STATE OF VERMONT

VERMONT SUPERIOR COURT **Franklin Unit**	**CIVIL DIVISION** **Docket No. 33-1-19 Frcv**

Athens School District, et al.,

Appellants-Plaintiffs,

v.

Vermont Board of Education, et al.

Appellees-Defendants.

SUR-REPLY IN OPPOSITION TO THE STATE'S MOTION TO DISMISS

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I. STANDARD ON A RULE 12(b)6 MOTION TO DISMISS

A motion to dismiss for failure to state a claim upon which relief can be granted should be granted only when it is "beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *In re Girouard*, 194 Vt. 162, 166-67 (2014). A court must take factual allegations in the complaint as true. *Id.* The Vermont Supreme Court has held that "motions to dismiss for failure to state a claim are disfavored and should be rarely granted." *Prive v. Vermont Asbestos Group,* 2010 VT 2, § 14. Thus, to survive a motion to dismiss, Appellants face "an exceedingly low threshold." *Id.* It is indisputable that Plaintiff-Appellants have overcome that exceedingly low threshold here.[1] In support of their opposition and sur-reply to the State's Motion to Dismiss, Plaintiff-Appellants incorporate by reference all briefing on their Motion for a Preliminary Injunction previously submitted to the Court and in sur-reply, assert the following.

II. PLAINTIFFS CAN CHALLENGE THE CONSTITUTIONALITY OF LEGISLATION AND AGENCY ACTION EXCEEDING ITS AUTHORITY.

Any of the named Plaintiffs can challenge the constitutionality of legislation, and agency action exceeding its statutory and constitutional authority. Plaintiff school districts have capacity to sue. *E.g., Clogston v. Burlington Sch. Dist.*, 2011 Vt. Super. LEXIS 97, **9-10 (May 31, 2011) "the plain language of 1 V.S.A. § 126 indicates that a town (or city) school district is a

[1] Plaintiffs, in their Opposition to the State's Memorandum Opposing a Preliminary Injunction and Supporting a Motion to Dismiss, intended no delay when they raised the procedural infirmities in that filing (the lack of a motion with citation to the rule under which the motion was being made) and instead addressed the probable legal bases for the motion in order to avoid delay. The State has clarified their Motion to Dismiss is based on Rule 12(b)(6).

distinct 'municipality,' capable of suing or being sued"); *Conn v. Middlebury Union High Sch. Dist. No. 3*, 162 Vt. 498, 500 (1994).

The Vermont Supreme Court has rejected the blanket proposition that a municipality cannot challenge state legislation, reversing a lower decision so holding, and reinstating the suit, holding, "A municipality may sue to question the constitutionality of a statute changing its form of government or affecting its operations." *Town of Andover v. State*, 170 Vt. 552, 553 (1999) (citing 17 E. McQuillin, Municipal Corporations, § 49.02 (3d ed. Rev. 1993)). The Vermont Supreme Court has also entertained suits by individuals challenging the validity of school formation and dissolution. *Pierce v. Whitman*, 2 Vt. 626 (1851) (finding for plaintiff's estate, construing the validity of union district power to waive ability to tax plaintiff).

Municipalities can also challenge the constitutionality of statutes on equal protection grounds. In *Hardwick v. Wolcott*, the Vermont Supreme Court considered the constitutionality of a statute that excluded municipal electric plants located outside the municipality's territory from a tax exemption and upheld it under the Federal Equal Protection clause. *Hardwick v. Wolcott*, 98 Vt. 343 (1925). While the Court noted that a municipal corporation "secures no rights, as against the State, to the equal protection of the laws, which can limit legislation to charge them with public obligations," it nevertheless addressed the merits of the constitutional challenge. *Id.* at 352, 355.

The Court's pronouncement that a municipal corporation has no rights as against the state is dicta, because the Court did not apply this principle. Furthermore, the application and import of *Hardwick*'s dicta is limited to equal protection challenges to municipal taxation. A dissenting justice in *Hardwick* pointed out the infirmity of the dicta, in voicing "dissent from so much of the opinion that seems to approve of the doctrine that legislation affecting municipal corporations is not subject to constitutional limitations." *Id.* at 356.

While a municipality may be restricted in its ability to challenge a legislative enactment that itself orders its property transferred, or a legislative enactment that orders a municipal entity dissolved, or a legislative enactment that unites one municipality, in whole or in part, with another municipality, it *can* challenge agency action that does so in violation of separation of powers, and it *can* challenge a statute that unconstitutionally delegates, wholesale, a purely legislative function to an agency in violation of separation of powers. *Village of Waterbury v. Melendy*, 109 Vt. 441, 446 (1938) (entertaining Waterbury Village suit that asserted, in addition to separation of powers claims, violation of due process and equal protection claims under Article 9 and the U.S. Constitution).

While a municipality, as a general rule, may not be able to challenge a legislative enactment on grounds that the enactment itself violates due process, for instance by failing to provide a notice requirement before costs are legislatively imposed on the municipality, the rule is not a blanket rule and does not go as far as the State claims. As the Vermont Supreme Court recognized in *Brighton v. Charleston*, when it validated a statute requiring a town to bear the cost of care for neglected children despite lack of notice of juvenile proceedings, the general rule requiring a court not to interfere would apply "unless the law through which it acts is manifestly in violation of some express constitutional provision." *Brighton v. Charleston*, 114 Vt. 316, 323 (1945); *see also Melendy*, 109 Vt. at 446.

Brighton does not bar Plaintiffs' Due Process claim under Count 5 because Count 5 does not assert that any legislative enactment violates due process or equal protection. Rather, the claim asserts that the Board of Education, an administrative agency, violated Due Process, in conducting its proceedings. "[A] decision arrived at without reference to any standards or

principles is arbitrary and capricious…such ad-hoc decision-making denies the applicant due process of law." *In re Miserocchi*, 170 Vt. 320 (2000). It is unclear, even to the State (as demonstrated by its briefing in this case), whether the process before the Board of Education was either purely legislative or purely adjudicatory, and this is a mixed question of fact and law, and legislative intent, that must be developed in merits briefing. The Due Process claim is colorable and must survive dismissal.

If Plaintiffs had asserted that a legislative enactment merging districts constituted an unconstitutional taking of property and assets, that claim would fail under *Hardwick*. But Plaintiffs are challenging an unconstitutional taking of property and assets by an agency whose power to order the transfer is in question on separation of powers grounds, and based on other statutory provisions (not repealed by Act 46) that restrain the Board. The Vermont Supreme Court has recognized challenges to takings powers on separation of powers grounds, not only as a justiciable controversy, but as a meritorious claim warranting an injunction against a state agency. *Melendy*, 109 Vt. 441 (1938). And neither *Brighton* nor *Hardwick* address challenges to an agency's power to redistribute debt from one municipality to another, and that legal question is addressed in a separate section below, and municipalities clearly have a protected interest in avoiding imposition of contractual debt that their electorate has not voted to accept.

All Plaintiffs are competent to assert all the claims asserted in the Complaint.

III. COUNTS II AND II SURVIVE BECAUSE THE LEGISLATURE CANNOT DELEGATE, WHOLESALE, ALL DISCRETION AND AUTHORITY TO DISSOLVE AND CONSTITUTE NEW MUNICIPAL SCHOOL DISTRICTS TO AN ADMINISTRATIVE AGENCY, NOR CAN IT DELEGATE AUTHORITY TO WRITE LAWS.

Counts II and III survive because the General Assembly cannot delegate, wholesale, all discretion and authority to dissolve and constitute new municipal school districts to an administrative agency, nor the whole plan for their formation and implementation. The General

Assembly cannot delegate its authority to write laws. An administrative agency cannot exceed its statutory powers or violate separation of powers by superseding, amending, or modifying existing statute, nor can it write new statutes.

The General Assembly is constitutionally vested with the authority to create municipalities.

The Vermont Constitution is unique in that several provisions expressly vest school district formation and alteration in the General Assembly's hands:

- Ch II, § 6, defining legislative powers, lists in one sentence the powers to "prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs, cities and counties";

- Ch II., § 68, makes clear the responsibility for maintaining a "competent number of schools," "in each town." "unless the general assembly permits other provisions for the convenient instruction of youth," is vested in the Legislature; and

- Ch II., § 69 makes clear the charters of incorporation referred to in § 6 includes educational charters, for it provides that the Legislature can grant, extend, change and amend by special law educational corporations under the patronage or control of the State.

