



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Representative Oliver Olsen
CC: Representative David Sharpe
From: Donna Russo-Savage
Date: July 2, 2015
Subject: Act 46; Tuition- Payment and Operation

You requested an explanation of the meaning and application of Act 46, Section 4, which protects an existing district's current decision to educate resident students by operating a school, by paying tuition, or by both operating a school and paying tuition.¹

I. A School District is a Single Entity

A school district is a single municipality, regardless of whether it is a town district, an incorporated district, a union school district, or a supervisory district.² It has one elected governing body, the school district board, that is responsible for the education of all students residing in the district. A single, district-wide budget, approved by a commingled majority of all voters in the district, pays for the cost of educating all resident students – whether by operating a school or paying tuition. The statewide education property tax rate for homestead property is the same throughout the district.³ A school district is, in all respects, a single entity — even if the students for which it is organized live in different towns or villages within the district.

A school district must provide for the education of a resident student in any one grade in the district in the same way that it provides for the education of every other resident student in that grade. If the district operates one elementary school, then all resident elementary students enroll in that school; if the district does not operate a grade for which it is organized, then the district pays tuition for all students in that grade. For example, a district organized to provide education for the students in one town, *e.g.* the Rutland City Supervisory District, cannot require all grade 9 students who live on Temple Street to enroll in the high school it operates but provide tuition vouchers to all grade 9 students who live on Pierpoint Avenue (to be used at the public or independent school of

¹ Students may also be enrolled in a home study program or in a school to which their parents pay tuition, but those options are not pertinent to the purposes of this memo and are not addressed.

² *See, e.g.*, 1 V.S.A. § 126 and 16 V.S.A. §§ 551, 701, 722.

³ The rate in a multi-town district is adjusted by each town's unique common level of appraisal (CLA), however, because appraisals are conducted at the town level.

their choice, located inside or outside the district). Similarly, a district organized to provide high school education to students living in more than one town, *e.g.* the Twinfield Union School District, cannot require the students living in Plainfield to enroll in the district-operated school and simultaneously pay tuition to the public or independent schools, in or outside the district or SU, chosen by the students living in Marshfield.

It would be impractical to treat students in the same district differently when, *e.g.*, the parents and other voters residing on Temple Street or in Plainfield (in the examples above) vote for the same budget and have the same tax rate as the parents and other voters residing on Pierpoint Avenue or in Marshfield.

In addition, offering different educational options to students in the same district solely on the basis of their residential address would likely violate the Common Benefits Clause of the Vermont Constitution, Chapter I, Article 7, as it relates to the Education Clause in Chapter II, § 68.⁴

For a discussion of how a newly merged district might concurrently operate a school for one or more grades and concurrently offer tuition-vouchers for the grade(s), *see* Section III below.

II. Protections for Operating and Tuition-Paying Districts

A. Act 46, Section 4

Section 4 preserves the ability of a district that currently pays tuition on its resident students' behalf to continue to pay tuition if it chooses to do so; it also provides the same protection to a district that chooses to educate resident students by operating a school.⁵

⁴ *See*, however, the final paragraph of Section II.D below.

⁵ Sec. 4. TUITION PAYMENT; SCHOOL OPERATION; PROTECTIONS; INTENT

(a) Tuition payment; protection. All governance transitions contemplated pursuant to this act shall preserve the ability of a district that, as of the effective date of this section, provides for the education of all resident students in one or more grades by paying tuition on the students' behalf, to continue to provide education by paying tuition on behalf of all students in the grade or grades if it chooses to do so and shall not require the district to limit the options available to students if it ceases to exist as a discrete entity and realigns into a supervisory district or union school district.

(b) School operation; protection. All governance transitions contemplated pursuant to this act shall preserve the ability of a district that, as of the effective date of this section, provides for the education of all resident students in one or more grades by operating a school offering the grade or grades, to continue to provide education by operating a school for all students in the grade or grades if it chooses to do so and shall not require the district to pay tuition for students if it ceases to exist as a discrete entity and realigns into a supervisory district or union school district.

(c) Tuition payment; school operation; intent. Nothing in this act shall be construed to restrict or repeal, or to authorize, encourage, or contemplate the restriction or repeal of, the ability of a school district that, as of the effective date of this section, provides for the education of all resident students in one or more grades:

(1) by paying tuition on the students' behalf, to continue to provide education by paying tuition on behalf of all students in the grade or grades; or

(2) by operating a school offering the grade or grades, to continue to provide education by operating a school for all students in the grade or grades.

A prekindergarten–grade 12 school district created under the accelerated merger provisions of Act 46, the RED provisions of Act 153 as amended by Act 156⁶, or otherwise under 16 V.S.A. chapter 11, (*i.e.*, a unified union school district), is a single school district, which is a single municipal corporation.⁷ The districts that merged to create the new district lose their independent district status upon merger.⁸ As discussed above, once merged, each student in any one grade in a newly merged district must be offered education in the same manner as every other student in that grade.

