**STATE OF VERMONT**

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

**Athens School District, et al.,**
Appellants-Plaintiffs,

**v.**

**Vermont Board of Education, et al.**
Appellees-Defendants.

## APPELLANTS-PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Now come the Appellants-Plaintiffs in the above matter and set forth below is their Statement of Undisputed Material Facts:

1. The General Assembly made a conscious choice to leave all voting rights intact with respect to the merger of school districts. 2017 Vt. Laws No. 49, Sec. 8(d)(3)(A) and (B) and Attachment B to Appeal and Complaint.
2. The State Board of Education's November 30, 2018 Final Order and default Articles of Agreement (collectively, the "State Board Order") impose bonded debt and convey property among force-merged districts without the consent or vote of the electorate of each affected district. *See* Exhibit P, articles 5 and 14; *see also* https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

3. As part of its guidance documents to school districts pertaining to Act 46 mergers, the Agency of Education advised: "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." *See* Attachment A.
4. There is no evidence in the record that the Board ever even discussed the meaning of that critical phrase "to the extent necessary" beyond having the Chair of the Board read Section 10 out loud to the rest of the Board. *See* Exhibits A and D to Defendants' Reply Memorandum in Support of Motion to Dismiss.
5. Throughout all of the Board hearings there was never a single finding that it was "necessary" to merge any of the districts that have been involuntarily merged by the Board or that the merged district would be the "best model" to meet the goals of Act 46. Attachment G.
6. Nowhere, at any time, is there any evidence in the record that the Board ever even developed any standards or yardsticks for judging whether or not the "comprehensive data" provided by districts in their Section 9 proposals demonstrated that a district was "meeting or exceeding the goals' of Act 46. *See* State Board Order and meeting minutes.
7. When districts provided evidence of exceptional academic outcomes at costs per pupil well below State averages, that evidence was ignored in favor of involuntary merger with no evidence the merger would provide better outcomes. *See* State Board of Education meeting recording, Oct. 17, 2018 at 3:40:05 and 3:42:37, *available at* https://

www.youtube.com/playlist?list=PLaXzAQwtzpj73XVGfJsjvuUGbcYe0td0a.

8. Districts that expected to retain their current governance structure developed thousands of pages of data to demonstrate that they were meeting or exceeding the goals of Act 46. All Section 9 Proposals are at this website and are hereby incorporated by reference*:* https:// education.vermont.gov/vermont-schools/school-governance/act-46-section-9-proposals.
9. No Section 9 proposal was ever approved by the Board. *See* Attachment G.
10. Except to acknowledge that some districts made "compelling cases," no Section 9 proposal was evaluated by the Board with respect to meeting or exceeding the goals of Act 46; in fact, that would have been impossible because the Board never established rules or benchmarks for judging Section 9 proposals. *See* State Board Order.
11. While districts that made "compelling" cases that they were meeting or exceeding the goals of Act 46 were involuntarily merged, districts that the Board said were not meeting the goals were allowed to retain their current governance structure. Attachment G at 20-21; *see also* State Board Order.
12. Contrary to the Board's own Rule 3440.11, Board members insisted that no Section 9 proposal be approved or disapproved on its merits by the Board. *See* recording of State Board meeting, Oct. 29, 2018 at 2:37:14 and also at 2:57, *available at* https:// www.youtube.com/playlist?list=PLaXzAQwtzpj73XVGfJsjvuUGbcYe0td0a.
13. The Board simply merged districts "wherever possible." State Board Order at 6; Attachment G.
14. Not a single decision to involuntarily merge districts was rendered on the basis of the Board's evaluation of the district's Section 9 proposal on its merits, and the Board never

determined that the evidence demonstrated a district's failure to meet or exceed the goals of Act 46 and that involuntary merger would better meet those goals. *See* State Board Order; *see also* Attachment G.

