State of New Hampshire Supreme Court

NO. 98-322

2000 TERM

AUGUST SESSION

REQUESTS OF THE SENATE FOR AN OPINION OF THE JUSTICES (SCHOOL FINANCING)

COMMENTS SUBMITTED BY NINE DEMOCRATIC STATE SENATORS

Caroline McCarley (Dist. 6), Allen Whipple (Dist. 8), Clesson Blaisdell (Dist. 10), Debora Pignatelli (Dist. 13), Sylvia Larsen (Dist. 15), John King (Dist. 18), Katie Wheeler (Dist. 21), Beverly Hollingworth (Dist. 23), Burton Cohen (Dist. 24)

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BACKGROUND

I. Legislative History

A. *Claremont II*

On December 17, 1997, the New Hampshire Supreme Court handed down its opinion in *Claremont School Dist. v. Governor (Claremont II)*, 142 N.H. __, 703 A.2d 1353 (1997). This Court held that the current property-tax method of funding local education violates Pt. II, Art. 5 of the New Hampshire Constitution. *Claremont II*, 703 A.2d at 1354. Rather than remand for consideration of a remedy, this Court retained jurisdiction of the case pending action by the legislature. *Id.* at 1360. The Legislature is expected to accomplish four related, but separate tasks. The Legislature must:

- establish educational standards that comply with the constitutional requirement that the State must provide its children an adequate education, *id.* at 1358;
- develop criteria to implement that constitutionally adequate education, *id.* at 1359;
- ensure that schools are comparably funded, *id.* at 1360; and
- institute a system that finances education from State resources which meets constitutional requirements. *Id.*

The Legislature must accomplish these tasks by the end of the current legislative session. *Id.*

B. Education Plans in the House and Senate

All money bills must originate in the House. N.H. CONST., Pt. II, Art. 18. Thus, on March 25, 1997, a bipartisan group of Representatives introduced HB 1075, also known as the "ABC Plan" – "Advancing Better Classrooms." The plan was debated and amended by both the House Education and House Finance Committees.

After some deadlock, proponents and detractors reached a widely publicized compromise:

- Implementation of the ABC plan will be delayed for a year;
- The Legislature will provide increased interim State funding to local schools, HB 1280 §5 (*doc. no. 1998-1849s* at 13);
- A commission will determine which formula should be used to calculate per-pupil cost (a matter of substantially differing expert opinion) and will issue a report to the Legislature by December, 1998, HB 1280 §3 (*doc. no. 1998-1849s* at 12); and
- If the Legislature is unable to reach agreement on a more sophisticated plan for financing education, the ABC plan, as written, will be the fall-back.

Five months after *Claremont II*, the bill as amended was passed by the full House on May 14, 1998, and was immediately transferred to the Senate. Before it was referred to any Senate committee, and prior to any Senate hearings,[1] the bill was taken up by the full Senate on May 21, 1998. On the floor, the Senate used a crafty parliamentary procedure. In order to retain the ABC plan, but simultaneously transfer questions concerning it to this Court, the Senate deleted the entire contents of HB 1280, which related to criminal background checks for school employees and volunteers,[2] and replaced it with the entire provisions of HB 1075, the ABC plan. The bill was in the possession of the Senate for less than a week.

C. Senate Resolutions Posing Questions for the Supreme Court

The Senate then passed Senate Resolution 4, incorporating pre-drafted questions, over the objections of the nine undersigned Senators. Senate Resolution 4 asks this Court questions about

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[1]At the time of the transfer, the Senate had two scheduled hearings on the bill: one on May 27, 1998, and one on June 1, 1998, both after the date of the transfer to this Court. *See* 35 SENATE CALENDAR (May 21, 1998), *Appendix* at 2.

[2]The criminal background items were inserted as an amendment to another bill for further action by the Legislature and are not relevant here.

the viability of provisions of now HB 1280 – the ABC plan. The bill now presented to this Court by the Senate was not subject to public hearing, public comment, committee debate, markup, amendment, or any legislative action by the Senate.

