

University of New Hampshire

## University of New Hampshire Scholars' Repository

---

Claremont Papers

NH State Publications

---

8-13-1992

### Notice of decision 91-E-00306-B : Claremont School Distict etal vx. Gregg, Judd etal

Claremont (N.H.). School District Board

Follow this and additional works at: <https://scholars.unh.edu/claremontpapers>

---

#### Recommended Citation

Claremont (N.H.). School District Board, "Notice of decision 91-E-00306-B : Claremont School Distict etal vx. Gregg, Judd etal" (1992). *Claremont Papers*. 1.  
<https://scholars.unh.edu/claremontpapers/1>

This Text is brought to you for free and open access by the NH State Publications at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in Claremont Papers by an authorized administrator of University of New Hampshire Scholars' Repository. For more information, please contact [nicole.hentz@unh.edu](mailto:nicole.hentz@unh.edu).

# THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COU

Leslie J Ludtke, Esq.  
Office Of Attorney General  
208 State House Annex  
Concord, NH 03301

--NOTICE OF DECISION--

91-E-00306-B

Claremont, School Dist etal vs. Gregg, Judd etal

You are hereby notified that on August 13, 1992 the following  
Order was entered in the above matter:

Re: Defendants' Motion for Reconsideration  
"Denied."

George L. Manias  
Presiding Justice"

SEE ATTACHED ORDER ON DEFENDANTS' MOTION TO DISMISS

08/13/92

*William S. McLaw*  
CLERK OF COURT

WSM/ tej  
cc: Attorneys Saunders, Garvey, Volinsky, Ludtke & Jones

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Claremont School District, et al

v.

Judd Gregg, Governor of the State of New Hampshire, et al

91-E-306

ORDER ON DEFENDANTS' MOTION TO DISMISS

The defendants have filed a motion to dismiss the above-captioned equity action. As grounds for dismissal, the defendants claim that the action is nonjusticiable; that it is barred by the doctrines of official, legislative, and sovereign immunity, and that the plaintiffs have failed to state a claim. The plaintiffs object to this motion. A hearing on the matter was held on June 5, 1992.

Pursuant to RSA 491:22, the plaintiffs seek a declaratory judgment that the system by which the State finances education violates the New Hampshire Constitution. Specifically, counts one and two respectively allege that, in violation of Part 2, Article 83 of the New Hampshire Constitution, the State fails to spread educational opportunities equitably among its students and fails to adequately fund education. Count three maintains that RSA 198:27-33, known as the Foundation Aid statutes, unconstitutionally restrains State aid to public education by capping State assistance at 8%. Counts four and five contend that plaintiffs have been denied equal protection; count four applies to the New Hampshire school finance system generally, and



count five to the Foundation Aid statutes specifically. Finally, count six alleges that the heavy reliance on property taxes to finance New Hampshire public schools results in an unreasonable, disproportionate, and burdensome tax in violation of Part 2, Article 5 of the New Hampshire Constitution.

First, the Court will consider the issues the defendants have raised regarding the justiciability of the plaintiffs' action. In support of their allegations that the matter is not justiciable, the defendants assert that the plaintiffs' petition does not allege a case or controversy, that it is not appropriate for declaratory judgment, and that it is barred by the political question doctrine. Additionally, the defendants contend that the Court cannot fashion an adequate remedy for the plaintiffs' equal protection claims. These arguments are meritless.

The defendants contend that the plaintiffs' petition does not present a case or controversy within the meaning of the declaratory judgment statute because the plaintiffs' sole statutory claims, counts three and five, fail to state a claim upon which relief can be granted. Absent the statutory counts, the defendants maintain that the plaintiffs have not established that their rights are subject to an adverse claim of the State.

New Hampshire's declaratory judgment statute provides that "[a]ny person claiming a present legal equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the Court's judgment or decree shall be

conclusive." RSA 491:22. The purpose of a declaratory judgment is to obtain a judicial declaration as "to the existence and effect of a relation between [the plaintiff] and the defendant." Radkay v. Confalone, 133 N.H. 294, 298 (1990). Furthermore, "[a] petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interest involved therein." Boehner v. State, 122 N.H. 79, 82-83 (1982) (quoting Levitt v. Maynard, 104 N.H. 243, 244 (1962)).

