

New Hampshire School Boards Association  
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MAY 2006

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**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**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**

**BRIEF OF AMICUS CURIAE  
NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION  
IN SUPPORT OF DEFENDANTS**

**INTERESTS OF THE AMICUS CURIAE**

The New Hampshire School Boards Association (NHSBA) is a non-profit, voluntary association whose membership is comprised of approximately 165 of the 176 locally elected school boards in the State of New Hampshire.

As an association of school boards, NHSBA represents the interests of local school boards in the development of state and federal educational policies, provides information and assistance to school boards so that all boards may more effectively perform their duties, and seeks public support and commitment for equal educational opportunities for all New Hampshire children.

The New Hampshire School Boards Association strives to be the focal point for student achievement and educational improvement in New Hampshire. NHSBA also believes that educational improvement can be best accomplished by implementing positive educational reform, through a

collaborative “system” comprising federal, state, and local resources, anchored by and through the leadership of locally elected school boards.

Guided by these principles, locally elected school boards in all regions of our state adopted the following resolution at a duly called assembly of the membership of *amici*:

NHSBA urges the Legislature to utilize the resources of the NH Department of Education...to define a curriculum that comprises an “adequate education” in the State of New Hampshire, and further to calculate the actual cost of an “adequate education,” and to develop an Adequate Educational Funding distribution formula which is consistent with the spirit of the Claremont decisions.

The instant case is another vital “education funding” case, in line with the earlier Claremont cases previously considered by this Court. NHSBA has often played a major role in representing the interests of its membership to the court during this time. Once again this Court is asked to determine whether the New Hampshire Legislature has fulfilled its duty to provide students with an adequate education, funded with constitutional taxes, and ensured through accountability measures and standards.

As elected bodies entrusted by their towns and cities to direct and oversee the public schools of New Hampshire, the school boards of New Hampshire are uniquely positioned to explain to this Court the import of this case.

NHSBA’s interest here is to ensure that the Court is fully aware of the enormous impact which its decision will have on local school boards throughout New Hampshire, an impact that will reach numerous decisions that local school boards throughout the State will have to make.

### **STATEMENT OF THE QUESTIONS, CASE, AND FACTS**

The *amicus* adopts the statement of the questions, the statement of the case, and the statement of facts as propounded by the plaintiffs, Londonderry School District SAU #12, Merrimack School District SAU #26, and New Hampshire Communities For Adequate Funding Of Education.

### **SUMMARY OF THE ARGUMENT**

The current system of funding New Hampshire public schools relies on four sources of funding: the Statewide Enhanced Education Tax (RSA 76:3); Local Tax Capacity Aid (RSA 198:40-a); Targeted Per Pupil Aid (RSA 198:40-b); and Statewide Enhanced Education Tax Capacity Aid (RSA 198:40-c). This system has created wide disparities in the educational opportunities that are afforded to students in given school districts. The current system does not allow “property poor” districts to provide their students with either adequate or equitable educational opportunities. The failure of the current funding system to deliver such adequate or equitable educational opportunities is therefore inconsistent with the mandates of the New Hampshire Constitution.

Additionally, the effect of the current system precludes many local school boards from fully complying with the array of statutory and administrative mandates. All school districts, regardless of wealth, are subject to a litany of mandatory statutes and administrative regulations enacted, in part, to ensure pupils are presented with an adequate education. Because the current funding system does not provide for an adequate or equitable education of New Hampshire’s school children, property poor towns are less able to meet these mandates than are their property rich counterparts. After struggling to comply with these various mandates, property poor school districts simply have little, if any, additional revenue to direct toward priorities established at the local level by elected school boards.

Conversely, under the current funding system, property rich school districts have the latitude to provide greatly expanded opportunities to provide an adequate education without regard to the burden imposed by additional costs.

With these vital public policy considerations in mind, the *amicus* asks this Court to affirm the trial court’s decision.

## **ARGUMENT**

- I. House Bill 616 and certain other statutes and regulations do not provide New Hampshire schoolchildren with an adequate education because they do not provide for equitable educational opportunities.**

This Court held that “a constitutionally adequate public education is a fundamental right” and that the State has a constitutional duty to fund an adequate public education. Claremont School District v. Governor, 142 N.H. 462, 473 (1997). Since that ruling, the New Hampshire Legislature has struggled to adopt a funding system that satisfies the constitutional directives of this Court. See generally Opinion of the Justices, 142 N.H. 892 (1998)(HB 1280-LOCAL would violate the New Hampshire Constitution); Opinion of the Justices, 145 N.H. 474 (2000)(SB 462-FN-A-LOCAL would not satisfy the requires of the New Hampshire Constitution.)

Elements of a “constitutionally adequate” public education were provided by this Court in Claremont II, were relied on by the trial court in this matter, and were again reiterated by the State in its brief to this Court. In RSA 193-E:2, the New Hampshire Legislature made efforts to codify the elements proffered in Claremont II. Additionally, the State developed “minimum standards” requirements, found in Ed. 306. However, and despite the Legislature’s diligent efforts to define an “adequate education” and implement accountability standards in accord with constitutional requirements, the resulting funding system and accountability standards still come short of the dictates of this Court.