B. Voluntary Merger

Because all voluntary mergers proceed pursuant to the union school district formation process of chapter 11, any change in the manner of operation caused by a voluntary merger must be approved independently by the voters of each potentially merging district. Thus, when voting whether to create a merged district, it is the choice of the voters of each potentially merging district whether to approve:

- merger with the other district(s); and
- any changes in the manner in which education will be provided to the students residing in the potentially merging district when the new district becomes operational.

Voluntary mergers, and the terms under which a merged district will operate, are precisely that – voluntary.

C. Merger by the State Board of Education

Act 46, Sec. 10 requires the State Board of Education to issue a plan in 2018 that merges and otherwise realigns districts to the extent necessary to provide educational opportunities through sustainable governance structures designed to meet the goals set forth in Sec. 2 of the act. Section 10 explicitly requires the State Board’s plan to “ensure adherence to the protections of Sec. 4 of this act.” Therefore, the State Board's plan cannot force a district to change the manner in which it provides education (whether by operating a school or paying tuition) by merging it with a district that provides for education in a different manner.⁹ If, for example, there is one district with no similar district anywhere nearby (in or outside the existing supervisory union) and the State Board feels it is necessary to make changes in that region, then the State Board’s plan will preserve that unique district under its current structure and will likely include it as a member district of a supervisory union that may or may not have the same borders as the current supervisory union in which the district is located.

⁶ 2010 Acts and Resolves No. 153 and 2012 Acts and Resolves No. 156.

⁷ 16 V.S.A. § 701.

⁸ 16V.S.A. § 722 (unified union districts) provides in part: “On the date the unified union district becomes operative, unless another date is specified in the study committee report, it shall supplant all other school districts within its borders, and they shall cease to exist.”

⁹ *Note*, however, that the State Board has had the authority since 1982 to close a school and require the district to pay tuition for its students if the district fails to meet or move toward meeting State education quality standards (or earlier, comparable standards). 16 V.S.A. § 165(b)(4).

Sections 4 and Section 10, when read separately or together, ensure that at no point under the provisions of Act 46 can a district be forced to provide education in a different manner than it currently provides it.

D. Alternative Interpretation of Section 4

Section 4 states in part that nothing in the act shall require a district “to limit the options available to students if it ceases to exist as a discrete entity and realigns into a supervisory district or union school district.” It has been suggested that the quoted phrase authorizes two districts with different structures that merge *voluntarily* into a single unified union school district to require resident students of the merged district who live in one member town to enroll in a district-operated school and to provide tuition vouchers to resident students in the same grade who live in another member town.

Although this interpretation may be possible under a literal reading of the quoted phrase in isolation, all mergers contemplated by Act 46 require that the new governance structure will support the goals of the act. Providing for the education of students in a single district by such different methods, and based solely upon the location of the student’s residence, would not support the act’s stated purpose to move toward sustainable models of education governance that, among other things, provide substantial equity in the quality and variety of educational opportunities statewide.

In addition, even if this interpretation of Sec. 4 were not impractical (see final paragraph of Section I above), interpreting the phrase in this broad manner cannot transform an otherwise unconstitutional arrangement into a constitutional one.

Finally, even if the Supreme Court were to accept the proposed, literal reading of the quoted phrase and also determine that it is constitutional to provide different educational options to students in the same district solely on the basis of their residential address, then the newly merged district would not be eligible to receive merger incentives *under a comparably literal reading* of Act 46, Secs. 6 and 7, or the RED provisions of Act 153 as amended by Act 156.¹⁰

¹⁰ Act 46, Secs. 6 (enhanced incentives for early action) and 7 (incentives for later mergers) provide incentives for merger only if the new unified union school district (quoting Sec. 6(a)):

(6) is organized and operates according to one of the following common governance structures:

(A) a district that operates a school or schools for all resident students in prekindergarten or kindergarten through grade 12;

(B) a district that operates a school or schools for all resident students in prekindergarten or kindergarten through grade 8 and pays tuition for all resident students in grade 9 through grade 12; or

(C) a district that operates a school or schools for all resident students in prekindergarten or kindergarten through grade 6 and pays tuition for resident students in grade 7 through grade 12;

(7) demonstrates in the study committee report presented to the State Board and district voters pursuant to 16 V.S.A. chapter 11 that the proposed governance changes will meet the goals set forth in Sec. 2 of this act

In each of the three common governance structures listed in (6)(A)-(C) above, eligibility for incentives is based on either operation *or* tuition payment for the students in each group of grades. Similarly, eligibility for RED incentives requires either operation or tuition-payment for all students in each grade level. 2010 Acts and Resolves No. 156, Sec. 3.

It is important to note that there is an existing practice in one union school district that proponents could cite in support of this broad interpretation of Sec. 4. In 2006, the General Assembly enacted Act 182, Sec. 28,¹¹ which authorizes a “town school district” both to be a member of a union high school district and concurrently to pay tuition for resident students in grades 7–12. It is my understanding that this authority applies solely to Vernon and was not granted to, or requested by, any other member of the Brattleboro Union High School District (or any member of another union school district). Section 28 grants formal, legislative approval to what appears to have been a long-standing practice originally validated on July 30, 1954 by Opinion No. 13 of the Vermont Attorney General. Sec. 28 emphasizes the limited nature of the granted authority:

It is the intent of the general assembly to authorize a town school district which has historically both belonged to a union school and provided for education of its students by paying tuition *to continue the practice and not to authorize the practice in other school districts.*

(emphasis added). Although legislatively authorized in this one, narrow instance, it is unclear whether the Vermont Supreme Court would find the limited nature of the provision permissible if the provision’s constitutionality were challenged.

