HCR 3 - AS INTRODUCED

2021 SESSION

21-0691
06/04

HOUSE CONCURRENT RESOLUTION ***3***

A RESOLUTION declaring that the Claremont case's mandates that the legislative and executive branches define an adequate education, determine its cost, fund its entire cost with state taxes, and ensure its delivery through accountability, are not binding on the legislative and executive branches.

SPONSORS: Rep. Lewicke, Hills. 26

COMMITTEE: Judiciary

ANALYSIS

This concurrent resolution declares that the Claremont case’s mandates that the legislative and executive branches define an adequate education, determine its cost, fund its entire cost with state taxes, and ensure its delivery through accountability, are not binding on the legislative and executive branches.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

A RESOLUTION declaring that the Claremont case's mandates that the legislative and executive branches define an adequate education, determine its cost, fund its entire cost with state taxes, and ensure its delivery through accountability, are not binding on the legislative and executive branches.

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 2, 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 constitutional power to tell the legislature whether and how to set educational policy, whether and how much to spend on education, whether and how to fund its cost, and whether and how to provide accountability, and that, accordingly, these aspects of the Claremont 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 1, Article 29 of the New Hampshire constitution, the legislature possesses the sole authority to create laws, and that under Part 1, 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 1, Article 1, relative to the origin and object of government.

(b) Part 1, Article 2, relative to individual property rights.

(c) Part 1, Article 6, relative to local control of education, both religious and secular.

(d) Part 1, Article 12, relative to the consent of the governed on both taxation and laws.

(e) Part 1, 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 1, Article 28-a, relative to the prohibition on unfunded mandates.

(g) Part 1, Article 31 and Part 2, Article 2, relative to the authority of the legislature to make laws.

(h) Part 2, 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, under Part 1, 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 2, Article 2; and

Whereas, the legislative power vested exclusively in the general court by Part 2, Article 2 includes the power and discretion to determine whether and how to set educational policy, whether and how much to spend on education, whether and how to fund its cost, and whether and how to provide accountability. Therefore, the legislature finds that it is wrongful for the judiciary, either directly or indirectly, to define educational adequacy, to determine the cost of educational adequacy, to specify how to fund educational adequacy, or to provide accountability. (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."); and

Whereas, Part 2, 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 were very specific using terms such as "pay towards the support of" and "at the expense of the state" and "salaries, ascertained and established by standing laws" (see Part 1, Articles 6, 15, & 35); and

Whereas, 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; and

Whereas, every single New Hampshire 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."); and

Whereas, 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 1 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 2 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."); and

Whereas, 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 his 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; and

Whereas, Part 1, Article 6 specifically stipulates that education is a local right; the right of the local communities to elect and contract with their own teachers must include the right to determine what is taught, the cost of that instruction, and the obligation to fund that cost through locally approved means (including local school taxes); and

Whereas, 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; New Hampshire's locally controlled public schools that were locally funded through local school tax districts were arbitrarily transformed into one large school district, one large tax district for school tax purposes, and one uniform statewide tax rate which created arbitrary donor and receiver towns; therefore 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 is absurd; and

Whereas, the supreme court ignored the actions of the first legislatures under the 1784 Constitution, wherein they enacted the School Tax Law of 1789, which, through many re-enactments and amendments – whose constitutionality was never cast into doubt – served until 1919 as the model for public school funding: by taxes locally raised and locally applied; and

Whereas, 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 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 1, 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 Claremont case's mandates that the legislative and executive branches define an adequate education, determine its cost, fund its entire cost with state taxes, and ensure its delivery through accountability, are not binding on the legislative and executive branches.