

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0422

Bedford School District  
and William Foote

v.

State of New Hampshire et al.

---

APPEAL FROM A JUDGMENT OF THE CHESHIRE COUNTY SUPERIOR COURT

---

BRIEF FOR APPELLANTS THE STATE OF NEW HAMPSHIRE,  
THE NEW HAMPSHIRE DEPARTMENT OF EDUCATION,  
MARGARET WOOD HASSAN, AND VIRGINIA M. BARRY

---

THE STATE OF NEW HAMPSHIRE ET AL.

Gordon J. MacDonald  
Attorney General

Anne M. Edwards, Bar No. 6826  
Associate Attorney General  
Civil Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3650  
(15 minutes)

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE AND FACTS .....	2
SUMMARY OF THE ARGUMENT .....	15
ARGUMENT.....	17
I.    STANDARD OF REVIEW .....	17
II.   AWARDING FEES WITHOUT FINDING BAD FAITH, OR ANY EVIDENCE TO SUPPORT SUCH A FINDING, WAS ERROR .....	17
A.   The trial court specifically declined to find bad faith, which is essential to an award of fees under Harkeem.....	17
B.   The record does not support a finding of bad faith.....	19
III.  BEDFORD WAIVED ITS CLAIM FOR FEES WHEN IT ACCEPTED PAYMENT UNDER HB 354-A.....	25
CONCLUSION.....	27
CERTIFICATE OF SERVICE .....	27

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Ali v. Fed. Bureau of Prisons</u> , 552 U.S. 214 (2008) .....	25
<u>Appeal of Local Gov't Ctr.</u> , 165 N.H. 790 (2014).....	17
<u>City of Dover v. State</u> , No. 219-2015-CV-00312 (Strafford County Super. Ct. Aug. 20, 2015) (" <u>Dover</u> ") .....	passim
<u>Griffin v. N.H. Dep't of Empl. Sec.</u> , 117 N.H. 108 (1977) .....	19
<u>Harkeem v. Adams</u> , 117 N.H. 687 (1977) .....	passim
<u>Harrington v. N.H. Dep't of Empl. Sec.</u> , 119 N.H. 517 (1979).....	18
<u>Holloway Auto. Grp. v. Lucic</u> , 163 N.H. 6 (2011) .....	17
<u>In re Hampers &amp; Hampers</u> , 154 N.H. 275 (2006).....	17
<u>In re Mallett</u> , 163 N.H. 202 (2012) .....	18
<u>Lawrence v. Phillip Morris USA, Inc.</u> , 164 N.H. 93 (2012).....	17
<u>Maguire v. Merrimack Mut. Ins. Co.</u> , 133 N.H. 51 (1990).....	19
<u>Pugliese v. Town of Northwood</u> , 119 N.H. 743 (1977).....	1, 18, 19, 25
<u>Taber v. Town of Westmoreland</u> , 130 N.H. 613 (1996).....	18
<u>Treisman v. Town of Bedford</u> , 135 N.H. 573 (1992) .....	18, 19
<u>Valley Disposal v. Cent. Vt. Solid Waste Mgmt. Dist.</u> , 71 F.3d 1053 (2d Cir. 1995) .....	26

## Statutes

2008 N.H. Laws ch. 173:7 .....	2
2015 N.H. Laws ch. 276:139 .....	2
2015 N.H. Laws ch. 276:140 .....	2
2015 N.H. Laws ch. 276:258 .....	2
N.H. Laws ch. 276:272 .....	2
RSA 14:35-B(I).....	13
RSA 198:41, III(b) .....	passim
RSA 198:42, I .....	3, 5

## **ISSUES PRESENTED**

I. Harkeem v. Adams, 117 N.H. 687 (1977), authorizes an award of attorneys' fees to a prevailing party only upon "a specific finding of bad faith, such as obstinate, unjust, vexatious, wanton or oppressive conduct." Pugliese v. Town of Northwood, 119 N.H. 743, 752 (1977). Yet the trial court assessed attorneys' fees against the defendants under Harkeem without making any finding—and without having any basis to find—that they acted in bad faith, and, in fact, specifically declined to make such a finding. Was this error? SA 224-226, 259-261.

II. HB 354-A, enacted in 2017, provides that "[a]cceptance of a disbursement by a municipality under this act shall constitute a waiver and full release of any and all claims it may have against the state of New Hampshire, its agencies, officers, employees, or agents arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." Yet the trial court awarded fees the Town of Bedford incurred in litigating this action, which was a claim for adequate education payments due through June 30, 2016, even though the Town accepted the disbursement made by HB 354-A and, with it, the waiver and release of that claim. Was this error? SA 261-262.

## **STATEMENT OF THE CASE AND FACTS**

On May 26, 2016, the Bedford School District and William Foote (collectively, “Bedford”) commenced this action against the State and its then-Governor, together with the Department of Education and its commissioner (collectively, “the State”), challenging RSA 198:41, III(b) as unconstitutional. SA 4.<sup>1</sup> This statute, which was first enacted in 2008 but was repealed in its entirety as of July 1, 2017, served as part of the statutory framework for calculating and distributing State adequate education grants to each municipality from the education trust fund. See 2008 N.H. Laws ch. 173:7, repealed, 2015 N.H. Laws ch. 276:140, 276:272, VI (setting effective date of repeal).

