STATE OF VERMONT

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

Athens School District, et al.,
Appellant-Plaintiffs,

v.

Vermont Board of Education, et al.
Appellee-Defendants.

APPELLANTS-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and MEMORANDUM IN SUPPORT

David F. Kelley, Esq.
1501 Shadow Lake Road
Craftsbury Common, VT 05827
davidkelley05602@gmail.com
802 249 8262

Ines McGillion, Esq.
Ines McGillion Law Offices, PLLC
P.O. Box 212
126 Main Street
Putney, VT 05346
ines@mcgillionlaw.com
802 258 6441

Counsel for Appellant-Plaintiffs

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Motion for Summary Judgment with Respect to Counts I, III and IV

Appellants-Plaintiffs ("Appellants") move, pursuant to V.R.C.P. 56(a), for summary judgment with respect to Counts I, III, and IV relative to the above-captioned matter and request that this Court vacate the State Board of Education's ("Board") November 30, 2018 Order. Attachment G. The Board's Order is unconstitutional and contrary to law. In the alternative, the Court should remand this matter to the Board so that it may make findings and orders in accordance with Vermont law and the Vermont and United States Constitutions.

In support of their motion, Appellants submit the following memorandum and hereby explicitly incorporate all legal arguments and all factual assertions that they have made in all previous filings in this matter.

Memorandum of Law in Support of Motion

I. Summary Judgment is Warranted on Count I Because the Board's Order Violates Vermont law and is Arbitrary and Capricious.

In reviewing the Board's actions, the Court must determine whether it acted "contrary to law;" in other words, whether its decisions and rulings are "consistent with governing statutes and prior Board policy." *In re Clyde River Hydroelectric Project*, 2006 VT 11, ¶ 10, 179 Vt. 606, 609, 895 A.2d 736, 740.

In construing a statute, one of the Court's "paramount functions" is to "ascertain and give effect to the legislative intent." *In re Reclassification of Ranch Brook*, 146 Vt. 602, 605, 508 A.2d 703, 705 (1986). "If the meaning of a statute is plain on its face, it must be enforced according to its terms and there is no need for construction." *Id.* at 605, 508 A.2d at 705. If, however, the statute is ambiguous, then legislative intent "should be gathered from a consideration of each and every part of the statute, the subject matter, the effects and consequences, and the reason and spirit of the law." *Paquette v. Paquette*, 146 Vt. 83, 86, 499 A.2d 23, 26 (1985). Further, "statutes

relating to the same subject matter should be read in pari materia." *In re A.C.*, 144 Vt. 37, 42, 470 A.2d 1191, 1194 (1984).

A. The Board's Order Violates Vermont law

1. Act 46 Does Not Empower the Board to Force School Districts to Merge Unilaterally

Defendants' chief argument in support of the Board's Order is that Section 10 of Act 46 authorizes the involuntary merger of school districts. But Former Governor Shumlin, who signed the Act 46 into law, said himself that "I don't think you will see ever a board saying 'you shall do this.' . . . I think Act 46 is optional." Vermont Public Radio, Vermont Edition, interview (Sept. 29, 2016), https://www.vpr.org/post/governor-shumlin-live-0, at 40:11-40:27. This is entirely consistent with Section 2 of Act 46, which explicitly establishes twin goals of Act 46: (1) "encourag[ing] and support[ing] local decisions and actions" and (2) "mov[ing] the State toward sustainable models of education governance." Contrary to the Defendants' position that Act 46 has only one goal—forcing merger into the so-called preferred model wherever possible, the Legislature explicitly provided *multiple* ways to meet the goals of Act 46 through encouraging and supporting local decisions and actions, and Section 9 was one of those ways. *See infra* Sec. I.B. Forced merger was not.

Section 2 of Act 46 is crystal clear that of these twin goals, the support for local decision-making is paramount: "The legislation is designed to encourage and support local decisions and actions *that* [meet the following listed goals]." 2015 Vt. Laws No. 46, Sec. 2. The goal is *not* to support local decisions *and* meet the listed goals, but rather to support local decisions *that* meet the listed goals. The Board never addressed this critical distinction.

More importantly, Defendants' position is not borne out by other portions of the statutory language. In fact, Section 40 of Act 46 (which Defendants entirely ignore) demonstrates that the Legislature knew precisely how to authorize forced merger and did so explicitly in that Section,

but *only for* failing schools that are not meeting educational quality standards. Section 40 of Act 46 amended 16 V.S.A. § 165(b) to add authority for the Board to "*require* two or more school districts to consolidate their governance structures" when "the Secretary determines that a school is not meeting the education quality standards" and further "fails to meet the standards or make sufficient progress within two years." 16 V.S.A. § 165(b)(1)(5) (emphasis added). Notably, the Board can require consolidation only after affording the affected districts full due process rights with "an opportunity for a hearing" and only if it is "the least intrusive action" available. *Id.*

The explicit authorization in Act 46 Section 40 to "require" forced merger of failing districts stands in marked contrast to Section 10(a) of Act 46, which directs the Secretary to develop a "proposed plan" to "move" or "realign" districts "to the extent *necessary* to [provide educational opportunities through sustainable governance structures designed to meet the goals set forth in Section 2 of this act pursuant to one of the models described in Sec. 5]." 2015 Vt. Laws No. 46, Sec. 10(a) (emphasis added). Where "it is not possible or practicable to develop a proposal that realigns some districts, where necessary," Section 10(a) authorizes the Secretary to include alternative governance structures in its proposal.

Section 10(b) directs the Board to review the Secretary's proposal and publish "an order merging and realigning districts and supervisory unions where necessary." This provision is where Defendants claim the Board derives its authority to force the merger of districts against their will from Section 10. But no language explicitly provides that power. Notably, the provision does not mention "possible" or "practicable," and instead restricts the Board's authority more tightly—to publish an order merging and realigning districts only "where necessary." 2015 Vt. Laws No. 46, Sec. 10.

The operative terms "possible," "practicable," and "necessary" must be applied to varying situations of school districts across the State. No language in Section 10 or elsewhere in Act 46

specifies that the Board shall have the authority to merge districts against the will of their constituents. Thus, to determine whether the Legislature intended involuntary mergers, the Court must move on to the second step of statutory interpretation: to examine "each and every part of the statute, the subject matter, the effects and consequences, and the reason and spirit of the law," including other provisions of Title 16. *Ranch Brook*, 146 Vt. at 605, 508 A.2d at 705.

The stated goals of Act 46 strike a balance between "encourag[ing] and support[ing] local decisions and actions" and "mov[ing] the State toward sustainable models of education governance." 2015 Vt. Laws No. 46, Sec. 2; *see also* 2017 Vt. Laws No. 49, Sec. 1, Findings and Purpose ("2015 Acts and Resolves No. 46 established a multi-year, phased process that provides multiple *opportunities* for *school districts* to unify existing governance units into more 'sustainable governance structures' designed to meet the General Assembly's identified educational and fiscal goals *while recognizing and reflecting local priorities*." (emphasis added)). Forced mergers destroy this balance because they are anathema to encouraging and supporting local decisions. A balanced "plan" for moving and realigning districts where "possible," "practicable," and "necessary" would include some element of local control—for example, where the Agency and the Board find that consolidation is the most sustainable governance model for certain districts, merger would be contingent on a vote of approval by the electorate of those school districts. Indeed, other applicable provisions of Title 16, which must be read in harmony with Act 46, indicate this is precisely what the Legislature intended.

"It is a fundamental rule of statutory construction that statutes dealing with the same subject matter should be construed with reference to each other as parts of one system." *Emmons v. Emmons*, 141 Vt. 508, 512, 450 A.2d 1113, 1115 (1982). Thus, in *Emmons*, the Court noted that one section of Title 15 provided for divorce without fault after a six-month separation, while

another section of Title 15 permitted fault to be a factor in the division of marital property. *Id.* at 511-12, 450 A.2d at 1115. The Court astutely recognized that

> [t]o hold that the mere act of separation itself can be grounds for finding fault under [the statutory section dealing with division of marital property] is to take away with one hand what was given with the other. If this were the case, whoever left the homestead first for the purpose of obtaining a divorce under the six month separation provision would jeopardize his or her right to the marital property. This would thwart the purpose of enacting [the six-month no-fault provision].

Id. at 512, 450 A.2d at 1115.

Just like Title 15, the various provisions of Title 16 must be read harmoniously to avoid "tak[ing] away with one hand what was given with the other." *Id.* Chapter 11 of Title 16, entitled "Union Schools and School Districts and Joint Schools," contains provisions relating to organization, operation, and change in membership of a union school district. As relevant here, Chapter 11 provides voting rights to the constituents of individual school districts so that proposals to merge with another district, take on new debt, or convey or receive property are not foisted upon a community without their consent.

Importantly, the Legislature explicitly sought and received advice on whether to amend any of these statutes concerning voting rights. Section 8 of Act 49 tasked the Vermont School Boards Association, the Vermont Superintendents Association, and the Vermont Agency of Education with advising the House and Senate Education Committees by January 15, 2018, as to which articles of agreement in newly merged districts would require approval by the electorate. 2017 Vt. Laws No. 49, Sec. 8(d)(3)(A) and (B). In late March, on behalf of those organizations, the Executive Director of the Vermont School Boards Association wrote to the chairs of both committees and advised that no changes to current law were necessary. *See* Attachment B to Appeal and Complaint. The committees concurred and no changes were made. After careful consideration, the Legislature left all voting rights in Chapter 11 of Title 16 intact.

The Board's disregard of these voting rights renders its Final Order infirm.

