The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

No. 219-2015-CV-312

CITY OF DOVER,
THE DOVER SCHOOL DISTRICT, and
SAU #11

v.

STATE OF NEW HAMPSHIRE

ORDER

The City of Dover, the Dover School District, and its school administrative unit (SAU #11) filed this suit claiming that a statutory cap on education funding sent to cities and towns (RSA 198:41, III (b) (2015 supp.) denies them money to which they are entitled under the state constitution. To the extent the statutory cap has deprived and will deprive them of the full amount of their education grant, they seek a (1) declaratory ruling that the law is unconstitutional as applied to them, (2) a permanent injunction against its application going forward when it reduces their grant amount, (3) a monetary remedy in the form of a constructive trust on the funds that were due, but not paid, and (4) attorneys' fees.

The State does not contest the claim of constitutional infirmity or the request for an injunction. *See* State's Objection to Pl. Mot. Summ. J., p. 1 (doc. no. 26). The State Senate President and the Speaker of the House of Representatives were permitted to intervene, therefore, in order to make the case in defense of the law. The plaintiffs and the intervenors

filed cross-motions for summary judgment on the constitutional issue, which is addressed first.

The legal and factual background is not in dispute. New Hampshire school children have a constitutional right to an adequate education. The "'Encouragement of Literature" clause in Part 2, Article 83 of the New Hampshire Constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." *Claremont School Dist. v. Governor* 138 N.H. 183, 184 (1993) ("*Claremont I*"). The legislature has two responsibilities that give effect to the right: first, to define a constitutionally adequate education and second, to pay for it. *Londonderry School Dist. v. State*, 154 N.H. 153, 162 (2006). *See Claremont I*, 138 N.H. at 184.

A "constitutionally adequate education" is defined in RSA 193-E:2-a, with RSA 198:40-a identifying the annual per pupil cost of providing that education. To convey the appropriate state funding to each school district, the state Department of Education establishes a total education grant for each municipality based on the per pupil cost, less the local education tax warrant for each municipality as determined by the Department of Revenue Administration. RSA 198:41. The plaintiffs do not challenge any of these legislative determinations. The dispute is over the next part of the law, which in Dover's case has limited how much of the allotted total education grant it actually receives.

Beginning with fiscal years 2009 and 2010, the law directs the department of education not to "[d]istribute a total education grant on behalf of all pupils who reside in a municipality that exceeds that municipality's total education grant for the 2009 fiscal year by more than 15 percent." Dover was unaffected by the limit in its first year, because it's pre-cap education grant for that year was not more than fifteen percent of its grant for the prior year. But in fiscal year 2010, the cap caused Dover to receive a lesser grant amount than it would have received before applying the cap. It continued to receive reduced grants when the cap was set at 105.5% and then at 108 percent. As a result, Dover says its adequacy grants for fiscal years 2009 through 2016 were cut by a total of $14,297,423.00.

The intervenors challenge the plaintiffs' standing to even bring this case. It is fundamental to every lawsuit that "[f]or a court to hear a party's complaint, the party must have standing to assert the claim." *Eby v. State*, 166 N.H. 321, 334–35 (2014). The standing requirement applies to declaratory judgment actions under RSA 491:22, and requires a claim of "a present legal or equitable right or title." RSA 491:22, I. So, "[a] party will not be heard to question the validity of a law, or any part of it, unless he shows that *some right of his* is impaired or prejudiced thereby." *Avery v. New Hampshire Dept. of Educ.*, 162 N.H. 604, 607–08 (2011) (quoting *Baer v. New Hampshire Dept. of Educ.*, 160 N.H. 727, 730 (2010)). "Simply stated, a party has standing to bring a declaratory judgment action where the party alleges an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." *Baer*, 160 N.H. at 731.

The City of Dover is a "single municipal corporation with powers for municipal and school purposes, including all powers of a school district conferred by law." DOVER CITY CHARTER, Article C4-1. The City, through its component (and co-plaintiff) school district and SAU, "carry out the mandates of the State's education laws." *Claremont School Dist. v. Governor*, 142 N.H. 462, 469 (1997) (quotation omitted). *See* RSA 189:1-a (2015 supp.) (school board responsible for providing "elementary and secondary education to all pupils who reside in the district.")

