THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT[1]

In this case, the plaintiffs challenge the manner in which the State carries out certain education-related obligations imposed by the State Constitution. See Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) ("ConVal"); see also Doc. 17 (Pls.' Am. Compl.). The parties now cross-move for partial summary judgment regarding the plaintiffs' claim that the State administers the Statewide Education Property Tax ("SWEPT") in an unconstitutional fashion. See Doc. 49 (Pls.' Mot. Summ. J. – SWEPT); Doc. 56 (State's Obj. & Cross-Mot. – SWEPT); Doc. 53 (Coalition's[2] Obj. & Cross-Mot.); see also Doc. 17. The Court held a hearing on the motions on July 12, 2023. For the reasons that follow, the plaintiffs' motion is **GRANTED**, and the cross-motions filed by the State and the Coalition are **DENIED**.

[1] The Court intentionally delayed issuing this Order so that it could be issued contemporaneously with the order in Contoocook Valley School District, et al. v. State of New Hampshire, docket no. 213-2019-CV-00069. The Court did this to afford the parties an opportunity to assess how or if that order impacts the procedure in this case. The SWEPT issue in that case was withdrawn by the plaintiff. To the extent the delay has frustrated any of the parties, the Court apologizes but remains convinced it was in the best interest of justice to do so.

[2] The Coalition represents a group of New Hampshire cities and towns that oppose the plaintiffs' challenge to the SWEPT. See Doc. 48 (Dec. 5, 2022 Order). On December 5, 2022, the Court allowed the Coalition to intervene solely as to this aspect of the case. See id.

Standard of Review

"In considering . . . cross-motions for summary judgment, [courts] consider the evidence in the light most favorable to each party in its capacity as the non-moving party." ConVal, 174 N.H. at 162–63. Summary judgment shall be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. As the parties acknowledged during the July 12, 2023 hearing, the facts underlying the plaintiffs' Part II, Article 5 challenge to the SWEPT are undisputed. Rather, the relevant dispute centers on the proper interpretation of our State's education funding jurisprudence, and how the law applies to the existing education funding and tax scheme.

Education Funding Jurisprudence

"Under our education funding jurisprudence, Part II, Article 83 of the State Constitution 'imposes a duty on the State to provide a constitutionally adequate education . . . in the public schools in New Hampshire and to guarantee adequate funding.'" ConVal, 174 N.H. at 156 (quoting Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) ("Claremont I")). "To comply with that duty the State must 'define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.'" Id. at 156–57 (quoting Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) ("Londonderry I"). Under Part II, Article 5 of the State Constitution, "constitutional taxes" must "be proportionate and reasonable—that is, equal in valuation and uniform in rate." Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) ("Claremont II") (citations and quotations omitted)).

Over time, the legislature has crafted several tax schemes aimed at complying with the above-described constitutional obligations. As of December 17, 1997, properties located within a particular school district were taxed at whatever rate was necessary to "meet the obligations of the school budget" within that district. See Claremont II, 142 N.H. at 467 (explaining Department of Revenue Administration ("DRA") set unique tax rates for properties in each school district). In Claremont II, a group of school districts, students, taxpayers, and parents successfully challenged this tax scheme. See id. at 465. The Claremont II plaintiffs argued (as relevant here) "that the school tax is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education" and thus "is a State tax that should be imposed at a uniform rate throughout the State." Id. at 467. The State countered that setting district-specific tax rates was constitutionally appropriate, characterizing the school tax as "a local tax determined by budgeting decisions made by the district's legislative body and spent only in the district . . . ." Id. at 467–68 (noting State's argument that this practice allowed each school district "to decide how to organize and operate their schools"). The Claremont II court concluded that because "the purpose of the school tax" was "overwhelmingly a State purpose"—i.e., fulfilling the State's duty "to provide a constitutionally adequate education . . . and to guarantee adequate funding"—it constituted a State tax. Id. at 469.

