

STATE OF NEW HAMPSHIRE

Hillsborough, SS
Northern District

SUPERIOR COURT

Docket No. _____

AMERICAN FEDERATION OF TEACHERS – NEW HAMPSHIRE
553 Route 3A, Ruggles IV
Bow, NH 03304

NATIONAL EDUCATION ASSOCIATION – NEW HAMPSHIRE
9 South Spring Street
Concord, NH 03301

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION
IUPA Local 9000, AFL-CIO
613 Front Street
Manchester, NH 03101

NEW HAMPSHIRE POLICE ASSOCIATION
816 Elm Street, Box 128
Manchester, NH 03101

NEW HAMPSHIRE RETIRED EDUCATORS ASSOCIATION
561 Ocean Boulevard, #4
Hampton, NH 03842

NEW HAMPSHIRE SCHOOL ADMINISTRATORS ASSOCIATION
Bow Brook Place
46 Donovan Street, Suite 3
Concord, NH 03301

PROFESSIONAL FIRE FIGHTERS OF NEW HAMPSHIRE
43 Centre Street
Concord, NH 03301

THE STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE; SEUI LOCAL 1984
207 North Main Street
Concord, NH 03301

RUSSELL C DAY
73 Wallace Road
Goffstown, NH 03045

NORMAN GAMACHE
176 Cumberland Street
Manchester, NH 03103

BARBARA DOYLE
561 Ocean Boulevard
Hampton, NH 03842

ELIZABETH M. THYNG
265 Aaron Drive
Deering, NH 03244

DAN SILVA
1858 Hooksett Road
Hooksett, NH 03106

BONNIE DOHERTY
50 Marston Street
Manchester, NH 03102

Plaintiffs, On Behalf of Themselves and Those Similarly Situated

v.

THE STATE OF NEW HAMPSHIRE
33 Capitol Street
Concord, NH 03301

NEW HAMPSHIRE RETIREMENT SYSTEM
54 Regional Drive
Concord, NH 03301

Defendants

**COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE AND OTHER
EQUITABLE RELIEF**

NOW COME the American Federation of Teachers – New Hampshire, the National Educators Association – New Hampshire, the New England Police Benevolent Association, the New Hampshire Police Association, the New Hampshire Retired Educators Association, the

New Hampshire School Administrators Association, the Professional Fire Fighters of New Hampshire, the State Employees Association of New Hampshire – SEIU Local 1984 and Russell C. Day, Norman Gamache, Barbara Doyle, in their own right and on behalf of those similarly situated employees and retirees who are members in the New Hampshire Retirement System (“NHRS”) (collectively, the “Plaintiffs”), by and through their attorneys, Bernstein, Shur, Sawyer and Nelson, P.A., and Gottesman and Hollis, PA complain against the State of New Hampshire and the New Hampshire Retirement System, (collectively, the “Defendants”) for a declaratory judgment, injunctive and other equitable relief, including restitution.

In support of their complaint, the Plaintiffs state as follows:

PARTIES

1. Plaintiff American Federation of Teachers -- New Hampshire (AFT-NH) is a voluntary labor association and the state affiliate of the American Federation of Teachers. AFT-NH's members include teachers, paraprofessionals, school nurses, guidance counselors, food service workers, custodians, school secretaries, public library employees and other employees throughout New Hampshire, all or nearly all of whom are also members of the NHRS. The AFT-NH is located at 553 Route 3A South, Ruggles IV, Bow, New Hampshire. AFT-NH is a state taxpayer. This taxpayer has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire and, as a result, has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This taxpayer does not have a right to challenge the conduct at issue in this matter pursuant to RSA 541 or under any other statute.

2. Plaintiff National Education Association -- New Hampshire (NEA-NH) is a voluntary labor association and the state affiliate of the National Education Association. NEA-NH's members include school teachers and certified professionals working in public schools throughout New Hampshire, all or nearly all of whom are also members of the NHRS. The NEA-NH is located at 9 South Spring Street, Concord, New Hampshire 03301. This plaintiff pays local property taxes to the city of Concord in which its headquarters are located because this plaintiff owns real estate that houses its headquarter offices. This taxpayer pays the statewide property tax for education. RSA 76. Additionally, this taxpayer has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, NEA-NH has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This taxpayer does not have a right to challenge the conduct at issue in this matter pursuant to RSA 541 or under any other statute.

3. Plaintiff New England Police Benevolent Association, IUPA Local 9000 (NHPBA) is a voluntary labor organization and an affiliate of the International Union of Police Associations, AFL-CIO. NHPBA's members include police officers throughout New Hampshire, all or nearly all of whom are members of the NHRS. The NEPBA's New Hampshire Regional Office is located at 613 Front Street, Manchester, New Hampshire 03101.

4. Plaintiff New Hampshire Police Association (NHPA) is a non-profit organization. NHPA's members include full-time and retired certified law enforcement officers and non-sworn law enforcement employees, nearly all of whom are also members of the NHRS. NHPA's address is P.O. Box 526, Portsmouth, New Hampshire 03802.

