher ratios.

Though strict scrutiny is the appropriate level of review, the Court notes that there is no rational basis for the Joint Committee's reliance on Ed. 306.17(a)(1) for selecting the ratios it did. Lilley, 204 A.3d at 205 ("Our rational basis test requires that legislation be rationally related to a legitimate government interest."). The teacher-student ratio was based on a regulation that clearly limits classroom sizes and has no rational relationship to calculating the number of teachers school districts will have. A cap on classroom sizes, naturally, sets the absolute minimum number of teachers that a school would need to employ. There is no rational relationship between Ed. 306.17(a)(1) and selecting a teacher-student ratio with which to fund an adequate education. The faulty ratio alone is sufficient to find that RSA 198:40-a, II(a) is

unconstitutional. However, by way of further explanation, the Court addresses the Petitioners other highlighted flaws with the Final Report.

2. *Teacher Benefits*

In addition to the faulty student-teacher ratio that controls costing of teacher salaries and benefits, the Petitioners have challenged the Joint Committee's calculation of teacher benefits. (Pet'rs' Mot. Summ. J. 7–9.)

The Final Report determined that salary and benefit percentages should be used in calculating the base adequacy aid and elaborates on its rationale for selecting a base salary, stating, "The Committee determines that the cost of adequacy should be calculated using a teacher salary calculated at the state average for a teacher with a bachelor's degree and three years [sic] experience plus benefits at 33% of salary." (Final Report 19.) The Final Report states that, in assisting with the Joint Committee's determination of proper salary level and benefit percentages, the DOE prepared reports documenting the 2007–2008 schoolyear salary schedules utilized by public schools across the State, specifically "costs for personnel benefits, including the average rate for benefits as a percentage of teacher salary." (Id. at 18.) The Final Report does not elaborate on how it chose the 33% figure, but explains its selection of a base salary level of a teacher with three years' experience: "The Committee decided that a teacher with three years [sic] experience is the most appropriate salary to choose for costing purposes because after three years of experience a teacher completes a probationary period for employment purposes." (Id. at 19.)

The Petitioners' apparent concern with the 2008 Spreadsheet's costing of teacher benefits is the amount provided according to the Joint Committee's 33%

calculation rather than specifically the percentage.[23] (2d Am. Pet. ¶¶ 61, 70; Pet'rs' Mot. Summ. J. 8–9.) They assert that base adequacy aid "does not provide for full benefit costs" and highlight four benefits that the school districts must provide: the New Hampshire Retirement System's determined teacher retirement contribution, federal employment taxes, State-required workers compensation cover and unemployment insurance, and health and dental insurance. (2d Am. Pet. ¶¶ 59–70; Pet'rs' Mot. Summ. J. 7.) The Petitioners have utilized the DOE website's average teacher salary in calculating that these four benefits amount to $27,000, an amount that exceeds the Joint Committee's costing of $11,728 in benefits. (Id. ¶¶ 62,70.) The Petitioners have not provided information about their specific costs but rather use the DOE website's average salary in calculating what the State is obligated to pay in teacher benefits. The Petitioners have also alleged that "[t]he portion of health and dental costs paid by the school district for a teacher will alone average in excess of $17,000.00." (Id. ¶ 68) And, ConVal Superintendent Saunders has attested that "[a]ctual teacher benefits exceed $11,728 in every school district in the State." (Saunders Aff. ¶ 48.) Thus, it is undisputed that each of the petitioning school districts is paying more than $11,728 in teacher benefits.

The Court cannot find that the Joint Committee's costing of teacher benefits is flawed according to the Petitioners' allegations. While the Petitioners have illustrated a discrepancy between what the Joint Committee costed in teacher benefits and what the actual costs are, the relevant question is whether there is a discrepancy between what

[23] The Court notes that the Petitioners incorrectly allege that the Joint Committee used a first-year teacher salary in calculating teacher benefits. (2d Am. Pet. ¶ 60; Pet'rs' Mot. Summ. J. 7.) The Joint Committee specifically explained that it used a third-year teacher's salary and why. (See Final Report 18.)

the State is obligated to provide and what is provided in the base adequacy aid.[24] The Joint Committee chose 33% as "the proper . . . benefit percentage[] to be used in calculating the universal cost for each position it determined should be included in the cost." (Final Report 18–19.) It is not made clear from the evidence that the Joint Committee's 33% calculation does not provide funds for those four benefits when using the appropriate teacher salary. It is thus unclear whether the base adequacy aid fails to sufficiently cost teacher benefits as the Legislature intended. Without more information about what the Legislature costed, the Court cannot discern whether it has failed to fulfill that intention and cannot find an actual deprivation of teacher benefits.