II. The ABC Plan Is Comprehensive Education Financing Reform Designed to Comply with Constitutional Requirements

The ABC Plan is a comprehensive educational financing plan designed to comply with this Court's decision in *Claremont II*, and with the provisions of the New Hampshire Constitution. HB 1280 § 1, Preamble (*doc. no. 1998-1849s* at 1); Senate Resolution 4.

A. Financing an Adequate Education

To finance an adequate education, the bill first creates a methodology to calculate the cost of an adequate education per student. Proposed RSA 193-E:3 (*doc. no. 1998-1849s* at 3-5). The methodology adds up all the costs associated with education (taking into account the various items on which money is spent and the various sources of money), and divides that by the total number of students (taking into account the vagaries of student attendance). This calculation results in an average cost to educate a New Hampshire student. Recognizing that this methodology may have flaws, it is made subject to refinement pending study by an expert commission created for the purpose. HB 1280 §3 (*doc. no. 1998-1849s* at 12).

To maintain constitutional proportional and reasonable tax rates statewide, the ABC plan abates taxes for those towns that are able to raise more than the minimum amount necessary for an adequate education. It does this by calculating the total amount of money needed statewide to fund all students' educations, divided by the equalized value of property in the state. The result is a state education tax rate which will be a function of what is determined to be an adequate

education. HB 1280 § 10 (*doc. no. 1998-1849s* at 14). The value of a town's property multiplied by this state education tax rate is the amount the town is deemed to be able to raise on its own. HB 1280 § 12 (*doc. no. 1998-1849s* at 14-15). By multiplying the cost of an adequate education in a town by the number of students, the formula calculates the amount of money needed by that town to pay for all of its students' adequate educations. These two figures are compared.

To aid poor towns, the Legislature recognizes its constitutional obligation to have on hand the money necessary to distribute to needy districts (to be raised by methods outside the purview of the ABC plan). Proposed RSA 193-E:8 (*doc. no. 1998-1849s* at 10). Using the per-pupil cost of an adequate education described above, the bill gives money to the districts that cannot raise that amount such that they will be guaranteed by the State to have the minimum amount necessary. Proposed RSA 193-E:7 (*doc. no. 1998-1849s* at 10). Districts are required to use the money for educational purposes. Proposed RSA 193-E:9 (*doc. no. 1998-1849s* at 10-11). If a town can raise more than the minimum required, that town's share of the state education tax is abated accordingly. HB 1280 § 15 (*doc. no. 1998-1849* at 15).

B. Guaranteeing an Adequate Education

After stating its purposes in the preamble, the bill sets forth criteria to define a constitutionally adequate education. Proposed RSA 193-E:2 (*doc. no. 1998-1849s* at 2-3). The bill attempts to allocate responsibility for providing local education between state and local authorities. Districts every three years must submit to the state a "local education improvement and assessment plan" containing a variety of programmatic data and the districts' assessment of how well their educational programs work. Proposed RSA 193-E:4, I (*doc. no. 1998-1849s* at 5). Districts also every year must submit to the state a variety of quantitative, results-based

"performance indicators," including attendance and drop-out rates, test results, proportion of graduates going on to college, etc. Proposed RSA 193-E:4, II (*doc. no. 1998-1849s* at 5). The State is required to polish existing educational standards, and districts are required to comply with them. Proposed RSA 193-E:4, III (*doc. no. 1998-1849s* at 6). These educational standards requirements are collectively known as the "quality standards." Proposed RSA 193-E:4 (*doc. no. 1998-1849s* at 5). The quality standards are to be periodically updated through a process involving the Department of Education, the Legislature, parents, employers, educators, and members of the public. Proposed RSA 193-E:5 (*doc. no. 1998-1849s* at 9).

The bill sets up a number of enforcement procedures to ensure that local schools are performing well. If a district does not meet the quality standards, the state may declare it a "district in need of assistance" (DINA). Proposed RSA 193-E:4, IV (*doc. no. 1998-1849s* at 6). Districts that exceed the quality standards may receive formal recognition. Proposed RSA 193-E:4, VII (*doc. no. 1998-1849s* at 6). Any district may request the state's help, and the state is required to provide available resources to DINAs that ask. Proposed RSA 193-E:4, VIII (*doc. no. 1998-1849s* at 6-7). The bill provides a number of resources for school districts that don't meet the quality standards. Proposed RSA 193-E:4, IX-XII (*doc. no. 1998-1849s* at 7-9).

