The State of New Hampshire

STRAFFORD COUNTY **SUPERIOR COURT**

Bill Duncan et al.
v.
The State of New Hampshire et al.
&
Network for Educational Opportunity et al.

Docket No.: 219-2012-CV-00121

ORDER

I. Introduction

The plaintiffs, eight individual New Hampshire residents/taxpayers and one New Hampshire business, pursue this action challenging the constitutionality of RSA 77–G (Supp. 2012), known as the Education Tax Credit program ("the program"). The plaintiffs seek a declaration that the program violates certain strictures of the New Hampshire Constitution, also injunctive relief to prohibit the program's implementation, and attorneys' fees and expenses.

The intervenor-defendants, who join the State in defending the program, consist of the Network for Educational Opportunity ("NEO"), a non-profit entity involved with the program, along with three individual New Hampshire citizens who wish their children to receive scholarship funds under the program. The Court also granted *amicus* status to certain other persons and entities, and have received from them memoranda and

materials. The Court held a hearing on April 26, 2013, during which it received evidence and heard argument.[1]

II. Background

A. *The Program*

The program was enacted by the Legislature on June 27, 2012, overriding a veto by the Governor. The program "establishes an education tax credit against the business profits tax and/or the business enterprise tax for business organizations and business enterprises that contribute to scholarship organizations which award scholarships to be used by students to defray educational expenses." Laws 2012, 287 (title page, SB 372-FN-LOCAL, "Amended Analysis"). The program's first program year began on January 1, 2013. Laws 2012, 287:5.

The program requires the New Hampshire Department of Revenue Administration to regulate and oversee certain organizations ("scholarship organizations"), which are approved "charitable organization[s] incorporated or qualified to do business in this State" that "[p]rovide scholarships from eligible contributions to eligible students to defray educational expenses." RSA 77–G:1, XVII; RSA 77–G:5, I; RSA 77–G:6. Businesses operating or carrying out pertinent activities in New Hampshire may donate to scholarship organizations and in return those businesses

> may claim a credit equal to 85 percent of the contribution against the business profits tax due pursuant to RSA 77–A, or against the business enterprise tax due pursuant to RSA 77–E, or apportioned against both provided the total credit granted against both shall not exceed the maximum education credit allowed. Credits provided under this chapter shall not be deemed taxes paid for the purposes of RSA 77–A:5, X.

[1] The Court has considered all the submitted evidence.

RSA 77–G:3. The total amount of tax credits awarded is capped at $3,400,000.00 for the first program year and at $5,100,000.00 the second year, with subsequent increases allowed pursuant to some conditions and limitations. RSA 77–G:4. The tax credits for an individual business or business enterprise are limited to 10 percent of the total allowable tax credits. Id.

The scholarship organizations may only award scholarships to "eligible students," meaning New Hampshire residents "at least 5 years of age and no more than 20 years of age, who [have] not graduated from high school," and who either (1) currently attend a New Hampshire public school, to include a charter school, whose "adequacy grant" would be reduced if that student no longer attended, or (2) received a scholarship under the program in the prior year, or (3) do not qualify under the first 2 categories of eligible students and whose family income is less than or equal to 300 percent of the federal poverty guidelines. RSA 77–G:1, VIII; RSA 77–G:5, I.

In each of the first and second program years, a scholarship organization needs to award at least 70 percent of its scholarships to those eligible students who qualify under criteria (1) or (2) above. RSA 77–G:2, I(b). The 70 percent minimum is phased-out gradually until it is eliminated after fifteen years of the program's implementation. Id. At least 40 percent of the scholarships awarded to students under criteria (1) and (2) above must be awarded to students who qualify for the federal free and reduced-price meal program in the final year they were in the public schools. RSA 77–G:2, I(d).

Eligible students who receive a scholarship may have the scholarship applied (with some limitations) to attend a nonpublic school; attend a public school located outside the school district where the eligible student resides; or for homeschooling

expenses. RSA 77–G:2, I(1). The average value of the scholarships awarded by a scholarship organization to attend nonpublic schools or out-of-district public schools may not exceed $2,500, with adjustments in subsequent years for inflation. RSA 77–G:2, I(b). Scholarships for homeschooled students are capped at "25 percent of the average scholarships as defined in RSA 77–G:2, I(b)." RSA 77–G:1, VI. Some special rules as to scholarship amounts pertain in regard to students receiving special education programs or services pursuant to RSA 186–C. RSA 77–G:2, 1(c). The scholarships go toward "educational expenses," which excludes certain specified incidental school expenses such as those associated with transportation or participation in athletic programs. RSA 77–G:1, VI.

Scholarship organizations must, among other criteria, comply "with applicable state and federal antidiscrimination and privacy laws" and may not restrict or reserve scholarships to a single nonpublic school or for a specific student or person. RSA 77–G:1, XVII(b); RSA 77–G:5, I(b). A particular scholarship organization appears to be able, however, to focus its provision of scholarships to a certain type or grouping of schools.

Governmental oversight of, or regulation of, schools receiving scholarship money pursuant to the program is explicitly limited: "Except as provided in this chapter, or otherwise provided in law, no state department, agency, or board shall regulate the educational program of a receiving nonpublic school or home education program that accepts students pursuant to this chapter." RSA 77–G:9, II.

The program contains a severability clause, which states:

> If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other

provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

RSA 77–G:10.

The purpose of the program is described as follows:

> (a) [To] [a]llow maximum freedom to parents and nonpublic schools to respond to and, without governmental control, provide for the educational needs of children, and this act shall be liberally construed to achieve that purpose.
>
> (b) [To] [p]romote the general welfare by expanding educational opportunities for children.
>
> (c) [To] [e]nable children in this state to achieve a higher level of excellence in their education.
>
> (d) [To] *[i]*mprove the quality of education in this state, both by expanding educational opportunities for children and by creating incentives for schools to achieve excellence.

Laws 2012, 287:1.

i. Legislative History

In about the late 2011 timeframe, a committee ("Study Committee") was created to study the implementation of an Education Tax Credit Program in New Hampshire, composed of members of both the Senate and House, which recommended that legislation to create such a program be enacted. Pls.' Ex. 9. Upon consideration of a legislative proposal of such a program, a majority of the House Ways and Means Committee issued a Report in March, 2012 which underscored the program's promotion of "school choices for those that might not otherwise be able to afford it" and the minimal cost to taxpayers, if any, the program would create. Pls.' Ex. 11 at 2. A minority of the House Ways and Means Committee, however, also issued a Report in March, 2012, which discussed, in addition to a contrary forecast of the cost of the program, constitutional concerns the program would raise. Pls.' Ex. 12 at 2.

The Minority Report expressly referenced New Hampshire Constitution Part I, Article 6 and Part II, Article 83, and also mentioned certain New Hampshire Supreme Court advisory opinions "that could be used as precedent in cases against this legislation." Id. It averred, among other things: "As the 1969 [advisory opinion, to be discussed later] dealt specifically with tax credits and as our state constitution is quite explicit on this issue, the success of a legal challenge arguing that businesses are being used only as an intermediary to deny a direct, unconstitutional, connection between the taxpayer and a religious school, is a real possibility . . . ." Id.

The Legislature received statements and letters from supporters and opponents of the program. E.g., Pls.' Exs. 13–16. Proponents highlighted its claimed proper and fair promotion of parental choice in education. Id. They saw the program as offering a significant way to improve the quality of education within the State. Id. The proponents included representative of a number of "religious" schools, among others. Id. Opponents urged that the program would work to undercut public education. E.g., Pls.' Ex. 13. at 7, 10, 14. They also raised concerns respecting the constitutionality of the program, and the costs of likely resultant litigation. Id.