While the Petitioners may be paying more in teacher benefits than the Joint Committee calculated, it is not clear to this Court that the 2008 Spreadsheet failed to sufficiently cost teacher benefits. It may be that the Joint Committee used an inappropriate teacher salary in calculating the teacher benefits, in which case the flaw is the Joint Committee's selection of a teacher salary. The Petitioners have not made that allegation.

[24] The Court notes that there is support for using actual costs to determine whether an adequate education is being provided. The Washington Supreme Court heavily relied on the disparity between what the state was funding and what actual costs were in finding that the state's school funding system was "broken." McCleary v. State, 269 P.3d 227, 257–58 (Wash. 2012); see also Gannon v. State, 319 P.3d 1196, 1237 (Kan. 2014) ("[A]ctual costs remain a valid factor to be considered during application of our test for determining constitutional adequacy under Article 6."). This Court does not entirely rely on the Petitioners' evidence of actual costs for two reasons: First, this Court is capable of assessing the State's failure to fulfill its obligation to fund an adequate education by comparing what the State has already determined it is obligated to fund and what it has costed and funded. And second, New Hampshire courts have yet to use actual costs as the bar for funding an adequate education. The Court notes, but does not adopt, the State's argument that the State is not obligated to fund actual costs because of the principle of "local control." If actual costs were the standard, the State impliedly argues, the State's funding of an adequate education would be at the mercy of local school districts' ministerial decisions rather than the constitutional obligation to provide an adequate education. The issue of local control and actual costs is addressed infra. Infra Part IV.A.

3. *Facilities Operation and Maintenance*

The Petitioners have challenged the Joint Committee's calculation of facilities operation and maintenance costs in its universal cost. The Joint Committee determined that the universal cost should include $195 per pupil for facilities operation and maintenance, relying on Ed. 306.07(a)(1), which the Joint Committee found required schools to provide a "clean, healthy and safe learning environment . . . for students to have the opportunity for an adequate education as defined in RSA 193-E:2-a." (Final Report 23.) The Joint Committee stated that it received "the latest school district reporting forms" from the DOE and that "facilities operation and maintenance constitutes about 8% of the total school costs," which was $195 per pupil. (Id.) The Final Report does not contain that DOE information, nor does it explain how, or how much of, the DOE's data on facilities operation and maintenance costs relate to the germane requirement of providing a "clean, healthy and safe learning environment." The Final Report states that it applied this percentage to "the projected universal costs as calculated through the Committee's other decisions" and arrived at $195.[25] (Id.)

The Petitioners argue that the $195-per-pupil figure is arbitrary and that the petitioning districts spend well above this amount: Monadnock plant operations cost approximately $1,482.92 per pupil, and ConVal plant operations cost approximately $1,406.81 per pupil. (Witte Aff. ¶ 19; Saunders Aff. ¶ 85.) The $195-per-pupil figure "does not even cover the oil/gas bill in ConVal," which is approximately $500,000. (Saunders Aff. ¶ 86; Pet'rs' Mot. Summ. J. 12.)

[25] The Final Report does not explain why the 8% figure resulted in $195 per pupil when the Joint Committee concluded that the universal cost, or base adequacy aid per pupil, was $3,456, 8% of which is $276.48.

As the Petitioners point out, "[w]hatever the State identifies as comprising constitutional adequacy it must pay for." (Pet'rs' Mot. Summ. J. 12 (quoting Londonderry (Claremont XII), 154 N.H. at 162).) The Joint Committee identified facilities operation and maintenance costs as a part of the definition of an "adequate education," and the Petitioners have demonstrated that their actual costs considerably exceed the $195 per pupil the Joint Committee costed. The Court acknowledges the State's argument that comparing the Joint Committee's costing to the Petitioners' actual costs is not an equal comparison when school districts may have included costs outside of the State's funding responsibility as the Joint Committee defined it. Yet, the Joint Committee did not delineate what portion of facilities operations and maintenance costs it intended to cost; it can only be inferred that the Joint Committee intended to provide "a reasonable and sufficient amount to include for facilities operation and maintenance." (Final Report 23.) The large disparity between $195 and all of the petitioning school districts' actual costs is sufficient to demonstrate that the Petitioners have been actually deprived of a "reasonable and sufficient amount" to provide for facilities operation and maintenance. (Id.) Again, while the Court does not rely on actual costs as the standard for the Legislature's funding, it is constitutionally suspect that the Joint Committee funded only $195 per pupil when all of the petitioning school districts pay nearly tenfold that amount. The State has not refuted the Petitioners' allegations of their costs nor alleged that they are outliers or unusual.