The bill creates a variety of mechanisms for oversight and for keeping current the various calculations and standards it contains. Proposed RSA 193-E:10 (*doc. no. 1998-1849s* at 11) (legislative oversight committee to review state education policy and to ensure ABC program working as intended); HB 1280 § 3 (*doc. no. 1998-1849s* at 12) (commission to study costs of adequacy and distribution of funds to districts); HB 1280 § 4 (*doc. no. 1998-1849s* at 13) (commission to study special education); HB 1280 § 6 (*doc. no. 1998-1849s* at 14) (state study of

distribution of school building aid).

The bill also contains numerous miscellaneous provisions to ensure that each district's attendance records are accurate; that towns' property values are consistent; that schools maintain the quality standards; that towns, districts, charter schools, and the state have authority to implement the plan; and other necessary changes in current law.

C. One-Year Delay

Section 5 of the bill is the Sytek compromise. It delays implementation of the ABC plan for one year. In the interim, it provides funding to local districts equal to the amount school districts should have been getting under the Foundation Aid (Augenblick) formula, had Augenblick been fully funded, or according to the alternative aid formula, whichever is greater. HB 1280 § 5, III (*doc. no. 1998-1849s* at 13). The reason for the delay is that the House recognized that many of the bill's provisions are based on preliminary data, that there is a need for more sophistication in calculating what constitutes an adequate education, and how much one costs. The delay was based on the Legislature's commitment to the principles and requirements of *Claremont II*, and the humble recognition that the task before it needs more expertise than the Legislature alone has. The commitment is demonstrated by a substantial increase in State funding in the interim.

SUMMARY OF ARGUMENT

The nine undersigned Senators first argue that, based on the political question doctrine, this Court should decline review of the questions submitted. They also argue that it should decline the questions because there is pending litigation in the matter, and because the Legislature has not had an adequate opportunity to construct a final plan. The Senators point out that several of the questions are not appropriate for review for a variety of other reasons.

The Senators then argue that if this Court reaches the questions, it should find the ABC plan does not violate the proportional taxation requirement in our constitution. They note that the ABC plan's detractor's argument that the plan will lead to differential effective tax rates is based on the erroneous assumption that the abatement will be returned by towns to taxpayers. Because there is no such requirement, disproportionality cannot be proved.

The Senators next argue that there is no such thing in New Hampshire as an "effective rate." This Court has eliminated the concept in a recent case.

The Senators also argue that because property values are not static, and are affected by tax rates, the ABC plan will have the effect, over time, of closing the tax gap between property rich and property poor towns. Even if disparities are not rectified immediately, the plan should be given a chance to work.

Finally, the nine Senators argue that the ABC plan does not create any unfunded mandates because the local cost of complying with the plan are negligible, and are likely to be included in the cost of an adequate education paid for by the State.

ARGUMENT

I. The Supreme Court Should Decline Review of the Questions Posed by the Senate

A. This Court Should not Review Political Questions

The New Hampshire Constitution, Pt. II, Art. 74, authorizes, but does not require, this Court to answer questions posed to it by the Legislature. *See e.g.*, *Opinion of the Justices*, 115 N.H. 329 (1975).

This Court may decline questions upon the "political question doctrine," which is recognized in New Hampshire. *Monier v. Gallen*, 122 N.H. 474 (1982); *Green v. Shaw*, 114 N.H. 289 (1974); *O'Neil v. Thomson*, 114 N.H. 155 (1974).

The doctrine is a recognition of the fact that, for all its imperfections, the legislative branch has the advantage that it is perpetually grounded in democratic elections, and it need not pay any particular attention to the strength of its existence or the root of its power.

> Disregard of inherent limits in the effective exercise of the Court's 'judicial power' not only presages the futility of judicial intervention . . . [i]t may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."

Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). In his book, *The Least Dangerous Branch*, Professor Bickel discussed the problems inherent in courts, which have little existential grounding in a democracy, stepping beyond the authority conferred by only the chimera of draped robes. The political question doctrine, he wrote, is founded in

> "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) at 184. See *Gilligan v. Morgan*, 413 US 1, 8 (1973) (suit by Kent State students after National Guard fatally shot protestors; court said allowing review "would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities").

How public education is funded is a quintessentially legislative function. *Claremont II*, 703 A.2d at 1360. The Legislature has not yet done its work – the Senate having had the House Bill for less than a week. Injecting itself into the legislative process at such an early stage calls into question this Court's role in New Hampshire's system of government.

Declining review of this case does not imply that this Court has no role in cases that have political implications or overtones. *See e.g.*, *Sununu v. Clamshell Alliance*, 122 N.H. 668 (1982); *Monier v. Gallen*, 120 N.H. 333 (1980). Each of those cases came to this Court in the context of a litigated controversy, with a plaintiff and a defendant, where a private remedy was at stake.

B. This Court Should Abstain from Interlocutory Review When There Is Pending Litigation

In matters where there is pending litigation, or there is likely to be, this Court has repeatedly and wisely abstained from reviewing the law at an early stage.

> "While the official power of the Legislature to enact the proposed law is presented by the question, we conceive it to be our duty in the present situation, in the light of the constitutional provision referred to, to request to be excused from submitting our individual views at this time. If the law is passed and the question subsequently litigated before the court, we think the justices ought not to be hampered, or the parties prejudiced, by the formal expression of individual views now held, formed upon less investigation than we feel ought to be given to the

decision of the question."

Opinion of the Justices, 76 N.H. 597, 600 (1911).

> "By the general rule of the common law, the statute, and the constitution, the justices of the supreme court are forbidden to give advice in matters that may come before the court for decision. The constitution introduces an exception to the rule in some cases, in which the official power or official duty of the senate, the house of representatives or the governor and council is doubtful, and in which the opinion of the justices are desired by one of those bodies upon an important question of law necessary to be determined by the body requiring the opinions. The questions now proposed . . . may come before the court for decision, and do not appear to be within the exception."

Opinion of the Justices, 67 N.H. 600, 601 (1892). *See also, Petition of Turner*, 97 N.H. 449, 450 (1952) ("opinions will not be given upon matters likely to come before the court for decision as to which the members might be disqualified by their prior expression of opinion"). There is little doubt that at some point either the *Claremont* plaintiffs or defendants will come before this court asking for review of whatever financing plan the Legislature ultimately creates. The case has already had its share of questions regarding the appointment of a judge sitting for another who was recused. *Claremont School District v. Governor* (motion to vacate), slip op. (decided May 8, 1988). There is no need to now exacerbate that situation.

Moreover, when there is pending litigation in the case, it is proper for this Court to abstain from involvement in interlocutory matters. *Petition of Turner*, 97 N.H. 449 (1952); *In re School Law Manual*, 63 N.H. 574 (1885) ("a prospective determination of the validity of [the proscribed form for publication of law books], without notice and opportunity of hearing given to persons whose interests may be involved in the facts and the law of a particular case, would not be an exercise of judicial power").

C. This Court Should Wait Until the Legislature Finishes its Development of a School Funding Plan, and Should Wait Until the Case is Ripe

At this point in its legislative career, the ABC plan has only been considered by the House of Representatives. The Senate, which requested this Court's opinion, had the bill before it for less than a week. No Senate committee had considered it, held hearings on it, or taken any action on it. The only thing the Senate did was to send HB 1280 here.