To illustrate this point, one need only examine the State’s efforts to fulfill its duty of accountability. At the trial court, the State relied on RSA 193-E:2, N.H. Administrative Rules Ed ch. 300, and RSA 193-C as evidence that the State satisfied its duty of accountability. With respect to Ed. 306, Minimum Standards for Public School Approval, many of the “accountability” standards contained therein are simply beyond the economic reach of observance for some New Hampshire school districts. Sadly, many New Hampshire school districts do not have adequate financial resources to adopt the optional standards.

For example, Ed. 306.04(a)(12) directs local school boards to adopt written policies and procedures relative to distance education, *if* the district chooses to provide distance education

opportunities. Similarly, Ed. 306.04(a)(13) directs local school boards to adopt policies and procedures relative to extended learning opportunities, *if* the district chooses to provide distance education. Ed. 306.26(d) states, “*If* a cocurricular program is offered...” (Emphasis added.)

The rules cited above are riddled with conflicting considerations. On one hand, they purport to grant locally elected school boards the ability to maintain local control over some educational programs and policies. However, in reality and because of economic consequence of adoption at the local school district level, these rules serve to allow the State to be “abdicating its duty in the process” of providing accountability standards to locally elected school boards. Claremont School District v. Governor (Accountability), 147 N.H. 499, 517 (2002).

The predominant issue is whether such “permissive” regulations are essential to providing New Hampshire’s schoolchildren with an adequate education. When viewed individually, the permissive regulations do not appear to prevent the State from fulfilling its duties. However, when viewed in totality and recognizing that many New Hampshire school districts do not have the economic *opportunity* to implement these permissive regulations, it is evident that the current education funding system is not adequately serving all school districts.

To further illustrate this point, it is helpful to view these permissive regulations in a manner consistent with what this Court stated in Claremont I and II. In Claremont I, the Court stated:

The State’s constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.

Claremont School District v. Governor, 138 N.H. 183, 192 (1993).

Mere competence in the basics – reading, writing, and arithmetic – is insufficient in the waning days of the twentieth century to insure that this State’s public school students are fully integrated into the world around them. A broad exposure of the social, economic, scientific, technological, and political realities of today’s society is essential to compete, contribute, and flourish on the twenty-first century.

Claremont II, 142 N.H. at 474.

With these passages in mind, it is clear that for a funding system to meet these constitutional dictates, it must necessarily provide each local school district the opportunity and real economic ability to implement *all* regulations that provide an adequate education, such as opportunities to realistically implement such programs as extended learning opportunities. The current system clearly does not allow this to happen, and thus does not meet the principles enunciated in Claremont I and II.

Though the constitutional duty to provide an adequate education is borne by the State, RSA 189:1-a provides “It shall be the duty of the school board to provide, at district expense, elementary and secondary education to all pupils who reside in the district...” As such, much of the actual burden to provide an adequate education to New Hampshire schoolchildren falls on local school boards. Everyday, local school boards are on the frontlines to provide a valuable and resourceful education. They struggle, often with inadequate resources, to provide an education that sufficiently prepares students for the social, economic, technological and political realities of the twenty-first century.

And, despite the laudable intent of these regulations to implement and account for an “adequate education” the stark reality is that the current funding system fails to allow many local school boards to implement the legislatively created optional provisions and programs. Though Court has clearly state that a constitutionally adequate education “is not the right to horizontal resource replication from school to school and district to district,” the fact that great economic disparity prevents many local school boards from implementing the optional programs is undeniably contrary to this Court’s consistent reasoning that an adequate education must provide students with skills beyond mere reading, writing and arithmetic. See generally Claremont II, 142 N.H. at 473-476 (comparable funding must be assured in order that every school district will have the funds necessary to provide such education); Claremont School District v. Governor (Accountability), 147 N.H. at 508 (standards must be subject to

meaningful application so that it is possible to determine whether the State has fulfilled its duty to provide a constitutionally adequate education.)

Any system that funds local school districts in a manner which is inadequate for many such districts to meet duly adopted State minimum education standards, as does the current system, is inherently inequitable, inadequate, and thus contrary to the New Hampshire Constitution. Additionally, such a system cannot be said to have any meaningful application when only a portion of the State's local school districts have the financial ability to fulfill the State's minimum standards. For these reasons, the current funding system and accountability standards do not satisfy the State's duty to provide an adequate education to every educable child.

**II. HB 616's funding formula is unconstitutional because it does not provide adequate funding to enable all New Hampshire school districts to comply with the State's minimum standards.**

It is one of the State's duty to provide a constitutionally adequate education is for the Legislature to determine the cost of an adequate education. Claremont I, 138 N.H. at 184. The Legislature is bestowed with the task of "adopting a funding mechanism to ensure that a constitutionally adequate education is provided." Claremont II, 142 N.H. at 467. The current funding system via HB 616 fails to ensure that New Hampshire's public education system is funded in a manner that satisfies this Court's directives.