The Court finds that this matter is appropriate for declaratory judgment. Two counts specifically challenge the constitutionality of statutes pertaining to the State's financing of public education, an important public interest. Moreover, even absent these two statutory counts, the four remaining counts assert various constitutional "rights", education, equal protection, and proportionate taxation, which have allegedly been denied by the State. Declaratory judgment is particularly appropriate for the determination of whether these "rights" exist under the New Hampshire Constitution, and if so what effect their existence has on the relationship between the parties.

The defendants also claim that the political question doctrine renders this matter nonjusticiable due to the "lack of judicially discoverable and manageable standards for resolving it; [and] the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial



discretion." Powell v. McCormack, 395 U.S. 486, 518 (1969).

In their contention that the political question doctrine renders this matter nonjusticiable, the defendants have overlooked the fact that "[t]he courts have the duty to interpret constitutional provisions." State v. LaFrance, 124 N.H. 171, 177 (1983). The issues raised in the plaintiffs' petition are no more political questions than any other constitutional challenges. Moreover, the Court has the duty to interpret the constitution even if the exercise of that duty "may result in decisions that run counter to the present desires of the voters or their elected representatives." Id. However, the Court's power of judicial review is limited to an interpretation of "what the constitution means and not whether such a law reflects a wise policy." Id. at 178. Accordingly, the Court will limit its consideration to the constitutional issues raised and leave any policy determinations for the legislature.

Additionally, the defendants contend that this matter is nonjusticiable because the Court is incapable of fashioning an adequate remedy with regard to the plaintiffs' equal protection claims. The defendants assert that "courts generally lack the institutional ability to assess the constitutionality or the 'equity' of expenditure differences by reference to individual pupils' educational needs." Memorandum of Law in Support of State's Motion to Dismiss, p. 32. Once again the defendants ignore the fact that the interpretation of constitutional provisions is the Court's duty. State v. LaFrance, supra.

Moreover, the remedy sought by the plaintiffs is a declaratory judgment determining the parties' rights and/or obligations regarding the system of financing public elementary and secondary schools in New Hampshire. The Court is certainly capable of determining the existence of any constitutional rights or obligations between the parties and leaving the legislature to enact laws in compliance with the standards determined by the Court. See e.g. Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 203 (1989).

In view of the foregoing, the Court finds that the plaintiffs' claims are justiciable.

In addition to their assertions regarding the justiciability of the plaintiffs' claims, the defendants maintain that the doctrines of official, legislative, and sovereign immunity bar the plaintiffs' claims against the named defendants. The defendants contend that because the plaintiffs' petition does not allege that the named officials either failed to perform a mandatory function or failed to exercise due care in the performance of their duties, both statutory and common law provide the defendant officials with immunity from suit. See e.g. RSA 541-B:19; Tilton v. Dougherty, 126 N.H. 294 (1985). Moreover, the defendants who are officials of the executive branch claim that they should be granted immunity because they cannot expend funds beyond those appropriated by the legislature. Likewise, the defendants who are members of the legislative branch claim that they should be granted immunity



because they are without authority to act on behalf of the General Court.

It is uncontroverted that the State itself is not immune from a declaratory judgment action challenging the constitutionality of State action. See Grinnell v. State, 121 N.H. 823, 825 (1981). As for the defendants' claims of official immunity, the statutes and cases the defendants cite in support of this position deal with tort claims for monetary relief, not with equity actions seeking declaratory relief such as the instant action. Moreover, each of the defendant officials is named as a party only in his or her official capacity. No personal claims are raised against the defendant officials. Accordingly, the defendants' claims of immunity do not serve to bar the instant declaratory judgment action against either the State or the named individuals in their respective official capacities.

Having determined that this action is justiciable and that it is not barred by any sort of immunity of the defendants, the Court now turns to the more substantive issue of whether the plaintiffs' petition should be dismissed for failure to state a claim. The defendants maintain that the plaintiffs' petition should be dismissed in its entirety.

In ruling upon the motion to dismiss, the Court will "determine whether the facts as pled are sufficient under the law to constitute a cause of action." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 44 (1987). In reaching this determination, "all



facts properly pleaded are assumed to be true, and the reasonable inferences therefrom are construed most favorably to the plaintiff." Morvay v. Hanover Ins. Cos., 127 N.H. 723, 724-25 (1986) (quoting Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 610 (1978)). The Court will deny the motion if "the [plaintiffs'] allegations are reasonably susceptible of a construction that would permit recovery." Rounds v. Standex International, 131 N.H. 71, 74 (1988) (quoting Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318, 320 (1985)).

