



GRANTED

THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELAWARE PUBLIC)	C.A. No. 2018-0029-VCL
SCHOOLS LITIGATION)	STATE TRACK
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SETTLEMENT STIPULATION AND [PROPOSED] ORDER

WHEREAS, the Delaware Constitution of 1897 provides in Article X, Section 1 as follows:

The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend public school unless educated by other means.

WHEREAS, on January 16, 2018, Delawareans for Educational Opportunity and the NAACP Delaware State Conference (“Plaintiffs”) initiated this action by filing a complaint against, *inter alia*, Governor John Carney, Secretary Susan Bunting, and Treasurer Ken Simpler¹ in their official capacities (collectively “State Defendants” and together with Plaintiffs, the “Parties”), alleging, *inter alia*, that the State of Delaware does not comply with the Education Clause of the Delaware Constitution because, as a result of its system of education funding and governance,

¹ After the Complaint was filed, Colleen Davis succeeded Ken Simpler in the Office of State Treasurer, and has been substituted as a party defendant.

the state does not provide all low income children, children with disabilities and children whose first language is not English with an adequate education;

WHEREAS, the term “Disadvantaged Students” as used herein refers to students who are considered to be low income (“Low Income students”) or “English Learners,” as defined by the Delaware Department of Education in Fiscal Year 2020, and students with disabilities;

WHEREAS, the State Defendants moved to dismiss the Complaint;

WHEREAS, the Court denied the motion, and fact discovery followed pursuant to the Rules of the Court of Chancery;

WHEREAS, following extensive paper discovery, fact witness depositions, the exchange of expert reports, and the deposition of witnesses designated as experts, the parties agreed to engage in mediation for a number of days before the Honorable Joseph R. Slights, III, Vice Chancellor of the Court of Chancery of the State of Delaware;

WHEREAS, the parties, having different expectations for the outcome of this action but a joint recognition of the risks of litigation and the benefit to themselves, the students attending Delaware public schools, and the Delaware public, of agreeing upon a settlement order that may be presented to the Court for approval, have in good faith negotiated the terms of this Settlement Stipulation and Order in order, *inter alia*, to provide additional funding for Disadvantaged Students.

IT IS NOW HEREBY STIPULATED AND AGREED, this _____ day of October, 2020, as follows:

1. All proceedings in this Action (except proceedings as may be necessary to carry out the terms and conditions of this Settlement Stipulation and Order) are hereby stayed until further order of the Court.

2. The Parties agree that this Settlement Stipulation and Order and its terms may not be used as evidence in this Action nor as an admission of fact or law by either party, except as necessary to enforce its terms.

3. In consideration of the Parties' agreements and commitments as set forth herein, the Governor agrees to make the following proposals to the General Assembly of the State Delaware:

A. Budget and Legislative Proposals: Opportunity Funding

i. The Governor will propose a budget to the General Assembly for Fiscal Year 2022 that includes an appropriation of not less than \$35 million for Opportunity Funding for the 2021-2022 School Year.

ii. The Governor will propose a budget to the General Assembly for Fiscal Year 2023 that includes an appropriation of not less than \$35 million in Opportunity Funding for the 2022-2023 School Year.

iii. The Governor will propose a budget to the General Assembly for Fiscal Year 2024 that includes an appropriation of not less than \$50 million in Opportunity Funding for the 2023-2024 School Year.

iv. The Governor will propose a budget to the General Assembly for Fiscal Year 2025 that includes an appropriation of not less than \$60 million in Opportunity Funding for the 2024-2025 School Year.

v. The Governor will propose legislation, to be effective beginning in the Fiscal Year 2023, amending the Delaware Code, Title 14, Chapter 17 to make Opportunity Funding permanent by providing that Opportunity Funding Program shall be an appropriation covered by that Chapter in an amount consistent with the appropriations specified in the foregoing subparagraphs and that funds appropriated pursuant to that new statutory section shall be indexed after Fiscal Year 2025 to grow with the increasing enrollment of Low Income students and English Learner students. The Fiscal Year 2025 per pupil allotment shall be calculated as follows: \$55 million divided by the sum of Low Income student enrollment and English learner enrollment. In each subsequent year, the total Opportunity Funds shall be equal to at least the Fiscal Year 2025 per pupil amount multiplied by the sum of each subsequent years Low Income student enrollment and English Learner enrollment, plus at least \$5 million for mental health and reading supports to schools as specified in Subparagraph 3.A.vii below. The proposed legislation shall provide

that Opportunity Funding shall be used to enhance services and provide additional supports to English Learner and Low Income students. Expenditures may include, but are not limited to, personnel dedicated to improving reading comprehension and math proficiency, or who provide additional wrap-around services or mental health supports.

vi. The Governor’s proposed legislation shall include a requirement that beginning in Fiscal Year 2023, local education agencies (“LEAs”) shall be required to prepare an annual report detailing how each school within the LEA spent its Opportunity Funding each year and total expenditures of Opportunity Funds by school. This report shall be submitted to the Delaware Department of Education (“DDOE”), and made publicly available on the LEA and the DDOE website.

