THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON MOTION FOR PRELIMINARY INJUNCTIVE RELIEF, MOTION TO INTERVENE, AND MOTION FOR TEMPORARY RESTRAINING ORDER

This case concerns challenges to the manner in which the State currently carries out its Part II, Article 83 duty to "provide a constitutionally adequate education to every educable child in the public schools . . . and to guarantee adequate funding" via "constitutional taxes . . . ." See Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) (citations and quotations omitted); see also Doc. 17 (Pls.' Am. Compl.). The following motions are pending before the Court: the plaintiffs' motion for preliminary injunctive relief, see Doc. 21; a motion to intervene filed by a group of New Hampshire cities and towns (the "Coalition"), see Doc. 36; and the plaintiffs' motion for a temporary restraining order, see Doc. 40. The Court held a hearing on these motions on November 28, 2022. For the reasons that follow, the plaintiffs' motion for a preliminary injunction is **DENIED**, the Coalition's motion to intervene is **GRANTED IN PART**, and the plaintiffs' motion for a temporary restraining order is **DENIED AS MOOT**.

Background

"Under our education funding jurisprudence, Part II, Article 83 of the State Constitution 'imposes a duty on the State to provide a constitutionally adequate

education to every educable child in the public schools in New Hampshire and to guarantee adequate funding.'" Contoocook Valley Sch. Dist., 174 N.H. at 156 (quoting Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993)). "To comply with that duty the State must 'define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.'" Id. at 156–57 (quoting Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006)); see also Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) ("Claremont II") ("Part II, article 5 of the State Constitution provides that the legislature may 'impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.' This article requires that 'all taxes be proportionate and reasonable—that is, equal in valuation and uniform in rate.'" (citations omitted)).

In an effort to comply with the above-described obligations, "the legislature enacted RSA 198:40-a, setting forth the annual per-pupil cost of providing the opportunity for an adequate education as defined in RSA 193-E:2-a." Contoocook Valley Sch. Dist., 174 N.H. at 158. Based on average daily membership in attendance ("ADMA"), the legislature determined that cost to be:

> (a) A cost of $3,561.27 per pupil in the ADMA, plus differentiated aid as follows:
> (b) An additional $1,780.63 for each pupil in the ADMA who is eligible for a free or reduced price meal; plus
> (c) An additional $697.77 for each pupil in the ADMA who is an English language learner; plus
> (d) An additional $1,915.86 for each pupil in the ADMA who is receiving special education services; plus
> (e) An additional $697.77 for each third grade pupil in the ADMA with a score below the proficient level on the reading component of the state assessment ....

Id. at 158–59 (quoting RSA 198:40-a, II).

"The statute provides that '[t]he sum total calculated under paragraph II shall be the cost of an adequate education.'" Id. at 159 (quoting RSA 198:40-a, III). "The rates set forth in the statute are adjusted each biennium to reflect changes in the federal Consumer Price Index." Id. at 159 (citing RSA 198:40-d (Supp. 2020)). At present, the State raises the funds necessary to provide public schools with the per-pupil amounts described above via the Statewide Education Property Tax (the "SWEPT"). See RSA 76:3 (requiring "the commissioner of the department of revenue administration" (the "Commissioner") to "set the education tax rate" each fiscal year).

The plaintiffs in this case each own and pay taxes on real property located in New Hampshire. See Doc. 1 (Compl.). In this action, the plaintiffs challenge two discrete aspects of the State's current school funding scheme. See id. First, they argue that the current scheme is unconstitutional because, as the Commissioner currently administers it, some property owners pay a higher SWEPT tax rate than others. See id. ¶¶ 28–39. In particular, the plaintiffs maintain that the Commissioner currently allows property-wealthy municipalities to keep surplus SWEPT funds collected in excess of their respective, education-related need, as determined by multiplying the relevant ADMA by the statutory per-pupil amount. See id. Similarly, the plaintiffs allege that the Commissioner allows municipalities with little to no education-related need to effectively reduce or eliminate their corresponding SWEPT rate by offsetting it with a negative local tax rate. See id. As a result, the plaintiffs argue, approximately ten percent of New Hampshire municipalities (including the members of the Coalition) effectively pay a lower SWEPT rate than the other ninety percent (including the municipalities in which the plaintiffs own real property). See id.

