RE: Presentation to NH Legislative Committee designed To Study Fiscal Disparities Between Public School Districts – RSA CHAPTER 198:62

From/By: Dr. Mark V. Joyce

Executive Director, NH School Administrators Association

Date: October 7, 2014

1.) A Brief History and Timeline of Adequacy State Aid To NH School Districts

NH had a long history of leaving the individual school district the control and funding responsibility for public education.

Is there a Federal role in funding public education?

In San Antonio School District v. Rodriguez, 411U.S. 1 1973– The Federal Courts decided that unequal schools did not violate the 14th amendment and reinforced that public education is a state and local controlled responsibility.

Is there a NH state role in funding public education?

In the late 1970's up to September 1985 Wendell Jessman brought a NH state court action challenging the reliance on drastically different local property taxes to support public education based on Part II, Article 83 of the NH Constitution.

The case was withdrawn as the State agreed to create and promise to fund the Augenblick Formula for support of K-12 public education.

1st year 24.3 Million of the 42.4 Million required or 57%. Never higher than 71% of promised funding in 1988

The failure to sufficiently fund the Augenblick Formula and the growing disparity of educational opportunities lead to the NH Supreme Court Case known as Claremont One 1993. The NH Supreme Court ruled that the state had a constitutional duty to provide an education to its public school students.

The matter was then remanded to Superior Court for a trial on its merits. The trial Court ruled that while not perfect the current system met obligation by delegating the responsibility to towns and cities. The case was appealed to the Supreme Court.

Claremont School District v. Governor, 142N.H. 462 (197) 2 was decided on 12/17/97. In sum the Court, by a 4-1 vote, found that the current system was unconstitutional. In part because the system requires a town to have a tax rate 4 times higher that another to provide educational opportunities.

_____*See Appendix A for a more detailed look at this part of funding history.*

2.) Responses to Claremont 2

The challenge: Define educational adequacy, cost it out, establish a system to ensure it is delivered to each child and access accountability for delivery.

Governor Shaheen initiated the "ABC" Plan – which sought to solve the problem by establishing a standard for adequacy, a uniform property tax, but left excess resources in property rich districts in the communities. The NH Supreme Court issued an advisory opinion saying it did not meet the standards set by the Court.

The Governor then formed a Blue Ribbon Committee to study the ability of the state to raise additional revenues needed to meet this obligation. She created "The NH Commission on Educational Funding" that was chaired by David T. McLaughlin, President Emeritus at Dartmouth College. They issued their report on January 8, 2001 showing the advantages, disadvantages and potential yields of various new taxes.

Simultaneously the NH Legislature engaged in several studies and commission sessions studying various models of educational funding, seeking public input and finally agreeing on its adequate education aid formula. The first formula proposed and approved for 2000 with a total cost of adequacy at about $824 million.

2000 – 2004 The system operated as designed with slight changes and was funded between $824 – 895 million dollar levels.

2004 "The Fund the Gap" study The NH Citizen's Voice Project, developed a thorough study about the actual costs of meeting the requirements for public education as defined by law and rule. The study details the "Gap" between the actual costs taxpayers are required to pay and the amount of adequacy aid that the state contributes. A copy of the study is available on-line at www.nhsaa.org under publications in a folder titled educational funding.

2005-6 A new system of funding was approved with a "targeted aid" feature and the law simply removed "adequacy" from the law. This then led to a NH Supreme Court challenge by a different coalition of school districts and cities lead by the Londonderry School District. The decision by the Court (See Londonderry School District SAU#12 &a v. State of NH September 8, 2006), reaffirmed Claremont 2 and the charge to the legislature but added a time limit to its completion (One year).

2007-8 The Legislature established a new Legislative Commission to redefine adequacy. The members travelled throughout the state and held public hearings and ultimately approved a new model that raised aid to schools by significantly increasing the amount of assistance given as differentiated aid, leading to overall increase in aid to more than $920 million in 2011.