In *Opinion of the Justices*, 70 N.H. 640 (1901), this Court declined to review questions that were submitted too late for the opinion to useful to the Legislature. In this case, where the Senate has not yet taken any action on the bill, where there are strongly-held opinions about the wisdom of it, and where it is very likely that the bill will be substantially amended (if not abandoned) by the Senate, whatever opinion expressed by this Court on the questions posed here are likely to be eclipsed by Senate action. At most, a Supreme Court opinion will only serve to hamper further debate on the bill, stymie its development, and (if the bill is determined to be constitutional) cause the Legislature to halt further refinement of it. *See Opinion of the Justices*, 115 N.H. 329 (1975) (declining review because bill not in possession of the Senate); William Ardinger, *An Analysis of the New Hampshire Supreme Court's Recent Application of the "Proportional and Reasonable" Standard to Restrict the Legislature's Taxing Power*, 33 N.H. B.J. 331, 337 (1992) ("The 'special risks' inherent in the advisory opinion process are exacerbated when the Court is asked to opine on highly technical issues in a speciality area such as State taxation.") (citing *Petition of Public Service Co. of N.H.*, 125 N.H. 595, 597 (1984)).

D. Further Reasons to Decline Specific Questions

Article 74 does not authorize this Court to review questions arising from existing statutes. *Opinion of the Justices*, 19 N.H. 266, 268 (1979) (declining review because "the request seeks, to a large extent, an interpretation of existing statutes"); *Opinion of the Justices*, 123 N.H. 510 (1983); *Opinion of the Justices*, 121 N.H. 280 (1981); *Opinion of the Justices*, 116 N.H. 358 (1976); *Opinion of the Justices* 115 N.H. 222 (1975); *Opinion of the Justices*, 102 N.H. 187 (1959).

SB 508, the subject of Senate Resolution 3, is merely a minor change in the way equalization ratios are calculated, and contains no significant policy changes. As such, review of the question is barred. Moreover, the bill was rejected by the Senate Education Committee by a vote of six to one. It thus has no chance of becoming law and must be declined by this Court. *Opinion of the Justices*, 70 N.H. 640 (1901) (declining review of questions the answers for which could be of no use to the Legislature).

Questions 3 and 4 of Senate Resolution 4 ask whether the foundation aid formula is constitutional in the context of the one-year interim funding before the ABC plan goes into effect. It is relevant only to the "Sytek compromise." The portion of the bill in question is not a significant modification of existing Foundation Aid. As such, review of the questions are barred.

Moreover, question 4 is hypothetical. It asks whether Foundation Aid is constitutional <u>if</u> the equalized adequate school education rate is applied to it. Article 74 does not authorize this Court to review cases that involve disputed facts. *Opinion of the Justices*, 123 N.H. 510 (1983); *Opinion of the Justices,* 116 N.H. 358 (1976). A hypothetical question is so fact-bound that review of it is barred.

Question 5 asks a question about existing law. School districts are already required to comply with minimum standards, and have done so since 1919. As such, review of the question is also barred.

Question 6 is a catch-all that asks if anything else the Senate hasn't thought of may be wrong with the bill. The question is far too broad for meaningful argument or meaningful opinion. This Court routinely declines to answer such broad questions. *See e.g. Opinion of the Justices*, 140 N.H. 22 (1995); *Opinion of the Justices*, 116 N.H. 358 (1976); *Opinion of the Justices*, 137 N.H. 260 (1993).

II. The ABC Plan's Abatement Provision Does Not Violate the Constitutional Requirement of Proportional Taxation

A. Alleged Constitutional Problems with the ABC Plan Are Based on an Erroneous Assumption That the Abatement Will Be Returned to Taxpayers

Detractors of the ABC plan argue that its abatement provision creates disproportionate taxes, N.H. CONST., Pt. I, Art. 5, by allowing those towns that receive an abatement to pay a lower effective tax rate. Although the argument is at first alluring, it is based on assumptions that have no grounding in law or in the practicalities of the plan.

> "The test to determine whether a tax is equal and proportional is to inquire whether the taxpayers' property was valued at the same per cent of its true value as all the taxable property in the taxing district."

Bow v. Farrand, 77 N.H. 451, 451-52 (1915); *see also, Smith v. N.H. Dept. of Revenue Admin*, 141 N.H. 681, 686 (1997) (proportional means equal in valuation and uniform in rate); *Opinion of the Justices*, 101 N.H. 549, 554 (1958) (proportional "requires a uniform valuation and a uniform rate throughout the district by which the tax is levied"); *Opinion of the Justices*, 117 N.H. 749 (1977).

