

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

No. 213-2019-CV-00069

ORDER ON STATE'S POST-TRIAL MOTIONS

In this case, the plaintiffs challenge the constitutionality of RSA 198:40-a, II(a), contending that "local school districts require substantially more" base adequacy aid funding to "deliver the opportunity for a constitutionally adequate education" Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 157 (2021) ("ConVal"). Following a three-week bench trial, the Court granted the plaintiffs' request for a declaratory judgment deeming RSA 198:40-a, II(a), unconstitutional. See Doc. 246 (Nov. 20, 2023 Order on the Merits (the "Base Adequacy Aid Order")) at 56. In addition, the Court partially granted the plaintiffs' request for injunctive relief, establishing a conservative threshold that base adequacy aid funding must exceed. See id. The Court also awarded the plaintiffs their reasonable attorney's fees. See id. The State now moves for partial reconsideration, see Doc. 247 at 1, and for a stay of the Base Adequacy Aid Order until one full legislative cycle has passed post appeal. See Doc. 248; see also Doc. 247 at 1 (seeking same outcome via delayed effective date of Base Adequacy Aid Order). Id. The plaintiffs object to each of the State's requests. See Doc. 250 (Obj. Doc. 247); Doc. 254 (Obj. Doc. 248). After review, the Court finds and rules as follows.

Background

Part II, Article 83 of the New Hampshire 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.” Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) (“Claremont I”). 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.” Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) (“Londonderry I”) (quotation omitted).

Pursuant to RSA 193-E:2-a, an adequate education requires instruction in:

English/language arts and reading; mathematics; science; social studies, including civics, government, economics, geography, history, and Holocaust and genocide education; arts education, including music and visual arts; world languages; health and wellness education . . . ; physical education; engineering and technologies including technology applications; personal finance literacy, and computer science.

See RSA 193-E:2-a, I (cleaned up). RSA 193-E:2-a, IV(a), explains that the “minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education.”

To fund this opportunity, the legislature enacted RSA 198:40-a, which provides for funding via “base adequacy aid” and “differentiated aid.” RSA 198:40-a, II. While school districts receive base adequacy aid for each pupil in the average daily membership in residence, they only receive differentiated aid for pupils who meet certain statutory criteria. Id.¹ Effective July 1, 2023, the legislature amended RSA 198:40-a to provide for base adequacy aid of \$4,100. See RSA 198:40-a, II(a) (2023).

¹ Prior to July 1, 2023, differentiated aid criteria included eligibility for free or reduced-price meals, English language learner status, receipt of special education services, and certain below-proficient test scores. See Laws 2023, 79:150. The 2023 amendment eliminated the test score criterion. See id.

Before this amendment took effect, the statute set base adequacy aid at \$3,561.27 per pupil, with that amount adjusted each biennium to reflect changes in the federal Consumer Price Index. See RSA 198:40-a, II(a) (2022). For the 2022 fiscal year, the adjusted base adequacy aid amount awarded under the then-existing version of the statute was just under \$3,800. See Joint Ex. 248 (Doc. 83 – Pls.’ 3rd Am. Compl.) ¶ 26.

Procedural History

The plaintiffs filed this action on March 13, 2019, seeking declaratory and injunctive relief in connection with their claim that existing base adequacy aid funding levels are constitutionally insufficient. See Doc. 1 (Compl.). Shortly thereafter, the State moved to dismiss, arguing (as relevant here) that the plaintiffs’ requested relief would be “incompatible with separation-of-powers principles.” See Doc. 15 at 22. The State reiterated these arguments in connection with the parties’ April 2019 cross-motions for summary judgment. See Doc. 37 (State’s Obj. Pls.’ 1st Mot. Summ. J.) at 13–14; see also Doc. 26 (State’s 1st Mot. Summ. J.).

By Order dated June 5, 2019, the Court denied portions of the State’s motion to dismiss, including that portion seeking dismissal on separation of powers grounds. See Doc. 51. In addition, the Court denied the State’s first motion for summary judgment, and granted portions of the plaintiffs’ cross-motion. See id. Thereafter, the State moved for reconsideration, arguing that the Court “fail[ed] to pay appropriate deference to” the legislature and “violated the separation-of-powers doctrine[.]” See Doc. 54 at 16; see also id. at 21 (arguing Court “fashioned standards that result in the judiciary serving as a super-legislature” in connection with school funding review).

In September of 2019, the parties filed cross-appeals of the June 5, 2019 Order. See Docs. 66, 68 (Notices of Appeal). As relevant here, the State's Notice of Appeal questioned "[w]hether the trial court erred in denying the . . . motion to dismiss." See Doc. 66 at 3. Upon review, the ConVal court affirmed this Court's denial "of the State's motion to dismiss for failure to state a claim" 174 N.H. at 156. Notably, however, the ConVal court concluded that this Court erred in partially granting the plaintiffs' summary judgment motion, determining questions of fact precluded the entry of summary judgment. See id. at 166. In vacating this aspect of the June 5, 2019 Order and remanding the matter for trial, the ConVal court explained that to "address the plaintiffs' costing argument," this Court would need to determine "what is required to deliver an adequate education as defined in the statute." Id. at 166–67.