The items listed in Ch. II, § 6 appear in one list, and it cannot be doubted that the power to grant charters of incorporation, like the power to write laws listed before it, and the power to constitute towns, borroughs, cities and counties listed after it, is of the same class of non-delegable powers. 2A Sutherland Statutory Construction §§ 47:17, 47:18 (doctrine of ejusdem generis ("of the same kind") treats enumerations as a class); *see In re Municipal Charters*, 86 Vt. 562 (1913) (power to constitute towns, borroughs, cities and counties nondelegable); *Vermont Educ. Bldgs. Fin. Agency v. Mann*, 127. Vt. 262, 267 (1968) ("The General Assembly cannot transfer its supreme legislative power to enact laws.").

Vermont Courts have also repeatedly stated that the General Assembly is the body expressly vested with the authority to define school districts by legislation.

The facts underlying the Supreme Court's decision in *Pierce v Whitman* make clear that the Legislature had created union districts by special legislative act, for the summary of the parties' arguments reveals that the union school district whose taxation power was at issue in that case was formed by a special statute in 1804, a few years prior to Vermont's first statute authorizing towns to form union districts, enacted in 1808. *Pierce v. Whitman,* 2 Vt. 626 (1851).

The Supreme Court in *Barre v. School District* also made clear that the state's power over education is legislative, because education is "created, controlled and enforced by public laws." *Barre*, 67 Vt. 108, 112-13 (1894). The Supreme Court made clear the Legislature "has the right and power to determine when, how and by whom its work shall be carried on; to change the agencies it has created." 67 Vt. 108 (1894). *Barre* does not stand for the proposition that the Legislature could devolve its legislative powers of municipal formation, whole cloth, to an administrative agency. The Defendants cannot point to a single Vermont precedent that does.

Rather than beginning their analysis with the Vermont Constitution and Vermont decisional law, the Defendants cite to A.L.R. and C.J.S. in the hopes these compendium encyclopedias (they are not scholarly treatises, and they are not sources of authoritative statements of law, and they do not necessarily report divisions of authority on each issue) will be treated as binding authority. These encyclopedias are not binding on any court. They do not purport to survey the law of all fifty states. Many of the cases cited are old and superseded. Furthermore, while the law of other jurisdictions can be persuasive or offer guidance, foreign decisions, interpreting foreign state constitutions, do not control the outcome in this case. Vermont law is primary on this issue. At any rate, most of the cases cited within them do not support the proposition that a legislature can delegate authority to form municipalities whole cloth to an agency, as the Board of Education has interpreted its authority in taking the actions it took here. Most of them, in fact, demonstrate that agencies have a limited role in approving

district formation as a single step in a multi-step statutory process where the legislature, and not an agency, sets out the plan for municipal formation, and where municipal formation requires petitions or votes for initiation, and electorate votes for ultimate formation. A sampling of these cases is discussed below.

First, Vermont decisions do not evidence a history of wholesale delegation of power to agencies.

The school district formation statute described in *Bill v. Dow* was not a statute delegating unfettered discretion to towns to determine whether, and by what means and processes, to organize school districts in a town. It was part of a comprehensive statutory scheme on school district formation, where the Legislature laid out the plan and means of district formation. See Appendix A, Vermont General Statutes §§ 19 – 90 on School Districts, 1870. The Vermont Legislature, under this old statute, mandated the creation of additional school districts "[w]hen the inhabitants of any town cannot be conveniently accommodated in one school district," and "it shall be the duty of such town, at a legal meeting, . . . to divide such town into as many school districts as shall be judged most convenient." *Id.* at § 20. The process for district alteration was voluntary, and required an electorate vote at a traditional Vermont town meeting. *Dow*, at 563-64 (referring to vote at annual town meeting). This is quite unlike a wholesale delegation of union school formation to an unelected and unaccountable agency, without any accompanying legislation determining the plan, the processes, or even the laws applicable to the formation. The statutes referred to in *Dow* are more akin to the voluntary union district formation statutes in 16 V.S.A. §§ 706 et seq.

Section 4:10 of Sutherland Statutory Construction describes such laws as "Local option laws":

> [E]nactment of a statute whose operation is contingent upon a vote held in a particular state subdivision is not an invalid delegation of authority. This exception rests on the

> power of the legislature to determine conditions upon which an Act may take effect. The vote of a particular subdivision is a fact on which legislatures can condition the operation of the law. This has been explained on the ground that the vote is not for or against the Act, or a determination of the time when it takes effect, but is an independent contingency upon which the statute may become operative. Such a distinction is purely formal. A more substantial basis on which to sustain local option legislation is the need for adjustment to local problems and conditions. As special legislation is unconstitutional in most states, local option legislation provides the flexibility that special legislation seeks. To permit this flexibility without carrying out referendum procedures, courts sustain much legislation which would not have statewide application. . . . Local option legislation is a more direct and democratic way to achieve flexibility.

1 Sutherland Statutory Construction § 4:10. (7th ed.) (entitled "Local option laws).

As 56 Am. Jur. 2d § 18 explains, the "delegation of legislative functions is not involved in general laws providing for the incorporation of municipal corporations, fixing the conditions on which they may be created, and leaving to some officer or official body the duty of determining whether those conditions exist." On the other hand, "there is an attempted delegation of legislative power and a statute is invalid if it requires or authorizes a court or other agency to pass on questions of public policy, exercise any discretion with regard to whether the municipal corporation should be created, or render any other assistance than the determination of facts." *Id.*

Vermont's school formation statutes 16 V.S.A. §§ 706 et seq. in places provide for Board of Education approval of changes if it finds district formation "is in the best interest of the state." *See* 16 V.S.A. § 706c. This is an independent contingency on which a general legislative plan or scheme can become operative, and the legislature, not an administrative board, has laid out the plan and scheme, and defined the conditions, and conditions precedent, to formation. This is quite unlike, and not precedent for, the wholesale delegation of powers to order dissolution and formation of municipalities, write municipal charters, and make up the laws governing their formation and implementation -- powers nowhere described in the Board of Education's list of statutory powers. The Board has been inventing and improvising procedures and exceptions to

existing Vermont statute, in ways that are startling and unprecedented in this State. And its Order flies in the face of numerous—at times unanimous—democratic votes by local communities opposed to forced mergers. And a majority of other states instead use processes more akin to the procedures in §§ 706 et seq.

It is interesting that the Attorney General has not identified which actual cases outside of Vermont and cited in Corpus Juris Secundum should be persuasive on the question of whether the Vermont Constitution and Vermont law should be interpreted to permit wholesale delegation of municipal formation to an unaccountable administrative agency, and despite failed electorate votes on the same question. A general citation to a non-scholarly encyclopedia cannot be dispositive of the question. The Attorney General has also failed to provide the Court with any analysis of why it should rely on foreign authority.

Analysis of the Constitutional law, statutory schemes, and decisional law in the foreign states cited in the State's brief indicates the legislative reorganization schemes in those states are more akin to the statutory processes laid out in §§ 706 et seq. than they are to the wholesale delegation of municipal formation that has occurred in this case. In its reply, the State cites cases from Wisconsin, Nebraska and Minnesota and none supports the proposition that municipal formation and school reorganization can be entirely handed over to an administrative agency that creates them entirely by fiat and by its own invented version of legislative processes.

In Nebraska, the current school district statutes, Neb. Rev. Stat. §§ 79-405-79-4,130, provide a comprehensive scheme, laid out in statute, for reorganization either by a petition method or election method. The Nebraska Supreme Court has explained that "the ultimate authority for changing the boundaries by either the petition method or the election method rests with the electors of the several districts involved." *Nicholson v. Red Willow County Sch. Dist. No. 0170*, 270 Neb. 140, 143-44 (2005) (describing the difference between the two

reorganization methods). The role of the State Committee is limited to recommending plans and approving plans promulgated by either method, and those methods are laid out in the statutes. These statutory processes are more akin to Vermont's §§ 706 et seq. than they are to the wholesale delegation of municipal formation to the Vermont Board of Education in this case. The statutes described in *Nickel v. Sch. Bd. of Axtell*, 157 Neb. 813 (1953), have been replaced, but in any case, that decision makes clear that the role of the county committee under those older laws was to formulate a reorganization plan, which proposal was then submitted to a special election. The *Nickel* court noted:

> It becomes evident that under this Act a county committee may only formulate and complete a plan or plans for reorganization of any or all school districts within the county and cannot, by itself, change, realign, or readjust any existing school districts or the boundaries thereof. That power is left with the electorate of the area involved in any proposed plan. They may either approve or reject it.

Nickel, 157 Neb. at 825.

The county committee under the older statutes was not purely an administrative body—rather, it was composed of members elected from among elected school board and board of education members, and the county superintendent of schools served as a non-voting member. *State ex rel. Medlin v. Choat*, 187 Neb. 689 (1972). And the question of that public body exercising any legislative judgment is quite distinguishable from an unelected administrative agency exercising legislative judgment.