5. Plaintiff New Hampshire Retired Educators Association (NHREA) is an organization affiliated with the American Association of Retired Persons (AARP). NHREA's members include retired teachers who worked in public schools throughout New Hampshire, all or nearly all of whom are members of the NHRS. NHREA's address is 561 Ocean Boulevard, #4, Hampton, New Hampshire 03842.

6. Plaintiff New Hampshire School Administrators Association (NHSAA) is a non-profit corporation. NHSAA's members include superintendents of schools, assistant superintendents, school business officials, special education directors, curriculum coordinators, and other school administrators throughout New Hampshire, all of whom are also members of the NHRS. The NHSAA is located at 46 Donovan Street, Suite 3, Concord, New Hampshire 03301. This taxpayer pays the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, the NHSAA has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This taxpayer does not have a right to challenge the conduct at issue in this matter pursuant to RSA 541 or under any other statute.

7. Plaintiff Professional Fire Fighters of New Hampshire (PFFNH) is a voluntary labor organization and the state affiliate of the International Association of Fire Fighters. PFFNH's members include firefighters and paramedics through New Hampshire, all or nearly all of whom are also members of the NHRS. The PFFNH is located at 43 Centre St, Concord, NH 03301. The PFFNH has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, the PFFNH has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the

state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This taxpayer does not have a right to challenge the conduct at issue in this matter pursuant to RSA 541 or under any other statute.

8. Plaintiff State Employees Association of New Hampshire, SEIU Local 1984 (SEA) is a voluntary labor organization. SEA's members include thousands of employees of the State of New Hampshire, nearly all of whom are also members of the NHRS. SEA is located at 107 North Main Street, Concord, New Hampshire 03301. This plaintiff pays local property taxes through a holding company to the city of Concord in which its headquarters are located because this plaintiff's holding company owns real estate that houses its headquarter offices. This taxpayer similarly pays the statewide property tax for education. RSA 76. This taxpayer also has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, the SEA has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This taxpayer does not have a right to challenge the conduct at issue in this matter pursuant to RSA 541 or under any other statute.

9. Plaintiff Russell C. Day is a resident of Goffstown, New Hampshire where s/he pays local and state property taxes and is a retired Group I employee of the State who receives a medical subsidy payment¹ pursuant to RSA 100-A:52-b. This plaintiff has received a medical subsidy since at least the beginning of 2008 and continues to receive a medical subsidy payment

¹ "Medical subsidy payment" is intended herein to mean a payment made by the NHRS to the member retiree of part of the cost for the retiree to participate in the employer-sponsored plan that provides for active employees of the retiree's former employer to receive permanent group hospitalization, hospital medical care, surgical care, and other medical and surgical insurance type benefits. See RSA 100-A:52, 52-a, and 52-b.

today. This plaintiff was entitled to, but did not receive an annual four percent escalator of the medical subsidy payment beginning in 2012. This plaintiff was entitled to receive a Cost of Living Adjustment (COLA) since 2008 or will be entitled to receive a COLA when the State Annuity Accumulation Fund is 85 percent funded.

10. Petitioner Norman Gamache is a resident of Manchester, New Hampshire where s/he pays local and state property taxes and is a retired Group II employee who receives a medical subsidy payment pursuant to RSA 100-52. This plaintiff has received a medical subsidy since at least the beginning of 2008 and continues to receive a medical subsidy payment today. This plaintiff was entitled to, but did not receive an annual four percent escalator of the medical subsidy payment beginning in 2012. This plaintiff was entitled to receive a Cost of Living Adjustment (COLA) since 2008 or will be entitled to receive a COLA when the State Annuity Accumulation Fund is 85 percent funded.

11. Barbara Doyle is a resident of Hampton, New Hampshire and is a retired Group I employee of a political subdivision of the State or a retired teacher who receives a medical subsidy payment pursuant to RSA 100-52-a. This plaintiff has received a medical subsidy since at least the beginning of 2008 and continues to receive a medical subsidy payment today. This plaintiff was entitled to, but did not receive an annual four percent escalator of the medical subsidy payment beginning in 2012. This plaintiff was entitled to receive a Cost of Living Adjustment (COLA) since 2008 or will be entitled to receive a COLA when the State Annuity Accumulation Fund is 85 percent funded.

12. Plaintiff Elizabeth M. Thyng is a resident of Deering, New Hampshire where s/he pays local and state property taxes and was a Group I employee of the State since on or before June 30, 1998 and remains so employed at the time of filing this Complaint.

13. Plaintiff Dan Silva is a resident of Hooksett, New Hampshire where s/he pays local and state property taxes and was a Group II employee of the State or of a political subdivision since on or before June 30, 1998 and remains so employed at the time of filing this Complaint.