In determining whether or not the plaintiffs' petition states a claim upon which relief could be granted, it is necessary to examine separately each of the six counts raised in the petition.

Counts one and two both allege violations of Part 2, Article 83 of the New Hampshire Constitution. Specifically, count one alleges that contrary to N.H. Const., pt. 2, art. 83, the defendants "have failed to spread the opportunities and advantages of education equitably among all New Hampshire students attending elementary and secondary public schools and have thereby failed to diffuse knowledge and learning generally throughout the State." Plaintiffs' Petition for Injunctive Relief and Declaratory Judgment at paragraph 47. Likewise, count two alleges that contrary to N.H. Const., pt. 2, art. 83, the defendants "have failed to adequately and equitably fund the public elementary and secondary schools of the State." Plaintiffs' Petition for Injunctive Relief and Declaratory Judgment at paragraph 48.

In order for either of these counts to state a claim, part 2, article 83 of the New Hampshire Constitution must impose on the defendants the type of duty[ies] asserted in the plaintiffs' petition. The defendants maintain that N.H. Const., part 2, art. 83, known as the "Encouragement of Literature" clause fails to set forth any standards by which the court may identify such a duty and determine whether the defendants have breached that duty. Upon careful consideration, the Court finds that the defendants' assertion is correct.

The relevant portion of the Encouragement of Literature clause provides that:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions....

N.H. Const., pt. 2, art. 83 (emphasis added).

The plaintiffs maintain that this language creates a duty upon the governor and the legislature to equitably spread educational opportunities and to equitably and adequately fund public schools.

Constitutional challenges to state systems of financing public education have been successfully brought in several states. However, in the states that have found a constitutionally mandated duty to meet certain standards of public education, the respective state constitutions explicitly



state a more concrete duty (i.e. "provide", "establish", "maintain") and a more tangible standard (i.e. "uniform", "efficient") than that set forth in N.H. Const., part 2, art. 83. See e.g. Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989). ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky. Const. §183); Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989) ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free public schools. Tex. Const. art. VII, §1); Washakie County School District Number One v. Herschler, 606 P.2d 310 (Wyo. 1980) ("The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction...." Wyo. Const., §14, art. VII). Moreover, in many states constitutional challenges to State funding of education have been unsuccessful. See e.g. Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991) (Court dismissed for failure to plead a valid claim the petitioner alleging that Oregon's method of funding public education violated Art. VIII, sec. 3 of the Oregon Const. which provides "[t]he Legislative Assembly shall provide by law for the establishment of a uniform, and general system of common schools"); Fair School Finance Council of Oklahoma v. State, 746 P.2d 1135, 1150 (Ok. 1987) (Affirming the trial court's dismissal because the plaintiff's allegations, "even if true, did not

establish any basis upon which the Oklahoma school finance system could be declared to have violated either the United States or the Oklahoma constitution"); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975) (State's system of financing education, with its heavy reliance on ad valorem property tax did not violate either equal protection or Art. 9, Sec. 1 of the Idaho Const. which provides: "it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform, and thorough system of public, free common schools").

New Hampshire's Encouragement of Literature Clause contains no language regarding equity, uniformity, or even adequacy of education. Thus, the New Hampshire Constitution imposes no qualitative standard of education which must be met. Likewise, the New Hampshire Constitution imposes no quantifiable financial duty regarding education; there is no mention of funding or even of "providing" or "maintaining" education. The only "duty" set forth is the amorphous duty "to cherish... public schools" and "to encourage private and public institutions." N.H. Const., pt. 2, art. 83. The language of pt. 2, art. 83 is hortatory, not mandatory.

In view of the foregoing, the Court finds that the N.H. Const., pt. 2, art. 83 imposes no duty as set forth in count one to equitably spread educational opportunities and advantages or as set forth in count two to equitably and adequately fund education. Absent such a duty, counts one and two of the plaintiffs' petition fail to state a claim upon which relief can be granted, and therefore, both counts must be dismissed.