III. Maintaining a School and Concurrently Paying Tuition for the Same Grade(s)

A. Current Statutory Law

In connection with its obligation to provide secondary education,¹² under current law, a school district that *operates* a high school may *concurrently* furnish education by paying *tuition*:

1. to “*a public school*,” if in the school board’s judgment the arrangement “may best serve the interests of *the students*” 16 V.S.A. § 822(c)(1)(A) (emphasis added)
2. to “an approved *independent school* or an independent school meeting education quality standards if the school board judges that *a student* has unique educational needs that cannot be served within the district or at a nearby public school” 16 V.S.A. § 822(c)(1)(B) (emphasis added)

¹¹ Sec. 28. TOWN SCHOOL DISTRICT; AUTHORIZED TO PAY TUITION

Notwithstanding the restrictions of 16 V.S.A. § 822(c), a town school district which is a member of a union school district and which has historically paid tuition for resident grade 7–12 students attending public and independent schools outside the union high school district, as authorized by the attorney general’s opinion No. 13 of July 30, 1954 and section 4339, V.S. 1947, may continue to do so in accordance with the provisions of 16 V.S.A. § 824. The town school district shall pay a tuition amount which does not exceed the average announced tuition of Vermont union school districts for grades 7 and 8 or grades 9–12 as appropriate. It is the intent of the general assembly to authorize a town school district which has historically both belonged to a union school and provided for education of its students by paying tuition to continue the practice and not to authorize the practice in other school districts.

¹² 11 V.S.A. § 11(5) defines both “secondary education” and “high school education” as grades 7–12.

Note that in connection with paying tuition to a *public high school* (#1) the decision is whether concurrent school-operation and tuition-payment is in the best interests of “*the students*” (in the plural). In other words, a district choosing this model provides *all* students in the pertinent grades with the option of enrolling in the school(s) it operates or receiving a tuition voucher. In contrast, a school board’s decision to operate a school and pay tuition to an *independent high school* (#2) is made on an individual basis for “*a student*” who requests that the board pay tuition. There does not appear to be any law or rule that prohibits a school board from granting the request of every student who asks that tuition be paid to an independent school, however, so the practical result of #2 might be identical to that in #1.

Also note that in connection with payment to *a public high school*, the authority is granted in the singular. That is, under a *literal* reading of the statute, the operating district may concurrently operate a high school and pay tuition to only one other public school.

If a district operates an elementary school, Title 16 authorizes the school board to grant a parent’s request to pay tuition to a public elementary school in an adjacent school district if the board determines it would be geographically more convenient for the student.¹³ Title 16 does not, however, authorize an elementary school district concurrently to operate a school and pay tuition in a manner comparable to the authority granted in connection with high school education.

B. Newly Merged Districts

A question has arisen whether a unified union school district (prekindergarten–grade 12) created under the accelerated merger provisions of Act 46, the RED provisions, or otherwise under 16 V.S.A. chapter 11 could provide for the education of resident students in one or more grades by operating the grade(s) and concurrently paying tuition. Although not explicitly addressed by Act 46, if all students in the same grade are provided the same options, then this is likely permissible, at least to some extent:

1. As described above, current statutory law permits a school district that operates a high school to concurrently pay tuition for students in those grades. If a newly merged district is organized to operate grades 7–12 (see footnote 10 at (6)(A)) or grades 7–8 (see footnote 10 at (6)(B)), then it is, at the very least (under the strictest reading of the statute), statutorily authorized also to pay tuition in the manner and to the extent described in “A.”
2. Because concurrent operation and tuition-payment is already contemplated by statute, and because Act 46 explicitly states the intention to support local decisions and actions creating sustainable education governance models that, among other things, provide substantial equity in the quality and variety of educational opportunities statewide, it seems reasonable that districts exploring merger might want to develop proposed articles of agreement that are either different or less restrictive than the strictly-construed statutory option described

¹³ 16V.S.A. § 821(c).

in #1 above.¹⁴ It is possible that the General Assembly will clarify the extent to which these alternatives are permissible or desirable because there have been so many districts around the State asking the same question. Until the General Assembly provides clarification, the State Board of Education, when reviewing proposed articles of agreement under 16 V.S.A. chapter 11, will need to determine whether it has authority to approve the specific configuration proposed.

* * *

I hope that this memorandum is helpful. Please let me know if you have any questions or would like further research or analysis.

I will continue to think about these issues and look for additional clarification.

¹⁴ To give several potential examples, a potential a prekindergarten–grade 12 district might propose to operate one or more schools offering the grade(s) and also pay tuition for the same grade(s) at the request of any resident student to:

- * a public school operated by another district or an independent school, regardless of where it is located
- * an independent school within the merged district's borders
- * an independent school, regardless of where it is located
- * any public school that is operated by another district