With respect to Minnesota, careful analysis of *In re Consolidation of School Dist.*, 246 Minn. 96 (1956) reveals, first, that the statutes providing for school consolidation in Minnesota at the time did not involve wholesale delegation of school district formation to an administrative agency—rather the consolidation process was provided for in statutes written by the legislature, they required electorate approval of the proposed consolidation, and the role of the administrative agency was one of approval as a matter of policy. Second, the decision makes

clear that in Minnesota school districts are not municipal corporations: "A school district, if technically not a municipal corporation, at least is a public corporation." *Id.* at 103. Third, the decision makes clear that "[w]hether public interests require and justify the organization of municipal or quasi-municipal corporations, including school districts, is a matter purely for the legislature." *Id.* While the statutes at issue required administrative agency approval, this was but one condition of a complete legislative scheme, and the statutes did not involve a total delegation of the district formation process to an administrative agency, as the Board of Education has interpreted its authority here. The statutes at issue in *In re Consolidation of School Dist.,* which are no longer in effect, appear, by description, to be more akin to Vermont's voluntary merger process under §§ 706 et seq. than to the forced merger process that has been undertaken by the Vermont Board of Education. The current statute for establishing school districts in Minnesota establishes the requirements for formation and provides for establishment by written agreement between school district boards. *See* Minn. Stat. § 123A.15 (with no reference to an administrative agency).

In addition, the Minnesota Constitution provides in Article XII that special legislation is prohibited, it provides for home rule charters[2], for the establishment of charter commissions, and Article IV defining the legislative department does not have a list of enumerated legislative powers similar to the Vermont Constitution that lists creation of municipal charters among the inalienable legislative powers. The constitutional provision charging the Minnesota legislature with the duty of providing a uniform system of public schools is listed in Article XIII entitled

[2] The State's Opposition to the Motion for a Preliminary Injunction, (at 5), suggests Vermont is a home-rule state. The Court in *Hagan v. City of Barre*, 2009 Vt. Super LEXIS 27 (2009) noted Vermont has not adopted a home rule act and construed Barre's charter as not conferring home rule.

Miscellaneous subjects. Vermont, in contrast, clearly places municipal formation and education in the hands of the Legislature.

The cases cited in 78 CJS § 16 warrant some discussion.

In New Jersey, a statutory scheme that, like 16 V.S.A. §§ 706 et seq., requires an electorate vote on proposed regional district formation, is set out in N.J. Stat. §§ 18A:13-34-18:42. School boards may study and adopt a proposal for unification, and the matter is put to an electorate vote. §§ 18A:13-34, 18A:13-35. The New Jersey case cited in C.J.S. § 16 regards the statutory procedure for withdrawal from a unified district, which requires both approval by the board and an electorate vote, and the board approval precedes the vote. The Supreme Court of New Jersey, in *In re Petition for Authorization to Conduct a Referendum On Withdrawal of North Heledon School District From Passaic Counter Manchester Reg. High School*, 181 N.J. 161 (2004), a case deciding an appeal from a granted petition to withdraw and a positive vote to withdraw, held the withdrawal violated the constitutional imperative to prevent segregation in public schools because it would create a significant decline in the percentage of white students in the districts. Nothing in that case or in the New Jersey statutory scheme puts the entirety of district formation in an administrative body's hands.

In North Dakota, a statutory scheme exists that, like 16 V.S.A. §§ 706 et seq., requires both initiation of a reorganization proposal by elected school boards, and final approval by an electorate vote, and also involves submittal of the plan to a county superintendent who holds public hearings prior to the electorate vote, and approval by the state board as one step of the statutory process. *See* N.D. Cent. Code §§ 15.1-12-01 – 15.1-12-29, *see also* §§ 15.1-12-09 (initiation of plan by elected boards) and 15.1-12-11 (special election). In *In re Lewis & Clark Public School Dist. #161 of Ward*, 2016 ND 41 (2016), the adjudicative annexation procedure at issue in that case (in which the school district had standing) was initiated pursuant to petition

under the statutory scheme, and board approval was just one step in the process. Nothing in the cited case or in the North Dakota statutory scheme puts the entirety of district formation in an administrative body's hands.

In Iowa, a statutory scheme exists, similar to 16 V.S.A. §§ 706 et seq., that provides for initiation of a consolidation proposal by citizen petition (Vermont's § 706 provides voters can petition boards to study consolidation, or boards can initiate study themselves), submission for approval to an education agency, and then submission of the proposal to voters. *See* Iowa Code §§ 275.1-275.59, Reorganization of School Districts. In *East Cent. Cmty. Sch. Dist. v. Mississippi Bend Area Educ. Agency*, 813 N.W. 2d 741 (Iowa 2012), the court held that an agency could place a merger proposal on the ballot for voters to consider and need not require a specific plan of merger, but the education agency in that case had no power to direct school districts to reorganize).

All this militates against the State's asserted wholesale delegation, particularly given the text of the Vermont Constitution which clearly lists municipal formation among non-delegable powers. Further, the Vermont Supreme Court's ruling in *Municipal Charters* clearly supports Plaintiff-Appellants' arguments here, and directly contradicts the State's arguments.

It strains logic to say that Municipal Charters in inapposite solely because it addressed villages, not school districts. The State cites *no authority* for the proposition that the General Assembly's ability to delegate the creation and governance of villages and its ability to delegate the creation and governance of school districts have never been treated the same way in Vermont. Instead, Vermont statute is replete with definitions and references to school districts as municipal corporations, subject to municipal law:

- 1 V.S.A. § 126, entitled "Municipality," provides "'Municipality' shall include a city, town, town school district, incorporated school or fire district or incorporated village, and all other governmental incorporated units."

- 16 V.S.A. § 551, entitled "Application of laws to school districts," provides "Unless otherwise specifically provided in statute with respect to a class of school district or in a municipal charter, the laws of this title, *the laws pertaining to municipal corporations*, and the rules of the State Board *shall apply to all school districts*." (emphasis added.)

- 16 V.S.A. § 1(a)(10) provides a "School district" means town school districts, union school districts, interstate school districts, city school districts, unified union districts, and incorporated school districts, each of which is governed by a publicly elected board.

- 16 V.S.A. § 701(b) provides it is "the policy of the State to provide equal educational opportunities for all children in Vermont by authorizing two or more school districts, including an existing union school district, to establish a union school district . . .and to constitute the district so formed a municipal corporation with all the rights and responsibilities that a town school district has in providing education for its youth."

The Vermont Supreme Court has affirmed that a "school district is defined as a municipal corporation." *Conn v. Middlebury Union High Sch. Dist. No. 3,* 162 Vt. 498 (1994). The Supreme Court there held that because a school district was a municipal corporation, it had "no authority to borrow money beyond one year without a bond vote" required by procedures set forth in 24 V.S.A. §§ 1751-1785, governing municipal indebtedness. *Id.* at 499. Rejecting arguments the school could support other procedures under its general borrowing power, the Court reasoned, "this Court does not grant powers to municipalities. Only the Legislature has the authority to grant such power." *Id.* at 506.

The Vermont Supreme Court has also recognized that school district formation is one of its "sovereign responsibilities," and that school formation requires that it ensure its "constitutional control" be "preserved." *Dresden Sch. Dist. v. Norwich Town Sch. Dist.,* 124 Vt. 227, 232 (1964). That decision affirmed the validity of voluntary interstate school district formation under a statutory scheme much like §§ 706 et seq., and which required compacting towns to form "Articles of Agreement," which the court in *Dresden* treated like a contract.

Nothing in Acts 46 or 49 modified or repealed 17 V.S.A. § 2654(d), the general municipal law requiring legislative approval of municipal charter formation and amendment. Sections 706 et seq. pertain to voluntary union formation, and the Supreme Court has held "where two statutes may apply to a single circumstance, with conflicting consequences, the general statute must yield to the special," and gave precedence to a more specific law governing withdrawal from a district over general law relating to consideration of a vote. *Appelget v. Baird*, 126 Vt. 503, 507 (1912). It is undisputed there are no laws equivalent to §§ 706 et seq. governing forced union district formation and organization—although the Board of Education and the Agency have impermissibly attempted to write some of them. Under 16 V.S.A. § 551, which provides, "Unless otherwise specifically provided in statute with respect to a class of school district or in a municipal charter, the laws of this title, the laws pertaining to municipal corporation, and the rules of the State Board shall apply to all school districts," the general provision, 17 V.S.A. § 2645(d), would require legislative enactment for any charter to become effective.

