

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2006-0258

Londonderry School District SAU #12, Merrimack School District SAU #26,
and New Hampshire Communities for Adequate Funding of Education

v.

State of New Hampshire

APPELLEES' REPLY MEMORANDUM

In their response to the Court's July 20, 2007 order, Appellees stated they "would assent to a dismissal of this case without prejudice if the State will commit to making a good faith effort to fulfill, by June 30, 2008, the remaining three mandates of its constitutional duty to provide an adequate education to every child in the state."

Appellees' Brief Memorandum at 1. The State has made no such commitment; nor have Amicus Curiae House Speaker Terie T. Norelli and Senate President Sylvia B. Larsen ("Amicus Curiae"). Instead, by June 30, 2008, they have committed to doing no more than fulfilling the second mandate, costing out an adequate education. Left unaddressed is any suggestion, let alone any commitment, when they intend to fulfill the third mandate of providing adequate funding or the fourth mandate of providing standards of accountability.

In fact, the State and Amicus Curiae appear to take the position that the "interim education funding plan" enacted during the 2007 legislative session, which provides funds for fiscal years 2008 and 2009, fulfills the third mandate. State's Response to Court's July 20, 2007 Order ("State's Response") at 3; Amicus Curiae Memo at part III. They also assert that this new plan replaces HB 616 and because it does, "[t]he remaining

constitutional challenges to the costing and funding of public education under HB 616 are therefore moot and no longer ripe for consideration.” *Id.* They ask the Court to dismiss the case as moot or, alternatively, to “stay judicial proceedings *while the General Court determines the cost of an adequate education*, after which time the judicial branch would consider the question of remand and whether further proceedings are appropriate.” State’s Response at 1 (emphasis added); Amicus Curiae Memo at 8 (“... stay all further proceedings in the case *until after the Legislature has completed the costing process at the end of the current fiscal year*”)(emphasis added).

The relief proposed by the State and Amicus Curiae is unacceptable. Fulfilling only the second mandate fails to comport with their acknowledged constitutional duty “to provide a constitutionally adequate education to every educable child in the public schools of New Hampshire and to guarantee adequate funding.” *Claremont School District v. Governor*, 138 N.H. 183, 184 (1993). To address only the second mandate during the current fiscal year is not, as Amicus Curiae state, “the Legislature and Governor ... continuing to act to complete the tasks required under *Claremont II*.” Amicus Curiae Memo at 3

Nor does the new education funding plan adopted by the legislature render any further challenge to HB 616 moot. In their filings, the State and Amicus Curiae refer the Court to the operating budget for fiscal years 2008 and 2009. *L. 2007, c. 262, s. 06-03-91*. For each fiscal year the State has budgeted total state aid of \$890,360,565, consisting of state education tax revenue \$363,000,000 and state education grants of \$527,360,565. See Exhibit 1 attached hereto.

The allocation of state education grants to municipalities is not done through the

operating budget but through House Bill 2, *L. 2007, c. 263*. Chapter 263:35 reads:

School Money; Determination of Grants. Notwithstanding the provisions of RSA 198:40-a, 198:40-b, 198:40-c and 198:41, for the fiscal year beginning July 1, 2007, each municipality shall receive total education grants in an amount that equals *the greater of either: a 5 percent increase in the education grant amount received by the municipality pursuant to RSA 198:41, I(b)(2) for the fiscal year beginning July 1, 2006, or 94.6596522 percent of the education grant amount to be received by the municipality pursuant to RSA 198:41, I(b)(2) for the fiscal year beginning July 1, 2007*. For the fiscal year beginning July 1, 2008, each municipality shall receive the same grant amount as determined for the fiscal year beginning July 1, 2007 (emphasis added).

Although chapter 263:35 supersedes several provisions of HB 616, the constitutional flaws in HB 616 are carried forward, in part, because chapter 263:35 simply adjusts mathematically - by the applicable percentage - allocations based on HB 616.

