

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STRAFFORD, SS.

Docket No. \_\_\_\_\_

THE CITY OF DOVER  
288 Central Avenue  
Dover, NH 03820

v.

THE STATE OF NEW HAMPSHIRE  
107 North Main Street  
Concord, NH 03301

**VERIFIED PETITION FOR DECLARATORY JUDGMENT,  
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

NOW COMES the City of Dover (the "City"), by and through its counsel, Bernstein, Shur, Sawyer & Nelson, P.A., pursuant to RSA 491:22, and respectfully petitions this Honorable Court for declaratory relief, preliminary and permanent injunction, stating as follows.

**Introduction**

1. This action is brought for declaratory and injunctive relief to enforce the City's rights under the New Hampshire Constitution, Part II, Article 83 (the Encouragement of Literature Clause), which requires the State to fund a constitutionally adequate education to every child in New Hampshire.

2. By arbitrarily limiting adequacy aid to prohibit municipalities from receiving more than 108% of the aid they received in previous years, see RSA 198:41 (Supp. 2014), the State violates its constitutional mandate to fund an adequate education to the students attending the City's schools. Dover schools are a department of the City.

3. The State persistently fails to fund education in a sufficient manner by applying the 108% cap. The State's funding policies harm communities that experience significant growth in enrollment, such as the City.

4. As a direct consequence of the cap on the adequate education grant, the City and its students are being shortchanged and deprived of funding for the fundamental right to a quality public education.

5. Taxpayers of the City are consequently also overburdened by the arbitrary cap because the City receives less state funds for its schools than it is entitled to receive under constitutional principles established in the Claremont Sch. Dist. v. Governor line of cases, *see infra*, and that should be available from the Education Trust Fund established pursuant to RSA 198:39.

#### **Request for Expedited Status**

6. This Petition involves the fundamental rights of not only Dover school children, but all children who obtain public education in this state. The interests of these children necessitate an expedited resolution of the pending constitutional challenge.

7. Moreover, the constitutional challenge raised in the instant Petition has a direct and immediate financial impact on the City as the next adequate education grant will be distributed on September 1, 2015. RSA 198:42 (Supp. 2014). The amount distributed not only affects the City's decisions regarding educational opportunities offered in its schools, but it also impacts capital improvements plans. These decisions, in turn, affect tax rate setting decisions. Thus, delay in resolving the constitutional validity of the cap imposed by RSA 198:41, III (b) creates continued financial disadvantages for the City and its taxpayers.

8. Finally, the facts asserted herein should not be the subject of serious contest as they are either known or readily determinable by the State.

9. Accordingly, the Court should afford this matter expedited status.

**Parties and Jurisdiction**

10. The Petitioner, the City of Dover, is a New Hampshire municipality with the authority to bring suit and having a mailing address of 288 Central Avenue, Dover, New Hampshire 03820. The Dover School Board is charged with overseeing primary and secondary education in the City of Dover. The City of Dover constitutes a single municipal corporation with powers for municipal and school purposes, including all of the powers of a school district conferred by law. Dover City Charter, Article C4-1.

11. The Respondent, the State of New Hampshire, is a body politic, having a mailing address of c/o The New Hampshire Secretary of State, 107 North Main Street, Concord, New Hampshire, 03301.

12. This Court's jurisdiction is proper pursuant to RSA 491:22 and RSA 498:1.

13. Venue is proper in Strafford County pursuant to RSA 507:9 because the City is located in the county.

**The State's Constitutional Duty to Provide  
an Adequate Education That is Adequately Funded**

14. Part II, Article 83 of the New Hampshire Constitution provides:

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, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.



15. In Claremont School District v. Governor, 138 N.H. 183, 184 (1993) (hereinafter Claremont I), the New Hampshire Supreme Court interpreted this constitutional provision to “impose[ ] a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding.”