2010-11 The formula was redesigned and the differentiated aid was lower in the amount and how it was applied (e.g. changed from whole school to only those

students in the count). In addition disparity aid was eliminated from the formula. This had the effect of lowering aid amount by about 150 million dollars per year and as a result a hold harmless provision was added to the formula.

Essential elements of adequacy in NH

Our system was and largely remains a "needs based" definition of adequacy. The basic measure of need is a student with added values being assigned as a student may have other characteristics or additional needs. (Initially the system was built upon a student equals a 1 count, one additional count if that person happens to be a special needs student, additional .2 count if the person is a high school student and so on.)

Currently the values are slightly different and have been adjusted over time. See Appendix B for an explanation or NH DOE website (http://www.education.nh.gov/data/documents/fy2015_explained.pdf)

Total Adequacy amounts over the years

2000 $824 million

2004 $895 million

2005 $804 million

2006 $835 was suppose to be $859

2010 $921 million

2014 Supposed to be $751 by formula but is funded at about $926 including hold harmless

Often asked Questions:

Where does the base cost of adequacy come from? $3,498.30 today?

Why is there such a difference between adequacy and the actual cost per pupil

What areas are not included in adequacy?

A case study : Special education costs in NH

Appendix A

Excerpt from NH Bar Journal – June 2007

From and article titled : The Judicial Journey of David Brock

"In the world of appellate jurisprudence, there are times, rare indeed, when the court is called upon to play its role as constitutional arbiter in matters of first impression. Such were the circumstances in 1993 in the case of *Claremont School District v. Governor*, 138 N.H. 183 (1993) *(Claremont I*).

The central issue the court was called upon to decide was whether the education clause in Part II, Article 83 of the New Hampshire Constitution imposes an affirmative duty on the state to provide a constitutionally adequate public education for school-age children. The case was on appeal from a ruling by the trial court on a petition for declaratory judgment. This litigation, however, had its origins in earlier times and in different forums.

At mid-20th century, as America emerged from the Great Depression of the 1930s and the consequences of World War II, it turned its attention increasingly toward matters of social justice, which included desegregation and educational equality in the nation's public schools. On May 17, 1954, the United States Supreme Court, in a landmark decision authored by Chief Justice Earl Warren for a unanimous court, ruled that there was no place in American society for a "separate but equal doctrine" in America's public schools. *See Brown v. Board of Education,* 347 U.S. 483 (1954). The *Brown* decision, in addition to raising the national consciousness concerning public schools and notions of equality, also marked a first step in a civil rights expansion that continues today.

The next major United States Supreme Court decision in matters of public education addressed the use of disparate property tax bases as a source of funding public schools. See *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). In a 5-to-4 opinion authored by Justice Powell, the court held, on March 21, 1973, that disparate property valuations rendering financial support for public schools unequal did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Id. at 54-55.

Those who claimed that it was unfair to fund education through local taxes because of the disparity in financial resources were left to make their arguments in the several states based on state rather than federal constitutional concerns. This direction was not lost on the state of New Hampshire.

Wendell Jesseman on his own behalf and that of his school-age child filed a petition for a declaratory judgment in the Merrimack County Superior Court claiming that Part II, Article 83 of the New Hampshire Constitution placed a duty upon the state to provide educational opportunities for school-age children,

thereby rendering existing funding based on varying real estate values unconstitutional. The case was transferred without ruling to the supreme court and later returned to the trial court for findings of fact or in their absence an agreement as to the nature of a factual predicate upon which the court might base a constitutional opinion.

Wendell Jesseman was represented by the law firm of Nighswander, Martin, Kidder and Mitchell and the Manchester firm of McLane, Graf, Raulerson and Middleton. The state was represented by the Attorney General. Subsequent developments suggest that while the case was pending in the superior court neither side was anxious to bear the risk of non-persuasion in the supreme court. This resulted in the plaintiffs, on September 4, 1985, filing a motion for voluntary non-suit based upon the legislature's adoption of the Augenblick Formula, so-called, to fund education. The motion also provided that the formula, if funded, would result in a more equitable distribution of state aid to education. In this manner, the search for a constitutional base upon which to seek educational funding temporarily ended.

