THE STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

EVELYN SIRRELL, KENNETH FOX

AND RUSSELL WAKEFIELD

v.

STATE OF NEW HAMPSHIRE AND

THE DEPARTMENT OF REVENUE ADMINISTRATION

Docket No. 99-E-692

PLAINTIFFS' TRIAL MEMORANDUM

NOW COME the plaintiffs, by and through their attorneys, Flygare, Schwarz & Closson, PLLC, and respectfully submit this Trial Memorandum.

I.

INTRODUCTION

As New Hampshire Department of Revenue Administration ("DRA") Commissioner Stanley Arnold testified at trial, in order for a system of taxation to survive, it must have the taxpayers' confidence. Indeed, the framers included part I, article 12 (supported by part II, articles 5 and 6) in the New Hampshire Constitution to guarantee all New Hampshire citizens that tax obligations would be applied proportionally between them, and that their tax revenue would only be used to further valid public purposes.

The plaintiffs brought this lawsuit because they have little confidence that the statewide property tax is being applied proportionally, and they have little confidence that the revenue generated by the statewide property tax is furthering the otherwise valid public purpose of providing an adequate public education. The evidence adduced at trial justifies the plaintiffs' lack of confidence.

II.

ARGUMENT

A. The Statewide Property Tax Is Not Being Applied Proportionally Between Individual Taxpayers.

Part I, article 12 of the New Hampshire Constitution guarantees each citizen equal protection of the laws and binds each citizen to contribute their share of the expense for that protection by paying taxes to the State. This provision "literally imposes a requirement of proportionality of a taxpayer's portion of the public expense, according to the amount of his taxable estate." Smith v. Department of Revenue Administration, 141 N.H. 681, 685 (1997); Opinion of the Justices, 4 N.H. 565, 568 (1829); see also Morrison v. Manchester, 58 N.H. 538, 549 (1879)("What each is bound to contribute being a debt of constitutional origin and obligation, no part of the share of one can be constitutionally exacted of another"). The paramount importance of proportional tax obligations between individual taxpayers is also reflected in part II, article 5 of the New Hampshire Constitution, which requires that all taxes assessed be both equal in valuation and uniform in rate throughout the taxing district – in this case the State. See Claremont School District v. Governor, 142 N.H. 462, 468 (1997)(Claremont II). Commissioner Arnold himself has advised New Hampshire taxpayers that "nobody owes any public duty to pay more taxes than the law demands" and that each taxpayer need only pay their "fair share of taxes, but not one penny more." **Trial Exhibit 6**.

According to the New Hampshire Supreme Court, the test to determine whether a tax is proportional is to inquire whether the taxpayer's property was valued at the same percent of its true value as all the taxable property in the taxing district. Claremont II, 142 N.H. at 468. In order for a tax to be proportional, all property in the taxing district must be valued alike and taxed at the same rate. Opinion of the Justices, 99 N.H. 525 (1955). As the New Hampshire Supreme Court has correctly recognized, a change in either factor, the rate or the valuation, affects the product, which is the tax, in the same way. Opinion of the Justices, 99 N.H. at 527; see also Opinion of the Justices, 76 N.H. 609 (1913).

There is no dispute that the statewide property tax is set at a uniform rate ("$6.60 on each $1,000 of the value" of taxable property - RSA 76:3). The problem is on the valuation side of the equation. As discussed in section 1 below, the DRA's own ratio study statistics prove that there are significant inequities between individual property assessments, and therefore individual taxpayers, across the State. As discussed in section 2 below, these inequities are caused and perpetuated by the widespread failure of New Hampshire municipalities to physically inspect and revalue all taxable property on a periodic basis. This failure violates part II, article 6 of the New Hampshire Constitution, generally accepted standards in the mass appraisal industry, and the recommendations of two of the State's own expert witnesses. As discussed in section 3 below, these inequities are exacerbated by the fact that the State does not insure that assessing practices are uniform and applied consistently from municipality to municipality. Finally, as discussed in section 4 below, the State's equalization process (which, at best, can only produce proportional tax obligations between municipalities) is also flawed.

The result is that under the current system of local property assessment and State equalization, individual New Hampshire taxpayers may be required to pay more (or less) in statewide property taxes depending on such arbitrary factors as when their property was last physically inspected and revalued; the quality of assessing practices in neighboring municipalities; or how effectively their local assessor controls the flow of sales and/or assessment information to the DRA. Such a system not only violates the New Hampshire Constitution, it fatally undermines taxpayer confidence that everyone is paying their fair share.

1. The DRA's Ratio Study Statistics Prove That There Are Significant Inequities Between Individual Taxpayers Across The State.

At trial, the DRA's Equalization Bureau Chief, Mrs. Linda Kennedy, gave a detailed explanation of the

annual property assessment/sales ratio study (the "ratio study") that the DRA conducts. As Mrs. Kennedy testified, the final step in the ratio study is the calculation of statistical measures of assessment equity for each municipality. The DRA's own statistics prove that there are significant inequities between individual assessments, and therefore individual taxpayers, across the State.

a. The COD Problem.

The most important statistical measure of assessment equity that the DRA calculates as part of its ratio study is the "coefficient of dispersion" or "COD." As Mrs. Kennedy described, the COD measures how close property assessment/sale ratios in a given municipality are, on average, to the median (middle) assessment/sale ratio. The COD (stated as a percentage) is the average percentage deviation from the median ratio. For example, a COD of 18.95 describes a municipality in which the average assessment/sale ratio is 18.95% away from the median assessment/sale ratio.

At trial, the plaintiffs used the hypothetical "Town A" to demonstrate the range of disparate assessments (and therefore disparate tax burdens) in a municipality with a high COD. **Trial Exhibit 56** a copy of which is attached at **Tab A**. In Town A, five properties, each with a market value of $100,000.00, are assessed from a high of $120,000.00 to a low of $70,000.00. As a result of these disparate assessments, even after equalization (that is, even after the total assessed value of Town A is adjusted to market value), the effective statewide property tax burden for these five properties ranges from a high of $833.68 to a low of $486.32. In this example, incorrect and/or outdated assessments cause the owner of one $100,000.00 property in Town A to pay over 70% more in statewide property taxes than the owner of another $100,000.00 property that might be across the street, or even right next door. This 70% spread is even more alarming when you consider that under the current system in New Hampshire, if the owner of the over-assessed property is not paying attention or lacks the means to seek an abatement, the full 70% spread will persist from one year to the next, annually adding to the disparate tax burden between two similarly situated taxpayers.

Although Town A is admittedly hypothetical, the conditions that it describes are not. The Court need only scan through the real world transactions recorded in the "DRA's Rebuttal Report" **(Trial Exhibit AA)** to see that the level of discrepancy between assessments and sale prices reflected in Town A may actually understate the problem in New Hampshire.