Legislative approval of voluntary union formation is expressed in the statutes laying out the plan, conditions, and processes for their formation—the State is incorrect to say the Legislature has no role in approving voluntary union school district formation. And the legislative powers the Board has arrogated to itself in decreeing the whole plan, policy, process, and laws of involuntary district formation bears no resemblance to the single factual contingency that the voluntary unification statutes place in the Board's hands to decide.

This Court must interpret Acts 46 and 49 consistent with the constitutional restrictions that prevent the Legislature from delegating the entire field of municipal formation to an administrative agency. The Board cannot have authority to exercise discretion to dissolve existing municipal corporations, form new ones, and draft their charters and the laws applicable

to them, without violating separation of powers under the Vermont constitution. The State's motion to dismiss should be denied.

IV. COUNTS II AND III SURVIVE BECAUSE THE DELEGATION TO THE BOARD, AND THE POWERS THE BOARD HAS ARROGATED TO ITSELF, VIOLATE SEPARATION OF POWERS BECAUSE AN AGENCY CANNOT WRITE, ALTER, AMEND, SUPERSEDE, OR MODIFY STATUTES.

Counts II and III also survive because the legislature cannot delegate its law-making power to an agency. 2 McQuillin Mun. Corp. § 4:8 ("[I]t is a fundamental rule that the power to make laws cannot be delegated, except to the extent that such power may be conferred upon municipal corporations for local self-government.") And the Legislature "cannot delegate the power to repeal, amend, or otherwise supplant an act of the legislature." 1 Sutherland Statutory Construction § 4:5 (citing *Freeman v. City of Mobile*, 761 So. 2d. 235 (Ala. 1999)).

The Vermont Supreme Court has said that "an agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene." *In re Agency of Admin.*, 141 Vt. 68, 75 (1982). "An administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legislature." *Id.* at 76.

The U.S. Supreme Court has held that a federal law, Section 3 of the National Industrial Recovery Act, violated separation of powers principles for several reasons, including because it permitted an agency to promulgate a Code governing "fair competition," a concept totally undefined by law, that had the force of statute and enlarged the scope of activity that could be subject to sanctions as unfair methods of competition within the meaning of the FTCA. *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495, 531, 534 (1935). The Live Poultry code defining fair practices in that case subjected petitioners to conviction for unfair practices. The Court criticized the provision permitting the agency to develop the "codes," which were essentially "codes of laws" despite how they were styled, because the Act "dispenses with this

administrative procedure," because it was "without precedent," and "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." "Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them," something the Court called a "legislative undertaking." In addition the President had unfettered discretion in approving the Codes, which the Court held was also an impermissible delegation of legislative power to the executive. *Id.* at 537-38.

The Second Circuit, in invalidating a Treasury regulation, explained the limits of an agency's rule-making power:

> A regulation, however, may not serve to amend a statute, *Koshland v. Helvering*, 298 U.S. 441 447 [] (1936), or add to the statute 'something which is not there.' *United States v. Calamaro*, 354 U.S. 351, 359 []1957). As stated in *Manhattan General Equipment Co v. Commissioner*, 297 U.S. 129, 134 [] (1936):
>
> > The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law – for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Iglesias v. United States, 848 F.2d 362, 366-67 (2d Cir. 1988).

In promulgating Default Articles of Agreement the Board violated separation of powers – the Board and the Agency have declared that the Default Articles are the law. Presumably, the State could bring an enforcement action if parties subject to them refuse to follow them or act as they require. The Agency's guidance, issued March 8, 2019, makes clear it considers the provisions of the Default Articles of Agreement as laws the existing districts must follow, and it has threatened enforcement for non-compliance, including under 16 V.S.A. § 165, in its last paragraph. "If the transitional board or initial board of a newly unified school district is unable or unwilling to follow the law, the Agency will take every action legally available to bring the

district into compliance to ensure students are provided access to substantially equal educational opportunities." March 8, 2019 Guidance, available at https://education.vermont.gov/sites/aoe/files/documents/edu-memo-guidance-following-the-courts-denial-of-a-preliminary-injunction_0.pdf

Neither the Board's Order nor the Default Articles went through rule-making procedure, nor are they regulations. The Board and Agency deem the Default Articles of Agreement a municipal charter as well as law. Furthermore, the Default Articles and Order purport to supplant 16 V.S.A. §§ 706 et seq., which requires electorate votes on Articles of Agreement and the transfer of property, assets, liabilities, and contractual agreements, as well as on the ultimate issue of union formation. Nothing in Acts 46 or 49 expressly granted the Board's ability to do this—there is no express language of repeal, or amendment—or stated that Articles may be imposed notwithstanding law to the contrary. Elsewhere, the legislature has been perfectly capable of using express language of repeal in laws on the same topic.

The Default Articles clearly attempt to supplant existing—still applicable—provisions of statutory law. The provisions of Article 6 essentially draft a law supplementing provisions in Title 16 regarding subsequent sale of real property to a town. Article 7, while it directs compliance with existing law regarding employment contracts, also supplements it by providing that the provisions of the Article will apply to contracts entered after November 1, 2018 only if they expire on or before July 1, 2020. Default Article 8 supplements, modifies and supplants 16 V.S.A §§ 706i and 706j, regarding organizational meeting notices and business. Warnings for such meetings have changed over time regarding the business to be transacted. They create public offices and dictate election procedures. And extraordinarily, Article 14 amends, modifies, and supplants 16 V.S.A. § 706n, even though Act 49 explicitly requested suggestions for additional legislation that would amend § 706n, and the Legislature chose *not* to amend it. In

addition, the Board and Agency have promulgated laws that supplant and modify 16 V.S.A. § 721 regarding the inclusion of additional school districts into existing union districts. In sum, the Board of Education has drafted a detailed municipal charter, and it has drafted laws governing this particular type of municipal charter, and it has modified and supplanted laws regarding union district enlargement. This violates separation of powers because it is legislation by an administrative agency. The General Assembly cannot constitutionally delegate the power to legislate, and the Board should not have interpreted Acts 46 and 49 as granting such power. Nothing in the Vermont Constitution or in Vermont law condones it.

V. COUNT I SURVIVES BECAUSE APPELLANTS HAVE CLEARLY MET THE EXCEEDINGLY LOW THRESHOLD FOR SURVIVING A MOTION TO DISMISS IN LIGHT OF NUMEROUS COMPELLING INDICATIONS THE BOARD ERRED.

Count I survives because, among other reasons, the Appellant-Plaintiffs have clearly and indisputably met the "exceedingly low" threshold for surviving a motion to dismiss on Count I, in light of the numerous compelling indications the Board erred. *Prive v. Vermont Asbestos Group*, 2010 VT 2 § 14.

In fact, the State's Reply conspicuously concedes that there is no basis for dismissing Count I at this early stage of the proceedings. The State argues (incorrectly) that Counts II-VI "should be dismissed," "must be dismissed," or "fail as a matter of law." Regarding Count I, the State claims only that the Appellants have failed to overcome the presumed validity of the Board's Order. While that argument—if it were true (it is not)—might provide a basis for prevailing on summary judgment, it fails to provide a basis for *dismissal* of a properly filed appeal of an agency action. Indeed, the State cites cases that concede (as they must) that, at a minimum, all agency actions must be reviewed to determine whether the agency exceeded its statutory authority, acted in an "arbitrary or capricious" manner, or based its actions on "an erroneous theory of law." Defendants' Corrected Reply at 19.

The State's arguments for dismissal of Count I are incorrect on numerous fronts. To begin, the Court should not defer to the State Board's decision. The State claims four bases for deferential review, but none applies here. First, according to the State (at 15), "the Board acted pursuant to broad decision-making authority conferred by the Legislature." Not so. The Legislature gave the Board authority to forcibly dissolve school districts "only" where "necessary." Act 46, Sec. 10. The Board exceeded that authority by dissolving school districts "wherever possible." State Board's Order at 6.

Second, the State claims (at 15) that the State Board has "substantial expertise" in this area, but fails to recognize that the Board has *never* forcibly merged a single school district or done anything even remotely resembling the process it engaged in here. Further, the State fails to distinguish *Devers-Scott v. Office of Prof'l Regulation*, 2007 VT 4, ¶ 9, where the Supreme Court denied deference to an attorney who does not have expertise in midwifery. According to the State, the Board "has reviewed more than 150 mergers, and has broad education policy responsibility." Defendants' Corrected Reply at 15 n.3. The alleged "review" of "150 mergers" is a red herring. True, the Board has rubber-stamped a large number of voluntary mergers, but it has never before engaged in any of the challenged actions here—most notably, forcibly changing a school's governance structure against the wishes of the local communities who know their schools best. Further, the issue before the State Board here was one of *governance*, not "broad education policy." The people with expertise in governance are lawyers, not unelected school board members. The Board does not have any expertise in this matter, let alone "substantial expertise." It is thus not surprising that the Board's Order is rife with errors.