Having resolved that issue, the Claremont II court next analyzed whether the tax scheme was "proportional and reasonable throughout the State in accordance with" Part II, Article 5. Id. at 470; see also id. at 468 ("Part II, article 5 of the State Constitution provides that the legislature may 'impose and levy proportional and reasonable

assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.'"). Citing evidence that the equalized tax rate for the 1994–95 school year was approximately four times higher in Pittsfield than in Moultonborough, the court concluded that the tax was disproportionate and unreasonable. Id. at 470–71. In reaching this conclusion, the court emphasized that "because the diffusion of knowledge and learning is regarded by the State Constitution as 'essential to the preservation of a free government,' N.H. CONST. pt. II, art. 83, it is only just that those who enjoy such government should equally assist in contributing to its preservation." Claremont II, 142 N.H. at 470–71. Given these conclusions, the court explained that "[t]o the extent . . . the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." Id.

In response to Claremont II, the legislature solicited an advisory opinion from the Supreme Court regarding the legality of an alternative tax scheme. See Opinion of the Justices (School Financing), 142 N.H. at 892–97. As relevant here, the proposed scheme "purport[ed] to establish a uniform State education tax rate based upon the equalized value of all taxable real property in the State." Id. at 899. However, the scheme included "a 'special abatement' for 'the amount of state education tax apportioned to each town in excess of the product of the statewide per pupil cost of an adequate education times the average daily membership in residence for the town." Id. (cleaned up). Under the proposed scheme, the DRA would "calculate each town's tax by multiplying the State education tax rate by the total equalized value of the property within it, less any special abatement." Id. (cleaned up). "Thus, the special abatement

applie[d] before any taxpayer within a given town receive[d] a tax bill." Id. (expressing Supreme Court's view that substantive legal issues would "remain unchanged" if proposed scheme provided for actual collection of revenue raised through uniform State education tax, and thereafter reimbursed taxpayers pursuant to the special abatement).

Ultimately, the Supreme Court concluded that the proposed scheme would not pass constitutional muster. See id. at 902. The court explained that as a result of the special abatement, "the effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children:"

> For example, in those towns where there are no children, the special abatement reduces the effective tax rate to zero. Meanwhile, in any town where the property value is insufficient to support the revenue required to educate local children adequately at the uniform State education tax rate, the effective rate remains equal to the uniform State education tax rate. Those towns receive a grant from the State to meet the otherwise unfunded cost of an adequate education. Although such towns would be fully funded, the owners of property therein would pay taxes at a higher rate than those in towns with a surplus of revenue, which would receive the special abatement.

Id. at 899–900.

Recognizing that tax abatements and exemptions "necessarily result in a disproportionate tax burden," the Supreme Court explained that such an outcome is permissible under Part II, Article 5 only when abatements are "supported by good cause and exemptions by just reasons." Id. at 900. The court concluded that the above-described special abatement would not meet that standard:

> Proponents . . . assert that the special abatement is designed to protect towns from financially contributing to the adequate education of children in other towns or school districts. Essentially, the proponents seek to measure proportionality and fairness on a municipality-by-municipality or district-by-district basis, rather than statewide. But, to the extent that a property tax is

> used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional across the State . . . .

Id. at 901 (also explaining that possibility of "social unrest cannot be a factor in . . . constitutional review" of proposed tax scheme). In addition, the court again emphasized the statewide benefits arising out of public education:

> Because the diffusion of knowledge and learning is regarded by the State Constitution as essential to the preservation of a free government, it is only just that those who enjoy such government should equally assist in contributing to its preservation . . . . This obligation cannot be avoided or lessened by the mere circumstance of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry.
>
> It should not be forgotten that New Hampshire is not a random collection of isolated cities and towns . . . . The benefits of adequately educated children are shared statewide . . . .

