

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

State of New Hampshire

---

**MOTION TO EXCLUDE TESTIMONY “CONVAL” WITNESSES**

---

The State of New Hampshire, by and through the Office of the Attorney General, moves to exclude the testimony of undisclosed witnesses, including witnesses from the trial in *Contoocook Valley School District v. State*, 213-2019-CV-00069, specifically including but not limited to, Lisa Witte, Kenneth Dassau, Donna Magoon, and Teresa Walker (collectively the “ConVal witnesses”) from testifying at trial. In support of this motion, the State states as follows:

**Background**

1. The plaintiffs filed this lawsuit on June 29, 2022, asserting, *inter alia*, that the State was failing to fund an adequate education in violation of Part II, Article 83 of the State Constitution (“adequacy claim”). The plaintiffs also alleged that the Statewide Education Property Tax (“SWEPT”) was being administered in a manner that violated Part II, Article 5.<sup>1</sup>

2. The plaintiffs filed an amended complaint on August 26, 2022, and the State answered on September 7.

---

<sup>1</sup> The SWEPT claim proceeded on a different track from the adequacy claim, and the Court ultimately resolved it on cross-motions for summary judgment on November 20, 2023. That issue was severed and is presently on appeal to the New Hampshire Supreme Court.

3. No automatic disclosures were exchanged pursuant to Rule 22. Consequently, the State was not provided with “the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defendants . . . and . . . a summary of the information believed by the disclosing party to be possessed by each such person” as required by Super. Ct. Civ. R. 22(a)(1).

4. On October 3, 2022, the Court (Bornstein, J.), approved the parties’ proposed Case Structuring and ADR Order with a single modification. Under the Court’s Case Structuring Order, the plaintiffs’ expert disclosures and reports were due December 6, 2022, the defendants’ expert disclosures and reports were due January 16, 2023, and any rebuttal disclosures and reports were due January 30, 2023. All interrogatories, requests for production, and requests for admission were to be propounded by January 17, 2023, and discovery was to be completed by February 17, 2023. The Court issued a Notice of Bench Trial that same day, scheduling a trial management conference for July 24, 2023, and a bench trial during the month of August 2023.

5. On November 28, 2022, the Court held a hearing on the plaintiffs’ motion for a preliminary injunction with respect to their SWEPT claim. At that hearing, the parties agreed “on a trial date in late September or early October 2023” for the adequacy claim. Dec. 6, 2022 Order at 13 n.1. On November 29, 2022, the Court issued a new Notice of Bench Trial scheduling a trial management conference for September 5, 2023, and a bench trial for the weeks of September 25 and October 2, 2023.

6. As of the February 17, 2023 discovery deadline, the only written discovery that had been propounded was one set of interrogatories, one set of requests for production, and one set of requests for admission, which the plaintiffs propounded on the State on January 17, 2023, and the State responded to on March 20, 2023. The plaintiffs also disclosed three experts on

December 6, 2022, and produced two of those experts' reports that same day and one a week later.

7. The parties never formally sought to extend the February 17, 2023 discovery deadline. Once the trial was continued to September 2023, however, the parties did agree to allow certain events to occur outside of the discovery period to accommodate schedules (which included defense counsel trying the ConVal matter in April and May 2023) and to facilitate preparation for trial in this case. As noted, the defendants provided their responses to the plaintiffs' written discovery requests on March 20, 2023. They disclosed their experts and produced their reports on March 10 and 24, 2023. John Freeman, Ph.D and Corinne E. Cascadden, Ed.D., two of the plaintiffs' experts, were deposed on July 13 and 14, 2023, respectively. The defendants' experts, Jay Greene, Ph.D, and James Shuls, Ph.D, were respectively deposed on July 20 and August 2, 2023.

8. During this same period, the plaintiffs expressed a desire to call witnesses at trial who were also witnesses in the ConVal matter and inquired whether the State would agree to allow the transcripts of their testimony during the bench trial in ConVal to be introduced in this case in lieu of live testimony. The parties had a handful of informal discussions around this topic, during which the State noted that, at a minimum, it would likely not agree to allowing the plaintiffs to introduce expert testimony from the ConVal case in this case. The State also expressed concerns about the logistics of using the trial transcripts from ConVal, including what would happen with objections made on the record during the ConVal case. The State expressed that it would be helpful if the plaintiffs could identify which ConVal witnesses they specifically intended to call.