15. Even members of the State Board itself acknowledged this failure: "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." Attachment H; *see also* Attachment J.
16. The evidence indicates that only two members of the Board even read each Section 9 proposal carefully. *See* Attachment K.
17. Board members themselves have admitted that claims in the Board's final order, such as at the top of page 18, to the effect that "the Board has carefully considered the arguments and sentiments" of a particular district are "nonsense." See Attachments G and J.
18. Despite the mandate of Section 7 of Act 49 that the Board should recognize "greatly differing levels of indebtedness" as a reason for not merging, the Board ignored that directive and merged districts carrying millions upon millions of dollars of indebtedness, debt that was incurred with the consent of the electorate, with districts that carried no indebtedness and, in fact, had established long-term plans and reserves for capital repairs. *See* Attachment G at 12, 17; Attachment L.
19. Though common sense and Act 49 at Section 1(e) both recognize lengthy driving times and inhospitable roads as an impediment to merger, the Board did not. *See* State Board Order.

20. All Section 9 proposals can be found at this website: https://education.vermont.gov/vermont-schools/school-governance/act-46-section-9-proposals; and the Secretary's Plan can be found at this website: https://education.vermont.gov/sites/aoe/files/documents/edu-secretary-proposal-act46-sec-10_0.pdf.

21. Franklin and Montgomery both raised the issues of imbalanced debt and geographic isolation in their Section 9 proposals. 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 Chair, Krista Huling states: "I know in Montgomery they are worried about geography." There is no further discussion. State Board, Oct. 29, 2018 meeting, recording at 1:55:18.

22. Berlin, Calais, Newbury, Pownal, Richford, Middlesex, and Worcester all raised the issue of imbalanced indebtedness in their Section 9 proposals. 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 discussed 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, 2018 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.

23. The default Articles adopted by the Board distribute debt among all merged districts and do not allow any amendment of that distribution. With greatly imbalanced populations between towns such as Enosburg and Richford, there would be little chance of negotiating anyway. *See* Attachment P, articles 5 and 14.

24. Athens, Barnard, Brighton, Charleston, Grafton, Greensboro, Lakeview, Lowell, Stannard, Westminster, and Windham all raised the issue of geographic isolation in their Section 9 proposals. In the cases of Barnard, Greensboro, Lakeview, and Stannard, the Board never even discussed the issue. (Mr. O'Keefe ignored the fact that mergers in districts such as Greensboro, Stannard and Hardwick, the larger more populous town, Hardwick, will now have the power to close the smaller schools, not necessarily based on quality or efficiency.) 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, without adopting any Section 9 proposal, but letting the districts retain their current governance structure, concluding there is "no opportunity for merger of scale." *See* Attachment F, Board minutes for Oct. 17, 2018, at 11; *see also* recording of Board meeting Oct. 29, 2018, at 3:26:17. With respect to Windham, Board Member Olsen comments that schools won't be closed without a vote. *See* Attachment F, Oct. 17, 2018 meeting Board minutes at 10.

25. In almost half of the instances where Appellant school districts raised the issues of

imbalanced debt or geographic isolation, the Board didn't even discuss the issue.

26. Act 46 and Act 49 are silent on the transfer of debt and assets except for Act 49's acknowledgment that greatly imbalanced debt is an impediment to merger. *See* 2015 Vt. Laws No. 46 & 2017 Vt. Laws No. 49.

27. Nothing in Act 46 repealed or amended any voting rights guaranteed by any prior statutes adopted by the General Assembly, including 16 V.S.A. §§ 477 and 706 et seq.

28. As a result of the way Act 46 treats "small schools grants," the students in schools with voluntary mergers receive substantially more favorable financial treatment than the students in schools with forced mergers. For instance, Montpelier has a higher per capita income than its relatively poorer neighboring towns of Barre City, Barre Town, Berlin, Calais, and Worcester; yet, because Montpelier voluntarily merged with Roxbury, the students of the wealthy town of Montpelier are receiving millions of dollars in incentives that are being denied to the students in the neighboring force-merged districts of Barre City, Barre Town, Berlin, Calais, and Worcester. As it is designed, some of the wealthiest districts in Vermont can receive hundreds of thousands of dollars that can be denied to some of the poorest towns. 2015 Vt. Laws No. 46, Sec. 6(b)(2), 7(b)(2), and 20.

29. Before this year, Peacham was eligible for small school support grants pursuant to 16 V.S.A. §§ 4015 et seq. Attachment P.

