Bill as Introduced

HCR 14 – AS INTRODUCED

2003 SESSION

03-0015
04/09

HOUSE CONCURRENT RESOLUTION *14*

A RESOLUTION declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

SPONSORS: Rep. Pepino, Hills 51; Rep. Giuda, Graf 13; Rep. Balboni, Hills 59; Rep. Soltani, Merr 37; Rep. Woods, Straf 69; Sen. Boyce, Dist 4; Sen. Kenney, Dist 3; Sen. Gallus, Dist 1

COMMITTEE: Ways and Means

ANALYSIS

This house concurrent resolution declares that it is wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

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03-0015
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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

A RESOLUTION declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

Whereas, the members of the executive and legislative branches of the state of New Hampshire, having made and subscribed an oath to God and to the state and its constitution, or alternatively, by affirming under the pains and penalties of perjury, their allegiance to the state of New Hampshire and its constitution pursuant to part II, article 84 of said constitution, hereby find that the New Hampshire supreme court decisions in the Claremont cases were wrong and that the supreme court does not have the power to tell the legislature whether and how to set educational policy and whether and how much to spend on education and that, accordingly, these aspects of the Claremont I and Claremont II decisions and any and all consequences that flow therefrom do not have the force and effect of the law; and

Whereas, in furtherance of this position, the legislature finds that under part I, article 29 of the New Hampshire constitution, the legislature possesses the sole authority to create laws, and that under part I, article 29 of said constitution, the legislature possesses the sole authority to suspend laws. Moreover, the legislature finds additional constitutional support for its position as follows:

(a) Part I, article 1, relative to the origin and object of government.

(b) Part I, article 2 relative to individual property rights.

(c) Part I, article 6 relative to local control of education, both religious and secular.

(d) Part I, article 12, relative to the consent of the governed on taxation.

(e) Part I, article 28, relative to the consent of the people, or their representatives in the legislature, prior to the establishment or imposition of a tax.

(f) Part I, article 28-a, relative to the prohibition on unfunded mandates.

(g) Part I, article 31 and part II, article 2, relative to the authority of the legislature to make laws.

(h) Part II, article 83, relative to the New Hampshire supreme court's inconsistent and unsupported interpretation of "cherish" to mean "to require payment for" within the context of this article; and

Whereas, the legislature hereby finds and declares that the tax structure in effect prior to the Claremont II ruling to be legally binding until such time as the legislature may vote to change it; and

Whereas, the basis for this legislative finding includes the following:

(a) Under part I, article 37, the people of New Hampshire have a right to a government based upon the separation of powers. The legislature finds that it would be a violation of this right for the legislature to delegate to the judiciary or to allow the judiciary to assert, directly or indirectly, any of the legislative powers vested exclusively in the general court by part II, article 2.

(b) The legislative power vested exclusively in the general court by part II, article 2 includes the power and discretion to determine whether and how to set educational policy and whether and how much to spend on education. Therefore, the legislature finds that it is wrongful for the judiciary, either directly or indirectly, to define educational adequacy or the cost of educational adequacy.

(See, e.g., Coleman v. School District of Rochester, "The courts may not declare acts of the legislature void on the sole issue whether they are 'wholesome and reasonable.' The legislature is to judge whether they are for 'the benefit and welfare' of the state.")

(c) Part II, article 83 nowhere states what the supreme court claims it states; there is no mention anywhere in said article that the state has a duty to "fund" education; rather, it says only "cherish," which does not mean "fund" because when our framers wanted the state to fund something they used the term "support."

(See, part I, article 6, of the New Hampshire constitution.)

(d) No state funding was provided for public education for the first 50 years of the state, which conclusively demonstrates that nobody understood the constitution as imposing a duty upon the state to fund public education.

(e) Every single supreme court, with the exception of the current supreme court, understood that the power to determine whether, how and to what extent to fund public education was exclusively a legislative power.

(See, Fogg v. Board of Education, "It is a duty not imposed by constitutional provision, but has always been assumed by the state.")

(f) Had the framers intended to make an adequate education a constitutional right, they could have and would have said so in the same way that they enumerated various rights in part I of our constitution, the Bill of Rights, by expressly calling it a right in that portion of our constitution; they would not have hidden a constitutional right to an adequate education in part II of our constitution, the Form of Government, using language so obscure that nobody would discover said "right" for 200 years.

(See, Wooster v. Plymouth, "The division of the constitution into 2 parts was not made without a purpose, and the name of each part is not without significance.")

(g) The framers of our constitution understood "rights" as freedom from government interference, the right to free speech has never been understood to mean that the government must provide one with a typewriter or fax machine, only that the government cannot prevent one from ventilating has or her viewpoint; in contrast, the "right" to an "adequate education" declared by our supreme court is a claim upon government, which is totally inconsistent with the nature of the types of rights recognized by the framers and, not surprisingly, the nature of the actual rights contained in our constitution.

(h) The educational system that the supreme court declared unconstitutional and the

provisions of the constitution that the supreme court relied upon to strike it down peacefully co-existed for more than 200 years; the assertion by the New Hampshire supreme court so late in our history that educational policy is a matter not for democratic decision making, but for constitutional law.

(i) The Claremont decisions are irreconcilable with the structure, text and history of our constitution; the "right" to an "adequate education" declared in the decisions and the "duty" of the state to fund this right are nothing more than the views of the current justices of the supreme court of what constitutes good social policy and, therefore, do not have the force and effect of law; and

Whereas, the legislature hereby finds and declares that the amount of state funding for public education required by the constitution has been and remains zero dollars, and that the legislature, not the supreme court, has the exclusive power and discretion to authorize any additional state funding, and that, to the extent not prohibited by part I, article 28-a, the state may continue to delegate some or all of the responsibility for providing public education to the local school districts; now therefore, be it

Resolved by the House of Representatives, the Senate concurring:

That the legislature hereby finds and declares that the school tax structure in effect prior to the Claremont II decision may continue to be used until such time as modified by the representative branches, and has been modified by the representative branches.

HCR 14 – AS AMENDED BY THE HOUSE

26mar03... 0434h

2003 SESSION

03-0015
04/09

HOUSE CONCURRENT RESOLUTION ***HCR 14***

A RESOLUTION declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

SPONSORS: Rep. Pepino, Hills 51; Rep. Giuda, Graf 13; Rep. Balboni, Hills 59; Rep. Soltani, Merr 37; Rep. Woods, Straf 69; Sen. Boyce, Dist 4; Sen. Kenney, Dist 3; Sen. Gallus, Dist 1

COMMITTEE: Ways and Means

AMENDED ANALYSIS

This house concurrent resolution declares the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

HCR 14 – AS AMENDED BY THE HOUSE

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

A RESOLUTION declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Whereas, under part 1, article 37 of the constitution of the state of New Hampshire, the 3 essential powers of the government of this state, the legislative, the executive and the judicial, are to be kept as separate from and independent of each other as the nature of a free government will admit; and

Whereas, only by a consistent and strict adherence to a separation of the powers of the 3 branches of the government can the rights of the people set forth in part 2 of the constitution be preserved, and the form of government set forth in part 2 be maintained; and

Whereas, the language of part 1, article 37 applies with equal force to the judicial as to the legislative and executive branches; and

Whereas, were part 1, article 37 to apply with less force to the judicial than to the legislative and executive branches, the legislative and executive branches would be inferior to, subordinate to, and dependent upon the judicial branch, and our system of government would be oligarchical and not republican; and

Whereas, it is the duty of the executive and legislative branches, pursuant to the oaths taken by their members under part 2, article 84, no less than it is of the judicial branch, pursuant to the oaths taken by its members, not to contravene any portion of the constitution, and to be vigilant for and to oppose any contravention by another branch; and

Whereas, upon the occurrence of a palpable attempt on the part of the judicial branch to exercise any authority inconsistent with the judicial function, it is the right and duty of the legislative and executive branches to intervene to the extent deemed by them necessary, within the scope of their enumerated powers, to oppose and defeat such exercise, thereby to safeguard the fundamental principle of our form of government that each of its 3 branches should be confined to its constitutional limits; and