Following remand, the parties filed another round of cross-motions for summary judgment. See Doc. 122 (State's 2nd Mot. Summ. J.); Doc. 126 (Pls.' 2nd Mot. Summ. J.). Citing the ConVal court's observation that the reliability of and weight to be afforded certain data were necessarily trial determinations, the Court denied those motions. See Doc. 194 (March 20, 2023 Order) at 10 (citing ConVal, 174 N.H. at 167, n.1). In response to the plaintiffs' renewed request for injunctive relief, see Doc. 126 ¶ 1, the Court explained that to obtain such relief, the plaintiffs would need to convince the Court it has the requisite "constitutional authority[.]" See Doc. 194 at 12. Accordingly, shortly before the April 2023 bench trial, the plaintiffs submitted a supplemental memorandum addressing that issue. See Doc. 230.

After the three-week bench trial concluded, the State submitted a memorandum outlining its position as to the separation of powers issue. See Doc. 244. In that filing,

the State argued that “a judicial determination of the exact per-pupil amount of funding necessary to provide for base adequacy would infringe the constitutionally committed responsibilities of the political branches and embroil the courts in weighty policy decisions belonging to the people’s representatives.” Id. at 1; see also id. at 2 (invoking Part I, Article 37 of New Hampshire Constitution); see also Doc. 243 (State’s Prop. Findings & Conclusions) ¶ 185 (asserting “this is not a situation that warrants the Court imposing its own” base adequacy aid figure). The State further argued that “Part II, Article 83 plainly commits the duty to ‘cherish’ education to the executive and legislative branches,” and thus, in the State’s view, injunctive relief defining the cost of providing the opportunity for a constitutionally adequate education would be improper. See Doc. 244 at 3; Doc. 242 (State’s Tr. Mem.) at 36–39 (raising similar arguments and asserting plaintiffs’ injunctive relief claim is nonjusticiable).

In issuing the Base Adequacy Aid Order, the Court carefully considered and responded to the State’s separation of powers concerns. See Doc. 246 at 42–44. Specifically, the Court noted that prior to trial, the Court was resistant to the plaintiffs’ request for an affirmative determination as to the necessary level of base adequacy aid funding precisely because of the weighty separation of powers concerns implicated here. Id. at 42. The Court further explained that because the Court remained concerned about those issues, the Court “agree[d] with the State that ‘a judicial determination of the exact per-pupil amount of funding necessary to provide for base adequacy would infringe the constitutionally committed responsibilities of the political branches and embroil the courts in weighty policy decisions[.]’” Id. (citation omitted).

The Court explained, however, that given the relevant history—including the fact that after hiring an expert to analyze school funding, the legislature set base adequacy aid at less than half of its own expert's recommended funding level—and the significance of the school funding issue, it would be inappropriate for the Court to simply strike the existing base adequacy aid funding level. See id. at 43–44 (noting relevant history “calls into question whether the politics of this issue are impeding” fulfillment of State’s constitutional obligations). Rather, in satisfaction of the judiciary’s “responsibility to ensure that constitutional rights not be hollowed out,” the Court concluded that a further judicial remedy was “not only appropriate but essential” here. See id. (citations omitted). Accordingly, the Court established a highly conservative base adequacy aid threshold intended to leave space for the legislature to fulfill its function, while ensuring that after devoting years to this litigation and ultimately proving that the existing level of base adequacy aid was woefully inadequate, the plaintiffs would obtain meaningful relief. See id. at 44.

Analysis

I. State’s Request For Reconsideration of Base Adequacy Aid Threshold

The State now moves for reconsideration as to the above-described base adequacy aid threshold. See Doc. 247. In support of that request, the State renews its separation of powers argument, contending the threshold “materially impairs” the “lawmaking function by mandating the General Court solve a complex policy issue in a particularized way.” See id. ¶ 14 (suggesting legislature might wish to modify definition of adequate education, institute new funding scheme, or clarify that other State funding counts toward base adequacy aid, and arguing Base Adequacy Aid Order precludes

such actions). In addition, the State contends that the Base Adequacy Aid Order “runs afoul of . . . the Speech and Debate Clause” because individual legislators may fear civil contempt proceedings if they support legislation that is inconsistent with the Base Adequacy Aid Order. See id. ¶¶ 20–25.