The DRA's COD calculations for 1998 and 1999 also evidence significant assessment inequities across the State. In her "1999 Equalization Summary" to Commissioner Arnold, Mrs. Kennedy reported that in 1998, 53.2% (124/233) of New Hampshire municipalities with sufficient sales to calculate a COD had a COD of over 15.99, and the State's overall mean (average) COD was 17.05. **Trial Exhibit 12, pp. 4-6**. Mrs. Kennedy reported a slight improvement for 1999: 45.5% (107/235) of New Hampshire municipalities with sufficient sales to calculate a COD had a COD of over 15.99, and the State's overall mean (average) COD was 15.62. **Trial Exhibit 12, pp. 4-6**. According to the DRA, a COD over 15.99 shows that the assessments in a municipality are below average equity. In other words, by the DRA's own account, in both 1998 and 1999, the assessments in nearly half the municipalities in New Hampshire were below average equity.

When the DRA tried to analyze this bleak COD information more closely, it produced an even more troubling picture of assessment inequity throughout the State. In both her "1998 Equalization Summary" **(Trial Exhibit 11)** and her "1999 Equalization Summary" **(Trial Exhibit 12)**, Mrs. Kennedy divided municipalities' ratio data into different strata (groupings by different classes of property, i.e. residential land, manufactured housing, etc.) and generated COD's for individual classes of property within each municipality. In 1998, 55.9% (122/218) of those municipalities for which Mrs. Kennedy was able to complete this stratified analysis had at least one class of property with an unacceptable

COD. **Trial Exhibit 11, p. 4**. Things got worse in 1999: 65.7% (148/225) of those municipalities for which Mrs. Kennedy was able to complete this stratified analysis had at least one class of property with an unacceptable COD. **Trial Exhibit 12, p. 5**.

a. The State Cannot Discount The Significance Of The COD Problem.

At trial, the State raised a number of arguments in an attempt to discount the significance of the COD problem. First, while acknowledging that high COD's indicate assessment inequities within a municipality, Commissioner Arnold testified that as a result of equalization, assessment inequities in one municipality are confined to that municipality and should not concern taxpayers in other municipalities. Second, Mrs. Kennedy testified that the value of those municipalities with an unacceptable COD is only a small percentage of the value of the entire State, and that as such, on a macro level, the COD problem is insignificant. Third, one of the State's expert witnesses, statistician Dr. Ronald L. Wasserstein, testified that as a result of certain systemic limitations (principally small sample sizes), it is possible that the CODs reported by the DRA are higher than the actual CODs in a number of municipalities, and therefore things may not be as bad as the DRA's statistics indicate. None of these arguments withstands scrutiny.

i. The COD Problem Is Not Merely An Intra-Municipality Problem.

The State's first argument – that high COD's are just an intra-municipality problem, and therefore not a major concern – proceeds from the erroneous premise that inequities between individual taxpayers in the same municipality are not constitutionally

significant. Under a statewide tax, which the State oversees, the State has an obligation to insure that each and every taxpayer only pays their fair share of the tax and nothing more. In this regard, intra-municipality inequities between individual taxpayers (which even the State concedes exist) are as much a problem for the State as inter-municipality inequities between individual taxpayers.

Additionally, the State's argument that high CODs are only an intra-municipality problem was undercut by two of the State's witnesses, Gary McCabe and the DRA's Assistant Commissioner, Barbara Reid. In his testimony, Mr. McCabe (with reference to the hypothetical Town A) confirmed earlier testimony by Mrs. Kennedy that equalization only adjusts municipalities' total assessed values, and does not correct inequities between individual assessments. As Town A demonstrates, a property over-assessed before equalization remains over-assessed after equalization, and a property under-assessed before equalization remains under-assessed after equalization. Mr. McCabe further testified that although accurate equalization will bring municipalities' total assessed values to market value, it cannot correct inequities between individual assessments of properties located in different municipalities, just as it cannot correct inequities between individual assessments of properties located in the same municipality. As a result, and as Mr. McCabe confirmed at trial, the disproportional effective tax burden between the owner of an over-assessed property located in Town A and the owner of an under-assessed property located in the hypothetical Town B (a copy of which is attached at **Tab B**) is not cured by equalization.

Moreover, as Assistant Commissioner Reid conceded in response to questioning by the Court, there is nothing that the owner of an over-assessed property located in Town A can do to force the owners of under-assessed property located in Town B to pay their fair share of the statewide property tax. The owner of an over-assessed property in Town A may be able to seek an abatement to try to adjust his/her assessment to the market value of the rest of Town A. As Assistant Commissioner Reid pointed out, the owner of an over-assessed property in Town A can also try to rally the support of fifty fellow residents of Town A to petition the Board of Tax and Land Appeals to compel a revaluation of Town A.

Unfortunately, as Commissioner Reid acknowledged, a resident of Town A can do nothing to prompt reassessment work in Town B. Under the current system, the only protection that over-assessed (or even accurately assessed) taxpayers in Town A have from a lifetime of inequity relative to under-assessed neighbors in Town B is part II, article 6 of the New Hampshire Constitution and its guaranty that at least once every 5 years, some kind of reassessment work must be completed in Town B to bring individual assessments to market value.

i. The COD Problem Is Not Limited To A Few Small Municipalities With Little Assessed Value.

The State's second argument is that the value of those municipalities with an unacceptable COD is a small percentage of the value of the entire State, and that as such, on a macro level, the COD problem is insignificant. Specifically, according to the DRA's analysis, in 1998, the total equalized value of municipalities with CODs over 21.00 was $5,869,057,211, compared to the total equalized value of municipalities with CODs under 20.00 of $64,697,630,089. **Trial Exhibit 11, p. 3**. According to the DRA's analysis, in 1999, the total equalized value of municipalities with CODs over 20.00 was $5,363,058,678, compared to the total equalized value of municipalities with CODs under 19.99 of $70,791,410,468. **Trial Exhibit 12, p. 4**. Although facially persuasive, the DRA's analysis is the product of suspect criteria applied to inaccurate data. Moreover, even if the DRA's analysis was correct, the State's argument again proceeds from an erroneous premise.

The DRA's analysis relies on the wrong criteria for differentiating between an acceptable and an unacceptable COD. The standard promulgated by the International Association of Assessing Officers (which the DRA has adopted as its own recommended guideline and has provided to assessing officials in New Hampshire – **Trial Exhibit 8**) sets CODs of 10.00 and 15.00 as the upper limit for the vast majority of residential and commercial properties, and only extends the COD limit to 20.00 for vacant land and residential and commercial properties in rural or seasonal locations. Nevertheless, for purposes of its analysis, the DRA used 20.00 as the upper limit for an acceptable COD in all municipalities. Even a cursory review of the DRA's table of CODs for 1998 and 1999 (**Trial Exhibit 1** and **Trial Exhibit 2** respectively) reveals that if the DRA had followed the IAAO standard, and its own recommended guideline, and repeated its analysis using a COD of 10.00 or even 15.00, its results would have changed dramatically. In fact, it seems highly unlikely that the State would have even raised this argument if the DRA's calculation of the value of those municipalities with an unacceptable COD correctly included the value of one or more of the following municipalities: Berlin (CODs for 1998 and 1999 were 13.93 and 18.12 respectively); Manchester (CODs for 1998 and 1999 were 14.72 and 14.51 respectively); Meredith (CODs for 1998 and 1999 were 14.88 and 18.55 respectively); Moultonborough (CODs for 1998 and 1999 were 17.45 and 19.96 respectively); New London (CODs for 1998 and 1999 were 16.48 and 18.04 respectively); Plymouth (CODs for 1998 and 1999 were 14.96 and 16.58 respectively); Portsmouth (CODs for 1998 and 1999 were 13.79 and 16.48 respectively); Rye (CODs for 1998

and 1999 were 18.57 and 17.14 respectively); Salem (CODs for 1998 and 1999 were 18.43 and 18.69 respectively); and Tilton (CODs for 1998 and 1999 were 13.79 and 15.32 respectively). **Trial Exhibit 1** and **Trial Exhibit 2**.