Further, the legislature has left unchanged HB 616's amendment to RSA 198:46 which, when combined with a reduced state education tax, eliminated the so-called "donor communities." Property-rich municipalities continue to retain all the state tax revenue they raise pursuant to RSA 76:3, allowing them to use the surplus revenue to defray the cost of their local education. This reduces their local tax burden and results in a state education tax that is not proportional across the state, as required by Part II, Article 5 of the New Hampshire Constitution. For good reason the trial court ruled that "HB 616 creates a non-uniform tax rate and the Court finds no constitutional justification can be articulated to permit retention of those excess funds by 'property-rich' municipalities." Trial Court Order at 29.

There can be no question that the new education funding plan also fails to take into consideration Chapter 270's definition of an adequate education, let alone guarantees adequate funding, since work on determining the cost has barely begun. As the Court stated in *Opinion of the Justices (Reformed Public School Financing System)*, 145 N.H. 474, 478 (2000): "It is not possible to determine the level of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined."

The third mandate requires the State to bear the full cost of providing an adequate education. No portion of that cost may be shifted to municipalities. *Id.* ("... the Constitution imposes solely on the State the obligation to provide sufficient funds for each school district to furnish a constitutionally adequate education to every educable child"). Under the new education funding plan, total state aid of \$890,360,565 for each of fiscal years 2008 and 2009 may well be insufficient to meet the third mandate. *See Londonderry School District v. State*, 154 N.H. 153, 164-165 (Duggan, J., concurring and dissenting)(noting "that the office of the legislative budget assistant projected the statewide cost of an adequate education to be over \$909 million for fiscal year 2001 ... and if, as the plaintiffs allege, the legislature appropriated only \$837 million for fiscal year 2006, then there may be considerable strength to the plaintiffs' argument that the funding provided in House Bill 616 is insufficient to fund a constitutionally adequate education").

In pointing out the deficiencies of the new education funding plan, Appellees do not ask the Court to rule that it is unconstitutional. Rather, they agree with Amicus Curiae that the "Legislature should complete the tasks of costing and adopting a

permanent funding plan for a constitutionally adequate education without the involvement of the judiciary.” Amicus Curiae Memo at 8.

But at this late date the timetable for completing the second and third mandates, which must take into account completion of the fourth mandate, see Appellees’ Brief Memorandum at 4-5, cannot be open-ended. The political branches must act by June 30, 2008 if they are to provide an adequate education to every child in the state. Further delay would be intolerable. Almost nine years ago in *Claremont School Dist. v. Governor*, 143 N.H. 154, 158 (1998), the Court stated:

Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable. The legality of the education funding system in this State has been questioned for at least the past twenty-seven years, and the parties involved in the present action have been engaged in litigation for over seven years. The controlling legal principles are plain. The command of Part II, Article 83 is that the State bears the duty to provide a constitutionally adequate education to every educable child in the State and to guarantee adequate funding.

“[C]onstitutional rights [can]not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.” *Londonderry School District v. State*, 154 N.H. 153, 163 (2006). Amicus Curiae agree: “[o]nly in the absence of action by the other branches, has this Court expressed any intention of fashioning a judicial remedy to ensure a constitutionally adequate education for the children of this state.” Amicus Curiae Memo at 7.

Given the limited and insufficient legislative undertaking proposed by the State and Amicus Curiae for the upcoming legislative session, Appellees request the Court to retain jurisdiction of the case, urge the political branches to complete the remaining three mandates by June 30, 2008, and make clear that “[s]hould they fail to do so, we will then

be required to take further action to enforce the mandates of Part II, Article 83 of the New Hampshire constitution.” *Londonderry School District*, 154 N.H. at 163.

Respectfully submitted,

Londonderry School District SAU#12,
Merrimack School District SAU#26, and
New Hampshire Communities for Adequate
Funding of Education

By their attorneys,

ORR & RENO, P.A.

Dated: September 5, 2007

By: _____
William L. Chapman
Martha Van Oot
Maria M. Proulx
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2381

CERTIFICATE OF SERVICE

I, William L. Chapman, Esquire, certify that on this 5th day of September, 2007, copies of the foregoing have been mailed to Anne M. Edwards, Esquire, John R. Munich, Esquire, Jeffrey A. Meyers, Esquire, Andru H. Volinsky, Esquire, Edward C. Mosca, Esquire, James Allmendinger, Esquire, David I. Frydman, Esquire, and Eugene M. Van Loan III, Esquire.

William L. Chapman

448096 1.
DOC