The truce brought about by the resolution of the *Jesseman* case was short-lived because shortly thereafter the State failed to fund the formula upon which the *Jesseman* plaintiffs and their counsel had relied. It was the legislature's disavowal of its commitment that brought many of the same lawyers together representing five "property poor" communities namely: Allenstown, Claremont, Franklin, Lisbon and Pittsfield, known as the *Claremont* communities. The lead firm in the new action was Shaheen, Cappiello, Stein and Gordon.

The *Claremont I* case, like its predecessor *Jesseman,* sought a declaratory judgment that the New Hampshire Constitution obligated the state to fund a constitutionally adequate public education for its school-age children. Justice Thayer was recused from participating in the case. Former Chief Justice William A. Grimes, a nationally recognized constitutional scholar, participated by special designation to fill the Thayer vacancy. Chief Justice Brock, writing for a unanimous court, held that the language contained in Part II, Article 83 in New Hampshire's Constitution imposed upon the state a constitutional duty to provide an education to its public school children sufficient to prepare them for their roles as participants and potential competitors in today's marketplace of ideas. *Claremont I,* 138 N.H. at 184, 192. The court also held that the state had a corresponding duty to underwrite the cost of a constitutionally adequate education. Id. at 184.

In so writing, the Chief Justice relied upon New Hampshire precedent as well as a similar interpretation of like language by the Massachusetts Supreme Judicial Court four years earlier. New Hampshire's constitutional language is almost identical to that of the Massachusetts Constitution. It is not contemporary language; it is the language of John Adams.

Upon remand, the trial court conducted a lengthy trial inquiring into the status of

public education in New Hampshire. In an extensive decree, the trial court concluded, in effect, that although there was room for improvement in public education, the state's constitutional duty to provide it was met by its *de facto* delegation of that duty to the several towns and cities.

The case was then revisited upon the supreme court on the September argument list in 1997. *See Claremont School Dist. v. Governor*, 142 N.H. 462 (1997) (*Claremont II*). In a 4-to-1 decision (Horton, J., dissenting), Chief Justice Brock, writing for the majority, wrote the language that has been the center point of political discourse, continuing to this day. The proposition that has proven nettlesome for the state's policy makers was written by the Chief Justice in simple terms: "In this appeal we hold that the present system of financing elementary and secondary public education in New Hampshire is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount taxed to others similarly situated in other towns or cities. This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens." *Claremont II*, 142 N.H. at 465. The court explained that the right to a state-funded constitutionally adequate education is fundamental and that any property tax levied to fund that right must be levied proportionately throughout the entire State. *Id*. at 471, 473.

The *Claremont* cases did not seek out Chief Justice Brock, nor did he seek out the issues that they presented. He was not alone in the *Claremont* opinions. He was supported at all times by a full court affirmation with the exception of one isolated dissent. Chief Justice Brock and *Claremont* are joined together in the history of New Hampshire's jurisprudence, as Chief Justice Earl Warren is joined with *Brown v. Board of Education* in the history of our country. In this regard, historians will treat Chief Justice Brock well as he occupies a high place in the company of his predecessors. As I noted at the outset, anyone who assumes the post of an appellate judge in a court of last resort, becomes in effect a trustee of the constitution. In contemplation of this concept some language from the great judge and wordsmith, Justice Benjamin N. Cardozo, comes to mind. While on the New York Court of Appeals in *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928), he had the occasion to write about trustees and said, "that the level of conduct for [trustees has] been kept at a level higher than that trodden by the crowd." The appellate judge is often reminded that he or she, on any given day, is walking on paths removed from those trodden by the crowd. This is as it should be because such a judge is a trustee of the constitution, the common law, and the hopes of a free society. At times the path is lonely."