Third, the State incorrectly claims (at 15-16) that the Court must defer to the Board because "Act 46 contemplated a broad information gathering process, not the development of the contested case record." The State attempts to analogize this case to *In re Prof'l Nurses Serv.*

App. for Certificate of Need, 2006 VT 112, but fails to recognize crucial distinctions between these matters. To begin, *Nurses* involved a professional service provider requesting that an agency allow it to provide specifically identified services, and the agency has specialized expertise in analyzing whether those services were needed. Here, by contrast, the State Board has *never* evaluated whether a forcibly merged board would better serve schoolchildren in districts where the parents of those children are opposed to merger. Further, the statutory scheme at issue in *Nurses* specifically exempts application of the Vermont Administrative Procedure Act. *Nurses*, 2007 VT 4, ¶ 14 (citing 18 V.S.A. § 9440(a) as "exempting CON procedures from the APA"). Here, by contrast, Acts 46 and 49 do not exempt the Board from compliance with the Vermont Administrative Procedure Act. In fact, Act 46, Section 40, which goes into effect July 1, 2020, and amends 16 V.S.A. § 165, allows the State Board to forcibly merge two districts to address educational deficiencies, but—under the existing language of Section 165—that can only happen if it is the least restrictive measure and only *after affording contested-case procedures to the affected districts*. As Defendants concede (at 17), this statutory provision applies only to a failing school that "does not meet the Board's standards." It is inconceivable that the Legislature—in the very same bill—chose to amend a statutory provision that recognize that the Board must afford contested-case procedures to failing schools being forcibly merged, but did not intend for contested-case procedures to apply to all of the successful school districts that the Board chose to forcibly merge here. Thus, unlike *Nurses*, whatever authority the Board had to do broad information-gathering to approve Alternative Governance Structures, the statutory scheme at issue here required application of the APA contested-case procedures before the Board could attempt to forcibly merge districts against their will.

Fourth, the State pleas for deference to the Board based on the State's claim (at 16) that "the Board's function was legislative or quasi-legislative in nature." Again, Defendants rely

heavily on *Nurses*, but, as explained above, that case in inapplicable here. More importantly, the State's argument on this front concedes exactly what went wrong when the State Board implemented Act 46: the Board tried to act like legislators. According to the State, "Act 46 *required* the Board to consider issues well beyond the interests of individuals or particular districts." Corrected Reply at 16 (emphasis added). Not so. While the Board may well have considered those issues, nothing in Act 46 "required" it to do so. Nor does the State cite any authority for this. To the contrary, Act 46—and the Board's own rules—required the Board to analyze the Alternative Governance Structure proposals to make sure they worked *for those particular districts*, and Act 46, Section 2 explicitly states that the law was "designed to encourage and support local decisions and actions" to meet the law's goals. While Act 46 also required a broader look for the sole purpose of ensuring that districts were not geographically isolated, the Board incorrectly interpreted its mandate as far broader than it actually was. It is now clear that, in looking at "issues well beyond the interests of individuals or particular districts" (Corrected Reply at 16), the Board appears to have considered whether it would be "fair" to allow districts to remain independent when other districts voluntarily merged under threat of forced merger. The result was forcibly merging successful districts in a way that ignored the negative impacts on those very districts, their taxpayers, and their students. That was improper, without statutory authority, and arbitrary and capricious.

Further, even if the Court were to grant deference, it has been overcome by the Board's numerous compelling errors, including: (1) ignoring directly applicable statutory provisions; and (2) making inconsistent decisions for similarly situated school districts. Either one of those errors, let alone the combination, requires vacating the Board's decision.

A. Count I.1—The Board's Interpretation of Act 46 Was Arbitrary and Capricious and Contrary to Legislative Intent.

The plain text of Act 46 called for mergers only when "necessary." It did not require or authorize the Board to force mergers wherever possible, as the Board did here. To the contrary, Act 46 went out of its way to offer multiple off-ramps to merger. As explained in numerous quotes in the Complaint from lawmakers who passed Act 46, those provisions were crucial.

First, Act 46, Section 10(a) clearly refers to two paths set forth in Section 5—the unified union district structure and the alternative governance structure. While it is true that the Legislature describes one path as "preferred," the State cannot ignore the fact that the other path exists and is explicitly allowed under the law.

Second, Section 10(a)(2) uses the words to "the extent necessary" to "promote the purposes set forth in subsection (a)." The purposes set forth in subsection (a) are to "meet the goals of Sec. 2 of this Act pursuant to one of the models set forth in Section 5." Section 10(a) refers to *either* model set forth in Section 5. If it didn't, then there would be no purpose in having Section 9 in the Act creating an avenue for an alternative structure. The Legislature could simply have said merge districts wherever possible. In their November 30 Order, the Board acknowledges that is what they did. But that is not what the law called for.

Third, Section 9(a)(3)(A) establishes the purpose of the Section 9 alternative governance proposals. It plainly states it is for those situations in which a district "*proposes to retain its current governance structure*." The intention is not to serve a purpose where it isn't "possible or practicable" to merge districts. If it isn't "possible or practicable" to merge districts, then they cannot be merged. Period. If that were the test, then there would have been no need—indeed, it would have been absurd—for districts to spend hundreds of hours gathering data to prove it (as many of the Plaintiff volunteer school board and other community members did here, at the direction of Act 46, Act 49, and the Board's own rules). The State has yet to put forth a single

plausible explanation for why the Agency and Board led school districts to dedicated hundreds of hours of volunteer time providing information that, on any reading of the administrative record, the Board ultimately ignored.

Fourth, the meaning of the statutory provisions, read together, is clear: If a district "proposes to retain its current governance structure," it must demonstrate its "ability to meet or exceed each of the goals set forth in Sec. 2 of this act." Sec. 9(a)(3)(B). That is what Section 9 explicitly said and clearly intended. The meaning could not be clearer. Furthermore, the Board had a duty, not to merge wherever possible, but to *evaluate* each of those proposals "*on their merits*." Board Rule 3440.11 (emphasis added). The Board would not have been required to evaluate Section 9 proposals on their merits if its directive was to merge wherever possible.

The State claims that the Board discussed the use of the word "necessary" repeatedly. Defendant's Corrected Memorandum at 20. As the State's attachments attest, the Board's discussion of that critical language was essentially the Board Chair reading Section 10 out loud to the rest of the Board. The State can point to no consideration of whether or not it was "necessary" to merge any of the districts with Section 9 proposals in order to meet the goals of the law or whether or not any of these proposals "met or exceeded the goals of the act." The Board's failure to analyze whether merger was "necessary" is clear error.

Board Rule 3400 "Proposals for Alternative Structures Under Act 46" says at 3420 in its "Statement of Purpose" that "Act 46 also includes some requirements and guidance for Alternative Structure proposals submitted under Section 9 *by districts that will not be merging*." [Emphasis added.] Plainly, the purpose of Section 9 proposals was to retain current governance structures. At Rule 3440.11, the Board was tasked with evaluating each of these proposals "on its own merits." It is clear that the Board never did that.

Not only did the Board fail to evaluate any Section 9 proposals on their merits—that is, their "ability to meet or exceed each of the goals set forth in Sec. 2"—but the Board plainly misapplied the law, in places claiming that alternative governance structures had to be superior to the preferred structure. *See, e.g.*, Affidavit (f) of Marty Strange attached to Complaint, at 4. This is completely contrary to Section 20 of Act 49, which explicitly forbid the Board from imposing more stringent requirements on alternative governance structures than on preferred structures. Some Section 9 proposals were not even discussed by the Board, much less evaluated. *See* Affidavit of Marty Strange at 7-8. Some Board members were adamant that Section 9 proposals *not* be evaluated on their merits. *See* Affidavit of Marty Strange at 19.

It falls on the shoulders of this Court to interpret the law. And the purpose of Section 9 could not be any clearer. Where an agency's interpretation of the law is clearly erroneous, it is not entitled to deference. *See, e.g.*, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter."); *see also Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) ("Of course, if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress.").

As alleged in our Appeal and Complaint (for instance, at paragraphs 266-287), the Board's order was so lacking in essential standards, so inconsistent and so arbitrary and capricious as to be unworthy of any deference by this Court. *See also* Reply in Support of Preliminary Injunction and Stay at 23-31.

There was nothing resembling a balanced analysis by the Board. For example, the State claims (at 26) that the Board did indeed consider greatly imbalanced debt—by citing the case of Cabot and Danville—but with no explanation of why the same would not apply to Enosburg and Richford or to the relatively wealthy town of East Montpelier foisting its debt on poorer towns like Calais and Worcester.

