THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

215-2022-cv-00167

Steven Rand, *et al.*

v.

State of New Hampshire

STATE'S OBJECTION TO
PLAINTIFFS' MOTION FOR EQUITABLE RELIEF

The State of New Hampshire, by and through counsel, submits this objection to the plaintiffs' motion for equitable relief:

Introduction and Background

1. Despite the tone of and rhetoric in the plaintiffs' motion, the present dispute is narrow and mundane.

2. The plaintiffs want to admit into evidence every DOE-25 generated by every school district in the State for each of the past five years.

3. The plaintiffs have not identified on their witness list (or *ever* suggested to the State or this Court that they intend to call) witnesses from every school district in the State who would have the requisite personal knowledge to testify as to the data contained in those DOE-25s or how the DOE-25s were generated. N.H. R. Evid. 602.

4. For its part, the State does not dispute the authenticity of the district-specific DOE-25s in question.

5. Nor does the State dispute that the Department of Education uses these district-specific DOE-25s for certain purposes, including calculating aggregate and average expenditures and setting the threshold for special education (also known as catastrophic) aid.

6. The State does, however, dispute that the data in these DOE-25s is relevant.

7. Furthermore, even if these documents were relevant, the plaintiffs do not appear to dispute that the data contained in these DOE-25s is hearsay to the extent the data would be introduced for its truth. N.H. R. Evid. 801(c).

8. The plaintiffs advance two arguments for why the Court should admit the district-specific DOE-25s as full exhibits.

9. First, the plaintiffs contend that the State agreed to stipulate to the district-specific DOE-25s coming in as full exhibits, subject only to a potential relevance objection.

10. The Court should reject this argument, as it is not borne out by the facts surrounding the parties' negotiations over a potential stipulation.

11. Second, the plaintiffs contend that the district-specific DOE-25s are admissible as records of regularly conducted activity under Rule 803(6); as public records under Rule 803(8), or under the residual exception in Rule 807.

12. These arguments are premature and can only be assessed once the plaintiffs call a witness (or witnesses) properly disclosed in this case who can testify about the district-specific DOE-25s.

Discussion

A. There was no agreement that the district-specific DOE-25s could come in as full exhibits.

13. The parties did not reach an agreement that the district-specific DOE-25s could be admitted as full exhibits.

14. The State attempted to engage in good faith with plaintiffs' counsel to negotiate a stipulation covering certain basic facts and addressing the authenticity and/or admissibility of certain exhibits.

15. Those negotiations were ongoing just days before this trial began—for example, the parties held a lengthy video meet-and-confer regarding stipulating to the admissibility of certain exhibits on the afternoon of Tuesday, September 24, 2024.

16. This discussion was followed by counsel for plaintiffs sending, at 11:15 p.m. that evening, a revision of their exhibit list highlighting the exhibits that plaintiffs requested that the State agree were admissible. Pls.' Mot. Equitable Relief, Ex. H at 8–9.

17. The plaintiffs did not appear surprised during the meet-and-confer that the parties were still discussing whether a stipulation as to admissibility and/or authenticity was possible, which exhibits could be subject to such a stipulation, and whether there were certain exhibits that were subject to disputes that the Court would be asked to resolve.

18. Nor did the plaintiffs contend in their email that night that the State had *already* stipulated to the admissibility of *any* specific exhibits.

19. The State responded to the plaintiffs' September 24 email the following day. In that response, the State:

- stipulated that dozens of the plaintiffs' proposed exhibits could come into evidence as full exhibits;
- stipulated to the authenticity of several-dozen more exhibits, but reserved the right to raise relevance objections to those exhibits; and
- identified a small number of exhibits—including the district-specific DOE-25s currently at issue—to which the State intended to raise other evidentiary objections, including hearsay.[1]

Pls.' Mot. Equitable Relief, Ex. H at 6–7.

[1] The plaintiffs have represented that they do not intend to introduce any of the other exhibits the State identified in this "third bucket."