The Governor vetoed the program on June 18, 2012, but the veto was overridden by the Legislature on June 27, 2012.

ii. New Hampshire's Nonpublic Schools

The plaintiffs and intervenor-defendants contest the percentage of New Hampshire primary and secondary nonpublic schools that may be considered

"religious,"[2] and, there is no agreement as to the number of students who actually attend "religious" schools, or what percentage theses students make up of the total number of students who attend nonpublic schools. For its part, the State does not specifically offer pertinent evidence or data. All this being said, however, the record establishes that a significant percentage of New Hampshire primary and secondary nonpublic schools are "religious" in nature, and a good number of students who attend private schools in New Hampshire attend "religious" schools.

Based on information from the New Hampshire Department of Education ("DOE"), the plaintiffs count 154 total nonpublic schools in New Hampshire including 116 general education schools and 38 special education schools. Pls.' Ex. 35. The plaintiffs count 71 "religious" schools, and the plaintiffs exclude the special education schools when determining that "religious" schools make up approximately 61 percent of their tally. Second Am. Compl. ¶ 82; and Pls.' Ex. 50. The intervenor-defendants appear to count 161 (or 162) total nonpublic schools and 62 "religious" schools. Intervenor-Defs.' Answer ¶ 76; see also Intervenors-Defs.' Ex. 4. The intervenor-defendants include special education schools in determining that approximately 38 percent of nonpublic schools in New Hampshire are "religious," see Intervenor-Defs.' Answer ¶77—but they also present evidence that, including private special education students, schools "with a religious orientation" make up 43 percent of New Hampshire's nonpublic schools. Intervenor-Defs.' Ex. 4.

[2] The parties do not offer an actual definition of a "religious" school. From the positions and evidence the parties present, however, the Court considers a "religious" school generally to be a one run by, or affiliated with, a religious sect or denomination, where an important mission is religious instruction and where teaching is generally imbued with a religious dimension.

The plaintiffs count approximately 17,000 students enrolled in general education nonpublic schools, approximately 11,200 of which, or approximately 66 percent, attend religious nonpublic schools. Pls.' Ex. 30. The intervenor-defendants do not present evidence as to total enrollment figures for nonpublic religious schools.

As they are certainly permitted to do under our law and customs, nonpublic "religious" schools in New Hampshire generally imbue their curriculums and learning environments with religiosity. Pls.' Ex. 37 (pages from schools' websites indicating, among other things, schools' learning environments); Pls.' Exs. 92–93 (summaries and selected pages from approval and approval-renewal materials concerning "religious" schools); and Amicus Br. of Concord Christian Academy et al. 6.

The plaintiffs also present evidence that the average education costs to attend a nonpublic "religious" school in New Hampshire are significantly less than the average costs for a secular nonpublic schools. Pls.' Exs. 29, 30. The State does not present evidence in this regard. The intervenor-defendants also do not themselves present actual cost evidence, but raise a number of contentions concerning the plaintiffs' calculations. Intervenor-Defs.' Answer ¶¶ 82–91.

The Court need not reach a specific calculation for education costs at "religious" or secular nonpublic schools in New Hampshire. The Court accepts the plaintiffs' evidence to the extent that it concludes that "religious" nonpublic schools in New Hampshire generally offer education at a significantly lower cost than their secular counterparts.

The plaintiffs' calculations, as discussed above, are based on information extrapolated from, or obtained from, the DOE, from the schools' websites, and certain

other sources. Pls.' Ex. 1 ¶¶ 4–9, 13–17 (Affidavit of Randall Maas dated Jan. 8, 2013). The plaintiffs' calculations respecting costs are generally corroborated by those the DOE provided to the study committee that also show significant disparity in education costs between "religious" and secular nonpublic schools. Pls.' Ex. 9 at 4.

From the above, it is clear that a significant portion of the scholarships awarded under the program will inevitably go toward defraying students' education costs at nonpublic "religious" schools. It is established that these schools constitute a substantial percentage of New Hampshire's nonpublic schools, they attract a significant percentage of those New Hampshire students who attend nonpublic schools, and they generally cost significantly less than nonpublic secular schools. See in this regard, Pls.' Ex. 43 (Expert report of Professor David Berliner, a Regents' Professor Emeritus at Arizona State University).

The testimony and letters that the several representatives of "religious" schools offered to the New Hampshire Legislature in support of the program reflect their reasonable expectation that a good many scholarship recipients would use the program's scholarship monies to attend "religious" nonpublic schools. Pls.' Exs. 13–16.

Scholarship recipients' preferences are also coming to light currently, through data from the NEO, a scholarship organization approved by the New Hampshire Department of Revenue Administration. Pls. Ex. 91 (document indicating NEO's approval from the New Hampshire Department of Revenue Administration); and Pls.' Exs. 98–99 (spreadsheets showing data about applicants to NEO). As of April, 2013, NEO had received 701 applications from students wishing to obtain scholarships through the program. Pls.' Ex. 98. Of those applications, 419 (or about 60 percent) had

indicated a preference to attend a school that the plaintiffs categorize as "Nonpublic Religious," while 106 preferred a "Nonpublic Secular" school, 3 preferred a public school, 20 preferred an "out-of-state" placement, and 148 preferred homeschooling. Pls.' Ex. 99.[3] See also Intervenor-Defs' Ex. 7.

B. Parties' Arguments

i. Plaintiffs' Arguments

The plaintiffs aver that the program violates certain provisions of the New Hampshire Constitution. Part I, Article 6 states that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination . . . ." N.H. CONST. pt. 1, art. 6. Further, "every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established." Id.

The plaintiffs highlight that the program imposes no restrictions on how scholarship funds may be used by the receiving schools, and they aver that that those funds will be used, in part, to further "religious" education benefiting, among others, schools that "discriminate" based on "religion" in their admission of students and their employment of teachers. According to the plaintiffs, the program was passed into law with the primary unconstitutional purpose of assisting "religious" schools, and it will have as well the impermissible effect of so doing.

The plaintiffs argue that the program violates Part II, Article 83 of the New Hampshire Constitution, specifically its "No-Aid Clause," which states that "no money raised by taxation shall ever be granted or applied for the use of schools or institutions

[3] 5 persons are listed as "not available." Pls.' Ex. 99 also reflects that "Catholic School applicants make up 26% of applicants to religious schools and 15% of all applicants."

of any religious sect or denomination." N.H. CONST. pt. II, art. 83. The plaintiffs claim that the program diverts tax funds to "religious" schools—without restriction and with improper effect—and is thus violative of the No-Aid Clause.

In support of their arguments under Part I, Article 6 and Part II, Article 83, the plaintiffs rely very much on a number of New Hampshire Supreme Court advisory opinions. See Opinion of the Justices, 99 N.H. 519 (1955) (hereinafter "1955 Opinion of the Justices"); Opinion of the Justices, 108 N.H. 268 (1967) (hereinafter "1967 Opinion of the Justices"); Opinion of the Justices, 109 N.H. 578 (1969) (hereinafter "1969 Opinion of the Justices"); Opinion of the Justices, 136 N.H. 357 (1992) (hereinafter "1992 Opinion of the Justices"). The plaintiffs urge this Court to follow these advisory opinions, which, according to them, compel a ruling that the program violates the State Constitution.

The plaintiffs also argue that the program violates New Hampshire Constitution Part I, Articles 10 and 12, along with Part II, Articles 5 and 6, which together, according to the plaintiffs, "require that taxation be uniform, equal, proportional, and non-discriminatory, and they prohibit tax exemptions and benefits that do not serve a public purpose." Pls.' Supp. Mem. of Law in Supp. of Pet. for Prelim. Inj. 1. The plaintiffs claim that because businesses who donate to the program will see a significant tax credit, while non-donating businesses will not, the program does not comply with the requirements of uniformity, equality, or proportionality, and, further, since the program "will support sectarian education and religious discrimination," it does not serve a public purpose. Second Am. Compl. ¶¶ 158–160.[4]

[4] The Court does not deal with the arguments presented by the plaintiffs or others respecting the program's fiscal impact in reaching its conclusions here.

ii. State & Intervenor-Defendants' Arguments

The State argues that all but the plaintiff-business lack standing to bring the present action, citing RSA 491:22, I (Supp. 2012), the statute conferring standing in taxpayer actions. The intervenor-defendants argue that none of the plaintiffs have standing due to the limits on standing created by New Hampshire Constitution Part I, Article 37, which concerns separation of powers, and Part II, Article 74, which limits the issuance of advisory opinions. Thus, according to the intervenor-defendants, if RSA 491:22, I does indeed confer standing on any of these plaintiffs, that statute must be deemed unconstitutional here.