Whereas, in its decisions in the Claremont school funding cases, the judicial branch unambiguously directed the legislative and executive branches to pass laws "implementing" an "adequate education" based upon "seven criteria articulated by the Supreme Court of Kentucky," and to pass laws establishing "standards of accountability," and unambiguously stated that it reserved for itself the ultimate authority to determine the sufficiency of these laws; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law a certain definition of an "adequate education"

or a definition of an "adequate education" based upon or incorporating certain criteria or parameters, or to enact into law any definition of an "adequate education" at all, adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law "standards of accountability," adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, in its decisions in the Claremont school funding cases, the judicial branch unambiguously directed the legislative and executive branches to fund public education and unambiguously directed the legislative and executive branches how to do so; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law a certain system for funding public education or a system for funding public education based upon or incorporating certain criteria or parameters, or that the legislative and executive branches are required to enact into law any system at all for funding public education, adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, at no time over the course of the 2 centuries of New Hampshire's statehood prior to the Claremont decisions did the judicial branch ever assert any authority to control, direct, or shape the educational policies to be pursued by the legislative and executive branches in terms of "adequacy" or any other qualitative measure; and

Whereas, at all times over the course of the 2 centuries of New Hampshire's statehood prior to the Claremont decisions, the judicial branch confined its review of statutory enactments and administrative actions respecting education to the constitutionality of the challenged statute or action and never considered the "adequacy" or any other qualitative measure of the statute or action.

Whereas, for the legislative and executive branches to treat as binding upon them any ruling by the judicial branch directing them to enact definitions agreeable to the judicial branch of "adequate education," or "systems of accountability" or to enact a particular system for funding public education, would attenuate the republican form of government established by part 2 of the New Hampshire constitution, and be subversive of representative government; and

Whereas, the scope of part 2, article 83 is not limited to cherishing the interest of public schools alone, but expressly encompasses as well cherishing the interest of literature, the sciences, and all seminaries; and further expressly states there to be a duty to "encourage," "countenance" and "inculcate" many other pursuits and virtues as well; and

Whereas, by its very terms, and in accordance with its original understanding, part 2, article 83 applies equally to the many matters therein enumerated, and the historical record is clear that it

was left to the legislative branch to decide which of these matters, if any, would be funded from the public purse and, consistent with the fundamental principle of the separation of powers, these legislative decisions were not subjected to judicial review; and

Whereas, acceptance by the legislative and executive branches of the judiciary's directives in the Claremont decisions would not merely be to surrender to the judiciary a portion of the legislative and executive power to set educational policy, but to set a precedent by which the judiciary may justify the exercise of legislative and executive policy-making powers over any number of other matters; and

Whereas, the Claremont directives that the legislative and executive branches must enact a certain definition of an "adequate education," and "systems of accountability" and a certain system of funding public education constitute a palpable exercise by the judicial branch of powers not granted to it by the constitution of New Hampshire, and the legislative and executive branches have the right and are duty bound to prevent the exercise of such powers in order to maintain within their respective limits the three branches of the government of this state; and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to define an "adequate education;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to adopt "standards of accountability;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to "guarantee adequate funding" of public education; now therefor, be it

Resolved by the House of Representatives, the Senate concurring:

That the legislature, having fully considered the foregoing enumeration of constitutional principles and having fully considered the foregoing enumeration of deficiencies inherent to the Claremont rulings, finds that the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Committee Minutes

Internal Affairs Committee

Hearing Report

To: Members of the Senate

From: Susan Duncan
Senior Legislative Aide

Re: **HCR 14** – *A Resolution declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.*

Hearing date: May 21, 2003

Members present: Senators Boyce, Flanders, O'Hearn, Larsen and Kenney

Members absent: No one

Sponsor(s): Representative Pepino with Representatives Giuda, Balboni, Soltani and Woods and Senators Boyce, Kenney and Gallus

What the bill does: This House Concurrent Resolution declares the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Who supports the bill: Senator Clegg, Representative Pepino, Keith Herman on behalf of Governor Benson, Representatives Jasper, Christiansen and R. Johnson

Who opposes the bill: Representatives Christine Hamm, Espiefs

Summary of testimony received in support:

- On December 17, 1991, four Supreme Court justices destroyed our State with their decision.
- The Supreme Court is our co-equal branch, but they think they are not.
- HCR 14 is needed to stop this nightmare that is occurring year after year.

- "Some people think that by passing this HCR, we will lose our (education) money. I would not vote to take a dime away" from the City of Manchester.
- While the Governor will not receive HCR 14 at his desk to sign, it should pass. This Resolution disavows the Court's role in the Claremont situation.
- This is a separation of powers issue.
- The court specifically overstepped their authority in the Claremont ruling. The Governor will continue to engage the Legislature in a resolution.
- The purpose of HCR 14 is to clarify that the judicial branch overstepped its authority in the Claremont decision.
- This resolution is appropriate because there has to be a separation of powers between the branches of government.
- The Legislature should legislate and the judicial branch should rule on the laws we establish.
- There are misinterpretations on what HCR 14 says and does.
- While the court has not told the Legislature specifically what to do, they keep rejecting the legislation that has been passed to address the Claremont ruling.
- Police and fire services are funded and provided at the local level – why not education? The court acted in order to have something happen.
- The Supreme Court made an error. It is the obligation of the Legislature to point out that they did make this error (in HCR 14).
- Yes, while HCR 14 has no effect of law, sometimes we need to make a statement.

Summary of testimony received in opposition:

- There is a checks and balances that exists in our government based upon the three separate but equal branches of government.
- Respect for the rule of law sustains our system. This is a political opportunity that will not be well regarded in history.
- This Resolution does nothing to advance the constituents we represent and serves as a distraction from the real work we should be doing.
- This Resolution could jump start another back and forth between the Legislature and the Courts.
- This Resolution says that there is no finality because we don't recognize what you have said.
- This seems to obstruct justice.
- The court did not solicit the Claremont case – people who felt the situation was wrong went to court and asked for a ruling.

Funding: None

Action: Senator O'Hearn moved ITL. Senator Larsen seconded the motion. The motion failed 2 to 3. Senator Kenney then moved OTP. Senator Boyce seconded the motion. The committee voted 3 to 2 in support. Senator Kenney will report out the bill.

sfd
[file: HCR 14 report]
Date: May 23, 2003

Date: May 21, 2003
Time: 10:35 a.m.
Room: LOB, Room 103

The Senate Committee on Internal Affairs held a hearing on the following:

HCR 14 (New Title) declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Members of Committee present:
Senator Boyce
Senator Flanders
Senator Kenney
Senator Larsen
Senator O'Hearn

The Chair, Senator Robert K. Boyce, opened the hearing on HCR 14 and recognized Senator Clegg.

Senator Robert Clegg, Jr., D. 14: Thank you, Mr. Chairman and members of the Committee. I come in support of HCR 14.

Yesterday, I spent a good deal of the day in Senate Judiciary and I heard testimony from the legal community on a couple of bills that said that we shouldn't pass the jury nullification bill and, most importantly, we shouldn't pass a bill that would deunify the Bar. The biggest reason they gave me was that there has to be a separation of powers between the three branches.

As I sat there and listened to their testimony, I remembered HCR 14. That is exactly what this bill is about. It is about the separation of the branches of government. Therefore, I come in favor of HCR 14, saying that I agree with the court. The Legislature should legislate and the courts should stick to the laws that we make. I think it is important that we pass this, just as it was

important for them for us not to pass jury nullification. If you are in favor of one, you can't be in favor of the other.

So, since the court came and told us that we need to have separation, I am, for the first time since I have been in the Legislature, going to be in full agreement with the courts and say that HCR 14 just further clarifies that the two branches of government are separate and that the Supreme Court should no longer try to legislate education.

I will take any questions.

Senator Robert K. Boyce, D. 4: Thank you. Any questions? Senator Larsen?

