

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

SUPERIOR COURT

Debrah Howes

v.

Frank Edelblut,

as Commissioner of the New Hampshire Department of Education

COMPLAINT

INTRODUCTION

1. The Education Trust Fund effectuates the New Hampshire Legislature’s constitutional duty to maintain and support a public school system. RSA 198:39; *Claremont School Dist. v. Governor*, 138 N.H. 183, 184 (1993). Use of the Education Trust Fund is limited by statute, the primary purpose of which is the distribution of funding to municipal school districts and approved charter schools in discharge of the State’s constitutional duty to provide a public education. *See* RSA 198:39 (Education Trust Fund statute).

2. In 2021, the New Hampshire legislature enacted a private education voucher program in the form of “education freedom accounts.” *See* RSA 194-F et seq. (hereinafter the “EFA” or “voucher” program or law).

3. Under the EFA program, parents of eligible students can apply to Children’s Scholarship Fund NH (CSF)¹ to establish an “education freedom account,” into which the State deposits adequacy aid money from the Education Trust Fund. *See* RSA 194-F:11.

4. Parents can then request money from their “education freedom account” for any number of qualifying private education expenses, including tuition and fees for private schools and private online learning programs, private tutoring services, textbooks, computer hardware and software, school uniforms, fees for testing, summer programs, therapies, higher education tuition and fees, and transportation. *See* RSA 194-F:2.

5. The diversion of money from the Education Trust Fund for these uses violates New Hampshire law, specifically the Education Trust Fund statute. *See* RSA 198:39.

6. The EFA program also violates Part II, Article 6-b of the New Hampshire Constitution, which provides that all money from New Hampshire’s state-run lottery be “appropriated and used exclusively for the school districts of the state.”

7. Finally, by enacting a private education voucher program as a substitute for public education, while delegating broad authority to a private entity to “administer[] and implement” nearly every aspect of the program with little oversight, the State has unlawfully delegated its duty to provide a public education

¹ The State selected the Children’s Scholarship Fund NH, a 501(c)(3) non-profit corporation, which already participates in the New Hampshire tax credit scholarship program, to administer the EFA program.

under Part II, Article 2 of the New Hampshire Constitution and its rulemaking authority.

PARTIES

8. Debrah Howes is a New Hampshire resident with a mailing address of 2 Glenview Drive, Hudson, NH, 03051.

9. Frank Edelblut is the current Commissioner of the New Hampshire Department of Education and is responsible for carrying out the EFA program, including the transfer of money from the Education Trust Fund to CSF. Commissioner Edelblut is named in his official capacity. His office is located at 101 Pleasant Street, Concord, NH 03301.

JURISDICTION, VENUE, AND STANDING

10. This Court has subject matter jurisdiction pursuant to RSA 491:7 and RSA 491:22.

11. Venue is proper as the defendant and seat of government are located in this county.

12. Plaintiff has standing pursuant to RSA 491:22 and Part I, Article 8 of the New Hampshire Constitution.

FACTS

I. The State is responsible for safeguarding and providing sufficient funding for public education.

13. Since colonial times, New Hampshire has insisted upon the provision of public education in some form.

14. To that end, when New Hampshire adopted its constitution in 1784, it included the following provision: “it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools...” Part II, Art. 83.

15. The New Hampshire Supreme Court interprets Part II, Article 83 of the State Constitution to “impose[] a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding.” *Claremont School Dist. v. Governor*, 138 N.H. 183, 184 (1993).

16. To comply with this duty, the State must “define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.” *Londonderry Sch. Dist. v. State*, 154 N.H. 153, 155-56 (2006) (quotation omitted).

17. While the New Hampshire Supreme Court “has never directed or required the selection of a particular funding mechanism,” it has determined that “the New Hampshire Constitution imposes solely upon the State the obligation to provide sufficient funds for each school district to furnish a constitutionally adequate education to every educable child.” *In re Op. of the Justices*, 145 N.H. 474, 477 (2000).

a. The State created the Education Trust Fund in order to meet its constitutional duty to provide a public education, keeping public education money separate from the general fund.

18. In response to the *Claremont* cases, the legislature enacted a series of laws aimed at defining and funding a constitutionally adequate education. This included, for example, a state-wide education property tax, *see* RSA 76:3.