2. Conflict with Sections 706d and 721

Title 16 of the Vermont Statutes Annotated § 706d sets forth the procedure for merging multiple school districts into a union school district. It requires an affirmative vote of the electorate of each forming school district. Likewise, 16 V.S.A. § 721 sets forth the procedure for merging a school district into an existing union school district. It too requires separate affirmative votes of the electorates of each of the merging school districts. Importantly, these statutes are not ambiguous. These two sections do not contain fluid standards for the Agency or Board to interpret and administer in their discretion; they are straightforward, mandatory procedural provisions. *See* 16 V.S.A. § 706d ("Each school district . . . shall vote . . . on the establishment of the proposed union school district."); 16 V.S.A. § 721(b) ("When a majority of the voters voting at the meeting vote to include an additional school district within the boundaries of the union school district as a member of the union, the board of directors shall notify the legislative branch of that additional district of the vote. Within 180 days thereafter, the legislative branch of the additional district proposed to be included shall duly warn . . . . [a] vote [whether] to be included within the union school district."). Because Sections 706d and 721 are unambiguous, they "must be enforced according to [their] terms." *Ranch Brook*, 146 Vt. at 605, 508 A.2d at 705.

To be sure, at first blush there is a reasonable question as to whether Acts 46 and 49 might operate independently of Sections 706d and 721, given that the latter provisions were enacted years before Acts 46 and 49. Under Defendants' theory as developed in their legal memoranda in this case, Sections 706d and 721 would be considered part of the "voluntary" phase of merger, while Acts 46 and 49 represent the "involuntary" phase of merger. But there are two key reasons why these sections apply to the Board's Order and must be read harmoniously with it.

First, the Legislature did not limit or suspend operation of these sections. The Legislature often does this when a new statutory scheme is being enacted to replace an old one and there might

be a question as to whether existing provisions still apply. For example, Act 49 allows a school district until July 1, 2019, to withdraw from a union school district under certain specified conditions, "[n]otwithstanding any provision of 16 V.S.A. § 721a to the contrary." The Legislature could have, but chose not to, sterilize the procedural protections afforded to individual school districts under Sections 706d and 721. It chose to keep those provisions in play, consistent with the goals of Acts 46 and 49 to "reflect local priorities" and "support local decisions and actions." 2017 Acts & Resolves No. 49, Sec. 1; 2015 Acts & Resolves No. 46, Sec. 2; *see State v. Searles*, 159 Vt. 525, 528, 621 A.2d 1281, 1283 (1993) (where Legislature could have included certain language in a statute but declines to do so, there is a presumption that it did so intentionally (citing *State v. Racine,* 133 Vt. 111, 114, 329 A.2d 651, 653–54 (1974))). The Vermont Supreme Court has held that repeals by implication are disfavored and whenever "the statutes may be harmonized" in any way, "the trial court erred" in finding that a previously enacted statute was repealed by implication. *State v. Joseph*, 2017 VT 52, ¶ 14. The same is true here. Existing provisions of Title 16 remain in place and have not been repealed.

Second, the Board itself specifically made Chapter 11 of Title 16—where Sections 706d and 721 reside—applicable to its Final Order. The first 18 of the Board's 20 directives affecting the merger of various districts explicitly refer to Chapter 11 of Title 16 or specific sections of it. *See* Attachment G, State Board's Final Order, at 30 – 37. And the Board's Default Articles of Agreement mandate transitional boards and districts to follow the protocols of Chapter 11 of Title 16 for various steps related to merger. *See, e.g.*, Attachment P, The Orleans Southwest Union Elementary School District Articles of Agreement, Article 9(D)(ii)(a) n.1 and Article 14(B)(ii).

Despite the fact that Sections 706d and 721 and other sections of Chapter 11 of Title 16 predate Act 46, they clearly apply to mergers of the type Appellants challenge. Accordingly, Acts 46 and 49 must be read harmoniously with those provisions. *Ranch Brook*, 146 Vt. at 605, 508

A.2d at 705; *In re A.C.*, 144 Vt. at 42, 470 A.2d at 1194. Neither Act 46 nor Act 49 explicitly empower the Board to force school districts to merge. Reading such authority into the statutes contravenes their stated goals and is irreconcilable with the clear procedural mandates of 16 V.S.A. §§ 706d and 721, which require an affirmative vote of each forming district to effect merger. Insofar as the Board's Final Order directs involuntary mergers, it is invalid.

3. Section 706f

For each individual district that the Board has deemed "necessary" to include in a union district, Section 706f requires an affirmative vote of that individual district's citizens before it may be merged with other districts to form a union district. 16 V.S.A. § 706f (setting forth ballot language for an individual district as follows: "Shall the town (city, union, etc.) school district of _____ which the State Board of Education has found (necessary or advisable) to include in the proposed union district, join with the school districts of _____ and _____ . . . to form a union school district . . . ."). Section 706f requires that same affirmative vote of each prospective "member" district before the prospective union district may assume the indebtedness or property of the member districts. *See id.* (subsection (d) of Article I).

The Default Articles of Agreement, which the Board made part of its Final Order, ignore 16 V.S.A. § 706f. The Default Articles mandate that certain districts merge with others and that all districts subject to merger transfer their indebtedness and property to the new merged district without a vote of the electorate of each district. *See, e.g.*, Attachment P, The Orleans Southwest Union Elementary School District Articles of Agreement, Articles 5(C) and 6(A). The Default Articles explicitly state that these provisions mandating the transfer of indebtedness and property cannot be amended by the electorate of the new merged district or the electorate or board of any "forming" district. *Id.*, Article 14(A)(i)(c) and (d). In crafting this Final Order, the Board failed

to harmonize its delegated authority under Acts 46 and 49 with the unambiguous statutory protections of § 706f.

To construct these statutes as the Board did is to "take away with one hand what was given with the other." *Emmons*, 141 Vt. at 512, 450 A.2d at 1115. The Legislature stated its intent was "to encourage and support local decisions and actions that [met the various goals of Act 46]," not to unilaterally force those goals upon communities. 2015 Acts & Resolves No. 46, Sec. 2. Section 706f, like Sections 706d and 721, is a recognition of that intent. Because the Board failed to effectuate the Legislature's intent, its Final Order is invalid and must be vacated.

4. Conflict with Section 706n

One background statutory provision where there is no doubt whatsoever what the Legislature intended it to mean is 16 V.S.A. § 706n. In Act 49, Section 8, the Legislature explicitly stated that Section 706n "currently requires all later amendments to articles to be approved by either the electorate or the unified board based upon whether the provision was included in the Warning for the original merger vote." 2017 Vt. Laws No. 49, Sec. 8. The Board, in ordering a forced merger of districts that already have existing articles of agreement (such as the U-32 district) entirely ignored not only the text of Section 706n, but also the Legislature's explicit recognition in Act 49 of the meaning of that text. For districts like U-32, which have existing articles of agreement, Section 706n explicitly requires that amendments to those existing articles may occur "*only* at a special or annual union district meeting" and "*shall be* by Australian ballot." 16 V.S.A. § 706n. The Board's Order would impose amendments on existing articles outside of a special or annual union district meeting, and by Board fiat rather than by the "Australian ballot" vote of the electorate required by statute. While Defendants now claim that the Board's action complies with Section 706n because it is not amending existing articles, but instead simply ending the entire existence of districts like U-32 (and the articles of that district), this post-hoc rationalization cannot

be squared with Section 706n or Act 49. If the Legislature intended to allow forced merger in a way that destroyed existing articles of agreement for districts like U-32, there would have been no reason for the Legislature to ask for potential amendments to language that "currently requires all later amendments to articles to be approved by either the electorate or the unified board based upon whether the provision was included in the Warning for the original merger vote." 2017 Vt. Laws No. 49, Sec. 8. The Board's actions cannot be squared with Section 706n or with Section 8 of Act 49.

5. Conflict with Sections 1755 and 1061 of Title 24, Which Are Consistent with Chapter 11 of Title 16 and Acts 46 and 49

Understood properly, Acts 46 and 49 and the remainder of the Education statutes are intended to encourage, facilitate, and prioritize more-consolidated governance structures, while leaving intact the voting rights of individual communities to make a final, fully informed decision on whether to merge their school districts with neighboring ones. Given that "statutes relating to the same subject matter should be read in pari materia," *In re A.C.*, 144 Vt. at 42, 470 A.2d at 1194, it is critical to analyze the Board's interpretation of Acts 46 and 49 for consistency with Title 24, which contains provisions relating to incurring bonded indebtedness and transferring municipal property. Although Title 24 addresses municipalities generally, it is well-settled that town school districts are municipalities distinct from towns. *See* 1 V.S.A. Sec. 126; 24 V.S.A. Sec. 1751(1).

Section 1755 of Title 24, like Section 706f of Title 16, requires an affirmative vote of the voters of a town school district before incurring a bonded debt. Section 1061 of Title 24, also consistent with Section 706f of Title 16, requires a special public meeting before a town school district may convey real property. The Legislature did not suspend or repeal these statutes in enacting Acts 46 or 49, so the Board and this Court must construe both sets of laws in harmony. The Board failed to do so because the Default Articles of Agreement do not allow for the vote of individual districts' voters before saddling them with the debt of other municipalities and

conveying away their property to a new municipality. Those provisions of the Default Articles of Agreement are invalid as contrary to existing law.

B. The Board misconstrued and misapplied Section 9 of Act 46 and failed to limit its order to *necessary* action, in violation of Acts 46 and 49.

On page 6 of its Order, the Board states that "the Board has chosen to hew as closely to the intent of the Act as that authority will allow, creating preferred structures wherever possible, and in all other cases, creating sustainable governance structures with the fewest number of districts possible and practicable." However, the intent of the Act was *not* to create "preferred structures wherever possible." The intent of the act was spelled out in Section 2. It was to "promote local decisions and actions" to achieve the five goals of equity, academic quality, fiscal efficiency, transparency, and accountability. 2015 Vt. Laws No. 46, Sec. 2. As the Vermont Supreme Court has already noted, the Board's task was to "merge or realign [governance structures] where necessary," *Paige v. State of Vermont,* 218 VT 136, ¶ 2, not "wherever possible." The State was expected to move districts into the "preferred model" only as a means of encouraging local decision-making and only to "the extent necessary" to meet the goals of the law as set out in Section 2. 2015 Vt. Laws No. 46, Sec. 10(a)(2). At the very outset, Act 46 states that its purpose is "to encourage and support local decisions and actions." *Id.*, Sec. 2.