The Court also notes that the Joint Committee included a custodian in its universal cost based on Ed. 306.07(a)(1), which states: "The local school board shall: (a) Require that the facilities for each school provide the following: (1) Consistent with RSA

189:24, a clean, healthy, and safe learning environment for all areas of the school building, grounds, and school-related activities; . . . ." (Final Report 21; 2008 Spreadsheet). RSA 189:24 further states, "A standard school is one approved by the state board of education, and maintained . . . in a suitable and sanitary building . . . ." As the Petitioners have alleged, there is no explanation of why the Joint Committee's intent to provide for a "clean, healthy and safe learning environment" did not include more accurate allocations for lights, heat, and snowplowing; why those items were not explicitly included in the definition; or whether those items were even considered as part of the definition. (2d. Am. Comp. ¶¶ 90–100.) Instead, the Joint Committee provided an 8% figure that is not a "reasonable and sufficient amount" for funding school districts' facilities operations and maintenance costs. By receiving the base adequacy aid with this insufficient allocation for facilities operation and maintenance, the Petitioners have demonstrated they have been actually deprived of a fundamental right to an adequate education and strict scrutiny applies.

The Joint Committee's arbitrary costing of facilities operation and maintenance costs fails scrutiny. Even though the Joint Committee may not have been obligated to cost the school districts' cost down to the last dollar, the large disparity between the funding and the actual costs indicates the stark insufficiency of the 8% figure. The Final Report lacks explanation of what government interest is served by selecting that percentage. The Court cannot assume that the 8% figure is the product of vigorous Legislative contemplation that involved an undisclosed compelling interest, nor can the Court assume that RSA 198:40-a, II(a) is narrowly tailored to accomplish that undisclosed interest. It is only apparent that the Petitioners have substantially higher

facilities operation and maintenance costs than the 8% figure has allowed for, and that the Joint Committee provided no explanation for its costing. These circumstances require invalidation under strict scrutiny. Similarly, because the Court has no explanation for the 8% figure before it and rather has evidence of a significant gap in funds, the Court cannot find a rational basis to support the 8% figure. Thus, the percentage would also fail rational basis review.

4. *Transportation*

The Petitioners have also challenged the Joint Committee's costing of transportation. While the Joint Committee expressly stated that transportation was not a part of the definition of an "adequate education," the Petitioners argue that, because the Joint Committee chose to fund transportation in its universal cost, the State is obligated to provide actual transportation costs and not just the average costs. (Pet'rs' Mot. Summ. J. 16.) In ConVal, per-pupil transportation costs are $914.60. (Saunders Aff. ¶ 28.) In Winchester, transportation costs are $962.73 per pupil. (Dassau Aff. ¶ 25.) In Monadnock, where high school students live substantially farther than two miles away from the high school they attend, it is $1,040.29 per pupil. (Witte Aff. ¶ 11.) In Mascenic, transportation costs are $619.81 per pupil. (Russel Aff. ¶ 12.) The Petitioners have also argued that the Joint Committee lacked a rational basis for its decision to fund transportation only for elementary and middle school students. (Pet'rs' Mot. Summ. J. 13.) The Joint Committee's universal cost included a transportation cost of $315 per pupil. (Final Report 23; 2008 Spreadsheet.) The inquiry is whether the Joint Committee's inclusion of $315 per pupil for transportation costs, as part of its costing of an adequate education, has resulted in an actual deprivation of the

Petitioners' fundamental right to a State-funded adequate education. The Court finds that it has.

In its Final Report, the Joint Committee "recognized that neither the statutory definition of adequacy nor the school approval standards directly identify transportation as part of adequacy." (Final Report 23.) However, the Joint Committee also stated, "Nevertheless, the Committee determined that transportation to school for students who reside far from school is an important consideration for students to have the opportunity for an adequate education." (Id.) The Joint Committee further noted that the principle that transportation costs were an important consideration was reflected in State law RSA 189:6,[26] which requires school districts to provide transportation to all pupils grades 1 through 8 who live more than two miles from the school to which they are assigned. (Id.) Thus, "[t]he Committee decided to include transportation costs in the universal cost calculation," but noted that its calculation only included "the costs for elementary and middle school students as high school students are not entitled to transportation services" and that it "reduced the statewide total of transportation costs for those students by subtracting any costs not attributable to transporting students." (Id.)