vii. The budget recommendations and legislation proposed by the Governor, as set forth in the subparagraphs above, shall provide that \$5 million of the Opportunity Funds identified above shall go to schools with 60% Low Income students and/or 20% English Learner students for mental health or reading supports. For avoidance of doubt, the \$5 million referenced in this subparagraph shall be part of the Opportunity Funds requested as set forth above and shall not be in addition to those funds. If the budget recommendations proposed by the Governor or appropriations made by the General Assembly increase beyond this \$5 million

allotment for mental health and reading supports to schools with substantial populations of English Learner and Low Income students, they shall not reduce the per pupil Opportunity Fund allocations set forth herein.

viii. The proposed Opportunity Funding legislation shall include a provision that, effective beginning Fiscal Year 2023, each local school board shall allocate Opportunity Funding to schools in its district such that not less than 98% of Opportunity Funding generated by a school shall be allocated to that school and that a local school board that wishes to allocate the funds in a different manner would be required to vote in public session to modify this requirement and state an explanation for the request.

ix. The proposed Opportunity Funding legislation shall provide for equal per pupil allocation on account of Low Income and English Learner students by Fiscal Year 2025 and shall provide that, as is currently the case, both allocations shall be made on account of a student who is both Low Income and an English Learner. This change in per pupil allocation shall not change the amount of Opportunity Funds for each year as provided above. Changes in the per pupil allocation prior to Fiscal Year 2025 shall not be such that there is a decrease of the per pupil amount for students in a category (English Learner, Low Income student, or both) in any year from the per pupil amount for students in that category in the prior fiscal year.

x. The proposed legislation shall provide that the LEAs may not supplant otherwise available funding with Opportunity Funding.

xi. The Governor will not propose a budget that decreases funding of existing programs created or primarily used for the benefit of Disadvantaged Students in pre-k through grade 12 for the purpose of providing Opportunity Funding as set forth above.

B. Legislative Proposal: K-3 Basic Special Education

The Governor will propose legislation via budget epilogue to be effective beginning School Year 2023-2024, to change the funding structure for basic special education students in grades K-3 to be the same as the funding structure for basic special education students in grades 4-12.

C. Creation of an Educational Ombudsperson

The Governor, in accordance with the bidding process required by Delaware law, will create, and propose in the budget to fund, an Ombudsperson program in each county to assist students and their families. The program shall begin in Fiscal Year 2022. The Ombudspersons shall focus on non-legal interventions with school districts to resolve disputes or complaints concerning disparate discipline, inequitable access to school programs, or otherwise different or unfair treatment of students. The Ombudspersons will be available to act as non-lawyer advocates for students and their families in any proceedings conducted by schools or local, state

or federal education agencies. The program will be bid out to an independent non-state organization in accordance with the State’s bidding laws and regulations. The successful bidder may, if it determines it to be appropriate and desirable, seek pro bono or subcontract for legal services. The Parties or their designees will meet and confer concerning the specific elements and allocation of funds for this program.

D. Budget Proposal: Early Childhood Assistance Program (“ECAP”)

The Governor will propose budgets to the General Assembly for Fiscal Years 2024 and 2025 that include appropriations of not less than \$12.2 million annually for ECAP. The proposal shall provide that at least fifty percent of the additional Early Childhood Education seats made possible by the funding above the existing \$6.1 million level shall be allocated to non-LEA community based early care and education programs.

E. Budget Proposal: Teachers in High Needs schools

The Governor will propose budgets to the General Assembly for Fiscal Years 2023, 2024 and 2025 that include appropriations of at least \$4 million annually to support enhanced teacher recruitment and retention in high-needs schools. The \$4 million appropriation shall be in addition to the amount of funds allocated for these purposes in Fiscal Year 2021.

F. Independent Funding Assessment

The Governor will include sufficient funding in his proposed budgets for a holistic assessment of the Delaware public school system financing to be completed by January 2024. The assessment shall consider total funding levels, the mechanisms for raising and distributing education revenue at the state and local level, and make recommendations for improvements to equity and efficiency. The legislation proposed by the Governor shall provide that (a) the assessment shall be done by an organization that is independent of the State, following State bidding laws and regulations; and (b) the Assessment shall be provided to the Governor, the Secretary of Education, Speaker of the House, Senate Pro Tempore and the House and Senate Education Committees. The Parties agree that the assessment shall not obligate the State to take any action and is limited to providing information concerning potential modifications and improvements to the financing of Delaware's public school system.

G. Certificate of Necessity Equity Statement

The Department of Education will amend 14 Delaware Administrative Code, Regulation 401 to require school districts to provide an Equity Statement in connection with a request of Issuance of a Certificate of Necessity for capital construction and major renovations. The Equity Statement shall identify demographic information (race, Low Income, English Learner) of the students who

are expected to attend a new school, use a new facility, or benefit from a major renovation and state how the capital project impacts equitable distributions of new and renovated buildings throughout the school district.