Id. at 901–02 (cleaned up). In light of the foregoing, the court concluded that because property owners who did not benefit from the special abatement would bear "an increased tax burden," and "such disproportionality [wa]s not supported by good cause or a just reason," the proposed education funding scheme would violate "both the plain wording of Part II, Article 5 and the express language of Claremont II." Id. at 902.

After receiving the Supreme Court's guidance, "the legislature passed an act in April 1999 'establishing a uniform education property tax'" and omitting any special abatement. See Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999) ("Claremont III") (citation omitted). Pursuant to the act, "[i]n each municipality in which the education property tax exceed[ed] the amount necessary to fund an adequate education, the excess" was to be "remitted" to the DRA. Id. at 213 (citation omitted). Notably, however, the act included a "phase-in" provision which provided that in certain property-rich towns, the full tax rate would be "imposed

gradually over five years, while taxpayers in the remaining towns [would] pay the full rate immediately." Id.

In Claremont III, the plaintiffs challenged (among other things) the constitutionality of the phase-in provision. See id. at 212. Although the State "acknowledged . . . that facially the phase-in perpetuate[d] a disproportionality for five years," the State nevertheless argued that the phase-in could "be viewed as a partial abatement" or a "partial exemption" of the tax liability in property-rich towns. See id. at 213. The Supreme Court summarily dismissed the State's abatement argument, explaining the phase-in did not constitute a permissible abatement because it did "not limit relief to persons aggrieved by the assessment of a tax." Id. (citation omitted). Further, the court concluded that the phase-in was not a valid tax exemption because it did not serve the general welfare. See id. at 212–14. In reaching this conclusion, the court reasoned that although the phase-in was intended to "ameliorate the possibility of foreclosures, bankruptcies, or similar adverse economic consequences that could occur" in the property-rich communities, "[t]he classification created by the phase-in encompasse[d] taxpayers who d[id] not merit special tax treatment in accordance with the just reasons offered by the legislature . . . ." Id. at 213–16.

Before considering whether the phase-in provision could be severed from the act (and ultimately concluding that it could not), the Supreme Court took the opportunity to emphasize and clarify important aspects of our State's taxation jurisprudence:

> [W]e give heed to the words of Chief Justice Doe written more than one hundred years ago: "A state law selecting a person or class or municipal collection of persons for favors and privileges withheld from others in the same situation . . . is at war with a principle which this court is not authorized to surrender." . . . In the field of taxation, the principle of uniformity and equality of rights is of paramount importance and has been embodied in the

> "proportional and reasonable" language of Part II, Article 5 of our State Constitution since June 2, 1784.
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> In this case, the classification at issue imposes a State tax on property at different rates for five years based solely on the location of the property. We can find no case where different rates of taxation exist in a State tax from one municipality to another. We can conceive of none that would pass muster under the words of Chief Justice Doe or the provisions of Part II, Article 5 . . . . our language on taxes requiring uniformity and equality is not something invented in the Claremont cases, but is the far-reaching language of constitutional mandate which has guided every tax decision of this court for over two hundred years.

Id. at 217 (citations omitted) (quoting State v. Griffin, 86 N.H. 609, 614 (1894)).

In response to Claremont III, the legislature "reenacted the statewide property tax without the phase-in . . . ." Sirrell v. State, 146 N.H. 364, 367 (2001). Under that tax scheme, communities which raised funds "beyond that necessary to fund an adequate education for their students" were "required to pay the excess . . . to the education trust fund for distribution to communities unable to raise sufficient funds to meet their cost of adequacy." See id. By 2006, however, the legislature had again modified the education tax scheme. See Londonderry Sch. Dist. SAU #12 v. State, No. 226-2005-EQ-00406, 2006 WL 563120 (N.H. Super. Mar. 8, 2006) (Groff, J.) ("Londonderry") at *6–7 (describing changes to tax scheme arising out of House Bill 616). As relevant here, the legislature eliminated the requirement that excess education funds be remitted to the State, instead permitting property-rich communities to "retain all the revenue they raise[d]" under the education tax scheme "in excess of what [wa]s needed to support the cost of an adequate education." Id. at *13. In Londonderry, a group of school districts, School Administrative Units and towns argued that this change "violate[d] Part II, Article 5" because it resulted "in some 'property poor' communities bearing a disproportional share of educational expenses through local taxes." Id.