The State (at 23-26) offers a litany of explanations for the Board's inconsistencies in its final order, but this does not help the State's arguments for upholding the Board's decision. The State claims that the Board's order "did what was requested by at least 37 districts in alternative proposals." Defendants Corrected Memorandum at 23. However, in nearly all of those districts, the law gave the Board no choice because it could not merge unlike governance structures.

Even in the rare instance where the Board chose to not merge districts that could be merged, such as Hartland and Weathersfield, its reasons for doing so are inconsistent and untethered to the actual goals of Act 46. For instance, it is undisputed that the Board's Order incorrectly lumped Hartland and Weathersfield in with districts that could not be merged "in light of the statutory prohibition of making changes to a district's operating and/or tuitioning structure." Order at 9. Defendants now attempt (at 24) to rewrite the Board's Order by citing to transcript testimony in which Board members talk about these districts being "oriented in different directions." That argument, however, fares no better. Nothing in Act 46, Act 49, or the Board's rules talks about being "oriented in different directions." And the Washington Central districts, for instance, were forcibly merged even though those five towns form a geographic donut around Montpelier (a donut that cuts through the roads connecting Montpelier with its merged town of Roxbury). Further, Defendants can point to nothing in the minutes that constitutes even a single motion to approve or disapprove any Section 9 proposal. Appellant-Plaintiffs would be glad to point out the speciousness of Defendants' litany of explanations when this matter is considered on the merits, but for now Appellant-Plaintiffs note that, in particular, nowhere does the State point to any instance where the Board evaluated a Section 9 proposal for

the district's "ability to meet or exceed" the goals of Section 2 of the law. In fact, we have yet to be shown what standards, if any, the Agency or the Board used in its evaluation.[3]

B. Count I.2—The Board Improperly Imposed Requirements on Alternative Governance Structures Beyond What the Applicable Statutes Require.

The State's argument for dismissal of Count I.2 exemplifies why the State's motion to dismiss should be denied. Vermont is a notice-pleading state. All that is required in a complaint is to provide enough information to put defendants on notice of the claims brought against them.

The State attempts to flip this standard on its head by focusing on what it refers to (at 26) as "the single claimed example identified in the complaint—geographic isolation." Count I.2 is as follows: "The Board violated Act 49's explicit requirement that 'the state board of education shall not by rule or otherwise impose more stringent requirements upon an alternative governance structure than those of this Act.' Act 49, Sec. 20." In that same section of the Complaint, Paragraph 232 reads as follows: "*For all the reasons noted above*, the Board's actions imposed requirements on alternative governance structures that are far beyond what the statutes require." Complaint ¶ 232 (emphasis added). This put Defendants on notice that Appellants are challenging any and all of the Board's actions described in the first 231 paragraphs of the Complaint that imposed more stringent requirements on Alternative Governance Structure proposals. While geographic isolation is one "example" of the Board's

[3] The State offers proposed amendments to Act 46 that were not ultimately adopted by the legislature—H.15 and S.15—as evidence supporting its interpretation of Act 46. *See* Corrected Reply in Support of Motion to Dismiss at 21-22. It is well established, however, that "[c]reating legislative intent from a proposed and rejected amendment to a bill is an exercise in unreliable speculation." *State v. Richland*, 2015 VT 126, ¶ 17, 200 Vt. 401, 412, 132 A.3d 702, 709 (2015) (citing *Munson v. City of S. Burlington,* 162 Vt. 506, 510, 648 A.2d 867, 870 (1994) (stating that Legislature's rejection of statutory amendment is not indicative of its intent and such "inference is based on speculation, not on sound principles of construction")). Because H.15 and S.15 have no probative value in determining the Legislature's intent in passing Act 46, the Court should not rely on those bills in interpreting Act 46.

improper actions, the State cannot have this entire count dismissed as a matter of law based only on an analysis of that issue. The Complaint alleges far broader claims. To give just one example, an earlier paragraph of the Complaint notes that "[g]eography *and indebtedness* are plainly recognized by the law as barriers to merger but were ignored by the Board." Complaint ¶ 223 (emphasis added). The State's reply does not say a word about Appellants' arguments regarding indebtedness in Count I.2 and the ways that the Board imposed a far more stringent standard than what legislators intended and what the laws require—something that the Board was forbidden from doing under Section 20 of Act 49.

Regarding geographic isolation, in light of the express mandate of Section 20 of Act 49, Appellants have stated a claim for relief by pointing to the State's failure to consider geographic isolation in determining whether or not a forced merger was practicable. *See* Defendants' Corrected Memorandum at 26. That failure itself should be enough to vacate the Board's order.

Further, Appellants have pointed to far more. Appellants have noted instances of Board members themselves actually stating on the record that the burden is greater on a Section 9 proposal to demonstrate how it will better meet the goals of Act 46 than the preferred structure. *See* Affidavit (f) of Marty Strange at 4 ¶ 10(c) (citing Oct. 17, 2018 meeting tape at 2:30:00).

In its Corrected Memorandum, the State devotes great attention to the review of mileage and distances in the Secretary's consideration of Montgomery's Section 9 alternative governance proposal. Corrected Memorandum at 27-30. The State tells us that Appellant/Plaintiffs are seeking to add another "off ramp" that the law has not allowed. Call it what you may, Act 46 plainly mandates against merger where it is not necessary and where it is not "possible or practicable." Act 49, in multiple places, underscores the fact that geographic isolation can render merger impracticable. The reasons are obvious: difficulties in getting to meetings, reduced parental engagement, longer and more dangerous bus rides when grades are shifted or schools

are closed, less time for learning and school activities. Geographic isolation is plainly a recipe for diminished educational opportunity. The Secretary's singular focus on border distances is an inadequate metric for this conversation. The Secretary ignores the weather patterns and the roads that make the geography of this merger impracticable. *See* Affidavit (a) of Mary CW Niles attached to Complaint. Appellant-Plaintiffs would proffer that the Secretary even gets key facts wrong in the analysis of Montgomery's geography—but this is a motion to dismiss and there is thus no need to engage in that critique at this juncture, since the Court must assume the validity of all of the factual allegations in the Complaint and its attachments. The Board has virtually ignored any meaningful analysis of geographic isolation throughout its consideration of forced mergers. Montgomery is simply one egregious example. As alleged in the Complaint, 13 separate appellant districts pointed to geography that rendered their merger impracticable.

More to the point, the Board's evaluation of this issue, critical to hundreds of people in the Montgomery district, took less than 30 seconds. As alleged in the Complaint, for many districts there was no consideration whatsoever for this issue that is so critical to a meaningful determination of "practicable" (a word itself that neither the Agency nor the Board ever even bothered to define).

C. Count I.3—The Board ignored Act 49's explicit recognition of debt as a barrier to merger.

Faced with clear statutory language and clearly stated legislative intent that districts be allowed to remain independent if they have "greatly differing levels of indebtedness among the member districts" (Act 49, Sec. 7), the State attempts to muddy the waters by again referencing two bills that were never passed, H.15 and S.15. The State claims that Appellants' interpretation would prevail only if the language in those bills became law. As noted earlier, legislative intent cannot be discerned from bills that were unsuccessful, let alone bills that (as with H.15 and S.15)

were introduced but never even discussed in Committee. Further, the language in Act 49 is arguably stronger than both of those bills because Act 49 indicates that districts should be allowed to remain independent whenever they have "greatly differing levels of indebtedness," without reference to how that debt may be spread out among equalized pupils. The State does not—and cannot—dispute that the Board instead chose to forcibly merge districts that have, in some instances, zero debt, with districts that have millions in debt.

Regarding Washington Central, the State incorrectly (at 32) faults Appellants for placing "emphasis on absolute numbers," which the State claims "is particularly misguided because they are not useful for making relative comparisons." The State is correct that, when the two poorest towns in a forced merger—Calais and Worcester—have exactly $0 in debt, and since there can be no multiples of $0, a "relative comparison" necessarily cannot explain how many times larger is the $4 million debt of Berlin, the $4 million debt of Middlesex, and the $7 million debt of East Montpelier. But let's be clear—the Board concluded that the following approximate numbers:

$0
$0
$4,000,000
$4,000,000
$7,000,000

are not "greatly differing levels of indebtedness." That cannot be right, and it is contradicted by the Appellants' allegations in the Complaint and attached Affidavits, including the detailed affidavit by Cameron Scott Thompson, which explains the real-world impacts of the greatly differing levels of indebtedness in Washington Central if those districts are forcibly merged.