19. Germane here was the legislature's creation in 1999 of the Education Trust Fund in the State Treasury, which remains a non-lapsing fund with the purpose to provide sufficient funds to deliver a constitutionally adequate education for all New Hampshire public school students. *See* RSA 198:39.

20. In establishing the Education Trust Fund, the legislature expressly forbade the use of monies in the fund “for any purpose other than to distribute adequate education grants to municipalities' school districts.” RSA 198:39 (1999).

21. To fund a constitutionally adequate education, the Legislature has, by separate statute, enacted and allocated tax increases to the Education Trust Fund, specifically business profits, business enterprises, room and meals, tobacco, real estate transfer, and utility property taxes. *See* RSA 77-A20-a (1999); RSA 77-E:14 (1999); RSA 78-A:26, III (1999); RSA 78-B:13 (1999); RSA 83-F:7, I (1999).

22. The legislature expressly required these increases – together with other sources, such as the lottery – to be deposited in the Education Trust Fund.

23. Over time, the Legislature has authorized certain expenditures from the Education Trust Fund that are integral to the State's constitutional duty to provide students with an adequate education. In July 2021, the statute was most recently amended, in pertinent part, to read as follows:

I. The state treasurer shall establish an education trust fund in the treasury. Moneys in such fund shall not be used for any purpose other than to distribute adequate education grants to municipalities' school districts and to approved charter schools pursuant to RSA 198:42, to provide low and moderate income homeowners property tax relief under RSA 198:56-198:61, to distribute school building aid to school districts and approved chartered public schools pursuant to RSA 198:15-b, to distribute tuition and transportation funds to school districts for

students attending career and technical education programs pursuant to RSA 188-E:9, to distribute special education aid to school districts pursuant to RSA 186-C:18, to fund department of education operating costs for a state student data collection and reporting system, and to fund kindergarten programs as may be determined by the general court.

RSA 198:39.

24. The legislature, through the plain language of the Education Trust Fund statute, section 198:39, continues to explicitly forbid the use of Education Trust funds for purposes “other than” those designated in the statute, which does not include the funding of private education vouchers or EFAs.

b. New Hampshire partly funds public education through its lottery.

25. Since its inception in 1963, “the primary purpose of the lottery and sweepstakes ... is to raise revenue for the benefit of public education” in New Hampshire. RSA 284:21-I, III.

26. The New Hampshire lottery is the oldest legal modern-day lottery in the United States.

27. At the time of its creation, the lottery was not simply the first of its kind, it was also extremely controversial.

28. From 1953 through 1963, Representative Larry Pickett put forth no less than five proposed bills to authorize a state-run lottery (then called a “sweepstakes”). The proposal finally passed in 1963.

29. Under the then-existing federal law, lotteries were illegal: transporting gambling paraphernalia, including lottery tickets, across state lines was a federal crime. Indeed, media reports at the time indicate that people were arrested in other

states, such as Rhode Island, New York, and New Jersey, for possessing New Hampshire lottery tickets.

30. Key to the ultimate passage and public acceptance of New Hampshire's lottery was the earmarking of profits for public education. This spending restriction was present in the original sweepstakes law in 1963 and has remained in some form ever since.

31. In 1990, New Hampshire further codified this principal that lottery profits be used only for public education by amending its constitution, adding Part II, Article 6-B:

All moneys received from a state-run lottery and all the interest received on such moneys shall, after deducting the necessary costs of administration, be appropriated and used exclusively for the school districts of the state. Such moneys shall be used exclusively for the purpose of state aid to education and shall not be transferred or diverted to any other purpose.

32. The State Treasurer is obligated to deposit all lottery profits into the Education Trust Fund. RSA 198:39(I)(h); RSA 284:21-j.

II. The EFA program is one of the most far-reaching private education voucher programs in the nation.

33. When the legislature enacted RSA 193-F in 2021, it created one of the most far-reaching private education voucher programs in the nation, allowing parents of eligible students to spend millions of tax dollars each year on an unlimited variety of private education “expenses” with money taken from the Education Trust fund. *See* RSA 194-F et seq.

34. The New Hampshire Department of Education describes the EFA program as “allow[ing] eligible New Hampshire students to direct state funded per-

pupil education adequacy grants toward select educational programming of their choice for a variety of learning experiences.” [PRESS RELEASE](#), New Hampshire Department of Education, September 9, 2022 (retrieved October 14, 2022).