"[T]he New Hampshire Constitution imposes solely upon the State the obligation to provide sufficient funds for each school district to furnish a constitutionally adequate education to every educable child," and may not shift any of this constitutional responsibility to local communities." *Opinion of the Justices*, 145 N.H. 474, 476-77 (2000). Whenever the cap reduces Dover's total education grant, the plaintiffs lose state funds the legislature said are necessary to provide a constitutionally adequate education to children in the district. This impairs the plaintiffs' ability to carry out their duty to furnish such an adequate education. Under this view, the plaintiffs have standing to challenge the school funding formula. *See Committee for Educational Equality v. State*, 294 S.W.3d 477, 485 (Mo. 2009) (finding standing for school districts on same basis). *Cf. Ladd v. Higgins*, 94 N.H. 212, 214 (1946) (school district's "statutory power to sue includes the right to maintain actions to recover property in which the school district has an interest.")

The next issue is whether, as the intervenors maintain, the cap on the amount of education grants is part and parcel of the legislature's determination of what it costs to provide a constitutionally adequate education. They emphasize that RSA 198:41, III should be read in conjunction with RSA 198:40-a, which sets the adequacy cost per pupil.

It is true that all statutes dealing with the same subject matter must be considered in interpreting any one statute. *Kenison v. Dubois*, 152 N.H. 448, 452 (2005). The "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Id., quoting State v. Whittey*, 149 N.H. 463, 467 (2003).

In response to rulings by the State Supreme Court, the legislature enacted RSA 198:40-a, I , which established that "the annual cost of providing the opportunity for an adequate education as defined in RSA 193-E:2 shall be $3,450 per pupil attending a public school. . . ." After making upward adjustments for differentiated aid (additional monies provided for students with various needs, *see* RSA 198:40-a, II-III), "[t]he sum total calculated under paragraphs I-III of this section shall be used to determine the cost of an adequate education," with the cost allocated "for each municipality by totaling the cost of an adequate education as determined in RSA 198:40-a, I-III for all children who reside in that municipality." RSA 198:40-a, IV (a), (b).

What an adequate education costs is established in RSA 198:40-a. What the department of education is to distribute by way of education grants to meet the cost is

addressed in RSA 198:41. The department determines the grant amount by taking the per pupil cost calculated under RSA 198:40-a, I-III. Next, there is subtracted from that sum as much as will be covered by local tax revenue determined by the commissioner of revenue administration. RSA 198:41, I (a), (b). The cap kicks in after the grant amount is set. The department is directed to "not distribute a total education grant on behalf of all pupils who reside in a municipality that exceeds 108 percent of the total education grant distributed to such municipality in the previous fiscal year." RSA 198:41, III (b). The cap moves to 160 percent for the fiscal year that began on July 1, 2016. *Id.*

Reading the sections together, RSA 198:40-a sets the cost of an adequate education, while RSA 198:41 describes the mechanism by which the adequacy cost is to be paid. Paragraph III (b) of RSA 198:41 has no bearing on the cost of an adequate education, because the cost is what RSA 198:40-a says it is. Neither does the percentage cap determine what grant amount is necessary to pay for a constitutionally adequate education. It operates only to set a limit on how much of that cost will be paid by the state.

The intervenors contend that even if the grant money Dover actually receives does not meet the legal definition of the cost of a constitutionally adequate education (as defined by the legislature), there is no evidence in the case that the percentage limit on the grant deprived Dover schoolchildren of the features of the education the legislature deemed adequate. They cite the legislature's prerogative to appropriate the funds it determines are necessary, and argue that it is at least implicit that the legislature found the funds available

to Dover under the cap were sufficient, notwithstanding its other determinations of adequacy. But one can only go by what the legislature has said. It sought to meet its constitutional obligations by identifying the qualities of a constitutionally adequate education and then determining what it cost each municipality to provide it. In instances when the State does not give the amount of aid the legislative branch says is necessary to offer the education it has defined, it puts the burden on the municipality to find other financial means by which to offer a constitutionally adequate education under state law.

The next question is how to review the challenged language in determining whether it is unconstitutional. The plaintiffs and the intervenors disagree about the degree of scrutiny the law deserves, with the plaintiffs advocating for strict scrutiny and the intervenors saying the rational basis test is sufficient. A rational basis test requires only that the legislation be "rationally related to a legitimate governmental interest," while strict scrutiny means that legislation restricting fundamental rights must "be necessary to achieve a compelling governmental interest and narrowly tailored to meet that end." *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 759 (2007) (*quoting Gonya v. Commissioner, New Hampshire Ins. Dept.*, 153 N.H. 521, 538 (2006) (Broderick, C.J., concurring specially)).

