THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

Case No. 213-2019-CV-00069

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

v.

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

RESPONDENTS' MOTION FOR RECONSIDERATION

The respondents, the State of New Hampshire, New Hampshire Department of Education ("DOE"), Christopher Sununu, as Governor, and Frank Edelblut, as Commissioner, by their attorneys, the Office of the Attorney General, submit the following Motion for Reconsideration of the Court's June 5, 2019 Order (the "June 5 Order"). As explained below, the Court overlooked or misapprehended several points of law or fact bearing on the outcome of this action.

STANDARD OF REVIEW

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present . . . ." Super. Ct. Civ. R. 12(e).

ARGUMENT

A. The Court erred in denying the respondents' motion to dismiss.

1. The Court erred in not ruling on whether the cost components at issue in this case fell within the statutory definition of adequate education.

In their motion to dismiss, the respondents stated that the petitioners' legal theory presented a threshold legal issue that the Court needed to resolve at the outset: whether the five cost components the petitioners contend the State is constitutionally obligated to fund fall within the statutory definition of adequate education. Resp'ts' Mot. to Dismiss at 9. The respondents explained in their motion to dismiss and elsewhere that those cost components do not fall within that definition as a matter of law. *See, e.g., id.* at 14–16; Resp'ts' Reply to Pet'rs' Obj. to Mot. to Dismiss ¶¶ 1–9 . The New Hampshire Supreme Court has indicated that the State's funding obligation extends solely to the substantive educational program, not to various ancillary costs that may be helpful to operate a school district. *See Londonderry School District SAU No. 12 v. State*, 154 N.H. 153, 160 (2006) (*Londonderry*) ("Determining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch."). Other states with substantially similar constitutional obligations have reached this same conclusion, finding that non-educational costs, such as transportation costs, are not constitutionally mandated. *See* Resp'ts' Mot. to Dismiss at 16 (collecting cases).

In its April 5, 2019 Order (the "April 5 Order"), the Court acknowledged that it would likely need to resolve these important issues. *See* April 5 Order at 21 ("The Court agrees with the State that the Plaintiffs must establish that the Legislature's definition of 'adequate education' embraces the cost components and funding amounts they have

identified; or alternatively, the Plaintiffs must show that the Legislature's determination of base adequacy aid effectively fails to meet its obligation to fund a constitutionally adequate education."). But the Court never did so. Because these are threshold legal issues, and because they are issues that the Court should have resolved in the respondents' favor for the reasons stated in the motion to dismiss, the Court erred in not ruling on those issues in resolving that motion. The respondents therefore request a ruling on those legal issues.

2. The Court erred in concluding that the petitioners had alleged a deprivation of fundamental right in their Second Amended Petition.

The Court also erred in concluding that the petitioners had alleged an actual deprivation of a fundamental right sufficient to defeat a motion to dismiss. The Court recognized in the June 5 Order, which resolved all pending dispositive motions, that in order for the petitioners' claims to survive dismissal, the petitioners needed to allege such a deprivation in their Second Amended Petition. *See* June 5 Order at 25–26 (citing *State v. Lilley*, 204 A.3d 198, 208 (N.H. 2019)). Citing paragraph 14 of the Second Amended Petition, the Court concluded that the petitioners had "unquestionably" done so. *Id.* at 25. Paragraph 14 does not support this proposition, as it is merely an introductory paragraph identifying Commissioner Edelblut as a party. Second Amend. Pet. ¶ 14. The only potentially supportive statements in the Second Amended Petition for this proposition appear in paragraphs 24, 102, and 103, which allege, at best, "statement[s] of conclusions of fact" not entitled to an assumption of truth at the motion to dismiss stage.[1] *See*

[1] Paragraphs 102 and 103 were added to the Second Amended Petition and paragraph 24 was substantively amended. *Compare* Second Amend. Pet. ¶ 24 *with* First Amend. Pet. ¶ 18. The respondents moved to strike the Second Amended Petition in part on this basis,

Snierson v. Scruton, 145 N.H. 73, 76 (2000) ("We will not . . . assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact or principles of law." (citations and quotation marks omitted)). The Court does not identify any well-pleaded allegations in the Second Amended Complaint that are entitled to an assumption of truth and, when taken as true, demonstrate an actual deprivation of a fundamental right by the State. The Court therefore erred in concluding that the petitioners had adequately alleged such a deprivation. The Court should reconsider that conclusion and grant the respondents' motion to dismiss.