In count three of their petition, the plaintiffs claim that:

RSA 198:27-33, the Foundation Aid Program, even if fully funded at its eight (8) percent cap, represents an unconstitutional restraint upon state participation in public school finance in direct violation of the constitutional requirement that education in the state be adequately funded and that opportunity and advantage be spread equitably among all New Hampshire students attending elementary and secondary public schools.

Plaintiff's Petition for Injunctive Relief and Declaratory Judgment, at paragraph 49. Since count three also relies on a nonexistent constitutional "duty" to adequately finance and equitably spread educational opportunity, this count must also be dismissed. Moreover, even if there were a constitutional duty regarding the financing of education, count three still must be dismissed because it relies on the erroneous assumption that "the Foundation Aid Program, even if fully funded at its eight (8) percent cap, represents an unconstitutional restraint upon state participation in public school finance."

A district's foundation aid is equal to the district percentage multiplied by the local education program cost per fiscal year. RSA 198:29, V. The statutory formula does not cap the amount of aid a district may receive at eight percent. In order for there to be an eight percent cap as claimed by the plaintiffs, the district percentage would always have to be no greater than eight percent. However, that is not the case.

A district's percentage is obtained by multiplying .08 by a number known as the equalization factor which is obtained by a

somewhat complex formula that takes into account a district's effort and fiscal capacity. RSA 198:29, II and IV. Commencing in fiscal year 1992, there will be a cap on the percent of foundation aid contribution a district will receive, because an amendment has been passed which allows a district's equalization factor to be no greater than nine. RSA 198:29, II-a. Thus, a district's foundation aid will be limited to no more than 72 percent of the local education program cost, but there is no eight percent cap as alleged by the plaintiffs.

In asserting that a district's foundation aid is capped at eight percent, the plaintiffs overlooked the equalization factor. Since count three relies on both an unquantifiable constitutional "duty" and a nonexistent eight percent statutory "cap" on a district's foundation aid, the Court finds that count three fails to state a claim upon which relief may be granted and therefore, must be dismissed.

Next the Court turns to the plaintiffs' equal protection claims which are set forth in counts four and five of the plaintiffs' petition. Count four is a very broad claim which asserts that the New Hampshire school finance system violates equal protection because it denies equal educational opportunities to the plaintiff students. Additionally, count four maintains that New Hampshire's school finance system "is not compellingly, fairly, substantially, or rationally related to any legitimate state interest and does not spread the opportunities and advantages of education equally to all New Hampshire students



attending public elementary and secondary schools." Plaintiffs' Petition for Injunctive Relief and Declaratory Judgment, at paragraph 50.

Count five is much more narrow. It asserts that RSA 198:27-33, the foundation aid statutes, unconstitutionally deny the plaintiffs equal protection. In count five the plaintiffs once again, rely on the erroneous assumption that there is an eight percent cap on a district's foundation aid.

In considering the equal protection challenge, the Court must first examine the interests and rights affected in order to determine the appropriate standard of review. Petition of State Employees' Assoc. v. Croulette, 129 N.H. 536, 540 (1987). The "class" represented in this challenge is students in property poor school districts, an economic classification. The right alleged in count four is the right to "an equal educational opportunity."

The plaintiffs do not comprise "the type of suspect classification, such as race, alienage or nationality, that would require strict scrutiny." Carson v. Maurer, 120 N.H. 925, 931 (1980). Moreover, "[a]bsent a showing that a suspect class is involved, economic classifications are typically subject to the rational basis test." Goulette, 129 N.H. at 540, see also Appeal of Bosselait, 130 N.H. 604, 613 (1988).

Additionally, the New Hampshire Constitution, part 2, art. 83 provides no fundamental right to "equal educational opportunity" as sought by the plaintiffs. The Encouragement of

Literature Clause makes no mention of "equal", "equitable" "uniform" or any other similar standard of education. Nor is there any implicit constitutional right to "equal" education. See e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (Assessing the Texas School financing system under the rational basis test because the U.S. Constitution neither explicitly nor implicitly guaranteed a fundamental right to an education). Furthermore, while the facts pled by the plaintiffs tend to prove that there is a disparity in the amount spent on public education in property poor districts as compared to the amount spent in property rich districts, there is:

"no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."

Id. at 37.