In effect, RSA 198:41, III(b) placed a limit, or “cap,” on the amount of educational adequacy funding that a municipality could receive from the State in each fiscal year based on the amount of such funding that the municipality had received in the prior fiscal year. See id. The version of the statute in effect when Bedford brought suit set this “cap” at 108 percent of the prior fiscal year’s grant for fiscal year 2016, and at 160 percent of the prior fiscal year’s grant for fiscal year 2017. See 2015 N.H. Laws ch. 276:139. This version also provided, however, that unexpended monies in the education trust fund at the end of fiscal year 2017 would be distributed “to any municipality in which the total education grant was reduced pursuant to RSA 198:41, III(b),” up to the amount of the reduction. 2015 N.H. Laws ch. 276:258.

---

<sup>1</sup> This brief uses the following abbreviations: “SA \_\_\_\_” to refer to the State’s Appendix, submitted with this brief, and “Tr. \_\_\_\_” to refer to the transcript of the hearing on the motion for preliminary injunctive relief.

Through the application of this “cap,” approximately 20 out of the 244 school districts in the State initially received less in state adequate education funding during fiscal year 2016 than they otherwise would have received. SA 5. Claiming that this violated the State constitutional guarantee of an adequate education, Bedford sought a declaratory judgment that RSA 198:41, III(b) is unconstitutional, a preliminary and permanent injunction barring its enforcement, and attorneys’ fees. SA 4-13.

By the time Bedford brought this suit, however, another action claiming that RSA 198:41, III(b) was unconstitutional had been pending for nearly eight months in a different superior court, before Associate Justice Brian Tucker, City of Dover v. State, No. 219-2015-CV-00312 (Strafford County Super. Ct. Aug. 20, 2015) (“Dover”). SA 56-58. Bedford did not join or attempt to intervene in the Dover litigation, even though Bedford became aware of it shortly after it had been filed. SA 148. When the plaintiffs in that case (who were the City of Dover and its school district) filed their petition in late August 2015, they sought a preliminary injunction to halt the application of the statute to state adequate education payments going forward. SA 56-57. Because the statutory funding framework requires these payments to be made in quarterly installments, specifically, on September 1, November 1, January 1, and April 1 of each fiscal year, see RSA 198:42, I, the next adequacy payment was due just days after the Dover case was filed, on September 1, 2015, SA 57.

To avoid having to litigate the constitutional issues presented by the Dover case on this expedited schedule—and to “provide the Court [there] with ample time and sufficient time to consider this matter without the time pressure of a September 1, 2015

payment”—the Dover plaintiffs and the State entered into an “Agreement and Stipulation as to Scheduling and Application of Orders Regarding Injunctive and Declaratory Relief Issued in this Matter.” SA 56-57. This stipulation contained two substantive provisions. SA 57-58. Through the first provision, set out in paragraph 4, the plaintiffs and the State agreed that

the rulings ultimately issued by this Court will be applied to all education adequacy payments made on or after September 1, 2015. In the event that the City is successful in obtaining a preliminary or permanent injunction against the cap required by RSA 198:41, III(b), the parties agree that the State will make a supplemental payment equal to the sum total of all funds withheld in any education adequacy payments made on or after September 1, 2015, because of the application of the cap, within ten (10) business days after the time for a motion to stay the preliminary or the permanent injunction has been filed, or in the event that a motion to stay has been filed, within 10 days after the motion to stay has been finally denied.

SA 57. Through the second provision, set out in paragraph 5, the State “agree[d] that it will be bound by any rulings issued in this matter regarding the constitutionality of the cap contained in RSA 198:41, III(b) as it applies to all other school districts in the state and that other school districts shall not be required to intervene or join in this action, or file separate actions to benefit from any injunctive or declaratory order issued” in the Dover action. SA 57-58.

Of further significance in the Dover litigation, the State, represented by the Office of the Attorney General, conceded that RSA 198:41, III(b) was unconstitutional. SA 94. But the President of the New Hampshire Senate and the Speaker of the New Hampshire House sought, and were permitted, to intervene to defend the constitutionality of the statute. SA 94. After the intervenors and the plaintiffs filed cross-motions for summary



judgment on that issue, SA 94-95, the Dover court heard oral argument in early May 2016, SA 242, indicating that it would reach a decision by the end of June 2016, SA 50.

This was the state of affairs as of May 26, 2016, when, as noted at the outset, Bedford filed its own challenge to the constitutionality of RSA 198:41, III(b), accompanied with its own request for preliminary injunctive relief. SA 1-2. In its written objection to that request, the State argued that, because “in the Dover litigation the State has entered into a stipulation that provided that any determination regarding the constitutionality of the [statute] would apply to all school districts similarly situated,” Bedford had “no need to request a preliminary injunction” against its application to adequacy payments for fiscal years 2016 or 2017. SA 50-51. The State filed a copy of the Dover stipulation with its objection. SA 56-58. The State further argued that enjoining it from applying the statutory cap to adequacy payments due during fiscal year 2016 would be tantamount to an award of damages in violation of state sovereign immunity, because, in accordance with RSA 198:42, I, all of those payments had already been made before Bedford filed suit in late May 2016. SA 51-52.