B. The Court erred by not granting the respondents' motion for summary judgment.

Even if the petitioners' claims could have survived the respondents' motion to dismiss, the Court should have granted the respondents' motion for summary judgment in full. Summary judgment must rest on facts supported by *admissible* evidence. RSA 491:8-a, II ("Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of *admissible* facts as to which it appears affirmatively that the affiants will be competent to testify.") (emphasis added). Throughout this litigation, the petitioners' theory of recovery was straightforward: they contended that they could demonstrate the actual cost of delivering the opportunity for a constitutionally adequate education through 11 exhibits containing data that, by and large, are available on the DOE's website.

But as the respondents explained in their motion for summary judgment, none of those exhibits was admissible under the New Hampshire Rules of Evidence to establish

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specifically citing, among other things, the addition of paragraphs 102 and 103. *See* Resp'ts' Mot. to Strike at 8–9.

the minimum funding the State must provide to meet its constitutional obligation. Resp'ts' Mot. for Summ. J. at 2. This is because the data contained in those exhibits "are reported *by the school districts themselves* and fail to, among other things, distinguish between those costs necessarily incurred to deliver the opportunity for an adequate education and those amounts an individual school district might choose to expend above and beyond what is constitutionally mandated." *Id.* In other words, the data the petitioners relied upon was not admissible because it was based on their actual costs, and there was no evidence in the record demonstrating what comprised those costs. The respondents explained exhibit-by-exhibit why this was the case. *Id.* at 6–14.

The respondents reiterated this argument in their objection to the petitioners' motion for summary judgment, and further explained that the exhibits in question were not admissible because the petitioners had failed to identify any witness with personal knowledge to testify about the data they purport to contain. Resp'ts' Obj. to Pet'rs' Mot. for Summ. J. at 8–11. The respondents also noted that the affidavits attached to the petitioners' motion for summary judgment offered only conclusory allegations that could not be relied on to meet their summary judgment burden. *See id.* at 11–12 (citing *Granite State Mgmt & Res. v. City of Concord*, 166 N.H. 277, 290 (2013)). The petitioners never meaningfully countered these arguments. Thus, the respondents were entitled to judgment as a matter of law, as the petitioners identified no admissible evidence with which they could meet their burden of proof. This Court overlooked or misapprehended these evidentiary requirements, which compel judgment in the respondents' favor.

C. The Court erred by depriving the respondents of any meaningful opportunity to conduct discovery.

The Court overlooked or misapprehended several points of fact or law in granting the petitioners summary judgment. Principal among them was the shifting nature of the case, which ultimately prevented the respondents from conducting necessary discovery on the petitioners' conclusory factual assertions.

At the March 29, 2019 preliminary injunction hearing, the respondents noted several times that to the extent the petitioners intended to demonstrate that the State was depriving them of a fundamental right based on the actual costs the petitioner school districts incurred for the cost components at issue, then the respondents would need to conduct discovery into the makeup of those costs. *See* Transcript of Preliminary Injunction Hearing at 71–72 ("[W]e have to get inside what the actual costs are and what the components of them are."); *see also id.* at 34 (noting that petitioners were asking the Court to award them their actual costs for the components at issue "when there hasn't even been a single . . . document exchanged [or] deposition taken."); *id.* at 46 ("Each district's individual and actual costs are going to vary.").

In response, the petitioners insisted that they intended to proceed solely using "the State's own data" and "the State's own formula," *id.* at 56, and the Court, relying on this representation, concluded that significant discovery would not be necessary and placed this case on an expedited schedule, *see* April 5 Order at 19 n.13 ("[B]ecause the plaintiffs rely on DOE data, the factual and discovery issues, if any, are very dis[crete] and well defined."); *see also id.* at 10, 22–23 (framing this case as being about whether the 11 exhibits relied upon by the petitioners since the inception of this case established that the State was not funding education at a constitutionally sufficient level).