This is exactly what the Agency told all of the school districts in Vermont was intended by the law. If the position taken by the Attorney General's office in this litigation is correct, then the Agency misled all school districts when the Agency advised all districts:

> The final State plan issued by the State Board of Education in 2018 will merge previously unmerged districts only to the extent necessary to achieve the goals and only if it can do so while maintaining each district's operating/tuitioning structure. Act 46 does not require that the districts created in the final State plan be of any particular size.

Attachment A, Agency of Education (AOE) Guidance Document, (also attached to Appellants original Appeal and Complaint as Attachment D). The underlined language is the Secretary's, not

the Appellants'. In reliance of the plain language of Act 46, Act 49, and the Agency's own guidance, volunteer parents and school board members in the Appellant school districts collectively spent *thousands* of hours working on Alternative Governance Structures that they submitted pursuant to Section 9 of Act 46.

What the Board did flies in the face of local decisions and actions (including *unanimous* votes in some districts), ignores comprehensive evidence that local actions and decisions were meeting and exceeding the goals of the law, and merges districts regardless of what the best means for meeting the goals of Act 46 might be. There is no evidence the Board even discussed what was meant by "to the extent necessary." As Attachments A and D to Defendants' Corrected Reply Memorandum in Support of Motion to Dismiss evidence, the Board's discussion of that subject was essentially limited to the Chair reading Section 10 of Act 46 out loud. With regard to any Section 9 proposal, there was never a single finding that it was necessary to force a merger in order to meet the goals of Act 46.

Section 9 of Act 46 provided for proposals by "the board of a district solely on behalf of its own district or jointly with the boards of other districts" that sought "to retain their current governance structure." 2015 Vt. Laws No. 46 Sec. 9(a)(3)(A). Section 9 contemplated single districts like Barnard, Stannard, or Franklin, being able to retain their current governance structure. To retain their current governance structure, Section 9 states that a district was expected to demonstrate, through comprehensive data: (1) the district's "ability to meet or exceed each of the goals set forth in Sec. 2 of this act"; and (2) how the district proposed "to continue to improve its performance in connection with each of the goals set forth in Sec. 2." Act 46, Sec. 9(a)(3)(B) and (C).

The Board's Rules explicitly stated that the Board, not the Agency, was expected to judge whether a district submitting a Section 9 proposal would retain its current governance structure.

The Board's job was to evaluate each proposal "on its own merits." State Board of Education Rule 3440.11.

There was nothing oblique, confusing, or complicated about this language. Legislators who supported Act 46 understood quite well what it meant. *See* Attachments B, C, D, and E.

The Barnard School District is a good example of the State Board's clearly erroneous application of the law. At its October 17, 2018 meeting, Board member Stacy Weinberger, describing herself as the "deep reader of this Section," pointed out that Barnard had presented a Section 9 proposal that showed the district may be meeting or exceeding the goals of Act 46. Oct. 17, 2018 meeting at 3:40:05.

The Secretary of Education Dan French replied: "I mean personally, when I look at this group of districts, you also have to consider the impact on the whole unit, so the state's interest in seeing a preferred structure is achieved in this area is being held up essentially by one district so to me it not only has to be a compelling case but you have to weight it against the opportunity to potentially form an entire preferred structure." Oct. 17, 2018 meeting at 3:42:37. In effect, a compelling case that a district was meeting or exceeding the goals of Act 46 was set aside because it was possible to create a "preferred structure" with no evidence—none whatsoever—that the preferred structure would be anywhere near as effective as the current structure in meeting the goals of Act 46. That position was not only in conflict with the law, but it was in conflict with common sense as well.

If Act 46 intended the Board to force merger "wherever possible," then why, knowing merger was "possible," would a district like Barnard, or any district, spend hundreds of hours preparing and submitting a Section 9 proposal? That makes no sense if the only result would inevitably be a merger *and* a loss of hundreds of unpaid volunteer hours and, more importantly, millions of dollars in tax incentives. To submit a Section 9 proposal, a district had to be willing to

forego all of the tax incentives that went with a voluntary merger. In the districts where mergers were possible, why would those districts even have held votes, often times multiple votes, on whether to merge, if the Legislature had already determined that a merger must happen wherever it was "possible or practicable"? The only purpose served by a "no" vote and a Section 9 proposal would have been to make the district ineligible for millions of dollars in tax incentives. That reading of Acts 46 and 49 is entirely nonsensical. Yet, that is precisely the reading of Acts 46 and 49 that the State Board's Order asks this Court to uphold.

Further, the Board conflated Section 8 and Section 9, when those Sections are separate and distinct. The Board was misled by the Secretary. In justifying the Agency's recommendation to forcibly merge Barnard, the Secretary wrote:

> Act 46 acknowledges that there are regions of the State where it may be necessary for the statewide plan to "include alternative governance structures … , such as a supervisory union with member districts or a unified union school district with a smaller average daily membership." Nevertheless, the Legislature limits the State Board's authority to include [Supervisory Unions] with multiple member districts in the statewide plan by declaring that the "State Board **shall approve** the creation, expansion, or **continuation** of a supervisory union **only if** the Board concludes that this alternative structure: (1) is the best means of meeting the [five Act 46 Goals of opportunity, equity, and efficiency] in a particular region; and (2) ensures transparency and accountability for the member districts and the public at large …."

The emboldened words loudly limiting the Board's mandate are the Secretary's emphasis. That language is from Section 8 of Act 46. *See* Act 46, Sec. 8(b)(1) and (2). It sets out the requirements for "proposals to create union school districts"—that is to say, voluntary mergers that expect to receive millions of dollars in tax incentives pursuant to Sections 6 and 7 of the act, and Section 8 refers specifically to Sections 6 and 7. *See* Act 46, Sec. 8(a). Section 8 is separate and distinct from Section 9. Section 8 refers to "proposals to create a union school district." Section 9 refers to proposals by a district or districts that seek "to retain their current governance structure." Act 46, Sec. 9(a)(3)(A). Section 8 is directed by the act to voluntary merger proposals pursuant to the provisions of Sections 6 and 7, separate and apart from alternative governance

proposals pursuant to Section 9. The fact that Section 9 stands alone is confirmed by the fact that there is no requirement under Sections 6 or 7 to submit "comprehensive data" demonstrating the district's "ability to meet or exceed the goals" of Section 2 or to demonstrate that they are likely to continue to be able to do so—as there is in Section 9. In fact, there would be no need for Section 9 or Section 9 proposals whatsoever if Section 8 were controlling all alternative governance structures.

The Board's decision to, in effect, ignore Section 9 was arbitrary, capricious, and contrary to law. Defendants have maintained that "[t]he balanced analysis conducted by the Board, which ordered the merger or conditional merger of 49 districts, while leaving the structure of 47 districts unchanged, was well within its discretion." Defendants' Memorandum of Law in Support of Motion to Dismiss (Jan. 30, 2019) at 22. In fact, Defendants also write: "For example, Plaintiffs state 'Not a single Section 9 proposal was ever approved by the Board.' To the contrary, the Board's Order did what was requested by at least 37 districts in alternative proposals." Defendants Corrected Reply in Support of Motion to Dismiss (March 4, 2019) at 23 & n.4.

It is interesting to see how carefully Defendants have worded that assertion—a linguistic sleight of hand. Note there is no claim that any Section 9 proposal was ever approved by the Board, much less evaluated "on its own merits" by the Board as mandated by law. That is because that never happened.

The Board's actions had virtually nothing to do with any Section 9 proposal. The Board said they merged "wherever possible," and that is what they plainly attempted to do—albeit with inconsistency, disregarding their task of evaluating every Section 9 proposal on its merits against the goals of Section 2, with at least some yardstick by which these proposals could be measured. In fact, it would have been impossible to evaluate any Section 9 proposal because neither the Board nor the Agency ever developed any standards by which the Board might evaluate or judge those

proposals, and on October 17, 2018, explicitly abandoned an earlier attempt to do so. *See* Attachment F, Minutes of State Board Meeting, Oct. 17, 2018, at 3-4.

Districts that by almost any measure are meeting or exceeding the goals of Act 46 have been ordered to merge (Franklin, Montgomery, and Barnard, for example), whereas districts are left unmerged (Cabot and Danville, for example) when the Board says they aren't meeting the goals of Act 46 and that their Section 9 proposal *doesn't* meet the goals of the act. But even in those instances the Board refused to evaluate or even approve or disapprove the Section 9 proposal. The Board was actually adamant in its refusal to evaluate or approve or disapprove any Section 9 proposal on its merits. *See* Attachment G, Board's Order of November 30, 2018 at 20-21; *see also* Oct. 29, 2018 meeting, recording at 2:45.

Despite the clear language of the law, neither the Agency of Education nor the State Board developed any tools or yardsticks by which they could meaningfully judge whether a district was, in fact, meeting or exceeding the goals of Sec. 2 of Act 46. In fact, throughout the Board's deliberations Board member Oliver Olsen, contrary to the Board's own Rule 3440.11, was insistent that no Section 9 proposal be approved or disapproved on its merits by the Board. *See, e.g.*, Oct. 29, 2018 meeting recording at 2:37:14 and also at 2:57. No Section 9 proposal was ever approved, much less evaluated "on its own merits."

Contrary to Defendants' claims, in the cases where districts were not forcibly merged it had nothing to do with their Section 9 proposals. In the case of Blue Mountain, for example, their Section 9 proposal was not even discussed at the Board meeting. They retained their current governance structure because they were being moved into a new supervisory union—a reason nowhere supported by any language in Act 46 or Act 49 (while Sheldon, likewise was moved into a new supervisory union, with all of the accompanying challenges, but was forced to merge). *See* Oct. 17 meeting at 3:30:22-3:38:38; *see also* Board's Order of November 30, 2018 at 19.