In these cases, the focus of the court's inquiry is on the taxpayer, and whether each taxpayer's rate is proportional.

It is beyond argument that, without the abatement provision, the ABC plan would create equal taxes statewide. The State would set the tax rate, issue the appropriate warrant to each town, and collect from each town an amount equal to the rate times the property value in the town. The resulting tax rate would be the same in all towns.

The plan's detractors take issue, instead, with the abatement provision, which credits to some towns the amount greater than that necessary to educate the town's children. The

detractors contend that the result is a lower effective tax rate in those towns receiving the abatement. While the abatement is a paper transaction, and no actual cash changes hands, the nature of the transaction is as though the money actually leaves the hands of the town, is taken by the State, and then returned to the town.

A town that receives the abatement then has a choice of what to do with it. Through its budgeting process, the town may distribute the money to property taxpayers according to the amount they paid or by any other formula, or the town may retain or spend the money on new services or infrastructure. There is no requirement in the ABC plan, and no known requirement in any other law, that the town must distribute the money to property taxpayers. The town is free to save or spend the money as it sees fit.

If all towns collect the uniform rate, and those receiving the abatement retain or spend the money, then all property taxpayers in the State will pay the same property tax rate. Thus, even with the abatement, there is no constitutional proportionality problem with the ABC plan. Arguing that there is assumes that all towns, instead of retaining or spending the money, will necessarily give it to property owners. The assumption is unfounded.

If a town alone gets a rebate, there cannot be a proportionality problem unless the town is required to give the money to taxpayers explicitly based on the taxpayers property tax burden.

> "Towns must prove that they (and derivatively their taxpayers) have been assessed at greater than market value in order to prove disproportionality."

Appeals of Town of Bow, 133 N.H. 194, 199 (1990) (emphasis added). Disproportionality cannot be proved by pointing to the abatement alone. Because there is no requirement of a refund upon which the detractors' argument can be based, the ABC plan simply raises no constitutional

proportionality issue.

The assumption that towns will issue refunds is a fact that has not been proved, and cannot be proved in this Article 74 forum where there is no factual record.

B. There Is No Such Thing as an Effective Rate

The plan's detractors, as noted above, base their argument on allegedly differing effective tax rates. Based on the law in New Hampshire, there is no such thing as an "effective rate."

In *Appeal of Campaign for Ratepayers Rights*, __ N.H. __, 706 A.2d 675 (1998), a ratepayer organization claimed that an electric utility was in violation of a requirement that electric rates must be the same for all customers. It argued that by granting special contracts to industrial customers, the utility was fixing "rates" that differed from customers for whom such contracts were not available. This Court found, however, that the utility was not in violation of the equal-rate requirement because it did not adjust the components that went into the rate. This Court found, instead, the utility left rates the same, and merely gave a contract abatement to some customers. Even though the contract customer paid a lower effective rate, without having adjusted the underlying elements that compose the rate, this Court held that the rate itself was unchanged.

This Court thus held that there is no such thing as an "effective rate." The underlying elements of the rate are what determine the rate, and a rate remains unchanged as long as the underlying elements are unchanged.

The abatement provision in the ABC plan operates the same way. The tax rate for each taxpayer is the same across the State. Even if towns refund the abatement to property taxpayers, the calculation by the town of the taxpayer's tax rate remains unchanged. The underlying

elements of the town's tax rate – assessed value of property, etc. – are not effected. The town's tax rate is therefore unchanged. As such, even if the taxpayer pays what one might call a lower effective rate, the taxpayers tax rate is the same.

Accordingly, because the ABC plan does not change tax rates for any town, there is no constitutional disproportionality in the plan.