With respect to the program itself, the State and the intervenor-defendants both argue that it does not violate, indeed implicate, Part I, Article 6, or Part II, Article 83. The intervenor-defendants emphasize, in regard to Part II, Article 83, that the pertinent Clause was meant to only bar direct aid to "Catholic" schools, and not to prohibit the type of indirect aid the program would offer. The State somewhat similarly argues that the program is beyond the reach of Part I, Article 6 and Part II, Article 83. It avers that the monies involved are not "money raised by taxation," or "public funds," and that the monies from the program actually go to benefit young students by encouraging businesses, through tax credits, to directly provide education support, only indirectly benefiting any schools the young students come to attend.

Even if the Court were to deem the program to use public funds to support religious institutions, the State argues that the Court should apply the Federal Establishment Clause test of Lemon v. Kurtzman, 403 U.S. 602 (1971), under which the State claims the program must be deemed constitutional. It is also urged by the

intervenor-defendants that the Court should not construe the State Constitution's pertinent provisions, particularly Part II, Article 83, to have prohibitive effect here, given that they reflect, or are tainted by, bigotry and intolerance particularly toward Catholics.

The State and the intervenor-defendants both also urge the Court to not deem the New Hampshire Supreme Court advisory opinions the plaintiffs cite as determinative here. Based on the State's reading of current Federal Establishment Clause precedent, the program is not violative of that Clause, and thus also is not violative of the New Hampshire Constitution. The State also argues that the program is factually distinguishable from the programs the advisory opinions were scrutinizing, in ways that make the program much less constitutionally suspect. The intervenor-defendants, more so than the State, acknowledge the difficulty the advisory opinions pose for the program, but also urge the Court to not accord those opinions determinative weight, as they are "outdated" and not "binding precedent."

In response to the arguments the plaintiffs make in regard to Part I, Articles 10 and 12, along with Part II, Articles 5 and 6, the State first claims that the program's tax credit is constitutionally permitted because it is available to all businesses and is not offered contingent on a business having a particular characteristic. Thus, it is urged, the tax credit at issue is a permissible tax, based on use. Second, the State claims the program has a valid public purpose—generally stated "promoting the public welfare through a state-wide improvement in education"—and the program is rationally related to achieving that purpose.

C. Judicial Task

This Court is asked to determine the constitutionality of a recently-enacted State statutory program. The Court is not tasked with evaluating or judging the soundness of the education and tax policy the program embodies. Nor is the Court tasked with prying into, judging, or weighing the "religiosity" of any institution. The Court's job here is judicial in nature. It in no way implicates a policy-making stance, or functions belonging to the Legislature and/or the Executive. The Court is cognizant of the controversial nature of the program, and the deeply-held and sincere concerns citizens have, whether they be for or against its implementation.

III. Analysis

A. Standing

The plaintiffs assert they have standing under RSA 491:22, I, which states in pertinent part:

> The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

The individual plaintiffs all assert that they pay a number of different kinds of taxes to the State of New Hampshire. Second Am. Compl. ¶¶ 10, 15, 19, 23, 27, 31, 36.

In interpreting statutory language, the Court starts by applying "the plain meaning of [the] words according to their common and approved usage." State v. Willard, 139

N.H. 568, 570 (1995). If the plain meaning is ambiguous, the Court "examine[s] the statute's overall objective and presume[s] that the legislature would not pass an act that would lead to an absurd or illogical result." Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399, 401 (2005) (citation omitted). The goal of statutory interpretation is to apply words "in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (citation omitted).

By its terms, RSA 491:22, I accords standing to "any taxpayer in the jurisdiction of the taxing district" to vindicate a recognized "equitable right and interest in the preservation of an orderly and lawful government within such district." The statute does not expressly differentiate among taxes in a "taxing district." Yet, assuming without deciding that the language of RSA 491:22, I may be seen as ambiguous respecting whether it confers standing on all the plaintiffs here and not just the one plaintiff that is a business that actually pays business profits taxes or business enterprise taxes, the Court looks to the legislative history to aid its analysis. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011) ("When interpreting a statute, we first look to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous." (citation and quotations omitted)); and Appeal of Gamas, 158 N.H. 646, 649 (2009) ("Since there is more than one reasonable interpretation of these statutory provisions, we conclude that the statute is ambiguous, and we look to legislative history to aid our analysis.").

The pertinent language in RSA 491:22, I was added by the New Hampshire Legislature effective January 1, 2013 in response to the case of Baer v. N.H. Dep't of Educ., 160 N.H. 727 (2010). See Pls.' Ex. 26. Because of Baer's ruling on taxpayer

standing, the added language had as its purpose to "again permit taxpayer suits to challenge governmental action-returning to taxpayers the same right that they possessed from 1863 until 2010." Id. at 2 (statement of N.H. Rep. Rick Watrous of the House Judiciary Committee and sponsor of the bill).

In Baer, taxpayers brought suit seeking declaratory relief concerning a waiver or waivers by DOE of certain requirements governing lot size for certain schools. Baer, 160 N.H. at 729. The Baer Court "focus[ed] [its] analysis upon whether the petitioners have standing to bring these claims under RSA 491:22" because "to bring a declaratory judgment action, a party is required to meet the standard articulated in RSA 491:22. [The Court does] not have the authority to circumvent this statutory requirement." Id. at 730, 731. Baer held "that taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22." Id. at 731. Since the petitioners were simply asserting their status as taxpayers, and had not shown requisite "injury or impairment of rights," the Court affirmed the dismissal of their action. Id.

Again, the new language in RSA 491:22, I confers taxpayer standing absent a showing that "personal rights were impaired or prejudiced," per Baer. The State asserts, however, that the individual plaintiffs are not "taxpayers" in a "taxing district" within the meaning of RSA 491:22 because the "taxpayers" here entitled to sue are those subject to paying business profits taxes or business enterprise taxes.

The Court is not persuaded by the State's argument. The State's reading of RSA 491:22 does not acknowledge the full breadth of the Legislature's action in overturning Baer's requirement that taxpayer petitioners show impairment or prejudice to personal

rights. The State's argument, moreover, is not supported by the holding in Clapp v. Jaffrey, 97 N.H. 456 (1952), a case Rep. Rick Watrous cited positively in his statement in support of the amendment to RSA 491:22, I. Pls.' Ex. 26 at 2.

In Clapp, taxpayers in the Town of Jaffrey challenged as illegal certain Town practices to achieve, through involvement of Town means, the plowing and treatment of certain public officials' personal driveways. Clapp, 97 N.H. at 457. Apparently the practices at issue did not result in any "burden fall[ing] on taxpayers." Id. at 457–58. The Clapp Court held that the petitioners had standing to challenge the practices as taxpayers of the town, "even though it cannot be shown that [the challenged practices] result in financial loss to the town." Id. at 460–61. It was enough to confer standing that the petitioners were taxpayers in the pertinent taxing district, and they were claiming that town officials were acting illegally. Id.

In Clapp, there was no tax at issue, the term "taxpayer," as used by that Court, simply meant that the petitioners were tax-paying citizens of the pertinent taxing district, and therefore had an interest in the actions of their elected officials. Here, the individual plaintiffs are tax-paying New Hampshire citizens who are challenging the constitutionality of a State statutory scheme. Under Clapp, all of the plaintiffs here have standing. See also Green v. Shaw, 114 N.H. 289, 293 (1974) (recognizing standing for city taxpayers to pursue allegations that certain Rochester city officials "expended public funds without authority . . . failed to carry out ministerial duties mandated by statute or ordinances and threaten to act contrary to law in the future" despite the fact that such allegations presented "purely political questions"); and N.H. &c. Beverage Ass'n v.