Senator Sylvia B. Larsen, D. 15: The Constitution, which all of us as elected officials swore to uphold, requires and affirms the separation of powers. The Legislature's duty is to pass laws and reasonable measures, but the court's duty, as a separate power, is to review the passage of our laws for their constitutionality and interpret the Constitution. With this bill, it would appear that we are saying that that is not their duty. So, if you believe that you are upholding your constitutional requirements, are you suggesting that we support, that we pass this?

Senator Robert Clegg, Jr., D. 14: I believe that you have misinterpreted what is in HCR 14. I think, when you look at line 24, it says, "Whereas in its decisions in the Claremont school funding cases, the judicial branch unambiguously directed the legislative and executive branches, to pass laws implementing an adequate education based on seven criteria..." I think they went beyond and I think we would be remiss if we didn't pass something like this because the Constitution requires that we keep the branches separate and yet, we have so far ignored that responsibility and allowed the court to tell us what laws we are going to pass.

Senator Sylvia B. Larsen, D. 15: Further question? While they suggested that we have a requirement and a responsibility as a state to fund an adequate education, I don't believe they told us how to do that or how to define an adequate education. As I recall, they pointed to the seven criteria articulated in Kentucky as an example, but they didn't require us to pass any of those other than to say that it was our responsibility to fund an adequate education. You obviously interpret it differently.

Senator Robert Clegg, Jr., D. 14: I obviously disagree with you. I think, first off, they told us that the word cherish means to take money out of your pocket and send it to wherever they told us to send it to. So, that would be

my first problem and I think it has been a problem around here ever since. While they haven't told us how to do it, they keep rejecting every method and means that we as the Legislature determine would be the appropriate manner.

So, I think that HCR 14 states again that the court has the right to interpret, but doesn't have the right to demand that we do things the way they want it done.

Senator Robert K. Boyce, D. 4: Any further questions? Senator Kenney?

Senator Joseph D. Kenney, D. 3: Yes, Senator Clegg, I wholeheartedly agree with your testimony, but I do have a question about the jury nullification hearing yesterday. When you refer to the court, I believe the Attorney General testified and the Trial Lawyers Association testified. The court that you are referring to, was there representation from the state Supreme Court there?

Senator Robert Clegg, Jr., D. 14: Howard Zibel represented the Supreme Court all day long in the judicial hearings yesterday.

Senator Joseph D. Kenney, D. 3: Thank you.

Senator Robert K. Boyce, D. 4: Any further questions? Thank you.

Senator Robert Clegg, Jr., D. 14: Thank you.

Senator Robert K. Boyce, D. 4: Now, I will recognize the prime sponsor, Leo Pepino.

Representative Leo Pepino: Good morning, Mr. Chairman and members of the Committee. Representative Leo Pepino from Manchester District 51.

I know you have just about heard everything there is to hear on this, so I have three presentations – a long one, a short one, and one in between. I will give you the one in between.

December 17, 1997 was a dark day for our state. That was the day four Supreme Court judges destroyed our state with their Claremont decision. The four judges caused havoc on the state, our tax structure, our school systems, town budgets, bond ratings, and the list of ramifications goes on and on. Undoubtedly, more problems are on the way.

Our leaders at that time let the deadline expire and did not ask the Supreme Court to reconsider its far-reaching decision. The lone dissenter on the court was Justice Sherman Horton. He said, "My problem was I was not appointed to establish education policy, nor to determine the proper way to finance the implementation of this policy", asserting those duties rest with elected state and local officials. The majority of the court denied they were doing any such thing.

Justice Horton also noted in his remarks that political subdivisions, at their own expense, carry out state duties on elections, fire, public and police protection, land use control, and the structure and staffing of local government. The logic of the court's position would indicate that should the necessary come before it, a majority of the justices might find that any or all of these functions must be funded by the state rather than local taxation.

Even the Superior Court, I believe he ruled in favor of the state two times and he didn't agree with the Supreme Court decision. We were doing pretty good in Superior Court until we got to Supreme Court.

The Legislature has a wide latitude in choosing the means by which public education is to be supported. That actually is not true. We have to pick one that meets with the court's approval or we are back in court again, like Governor Shaheen's ABC Plan. The first plan we had went to the Supreme Court and they rejected it. Speaker Sytek injected a plan of hers.

When all this came about in 1997, some said we should look to Maine. Ultimately, the citizens repealed the state property tax by public referendum because they have that in Maine. Imagine if this process was in our Constitution? After four years, the citizens of Maine abolished the state property tax. They called it a nightmare like Frankenstein's monsters. Don't let that tax monster loose in New Hampshire.

Numerous articles focused on Maine's plight. Even the donor towns in Maine revolted. One town led the charge by one woman and refused to even collect funds. They said they would go to jail to protect the townspeople. Sounds familiar, doesn't it? We are going through exactly the same thing Maine went through.

It makes me wonder how we got caught up in the Maine nightmare. At that time in 1997, some state leaders were supposed to discuss the issue with Maine. But, did they? Four days after our Supreme Court's decision, everything Maine predicted came true. The State of New Hampshire was caught in the same trap.

Now, when they had this problem in Maine, they had to have citizens' petitions, but we don't have them in New Hampshire. One woman took it upon herself and she beat the State of Maine in Supreme Court.

Our former Speaker supported a constitutional amendment and said, "The amendment should be drafted in a way that would affirm the current system of local control and local funding for education. The Supreme Court cannot dictate to the General Court."

The justices cannot command the legislative branch to act on a schedule, which they have done. The Supreme Court is our co-equal, not a superior branch of government. Its mandates are not final, irrevocable or irreversible. The Supreme Court's authority is reserved not to the justices, but to the people.

That is why HCR 14 is needed to stop this nightmare year after year. Justices must interpret the Constitution and follow the rule of law.

If you read the paper, about two or three years ago, that is what cost Justice Souter, the first time he was considered for the U.S. Supreme Court. Actually, he was too active in the court system.

Now, there are a couple of things. One more thing I will read to you and then I will be on my way.

This is in our state Constitution. It more or less explains the beginning of it. It says, "One of the basic principles of the New Hampshire Constitution is that citizens have the right to elect their government, representatives and hold them accountable through the electoral process". What many do not realize is that voting affords citizens the power to check judicial authority.

I am going back to the first part when you read about the Bill of Rights and I will just give you a couple of quotes on them. To them, government equals power and power meant abuse. The love of power is so alluring we had almost said that few have ever been able to resist this power. This comes from the Bill of Rights in our own state.

That's all I have to say. The House passed it overwhelmingly and we are sitting here waiting. If you will recall, in the paper a few weeks ago, the Town of Danville sent letters to all of their Representatives asking them to vote against this because they didn't want to lose any money. Manchester, the biggest receiver town in the state, and I'm bringing this in, if I thought for one minute that Manchester would lose five cents, I wouldn't be here today. We get forty some odd million dollars. They are all under the

impression that if we pass this, we are going to act on it. Well, we should act on it. Some people say if you act on it, you are defying the court. What can they do to you? Well, call the National Guard and lock us all up, 424 of us. That's about where I stand on it and I just can't get it through my head that people think they are going to be losing, that we are going back to the way we were before and that money that is allocated now can't be lowered 'cause I would not vote to take a dime away from Manchester.

That's where I'm coming from for four years now.

Please see Representative Pepino's "Speech", attached hereto and referred to as Attachment #1.

Senator Robert K. Boyce, D. 4: Thank you. Any questions? I saw you first.

Senator Jane E. O'Hearn, D. 12: Representative Pepino, what will the HCR actually do other than make a statement?

Representative Pepino: Some people say it is a worthless piece of legislation and some people say it is the strongest legislation, it is the most powerful legislation ever passed in the United States and we would be the first on that one if we take a stand on it which, under this, we are saying we are.

Actually, what I'm saying is that all these decisions they have made on Claremont are wrong. Let us go ahead, let us do our work, and present our education policy. Whatever we want to do, let us do that. Don't be bothering us all the time. Like Donna Sytek used to say, every time we have a problem, we go to Supreme Court and they win. Every time we have something, the court security bills which were saving almost $500,000 or $600,000. It went before them and they won again.