Based on this understanding, the respondents filed their motion to dismiss, arguing, among other things, that the data upon which the petitioners premised their case were irrelevant to the Court's analysis of the constitutionality of RSA 198:40-a, II. Resp'ts' Mot. to Dismiss at 20. In response to that motion, the petitioners, without leave of the Court, filed a Second Amended Petition, adding factual issues that, in the respondents' view, necessitated considerable discovery incompatible with the expedited schedule established by the Court. *See* Second Amend. Pet. ¶¶ 102, 103; *see also id.* ¶¶ 96, 105, 121, 164. The respondents accordingly filed an emergency motion to strike the Second Amended Petition and other motions, arguing, *inter alia*, that they could not competently defend against the petitioners' new allegations without "extensive discovery on, among other things, how each school district spends the resources provided by the State and what services each district provides in excess of those required under the statutory definition of 'adequate education.'" Resp'ts' Mot. to Strike at 9. The respondents further noted that they "would almost certainly need to secure one or more experts" and argued that any factual defenses the respondents might raise with respect to the school districts added as petitioners in the Second Amended Complaint would "necessarily depend on the specific circumstances as they exist in each school district." *Id.*

The Court denied the motion to strike in an order dated April 29, 2019 ("April 29 Order"). The Court credited the petitioners' assertion that "the Second Amended Petition w[ould] call for the same evidence as [the] previous petitions with the only exception being evidence of Monadnock's facilities operation and maintenance." April 29 Order at 5. The Court emphasized its understanding that "the Petitioners' theory for each

individual petitioner [was] consistent and [did] not turn on 'how each school district spends the resources provided by the State,'" but rather on "the base adequacy aid, a static figure that the State has provided to each petitioner, and its failure to fulfill the actual costs of the same five items the original Petition stated have been underfunded in ConVal." *Id.* at 5; *see also id.* at 11 ("[T]he Petitioners' underlying legal theory is unquestionably unchanged."). According to the Court, "nothing in the Second Amended Petition change[d] the Petitioners' legal theory such that new evidence [would be] required." *Id.* at 4–5.

By virtue of the Court's April 29 Order, and the representations by the petitioners on which that order was based, this case was clearly limited to whether the petitioners could prove a constitutional violation based solely on the 11 exhibits attached to each iteration of the petitioners' pleadings. The respondents accordingly filed a motion for summary judgment challenging the admissibility of the data contained in those exhibits, arguing that those data were not "reliable, competent evidence of the minimum amount of funding needed to provide the opportunity for an 'adequate education' under the New Hampshire Constitution" because they were "reported *by the school districts themselves* and fail[ed] to, among other things, distinguish between those costs necessarily incurred to deliver the opportunity for an adequate education and those amounts an individual school district might choose to expend above and beyond what is constitutionally mandated." Resp'ts' Mot. for Summ. J. at 2 (emphasis in original).

In other words, the respondents argued that the data in question were not admissible to demonstrate a deprivation of a fundamental right because they were based on the school districts' reports of their *actual costs* and there was no evidence in the

record establishing what those costs consisted of or the extent to which they exceeded the baseline amount the State is required to fund to meet its constitutional obligation. The respondents reiterated this argument in their objection to the petitioners' motion for summary judgment, *see* Obj. to Pet'rs' Mot. for Summ. J. at 8–13, noting that by seeking to forego what was necessarily a fact-intensive, expert-driven inquiry, the petitioners had "vastly oversimplify[ied] the nature of the relief they ask[ed] the Court to impose," *id.* at 12 (quoting *Londonderry*, 154 N.H. at 166–67 (Duggan, J., concurring in part and dissenting in part)).

In its June 5 Order, the Court acknowledged that it could not properly consider the data contained in the petitioners' exhibits in the context of a summary-judgment analysis. June 5 Order at 63.[2] Because those data were the only evidence the petitioners were relying on to prove their case, the petitioners failed to meet their burden as a matter of law, and the Court should have entered summary judgment in the respondents' favor. But the Court chose a different path: it inferred multiple deprivations of the fundamental right to an adequate education from what it characterized as "undisputed allegations" in four affidavits attached to the petitioners' motion for summary judgment regarding the actual teacher-student ratios in Winchester and the actual costs the petitioner school districts incurred for facilities operations and maintenance and transportation. *See id.* at 63, 67–72, 75–78, 78–82 . The Court accordingly granted the petitioners' motion for summary judgment in part and invalidated RSA 198:40-a, II(a) on an as-applied basis.

[2] As explained above, the respondents challenged the admissibility of these exhibits, and the Court should have concluded that the exhibits were not admissible.

As discussed in greater detail below, the Court's decision to infer a deprivation of a constitutional right as a matter of law was manifestly erroneous. However, the overarching problem with this decision is that it effected a result that the respondents had been assured would not come to pass: a ruling in the petitioners' favor based in substantial part upon the actual, on-the-ground conditions within the petitioner school districts themselves. This fundamentally changed the evidentiary scope of this action after all briefing was complete and without affording the respondents any meaningful opportunity to conduct discovery. And the Court imposed this change *sua sponte* after the respondents repeatedly noted that they could not competently defend against claims based on the actual conditions in the petitioner school districts without considerable discovery, including expert discovery, into the nature of those conditions and what they meant in terms of delivering the opportunity for an adequate education.