Citing the jurisprudence discussed above, Judge Groff agreed with the plaintiffs:

> Under HB 616, the real effect of having the "property-rich" municipalities retain excess [education tax] proceeds is to permit these municipalities to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children. At the same time, "property-poor" municipalities will be required to use the full amount of the statewide enhanced education tax assessment revenues collected to support the cost of an adequate education. Therefore, HB 616 creates a non-uniform tax rate and the Court finds that no constitutional justification can be articulated to permit the retention of those excess funds by the "property-rich" municipalities.

Id. at *15 (noting "special abatement" and phase-in provisions of prior proposed legislation were deemed unconstitutional because they permitted municipalities to avoid payment of statewide education property tax which exceeded the amount necessary to provide an "adequate education" within relevant school district).

On appeal, the Supreme Court concluded that it could not analyze whether the State was funding public education in a constitutional manner until the legislature appropriately defined the scope of a constitutionally adequate education. See Londonderry I, 154 N.H. at 162. In response, the legislature enacted sweeping changes to the public education laws, including the funding scheme. See Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734, 735 (2008) ("Londonderry II"). As a result, the Supreme Court determined that the remaining challenges to House Bill 616 had become moot. See id. at 736. Thus, the Supreme Court has not definitively determined whether allowing a municipality to retain excess education funds—that is, funds generated under a statewide education tax scheme which exceed the cost of providing the opportunity for a constitutionally adequate education to the public school students living in that municipality's school district—runs afoul of Part II, Article 5.

Existing Education Funding and Tax Scheme

Today, RSA 198:40-a, II, sets forth the annual per-pupil cost of providing the opportunity for a constitutionally adequate education (hereinafter "adequacy aid"). The State raises adequacy aid funds via the SWEPT. See ConVal, 174 N.H. at 159. Specifically, RSA 76:3 requires that the DRA "set the education tax rate at a level sufficient to generate" a statutorily-defined total "when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." Funds raised via this tax are "collected and distributed at a local level and . . . used to meet the cost of an adequate education." See Doc. 18 (State's Am. Answer 1st Am. Compl.) ¶ 19.

"The State admits that since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid [to that community] by the State have been permitted to retain the excess . . . ." Id. ¶ 22; see also Laws 2011, 258:7 (eff. July 1, 2011) (eliminating requirement that excess SWEPT funds be paid to DRA "for deposit in the education trust fund"). The State further acknowledges that for certain areas in New Hampshire, the DRA has "set negative local education tax rates" which mathematically offset most if not all of the applicable equalized SWEPT rate. See Doc. 18 ¶ 35; Doc. 59 (Aff. Bruce Kneuer) ¶ 18 ("A negative Local Education Rate may occur . . . when a municipal entity . . . has minimal or no public education responsibilities within its boundaries . . . ."). For example, for the 2020–21 school year, the DRA set a local education tax rate for Hale's Location of negative $1.84 / $1000, whereas the equalized SWEPT rate for that same area was $1.85 / $1000. See Doc. 18 ¶ 36.

Analysis

The plaintiffs argue that because the State allows communities to retain excess SWEPT funds or offsets the equalized SWEPT rate via negative local education rates, the SWEPT is not being administered in a manner that is "uniform in rate," as required by Part II, Article 5. See Doc. 50 (Pls.' Mem Law) at 3, 14. The parties now cross-move for summary judgment with respect to this issue. Compare Doc. 49 with Docs. 53 and 56. Before turning to the merits of the parties' arguments, the Court must address two preliminary matters. First, in support of their cross-motions for summary judgment, the State and the Coalition maintain that the SWEPT should be presumed constitutional, and that the plaintiffs bear the burden of establishing a "clear and substantial conflict" between the SWEPT and the State Constitution. See Doc. 53 at 3 (citing ConVal, 174 N.H. at 161, for proposition that Court may only declare SWEPT unconstitutional "upon 'inescapable grounds'"); accord Doc. 57 (State's Mem. Law) at 6. For the reasons outlined below, the Court concludes that if the State and the Coalition have appropriately framed the relevant standards, the plaintiffs have overcome the presumption of constitutionality and met their burden of showing a clear and substantial conflict. Accordingly, the Court will assume, without deciding, that those standards apply here. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (declining to reach arguments that would not alter court's conclusion).