Back in '83, the guns in court issue with the policeman in the courts up in Laconia. The policemen are still there. We had a rule on the books that said a policeman shall carry a firearm in court. The judge say no, you get out of here. The policeman walked because he would not go into court without his gun. The guy was up on drug charges. He just left the room, nobody to prosecute. That's my long presentation, back to '83. That's just parts of it.

Senator Robert K. Boyce, D. 4: Follow up.

Senator Jane E. O'Hearn, D. 12: And, a follow up on that. Will this then open all our work on resolving our education problems and we will be starting all over on page one?

Representative Pepino: If we decide to do that. I believe the Senate has some sort of a plan now for education. It was in the paper last week and said it might not be constitutional. So, if you work on that and that goes over there and they kick that back to us, that's another one. I think it can be resolved without dismantling the whole thing because we can't with what's out there now. If we did, we took forty some odd million dollars from Manchester, you couldn't afford to live there. The tax rate would go through the roof.

Senator Sylvia B. Larsen, D. 15: You, like I, were sworn into office with an oath to uphold the Constitution and you acknowledged in your statement to us that you felt that judges must interpret the Constitution. In the Claremont decisions, wouldn't you agree that the judges were interpreting the Constitution as to whether the taxes to support a state responsible education plan were equal and proportional? The Constitution requires that our taxes be equal and proportional to pay for anything that is a state responsibility. And so, what I'm asking you is, do you believe that we need to uphold the Constitution and make sure that our taxes in our state are equal and proportional?

Representative Pepino: In a word, yes. I believe we should uphold the Constitution. It's right in the Bill of Rights. Like I said, we have the authority to ask the Supreme Court for opinions on legislation, not have them rewrite it and give us a schedule of what we should do or shouldn't do. We ask them to interpret it and give us an opinion on it, not rewrite legislation. I respect the Constitution and I live by the Constitution. But, in this case, I believe four of them, when they put their hands up, they didn't uphold the Constitution. They are telling us what to do.

Senator Sylvia B. Larsen, D. 15: Further question? When we were working on resolving the Claremont issue, there were options available to pay for an adequate education. The leaders primarily of the House pushed the statewide property tax as the solution. Manchester receives $42 million as a result of the statewide property tax. If the state were not funding education with any method, we would return to local property taxation and that $42 million that goes to Manchester would not be there. So, wouldn't that add to the burden of Manchester's local taxes?

Representative Pepino: As you know, Senator, up here everybody has an education formula. They all sit down and figure out this and figure out that. They all have a plan and I have made it very clear on the floor many times that I do not have plans. I provide recommendations that we hire people up here, pay them enough money to come up with a plan. Last session, I wanted to eliminate donor towns. I wanted to put a cap of $825 million. I got

twenty-three votes to eliminate donor towns and six were from Manchester. So, there were 17 votes. Fifty some odd votes to cap the $825 million.

Like I said, you people make the decisions, not me. You people set the structure up and I will make the recommendations. I have been like that all my life. I will walk in and say this is an idea, how can we make it work. But, up here, they all have a plan and, once it goes over to the Supreme Court, it's dead.

Senator Sylvia B. Larsen, D. 15: Wouldn't you agree that it is usually death because the tax structure is not equal and proportional? That's what has been the interpretation for most of the responses from the court.

Representative Pepino: When you use that term equal and proportional, that's a dynamite term.

Senator Sylvia B. Larsen, D. 15: Yes, it is, and it is in our Constitution.

Representative Pepino: Like I said, I'm not going to look at it that way. I'm going to look at that this is the money we owe now and we have to pay. We can't renege on our promises. It is up to somebody to come up here and say this is what we are going to do and not, first thing, look at an income tax. There are other ways. Your state budget is so big one person can't look at it and find waste or anything in it. But, the city budget is different. In Manchester I can find $10 wasted in the budget down there. But, up here, like one year when they bought a million dollars worth of furniture and somebody wanted to know where the million dollars came from in our budget. We didn't find it, but it was there. I don't have a problem with that, but I figure there is somebody here who will straighten this out and I will be looking over their shoulder.

Senator Robert K. Boyce, D. 4: Thank you. Next, I will call the honorable emissary from His Excellency, the Governor, Keith Herman. Since you don't have an actual title, I had to make one up.

Keith Herman: Thank you, Mr. Chairman and members of the Senate. It is an honor to be here in front of you to testify. For the record, I am Keith Herman. I currently work in the Governor's Office and I am here today representing the Governor on HCR 14.

While the Governor has no direct role in HCR 14 in the sense that this is a piece of legislation that will not come to his desk for signature should it pass, HCR 14 does speak to executive branch power and policy making which could

affect the executive branch. And so, we feel it is appropriate for us to comment on HCR 14. I am here to testify in support.

HCR 14, if you look at the definition that the Legislature has adopted in rules on what the purpose of this concurrent resolution is, concurrent resolutions may be used to put the Legislature on record as supporting or disavowing some aspect of national or state policy. I believe in HCR 14, the intent is for the Legislature to disavow the aspect of state policy dealing with the result of the Supreme Court's Claremont decision.

To suggest that the Supreme Court's Claremont decision stopped at simply commenting on whether or not the property tax, as administered locally, met the constitutional criteria of equal and proportional is not seeing the whole picture. Clearly, we all agree that the court said more than that. They said that the state has an obligation to provide an adequate education. The Legislature didn't determine the words adequate education; the court did. They established a policy of adequate education. How the Legislature chose and the state chose to define that has been left to the Legislature, but clearly, the policy determination that adequate education exists was not created by the Legislature; it was created by the court. So, to that extent, it is appropriate for the Legislature to use this vehicle to disavow the court's findings. To that extent, the Governor supports the Legislature's efforts.

In addition, there is the separation of power issue. While the Legislature clearly has broad latitude to determine how it wants to fulfill its obligations under the Claremont decision and has chosen to do so, the court still retains the case in its possession. There can be little doubt that the reason they retained the case is to determine whether or not the legislative responsibility is sufficient, not whether or not it is merely constitutional, but sufficient. To that extent, the Governor believes that is not the proper role of the judicial branch. And, to the extent that the Legislature goes on record agreeing that it is not the proper role of the judicial branch to determine sufficiency, the Governor agrees.

With that, I will be happy to answer any questions.

Senator Robert K. Boyce, D. 4: Thank you. Any questions?

Senator Jane E. O'Hearn, D. 12: Thank you. Do you believe that the way this is written is the way it actually was done? For instance, I am referring to the first page on lines 25 and 26. Implementing an adequate education based on seven criteria and that's what we were directed to do.

Mr. Herman: That is a very legitimate question, Senator, in the sense that the Governor is not here to comment on the whereases that are written in HCR 14. Should the Legislature choose to change those to better reflect their understanding of the situation, is purely a legislative prerogative that the Governor has very little input into since it is not something that he has to sign or could veto or comment on in any way, shape or form. But, the result is clearly something that the Governor supports.

Senator Jane E. O'Hearn, D. 12: Follow up on that. So, bottom line, what the Governor is supporting is a removal of this case from the Supreme Court, of their oversight?

Mr. Herman: I think, I don't think that is the intent of my testimony. The intent of my testimony is to just say that the Governor supports the Legislature's efforts to make a statement that the Legislature feels that the judicial branch of government overstepped its bounds in its Claremont ruling. The Governor agrees with that interpretation of the Legislature and would encourage the Legislature to make that statement through HCR 14 as a non-binding resolution that has no effect of law. How the Legislature chooses today and in the future to respond to the Claremont decision is something the Governor will continue to have...

Tape change.

The Governor will continue to engage the Legislature on the appropriate response, but clearly, the judicial branch of government should not be involved in policy making for the legislative branch of government or the executive branch of government and should not be involved in determining whether the Legislature's response and the executive branch's response to Claremont has been sufficient. That is not the role of the judicial branch.

Senator Jane E. O'Hearn, D. 12: Just one follow up. So, by directing us to make policy is overstepping their bounds?

Mr. Herman: In our opinion, yes.