At the hearing on its motion for preliminary injunctive relief, Bedford argued that it should not be required to “sit back and wait and see what happens in the Dover case” because there were “a whole lot of differences between Bedford’s request and Dover’s request,” which included “five years of back damages,” while Bedford was only “seeking to enjoin [the cap] during [the then-current] fiscal year,” 2016. Tr. 16-17. The State responded that, if Bedford was “not going to rely on the Dover case, and how the Dover

case was pled and argued,” then it “should have filed before April 1,” the date Bedford received its final state adequacy payment of fiscal year 2016. Tr. 23.

The State also articulated its principal argument in opposition to Bedford’s request for a preliminary injunction: that Bedford did not “need[] to bring any claim for fiscal year 2016, because that’s what the stipulation in the Dover case was about.” Tr. 18. This led to the following colloquy between the trial court and Associate Attorney General Anne Edwards, who was representing the State:

THE COURT: And when the [Dover] judge decides then we’ll get the money eventually?

MS. EDWARDS: Right, well if --

THE COURT: If Judge Tucker decides for the City of Dover --

MS. EDWARDS: And if the Legislature appropriates the money --

THE COURT: Right.

MS. EDWARDS: -- because then we got a different constitutional issue with respect to that.

THE COURT: That’s a different kettle of fish, I understand that.

Tr. 18-19. Later in the hearing, the State reiterated its position that separation-of-powers principles would prevent a court from ordering the Legislature to “pay any money” to Bedford, and the court again responded, “I completely agree with that.” Tr. 26.

The court subsequently denied Bedford’s motion for a preliminary injunction in a written order. SA 67-73. Noting the State’s concession that RSA 198:41, III(b), was unconstitutional, the court identified the issues for decision as “what remedy is available” and “whether [Bedford] ha[s] suffered, or will suffer, irreparable harm based on the

unconstitutional cap.” SA 70. The court proceeded to rule that Bedford had failed to demonstrate any such harm, explaining, in relevant part, that the court was “persuaded by the [State’s] arguments that any short fall [Bedford] experienced in FY 2016 will likely be remedied by the ruling on the similar issue presented in [Dover] and that any potential shortfall in FY 2017 will be addressed by 2015 N.H. Laws 276:258.” SA 71.

Bedford did not appeal this ruling, nor did it ask the court for any substantive relief for several more months. In fact, the parties failed to submit a proposed case scheduling order by the applicable deadline, causing the court to schedule a compliance hearing for October 20, 2016. SA 92.

In the meantime, on September 2, 2016, the court in the Dover case issued its final order, ruling that RSA 198:41, III(b) is unconstitutional and entering a permanent injunction against its continued application. SA 94-107. Significantly, however, the Dover court did not order the State to make any payment to Dover, or to any other municipality whose adequacy grants were reduced by operation of the statute during fiscal year 2016. SA 106. In addition, the Dover court rejected Dover’s claim for attorneys’ fees, finding “no evident, broad public benefit from the matters on which [Dover] prevailed.” SA 106. The State did not seek reconsideration of the order; motions for reconsideration by both Dover and the intervenors were denied. SA 146-147. None of these orders was appealed, by any party. Instead, the State immediately began complying with the Dover court’s order by making adequacy payments that came due after the decision—including all then-remaining payments for fiscal year 2017—without regard to the statutory cap. SA 176-177.

In light of this state of affairs, counsel for the State contacted counsel for Bedford to ask whether it would assent to staying this action to provide the Legislature with an opportunity to consider legislation appropriating the funds to pay Bedford and other affected municipalities what they would have received in adequacy grants in fiscal year 2016 had RSA 198:41, III(b) not been applied. SA 91-92. After Bedford refused to assent to a stay, the State filed a motion for that relief with the court, representing that “legislation will be introduced to pay all municipalities—including Bedford—the sums they would have been paid in fiscal year 2016 but for the statute.” SA 91. Indeed, within two weeks of the Dover court’s decision, in mid-September 2016, the President of the New Hampshire Senate had publicly announced his intent to pursue such action at the start of the next legislative session. SA 152.

Bedford objected to the State’s motion to stay, SA 110-114, and less than three weeks later, filed a motion for summary judgment, requesting, among other relief, that the court order the State “to pay Bedford School District the amounts due for fiscal year 2016” but not paid as a result of RSA 198:41, III(b). SA 118-127. Bedford’s summary judgment motion also asked for “an award of reasonable attorneys’ fees for needing to bring this action and motion,” but contained no argument or discussion as to why that relief would be appropriate. SA 118-127. In response, counsel for the State again contacted counsel for Bedford, requesting its assent to staying the State’s deadline to object to the summary judgment motion until after the court ruled on the motion to stay, which was still pending at that point. SA 151-154. Bedford again refused to assent to any stay, SA 154, so the State filed a motion for that relief, to which Bedford objected,

SA 156-158. On December 21, 2016, the court denied the State's requests for a stay, but granted a brief extension of its deadline to object to Bedford's motion for summary judgment, via margin order. SA 161-162.