35. A student is eligible for vouchers if they are “a resident of [New Hampshire] who is eligible to enroll in a public elementary or secondary school” and their household income at the time of application to the program is “less than or equal to 300 percent of the federal poverty guidelines.” RSA 194-F:1(VI). Such eligibility is broad, encompassing all students (including those who are not enrolled in school and students who are enrolled in private schools) regardless of whether they have ever attended public school. Additionally, once a student meets the 300 percent income threshold, they remain eligible in subsequent years regardless of their household income, as long as the student otherwise qualifies for the EFA. *Id.*

36. Funding for the EFA program vouchers is transferred from the Education Trust Fund in the same amount as the “per pupil adequate education grant,” which is calculated based on the amount of money that a school district receives from the Education Trust Fund on a per-pupil basis. RSA 194-F:2; RSA 198:40-a.

37. These re-directed Trust funds are being used to pay private “education” expenses. Indeed, parents can use the EFA funds on any “qualifying expenses,” which include a variety of education-adjacent categories including, for example, buying computers for their children. *See* Ed 804.02.

38. Other qualifying expenses include: tuition and fees at a private school, tuition and fees for non-public online learning programs, private tutoring services, textbooks, computer software, school uniforms, fees for testing, summer programs, therapies, higher education tuition and fees, and transportation. RSA 194-F:2. The list of qualifying expenses concludes with a “kitchen sink” provision that authorizes the use of EFA funds for “[a]ny other educational expense approved by the scholarship organization.” See RSA 194-F:2, II.

39. For example, in 2021, Amazon was the biggest beneficiary of the program, taking in 18.2%, or \$437,736 of the total funds released to parents. [Private Christian academies see boost from ‘education freedom account funds](#), Ethan Dewitt, CONCORD MONITOR, published April 5, 2022, last accessed October 18, 2022.

40. Upon information and belief, none of the funding provided via the EFA program has been used for any of the purposes identified in the Education Trust Fund statute, RSA 198:39.

III. The State is funding the EFA program by unlawfully transferring or expending funds from the Education Trust Fund.

a. The funding mechanism violates New Hampshire law.

41. RSA 194-F:2 requires the commissioner of the DOE to “transfer to [CSF] the per pupil adequate education grant amount under RSA 198:40-a, plus any differentiated aid that would have been provided to a public school for that eligible student. The transfers shall be made in accordance with the distribution of adequate education grants under RSA 198:42.” RSA 194-F:2.

42. The only source of funding for the EFA program is the Education Trust Fund; it does not have any other funding mechanism. *See* RSA 194-F:11.

43. Distribution of Education Trust funds to a non-profit, such as CSF, to operate a voucher program is not an authorized use of the Education Trust Fund. *See* RSA 198:39.

44. Further, the EFA program also provides that if a student is withdrawn from the program, or graduates, any unused funds will revert to the Education Trust Fund, but that those returned funds will then be reallocated to fund more vouchers. RSA 194-F:2. Thus, even where funds attributed to a particular student are returned by CSF to the State for deposit in the Education Trust Fund, those funds remain “earmarked” for future voucher use only. This arrangement violates the strict statutory boundaries of the Education Trust Fund statute. *See* RSA 198:39.

b. For FY2022 and FY2023, the State did not budget any funds for the EFA program, yet transferred over \$9 million from the Education Trust Fund to the program in FY2022 alone.

45. Although it enacted the EFA Program at the same time it approved the biennial budget for FY2022-FY2023, the State did not budget any expenditures for the EFA program for those years.

46. For example, for FY2022 the State budgeted funding the Education Trust Fund as follows:

Business Profits Tax	\$128,900,000
Business Enterprise Tax	\$265,000,000
Meals And Rooms Tax	\$10,300,000
Tobacco Tax	\$108,900,000
Real Estate Transfer Tax	\$65,300,000
Lottery	\$125,000,000
Tobacco Settlement	\$38,200,000

Utility Property Tax	\$40,600,000
<u>Statewide Property Tax</u>	<u>\$363,100,000</u>
Total	\$1,145,300,000

47. For FY2022, the State budgeted the following with respect to authorized uses of the Education Trust Fund:

077 Building Aid - Education	\$26,972,728
079 Adequate Education Aid - State	\$968,337,773
600 Tuition and Transportation Aid	\$9,000,000
611 Charter School Tuition *	\$46,968,390
<u>629 Special Education Aid</u>	<u>\$33,252,000</u>
TOTAL	\$1,084,530,891

48. The FY2022 budget did not include any appropriation for the EFA program.

49. Yet, according to the most recent publicly available data for FY2022, the State transferred over \$9 million from the Education Trust Fund to CSF for the EFA program during that fiscal year. [STATE SHARE EXPENDITURE REPORT FY2022 YTD THROUGH MARCH](#), accessed October 18, 2022.