By fundamentally changing the scope of this case, depriving the respondents of the ability to conduct any discovery, and then ruling in the petitioners' favor based on the very theory the respondents contended they needed discovery to defend against, the Court erred. *See, e.g.*, *Moore v. Shelby Cty., Kentucky*, 718 F. App'x 315, 320 (6th Cir. 2017) ("A summary judgment determination requires an inquiry into 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one part must prevail as a matter of law.' *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986). Common sense dictates that before a district court tests a party's evidence, the party should have the opportunity to develop and discover the evidence."); *Sanchez v. Triple-S Mgmt., Corp.*, 492 F.3d 1, 7 (1st Cir. 2007) (noting that before a trial court may enter summary judgment sua sponte, "the discovery process must be

sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts" (citations and quotation marks omitted)); *cf. Cantwell v. J & R Properties Unlimited, Inc.*, 155 N.H. 508, 513 (2007) (holding that the trial court erred "by not permitting the plaintiff to conduct discovery on the prerequisites to maintaining a class action" and nothing that "[b]efore the trial court ruled definitively on class certification, it should have given the plaintiff a fair opportunity to develop the facts necessary to show that his case is suitable for class action treatment" (same omissions)). If the Court is now inclined to resolve this case based on the actual conditions present in the petitioner school districts, the June 5 Order should be vacated and the case should be appropriately structured for discovery and, ultimately, trial.

D. In ruling on the parties' cross motions for summary judgment, the Court erred in concluding that the petitioners had demonstrated deprivations of a fundamental right as a matter of law.

To prevail on a motion for summary judgment, the moving party must demonstrate that it is "entitled to judgment as a matter of law." RSA 491:8-a, III. In this case, the Court concluded that the petitioners had demonstrated multiple deprivations of a fundamental right as a matter of law based solely on factual inferences the Court believed it could draw when comparing the teacher-student ratio and funding levels adopted by the Joint Committee and the funding level set by the legislature with the actual teacher-student ratios in Winchester and the actual costs the petitioner school districts claimed to incur for certain of the cost components at issue in this case. The Court drew these inferences from affidavits attached to the petitioners' motion for summary judgment despite the fact these affidavits set forth ultimate facts, not evidentiary facts, and failed to particularize those facts in any meaningful way. *See Granite State Mgmt & Res.*, 165

N.H. at 290 ("The affidavits should set forth evidentiary, and not ultimate, facts and should set forth the facts with particularity, mere general averments being insufficient."). In other words, the Court found facts in the moving parties' favor from ultimate, general averments, without a trial, in resolving the motions for summary judgment. This violates the standard of review on summary judgment. Several other errors emanated from this violation.

First, the Court erred by finding a deprivation of a fundamental right as a matter of law based on evidence the Court acknowledged it could not consider for the purposes of summary judgment. "When considering a motion for summary judgment, the trial court cannot weigh the contents of the parties' affidavits or resolve factual issues . . . ." *Sabinson v. Trustees of Dartmouth Coll.*, 160 N.H. 452, 460 (2010) (citation omitted). As noted above, the Court concluded that it could not properly consider the data on which the petitioners based their entire case because "the weight of the evidence and its materiality are disputed." June 5 Order at 63.[3]

Nonetheless, the Court relied on "allegations" in the petitioners' supporting affidavits reflecting, in substantial part, the very same data contained in the exhibits the Court concluded it could not consider. For instance, the Court cited Winchester's teacher-student ratio to support its conclusion that the Joint Committee's ratio, adopted by the legislature, resulted in the deprivation of a fundamental right. *See id.* at 63. But the Court did not identify where Winchester provided that ratio independent from the DOE spreadsheet attached to their motion, *see id.* at 63, and the only place in the

[3] These exhibits were, in fact, inadmissible for the reasons stated in the respondents' motion for summary judgment.