In addition, the plaintiffs challenge the adequacy of the per-pupil funding the State provides for the education of public school students, arguing that this amount is insufficient to provide any public school student with a constitutionally-adequate education. See id. ¶¶ 40–72. As a result, the plaintiffs maintain, public schools rely on local school taxes to "bridge the gap." Id. ¶ 72. The plaintiffs argue that because local school tax rates vary based on whether the relevant area is "property-wealthy" or "property-poor," the State's under-funding of certain municipalities (and resulting requirement that local school taxes make up for the shortage) violates its obligation under Part II, Article 83. Id. (noting the local school taxes used to make up for the State's underfunding of its education-related obligations are "not uniform in rate").

In both their original Complaint and their amended Complaint, the plaintiffs requested (among other things) "permanent injunctive relief requiring New Hampshire to discontinue its unconstitutional public education funding scheme . . . ." Doc. 1 ¶ 73; accord Doc. 17 ¶ 81. Over a month after the plaintiffs amended their Complaint to add additional plaintiffs, see Doc. 16 (Aug. 26, 2022 Motion to Amend), they moved for preliminary injunctive relief. See Doc. 21 (filed October 5, 2022); see also Docs. 22–25, 28–29, 21–34 (related filings). While that motion was pending, the Coalition moved to intervene. See Doc. 36; see also Doc. 39 (Pls.' Obj.). After holding a hearing on the plaintiffs' request for injunctive relief, Judge MacLeod recused himself from presiding over this case. See Doc. 37 (Nov. 9, 2022 Recusal Order). Thereafter, Judge Nadeau issued an Order transferring venue to the Rockingham County Superior Court, and reassigning the matter to the undersigned judge. See Doc. 38.

On November 12, 2022, the plaintiffs moved for a temporary restraining order to "maintain[] the status quo" by suspending efforts to set local property tax rates or collect property taxes for the coming year. See Doc. 40 (arguing this relief was necessary so the plaintiffs' request for preliminary injunctive relief would not be rendered moot by the delay associated with the transfer and reassignment of this matter); see also Doc. 41 (Coalition's Obj.); Doc. 42 (State's Obj.). Prior to the November 28, 2022 hearing on pending motions, the parties submitted affidavits and other exhibits concerning the manner in which SWEPT funds are generally collected and allocated, and how far that process has progressed for this tax year. See, e.g., Doc. 34 (Exhibits to Kneuer Aff.). The parties agreed during the hearing that the Court could consider the substance of those items, along with the hearing exhibits, when ruling on the pending motions.

Analysis

I. The Plaintiffs' Request For Preliminary Injunctive Relief

In their original motion for preliminary injunctive relief, the plaintiffs sought to enjoin the Commissioner from approving or proceeding with property tax collection for the coming year based on any "negative" school district tax rates. See Doc. 21 at 7. The plaintiffs subsequently amended their request such that their proposed injunction would prevent the Commissioner from proceeding with any aspect of this year's SWEPT assessment or collection. See Doc. 24 at 5; see also Doc. 22 (Pls.' Mem. Law for Doc. 21) at 19 (arguing an injunction is necessary to prevent the plaintiffs "and similarly situated taxpayers across the state" from paying "unconstitutional taxes").

However, in replying to the State's October 28, 2022 objection, see Doc. 28, the plaintiffs seemingly further amended their request for preliminary injunctive relief to the

effect that the Commissioner would instead be enjoined from "permitting property wealthy communities to retain excess [SWEPT] funds" or "offset SWEPT with a negative-tax rate." Doc. 29 at 2. The plaintiffs confirmed this shift in their requested relief during the November 28, 2022 hearing, at which time they informed the Court that they were not seeking to reduce their own tax liabilities for the coming year, but rather to require that all municipalities actually collect SWEPT taxes (without any offsets) and hold excess amounts (that is, amounts collected which exceed the relevant per-pupil times ADMA product for the relevant municipality) in escrow pending the resolution of this matter. The plaintiffs maintain that this scenario would cause no harm to the State because it could proceed with the collection of this year's SWEPT, while avoiding further harm to the plaintiffs because all property owners would be required to actually pay a uniform SWEPT rate.

