

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

No. 213-2019-CV-00069

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

DEFENDANTS' MOTION TO STAY NOVEMBER 20, 2023 MERITS ORDER

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move to stay the court's November 20, 2023 merits order. In support thereof, the defendants state as follows:

1. The court's November 20, 2023 merits order declares RSA 198:40-a, II(a) facially unconstitutional, requires the General Court via injunction to set a base adequacy amount that exceeds \$7,356.01, and grants the plaintiffs' request for attorney's fees.

2. The defendants respectfully request a stay of this court's merits order until it becomes a final judgment on the merits and one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter so the General Court has the opportunity to fix any constitutional infirmities that may remain following appeal.

3. The defendants request this stay for three significant reasons.

4. First, absent a stay, this court's order declaring RSA 198:40-a, II(a) facially unconstitutional will go into effect immediately and render the Executive Branch unable to fund adequacy grants for schools. Adequacy grants for schools will not resume until the General Court fixes the statute. The General Court may not act to fix the statute while this case is pending reconsideration and appeal, and may await further guidance from the New Hampshire

Supreme Court before taking remedial action. In the meantime, payments for schools will likely come due before the General Court fixes the statute. Accordingly, a stay of this court's declaratory judgment is necessary to prevent irreparable harm to New Hampshire's school funding system and to permit the Executive Branch to continue funding schools until this matter is finally resolved on the merits, and the General Court has sufficient time to fix any constitutional infirmities that may exist after appeal.

5. Second, and for the reasons stated in further detail in the Defendants' Motion for Reconsideration, this court's injunction violates the separation of powers principles embodied in Part I, Articles 30 and 37 because it materially impairs the lawmaking power of the General Court. "The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be subject to the control or supervision of the other." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). New Hampshire thus follows "the rule which exempts the legislature from the control of the court." *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Court properly denied the injunction as it had no power to interfere with proposed legislative action.").

6. The General Court has the plenary power and authority to solve the issue identified in this court's merits order in a myriad of ways, including by altering the definition of an adequate education or by creating an entirely new funding model for education. The General Court also cannot be enjoined from conducting its own further legislative study of the cost of an adequate education and endorsing a number produced from that process lower than the threshold figure this court has identified. *See City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (explaining that the "prevailing rule . . . under a tripartite form of government" is that "a court

cannot enjoin the legislature from passing a law” even if “such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law”) (internal quotations omitted).

7. The court’s injunction allows the court to control the General Court, dictates the content of proposed legislation, and seemingly prevents legislators from voting for proposed legislation inconsistent with the court’s order on threat of civil contempt. This result violates the separation of powers set forth in Part I, Article 37, and the speech and debate clause contained in Part I, Article 30. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005) (explaining that Part I, Article 30 protects “the legislature and individual legislators from incurring liability for ‘any act generally done in a session of the [legislature] . . . in relation to the business before it” including voting on proposed legislation) (internal quotations omitted).

8. Accordingly, the court’s injunction order, if it is not vacated on reconsideration, is likely to be vacated on appeal as a violation of these constitutional provisions and an unprecedented encroachment by the judiciary on the powers of the General Court.

9. Third, any further litigation related to attorney’s fees is premature at this juncture and should be stayed. The defendants are moving for reconsideration and plan to appeal. They have preserved numerous legal issues for appeal in a relatively undeveloped area of the law, any one of which could result in this court’s merits order being entirely reversed. If that occurs, the plaintiffs will not be entitled to attorney’s fees. Consequently, until the court’s merits order becomes a final judgment on the merits, the court’s order as it relates to attorney’s fees should be stayed. If, following appeal, the plaintiffs remain entitled to an award of attorney’s fees, the parties may properly litigate those fees on remand.

10. The defendants have sought the position of the plaintiffs, through counsel, but have not received a response as of the time of this filing.

WHEREFORE, the defendants respectfully request this court enter an order:

- A. Staying the effective date of this Court's November 20, 2023 merits order until it becomes a final judgment on the merits and one full legislative cycle (beginning July 1 and ending June 30) of the General Court expires thereafter;
- B. Staying the effective date of this Court's November 20, 2023 attorney's fees order until it becomes a final judgment on the merits so the parties may litigate the proper amount of any attorney's fees, if any, owed at a later date on remand; and
- C. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE, DEPARTMENT OF
EDUCATION, GOVERNOR CHRISTOPHER T. SUNUNU,
AND COMMISSIONER FRANK EDELBLUT

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: December 14, 2023

By: /s/ Anthony J. Galdieri
Anthony J. Galdieri, Bar # 18594
Solicitor General
Samuel R.V. Garland, Bar # 266273
Senior Assistant Attorney General
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3650
anthony.j.galdieri@doj.nh.gov
samuel.r.v.garland@doj.nh.gov

and

STINSON LLP
John R. Munich (admitted pro hac vice)
J. Nicci Warr (admitted pro hac vice)
Christina J. Hansen (admitted pro hac vice)
Zachary Buchheit (admitted pro hac vice)
7700 Forsyth Blvd., Suite 1100
St. Louis, MO 63105-1821
(314) 863-0800
john.munich@stinson.com
nicci.warr@stinson.com
zachary.buchheit@stinson.com
christina.hansen@stinson.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record.

Date: December 14, 2023

/s/ Anthony J. Galdieri