Even accepting the DRA's criteria as correct, the DRA's numbers still do not add up. Based on the DRA's table of CODs for 1998 (**Trial Exhibit 1**), 69 municipalities actually had a COD over 20.00, as opposed to the 52 municipalities that the DRA used as the basis for its analysis in **Trial Exhibit 11, p .3**. Similarly, based on the DRA's table of CODs for 1999 (**Trial Exhibit 2**), 37 municipalities actually had a COD over 20.00, as opposed to the 30 municipalities that the DRA used as the basis for its analysis in **Trial Exhibit 12, p. 4**. In both cases, it appears that the DRA erroneously included the value of those municipalities with a COD between 20.00 and 21.00 in its calculation of the value of municipalities with a COD less than 20.00. To make matters worse, it appears that in both 1998 and 1999, the DRA also included the value of municipalities with insufficient sales to determine a COD in their calculation of the total value of municipalities with an acceptable COD. Compare **Trial Exhibit 1** with **Trial Exhibit 11, p. 3**; also compare **Trial Exhibit 2** with **Trial Exhibit 12, p. 4**.

The State's argument also incorrectly presumes that as long as the most egregious assessment inequities are in small towns, the State need not worry about the COD problem. Of course, this argument ignores the fact that the mean (average) COD for the entire State was 17.05 in 1998 and 15.62 in 1999, both below average equity according to the DRA. **Trial Exhibit 12, p. 6**. This argument also ignores the fact that all taxpayers, including those who live in small towns, are protected by the New Hampshire Constitution. Taxpayers in small towns are equally entitled to protection and assurance from the State that they are only being required to pay their fair share of the statewide property tax, and nothing more.

ii. The DRA's Own Lack Of Precision Does Not Excuse The COD Problem.

The State's third argument is that the DRA's COD calculations are not nearly as precise as they appear, and in many cases municipalities' actual CODs may fall within the acceptable range. Ultimately, this argument supports the plaintiffs' criticism of the current system.

According to Dr. Wasserstein, as a result of certain systemic limitations (principally small sample sizes), it is possible that the CODs reported by the DRA are higher than the actual CODs in a number of municipalities. Therefore, according to the State, things may not really be as bad as the DRA's own statistics indicate. Of course, Dr. Wasserstein also testified at trial that it is just as likely that the CODs reported by the DRA are lower than the actual CODs in a number of municipalities, and therefore things may really be worse than the DRA's own statistics indicate. For example, according to Dr. Wasserstein, applying a 95% "confidence interval" to the COD that the DRA calculated for Acworth in 1998 (19.6) results in a spread of possible CODs from a low of 13.8 to a high of 32.7. **Trial Exhibit A-1, columns *DRA COD, DRA COD lo* and *DRA COD hi.*** The State's point seems to be that because the DRA's calculations are imprecise, assessments in Acworth (and throughout the State) may be more proportional

or less proportional than even the DRA is able to determine. If Dr. Wasserstein is correct, this line of defense further undermines taxpayer confidence in the system, and certainly does not justify maintaining the status quo.

2. These Significant Inequities Between Individual Taxpayers Are Caused And Perpetuated By The State's Failure To Enforce Part II, Article 6 Of The New Hampshire Constitution.

Part II, article 6 of the New Hampshire Constitution provides that

> [t]he public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order. (emphasis added)

According to the New Hampshire Supreme Court, "probably no constitutional principle is better understood than that the taxation of property requires a proportional valuation and a uniform rate." Opinion of the Justices, 81 N.H. 552, 558 (1923). The framers included part II, article 6 in the New Hampshire Constitution to protect the constitutional principle of proportionality. See State v. U.S. Canada Express Co., 60 N.H. 219, 236 (1880)("In article 6 of the constitution the doctrine of the equality of taxation is affirmed, and measures are provided by which it may be ensured"); Opinion of the Justices, 76 N.H. 588, 595 (1911); Spiros Flomp v. City of Nashua, 1993 N.H. Tax LEXIS 599, *11-12 (New Hampshire Board of Tax and Land Appeals, Docket Nos. 7118-89 and 8585-90, July 5, 1993)("[t]his provision requires full revaluation on a periodic basis to ensure proportionality").

Prior to the implementation of the statewide property tax, little attention was paid to whether or not municipalities were complying with the five year valuation requirement in part II, article 6 of the New Hampshire Constitution. Things have changed dramatically. Faced with a distribution scheme that pits municipality against municipality and taxpayer against taxpayer for property tax revenue, taxpayers across the State now have a significant interest in making sure that every other municipality is valuing its property accurately, on a timely basis. Indeed, under the statewide property tax, the DRA itself concedes that

> [e]very community and every property owner within that community needs assurance that every other community is properly assessing the property within that community.

Trial Exhibit 34, p. 2.

The State maintains that the valuation required by part II, article 6 need not include any actual reassessment work. According to the State, its annual equalization satisfies part II, article 6. The State has little choice but to make this argument. As Mrs. Kennedy testified at trial, according to the DRA's own records, 71 municipalities (not including the unincorporated places) have not completed any reassessment work since 1994, and have no reassessment work planned until 2001 at the earliest (if at all). Further, according to the DRA's own "Assessment History" spreadsheet, 184 municipalities have not completed a full revaluation (a physical inspection and revaluation of all taxable property) since 1994, including major municipalities like Manchester (last full revaluation in 1991), Salem (last full revaluation in 1980) and Keene (last full revaluation in 1971). **Trial Exhibit 5**.

a. Equalization Alone Does Not Satisfy The Requirements Of Part II, Article 6.

There is no merit to the State's argument that part II, article 6 of the New Hampshire Constitution requires only equalization. As Mrs. Kennedy testified, and as Messrs. Gloudemans, Almy, Davis and McCabe all confirmed, even perfect equalization only corrects inequities on a municipality versus municipality level. Equalization cannot correct inequities between individual assessments, and therefore individual taxpayers. In order to accept the State's interpretation of part II, article 6, this Court would have to interpret the New Hampshire Constitution as merely requiring proportional tax obligations between municipalities, not between individual taxpayers. Such an interpretation offends the plain language of the New Hampshire Constitution, and is contrary to New Hampshire law.