20. On September 26, in response to *that* email, the plaintiffs took the position that the State had already agreed to stipulate to the admissibility of the district-specific DOE-25s. *Id.* at 1–2.

21. The State responded later that morning, reiterating that it did not "agree that [it had] reneged on a stipulation that the DOE-25s (or any other documents) would come in as full exhibits." *Id.* at 1.

22. The next day, on the last business day before trial began, plaintiffs filed the present "Motion for Equitable Relief" asserting, contrary to the course of negotiations between the parties and contrary to their own actions up to the September 24 meet-and-confer and annotated exhibit list, that the State had *already* stipulated to the admission of a wide range of documents.

23. The facts simply do not support this assertion.

24. The original version of the stipulation under discussion by the parties was drafted by counsel for the plaintiffs and circulated by email on September 5, 2024.

25. This stipulation was not primarily concerned with documents but devoted nearly the entirety of its contents to various factual stipulations regarding, *inter alia*, the publication of materials on various state-run websites, contentions regarding the content and import of various state and federal statutes, and how the State utilizes certain information gathered by school districts.

26. The brief discussion of a stipulation regarding exhibits in this draft was unilateral and was solely concerned with the State conceding the admission of various plaintiffs' exhibits in full and for any purpose.

27. The initial draft stipulation prepared by plaintiffs was not one that the State was willing to sign.

28. Instead, on September 13, the State sent plaintiffs a revision of the stipulation in redline.

29. As with the original draft, the State's revisions were almost entirely focused on the factual recitals of the stipulation and did not address any of the specific exhibits that Plaintiffs sought to had declared admissible by stipulation.

30. In fact, the State's revision of the stipulation regarding exhibits was aimed solely at making the plaintiffs' unilateral language bilateral, so that both sides could propose exhibits that the other side would stipulate as to admissibility.

31. The plaintiffs responded with further revisions to the stipulation on September 16, none of which were directed to the language regarding the admissibility of exhibits.

32. In a cover email with these revisions, after stating that "I think we are very close to agreement," counsel for the plaintiffs commented on the new, bilateral language by writing that "[w]e would like to see the exhibits that the State would like to stipulate to. Please send us a list, with links like we provided to you. We would appreciate it if you also categorized the exhibits as appropriate, and briefly explained the basis for admitting the different categories as we did." *Id.*, Ex. F at 1.

33. The State sent a further revision to the draft stipulation the same day. Once again, the revisions focused exclusively on the factual content of the stipulation and did not address the portion concerning the exhibits. Plaintiffs' counsel accepted this version of the document, writing on the evening of September 16 that "these changes are fine. We'll update this with

exhibit numbers on our end. When can we see the exhibits that you would like us to stipulate to?" *Id.*, Ex. G. at 1.

34. This is what the parties' *actual* negotiation shows: that, after exchanging multiple drafts, the parties reached an agreement on certain factual recitals that both sides could stipulate to. The parties also reached an agreement regarding language governing a stipulation on admissibility of certain exhibits. What the parties had *not* done is reach a stipulation that various of the plaintiffs' proposed exhibits were admissible in full. There had been no substantive discussion, let alone agreement, on that front. The draft stipulations exchanged included no exhibit numbers, only placeholders to be filled in. And even when the draft stipulation was finalized, the parties still had not filled in any exhibit references.

35. That is why, over a week after these emails on September 16 finalizing the language of the stipulation, the parties were still meeting and conferring about which exhibits, if any, would be stipulated as admissible, which would be stipulated as authentic but subject to other objections such as relevance or hearsay, and which the parties would not be able to reach an agreement upon.

36. This is not the first time the plaintiffs have suggested to this Court that the State's good-faith discussions constituted an agreement to waive the rules that typically govern contested litigation.

37. The facts do not support the plaintiffs' contention that the parties entered a binding stipulation, enforceable through the plaintiffs' motion, that thousands of pages of documents may come into evidence as full exhibits without any sponsoring witness and without regard to the State's good-faith and well-founded evidentiary objections.