Since the plaintiffs do not comprise a suspect class and since there is no fundamental right to "equal" education under the New Hampshire Constitution, the Court will analyze whether or not the plaintiffs have stated a claim under the rational basis test of equal protection. Many other jurisdictions which have analyzed equal protection challenges to their respective school financing systems have likewise found no basis for strict scrutiny. See e.g. Thompson, supra; Fair School Finance Council, supra; Britt v. North Carolina State Board of Education; 357



S.E.2d 432 (N.C. 1987); Lujan v. Colorado State Bd. of Education, 694 P.2d 1005 (Colo. 1982); Shofstall v. Hollins, 540 P.2d 643 (Ariz. 1975); but see Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) (Finding a fundamental right to an "efficient" school system based upon Ky. Const. §183); Serrano v. Priest, 557 P.2d 929 (Calif. 1977) (Strict scrutiny applied because "wealth" is a suspect classification under California law and education is a fundamental right under the California Constitution). Under the rational basis test, the Court's inquiry is whether the challenged legislation, in this case the New Hampshire school finance system, specifically RSA 198:27-33, is rationally related to a legitimate state interest.

It is undisputed that the State has a legitimate interest in providing financial aid to various school districts throughout the State, and none of the facts pled, even viewed in the light most favorable to the plaintiffs, indicate that the New Hampshire school finance system is not rationally related to providing financial aid to the public schools. Moreover, count five, in support of its equal protection challenge, erroneously contends that "the New Hampshire school finance system, with its eight (8) percent cap, is not compellingly, fairly, substantially or rationally related to any legitimate state interest." As previously discussed, the foundation aid formula does not contain an eight percent cap.

Assuming for the sake of argument, that the plaintiffs equal protection claims should be subject to the middle tier

scrutiny of the substantial relationship test, counts four and five still fail to state a claim upon which relief may be granted. Under this analysis the challenged classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Carson, 120 N.H. at 932. The object of the foundation aid legislation, as stated in RSA 198:27 is for "the state of New Hampshire to share in the costs of public elementary and high school education of the local school districts of the State to the end that (1) the more needy school districts may be assisted in providing an adequate education program; and (2) education throughout New Hampshire may be improved."

As previously discussed, the formula used to distribute funds in the foundation aid program takes into account a local district's fiscal capacity and taxation effort in order to distribute more funds to "poorer" districts. None of the facts pled by the plaintiff indicate that the foundation aid money is not being distributed in a manner that favors the needy school districts. Instead, the facts pled by the plaintiff tend to show only that certain property poor districts spend less money and provide a less varied curriculum than do certain property rich school districts. As aforesaid, the rights claimed by the plaintiffs do not exist under the New Hampshire Constitution. Moreover, the goal of the foundation aid statutes is to assist needy districts in providing "an adequate education program". RSA 198:27 (emphasis added).



Furthermore, neither the state constitution nor the foundation aid statutes set forth any standards requiring a specified amount/percentage.

In view of the foregoing, the Court finds that the plaintiffs' equal protection claims set forth in counts four and five fail to state a claim for which relief may be granted. Accordingly, counts four and five are dismissed.

Finally, the Court turns to count six which alleges that "[t]he New Hampshire system of school finance, with its almost exclusive reliance upon property taxes, violates Part 2, Article 5 of the New Hampshire Constitution in that it results in unreasonable disproportionate and burdensome taxation upon the class of petitioner taxpayers as alleged herein. This contention lacks merit.

As interpreted by the New Hampshire Supreme Court, "Article 5th, Part Second, of our Constitution requires that taxes shall be proportional and reasonable. This requires a uniform valuation and a uniform rate throughout the district by which the tax is levied." Opinion of the Justices, 101 N.H. 549, 554 (1958), (emphasis added). Thus, ad valorem property taxes levied at the local level must be proportional and reasonable throughout the local district where they are levied, but since such property taxes are not levied by the state there is no requirement of such uniformity at the State level. Consequently, despite the plaintiffs' pleadings regarding the disparity in tax rates between property poor towns (i.e. Allenstown) and property

rich towns (i.e. Rye), the plaintiffs have failed to state a claim for which relief may be granted as to count six. Accordingly, this count must also be dismissed.

In view of the foregoing, the Court finds that the plaintiffs have failed to state a claim in any of their counts. Accordingly, the defendants' motion to dismiss is GRANTED.

So ordered.

8/13/52  
Date

*G. Manias*  
George L. Manias, Presiding Justice