STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
No. 08-E-456

Hudson School District

v.

State of New Hampshire, State Department of Education, and
Commissioner Lyonel B. Tracy

ORDER ON PETITIONER'S REQUEST FOR A PRELIMINARY INJUNCTION

The petitioner, Hudson School District, has filed a bill in equity against the respondents, the State of New Hampshire, the Department of Education, and Commissioner Lyonel B. Tracy (collectively "the State"), to enjoin the respondents from (1) requiring the petitioner to submit an implementation plan for public kindergarten to the Commissioner; (2) requiring the petitioner to implement public kindergarten; and (3) penalizing the petitioner for not implementing public kindergarten while this litigation is pending. The respondent objects. The Court held a preliminary hearing on March 18, 2009. For the following reasons, the petitioner's request for temporary injunctive relief is DENIED.

Background

For the purposes of this case, the Court finds the following relevant facts. In 2007, the New Hampshire Legislature mandated that school districts provide public kindergarten education. The legislation required each school district not providing kindergarten during the 2008-2009 school year to submit a kindergarten implementation plan by December 1, 2008 outlining how a kindergarten program would be developed for the 2009-2010 school year. The legislation also included funding for the requisite construction and operational costs associated

with the implementation of mandatory public kindergarten. On December 1, 2008, the petitioner sent a letter to Commissioner Tracy explaining that it was challenging the constitutionality of the legislation. The petitioner filed a petition in this Court for declaratory relief and preliminary and permanent injunctive relief on December 24, 2008, arguing that mandatory kindergarten is an unfunded mandate in violation of Part I, Article 28-a of the New Hampshire Constitution.

Analysis

The issuance of an injunction is an extraordinary remedy, appropriate only where there is an immediate danger of irreparable harm to the petitioner, and there is no adequate remedy at law. Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). "[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (quotation and ellipsis omitted). In order to obtain preliminary injunctive relief, the petitioner must demonstrate: (1) a present threat of irreparable harm; (2) there is no adequate remedy at law; (3) a likelihood of success on the merits; and (4) the public interest would not be adversely affected if the Court granted the preliminary injunction. Id. at 14-15.

The thrust of the petitioner's argument is that the funding provided by the legislature is insufficient to cover the costs of implementing a kindergarten program. Thus, the petitioner claims that it will suffer irreparable harm by having to supplement State funding and is also likely to succeed on the merits. According to the petitioner, it will have to raise, appropriate, and expend a significant amount of money above what the legislation provides in construction and operational costs. However, the State challenges the accuracy of this assertion. First, a construction grant covering "100 percent of the actual cost of the design and construction of a

basic code compliant kindergarten facility" is available under RSA 198:15-r, I(b) (Supp. 2008). The petitioner claims that it is instead going to have to build a better quality facility, one that is more than just "basic" and "code compliant," because Mr. Ed Murdough of the Department of Education encouraged districts to do so. If a district decides to build a better quality facility, only 75% of the cost of construction is covered under the statute. RSA 198:15-r, I(a). While the petitioner may be feeling some pressure to forgo the 100% funding option under the statute, it is still available, contrary to the petitioner's argument.

The petitioner also points out that even under the 100% funding option it is required to pay the cost of "site acquisition and core facilities." RSA 198:15-r, I(b). However, the respondent maintains that the petitioner already has land adjacent to its current elementary schools on which the kindergarten facilities can be built. Further, the respondent argues that there will be no expense for "core facilities" because the already existing elementary schools have the necessary facilities. Because the petitioner has not countered the respondent's argument, the Court will accept that the petitioner will bear no costs for site acquisition or for core facilities. Lastly, the cost of initial furniture, fixtures, and equipment for the new kindergarten facilities are also to be paid by the State pursuant to statute. RSA 198:15-r, III. As a result, the Court is not persuaded that the petitioner will be required to pay any construction costs for its kindergarten classrooms.