The precise nature of the plaintiffs' requested relief is important because it bears on the State's claim that the plaintiffs lack standing to pursue injunctive relief. See Doc. 28 at 6–12. In response to the State's standing argument, the plaintiffs assert (among other things) that they have "taxpayer standing under Part I, Article 8 of the New Hampshire Constitution as they challenge specific components of SWEPT." Doc. 29 (Pls.' Reply to Doc. 28) at 4 (bolding omitted).

New Hampshire law concerning taxpayer standing has developed and changed over time. See Carrigan v. N.H. Dep't of Health & Hum. Servs., 174 N.H. 362, 367 (2021) (recounting the history of taxpayer standing). Today, standing is constitutionally-guaranteed to "any individual taxpayer eligible to vote in the State" under Part I, Article 8 of the New Hampshire Constitution, which provides (in relevant part):

> The public . . . has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

Carrigan, 174 N.H. at 368–69 (quoting Part I, Article 8). Notably, however, the Carrigan court concluded "that a plaintiff relying upon Part I, Article 8 to establish standing must challenge a specific governmental action" rather than a broad policy. Id. at 372.

In the State's initial objection to the plaintiffs' request for preliminary injunctive relief, the State correctly noted "that taxpayer standing is only available under Part I, Article 8 for challenges to a specific spending action or spending approval." Doc. 28 at 10 (quotations and citation omitted). The State argued that although "the plaintiffs' reasoning for why the SWEPT is unconstitutional may relate to the manner in which revenues generated by the SWEPT are distributed . . . the injunction they seek is not so limited. Rather, the plaintiffs purport to seek to enjoin the SWEPT itself statewide." Id.; see also id. at 7 (arguing that although "the plaintiffs imply that their local education tax rates are higher than they might otherwise be because of these practices," they "offer no competent evidence . . . to support this implication"). Once "the plaintiffs . . . substantially changed or clarified the nature of the preliminary injunctive relief they seek," however, see Doc. 32 (State's Surreply to Doc. 29) at 1, the State recognized that this "shift . . . may well bolster the plaintiffs' claim to taxpayer standing . . . ." Id. at 6 (arguing that the amended request should nevertheless be denied").

The Court appreciates the State's candor in recognizing that the shift in the plaintiffs' request for preliminary injunctive relief impacted the viability of the State's

standing-based challenge. See id. At this stage of the proceedings, the Court concludes that the Commissioner's decision to allow certain municipalities to retain excess SWEPT funds or offset the SWEPT rate through negative local education tax rates constitutes a sufficiently-specific governmental action as to support a finding of standing under Part I, Article 8. See Carrigan, 174 N.H. at 372. As a result, the Court need not reach the plaintiffs' alternative arguments on this topic.

Having found that the plaintiffs have standing to pursue their modified request for preliminary injunctive relief, the Court now turns to the merits of that request. The standard for granting a preliminary injunction is well established:

> The issuance of injunctions . . . has long been considered an extraordinary remedy. A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits. An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law. Also, a party seeking an injunction must show that it would likely succeed on the merits.

N.H. Dept. Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (citations and quotations omitted). Notably, the granting of an injunction "is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (quotations, citation, and brackets omitted) (recognizing courts may consider public interest in evaluating requests for injunctive relief).

As set forth above, the plaintiffs' request for injunctive relief centers on their claim that by allowing municipalities to offset the applicable SWEPT rate or retain funds collected through SWEPT which exceed their respective "need" (again, as calculated by multiplying the statutory per-pupil amount of funding by the relevant ADMA), the

Commissioner is effectively reducing the SWEPT rate paid by those municipalities, thereby resulting in a rate that is not uniform (and is thus unconstitutional). See Claremont II, 142 N.H. at 468 (noting Part II, Article 5 requires taxes to be "equal in valuation and uniform in rate" (citation and quotations omitted)). Assuming, without deciding, that the plaintiffs have demonstrated a likelihood of success on the merits with respect to this issue and that the other requirements for obtaining injunctive relief are met, see Mottolo, 155 N.H. at 63, the Court nevertheless finds that the balance of the equities favors the State and the Coalition, and thus, no preliminary injunction should issue. See UniFirst Corp., 130 N.H. at 14.