summary judgment record where that ratio is detailed is in that spreadsheet. *See* Affidavit of Kimberley Rizzo Saunders ("Rizzo Saunders Aff."), Ex D. at 3. Likewise, the "allegations" as to the petitioner school districts' actual transportation costs in three of their four supporting affidavits were expressly based on data contained in the exhibits submitted by the petitioners, *see* Affidavit of Dr. Kenneth R. Dassau ¶ 14, Affidavit of Lisa A. White ¶ 11, Affidavit of Dr. Stephen Russell ¶ 9 (all citing Rizzo Saunders Aff., Ex. B), and the "allegation" as to those costs in the remaining affidavit was sufficiently similar to the per-pupil cost for that district reflected in those exhibits to support an inference in favor of the *non*-moving party, at least for summary judgment purposes, that it was based on those documents, *compare* Rizzo Saunders Aff. ¶ 28 ($914.60 per pupil) *with* Rizzo Saunders Aff., Ex. B at 2 ("$944.60 per pupil").[4] Thus, the Court entered summary judgment in the petitioners' favor based on evidence that was inadmissible, contrary to RSA 491:8. In doing so, the Court committed an error of law.

Second, the Court based its finding that the petitioners had demonstrated multiple deprivations of a fundamental right as a matter of law on improper inferences drawn in the petitioners' favor. When reviewing a motion for summary judgment, the Court must "consider the affidavits and other evidence, and all inferences properly drawn therefrom, *in the light most favorable to the non-moving party*." *Jeffery v. City of Nashua*, 163 N.H.

[4] The only "allegation" in any of the affidavits related to facilities operations and maintenance is a single paragraph in Rizzo Saunders's affidavit averring the costs ConVal incurred for plant operations. Rizzo Saunders Aff. ¶ 85. To the extent this allegation was derived independently from the data reflected in the petitioners' exhibits, the Court erred in relying on it to grant summary judgment in favor of the petitioners, as the respondents were not afforded a meaningful opportunity to conduct discovery into what comprised these costs.

683, 685 (2012) (citation omitted) (emphasis added). Departing from that standard, the Court inferred that the State was depriving students in the petitioner school districts of their fundamental right to an adequate education because, in the Court's view, (1) the teacher-student ratios in Winchester were much lower than the teacher-student ratios established by the Joint Committee, and (2) the actual costs incurred by the petitioner school districts for facilities operations and maintenance and student transportation were much higher than the funding the State provided for those cost components. *See* June 5 Order at 67–71, 75–78, 78–82.

As explained in the respondents' summary judgment filings, however, this is not the only reasonable inference the Court could have drawn from the differences in these numbers. Rather, the Court could just as reasonably have inferred that these differences were attributable to the individual school districts' choices to provide services and programs above and beyond what is constitutionally mandated. The Court rejected this argument, without explaining why the argument failed as a matter of law, particularly given the limited record in this case. *See* June 5 Order at 89. By doing so, and by then granting the petitioners' motion for summary judgment based on an inference that was clearly favorable to the petitioners rather than the non-moving respondents, the Court misapplied the summary judgment standard.

Third, the Court misapplied *McCleary v. State*, 269 P.3d 227 (Wash. 2012), and *Gannon v. State*, 319 P.3d 1196 (Kan. 2014), to support its conclusion that it could infer a constitutional violation on a summary judgment record from the "disparity" between the funding the State had provided in the actual costs the petitioner school districts incurred. *See* June 5 Order at 74 n.24. The appeal in each of those cases followed an extensive trial

at which hundreds of exhibits were received into evidence and during which dozens of witnesses, including policymakers and school finance experts, provided testimony. *See Gannon*, 319 P.3d at 1117 ("At trial, the plaintiffs elicited testimony from various employees of the plaintiff districts; representatives from the Kansas Association of School Boards, Kansas Board of Regents, and Kansas State Department of Education; members of the legislature; and experts in the field of school finance. In response, the State called a series of school finance experts. In addition to this extensive testimony, 650 exhibits were received into evidence."); *McCleary*, 269 P.3d at 245 ("The court heard testimony from 28 fact and expert witnesses, with another 27 witnesses testifying via deposition. Many of the witnesses were state officers, including former and current superintendents of public instruction, the longtime assistant superintendent of public instruction for school financial resources, the director of the State's office of Financial Management, and current and former legislators involved in K–12 reform. Witnesses also included local school district superintendents, as well as [parents of students in the school districts]. The State called several other witnesses, including nationally recognized experts in the area of school finance. During the course of the testimony, over 500 exhibits came into evidence."). Nothing in these cases supports the proposition that a Court may find a deprivation of a fundamental right as a matter of law on a summary judgment record based solely on speculative, factual inferences drawn between two numbers, one of which was inadmissible under the New Hampshire Rules of Evidence. By concluding otherwise, the Court erred.