Second, in support of their motion for partial summary judgment, the plaintiffs have submitted data tables generated by Douglass Hall. See Doc. 51 (Pls.' State. Mat. Facts) Ex. A (Aff. Douglass Hall) ("Hall Aff."). These tables indicate which New Hampshire communities generated "SWEPT in Excess of Adequacy" in certain tax

years, and they also reflect Hall's calculations as to what the SWEPT rate would have been had such communities only collected the funds necessary to cover their own adequacy aid needs. See id. ¶¶ 4–9. The tables contain similar information concerning communities for which the DRA has set negative local tax rates. See id. ¶¶ 10–13.

The Coalition suggests Hall's work deserves little weight. Doc. 53 at 14 n.3 (noting Hall's affiliation with N.H. School Funding Fairness Project, and that Hall did not "explain why he selected" data points reflected in tables). Notably, however, the Coalition concedes that Hall's tables were "created from State data," and the Coalition does not suggest that Hall misreported the data, or that the data is otherwise unreliable. See id. Nor does the Coalition assign error to Hall's calculations. See id. As there is no dispute regarding the validity of the data underlying his work, the Court concludes that it is appropriate to substantively consider Hall's calculations, as reported in the tables, in ruling on the parties' cross-motions for summary judgment.

The Court now turns to the substance of the parties' cross-motions. As the parties raise somewhat distinct arguments concerning "excess" SWEPT communities and "negative tax rate" communities, the Court will address each category, in turn.

I. Excess SWEPT Communities

Relying on the caselaw discussed above, the plaintiffs argue that allowing municipalities to retain "excess" SWEPT funds beyond those needed to meet local adequacy aid requirements is the functional equivalent of the special abatement and phase-in schemes which the Supreme Court previously deemed unconstitutional. See Doc. 50 at 14. In particular, the plaintiffs argue that property-poor communities which do not generate excess SWEPT funds are effectively paying a higher SWEPT rate than

those which do generate and are allowed to retain excess funds. See id. at 15. As a result, the plaintiffs argue that the SWEPT is being administered in a manner which is not "uniform in rate," as required under Part II, Article 5. See id. at 15–18. In response, the State and the Coalition argue that the legislature's decision to permit retention of excess SWEPT funds constitutes a spending decision and not a tax, rendering the prior school funding cases distinguishable. See Doc. 57 at 1–2; Doc. 53 at 2. The State and the Coalition thus assert that the plaintiffs' Part II, Article 5 challenge to the SWEPT must fail. See Doc. 57 at 2; Doc. 53 at 2.

Upon review, the Court agrees with the plaintiffs' characterization of this issue. The plaintiffs do not challenge the amount of money the State spends on education in one community versus another. Rather, as in Claremont II, the plaintiffs in this case emphasize that the SWEPT "is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education." See Claremont II, 142 N.H. at 467; see also Doc. 61 (Pls.' Reply – SWEPT) at 1–2 (noting in a footnote that SWEPT "is not a generic tax for education" but "a specific state tax to pay for the State's constitutional duty to fund adequacy"). The plaintiffs thus contend that by allowing property-rich communities to retain excess SWEPT funds, the State is administering the SWEPT in a manner which effectively reduces the SWEPT rate paid by those communities. In other words, although the SWEPT rate is uniform on its face, the plaintiffs argue that any scheme which diverts SWEPT funds to purposes other than adequacy aid lowers the effective SWEPT rate paid by certain communities, thus running afoul of Part II, Article 5.

