

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

Docket No. 215-2022-CV-00167

**OBJECTION TO MOTION TO CONSOLIDATE
OR, IN THE ALTERNATIVE, FOR SPECIAL ASSIGNMENT**

The State of New Hampshire, by and through counsel, the New Hampshire Attorney General's Office, objects to the Plaintiffs' Motion To Consolidate Or, In The Alternative, For Special Assignment. In support thereof, the State says as follows:

1. The Plaintiffs, four individual taxpayers and two corporate entities, move to consolidate this education funding case with an education funding case brought by seventeen school districts that has been pending in superior court in another county since March 13, 2019 (*Contoocook Valley School District, et al. v. State of New Hampshire, et al.*, Docket No. 213-2019-CV-00069) (the "ConVal case").

2. The parties in the ConVal case have progressed substantially into the discovery phase of the case and are presently in the process of conducting depositions. Fourteen of these depositions have been scheduled and will take place from later July through August. The plaintiffs in the ConVal case have already disclosed an expert, and the defendants are in the process of gathering the discovery necessary to do the same. Discovery in the ConVal case is scheduled to close on November 2, 2022, with trial scheduled for April 2023.

3. This case, by contrast, is in its infancy. Counsel for the State accepted service of this case on July 6, 2022. The State has until August 5, 2022 to answer or otherwise plead. The case will not be structured until the pleadings are closed.

4. This case also presents claims and theories different from those presented in the ConVal case. This case presents tax claims and theories under Part II, Article 5 of the New Hampshire Constitution that are not squarely presented in the ConVal litigation. This case also appears to present a theory of the State's education funding obligations under Part II, Article 83 of the New Hampshire Constitution different from the theory advanced in the ConVal litigation. As a result, it is far from clear at this juncture to what extent this action will have legal and factual issues in common with the ConVal action.

5. The State will need to have an adequate opportunity to develop discovery in this case and, in the ordinary course, would likely put this case on a one-year trial track. Though counsel for the State and counsel for the Plaintiffs have discussed the possibility of expediting this matter to some degree, that will only be possible to the extent both sides are comfortable with the theories underpinning the claims and defenses and the universe of facts each side intends to rely on to support those claims and defenses. It will, at a minimum, require that the parties conduct some measure of initial discovery and exchange expert reports. Consolidating this case with the ConVal case would unnecessarily inject unrelated factual disputes and legal theories into this case, hindering (if not precluding) the parties and, ultimately, the Court from efficiently identifying and resolving the legal and factual disputes this case presents. To the extent consolidation occurs, it is hard to conceive

how the State could complete all potential discovery and pre-trial motion practice within the next four months in order to keep the ConVal litigation on its current trial schedule.

6. The State also disagrees with the Plaintiffs' contention that this case will involve "the same facts, witnesses, and evidence, including public data informing education costs in New Hampshire and tax rates imposed to finance those costs." Pls.' Mot. ¶ 9. While some state witnesses may be the same, the Plaintiffs in this case are not witnesses in the ConVal litigation, and it does not appear that the seventeen school districts in the ConVal case will be witnesses in this case. There will presumably be witnesses related to tax data and information in this case that will not be involved in the ConVal case. Additionally, the Plaintiffs have suggested that they will disclose at least one expert in this case, who presumably is not involved in the ConVal case and who will produce expert reports and opinions different from those involved in the ConVal case. The differences between the two cases in these regards are likely to be significant.

7. Additionally, because the claims and theories advanced in each case are different, consolidating these matters will substantially complicate trial by requiring the State to defend against, and the Court to ultimately resolve, what are functionally two separate lawsuits at the same time.

8. In short, the ConVal litigation is sufficiently different and sufficiently far along to make consolidation at this juncture problematic and prejudicial to the State in both cases.

9. The State therefore objects to consolidating this matter with the ConVal matter.

10. The State also objects to having this case specially assigned to a specific superior court judge in a county where venue does not lie.

11. While plaintiffs typically have some ability to choose the forum and venue in which they will proceed, our legal system presumes that the assignment of a particular judge to a case will be random unless a case is filed in a forum in which only a single judge presides.

12. Maintaining the random assignment of judicial officers is an important feature of our system, which assures the public that cases are assigned and heard on an impartial and neutral basis. *Cf. Trump v. Committee on Ways and Means, U.S. House of Representatives*, 391 F. Supp. 3d 93, 97 (D.D.C. 2019) (construing local court rule requiring random assignment of cases); *Tripp v. Executive Office of President*, 196 F.R.D. 201, 202 (D.D.C. 2000) (“The fundamental rationale for the general rule requiring random assignment of cases is to ensure greater public confidence in the integrity of the judicial process. The rule guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.”).

13. That a particular judge has heard more of a specific type of case than other judges cannot override this important feature of the state judicial system. All superior court judges are qualified and required to sit on the cases over which they have jurisdiction and are not recused. No mechanism exists within the New Hampshire Superior Court Rules to have a particular case assigned to a particular superior court judge, particularly a superior court judge who does not sit in a county where venue exists in the case. Further, while

seeking to ensure that similar legal issues are approached consistently may be an understandable impulse, “conformity for its own sake is neither necessary nor desirable for the [lower courts], because differences in opinion have the effect of ventilating important legal questions and creating a background against which the Supreme Court can ultimately resolve an issue for the [State] as a whole.” *Walker v. O’Brien*, 216 F.3d 626, 634 (7th Cir. 2000).

14. Accordingly, if consolidation with another case is not appropriate, this case should not be specially assigned to the judge overseeing that case and should instead proceed in the normal course.

WHEREFORE, for all the above reasons, the defendant respectfully requests this Court enter an order:

- A. Denying the Plaintiffs’ Motion To Consolidate Or, In The Alternative, For Special Assignment; and
- B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,

By its Attorney

JOHN M. FORMELLA

ATTORNEY GENERAL

Date: June 6, 2022

/s/ Lawrence P. Gagnon

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, a copy of the foregoing was served via the court's electronic filing system to all counsel of record.

/s/ Lawrence P. Gagnon
Lawrence P. Gagnon