Part 1, article 12 of the New Hampshire Constitution could not be clearer - the framers intended to protect individuals from disproportional taxation by limiting the required contribution of "every member of the community" to "his share…" (emphasis added). As the New Hampshire Supreme Court has held, this provision of the Constitution "literally imposes a requirement of proportionality of a taxpayer's portion of the public expense, according to the amount of his taxable estate." Smith v. Department of Revenue Administration, 141 N.H. 681, 685 (1997)(emphasis added). The New Hampshire Supreme Court has further held that the framers included part II, article 6 in the New Hampshire Constitution to protect the constitutional principle of proportionality. See State v. U.S. Canada Express Co., 60 N.H. 219, 236 (1880)("In article 6 of the constitution the doctrine of the equality of taxation is affirmed, and measures are provided by which it may be ensured"). Even the BTLA has interpreted part II, article 6 as requiring more than just equalization. In Spiros Flomp v. City of Nashua, 1993 N.H. Tax LEXIS 599 (NHBTLA, Docket Nos. 7118-89 and 8585-90, July 5, 1993) the BTLA relied, in part, on the City of Nashua's disregard for its duties under part II, article 6 of the New Hampshire Constitution to require the City to reassess. In reference to part II, article 6, the BTLA held that

> [t]his provision requires full revaluation on a periodic basis to ensure proportionality. Opinion of the Justices, 76 N.H. 588, 595 (1911). Periodic review of assessments is so important, it is embodied in our constitution! Yet, the City ignored this duty.
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> These constitutional and statutory mandates are clear, and the City did not comply with them. Incredulously, the City asked for certain presumptions about the correctness of assessments even though the City was seriously derelict in fulfilling its constitutional and statutory mandates. Because the City did not comply with its statutory and constitutional duties, the assessments are not entitled to the normal presumption of correctness that is normally accorded assessments.

Spiros Flomp, 1993 N.H. Tax LEXIS 599 at *11-12.

As recently as its decision in Claremont II, the New Hampshire Supreme Court has reaffirmed that in the interest of insuring proportionality, the New Hampshire Constitution requires that all property be valued within a reasonable time before a tax is assessed. Claremont II, 142 N.H. at 452. In this context, the State's interpretation of part II, article 6 as requiring only equalization, a process that Mrs. Kennedy testified can at best only insure proportionality between municipalities, makes no sense. Evidence offered through Mrs. Kennedy, DRA Appraiser James Gibney and Mr. Davis further undercuts the State's strained interpretation of part II, article 6.

a. Mrs. Kennedy's Equalization Summaries.

In the Equalization Summaries that she prepared for 1996 (**Trial Exhibit 9, p. 3)**, 1997 **(Trial Exhibit 10, p. 4)** and 1998 **(Trial Exhibit 11, p. 5)** Mrs. Kennedy referred to part II, article 6 of the New Hampshire Constitution, and recorded how well New Hampshire municipalities were "complying with this rule." Specifically, Mrs. Kennedy tracked each municipality's assessment history and recorded what, if any, reassessment work (full revaluation, partial revaluation or assessment update) each municipality had completed in the five year cycle prescribed by part II, article 6.

When she prepared these Equalization Summaries, Mrs. Kennedy obviously interpreted part II, article 6 as requiring periodic reassessment work, not just equalization. If Mrs. Kennedy had interpreted part II, article 6 as requiring only equalization, there would have been no need to track communities' "compliance" over a five year period. By law, all communities would have been in compliance every year because the DRA equalizes each community on an annual basis.

Further, Mrs. Kennedy's Equalization Summary for 1999, which does not mention part II, article 6, is not to the contrary. Mrs. Kennedy testified at trial that she removed reference to part II, article 6 from her latest Equalization Summary upon the advice of counsel, only after the plaintiffs had identified the widespread disregard for part II, article 6 as one of the cornerstones of this litigation.

(ii.) Mr. Gibney's Advisory Letters.

Mrs. Kennedy is not the only person at the DRA who shared the plaintiffs' interpretation that part II, article 6 requires periodic reassessment work, and not just equalization. James Gibney, a field appraiser at the DRA, testified that even after the inception of this litigation, he wrote letters to officials in both Fitzwilliam and Stoddard, advising them that "the State constitution suggests a revaluation within five years especially if the ratio studies are not within acceptable guidelines as outlined in the information that was delivered to your office." **Trial Exhibit 21** and **Trial Exhibit 22** As Mr. Gibney testified at trial, by revaluation, he meant some type of reassessment work, not equalization.

At trial, the State tried to downplay the significance of Mr. Gibney's testimony and letters by arguing that he is new to the DRA, in a position below the policy making level, and simply unaware of the DRA's "official" interpretation of part II, article 6. However, as Mr. Gibney testified at trial, prior to sending his letters, he showed them to at least one supervisor who confirmed his interpretation of part II, article 6. Additionally, Mr. Gibney testified that prior to sending his letters, he reviewed seminar materials prepared by the New Hampshire Board of Tax and Land Appeals that supported his interpretation. Mr. Gibney also testified that it was apparent from discussions he had with his fellow appraisers at the DRA that many of them shared his interpretation. Finally, although the evidence shows that Mr. Gibney provided copies of his letters to Guy Petell (Director of the DRA's Property Appraisal Division) on April 20, 2000 **(Trial Exhibit 17** and **Trial Exhibit 24)**, there is no evidence in the record to suggest that Mr. Gibney was ever advised that his interpretation of part II, article 6 was incorrect.

(iii.) Dr. Wasserstein And Mr. Davis' Interpretation.

In their initial communication with the State, Dr. Wasserstein and Mr. Davis made it clear that they "… believe strongly that equalization should not be considered a cure for deficient assessment practices at the local level." **Trial Exhibit 43, p. 2**. In the same communication, Dr. Wasserstein and Mr. Davis recommended that "[r]eappraisal should be ordered in those jurisdictions which have not followed the law regarding the frequency of reappraisal." **Trial Exhibit 43, p. 3**. In their expert report, Dr. Wasserstein and Mr. Davis continued to refer to New Hampshire's "5 year reappraisal cycle." **Trial Exhibit A, pp. A-3 and C-13**. At trial, Mr. Davis confirmed that the "law regarding frequency of

reappraisal" and the "5 year reappraisal cycle" that he and Dr. Wasserstein were citing was part II, article 6 of the New Hampshire Constitution. As Mr. Davis further testified, his interpretation of part II, article 6 formed part of the basis for the recommendation on reappraisal frequency that he and Dr. Wasserstein included in their expert report. **Trial Exhibit A, pp. A-4 and D-4**. In other words, two of the State's own expert witnesses do not share the State's interpretation that equalization alone satisfies part II, article 6.

a. Part II, Article 6 Requires The Periodic Inspection And Revaluation Of All Taxable Property.

If the plaintiffs are correct, and the New Hampshire Constitution requires proportional tax obligations between individual taxpayers and not just municipalities, the only plausible interpretation of part II, article 6 is that it requires more than just equalization – it requires some type of periodic reassessment work.

The State's fallback argument has been that something less than the physical inspection and revaluation of all taxable property may produce proportionality, and as such, the current system may not be deficient. This fallback argument is a red herring. Regardless of what type of periodic reassessment work part II, article 6 requires, Mrs. Kennedy testified without contradiction that at least 71 municipalities (not including the unincorporated places) have not completed any reassessment work since 1994, and have no reassessment work planned until 2001 at the earliest (if at all). Widespread violation of part II, article 6 is, therefore, undisputed. Mrs. Kennedy's testimony also calls into question these 71 municipalities' compliance with RSA 75:8, which requires assessors and selectmen in each municipality to examine all real estate in their respective cities and towns, reappraise such real estate as has changed in value, and update assessments accordingly. The State may argue that the DRA has no responsibility to enforce RSA 75:8. However, this ignores RSA 21-J:3(V), which vests DRA Commissioner Arnold with a "duty" to "[e]xercise general supervision over the administration of the assessment and taxation laws of the state and over all assessing officers in the performance of their duties…" In other words, the ultimate responsibility for enforcing both part II, article 6 and RSA 75:8 rests with Commissioner Arnold.