On January 1, 2017, before the State's summary judgment objection came due, the promised legislation was introduced, appropriating sums "for the purpose of providing additional adequate education grants to certain municipalities," including Bedford, "for the fiscal year ending June 30, 2016, which were not distributed to those municipalities in that fiscal year." SA 179-181. As a result of this legislation—and the State's immediate compliance with the Dover order as to all adequacy payments for fiscal year 2017 which came due after the order issued—Bedford stood to receive all of the funding that it would have received in both fiscal year 2016 and fiscal year 2017 but did not as a result of the challenged statute. SA 176-177. The State made this point, supported by the sworn testimony of a Department of Education official, in its summary judgment objection, SA 166, which also attached a copy of the legislation, SA 179-181.

In substance, the State's summary judgment objection argued, in relevant part, that sovereign immunity prevented the court from ordering the State to make payments to Bedford in the amounts that it would have received in adequacy funding in fiscal year 2016 but for the statutory cap. SA 167-173. This was so, the State explained, despite Bedford's mistaken suggestion that such an order was appropriate because the State had "entered into a stipulation at the outset of the Dover litigation agreeing to pay Bedford any funds withheld on or after September 1, 2015 within 10 days of the State's loss there." SA 167-168. As the State argued, this was a misreading of the stipulation, which

simply entitled Bedford to the same relief it would have received had it joined in the earlier challenge with Dover—which, as already discussed, did not obtain an order that the State pay it any money, but only a declaration that RSA 198:41, III(b) was unconstitutional and an injunction against its continued application. SA 170-171.

Far from arguing that Bedford was not entitled to the benefit of that relief, the State explained, it was “simply arguing that, even though RSA 198:41, III(b) has been ruled unconstitutional [in Dover], sovereign immunity prevents this court from ordering the State to pay Bedford (or any municipality) the money it would have received but for the statute in fiscal year 2016.” SA 171-172. The State argued, in the alternative, that “even if, contrary to its plain terms, the stipulation amounted to an agreement that the State would make payments to Bedford for fiscal year 2016 following an adverse ruling in the Dover case, sovereign immunity would still prevent this court from ordering the State to make those payments,” since “sovereign immunity may be waived only by the Legislature, and not by the actions of the Office of the Attorney General in conducting litigation.” SA 172-173. Finally, the State argued that Bedford was not entitled to attorneys’ fees on the theory that its pursuit of this litigation had conferred a public benefit, but that, in any event, Bedford’s summary judgment motion failed to address its claim for fees at all. SA 173-174.

While Bedford’s motion for summary judgment was pending, HB 354-A, the legislation appropriating the funds to pay Bedford and the other affected municipalities what they would have received in adequacy payments in fiscal year 2016 but for RSA 198:41, III(b), proceeded through committee in the House of Representatives, and, on

March 23, 2017, was passed by the House in full. SA 228. On April 5, 2017, the bill was approved by a Senate committee. SA 228. On the next day, April 6, 2017, the court issued a written decision on Bedford's motion for summary judgment. SA 188-210. The court reached this decision without holding a hearing on the motion.

In its decision, the court ordered the State "to pay to Bedford School District the withheld funds for FY 2016 within 30 days of April 1, 2016." SA 208. In rejecting the State's argument that this relief was barred by sovereign immunity, the court relied on theories that had not been advanced by Bedford, including that, by entering into the Dover stipulation, the State had become judicially estopped from asserting sovereign immunity and also entered into a contract enforceable through RSA 491:8. SA 206-208. The court also awarded attorneys' fees to Bedford on a theory it had not argued. SA 209-210. Citing Harkeem v. Adams, 117 N.H. 687 (1977), the court wrote:

an award of fees may be made where there has been bad faith by one of the litigants. While the court stops short of finding that bad faith exists in this case, the State's inconsistent positions taken in this case is [*sic*] troubling, to say the least. It is clear from the record that at one point – even prior to the filing of this lawsuit – the State informed [Bedford] that [it] would get [its] money and no lawsuit was necessary because of the Stipulation in the Dover case. Yet here we are – almost a year later – with the State arguing that it was never bound by the Stipulation and that it is not enforceable against the State. The court finds that an award of attorneys' fees is appropriate in this matter because the State has always promised to pay, yet never has. It even made such representations in order to prevent the filing of the suit. This lawsuit was necessary to enforce compliance with the statute [*sic*] and to compel the State to comply with the promises and representations it made both to the court at the hearing in this matter and [Bedford] prior to filing suit.

SA 210. In the portion of its order making these findings, the court did not refer to anything in the record that supported them. SA 210-211.