Senator Jane E. O'Hearn, D. 12: Thank you.

Senator Robert K. Boyce, D. 4: Thank you. Further questions?

Senator Joseph D. Kenney, D. 3: Representative Pepino mentioned that, if HCR 14 passes, that potentially the courts could lock up the Legislature. Would that include the Governor, too?

Mr. Herman: I don't think there is a direct correlation between the passage of HCR 14 and any other aspect of implementing state statute for upholding the New Hampshire Constitution. It would require additional action beyond the passage of HCR 14 for the Legislature to take, that could result in an issue that Representative Pepino addressed. But simply passage of HCR 14 by itself would not trigger any sort of lock up.

Senator Robert K. Boyce, D. 4: Something that Representative Pepino said in that regard was about the National Guard. Isn't it true that only the Governor can order the National Guard out to do anything?

Mr. Herman: It is the executive power granted in the Constitution to the Governor as the Chief Executive to call out the National Guard.

Senator Robert K. Boyce, D. 4: I just wanted to clarify that for the record. The court has no power over the National Guard.

Senator Sylvia B. Larsen, D. 15: Does the Governor believe that the state has any responsibility to educate its youth?

Mr. Herman: Yes, he does. What the term adequate education has come to mean is that, as this Legislature has chosen to interpret it and fulfill that term, is that every child should be provided an equal payment on the part of the state for education. The Governor does not agree that that obligation is necessarily the correct one.

Senator Sylvia B. Larsen, D. 15: Wasn't the interpretation of an adequate education left to the Legislature? In fact, some of us worked for two years meeting every Friday in an effort to define it and that, in fact, even to the extent that it was the legislative interpretation that every child of this state was to receive a base educational amount was in fact a legislative determination. So, in fact, isn't your argument with the legislative interpretation, because those definitions were in fact left to, and the standards of accountability and the other parts were left to the Legislature? It was a state responsibility and whatever the state's responsibility was had to be paid for in a way that was equal and proportional?

Mr. Herman: No, I disagree with that. Prior to December 17, 1997, or 6, whatever the year was. I apologize for that. The Legislature had determined that it was funding the proper amount of state responsibility for education. The judicial branch of government then said it is not providing the proper amount, it is not adequate. That was a policy determination that the judicial branch made. They then said, based on that policy decision, that the way you are funding it is not equal and proportional because you're using various tax

rates in varying towns and so you need to change that mechanism. But, they based that decision based on a policy determination that the state was not providing the proper amount of educational support. The Legislature didn't determine that. Without the judicial branch's interference in Claremont, I find it unlikely that the Legislature would have chosen on its own to engage in trying to define an adequate education.

Senator Sylvia B. Larsen, D. 15: So, the Governor, through you, essentially believes that the state was doing, fulfilling its responsibility to fund education when we were back funding education at an 8% level?

Mr. Herman: No, I did not say that. The Governor is not representing that and that is not the testimony today. The Governor was elected in November of last year and has put forth a proposal on how to fund education for the state of New Hampshire that is substantially different from a system that was in place prior to his taking office. So, in no way is the Governor representing today that he would approve, disapprove, or comment on whether or not the way the state paid for its share of education back in 1996 was appropriate or not. He has presented a different proposal today.

Senator Jane E. O'Hearn, D. 12: Going back to that decision and having been directed by the Speaker who came into House Education and directed us at that time to define an adequate education, that also based on that decision was the fact that we were funding education with the so-called Augenblick formula and we were not fully funding the Augenblick formula. Therefore, if we had been funding the Augenblick formula, fully funding it, we may not be in the position we are today. Is it fair to say that we were funding education appropriately at that time when the court case came to Supreme Court?

Mr. Herman: I don't recall in the Claremont case any mention of the lack of the Legislature to fully fund the Augenblick formula as a deficiency in the state's responsibility to education. I don't recall any reference to it, so I don't think there is a correlation between the court's action based on their ruling and the either lack of or level of funding prior to that decision.

Senator Jane E. O'Hearn, D. 12: Thank you.

Senator Robert K. Boyce, D. 4: I would like to ask, isn't the real problem with the Claremont decisions in that the court decided, took it upon themselves, to decide that cherish, which was word that John Adams probably should not have used when he wrote this, but to cherish the interests of such things as literature, sciences, seminaries, public schools, was in effect to say fund is something that I have never seen a definition of

the word cherish say fund? They also then put in place words that were never in the Constitution, which refer to adequate education.

Adequate is one of these terms that is a nebulous term, more nebulous even than cherish, because it is a very subjective term. Isn't it true that adequate for somebody who is going to go on to be the greeter at Wal-Mart and adequate for somebody going to MIT are very different things? What is an adequate education for any two different individuals? Isn't that the real problem, that they have chosen to apply a meaning to a word that has very little meaning in this context and they added into their decision an indefinable term?

Mr. Herman: I would agree that that is part of the problem.

Senator Robert K. Boyce, D. 4: Any further questions? Seeing none, thank you.

Mr. Herman: Thank you, Mr. Chairman and members of the Senate.

Senator Robert K. Boyce, D. 4: Next I will call Representative Shawn Jasper.

Representative Shawn Jasper: Thank you, Chairman Boyce and members of the Committee. For the record, I am Shawn Jasper, District 66, which is Hudson and Pelham and I am here today representing the majority of the Ways and Means Committee and the position of the House.

HCR 14 is a rejection of judicial activism. In its Claremont decision the court set out guidelines defining and for funding an adequate education. The Legislature should find that the court has set such standards, which are not found in the Constitution. This resolution is not a rejection of the judicial responsibility to measure the constitutionality of legislation relating to education and tax policy. It in fact makes it clear that the Legislature understands and respects the separation of powers.

This resolution takes the pulse of the Legislature. The minority questions the purpose of the resolution. That purpose is to make it clear that we find the lines of responsibility between the judicial and the legislative branches to have been crossed in the Claremont decision.

HCR 14 can be seen as a measure of our resolve to defend our constitutional responsibilities in the future. Justice Horton said it best when, in his dissent, he stated, "My problem is that I was not appointed to establish educational policy nor to determine the proper way to finance the

implementation of this policy. Those duties, in my opinion, reside with the representatives of the people. My job is to determine whether the structure for providing and financing education meet the mandates of the Constitution."

I would like to address a couple of things that have come up in the discussion and I think we have pretty well covered the issue of cherish. I find it very interesting that they defined it that way. I think, when you look back at what actually was happening at the time that the Constitution was written, you will find that most towns had school districts, sometimes nine or ten school districts or more, within the town and those school districts were funded by the families that lived in the district. So, it was found by the state at that time to be acceptable not just for a town to support the schools, but for a small district and a small number of families to support that and that was certainly not something that was uncommon.

What is really troubling to me is that the Supreme Court ignored the difference between legislature and legislators because, in fact, what our Constitution says is that it is the duty of legislators. So, if there is a violation, if the Supreme Court is right in their interpretation, then we must look to those of us who represent the people to be those who are in violation individually. It is therefore incumbent upon our constituents to remove us from office at their next available option. So, I think that's really an important distinction. Is the Supreme Court saying there was a mistake when the Constitution was written and it really didn't mean to put legislators in there, that it really should have been legislature? I don't think so. But, that's what the effect has been, to focus away from our individual responsibility as defined versus the responsibility of the Legislature.

Moreover, if you look at our constitutional responsibilities, or rather, the state's constitutional responsibility, one of the largest and perhaps the most important responsibility is for the state to provide for public safety. I think that most of us would not argue that, if we didn't have public safety, education would be of little value. That's first and foremost. How do we provide public safety? We provide it primarily through our police and fire. Who raises the money for police and fire in the state of New Hampshire? The individual towns and cities. So, if that's acceptable, why wouldn't it be acceptable to raise money in a similar fashion for what is arguably the secondary consideration of government, which is education?

I think clearly taxation is a state function which we have delegated to the localities and we have individual districts and that's where it is important that the taxation be proportional, is in those individual districts. That has been the history of our state, that's how it has always been done, and what

we are saying, with HCR 14 is that the court has actually looked for a way to make something happen that cannot be found in the plain reading of the Constitution.