Ultimately, at trial, the type of periodic reassessment work necessary to produce proportionality was also largely undisputed. Both Mr. Gloudemans and Mr. Davis agreed that in order to keep property assessments accurate, it is necessary to physically inspect and revalue property on a periodic basis. According to Mr. Gloudemans, a municipality that fails to inspect and revalue its property on a periodic basis is going to miss substantial changes in value. According to Mr. Gloudemans, the most obvious, and prevalent, example of this "missed value" is homeowner improvements made without obtaining a building permit. As Mr. Gloudemans also testified, individual property values may fluctuate as property deteriorates; as different neighborhoods become relatively more or less popular; as public services (like schools) improve or deteriorate; and even as the use of a neighboring property changes (i.e. an increase in value may result from a new neighborhood park while a decrease in value may result from a new neighborhood junkyard). The effect of this missed value is that some percentage of taxable properties will remain under-assessed. The burden of making up the slack for these under-assessed properties then shifts to all of the other taxpayers in the taxing jurisdiction - in this case the rest of the State. If the goal is proportionality, this shifting of tax burdens is obviously a problem.

In his expert report and at trial, Mr. Gloudemans recommended that because so many New Hampshire municipalities have not physically inspected and revalued their property in the last five years, a statewide revaluation is necessary to insure that the statewide property tax is being applied proportionally. In their expert report, Dr. Wasserstein and Mr. Davis reject Mr. Gloudemans' recommendation for a statewide revaluation. However, at trial, Mr. Davis acknowledged that if 71 New

Hampshire municipalities have neglected to do any reassessment work in the past five years, he might change his opinion about the need for a statewide revaluation. Of course, as Mrs. Kennedy testified earlier during trial, at least 71 New Hampshire municipalities have in fact neglected to complete any reassessment work since 1994.

Mr. Gloudemans also recommended that the State begin requiring municipalities to physically inspect and revalue all of their taxable property on at least a five-year cycle. This recommendation not only conforms to the requirements of part II, article 6, it satisfies the generally accepted standards for the mass appraisal industry, and it is virtually identical to the recommendation made by Dr. Wasserstein and Mr. Davis. Specifically, in its March 1984 "Standard On Mass Appraisal Of Real Property," the IAAO established the following standard for the frequency of reappraisals:

> Properties should be revalued annually. Annual assessment does not necessarily mean, however, that each valuation must be reviewed or recomputed individually. Instead, trending factors based on criteria such as property type, location, size, and age can be developed and applied to groups of properties. These factors should be derived from assessment-ratio studies or other market analysis.
>
> The analysis of assessment-ratio study data can suggest groups or strata of properties in need of physical review. In general, trending factors can be highly effective in maintaining uniformity when appraisals are uniform within strata. Physical review and individual appraisals are required to correct lack of uniformity within strata.
>
> While assessment trending can be effective for short periods, property should be physically reviewed and individually reappraised at least every six years. This can be accomplished in at least three ways: (1) reappraising all properties at periodic intervals (e.g., every four to six years); (2) reappraising properties on a cyclical basis (e.g., one-fourth or one-sixth each year); and (3) reappraising on a priority basis as indicated by assessment-ratio studies or other considerations, while still ensuring that all properties are physically reviewed at least every sixth year. (emphasis added).

Trial Exhibit 35, pp. 10-11, ¶4.5 "Frequency of Reappraisal." In their expert report, Dr. Wasserstein and Mr. Davis not only cite this section of the IAAO standard, it is the basis for their recommendation to the DRA that it "work with local jurisdictions who are not already doing so to implement annual reassessment, and that all property should be physically inspected and reappraised at least every 6 years per IAAO standards." **Trial Exhibit A, pp. A-4 and D-4**.

In an effort to minimize the importance of part II, article 6 and the IAAO standard, and presumably to rebut its own experts' recommendation that all taxable property be physically inspected at least every 6 years, the State offered Laura Thibodeau, the assessor from the City of Keene, as a witness. The State undoubtedly expected Ms. Thibodeau's testimony to prove that despite the fact that Keene has not physically inspected and revalued all of its taxable property since 1971, individual assessments in Keene have remained reasonably accurate as a result of an elaborate annual program of statistical assessment trending (akin to a mini ratio study). As it turns out, Keene is hardly the model of assessment equity to which the State or any other New Hampshire municipality should aspire. Indeed, as the report of independent real estate appraisal consultant John Ryan proves, Keene may well be the poster child for the importance of periodic physical inspections.

On or about January 19, 1999, Mr. Ryan submitted a report to Keene's Department of Assessment, outlining Keene's "valuation system" and making recommendations to assist Keene "in making important decisions regarding the future systems and procedures necessary for the Department of Assessment to function in an efficient and effective manner." **Trial Exhibit 45, p. 1**. According to Ms. Thibodeau, Keene's Department of Assessment commissioned the "Ryan Report," and has implemented many of its recommendations.

The Ryan Report is very critical of the situation in Keene. According to the Ryan Report:

> [w]hile the Department is doing a credible job maintaining most property values at market value, there are problems with assessment equity that cannot be addressed with its current system and procedures. The City is foregoing substantial taxable real estate value that, if properly assessed, will result in a more fair and equitable distribution of the property tax levy among taxable property owners.

Trial Exhibit 45, p. 1. Further, according to the Ryan Report:

> [t]he City's current valuation system was implemented in 1971 and it is clearly recognized that there are major issues that the City must address in order for the Assessor's Office to continue to meet its statutory and service obligations.

Trial Exhibit 45, p. 2. Ultimately, the Ryan Report concludes that as a result of Keene's outdated and flawed assessment system:

> approximately 16% of all the residential property assessments in the City, approximately 950 parcels, are likely missing significant taxable value. By any professional appraisal standard, this is unacceptable. In terms of assessment equity, this simply means that some property owners are not paying their fair share of the City's property tax burden. Among the identified data problems there was no consistent pattern that would suggest a cure short of a citywide inspection program.

Trial Exhibit 45, pp. 9-10.

As a consequence of the Ryan Report, Keene is currently in the process of physically inspecting and valuing all of its taxable property. Rather than supporting the State's contention that periodic inspection and revaluation of all taxable property are unnecessary to insure proportionality between individual taxpayers, Keene demonstrates just the opposite. As the IAAO standard provides, and as the Ryan Report proves, the kind of statistical trending that Keene does only works for a short period of time. Trending is at best a maintenance tool of limited utility. Further, as the conflict between the Ryan Report and Keene's low COD suggests, trending may also mask serious flaws in a system of local assessment.