Because the Joint Committee included transportation in its costing but expressly stated that it was not part of the definition of an "adequate education," it appears the Legislature's intent was to not be held accountable for transportation costs as the State must fully fund what it determines is comprised in the definition. However, RSA 198:40-a, II(a) was codified with the Joint Committee's universal cost, which included a

[26] The Joint Committee mistakenly identified this statute as RSA 198:6 in its Final Report. (Final Report 23.)

transportation cost of $315 per pupil. See RSA 198:40-a, II(a); (2008 Spreadsheet.) Even with the intention that transportation not become the State's responsibility, the Legislature chose to fund transportation within base adequacy aid. The Legislature codified the Joint Committee's universal cost in RSA 198:40-a, II(a) as the cost to an adequate education with no distinction in base adequacy aid without transportation costs for high school students. The Joint Committee's attempt to qualify transportation as merely "an important consideration for students to have the opportunity for an adequate education" rather than part of the definition of an "adequate education" does not change that RSA 198:40-a, II(a) provides funds to school districts for transportation. (2008 Spreadsheet); see RSA 198:40-a, II ("Cost of an Adequate Education"); SB 539, 173:1, IV ("The cost of the opportunity for an adequate education consists of several elements. All such elements must be provided in order to ensure the delivery of the state's constitutional duty. . . . The universal cost represents the costs attributable only to the subset of education that is included in the definition in RSA 193-E:2-a.").

RSA 198:40-a, II(a) does not distinguish between transportation costs for different grade levels, thus school districts are provided $315 per pupil for their transportation costs including transportation for high school students. (2008 Spreadsheet); RSA 198:a, III ("The sum total calculated under paragraph II shall be the cost of an adequate education."). Thus, the statute represents the Legislature's funding for all school districts and students of all grades, and the Joint Committee explicitly costed transportation for all students at a dollar amount insufficient to provide transportation for all students. It is undisputed that the petitioning school districts receiving this base adequacy aid pay for transportation for students of all grade levels.

Therefore, the Joint Committee's decision to exclude the costs of transportation for high school students has resulted in an actual deprivation of a fundamental right and strict scrutiny is warranted.

RSA 198:40-a, II(a) fails strict scrutiny for the Joint Committee's untenable decision to provide transportation costs to all students except high school students. The Joint Committee's basis for its decision, according to the Final Report, consisted of the following: "In calculating the transportation amount to include, the Committee decided to use only the costs for elementary and middle school students as high school students are not entitled to transportation services." (Final Report 23.) The Joint Committee relied on RSA 189:6, which requires school districts to provide transportation to all pupils grades 1 through 8. The Petitioners assert that, "[i]f transportation is important for students to have the opportunity to obtain a guaranteed education, then that is true for students of all ages, not only the students designated in a pre-existing statute." (Pet'rs' Mot. Summ. J. 13.)

RSA 189:6 lacks any relevance to the State's constitutional obligation to provide an adequate education. Even if the Joint Committee intended to only provide for some transportation costs and not all, the Joint Committee's decision to exclude high school students does not comport with the constitutional duty to fund an adequate education. There is no apparent connection between RSA 189:6 and the State's constitutional obligation to provide an adequate education, and the Encouragement of Literature clause in the New Hampshire Constitution, as historically interpreted, does not distinguish between students of certain grade levels. N.H. Const. Pt. 2, Art. 83. While school districts are not required by statute to transport high school students, they are

required to provide education to those students. The State's constitutional mandate has been to fund an adequate education for all students; the fact that high school students are not included in RSA 189:6 does not mean that high school students are not owed that constitutionally mandated opportunity to an adequate education. No other government interest, compelling or otherwise, has been provided in the Final Report to support the Joint Committee's decision, and the Court will not assume one.

Furthermore, as stated, even if the Joint Committee intended to fund transportation costs only partially, its universal cost was codified in RSA 198:40-a, II(a) with no such distinction, effectively providing school districts base adequacy aid with diluted transportation costs that were to be used for all students' transportation. There is no compelling government interest for this actual deprivation. Also, while RSA 189:6 provides an explanation for the Joint Committee's decision, there is no explanation for why the Legislature would codify a "Cost of an Opportunity for an Adequate Education," a fundamental right to all students, that includes transportation costs intentionally insufficient to provide transportation to high school students. There can be no rational basis for this decision, and the statute would even fail the lower scrutiny of rational basis review.

5. *State-Required Services Not Included in 2008 Spreadsheet*

The Petitioners have also challenged RSA 198:40-a, II(a) and its failure to cost school nurses, superintendent services, and food services. (2d Am. Pet. ¶¶ 71–89.) The Petitioners argue these items are part of the definition of an "adequate education" because they are items required by Board of Education regulations Ed. 306, and that because the Legislature "incorporated DOE regulatory requirements in Part 306 into the

statutory definition of a constitutionally adequate education, the State must pay for all it requires of schools." (Pet'rs' Mot. Summ. J. 18–19.)