30. Though Peacham could not have been involuntarily merged due to different operating structures, in the fall of 2017, Peacham, together with its neighbors, Barnet, Walden, and Waterford, submitted a 3 by 1 merger proposal to the State Board of Education pursuant to Section 3 of Act 49. Attachment P.

31. The proposal was approved by the State Board on October 18, 2017. *See* State Board of Education Oct. 18, 2017 Meeting minutes.
32. In order to satisfy the goals as set forth in Section 2 of Act 46, as part of its 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. Attachment P.
33. 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. Attachment P.
34. In applying the new metrics adopted by the State Board of Education for determining eligibility for small schools support grants, for schools that were not voluntarily merged pursuant to a vote of their electorate under Act 46, Peacham was denied this funding on the basis of the student/staff ratio metric. Attachment P.
35. In calculating Peacham's student/staff ratio, the Agency of Education included 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. Attachment P.
36. None of the students from outside districts were included in the calculation. Absent this

para-professional, the amount of the grant would have been approximately $90,000. Without accepting this special needs student and accompanying para-professional, Peacham would have been well within the metrics that would have allowed for receipt of the grant. Attachment P.

37. The purpose of the small school grant metrics required by Act 46 for schools who did not voluntarily merger is to assess a schools "excellence and efficiency." Attachment P.

38. 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. Attachment P.

39. When the Senate passed Act 46, lawmakers noted that their support for Act 46 was based on an understanding that those districts "who can prove they are educationally and fiscally sound" will be allowed "to stay on their own." Terri Hallenbeck, *Senate Backs School District Consolidation* (May 07, 2015), available at: https://www.sevendaysvt.com/OffMessage/archives/2015/05/07/senate-backs-school-consolidation. That statement was attributed to David Zuckerman, a Progressive/ Democrat from Chittenden. In the same article, Senator Joe Benning, a Republican from Caledonia, noted that he disagreed with claims by the 1,100 signers of a petition who claimed that Act 46 would negatively impact small schools: "'It occurred to me very clearly that the commentators have not read the deep weeds of this bill," he said. 'If you are indeed operating in an efficient way and you feel your children are getting a good education, this bill seeks to leave you alone.'" *Id.*

40. Similarly, in 2016, Representative David Sharpe, who was Chair of the House Education

Committee when Act 46 passed, explicitly recognized in a letter to the Addison Northeast Supervisory Union that Act 46 provided flexibility and was not one-size-fits-all: "The Legislature structured act 46 with an alternative structure provision intentionally. We, in the legislature, realize the legislation *clearly does not call for a one size fits all*. Or that Montpelier knows best for [your district]'s governance structure." Letter from David Sharpe to Addison Northeast Supervisory Union Act 46 Study Committee.

41. Many lawmakers did not view Act 46 as allowing the State Board to force mergers against the will of the people in those affected areas. For instance, Governor Shumlin, who signed Act 46 into law, told reporters on Vermont Public Radio 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), *available at* http://digital.vpr.net/post/governor-shumlin-live-0#stream/0.
42. Multiple legislators have written to express their understanding of similar Legislative intent. *See, e.g.*, Attachments B, C, D, and E.
43. The Affidavit of Mary Niles (Attachment Q) explains in detail how a school district (in this case Montgomery) is "meeting or exceeding" the goals of Act 46 and why a forced merger is not practicable. The facts are spelled out in the numbered paragraphs of her Affidavit.
44. Reference is made to paragraph 1 of the Mary Niles Affidavit.
45. Reference is made to paragraph 2 of the Mary Niles Affidavit.
46. Reference is made to paragraph 3 of the Mary Niles Affidavit.
47. Reference is made to paragraph 4 of the Mary Niles Affidavit.

48. Reference is made to paragraph 5 of the Mary Niles Affidavit.

49. Reference is made to paragraph 6 of the Mary Niles Affidavit.

50. Reference is made to paragraph 7 of the Mary Niles Affidavit.

51. Reference is made to paragraph 8 of the Mary Niles Affidavit.

52. Reference is made to paragraph 9 of the Mary Niles Affidavit.

53. Reference is made to paragraph 10 of the Mary Niles Affidavit.

54. Reference is made to paragraph 11 of the Mary Niles Affidavit.

55. Reference is made to paragraph 12 of the Marry Niles Affidavit.

56. Reference is made to paragraph 13 of the Mary Niles Affidavit.

57. The Affidavit of Pamela Fraser (Attachment R) explains in detail how a school district (in this case Barnard) is "meeting or exceeding" the goals of Act 46 and why a forced merger is not practicable. The facts are spelled out in the numbered paragraphs of her Affidavit.