In Mr. Davis' words, if he was forced to analogize the system in Keene to an automobile, he would choose a 1971 pick-up truck. While it is always possible to buy new tires (i.e. engage in annual trending), you are still left with a 1971 pick-up truck. The New Hampshire Constitution requires, and New Hampshire taxpayers deserve, something substantially more reliable.

3. The State Can Provide No Assurance That Assessing Practices Are Uniform And Applied Consistently Across The State.

The DRA has defined its mandate under the statewide property tax as follows:

> [e]very community and every property owner within that community needs assurance that every other community is properly assessing the property within that community.

Trial Exhibit 34, p. 2. This mandate is consistent with Commissioner Arnold's testimony that in order for a system of taxation to survive, it must have the taxpayers' confidence. Where, as here, the DRA can provide no assurance that assessing practices are uniform and applied consistently across the State, taxpayers cannot have any confidence in the statewide property tax.

At trial, the plaintiffs offered undisputed evidence (in the form of Mrs. Kennedy's testimony and the two "Assessment History" spreadsheets prepared by the DRA – **Trial Exhibit 4** and **Trial Exhibit 5**) that the reassessment timetable New Hampshire municipalities follow is at best inconsistent, and at worst chaotic. Further, Mr. Almy testified that from his survey results, many municipalities appear to lack the staffing, materials and computer systems necessary to produce accurate assessments. Mr. Davis concurred, and testified that the current system in New Hampshire is both antiquated and handicapped. In response to inquiries from the Court as to whether there was a process in place to insure that all municipalities assess at an equal and uniform rate, Mr. Davis testified "no." Mr. Davis further testified that the DRA's failure to oversee and audit local assessors is a serious deficiency that must be corrected. Finally, Mr. Davis acknowledged that given the relative importance of the property tax, New Hampshire should have a model system in place. Mr. Davis admitted that the current system is not even approaching a model system.

At trial, the State offered no evidence of uniform assessing practices. The State chose instead to attack the plaintiffs' evidence as unreliable. This was a common thread throughout the State's defense. Obviously the plaintiffs do not agree that their evidence is unreliable since much of it was either provided by the State, or confirmed by the State's own experts. Moreover, the lack of any affirmative evidence by the State is telling. If assessment practices are in fact uniform and applied consistently across the State, why didn't the State offer a single witness or a single exhibit to prove it? The State may respond that it is not their burden of proof. However, once Mr. Almy and Mr. Davis both testified that the assessing practices in New Hampshire are not only inconsistent, but also inferior, the State was obliged to produce some evidence to the contrary. Further, while burdens of proof may have some relevance within the confines of the courtroom, they are meaningless in the real world. Again, by the DRA's own definition, its mandate under the statewide property tax is to assure "[e]very community and every property owner within that community… that every other community is properly assessing the property within that community." **Trial Exhibit 34, p. 2**. Under the current system, the DRA cannot possibly achieve this mandate.

4. The State's Equalization System Is Also Flawed.

Equalization does not solve the COD problem described above. However, regardless of any inequities between individual taxpayers, if the State's equalization system functioned correctly, taxpayers in New Hampshire could at least have confidence that their municipality was only being required to pay its fair share of the statewide property tax. Unfortunately, the State's equalization system is also flawed.

The ratio study is the heart of the equalization process. As Mrs. Kennedy testified, the steps in the ratio study are as follows: first, the DRA gathers local assessments and sale prices for all real property transactions that occurred between October 1 and September 30 in each New Hampshire municipality; second, the DRA screens these transactions to retain a sample of valid sales and eliminate those that are

not arm's length transactions; third, the DRA calculates a ratio (assessment divided by sale price) for each valid sale; fourth, the DRA chooses the ratio that it believes most accurately reflects the average level of assessment in that municipality and ultimately uses that ratio to adjust the total assessed value of that municipality to market value; and fifth, the State analyzes the ratio for each valid sale and calculates various statistical measures of assessment equity within each municipality.

The evidence adduced at trial demonstrates that from the outset, New Hampshire's ratio study is compromised by the lack of sufficient sales in a number of municipalities. Additionally, even when sample sizes are sufficient, there are few, if any uniform standards built into the ratio study process. Instead, the process is governed by the subjective judgement of a handful of DRA personnel, influenced by the self-interested input of local assessing officials. The effect of these flawed practices is not trivial – merely correcting inconsistencies in sales screening procedures can dramatically shift the way in which statewide property tax obligations are apportioned between municipalities.

a. The Sample Size Problem.

As Dr. Wasserstein explained at trial, the degree of precision of any statistical measure depends on the size of the sample analyzed. This makes common sense – assuming all other things are equal, an exit poll of 2,000 voters is a better predictor of the outcome of an election than the same exit poll of only 20 voters.

According to Dr. Wasserstein, from a statistical standpoint, the large number of very small municipalities in New Hampshire makes it exceedingly difficult to conduct an accurate ratio study. For example, according to Dr. Wasserstein, applying a "95% confidence interval" to the median ratio that the DRA calculated for Acworth in 1998 produces a range of possible median ratios from 100.8 to 134.8. **Trial Exhibit A-1, columns *DRA Med lo* and *DRA Med hi***. In other words, according to Dr. Wasserstein, the small sample size for Acworth (14 sales in 1998) results in a wide range of possible median ratios. The problem is, when the DRA equalized the total assessed value of Acworth in 1998, it had to pick one ratio. According to Dr. Wasserstein, it is impossible to have confidence that the DRA chose the right ratio. As Mr. Gloudemans testified, and as **Trial Exhibit A-1** confirms, the small sample size problem is widespread in New Hampshire.

b. There Are No Uniform, Written Standards For Screening Sales, Resulting In Inconsistent Sales Screening Decisions.

Even when sample sizes are adequate, problems remain. As Mrs. Kennedy testified at trial, prior to this litigation, the DRA did not maintain any written standards for its sales screening decisions. As Mr. Gaskell testified, this lack of standards resulted in a corresponding lack of consistency in the way sales were screened between municipalities, and in some cases even within the same municipality. Messrs. Dorsey, Gaskell and Gloudemans each testified about widespread inconsistencies in the way certain transactions were treated in the DRA's ratio studies. Specifically, Mr. Gaskell

testified about the many different ways that municipalities report, and the DRA screens, trust sales; sales involving current use property; sales involving new construction; properties with assessments adjusted after a sale; multiple parcel sales; and sales that may be considered "outliers."

According to Mr. Gaskell, consistency is one of the hallmarks of an effective ratio study. In Mr. Gaskell's expert opinion, the complete lack of consistency that he observed is a fatal flaw.

c. There Are No Uniform, Written Standards For Choosing The Correct Equalization Ratio For A Municipality.

Mrs. Kennedy also testified that there are no written standards that govern her decision which ratio to use to equalize a municipality's total assessed value. As Mrs. Kennedy testified at trial, there are a number of different ratios that she typically chooses among, including the median (middle) ratio, the mean (average) ratio, and the weighted

mean ratio. Mrs. Kennedy also retains sole discretion to choose some other ratio, including a ratio that has absolutely no connection to the current year's ratio study. For example, as Mrs. Kennedy testified, although the 1998 ratio study indicated a median ratio of 1.30 for Roxbury, she unilaterally decided to override the ratio study and used the prior year's ratio of 1.07. The application of a ratio of 1.07, versus a ratio of 1.30, increased Roxbury's equalized assessed value, and thereby increased Roxbury's share of the statewide property tax.