As explained in the Court's analysis of the State's Motion to Dismiss, the Joint Committee distinguished what it considered was part of the definition of an "adequate education" and expressly excluded certain items like school nurses and food services. Supra Part II.E.4.c. The Court determined above that the Joint Committee's selection of specific Board of Education regulations and exclusion of others when costing an adequate education was often arbitrary or unexplained. Supra Part II.E.4.c & III.C. And, the Court found that even though it appeared that the entirety of Ed. 306 had been included or relied upon in establishing the definition of an "adequate education," the Joint Committee had clearly not costed other items that Ed. 306 requires. It may be that the Legislature intended for everything in Ed. 306 to be costed by the Joint Committee, but the Joint Committee did not cost everything those regulations require. However, in deciphering whether an actual deprivation has occurred, the Court will not presume that the definition of an "adequate education" includes school nurses, superintendent services, and food services such that the Petitioners were obligated to cost those items. Such an analysis would require the Court to define what the fundamental right to an adequate education includes, a task reserved for the Legislature. See infra Part IV.B.

Therefore, the Court does not determine that the Petitioners have been deprived of a fundamental right by the exclusion of school nurses, superintendent services, and food services from RSA 198:40-a, II(a). Also, as the Petitioners have demonstrated deprivation from the previous "flaws" analyzed, it is not necessary to make that determination.

6. *RSA 198:40-a, II(a) Fails Strict Scrutiny*

For the above reasons, RSA 198:40-a, II,(a) must be invalidated. The Petitioners have demonstrated actual deprivations of the fundamental right to the opportunity to a State-funded adequate education, and the Joint Committee's Final Report fails to provide any compelling government interests for its allocations. The Court notes that much of the statute's failure is due to the lack of legislative record that, potentially, could have explained the Joint Committee's conclusions. However, some of the Joint Committee's decisions, most notably its teacher-student ratio, appear baseless and the products of arguably illogical and unsound conclusions and findings such that legislative support likely would not have changed Court's decision. As noted above, one possible explanation for the figure derived by the Joint Committee can be found in the coincidental similarity between the appropriation generated by the 2008 per pupil cost and the prior year's budget appropriation for school funding. See supra. n.16.

D. SWEPT

In addressing the Petitioners' Motion for Summary Judgment, the Court last addresses the SWEPT. As already explained above, the SWEPT results in disproportionate funds between school districts based on whether a school district is in a property-wealthy or property-poor area. Supra Part II.F. However, a tax's effect is separate from the tax itself. Article 5's concern with proportionality has clearly been limited to the tax itself, as it mandates that a tax be imposed proportionally. Supra Part II.F. Yet, in regard to the alleged disproportionate effect of the SWEPT, the Court notes that it is obvious that the disparity in school funds between property-wealthy and property-poor is concerning. See Londonderry (Claremont XII), 154 N.H. at 155. There

is a potential constitutional issue regarding whether the State is fulfilling its obligation to fund an adequate education when students throughout the State may be receiving drastically different qualities of education due to large differences in school funding. See Opinion of the Justices (School Funding),142 N.H. at 901; Claremont II, 142 N.H. at 902 (invalidating tax scheme that imposed disproportionate taxes on school districts to fund adequate education). And, a viable constitutional question remains of whether the State has relied on local taxes to fulfill its obligation to provide an adequate education. As these questions chiefly rest on the base adequacy aid, the amount of which is now invalidated, the Court cannot address the SWEPT further. The Petitioners do not argue that the SWEPT itself results in the disproportionate school funds but rather it is the gap left over that concerns the Petitioners: property-poor towns only receive base adequacy aid to make up the gap between their collected SWEPT and what is required for an adequate education, while property-wealthy towns are permitted to keep their collected SWEPT even in excess of what is required for an adequate education. Because the Court has invalidated RSA 198:40-a, II(a), the thrust of the Petitioners' argument—the base adequacy aid amount contained in that statute—cannot be addressed at this time. In the Court's view, the Petitioner's arguments to invalidate the SWEPT are not ripe for adjudication because the baseline or starting point for determining any SWEPT "gap" has been invalidated.

IV. Relief

A. RSA 198:40-a, II(a) is Invalidated

The Court is aware that while the Petitioners sought for this Court to invalidate RSA 198:40-a, II(a), the Court does not provide the precise relief the Petitioners

requested. The Petitioners seemingly sought for this Court to replace the cost calculation in RSA 198:40-a,II(a) with its own cost calculation or instruct the Legislature on how to "cost" certain factors. The Court will not pick its own number. As has been echoed consistently in New Hampshire jurisprudence in the past, that determination is not for the Judiciary and is expressly reserved for the Legislature and the Executive Branch. Insofar as this Court's decision extends into the Legislature's prerogative, such intrusion is warranted. As repeatedly found above, the Joint Committee's conclusions were not only unsupported by the legislative record but were clearly or demonstrably inadequate according to the Legislature's own definition of an adequate education.