E. The Court erred by failing to afford RSA 198:40-a, II(a) a presumption of constitutionality, by failing to pay appropriate deference to the legislature, and by imposing unworkable standards on the legislature. In doing so, the Court violated the separation-of-powers doctrine and fashioned a nonjusticiable standard.

1. The Court erred by not affording RSA 198:40-a, II(a) a presumption of constitutionality.

The New Hampshire Supreme Court has emphasized that statutes are presumed constitutional and cannot be declared invalid "except on inescapable grounds." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669 (2016) (citations and quotation marks omitted). Despite this clear directive, the Court determined that it need not afford RSA 198:40-a, II(a) any presumption of constitutionality. The Court reached this determination for two reasons. First, the Court concluded that such a presumption "cannot be reconciled with strict scrutiny." June 5 Order at 27. But this conclusion overlooked the fact that strict scrutiny is only triggered once a petitioner makes the requisite evidentiary showing that it is being deprived of a fundamental right (*i.e.*, once it overcomes the presumption of constitutionality). *See Lilley*, 204 A.3d at 208. As discussed above, and explained in greater detail in the respondents' motion to dismiss and summary-judgment filings, the petitioners in this case neither alleged well-pleaded facts nor adduced with competent, admissible evidence any deprivation of a fundamental right. Thus, the petitioners never overcame the presumption of constitutionality and strict scrutiny was never triggered at any point in this case. The Court therefore should have presumed RSA 198:40-a, II(a) to be constitutional in its analysis.

The Court also determined that RSA 198:40-a, II(a) was not entitled to a presumption of constitutionality based on a narrow exception to that presumption recognized in *Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n*, 159 N.H. 627

(2010). *See* June 5 Order at 28. In *Tuttle*, the New Hampshire Supreme Court stated that a statute need not be presumed constitutional when "there is no question of statutory interpretation" and "[t]he effects of the legislation are obvious and acknowledged." 159 N.H. at 640. The *Tuttle* exception does not apply here, as this Court engaged in lengthy statutory interpretation and extensively reviewed and audited the legislative history of the entire education-funding scheme in reviewing the constitutionality of RSA 198:40-a, II(a). *See* June 5 Order at 30–54. In its June 5 Order, the Court expressly recognized that the unconstitutional effects of RSA 198:40-a, II(a) were not "obvious and acknowledged," as it rejected the petitioners' facial challenge to that statute on the basis that it was "not apparent on [that] statute's face that it could not, in some circumstances, provide sufficient funding." June 5 Order at 65; *see also id.* at 64 ("While the underlying calculus upon which the base adequacy aid was determined may be questionable, or even illogical, the statute and its text are not."). The fact the Court felt it was necessary to turn to legislative history further illustrates this point, as legislative history may only be considered when the statutory text is ambiguous. *See Anderson v. Estate of Wood*, 171 N.H. 524, 528 (2018). Thus, *Tuttle* also fails to support the Court's conclusion that it did not need to afford RSA 198:40-a, II(a) a presumption of constitutionality.

2. <u>The Court erred in determining that its review of the constitutionality of RSA 198:40-a, II(a) was not limited by any deference to the legislature</u>.

The Court concluded that its review of the constitutionality of RSA 198:40-a, II(a) was "not limited by any deference to the Legislature" and that such deference only "curtails [a court's] ability to provide injunctive relief." June 5 Order at 29. The respondents respectfully disagree. Such a standard would be unworkable, as it would allow a court to subject education-funding legislation to exacting review, without any

deference paid to the necessary policy determinations underpinning that legislation, while at the same time prohibiting the court, in the name of deference to a co-equal branch of government, from providing any meaningful guidance as to what sort of legislation might pass constitutional muster. This result also strips any meaning from the New Hampshire Supreme Court's repeated references to the wide latitude afforded to the legislature when determining how the State will meet its constitutional obligation to deliver students the opportunity for an adequate education. *See, e.g.*, *Londonderry*, 153 N.H. at 160 ("The task of developing the specific criteria of an adequate education is for the legislature."); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 471 (1997) (*Claremont II*) ("Decisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported."). The Court therefore erred in concluding that it need not defer to the legislature when reviewing the constitutionality of RSA 198:40-a.

The Court likewise failed to properly pay deference to the legislature when it imposed a *de facto* requirement that any legislative enactment related to education funding be supported by a comprehensive legislative record. *See* June 5 Order at 52, 84. The New Hampshire Supreme Court has never suggested, let alone imposed, such a requirement in any of its school-funding decisions. And research discloses no case from another jurisdiction suggesting, much less holding, that a legislative enactment may only survive a constitutional challenge if a legislature "shows its work" to the satisfaction of the judicial branch. Such a standard denigrates the legislative function, making the legislature essentially a second-class branch of government in the education-funding

context. This, too, serves as a basis for the Court to reconsider and vacate its June 5 Order.