The plaintiffs' do not take issue with Mrs. Kennedy's expertise or her ability to make judgment calls. Instead, the plaintiffs object to a system that places such an important decision in the hands of one person, with unfettered discretion and no uniform, written standards to follow.

d. Local Assessors Exert Too Much Control Over The Ratio Study.

Local assessors have exploited the lack of uniform, written standards to exert substantial control over the ratio study. The problem is, under the statewide property tax, tax revenue flows into, or out of each municipality depending on (among other things) municipalities' respective equalized values. Accordingly, local assessors have a self-interest in the ratio that the DRA chooses to equalize the property in their municipality. Additionally, local assessors have a self-interest in preserving low CODs to mask any major inequities that may exist within their municipality. As a result, local assessors have an interest in what sales are included in, and what sales are excluded from the ratio study.

According to Mr. Gaskell, the most effective way local assessors control the ratio study is by failing to provide information to the DRA. As Mrs. Kennedy testified, in order for the DRA to even be able to consider a sale for use in the ratio study, the DRA must have both the assessment and the sale price. If either piece of information is missing, the sale cannot be used. As **Trial Exhibit AA** (the "Rebuttal Report" prepared by the DRA) shows, local assessors can and do effectively insure that certain sales will not be included in the ratio study simply by withholding assessment information from the DRA. For example, **Trial Exhibit AA** shows that during the 1998 ratio study, the assessor in Derry failed to provide assessment information for dozens of sales. As Mrs. Kennedy testified, without this assessment information, the DRA had no choice but to exclude the sales from the ratio study.

Another way that local assessors control the ratio study is by providing comments to the DRA. For example, as Ms. Thibodeau testified at trial, among the comments that she provides to the DRA during the sales screening process is whether or not a particular transaction was a sale to an "out of state buyer." As Ms. Thibodeau testified, she identifies such sales because it is possible that an out of state buyer may be an uninformed buyer, and therefore the sale may not be at arm's length. However, according to the DRA's Rebuttal Report, the only sale that Ms. Thibodeau identified in the 1998 ratio study as involving an out of state buyer was a sale with a relatively poor ratio (current assessed value of $91,000 /sale price of $117,500). **Trial Exhibit AA, section "Keene 1998" verno #12**. By contrast, as Ms. Thibodeau conceded during cross-examination, she did not identify a number of other sales involving out of state

buyers that had much better ratios. The DRA dutifully excluded the one sale with a poor ratio that Ms. Thibodeau identified, and included all of the other sales with good ratios.

A final way that local assessors control the ratio study is by exploiting their access to the DRA. Mrs. Kennedy testified, for example, that she gives great deference to the comments and other input provided by certain local assessors. The effect of this deference is obvious from, among other things, the DRA's exclusion of a number of "for sale by owner" sales in Keene from the 1998 ratio study. Notably, it does not appear that any of the other 32 municipalities that the DRA analyzed in its Rebuttal Report **(Trial Exhibit AA)** even identified "for sale by owner" sales, much less succeeded in having them excluded from the ratio study. Moreover, this deference is not limited to individual sales screening decisions. Mrs. Kennedy testified that she even welcomes the input of local assessors on the ultimate choice of which ratio to choose for their municipality (i.e. mean, median, weighted mean or something else).

The degree to which local assessors exert control over New Hampshire's ratio study is alarming. Local assessors have much at stake in the outcome of the ratio study. Because the DRA so loosely regulates the flow of information into its ratio study, the temptation to manipulate assessments to match sale prices ("sales chasing"), or to exclude sales with "bad ratios" in favor of sales with "good ratios" is too great. Mr. Davis acknowledged this fact at trial, and testified that by comparison, the local assessors in Kansas have been completely removed from the ratio study. At the very least, according to Mr. Davis, if local assessors are going to continue to play a significant role in New Hampshire's ratio study, the DRA must set and enforce uniform standards, and routinely audit local assessors to insure compliance.

a. Inconsistent Sales Screening Alone Can Significantly Change The Ratio Study, And Therefore The Results Of The Equalization Process.

As part of their expert report, Messrs. Almy and Gloudemans prepared a spreadsheet to demonstrate the effect of merely correcting inconsistencies in sales screening on the ratio study. **Trial Exhibit 50, p. 45**. At trial, Mr. Almy produced two revised spreadsheets. The first revised spreadsheet, labeled "apples to apples," compares the effect of using the median ratios Almy-Gloudemans calculated in the 33 municipalities they analyzed versus using the median ratios calculated by the DRA. **Trial Exhibit MM**. The second revised spreadsheet compares the effect of using the median ratios Almy-Gloudemans calculated in the 33 municipalities they analyzed versus using the actual ratio used by the DRA. **Trial Exhibit 60**.

The purpose of Almy-Gloudemans' initial spreadsheet, as well as the two revised spreadsheets, was to show that simply by consistently applying correct sales screening procedures (i.e. excluding all current use property, including multiple-parcel sales, etc.), the results of the equalization process will change dramatically from one municipality to the next. As the spreadsheets also show, these changes can and will still occur even if the bottom-line number (the total amount of tax revenue that the State raises) remains largely the same. The point is, there are winners and losers in the equalization process. Depending on what procedures are used to screen sales (or if no consistent procedures are used), the relationship between winners and losers can change dramatically, shifting hundreds of thousands of dollars in tax revenue/tax obligations between municipalities.

A. The Distribution Scheme Built Into The Statewide Property Tax Exceeds The State's Taxing Power, And Offends The New Hampshire Constitution.

1. The Statewide Property Tax Exceeds The State's Taxing Power.

The State's taxing power is broad, but it is not unfettered. The first sentence of part II, article 6 of the

New Hampshire Constitution limits "taxation upon polls, estates, and other classes of property" to fund the "public charges of government." In defining the scope of the State's taxing power, the New Hampshire Supreme Court has held that

> [t]he legislature has no taxing power to raise state money, or to require a town or city to raise money, to aid another town or city unless the aid is in some degree of benefit to the state or municipality extending it.

Opinion of the Justices, 88 N.H. 500 (1937) (citing Keene v. Roxbury, 81 N.H. 332, 334 (1924) and Opinion of the Justices, 84 N.H. 559, 579 (1930)). Therefore, the State cannot exercise its taxing power to compel taxpayers in one community to subsidize taxpayers in another community unless the subsidy satisfies some public charge of State government, and thereby confers some benefit on the State as a whole.

In Claremont II, the New Hampshire Supreme Court ruled that providing an adequate education to the State's public school students is a public charge of State government that confers a benefit on the State as a whole. The question remains, however, whether there is any assurance that once it is collected and disbursed, the statewide property tax will actually help satisfy this public charge. The plaintiffs submit that there is no such assurance.