4. The Governor will use his best efforts to persuade the Delaware General Assembly to adopt the proposals set forth in Paragraph 3, above, and will sign such legislation if passed by the General Assembly substantially in the form proposed.

5. The Parties acknowledge that the Governor's recommended budget is a proposed budget by the Governor to the Delaware General Assembly, and the Governor's recommended budget is not binding on the Delaware General Assembly. The parties acknowledge that the Delaware General Assembly determines the final budget for the State of Delaware.

6. The Parties agree that if the Delaware General Assembly passes legislation substantially in the form proposed by the Governor during the January 1, 2021 to June 30, 2021 legislative session, pursuant to Paragraph 3 of this Settlement Stipulation and Order, Plaintiffs will dismiss this Action by August 15, 2021 without prejudice, subject to their rights in Paragraphs 7, 8, 10 and 13 below. The Parties further agree that each side shall bear its own costs and attorneys' fees.

7. The Parties agree that if, by July 31, 2021, the Delaware General Assembly does not pass legislation substantially in the form proposed by the Governor during the January 1, 2021 to June 30, 2021 legislative session pursuant

to this Settlement Stipulation and Order, subject to Paragraph 9 below, Plaintiffs may apply to the Court for an order scheduling a trial and time for discovery relating to the claims that will be tried.

8. If this Action is dismissed pursuant to Paragraph 6 of this Settlement Stipulation and Order, subject to Paragraph 9 below, Plaintiffs may apply to the Court to reinstate the Action and for an order scheduling a trial and time for discovery relating to the claims that will be tried in the following circumstances:

A. The Governor does not timely propose the budget appropriations provided for in Paragraph 3 of this Settlement Stipulation and Order or Delaware General Assembly does not timely pass the budget appropriations proposed by the Governor for Fiscal Years 2022-2025.

B. In Fiscal Year 2026 and thereafter, the General Assembly does not pass either (i) budget appropriations necessary for Opportunity Funding consistent with the formula set forth in Paragraph 3.A.v. of this Settlement Stipulation and Order, and funding necessary for the programs described in Paragraphs 3.A.vii., 3.B., 3.C., 3.D. and 3.E. of this Settlement Stipulation and Order at the levels set forth for Fiscal Year 2025 in those paragraphs; or (ii) equivalent appropriations for substantially the same purposes as those described in this Settlement Stipulation and Order.

9. Before making any application pursuant to Paragraph 7 or 8 of this Settlement Stipulation and Order or to otherwise enforce the terms of this Settlement Stipulation and Order, Plaintiffs must first provide to State Defendants a written request for mediation, and then complete a good faith mediation if State Defendants are willing to do so.

10. Through Fiscal Year 2025, State Defendants will not oppose an application by Plaintiffs pursuant to Paragraph 7 or Paragraph 8.A., if the application is made in compliance with Paragraph 9. If an application pursuant to Paragraph 7 or 8.A. is granted prior to January 21, 2025, the State of Delaware shall pay to Plaintiffs' counsel the sum of \$1 million. For the avoidance of doubt, if Plaintiffs file their application after January 21, 2025, there shall be no obligation to make any payment to Plaintiffs' counsel. After January 21, 2025, State Defendants may oppose an application by Plaintiffs pursuant to this Stipulation and Order only where (i) Plaintiffs have not complied with Paragraph 9; or (ii) State Defendants, having considered the educational needs of Disadvantaged Students in light of materially changed circumstances relating to the educational needs of those Disadvantaged Students or the manner in which the State addresses those needs, present a good faith basis to oppose reopening the litigation.

11. Defendant Colleen Davis in her official capacity as State Treasurer shall have no obligations pursuant to this Settlement Stipulation and Order other than to authorize payments of state funds as directed by law.

12. The foregoing constitutes the entire agreement of the Parties with respect to the settlement of this Action.

13. The Court shall retain jurisdiction to enforce the terms of this Settlement Stipulation and Order and to permit reinstatement of this Action by Plaintiffs as provided in Paragraph 8.

**ACLU FOUNDATION OF
DELAWARE, INC.**

/s/ Karen Lantz

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-and-

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IT IS SO ORDERED this ____ day of _____, 2020.

Vice Chancellor J. Travis Laster

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: J Travis Laster

File & Serve

Transaction ID: 66009415

Current Date: Oct 12, 2020

Case Number: 2018-0029-JTL

Case Name: CONF ORD ON COUNTY/STATE TRACKS - COUNTY TRACK STAYED - IN RE
Delaware Public Schools Litigation

Court Authorizer: J Travis Laster

Court Authorizer

Comments:

The parties are to be commended on reaching a resolution in this difficult and important case.

/s/ Judge J Travis Laster