

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Docket No. 215-2022-CV-00167

Steven Rand and Randvest, Inc., et al.

v.

State of New Hampshire

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**REPLY TO PLAINTIFFS' OBJECTION TO THE STATE'S MOTION FOR  
RECONSIDERATION**

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The State of New Hampshire, by and through counsel, the New Hampshire Attorney General's Office, hereby files this reply to the plaintiffs' objection to the State's motion for reconsideration.

**A. Timing of Trial and Discovery**

1. Contrary to the plaintiffs' representation, the State is not trying to exclude the plaintiffs from presenting witnesses at trial simply by relating to the court what it understands the current state of the litigation to be so the court can select an appropriate block of time for trial.

2. The plaintiffs did not do automatic disclosures in this case and, during the discovery period, disclosed only two expert witnesses. The State never waived the automatic disclosure rules or any of the other superior court rules regarding discovery.

3. Counsel for the State also has never agreed, as plaintiffs have represented in their objection, that, at any time prior to trial, each side may disclose the witnesses they want to put on and make their witnesses available for depositions.

4. The plaintiffs did disclose a proposed preliminary witness list after discovery closed, approximately two months before trial but, again, the State never agreed that those persons identified on that proposed witness list, but not disclosed during the discovery period or within a reasonable time thereafter could be called at trial. The State further does not agree that the general designation of “ConVal witnesses” on that proposed, non-agreed-to list is appropriate or sufficient particularly within two months of trial.

5. This court ultimately stayed this litigation pending the outcome of the *ConVal* case. At that time, neither side had committed to additional witnesses being called at trial beyond the experts each side had disclosed, much less what impact any agreement to add witnesses within two months of trial would necessarily have on the trial schedule.

6. Consequently, the current state of affairs, as the State presently understands it, is that there are two witnesses in this case fairly disclosed by both sides. The State has not agreed to any other witnesses at this time, and has not had an opportunity to engage in discovery with respect to any other witnesses. The State did not agree to trial by ambush, and finds it difficult to believe that the plaintiffs did as well.

7. Thus, assuming discovery is closed and the present state of affairs remains unchanged, a two-week bench trial is, in the State’s view, not required.

8. Though the State could assert that plaintiffs’ counsel is also providing misleading information with respect to the present state of the litigation, it is perhaps more likely the case that the plaintiffs have a different perspective on the parties’ informal discussions up to this point than the State does. And the State certainly does not share the perspective, nor have any recollection, of agreeing that the parties may disclose witnesses at any time in this case, even after the discovery period has closed.

9. Consequently, at this juncture, the State has not agreed to extend the discovery schedule, has never agreed that the plaintiffs may disclose witnesses beyond the close of discovery deadline, and has never agreed that the plaintiffs may utilize at trial witnesses who were not disclosed within the discovery period or who plaintiffs placed on a proposed list hoping the State would assent to them.

10. Of course, all of this does not mean that the State would not enter into such an agreement and consider a proposal to modify the current case structure to allow the plaintiffs to propose, disclose, and call additional witnesses, and to allow the State to engage in discovery as to those new witnesses. But this Court directed the plaintiffs or the State to file a motion for reconsideration regarding the trial date within ten days of its order if the trial schedule needed to be modified or adjusted—a trial schedule predicated on its understanding that discovery was closed—and the State did so consistent with its current understanding of where this case presently stands.

11. Counsel for the State has no concern with accommodating Mr. Freeman's schedule.

12. Counsel for the State would suggest, however, that if the plaintiffs would like to proceed with more witnesses than the two experts disclosed within the discovery period, that the parties should meet and confer about a new case structure that builds in a new discovery period and submit that new case structure to the court so the court can reliably set a new trial schedule for a reasonable amount of time.

13. This would seem to be particularly prudent given that the plaintiffs appear to want to call numerous witnesses from the *ConVal* trial in addition to the experts they have already

disclosed and the *ConVal* trial lasted significantly longer than the two-week window this court has scheduled for trial.

### **B. Summary Judgment**

14. The plaintiffs appear to assert in their objection that this court did reject the broader argument the State made with respect to the plaintiffs' adequacy claim.