Elsewhere in the decision, however, the court relied upon the statement from the State's objection to preliminary injunctive relief, quoted above, that because "the Stipulation provides that other school districts do not need to file litigation to obtain the relief . . . Bedford had no need to file an injunction for fiscal year 2016." SA 196. The court observed that "the State does not specify in that objection that the Stipulation would only grant declaratory judgment relief to the other school districts and not monetary relief." SA 196. The court went on to conclude that "the only reasonable interpretation of the State's original representations as to the nature of the Stipulation is that it entitled Bedford School District to the withheld funds for FY 2016 if the plaintiff in Dover prevailed." SA 197. The court acknowledged the "fact that, throughout this case, the State has asserted sovereign immunity as to the withheld funds for FY 2016," but reasoned that this "does not change the nature of the State's original position regarding the Stipulation." SA 197.

Following the issuance of the decision, the State filed a timely motion for reconsideration, arguing, in relevant part, that the court had overlooked or misapprehended several points of law and fact both in ruling that sovereign immunity did not prevent the court from ordering the State to make payments to Bedford for fiscal year 2016, and an award of attorneys' fees was appropriate under Harkeem. SA 218-227. Through a separate motion, the State also sought a stay of the order for 30 days, to provide additional time both for the Senate to pass upon HB 354-A and for the court to rule on the State's motion to reconsider. SA 211-214.



On May 3, 2017, less than one year after it had commenced this action, Bedford notified the court that “the State paid the amounts ordered by the court,” namely, the adequacy payments that Bedford would have received during fiscal year 2016 but did not as a result of the statutory cap. SA 238. This payment was effected by HB 354-A, which became law on April 27, 2017. SA 269-270. This bill made an “appropriation to the department of education for the purpose of providing additional adequate education grants certain to municipalities . . . for the fiscal year ending June 30, 2016 which were not distributed to those municipalities in that fiscal year.” SA 269-270. The legislation, as passed, directed the department of education to distribute a sum to each of more than twenty municipalities whose adequacy payments during fiscal year 2016 had been reduced by operation of RSA 198:41, III(b), including more than \$4,287,500 to Bedford. SA 269-270.

Significantly, the amount of the payment to Bedford far exceeded the Attorney General’s settlement authority at that point, which, by operation of RSA 14:35-B(I), was approximately \$2.4 million. SA 171. Even more significantly, HB 354-A expressly provides that “[a]cceptance of a disbursement by a municipality under this act shall constitute a waiver and full release of any and all claims it may have against the state of New Hampshire, its agencies, officers, employees, or agents arising out of the state’s adequate education payments between September 1, 2008 and June 30, 2016.” SA 270.

Counsel for Bedford subsequently filed an affidavit in support of its request for fees, claiming more than \$39,000—including more than \$22,000 incurred before the Dover case was decided. SA 242-243. The State objected to Bedford’s fee application in

its entirety, arguing (as it had in its motion for reconsideration) that Harkeem did not authorize an award of fees absent bad faith, which the court had expressly declined to find, as well as that Bedford had waived its claim for fees by accepting the State's payment under the terms of HB 354-A. SA 258-263. The court issued a brief written order noting that it had awarded fees due to "the State's schizophrenic representations and litigation strategy in this case," and awarding more than \$21,000 in claimed fees which, the court found, were "directly attributable to [those] representations and litigation strategy." SA 272-273. The court did not address the State's argument that Bedford had waived its claim for fees by accepting payment under the terms of HB 354-A. Nor did the court ever issue a ruling on the State's motion for reconsideration (though the court denied the motion to stay on the same day that Bedford provided notice of its receipt of the funds that the court had ordered to be paid). SA 237. This appeal followed.

## **SUMMARY OF THE ARGUMENT**

The State's appeal in this matter does not raise any issue as to the constitutionality of the "cap" previously imposed on adequacy payments by RSA 198:41, III(b), which has since been repealed. Nor does the State's appeal raise the potentially difficult issues of sovereign immunity implicated by the trial court's order that the State pay Bedford the full amount of the adequacy payments it would have received during fiscal year 2016 but for the "cap"—those issues became moot when Bedford received that sum as a result of the passage of HB 354-A. But this appeal raises an important issue nevertheless: can the exception to the rule that each side pays its own attorneys' fees recognized by Harkeem v. Adams be applied in the absence of a finding that the losing party has acted in bad faith? As this Court has previously made clear, the answer to that question is no. Because the trial court expressly declined to find that the State acted in bad faith, and there is no support in the record for such a finding, the trial court's award of attorneys' fees to Bedford should be vacated.