38. The Court should therefore reject the plaintiffs' argument that the district-specific DOE-25s should come into evidence as full exhibits by agreement and should instead, as it would in any other case, consider the parties' respective legal arguments as to their admissibility.

B. The district-specific DOE-25s are not relevant.

39. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H. R. Evid. 401(a)–(b) (formatting altered).

40. In this case, the plaintiffs contend that the State is failing to fully fund an adequate education, as defined by the Legislature through RSA 193-E:2-a.

41. The plaintiffs' theory appears to rest in substantial part on the fact that school districts report *spending* more to run their schools than the State provides in funding.

42. Costs and expenditures are not the same thing.

43. What a school district spends to operate its school is not indicative of the "objective" cost of an adequate education. *Londonderry Sch. Dist. v. State*, 154 N.H. 153, 162 (2006).

44. Both the Supreme Court and the Legislature have recognized that school districts may choose to spend money on things that are not required to deliver an adequate education, as defined by the Legislature through RSA 193-E:2-a. *See, e.g.*, *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 475 (1997) ("Our decision does not prevent the legislature from authorizing local school districts to dedicate additional resources to their schools or to develop educational programs beyond those required for a constitutionally adequate education."); RSA 198:43 ("School districts are authorized to develop educational programs beyond those required for an adequate education and to raise and appropriate amounts necessary for such programs.").

45. The data in the district-specific DOE-25s does not, on its face, purport to isolate what portion of the school district's total self-reported expenditures are required to fund the substantive program comprising an adequate education, as defined by the Legislature, let alone reflect an "objective determination" of what that program costs. *Londonderry Sch. Dist.*, 154 N.H. at 162.

46. The district-specific DOE-25s are therefore not relevant to the plaintiffs' claim and are inadmissible on this basis. N.H. R. Evid. 402.

C. The plaintiffs cannot establish that the district-specific DOE-25s are admissible under Rule 803(6), Rule 803(8), or Rule 807 without witness testimony.

47. Even if the district-specific DOE-25s were relevant, the plaintiffs do not appear to dispute that the data contained in those documents is hearsay.

48. The plaintiffs contend, however, that the documents should come in as full exhibits under three different hearsay exceptions: Rule 803(6), Rule 803(8), and Rule 807.

49. The State disputes that the plaintiffs can demonstrate that any of these exceptions apply, at least without the support of witness testimony.

50. The plaintiffs have not disclosed, and have no credible argument that they ever intended to disclose, witnesses from every school district in the State who could speak to how each district-specific DOE-25 was compiled.

51. The plaintiffs have identified a small number of district-affiliated witnesses who may be able to offer this type of testimony with respect to certain districts, but none of those witnesses other than Dr. Freeman has yet testified.

52. The plaintiffs also intend to call Mark Manganiello from the Department of Education, and the State does not dispute that Mr. Manganiello will be able to offer testimony as to how the district-specific DOE-25s are used by the Department of Education.

53. Whether any of this testimony will be sufficient to establish that the district-specific DOE-25s (or some subset of those DOE-25s) are admissible under one or more of the hearsay objections the plaintiffs have invoked will depend on the testimony in question.

54. The Court should therefore defer ruling on this issue until the plaintiffs seek to introduce the district-specific DOE-25s through witness testimony.

55. At that time, the State can assess whether it will maintain its hearsay objection in light of the testimony of the witness or witnesses in question, and the Court can rule on any objection lodged.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

A. Deny the plaintiffs' motion to the extent the plaintiffs ask the Court to rule that the district-specific DOE-25s can come into evidence as full exhibits by agreement;

B. Defer ruling on whether any of the district-specific DOE-25s can come into evidence under one or more of the hearsay exceptions invoked by the plaintiffs until after the plaintiffs seek to introduce the exhibits in question through witness testimony; 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

Date: October 1, 2024

By: /s/ *Samuel Garland*

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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: October 1, 2024

/s/ *Samuel Garland*
Samuel Garland