We do not have to debate whether or not the Board did anything except merge "wherever possible." Board Order at 6. We do not have to debate whether or not the Board ignored Section 9 proposals or what role those proposals played in their decision-making because the answers are clear. The Board's Order, at page 28, says there were 47 districts that were not merged. The Board's Order dated November 30, 2018 lays it all out:

- Page 8 lists five districts that do not operate any schools so there was no point in merging them;
- Page 9 lists eight districts and says there are no viable partners;
- Page 9 lists another group of 10 schools and says there are no viable partners because of unlike operating/tuitioning structures;
- Page 10 lists 12 districts where merger is not possible because of union high schools and elementary schools with incompatible operating/tuitioning structures;
- Page 19 lists six districts where the population is too sparse to achieve any economies of scale;
- Page 19 also lists Blue Mountain and says they are not being merged because they are being put in a new supervisory union;
- Page 20 lists Cabot and Danville and says that one of the main reasons they are not being merged is Cabot's need for substantial capital improvements;
- Page 28 says Twinfield is not being merged because it is being moved into another supervisory union.

Attachment G.

Contrary to Defendants' suggestion that these districts were not merged because the Board considered their Section 9 proposals, not a single one of these decisions was based on a Section 9

proposal. Contrary to the intent of the Legislature, the Board disregarded those proposals. Members of the Board admitted this:

> Is this what the Legislature had in mind when it passed Act 46? That virtually every community's proposal for an alternative governance structure will be over-ruled by this Board and replaced with an order to merge? I'm guessing the answer [is] probably not. The Board has heard in the last few months from several members of the Legislature. With few exceptions legislators have expressed their surprise and dismay with the direction the Board is taking the provisions of Act 46.... In fact, the Legislature stated clearly that an alternative structure which achieves the goals of the Act is, by definition, a 'sustainable structure'. The 'alternative structure' was intentionally offered by the Legislature to those districts which had chosen not to merge. It's not an exception; it's an alternative approach to achieving the goals of Act 46.... In other words, the Secretary must *first* establish that an AGS proposal fails "to the extent necessary to promote the purpose [of the Act]" *before* ordering a merger. However, in virtually every instance of commenting on districts' AGS proposals, the Secretary neglects to make any such finding.

Attachment H, commentary submitted to Board by Board member John Carroll at the Nov. 28, 2018 Board meeting, at 2-3.

Board Member Mathis expressed similar thoughts. He spoke about the burden of proof and noted that Montgomery's 84-page Alternative Governance Structure proposal answered what was requested, showed that Montgomery's test scores are high, "that *countering facts were never presented*, [and] that *the Board was working with inadequate information*." Attachment I, Minutes of Nov. 28, 2018 Board meeting, at 6 (emphasis added); *see also* Attachment J, document submitted by Board member Mathis to full Board, Nov 28, 2018, at 2 ("[T]he secretary presented no compelling evidence that would indicate her preference is the 'best.' And neither did the board.").

At one point Board member Olsen argued that nothing required the Board to approve or reject Section 9 proposals. *See* Oct. 29, 2018 meeting recording at 2:45:25. Board member Carroll asked, what then was the point of asking districts to prepare Section 9 proposals anyway? Oct. 29, 2018 meeting, recording at 2:46:38. It was a good question that went unanswered. Under any

reading of Acts 46 and 49, school districts that provided comprehensive data demonstrating that they were meeting or exceeding the goals of the law and were likely to continue doing so were intended to retain their current governance structure—for good reasons.

In the end, under the Board's Order, districts that retained their current governance structure did so either because they could not be merged or for reasons having nothing to do with the goals of Act 46 or their capacity to achieve those goals under a structure different from a "preferred structure." They were merged because they could be merged, regardless of whether or not they were already meeting or exceeding the goals of Act 46 and without asking what was the "best means" of meeting the goals of Act 46 or even how much damage the merger might do.

What the Board did was clearly erroneous. *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."); *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 ("Of course, if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress.").

In addition to being clearly erroneous, the Board's actions were arbitrary and capricious. As noted above, the Board was tasked with evaluating each Section 9 proposal on its own merits. The evidence indicates that only two members of the Board even read each proposal carefully. *See* Attachment K.

Board member Mathis indicated that the claim at the top of page 18 of the Board's final order, that the "The Board has *carefully considered the arguments and sentiments* of the Montgomery School Board and members of the Montgomery community" was simply incorrect. Attachment J. He goes on to say that the proclaimed "careful consideration of the arguments and sentiments" consisted of three short paragraphs on Montgomery: "The first is introductory, the third is a motion. Two sentences are spent on the articles of agreement and the union district

accepting them. Vote 3 nays, 1 present. On the contrary, the secretary presented no compelling evidence that would indicate her preference is the 'best.' And neither did the board." *Id.*

The Vermont Supreme Court has held that using a flawed analysis is arbitrary and capricious: "Once the court determined that the State had acted arbitrarily and capriciously, because its methodology was fundamentally flawed, it should have remanded the matter back to PVR to determine the valuation anew after correcting the flaws the court found." *Town of Victory v. State*, 2004 VT 110, 177 Vt. 383, 393, 865 A.2d 373, 381.

The Board also effectively ignored greatly imbalanced debt burdens, contrary to the plain language of Act 49. Section 7 of Act 49 amends Section 5 of Act 46 by adding 5(c)(4) and was intended to recognize that "greatly differing levels of indebtedness" will render mergers impracticable in some places. The Defendants did an analysis of tax rate differentials for a single year in some cases and determined that in no case would "greatly differing levels of indebtedness render any merger impracticable." In one case, Danville and Cabot, the Board said that Cabot needed repairs and that this would be a reason to render merger impracticable. *See* Attachment G at 21. But where districts were confronted with far, far greater indebtedness, millions and millions of dollars being shifted on to the shoulders of smaller, less affluent districts—districts that had actually created long-term capital reserves to avoid taking on debt—the Board found no barriers and nothing inequitable about involuntarily, and inequitably, imposing enormous debt, contrary to local decisions and actions and contrary to the intent of both Act 46 and 49. *See* Attachment G at 12, 17.

The Washington Central merger would impose a proportionate share of approximately $15 million of bonded indebtedness for the remaining 19 years of the bonds of three other towns on Calais and Worcester, communities with virtually no debt. The additional cost to the Calais elementary school budget in just the first year alone would be $165,485—roughly the cost of

paying three teachers with benefits. Attachment L, Affidavit of Cameron Scott Thompson, ¶ 25. A similar additional cost would carry forward for the life of the bond with an equally heavy burden on the district and its teachers. *Id.* In an elementary school with 125 students, three teachers can make all of the difference in the world. *Id.*

Geographic isolation is another part of Act 49 that the Board effectively ignored. One of the essential purposes of Act 49 was a recognition that geographic isolation can render a merger not "practicable." Act 49, Sec. 1(e). Even without the recognition of Act 49, it should be obvious that lengthy travel times and inhospitable travel routes would render mergers not "practicable." Shifting grades, closing schools, putting students on longer, more dangerous bus rides, making it more difficult and time consuming for parents to meet with teachers, with more difficulty for families with two working parents to be engaged with school activities and less time for student learning and extracurricular activities.

It is more likely than not that many members of the Board have never even visited some of the towns that raised this issue. Set out below is a summary of what the Board did with both the debt and geographic isolation issue:

1. Franklin and Montgomery both raised both the issues of imbalanced debt and geographic isolation. The Board never discussed imbalanced debt or geographic isolation with respect to Franklin. The Board never discussed imbalanced debt with respect to Montgomery. With respect to Montgomery's concerns about geographic isolation, the Board Chair states: "I know in Montgomery they are worried about geography." There is no further discussion. Oct. 29, 2018 meeting, recording at 1:55:18. Montgomery expressed deep concerns about unpaved mountain roads with some of the heaviest snowfall in the State and treacherous driving during mud season. Montgomery's description of inhospitable roads is at page 26

of their Section 9 proposal. The Secretary's plan evidences a significant lack of knowledge about the roads in that part of the State and talks only about distances.

2. Berlin, Calais, Newbury, Pownal, Richford, Middlesex, and Worcester all raised the issue of imbalanced indebtedness. With respect to Berlin, Calais, Middlesex, and Worcester, the Board minutes for the October 17, 2018 meeting state: "Olsen brought up debt as one of the major topics of public comment, and said there is clearly a differential in debt, but he does not see that it meets the threshold in the law of 'greatly' differing levels of debt. He does not see that it significantly affects the tax rate." That is it. End of discussion. *See* Attachment F, Board minutes for Oct. 17, 2018 meeting, at 7. The Board never even discusses the debt issue with respect to Newbury and Pownal—anywhere. With respect to Richford, Board Member Mathis raises debt inequities but says they should be addressed in a separate letter. Oct. 29, 2018th meeting, recording at 1:09:02. Later Mathis says he assumes debt inequities will be addressed in articles of agreement. Oct. 29, 2018 meeting, recording at 1:15:25.

3. Athens, Barnard, Brighton, Charleston, Grafton, Greensboro, Lakeview, Lowell, Stannard, Westminster, and Windham all raised the issue of geographic isolation. In the cases of Barnard, Greensboro, Lakeview, and Stannard, the Board never even discussed the issue. With respect to Athens, Westminster, and Grafton, Board Member O'Keefe commented that Act 46 doesn't require schools to close. *See* Attachment M, Board minutes for Nov. 15, 2018, at 12. With respect to Brighton, Charleston, Derby, Holland, Jay, and Westfield, the Board rejected the Secretary's proposal for mergers, did not adopt any Section 9 proposal, but nevertheless allowed those districts to retain their current governance structure, concluding there was "no opportunity for merger of scale." *See* Attachment F, Board minutes for Oct. 17, 2018, at 11; *see also* Oct. 29, 2018 meeting, recording at

3:26:17. With respect to Windham, Board Member Olsen commented that schools would not be closed without a vote. *See* Attachment F, Oct. 17, 2018 meeting Board minutes, at 10.

In almost half of the instances where the Appellant school districts raised the issues of imbalanced debt or geographic isolation, the Board did not even discuss the issue.