C. Property Values are Affected by Tax Rates

Property values are not static. They are affected by a multitude of factors, including property tax rates. When public money is well spent, property values increase; when it is inefficiently spent, property values decrease. Wallace Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. OF POLT. ECON. 957-971 (1969) (and subsequent literature); John Yinger, *Capitalization and the Theory of Local Public Finance*, 90 J. OF POLT. ECON. 917-943 (1982). In any case, buyers of real estate take into account the perpetual stream of liabilities that property taxes create, and value the property accordingly. If buyers perceive the rate continually going up, they are willing to pay less for the property. Thus, property tax rates are a crucial element of the value of property. *See, Felder v. Portsmouth*, 114 N.H. 573 (1974).

As the effect of the ABC plan – the possibility of higher local tax rates in "rich" communities, and much lower rates in "poor" towns – is recognized by buyers and sellers of property, the value of property will adjust accordingly. In the "rich" towns, the value of property will decrease because of the possibility of higher school taxes. In the "poor" towns, the value of property will increase because of the guarantee of lower school taxes. Thus, statewide there will, over time, be a decreasing disparity in assessed values between property rich and property poor

towns.

The ABC plan will immediately reduce the disparities. But even if it does not overnight create identical tax rates in every town, over time it will have the effect of decreasing the property-tax disparity this Court found so abhorrent in *Claremont II.* Because the ABC plan will lessen disparities, and has the tendency to continue to do so as it is allowed to operate, it accomplishes the remedy demanded by this Court in *Claremont II.* Any tax plan implemented to address *Claremont II* must be expected to have long-term ripples throughout New Hampshire's economy. Without a factual record showing that the ABC plan does not address *Claremont II*, but with the likelihood that it ultimately will, the plan is constitutional. To demand immediate elimination of disparity is to erect a requirement that any tax plan will fail. William Ardinger, *An Analysis of the New Hampshire Supreme Court's Recent Application of the "Proportional and Reasonable" Standard to Restrict the Legislature's Taxing Power*, 33 N.H. B.J. 331, 337 (1992). There is virtue in phasing-in changes that may result in significant social and economic upheaval. *See Brown v. Board of Education*, 394 U.S. 294 (1955) (requiring desegregation with "all deliberate speed").

III. The ABC Plan Creates No Unfunded Mandates

Detractors of the ABC plan argue that it is a violation of the constitutional prohibition against unfunded mandates. N.H. CONST., Pt. I, Art. 28-a. The ABC plan, however, creates no unfunded mandates.

To violate Article 28-a, there must be a mandate of responsibility from the State to a municipality, and the requirement of additional local expenditures because of the mandate. *Opinion of the Justices*, 135 N.H. 543 (1992). Where "[t]he local legislative body will have the last word on both the program and the funding," *id.* at 547, there can be no violation of the unfunded mandates clause. Moreover, there can be no violation when any increased local expenditures are negligible. *See N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r*, 133 N.H. 17 (1996) (statute deeming diseases job-related created substantial new responsibilities for localities). If before the new law the locality already had a financial duty, there is no constitutional violation. *Nashua School Dist. v. State*, 140 N.H. 457 (1995).

The ABC plan creates a new responsibility for localities only to the extent that the State will require increased data reporting for the various oversight provisions necessary to administer the plan. School districts have operated under data reporting requirements for years. Thus, there are no new significant duties requiring local expenditures. To the extent that there are, they are part of the cost of an adequate education, will be incorporated into the district's budget, and will become part of the matrix used to calculate the cost of an adequate education. Thus, any increased cost will either be negligible and therefore not an additional mandate, or will be paid for by the State and therefore not unfunded. In either case, there is no constitutional violation.

CONCLUSION

The nine undersigned Senators urge this Court to defer consideration of the constitutionality of the ABC plan until such time as the Legislature finishes its work. If this Court reaches the questions, the Senators urge this Court to find the ABC plan is constitutional in all respects.

Respectfully submitted,

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By their Attorney,

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Dated: August 20, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for the nine Democratic State Senators request that Attorney Joshua L. Gordon be allowed to argue orally.

I hereby certify that on August 20, 2000, a copy of the foregoing will be forwarded to Judy E. Reardon, Esq., Counsel for the Governor; Honorable Joseph Delahunty, President of the Senate; Philip McLaughlin, Attorney General.

Dated: August 20, 2000

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APPENDIX