Thank you very much.

Senator Robert K. Boyce, D. 4: Thank you. Any questions? I have one. Are you familiar with the Constitutional Convention of 1850 where, with Franklin Pierce presiding, they came up with some proposed amendments, which was the first time there was an attempt to make any changes to the Constitution? One of the major changes they wanted to make, and proposed to the people, was to take from Part 2, Article 83 this section that is the basis for the entire Claremont decision and simply move it to Part 1, moving it from the Form of Government part of the Constitution to the Bill of Rights because they had an understanding that there was no right to an education built into the Constitution because there was nothing in the Bill of Rights talking about education, except Part 1, Article 6, which says that the towns and municipalities shall forever have the right to elect and contract with their own teachers.

Also, in that Constitutional Convention, they proposed that the Constitution be amended so that Part 1, Article 6 would strike the language that the towns be able to elect their own teachers because they saw that the state couldn't step in and provide a free public education, which were the words that they wanted to use at that time for everyone in the state, because there was a hindrance in Part 1; Article 6.

Both of those constitutional amendments were proposed by that Con Con and put to the people and both were resoundingly defeated. The people, at that time, understanding that they didn't want to change the Constitution. The purpose for changing the Constitution was to do exactly what the court did one hundred and fifty years later. Did that come up?

Representative Jasper: No, it did not. I thank you for making me aware of that. I find that very interesting.

Senator Robert K. Boyce, D. 4: Any further questions? Seeing none, thank you for your testimony. I did say, did you know on this?

Representative Jasper: Yes, you did. Thank you very much.

Senator Robert K. Boyce, D. 4: I will try not to do that. Next, we have, wishing to speak, Representative Christiansen. I do have a list of several people, so if we can keep it short and we will try to keep our questions short.

Representative Lars Christiansen: Good morning, ladies and gentlemen. Representative Christiansen, District 66, Hudson and Pelham.

I am here to support HCR 14 and make a statement that I feel that we should support our Constitution. I take it very serious, my oath to uphold the Constitution and I would hope that each one of you people would do the same.

When you take, your Constitution is five years older than the U. S. Constitution. Okay? Before the sovereign state of New Hampshire went into the union, it was a requirement that the U.S. Constitution have a Bill of Rights. In New Hampshire, the Bill of Rights came first and the government came after. History has shown us that the U.S. Constitution, that was the first thing they did, when they formed the union and New Hampshire became a sovereign state without the United States. Okay? And joined the union.

The Supreme Court used other constitutions to adjudicate a New Hampshire case. They were adjudicated a New Hampshire case and should have been using our historic New Hampshire Constitution. We all know what Part 1, Article 6 says. Okay? We all know that Part 2 is directional. There is also numerous constitutions, Supreme Court decisions that cherish is only directory and can a Supreme Court, U. S. Supreme Court, to cherish is only directive and cannot be enforced. Okay?

I was at a constitutional meeting and the question was put to Chief Justice Brock. Did they use Part 1, Article 6? His answer was that they didn't, they used the Kentucky Constitution. Okay? The Supreme Court ruling in the State of Kentucky, which is much younger than the state of New Hampshire. They errored in not adjudicating a New Hampshire case with the New Hampshire Constitution. Okay?

One other comment I want to make while I'm here. It does apply to this because this, like I said, is a historic Senate chamber in the sovereign state of New Hampshire. In our corner is our flag, which is a Presidential flag, which don't belong even in this state building because this is not a Presidential function. Then, it has the gold braid, which is admiralty jurisdiction and the only place that belongs is in the Hall of Flags where our militias worked in the admiralty jurisdiction.

I will take any questions.

Senator Robert K. Boyce, D. 4: Thank you. Any questions? Thank you very much. Next I will call Representative Johnson.

Representative Rogers Johnson: Thank you, Mr. Chairman. For the record, my name is Rogers Johnson. I am State Representative from District 83, representing the towns of Stratham, North Hampton and Exeter, and I'm here in support of HCR 14.

I want to take a little different bend, if you will. One of the things that is obviously set off and looking at the concept of the Supreme Court and whether a Supreme Court can be wrong. I think I am uniquely qualified to answer that question. Supreme Courts can be wrong. Let me give you a perfect example of that. I'm sure that most of you can remember that, back in 1854, an individual by the name of Dred Scott applied to the United States Supreme Court for relief from being returned to Louisiana as a slave. The Supreme Court ruled against him, eight to one, and he was returned. Now, everyone in this room knows that that was a mistake. The Supreme Court of the United States was wrong.

Let me give you another example. In 1894 an individual by the name of Homer Plessy wanted to get on a train and a conductor there by the name of Ferguson told him that he couldn't ride in the same car with the other individuals and created the concept of the separate vehicle. Now, it took almost sixty years before Brown v. Board of Education when the Supreme Court admitted that they were wrong. Again, the Supreme Court can be wrong.

Now we are looking at the New Hampshire Supreme Court and its decision in the Claremont issue. With HCR 14 we are saying that the Supreme Court was wrong in its decision. Notwithstanding the fact that they looked at the Kentucky Constitution written in 1897 to interpret the New Hampshire Constitution written in 1784 and how can anyone, except for Barbara Striesand, deny the intent of the New Hampshire Constitution by individuals who were born and lived a hundred years after the fact is beyond me. But, that's what they did. In essence, I believe, and many around me believe that the New Hampshire Supreme Court, on this issue, was wrong.

Our Supreme Court, in issuing its decision on Claremont obviously made an error. We are in the process of making a statement that we believe that they made an error and will do the best that we can to correct that. But, it is our right and, in fact, it is our solemn obligation in terms of upholding our Constitution to actually point out to the New Hampshire Supreme Court that they did in fact make an error. That is what we are doing. We are simply making a statement. Yes, this has no effect of law, but sometimes the most documents are those that don't have an effect of law, but actually make a statement as to the true purpose and desire of people to right a wrong and that's what we're saying.

Thank you for the opportunity to speak.

Senator Robert K. Boyce, D. 4: Thank you.

Senator Sylvia B. Larsen, D. 15: You cited the cases of Dred Scott and Homer Plessy and those cases in which you said that the Supreme Court was wrong. In both of those cases, those Supreme Court decisions, I agree with you, were wrong. But, did they not in fact, in part of their wrongness was that it closed the door to opportunity for a certain segment of the population and, in fact, does not the Claremont decision open up the doors of educational opportunities to children who live in communities that don't have the ability to raise adequate funds to support the educational needs of those children, children in towns like Allenstown, Franklin, Claremont, are in fact denied an equal opportunity because their own community does not have the ability to raise educational funds at a level sufficient to offer them opportunities and open doors? So, in fact, is the Supreme Court not wrong when it closes doors, but when in fact it reinforces constitutional opportunity, equal opportunity and the pursuit of happiness and the ability to be educated. Do we not want to support a court decision that increases opportunity? I just find it interesting that you used those two cases because they closed doors. This Claremont decision opens doors for people.

Representative Johnson: I want to make sure you are finished with your questions.

Senator Sylvia B. Larsen, D. 15: I am. Thank you.

Representative Johnson: Okay. Thank you for the question, Senator. I think that you're taking somewhat, I would say poetic license with the interpretation of the Claremont decision in terms of it opening doors, if you will. I think that is more your interpretation than the Supreme Court's.

Let me state it this way. Those two earlier decisions by the United States Supreme Court did in fact close doors, but it did so for reasons that I would say are more based on the individual caught in the political situation at the time versus what reality indicates currently.

The Claremont decision, in and of itself, did not look at an issue relative to whether it is an equal opportunity, if you will, for individuals within the school districts throughout the state. Therefore, I think you are taking somewhat license in that approach.

