THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

Docket No. 215-2022-CV-00167

Steven Rand and Randvest, Inc., et al.

v.

State of New Hampshire

MOTION TO RECONSIDER ORDER ON CASE STATUS AND PENDING MOTIONS

The State of New Hampshire, by and through counsel, the New Hampshire Attorney General's Office, hereby moves for reconsideration of this court's April 25, 2024 Order on Case Status and Pending Motions. In support thereof, the State provides the following:

1. A motion for reconsideration "shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended …" Super. Ct. Civ. R. 12(e).

A. Summary Judgment

2. The Court should reconsider its decision on the State's motion for summary judgment for several reasons.

3. In granting in part and denying in part the State's motion for summary judgment, this court decided on its own to construe the State's motion for summary judgment far too narrowly.

4. The State moved for summary judgment on the ground that the plaintiffs could not "meet their heavy burden of demonstrating that the current funding formula is in clear and substantial conflict with the [sic] Part II, Article 83." State's Memo. Of Law In Support Of Mot. for Summ. J. at 1-2.

5. The State explained that the Court "should therefore enter summary judgment in the State's favor on the plaintiffs' adequacy claim." *Id.* at 2.

6. The plaintiffs objected to the motion, and the State subsequently replied identifying why the objection was insufficient to raise a genuine issue of material fact sufficient to show that the current education funding formula is unconstitutional.

7. In resolving the motion for summary judgment, this Court incorrectly recharacterized the State's motion as alleging solely that the amended complaint advanced claims seeking a level of state funding no less than that statewide per pupil average of all school expenditures. State's Memo. Of Law In Support Of Mot. for Summ. J. at 1-2.

8. Among other things, the State's motion for summary judgment put before the Court the material, threshold question of how RSA 193-E:2-a, I and the specific regulations that apply to the learning areas within it, should be interpreted, and asserted that the plaintiffs had failed to come forward with evidence sufficient to raise a genuine issue of material fact against that legislative definition that RSA 198:40-a is unconstitutional. *Id.* at 8-19.

9. This Court did not resolve how RSA 193-E:2-a, I should be interpreted in the *ConVal* litigation. It is the State's position that the Court should have done that and, as a result, it is now an issue on appeal with the New Hampshire Supreme Court. State's Memo. Of Law In Support Of Mot. for Summ. J. at 9.

10. In this case, the Court should reconsider its summary judgment decision and decide that issue now.

11. Once the Court decides that issue, the Court should then find that the plaintiffs have failed to come forward with evidence sufficient to raise a genuine issue of material fact against that legislative definition that RSA 198:40-a is unconstitutional.

12. In advancing this argument on summary judgment, the State made clear that the plaintiffs had no evidence of what portion of a school district's total expenditures are attributable to providing the substantive educational program defined in RSA 193-E:2-a, I. State's Memo. Of Law In Support Of Mot. for Summ. J. at 9.

13. The plaintiffs still do not. The Court should therefore reach this issue and enter summary judgment in the State's favor.

14. The State also argued in its summary judgment motion that the definition of an adequate education contained in RSA 193-E:2-a, I does not include everything a school district spends money on, including transportation, capital costs, and debt. State's Memo. Of Law In Support Of Mot. for Summ. J. at 9-18. The State asserted that because the Amended Complaint rested on that theory, and that theory was manifestly incorrect, that theory could not prevail at trial.

15. This court did not resolve whether that theory was viable in its order. This court should therefore do so on reconsideration and find that RSA 193-E:2-a, I does not encompass everything a school district spends money on, does not encompass transportation, capital costs, and debt as a matter of law based on the statutory and regulatory language that comprises the definition, and should further find that summary judgment is appropriate because the plaintiffs have advanced no evidence showing that the amount of money RSA 198:40-a actually provides is insufficient to cover the carefully defined and circumscribed educational program identified in RSA 193-E:2-a, I, and the specific regulations that apply to it.

16. While the plaintiffs may have done enough in their Amended Complaint to *allege* one or more of these things, on summary judgment this Court needs to go further to test whether the plaintiffs have advanced sufficient evidence in their objection to demonstrate: (1) what the

legislative definition actually encompasses; and (2) evidence showing that RSA 198:40-a does not provide sufficient funds to cover what that legislative definition actually encompasses. *See* Am. Complaint. ¶¶ 1-2. "The role of summary judgment is 'to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Carney v. Metro. Prop. & Cas. Ins. Co.*, 612 F. Supp. 3d 1, 3 (D. Mass. 2020) (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991)). "Genuine issues of material fact are not the stuff of an opposing party's dreams." *Mesnick*, 950 F.2d at 822. In cases like this, "where the nonmovant bears the ultimate burden of proof, he must present definite, competent evidence to rebut the motion." *Id.*

17. The plaintiffs failed to advance sufficient evidence to demonstrate what the legislative definition encompasses and, even if they had, failed to advance evidence showing that RSA 198:40-a does not provide sufficient funds to cover what the legislative definition encompasses.

