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(Retired)

August 14, 2007

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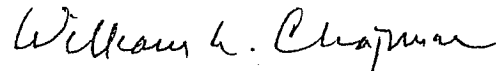
Eileen Fox, Esq., Clerk  
New Hampshire Supreme Court  
One Noble Drive  
Concord, NH 03301

Re: Docket No. 2006-0258, Londonderry School District #12,  
Merrimack School District #26, and New Hampshire  
Communities for Adequate Funding of Education v. State of  
New Hampshire

Dear Clerk Fox:

In accordance with the Court's July 20, 2007 order and Supreme Court Rule 21 (10), I enclose original and seven copies of Appellee's Brief Memorandum. Copies of the brief memorandum have been mailed first-class to counsel of record.

Sincerely yours,



William L. Chapman

Susan S. Geiger  
Judith A. Fairclough  
(Of Counsel)

WLC/gmf  
Enclosures  
cc: Counsel of Record  
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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Docket No. 2006-0258

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

v.

State of New Hampshire

**APPELLEES' BRIEF MEMORANDUM**

On July 20, 2007, this Court issued an order directing the parties to file brief memoranda “addressing whether, in light of the actions taken by the Legislative and Executive branches to define with specificity the components of a constitutionally adequate education, see Laws 2007, ch. 270, this case should be remanded to the superior court for further consideration and for such further proceedings as it may deem appropriate.”

Appellees submit that the State has fulfilled its obligation to define a constitutionally adequate education and do not seek a remand of the case. Instead, Appellees, for the reasons discussed, would assent to dismissal of the case without prejudice if the State will commit to making a good faith effort to fulfill, by June 30, 2008, the remaining three mandates of its constitutional duty to provide an adequate education to every child in the state.

In the proceedings below, the superior court ruled that the State not only had failed to define an adequate education, but it had “failed to determine the cost of an adequate education, and failed to satisfy the requirement of accountability, and that House Bill 616 (the current education funding law) creates a non-uniform tax rate in violation of Part II, Article 5 of the New Hampshire Constitution.” *Londonderry School District v. State*, 154 N.H. 153, 155 (2006). On appeal, this Court affirmed the superior court’s ruling on the State’s failure to define an adequate

education but stayed consideration of its remaining rulings. *Id.* at 162. The Court retained jurisdiction of the case “with the expectation that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007.” *Id.*

The State has responded by enacting Laws 2007, ch. 270 (“Chapter 270”). Chapter 270:2 sets forth nine “subject areas” that, together with their corresponding “school approval standards,”<sup>1</sup> comprise the definition of an adequate education. Appellees believe this definition meets the State’s duty “to define the substantive content of a constitutionally adequate education in such a manner that the citizens of this state can know what the parameters of that educational program are.” *Id.* at 161.

But the definition of an adequate education is only the starting point. The Court has noted, on no fewer than three occasions, the State’s acknowledgement that “*Claremont School District v. Governor*, 142 N.H. 462 (1997) (*Claremont II*) issued ‘four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and insure its delivery through accountability,’ and that these four mandates comprise the State’s duty to provide an adequate education.” *Londonderry*, 154 N.H. at 155-156. Having completed the first mandate, the State’s task is to fulfill the remaining three. It must do so expeditiously. Thousands of New Hampshire youth have graduated from public schools since *Claremont School District v. Governor*, 138 N.H. 183 (1993) (*Claremont I*). Given the passage of almost fifteen years, “the judiciary has a responsibility to insure that constitutional rights not be hollowed out and, in the

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<sup>1</sup> Appellees understand that the school approval standards for the nine subjects areas are: English/language arts and reading – Ed. 306.37; Mathematics – Ed. 306.43; Science – Ed. 306.45; Social studies – Ed. 306.46; Arts education – Ed. 306.31; World language – Ed. 306.48; Health education – Ed. 306.40; Physical education – Ed. 306.41; and Technology education, and information and communication technologies – Ed. 306.42 and Ed. 306.47.

absence of action by other branches, a judicial remedy is not only appropriate but essential.”

*Londonderry*, 154 N. H. at 163.

With a new definition of an adequate education in place, the State now must turn to its cost. As the Court has previously stated, the cost of an adequate education necessarily is tied to its definition:

Any definition of constitutional adequacy crafted by the political branches must be sufficiently clear to permit common understanding and allow for an objective determination of costs.

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Because the definition of a constitutionally adequate education is essential to all other issues, including the cost of a constitutionally adequate education and the method by which to raise the necessary funds, we stay that portion of the case containing the trial court’s findings that the legislature has failed to determine the cost, failed to satisfy the requirement of accountability and establish a non-uniform tax rate.

*Londonderry*, 154 N.H. at 162; *accord*, *Opinion of the Justices (Reformed School Financing Systems)*, 145 N.H. 474, 478 (2000)(“It is not possible to determine the level of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined”).