14. Bonnie Doherty is a resident of Manchester, New Hampshire where s/he pays local and state property taxes and was a Group I employee of a political subdivision since on or before June 30, 1998 and remains so employed at the time of filing this Complaint.

15. The individual plaintiffs have directly suffered harm or likely will suffer harm as a result of the adoption of the legislation at issue. None of the individual plaintiffs or the organizational plaintiffs has a right to appeal the decisions or statutes at issue pursuant to RSA 541 or under any other statute. But for changes in legislation, all of the individual plaintiffs would have received a four percent, or an eight percent, annual increase in their medical subsidy payments, or a future expectation of same and would have benefitted from receiving a Cost of Living Adjustment (COLA) or the expectation of a COLA when the NHRS became 85% funded.

16. The individual plaintiffs have directly suffered harm or likely will suffer harm as the result of the retention of funds by the New Hampshire Retirement System ("NHRS") that the NHRS is not entitled to retain.

17. The individual plaintiffs have directly suffered harm or likely will suffer harm as the result of the diversion of funds by the New Hampshire Retirement System ("NHRS") that the NHRS was not entitled to divert.

18. The individual plaintiffs and the organizational plaintiffs are taxpayers of political subdivisions in the state of New Hampshire that pay local and state property taxes. Most of the organizational plaintiffs, as previously indicated, also pay business enterprise taxes.

19. Defendant State of New Hampshire ("State"), acting through different instrumentalities of the executive branch, is located at 33 Capitol Street, Concord, New Hampshire 03301.

20. Defendant NHRS, a financially self-sustaining state governmental entity is a defined benefit pension plan qualified under § 401(a) of the Internal Revenue Code. The NHRS is also required to collect and pay medical subsidies to qualified retirees. NHRS provides benefits to its eligible members and their beneficiaries upon retirement, disability or death. NHRS has approximately 48, 688 active members including firefighters, police officers, teachers, and state and local government employees. Medical subsidy payments are a form of Other Post-Employment Benefit or "OPEB". Approximately 2,729 individuals currently receive a monthly benefit from NHRS. Approximately, 10,264 retirees receive OPEBs through the NHRS. The NHRS is located at 45 Regional Drive, Concord, New Hampshire 03301.

JURISDICTION AND VENUE

21. This court has personal jurisdiction over the parties and subject matter jurisdiction pursuant to N.H. RSA 491:22 and 498:1.

22. Venue is proper because one or more plaintiffs reside in Hillsborough County. RSA 507:9.

FACTS

A. Common to All Counts

23. The individual plaintiffs and the classes of plaintiffs they represent lack a full and complete remedy at law and have suffered irreparable harm. The public interest would not be harmed by enjoining the operation of an illegal or unconstitutional statute. The State and the NHRS are not harmed by preventing them from enforcing illegal and unconstitutional statutes.

24. The plaintiffs are litigating in the common good against the State to vindicate commonly held constitutional rights.

25. Each of the named plaintiffs seeks permission, through the filing of a separate motion and by these assertions, to represent a class of similarly situated class members. In seeking class certification, each of the named plaintiffs asserts that the members of the class are so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; that there are questions of law or fact common to the class which predominate over any questions affecting only individual members; that the claims of the representative parties are typical of the claims or defenses of the class; that these proposed representative parties will fairly and adequately protect the interests of the class; that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and the named plaintiffs assert that the attorney for the representative parties will adequately represent the interests of the class.

B. Medical Subsidy Annual Increase or Escalator

26. The NHRS medical insurance funding program, through which medical subsidies are paid, initially began in 1988 and provided for the funding of some of the costs of certain qualified Group II retirees' participation in their former employers' group medical or group healthcare plans. The program is referred to as a subsidy because the entire costs of medical insurance are not fully paid. Eventually, the program was expanded to cover additional Group II retirees and Group I retirees whether employed by the State or political subdivision employers. Funding for the program was through an IRC 401(h) sub-trust and involved a direct payment to the sub-trust from employer contributions with the employers being reimbursed from the core pension reserves.

27. Through 2008, the medical subsidies were calculated so as to increase by eight percent per year, compounded, on July 1st of each year. On or before June 30, 2007, for example, certain retirees received \$375.56 per month and this amount was increased by eight percent on July 1, 2007. There have been no increases in the monthly maximum subsidy amounts payable since July 1, 2007. See NHRS 2011 CAFR at 31.²

28. In or around 2007 and 2008, the NHRS believed that the funding mechanism by which the employers paid the medical subsidy payment was improper and potentially violated applicable federal tax laws.

29. The plaintiffs do not agree that the funding mechanism for the medical subsidy payment was improper and/or violated applicable federal law or that any required change in the funding system that was necessary to comply with applicable law required the changes effected through HB 1645 regarding the annual eight percent escalator for medical subsidy payments.

30. As a result of its belief that the mechanism for funding the medical subsidy needed to be changed, the NHRS made application to participate in the Voluntary Correction Program of the Internal Revenue Service and sought legislative changes to effectuate a program of voluntary compliance.

