

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

Debrah Howes

v.

Frank Edelblut, Commissioner, New Hampshire Department of Education

v.

Jessica Ash, Amy Shaw, and Karl Jackson

Docket No.: 217-2022-CV-01115

**ORDER ON DEFENDANT’S MOTION TO DISMISS AND INTERVENORS’ MOTION  
FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Debrah Howes, brings this suit against the defendant, Frank Edelblut, Commissioner of the New Hampshire Department of Education (the “Department”), challenging the constitutionality of RSA 194-F. (Court index #1.) The Department moves to dismiss. (Court index #15.) The intervenors, Jessica Ash, Amy Shaw, and Karl Jackson, move for judgment on the pleadings. (Court index #17.) Howes objects to both motions. (Court index #20.) The Court held a hearing on the motions on September 18, 2023. For the following reasons, the Department and intervenor’s motions are GRANTED.

**Factual Background**

The complaint alleges the following facts, which the Court must assume to be true for the purposes of these motions. See Berry v. Watchtower Bible & Tract Soc’y of N.Y., 152 N.H. 407, 410 (2005); Sivalingam v. Newton, 174 N.H. 489, 493-94 (2021) (treating a motion for judgment on the pleadings the same as a motion to dismiss).

In 1999, the New Hampshire legislature created the Education Trust Fund, a non-lapsing fund with the purpose to provide a constitutionally adequate education to New Hampshire students. (Court index #1 ¶ 19.) The legislature prohibited funds from the Education Trust Fund to be used “for any purpose other than to distribute adequate education grants to municipalities’ school districts.” (Id. ¶ 20.) Included in the Education Trust Fund are the profits from the State-run lottery (“lottery money”). (Id. ¶ 32.) In 1990, the New Hampshire legislature amended the New Hampshire Constitution to require all lottery money to be “used exclusively for the purpose of state aid to education . . . .” (Id. ¶ 31.) The State does not segregate lottery money from other funding sources within the Education Trust Fund. (Id. ¶ 66.)

In 2021, the New Hampshire legislature enacted RSA 194-F, authorizing education freedom accounts (the “EFA program”). (Id. ¶ 2.) Through the EFA program, parents of eligible students can apply to the Children’s Scholarship Fund NH to establish an education freedom account. (Id. ¶ 3.) Then, the State deposits adequacy aid money from the Education Trust Fund into the education freedom account. (Id.) Parents can request money from their education freedom account for qualifying education expenses as outlined by RSA 194-F:2, II. (Id. ¶ 4.)

For the fiscal year 2022, the State budgeted funding for 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
Statewide Property Tax	\$363,100,000
Total	\$1,145,300,000

(Id. ¶ 46.) The fiscal year 2022 budget did not specifically allocate funds to the EFA program.

(Id. ¶ 48.) However, \$9,000,000 from the Education Trust Fund was used to fund the EFA

program in the fiscal year 2022. (Id. ¶ 49.) As of September 2022, \$3,000,000 from the

Education Trust Fund was used to fund the EFA program for the fiscal year 2023. (Id. ¶ 52.)

### Legal Standard

When ruling on a motion to dismiss, the Court must discern “whether the allegations in the [complaint] are reasonably susceptible of a construction that would permit recovery.” Boyle v. Dwyer, 172 N.H. 548, 553 (2019). The Court assumes all well-pleaded facts in the complaint to be true and construes all reasonable inferences in the light most favorable to the pleading’s proponent. Weare Bible Baptist Church, Inc. v. Fuller, 172 N.H. 721, 725 (2019). The Court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief, must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141–42 (2019). “In conducting this inquiry, [the Court] may also consider documents attached to the plaintiffs’ pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint.” Boyle, 172 N.H. at 553 (quoting Ojo v. Lorenzo, 164 N.H. 717, 721 (2013)). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court “need not . . . assume the truth of statements that are merely conclusions of law.” Lamb v. Shaker Reg’l Sch. Dist., 168 N.H. 47, 49 (2015).

The Court applies this same standard to a motion for judgment on the pleadings. Sivalingam, 174 N.H. at 493-94 (“In general, a motion seeking judgment based solely on the

pleadings is in the nature of a motion to dismiss for failure to state a claim upon which relief may be granted.”).