15. The State disagrees with that position.

16. Based on the State's reading of this court's order resolving its summary judgment motion, the court did not reach the State's broader challenge to the plaintiffs' adequacy claim because it construed the State's motion narrowly to seek summary judgment only on the ground that plaintiffs' adequacy claim seeks a funding level threshold of no less than the statewide per pupil average of all school expenditures.

17. Consequently, the court did not reach and resolve the broader challenge to the plaintiffs' adequacy claim, and it should do so.

18. In doing so, this court should correct the error made in the *ConVal* matter.

19. Specifically, in *ConVal*, this court should have approached the definition of an adequate education [RSA 193-E:2-a] as an act of statutory construction in the first instance by identifying from the statutory text and specifically-applicable regulations what the legislature has agreed to pay for and what it has not agreed to pay for.

20. The definition is intended to be a clear, objective legal standard that identifies the specific items the legislature has agreed to pay for and against which a court is actually able to measure the cost of an adequate education. *See Londonderry v. State*, 154 N.H. 153, 162 (2006) (holding that the definition of a constitutionally adequate education is "essential to all other issues, including the cost of a constitutionally adequate education" and that "[a]ny definition of

constitutional adequacy crafted by the political branches must be sufficiently clear to permit common understanding and allow for an objective determination of costs. Whatever the State *identifies* as comprising constitutional adequacy it must pay for.”).

21. Without a definition capable of serving as a clear, objective standard for the court to apply, the education funding jurisprudence is essentially non-justiciable and amounts to nothing more than judicial policymaking.

22. After identifying what items the legislature has agreed to pay for following a statutory construction analysis, the plaintiffs need to supply evidence to this court sufficient to create a genuine issue of material fact as to whether the amount RSA 198:40-a provides is sufficient to cover an adequate version of only those specific items the legislature has agreed to pay for through RSA 193-E:2-a. And RSA 193-E:2-a, combined with the specific regulations applicable to learning areas in that statutory definition, evince a clear legislative intent to pay only for instruction and materials for those specific classes.

23. The definition of an adequate education is not concerned with so-called “cost drivers,” as the plaintiffs put it. Such an analysis essentially renders the legislative definition of an adequate education meaningless. The legislative definition of an adequate education is concerned with paying only for what the definition specifically identifies, and the definition does not, as a matter of law and legislative intent, identify transportation, facilities, maintenance of facilities, capital costs, and many of the other items the plaintiffs wish were in the statutory definition, but are identified in different statutes or regulations.

24. The statutory definition of an adequate education [RSA 193-E:2-a], properly interpreted against only the regulations that correspond to the learning areas identified therein,

requires, with some minor variation, the legislature to pay for instruction and materials for those classes.

25. While it is a factual question as to what is required to provide instruction in science, K-12, or social studies, K-12, and what the cost of the instruction and materials for those classes may be, the collateral business expenses associated with running a school like transportation and facilities and maintenance are not covered, and the State has properly delegated those obligations to the municipalities.

26. The plaintiffs are essentially inviting this court to do what it did in *ConVal*, *i.e.*, to rewrite the statutory definition of an adequate education through the guise of a so-called “cost drivers” or business expenses analysis and thereby undermine the statutory scheme and the New Hampshire Supreme Court’s school funding jurisprudence and substitute its own definition of an adequate education for the legislature’s chosen definition.

27. In other words, the plaintiffs are inviting this court to engage in a judicial policymaking function that violates the separation of powers to an egregious degree and usurps the legislature’s authority to direct and set the fiscal educational policy of the State.

28. The statutory definition of an adequate education [RSA 193-E:2-a] leaves the obligations of the actual operation and maintenance of schools to the localities to fund, which allows municipalities to exercise a wide-range of local choice to choose the best school building(s) for their community, the best transportation routes and contracts for their communities, the best maintenance plan for their building(s), and the best administrative support structure for their school districts.

29. A so-called “cost drivers” or business expenses analysis, which no New Hampshire Supreme Court precedent endorses and which is not referenced in the statutory

definition of an adequate education or in RSA 198:40-a, is simply another way of saying that nearly everything a school district or school spends money on to operate must be read into the definition of an adequate education because the core instructional program set out in the definition cannot be provided without a locality incurring those other business costs.