9. To facilitate this discussion, the parties agreed to exchange preliminary proposed witness lists. On July 6, 2023, the plaintiffs sent the State an email containing their “preliminary” proposed witness list, which consisted in its entirety of the following:

- i. Experts
  1. Corinne Cascadden
  2. John Freeman
- ii. Fact Witnesses
  1. Jennifer Dolloff – Ed.D (provision of special education services and costs in relation to adequacy)
  2. Annette Blake (school counseling and costs in relation to adequacy)
  3. Steven Rothnberg (CTE and costs in relation to adequacy)
- iii. Reservations (pending stipulations)
  1. ConVal Witnesses
  2. Kevin Clougherty (Expert)
  3. Named Plaintiffs
  4. Rebuttal
  5. Witnesses listed by State on potential witness list

This email is contained on pages 8 and 9 of the email chain attached to this motion as **Exhibit A**.

10. On August 1, 2023, the State sent the plaintiffs an email attaching the witness lists from the ConVal trial as its tentative witness lists. A copy of this email is contained on page 1 of **Exhibit A**.

11. On July 27, 2023, the State moved for summary judgment. In that motion, the State specifically noted that the plaintiffs relied on just two experts—Dr. Freeman and Dr. Cascadden—in support of their adequacy claim and explained why, in the State’s view, those experts’ opinions could not sustain the adequacy claim as a matter of law. *See* Mem. Law Supp. Mot. Summ. J. at 2–10. The plaintiffs filed their objection on August 28, 2023, which relied solely on the opinions and deposition testimony of Dr. Freeman and Dr. Cascadden as evidence to support the adequacy claim. Mem. Law Supp. Obj. Mot. Summ. J. at 4–6, 8–11. The plaintiffs further noted that the State had only disclosed two experts and specifically criticized the State for

“disclos[ing] no other fact witnesses, including no witnesses from the Department of Education.”  
*Id.* at 7.

12. On August 8, 2023, the Court *sua sponte* stayed this case “pending the issuance of the order on partial summary judgment in this case and the Order on the merits in the ConVal case.” Aug. 8, 2023 Order at 1. At the time this stay was issued, the State’s motion for summary judgment remained pending and the plaintiffs had not identified any specific ConVal witnesses they wished to call at trial.

13. On November 20, 2023, the Court issued orders on the cross-motions for summary judgment on the SWEPT claim in this case and on the merits in the ConVal case. The plaintiffs thereafter filed a motion for partial judgment on the pleadings, asking the Court to enter judgment as to “base adequacy” in this case consistent with its merits order in the ConVal case. The State objected to this motion.

14. On January 9, 2024, the Court issued a Notice of Hearing scheduling a hearing on the plaintiffs’ motion for partial judgment on the pleadings for March 22, 2024. At that hearing, the Court also heard argument on the State’s motion for summary judgment. The State contended at the hearing that the adequacy claim in this case should remain stayed pending the outcome of the ConVal appeal before the New Hampshire Supreme Court. The plaintiffs asked for the stay to be lifted.

15. On April 25, 2024, the Court issued an order lifting the stay in this case, granting in part and denying in part the State’s motion for summary judgment, denying the plaintiffs’ motion for partial judgment on the pleadings, and scheduling a two-week bench trial to commence on September 30, 2024. In that order, the Court specifically noted that in lifting the stay, it was “mindful that (as the plaintiffs confirmed during the March 22, 2024 hearing)

discovery in this matter is already complete.” Apr. 25, 2024 Order at 5. The Court further specifically ordered that if the parties “believe that an adjustment to the duration of trial is warranted, they must file an appropriate motion **within ten (10) days** of the date of the Notice of Decision accompanying this Order.” *Id.* (emphasis in original).