Upon review, the Court is not persuaded by the State’s arguments. As explained above, the Court carefully considered the relevant separation of powers concerns when issuing the Base Adequacy Aid Order. Ultimately, the Court concluded that those concerns must be balanced against the reality that the right to “a constitutionally adequate public education is a fundamental right.” See Claremont Sch. Dist. v. Governor, 142 N.H. 462, 473 (1997) (“Claremont II”). In addition, given the relevant history, the Court felt compelled to establish a threshold level of base adequacy aid funding to avoid further unnecessary “delay in achieving a constitutional system[.]” See Claremont III, 143 N.H. 154, 158 (1998) (“Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable.”). To the extent each of the separation of powers arguments raised in the State’s motion for reconsideration are properly before the Court at this juncture, but see infra at 3–6 (outlining relevant procedural history), those arguments do not undermine the Court’s conclusions on these fronts.

Notwithstanding the foregoing, given the nature of the State’s arguments, some clarification is warranted. In the Base Adequacy Aid Order, the Court recognized that the legislature recently considered creative solutions to education funding. See Doc. 246 at 53 n. 27 (noting in 2023, legislature “considered but ultimately rejected an education funding model that would have eliminated base adequacy and differentiated aid, opting instead to fund public education at half of certain statewide average

expenditures"). By setting a base adequacy aid funding threshold, the Court did not intend to suggest that the legislature cannot enact meaningful changes to the education funding scheme. Rather, the Court's intention was to ensure that if the legislature maintains the existing scheme in substantial part, the legislature will not repeat the constitutional violations of the past by funding base adequacy aid at a level the plaintiffs have already proven to be unconstitutional.

In other words, the threshold set forth in the Base Adequacy Aid Order does not prohibit the legislature from meaningfully altering the education funding scheme, so long as such alterations provide New Hampshire children with the opportunity for a constitutionally adequate public education. Instead, the threshold establishes a minimum level of per-pupil funding—exclusive of the additional costs attributable to the heightened needs of students who qualify for differentiated aid—under the existing funding model. See id. at 44–51 (explaining why conservative calculations exclude additional costs attributable to students who qualify for differentiated aid).

To the extent the legislature considers or enacts legislation that funds education at a level below the aforementioned threshold, the Court further clarifies that the Base Adequacy Aid Order must not be construed as exposing legislators to civil contempt proceedings. Cf. MacDonald v. Jacobs, 171 N.H. 668, 679 (2019) (explaining injunctive relief is equitable in nature, and Superior Court has "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation"). Instead, the threshold merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action. If the legislature's response to the Base Adequacy Aid Order falls short of the threshold, an aggrieved party may

seek prompt declaratory relief without need for further, protracted litigation. Given the historical difficulties in the school funding context, and in recognition of the plaintiffs' substantial investment of time and resources in litigating this action, the Court maintains the view that establishing a clear guideline by which future legislative action can readily be measured is not only permissible, but essential.²

Consistent with the foregoing, the State's motion for reconsideration is **DENIED** vis-à-vis the injunctive relief set forth in the Base Adequacy Aid Order and clarified here.

II. State's Request For Stay or Deferral of Base Adequacy Aid Order

The State also moves for a stay of the Base Adequacy Aid Order until one full legislation cycle has passed post appeal. See Doc. 248. Alternatively, the State urges the Court to defer the effective date of the Base Adequacy Aid Order for the same duration. See Doc. 247 at 1. In support of these requests, the State contends that because the Court has declared RSA 198:40-a, II(a), unconstitutional, it is unclear "whether the Executive Branch may continue to make adequacy payments to schools while" the Base Adequacy Aid Order "remains subject to . . . appeal[.]" Doc. 247 ¶ 26.

The Court is unpersuaded. To the extent necessary, the Court clarifies that during the appellate period and pending further legislative action to address this issue, the State not only may continue to provide education funding to public school districts, the State is constitutionally bound to do so. See Claremont II, 142 N.H. at 473

² The Court sincerely hopes that the legislature will respond to the Base Adequacy Aid Order in a manner that honors and effects the State's constitutional school funding obligations. Yet, if the Court simply struck the existing funding level without establishing a threshold, the legislature might inadvertently increase funding to a level the plaintiffs have already proven to be unconstitutional. In the Court's view, additional relief is warranted to protect the plaintiffs from such an outcome. The State's suggestion that such protections are not necessary brings to mind the fable of the Wolves and the Sheep. See The Aesop for Children, The Wolves and The Sheep, available online from the Library of Congress at: <https://www.read.gov/aesop/144.html> (last accessed February 16, 2024).

(explaining right to “constitutionally adequate public education is a fundamental right”). Within that window, however, the Court concludes that it would be inappropriate to continue funding base adequacy aid at the \$4,100 level plaintiffs have proven to be woefully inadequate, and thus, unconstitutional. In reaching this conclusion, the Court observes that although the issues implicated here may seem like a simple matter of dollars and cents to some, the reality is that with each passing school year, another class of public school children is permanently deprived of the fundamental right to a constitutionally adequate public education. See Claremont II, 142 N.H. at 473. In light of this reality, and given the overwhelming evidence the plaintiffs presented at trial, the Court cannot endorse the State’s request to perpetuate the egregious underfunding of public education pending appeal.

Rather, pending resolution of any appeal or further legislative action, the Court **DIRECTS** the State to make base adequacy aid payments equal to the conservative \$7,356.01 threshold set forth in the Base Adequacy Aid Order. See Doc. 246 at 56. The Court notes that this funding level is far less than the plaintiffs requested and, as explained in the Base Adequacy Aid Order, the plaintiffs have proven that this funding level is also constitutionally insufficient. See id. at 54; see also Doc. 245 (Pls.’ Tr. Mem.) at 33 (seeking base adequacy aid funding of \$9,900 plus actual transportation costs). As a result, temporarily funding base adequacy aid at the threshold level will still result in a regrettable “delay in achieving a constitutional system.[.]” See Claremont III, 143 N.H. at 158. Yet, under the “extraordinary circumstances” presented here, the Court concludes that this compromise strikes an appropriate balance between the

parties' competing interests while the State pursues appellate relief or further legislative action. See MacDonald, 171 N.H. at 679.

Consistent with the foregoing, the State's requests to stay or defer the effective date of the Base Adequacy Aid Order are each **DENIED**.

III. State's Request For Reconsideration of Attorney's Fee Award

Lastly, the State moves for reconsideration with respect to the Court's award of the plaintiffs' reasonable attorney's fees. See Doc. 247 ¶¶ 31–34. Specifically, the State contends that it is "premature to address the issues of attorney's fees in any detail" because the plaintiffs may not be entitled to such fees if the State prevails on appeal, and the plaintiffs may incur additional fees during the appellate process. See id.

Upon review, the Court concludes that the interests of justice are best served by promptly litigating the reasonableness of the attorney's fees the plaintiffs have incurred to date. See Super. Ct. R. 1(b) (providing that "rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action"). When determining the reasonableness of attorney's fee requests, the Court considers, among other things, the "difficulty of the litigation, the attorney's standing and the skill employed, the time devoted, . . . the extent to which the attorney prevailed, and the benefit thereby bestowed on his clients." In re Metevier, 146 N.H. 62, 64 (2001) (citation omitted). As a result, the Court is better positioned to determine the reasonableness of a fee request close in time to the events underlying that request, including (as is true here) counsel's performance during a lengthy trial. Cf. City of Rochester v. Marcel A. Payeur, Inc., 169 N.H. 502, 508 (2016) (explaining statutes of limitations "reflect the fact that it becomes more difficult . . . to try claims as evidence

disappears and memories fade with the passage of time” (citation omitted)). For this reason, the State's motion for reconsideration is **DENIED** as it relates to the issue of attorney's fees. The Court will entertain a motion to stay payment of the plaintiffs' attorney's fees pending appeal, but the Court concludes that determining the reasonableness of the plaintiffs' fee request is best performed in the immediate future.

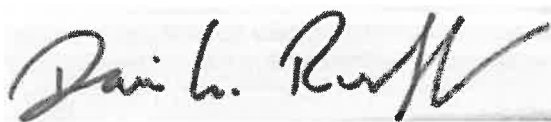
While the State's motion for reconsideration remained pending, the State understandably did not file a substantive response to the plaintiffs' affidavit of fees. See Doc. 249 (Pls.' Dec. 15, 2023 Aff. Fees); see also Doc. 252 (State's Resp. Doc. 249). Rather, citing the level of detail included in the plaintiffs' affidavit, the State requested an additional 60 days in which to file a substantive response in the event that the Court denied the relevant portion of the State's motion for reconsideration. See Doc. 249 ¶ 11. The plaintiffs have not objected to this reasonable request for additional time. Accordingly, the State's request for additional time is **GRANTED**.

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Conclusion

Consistent with and subject to the clarifications outlined above, the State's motion for partial reconsideration of the rulings set forth in the Base Adequacy Aid Order is **DENIED**. See Doc. 247. The State's motion to stay or defer the relief granted within the Base Adequacy Aid Order is also **DENIED**. See Doc. 248. As explained above, pending resolution of any appeal or further legislative action, the Court **DIRECTS** the State to make base adequacy aid payments in an amount equal to the \$7,356.01 conservative threshold established in the Base Adequacy Aid Order. Finally, the State's request for additional time in which to respond to the plaintiffs' attorney's fee affidavit is **GRANTED**. See Doc. 252. The State shall file a substantive response **within sixty (60) days** of the date on the Notice of Decision accompanying this Order. SO ORDERED.

Date: February 20, 2024

A handwritten signature in black ink, appearing to read "David W. Ruoff", is written over a light gray rectangular background.

Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 02/20/2024