31. In or about 2008, the Legislature adopted HB 1645 which relieved the political subdivision and State employers from paying the compounded eight percent annual medical subsidy increases, or annual escalators, and directly and in return for foregoing these annual escalators the Legislature substituted another funding mechanism that provided, after four years

² Different medical subsidy rates apply for retirees who participate in Medicare and for those who did not. Further, qualified retirees are entitled to single person subsidies or two person subsidies. All were entitled to the eight percent increase per annum.

without any annual escalators, the political subdivision and State employers would make contributions reflecting increases of four percent, compounded, per annum beginning in 2012.

32. In other words, the four year suspension of payments coupled with a four percent annual escalator beginning in 2012 were a *quid pro quo* for the cessation of the eight percent annual escalator.

33. In its press release dated July 9, 2008, the NHRS stated, in part, "Starting July 1, 2008, the medical subsidy amounts payable shall not be increased for four years. Effective July 1, 2012 and each July 1st thereafter, the rate of medical subsidy will increase by 4% for eligible retired members." The published FY 2008 CAFR for the NHRS provides, "There will be no increase in the monthly maximum subsidy on July 1, 2008, 2009, 2010, and 2011. 4.0% annual increases will resume beginning on July 1, 2012 and each July 1st thereafter." The plaintiffs relied on these statements and similar statements made by the NHRS, the State and the political subdivision employers.³

34. Nonetheless, despite the *quid pro quo* nature of foregoing an eight percent escalator for a four percent annual escalator after a four year suspension (often referred to as a "four plus four solution"), the Legislature in 2011 adopted HB 2 which completely dispensed with the four percent annual escalator. See 224:176 ("Medical Benefits Subsidy; Payment by Retirement System. RSA 100-A:52, II is repealed and reenacted to read as follows: II. For the fiscal year beginning July 1, 2011, the maximum amount payable by the retirement system under this subdivision on account of each person qualified under paragraph I who is not entitled to Medicare benefits, shall be \$375.56 per month, and on account of each person qualified under

³ Certain qualified political subdivision retirees did receive a supplemental allowance under the HB 2 legislation of \$500 for a single person subsidy and \$1000 for a two person subsidy.

paragraph I who is entitled to Medicare benefits, shall be \$236.84 per month. The rate payable under this paragraph shall not be increased.”).

35. As the right to the “four plus four solution” only applies to those retirees and vested employees who were in the NHRS in 2008 when the *quid pro quo* arrangement was made, the amounts due and owing to these employees may be actuarially determined and represents a finite cost to the employers and the NHRS.

36. The retirees in the NHRS in 2008 and the vested employees in the NHRS in 2008 were the beneficiaries of a contract with the State and the NHRS in which the retirees and the employees agreed to forego their annual eight percent escalator in return for the “four plus four solution.” The State and the NHRS then breached said contract in violation of the constitutional rights of the employees and retirees.

37. The 2008 legislation known as HB 1645 that contained the four plus four solution also required the transfer of \$250 million from the sub-trust that funded the annual escalators to the State Annuity Accumulation Fund (i.e., net pension assets, referred to herein as “SAAF”) and the transfer occurred upon the legislation becoming effective. In describing the transfer, Lisa Shapiro, Ph.D., the then chair of the NHRS board of trustees, wrote, “the transfer to the Pension Plan of \$250 million from the Special Account [was] to increase pension plan assets and restrain employer contribution rates.” Letter from the Chair dated November 21, 2008 included in the published NHRS FY 2008 CAFR.

38. The NHRS received a benefit that it was not legally entitled to receive by the transfer of the \$250 million and it would be unconscionable to allow NHRS to keep that benefit.

39. As well, the NHRS received a benefit by being permitted to forego the eight percent escalators and not instituting the four percent escalators in 2012. The NHRS has

commingled and invested the funds that would have been required to pay the four percent escalators since 2012. The NHRS has benefitted thereby and said benefits, as they are derived from illegal and unconstitutional laws are unconscionable.

C. Illegal Transfer of Special Account Funds-Cost of Living Allowances

40. Before 1982, the Legislature paid for Cost of Living Allowances (“COLAs) for NHRS retirees from the State’s general operating funds. In 1983, the Legislature directed the NHRS to create a Special Account funded by excess earnings above and beyond the statutorily required expected rate of return for NHRS investments. RSA 100-A:16(h). The funds earned in excess of the statutorily established expected rate of return were placed in the Special Account and were specifically earmarked to fund COLAs and medical subsidies and were potentially available for other OPEBs. The funds in the Special Account were held in trust for the benefit of those retirees and employees who did receive and who would eventually receive COLAs and medical subsidies. The transfers to the Special Account were sometimes referred to as “gain sharing” because the gains on NHRS investments were used both to reduce employer contributions and to increase the array of benefits available to NHRS members through a self-funding mechanism that did not further tax employers or state general funds. An increase in the array of benefits was an attraction to public service for eligible members.