In reaching this conclusion, the Court relies in part on the affidavits of Mark Decoteau and Martha Roy, which were appended to the Coalition's objection to the plaintiffs' request for a temporary restraining order. See Doc. 40 at 15–20 (Decoteau Aff.); id. at 21–22 (Ex. A to Decoteau Aff.); Id. at 24–27 (Roy Aff.). According to Mr. Decoteau's affidavit, the Town of Waterville Valley received its local education and SWEPT rates from the State on October 20, 2022, and sent out tax bills to local property owners on October 26, 2022. See id. at 16. Mr. Decoteau notes that the excess SWEPT retained by Waterville Valley comprised 3.5% of that town's education funding for 2022. See id. Mr. Decoteau points out that if Waterville Valley must adjust its local tax rate to account for the inability to use excess SWEPT funds, it will have to issue replacement or supplemental bills "at significant time and expense." Id. at 19. He also sensibly observes that local property owners who pay their taxes via an escrow account would face additional administrative challenges. See id.

According to Ms. Roy's affidavit, the Town of Newington (and those who pay taxes on property located therein) would face similar challenges as those described by Mr. Decoteau if the Court were to grant the plaintiffs' request for preliminary injunctive relief. See id. at 24–27 (indicating Newington has also already sent out its tax bills, and would have to reissue or supplement those bills if Newington must make up for the loss of excess SWEPT funds). Further, neither Mr. Decoteau nor Ms. Roy believes their respective towns would be able to secure a loan to alleviate the significant impacts on town administration caused by a delayed receipt of adequate tax funds. See id. at 19 (explaining Mr. Decoteau's concern that banks will not lend funds due to the uncertainty of this situation); id. at 26–27 (explaining Ms. Roy's concern that Newington lacks a sufficient credit history to obtain a loan).

During the November 28, 2022 hearing, the plaintiffs acknowledged that even if the State were to collect SWEPT funds in what the plaintiffs characterize as a uniform fashion, and thereafter hold any excess funds generated by a particular municipality in escrow pending the resolution of this case, the plaintiffs would not receive any financial benefit from that course of action. More specifically, the plaintiffs recognized that under such a scenario, even if the plaintiffs were to win on the merits, they would not be entitled to receive any of the escrowed funds. As a result, the only benefit the plaintiffs would obtain via the issuance of preliminary injunctive relief would be not having to pay what they characterize as an unconstitutional tax because the rate paid by all municipalities would, in their view, be uniform. The rate paid by the plaintiffs, however, would not change.

The Court in no way wishes to minimize the significance of the plaintiffs' claimed constitutional injuries. Nevertheless, the Court cannot ignore the substantial, immediate, and concrete harm that the Coalition members and their constituents would suffer if the Court were to grant the plaintiffs' request for preliminary injunctive relief. Because the Commissioner is responsible for carrying out the State's education funding scheme, the Court cannot fault the Coalition members for relying on the Commissioner's years-long practice of allowing them to retain excess SWEPT funds or offset their respective SWEPT rates. Further, the Court is mindful that the injury claimed by the plaintiffs strikes at the heart of the merits of this action. In other words, the plaintiffs will only suffer harm if they are correct in their assertion that the existing scheme runs afoul of the New Hampshire Constitution. At this preliminary stage, the Court is disinclined to impose substantial, concrete harm on the Coalition members to avoid such speculative harm to the plaintiffs.

Moreover, the Court notes that even where—on appeal, after a full trial on the merits—the New Hampshire Supreme Court has deemed a particular "system of financing public education unconstitutional," it has allowed that system to "remain in effect" for a reasonable period of time "to effect an orderly transition to a new system . . . ." Claremont II, 142 N.H. at 462 (opinion dated Dec. 17, 1997) (providing that the system at issue could "remain in effect through the 1998 tax year"). Like the Claremont II court, this Court must be mindful of the practical implications of its rulings.

In sum, the issue of whether the current application of the SWEPT results in a constitutional violation is a complicated question best decided with the benefit of a fully developed record and additional time for the parties to brief (and the Court to consider)

the relevant legal issues. Under the circumstances presented here, the Court cannot conclude that in the interim, equity favors disrupting the Coalition members' fiscal operations in such a substantial way to avoid the plaintiffs' claimed (but as yet unproven) constitutional injuries, especially given that the injunction the plaintiffs now seek would not impact the SWEPT rate they will pay for this tax year. For these reasons, the Court concludes that even assuming (without deciding) that the plaintiffs have demonstrated a likelihood of success on the merits and that the other requirements for obtaining injunctive relief are met, see Mottolo, 155 N.H. at 63, the balance of the equities favors the State and the Coalition, and thus, no preliminary injunction should issue. See UniFirst Corp., 130 N.H. at 14. Accordingly, the plaintiffs' motion for preliminary injunctive relief is **DENIED**. See Doc. 21.