"[A] constitutionally adequate public education is a fundamental right." *Claremont School Dist. v. Governor*, 142 N.H. 462, 473 (1997). "[G]enerally, when governmental action impinges upon a fundamental right, such matters are entitled to review under strict judicial

scrutiny." *Akins v. Secretary of State*, 154 N.H. 67, 71 (2006) (citing *Claremont School Dist.*, 142 N.H. at 472). *See Follansbee v. Plymouth Dist. Court*, 151 N.H. 365, 368 (2004) (applying rational basis test where no fundamental right implicated). Neither side argues for the use of an intermediate test. *See Guare v. State*, 167 N.H. 658, 663 (2015).

Since the cap pertains to a fundamental right, the test to apply is that of strict scrutiny. The intervenors suggest reasons for the cap, but there is no evidence in the record to support their assumptions. And in any event, they do not argue their reasons are "compelling" as opposed to simply "rational."

The upshot is that having determined the cost of an adequate education, the statute applying a percentage cap to Dover's grant operates to prevent the State from paying for the cost of that education. Curbing the amount of the grant deprives Dover of the full amount of what the legislature deemed necessary to sufficiently fund the opportunity for an adequate education in Dover. When this occurs, the school district is left short of funds to pay the cost of an adequate education and either must make do with the amount of state aid allotted or make up the shortfall on its own. Either outcome violates Part II, Article 83, because the State "has the exclusive obligation to fund a constitutionally adequate education," and "may not shift any of this constitutional responsibility to local communities." *Opinion of the Justices*, 145 N.H. at 476. Accord, *Londonderry School District SAU No. 12 v. State*, 154 N.H. 153, 162 (2006) ("Whatever the State identifies as comprising constitutional adequacy it must pay for. None of that financial obligation can be shifted to

local school districts, regardless of their relative wealth or need.") So, the cap is unconstitutional in instances when it causes the plaintiffs to receive less than the full grant amount. This is so despite the strong presumption against declaring statutes unconstitutional. *New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 385 (2011) (quotation omitted).

The intervenors say such a ruling violates the separation of powers in N.H. CONST. Pt. I, Art. 37, since it intrudes on the legislature's sole authority to appropriate funds. They cite *City of Camden v. Byrne*, 411 A.2d 462 (N.J. 1980) as an example in which the Supreme Court of New Jersey came to that conclusion. But in a later case the same court distinguished *City of Camden* and found that state's Appropriations Clause "creates no bar to judicial enforcement when, as here, . . . the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation." *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1038 (N.J. 2011).

A court's place in such matters is "to protect constitutional rights and in doing so 'to support the fundamentals on which the Constitution itself rests.'" *Claremont School Dist. v. Governor*, 144 N.H. 210, 212 (1999) (*quoting Trustees & c. Academy v. Exeter*, 90 N.H. 472, 487 (1940)). Here, "[t]he judicial role is limited to deciding whether certain public educational systems, as presently constituted and funded, satisfy an articulated constitutional standard." *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 224 (Conn. 2010). To say a law is unconstitutional does not intrude on the legislative function.

The next issue is what to do about the law's consequences. The plaintiffs and the State entered into a stipulation under which the State agreed

> that the rulings ultimately issued . . . will be applied to all education adequacy payments made on or after September 1, 2015. In the event that the City is successful in obtaining a . . . permanent injunction against the cap required by RSA 198:41, III (b), the parties agree that the State will make a supplemental payment equal to the sum total of all funds withheld in any education adequacy payments made on or after September 1, 2015, because of the application of the cap. . . .

Agreement and Stipulation (doc. no. 8) ¶ 4. In addition to payments going forward, however, the plaintiffs seek compensation for past funds wrongly withheld. Under other circumstances, the plaintiffs' could sue the State for damages equal to the difference between the grant it was due and the grant it received. But this course is barred by sovereign immunity, as the plaintiffs acknowledge. *See* Pl. Memorandum in Support of Mot. Summ. J., p. 12; *Lorenz v. N.H. Admin. Office of the Courts*, 152 N.H. 632, 635 (2005). Their theory of recovery is that a constructive trust should be imposed on the funds not expended.