18. Accordingly, this court should reconsider its summary judgment ruling and enter summary judgment for the State.

B. Stay of Proceedings

19. If the Court is not inclined to reconsider its summary judgment ruling, it should reconsider its decision to lift the stay for several reasons.

20. First, the *ConVal* appeal will either moot this case or significantly alter the analytical approach in this case as to make any trial of this matter a waste of time, money, and resources for the parties and the judiciary.

21. The *ConVal* appeal will moot this case if the New Hampshire Supreme Court affirms this court's declaratory ruling that RSA 198:40-a, II(a) is facially unconstitutional because RSA 198:40-a, II(a) is not severable from RSA 198:40-a. RSA 198:40-a, II is a statutory

formula. RSA 198:40-a, II(a) is an integral component part of that formula. RSA 198:40-a does not contain a severability clause, and there is no way to sever RSA 198:40-a, II(a) from the rest of the statute without collapsing the entire statutory formula. Consequently, if the New Hampshire Supreme Court affirms this court's declaratory ruling, that order will render RSA 198:40-a unconstitutional in its entirety. Differentiated aid under the statute will no longer exist, and there will be nothing to try.

22. If defendants prevail on their appellate argument in the *ConVal* case that this Court erred in its analytical approach to the definition of an adequate education, that decision will fundamentally change how this case is tried. It would be a significant waste of the time, resources, and money, both of the parties and the judiciary, to try another education funding case only to find out thereafter that the analytical approach the Court used to evaluate the case was incorrect.

23. Alternatively, if the New Hampshire Supreme Court finds that this Court correctly resolved the definition of an adequate education, and correctly decided that items like transportation, maintenance of facilities, nurses, principals, and other items not expressly identified in the statutory definition of an adequate education and its applicable minimum standard regulations are in fact part of the definition, then RSA 198:40-a will undoubtedly be unconstitutional because it was never intended to pay for all of those extra items. It was intended to pay solely for a component of the state's educational system, *i.e.*, the educational program specifically defined in, and limited by, RSA 193-E:2-a, I and the corresponding, specific regulations that apply to it.

24. Consequently, the outcome of the *ConVal* appeal will almost certainly materially affect the adequacy claim raised in this case and will in all likelihood render a trial in this matter

before the *ConVal* appeal is decided a waste of judicial resources and party resources for both sides.

25. In deciding whether to stay cases, courts often weight the potentiality of an appeal having a dispositive effect on the case to be stayed, the judicial economy to be saved by waiting on a dispositive decision, the public welfare, and the hardship/prejudice to the party opposing the stay, given its duration. *See Michael v. Ghee*, 325 F. Supp. 2d 829, 831 (N.D. Ohio 2004).

26. The cases need not have identical issues to warrant a stay; it is sufficient if the issues are "substantially similar." *In re Zillow Grp., Inc. Session Replay Software Litig.*, 2024 U.S. Dist. LEXIS 2976, at *5 (W.D. Wash. Jan. 5, 2024).

27. As detailed above, the *ConVal* appeal is likely to have a dispositive effect on this case. Judicial economy will also be saved, and by waiting for a decision, the Court will be assured that it is proceeding in the correct way to trial, if it has to proceed to trial at all. The public welfare also tilts in favor of a stay. This Court has already determined that RSA 198:40-a is unconstitutional and that decision is on appeal. Another trial court decision on substantially the same issue will not change the status quo and may result in one or more rulings that are inconsistent with what the Supreme Court actually rules. One purpose of a stay pending appeal is to avoid such a result. See, e.g., *Fed. Home Loan Mortg. Corp. v. Kama*, 2016 U.S. Dist. LEXIS 30455, at *30 (D. Hawaii March 9, 2016) ("The Court is also concerned with the possibility of inconsistent rulings if the proceedings continue prior to resolution of the related appeals."); *Karoun Dairies, Inc. v. Karlacti, Inc.*, 2013 U.S. Dist. LEXIS 125652, at *17-18 (S.D. Cal. Sept. 3, 2013) (explaining that inconsistent rulings with the appellate court "would result in significant confusion and would likely extend litigation in order to address the

inconsistent decisions" and "would waste judicial time and resources as well as impose further hardship and inequity to the parties").