II. The Coalition's Motion To Intervene

The Court now turns to the Coalition's motion to intervene. See Doc. 36 (noting the State's assent to the motion). Superior Court Civil Rule 15 provides that "[a]ny person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his relation to the cause." "The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." Brzica v. Trustees of Dartmouth Coll., 147 N.H. 443, 446 (2002) (quoting Scamman v. Sondheim, 97 N.H. 280, 281 (1952)). "A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein." Id. (quoting Snyder v. N.H. Savings Bank, 134 N.H. 32, 35 (1991)).

In this case, the reasoning underlying the Court's denial of the plaintiffs' request for preliminary injunctive relief demonstrates that the Coalition members have "a right involved in the trial and a direct and apparent interest therein." See id. The plaintiffs seemingly recognize that this is so, as their objection does not meaningfully challenge the sufficiency of the Coalition members' interest, but rather argues that the motion to intervene should be denied because intervention could result in delay. See Doc. 39. In the plaintiffs' view, any such delay is unwarranted because the Coalition's interests are represented by the State. See id. During the November 28, 2022 hearing, however, the State indicated that it could not fully articulate or protect the Coalition's interests. Moreover, the Coalition's participation thus far has not resulted in undue delay, and the Court has no basis to believe that it will result in future delays.

In light of the foregoing, the Court concludes that the Coalition may intervene with respect to the plaintiffs' challenge concerning the manner in which the SWEPT is collected and distributed. At this stage of the proceedings, however, the Coalition has not demonstrated that it has a direct and unique interest in the plaintiffs' claim concerning the adequacy of per-pupil funding the State provides to public schools, such that the Coalition should be allowed to intervene with respect to that issue. In other words, the Court is not convinced that the Coalition's view on that topic is so unique that it should operate as an additional party to that portion of this dispute.[1]

[1] The Court is also mindful that the adequacy of the State's per-pupil education funding is currently being litigated in another action, which is currently scheduled to begin jury selection on April 10, 2023. See Contoocook Valley Sch. Dist. v. State of New Hampshire, No. 213-2019-CV-00069 (the "ConVal case"). During the November 28, 2022 hearing, the parties to this action agreed on a trial date in late September or early October of 2023. By that time, the parties will presumably have the benefit of seeing the evidence presented in and the outcome of the public trial of the ConVal case. This context bolsters the Court's current view that the Coalition need not operate as a standalone party in litigating the plaintiffs' challenge to the adequacy of the State's per-pupil education funding.

For the reasons set forth above, the Coalition's motion to intervene is **GRANTED** with respect to the plaintiffs' challenge to the Commissioner's practice of allowing municipalities to retain excess SWEPT funds or offset the SWEPT rate. To the extent the Coalition also seeks to intervene as to the plaintiffs' challenge concerning the adequacy of the State's per-pupil education funding, however, that request is **DENIED**.

III. The Plaintiffs' Request For A Temporary Restraining Order

The last motion pending before the Court is the plaintiffs' request for a temporary restraining order. See Doc. 40. As previously noted, the plaintiffs filed that motion after this case was transferred and reassigned, in the hope of preventing their request for preliminary injunctive relief from being rendered moot by any resulting delay in obtaining a ruling on that motion. See id. As this Order contains the Court's ruling on the plaintiffs' request for preliminary injunctive relief, their request for a temporary restraining order pending receipt of such a ruling is **DENIED AS MOOT**.

Conclusion

Consistent with the foregoing, the plaintiffs' motion for a preliminary injunction is **DENIED**, see Doc. 21; the Coalition's motion to intervene is **GRANTED IN PART**, see Doc. 36; and the plaintiffs' motion for a temporary restraining order is **DENIED AS MOOT**, see Doc. 40.

SO ORDERED.

Date: December 5, 2022

Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 12/05/2022