

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' REPLY TO STATE'S OBJECTION TO
MOTION FOR PARTIAL JUDGMENT ON PLEADINGS**

Now come the Plaintiffs in this matter, through counsel, and reply to the State's Objection to their Motion for Partial Judgment on Pleadings, stating as follows:

1. In opposing the motion for partial judgment on the pleadings based on the Court's ruling issued on November 20, 2023 in the matter of *Contoocook Valley School District v. State* ("*ConVal*"), No. 213-2019-CV-00069, the State seems to misunderstand Plaintiffs' request.

According to the State's Objection, Plaintiffs move for judgment "on part of their adequacy claim," State's Objection ¶ 1, and "specifically. . . contend that they are entitled to judgment on the pleadings on the portion of their adequacy claim concerning base adequacy,"¹ Objection ¶ 2.

2. In fact, Plaintiffs request that the Court "enter a partial judgment finding that the current state school funding scheme violates Part Two, Article Five of the New Hampshire Constitution." Pltfs. Mtn. for Judgment on the Pleadings at 5. Although the Court's decision in

¹ Plaintiffs' claim in this case includes both base adequacy and differentiated aid.

ConVal concerned base adequacy, and that necessarily leads to the requested judgment in this case, Plaintiffs are not seeking a ruling on the amount of base adequacy in their Motion for Judgment on the Pleadings. They simply ask the Court to recognize in the instant case, as it did in ConVal, that the amount paid by the State in base adequacy is constitutionally deficient.

3. The State recasts the Plaintiffs' assertion that this Court should take judicial notice of its own decision as a request to apply the specific factual findings of the ConVal ruling concerning base adequacy. *See* Objection ¶ 5. The Plaintiffs are expressly not seeking that, as they consider the figure set by the Court in ConVal to be too low. *See* Motion ¶ 6. Plaintiffs stress that this position is not a critique of this Court's reasoning, as they recognize that the cost number established by the Court in ConVal was based on the evidence presented during the ConVal trial. This is precisely why the Rand Plaintiffs are *not* asking the Court to take notice of the factual findings in ConVal, as the State alleges, but rather, the overall legal conclusion that the State's funding is deficient, in violation of Part 2, Article 83 of the New Hampshire Constitution, as well as the conclusion that necessarily follows: that underfunding of adequacy, in any amount, means that the State is violating Part 2, Article 5 of the New Hampshire Constitution [the tax clause] by downshifting a portion of its duty to fund base adequacy to the local property tax. *See Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 465 (1997).

4. With this accurate representation of the requested judgment in mind, much of the State's argument in its Objection misses the point. Cases that delve into the intricacies of which factual details can or cannot be applied to a proceeding, and whether or not those facts or records were properly introduced into evidence, *see, e.g. State v. Cox*, 133 N.H. 261 (1990), are not apt here. It is important to recognize the distinction between a decision and factual findings. *See Pascagoula Sch. Dist. v. Tucker*, 91 So. 3d 598, 612 (Miss. 2012) ("Judicial decision is the

application, by a court of competent jurisdiction, of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow.”) (citations omitted).

5. It is accepted that a court can acknowledge an overall opinion or decision. *See, e.g., United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (noting that a court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue”). That is more in line with what Plaintiffs are asking this Court to do: judicially notice a decision, or legal conclusion, that the State underfunds education. “Judicial notice is particularly applicable to the court’s own records of prior litigation closely related to the case before it.” *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).²

6. Much of the State’s Objection argues against applying the doctrine of “offensive collateral estoppel,” though it bears noting that the State itself recognizes that Plaintiffs did not raise or rely on that doctrine. *See* Objection ¶¶ 16-26. Nonetheless, courts have explained that “[c]ollateral estoppel should not be mechanically applied. Rather, it should be employed with reason, equity, and fundamental fairness as ultimate goals.” *Bruzga's Case*, 142 N.H. 743, 745 (1998) (citations omitted).

7. The State’s opposition to the use of that doctrine hinges on the finality of judgment. Plaintiffs do not, however, seek a final judgment from this Court of a constitutional deficiency in the funding of base adequacy. Rather, Plaintiffs ask that the decision in ConVal be applied in the Rand case, and Plaintiffs presume the State will appeal that judgment, as well as

² Judicial notice in this case would serve the policy of judicial efficiency, as it would take away the need to fully adjudicate that which is already effectively settled. Not noticing this Court’s decision in ConVal would merely prolong litigation and cause delay. *Cf. United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (explaining that declining to take judicial notice of a judgment of conviction “would merely be delaying the inevitable” as it would require the case to be remanded to resolve one simple issue.)

the judgment in ConVal. The Plaintiffs explicitly stated this position in their motion in the “Wherefore” paragraph: “Plaintiffs move the Court to enter a partial judgment finding that the current state school funding scheme violates Part Two, Article Five of the New Hampshire Constitution. Plaintiffs assume the State will interlocutorily appeal this finding and Plaintiffs assent to an interlocutory appeal, with or without ruling, if the State also appeals the ConVal Order.” To the extent the ConVal decision is not yet final, applying the decision to the instant case allows both to be appealed at the same time — an efficient use of judicial resources.