Commission, 100 N.H. 5, 6 (1955) (citing Clapp and allowing challenges by taxpayers concerning the actions of State—as opposed to town—officials).

RSA 491:22, I states that standing now exists for "any taxpayer in the jurisdiction of the taxing district . . . ." (emphasis added). The use of the word "any" broadly contemplates standing for all taxpayers of the taxing district, not just those paying the particular tax or taxes implicated in the program or action to be challenged. And a "taxing district" certainly may be the entire State. Here, the program is State-wide and scholarships are available to any New Hampshire student, and any eligible business may claim a tax credit under it.

The State argues that if the Court reads RSA 491:22, I as conferring standing to these plaintiffs, then anyone driving through New Hampshire on an interstate highway, who stops and buys a snack—and thus pays a State tax—is also conferred standing by RSA 491:22; which, according to the State, is an absurd result. The Court is not faced with any such a scenario. The Court concludes that all the plaintiffs here have standing under RSA 491:22, I.

The intervenor-defendants argue that to the extent that RSA 491:22, I confers standing on these plaintiffs, that statute thus violates Part I, Article 37 and Part II, Article 74 of the State Constitution.

At the outset, the Court observes that under Part II, Article 4 of the State Constitution, the Legislature is bestowed broad authority to create courts vested with expansive jurisdiction. See N.H. CONST. pt. II, art. 4 (giving the General Court power to create courts "for the hearing, trying, and determining, all manner of crimes, offenses,

pleas, processes, plaints, actions, causes, matters and things whatsoever arising or happening within this state . . . .").

The intervenor-defendants argue that to give standing to taxpayers who have suffered no injury would violate Part I, Article 37 of the State Constitution, which has been interpreted to prohibit one branch of government from "encroach[ing] upon another branch's power as to usurp from that branch its constitutionally defined function." New Hampshire Health Care Assoc. v. Governor, 161 N.H. 378, 394 (2011) (citation and quotation marks omitted). The intervenor-defendants claim that if standing here is recognized, that "would upset the judiciary's role by flooding the courts with litigation and deprive the courts of resources to resolve actual controversies." Intervenor-Defs.' Reply Br. 3. Additionally, the Courts would obtain "undue power over the legislation and executive branches by allowing courts to prematurely strike down legislation at the behest of a single taxpayer" thus turning courts into "arbiters of policy rather than the arbiters of controversies." Id.[5]

The plaintiffs here, like those involved in Clapp, advance an alleged infringement on their "right to the preservation of an orderly and lawful government . . . ." Clapp, 97 N.H. at 461. They advance a case based on a right and interest that the amendment to RSA 491:22, I recognizes for taxpayers to vindicate through litigation.

The instant controversy calls for the Court to carry out a recognized judicial function—deciding the validity of a statute under the State Constitution. O'Neil v. Thomson, 114 N.H. 155, 159 (1974) ("interpretation of our State constitution and of statutes relative to the executive and legislative branches of our government . . . is a

[5] It is clear that "the constraints of Article III [of the Federal Constitution] do not apply to state courts, and . . . the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." ASCARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989).

traditional function conferred on the judiciary for which it is responsible."). The standing conferred on these plaintiffs under RSA 491:22, I does not violate the strictures of Part I, Article 37. It does not, work, as claimed, to open the Court to inappropriate forms of "advisory" proceedings.

In this regard, intervenor-defendants also argue that conferring standing under RSA 491:22, I violates Part II, Article 74 of the State Constitution, in that the New Hampshire Superior Court would be issuing advisory opinions, which, under that article only the New Hampshire Supreme Court may do. The case before the Court is an actual declaratory judgment/injunctive relief action. Like certain other states, see, e.g., Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 962 n.1 (Utah 1986), New Hampshire allows taxpayers special status to bring actions like the one at bar. The Court proceeds to consider the specific claims this case presents.

B. The "Public Funds" Dispute

The defendants strongly argue that the program does not involve "public funds," or "money raised by taxation'" and thus Part I, Article 6 and the No-Aid Clause are not violated, indeed at all implicated.

To constitute such "public funds," it is argued, the money involved must be collected from taxpayers and deposited into the State treasury. The plaintiffs argue, on the other hand, that the mechanism of support the program utilizes involves "public funds" because the delivery of money under the program very much depends on a tax credit to achieve its goals.

Much focus is placed on Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) and Ariz. Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436 (2011). Neither Killian nor Winn,

however, dealt with the New Hampshire Constitution, and their dissents show that the determination of what constitutes "public funds" is quite contentious.

In examining a comparable education tax credit program in Arizona, the Killian majority did not see "public funds" as going beyond money in the state's treasury, exclusive of private money for which the state treasury acts merely as a conduit or custodian. Killian, 972 P.2d at 617–18. It observed that to hold that money is "public" before it reaches the state treasury would be to say that "all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." Id. at 618. It saw no reasonable difference between the tax credit there at issue, and deductions and exemptions which are generally not regarded as public funds. Id.

The Killian dissent, however, was of the view that the tax credit there at issue, described as a form of "tax expenditure," should be treated the same as a direct appropriation. Id. at 642. The dissent did not see the tax credit at issue to be like a deduction or exemption because:

> it is a direct government subsidy limited to supporting the very causes the state's constitution forbids the government to support. Unlike neutral deductions, the credit is not the state's passive approval of taxpayers' general support of charitable institutions. Thus, there is no philanthropy here, no neutrality, and no limitation to secular use.

Id. at 642–43.

In Winn, the United States Supreme Court dealt with a Federal Establishment Clause challenge to the Arizona tax credit program involved in Killian. Winn, 131 S.Ct. at 1440–41. As an initial matter, however, the Winn Court was faced with determining whether the plaintiffs had standing under the U.S. Constitution. To have standing in federal court, Winn held that the plaintiffs must show that the government "extracted"

"tax money" from them which the government then, in turn, spent in violation of specific constitutional prohibitions. Id. at 1446. According to the Winn majority, a plaintiff-taxpayer has no standing to challenge the tax credit program at bar as the taxpayer's money is not being extracted and spent as in the case of appropriation. Id. at 1447–48. In the case of a tax credit, the government is, it is suggested, "declin[ing] to impose a tax." Id. Taxpayers can choose not to contribute to the scholarship program simply by declining to donate. Id.

The Winn dissent, however, strongly disagreed with the distinction being made between appropriations and tax credits to determine standing. Id. at 1450.

> Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

Id.

The State also cites Opinion of the Justices, 142 N.H. 95 (1997) (hereinafter "1997 Opinion of the Justices") and specifically a statement therein that "[t]he bill before us provides for a tax exemption, not the expenditure of public funds for private purposes." Id. at 101. The State interprets this language to mean that tax exemptions, and thus tax credits, are not "public funds."

The Court does not read 1997 Opinion of the Justices as determinative in regard to whether the "tax credit" here constitutes "public funds" or "money raised by taxation" for purposes of the pertinent provisions of the State Constitution. In 1997 Opinion of the Justices, the New Hampshire Supreme Court was asked to advise concerning the

constitutionality of a proposed bill allowing municipalities to provide certain industrial construction property tax exemptions. Id. at 95-96. The Court was asked, among other things, whether such legislation would allow for a form of outlay of public funds for private purposes, contrary to the New Hampshire Constitution's prohibition on governmental "gifts to corporations organized for profit . . . ." Id. at 100. The Court deemed the proposed bill constitutional, not an impermissible gift, because it was enacted for a public purpose. Id. at 101. The Court reasoned in this context as follows:

> [t]he bill before us provides for a tax exemption, not the expenditure of public funds for private purposes. The primary object of the bill is not to aid and benefit private persons for private ends, but, rather, to benefit the public at large by increasing the resources of the State and its taxable property through the establishment of new industries. Cf. Eyers Woolen Co., 84 N.H. at 16–17, 146 A. at 519 (particular law applicable to one party only in his private capacity cannot be classified as general exemption).