41. Over the years, the Legislature has directed the NHRS to raid the Special Account and to transfer some or all of the funds in the Special Account to the State Annuity Accumulation Fund (“SAAF”). The SAAF, with the member annuity accumulation fund, is the source of funds used to pay member retirement annuities and other retirement benefits.

42. There are three legitimate sources of funding for the SAAF. These sources are the member contributions,⁴ the investment returns, and the employer contributions.⁵

43. In 2007, the Legislature adopted HB 653 that suspended the funding of the Special Account from excess returns until the SAAF is 85% funded. That is, the Legislature suspended gain sharing with members until the core SAAF was deemed healthy by reaching the 85% funding level.

44. At the time of the 2007 legislation, the Special Account had an actuarial value of \$253 million and the suspension in gain sharing resulted in the Special Account not receiving approximately \$204 million that would otherwise have been transferred absent the 85% funding requirement. FY 2007 NHRS Actuarial Report at 5. Regardless of the suspension in gain sharing, in FY 2007, the Special Account had a \$253 million balance and continued to be invested to fund future OPEBs.

45. Through the Legislature's adoption of HB 1645 in 2008, \$250 million in funds were transferred from the Special Account to the SAAF. This transfer was for the purpose of

⁴ RSA 100-A:16, I. The member contribution rate is set by statute and deductions are made from members' paychecks. *Id.* From 1988 through 2011, the member contribution rate for Group I teachers and employees was 5%. The rate for Group II police and firefighters was 9.3% from 1977 through 2011. See RSA 100-A:16 (2010); see also Supreme Court Docket No. 2013-0669 Joint *Amicus* Associations Br. at 5 (acknowledging that "except for a small increase in the group I employee rate in 1988, [employees'] rates were unchanged from 1977 to 2009."); *Id.* at 4, n.2. Thus, Group I and Group II rates were essentially unchanged for thirty-two years. The issues of whether and when these contribution rates vested are currently on appeal to the New Hampshire Supreme Court with appellees arguing that the rates vested when they became non-probationary or permanent employees.

⁵ The employer contributions have two parts, both of which are established actuarially. Employers make "normal" contributions to fund the actuarially determined cost of benefits such as annuities. RSA 100-A:16, II(b). Employers also fund the accrued unfunded liability in the NHRS through an "accrued liability contribution" which is actuarially designed to retire the accrued unfunded liability over 30 years consistent with Governmental Accounting Standards Board ("GASB") requirements.

depressing employer contribution rates. Letter of NHRS Chair, Lisa Shapiro, PhD., dated November 21, 2008 (“...the transfer to the Pension Plan of \$250 million from the Special Account to increase pension plan assets and restrain employer contribution rate increases.”).

46. The transfer of \$250 million in 2008 occurred despite the employee and retiree member vested rights in the Special Account and the fact that the SAAF may not be legally funded by a Special Account transfer. In particular, RSA 100-A:16, II (b) provides: “The state annuity accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all state annuities payable from contributions made by employers, any amounts transferred thereto from a similar fund under one or more of the predecessor systems, amounts transferred from the member annuity savings fund, and all amounts paid to the system by or on account of call, substitute, or volunteer firemen and from which shall be paid all benefits payable under the system other than those payable from the member annuity savings fund.”

47. The transfer of the \$250 million from the Special Account deprived employees and retirees of the benefit of having these funds available to fund OPEBs when the 85% funding requirement is met. The employees did not receive a comparable benefit for the loss of these funds as the addition of these funds into the SAAF was used to depress employer contributions and to reduce the unfunded liability that employers must pay. The transfer of these funds did not provide the employees or retirees with a new, different or enriched benefit.

48. If employer contributions had not been depressed by the transfer of the \$250 million, then an argument could have been made that the transfer was made to bulk up the SAAF and make it more stable and financially viable.⁶ However, by transferring the \$250 million from

⁶ The funds in the Special Account could also have been used to pre-buy the benefits at issue.

the Special Account and coupling this with a reduction in employer contribution rates, the employees were denied any comparable benefit.

49. The strategy of raiding the Special Account and using the raided funds to depress employer contributions is no different than if the Special Account funds were simply transferred to the State and political subdivision employers as unencumbered bonuses that could be used for any governmental purpose of the employer's choosing.⁷

50. The \$250 million raided from the Special Account in 2008 remains in the SAAF today and the employers who contribute to the NHRS continue to enjoy the benefit from this \$250 million addition to the corpus of the SAAF because the \$250 million is part of the invested corpus of the trust.

51. Two bills were passed during the 2011 Legislative Session that further impacted the Special Account. The first required a transfer of \$89 million from the Special Account to the SAAF. HB 2. The second piece of legislation required a transfer of the balance of all funds remaining in the Special Account, except for the funds necessary to comply with the requirements of RSA 100-A:41-d, III regarding temporary supplemental allowances due to be paid July 1, 2012. *Id.* This legislation resulted in an additional transfer from the Special Account to the SAAF of \$167.3 million for a total transfer of \$256.3 million. As of June 30, 2011, the balance remaining in the Special Account was \$20.0 million. The comparable figure for June 30, 2010 was \$328.6 million.