The majority of this Court's conclusion pertains to the Legislature's definition of an "adequate education" despite the Petitioners resistance to that inquiry. The parties' conflicting explanations of the Legislature's definition strongly suggested that the Legislature has repeated its failure in Londonderry (Claremont XII), in which the Supreme Court found RSA 193-E:2 was an inadequate definition of "adequate education." 154 N.H. at 160. Many of the issues in Londonderry (Claremont XII) arose in this case, including the difficulty, or impossibility, "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." Id. at 161. While the State presented what it called an "objective[] and precise[]" definition of an "adequate education" that the Joint Committee adhered to, it is clear from the Final Report that the Joint Committee included items outside of the regulations to which the State cites. (State's Mot. Dismiss 14.)

Nonetheless, the Court does not invalidate RSA 193-E:2-a on these facts. First, the Petitioners do not request it to. Second, it has not been clearly demonstrated that the "definition" of an "adequate education" in RSA 193-E:2-a is entirely unworkable. Indeed, in using this imprecise statute, the Legislature created an entity that further defined an "adequate education"—of course, this was the Joint Committee on costing, an entity that was likely delegated this task unintentionally. Yet, if the Legislature determines that RSA 193-E:2-a is a proper foundation and creates a committee, or other vehicle, to further and specifically define what goes into "adequate education" and then costs, the Court cannot at this stage say that would be improper. Importantly, this Court has not determined that the "definition" in RSA 193-E:2-a fails to provide an "adequate education" in its content; it is the automation, application and costing of that statute that has failed. A solution may be reliance on RSA 193-E:2-a while also codifying a more specific breakdown of base adequacy aid with clear formulas for each item and notation of whether each item falls into the definition of an "adequate education"—without an eye towards reaching a specific total appropriation amount. The Legislature is only bound by Claremont II's four mandates and the Supreme Court precedent that has honed those mandates, and this Court upholds the tradition of preserving legislative control over how the State fulfills its constitutional obligation to provide an adequate education. Appropriately, it is the courts' role in ensuring that responsibility is fulfilled. See Ct. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 224 (Conn. 2010) ("The judicial role is limited to deciding whether certain public educational systems, as presently constituted and funded, satisfy an articulated constitutional standard."); Neeley, 176 S.W.3d at 785.

The Court also has not directly addressed the Petitioners' overarching argument that the State's failure to accurately and fully fund an adequate education burdens local school districts and forces them to raise local taxes. It is implied in that duty that local school districts may not be relied upon to provide the funds that are required to provide an adequate education. Claremont IX, 145 N.H. at 476 ("The State may not shift any of this constitutional responsibility to local communities as the proposed bill would do."). In other states, school districts have challenged inequitable taxes by juxtaposing the facilities and capabilities of property-poor school districts in providing an education with property-wealthy districts. See McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 552–54 (Mass. 1993); see also Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 143–46 (Tenn. 1993). However, here, the Petitioners have not demonstrated that, even with unequal local taxes throughout the State, students are receiving different qualities of education. The Court notes, however, that other states have determined that disparities in education funding between property-poor school and property-wealthy school districts require legislative attention when local taxes are relied upon to fulfill a constitutional obligation to provide an adequate education. See e.g., Gannon v. State, 420 P.3d 477, 493 (Kan. 2018); McDuffy, 615 N.E.2d at 553–54; DeRolph v. State, 728 N.E.2d 993, 999 (Ohio 2000) ("The valuation of local property has no connection whatsoever to the actual education needs of the locality, with the result that a system overreliant on local property taxes is by its very nature an arbitrary system that can never be totally thorough or efficient."); Neeley, 176 S.W.3d at 756 ("Compensation must be made for disparities in the amount of property value per student so that property owners in property-poor districts are not burdened with much heavier tax rates

than property owners in property-rich districts to generate substantially the same revenue per student for public education."); Brigham v. State, 692 A.2d 384, 390 (Vt. 1997); id. at 396 ("Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere *fortuity* of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system.").

There also remains the issue of whether "actual costs" have been ignored by the Legislature due to an inappropriate emphasis placed by the Legislature on the principle of retaining "local control," resulting in unconstitutional underfunding. See San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (finding disparate funding for education in Texas schools was rationally related to "local control"). As repeated, it has not yet been established in New Hampshire that the Petitioners may seek full funding of actual costs. See supra Note 24. This Court does not address whether actual costs is the proper standard for the Legislature to consider in costing an adequate education, but notes the disparate funding that has been highlighted in this litigation cannot be excused by the principle of "local control." See supra Note 24. Local control has been revered and protected in much of this State's school funding jurisprudence, and the Legislature is applauded for recognizing that school districts are uniquely situated such that complete or actual funding could, in theory, wrest them of that control. Nonetheless, it is clear from the Supreme Court's mandate that the Legislature must fully fund what it defines as an "adequate education," and it is essential that the Legislature respect local control in its definition of an "adequate education" and

not through selective costing of an adequate education. See Claremont II, 142 N.H. at 475 ("We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy."). The principle of local control is not fulfilled when the State's funding results in local school districts being coerced into using their locally raised funds to fulfill obligations of the State, a scenario that removes the discretion protected by "local control."