50. Upon information and belief, the majority of these funds were then granted by CSF to parents for private expenditures pursuant to the EFA program.

51. Similarly, the FY2023 budget did not account for the EFA program.

52. Yet, as of September, a mere three months into FY2023, the State already transferred nearly \$3 million from the Education Trust Fund to CSF for the EFA program. [STATE SHARE EXPENDITURE REPORT FY2023 YTD THROUGH SEPTEMBER](#), accessed November 30, 2022.

IV. The State is unlawfully delegating its duty and authority to a private entity.

53. The duty to ensure an adequate public education rests solely with the State.

54. The structure and funding mechanism of the EFA program is expressly designed, and “marketed” to the public, as a method for expanding education to the public.

55. For example, CSF describes the program as follows: “[e]ligible New Hampshire families earning up to 300% of the poverty line **can direct part of their child’s state education funding** to pay for tuition at the school of their choice, tutoring, online learning programs, educational supplies, and other educational expenses.” [NH EDUCATION FREEDOM ACCOUNTS](#), last accessed November 30, 2022 (emphasis added).

56. This diversion of public education funding is central to the State’s goal for the program: removing students from public school systems by using the EFA as a substitute for the State’s duty to provide an education.

57. Indeed, the law requires parents utilizing the EFA to sign an agreement which includes among its terms a promise “[n]ot to enroll the eligible student as a full-time student in their resident district public school while participating in the EFA program.” RSA 194-F:3, III(d)(2).

58. According to the State, using the EFA program, rather than public schools, to deliver education services will purportedly save taxpayers money:

Education Freedom Accounts allow eligible New Hampshire students to direct state funded per-pupil education adequacy grants toward select educational programming of their choice for a variety of learning experiences. There are currently 3,025

children enrolled in the EFA program that is offering grants totaling nearly \$14.7 million this school year. The cost to taxpayers would be about \$65 million if the 3,025 students, who are all eligible, attended a traditional public school.

59. However, the EFA program delegates virtually all authority to CSF with no meaningful oversight. In particular, the law delegates to CSF the authority to “administer[] and implement” the EFA program. RSA 194-F:1, XII. This authority includes the sole discretion to determine key details of the EFA program, including, which entities are funded with state education funds and for what purposes, what qualifies as an “educational expense,” and how education is delivered to students participating in the program. All this is done with little State oversight, no transparency, and no clear means of public access to CSF records under the State’s Right-to-Know Law, RSA 91-A.

60. Since the enactment of the EFA program in 2021, the State’s reports on the Education Trust Fund provide little to no information on the actual expenditures for EFAs other than that millions of dollars are being transferred each year.

61. Moreover, the EFA program’s enabling statute expressly *prohibits* the state from regulating or imposing standards – such as those required to ensure a constitutionally adequate education – on the recipients of the private education voucher funds distributed by the EFA program. RSA 194-F:6 (providing that “nothing in this chapter shall be deemed to limit the independence or autonomy of education service providers” and that the State cannot “impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the EFA program.”)

62. The grant of authority gives CSF and the private schools and entities that receive EFA funds much broader discretion than the New Hampshire DOE, local school districts, and local school boards.

COUNT I – DECLARATORY JUDGMENT – LOTTERY PROFITS

63. Part 2, Article 6-b of the New Hampshire Constitution provides that “All moneys received from a state-run lottery and all the interest received on such moneys shall, after deducting the necessary costs of administration, be appropriated and used exclusively for the school districts of the state. Such moneys shall be used exclusively for the purpose of state aid to education and shall not be transferred or diverted to any other purpose.”

64. The State created and operates an Education Trust Fund.

65. RSA 284:21-j requires that lottery profits “shall be deposited in the education trust fund established under RSA 198:39.”

66. The State does not segregate lottery money from other funding sources.

67. The use of Education Trust Fund money for “education freedom accounts” is not a use for “school districts of the State.”