Id. 1997 Opinion of the Justices thus in no way precludes a finding that a tax credit could constitute "public funds" in another context such as the one here. That opinion does not operate, as the State appears to be arguing, to establish that an exemption in another context, may not constitute "public funds," even though it is not an actual appropriation from the State treasury.[6]

Significantly, the New Hampshire Supreme Court advised in another opinion that "relieving" entities from paying certain taxes may indeed qualify as a form of public funds for private purposes. See Opinion of the Justices, 106 N.H. 180 (1965) (hereinafter "1965 Opinion of the Justices"). That opinion concerned the constitutionality of a proposed bill that would, among other things, allow municipalities to

[6] The State appears to concede weakness in its own argument that a tax exemption or credit cannot constitute public funds when it acknowledges that "[t]he theory of appropriation via exemption" has been here recognized in certain circumstances. See State's Trial Mem. 14.

acquire industrial buildings by gift, and then lease said buildings to private corporations. Id. at 180-82. The Court stated, among other things, that such a scheme would involve an unconstitutional use of public funds for private benefit, explaining:

> [t]hus a corporation for profit which leased an industrial facility might indirectly be relieved of the payment of any taxes for a substantial period of time . . . . In such a case the lessee, as compared with other industries within the taxing district, might be relieved of payment of its just share of the public expense (Const., Pt. I, Art. 12, supra) and so indirectly receive the benefit of money which the town or county would otherwise receive from taxes. Const., Pt. II, Art. 6, supra.

Id. at 185.

The State strongly urges the Court to adopt the reasoning of the Killian majority, contending that if the program at issue uses "public funds," then "all taxpayer income could be viewed as belonging to the State because it is potentially subject to taxation by the legislature." See State's Trial Mem. 10; and Killian, 972 P.2d at 618. The Court, however, need not determine when money becomes the property of the State. The phrases "public funds," or "money raised by taxation," focuses the Court's inquiry not on when the government's technical "ownership" of funds or monies arises, but on when, or at what point, the public's interest fairly arises in how funds or monies are spent. The Court concludes that the interest of New Hampshire taxpayers in regard to challenging the legality of legislation such as the program at bar does not arise only after money is deposited in the New Hampshire treasury.

To rule otherwise would be to adopt an overly-formalistic and unrealistic concept of public expenditures, one contrary to our State's liberal cognizance of taxpayer injury. Cf. Clapp, 97 N.H. at 461 ("taxpayers should . . . not be forced to resort to ancient and rigidly limited procedures" to protect their rights); see also Pls.' Ex. 44 (Expert Report of

Professor Peter D. Enrich, a Professor at Northeastern University School of Law, concluding that the tax credit under the program is an "archetypal tax expenditure," which "serves the same functions as direct governmental spending" and has been recognized as equivalent to a direct appropriation "by public finance economists and analysts for at least half a century."); and Killian, 972 P.2d at 308 (dissent collecting cases and chastising the majority for "overlook[ing] the great body of precedent dealing with the religion clauses" that "have long viewed tax subsidies or tax expenditures similar to Arizona's tax credit as the practical equivalent of direct government grants." (quotation marks and brackets omitted)).

It is argued that since the money at issue in the program stems from donations made by private businesses and then passes through the hands of the scholarship organizations, it cannot be considered "public funds" or "money raised by taxation." The taxpayers' interests are not lessened, however, by the fact that the funds used for the program initiate from private organizations. All public funds originate from private sources. A taxpayer's interest is also not dependent on the number of hands the money passes through. A taxpayer's concern arises when a large portion of the donated funds are, as here, realized very much through a tax credit.

The State also highlights that the legislature here specifically indicated that the tax credits provided to donating businesses in the program "shall not be deemed taxes paid for the purposes of RSA 77–A:5, X." RSA 77–G:3. Thus, according to the State, the funds used by the program are nothing more than private donations. While the Court notes this legislative expression, the Court must complete its own constitutional analysis. O'Neil, 114 N.H. at 159.

This Court concludes that the program uses "public funds," or "money raised by taxation," and thus the program implicates Part I, Article 6, and Part II, Article 83. The New Hampshire tax code is the avenue used for producing and directing much money into the program. Contrary to the State's assertion that "the government has not set aside revenue for a specific purpose," see State's Trial Mem. 17, it appears to the Court that is indeed exactly what the legislature has done. Money that would otherwise be flowing to the government is diverted for the very specific purpose of providing scholarships to students.

This Court's view comports with 1965 Opinion of the Justices, where the New Hampshire Supreme Court advised that relieving certain entities of paying certain taxes may be a type of use of public funds. See 106 N.H. at 185. Furthermore, it is also clear that this Court's opinion comports with 1969 Opinion of the Justices, where the New Hampshire Supreme Court accepted that the property tax "exemption"[7] there at issue constituted "money raised by taxation" for the purposes of the No-Aid Provision, but did so without explicit analysis. 109 N.H. at 581-82.

C. Burden

The plaintiffs challenge the constitutionality of the program on its face.

> The party challenging a statute's constitutionality bears the burden of proof. The constitutionality of an act passed by the coordinate branch of the government is presumed. It will not be declared to be invalid except upon inescapable grounds; and the operation under it of another

[7] The tax "exemption" addressed in 1969 Opinion of the Justices appears to actually have been a tax credit, just as the program before this Court uses a tax credit. See Pls.' Ex. 25. 1969 Opinion of the Justices considered legislation that allowed the eligible property owners to be "exempt . . . from taxation each year in the amount of fifty dollars in taxes upon their residential real estate." Id. See also West's Tax Law Dictionary §§ C4530, T330 (West 2013) ("a credit is an allowance against the tax itself"; in other words, "[a] tax credit reduces tax liability in contrast to a deduction which reduces income subject to tax."); and Black's Law Dictionary 653 (9th ed. 2009) (a tax exemption is "[a]n amount allowed as a deduction from adjusted gross income, used to determine taxable income.").

> department of the state government will not be interfered with until the matter has received full and deliberate consideration.

Cloutier v. State, 163 N.H. 445, 451 (2012) (quotations and citation omitted). "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." State v. Hollenbeck,164 N.H. 154, 158 (2012) (citation and quotation marks omitted). The plaintiffs "must establish that no set of circumstances exists under which the [program] would be valid." Id. (citations and quotation marks omitted).

While the plaintiffs have stated in their Pretrial Reply Memorandum at 5 that they are also making an "as applied" challenge, the Court understands that the dispute here, brought by the plaintiffs as taxpayers, involves a broad challenge to the program, as it has been enacted and being implemented per its terms, with scholarship monies slated to go to, among others, "religious" schools, as violative of certain State Constitutional strictures.

D. Part I, Article 6 & Part II, Article 83

i. Purpose of the Program

The plaintiffs aver that the program should be struck down under these provisions because "the legislature passed the Program with a purpose of primarily benefitting religious schools." Second Am. Compl. ¶¶ 147, 150. In support of this assertion, the plaintiffs point to legislative history showing, among other things, lobbying of the Legislature by representatives of "religious" schools who anticipated that the program would benefit their institutions. See, e.g., Pls.' Mem. of Law in Supp. of Pet. for Prelim. Inj. 11. The plaintiffs also claim that the legislature knew of the "vast tuition

disparity" between secular and "religious" schools, which would lead legislators to realize that scholarships under the program "would mainly enable parents to afford religious private-school educations" as opposed to secular education. Id. at 11–12. The plaintiffs also aver that the legislature knew of the potential unconstitutionality of the program. Id. at 12–13.