As set forth above, the plaintiffs' contention finds substantial support in our State's education funding jurisprudence. Indeed, the Claremont II court expressly noted that "[t]o the extent . . . the property tax is used . . . to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." 142 N.H. at 470 (emphasis added). The court's broader discussion of the administration of such a tax, rather than just the facial tax rate, aligns with the plaintiffs' position. See id. Similarly, in Opinion of the Justices (School Financing), the Supreme Court concluded that the proposed "special abatement" impermissibly resulted in a lower "effective" education tax rate for certain communities. See 142 N.H. at 902. While recognizing that the proposed tax would be uniform on its face, the Supreme Court concluded that the proposed tax would violate Part II, Article 5 because "[a]pplication of the special abatement [would] guarantee[] that property owners paying the full rate [bore] an increased tax burden . . . ." Id. at 901–02 (explaining that "effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children"); see also id. at 899 (noting court's conclusions "would remain unchanged" if proposed scheme had provided for actual collection of revenue, then reimbursed taxpayers pursuant to special abatement).

Relying on this reasoning, Judge Groff determined in Londonderry that the retention of surplus education tax funds violated Part II, Article 5 because it allowed property-rich municipalities "to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children." 2006 WL 563120, at *15. While Judge Groff's holding on this issue and

other aspects of the jurisprudence discussed above do not constitute binding precedent, the Court is persuaded by the reasoning set forth therein. As Judge Groff noted, where education taxes like the SWEPT are intended to fulfill the State's constitutional obligation to fund adequacy aid, the effective rate of such a tax is only uniform if all proceeds of the tax are directed to that purpose. See id.

In this case, the existing education funding and tax scheme permits communities to retain surplus SWEPT funds which exceed local adequacy aid needs. As a result, such funds are not remitted to the State for use in meeting the adequacy aid needs of other communities where SWEPT revenues fall short of adequacy. While communities which retain excess SWEPT funds must use those funds for education, the excess funds are not used to satisfy the State's adequacy aid obligations.[3] By contrast, communities which do not generate such an excess must use all collected SWEPT revenue to satisfy the State's adequacy aid obligations. In short, communities which do not generate excess SWEPT funds use all revenues generated under the facial SWEPT rate for adequacy aid purposes, and excess SWEPT communities do not.

Given the unique nature of the SWEPT—a State tax meant to generate the funding necessary to meet the State's constitutional adequacy aid obligations, see Claremont II, 142 N.H. at 467—there can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities. See Hall. Aff. Table 1. Accordingly, the Court concludes that allowing some communities to retain excess SWEPT funds impermissibly results in a

[3] In the event the amount of adequacy aid is increased in the future, such a change would not undermine the conclusion that a community's retention of SWEPT funds generated in excess of adequacy aid effectively reduces the SWEPT rate for that community, in violation of Part II, Article 5.

disproportionate tax rate, in violation of Part II, Article 5. See Claremont II, 142 N.H. at 467; see also Opinion of the Justices (School Financing), 142 N.H. at 902; Londonderry, 2006 WL 563120, at *15. In light of the foregoing, the plaintiffs have overcome any applicable presumption of constitutionality regarding the retention of excess SWEPT funds, and have further established a "clear and substantial conflict" between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs' motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

II. Negative Tax Rate Communities

The plaintiffs similarly argue that by setting negative local education tax rates in communities with little to no education expenses, the State is impermissibly reducing the effective SWEPT rate for those communities. See Doc. 50 at 16 (arguing this scheme is "virtually identical" to the special abatement scheme deemed unconstitutional in Opinion of the Justices, 142 N.H. at 899); see also Hall Aff. Table 3. In response, the State contends that the communities at issue, which are generally "unincorporated places," are not and need not be part of the SWEPT tax base. See Doc. 57 at 14–18.[4] In other words, the State does not deny that negative local education tax rates effectively reduce or eliminate SWEPT liability, but argues this outcome is contemplated by the relevant statutory scheme and is constitutionally permissible. See id.