16. On May 6, 2024, the State filed a motion for reconsideration of the April 25, 2024 order. In addition to arguing that the Court should reconsider its rulings denying the State’s motion for summary judgment and lifting the stay, the State specifically argued that it was “not clear to the State that a two-week bench trial is required” because the plaintiffs “did not do automatic disclosures” and “[d]uring the discovery period,” the parties only disclosed two experts each. Mot. Recons. at 8. The State further noted that “[i]f the parties are not limited to 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.” *Id.* at 9 n.1.

17. The plaintiffs objected to this motion and implied that the State had agreed that each side could disclose witnesses at any point prior to trial and make those witnesses available for depositions. The State filed a reply disputing that any such agreement had been reached. Reply Obj. Mot Recons. at 1–4. The State acknowledged that the plaintiffs had disclosed a proposed “preliminary” witness list approximately two months before the then-scheduled September 2023 trial but reiterated that the State had not agreed to any of those proposed witnesses. *Id.* at 2. The State further emphasized that this proposed preliminary list included a general designation of “ConVal witnesses,” and contended that this did not sufficiently identify who the plaintiffs intended to call at trial. *Id.* The State reiterated that in its view, there were only four witnesses—each side’s respective experts—who were properly disclosed such that they could testify at trial. *Id.* The State nonetheless noted that, absent reconsideration of the order

lifting the stay, it was willing to work with plaintiffs' counsel to restructure the case to allow for appropriate additional discovery to occur with respect to additional witnesses. *See id.* at 2–4.

18. On May 23, 2024, the Court issued a margin order denying the State's motion to reconsider. The Court noted in that order that "if witnesses need to be taken out of order, or testify remotely, such issues can be resolved" at the trial management conference.

19. Following this order, the State resumed discussions with the plaintiffs regarding, among other things, how to handle potential trial testimony from ConVal witnesses. The State reiterated that it would not agree to expert witness testimony from the ConVal trial being introduced in the trial in this case through the trial transcripts. The State also indicated that it would not agree to full exhibits from the ConVal case that were not disclosed during discovery in this case being admitted as full exhibits in this case, particularly if those exhibits were introduced through witnesses that the plaintiffs did not intend to call in this case.

20. The State also reiterated on multiple occasions that it would need to know the identities of the ConVal witnesses the plaintiffs intended to call before it could formally agree to how these witnesses would be handled. The State noted that it needed this information for two reasons.

21. First, to the extent some portion of those witnesses' testimony would come into evidence in this case through their trial transcripts, the parties required time to review that testimony and excise any portions of it that, among other things, referred to or relied on documents that did not come into evidence through the witnesses in question, consistent with the concern identified above. To facilitate this, the State offered to provide the plaintiffs with the trial transcripts from the ConVal trial, which had been generated for the appeal in ConVal. The plaintiffs did not take the State up on this offer.

22. Second, the State made clear that to the extent the plaintiffs sought to elicit any additional testimony from these witnesses with respect to differentiated aid, the State needed to be afforded the opportunity to depose the witnesses before trial.

23. During a conference call on July 29, 2024, the plaintiffs agreed to identify for the State which ConVal witnesses they intended to call at trial.

24. As of the date of this filing, however, the plaintiffs have *still* not provided the State with a list of ConVal witnesses they intend to call at trial. Consequently, the parties have not been able to review and attempt to reach agreement on what portion, if any, of those witnesses' previous trial testimony can be introduced in this case via the trial transcripts. Nor has the State been able to depose these witnesses on what testimony they might seek to offer related to differentiated aid.

25. Indeed, the only inkling the State currently has as to what witnesses the plaintiffs may be seeking to call from the ConVal case comes from a series of recent filings in this docket by the plaintiffs in this case and counsel for the plaintiffs in the ConVal case. On August 9, the Grantham School District, a plaintiff in ConVal, moved to quash a trial subpoena addressed to Lisa Witte dated August 5, 2024, seeking to compel her to testify in trial on this matter. On August 12, the plaintiffs objected to that motion, and the Grantham School District filed a reply that same day.