The political branches agree that determination of the cost of an adequate education – the second *Claremont* mandate – is the next step. Chapter 270:2 states that “[t]he general court shall complete the determination of the cost of an adequate education in accordance with the provisions of this chapter as expeditiously as possible following submission of the findings and recommendations of the joint legislative oversight committee ... but not later than the end of the 2008 fiscal year.” The joint legislative oversight committee (“oversight committee”), established by Chapter 270:2, is to “report its findings and recommendations ... no later than February 1, 2008 to the governor, the speaker of the house, the president of the senate, and the state

librarian.” So doing will enable the political branches, before their self-imposed deadline of June 30, 2008, to enact legislation to fulfill the second mandate.

Yet, at the same time the political branches must fulfill the all-important third mandate of raising the necessary funds in a constitutional manner. In his concurring and dissenting opinion, Justice Duggan got to the heart of the matter: “The core of this appeal is the basic question of whether the State has ... fulfilled its constitutional obligation to *fund* an adequate education.” *Londonderry*, 154 N.H. at 166 (emphasis original). Without the funding, Chapter 270’s “opportunity for an adequate education” is illusory.

The mandates to cost out and fund an adequate education necessarily must take into consideration the fourth mandate: a system of accountability tied to the definition set forth in Chapter 270:2. In *Claremont School District v. Governor (Accountability)*, 147 N.H. 499, 509 (2002), the Court held that “the State’s duty to provide a constitutionally adequate education includes accountability:”

Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education the State has fulfilled its duty.

*Id.* at 508.<sup>2</sup> Continuing, the Court stated: “[t]he development of meaningful standards of accountability is a task for which the legislative branch is uniquely suited.” *Id.* at 518.

Having met the definitional requirement through the enactment of Chapter 270:2, the State must revise the “standards of accountability” set forth in RSA Ch. 193-C (“Statewide Education Improvement and Assessment Program”) and RSA Ch. 193-H (“School Performance and Accountability”) so they are tailored to ensure delivery of each of the nine subject areas

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<sup>2</sup> See *Claremont (Accountability)*, 147 N.H. at 509 (“...the legislature’s response to *Claremont* demonstrates that it also views accountability as a logical corollary to the State’s duty to provide a constitutionally adequate education”).

identified in Chapter 270:2. *See Claremont (Accountability)*, 147 N.H. at 516 (“While the curriculum frameworks developed pursuant to RSA 193-C:3 define what students should know and be able to do, none of the provisions in RSA chapter 193-C refers to the statutory scheme that sets out the criteria for and the delivery of an adequate education, RSA chapter 193-E”). Further, as part of the determination of cost, the State must take into consideration the expense to be incurred by school districts in fulfilling their part of the improvement and assessment program. *See, e.g.*, Laws 2007, chapter 3:2 (amending RSA 193-C:6 to require school districts to administer statewide assessments in “grades 3 through 8 and one grade in high school”).<sup>3</sup>

Where Appellees respectfully take issue with the State is over the date it has set – February 1, 2008 - for submission of the oversight committee’s “findings and recommendations” on the cost of an adequate education. Members of the general court well know that virtually every school district will begin in the fall the budget process for the 2008 - 2009 school year. There is no reason why the oversight committee cannot submit a report on cost in the fall so its findings and recommendations would inform the budget process and help minimize the transition issues school districts undoubtedly will face. That said, Appellees recognize that in politics, as in life, “the perfect is the enemy of the good.” They will take the State at its word and accede to the deadline it set of June 30, 2008.

In conclusion, the State has acted in good faith by enacting Chapter 270 to define an adequate education and to establish a process and timetable for determining its cost. If the State will commit to making a good faith effort to fulfill, by June 30, 2008, the remaining three

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<sup>3</sup> It goes without saying that the State will have to revise Ed. 306.30 (“Delay in Full Compliance”), which continues to permit the Board of Education, acting pursuant to RSA 194:23-c, “to approve, for a period of 1 year, a school, although it does not fully meet the requirements for an approved school ... [for] [r]eduction in local tax base.” *See Claremont (Accountability)*, 147 N.H. at 513 (“The State’s duty cannot be relieved by the constraints of a school district’s tax base or other financial condition”).

mandates of its constitutional duty to provide an adequate education to every child in the state, Appellees would assent to dismissal of this case without prejudice.

Respectfully submitted,

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

By their attorneys,

ORR & RENO, P.A.

Dated: August 14, 2007

By: William L. Chapman

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**CERTIFICATE OF SERVICE**

I, William L. Chapman, Esquire, certify that on this 14 day of August, 2007, a copies of the foregoing have been mailed to Anne M. Edwards, Esquire, Jeffrey A. Meyers, Esquire, Andru H. Volinsky, Esquire, Edward C. Mosca, Esquire, James Allmendinger, Esquire, David I. Frydman, Esquire, and Eugene M. Van Loan III, Esquire.

William L. Chapman

William L. Chapman