

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 STATE'S MOTION TO EXCLUDE TESTIMONY  
OF CONVAL WITNESSES**

Plaintiffs, by and through their undersigned counsel, respectfully submits this objection to the Defendant State of New Hampshire's (the "State") *Motion to Exclude Testimony "ConVal" Witnesses* (the "Motion" or "Mot.").

**PRELIMINARY STATEMENT**

Despite the State's protestations about a "trial by ambush" and accusations of Plaintiffs' purported disclosure failures, the State cannot dispute that it has known for over a year that Plaintiffs intended to call the *ConVal* Witnesses at trial. The *ConVal* Witnesses, all of whom are current or former employees of school districts at issue in the *ConVal* matter, are critical fact witnesses who are best situated to provide testimony addressing the insufficiency of differentiated aid. The basis for the State's Motion boils down to two main "unresolved" issues: (i) the parties have not come to agreement on what portion of the *ConVal* Witnesses' trial transcripts can be introduced and (ii) the State has not had an opportunity to depose the *ConVal* Witnesses on the issue of differentiated aid. But the solution to these "unresolved" issues is not, as the State proposes, to entirely preclude Plaintiffs from calling these critical witnesses to trial. The parties are more than capable of resolving these issues prior to the start

of trial. The relief sought in this Motion is, at minimum, premature. But as argued further below, the State's contentions are entirely without merit and this Court should deny the Motion in its entirety.

## **BACKGROUND**

On August 26, 2022, Plaintiffs filed their *Amended Complaint* (Doc. 17) asserting that the State's base adequacy cost and differentiated aid funding are insufficient to provide New Hampshire students with a constitutionally adequate education.

Although the discovery deadline for this case was initially set for February 17, 2023, the parties agreed to additional discovery beyond the discovery deadline in order to accommodate the State's counsels' schedules (namely defense counsel's participation in the *ConVal* trial).

From the outset of the case, Plaintiffs have attempted to work cooperatively with the State to reduce the need to repeat discovery and testimony already taken in *ConVal*. This included moving to consolidate cases to prevent the need for identical witnesses to testify in both matters. The *ConVal* parties refused to consolidate the cases.

After the *ConVal* trial, Plaintiffs approached the State to discuss a compromise to prevent the need for repeat testimony. Plaintiffs once again indicated that they intended to call *ConVal* witnesses who had testified on the topic of base adequacy (the "*ConVal* Witnesses") in the April–May 2023 trial held in *Contoocook Valley School District v. New Hampshire* ("*ConVal*"), No. 213-2019-cv-00069 (Super. Ct.). As an accommodation, Plaintiffs proposed introducing the transcript of the witnesses (including both direct and cross examination) to avoid repeat testimony. The State refused.

Plaintiffs then suggested to the State that the parties exchange preliminary witness lists to determine whether any additional depositions would be needed prior to trial. Plaintiffs disclosed their preliminary proposed witness list on July 6, 2023 and identified the *ConVal*

Witnesses. *See* Mot. at Ex. A. This preliminary witness list made clear to the State that Plaintiffs were reserving the right to call the *ConVal* Witnesses at trial. Despite attempts to reach reasonable compromise with the State on this issue, to date, the State has refused to consent to the introduction of any portion of the *ConVal* trial transcripts.

The State did not seek depositions of the remaining identified witnesses (namely, the *ConVal* Witnesses) and instead chose to move for summary judgment. The Court stayed the case, indicating that given the overlapping issues with *ConVal*, a stay was appropriate so that the Court could rule on *ConVal* first. *See* Stay Order (Aug. 8, 2023) (Doc. 75). In *ConVal*, the Court ruled in favor of plaintiffs against the State. *See* Order, *Contoocook Valley Sch. Dist. v. New Hampshire*, No. 213-2019-CV-00069 (N.H. Super. Nov. 20, 2023) (“*ConVal* Trial Order”). The Court next denied the State’s summary judgment motion in the instant case and lifted the stay. *See* Order on Case Status and Pending Motions, Doc. 103 (Apr. 25, 2024). The State proceeded to file a motion to preclude (disguised as a motion to reconsider), and asked the Court to limit the parties to only the disclosed expert witnesses. State’s Mot. to Reconsider Order on Case Status & Pending Mots., Doc. 104 (May 6, 2024). The court denied the motion on May 23, 2024.