26. Also on August 12, the plaintiffs in this case filed an expedited motion seeking a protective order from this Court "that permits them to speak with witnesses who testified in the *ConVal* case" subject to certain conditions. Mot. Protect. Order at 1. In that motion, the plaintiffs indicated that they intend to serve subpoenas on four ConVal witnesses: Lisa Witte, Kenneth

Dassau, Donna Magoon, and Teresa Walker. *Id.* at 2. The plaintiffs noted that as of the date of filing, they had only successfully served Mr. Dassau. *Id.* at 2 and n.2.

27. Later that same day, all eighteen school district plaintiffs in the ConVal matter objected to the motion for a protective order. The ConVal plaintiffs argued that the plaintiffs sought information from the ConVal witnesses, including information related to differentiated aid, that is protected by the attorney-client privilege. Obj. Mot. Protect. Order at 1–4. The ConVal plaintiffs noted that “[i]n the *ConVal* matter, the question of whether base adequacy can be challenged without consideration for differentiated aid was briefed pretrial, argued during trial, and . . . explicitly raised by the State’s Notice of Appeal in the *ConVal* matter” and “was therefore the subject of many privileged conversations prior to, during, and after the *ConVal* trial.” *Id.* at 4. The ConVal plaintiffs also noted that they anticipated that once all of the ConVal witnesses were served with subpoenas, the ConVal plaintiffs would “object to those witnesses being compelled to testify for the reasons set forth in the Grantham School District’s Motion to Quick Subpoena to Lisa Witte and Reply in support thereof.” *Id.* at 2 n.1.

28. Neither the Grantham School District’s motion to quash nor the plaintiffs’ motion for a protective order have been resolved as of the date of this filing.

29. Per the Notice of Bench Trial, pretrial motions are due August 21, 2024, the trial management conference is scheduled for September 4, 2024, all witness and exhibit lists must be filed by the date of that conference, and trial commences on September 30, 2024.

### **Discussion**

30. “The underlying purpose of discovery . . . is to reach the truth and to reach it as early in the process as possible by *narrowing the issues* pertaining to the controversy between the parties.” *Kurowski v. Town of Chester*, 170 N.H. 307, 315 (2017) (citations and quotation

marks omitted; ellipsis and emphasis in original). “The adversary process could not function effectively without adherence to the rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contract or explain an opponent’s case.” *Taylor v. Illinois*, 484 U.S 400, 410–11 (1988).

31. The State has, throughout this case, sought to work with the plaintiffs to find a way to efficiently and fairly move this case to trial. To that end, both sides allowed for limited discovery to occur beyond the February 17, 2023 deadline, and the State engaged in good faith discussions with the plaintiffs regarding previously undisclosed trial witnesses in late-spring and early-summer of 2023. The State did so even though the plaintiffs had not made automatic disclosures identifying those witnesses in accordance with Rule 22, the discovery deadline had long since passed, and trial was then barely two months away. Likewise, after the Court lifted the stay on April 25, 2024—and specifically noted in its order the plaintiffs’ acknowledgement that discovery had closed—the State resumed good faith negotiations with the plaintiff with respect to additional witnesses they sought to call at trial, including numerous unidentified ConVal witnesses.

32. The State believes the plaintiffs engaged in these discussions in good faith. But even the best of faith does not change the fact that as of the date of this filing, the plaintiffs still have not disclosed to the State which ConVal witnesses they intend to call at trial. As a result, the parties have not been able to determine whether they can reach agreement as to what portions, if any, of those witnesses’ trial testimony in ConVal can come into this case through the trial transcripts. And without knowing who those witnesses are, the State cannot depose them to determine what they might say related to differentiated aid. Again, regardless of plaintiffs’ good

faith, the fact remains that the State is currently left to face a “trial by ambush” that discovery is intended to prevent. *See, e.g., State v. Cromlish*, 146 N.H. 277, 280 (2001) (“We have long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information”); *Macaulay v. Anas*, 321 F.3d 45, 50 (1st Cir. 2003) (purpose of discovery is to avoid trial by ambush).