3. The Court erred by suggesting that any amount funded by the State must "strictly align" with the definition of "adequate education" in order to pass constitutional muster.

In concluding that the State had failed to meet its constitutional obligation to fund the opportunity for an adequate education, the Court emphasized that the cost/funding formula adopted in RSA 198:40-a, II(a) did not "strictly align" with the statutory definition of "adequate education" contained in RSA 193-E:2-a. *See* June 5 Order at 48–49. The Court concluded that this was problematic in light of the statement in *Londonderry* that:

> 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 school district in this State can determine the distinct substantive content of a constitutionally adequate education.

154 N.H. at 160. This language does not extend to the circumstances in this case for at least two reasons. First, in *Londonderry*, the State did not point to a statutory or regulatory provision defining the educational program, arguing instead that the "'the school approval standards go well beyond the constitutional floor of adequacy' and 'far surpass the constitutional minimum of adequacy.'" *Id.* Here, in contrast, the respondents have pointed to specific statutory and regulatory provisions laying out the substantive content of the educational program such that it can be readily understood by a citizen or school district. *See* Resp'ts' Mot. to Dismiss at 11–19. The circumstances in this case were therefore not present in *Londonderry*.

This difference also highlights the second, more fundamental reason *Londonderry* is inapplicable in the present context: unlike in *Londonderry*, the statutory definition of "adequate education" is not at issue in this case.[5] The New Hampshire Supreme Court has never suggested that the legislature may only fund education at a level that "strictly aligns" with that statutory definition. This would once again be an unworkable requirement, as it would command that the legislature line itemize and cost any expenditure conceivably required under the definition of "adequate education." Thus, any force the quoted language from *Londonderry* might have in the context of a challenge to the definition of "adequate education" dissolves when the challenge is instead directed at the cost/funding formula used to implement that definition. By concluding otherwise, the Court erred.

4. The Court's June 5 Order violated the separation-of-powers doctrine and fashioned a nonjusticiable standard.

The separation-of-powers doctrine embodied in Part I, Article 37 of the New Hampshire Constitution "prevents one branch of government from encroaching on the power of another." *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160–61 (1998) (citations omitted). An offshoot of this doctrine, the doctrine of justiciability, "prevents the judicial violation of the separation of powers doctrine by limiting judicial review of certain matters that lie within the province of the other two branches of government." *In re Petition of Judicial Conduct Comm.*, 151 N.H. 123, 128 (2004) (citation and quotation marks omitted). The requirements imposed on the legislature in the June 5 Order invade the province of the legislature by imposing unworkable standards that pay the legislature

[5] Though the Court addressed the constitutionality of RSA 193-E:2-a in its June 5 Order, it did so in error for the reasons explained *infra*.

no deference when reviewing the constitutionality of a legislatively enacted, policy-driven cost/funding formula, while the same time requiring the legislature to: (1) craft a formula that "strictly aligns" with the substantive definition of an "adequate education," and (2) create a comprehensive legislative record of every policy decision bearing on that formula. In other words, the Court has fashioned standards that result in the judiciary serving as a super-legislature when reviewing challenges to education-funding statutes, standing ready to audit and second-guess the legislature's work against no objective, discernible standards. This is the precise sort of judicial interference in the legislative function that the separation-of-powers and justiciability doctrines were designed to prevent. The Court erred by overlooking or misapprehending those doctrines.

F. Other instances of error.

The other instances of error in the June 5 Order can be addressed in short order. *See* Super. Ct. Civ. R. 12(e) (a motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument . . . as the movant desires to present").