Defendants attempt to save the Board's clearly erroneous analysis by quoting from a discussion of the Board members in which the Board Chair claimed that the debt "differences were lower than the voluntary incentives area districts chose not to pursue." Defendants' Corrected Reply at 32 (citing pages 150-51 of transcript from Board meeting). This statement is

(1) incorrect, (2) without any support whatsoever in the administrative record, and (3) entirely irrelevant even if it were true.

As noted in the Affidavit of Scott Thompson—which must be taken as true in evaluating Defendants' motion to dismiss—"*even with tax incentives factored in*, property tax rates for Calais would rise sharply compared with no merger." Thompson Affidavit ¶ 4 (emphasis added); *see also id.* ¶ 22 ("[N]o matter what cost savings or revenue enhancements . . . , until 2033 the education tax rate for Calais and Worcester will be some $0.15 higher than East Montpelier's, compared to what it would have been without merger—*for the very same education*."). Further, even if one were to ignore the gross inequity of forcing poorer towns to pay the richer towns' bonds, and look at all districts together, there is no factual basis whatsoever for the State's assertion that the voluntary incentives would have been larger than the debt differentials. The bonds held by the three wealthier towns in Washington Central extend for *19 years*. The voluntary incentives, on the other hand, last only four years (8% decrease, then 6%, then 4%, then 2%), followed by no incentives at all for years five though 19. In raw numbers, the total amount of those four years of incentives comes nowhere near the $15 million in outstanding debt. Finally, even if Washington Central could have received voluntary incentives that would have balanced out the debt differential (it could not have), that is *entirely irrelevant* because forced mergers—the only type of merger the State Board was evaluating—do not receive these incentives.

Again, these are all factual matters that cannot be resolved in the State's favor on a motion to dismiss. For this and other reasons, she State's motion should therefore be denied.

Finally, on this matter, the Appellants must stress that the State's representations appear to have misled the Court into a mistaken belief that the debt issue can somehow be "figured out" even if districts are forcibly merged. This is decidedly incorrect. On February 18, 2019, the

Appellants filed a one-page letter with the Court citing Articles 5 and 14 of the Default Articles and noting that "debt is automatically redistributed under the Default Articles, without opportunity for amendment to address inequities." As explained in that letter, Appellants brought this to the Court's attention "because at oral argument, when asked by the Court, the State made a contrary assertion that the Default Articles permitted amendment of this provision and the equitable distribution of debt." The State's representation on this issue was relied upon by the Court in its March 4, 2019 ruling denying a preliminary injunction: "As the State points out, the Default Articles of Agreement specifically permit newly merged members to examine and vote on redistribution of any transferred debt." March 4, 2019 Order at 24. Appellants again reiterate that the State is incorrect. Article 5 explicitly requires that the new district "shall assume all indebtedness" on the date of the merger, Article 14 explicitly precludes amending that provision in any way, and—more fundamentally—there is simply no plausible method (nor has the State identified one) for imposing differential tax rates town-by-town once merger happens. As Cameron Scott Thompson of Calais—a town that will be harmed greatly by the imposition of bonded debt incurred by other towns—has explained, this issue was explored thoroughly over the last few years until "consensus was finally achieved around the question: is the debt problem solvable without legislative intervention? The answer, now fully accepted and acknowledged, is a resounding No." Affidavit of Cameron Scott Thompson (attached to Complaint) at ¶ 24. Articles of Agreement under §§ 706 et seq. require agreement and electorate votes for the transfer of assets and liabilities for a reason, and it is error to interpret Acts 46 and 49 as not requiring an electorate vote. *Henry Atkins & Co. v. Randolph*, 31 Vt. 226, 239 (1858) (while towns are organized for public political purposes "it does not follow that they, as organized corporations, or the inhabitants composing them, can be subjected, arbitrarily, to pecuniary burdens and liabilities").

D. Count I.4—The Board's Order Violated 16 V.S.A. § 706(n) by Imposing Default Articles Without an Opportunity to Amend Them and In Violation of the Requirements for Amended Existing Articles of Union Districts.

For the reasons explained above and in the Plaintiff-Appellants' previous filings, this Count clearly meets the exceedingly low threshold for surviving a motion to dismiss.

E. Count 1.5—The Board's Order Forcing Districts to Merge into Modified Unified Union School Districts Violated 16 V.S.A. § 721(b) and Act 49.

For the reasons explained above and in the Plaintiff-Appellants' previous filings, the Order calling for districts to merge with Modified Unified Union School Districts violates separation of powers principles, because the Board and Agency essentially re-write and modify a long-standing statute, 16 V.S.A. § 721(b), and the Board failed to recognize that because elementary school districts are necessarily part of the statutorily defined MUUSD structure, those districts are exempt from the State Plan under Act 49.

F. Count I.6—Numerous Aspects of the Board's Order Are Arbitrary and Capricious.

For the reasons explained above and in the Plaintiff-Appellants' previous filings, this Count clearly meets the exceedingly low threshold for surviving a motion to dismiss.

Perhaps recognizing the arbitrary and capricious nature of the Board's Order, the State attempts to prevent the Court from analyzing that Order by anointing the Board with papal infallibility. Defendants argue that the Legislature granted the Board legislative or quasi-legislative authority and that the Board could do *anything at all*, and the only remedy would be to go back to the Legislature. For the reasons discussed above, the State's interpretation is inconsistent with the Vermont constitution and background statutory provisions that have not been repealed. The State's interpretation is also inconsistent with the Supreme Court's ruling that each state agency "has only such powers as are expressly conferred upon it by the

Legislature," along with incidental powers "necessary" to carry out the Legislature's will. *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941). The only thing the State's interpretation is consistent with is the process the Board *chose* to follow here, in direct violation of binding constitutional, statutory, and case-law prohibitions on the Board acting legislatively.

Defendants ignore that the State Board could have chosen to merge no districts at all. That would have been consistent with Act 46, Act 49, and all of the background educational statutory provisions that require electorate votes to do things like transfer debt and assets or amend the articles of agreement for existing union districts. It also would have been consistent with the Vermont Constitution, and with the Supreme Court's recognition that "local officials are generally more familiar with the interests of their community and are best equipped to make decisions on local matters." *Rhoades Salvage/ABC Metals v. Town of Milton Selectboard*, 2010 VT 82, ¶ 10, 188 Vt. 629, 631, 9 A.3d 685, 688 (2010). But that is not what the Board chose to do. Instead, the Board chose to forcibly merge dozens of local school districts against their—often unanimous—will. That decision cannot be squared with applicable constitutional provisions, statutory requirements, and caselaw.

In fact, the State concedes that Appellants have identified inconsistencies in the Board's Order, but claims that these inconsistencies are justified in light of the "necessarily particularized nature of the Board's district-by-district analysis of school governance, as well as its discretion in determining the relative weight to give each statutory criterion in a given situation." Defendants' Corrected Reply at 39 (quotations and alteration marks omitted). The two cases Defendants cite in support of this claim are out of date and cannot be reconciled with the Vermont Supreme Court's decision last year that squarely held that it will not defer to a state agency, but will instead "find error" and reverse if the agency's actions are "inconsistently applied." *Stowe Cady Hill*, 2018 VT 3, ¶ 21. The *Stowe Cady Hill* holding does not provide an

exception for decisions involving a "particularized nature" or "discretion"—in fact, the certificate of public good process at issue in *Stowe Cady Hill* can be described that same way. It is a good thing for Vermonters, though bad for the State's arguments here, that we hold agencies to this high standard.

The Complaint identifies numerous instances of arbitrary and capricious actions of the Board's Order. These include, among other things, treating similarly situated districts differently, failing to provide record support for actions, ignoring directly applicable statutory language, and exceeding the scope of the Board's statutory authority. A single one of these actions, let alone the combination, meets the "exceedingly low" threshold for stating a claim and warrants denial of the State's motion to dismiss.

VI. COUNT IV SURVIVES BECAUSE, AMONG OTHER REASONS, APPELLANTS HAVE CLEARLY MET THE EXCEEDINGLY LOW THRESHOLD FOR SURVIVING A MOTION TO DISMISS IN LIGHT OF NUMEROUS VIOLATIONS OF THE COMMON BENEFITS CLAUSE.

The State attempts to dismiss *the entirety of Count IV* based on its assertion that "[a]t the time the complaint was filed, no Plaintiff had a potentially ripe claim *relating to small schools grants*." Defendants' Corrected Reply at 41 (emphasis added). This ignores altogether the other aspect of the Appellants' Common Benefits Clause claim, which explains in detail at paragraphs 319 and 321-326 of the Complaint the State's disparate treatment through providing tens of millions of dollars in incentives to voluntarily merged districts (like the relatively wealthy Montpelier), while denying those educational dollars to schoolchildren in districts forced into merger (like Calais and Worcester). As explained in the Complaint, "the distribution of school funding—'a resource as precious as educational opportunity'—'may not have as its determining force the mere fortuity of a child's residence.'" Complaint ¶ 324 (quoting *Brigham v. State*, 166

Vt. 246, 265, 692 A.2d 384 (1997)). The State has entirely failed to present any argument for dismissing that portion of the Appellants' claim.