In the alternative, the award of attorneys' fees to Bedford should be vacated because Bedford waived its claim for fees when it accepted the payment offered by HB 354-A. That act expressly provides that a party's acceptance of such a payment "shall constitute a waiver and full release of any and all claims it may have against the state of New Hampshire . . . arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." This language readily encompasses Bedford's claim for the fees it incurred in seeking to recover its "capped" adequacy payments from fiscal year 2016 through this action. It follows that, even if the trial court properly ruled

that Bedford could claim attorneys' fees against the State under Harkeem v. Adams, Bedford subsequently waived that claim by accepting payment on the underlying liability under HB 354-A. The fee award should be vacated.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court reviews a trial court's award of attorneys' fees "under an unsustainable exercise of discretion standard, and if there is some support in the record for the trial court's determination, [this Court] will uphold it." Holloway Auto. Grp. v. Lucic, 163 N.H. 6, 12-13 (2011). But this Court "give[s] less than ordinary deference to the trial court's factual findings" where, as here, they rely "only upon a paper record" and not upon the trial court's first-hand observation of witnesses. Lawrence v. Phillip Morris USA, Inc., 164 N.H. 93, 96-97 (2012) (citing Hillside Assocs. of Hollis v. Me. Bonding & Cas. Co., 135 N.H. 325, 330 (1987)). In addition, this Court reviews questions of statutory interpretation, such as the proper application of HB 354-A, de novo. See, e.g., Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014).

### **II. AWARDING FEES WITHOUT FINDING BAD FAITH, OR ANY EVIDENCE TO SUPPORT SUCH A FINDING, WAS ERROR**

#### **A. The trial court specifically declined to find bad faith, which is essential to an award of fees under Harkeem**

"An award of attorney's fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees." In re Hampers & Hampers, 154 N.H. 275, 289 (2006). In its landmark decision in Harkeem v. Adams, this Court recognized an "[e]xception[]" to the general rule that parties pay their own counsel fees—a rule which, as this Court observed, serves the important "principle that no

person should be penalized for merely defending or prosecuting a lawsuit.” 177 N.H. at 691. As an exception to this rule, this Court held that “[w]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate.” Id. This Court observed that the sort of “[b]ad faith conduct held to justify the award of counsel fees has been found where one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action.” Id. (citations and quotation marks omitted).

In line with these observations, this Court has cautioned that, “before a Harkeem exception may be carved out, it must be supported by a specific finding of bad faith, such as obstinate, unjust, vexatious, wanton or oppressive conduct.” Pugliese v. Town of Northwood, 119 N.H. 743, 752 (1977) (emphasis added). Here, the trial court disregarded this principle when it awarded Bedford its fees under Harkeem without making any “specific finding of bad faith” on the part of the State. On the contrary, the trial court specifically declined to make such a finding, announcing that it “stops short of finding that bad faith exists in this case.” SA 209. It was error for the trial court to award fees under Harkeem without finding bad faith, as this Court has repeatedly recognized. See, e.g., In re Mallett, 163 N.H. 202, 211-12 (2012); Taber v. Town of Westmoreland, 130 N.H. 613, 616-17 (1996); Treisman v. Town of Bedford, 135 N.H. 573, 575 (1992); Harrington v. N.H. Dep’t of Empl. Sec., 119 N.H. 517, 518 (1979); Griffin v. N.H. Dep’t

of Empl. Sec., 117 N.H. 108, 114 (1977). This Court should vacate the trial court's fee award here, just as it has routinely vacated similarly unsupported fee awards in the past.

**B. The record does not support a finding of bad faith**

It is true that, even when a trial court fails to make a specific finding of bad faith, this court has on occasion “look[ed] for some support in the record for a trial court's decision concerning attorneys' fees.” Treisman, 135 N.H. at 575 (quoting Maguire v. Merrimack Mut. Ins. Co., 133 N.H. 51, 55 (1990)). Here, however, the record is devoid of any support for the notion that the State acted in bad faith, in the sense that it engaged in “obstinate, unjust, vexatious, obstinate or oppressive conduct” in defending Bedford's lawsuit. Pugliese, 119 N.H. at 752.

In explaining its decision to award fees to Bedford, the court seems to have focused on the argument by the State, in objecting to Bedford's motion for preliminary injunctive relief, as to the effect of the Dover stipulation on Bedford's need for that relief. SA 196-197, 210-211. The trial court concluded that “the only reasonable interpretation of [these] original representations as to the nature of the Stipulation is that it entitled Bedford School District to the withheld funds for FY 2016 if the plaintiff in Dover prevailed.” SA 197. Because the plaintiffs in the Dover case indeed prevailed, the trial court seems to have reasoned, the State necessarily acted improperly in failing to promptly pay Bedford what it would have received in adequacy payments during fiscal year 2016 but did not as a result of the statutory cap. SA 210-211. Instead, as the court noted the State objected, on the grounds of sovereign immunity, to Bedford's request in its motion for summary judgment that the court order the State to make that payment. SA

196-197. These observations simply do not add up to a sustainable basis to award attorneys' fees for bad faith litigation conduct, for several reasons.