⁷ The raiding of the \$250 million from the Special Account in 2008 is particularly egregious as the transfer was made at about the same time as the State dispensed with the use of the improper Open Aggregate Actuarial Cost Method which had been in place from 1992 to 2007 and served to depress employer contributions by inflating the apparent actuarial value of the SAAF. See FY 2007 NHRS Actuarial Valuation at 5.

52. On information and belief, the transfers that were authorized in 2011 similarly were used to reduce employer contribution rates and, as result, similarly did not convey a benefit to employees and retirees.

53. The \$256.3 million raided from the Special Account in 2011 remains in the SAAF today and the employers who contribute to the NHRS continue to enjoy the benefit from this \$256.3 million addition to the corpus of the SAAF.

54. Finally, HB 1483 adopted in 2012 repealed the Special Account. The remaining \$16.3 million were transferred to the SAAF. FY 2012 NHRS CAFR at 45. The \$16.3 million transferred to the SAAF in 2012 remains in the SAAF today and, on information and belief, the employer contribution rates were depressed as a result of this transfer and the NHRS continues to enjoy the benefit from this \$16.3 million transfer today.

55. The court in this matter in equity has broad powers to fully make the plaintiffs whole. See *Dunlop v. Daigle*, 122 N.H. 295, 300, 444 A.2d 519, 521 (1982). Further, “[i]t is the practice of courts of equity, having jurisdiction, to administer all relief which the nature of the case and facts demand.” *Baldwin v. Wallace*, 84 N.H. 71, 72, 146 A. 90, 91 (1929) (quotation omitted). “An award of attorney's fees to the prevailing party where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well, has been recognized as ^{**393} an exception to the American rule that each party must bear its own attorney's fees.” *Claremont v. State*, 144 NH 590, 595 (1999) (further citations omitted). This action, should plaintiffs be successful, corrects the unconstitutional conduct of the State and confers a benefit upon the public which has an interest in the lawful conduct of its government.

CAUSES OF ACTION

COUNT I – Contract Clause-Annual Increase in Medical Subsidies

56. The Plaintiffs incorporate by reference and re-assert all preceding paragraphs of this Complaint.

57. Employee and retiree members of the NHRS who received medical subsidies in 2008 or who had the expectation of medical subsidies in the future had a contractual right to receive annual four percent escalator payments to their medical subsidies beginning on or about July 1, 2012 or when they became eligible for medical subsidies.

58. The contractual right to the four percent annual increases resulted from the *quid pro quo* discontinuation of the eight percent annual escalator payments followed by four years without any increases in medical subsidies in return for the institution of annual four percent increases on July 1, 2012.

59. Part 1, Article 23 of the New Hampshire Constitution prohibits retrospective laws and this prohibition has been interpreted by the courts to render unconstitutional any law that takes away or impairs vested rights acquired under existing laws. See *Woart v. Winnick*, 3 N.H. 473 (1826).

60. Article 1, § 10 of the United States Constitution declares that “[n]o state shall...pass any...law impairing the obligation of contracts....”

61. Non-probationary employees who had a future expectation of medical subsidies and retirees who received medical subsidies in 2008 and were deprived of annual eight percent increases in the amounts of their medical subsidies in exchange for the payment of four percent increases beginning in 2012 had vested rights that existed under then current law.

62. The State, by adopting HB 2 in 2011, impaired the above-referenced vested rights by repealing the legislation that provided for the four percent annual increases. As a result, HB 2 is unconstitutional in this regard as it violates the Contract Clause of the state and federal constitutions. In the alternative, the discontinuation of the eight percent annual increases violated the Contract Clause and the promise of the "four plus four" solution equitably tolled the statute of limitations.

63. The NHRS has directly benefitted from the unconstitutional conduct of the State in that it has not paid four percent increases to recipients of medical subsidies since July 2012 and will not be required to pay four percent annual increases in the future.

64. Further, the repeal of the law that provided for the four percent annual increases has allowed the NHRS to transfer funds from the Special Account that were, in part, earmarked for the payment of the four percent annual increases to the SAAF thereby depressing employer contributions.

65. WHEREFORE, for the foregoing reasons, the plaintiffs request the Court declare that HB 2 as adopted in 2011 is unconstitutional so far as it repealed the right to a four percent annual increase to medical subsidies and permanently enjoin its operation, order the NHRS to disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate, the funds that the NHRS has illegally obtained and the earnings on those funds, order the State and the NHRS to pay plaintiffs' attorney fees and costs, order pre-judgment and post-judgment interest, and for such other relief as just and proper. In the alternative, the plaintiffs request the Court to declare the discontinuation of the eight percent annual increases as unconstitutional and order the NHRS to disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate,

the resulting funds that the NHRS has illegally obtained and the earnings on those funds. Further, also in the alternative, the plaintiffs request the State make them whole.