8. The State’s Objection further contends that the instant case should be stayed pending an appeal in ConVal, and only then should differentiated aid be examined. *See* Objection ¶ 36. The State notes however that on appeal the Supreme Court may address the threshold issue of whether base aid and differentiated aid can be disaggregated. Objection ¶¶ 31-32.³ Surely, any consideration of differentiated aid by the New Hampshire Supreme Court would be better served with prior findings concerning arguments about differentiated aid. The State’s position seeks to deprive the Supreme Court of a full record. Such a partial record and the consequent piecemeal litigation would not serve the interests of efficiency and judicial economy.

9. Finally, the State suggests the case should not proceed because the legislature might act in the future. *See* Objection ¶ 34. While counsel’s faith in the legislature is admirable, they offer no good faith factual basis for such a suggestion.⁴ For this reason, this justification to deny the Plaintiffs’ Motion for Partial Judgment on the Pleadings should be rejected out of hand:

³ The claim that base adequacy and differentiated aid cannot be disaggregated is belied by the present statute that separately sets the cost of base adequacy, RSA 198:40-a II(a), and differentiated aid, RSA 198:40-a, II (b),(c) and (d). Addressing the cost of base aid separately from differentiated aid has been the approach taken by the State ever since *Claremont I* was first decided 30 years ago.

⁴ Interestingly, in a motion filed by the State today in the ConVal case, the State suggests that the legislature will refrain from any action until the case is fully resolved by the New Hampshire Supreme Court. *See* Defendants’ Motion to Stay November 20, 2023 Merits Order in *Contoocook Valley School District v. State* (“ConVal”), No. 213-2019-CV-00069, at ¶ 4 (“The General Court may not act to fix the

How long are we to wait before giving [a party] the judgment they are clearly entitled to? 5 years, 50 years? Would not the concept of finality in the American system of justice be rendered meaningless if we are going to delay entering judgment because of future actions that a legislative body might take. We might sooner wait for the end of the world to finally terminate litigation.

EEOC v. Bethlehem Steel Corp., 727 F. Supp. 952, 955 (rejecting argument that case should be held in abeyance because of speculation that Congress may pass legislation negating prior caselaw and apply it retroactively).

10. The Plaintiffs filed suit in June of 2022 — 18 months ago. They assert that they pay higher taxes than they should because the State has downshifted the cost of its duty to local property taxpayers. The Plaintiffs have paid unconstitutionally higher taxes in June 2022, December 2022, and June 2023, and will pay higher taxes this month (December 2023). The State now seeks to further delay trial through what is likely to be the June 2024 and December 2024 tax bills. The Court can be certain that if the Plaintiffs are successful, the State will assert sovereign immunity or some other basis to prevent the Plaintiffs from being reimbursed for their overpaid taxes. Absent a waiver of sovereign immunity and agreement not to interpose objection to reimbursement, Plaintiffs are denied a legal remedy for overpayment of their taxes with every new tax bill that is issued. That is, Plaintiffs’ constitutional right to a legal remedy as protected by Part 1, Article 14 of the New Hampshire constitution is violated the longer this case goes without a trial.⁵

11. For these reasons, Plaintiffs respectfully move the Court to enter a partial judgment that the current state school funding scheme violates Part Two, Article Five of the New

statute while this case is pending reconsideration and appeal, and may await further guidance from the New Hampshire Supreme Court before taking remedial action.”). In other words, the State’s filings this week present the Court with a classic Catch-22 problem: the court should not proceed because the legislature may act, but the legislature may not act until the court wraps up proceedings.

⁵ Three of the Rand Plaintiffs are over 70 years old. Delay may also be tantamount to denial for them.

Hampshire Constitution. Plaintiffs further request a status conference at which the parties may discuss the parameters of a trial on the sufficiency of the state's funding of base adequacy and differentiated aid.

Dated: December 14, 2023

Respectfully submitted,

/s/ Natalie Laflamme

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

John E. Tobin, Jr., NH Bar No. 2556
60 Stone Street,
Concord, NH 03301
(603) 568-0735
jtobinjr@comcast.net

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

Joshua D. Weedman*
Michael-Anthony Jaoude*
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020

** admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply has been served via the court's electronic filing system to all parties of record on this 14th day of December, 2023.

/s/ Natalie Laflamme

Natalie Laflamme