Following that ruling, the parties tried to engage on a stipulation regarding the *ConVal* Witnesses. The State refused unless Plaintiffs identified specific witnesses. Plaintiffs clarified that they did not intend to call any of the *ConVal* expert witnesses, only fact witnesses, but the State maintained its objection. The State did not provide a legitimate explanation as to why certain *ConVal* fact witnesses would be objectionable while others would not be. To facilitate stipulation, Plaintiffs agreed to identify specific *ConVal* Witnesses and noted they would proceed with issuing subpoenas.

On August 6, 2024, Plaintiffs began the process of issuing trial subpoenas to the *ConVal* Witnesses, all of whom are current or former employees of the school districts that were

plaintiffs in *ConVal*. Counsel for the *ConVal* plaintiffs promptly moved to quash Plaintiffs’ trial subpoenas. Mot. to Quash Plfs. Subpoena to Lisa Witte, Doc. 108 (Aug. 9, 2024). To date, Plaintiffs have effectuated only one subpoena, issued to Ken Dassau. *See* Pls.’ Obj. to Mot. to Quash at 2, Doc. 109 (Aug. 12, 2024). Mr. Dassau has relevant knowledge relating to adequacy aid (in particular, differentiated aid) and was already deposed by the State in *ConVal*.

On August 21, 2024, the State filed the instant Motion seeking to preclude Plaintiffs from calling any of the *ConVal* Witnesses to trial.

### **ARGUMENT**

Plaintiffs intend to call several of the *ConVal* Witnesses, all of whom are current or former employees of the school districts that were plaintiffs in *ConVal*. The *ConVal* Witnesses will provide lay testimony addressing the insufficiency of adequacy aid (particularly differentiated aid, which was not addressed at the *ConVal* trial). The Court should deny the State’s attempt to preclude these witnesses from testifying at trial.

#### **A. The State Cannot Reasonably Allege Trial by Ambush**

The State complains that the *ConVal* Witnesses were not disclosed and any issues surrounding those witnesses will not be resolved sufficiently in advance of trial. Mot. ¶¶ 32, 36. But the State cannot genuinely claim that it is prejudiced or that it will be subject to trial by ambush. As discussed above, Plaintiffs have been forthcoming about their desire to call the *ConVal* Witnesses from the outset of the case. And Plaintiffs disclosed the *ConVal* Witnesses in their preliminary witness list on July 2023. The State has been on notice for over a year that Plaintiffs intended to call the *ConVal* Witnesses at trial. The State alleges that two “unresolved” issues warrant preclusion of the *ConVal* Witnesses: (i) the parties have not come to agreement on what portion of the *ConVal* Witnesses’ trial transcripts can be introduced and (ii) the State has not had an opportunity to depose the *ConVal* Witnesses regarding their

differentiated aid testimony. Plaintiffs address these contentions below, each of which are without merit.

**1. The Parties' Outstanding Disagreement over the *ConVal* Trial Testimony Is Not a Valid Basis for Exclusion**

The parties' outstanding disagreement over the *ConVal* trial testimony is entirely irrelevant to the issue of exclusion. Plaintiffs attempted to reach a stipulation to avoid the need to call these witnesses and/or to limit their testimony, but the State has refused to agree to one. The State is trying to obfuscate the issue by referencing the parties' stipulation negotiations, but that does not alter the fact that these witnesses are disclosed and proper. A stipulation would simply limit the need for the *ConVal* Witnesses to testify (or at least limit the issues they will need to testify to live). The parties do not need to reach an agreement on the stipulation for Plaintiffs to call these witnesses.