### Analysis

Howes brings the following claims: (1) declaratory judgment that the use of Education Trust Fund for education freedom accounts violates Part II, Article 6-b of the New Hampshire Constitution, (2) declaratory judgment that the use of Education Trust Fund money for education freedom accounts violates RSA 198:39, and (3) declaratory judgment that the Education Trust Fund program is an unlawful delegation of duty and authority. Howes seeks injunctive relief prohibiting the Department from transferring or expending Education Trust Fund money for education freedom accounts. The Court addresses each claim in turn.<sup>1</sup>

#### Constitutionality of RSA 194-F

Howes challenges RSA 194-F on the basis that it allegedly apportions lottery money contained in the Education Trust Fund to uses other than those supporting “the school districts of the state” in violation of Part 2, Article 6-b of the New Hampshire Constitution. Howes’ allegation is based on the lack of segregation of different funding sources within the Education Trust Fund. Particularly, it is impossible to know if the lottery money within the Education Trust Fund is being used to fund the EFA program. The Department argues that this uncertainty does not suffice to overcome the presumption of RSA 194-F’s constitutionality.

“The constitutionality of a statute is a question of law . . . .” Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 161 (2021). “In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds.” Id. “This presumption requires that [the Court] will hold a statute to be constitutional unless a clear and

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<sup>1</sup> The Department and intervenors raise substantially similar arguments in their motions. Accordingly, the Court incorporates the intervenors’ arguments into the Department’s.

substantial conflict exists between it and the constitution.” Id. “When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.” Id. Accordingly, the Court “will construe a statute to avoid conflict with constitutional rights whenever reasonably possible.” Doe v. Comm’r of N.H. Dept. of Health and Human Serv., 174 N.H. 239, 251 (2021). “The party challenging a statute’s constitutionality bears the burden of proof.” Contoocook Valley Sch. Dist., 174 N.H. at 161. On a facial challenge to a statute, “the plaintiff must demonstrate that there is no set of circumstances under which these provisions might be valid.” In re S. New Hampshire Med. Ctr., 164 N.H. 319, 326 (2012).

Howes’ challenge to RSA 194-F relies on Part 2, Article 6-b which provides,

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.

To comply with Part 2, Article 6-b, the legislature directed lottery money into the Education Trust Fund. RSA 198:39, II(g). To fund the EFA program, the legislature apportioned funds from the Education Trust Fund. RSA 194-F:11. There is no dispute that the EFA program supports non-public education and thus the use of lottery money to fund the program would run afoul of Part 2, Article 6-b.

The Court begins by presuming the constitutionality of RSA 194-F. See Contoocook Valley Sch. Dist., 174 N.H. at 161. Howes bears the burden of demonstrating that there is no set of circumstances under which the funding of the EFA program with funds from the Education Trust Fund might be valid. See In re S. New Hampshire Med. Ctr., 164 N.H. at 326. Howes does not meet this burden, even with the allegations in her complaint taken as true and viewing all reasonable inferences in her favor. See Weare Bible Baptist Church, Inc., 172 N.H. at 725.

Howes argues that because there is no way to prove lottery money is not being allocated to the EFA program, the program is unconstitutionally funded. The Court disagrees because it must presume that the EFA program is constitutional and thus not funded by lottery money. Money is generally fungible and funds within the Education Trust Fund are not segregated by source. For that reason, it is impossible to track the flow of one income source, such as lottery money, to its final use: either to a public school district or to the EFA program. The Court must presume that RSA 194-F:11 is constitutional. Absent evidence that lottery money is being used to fund the EFA program, the Court must presume otherwise. Lottery money comprised \$125,000,000 of the total \$1,145,300,000 of funding for the Education Trust Fund in the 2022 fiscal year. Also in the 2022 fiscal year, the State transferred over \$9,000,000 from the Education Trust Fund to the Children's Scholarship Fund for the EFA program. Due to the proportion that lottery money takes up of the Education Trust Fund and the respectively minor allocation to the EFA program, (see court index #1 ¶ 47), the Court's required constitutional presumption is reasonable. Howes points out that the Education Trust Fund is non-lapsing and its principal is invested in interest bearing accounts. For that reason, Howes argues that the State's compliance with Part 2, Article 6-b cannot be demonstrated with the figures from one fiscal year. While true that the figures from the 2022 fiscal year do not definitively prove the State's compliance, the fact that the Education Trust Fund is non-lapsing and collects interest does not disturb the Court's presumption that disbursements to the EFA program do not include lottery money.

Further, Howes cannot meet her burden of demonstrating there is no set of circumstances under which the funding of the EFA program with funds from the Education Trust Fund might be valid. See In re S. New Hampshire Med. Ctr., 164 N.H. at 326. The money within the

Education Trust Fund is not segregated by funding source. Accordingly, it is impossible to know whether lottery money is used to fund the EFA program. The Court shall not declare the EFA program unconstitutional except upon inescapable grounds. See Contoocook Valley Sch. Dist., 174 N.H. at 161. The inability to determine whether lottery money is used to fund the EFA program precludes a declaration that RSA 194-F is unconstitutional because the Court must presume its constitutionality and the means by which the State accounts for the funds within the Education Trust Fund prevent Howes from demonstrating the use of lottery money for a non-public education purpose. Accordingly, Howes' claim for declaratory judgment that the EFA program is unconstitutionally funded is DISMISSED.