The issue of geographic isolation is not nearly as simple as Mr. Olsen suggests. Elementary school grades are already being shifted further from the community. Board meetings are already further removed from communities. Inevitably schools will be closed as larger districts with enough voting power seek to boost revenues by moving students—first, fifth and sixth grades, then, when schools lack the critical mass to be sustainable, the entire school. The single most important factor will be voting power, not academic quality or fiscal efficiency. In the meantime, school board meetings will become further removed from multiple communities, and geographic isolation will leave more and more communities disengaged and disconnected. Especially for rural elementary schools, community proximity and geographic isolation are complex and critical issues deserving more than a cursory discussion by unelected officials who have never even lived in the affected communities.

C. Summary judgment is warranted on Count I.2 because the Board acted well outside its authority and imposed requirements in direct violation of Act 49, Section 20.

Defendants have already conceded that Act 49's "prohibition on 'more stringent requirements' makes the requirements of Acts 46 and 49 into 'both a floor and a ceiling' for alternative structure proposals." State's Opposition to Preliminary Injunction at 23 (quoting Compl. ¶ 230); *see also* 2017 Vt. Laws No. 49, Sec. 20 ("The State Board may adopt rules designed to assist districts in submitting alternative structure proposals, but shall not by rule or otherwise impose more stringent requirements than those in this act."). Defendants then argue that the Board

complied with this prohibition because it never said it was imposing more stringent requirements. But the test is not what the Board *said* it was doing. The test is what the Board actually did, and it is indisputable that, to the extent the Board evaluated alternative governance structures at all, it did so in a way that effectively imposed requirements that appear nowhere in Act 46, Act 49, or the 3400 series of the Board's own Rules.

For instance, the Board entirely disregarded geographic isolation. Act 49 recognized that "lengthy driving times" and "inhospitable travel routes" could be a significant barrier to merging some districts. Act 49, Section 1(e). Thirteen of the Appellant districts have indicated that geographic isolation is a barrier to their being forcibly merged pursuant to the Board's Order. *See* Complaint Attachment A. Defendants have only ever addressed the issue of Montgomery.

It might prove helpful for the Court to see exactly how the Board analyzed these issues for the Montgomery School District. A video recording of the Board Meeting on October 29, 2018 is available here:

https://www.youtube.com/watch?v=BBFk_GvcOYA&list=PLaXzAQwtzpj73XVGfJsjvuUGbcYe0td0a&index=4&t=0s.

Appellants request that the Court take, literally, just one minute to review the entirety of the Board's discussion of the geographic barrier issue regarding Montgomery: 1:55:00 to 1:56:12. This one minute of video must be seen to fully understand how arbitrarily the Board was operating. Chair Huling, after recognizing that Montgomery "sticks out as a school that has done extremely well," notes in passing, "I know in Montgomery they are worried about geography, other comments on Montgomery?" And then silence. That is it—the entire amount of consideration given by the Board to that issue. Chair Huling then summarizes the districts the merger would involve. Less than five minutes of consideration is given for the entire merger, with

only one rhetorical question asked, and no answers given, in response to the community's deep-seated and well-founded concerns about mountain roads in winter time.

While Defendants claim that the Secretary's Plan discussed geographic issues in some detail, the only thing the Secretary failed to account for the fact that these are dirt roads and mountain roads with some of the highest snowfall in the State. In the winter of 2017-2018, Jay Peak, next to Montgomery, received 30 feet of snowfall; that same year, Burlington received only 7.39 feet. *See* Affidavit of Mary Niles at ¶ 5(h). None of those factual issues were ever discussed or considered by the Board.

Despite the directive of the General Assembly, geographic isolation, lengthy driving times, and inhospitable travel routes were never recognized by the Agency or the Board as a barrier to merger. In most cases, the issue was completely ignored. This is a safety issue, not an efficiency issue. And on this issue, the parents who are putting their children on the buses are the ones with the expertise.

D. Summary judgment is warranted on Count I.3 because the Board failed to consider greatly differing levels of indebtedness.

Defendants ignored the General Assembly's statutory directive to recognize both greatly imbalanced debt and geographic isolation as important considerations and barriers to merger. Both greatly imbalanced debt and geographic isolation were cited by numerous districts as barriers to merger, and neither of those barriers were ever recognized as an obstacle to merger by the Board.

Far from rebutting this fact, the State's filings to date have made it all the clearer that the Board failed to meet its statutory obligation. The State contends that the Board had "detailed spreadsheets" and discussed the resulting tax rate differentials at its October 17, 2018 meeting. State's Opposition to Preliminary Injunction at 25. Then the State claims that: "Plaintiffs may disagree with the Board's conclusion, but there is no question that the Board considered levels of debt within the Washington Central Supervisory Union specifically and found that those districts

did 'not meet the threshold' for greatly differing levels of indebtedness." *Id.* at 26. Then the State attaches a brief exchange between Board member Peter Peltz and Board Chair Krista Huling as evidence of the Board's consideration.

What is evident from this exchange is that there was no evaluation or analysis. Further, nearly every statement that the Board members make in the Board discussion attached to the State's filing is either factually incorrect, not in the record before the Board, or both. *See* Affidavit of Cameron Scott Thompson. The discussion is thus a clear example of arbitrary and capricious agency action for failure to consider the record that was before it, and for ignoring substantial evidence that is directly contrary to the Board's conclusions. *See, e.g.*, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951) (holding that when agencies are evaluating whether evidence is substantial enough to support a particular action, they "must take into account whatever in the record fairly detracts from its weight"); *Carpenters & Millwrights, Local Union 2471 v. N.L.R.B.*, 481 F.3d 804, 809 (D.C. Cir. 2007) (holding that an agency must "explain why it rejected evidence that is contrary to its finding").

First, no one at the Agency or on the Board ever articulated what that "threshold" for greatly differing levels of debt might be. Defendants have failed to rebut this crucial fact, and on this basis alone the Court should find the Board's actions arbitrary and capricious. *See, e.g.*, *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 26, 203 Vt. 274, 155 A.3d 1207 ("We cannot conclude, based on the record before us, that [the Green Mountain Care Board] has given us an adequate explanation to determine the reasons for GMCB's decision and how they are consistent with the statutory standards."). Defendants concede that the Board viewed this matter through the lens of tax rate differentials. But Act 46 and Act 49 do not involve or even mention tax rate differentials—the law concerns itself with "greatly differing levels of indebtedness." If the three richer towns of Washington Central and their $15 million of combined debt is not a greatly differing level of

indebtedness for the two poorer debt-free small towns of Calais and Worcester, then it is hard to imagine what could ever meet the statutory "threshold." The Board in effect wrote that statutory provision entirely out of existence. State agencies are not free to do that.

Second, the only thing the Board did was look at one year's tax rates, ignoring the fact that in Washington Central the two towns with the lowest average and median adjusted gross income, and with no debt, would now be engaged in shouldering approximately $15 million of bonded debt for the remaining 19 years of those bonds incurred by neighboring districts—a debt that in the first year alone would cost Calais $165,485. Affidavit of Cameron Scott Thompson ¶ 25. For a small, rural town like Calais, that amount harms its taxpayers.

Third, Board Member Peltz claims, without reference to any basis for his statement, that "I do know that the Worcester and Calais schools do need work in terms of just physical work." State's Opposition to Preliminary Injunction at Declaration transcript page 150. This is incorrect. Not only is there *nothing* in the record before the Board that supports this claim, but the record in fact directly refutes it. In response to the Agency's proposed statewide plan, when each district was provided an opportunity to send a response to the Board (which the Board limited to a maximum of 1 page), the six boards of Washington Central unanimously submitted a response explaining, among other things, the barriers from debt. That document *was in the record before the Board*. Washington Central's response explicitly noted that the Secretary's claim that "[t]oday's district with little or no debt will tomorrow become the district that needs a new roof" was an inapt comparison: "The Secretary may be unaware that over the last few years WCSU's smallest elementary school, Doty Memorial [Worcester], methodically replaced its entire roof without going out to bond. The Secretary appears to assume that districts that do not bond to address capital needs must either be in negligent disrepair, or lucky, or both. This is self-evidently

not the case." WCSU Response to Agency's Statewide Plan (August 2018) (attached to Affidavit of Cameron Scott Thompson).

The same goes for Calais. Calais has had the foresight to create a 75-year capital funding plan. Affidavit of Cameron Scott Thompson ¶ 19. Thus, whatever led Board Member Peltz to "know that the Worcester and Calais schools do need work in terms of just physical work," it was not the record before the agency. Nor was it factually correct. Agency actions such as this cannot be upheld on appeal.

Fourth, Board Member Peltz goes on to say that savings from a merger would compensate for many of these costs, but the only evidence in the record recognizing any sort of potential savings is Washington Central's response, which refers to the savings as entirely "theoretical" and as dependent on the "dramatic" step of "closing Calais Elementary School and reconfiguring other elementary schools." *Id.* Those types of savings cannot be considered since, as the State itself recognizes, Act 46 was not intended to close schools. Further, Washington Central noted that even if these "theoretical savings" came to pass, "Calais and Worcester taxpayers would pay $0.035 more in their baseline tax rates than they would if they were not subsidizing wealthier towns' bonded debts." *Id.* It hardly furthers Act 46's goal of enhancing equity when the real-world impact here is a reverse-Robin-Hood shift in debt.

Finally, Defendants seems to argue that even if Washington Central provides an extreme example of greatly differing levels of debt, Acts 46 and 49 do not explicitly give a "carve-out" from merger to the Washington Central districts. This appears to be Defendants' way of responding to the overwhelming evidence—in the record before the Board, not to mention the express legislative history of Act 49—that Calais Representative Janet Ancel is the legislator who had the provision about indebtedness inserted into Act 49 to protect Calais from merger.

E. Summary judgment is warranted on Count I.4 because 16 V.S.A. § 706(n) was not repealed or amended to accommodate involuntary mergers when "necessary" under Section 10 of Act 46.