16. Subsequently, in Claremont School District v. Governor, 142 N.H. 462, 473 (1997) (hereinafter Claremont II), the Court “concluded that ‘the property tax levied to fund education is, by virtue of the State’s duty to provide a constitutionally adequate public education, a State tax . . . .’” Opinion of the Justices (Reformed Public School Financing System), 144 N.H. 474, 476 (2000) (quoting Claremont II, 142 N.H. at 466).

17. Further the Claremont II Court determined that “the right to a State funded constitutionally adequate public education” was “fundamental.” Claremont II, 142 N.H. at 473.

18. Throughout the litany of school funding cases that the New Hampshire Court has addressed, a clear principle emerges: Part II, Article 83 “imposes upon the State the exclusive obligation to fund a constitutionally adequate education.” Opinion of the Justices, 145 N.H. at 476. Thus, although the constitution may not mandate “statewide equality,” it does mandate “statewide adequacy.” Id. at 477.

#### **The State’s Failure to Fully Fund the Costs of an Adequate Education**

19. In response to Claremont II and its progeny, the Legislature developed and subsequently revised the definition of an adequate education, see RSA 193-E:2, and passed SB 539, which amended New Hampshire’s educational funding scheme in an effort to properly fund the costs of an adequate education. See SB 539 (2008); Laws 2008, 173:9.

20. As part of its restructuring, in 2008, the Legislature repealed RSA 198:41 and reenacted it to reflect modifications to the determination of the total education grant given to municipalities.

Pertinent to the instant action, Section 173:9 of SB 539, which became effective on July 1, 2009, provided:

For the fiscal years beginning July 1, 2009 and July 1, 2010, the department of education shall not:

(a) Distribute a total education grant on behalf of all pupils who reside in a municipality that exceeds that municipality's total education grant for the 2009 fiscal year by more than 15 percent; or

(b) Reduce the total state aid for an adequate education provided on behalf of all pupils who reside in a municipality to an amount less than that municipality's total state aid for an adequate education received in the 2009 fiscal year.

2008 Laws, 173:9.

21. This so-called transition aid plan purportedly provided a mechanism to phase in the increases and decreases in anticipated funding for New Hampshire public schools. The impact of the transition formula, however, resulted in five communities not receiving a grant during the transition period, despite the State's constitutional duty to provide adequate funding for the costs of an adequate education.

22. In 2011, the Legislature again amended RSA 198:41, this time establishing a cap on the amount of increase in state aid to which municipalities are entitled. See 2011 Laws, 258:3. The amendment, which became effective July 1, 2011, provided that commencing July 1, 2013, a municipality's total education grant shall not exceed 105.5% of the total education grant received in the previous fiscal year. Id.

23. Subsequently, the provision was again amended in 2013 to raise the cap to 108% of the total education grant received in the previous fiscal year. See 2013 Laws, 144:120.

24. Since its inception, the cap has deprived seventy-nine municipalities of crucial and constitutionally mandated state aid. Moreover, the cap disproportionately affects communities experiencing growth in enrollment.

**The Cap Deprives the City's Students and Taxpayers Funding for an Adequate Education**

25. The City consistently receives less state money than is calculated under the current funding formulas, as is demonstrated in the following chart:

<b>Fiscal Year</b>	<b>ADM</b>	<b>Required Adequacy Aid Grant</b>	<b>Adequacy Aid Received</b>	<b>Cap Impact</b>
FY 2009	3,299.8	\$5,262,210	\$5,262,210	\$0
FY 2010		\$9,780,687	\$6,051,542	\$3,349,054
FY 2011		\$9,273,774	\$6,051,542	\$3,222,232
FY 2012	3,417.23	\$7,431,385	\$6,051,542	\$1,379,843
FY 2013	3,417.23	\$7,253,305	\$6,051,542	\$1,201,763
FY 2014	3,483.63	\$8,303,822	\$6,535,665	\$1,768,157
FY 2015	3,525.69	\$8,605,225	\$7,058,518	\$1,546,707
FY 2016	3,525.69	\$9,072,775	\$7,623,199	\$1,449,556
<b><i>Cumulative Cap Impact for FY 2009 – FY 2016</i></b>				<b><i>\$13,917,313</i></b>