Notably, the Vermont Supreme Court found that disparities in property-poor versus property-wealthy school districts resulting from an equal statewide education tax, even in the absence of an allegation that property-poor districts did not provide a baseline constitutionally required education, failed rational basis review. Brigham, 692 A.2d at 390. In recognizing the value of local control, the Vermont Supreme Court stated: "[I]nsofar as 'local control' means the ability to decide that more money should be devoted to the education of children within a district, we have seen . . . that for poorer districts 'such fiscal freewill is a cruel illusion.'" Id. (quoting Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971)); see also Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 154–56 (Tenn. 1993) ("If a county has a relatively low total assessed value of property and very little business activity, that county has, in effect, a stone wall beyond which it cannot go in attempting to fund its educational system regardless of its needs. In those cases, local control is truly a 'cruel illusion' for those officials and citizens who are concerned about the education of the county's school children.").

The Court further notes that there are two possible issues with the Legislature's reliance on the Board of Education regulations. The first is expressed in Londonderry

(Claremont XII), in which the Supreme Court determined that, if the State is going to rely on Ed. 306 in its entirety to illustrate what components go into an "adequate education," every requirement from the regulations would need to be entirely State-funded. 154 N.H. at 162–63. Or, alternatively, if the State argues that Ed. 306 contains more than what composes an "adequate education," then the State has still failed to sufficiently and specifically define which regulations within Ed. 306 compose an adequate education. Secondly, the Court questions the wisdom in relying on the Board of Education regulations, either all or only some, for the Legislature's constitutional obligation to define an adequate education. As demonstrated in the legislative process that created RSA198:40-a, II(a), the Board of Education regulations are not lists of cost items but rather guidelines and principles designed to regulate and better school conditions. It is beyond dispute that the role of the Department of Education is distinct from the Legislature, and while collaboration is productive and should be encouraged, it is inappropriate to assume that the Board of Education creates its regulations according to a constitutional mandate to provide a State-funded adequate education. See Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) ("[B]ecause many of the [Board of] Regents' and Commissioner[of Education]'s standards exceed notions of a minimally adequate or sound basic education—some are also aspirational—prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy."). The Court notes that Massachusetts' Supreme Judicial Court's review of its General Court's reliance on its Board of Education:

> [I]t is generally within the domain of the "legislatures and magistrates" to determine how they will fulfil their duty under Part II, C. 5, § 2. In fulfilment of their duty, they may, as they have done, assign some responsibilities for education to the local communities of the Commonwealth. At all times,

> however, the ultimate responsibility for educating the public belongs to the 'legislatures and magistrates." If the mandate of the Constitution is not met, or if a statutory structure which worked at one time no longer works, the responsibility for the failure to educate falls squarely on the Commonwealth, specifically the "legislatures and magistrates." They may delegate, but they may not abdicate, their constitutional duty.

McDuffy, 615 N.E.2d at 550 (finding a constitutional duty to provide an education as per the Commonwealth's Constitution). The Board of Education is not responsible for funding an education or for making determinations about what specific items compose the New Hampshire resident students' right to an opportunity for an adequate education, nor should it be.

B. Injunctive Relief

In regard to injunctive relief, the Court does not grant the Petitioners' request to bar the State from violating Article 5. As stated, the Court cannot reach the Article 5 issue because the SWEPT is proportional and the crux of the Petitioners' Article 5 argument is RSA 198:40-a, II(a), a statute this Order invalidates. Therefore, whether the SWEPT has an unconstitutional effect as a product of that statute is a question not ripe for adjudication at this point.

Also, this Court does not grant the Petitioners' request for injunctive relief in the form of ordering Commissioner Edelblut and Governor Sununu to draw funds from the Education Trust Fund. (2d Am. Pet. ¶¶ 159–61.) The Petitioners do not have valid grounds to seek the amount that they request. In calculating their requested amount, the Petitioners take the 2008 Spreadsheet and input DOE data to calculate what they assert the base adequacy aid should be. (2d Am. Pet. ¶ 104; id., Ex. I.) Regardless of the DOE data's relevance or validity, this request relies on RSA 198:40-a, II(a) and the 2008 Spreadsheet, both of which represented the Legislature's selection of specific

items that compose an "adequate education"; neither is valid as per this Order. In RSA 198:40-a, II(a)'s absence, the remaining definition of an "adequate education" comes from RSA 193-E:2-a, a statute the Court has already determined does not specify what items go into an "adequate education." Indeed, the Legislature was unable to use solely RSA 193-E:2-a to determine what defines an adequate education, as demonstrated by its need to rely on the Joint Committee to further define an "adequate education." Even if the statute remained valid, the 2008 Spreadsheet upon which the Petitioners rely in their calculation has been discredited; the 2008 Spreadsheet's "flaws" were the primary reasons for RSA 198:40-a, II(a)'s invalidation. To rely on the 2008 Spreadsheet's cost items now would be improper.