Act 49 provides that after the Board issued its Statewide plan on November 30, 2018, those districts that were subject to involuntary forced mergers would have 90 days to adopt their own articles of agreement; otherwise those districts would be subject to the Board's Default Articles of Agreement. Act 49, Sec. 8, adding Act 46 Sec. 10(d).

On January 9, 2019, the Agency of Education issued a guidance document to various school districts that were being forcibly merged. On page 1 is "Note: Amendment Committee" which reads in part: "The delayed Org. Meeting date makes it *impossible* to meet the Act 49 deadline for a favorable vote of the electorate (February 28, 2019)." (Emphasis added.) Thus, an unelected State agency has determined that something is "impossible" even though the Legislature explicitly provided for it. The State cannot do that.

The January 9, 2019 guidance document goes on to state: "It is *possible,* however, to (1) *use the work of the Amendment Committee* and (2) to ***adopt*** the amendments ***before July 1, 2019*** pursuant to the pre-existing statute 16 V.S.A. 706n . . . ." (Bold and italics in original.)

Section 706n requires, among other things, that particular articles of agreement put in place by existing union school districts can only be amended by votes of the electorate. The Board's scheme for imposing Default Articles of Agreement violates that existing statutory voting requirement. While Defendants claim that new unified union school districts do not have articles of agreement because they are new, this is incorrect. The respective electorates have not voted to dissolve those existing articles, and those union school districts continue to have articles of agreement, which under existing law—Section 706n—requires a vote of the electorate to be changed. What the State is attempting to conjure, contrary to law, is that those articles have somehow disappeared.

What is ironic is that the imposition of Default Articles of Agreement violates section 706n, and yet the State is still attempting to rely on 706n at the same time. The Agency is seeking to create *ultra vires* a process for imposing new articles for forcibly merged districts using the section 706n process. The State does not get to pick and choose when Section 706n applies and when it doesn't.

Section 706n was intended only for voluntary mergers. It explicitly incorporates Section 706f by reference, which requires an affirmative vote of each existing district, consenting to the conveyance of property and the transfer of debt before formation of a union, consolidated, or merged district—very much contrary to the Board's Default Articles of Agreement. As Appellants have already pointed out, the Legislature sought guidance from the Agency of Education, the Vermont Superintendents Association, and the Vermont School Boards Association as to what amendments would be needed in order to provide for an appropriate voting process, and which articles needed to be approved by the electorate with respect to those mergers that were deemed "necessary" pursuant to Section 10 of Act 46. And in a March 29, 2018 letter to the chairs of the Education Committees on behalf of these organizations, the Executive Director of the School Board's Association advised the Committees that nothing needed to be done.

The current unrepealed Vermont statutes like Sections 706n and 706f all contemplate votes of the electorates. There is no statutory process for involuntary mergers, only the Board's impermissible homemade process (which amounts to legislation in violation of separation of powers), for addressing issues such as the adoption of Articles of Agreement or the conveyance of property or the transfer of debt. The Board and Agency seek to put a round peg in a square hole by using existing statutes regarding voluntary mergers as a template for forced mergers. The Agency, as an administrative body, as repeatedly noted, has no prerogative to create a statutory process reserved to the Legislature.

It should also be noted that in many involuntary merger situations, where one town has substantially more votes than a merged partner, such as Hardwick and Greensboro, there can be no Articles of "Agreement"—only articles of imposition. Indeed, this could be said for all forced mergers.

F. Summary judgment is warranted on Count I.5 because the Board's attempted merger of Modified Unified Union School Districts (MUUSDs) violates 16 V.S.A. § 721(b) and Act 49.

Count I.5 asserts a meritorious statutory and constitutional argument. Act 49, Section 8(e) exempts Modified Unified Union School Districts (MUUSDs) from involuntary mergers. The State Board decided to involuntarily and forcibly merge Barnard, Cambridge, Huntington, Orwell, and Windham with their respective unified districts within the MUUSDs. However, the law prevented MUUSDs from being forcibly merged, and the law did not authorize forcing the unmerged elementary school district to merge with unified district within the MUUSDs. Thus, the Agency of Education and the State Board had to invent a process for doing this. What the Agency did, again, was take existing statutes and rewrite them. In the Agency's own words, what they did was create a new voting system. In the Agency's guidance document, they explain that "the vote in this instance would be *one half of the Section 721 process*: Does the existing union school district accept the new member? A State Board requirement [under Acts 46 and 49] that the [elementary district] must merge if the MUUSD accepts it would replace the other part of the Section 721 process." State's Opposition to Preliminary Injunction at 34 (emphasis added). This newly created voting process by an administrative agency—choosing, in its own words, to apply only "one half" of an applicable statute—violates the separation of powers and amounts to pure legislation. Even if devising how elections can be conducted, and amending statutes, were permissible, it is notable that this was not even submitted for a formal rulemaking process. And

even if it had been submitted to rulemaking, agency rules cannot repeal, amend, or otherwise supplant an act of legislation. *Freeman v. City of Mobile*, 761 So. 2d 235 (Ala. 1999).

Section 721 of Title 16 provides the district sought to be subsumed within a union with the right to vote. Again, the statute was never amended, repealed, or supplemented by Act 46 or Act 49 to accommodate involuntary mergers. The Agency simply assumed the authority to suspend half of the law. It is axiomatic that a Legislature cannot delegate powers that go to fundamental rights and liberties, such as the right to travel or the right to vote. *Kent v. Dulles*, 357 U.S. 116 (1958); *see also Greene v. McElroy*, 360 U.S. 474 (1959). Neither the Agency nor the Board ever has the authority to ignore half of a statute as it suits their needs, particularly when it comes to something as fundamental as voting. The executive does not have lawmaking power. *See Peters v. Hobby*, 349 U.S. 331, 350 (1955); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 539 (1952).

If the Vermont Legislature intended a process of merging unmerged districts with districts that could not be forcibly merged, and to deny the unmerged school district a right to vote independent of the other school districts, then it was incumbent upon the Legislature to make that determination and to amend existing law. What is not allowed is an administrative agency picking and choosing which half of a statute to apply to its own actions in any given week.

G. Summary judgment is warranted on Count I.6 because the Board's actions were arbitrary and capricious.

Appellants' filings to date explain in detail the myriad of ways that the Board acted in an arbitrary and capricious manner and the applicable case law that requires vacating agency action in these circumstances. Defendants' response has essential been a plea for deference, but deference is inapplicable here. Functions of the Legislature that are purely legislative cannot be delegated and must be exercised by it alone. *Village of Waterbury v. Melendy*, 109 Vt. 441, 199

A. 236 (1938). Further, even if the State were entitled to deference, the State's actions could not be upheld even under the most deferential standard of review.

II. Summary Judgment is Warranted on Count III Because the State Lacks Authority to Impose One Municipality's Bonded Debt on Another Municipality Without Its Consent.

A. Bonded indebtedness cannot be transferred to other districts absent an electorate vote consenting to assumption of debt.

Vermont law on this issue has been settled and has not changed for over a century. The Board of Education had no authority to order the transfer of one district's previously voted-upon and incurred indebtedness upon another district, absent a vote of the electorate agreeing to assume the debt. Even if the courts were to conclude that the Board has the power to dissolve municipal school districts and form new ones, the Board does not have the power to shift debt onto a community that has not consented to that debt. Section 7 of Act 49 told the Board that greatly imbalanced debt could be a bar to merger. But nothing in Act 46 or 49 gave the Board the power to shift debt—even in those cases where districts were merged with one district having substantial debt. Existing law was neither repealed nor amended. In fact, the Legislature made a conscious decision not to change any existing law with respect to voting rights. *See* 2017 Vt. Laws No. 49, 8(d)(3)(A) and (B) amending 2015 Vt. Laws No. 46, Sec. 10. The Legislature asked the Superintendents Association, the School Boards Association, and the Agency of Education if they should make any changes to current law with respect to voting rights, and they determined to leave all existing laws in place. The laws currently in effect remain in effect. Nothing has changed those laws and nowhere has the Legislature empowered the Agency or Board to change those laws.

With respect to mergers of districts within the same town, the law is crystal clear: 16 V.S.A. 477(c) remains in effect:

> In case of a union of an incorporated district and a town district under either subsection (a) or (b) of this section, each district *shall settle its own business affairs and pay all its indebtedness*, except for repairs and new buildings, shall deposit its

> records with the town clerk and shall no longer exist *except for the settlement of its own pecuniary affairs*. In effecting such settlement, a district may remain in existence for not more than five years for the purpose only of voting, assessing and collecting a special tax annually to pay such indebtedness.

(Emphasis added.) With respect to the creation of union districts by mergers between towns, 16 V.S.A. § 706f is equally clear: Indebtedness does not shift without the consent of the electorate of each municipality. The law requires that the following article be submitted to the voters and that it be adopted by an affirmative vote of a majority of the voters in each town:

> The union school district shall assume the indebtedness of member districts, acquire the school properties of member districts, and pay for them, all as specified in the final report. (If no indebtedness is to be assumed, or school property acquired, by the union district, this paragraph (d) may be omitted.)

16 V.S.A. § 706f.

Defendants put much stock in *Town of Barre v. Barre Sch. District*, 67 108, 110, 30 A. 807 (1894). But this was a case about funds on hand and future collections, not about shifting the debt incurred with the consent of one district on to the unconsenting taxpayers of a neighboring district. The Court specifically recognized that the Defendant had the right to use funds to defray their previously incurred indebtedness:

> The Acts of 1892 declare that all such school districts shall no longer exist *"except for the settlement of their pecuniary affairs,"* and constitute each town into a single district for school purposes.... The money which the defendant had April 1, 1893, coming from its own tax and what it should realize from the uncollected taxes, had by law and the vote of the district been appropriated to defraying its current expenses, *and to the payment of its indebtedness*. It belonged to the defendant, and not to its taxpayers, to be used for these purposes. The defendant held it, and had the right to the uncollected portion of the tax for these purposes, and for these purposes only.

Id. (emphasis added). The same language continues in the statute today at 16 V.S.A. 477.