33. Trial is just over a month away. Pretrial motions are due today. The trial management conference is in just two weeks, and witness and exhibit lists are due on the date of that conference. Even in a vacuum, the parties would be hard-pressed to resolve the outstanding questions with respect to the ConVal witnesses’ previous trial testimony and conduct appropriate fact-gathering with respect to what those witnesses might say beyond that testimony between now and trial. Indeed, discovery deadlines exist to ensure that the universe of facts is set sufficiently in advance of trial that the parties do not need to conduct a mad dash of discovery on the eve of trial.

34. The issue between the State and the plaintiffs in this matter with respect to the ConVal witnesses does not, however, exist in a vacuum. As discussed, there is also a separate, ongoing, unresolved dispute between the plaintiffs here and the ConVal districts over whether *any* ConVal witness can be compelled to provide testimony at the trial in this case at all.

35. It is only through the filings related to that dispute that the State has any inkling which ConVal witnesses the plaintiffs intend to call. And even if the witnesses identified in these filings *are* the ConVal witnesses the plaintiffs intend to call, the ConVal districts are resisting the plaintiffs’ efforts to compel these witnesses to testify at trial. The ConVal districts have specifically asserted, among other things, that the testimony the plaintiffs seek to elicit from these witnesses, including in relation to differentiated aid, is protected by the attorney-client

privilege. Any attempt by the State to depose these witnesses would be met with similar resistance. Thus, even if the State could be sure what ConVal witnesses the plaintiffs intend to call, it is left unable to do any basic fact gathering as to what those witnesses might say.

36. The State has been solicitous in its willingness to allow the plaintiffs to continue to develop their case outside and beyond the established procedural rules governing automatic disclosures and discovery. The State should not be put in a position where its solicitousness requires it to divert time and resources away from preparing for trial to engage in basic fact gathering that would have needed to occur well over a year ago but for the State's efforts to accommodate the plaintiffs. And the State certainly should not be subject to trial by ambush with respect to what appears to be a—if not the—central issue at trial simply because witnesses were not disclosed, and any legal issues surrounding those witnesses were not resolved, sufficiently in advance of trial.

37. Accordingly, to the extent the plaintiffs insist upon this trial going forward on September 30 (and the State maintains that this is neither prudent nor necessary), the Court should preclude the plaintiffs from calling any undisclosed witnesses and all ConVal witnesses, including but not limited to Lisa Witte, Kenneth Dassau, Donna Magoon, and Teresa Walker.

38. Given the nature of the relief sought in this motion and the plaintiffs' other recent filings with this Court, the State has not sought the plaintiffs' position on this motion before filing.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Issue an order precluding the plaintiffs from calling at trial any undisclosed witnesses and all ConVal witnesses including but not limited to Lisa Witte, Kenneth Dassau, Donna Magoon, and Teresa Walker; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Clerk's Notice of Decision  
Document Sent to Parties  
on 09/12/2024

Date: August 21, 2024

After a hearing, the Motion is Denied. The listed "Conval Witnesses" will be allowed to testify as fact witnesses in this case. The Court agrees with the Plaintiff's argument and cannot discern any real prejudice to the defendants in light of the fact that all parties have transcripts of the Conval Witness testimony from the Conval trial. It can hardly be said that such testimony (which is largely admitted to lay foundation for the DOE forms) is surprising to any party.

By: /s/ Samuel Garland  
Anthony J. Galdieri, No. 18594  
Solicitor General  
Samuel Garland, No. 266273  
Senior Assistant Attorney General  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301  
Phone: (603) 271-3658  
E-mail: Anthony.j.galdieri@doj.nh.gov  
samuel.rv.garland@doj.nh.gov

John R. Munich, (pro hac vice)  
J. Nicci Warr (pro hac vice)  
STINSON LLP  
7700 Forsyth Blvd., Suite 1100  
Clayton, MO 63105  
Phone: (314) 863-0800  
Email: john.munich@stinson.com  
nicci.warr@stinson.com



Honorable David W. Ruoff

September 12, 2024

**CERTIFICATE OF SERVICE**

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

Date: August 21, 2024

/s/ Samuel RV Garland  
Samuel RV Garland.