58. Reference is made to paragraph 1 of the Pamela Fraser Affidavit.

59. Reference is made to paragraph 2 of the Pamela Fraser Affidavit.

60. Reference is made to paragraph 3 of the Pamela Fraser Affidavit.

61. Reference is made to paragraph 4 of the Pamela Fraser Affidavit.

62. Reference is made to paragraph 5 of the Pamela Fraser Affidavit.

63. Reference is made to paragraph 6 of the Pamela Fraser Affidavit.

64. Reference is made to paragraph 7 of the Pamela Fraser Affidavit.

65. Reference is made to paragraph 8 of the Pamela Fraser Affidavit.

66. Reference is made to paragraph 9 of the Pamela Fraser Affidavit.

67. Reference is made to paragraph 10 of the Pamela Fraser Affidavit.

68. Reference is made to paragraph 11 of the Pamela Fraser Affidavit.

69. The Washington Central Supervisory Union is an area where greatly imbalanced debt is a barrier for merger. For example, two towns with no debt and the lowest median and average adjusted gross income (Worcester and Calais) would take on millions of dollars of debt while the town with the second highest level of income in the supervisory union would receive nearly 50% debt relief. Attachment L, Affidavit of Cameron Scott Thompson, ¶ 9.

70. Over the life of their neighbors' bonds, towns such as Calais and Worcester will incur millions of dollars in the way of new financial burdens on their school district. Attachment L, Affidavit of Cameron Scott Thompson, ¶¶ 5 and 9.

71. In the first year of the involuntary merger there would be an additional $165,485 added to the school budget for the Calais Elementary School and $110,324 added to the school budget for the Worcester Elementary School. Attachment L, Affidavit of Cameron Scott Thompson, ¶ 25.

72. Reference is further made to paragraph 4 of the Cameron Scott Thompson Affidavit.

73. Reference is made to paragraph 5 of the Cameron Scott Thompson Affidavit.

74. Reference is made to paragraph 6 of the Cameron Scott Thompson Affidavit.

75. Reference is made to paragraph 7 of the Cameron Scott Thompson Affidavit.

76. Reference is made to paragraph 8 of the Cameron Scott Thompson Affidavit.

77. Reference is made to paragraph 10 of the Cameron Scott Thompson Affidavit.

78. Reference is made to paragraph 11 of the Cameron Scott Thompson Affidavit.

79. Reference is made to paragraph 12 of the Cameron Scott Thompson Affidavit.

80. Reference is made to paragraph 13 of the Cameron Scott Thompson Affidavit.

81. Reference is made to paragraph 14 of the Cameron Scott Thompson Affidavit.

82. Reference is made to paragraph 15 of the Cameron Scott Thompson Affidavit.

83. Reference is made to paragraph 16 of the Cameron Scott Thompson Affidavit.

84. Reference is made to paragraph 17 of the Cameron Scott Thompson Affidavit.

85. Reference is made to paragraph 18 of the Cameron Scott Thompson Affidavit.

86. Reference is made to paragraph 19 of the Cameron Scott Thompson Affidavit.

87. Reference is made to paragraph 20 of the Cameron Scott Thompson Affidavit.

88. Reference is made to paragraph 21 of the Cameron Scott Thompson Affidavit.

89. Reference is made to paragraph 22 of the Cameron Scott Thompson Affidavit.

90. Reference is made to paragraph 23 of the Cameron Scott Thompson Affidavit.

91. Reference is made to paragraph 24 of the Cameron Scott Thompson Affidavit.

92. Reference is made to paragraph 25 of the Cameron Scott Thompson Affidavit.

93. Reference is made to paragraph 26 of the Cameron Scott Thompson Affidavit.

94. Reference is made to paragraph 27 of the Cameron Scott Thompson Affidavit.

95. Reference is made to paragraph 28 of the Cameron Scott Thompson Affidavit.

96. Reference is made to paragraph 29 of the Cameron Scott Thompson Affidavit.

97. Reference is made to paragraph 30 of the Cameron Scott Thompson Affidavit.

98. Margaret MacLean has been an educator for 45 years. She has been recognized as Vermont Principal of the year, is a past member of the Vermont State Board of Education and for 14 years was employed by the Rural School and Community Trust, a national advocacy organization for rural schools. In that capacity, she has worked with rural

schools around the United States. She could be qualified in a courtroom as an expert on rural education capable of rendering expert opinions. Attachment S, Affidavit of Margaret MacLean, ¶ 1.