The *Barre* case stood for the proposition that after the previously incurred debts were paid, the remainder could not be reimbursed to the taxpayers. While assets and future obligations became shared by the new district, the previously incurred debts remained the debts of the former

districts. When two adjoining school districts united, under Vermont law, the new district was not liable for the debts of the old. The old districts survived "to settle their pecuniary affairs." *Needham v. School Dist. No. 6 in Shrewsbury*, 62 Vt. 176 (1890). *Needham* was a suit against a new merged district to recover a debt which had been incurred by the old district. By force of the statute (R.L. 557), "a district which has become part of a new district continues to exist for settlement of its affairs," and therefore the suit was dismissed. We have similar statutes today. Title 16, Section 477 is an almost identical statute using the exact language of previous statutes. *See also* 16 V.S.A. § 706(f).

The Board has no authority to impose indebtedness via Default Articles or any other means. Current law plainly reserves the power to shape budgets and to incur indebtedness to the electorate, not the Board. 16 V.S.A. § 562(8) and (9). Nothing in Act 46 or 49 says anything about changing the powers reserved to the electorate.

B. In Vermont the Legislature does not have the power to transfer debt without the consent of the electorate.

It is the long-established law of the State of Vermont that, while the Legislature has the power to create or dissolve municipal governments, it does not have the power to bind a municipal corporation to contracts without the authorization or consent of the municipal government. In this respect, municipal corporations are no different than private corporations. *Atkins & Co. v. Randolph,* 31 Vt. 226, 232 and 237 (1852). In the *Atkins* case, the Legislature had created liquor agents to purchase and supply liquor on behalf of the various municipalities. When the agent for Randolph didn't pay his suppliers, the suppliers sued the town. The Court said the contract was between the agent and supplier and that the Legislature could not impose a debt upon the municipality without the municipality's consent. The *Atkins* Court held:

> So far as a municipal corporation is endowed by law with the power of contracting, and as such, is made capable of acquiring, holding and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being invested with

> legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forums, upon the same principles, and by the same means as in case of a private corporation, such municipal corporation must stand on the same ground of exemption from legislative control and interference as a private corporation.

Atkins, 31 Vt. at 237-38.

Further, the *Atkins* Court noted:

> This view seems to be fully recognized and embodied in the learned and elaborate opinion drawn up by Isham, J., in the case of *Montpelier v. E. Montpelier*, 29 Vt. 12. That case, moreover, as well as that of *Bowdoinham v. Richmond*, 6 Greenl. 112, demonstrates that some things are beyond the scope of legitimate legislation, as affecting municipal corporations, a doctrine entirely at variance with the idea of illimitable supremacy of the law making powers over corporations.
>
> The language of Hutchinson, J. in *Poultney v. Wells*, 1 Aik. 180, [31 Vt. 238], embodying the principle upon which the decision of that case was rested, is comprehensive, and to the point. He says, "the court[s] are unanimous in the opinion that the school right, thus appropriated by the charter, belongs to the town of Wells, so that the legislature can exercise no power over it to vary its appropriation, without the consent of the town, and this consent must be by those who are inhabitants of the town at the time the assent is given."

Id. at 238.

Other courts have taken a similar view:

> Upon the same question Chief Justice Breese, in *People v. Mayor, etc., of Chicago*, 51 Ill. 17—a case involving the question as to whether the city of Chicago could be compelled without its consent to assume a local indebtedness,—said: "If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed; in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature."

Helena Consol. Water Co. v. Steele, 20 Mont. 1, 7, 49 P. 382, 384 (1897).

The Legislature lacks the power to bind a municipal corporation to contracts, and bonded indebtedness, without the authorization or consent of the municipal government. Lacking that power, it cannot delegate it to any agency. The Board's Order, and the Default Articles of Agreement, must be declared ultra vires and be vacated.

C. Even if the Legislature had such a power, it never delegated that power to the Board.

At issue here are the constitutionally guaranteed and statutorily granted rights of individuals in one community to vote before incurring debt on behalf of their community versus the right of an unelected Board, an agency, without any grant of explicit authority from the General Assembly, to deny that right to other individuals in another community. Also at issue is the power of an executive agency, not the Legislature, to order the shift of millions of dollars of debt without explicit authorization from the Legislature, contrary to existing statutory law. While the right to vote is not guaranteed in the U.S. Constitution, all Vermont citizens are guaranteed the same equal voting rights in the Vermont Constitution. *Vermont Constitution, Chapter II, Section 42.*

The State overlooks the critical facts before this Court: (1) An unelected state agency (not the Legislature) is shifting millions of dollars of debt from taxpayers who were given the opportunity to consider and consent to that debt onto the shoulders of taxpayers who were denied those rights; and (2) not only is there no statutory authorization for this, but the State has not addressed the central issue of Appellants' constitutional claims regarding the transfer and disposition of debt or assets with regard to forced mergers.

Neither Act 46 nor Act 49 ever specifically addressed the issues regarding transfer of debt or assets in any manner whatsoever, other than recognizing this as a *barrier* to merger. The Legislature asked for more information on what additional legislation was needed to address those issues, particularly issues with respect to the right to vote. 2017 Vt. Laws No. 49, Sec. 8(d)(3)(A) and (B). The ultimate decision was to leave the existing law the way it was—nothing gave the Board the power to take away people's right to vote with respect to incurring debt.

Existing Vermont statutes do, however, address this issue. Sections 477 and 706(f) of Title 16 are explicit: in one case debt remains with the district that incurred the debt and in another each existing district must vote on the acceptance of debt or the conveyance of property with respect to

school mergers. The statutes were never amended or repealed by Act 46 or Act 49. Statutes that direct that debt and assets become the debts and assets of the merged district (16 V.S.A. §§ 722 and 723) are predicated upon an affirmative vote of the electorate of each and every district to be merged. The State picks and chooses which statutes they seek to have recognized, but 16 V.S.A. §§ 706(f), 722, and 723 must be read together in pari materia. None of those statutes have been repealed or amended. In fact, the Legislature was explicit. Act 49 expressly provides that greatly imbalanced indebtedness can be a barrier to merger. The Board thus never had authority to impose forced-merger on districts with differing levels of debt. But even if the Board went ahead and merged districts with imbalanced debt, there is no law authorizing the shift of that debt without a vote. There are specific statutes in place relating to the transfer of debt and property, and those statutes call for a vote of the electorate of each affected district. 16 V.S.A. § 706(f) and 24 V.S.A. §§ 1755 and 1786(a). Those statutes were never repealed or amended.

In this case, in the absence of any explicit authority from the General Assembly, we have an unelected Agency and an unelected Board from the Executive Branch exercising the taxing powers of the Legislature, and allowing some districts to vote with respect to incurring debt and denying that voting right to other districts. The Board, by its Default Articles, is in effect enacting rules, and even laws; it is imposing already incurred debt retroactively on communities that have not consented to or incurred that debt and denying the citizens of multiple communities the common benefit of the constitutionally guaranteed right to vote on an issue on which their neighbors have been entitled to vote. "As a general matter, statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

The alternative to the Default Articles is a situation where a whole new scheme of voting has been set up—not by the Legislature—but by an unelected Agency and Board. In this scheme, votes on new articles occur in a merged district—where, in most cases, such as Enosburg and Richford or Hardwick and Greensboro or as in Washington Central, the town with the debt also has far greater population, and as a result their neighbors' voting rights have been severely diluted. There are no "Articles of Agreement" in such a situation because there is no agreement. There is simply a new majority with the ability to impose its will and shift its debt onto less populous and often less affluent communities.

D. Vermont falls squarely on the side of states that require the consent of the electorate to shift debt onto a municipality.

Vermont has never deferred to majority opinion when there is a moral issue at stake. Vermont was alone in being the first State to outlaw slavery. Vermont has stood in the minority in recognizing equal education funding. There is a division of authority regarding whether indebtedness is assumed by a consolidated district, and Vermont aligns with those jurisdictions that hold indebtedness is not assumed by the consolidated district. 121 A.L.R. 826 (citing *Needham v. School Dist.*, 62 Vt. 176 (1890)). Many states share Vermont's conviction that municipal bond debt cannot be incurred without consent of the municipality. *See Terrell v. Clifton Independent School Dist.*, 5 S.W. 2D 808 (1928, Tex. Civ. App.); *State, Sharp, Prosecutrix v. Froelich*, 37 A. 1024 (N.J. 1897); *Yarborough v. Wilson,* 159 Miss. 97, 131 So. 828 (1931); *State ex rel. Zylstra v. Clausen,* 66 Wash. 324, 119 P. 797 (1911); *Owsley County Bd. Of Ed. v. Owsley County Fiscal Ct.*, 251 Ky. 165, 64 S.W.2d 179 (1933); *Ewing v. Schopf*, 11 Ohio App. 379, Ohio C.A. 63 (1919); *St. Louis-San Francisco R. Co. v. County Excise Bd.,* 142 Okla. 176, 286 P. 345 (1930).

In *Barber v. P.S. Cummings and Sons*, 167 Ga. 289 (1928), the Court held that where one school district incurs bonded indebtedness for the purpose of building a school house, and the

district thus incurring the debt and another district are consolidated so as to form a new consolidated district, the second district (whose residents and taxpayers have not participated in the creation of the bonded debt) is not liable to pay any part of the debt incurred by the other district. The Court reasoned "that to tax the property of the petitioners . . . would be the equivalent of taking their property without due process of law." *See Needham v. School District No. 6 in Shrewsbury*, 62 Vt. 176.

In *Bruce v. Catahoula Parish School Board*, 174 La. 451 (1932), the Court dealt with an issue identical to the issue posed by Enosburg shifting its debt onto Richford, or East Montpelier shifting its debt onto Calais and Worcester, or Hardwick shifting its debt onto Stannard. The Court held that "bonded indebtedness of a particular district does not automatically become the indebtedness of a larger district, in which it is included, from the act of merger or consolidation," reasoning "we can conceive of cases where great injustice and financial wrong could be inflicted upon some taxpayers," i.e., "a small but thickly populated district with a bonded indebtedness outstanding could be merged with large tracts of valuable, unimproved lands, inhabited by few people, and at an election for the purpose the bonded debt could be fastened for payment upon the entire new district, almost entirely by the vote of the populous district." *Id.*; *see also In re Joint Class A School District*, 77 Idaho 453 (1956) (holding that upon consolidation, neither all nor part of one district's bonded indebtedness could be imposed involuntarily upon taxpayers of the unencumbered district, and legislative act so providing violated the Idaho Constitution).