**2. The State's Failure to Depose the *ConVal* Witnesses Is Not a Valid Basis for Exclusion**

The State contends that Plaintiffs' purported failure to disclose the *ConVal* Witnesses has rendered them unable to depose the *ConVal* Witnesses. Mot. ¶¶ 24, 32. However, there are three issues with the State's contention.

*First*, the *ConVal* Witnesses that Plaintiffs intend to call as fact witnesses are non-parties and not within Plaintiffs' control. The State concedes this point as well. *See* Mot. ¶¶ 34–35 (“[T]here 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. . . . [T]he *ConVal* districts are resisting the plaintiffs' efforts to compel these witnesses to testify at trial.”). Plaintiffs have no duty to make third-party witnesses available. Plaintiffs fulfilled their obligations by properly identifying these witnesses as having factual knowledge since the beginning of this case.

*Second*, the State has never attempted to depose the *ConVal* Witnesses in this case. There can be no dispute that Plaintiffs formally notified the State that they reserved the right to call the *ConVal* Witnesses to trial on July 6, 2023, over a year ago. The State could have deposed those witnesses in the interim—but they did not. The State concedes as much, noting in its Motion that “[a]ny attempt by the State to depose these witnesses *would be* met with similar resistance [on the grounds of attorney-client privilege].” Mot. ¶ 35 (emphasis added). The State’s argument that a lack of formal disclosure precluded it from taking depositions of these witnesses is without merit.

*Third*, the State asserts that it required the specific identities of the *ConVal* Witnesses that Plaintiffs intend to call at trial in order to “elicit any additional testimony from these witnesses with respect to differentiated aid.” Mot. ¶ 22. But the State already had the opportunity to depose those witnesses in the *ConVal* case on the topic of differentiated aid. Even if the State had not had the prior opportunity to develop such testimony from the *ConVal* Witnesses, there is still time to do so. To the extent the State determines it requires additional testimony on the topic of differentiated aid from *ConVal* Witnesses, it is free to subpoena those witnesses. However, as discussed above, the State has failed to even attempt to depose them.

### CONCLUSION

The *ConVal* Witnesses were disclosed to the State. The parties have known these witnesses have relevant information for multiple years. The State’s failure to take action until the eve of trial does not warrant the preclusion of the *ConVal* Witnesses. Plaintiffs respectfully request that this Court deny the State’s Motion in its entirety.

Dated: August 30, 2024

Respectfully submitted,

/s/ John E. Tobin, Jr.

John E. Tobin, Jr., NH Bar No. 2556

60 Stone Street

Concord, NH 03301

(603) 568-0735

jtobinjr@comcast.net

Natalie Laflamme, NH Bar No. 266204  
Laflamme Law, PLLC  
100 N. Main St, Suite 512  
Concord, NH 03301  
(603) 937-5434  
natalie@laflammelaw.com

Andru Volinsky, NH Bar No. 2634  
160 Law, PLLC  
P.O. Box 1181, Concord, NH 03302  
(603) 491-0376  
andruvolinsky@gmail.com

Wendy Lecker\*  
Education Law Center  
60 Park Place, Suite 300  
Newark, NJ 07102  
(203) 536-7567  
wlecker@edlawcenter.org

Joshua D. Weedman\*  
Alice Tsier (pro hac pending)  
White & Case LLP  
1221 Avenue of the Americas  
New York, NY 10020  
(212) 819-8200

Michael-Anthony Jaoude\*  
Franco Mirolo (pro hac pending)  
Harter Secrest & Emery LLP  
50 Fountain Plaza, Suite 1000  
Buffalo, NY 14202-2293  
(716) 853-1616

\* *admitted pro hac vice*

### 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 30<sup>th</sup> day of August 2024.

/s/ John E. Tobin, Jr.  
John E. Tobin, Jr.