99. A public records request was made to the Vermont Agency of Education seeking "all data relative to the goals of Act 46 that was used in deciding to reject any of the AGS [Alternative Governance Structures] proposals and communications among agency personnel and with others related to the decision-making process in deciding to reject AGS proposals and the decisions to force any districts to merge." Attachment S, Affidavit of Margaret MacLean, ¶ 10. (There is a typographical error in this affidavit. There are two paragraphs numbered "10" and this is a reference to the first such paragraph.)

100. In all of the documentation provided pursuant to the public records request referred to in paragraph 98 above, there is no evidence of any analysis or evaluation of Section 9 proposals with respect to the goals of Section 2 of Act 46 submitted by communities as required by Board Rule 3440.11. Attachment S, Affidavit of Margaret MacLean, ¶ 10.

101. Additionally, there is no evidence of any standards or benchmarks set by the Agency to decide compliance with the goals of Act 46 or standards or barriers set to define barriers to merger such as debt, geographic isolation, or lack of scale. Attachment S, Affidavit of Margaret MacLean, ¶ 10.

102. The Agency established no criteria for defining "practicable" or "necessary." Attachment S, Affidavit of Margaret MacLean, ¶ 10.

103. Reference is further made to paragraph 2 of the Margaret MacLean Affidavit.

104.Reference is made to paragraph 3 of the Margaret MacLean Affidavit.

105.Reference is made to paragraph 4 of the Margaret MacLean Affidavit.

106.Reference is made to paragraph 5 of the Margaret MacLean Affidavit.

107.Reference is made to paragraph 6 of the Margaret MacLean Affidavit.

108.Reference is made to paragraph 7 of the Margaret MacLean Affidavit.

109.Reference is made to paragraph 8 of the Margaret MacLean Affidavit.

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111.Reference is made to paragraph 11 of the Margaret MacLean Affidavit.

112.Reference is made to paragraph 12 of the Margaret MacLean Affidavit.

113.Reference is made to paragraph 13 of the Margaret MacLean Affidavit.

114.Reference is made to paragraph 14 of the Margaret MacLean Affidavit.

115.Reference is made to paragraph 15 of the Margaret MacLean Affidavit.

116.Reference is made to paragraph 16 of the Margaret MacLean Affidavit.

117.Reference is made to paragraph 17 of the Margaret MacLean Affidavit.

118.Reference is made to paragraph 18 of the Margaret MacLean Affidavit.

119.Reference is made to paragraph 19 of the Margaret MacLean Affidavit.

120.Reference is made to paragraph 20 of the Margaret MacLean Affidavit.

121.Reference is made to paragraph 21 of the Margaret MacLean Affidavit.

122.Reference is made to paragraph 22 of the Margaret MacLean Affidavit.

123.Reference is made to paragraph 23 of the Margaret MacLean Affidavit.

124.David F. Kelley is co-counsel of record to Appellants-Plaintiffs in this matter and has attached true and correct copies of documents referenced in his attached declaration.

125.Reference is made to paragraph 2 of the David F. Kelley Declaration.

126.Reference is made to paragraph 3 of the David F. Kelley Declaration.

127.Reference is made to paragraph 4 of the David F. Kelley Declaration.

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140.Reference is made to paragraph 17 of the David F. Kelley Declaration.

141.Reference is made to paragraph 18 of the David F. Kelley Declaration.

142.Reference is made to paragraph 19 of the David F. Kelley Declaration.

143.Reference is made to paragraph 20 of the David F. Kelley Declaration.

144.Reference is made to paragraph 21 of the David F. Kelley Declaration.

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

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