28. The public welfare will also be served by the orderly and logical resolution of these cases so that state and judicial resources are not needlessly wasted litigating them and so inconsistent rulings do not result public confusion.

29. Finally, there is no hardship or prejudice to the opposing party. The plaintiffs have not been harmed in a manner that is any more real or immediate than the plaintiffs in the *ConVal* case. An outcome in their favor from this court while the *ConVal* appeal is pending will get them nothing new or different than what already potentially exists for them as a result of the *ConVal* case. And if the *ConVal* appeal upends the result in this case, the plaintiffs will simply have to invest more time, effort, and resources into redoing it, if that is possible at that juncture. Accordingly, a stay is rational, appropriate, is in the public interest, and will not result in hardship or prejudice to the plaintiffs.

30. Many cases find that a stay is generally warranted where a proceeding pending before an appellate court of last resort is likely to have a substantial or dispositive impact on the case or may otherwise moot the case. *See, e.g.*, *Knapp v. Am. Honda Motor Co.*, 2023 U.S. Dist. LEXIS 78133, at *5 (S.D. W.Va. May 4, 2023) (unpublished) ("A stay will ordinarily be appropriate when a controlling court will issue a decision that may affect the outcome of the pending case.") (internal quotations omitted); *Ali v. Trump*, 241 F. Supp. 3d 1147, 1153 (W.D. Wash. 2017) (staying case where there was a "significant overlap of issues" with a case on appeal and the appellate decision would "likely have significant relevance to – and potentially control – the court's subsequent rulings"); *Salazar v. United States*, 2017 U.S. Dist. LEXIS 24825, at *9 (S.D. Fla. Feb. 21, 2017) ("One circumstance that counsels in favor of staying a

proceeding is when there is another proceeding pending before the United States Supreme Court that will likely have a dispositive impact on the case."); *Fed. Home Loan Mortg. Corp. v. Kama*, 2016 U.S. Dist. LEXIS 30455, at *30 (D. Hawaii March 9, 2016) ("The Court finds that staying proceedings pending the appeals of related cases will serve the interests of judicial efficiency and economy and will help to clarify the issues and questions of law going forward.").

31. This case should remain stayed for all of the above reasons until the *ConVal* appeal is decided. The Court should therefore reconsider its decision to lift the stay in this matter, and should leave the stay in place until the *ConVal* appeal is fully resolved, at which point the parties may brief what impact the resulting New Hampshire Supreme Court decision has on this case.

C. Timing of Trial

32. The Court has scheduled this case for a two-week bench trial beginning September 30, 2024.

33. It is not clear to the State that a two-week bench trial is required.

34. The plaintiffs did not do automatic disclosures.

35. During the discovery period, the plaintiffs disclosed only two expert witnesses with respect to their adequacy claim, Dr. Cascadden and Dr. Freeman.

36. The defendants disclosed two experts as well, Dr. Schuls and Dr. Greene.

37. If the parties are limited to the presentation of witnesses actually disclosed during the discovery period, it would seem that a one-week bench trial would be more than sufficient; however, one of the State's experts, Dr. Greene, has a conflict during the two-week period

beginning September 30, 2024, with the Jewish High Holy days of Rosh Hashanah (Oct. 2-4) and Yom Kippur (Oct. 11-12).[1]

38. Given these circumstances, the State believes a one-week bench trial beginning October 15, 2024, or some time thereafter, would be adequate for the trial of this case, and the State would ask the Court to reconsider its order accordingly.

WHEREFORE, the State respectfully requests that this Court entering an order:

A. Granting this motion for reconsideration;

B. Upon reconsideration of the State's motion for summary judgment, entering summary judgment against the plaintiffs on their adequacy claim;

C. Upon reconsideration, reimposing the stay of proceedings pending the outcome of the *ConVal* appeal;

D. Upon reconsideration, scheduling a one-week bench trial for date to begin on or after October 15, 2024; and

E. Granting such further relief as the court deems just and equitable.

[1] If the parties are not limited to the witnesses actually disclosed during the discovery period, the case will need to be restructured for further discovery and the present bench trial will need to be cancelled.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: May 6, 2024

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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: May 6, 2024

/s/*Anthony J. Galdieri*____