Further, even on the small-schools grant issue, the State has not come anywhere near meeting the standard for dismissal of that portion of the Appellants' Common Benefits Clause claim.

This is not a complicated issue. We have various districts that: (1) entered into school district mergers voluntarily; or (2) spent hundreds of hours crafting Section 9 proposals that by law would have allowed them to keep their current governance structure if they met or exceeded the goals of Act 46; or (3) did not prepare a Section 9 proposal because they could not be merged because of different governance structures.

All three groups were in full compliance with the law. All three groups contain schools that depend on small schools grants. But the first group is guaranteed the continuation of the total of their small schools grants for as long as those small schools remain open. The result is that some of the most affluent districts in Vermont are guaranteed hundreds of thousands of dollars in additional support—coming out of the State Education Fund and hence the pockets of some of the least affluent districts in Vermont. For example, the schools of the Addison Central Supervisory Union will now be guaranteed approximately a half million dollars of support that can now be denied to schools with far higher poverty rates like Lowell, Coventry, and Glover, and then Lowell, Coventry, and Glover will be among the towns that have to pay that subsidy.

The State first claimed that no district had been denied a small schools grant under this new scheme. Then, when the small schools grants were awarded, and one of the first unmerged districts was denied such a grant and moved to intervene in this matter, the State, in its Corrected Reply in Support of Motion to Dismiss (at 41) still did not deny any of those allegations. It

instead informed the Court that there would be another Motion to Dismiss. Appellant-Plaintiffs will respond to that motion shortly, but clearly this claim cannot be dismissed altogether.

VII. COUNT V SURVIVES BECAUSE, AMONG OTHER REASONS, APPELLANTS HAVE CLEARLY MET THE EXCEEDINGLY LOW THRESHOLD FOR SURVIVING A MOTION TO DISMISS IN LIGHT OF DUE PROCESS VIOLATIONS.

For the reasons explained above and in the Plaintiff-Appellants' previous filings, this Count clearly meets the exceedingly low threshold for surviving a motion to dismiss.

The Appellant school districts have a right to be heard on all of their claims. The State attempts to dismiss the due process claim on the theory that it is a challenge to the underlying legislation itself. However, as explained above, those cases are inapplicable here because the Appellants are challenging the Board's *implementation* of Act 46 in a way that deprived school districts, students, teachers, parents, school board members, and taxpayers of even the most basic due process rights in presenting evidence on decisions that severely affect their lives. For instance, the State's most recent filing cites to a transcript of a Board discussion of Washington Central's debt situation as the Board was voting on whether to merge those districts. It is undisputed that the very people affected by that debt situation—like Cameron Scott Thompson of Calais, who is an Appellant and has filed an Affidavit attached to the Complaint—was never given an opportunity to rebut the factual errors in that discussion before the Board took its vote.

Additionally, while the State attempts to dismiss this claim of individual school board members by reference to federal caselaw that states that individual board members do not have due process protections against being removed from office, the State's argument fails to cite applicable Vermont law applying Chapter I, Article 4, of the Vermont Constitution. The Vermont Supreme Court has held that Article 4 is self-executing and that "we have almost no precedents in which Article 4, rather than the Fourteenth Amendment to the United States

Constitution, is the primary basis for decision and *none in which the party invoking Article 4 is seeking relief within or because of an administrative process*." *Nelson v. Town of St. Johnsbury*, 2005 VT 5, ¶ 54 (emphasis added). This thus presents a novel situation. The Vermont Supreme Court has long held that motions to dismiss are "rarely granted, *especially when the asserted theory of liability is novel*." *Ass'n of Haystack Prop. Owners v. Sprague*, 145 Vt. 443, 446-47, 494 A.2d 122, 125 (1985) (emphasis added). The State's motion to dismiss should be denied.

VIII. COUNT VI SURVIVES BECAUSE, AMONG OTHER REASONS, APPELLANTS HAVE CLEARLY MET THE EXCEEDINGLY LOW THRESHOLD FOR SURVIVING A MOTION TO DISMISS IN LIGHT OF VIOLATIONS OF THE EDUCATION CLAUSE OF THE VERMONT CONSTITUTION.

For the reasons explained above and in the Plaintiff-Appellants' previous filings, this Count clearly meets the exceedingly low threshold for surviving a motion to dismiss.

At town meeting in 1964 the State of Vermont adopted an amendment to the Vermont Constitution so that Chapter II, Sec. 68 reads as follows: "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." The General Assembly has never provided for school unification by any means other than an affirmative town vote.

The mandate to maintain schools in each town is clear and unchanged by either Act 46 or Act 49. The Legislature may "permit" alternatives—such as tuitioning to another town or district. *See* 16 V.S.A. 821(a).

The Board's order puts small town schools at risk of closure because the political power of small towns is diluted on merged boards, and, as the Agency has admitted, mergers will initially be costly and the pressure will be inevitable to close small schools. While Act 46 professes in Section 3(a) that "nothing in this act shall be construed to require, encourage, or contemplate the closure of schools in Vermont," in practice, the creation of merged boards and

the dilution of small town political power will lead to this result—and in fact there is already evidence that this is starting to occur in a number of the voluntarily merged districts.

Current applicable statutes require a vote of the town before a school can be closed. 16 V.S.A. § 821(a). As explained in Attorney General's Opinion No. 265, "relating to the constitutional prohibition, there is a cardinal point—that while it is not unconstitutional to educate the youth of one town in a school located elsewhere, such an arrangement must be entered into according to methods prescribed *by the Legislature*." AG's Op. 265, p. 103 (emphasis added). Here, by contrast, *the Board*, in its Order and the Default Articles of Agreement, purports to force towns into arrangements that they oppose.

The General Assembly has the power to establish a process that permits a town to close its school. There is no language in Act 46 or Act 49 that authorizes the State Board of Education to exercise or delegate this power to newly created merged districts.

The same is true with respect to the transfer of debt and the conveyance of property. There is not a single word in either Act 46 or Act 49 explicitly authorizing the transfer of debt or the conveyance of property. On the contrary, Act 49 mandates consideration of greatly imbalanced debt as a barrier to merger. The so-called "Vicious Acts of 1892" were explicit: "These acts . . . provide that the town shall take charge of all of the school buildings and school property, and assume and pay all debts outstanding incurred for the purchase of land, and the erection and repair of school houses." *Town of Barre v. Barre School District*, 67 Vt. 108, 30 A. 807 (1894). *Town of Barre*, unlike the situation here, preceded the 1964 amendment, dealt with consolidation *within* a town, and involved explicit legislative authorization for the assumption of debt and conveyance of property.

The only authorization by the General Assembly today for the transfer of debt or the conveyance of property is via the Section 706 process contained in Title 16. That process

requires a vote of the existing districts. Without explicit authorization of the Legislature and an electorate vote, there is no power to transfer debt or convey property. *See Needham v. School District No. 6 of Shrewsbury*, 62 Vt. 176 (1890). Debts and liabilities cannot be transferred by compulsion when existing Vermont statutes require an affirmative vote. *Henry Atkins & Co. v. Randolph,* 31 Vt. 266 (1858). Where the State Board has acquired the enormous power it professes to delegate in its Default Articles of Agreement is a mystery. Without an express grant of these powers from the Vermont Legislature, the State Board of Education has no such powers. *Conn v. Middlebury High School District # 3,* 162 Vt. 498, 648 A.2d 1385 (1994). "Any 'fair, reasonable, substantial doubt' regarding the power of a municipality will be resolved against the grant of such power."

IX. CONCLUSION

WHEREFORE, Appellant-Plaintiffs, by and through their undersigned attorneys, urge that this Court deny the State's motion to dismiss the complaint.

Dated:
March 20, 2019

/s/ David F. Kelley

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STATE OF VERMONT

VERMONT SUPERIOR COURT **CIVIL DIVISION**
Franklin Unit **Docket No. 33-1-19 Frcv**

Athens School District, et al.,

Appellants-Plaintiffs,

v.

Vermont Board of Education, et al.

Appellees-Defendants.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Vermont Rule of Civil Procedure 5(h), that on this day, I served this Sur-Reply on Assistant Attorney General David Boyd by U.S. Mail, addressed to the Office of the Attorney General, 109 State Street, Montpelier, Vermont, and in addition delivered a courtesy copy by email to both opposing counsel and the court.

Dated: March 20, 2019
Putney, Vermont

/s/ Ines McGillion

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