26. The State's failure to fully fund the City has resulted in a cumulative cap impact of nearly \$14 million dollars.

27. The next education grant disbursement is scheduled for September 1, 2015. The City anticipates receiving \$1,524,639, which is \$289,916 less than the amount determined by the



adequacy grant formula. The City will experience the same shortfall in November and slightly larger shortfalls in January and April of 2016.

28. The State's failure to fully fund the September 1, 2015 distribution will require the City to accommodate the shortfall.

29. Removal, or non-enforcement, of the 108% cap; however, will remove this aspect of the State's non-compliance with the constitutional mandate to fund the costs of an adequate education.<sup>1</sup>

30. The State has established a special, non-lapsing trust fund to pay for its constitutionally required adequate education funding obligation (the "Trust Fund"). RSA 198:39. The Trust Fund receives revenues from certain sources specified by statute. RSA 198:39, I (a)-(k). The Trust Fund also is permitted to invest funds and to retain the proceeds from investments. RSA 198:39, II. The Governor is authorized to draw warrants for required payments to municipalities from the Trust Fund when those payments are due, despite the fact that the Trust Fund may have insufficient funds to make said required payments. RSA 198:42, II.

31. The arbitrary cap imposed by RSA 198:41, III (b), has unconstitutionally limited the payments made from the Trust Fund to the City and has allowed the Trust Fund to hold funds that should have been paid to the City and to use those funds for other purposes, including for investment.

32. The City is entitled to request that the Court impose a constructive trust on the State's Trust Fund for the payments that have been improperly withheld from the City and to require the State to now disgorge those improperly held funds to the City.

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<sup>1</sup> The City does not accept, nor challenge, in this Petition that the State's per pupil funding formula is constitutionally correct. See RSA 193-E. The sole focus of this Petition is the arbitrary funding cap contained in RSA 198:41, III (b).

**Count One: Declaratory Relief –  
RSA 198:41, III (b) Is Unconstitutional**

33. The City incorporates by reference all paragraphs above and below.

34. Part II, Article 83 of the New Hampshire Constitution, guarantees that New Hampshire children obtain an adequate public education that is funded by the State, and imposes upon the State the exclusive obligation to fund a constitutionally adequate education. Opinion of the Justices, 145 N.H. at 476.

35. RSA 198:41, III (b) violates this constitutional provision in that it deprives the City of full funding for the cost of an adequate education by capping the adequate education grant distributed to the City to the extent that it exceeds 108% of the total education grant distributed to the City in the previous fiscal year.

36. Accordingly, the City is entitled to a declaratory ruling that RSA 198:41, III (b) is unconstitutional in violation of Part II, Article 83 of the New Hampshire Constitution.

**Count Two: Request for Preliminary and Permanent Injunction**

37. The City incorporates by reference all paragraphs above and below.

38. The next adequate education grant is scheduled for disbursement on September 1, 2015. RSA 198:42.

39. The State's persistent underfunding violates the constitution and deprives the City of millions of dollars in education funding to which it is entitled. The State's failure to pay the full adequate education grant imposes immediate irreparable harm to the City.

40. The City lacks a full and complete remedy at law and therefore, seeks equitable relief against the State.



41. The public interest would not be harmed by enjoining the application of an arbitrary and inequitable funding cap that violates the New Hampshire Constitution. Further, the State is not harmed by preventing it from applying an illegal and unconstitutional statute.

42. Accordingly, the City seeks a preliminary and permanent injunction enjoining the application of the adequacy funding cap imposed by RSA 198:41, III (b), and requiring the State to pay the City the full amount that the department of education determined to the City.

