STATE OF NEW HAMPSHIRE
Superior Court
Rockingham, ss.
Case No. 215-2022-CV-00167

*Steven Rand, et al*

Plaintiffs,

*v.*

*The State of New Hampshire*,

Defendant.

**PLAINTIFFS' OBJECTION TO THE STATE'S MOTION FOR RECONSIDERATION**

1. On April 25, 2024, this Court granted in part and denied in part the State's motion for Summary Judgment, lifted the stay in this matter, and scheduled a two-week bench trial commencing on September 30, 2024 on Plaintiffs' school funding claims. *See* Doc No. 103 (the "**Order**").

2. That day, Plaintiffs reached out to the State to renew the parties' discussions regarding the identity of each side's trial witnesses, the manner of presentation of evidence, and the possibility of stipulating to certain evidence presented in the *ConVal* matter, to streamline the presentation of evidence for this Court.

3. After ignoring Plaintiffs' repeated efforts to engage on these issues for ten days, the State moved for reconsideration of the Order and to unilaterally request this Court to limit the time scheduled for trial. *See* Doc. 104 (the "**Motion**"). As discussed below, the Court should deny the Motion.

## I. THE COURT CORRECTLY DENIED THE STATE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' ADEQUACY CLAIMS

4. Under Superior Court Rule 12(e), a party moving 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). In seeking reconsideration on its motion for summary judgment, the State does not identify any facts or law that this Court overlooked or misapprehended. Rather, the State re-hashes three arguments that it made before, none of which warrant reconsideration.

5. *First*, the State re-hashes its argument that it is entitled to summary judgment because Plaintiffs have not put forward 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. Motion ¶¶ 8, 12-13. The Court did not overlook the State's argument but has repeatedly rejected it. *See e.g. Order on Cross Motions for Summary Judgment in Contoocook Valley School District v. State*, March 20, 2023, at 9. Rightly so, because the law does not require Plaintiffs to isolate what portions of a school district's budget are attributable to providing a constitutionally adequate education. Rather, to determine whether adequacy funding is sufficient, the Court must determine what is required to deliver an adequate education as defined under the statue and then determine whether the funding provided by the State is sufficient. *See Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 166-67 (2021) ("ConVal"). *See also*, *Mem. Of Law in Supp. of Plaintiffs' Obj. to State's Mot. for Summ. Judg.*, ("**Plaintiffs' SJ Opp**.") Doc. No. 77 at 11. Notably, the State has provided no evidence to date that funding is sufficient. The State has admittedly only disclosed two witnesses, neither of whom opine that current funding is sufficient.

6. *Second*, the State argues that this Court failed to address the theory, which according to the State underlies Plaintiffs' Amended Complaint, that RSA 193-E:2-a includes everything a school district spends money on, including transportation, capital costs, and debt.

Motion ¶ 15. This theory mischaracterizes Plaintiffs' Amended Complaint. Order at 7 ("[T]he Amended Complaint put the State on notice that the plaintiffs were generally contesting the sufficiency of school funding . . . The plaintiffs' specification of relevant costs undermines the State's characterization that the plaintiffs seek to require State funding for all school district expenditures.")

7. As an initial matter, the State ignores that all sides agree that RSA 193-E:2-a may not include <u>everything</u> a school district spends money on, and that the Court ruled for the State on this issue. Order at 8 ("[I]t would be inappropriate to set an education funding level based <u>solely</u> on the simple mathematical exercise of determining the statewide per pupil average of all school district expenditures."). What is required to provide an adequate education as defined by RSA 193-E:2-a and how much it costs, however, are both disputed issues appropriate for trial.