As an initial matter, the record as a whole simply does not support the trial court's finding that "the only reasonable interpretation of the State's original representations as to the nature of the Stipulation is that it entitled Bedford School District to the withheld funds for FY 2016 if the plaintiff in Dover prevailed." SA 196-197. In reaching that conclusion, the trial court focused on the State's written objection to Bedford's motion for preliminary injunctive relief, but that focus is misplaced. The objection simply describes the Dover stipulation as providing that "[a]ny determination regarding the constitutionality of the cap would apply to all school districts similarly situated," which "do not need to file additional litigation to obtain the relief." SA 50-51. "As a result," the objection continues, "Dover has no need to request a preliminary injunction for Fiscal Year 2016." SA 51. Nowhere does the objection expressly state, as the trial court found, that the stipulation "entitled Bedford School District to the withheld funds for FY 2016 if the plaintiff in Dover prevailed." SA 196-197. At worst, the objection is ambiguous on that point, since, as the trial court observed, it "does not specify" the nature of "the relief" to which the stipulation entitles other school districts. SA 196-197.

It is also worth emphasizing that, together with its objection to preliminary injunctive relief, the State submitted a copy of the stipulation itself for the court's review. SA 56-58. Yet, in deciding to award attorneys' fees against the State, the trial court never analyzed the actual language of the stipulation—which, as the State pointed out in its summary judgment objection, does not support the view that Bedford was entitled to



prompt payment of its capped 2016 adequacy grants simply because the Dover plaintiffs succeeded in challenging the statute. SA 170-171.

Moreover, the State cleared up any ambiguity its objection might have unintentionally created as to the effect of the stipulation during argument at the subsequent injunction hearing. There, in response to the court's question whether, owing to the stipulation, a decision in favor of the plaintiffs in Dover meant that Bedford would "get the money eventually" for its capped 2016 payments, the State responded that it would also be necessary for the Legislature to appropriate that money. Tr. 18-19. That was so, the State explained, because a court order for the State to pay money in the absence of a legislative appropriation would raise "a different constitutional issue," namely, one of separation of powers. Tr. 18-19, 26.

In light of this discussion, the trial court's finding that "the only reasonable interpretation of the State's original representations as to the nature of the Stipulation is that it entitled Bedford School District to the withheld funds for FY 2016 if the plaintiff in Dover prevailed" simply does not hold up. The same is true of the trial court's findings that "the State has always promised to pay, yet never has. It even made such representations in order to prevent the filing of the suit." SA 210. On the contrary, the State made clear at the hearing that, even if the Dover court ruled in favor of the plaintiffs, that ruling alone would not entitle Bedford to payment for fiscal year 2016; additional action, in the form of a legislative appropriation of the funds to make that payment, would also be necessary. Tr. 18-19.

Viewed in their totality, then, the “representations” the State made as to the effect of the stipulation in objecting to Bedford’s motion for preliminary injunctive relief were perfectly consistent with the position the State took in subsequently objecting to Bedford’s motion for summary judgment: regardless of the stipulation, Bedford could receive the capped adequacy payments from fiscal year 2016 only through legislative appropriation, and not through a court order, which would be barred by sovereign immunity. SA 171-172. Aside from the court’s misimpression of the State’s argument as to the effect of the stipulation, the record contains no evidence of any “representations” or “promise” to the contrary. Indeed, the trial court specifically found that, “throughout this case, the State has asserted sovereign immunity as to the withheld funds for FY 2016.” SA 197 (emphasis added).

This acknowledgment that the State had maintained a consistent position as to the effect of sovereign immunity on Bedford’s claim for fiscal year 2016 significantly undermines the court’s ruling that a fee award was justified by the State’s “schizophrenic representations and litigation strategy.” SA 272. As the court recognized, the State’s position was always that, regardless of what happened in the Dover case, Bedford could not receive the sums that had been capped from its 2016 payments without further legislative action. The trial court erred insofar as it based its fee award on a finding that the State had changed positions as to the effect of the stipulation on Bedford’s ability to receive the capped 2016 payments without an appropriation. The State did no such thing, as the trial court expressly found.

In addition, the State's consistent position informed the State's consistent "litigation strategy," which, as the record conclusively demonstrates, entailed repeated efforts to stay the litigation so that the Legislature could act to appropriate the necessary funds. Just two weeks after the plaintiffs in the Dover case prevailed on their claim for a declaratory judgment that the statute was unconstitutional—a claim which, it should be noted, was not even opposed by the State itself or any of the other defendants named in this case—the President of the New Hampshire Senate publicly announced that he intended to introduce the legislation to appropriate monies to pay Bedford and other municipalities in full for the 2016 fiscal year. SA 152. Based on this announcement, the State asked Bedford to agree to stay this case. SA 91-92. After Bedford refused, and filed a motion for summary judgment instead, the State asked Bedford to stay the litigation of that motion, once again citing the forthcoming legislation, but Bedford once again refused. SA 151-153. By the time the court ruled on Bedford's summary judgment motion, the legislation had not only been introduced as promised, on the first day of the 2017 legislative session, but had been passed by the House of Representatives and was pending before the Senate. SA 228. Within a few more weeks, HB 354-A had passed, was signed by the Governor, and become law. SA 228.