What you are really looking at in essence is that the Supreme Court looked at a specific aspect of our Constitution, which is Article 83-A, which essentially says that the legislators have an obligation based on the concept of the word cherish, to fund an adequate education. If you read the entire article, and I suggest you do that again. As a product of Phillips Exeter Academy, I would say that the New Hampshire, based on that literal interpretation, that the people of New Hampshire have an obligation to fund the Phillips Exeter Academy. So, depending upon how you look at it, what does it truly mean? When you look at it from the standpoint that you are asking for the opening of a premium opportunity, I think, if you looked at it from its most extreme, absolutely you can go to the other end and say that my education should have been provided for me, perhaps even for nothing, paid for by the people of the state.

Senator Jane E. O'Hearn, D. 12: Thank you, Mr. Chairman. If this is claiming or attempting to say that the Claremont decision was not the right decision of the courts, is this written appropriately when you have the judicial branch directing the Legislature to implement a definition of an adequate education based on the seven criteria or requires the Legislature to enact a law with a certain definition with certain criteria and provide for a certain system of funding? Is this appropriate to be saying and using words such as certain and how to do so and directing, based on the seven criteria?

Representative Johnson: In looking at what the Supreme Court has done subsequent to the Claremont decision, given the various fits and starts that the Legislature has gone through in attempting to meet the criteria as established by the court, one could easily understand why that language exists within this resolution currently. Now, I'm not sure if I am answering your question. You are giving me a puzzled look.

Senator Jane E. O'Hearn, D. 12: Well, you said it is understandable, but I don't understand why the word certain is in here, or based on the seven criteria. I know how the definition was developed.

Representative Johnson: I understand.

Senator Jane E. O'Hearn, D. 12: And, I know the court decision and it is probably going to be read again another time as this bill is before us. But, certain words like the word certain, certain criteria, certain definition, how to do so based on parameters. Those are all words that were not used when the definition was developed and those were words not used when the funding source was developed.

Representative Johnson: Now, was that a question?

Senator Jane E. O'Hearn, D. 12: That's the question. I am going back so you can see why those words were used. Why do you see why those words should be used?

Representative Johnson: Again, given what's happened in terms of the history of what has happened relative to trying the solve the issue, if you will, given the number of attempts which have all been struck down, mainly because we keep asking the Supreme Court for permission to do something, it becomes very obvious to me why those words were written in the resolution as it currently stands. Now, if you are saying that you want to amend that, then be our guest and we will take a look at it. But, what I am saying to you is I can understand wholeheartedly why those words were put in there.

Senator Jane E. O'Hearn, D. 12: Thank you.

Senator Robert K. Boyce, D. 4: Any further questions? Seeing none, thank you. The next person signed up to speak is Representative Christine Hamm. The large signature of the person below you overlapped.

Representative Christine Hamm: Thank you, Senator Boyce, and thank you members of the Committee. My name is Christine Hamm and I am here today to represent District 34, which includes seven towns, some of which have been represented in the past by Senator Larsen and now are represented by Senator Flanders. I am also here to represent the members of the Ways and Means Committee, the minority, who did not agree with Representative Jasper.

I wrote the minority blurb for the House calendar and I also did a parliamentary inquiry opposing this resolution. What I am going to do is bring up the three points that I made in the parliamentary inquiry and make a few brief comments.

I said, Mr. Speaker, you learned as I learned a while back in grade school history class, that the founders of our country had the foresight to establish a constitutional system based on a structure of checks and balances among three separate but equal branches of government. I would say that, in declaring that the directives of the judicial branch are not binding upon the legislative and executive branches, this resolution defies the concept of a partied co-equal division of government authority, which is the system of checks and balances established by the framers of the U.S. Constitution and reaffirmed in the Federalist Papers and by more than two centuries of court decisions. It has always been the historical prerogative of the court system, of the judicial branch of the government, to interpret words. I think, when

we talk about the word cherish, that includes that as well and, to make recommendations based upon that interpretation.

I then said if you know, as I know, it is not the popularity or unpopularity of individual judicial decisions, but rather the respect for the rule of law that sustains our democratic institution. Here again, I fear that this resolution is a political opportunity at this moment in time and will not be well respected by history. If I heard Representative Pepino say that this could be breaking ground for the United States in having the Legislature upset the judicial branch and I fear that that will not be well regarded by people beyond ourselves. When Representative Johnson said that the Supreme Court has made mistakes in the past, the Legislature, the executive branch of government, all of us had made mistakes in the past and I fear that this could be the same kind of mistake that was made that we now, history now regards, for example, Governor Fobbs and Governor Wallace and their state legislature of Arkansas and Alabama, to have been mistakes in the past. And, I fear that we will be in a similar kind of mistake.

The third point of my parliamentary inquiry was, if you know, as I know, that this resolution does nothing to advance the business of the constituents we represent, nor to enhance the dignity of the office we are sworn to uphold. I, in fact, fear that this is a distraction from the real business of what we are supposed to be doing for the public interest. I know that members of our Committee who voted against this resolution believe that, carried to its logical conclusion, this assertion could threaten the basic rights of all members of society to seek judicial redress and we felt that the passage of the resolution, while non-binding in law, is an impediment to effective government and an unworthy use of legislative power.

I fear, as has been mentioned here today, that passage of this resolution will jump start yet another series of back and forth between the Legislature and the Supreme Court and that that is really a waste of everyone's and the people that we represent, a waste of their time.

Thank you.

Senator Robert K. Boyce, D. 4: Thank you. Any questions? Seeing none, thank you. The only other person who is checked off to speak is Representative Espiefs, and you hadn't checked off that you wanted to speak. That's why I passed you. I went down the list and picked the ones that had marked they wanted to speak.

Representative Peter Espiefs: I'm sorry. I am Peter Espiefs from District 25 in Keene, New Hampshire. I am on the Ways and Means Committee and I appear in opposition to HCR 14.

HCR 14 is apparently nothing new. I am a new legislator, but I have been here now for two terms. The first term I was here there was a similar HCR and that was defeated at the Senate level, I believe. Now we have the resurrection of HCR 14 and it says that directives of the judicial branch are not binding on the legislative and executive branches. I have some difficulty with that because I understand that there is a rule of law of prevailing policy in our country. That's one of the things that makes the United States very unique. Our forefathers had the foresight of creating a separation of powers of government and that was the first kind of government like that on the earth. The reason for that was so that the political things could remain in the political arena and executive things could remain in that arena, and that the law would be independent of both.

There is a presumption everywhere that when judges make decisions, that's the law, and that's proper. The law, as interpreted by the courts, has to have finality and without finality, we don't have anything that is reliable. We can't make predictions, we can't take actions, we can't enforce policies. So, there has to be some finality to it.

But, this resolution says there isn't any finality because we don't recognize it. What you are really doing is you are saying to people you have been through the legal process and you won, but we don't care because we interpret this as a mistake because we don't agree with it. Now, that's preposterous.

It is also a kind of resolution that seems to be telling people to obstruct justice. Maybe you're not out there preventing the Supreme Court and tying them up, but you are saying, you are expressing your intent in advance, that you don't intend to be bound by anything they say on this subject. If that is so, matters about education that follow a path that you don't agree with are not going to get a hearing, are not going to get any action in this state. So, you are really discriminating against minorities who are seeking justice because you don't agree with their point of view, even though the very body which we have established for making these kind of decisions says this is the law. I find that very hard to digest. Being a lawyer, I can't imagine a Legislature picking out isolated cases and saying we agree with this one, but we don't agree with that one and telling the public that that's not the law.

So, I would like to know, is this the law or isn't it the law? Am I in the United States of America or am I somewhere else? Are we in Nazi Germany or some other fascist regime where the majority says that we don't care what

the law is? Is that what you want? If that's what you want, that's what you'll get. I'm sorry to see this kind of development in this state and I don't think it is proper. I don't think you are setting an example for the youth of this state and I don't think that the Supreme Court of New Hampshire has been shown to be a biased Supreme Court or that they are crazy, they don't know what they are doing, they don't know what the law is, they can't read.

Education has been mandatory in this state for over a hundred and fifty years. I hope you people understand that. That's state law and here you are arguing about whether people have a right to an education and you don't want the Supreme Court to tell you what to do. Well, it's mandatory that we go to school. It's on the books. When you start talking about the words that the Supreme Court used in its Claremont decision, the Supreme Court was using, and went back to a dictionary used in 1780 that established the meaning of words. Read the Claremont decision.