8. As to the specific issue of whether transportation, capital costs, and debt are cost drivers that are necessary to providing an adequate education as defined in the statute, the Court correctly held that this is a mixed question of law and fact that is not susceptible to summary judgment. *Id*. at 7 n. 3, ("To the extent the State also challenged 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. 166-67.") The Court's decision was correct. Indeed, the New Hampshire Supreme Court held that this exercise was not appropriate for summary judgment. *ConVal*, 174 N.H. at 167 (reversing order granting partial summary judgment because dispute about whether specific services such as nurse, superintendent, and food services, are part of a constitutionally adequate education is not suited to resolution by summary judgment). Plaintiffs put forward competent evidence through their experts that it is not possible to provide an adequate education in the subject matter areas set out in RSA 193-

E2-a without having functioning facilities. *See e.g*. Freeman Report at 6 ("If a school cannot legally operate, "open its doors," so to speak, it cannot provide an adequate education . . . School districts must also supply . . . buildings in which educational and administrative services are provided, as well as pay for the utilities to heat and light those buildings."). Likewise, Plaintiffs put forward expert testimony that the cost of transportation is required for providing an adequate education. *See*, Cascadden Report at 6. The State's experts take no position on the definition of an adequate education. However, when viewed in light most favorable to the State, it is clear the parties dispute, at the very least, what is required to provide an adequate education and its cost. This precludes summary judgment.

9. *Third*, the State argues that reconsideration is warranted because Plaintiffs failed to advance sufficient evidence to demonstrate that RSA 198:40-a does not provide sufficient funds to cover what the legislative definition of adequacy encompasses. Motion ¶ 16. Dr. Freeman's analysis demonstrated that the State's adequacy funding would not even be enough to allow the Pittsfield School District to afford enough teachers to meet the State's minimum standards. *See* Plaintiffs' SJ Opp. at 8-9 (discussing Dr. Freeman's analysis). Based on this evidence, the Court properly denied the State's motion for summary judgment.

## II. THE COURT CORRECTLY LIFTED THE STAY ON PLAINTIFFS' ADEQUACY CLAIMS

10. The State asks the Court to re-issue the stay on Plaintiffs' adequacy claims based on three arguments, none of which warrant reconsideration.

11. *First*, the State argues, again, that if the Supreme Court affirms this Court's decision in *ConVal*, it would render RSA 198:40-a unconstitutional in its entirety because differentiated aid cannot be severed from the rest of RSA 198:40-a. Motion ¶¶ 20-21. *See also*, *Objection to Motion for Judgment on the Pleadings*, Doc No. 89, ¶¶ 30-36. But an affirmative ruling on the *ConVal* decision would not resolve the parties' dispute here about what resources are required to provide an adequate education for special education students,

English language learners, and students living below the poverty line. Nor would it resolve the parties' dispute about whether the State's adequacy funding (both base and differentiated aid) is sufficient to fund an adequate education for such students. Plaintiffs submitted competent evidence that it is not sufficient.[1] This dispute would not be resolved by the *ConVal* appeal.

12. *Second,* the State asserts, without elaboration, that if it prevails on its appellate argument that differentiated aid cannot be severed from base adequacy aid, that would fundamentally change how this case is tried. Motion ¶ 22. But unlike *ConVal*, Plaintiffs challenge the sufficiency of both base adequacy aid and differentiated aid, which, according to the State, is the correct analytical approach. If the State prevails on its appellate argument, that may require additional proceedings in *ConVal* but would not change anything about how the trial in this case should proceed.

13. *Third,* the State argues that if the Supreme Court decides that items like "transportation, maintenance of facilities, nurses, [and] principals" are part of the definition of an adequate education, "then RSA 198:40-a will undoubtedly be unconstitutional . . ." Motion ¶ 23. Plaintiffs agree. But this would not resolve the need for a trial in this case because the State disputes the cost of these items and the accuracy and reliability of the DOE data that Plaintiffs offer to prove such costs. *See*, State Opposition to Judgment on the Pleadings, Doc. No. 89 ¶ 10. This Court held that the State is entitled to do so. Order at 10. Indeed, the State has repeatedly refused to stipulate to the admission of DOE data as evidence of educational costs, which means a trial in this case is necessary regardless of *ConVal's* fate on appeal.