As stated above, New Hampshire's public education system is funded through a combination of four funding sources: (1) RSA 76:3, Statewide Enhanced Education Tax; (2) RSA 198:40-a, Local Tax Capacity Aid; (3) RSA 198:40-b, Targeted Per Pupil Aid; and (4) RSA 198:40-c, Statewide Enhanced Education Tax Capacity Aid. Notably lacking from any of these statutes is a legislative determination of the cost of an adequate education. This is contrary to this Court's directive that the Legislature is required to determine the cost of an adequate education. See generally Claremont School District v. Governor (Accountability), 147 N.H. at 505.

Because the Legislature has failed to even define or determine the cost of an adequate education, the duty imposed upon it by this Court has not been met. Therefore, HB 616 and its supporting statutes are unconstitutional.

The State argues that nothing in HB 616 is “inescapably” insufficient to meet the State’s obligations regarding education funding and therefore the \$837 million provided by State to fund public education is sufficient. By way of an example, which is overly simplistic, the State argues it would be fulfilling its constitutional duties had the Legislature appropriated only \$1.00 to public education funding. This argument fails to consider the other constitutional mandates of educational funding, how those mandates interrelate, and makes a mockery of what the State has done in this regard, to date.

Weaved throughout the pleadings of all parties, it is admitted and agreed that the State has a constitutional obligation to provide each educable child with an adequate education. If the State chooses to levy a tax in order to raise monies for the support of public schools, such a tax must be applied proportionally. And, additionally consistent with prior rulings of this Court, any measure of an adequate education must be supported by accountability standards.

The State’s argument that if the Legislature appropriated only \$1.00 such funding would be sufficient to providing for an adequate education is without merit. As discussed above, this Court has determined that sufficient accountability standards must be in place so that an “adequate education” can be appropriately measured or assessed. Currently, the State has in place numerous “minimum standards” regulations designed to satisfy the accountability standards. These minimum standards, as previously noted, require local school boards to adopt and/or implement numerous policies and programs. Because the State mandates that these programs be implemented into the educational framework, the State then has an obligation to assist local school districts with adequate funding to create and operate those programs.

Therefore, it is inconceivable how it can be argued that the State is somehow fulfilling its constitutional duties to provide and fund an adequate education by appropriating a single dollar, when that single dollar would have to be stretched to comply with the numerous mandates promulgated by the New Hampshire Department of Education. Such reasoning satisfies neither sound legal nor public policy considerations, and is an insult to both the spirit and letter of numerous previous decisions of this Court. Furthermore, the State's argument that it could adequately fund public education with a \$1.00 appropriation runs directly counter to the mandate of Claremont I that the State has a duty to provide an adequate education and to guarantee adequate *funding*. Claremont I, 138 N.H. at 184 (1993). Surely, this is not the public education system the State's constitution demands, and such an argument is consistent with the very system that this Court previously struck down as being "precisely the kind of taxation and fiscal mischief which the framers of our state constitution took strong steps to protect our citizens." Claremont II, 142 N.H. at 465.

Under the State's argument, the burden left by an ineffective funding system would be borne to local school boards, who are charged with the initial duty to maintain and effectively operate New Hampshire's school districts. If such an argument were to survive, local towns and municipalities would be forced to raise local property taxes to exorbitant rates in order to fund their local schools in a manner sufficient enough to satisfy State rules and regulations.

In the same vein, the State also argues that the New Hampshire Legislature had a significant amount of information from which it could determine the amount of financial resources necessary to fund an adequate education. However, the State's reliance on this representation does not mean in any significant way that the Legislature's appropriation satisfies the requirements of the New Hampshire Constitution. The Legislature is obligated to designate "sources of funds sufficient to meet the constitutional mandate" to provide an adequate education. Claremont II, 142 N.H. at 476. The "test" is not how much or how little the Legislature actually appropriates for public education.

Rather, the only proper test to determine whether the State has met its obligation to adequately fund an adequate education is to reasonably assess whether that amount appropriated by the State allows local school districts to meet the constitutional, legislative, and regulatory dictates which they face. The State has consistently failed to meet this test since the early school funding decisions of this Court, and again has failed to do so under HB 616.

It is imperative that the Legislature not only fund public education on a proportional and reasonable basis, but also that local school districts and school boards be provided with adequate funding so they are able to provide New Hampshire schoolchildren an education with “a broad exposure of the social, economic, scientific, technological, and political realities of today’s society is essential to compete, contribute, and flourish on the twenty-first century.” *Id.* at 474.

The effect of this system under HB 616 is to once again place undue, unreasonable, and unconstitutional burdens on local school boards who are charged with the initial duty to maintain and effectively operate New Hampshire’s school districts.

## **CONCLUSION**

Based on the foregoing reasons, *amicus* respectfully asks this Court to affirm the decision of the court below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that copies of this brief have been forwarded by first class mail, postage pre-paid, to Anne M. Edwards, Esq., counsel for the petitioner, the State of New Hampshire, and William Chapman, Esq., counsel for respondent Londonderry School District SAU #12, et al.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
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