Upon review, the Court again agrees with the plaintiffs. As the Supreme Court has repeatedly emphasized, the public education system benefits the entire State, not

[4] The Coalition does not directly address the negative local education tax rate issue in their filings. See Docs. 53; 63 (Coalition's Reply).

merely those communities in which publicly-educated children reside. See Claremont II, 142 N.H. at 470 ("[B]ecause the diffusion of knowledge and learning is regarded by the State Constitution as 'essential to the preservation of a free government' . . . it is only just that those who enjoy such government should equally assist in contributing to its preservation."); Opinion of the Justices (School Financing), 142 N.H. at 901–02 ("The benefits of adequately educated children are shared statewide . . . ."). Of particular relevance here, even property owners in uninhabited locations benefit from the preservation of our State's government, without which their property interests would be put in jeopardy. See Claremont II, 142 N.H. at 470. Accordingly, the fact that few if any publicly-educable children reside within some unincorporated places does not constitute a "just reason[]" for reducing or eliminating SWEPT liability in those locations. See Opinion of the Justices (School Financing), 142 N.H. at 900 (explaining Part II, Article 5 requires that tax exemptions be "supported by . . . just reasons").

In light of this conclusion, the Court is not persuaded by the State's proffered interpretation of the term "municipalities," as used in RSA 76:3 and 76:8. See Doc. 57 at 14–15 (arguing "municipalities," as used in relevant statutes, does not include unincorporated places). It is well settled that New Hampshire courts "must construe a statute to avoid a conflict with constitutional rights whenever reasonably possible." Bellevue Properties, Inc. v. 13 Green St. Properties, LLC, 174 N.H. 513, 517 (2021) (citation and quotations omitted). For the reasons outlined above, if the legislature intended to exempt unincorporated places from contributing to the State's education funding obligations, such an exemption would not be supported by the requisite "just reasons." See Opinion of the Justices (School Financing), 142 N.H. at 900.

Accordingly, the Court cannot construe the term "municipalities" as excluding unincorporated places in this context. See Bellevue Props., 174 N.H. at 517.[5]

For the reasons outlined above, the Court concludes that the setting of negative local education tax rates which offset the SWEPT to any degree runs afoul of Part II, Article 5. Accordingly, the plaintiffs have overcome any applicable presumption of constitutionality regarding the offsetting of SWEPT rates via negative local tax rates, and have further established a "clear and substantial conflict" between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs' motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

III. Remedy

Having found that the plaintiffs are entitled to judgment as a matter of law regarding their Part II, Article 5 challenge to the administration of the SWEPT, the Court must now determine the appropriate remedy. As noted in the Court's December 5, 2022 Order on the plaintiffs' motion for preliminary injunctive relief, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Doc. 48 at 8 (quoting N.H. Dept. Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007)). Moreover, "the granting of an injunction 'is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity.'" Id. (citing UniFirst Corp. v. City of

[5] Although the State's Reply identifies other property types which are not subject to the SWEPT under the existing scheme, see Doc. 64 at 3, the State does not cite (and the Court is not aware of) any legal basis for rejecting a valid Part II, Article 5 challenge because the relevant tax may also run afoul of the constitution in other respects.

Nashua, 130 N.H. 11, 14 (1987) for proposition that courts may consider public interest in evaluating requests for injunctive relief).