14. *Fourth*, the State argues that a stay is warranted because the Court "has already determined that RSA 198:40-a is unconstitutional . . . [and] [a]nother trial court decision on

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[1] For example, Dr. Freeman explained in his report that relying just on adequacy and differentiated aid, the District would have to cut out of its budget all resources for special education students, including paraprofessionals that serve special needs students as required in individualized education plans, and eliminate three special education teachers. Freeman Report at 3-4. Likewise, Dr. Cascadden stated that the differentiated aid amount for children who qualify for special education services did not cover the cost of even one special education teacher. Cascadden Report at 3.

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 rules." The State cannot have its cake and eat it too. If the State believed that the *ConVal* and *Rand* cases were so closely intertwined that litigating them separately is wasteful, it should have agreed to consolidate the cases. Having successfully argued that the two cases are different and should be litigated separately, the State must live with the consequences. *See Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 849 (2005) (a party is judicially estopped from asserting inconsistent positions where it would give the party an "unfair advantage" and be "manifestly unjust"). Likewise, if the State believes that the *ConVal* decision resolves Plaintiffs' adequacy claim in this case, then it should not have opposed Plaintiffs' motion for judgment on the pleadings, which sought a declaratory judgment on the point that the State now apparently concedes (that the Court has already decided that RSA 198:40 is unconstitutional insofar as it does not provide sufficient aid to fund adequacy) and the necessary corollary of that point (that districts in New Hampshire must rely on disproportionate local school taxes to bridge the gap). Allowing the State to apply *ConVal* to this case only when doing so would favor the State's position would be unjust and would unfairly disadvantage Plaintiffs. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (a party should be estopped from asserting an inconsistent position where "the party seeking to assert an inconsistent position would derive an unfair advantage").

## III. THE COURT SHOULD DECLINE THE STATE'S EFFORT TO EXCLUDE WITNESSES THAT PLAINTIFFS DISCLOSED ALMOST A YEAR AGO

15. Finally, the State seeks accommodation for its expert Dr. Greene, who is unavailable during Rosh Hashanah (October 2-4) and Yom Kippur (October 11-12) (Motion ¶ 37), and requests that the Court schedule a one-week trial instead of a two-week trial, based on a misleading representation that Plaintiffs only disclosed two expert witnesses during the discovery period. *Id.* ¶¶ 34-35, 38.

16. Plaintiffs reached out to the State twice since this Court's order and prior to the State's filing of a motion for reconsideration to discuss the trial schedule and seek an accommodation for one of Plaintiffs' counsel. Had the State responded, Plaintiffs would have agreed to the accommodation and the parties could have jointly approached the court to determine an appropriate schedule to accommodate both parties and the Court. Instead, the State did not engage with Plaintiffs and filed the Motion as a back-door motion *in limine*.

17. Plaintiffs are willing to accommodate Dr. Greene's schedule. Plaintiffs cannot agree to the start date suggested by the State (October 15), however, because their expert Dr. John Freeman will be out of the country and unavailable from October 14-28.

18. Plaintiffs also disagree with the State that a one-week trial is appropriate and object to the State's thinly veiled efforts to preclude Plaintiffs from presenting witnesses that Plaintiffs disclosed to the State nearly a year ago. There is no basis to do so, and the State's motion is grossly misleading on this point.

19. Since this case was filed, the parties engaged in efforts to streamline discovery. Well before any automatic disclosures were due, parties had numerous meetings via video conference to narrow factual disputes, isolate issues that would be in dispute, and discuss the possibility of entering into extensive factual stipulations, which the State still refuses to discuss. The parties agreed that the documents produced in the *ConVal* litigation and any documents the State intends to rely upon at trial would be sufficient. In that spirit, the Plaintiffs sent minimal written discovery requests and the State chose to send none.

20. Neither party made automatic disclosures, as the parties agreed that they would work together to limit discovery and engage in good faith efforts to stipulate to undisputed facts and data to limit the need for witnesses. Accordingly, the agreed that prior to trial, each side would disclose the witnesses they want to put on and make their witnesses available for depositions.