Education grants are distributed from the education trust fund. RSA 198:39. The State moves to dismiss the constructive trust claim on the basis that the education trust fund has a negative balance now and historically. So, it says, there are no specific funds to which a constructive trust may attach. The plaintiffs do not take issue with the State's description of the trust account's status. They point, however, to state law that authorizes the governor "to draw a warrant from the education trust fund to satisfy the state's obligation under this section." RSA 198:42, II. It continues, "[s]uch warrant for payment

shall be issued regardless of the balance of funds available in the education trust fund." It contemplates that the balance in the education trust fund may be less than zero, since a reporting requirement is imposed in such instances. *Id.* The plaintiffs say this provision shows that funds for education grants are not limited to those in the education trust fund, but also may be drawn from the state's general fund or the so-called "Rainy Day Fund" established by RSA 9:13-a.

"The device of a constructive trust is based upon principles of restitution, to prevent unjust enrichment of one person at the expense of another." *Cornwell v. Cornwell,* 116 N.H. 205, 208–09 (1976).

> [I]t is a court-imposed device, essentially remedial in purpose, to achieve equitable restitution "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great–West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 213 (2002).The central objective is to prevent unjust enrichment, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(1) (2011)[.]

Zimmermann v. Epstein Becker and Green, P.C., 657 F.3d 80, 83 (1st Cir. 2011).

As a result of the percentage cap, funds were not appropriated for the full amount of Dover's education grant and the Governor had no basis to draw a warrant to fund its particular grant in full. So, all that can be said is that the State did not pay the entire grant that Dover was due. There are no specific funds in the State's possession devoted to education grants that the State declined to pay over and continues to hold. And "for restitution to lie in equity, the action generally must seek not to impose personal liability on

the defendant, but to restore to the plaintiff *particular* funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (emphasis added). *Cf. Connecticut General Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988) ("There can be no recovery ... where all that can be shown is enrichment of the trustee. [The trust property] must be clearly traced and identified in specific property. It is insufficient to show that trust property went into the general estate and increased the amount and value thereof.") (quotation omitted).

An "obligation to fund," is not subject to a constructive trust. *Briggs v. Goodyear Tire & Rubber Co.*, 79 F.Supp.2d 228, 238 (W.D.N.Y. 1999). Where there was no appropriation of the grant funds at issue and where the governor did not draw a warrant that identified funds to make up the difference, there is no property on which to impose a trust. The State's motion to dismiss this count of the complaint is granted.

The final issue is whether the plaintiffs ought to be awarded their attorney's fees in bringing this case. Typically, plaintiffs are responsible for their own attorneys' fees, but there is an exception to that rule "where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well." *Claremont School Dist. v. Governor*, 144 N.H. 590, 595 (1999). *See Bedard v. Town of Alexandria*, 159 N.H. 740, 744 (2010). The plaintiffs move that the State be ordered to pay their attorneys' fees on this basis.

Even if the rulings on the constitutionality of the cap and the injunction against it substantially benefit the plaintiffs, the State contends the rulings affect only a "handful" of other municipalities impacted by the cap. And this part of the case was not one in which the plaintiffs had to overcome opposition from the State. There is no evident, broad public benefit from the matters on which the plaintiffs' prevailed, so the request for attorney's fees under this exception is denied.

In summary, the plaintiffs' request for a declaratory ruling that the percentage cap is unconstitutional when it operates to reduce the full amount of the statutory grant is GRANTED. Their request for a permanent injunction against application of the law in that circumstance is GRANTED. The claim that they are entitled to a constructive trust on state funds is DENIED, as is their application for attorney's fees.

The rulings transfer into the following dispositions on the pending motions. The plaintiffs' motion for summary judgment (doc. no 23) is GRANTED in part and DENIED in part. It is *granted* as to Counts I and II of the complaint (for a declaratory judgment and permanent injunction respectively) and *denied* with respect to Count III (constructive trust).

The Intervenors' motion for summary judgment on Counts I and II of the complaint (doc. no. 27) is DENIED. Their motion for summary judgment on Count III is DENIED as

moot, in light of the State's motion to dismiss Count III (doc. no. 15) which is GRANTED.

SO ORDERED.

DATE: SEPTEMBER 2, 2016

BRIAN T. TUCKER
PRESIDING JUSTICE