The purposes of the program are unambiguously stated in the challenged legislation itself: To maximize parental choice in education; to promote the expansion of education opportunities for New Hampshire students; and to improve the overall quality of primary and secondary education in New Hampshire. Laws 2012, 287:1. These are secular purposes. While the program's purposes contemplate a significant role for "religious" schools in receiving scholarship monies and providing education, the Court concludes that the program was enacted with legitimate secular purposes. See in this regard, Brief of Amicus Pacific Legal Foundation, et al 4–10.

ii. Background of the Pertinent "Religion" Constitutional Clauses

When construing the State Constitution, the Court "give[s] the words the same meaning that they must have had to the electorate on the date when the vote was cast. Thus [the Court] first will inquire as to the plain meaning of the amendment." Smith v. State, 118 N.H. 764, 768 (1978) (citation omitted). In doing so, "the court . . . place[s] itself as nearly as possible in the situation of the parties" when the provision at issue was written, "that it may gather the[] intention from the language used, viewed in the light of the surrounding circumstances." Attorney-General v. Morin, 93 N.H. 40, 43 (1943) (quotation marks and citation omitted).

Examining the circumstances surrounding a constitutional amendment, and construing the intent of the words used, may involve review of a variety of sources. Statements made by delegates to a Constitutional Convention are only given consideration if they are "interpret[ing] the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object." N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r, 133 N.H. 17, 21 (1990). The Court, however, will not "redraft the constitution in an attempt to make it conform to an intention not fairly expressed in it." Id. (citation and quotation omitted). "Whatever may have been the undisclosed intent of the voters, it cannot prevail over their clearly expressed intent." Concrete Co. v. Rheaume Builders, 101 N.H. 59, 61 (1957).

Part I, Article 6, entitled Morality and Piety, reads in its entirety:

> As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.

The pertinent portion of Part II, Article 83 entitled Encouragement of Literature, etc., reads:

> 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: *Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.

Read together, Part I, Article 6, and Part II, Article 83, broadly obstruct, or bar, the provision of, or diversion of, "public funds," or tax monies, to financially aid "the schools of a religious sect or denomination." The sponsor of the No-Aid Clause at the 1876 Constitutional Convention, the body which adopted it and determined to offer it to the electorate, described its object as follows: "to prevent, in this state, the appropriation of any money raised by taxation for the purposes of sectarian education." Pls.' Ex. 84 at 124.

The intervenor-defendants focus on the history and context of these provisions—particularly Part II, Article 83—to argue that nothing in the State Constitution should be read to bar the program at issue. They aver that despite the passage of Part I, Article 6, public schools in New Hampshire remained Protestant in orientation in the earlier years of our State, and that that clause was enacted as a way to promote religious education in public schools. Intervenor-Defs.' Proposed Br. in Opp'n to Pls.' Mot. for a Prelim. Inj. 19–20.

With support from expert historian, Professor Charles L. Glenn, Professor of Education and Policy Studies at Boston University, they claim that the No-Aid Clause of Part II, Article 83 was a State "Blaine Amendment" adopted in an atmosphere of tension between Protestants and Catholics, and tainted by bigotry directed at Catholics. Intervenors-Defs.' Ex. 1 (Glenn Aff.) at 42–43. The plaintiffs counter, with support of

their own expert historian, Professor Charles E. Clark, Professor of History Emeritus at the University of New Hampshire, to the effect that although the No-Aid Clause was adopted "with the consciousness of a rapidly growing new Roman Catholic population and the rise of its church and schools . . . the amendment's purpose was simply the protection of the public school system and prevention of diversion of tax funds away from it." Pls.' Ex. 46 at 16–17. There were also other proposed constitutional amendments added in 1877 that indicated a desire to remove "government from the religious sphere . . . ." Id. at 17–18.

The Court accepts that the No-Aid Clause was adopted while major tension existed between Catholics and Protestants in this State concerning, among other things, the degree, if at all, the State would provide aid to those citizens, particularly Catholics, who wanted to send their children to "religious" schools. The Court also has no doubt that New Hampshire citizens of the era endured forms of serious religious bigotry, and suffered from very objectionable religious stereotyping. Yet, this being said, it is also the case, as Prof. Clark concludes, that a discernible major purpose of the No-Aid Clause, when enacted, was to promote and sustain public schools, which, over time, were losing their Protestant orientation.

Significantly, New Hampshire did not stand still in its efforts to eliminate vestiges of objectionable religious bias in the provision of public services such as education, and the Constitutional amendments adopted in 1968 reflect the view that, by that era, the New Hampshire Constitution had been cleansed of improper religious biases or slants. Pls.' Pretrial Reply Mem. 25–26; S. Marshall, The New Hampshire Constitution: A

Reference Guide 47–48 (2004); Pls.' Ex. 24 at 3; Pls. Ex. 46 at 19–20 (Expert Report of Professor Clark).

The New Hampshire Supreme Court, in a number of advisory decisions, has never questioned the force or integrity of the No-Aid Clause in Part II, Article 83, which is oriented to keep the State from financially supporting "religious" schools. Indeed, in 1955 Opinion of the Justices, the Court expressly discussed the purpose of the No-Aid Clause amendment, referencing the statements of the amendment's sponsor, as well as the question posed to the voters, going to whether they approved of prohibiting public money "from being applied to the support of the schools or institutions of any religious sect or denomination." 1955 Opinion of the Justices, 99 N.H. at 116 (quoting the Journal of the 1876 Convention). The Court concluded: "Article 83 is purposeful and meaningful and is intended to prevent the use of public funds for sectarian or denominational purposes." Id. (citation omitted).

The No-Aid Clause stands as a State constitutional expression, separate from the Federal establishment Clause "emphasiz[ing] the separation of church and state . . . ." S. Marshall, The New Hampshire State Constitution: A Reference Guide 17 (2004).

iii. New Hampshire Advisory Opinions

The parties dispute how the Court should interpret and apply the pertinent New Hampshire Supreme Court advisory opinions.

1955 Opinion of the Justices responded to questions propounded by the New Hampshire House of Representatives, going to whether a proposed bill designed to promote and support nursing education conflicted with the No-Aid Clause. 99 N.H. at

519. The first part of the proposed bill was to provide scholarships to nursing students, and the second part was to provide grants to hospitals that offered nursing education. Id. at 520.

The monetary aid to be provided by the proposed bill was to be subject to certain stipulations, namely:

> No hospital shall be eligible for such aid which imposes any religious or other unreasonable discrimination in the enrollment of student nurses, as determined by the board; and such aid shall be used by each eligible hospital solely and exclusively for defraying the cost of training student nurses in basic professional nursing and for no other kind of instruction or purpose.

Id. (quoting the proposed bill).

The Court stated that a determination of whether the No-Aid Clause "or similar articles in other constitutions" is violated "can be determined only by an examination of the factual situation and not by the application of generalizations," and the Court cited three U.S. Supreme Court decisions in regard to this type of review. Id. at 522. The Court looked to the purpose of the proposed bill, along with its "objectives and methods proposed" and determined that it did not violate the No-Aid Clause. Id. The Court concluded that the bill was designed to promote nursing, not to aid sectarian institutions, with the money offered available to all hospitals regardless of religious affiliation, and not to be used except for nursing education. Id. The Court was not concerned about the possibility that religious institutions would "incidentally" benefit as those institutions would merely be "conduits," the funds being expressly limited to a secular use with a "public purpose." Id.

1967 Opinion of the Justices responded to questions propounded by the Governor and the Executive Council, going to whether a bill passed by the General

Court violated the No-Aid Clause, and, if not, the Federal Establishment Clause. 108 N.H. at 270–71. The bill at issue would take money raised from sweepstakes revenues, and divide it among all public and nonpublic schools on a per pupil basis. Id. at 269. The funds were to be for "educational purposes," not to be used for any other purpose. Id.

The Court majority[8] declined to answer whether the proposed bill violated the No-Aid Clause because the Court advised that it violated the Federal Establishment Clause. Id. at 271. It cited, among other cases, Everson v. Board of Education, 330 U.S. 1 (1947), and that case's general iteration that states cannot allocate public funds "to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson, 330 U.S. at 16; see also 1967 Opinion of the Justices, 108 N.H. at 273 (quoting Everson). It considered cases following Everson, including Abington School District v. Schempp, 374 U.S. 203 (1963), which articulated a test for validity under the Establishment Clause that required courts to ask:

> what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Schempp, 374 U.S. at 222; see also 1967 Opinion of the Justices, 108 N.H. at 274 (quoting the Schempp test). It observed that Schempp was not on point because it involved religious exercises in school, and did nothing "to weaken the established principle that public funds cannot be used to assist a religious institution." Id.