**Count Three: Request for Constructive Trust and Payment Therefrom**

43. The City incorporates by reference all paragraphs above and below.

44. As a result of the unconstitutional cap, the State has illegally withheld nearly \$14 million from the City that were due to be paid to the City from the Education Trust Fund established by RSA 198:39.

45. The State's conduct, in applying the cap and withholding the funds, was unconstitutional and therefore, *void ab initio*.

46. Funds not properly paid to the City were used for other purposes, including investment, and improperly held by the State in the Education Trust Fund. The Court should declare that these funds are subject to a constructive trust for the benefit of the City to the extent the funds were withheld because of the operation of the RSA 198:41, III (b) cap.

47. The State should be enjoined from holding the funds subject to the aforementioned constructive trust and these funds should be returned to the City, with interest. This portion of the injunction sought by the City will prevent the State from having profited from its unconstitutional actions.

**Count Four: Attorney's Fees**

48. The City incorporates by reference all paragraphs above and below.

49. The City is entitled to attorney's fees because this action confers a substantial benefit on the public, namely public school students, taxpayers, and the citizens of Dover, by vindicating a fundamental and constitutional right to adequately funded public education. See Claremont Sch. Dist. v. Governor, 144 N.H. 590, 595 (1999).

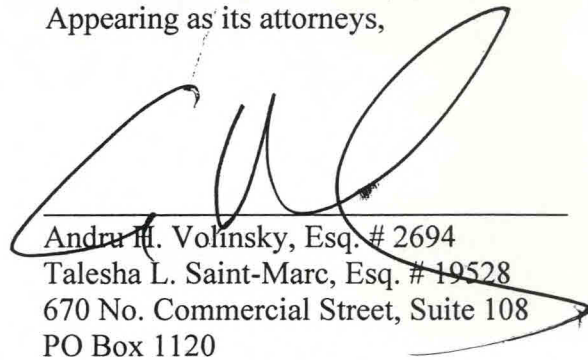
WHEREFORE, for the foregoing reasons, Petitioner requests that this Honorable Court:

- A. Declare RSA 198:41, III (b) unconstitutional, in that it violates the State's constitutional mandate to pay for a constitutionally adequate education;
- B. Enter a preliminary and permanent injunction enjoining the application of the adequacy funding cap imposed by RSA 198:41, III (b);
- C. Impose a constructive trust on funds improperly withheld from the City by operation of RSA 198:41, III (b) and order the funds in the constructive trust and interest thereon to be returned to the City;
- D. Conduct expedited hearings on the request for preliminary and permanent injunction;
- E. Award its reasonable attorney's fees and costs; and
- F. Grant such further relief as may be just and reasonable.

Respectfully submitted,

City of Dover

With Bernstein, Shur, Sawyer & Nelson, P.A.  
Appearing as its attorneys,



Andra M. Volinsky, Esq. # 2694  
Talesha L. Saint-Marc, Esq. # 19528  
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Manchester, NH 03105-112

Date: August 20, 2015

**VERIFICATION**

I have reviewed the foregoing Verified Petition for Declaratory Judgment, Preliminary and Permanent Injunctive Relief. All of the factual allegations contained herein are true to the best of my knowledge and belief.

August 20, 2015

Karen Weston  
Karen Weston, Mayor

STATE OF NEW HAMPSHIRE  
COUNTY OF STRAFFORD

On this 20<sup>th</sup> day of August, 2015 personally appeared before me, Karen Weston, Mayor of the City of Dover, and acknowledged that she executed the within document for the purposes therein contained, and swore that the statements contained therein are true.

Mary Ellen McMahon  
Notary Public/Justice of the Peace

My Commission Expires: 7/10/18

MARYELLEN McMAHON  
NOTARY PUBLIC NEW HAMPSHIRE  
MY COMMISSION EXPIRES  
JULY 10, 2018