Given the lengthy history of constitutional violations arising out of the State's various education tax schemes, the plaintiffs urge the Court to act swiftly in curing the above-described constitutional infirmities. See Doc. 50 at 18–19 (quoting Claremont III, 143 N.H. at 158, for proposition that "[a]bsent extraordinary circumstances, delay in achieving a constitutional system is inexcusable"); see also Doc. 61 at 12–14 (noting plaintiffs first sought preliminary injunctive relief in October 2022). For its part, the State urges the Court not to "impose any remedy that disrupts the current municipal budget cycle," arguing that if any remedy is warranted, "it would be far less disruptive for the remedy to become effective with the next budget cycle, which will commence in late-2023 and culminate in budget votes in March or April 2024." Doc. 57 at 20. In addition, the State maintains that because the legislature repealed any statutory authority for remitting excess SWEPT revenues to the education trust fund, the Court should order those funds held in escrow pending further legislative action. See id.[6]

The parties' arguments implicate important considerations regarding the roles of the respective branches of State government. See Londonderry I, 154 N.H. at 163. The Supreme Court's respect of those roles has led it to "demure[]" each time the court "has been requested to define the substantive content of a constitutionally adequate public education . . . ." Id. However, as the Londonderry I court recognized, "the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and,

[6] The Coalition's filings do not directly address the issue of an appropriate remedy. See Docs. 53; 63.

in the absence of action by other branches, a judicial remedy is not only appropriate but essential." Id. (citing Petition of Below, 151 N.H. 135 (2004)).

In light of the substantial guidance that can be gleaned from the jurisprudence discussed above, the plaintiffs are understandably frustrated by the manner in which the State is currently administering the SWEPT. However, any immediate remedy which impacts the current budget cycle will necessarily have a far greater impact on the Coalition's members and other similarly-situated communities than on the State. See Doc. 60 (Aff. Lindsey Stepp) ¶ 20 (explaining prospective remedy would allow affected communities to consider this change "when building their next budgets"). While those communities also could have benefitted from the guidance discussed above, the Court recognizes that it may have been impractical or imprudent for communities to collect a surplus of tax revenue before the Court ruled on the merits of the relevant constitutional issues. On the other hand, the Court is mindful that communities which do not generate excess SWEPT funds or offset the SWEPT with negative local tax rates continue to shoulder an unfair burden as it relates to the State's adequacy aid obligations.

Having considered all of the relevant facts and circumstances, the Court concludes that the following remedy strikes the appropriate equitable balance:

Beginning with the upcoming budget cycle (i.e., the budget cycle the State characterizes as commencing "in late-2023" and culminating in "budget votes in March or April 2024," Doc. 57 at 20), the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated by a community which exceed the amount of adequacy aid to which that community is statutorily entitled must be remitted to the

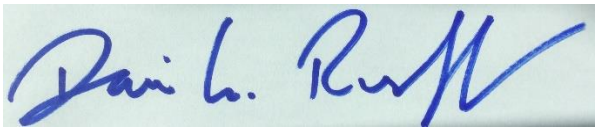
DRA. While the Court declines to direct that the State place such revenue in a particular fund, the Court reiterates that such funds must be used for the exclusive purpose of satisfying the State's adequacy aid obligations.

Conclusion

Consistent with the foregoing, the Court concludes that by administering the SWEPT in a manner which allows communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates, the State has violated Part II, Article 5 of the State Constitution. Accordingly, the plaintiffs' motion for partial summary judgment as to this issue (Doc. 49) is **GRANTED**, and the cross-motions filed by the State (Doc. 56) and the Coalition (Doc. 53) are **DENIED**. Beginning with the budget cycle commencing in late-2023 and culminating in budget votes in March or April 2024, the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated in excess of the adequacy aid to which any community is statutorily entitled must be remitted to the DRA, and thereafter used for the exclusive purpose of satisfying the State's constitutional adequacy aid obligations.

Lastly, given the timing of this Order and the fact that the Court is contemporaneously releasing an order in Contoocook Valley School District, et al. v State of New Hampshire, finding the current base adequacy amount unconstitutional, the deadline to file a Motion to Reconsider is extended to 30 days.

SO ORDERED.



Date: November 20, 2023

Hon. David W. Ruoff
Rockingham County Superior Court