I don't have anything further. Thank you.

Senator Robert K. Boyce, D. 4: Questions? I have a question. You said that when the court rules that that is a finality, that's the end.

Representative Espiefs: Yes.

Senator Robert K. Boyce, D. 4: Let's take this to its obvious and totally illogical and impossible conclusion. The Supreme Court rules that you and I have no rights to speak in the Legislature. We have no right to vote in the Legislature. We have no right to pass laws in the Legislature. What would you do? Would you accept that ruling? Would you say, well the court has spoken and therefore I can do nothing?

Representative Espiefs: If the Supreme Court said that all of us could not do those things, then we would have the right to revolt.

Senator Robert K. Boyce, D. 4: So, the court is not the final judge. The people are the final judge.

Representative Espiefs: Not necessarily. Here we have a minority of people, obviously, who don't have any recourse except through the courts. The Legislature hasn't done anything in eight years about education funding. So, they went to court. The court did not solicit that case, by the way. The court doesn't go around soliciting education funding cases. These people felt strong enough about it and there were individuals involved as well as organizations and they said we want to get this straightened out because it is unfair.

Now, I don't understand the policy of this kind of thinking. I don't understand what the policy is behind it, but if I were a soldier going to fight for my country, I certainly wouldn't ask the state of New Hampshire for the weaponry that I needed, because the state of New Hampshire probably would give me a pitchfork instead of a rifle and it probably would give me a horse instead of a jeep. That's the way I look at it. If the people from New Hampshire are not entitled to an equal education and the best education that we can provide, then they are second rate citizens. That's my point.

Senator Robert K. Boyce, D. 4: Thank you. Seeing no more speakers on the list, I will end the hearing.

Hearing concluded at 11:50 a.m.

Respectfully submitted,

L. Gail Brown
Senate Secretary
6/25/03

1 Attachment

ATTACHMENT #1

SPEECH

Rep. Leo P. Pepino

RE: HCR 14, declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education

December 17, 1997, was a dark day for our state. That was the day four Supreme Court judges destroyed our state with their Claremont decision. The four judges caused havoc on the state, our tax structure, our school systems, town budgets, and bond ratings, and the list of ramifications goes on. Undoubtedly, more problems are on the way.

Our leaders at that time let the deadline expire and did not ask the Supreme Court to reconsider its far-reaching decision. The lone dissenter on the court – Justice Sherman Horton – said, "My problem was I was not appointed to establish education policy, nor

to determine the proper way to finance the implementation of this policy", asserting those duties rest with elected state and local officials. The majority of the court denied they were doing any such thing.

Justice Horton also noted in his remarks that political subdivisions, at their own expense, carry out state duties on elections, fire and police protection, land use control, and the structure and staffing of local government. The logic of the court's position would indicate that should the necessary appeal come before it.

A majority of the justices might well find any or all of these functions must also be funded by the state rather than local taxation. Even the Superior Court judge that ruled against Claremont before it went to the Supreme Court doesn't agree with the Supreme Court decision! He ruled twice in favor of the state.

Decisions concerning the raising and disposition of public revenues are particularly a legislative function, the court conceded. The Legislature has wide latitude in choosing the means by which public education is to be supported. That isn't actually true. We have to pick one that meets with the court's approval or we are back in court again!

When this all came about in 1997, some said we should look to Maine. Ultimately, the citizens repealed the state property tax by public referendum, enabled by the citizen initiative. Imagine if this process was in our Constitution?

After four years, the citizens of Maine abolished the state property tax. They called it a nightmare. They likened it to Frankenstein's monster. Don't let loose the tax monster!

Numerous newspaper articles focused on Maine's plight. Even the donor towns in Maine revolted. One town led the charge and

refused to even collect funds. They said they would go to jail to protect the townspeople. Sounds familiar, doesn't it? We are going through exactly what Maine went through.

It makes me wonder how we got caught up in the Maine nightmare. At that time in 1997, some state leaders were supposed to discuss the issue with the State of Maine. But did they? Just four days after our Supreme Court's decision, everything Maine predicted came true. The State of New Hampshire was caught in the same trap.

Our former Speaker supported a constitutional amendment and said, "The amendment should be drafted in a way that would affirm the current system of local control and local funding for education. The Supreme Court cannot dictate to the General Court."

The justices cannot command the legislative branch to act on a schedule. The Supreme Court is a co-equal, not a superior, branch of government.

Its mandates are not final, irrevocable or irreversible. The Supreme Court's authority is reserved not to the justices, but to the people.

That is why HCR 14 is needed to stop this nightmare year after year. I spoke in favor of this one day on the Floor.

Judges must interpret the Constitution and follow the rule of law. If you read the paper, that is what cost Justice Souter the first time he was considered for the U.S. Supreme Court. The Justice Department was deeply alarmed by his judicial activism in New Hampshire.

Speakers

SENATE INTERNAL AFFAIRS COMMITTEE

Date 5/21/03 Time 10:30 a.m. Public Hearing on **HCR 14**

HCR 14 - (New Title) declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Please check box(es) that apply.

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
☑	☒	☐	Rep. Shawn Jasper	House Ways & Means
☑	☒	☐	Rep Leo Pepino	Self
☐	☒	☐	Rep. Daniel M. Hughes	House Ways & Means
☑	☐	☒	Peter Espiets	Ways & Means
☑	☒	☐	Sen Bob Clegg	Dist 14
☑	☒	☐	Keith Herman	Governor Benson
☑	☒	☐	Lars Christensen	Dist 66 Hudson Pelham
☑	☒	☐	Roger J. Johnson	House Dist 63
☑	☒	☐	Sen Robert Boyce	Dist 4
☐	☐	☒	Rep Susan Almy	MD 18
☐	☐	☑	Rep Chris Pappas	Dist 49
☑	☐	☑	Sen Christine Hamm	Dist. 34
☐	☒	☐	Elliot D. Broyles	# 73
☐	☒	☐	Rep Rick Ladd	# 66
☐	☒	☐	ROY H. STEWART	GRST TAXPAYERS
☐	☐	☐		
☐	☒	☐	Rep M. Hamm	Dist 34
☐	☒	☐	Tom McCormick	DIST 32 MERR
☐	☒	☐	Rep Mike Gilman	Grafton 9
☐	☐	☒	Rep Lee Hammond	Lebanon Grafton 18

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON Internal Affairs

to which was referred House Concurrent Resolution 14

AN ACT (New Title) declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

VOTE: 3-2

Having considered the same, report the same without amendment and recommend that the bill: **OUGHT TO PASS.**

Senator Joseph D. Kenney
For the Committee

HCR14 Docket

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Bill Title: (New Title) declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Date	Body	Description
1/9/2003	H	Introduced and ref to Ways & Means; HJ 12, p192
1/22/2003	H	Copy to Chairman on 1/22/2003
2/5/2003	H	Hearing Mar 5 2:00 RM202,LOB
3/19/2003	H	Maj Report OTP/AM for Mar 26 (Vote 11-7;Reg)
3/19/2003	H	Min Report ITL
3/19/2003	H	Prop Maj Am{0434}(New Title); HC26, p781-782
3/26/2003	H	Maj Am, AA VV; Adopted with Am RC(213-142); HJ30, p987-991 + 1000
4/24/2003	S	Introduced and Ref. to Internal Affairs; SJ 14, Pg.342
5/12/2003	S	Hearing; May 21, 2003, Room 103, LOB, 10:30 a.m.
5/22/2003	S	Committee Report; Ought to Pass , [05/29/03]; SC24
5/29/2003	S	Ought to Pass, RC 9Y-14N, MF; SJ 18, Pg.505
5/29/2003	S	Sen Boyce Moved laid on Table, RC 10Y-13N, MF; SJ 18, Pg.505
5/29/2003	S	Sen. Sapareto Moved Inexpedient to Legislate, RC 14Y-9N, MA === KILLED ===; SJ 18, Pg.505

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations