

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 CASE STATUS AND PENDING MOTIONS

In this case, the plaintiffs assert claims concerning the State's administration of the Statewide Education Property Tax ("SWEPT") and the sufficiency of State funding for public education. See Doc. 17¹ (Am. Compl.). On July 27, 2023, the State moved for summary judgment with respect to the plaintiffs' school funding claims. See Doc. 70. Shortly thereafter, the Court stayed the school funding portion of this case pending the issuance of an Order on previously filed summary judgment motions regarding the plaintiffs' SWEPT claims and an Order on the merits in another school funding case. See Doc. 75 (Stay Order); see also Contoocook Valley Sch. Dist. v. State, Docket No. 213-2019-CV-00069 ("ConVal"). After those Orders issued, see Doc. 86; ConVal Doc. 246, the plaintiffs moved for partial judgment on the pleadings concerning their school funding claims. See Doc. 87. The Court held a hearing in this matter on March 22, 2024. For the reasons that follow, the stay imposed on the plaintiffs' school funding claims is **LIFTED**, the State's school funding summary judgment motion is **GRANTED IN PART**, and the plaintiffs' motion for partial judgment on the pleadings is **DENIED**.

¹ Unless otherwise noted, all document references pertain to those filed in the above-captioned matter.

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). In an effort to fund “the opportunity for the delivery of an adequate education,” see RSA 193-E:2-a, IV(a), the statutory scheme provides for “base adequacy aid” and “differentiated aid.” RSA 198:40-a, II. The State provides base adequacy aid for each pupil in the average daily membership in residence (“ADMR”), but only provides differentiated aid for pupils in the ADMR who meet certain statutory criteria. Id. The claims presented in ConVal exclusively challenged the sufficiency of base adequacy aid, whereas the plaintiffs’ school funding claims challenge the sufficiency of both base adequacy aid and differentiated aid. Compare ConVal Doc. 1 with Doc. 17.

As relevant here, on June 5, 2019, the Court issued an Order in ConVal partially granting the ConVal plaintiffs’ motion for summary judgment. See ConVal Doc. 51. On March 23, 2021, however, the New Hampshire Supreme Court reversed that decision, concluding that genuine issues of material fact—including the credibility of data reported to the Department of Education (“DOE”)—precluded the “entry of summary judgment for either party.” Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 166–67 (2021) (“ConVal”). Nevertheless, on remand, the ConVal parties again moved for summary

judgment. See ConVal Docs. 122, 126 (filed Dec. 12, 2022). After the Court denied those motions, see ConVal Doc. 194, the ConVal matter proceeded to a bench trial.

As the foregoing procedural events were unfolding, the parties in this action filed cross-motions for summary judgment concerning the plaintiffs' SWEPT claims. See Docs. 49, 53, 56 (filed between December 2022 and February 2023). The Court held a hearing on those motions on July 12, 2023. While those motions remained under advisement, the State also moved for summary judgment regarding the plaintiffs' school funding claims. See Doc. 70. The Court subsequently stayed the school funding portion of this case pending the issuance of an Order on the SWEPT summary judgment motions and an Order on the merits in ConVal. See Doc. 75.

On November 20, 2023, the Court issued both the SWEPT summary judgment Order and the ConVal merits Order. See Doc. 86; ConVal Doc. 246. The next day, the plaintiffs moved for partial judgment on the pleadings with respect to their school funding claims. See Doc. 87 (requesting that Court take judicial notice of ConVal merits Order). Following the resolution of various post-trial motions, the State appealed the ConVal merits Order to the New Hampshire Supreme Court. See ConVal Doc. 254.

Analysis

At this juncture, there are (at most) three open issues: (I) the status of the stay on the plaintiffs' school funding claims; (II) the State's school funding summary judgment motion; and (III) the plaintiffs' motion for partial judgment on the pleadings. The Court addresses the status of the stay first, as that issue controls the ripeness of the motions.

I. Status of Stay on School Funding Claims

As set forth above, in staying the plaintiffs' school funding claims, the Court expressly indicated that the stay was intended to last for a limited duration: i.e., "pending the issuance of" the SWEPT summary judgment Order and the ConVal merits Order. See Doc. 75. During the March 22, 2024 hearing, however, the State argued that the Court should maintain a stay on the plaintiffs' school funding claims despite the issuance of those Orders. In support of its position, the State emphasized that because either the Legislature's response to or the State's appeal of the ConVal merits Order could dramatically impact the base adequacy aid portion of the plaintiffs' school funding claims, maintaining a stay on all aspects of those claims would best serve the interests of judicial economy. For their part, the plaintiffs argued that because they were not permitted to consolidate this action with ConVal, see Doc. 5 (margin Order denying consolidation request), a continuation of the stay would deprive them of their right to be heard on their school funding claims. The plaintiffs also emphasized differences between their school funding claims and those litigated in ConVal.

Upon review, the Court agrees with the plaintiffs that although the cases have significant overlap, there are important differences between the school funding claims litigated in ConVal and those presented here. Among other things, in appealing the ConVal merits Order, the State assigns error to the Court's decision not to consider differentiated aid in determining whether the State is fulfilling its constitutional school funding obligations. See ConVal Doc. 256 (State's Notice of Appeal) ¶¶ 13.8–9. In this case, because the plaintiffs challenge the sufficiency of both base adequacy aid and differentiated aid, the Court will necessarily consider both funding sources in resolving

the plaintiffs' claims. See Doc. 17 ¶ 16. As a result, the State's reliance on the pending ConVal appeal as justification for extending the stay in this action is misplaced. In addition, the Court is mindful that (as the plaintiffs confirmed during the March 22, 2024 hearing) discovery in this matter is already complete. On this record, the Court cannot conclude that the interests of judicial economy outweigh the plaintiffs' interests in promptly obtaining a decision on their school funding claims. See Claremont Sch. Dist. v. Governor, 143 N.H. 154, 158 (1998) ("Claremont III") ("Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable.").

Consistent with the foregoing, the stay imposed on August 8, 2023 is **LIFTED**, and the plaintiffs' school funding claims are hereby scheduled for a **two-week bench trial** commencing on **September 30, 2024 at 9am**. If the plaintiffs or the State believe an adjustment to the duration of trial is warranted, they must file an appropriate motion **within ten (10) days** of the date on the Notice of Decision accompanying this Order.²

II. State's School Funding Summary Judgment Motion

Given the foregoing analysis, the State's school funding summary judgment motion is ripe for resolution. See Doc. 70. As the parties have fully briefed the relevant issues, the Court concludes that a hearing on this motion is unnecessary.

In its motion, the State characterizes the plaintiffs' school funding claims as seeking a funding level threshold of "no less than" the statewide per pupil average of all

² The Court takes this opportunity to note that although the Court permitted the Coalition to intervene in this action in connection with the plaintiffs' SWEPT claims, the Court denied that request with respect to the plaintiffs' school funding claims. See Doc. 48 at 14. The Coalition did not seek reconsideration of that limitation on their involvement. The November 20, 2023 Order issued in this action constitutes a final decision on the merits of the plaintiffs' SWEPT claims. See Doc. 96 (Feb. 20, 2024 Order on Pending Motions Concerning SWEPT Claims) at 9. Accordingly, absent a remand of the plaintiffs' SWEPT claims from the New Hampshire Supreme Court, any future proceedings before this Court fall outside the scope of the Coalition's limited involvement as an intervenor in this matter.

school expenditures. See Doc. 71 (Doc. 70 Mem.) at 1. The State further contends that the plaintiffs cannot establish the propriety of this request because schools spend money on items that fall outside of the State’s constitutional funding obligations. See id. at 17–18. In objecting to the State’s motion, the plaintiffs argue that while their school fundings claims do implicate statewide average expenditures, the plaintiffs also generally challenge the sufficiency of base adequacy and differentiated aid. See Doc. 76; see also Doc. 77 (Doc. 76 Mem.) at 1–2. The State counters that, at a minimum, it is entitled to summary judgment “to the extent the plaintiffs contend that the State is obligated . . . to fully fund an amount ‘no less than the average state expenditure per pupil[.]’” See Doc. 83 (also arguing plaintiffs are improperly shifting their legal theory).

Upon review, the Court concludes that the plaintiffs pled their school funding claims more broadly than the State’s summary judgment filings suggest. See Doc. 17. Indeed, the introduction to the Amended Complaint explains:

This is an action in which the [plaintiffs] . . . seek a declaratory ruling that the State of New Hampshire improperly relies upon local taxpayers, including [the plaintiffs], to raise the funds necessary to provide students with a constitutionally adequate education . . . because the State’s own funding falls far shy of that amount. . . .

[The plaintiffs] also seek a permanent injunction that requires New Hampshire to discontinue its unconstitutional public education funding scheme, and for such other relief as is just and proper.

Id. ¶¶ 1–2. In addition, the plaintiffs’ request for injunctive relief provides:

[The plaintiffs] further seek an order, directing the State to adopt a revised cost determination, which accounts for the full cost of providing constitutional adequacy to all school districts and amounts to no less than the average state expenditure per pupil, with allowances for demographic and geographic diversity and that includes consideration of the costs of transportation, capital costs, and debt.

Id. ¶ 82.

Our Supreme Court has repeatedly recognized that because New Hampshire is a “notice pleading jurisdiction,” New Hampshire courts “take a liberal approach to the technical requirements of pleadings.” Toy v. City of Rochester, 172 N.H. 443, 448 (2019) (citation omitted). As a result, “a complaint need not do more than state the general character of the action and put both court and counsel on notice of the nature of the controversy.” Id. (cleaned up). In the Court’s view, the Amended Complaint put the State on notice that the plaintiffs were generally contesting the sufficiency of school funding. Among other things, although the Amended Complaint seeks to require that the State fund education at “no less than the average state expenditure per pupil,” the document subsequently clarifies that relevant expenditures “include[] . . . the costs of transportation, capital costs, and debt.” Doc. 17 ¶ 82. The plaintiffs’ specification of relevant costs undermines the State’s characterization that the plaintiffs seek to require State funding for all school district expenditures.

For the reasons outlined above, the Court disagrees with the State’s characterization that the plaintiffs “premise their adequacy claim on” the “legally erroneous contention” that the State must fund education at no less than the statewide per pupil average of all school expenses. See Doc. 71 at 9–17. Accordingly, the Court need not reach the State’s argument that the plaintiffs cannot meet what the State argues is the plaintiffs’ burden of proof concerning such a claim. See Doc. 71 at 5–8; cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (declining to reach arguments that would not alter court’s conclusion).³

³ To the extent the State also challenges the plaintiffs’ right to recovery in connection with their claim that existing funding levels are generally insufficient, the Court concludes that as in ConVal, there are genuine issues of material fact precluding summary judgment on that point. See ConVal, 174 N.H. at 166–67.

Notwithstanding the foregoing, the Court agrees with the State that if the plaintiffs actually seek injunctive relief requiring school funding in an amount no less than the statewide average of all school district expenditures, the State is entitled to summary judgment with respect to that request. See Doc. 83 at 10. As the State points out, see id., the plaintiffs acknowledge in their legal memorandum that not all school district expenditures are constitutionally required. See Doc. 77 at 10 (“The parties do not dispute that some districts provide services or programs beyond adequacy.”). Moreover, as in ConVal, the Court’s task at trial will be to compare existing funding levels with constitutionally necessary cost drivers. See ConVal Doc. 246. Given the nature of that inquiry, the Court agrees with the State that it would be inappropriate to set an education funding level based solely on the simple mathematical exercise of determining the statewide per pupil average of all school district expenditures.

Consistent with the foregoing, the State’s school funding summary judgment motion is **GRANTED** as it relates to any claim for injunctive relief setting an education funding level exclusively derived from the statewide per pupil average of all school district expenditures, but is otherwise **DENIED**.

III. Plaintiffs’ Motion for Partial Judgment on the Pleadings – School Funding

In their motion for partial judgment on the pleadings, the plaintiffs argue that the Court should “take judicial notice of its own ruling in ConVal” that the “State does not currently guarantee funding sufficient to cover the cost of an adequate education.” Doc. 87 ¶¶ 5, 8. The State objects, emphasizing that it has appealed the ConVal merits Order, and arguing that the facts underlying that decision are “subject to reasonable

dispute.” Doc. 89 ¶¶ 6–13 (quoting N.H. R. Ev. 201(a)). In response, the plaintiffs argue that they are requesting judicial notice of rulings, not facts. Doc. 90 ¶ 3.

The “underlying theory of judicial notice is that there is no need to prove what everyone already knows.” State v. Gagnon, 155 N.H. 418, 419-20 (2007) (cleaned up) (citing C. Douglas, New Hampshire Evidence Manual 59 (4th ed. 2000)). As a result, under “New Hampshire Rule of Evidence 201, the circumstances under which a judge may judicially notice a fact are limited.” Torromeo Indus. v. State, 173 N.H. 168, 178 (2020) (citation and quotations omitted). Specifically, pursuant to Rule 201, “a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Id. (quoting N.H. R. Ev. 201(a)).

In this case, both the plaintiffs’ December 14, 2023 Reply and their presentation during the March 22, 2024 hearing suggest that the true object of their judicial notice request is to acquire a “seat at the table” in connection with the State’s appeal in ConVal. See id. ¶ 7 (“To the extent the ConVal decision is not yet final, applying the decision to the instant case allows both to be appealed at the same time[.]”). Indeed, during the March 22, 2024 hearing, the plaintiffs suggested that the Court could transfer the questions raised in their motion to the Supreme Court without a ruling. See Sup. Ct. R. 9. Further, when the State suggested that the plaintiffs could seek leave to file an *amicus* brief in the ConVal appeal, the plaintiffs countered that such a filing would not equate to direct participation in the appellate process.

Although the plaintiffs' desire to directly participate in the ConVal appeal is understandable, the Court agrees with the State that at this juncture, it would be inappropriate to take judicial notice of any factual findings or resultant rulings set forth in the ConVal merits Order. Notwithstanding the plaintiffs' characterization that their motion seeks judicial notice of rulings and not of facts, see Doc. 90 ¶ 3, the legal rulings in ConVal were predicated on (among other things) the Court's conclusion that data reported to the DOE by individual school districts was credible. See ConVal Doc. 246. Indeed, as the Court reiterated in denying the ConVal parties' second round of summary judgment filings, the New Hampshire Supreme Court recognized prior to trial in ConVal that "the reliability and weight of said data" were significant factual questions that precluded the entry of summary judgment for either party. See ConVal Doc. 194 at 10 (citing ConVal, 174 N.H. at 167, n.1).

While the Court ultimately determined in ConVal that the DOE data was credible, see generally ConVal Doc. 246, the Court cannot presently conclude that said data is "not subject to reasonable dispute[.]" See N.H. R. Ev. 201; see also ConVal, 174 N.H. at 166–67. In other words, the fact that the Court found the DOE data credible in one action does not bar the State from reasonably disputing the accuracy of that data in this case, particularly given that the State's appeal of the ConVal merits Order remains pending. For this reason, the plaintiffs' judicial notice request is inconsistent with the limitations imposed by Rule 201. See Torromeo Indus., 173 N.H. at 178. Accordingly, the plaintiffs' motion for partial judgment on the pleadings is **DENIED**.

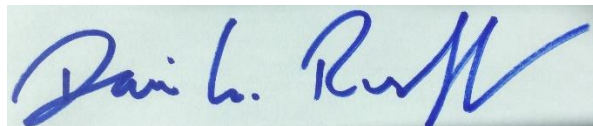
For similar reasons, a Rule 9 transfer to the Supreme Court would not be appropriate. Among other things, Rule 9 requires an interlocutory transfer statement of

“the reasons why a substantial basis exists for a difference of opinion on the question” being transferred. See Sup. Ct. R. 9(1). The Court cannot conclude that such a substantial basis exists with respect to the merits of the plaintiffs’ judicial notice request. As a result, the plaintiffs’ March 22, 2024 oral request for a Rule 9 transfer is **DENIED**.

Conclusion

Consistent with the foregoing, the stay imposed on the school funding portion of this case is **LIFTED**. See Doc. 75. The State’s school funding summary judgment motion is **GRANTED** as it relates to any claim for injunctive relief setting an education funding level exclusively derived from the statewide per pupil average of all school district expenditures, but is otherwise **DENIED**. See Doc. 70. The plaintiffs’ motion for partial judgment on the pleadings is **DENIED**, see Doc. 87, as is their related oral motion for a Rule 9 transfer. Lastly, the plaintiffs’ school funding claims are hereby scheduled for a **two-week bench trial** commencing on **September 30, 2024 at 9am** SO ORDERED.

Date: April 25, 2024



Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 04/25/2024