The bill effectuated payment in full to Bedford for the sums it would have received as adequacy funding in fiscal year 2016 but did not on account of the statutory cap. In other words, it provided Bedford with the very relief that it had sought through this lawsuit, and which the State had repeatedly assured Bedford would be forthcoming if it would simply let the legislative process run its course. Contrary to Bedford's

suggestion, the State in no way “forced” the town to bring this litigation to secure payment of what Bedford would have received in adequacy funding in 2016 but for the cap. Indeed, despite having done so, Bedford ended up in precisely the same position as the 20 or so other municipalities that were affected by the statute during that period but did not bring suit, i.e., it received payment in full for the capped 2016 grants after the Legislature appropriated funds for that purpose in April 2017.

The State’s conduct of this litigation, then, could hardly be more different than that of the defendants in Harkeem, who “instead of ceding to [the plaintiff] the fruits of his victory . . . sought to subject him to further litigation,” justifying an award of attorneys’ fees on the basis of bad faith. 117 N.H. 691-692. Crucially, the trial court never found, or even suggested, that it would have been possible for the State to pay Bedford the more than \$4.25 million it had been “capped” during fiscal year 2016 without a legislative appropriation of that sum. Nor has Bedford ever suggested where else that money might have come from. Yet the trial court ordered the State to pay attorneys’ fees based on its failure to pay that money promptly after the Dover court’s decision, despite the State’s repeated requests of both Bedford and the court that, before proceeding further with the litigation, they wait to see whether that appropriation (which, again, was promised by the Senate President within two weeks of the ruling in the Dover case) passed the Legislature and became law.

In short, rather than forcing Bedford to pursue this lawsuit, the State repeatedly attempted to dissuade Bedford from further litigation with assurances that the relief it sought was forthcoming—assurances on which the State made good with the passage of

HB 354-A less than four months into the legislative session which immediately followed the ruling in the Dover case. It follows that nothing about the State's conduct of this litigation can be said to have been "obstinate, unjust, vexatious, wanton or oppressive." Pugliese, 119 N.H. at 752. Because the record contains no support for the trial court's decision to award attorneys' fees to Bedford based on the State's "bad faith," the fee award was an unsustainable exercise of discretion, and should be vacated.

### **III. BEDFORD WAIVED ITS CLAIM FOR FEES WHEN IT ACCEPTED PAYMENT UNDER HB 354-A**

Even if the award of attorneys' fees to Bedford could be upheld as adequately supported by the record, the award should nevertheless be vacated because Bedford waived its claim for fees when it accepted the payment offered by HB 354-A. That act expressly provides that a party's acceptance of such a payment "shall constitute a waiver and full release of any and all claims it may have against the state of New Hampshire . . . arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." As Bedford acknowledges, it accepted the funds disbursed by HB 354-A by early May 2017. SA 238. By the plain terms of the statute, this acceptance effected a waiver and release of Bedford's claim for the fees it incurred in seeking to recover its "capped" adequacy payments from fiscal year 2016.

In matters of statutory interpretation, this Court "must give full effect to all words in a statute, and presume that the legislature did not enact redundant or superfluous words." State v. Wilson, 169 N.H. 755, 760 (2017) (quotation formatting omitted). In addition, it is well-established that the use of the term "any" in a statute "suggests an expansive meaning." Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (quotation

marks omitted). In light of these principles, HB 354-A's command that, by accepting the funds disbursed by the act, a party gives a "waiver and full release of any all claims it may have against the State of New Hampshire . . . arising out of the State's adequate education payments between September 1, 2008 and June 30, 2016" plainly encompasses Bedford's claim for attorneys' fees in this action—which is an action claiming adequate education payments for the period between September 2008 and September 2016.

Indeed, "a party may express its intent to waive attorneys' fees by employing broad release language, regardless of whether that language expressly mentions attorneys' fees." Valley Disposal v. Cent. Vt. Solid Waste Mgmt. Dist., 71 F.3d 1053, 1058 (2d Cir. 1995). As just discussed, HB 354-A employs such "broad release language," effectuating a waiver and release of "any and all claims" arising out of capped adequacy payments made through fiscal year 2016. It follows that, by accepting the funds disbursed by HB 354—funds which were intended to, and did, fully compensate Bedford for the shortfall in its fiscal year 2016 adequacy payments effected by the statutory cap—Bedford released the State from its claim for attorneys' fees. On this basis alone, the trial court's award of attorneys' fees to Bedford should be vacated.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this honorable Court vacate the trial court's attorneys' fee award.

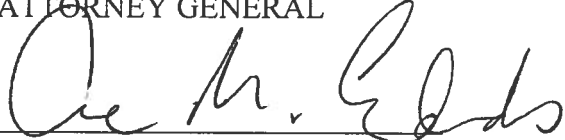
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD  
ATTORNEY GENERAL

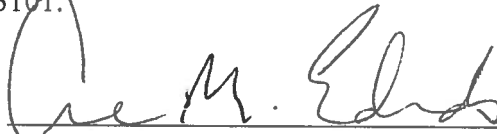


November 9, 2017

Anne M. Edwards, Bar No. 6826  
Associate Attorney General  
Civil Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3658

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing were mailed this 9<sup>th</sup> day of November 2017, postage prepaid, to Michael J. Tierney, Esq., Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101.



Anne M. Edwards