21. Consistent with that approach, in December 2022, Plaintiffs disclosed, through emails and orally, the two expert witnesses referred to in the State's motion (Drs. John Freeman and Corinne Cascadden), a third expert witness, former DRA Commissioner Kevin Clougherty, with his initial and supplemental reports, and a fourth expert, Doug Hall, with a brief report.[2] The parties had discussed entering into a stipulation for Mr. Clougherty's testimony as the basis for his testimony relates to undisputed tax and DRA data.

22. Plaintiffs also repeatedly put the State on notice that the Plaintiffs will introduce the same cost testimony about the five factors included in the Court's *ConVal* cost analysis if the State is ultimately unwilling to stipulate that the same witnesses will offer the same testimony on direct and cross in the *Rand* case as they offered in the *ConVal* case.[3] Ultimately, Plaintiffs did not want to re-call the same witnesses to testify to identical testimony that current funding is insufficient, particularly where the State provided no counter evidence in *ConVal* and seemingly does not intend to do so here.[4]

23. The State asked for multiple accommodations to extend their deadlines during the discovery period. Plaintiffs agreed with the understanding that both parties were continuing to work together to limit discovery and that discovery would be completed prior to the original September 2023 trial date. Plaintiffs operated in good faith throughout the discovery process.

24. On July 6, 2023, Plaintiffs disclosed by e-mail a preliminary witness list that included two experts, three specific fact witnesses (disclosing the subject of their testimony including the cost of adequacy and special education, counseling, or Career Technical

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[2] Hall's report focused on matters related to SWEPT but some of it may be relevant to the cost of adequacy issue. Prior to the State's current extraordinary effort to limit the proof in this matter, the Plaintiffs did not plan to call Mr. Hall as a witness, but now must reserve the right to do so.

[3] The Plaintiffs have offered to stipulate that the witnesses will testify similarly, not that the State should stipulate to the underlying facts addressed in the ConVal trial testimony, although the State did not offer conflicting facts in the ConVal trial.

[4] Neither of the State's experts opine that current funding is sufficient. Rather, their experts merely challenge the methods relied upon by Plaintiffs' experts.

Education). Plaintiffs also included a categorical list of witnesses that Plaintiffs may call, but believed the parties could stipulate to their testimony instead. These categories included the *ConVal* witnesses, expert Kevin Clougherty, the Plaintiffs, witnesses identified by the State, and witnesses necessary for rebuttal. Plaintiffs indicated in their email this list was to facilitate discussion over the remaining schedules and depositions. Additionally, Plaintiffs orally agreed to make these witnesses available multiple times, particularly of Dr. Jennifer Dolloff, who has vast experience as a special education administrator over decades and in many school districts within New Hampshire.

25. In its written response, the State promised to provide its own witness list the following week. Those disclosures never came. The State never sought depositions of any of the witnesses, nor provided any objections. Instead, the State moved for summary judgment on July 27, 2023. This Court stayed the case by order dated August 8, 2023 – over a month after Plaintiffs disclosed their preliminary witness list and the State promised to do the same.

26. At this point, the State has had the benefit of Plaintiffs disclosures for nearly a year, without ever having honored its side of the agreement to disclose trial witnesses. The fact that the State took no action to depose other potential witnesses, as offered, does not mean it can now preclude those witnesses or claim that discovery was not completed and delay the trial. Nonetheless, there is still ample time before trial and if the Court deems it appropriate, Plaintiffs would agree to reopen discovery to allow the State to depose additional witnesses.

Wherefore, Plaintiffs respectfully request that this Court:

A. Deny the State's Motion to Reconsider;

B. Schedule a two-week bench trial beginning after October 28; and

C. Grant such further relief as the Court deems just and proper.

Dated: May 13, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection has been served via the court's electronic filing system to all parties of record on this 13th day of May 2024.

*/s/ Natalie Laflamme*
Natalie Laflamme