As for operational costs, the petitioner claims that it will only receive $1,200 per pupil even though the State has determined that the appropriate funding per pupil for the 2009-2010 school year is $3,450. At $1,200 per pupil, the petitioner maintains that it will have to provide additional funds in order to operate the kindergarten program. The respondent argues that the $1,200 figure located in RSA 198:48-b, II was for 2008 kindergarteners and that the $3,450

figure will take effect beginning in the fall of 2009. RSA 198:40-a, I. Thus, starting in 2009, kindergarten students will be funded under the same formula as all other students. However, the respondent acknowledged at the hearing that each kindergarten student will be calculated at half of the $3,450 figure, $1,725, because the kindergarten program is half-day. The petitioner nevertheless maintains, based on information provided to the district's superintendent, that $1,200 is the allotment per kindergartener for next year. But, even assuming the $1,725 figure is correct, the petitioner argues that it will be required to provide extra funds for the program to actually operate.

According to statute, the petitioner will receive $1,725 per kindergartener, and, as a result, the Court believes that the relevant figure is $1,725. Also, because $1,725 is representative of the funding formula for all students ($1,725 is half of $3,450—the amount allocated to each full-time student), it is unlikely that it is insufficient. To say otherwise would suggest that the legislature's entire education funding scheme is inadequate—a claim that the petitioner argues it is not making. Because the legislature has funded the operational costs of kindergarten to the same degree as other grade levels, the Court is not convinced that the petitioner will be required to use its own funds to run the kindergarten program.

In light of the above analysis, the Court finds that the petitioner has not met its burden to demonstrate either irreparable harm or likelihood of success on the merits.[1] There is no irreparable harm because the petitioner has not shown that it will be required to expend any of its own funds to either construct kindergarten facilities or operate the program. Further, it is important to recognize that if the injunction is granted, kindergarten-aged children in the Hudson

[1] The petitioner, citing several federal cases, argues that the standard for irreparable harm is relaxed when a constitutional right is being threatened or impaired. However, the standard is only loosened when the party seeking the injunction is able to show a likelihood of success on the merits. See Elrod v. Burns, 427 U.S. 347, 373-74 (1976). Because the petitioner has not made such a showing, a finding of irreparable harm is not mandated.

School District will not be provided with the education required by the legislature. See UniFirst, 130 N.H. at 13, 15 (balancing alleged harm against the injury that would result from granting the injunction). Additionally, the State represented at the hearing that soon children will be prevented from matriculating into high school unless they successfully completed kindergarten. Therefore, on balance, the petitioner has not demonstrated irreparable harm.

To succeed on the merits, the petitioner will have to establish that the legislature's addition of kindergarten is unconstitutional as an unfunded mandate under Part 1, Article 28-a of the New Hampshire Constitution. Adopted in 1984, Article 28-a provides:

> The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

N.H. CONST. pt. I, art. 28-a (emphasis added). "In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds. In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." N.H Ass'n of Counties v. State, ___ N.H. ___ (Jan. 16, 2009) (slip op. at 3) (citation omitted). Given this presumption of constitutionality and the fact that it appears that the legislature provided all the necessary funding for the kindergarten program, the petitioner is unlikely to succeed at trial.[2]

Lastly, the Court will briefly discuss whether the petitioner has an adequate remedy at law and the degree to which the public interest will be adversely affected if the injunction is granted. Turning first to whether there is an adequate legal remedy, the respondent argues, and the Court agrees, that if the petitioner is required to use its own funds to implement public

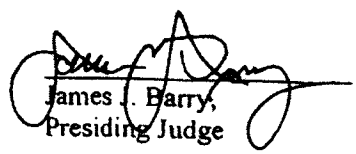
[2] On March 10, 2009, the voters of the Hudson School District rejected the idea of funding public kindergarten. However, this is inconsequential if the program is fully funded by the State.

kindergarten, the harm can be remedied by increasing the petitioner's construction and adequacy grants. Further, because the program is at least somewhat funded by the State, this is not a situation where the petitioner is going to have to absorb the entire cost while waiting for the litigation to come to an end. Finally, the impact on the public interest is significant. While preserving the *status quo* does not seem outrageous at first glance, it would mean that a portion of New Hampshire schoolchildren will not receive the education the legislature mandated. Additionally, because there is at least some concern that kindergarten is going to be a prerequisite for admission to high school, there is a risk that the students, as well as society as a whole, will be harmed by the injunction the petitioner seeks. Thus, all four factors suggest that the petitioner's request for a preliminary injunction should be denied.

For the foregoing reasons, the petitioner's request for a preliminary injunction is DENIED.

So Ordered.

Date: March 20, 2009



James J. Barry,
Presiding Judge