30. This analysis functionally eliminates any division between State and local funding responsibility and makes the State fully responsible for reimbursing a locality for all of the expenses associated with operating a school. This analysis also renders the function of the legislative definition and its utility, as set forth in the *Londonderry* decision, meaningless, and thereby effectively overturns *Londonderry*. It is therefore an incorrect analysis as a matter of law and should be rejected in this case.

31. Consequently, to create a genuine issue of the material fact for trial, the plaintiffs had to tender evidence that, if credited, is capable of showing that the amount RSA 198:40-a provides to all school districts in the State is insufficient to cover an adequate version of the specific educational program that the legislature has agreed to pay for in RSA 193-E:2-a, I. Evidence that a single municipality, through its own legislative body, will not appropriate enough money to allow a school to operate, while it may give rise to legal rights or causes of action against that municipality, does not meet that standard. Similarly, evidence of transportation, infrastructure, and administrative costs that are not contained in the statutory definition of an adequate education as a matter of law and legislative intent do not meet this standard.

32. Accordingly, the plaintiffs' evidence on their broader adequate education claim is insufficient to meet the summary judgment standard, and entitles the State to judgment as a matter of law in its favor.

### C. Continued Maintenance of the Stay

33. This court stayed this case pending the outcome of the *ConVal* litigation.

34. The *ConVal* litigation is not over yet; the case is on appeal, the transcripts have come in, and its resolution by the New Hampshire Supreme Court will likely have a dispositive effect, one way or the other, on this litigation.

35. This is all but confirmed by the plaintiffs' apparent desire to call a number of witnesses from *ConVal* at trial in this case and their attempt to proceed under the same flawed cost-drivers theory that was central to the adequacy claim in *ConVal*.

36. It will amount to nothing more than a waste of time and resources for the judiciary, the executive branch, and the plaintiffs to try this case without knowing the result in *ConVal*. The result in that appeal might entirely moot this case. The result in that appeal may clarify the analytical framework and analysis that applies to adequate education claim in this case. And even if the *ConVal* matter was vacated and remanded to try base adequacy and differential aid together, without any further clarification as to the standards that should be applied on remand (an outcome that seems unlikely but possible), this court has said it would consolidate *ConVal* and this matter for trial at that stage given that they would then present the same case and the timing concerns with the original consolidation request will no longer exist.

37. Lifting the stay will realize none of these benefits, will ensure *ConVal* and this case remain on very separate tracks, and will likely result in the parties either having to retry this case if it remains viable after the *ConVal* appeal or in this case becoming entirely moot after the *ConVal* appeal.

38. It seems inadvisable and wasteful to proceed in this manner, and can only result at this juncture in the type of duplicative relief that the New Hampshire Supreme Court has already stayed, with no greater benefit to the individual plaintiffs and no greater public benefit.

39. Contrary to the plaintiffs' arguments, the State is not trying to have its cake and eat it too. The State is advocating for, in its view, the most sensible way to proceed. The State understands the plaintiffs are frustrated that their case did not proceed before *ConVal* and that they wish to merge their case with the *ConVal* case, but they cannot accomplish that result by ignoring court rules and procedures or by spurring the court to granting them partial summary judgment based on the non-final outcome of a different case. And their frustration with that result does not justify departing from the rational procedure of leaving the stay in place until the *ConVal* appeal resolves.

40. Forcing the wasteful expenditure of state resources, including scarce judicial branch and executive branch resources, to accomplish nothing more than what already exists for the individual plaintiffs and the public, and ultimately to obtain a result that may be either incorrect or otherwise mooted, is not, in the State's view, the way in which this litigation should proceed, and, in the event it does not prevail, the State will resist any subsequent requests for attorney's fees on these bases if this matter is required to proceed.

41. Accordingly, the State would request that the court reconsider its stay ruling and leave the stay in place pending the outcome of the *ConVal* appeal.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: May 21, 2024

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**CERTIFICATE OF SERVICE**

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

Date: May 21, 2024

/s/Anthony J. Galdieri