COUNT II – Contract Clause-Illegal Transfer of Special Account to SAAF

66. The Plaintiffs incorporate by reference and re-assert all preceding paragraphs of this Complaint.

67. Employee members of the NHRS who were employed in 2011 or 2012 and retiree members of the NHRS who were retired in 2011, or in 2012, had a vested right to the maintenance of the Special Account and the use of the funds maintained in the Special Account for earmarked purposes including the payment of COLAs as these employees and retirees both contributed to the accumulation of funds in the vested account and were the recipients of other than post-employment benefits from the Special Account.

68. In the alternative, these employees and retirees had an expectancy of other than post-employment benefits from the Special Account because eventually, as the result of their employers contributing amounts to the NHRS designed to reduce the unfunded liability in the retirement system, the SAAF would be 85% funded. The employees and retirees were entitled to have funds accumulate in the Special Account to their benefit so that these funds would be available to them to fund other than post-employment benefits once the unfunded liability was 85 percent. The preservation of the Special Account also negates any claim that sufficient funds are not available to fund other than post-employment benefits.

69. Part 1, Article 23 of the New Hampshire Constitution prohibits retrospective laws and this prohibition has been interpreted by the courts to render unconstitutional any law that takes away or impairs vested rights acquired under existing laws. See *Woart v. Winnick*, 3 N.H. 473 (1826).

70. Article 1, § 10 of the United States Constitution declares that “[n]o state shall...pass any...law impairing the obligation of contracts....”

71. Non-probationary employees who were employed in 2011 and retirees who were employed or retired in 2011 were deprived of the benefit of the funds in the Special Account by the State’s illegal transfer of approximately \$256.3 million from the Special Account to the NHRS’s SAAF pursuant to HB 2.

72. Non-probationary employees who were employed in 2012 and retirees who were employed or retired in 2012 were deprived of the benefit of the funds in the Special Account by the State’s illegal transfer of approximately \$16.3 million from the Special Account to the NHRS’s SAAF pursuant to HB 1483 .

73. All of these employees were deprived of the existence of the Special Account when it was repealed in 2012 pursuant to HB1483.

74. WHEREFORE, for the foregoing reasons, the plaintiffs request the Court declare that HB 2, HB 464 and HB1483 are unconstitutional so far as each of these laws transferred funds from the Special Account to the SAAF or repealed the Special Account and permanently enjoin the operation of these laws, order the NHRS to disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate, the funds that the NHRS has illegally transferred from the Special Account, or, in the alternative, order the NHRS to re-establish the Special Account and return the transferred funds to it, both along with earnings on those funds, order the State and the NHRS to pay plaintiffs’ attorney fees and costs, order pre-judgment and post-judgment interest, and for such other relief as just and proper.

COUNT III- VIOLATION OF ARTICLE 36-a

75. The Plaintiffs incorporate by reference and re-assert all preceding paragraphs of this Complaint.

76. Part I, Article 36-a provides:

[Use of Retirement Funds.] The employer contributions certified as payable to the New Hampshire retirement system or any successor system to fund the system's liabilities, as shall be determined by sound actuarial valuation and practice, independent of the executive office, shall be appropriated each fiscal year to the same extent as is certified. All of the assets and proceeds, and income there from, of the New Hampshire retirement system and of any and all other retirement systems for public officers and employees operated by the state or by any of its political subdivisions, and of any successor system, and all contributions and payments made to any such system to provide for retirement and related benefits shall be held, invested or disbursed as in trust for the exclusive purpose of providing for such benefits and shall not be encumbered for, or diverted to, any other purposes.

77. "[A]ll contributions and payments made to [the NHRS] to provide for retirement and related benefits shall be held, invested or disbursed as in trust for the exclusive purpose of providing for such benefits and shall not be encumbered for, or diverted to, any other purposes."

Id. Pt. 1, Art. 36-a, NH Const. (emphasis supplied). The State and the NHRS violated this provision of the New Hampshire Constitution when it transferred funds from the Special Account to the SAAF for the purpose of depressing employer contribution rates. These transfers occurred in 2008, 2011 and 2012, pursuant to HB1645, HB464, HB2 and HB1483, respectively.

78. WHEREFORE, for the foregoing reasons, the plaintiffs request the Court declare that HB 2, HB464 and HB1483 are unconstitutional so far as each of these laws transferred funds from the Special Account to the SAAF and permanently enjoin the operation of these laws, order the NHRS to disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate, the funds that the NHRS has illegally transferred from the Special Account, or, in the alternative, order the NHRS to re-establish the Special Account and return the transferred funds to it, both along with earnings on those funds, order the State and the NHRS to pay

plaintiffs' attorney fees and costs, order pre-judgment and post-judgment interest, and for such other relief as just and proper.