Under Vermont statute and controlling decisions, an electorate vote is required to transfer bonded indebtedness. The Legislature has not expressly amended or repealed these statutes or abrogated those decisions. The Board's Default Articles violate Vermont law and the Vermont Constitution if they are construed to impose bonded indebtedness upon a municipality that did not vote to accept that indebtedness.

III. Summary Judgment is Warranted on Count IV Because Distribution of Small Schools Grants and Incentives Only to Voluntarily Merged Districts Violates *Brigham* and the Common Benefits Clause.

A. The Vermont Constitution mandates that all students have access to similar educational revenues.

In Vermont it is axiomatic that all students, regardless of which town or school district they live in, should "be afforded a substantially equal opportunity to have access to similar educational revenues":

> Children who live in property-poor districts and children who live in property-rich districts should be afforded a substantially equal opportunity to have access to similar educational revenues.

Brigham v. State, 166 Vt. 246 (1997).

In considering this issue, the Court should apply a heightened scrutiny standard and not simply a rational basis standard. *Brigham* is instructive:

> The State also suggests that placement of the education clause in Chapter II, setting forth the "Frame of Government," rather than Chapter I, which contained the Declaration of Rights, implies that education was not considered by the framers to be an individual right. The argument is equally unpersuasive. Chapter II of the original Constitution enumerated any number of individual rights besides education, including the right to trial by jury, Vt. Const. of 1777, ch. II, § 22, the right to bail, *id.* ch. II, § 25, and the right to hold and acquire land. Id. ch. II, § 38. From the perspective of the framers, Chapter II represented a perfectly logical place to provide for education.

Id. at 262.

Further, *Brigham* noted:

> Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny; the state must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective. *Rodriguez*, 411 U.S. at 16-17; *Veilleux*, 131 Vt. at 40, 300 A.2d at 625.
>
> This is not a case, however, that turns on the particular constitutional test to be employed. Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may

> not have as its determining force the mere fortuity of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system.

Id. at 265.

Fundamental rights merit heightened scrutiny. In *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994), the Ninth Circuit Court of Appeals, addressing free speech, used intermediate scrutiny to evaluate a federal statute which prohibited telephone companies from providing video programming to subscribers. Courts have applied heightened scrutiny to the regulation of adult entertainment, *Am. Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994), and highway signs, *Rappa v. New Castle County* 18 F. 3d 1043 (3d Cir. 1994).

Our Supreme Court has been emphatic that in Vermont education is a fundamental right. Disparate treatment triggers heightened scrutiny under our Common Benefits Clause. There should be little question that the facts presented here merit heightened scrutiny.

B. The Board's plan violates *Brigham*.

Defendants have engaged in disparate treatment by 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 the Vermont Supreme Court has held, 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." *Brigham*, 166 Vt. at 265.

Regarding small schools grants, various districts: (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 under Acts 46 and 49 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.

Under Act 46, school districts that voluntarily merged and that received a small school support grant shall receive an annual "merger support grant" in an amount equal to the "small school support grant received by the eligible school district in fiscal year 2016. If more than one merging district was an eligible school district, then the merger support grant shall be in an amount equal to the total combined small school support grants they received in fiscal year 2016." Act 46 goes on to state: "Payment of the grant under this subdivision shall continue annually unless explicitly repealed by the General Assembly" or the school or schools in what had been the "eligible district" close. 2015 Vt. Laws No. 46, Sec. 6(b)(2)(A) and (B).

Those school districts that could not be merged, that submitted Section 9 proposals, or that were merged involuntarily, were treated disparately and placed in a different category whereby their small school support grants could be revoked for a wide variety of reasons. In their case, the Board was directed "to adopt and publish metrics by which it will make determinations whether to award small school support grants . . . on and after July 1, 2019."

Thus, in 2016 the various districts in the Addison Central Supervisory Union, now the Addison Central School District, received $474,113.00 in small school support grants. So that

district, one of the two or three most affluent districts in the State of Vermont, is now guaranteed approximately a half million dollars in additional grants—regardless of geographic convenience, poor academic outcomes, low student-to-staff ratios, or poor fiscal efficiencies.

On the other hand, districts that could not be merged, districts which prepared Section 9 proposals, and those which were simply merged involuntarily, are subject to subsequently announced "metrics" that they must meet to be able to continue to receive small schools grants. These districts, especially the districts in Orleans County, are among the most economically disadvantaged in the State. The metrics are attached to this memorandum. *See* Attachment N. The Board itself has expressed significant misgivings about this system and requested that the Legislature to revisit this topic during the 2019 Session. *See* Attachment N at 1. The Legislature has not revisited this topic and has done nothing to address even the Board's concerns and misgivings about this system of disparate financial treatment of our students.

The issue posed is not merely the fact that we now have a double standard for the distribution of millions of dollars to our schools. Just as importantly, the new metrics are an open invitation for arbitrary and capricious decision-making. One of the metrics is geographic isolation (a factor that was essentially ignored in the Board's consideration of forced mergers). The litmus test for receiving the grant is having more than 5% of the applicant's students reside more than 15 miles from the nearest school with capacity—not accounting for what kind of roads service the school, what kind of travel routes students would have to take, or how many stops the bus must make, or even the travel time required to cover that distance. *See* Attachment N, at 4. This metric does not even comport with the Act 46 requirement to give consideration to "lengthy driving times and inhospitable travel routes." Act 46, Sec. 20(a)(1)(B).

Academic excellence is another metric. However, comparing academic excellence at a school like Lowell with a free and reduced lunch rate of over 80%, versus East Montpelier where

the rate is 22%, is difficult at best. Students from economically disadvantaged families bring an entirely different panoply of challenges to the classroom. Likewise, at small schools, with small testing cohorts, the average test results can vary radically from year to year—how does a small school plan its budget if one year it is eligible for a small schools grant, but the next year test results drop significantly in an entirely unpredictable fashion?

C. Peacham is an example of the arbitrary and capricious manner in which this scheme provides significantly disparate educational funding to different districts.

Peacham exemplifies the arbitrary and capricious nature of this double standard.

Before this year, Peacham was eligible for small school support grants pursuant to 16 V.S.A. ¶ 4015, et seq. Though Peacham could not have been force-merged, due to different operating structures, Peacham and its neighbors, Barnet, Walden and Waterford, submitted a 3-by-1 merger proposal to the Board pursuant to Sec. 3 of Act 49. The proposal was approved by the State Board on October 18, 2017. *See* Exhibit 1, attached to Peacham's Motion to Intervene. In order to satisfy the goals set forth in Section 2 of Act 46, as part of their proposal, the four schools agreed to create a system of cooperation and collaboration that would allow for a system of inter-school choice within the newly created "Caledonia Cooperative Unified Union School District." This was a cost-neutral policy, with the sending district paying for any special services.

Any of these students that chose to come to Peacham are not counted as part of Peacham's average daily membership, and Peacham receives no additional funds for these students. Since the initiation of the program, Peacham has had six additional students who have chosen to attend school in Peacham but who are not residents of Peacham. One of those students has special needs and is accompanied by a para-professional who is paid by the sending district and who serves only that one student.

In applying the new metrics adopted by the Board for determining eligibility for small schools support grants, Peacham was denied this funding on the basis of the student/staff ratio metric. The Agency of Education insisted on including the para-professional that accompanied the student from an outside district, who was paid by that outside district and who served only that student from an outside district, in calculating Peacham's student/staff ratio. Of course, none of the students from outside districts were included in the calculation. The amount of the grant would have been approximately $90,000. Had Peacham not accepted this special needs student and accompanying para-professional, it would have been well within the metrics that would have allowed for receipt of their grant. *See* Attachment O, Affidavit of Jessica Philippe, Vice-Chair, Peacham School Board.

The absurdity of this scenario approaches Kafkaesque levels: Because Peacham made a conscientious, good faith effort to comply with the spirit of Act 46 and to achieve the goals of Act 46 by submitting a 3-by-1 plan pursuant to Act 49, and to create more robust cooperation with neighboring districts, akin to the voluntary mergers that guaranteed receipt of small schools grants with no questions asked, Peacham's students are now being punished with the loss of $90,000 in education funding. If we consider all of the metrics being thrown in front of all of the small school districts that could not be merged, or that submitted Section 9 proposals, or that did not merge voluntarily, the potential for bureaucratic mischief is almost unlimited.

Distribution of small schools grants is a matter of State law, not federal law, and any federal rules regarding calculating staff levels at a school are irrelevant for these purposes. The purpose of the small schools grant metrics required by Act 46 for schools that did not voluntarily merge is to assess a school's "excellence and efficiency." The inclusion of a special education aide, who is not a Peacham employee, for a student for whom Peacham receives no state funding, in no way demonstrates a lack of excellence or efficiency on the part of the Peacham School District.

* * *

Wherefore, for all of those reasons set forth above, Appellants-Plaintiffs request that this Court vacate the Board's November 30, 2018 Order because the Board's Order is unconstitutional and contrary to law, or, in the alternative, Appellants-Plaintiffs request that this matter be remanded to the Board so that it may make findings and orders in accordance with Vermont law and the Vermont and United States Constitutions.

Dated at Montpelier, Vermont, this 3rd day of May, 2019.

Ines McGillion, Esq.
Ines McGillion Law Offices, PLLC
P.O. Box 212
126 Main Street
Putney, VT 05346
ines@mcgillionlaw.com
802 258 6441

David F. Kelley, Esq.
1501 Shadow Lake Road
Craftsbury Common, VT 05827
davidkelley05602@gmail.com
802 249 8262