Furthermore, as the Court stated in regard to the Petitioners' arguments of what ought to have been included in the 2008 Spreadsheet, supra Part III.C.5, it is the Legislature's role to define an "adequate education." Not only do the Petitioners rely on the now-invalidated and highly questionable costing contained in the 2008 Spreadsheet and Final Report, but they also seek funds for items expressly not part of the definition of an "adequate education." (Pet'rs' Mot. Summ. J., Ex. I.) If the Court granted the Petitioners' request, the Court would effectively be defining an "adequate education" and infringing on a role reserved for the Legislature. This is clearly improper. As has been established in Claremont II and consistently adhered to, the Judiciary will not usurp the Legislature's role in defining an adequate education:

> [W]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government and why we did so in the unanimous opinion of this court in Claremont I.

Claremont II, 142 N.H. at 475; see also Londonderry (Claremont XII), 154 N.H. at 156 ("Since the inception of the education cases in 1993, we have consistently deferred to the legislature's prerogative to define a constitutionally adequate education."); Claremont XI, 147 N.H. at 518; Claremont IX, 145 N.H. at 477 ("[T]he content of a constitutionally adequate education must be defined, in the first instance, by the legislature."); Claremont I, 138 N.H. at 192 ("We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."); N.H. Const. Pt. 1, Art. XXXVII.

C. Attorney's Fees

The Petitioners have also requested attorney's fees. (2d Am. Pet. 25.) The State has not responded to this request, and the Petitioners have not elaborated on the merit of shifting their fees to the State. However, the Supreme Court has previously awarded attorney's fees as per the substantial benefit theory. See Claremont Sch. Dist. v. Governor (Costs and Attorney's Fees) (Claremont VIII), 144 N.H. 590, 595–99 (1999). "An award of attorney's fees to the prevailing party where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well, has been recognized as an exception to the American rule that each party must bear its own attorney's fees." Id. at 595. This theory permits cost shifting not to penalize the State "but rather to compensate the plaintiff towns for their efforts on behalf of the public." Id. Thus, the award does not turn on the defendants' good or bad faith. Id. (quoting Silva v. Botsch, 121 N.H. 1041, 1044 (1981)).

School funding cases such as this "combine two significant rights specifically protected by the State Constitution and of primary concern to New Hampshire citizens;

namely, education and taxation." Id. at 596. In Claremont VIII, the Supreme Court recognized that the plaintiffs had initiated an action that resulted in establishing that Article 83 imposed a duty on the State to provide a constitutionally adequate education, to guarantee its adequate funding, and that the property tax then levied was disproportionate and unreasonable in violation of Article 5. Id. In bringing suit, the plaintiffs had "contributed to the vindication of important constitutional rights" and, "[i]n doing so, they have conferred a significant benefit upon the general public, and it is thus the general public that would have had to pay the fees incurred if the general public had brought the suit." Id.

Here, the Petitioners have similarly sought to enforce an important constitutional right and, in the process, have established that the State's constitutional mandate to provide an adequate education extends to its costing of an adequate education. See supra Part II.E. By doing so, the Petitioners have established this fundamental right to "all members of the public." Claremont VII, 144 N.H. at 598.

While the Supreme Court noted in Claremont VIII that it did not opine that "attorney's fees are recoverable for litigation related to these proceedings," the Court does not find this case distinguishable from Claremont VIII such that the Petitioners' relief is not also a benefit to the public. Id. at 598. As in Claremont VIII, the Petitioners contributed to the recognition and enforcement of a "significant right[] specifically protected by the New Hampshire Constitution and primary concern to New Hampshire citizens": education. Id. at 596. Therefore, the Petitioners' request for attorney's fees is GRANTED.

Petitioners are given 30 days to submit an affidavit of fees for the Court to review.

V. Conclusion

The Court does not take this decision lightly and recognizes its significant implications. As the Supreme Court has recognized, the Joint Committee's efforts are laudable and exceptional examples of how a legislature ought to automate and protect its citizens' rights. However, the same principle that lauds the Joint Committee members and their dedication to public education also requires more from the Legislature. As every court decision on the matter has recognized, school funding is no small task, and the burden on the Legislature is great. Yet, as every court decision has similarly recognized, the Legislature is the proper governmental body to complete it. As has been the result in the past, the Court expects the Legislature to respond thoughtfully and enthusiastically to funding public education according to its constitutional obligation.

SO ORDERED.

June 5, 2019

David W. Ruoff
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/05/2019