WHEREFORE, the plaintiffs respectfully request this Honorable Court:

- A) Issue a declaratory judgment that the use of Education Trust Fund money for the “education freedom accounts” violates Part II, Article 6-B of the New Hampshire Constitution and RSA 284:21-j; and
- B) For such further relief this Court deems fair and just.

**COUNT II – DECLARATORY JUDGMENT –
UNLAWFUL USE OF EDUCATION TRUST FUND**

68. The State created and operates an Education Trust Fund, the primary purpose of which is to discharge the State’s constitutional obligation to ensure an adequate education. *See* RSA 198:39.

69. In pertinent part, RSA 198:39, I provides that:

The state treasurer shall establish an education trust fund in the treasury. Moneys in such fund shall not be used for any purpose other than to distribute adequate education grants to municipalities' school districts and to approved charter schools pursuant to RSA 198:42, to provide low and moderate income homeowners property tax relief under RSA 198:56-198:61, to distribute school building aid to school districts and approved chartered public schools pursuant to RSA 198:15-b, to distribute tuition and transportation funds to school districts for students attending career and technical education programs pursuant to RSA 188-E:9, to distribute special education aid to school districts pursuant to RSA 186-C:18, to fund department of education operating costs for a state student data collection and reporting system, and to fund kindergarten programs as may be determined by the general court.

70. The Education Trust Fund is a non-lapsing fund, the entirety of which must be invested.

71. There is no mechanism for segregating any portion of the Education Trust Fund.

72. Vouchers for “education freedom accounts” are not an authorized use of Education Trust Fund money.

73. Vouchers cannot be returned back to the fund and be segregated without additional action of the Legislature.

WHEREFORE, the plaintiffs respectfully request that this Honorable Court:

- A) Issue a declaratory judgment that the use of Education Trust Fund money for “education freedom accounts” violates RSA 198:39; and
- B) For such further relief this Court deems fair and just.

**COUNT III – DECLARATORY JUDGMENT –
UNLAWFUL DELEGATION OF DUTY AND AUTHORITY**

74. The State has a constitutional duty to provide a public education.

75. “While the State may delegate [the duty to provide a constitutionally adequate education], it must do so in a manner that does not abdicate the constitutional duty it owes to the people.” *Claremont School Dist. v. Governor*, 147 N.H. 499 (2002) (*Claremont IV*).

76. Here, the State is using the EFA program as a mechanism to fulfill its duty to provide a constitutionally adequate education.

77. Via the EFA program, the State delegated broad authority and discretion to CSF.

78. The EFA program does not enable – but rather prohibits – State oversight of the provision of education, delegating the authority and duty to provide educational services to CSF and, ultimately, whatever providers CSF authorizes, such as private schools or vendors like Amazon.com.

79. The EFA program is an unlawful delegation of the State’s constitutional duty to provide an adequate education.

80. The EFA program, and the State’s contract with CSF, delegate rulemaking and policy making authority to CSF. This is an unlawful delegation of

the State’s legislative authority under Part II, Article 2 of the New Hampshire Constitution.

WHEREFORE, the plaintiffs respectfully request that this Honorable Court:

- A) Issue a declaratory judgment that the delegation of duty under the EFA program is unlawful; and
- B) Issue a declaratory judgment that the delegation of authority under the EFA program is unlawful; and
- C) For such further relief this Court deems fair and just.

COUNT IV – INJUNCTIVE RELIEF

81. Plaintiffs incorporate by reference the allegations in Count I and Count II.

82. The use of lottery money for “education freedom accounts” violates RSA 284:21-j and the New Hampshire Constitution.

83. The use of Education Trust Fund money for “education freedom accounts” violates RSA 198:39.

84. In FY2022, the State, through the Commissioner of the Department of Education, transferred at least \$9 million from the Education Trust Fund to a private entity for purposes of operating the EFA program.

85. Upon information and belief, for FY2023, the State intends to continue this practice.

86. As the transfers are unlawful, this Court should issue an injunction prohibiting the same.

WHEREFORE, the plaintiffs respectfully request this Honorable Court:

- A) Issue an injunction prohibiting the Department of Education from transferring or expending Education Trust Fund money for "education freedom accounts";
and
- B) For such further relief this Court deems fair and just.

Respectfully submitted,

Debrah Howes

By her Attorneys,

Drummond Woodsum & MacMahon

Dated: December 8, 2022

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