The State has no control over, and really no idea, how the educational adequacy grants are being used. Indeed, RSA 198:48 provides statutory protection for the receiver communities to spend the educational adequacy grants as they see fit:

> [d]istributions under RSA 198:42 [of the educational adequacy grants] depend only on weighted average daily membership in residence and the per pupil adequacy cost amounts as determined in this subdivision and are independent of how the municipalities decide to spend the distributions or other funds they may raise for education. Notwithstanding any other provision of law, nothing in this subdivision is intended in any way to limit or control how school districts operate or spend their budgets. (emphasis added).

Without any oversight or control over how the educational adequacy grants are being spent, the State can not be assured, and can provide no assurance, that the public charge of educational adequacy is actually being met. At trial, the State responded to this charge first by saying that its responsibility ends when it delivers the educational adequacy grant to the receiver community. This is wrong. The State cannot discharge its duty to ensure an adequate public education merely by sending a check to a municipality with no oversight, any more than it can discharge its obligation to oversee the construction of a highway by merely sending a check to a local highway department without checking to make sure that a road or bridge is actually being built.

The State next argues that because the DRA annually audits the books of each school district and satisfies itself that all school district expenditures are for valid educational purposes, the State actually does provide meaningful oversight. The State misses the point. While each check written by each school district may be for a valid educational purpose, it is the check not written – the one from the municipality to the school district - that is critical. The educational adequacy grants are being paid to local school districts, allowing municipalities to reduce their own contributions to their local school budgets. Dollars that the municipality no longer commits to education can be used for any town purpose, including the "shiny red fire truck" that Attorney Schwarz referred to in his opening argument.

During trial, Elizabeth M. Twomey, Ph.D., former Commissioner of the New Hampshire Department of Education ("NHDOE"), confirmed that her department has no control over how the educational adequacy grants are being spent. Dr. Twomey also testified that she is not aware of any other branch of State government that has any control over how the educational adequacy grants are being spent.

What little information the NHDOE has on the subject is limited to a set of surveys that the NHDOE sent to all New Hampshire school districts, asking them how they used their adequacy funds in school year 1999-2000, and how they are using their adequacy funds in school year 2000-2001. These surveys **(Trial Exhibit 48)** are troubling on a number of levels. First, the need for such a survey establishes the State's complete abdication of control over the receiver communities' use of the educational adequacy grants. Second, the format of the survey evidences the State's apparent acceptance of the fact that funding educational initiatives is just one way that a receiver community can use its educational adequacy grants. Third, the survey responses confirm that in an overwhelming majority of cases in both 1999-2000 and 2000-2001, the educational adequacy grants are not being used to fulfill the public purpose expressed by the legislature, but rather to fund local tax relief.

The State offered two responses at trial. First, don't trust the surveys. Second, Claremont II was all about property tax relief anyway.

As to the State's first argument, there is simply no reason to believe that when the overwhelming majority of respondents to the NHDOE's survey indicated that they were using their adequacy funds for local tax relief, these respondents were all either confused or mistaken. The fact that the State does not like the results of the NHDOE's survey does not eliminate, or even diminish their evidentiary value.

The State's second argument also fails. While it is true that the Claremont Court found that the funding system then in place (complete reliance on local property taxes) was unconstitutional because it imposed disproportional burdens on property poor towns to fund a State obligation, the Court did not opine as to what type of system would pass muster. It certainly did not, as the State now strenuously argues, give the green light to system in which property tax relief is the only certain outcome and the promotion of educational adequacy is not even an afterthought.

Ultimately, the State cannot defend a distribution scheme that fails to insure some benefit to the State as a whole. In this case, complete deference to local control, and the failure to accompany the statewide property tax with legislation to insure the accountability of school districts receiving education adequacy grants, have compromised the State's ability to insure that the tax satisfies the legitimate public charge articulated in Claremont II. The statewide property tax, therefore, exceeds the State's legitimate taxing authority.

2. The Statewide Property Tax Violates The Equal Protection Provisions Of Both The New Hampshire And United States Constitutions.

A second unacceptable consequence of the flawed distribution scheme built into the statewide property tax is that taxpayers in the donor communities get no vote on how the redistributed portion of their property tax revenue is spent. By contrast, residents of the receiver communities not only get to vote on how all of their property tax revenue is spent, they get to vote on how the portion redistributed from the donor communities is spent. Taxpayers in the donor communities are partially disenfranchised simply by virtue of geographic happenstance. Absent compelling circumstances, the equal protection provisions of both the New Hampshire Constitution (pt. I, art. 1) and the United States Constitution (amend. XIV, §1) prohibit infringement on the fundamental right to vote on the basis of such a suspect classification. See Claremont II, 142 N.H. at 472 ("When governmental action impinges fundamental rights, such

matters are entitled to review under the standard of strict judicial scrutiny"); see also Tiews v. Timberlane Regional School District, 111 N.H. 14, 17-18 (1971).

If the State retained some control over the use of the educational adequacy grants, or if accountability measures were in place, taxpayers in both the donor communities and the receiver communities would be on equal footing. Both groups would have an opportunity to vote in State elections, and the State official(s) charged with spending their tax dollars would be accountable to both groups. Under the present distribution scheme, however, taxpayers in the donor communities have no vote on how a portion of their statewide property tax obligation is spent simply by virtue of where their property is located. By combining a statewide property tax with a distribution scheme that defers completely to local control, the State has subjected the taxpayers in the donor communities to taxation without equal accountability or representation vis-a-vis taxpayers in the receiver communities. The equal protection provisions of the New Hampshire and United States Constitutions protect taxpayers in the donor communities from such discrimination.

III.

RELIEF REQUESTED

The plaintiffs respectfully request that this Court declare the statewide property tax unconstitutional, and enjoin the State from collecting the tax until the defects described above are cured. The plaintiffs further submit that if this Court declares the statewide property tax unconstitutional, taxpayers in the donor towns are entitled to reimbursement of the "excess education taxes" they have already paid. As this Court will recall, earlier this year the State conceded the propriety of such reimbursement as an alternative to the donor towns' attempt to interplead their excess property tax payments pending the outcome of this litigation. City of Portsmouth, et al. v. State of New Hampshire, et al., Rockingham County Superior Court, Docket No. 00-E-0136.

Contrary to the State's opening argument, the plaintiffs have never requested, and are not now requesting, reimbursement of the nearly one billion dollars collected under the statewide property tax. The plaintiffs recognize that such relief would cripple the State. More importantly, the plaintiffs concede that even if the statewide property tax is unconstitutional, their obligation to help fund the provision of an adequate public education remains. To require the State to reimburse the total amount of the statewide property tax would constitute an unfair windfall. This is precisely why the plaintiffs carefully avoided raising this case to the "billion dollar crisis" that the State incorrectly threatened in its opening argument.

IV.

CONCLUSION

A system of taxation cannot survive if taxpayers do not have confidence that everyone is paying their fair share, and everyone is getting some of the benefit. The statewide property tax inspires no such confidence. The plaintiffs request relief from this unconstitutional burden.

Respectfully submitted,

Evelyn Sirrell, Kenneth Fox and Russell Wakefield

By their counsel,

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_____ _____

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CERTIFICATION

I, Thomas M. Closson, hereby certify that a copy of the foregoing pleading was delivered to Anne M. Edwards, Esq., opposing counsel of record.

_____ _____

Date Thomas M. Closson, Esq. (#9966)