COUNT IV– Unjust Enrichment

79. The Plaintiffs incorporate by reference and re-assert all preceding paragraphs of this Complaint.

80. The NHRS has illegally received funds, has illegally failed to pay funds, and/or has illegally transferred funds that were received for an earmarked purpose to general use.

81. The NHRS has benefitted in the past from this illegal conduct and, as it continues to maintain the funds in question, continues to benefit currently from the illegal retention or use of the funds in question.

82. Specifically, the NHRS has not paid four percent annual medical subsidy increases since July 1, 2012. The NHRS has illegally transferred funds from the Special Account to the SAAF in 2008 (\$250 million), 2011 (\$256 million) and 2012 (\$16.3 million).

83. The NHRS has used the funds described in the preceding paragraph for illegal purposes, including the depression of employer contribution rates.

84. The conduct of the NHRS has been unconscionable and has resulted in the NHRS being unjustly enriched.

85. Wherefore, for the foregoing reasons, plaintiffs request the Court order the NHRS to disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate, the funds that the NHRS has illegally failed to pay in four percent annual medical subsidy increases or that the NHRS has transferred from the Special Account, or, in the alternative, in the case of the Special Account funds, to order the NHRS to re-establish the Special Account and return the transferred funds to it, all actions along with earnings on the funds in question and order the

NHRS to pay plaintiffs' attorney fees and costs, order pre-judgment and post-judgment interest, and for such other relief as just and proper.

Count V-General Equitable Powers and Breach of Fiduciary Duties

86. The plaintiffs incorporate by reference all of the preceding paragraphs in this complaint.

87. This Court enjoys general equitable powers to do justice. The NHRS and its trustees are fiduciaries with respect to funds held by the NHRS for the benefit of current and future members.

88. Even though the NHRS, and through it, the State, are holding funds that were wrongly received by the NHRS due to unconstitutional acts of the State and its political subdivisions, the NHRS and the State refuse to return those funds to the plaintiffs and the classes of individuals they represent.

89. Further, the NHRS and the State have benefitted from their illegal receipt of the aforesaid funds.

90. In the interests of justice, this Court should order the NHRS and the State to restore to the plaintiffs and the classes of individuals they represent the illegally obtained funds and the benefits derived therefrom.

PRAYERS FOR RELIEF

WHEREFORE, for the foregoing reasons, the plaintiffs request the Court:

A. Declare HB 2, HB 464, HB 1483 unconstitutional and violative of the State and Federal Contract Clause;

B. Declare HB 2, HB 464, HB 1483 unconstitutional and violative of the Article 36-a of the New Hampshire Constitution;

C. Permanently enjoin the operation of HB 2, HB 464, HB 1483;

D. Order the NHRS to disgorge, forfeit and return funds that it illegally has in its possession and to similarly disgorge, forfeit and return any benefits it has derived from the illegal possession of these funds;

E. Order the NHRS to re-establish the Special Account and return funds from the SAAF to the Special Account;

F. Approve class representation as requested herein;

G. Order the reinstatement of the four percent annual medical subsidy escalator and payment to appropriate plaintiffs and class members the value of the four percent annual escalators that have been missed since 2012, or in the alternative, the plaintiffs request the Court order reinstatement of the eight percent annual escalator and that the NHRS disgorge, forfeit and return to the plaintiffs and relevant class members, as appropriate, the resulting funds that the NHRS has illegally obtained and the earnings on those funds;

H. Order the State and the NHRS to pay the plaintiffs reasonable attorneys fees and costs;

I. Order the State and the NHRS to pay pre-judgment and post-judgment interest; and

J. for any other relief as is just and proper.

Respectfully submitted,

American Federation of Teachers – New Hampshire
National Education Association – New Hampshire
New England Police Benevolent Association
New Hampshire Police Association
New Hampshire Retired Educators Association
New Hampshire School Administrators Association
Professional Fire Fighters of New Hampshire
State Employees Association of New Hampshire,
SEIU Local 1984

Russell C. Day, individually and for the class he represents;

Norman Gamache, individually and for the class he represents;

Barbara Doyle, individually and for the class she represents;

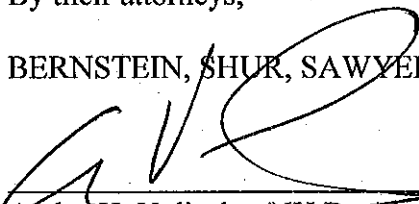
Elizabeth M. Thyng, individually and for the class she represents;

Dan Silva, individually and for the class he represents;

Bonnie Doherty, individually and for the class she represents

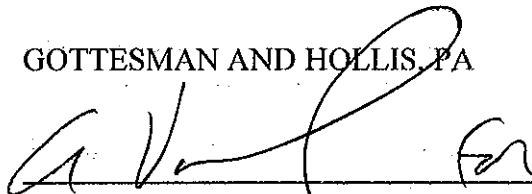
By their attorneys,

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