[8] One of the Justices, Justice Lampron, advanced the view that the proposed bill passed constitutional muster in all respects. Id. at 275–78.

1969 Opinion of the Justices responded to questions from the New Hampshire Senate, going to whether several proposed bills violated, among other constraints, the No-Aid Clause and the Federal Establishment Clause. 109 N.H. 578. One such bill was to provide a $50 "tax exemption" on residential real estate for property owners with children attending nonpublic schools—whether religious or secular. Id. at 581.

The Court reviewed 1967 Opinion of the Justices and its Establishment Clause analysis. It also considered a United States Supreme Court case issued post-1967 that upheld a law from another state dealing with issues akin to those being then presented. Id. at 579–80 (reviewing Board of Education v. Allen, 392 U.S. 236 (1968) addressing the constitutionality of loaning public textbooks to students at nonpublic schools). The Court also reviewed 1955 Opinion of the Justices and its analysis under the No-Aid Clause. Id. at 580–81. The Court stated:

> Our state Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination. We are also of the opinion as expressed in Opinion of the Justices, 99 N.H. 519, 113 A.2d 114, that members of the public are not prohibited from receiving public benefits because of their religious beliefs or because they happen to be attending a parochial school.

Id. at 581. The Court then observed that the Schempp test, "relating to the Constitution of the United States, while not easy to apply, serves as a guide . . . [and] must be applied by us in considering the various proposals before us." Id. The legislative proposals the Court then considered, however, concerned not just the tax exemption issue but also issues relating to such matters as transportation for nonpublic students

and their entitlement to other benefits, which required perhaps more analysis or consideration.

The Court went on to advise, among other things, that the proposed property tax exemption would create "unconstitutional discrimination" by making available to "parents funds which they could contribute directly to the nonpublic school, including parochial schools, without restricting the aid to secular education." Id. And, even though some nonpublic schools are secular, the funds would also go towards supporting religious schools, "which is not a public purpose." Id. at 582.

1992 Opinion of the Justices responded to questions from the New Hampshire Senate regarding the constitutionality, under Part I, Article 6, of a proposed bill meant to promote "parental choice in education." 136 N.H. 357.[9] The proposed bill was to allow students to transfer to any "state approved school," including nonpublic "religious" schools, and the school district in which the student resides would be required to pay to the recipient school up to 75 percent of the cost of tuition in the sending school district. Id. at 357.

The Court advised that the proposed bill was unconstitutional under Part I, Article 6 as it provided no safeguards "to prevent the application of public funds to sectarian uses." Id. at 359 (citing the 1955 Opinion of the Justices and the 1969 Opinion of the Justices). The Court highlighted that "[o]ur Consitution recognizes the fundamental separation between church and state." Id. The Court concluded: "the sending district's payments would constitute an unrestricted application of public money to sectarian schools." Id.

[9] A question regarding the constitutionality of the proposed program under Part I, Article 12 and Part II, Article 5 was also presented but not answered. Id. at 358, 360.

Examined together, the above-discussed New Hampshire Supreme Court advisory opinions announce that the New Hampshire Constitution allows no more than incidental benefit to go to, or reach, "religious" schools through state aid, or tax money. 1955 Opinion of the Justices, 99 N.H. at 522 (calling incidental benefits to religious institutions "immaterial"); and 1969 Opinion of the Justices, 109 N.H. at 581 (requiring "sufficient safeguards . . . to prevent more than incidental and indirect benefit to a religious sect or denomination"). On the other hand, the State Constitution is not construed to work to deprive members of a religious denomination of public benefits because of religious beliefs. 1955 Opinion of the Justices, 99 N.H. at 522.

Significantly, these opinions reflect that a piece of legislation is not saved from a finding of unconstitutionality by virtue of the circumstance that the monies only get to "religious" schools through the choice of parents. 1992 Opinion of the Justices, 136 N.H. at 359 (advising as unconstitutional a proposed bill, establishing "parental choice" in education for those dissatisfied with the student's current school).

The advisory opinions also show that proposed programs are to be scrutinized based on the individual facts they present. 1955 Opinion of the Justices, 99 N.H. at 522. In this regard, the opinions also reflect that the New Hampshire Supreme Court has recognized that "religious" schools have, over many years, made up a significant percentage of New Hampshire's nonpublic schools, indeed "predominate." 1967 Opinion of the Justices, 108 N.H. at 274–75; 1992 Opinion of the Justices, 136 N.H. at 360.

The State argues that the pertinent advisory opinions should be read as adopting the Federal Establishment Clause analysis for determining, under Part I, Article 6 and

the No-Aid Clause, whether programs such as the one at bar pass constitutional muster. The State cites a number of Federal Establishment Clause cases culminating with Zelman v. Simmons-Harris, 536 U.S. 639 (2002). According to the State, in view of Zelman's Establishment Clause analysis, the New Hampshire Supreme Court would not follow its previous advisory opinions, or read them to not allow the instant program.

To be sure, Zelman upheld, under the Federal Establishment Clause, by a 5-4 vote, a program through which state funds were used to provide "voucher" aid to students to attend nonpublic schools—both religious and secular—of their parents' choosing, and also to provide tutorial aid for students who remained in public schools. 536 U.S. at 643–47 (describing the program at issue). The Zelman majority focused on whether the program had "the forbidden 'effect' of advancing or inhibiting religion." Id. at 649.

The Zelman majority observed that under the program at issue the participating religious schools did not receive aid directly from the state, but only obtained "voucher" funds if the parents chose to send their students there. Id. at 653. The program was deemed constitutional because religious schools only benefited through the exercise of "genuine choice" of the parents who could also use the funds toward secular education if they wished. Id. at 662–63.

Yet, our Supreme Court advisory opinions reflect that the pertinent State Constitutional provisions do more than mirror the Federal Establishment Clause. The opinions show that while our Supreme Court considered pertinent federal cases and at times used them as guides, the Court certainly undertook to apply and vindicate State Constitutional strictures themselves.

Moreover, the Zelman decision, which has been described as "alter[ing] the landscape of Establishment Clause jurisprudence in the school finance context," see Eulitt v. Me. Dept. of Educ., 386 F.3d 344, 348 (1st Cir. 2004), hardly reflects a strong consensus of view among the Justices—indeed it obtained only the support of a bare majority of the Justices, and featured strong dissents by Justice Stevens, Justice Souter (joined by three other justices), and Justice Breyer.

The intervenor-defendants expressly urge this Court to not give our State Supreme Court advisory opinions much weight. They stress that the opinions are "advisory" in nature, not the result of an adversarial process, and "oftentimes they are issued without outside input from interested parties on both sides of the constitutional question." Intervenor-Defs.' Proposed Br. in Opp'n to Pls.' Mot. for a Prelim. Inj. 27.

Yet, while advisory opinions are not "binding precedent," see State v. Ploof, 162 N.H. 609, 625 (2011), the pertinent ones here are on point consistently affirm that this State's pertinent constitutional constraints do not generally permit "public funds" to go to financially support "religious" schools, and have been sustained over time (the earlier ones being cited and discussed in later opinions, with the line of opinions going from 1955 to 1992). These are circumstances which add to their "persuasiveness." See in this regard Opinion of the Justices, 95 N.H. 540, 542 (1949) (advisory opinion Court in disagreement with a previous advisory opinion, illustrating the "tentative and provisional nature" of such opinions). While not regarding the pertinent advisory opinions as "binding precedent," the Court views them to be substantially persuasive. It is not appropriate for this Court to vary from them.

iv. Constitutionality of the Program

The Court concludes that the program must be deemed to be violative of the No-Aid Clause of Part II, Article 83 of the New Hampshire Constitution. While the program provides funds for schooling in a number of ways beyond regular public education, and a parent is accorded choice as to which school a scholarship is to be applied (or for homeschooling), these features are inadequate to enable the program totally to survive scrutiny under the New Hampshire Constitution. The program has been shown to have "money raised by taxation" inevitably go toward educational expenses at nonpublic "religious" schools without restriction regarding how the money may be used. The benefit to "religious" schools will be inevitably and obviously more than incidental or de minimis. While the Court has already noted that a significant percentage of New Hampshire's nonpublic schools are "religious" in nature, the Court need not inquire further into the depth or type of religiosity of those schools.