#### Violation of RSA 198:39

Howes seeks a declaratory judgment that the Department's use of Education Trust Fund money to operate the EFA program violates RSA 198:39. At the time of the parties' filings, RSA 198:39 was silent as to RSA 194-F, but, effective July 1, 2023, the legislature amended RSA 198:39 to authorize the distribution of "funds to scholarship organizations approved under RSA 77-G, that administer and implement RSA 194-F." The Court considers Howes' allegation that RSA 194-F violates the Education Trust Fund requirements in RSA 198:39 moot in light of the recent amendment to include distributions related to RSA 194-F and is thus DISMISSED.

#### Unlawful Delegation

Howes alleges that through the EFA program, the State is unlawfully delegating its duty to provide an education. Howes makes two arguments: (1) the EFA program deters and ultimately prohibits children from public school enrollment and (2) the EFA program delegates virtually all authority to the Children's Scholarship Fund without meaningful oversight. The Court addresses each argument in turn.

Part II, Article 83 of the New Hampshire Constitution “imposes 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.” Contoocook Valley Sch. Dist., 174 N.H. at 156. To comply with this mandate, the State must ensure the delivery of an adequate education through accountability. Id. at 157. Howes contends that, through the EFA program, the State is discharging its duty to provide a constitutionally adequate education by offering an exchange of money for children’s removal from the public school system. Howes alleges that the State’s goal in enacting the EFA program is to remove students from the public school system to obviate the requirement to provide an adequate education. (See court index #1 ¶ 56.) The Court is not persuaded. The State does not have an obligation to provide a constitutionally adequate education to children whose parents opt to provide them a private education. See Contoocook Valley Sch. Dist., 174 N.H. at 156.

Further, the Court disagrees with Howes’ argument that the EFA program prohibits children from obtaining a public education. To be sure, a child cannot both take money from the EFA program and attend public school. However, the EFA program does not prohibit children from returning to public school. Parents are only required to agree not to enroll their child in public school “while participating in the EFA program.” RSA 194-F:3, III(d)(1). Importantly, RSA 194-F provides that “[u]pon notice to the scholarship organization, an EFA student may choose to stop receiving EFA funding and enroll full-time in a public school.” RSA 194-F:3, VI.

Accordingly, the Court finds that the State did not delegate its duty to provide an adequate education because it has no duty to students not enrolled in public school and RSA 194-F does not prevent students from attending public school. The Court now turns to Howes’



argument that the legislature failed to institute proper limitations for the approval of expenditures under the EFA program.

RSA 194-F:2, II provides an exclusive list of qualifying EFA expenses. The items listed (a) through (n) are traditional education expenses including tuition and fees, tutoring, textbooks, technology, and uniforms, inter alia. However, Howes' argument focuses on the last item on the list, RSA 194-F:2, II(o), a catchall provision. RSA 194-F:2, II(o) permits the use of EFA funds for "[a]ny other educational expense approved by the scholarship organization." "Educational expense" is not defined by the statute. Specifically, Howes points to her allegation that, in 2021, Amazon received \$437,736 from expenditures authorized under the EFA program without any public accounting.

The Court determines that the structure of the EFA program does not unreasonably delegate authority to private parties. While the general court is not permitted to delegate the power to legislate, it may delegate the authority to execute legislative directions. Opinion of the Justices, 143 N.H. 429, 442 (1999). "Delegations of governmental functions to private individuals are permitted so long as proper safeguards are provided." City of Portsmouth v. Ass'n of Portsmouth Teachers, NEA-New Hampshire, 134 N.H. 642, 646 (1991). The legislature drafted RSA 194-F:2, II to include several types of educational expenses authorized under the EFA program. The legislature also included a catchall provision presumably designed to allow for flexibility as it would be difficult for the legislature to determine all potential expenses related to a child's education. The legislature delegated the authority to approve expenses extraneous to the specific items listed to the scholarship organization but required those expenses be "educational" and Howes has not identified any expenditures that are not educational. Finally, RSA 194-F:12 establishes a legislative oversight committee designed to

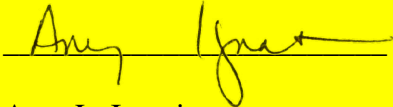
monitor the implementation of RSA 194-F. Upon consideration of the entire statute, the enumerated list of permitted expenses, the catchall provision’s restriction to “educational expenses” and required approval from the scholarship organization, and the legislative oversight committee, the Court finds that the legislature established proper safeguards and did not impermissibly delegate a government function.

Conclusion

For the foregoing reasons, the Department’s motion to dismiss and the intervenors’ motion for judgment on the pleadings are GRANTED.

SO ORDERED.

November 13, 2023



Amy L. Ignatius  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 11/14/2023