First, the Court erred in analyzing the constitutionality of RSA 193-E:2-a—the statute defining an "adequate education"—when that statute was not challenged as part of this lawsuit. It is well established that a petitioner is "the master of the complaint," *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (citation omitted), and in this case the petitioners filed three separate petitions without challenging the constitutionality of RSA 193-E:2-a. Consequently, the respondents indicated, on multiple occasions, that they were taking the petitioners at their word and were limiting their arguments accordingly. *See* Resp'ts' Mot. to Dismiss at 14 ("Notably,

the plaintiffs do *not* challenge the constitutionally required definition of 'adequate education' as laid out by the legislature."); Resp'ts' Obj. to Pet'rs' Mot. for Summ. J. at 13 ("The legislature then came up with the current definition of 'adequate education,' a definition these plaintiffs do not challenge."). Then, without notice, the Court concluded *sua sponte* in its June 5 Order that RSA 193-E:2-a is constitutionally suspect and entered summary judgment in the petitioners' favor in part based on this conclusion. This conclusion was incorrect as a matter of law, as the current definition of adequate education fully comports with *Londonderry*. *See* Resp'ts' Mot. to Dismiss at 11–19. But it was also fundamentally unfair to the respondents, who had no opportunity to research or brief a major issue of statutory interpretation that ultimately served as a basis for the Court's decision in the petitioners' favor. Accordingly, the Court erred by addressing the constitutionality of RSA 193-E:2-a.

Second, the Court erred by suggesting that the definition of "adequate education" incorporates any education-related services or programs that the legislature has decided to fund. In *Londonderry*, the Supreme Court emphasized that the State must "isolate what parts of the scheme comprise constitutional adequacy." 154 N.H. at 160. As explained above and in the respondents' motion to dismiss, the legislature has done just that through RSA 193-E:2-a. Neither *Londonderry* nor any other New Hampshire education-funding decision suggests that once the State has met its constitutional obligation to define a substantive educational program, the scope of that definition will fluctuate based on the funding choices the legislature decides to make during a particular funding cycle. Indeed, such a requirement would discourage the legislature from ever

increasing education funding beyond the constitutional minimum, as doing so would leave the entire statutory scheme susceptible to constitutional challenge.

Third, the Court erred in concluding that the respondents agreed that no school in New Hampshire *could* function at $3,562.71 per student. June 5 Order at 1. The respondents at no point conceded that it would be impossible for New Hampshire school districts to provide a constitutionally adequate education at that per-pupil rate. To the contrary, the respondents repeatedly emphasized that any such determination would require considerable discovery and expert testimony. As discussed above, the respondents were never afforded the opportunity to conduct that discovery.

Fourth, the Court erred in not dismissing the petitioners' SWEPT claim. The New Hampshire Supreme Court has held that "[t]o the extent [a] property tax is used . . . to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." *Claremont II*, 142 N.H. at 471. In its June 5 Order, the Court concluded that the petitioners had not alleged that the State levies SWEPT in a disproportionate manner. *See* June 5 Order at 60. The Court accordingly should have dismissed the SWEPT claim.

Fifth, the Court erred in concluding that the petitioners would still be entitled to summary judgment on their claim for declaratory relief even under a rational-basis standard. As explained in greater detail in the respondents' motion to dismiss, there are numerous rational bases for the Joint Committee's determinations with respect to teacher-student ratios, facilities operations and maintenance, and student transportation. Resp'ts' Mot. to Dismiss at 14–16. By disregarding these bases, the Court conducted the precise sort of inquiry the New Hampshire Supreme Court has emphasized is not permitted on

rational-basis review. *See Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 757 (2007) ("In rational basis review, we will not independently examine the factual basis for [a statute]."); *Boulders at Strafford, LLC v. Town of Strafford*, 154 N.H. 633, 638 (2006) ("An analysis of least restrictive alternatives is not part of a rational basis analysis. We will not second-guess the town's choice of means to accomplish its legitimate goals, so long as the means chosen is rationally related to those goals." (citation and quotation marks omitted)).

Finally, the Court erred in granting the petitioners' request for an award of attorney's fees. The New Hampshire Supreme Court has never held that attorney's fees are necessarily available when a petitioner prevails on a constitutional challenge to the state's education-funding system. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 598 (1999) ("We express no opinion as to whether attorney's fees are recoverable for litigation related to these proceedings."). Because the petitioners have prevailed only on their as-applied challenge, they have not conferred a substantial benefit on the general public warranting an award of fees. *See id.* at 595 (discussing "[a]n award of attorney's fees to the prevailing party where the action conferred a substantial benefit *not only on the plaintiffs* who initiated the action, but on the public as well . . . ." (emphasis added)).

CONCLUSION

In sum, the Court overlooked or misapprehended numerous points of law or fact when resolving this case in its June 5 Order. For the reasons stated above, the Court should grant this motion for reconsideration, vacate the June 5 Order, and enter judgment in the respondents' favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Motion for Reconsideration was served on June 20, 2019, to all counsel of record via the court's electronic filing system.

/s/ Anthony J. Galdieri
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