At the April 26, 2013 hearing, counsel for the plaintiffs indicated that the plaintiffs' main argument is under Part II, Article 83. The Court confines it analysis to this provision and declines to rule on whether the program violates the other constitutional provisions the plaintiffs advance. Nothing about the other constitutional arguments, moreover, would alter the Court's severability decision, discussed infra.

E. Severability

The plaintiffs argue that the program, if the Court deems it to be unconstitutional on any grounds, should be struck down in its entirety, notwithstanding the program's

severability clause.[10] The intervenor-defendants highlight that the program was contemplated to be severable, but raise certain constitutional concerns if the Court only disallows the program in regard to "religious"-type nonpublic schools.

In determining severability, the Court "presume[s] that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." Carson v. Maurer, 120 N.H. 925, 945 (1980) (quotation marks and citation omitted). The Court "must also determine, however, whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure." Id. (quotation marks and citation omitted). The Court will not sever a portion of a statute so as to "give[] a statute meaning the legislature did not intend, either by addition or subtraction from its terms." Claremont School Dist. v. Governor (Statewide Property Tax Phas-In), 144 N.H. 210, 218 (1999) (citation omitted). A severability clause will not save a statute if, after severing, "[v]ital objectives in the entire scheme . . . cannot be carried out." Opinion of the Justices, 106 N.H. 202, 207 (1965).

The program was enacted to promote parental choice, expand educational opportunities for New Hampshire students, and improve the quality of education in New Hampshire. If the Court disallows scholarship funds to be used at "religious" schools, but otherwise allows the program to go forward, the program's goals will be hampered, but not entirely stymied.

The Court deems severability to be appropriate, consistent with the Legislature's intent. Accordingly, the program may proceed, except that scholarship monies may not

[10] The plaintiffs did not take this position in their Second Amended Complaint. See Second Am. Compl. ¶ 163.

go to "schools or institutions of any religious sect or denomination" within the meaning of the No-Aid Clause of Part II, Article 83, and the associated tax credits are likewise disallowed. This works to maintain or preserve a certain amount of the desired parental choice as well as a certain amount of the desired expanded educational opportunities by allowing parents to choose between a nonpublic secular school, an out-of-district public school, or homeschooling. Further, the program will still be structured to instill a certain amount of "competition" for students among schools, consistent with the program's expressed purpose in that regard.

The plaintiffs argue that severing in such a manner would re-write the program so as to mainly benefit higher-income families—something the legislature did not intend. They also raise concerns respecting whether this would result in significant oversight and regulation to insure that schools comply with court-imposed restrictions. They aver that such severance would create a program far different from the one the Legislature contemplated. Yet in ruling for severability, and allowing the program to go forward in a "severed" state, the Court's honors its expressed core purposes, even though the program, as severed, will not be offering the full range of contemplated schooling opportunities; and the Court does not see the remedy it imposes as needing to result in any significant and unwanted oversight or regulation.

The intervenor-defendants argue that prohibiting the use of scholarship funds at nonpublic "religious" schools only violates the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause of the U.S. Constitution.[11] The Court

[11] The intervenor-defendants also argue that funding nonpublic secular schools at the exclusion of nonpublic religious schools has implications on free speech. See Intervenor-Defs.' Supplemental. Br. In Opp'n To Pls.' Mot. for Prelim. Inj. 37–38. The Court finds this argument undeveloped and generally

disagrees. The First Circuit Court of Appeals upheld, in the face of these arguments, a state program that provided public funds to students to be used for their educational expenses at out-of-district public schools or "nonsectarian" nonpublic schools, to the exclusion of religious schools. See Eulitt, 386 F.3d 344 (2004). The Court is persuaded by the Eulitt decision.[12]

The intervenor-defendants' Free Exercise Clause argument rests on the assertion that excluding "religious" schools from the program would exclude citizens from a public benefit because of their membership in a religion. This argument was rejected in Eulitt. Id. at 353-56. Moreover, the Court's severing would still allow students of all faiths and religions to participate. No student would be excluded from receiving a scholarship based on the student's religion.

New Hampshire students, and their parents, certainly have the right to choose a religious education. However, the government is under no obligation to fund "religious" education. Id. at 354. Indeed, the government is expressly forbidden from doing so by the very language of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 6; pt. II, art. 83. These provisions have their own force, and are to be enforced. Cf. Locke v. Davey, 540 U.S. 712, 719 n.2 (2004) (upholding a program to honor a clause in the Washington State Constitution that reads in pertinent part "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.").

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without merit. See Locke v. Davey, 540 U.S. 712, 721 n.3 (2004) (rather summarily dismissing a similar argument); and Eulitt, 386 F.3d at 356–57 (same).

[12] The Court's severance does not implicate the type of governmental scrutiny into the level of "religiosity" of nonpublic schools that so concerned Colo. Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008). Furthermore, while that Court questioned Eulitt, it did not address Eulitt directly. Id. at 1256–57.

The intervenor-defendants also argue that the Court's severance will violate equal protection rights guaranteed by the U.S. Constitution. This argument was also rejected in Eulitt. See 386 F.3d at 356; see also Locke, 540 U.S. at 721 n.3 (holding that if no Free Exercise Clause violation is found, a program receives rational basis scrutiny under an Equal Protection argument).

In regard to "rational basis scrutiny," and the severance's survival, if necessary, of any such scrutiny, the Court concludes that the severance certainly passes muster. See generally Eulitt, 386 F.3d at 356 (Under rational basis, explaining the program's justification to "include [the State's] interests in concentrating limited state funds on its goal of providing secular education, [and] avoiding entanglement . . . .").

The intervenor-defendants also argue that this Court's choice of severance will "violate the equal protection for religions component of Part II, Article 83" of the New Hampshire Constitution. Intervenor-Defs.' Proposed Br. in Opp'n to Pls.' Mot. for a Prelim. Inj. 36. On the contrary, this Court's severance comports with the plain language of the No-Aid Clause in prohibiting the application of scholarships "for the use of the schools or institutions of any religious sect or denomination." See also N.H. CONST. pt. I, art. 6 ("support of schools of any sect or denomination.").

IV. Conclusion

The plaintiffs' request for declaratory relief is **GRANTED** consistent with the Court's foregoing analysis. The Court declares that the program violates Part II, Article 83 of the New Hampshire Constitution.

The plaintiffs' request for injunctive relief is **GRANTED** to the extent that, effective immediately, the State and all those involved with the program's realization

and implementation are enjoined from proceeding to allow scholarships, as well as any associated tax credits, to be approved, granted, or applied, or in any way further carried forth or realized, in regard to, or toward, or covering educational expenses of "schools or institutions of any religious sect or denomination" within the meaning of Part II, Article 83.

The Court defers ruling on the plaintiffs' request for attorneys' fees and expenses. It is clear this Order will be appealed. The Court will rule on issues pertaining to attorneys' fees and expenses once the appeal is complete.

The plaintiffs have submitted a Proposed Findings of Fact and Rulings of Law; and the intervenor-defendants have filed a Request for Findings of Fact and Conclusions of Law. The Court's findings and rulings are contained in this Order. Insofar as the parties' proposed findings and rulings are consistent with this Order, they are granted; otherwise, they are denied or not acted upon.

So Ordered.

6/17/13
Date

John M. Lewis
Presiding Justice