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Agency of Education

February 25, 2014

Vermont Senate Education Committee
Senator Dick McCormack, Chair
115 State Street
Montpelier, VT 05633

Dear Senator McCormack:

I write in response to your memorandum to Secretary Holcombe, dated February 14, 2014, regarding public funding of education in Vermont. The Agency of Education does not intend to announce any policy position, or point of view, in providing the below analysis. This is simply an attempt to point out possible legal/constitutional concerns in response to the questions you have asked. I address each of your three questions in turn.

QUESTION # 1

"What, if any, are the legal problems and constitutional problems (per Brigham) of a local education authority spending public educational tax dollars on tuition to schools that do not honor the same legal requirements as public schools?"

- "Is substantially equal educational opportunity achieved in such arrangements?"
- "Does the state honor its constitutional obligations by delegating its educational responsibilities to such an arrangement?"
- "Does the LEA fulfill its delegated duty?"
- "Is there a class of students whose rights are violated by such an arrangement?"

The following is an attempt to offer a global response to question #1:

In the Brigham case, the Vermont Supreme Court held that the educational financing system existing at the time fell short of "providing every school-age child in Vermont an equal educational opportunity." Brigham v. State, 692 A.2d 384, 386 (Vt. 1997). "In Vermont, the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate

heavy burden of justification." Id. at 390. "When we consider the evidence in the record before us, and apply the Education and Common Benefits Clauses of the Vermont Constitution to that evidence, see Vt. Const. ch. I, art. 7 and ch. II, § 68, the conclusion becomes inescapable that the present system has fallen short of providing every school-age child in Vermont an equal educational opportunity." Id. at 386. "This duty was eloquently described in Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954):

> '[E]ducation is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, **[166 Vt. 250]** where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'"

Id. at 386.

While the Brigham Court resolved the constitutionality of the school funding system which then existed, the Court deliberately steered clear of the quality of education approach to school finance cases. "Finally, we underscore the limited reach of our holding." Id. at 398. "Although the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion." Id.

Act 60, which was signed into law in June 1997, serves as the legislature's interpretation of its obligation under the Vermont Constitution to make educational opportunity available on substantially equal terms to Vermont's children. See 16 V.S.A. § 1 ("the right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights…to keep Vermont's democracy competitive and thriving, Vermont's students must be afforded substantially equal access to a quality basic education ."). Act 60 has two (2) basic components: (i) school finance reform and (ii) the implementation of certain school quality standards. See 16 V.S.A. § 165. It seems to make to sense consider whether the enactment of school quality standards might be considered as an affirmative statement by the legislature that the Education and Common Benefits Clauses of the Vermont Constitution guarantees

Vermont's students the right to a particular minimum quality of education, and, if so, whether the existing standards are in fact the baseline.

In analyzing your first question, "it is, of course, appropriate to consider sister-state interpretations of constitutional provisions similar to Vermont's." Brigham v. State, 692 A.2d at Footnote 6." "Unlike the education clauses in most other states, which can generally be classified in one of several categories according to their operative language, the education clause set forth in Chapter II, § 68 of the Vermont Constitution is unique." Id., citing G. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L.Rev. 777, 814-16 (1985) (describing four general categories of state education clauses). "Perhaps the closest education clause textually to Vermont's is Connecticut's, which provides: 'There shall always be free public elementary and secondary schools in the state." Id. "The general assembly shall implement this principle by appropriate legislation.'" Conn. Const. art. VIII, § 1. "In Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977), the Connecticut Supreme Court held that this provision created a fundamental right to education, 'that pupils in the public schools are entitled to the equal enjoyment of that right,' and that inequities in education funding resulting from interdistrict wealth disparities failed to advance a sufficiently compelling state interest." See Brigham v. State, 692 A.2d at Footnote 6.

Since Brigham was decided, the Connecticut Supreme Court has addressed whether article eighth, § 1, of the constitution of Connecticut also guarantees students in Connecticut the right to a particular minimum quality of education, namely, suitable educational opportunities. See Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell, 295 Conn. 240, 244 (Conn. 2010). There, the Connecticut Supreme Court answered this question in the affirmative. The plaintiffs, the Connecticut Coalition for Justice in Education Funding, Inc., and numerous parents and their children alleged that the state of Connecticut "had failed to provide their children with 'suitable and substantially equal educational opportunities' because of inadequate and unequal inputs, which 'are essential components of a suitable educational opportunity,' namely: (1) high quality preschool; (2) appropriate class sizes; (3) programs and services for at-risk students; (4) highly qualified administrators and teachers; (5) modern and adequate libraries; (6) modern technology and appropriate instruction; (7) an adequate number of hours of instruction; (8) a rigorous curriculum with a wide breadth of courses; (9) modern and appropriate textbooks; (10) a school environment that is healthy, safe, well maintained and conducive to learning; (11) adequate special needs services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; (12) appropriate career and academic counseling; and (13) suitably run extracurricular activities." Id. at 245 (noting that "these inputs have been recognized by the state board of education [of

Connecticut] in various 'position statements' as 'necessary components of a suitable educational opportunity.'").

The decision in the Rell case may be applicable to Vermont and relevant to the question presented herein, since the Brigham Court considered relevant case law precedent in Connecticut, as set forth above.[1] The Rell Court decided that the Connecticut Constitution guarantees all of that state's students the right to a particular minimum quality of education, in the absence of any prior action by the Connecticut legislature. In other words, Connecticut, unlike Vermont, did not impose school quality standards or the like, in the wake of the Connecticut Supreme Court striking down the school financing scheme there as unconstitutional. See Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).[2]

Vermont's school quality standards, at 16 V.S.A. § 165 and the administrative rules of the State Board of Education at SBE Rule 2000 et seq. could conceivably be interpreted by a reviewing court as the baseline for providing Vermont's children with "suitable and substantially equal educational opportunities" which "are essential components of a suitable educational opportunity." Rell, supra, 295 Conn. at 244.

If a reviewing court did in fact make such a ruling, it is possible that any school which uses public tuition monies may be required to meet some baseline standard of educational quality, if not the standards that already exist at 16 V.S.A. § 165 and SBE Rule 2000 et seq., under the Vermont Constitution. In sum, if at some point there is judicial review of the practice of a school district providing education by paying tuition, a reviewing court might consider the question of whether the sending district must ensure that it is paying tuition to a school that provides a baseline standard of educational quality, however that may be defined.

I want to reiterate that this analysis is entirely speculative. However, since the Brigham decision did not fully resolve the issues you have raised in question #1 (and in part, with question #2) of your memorandum, there may be lingering issue(s) that result

[1] The Brigham Court, and the Rell Court, respectively, both considered the precedents in various states around the issue of what right there is to an education. The case law precedents cited in Rell may also serve as relevant precedent for a reviewing court in Vermont, if there is further litigation in Vermont, as discussed above. The Rell Court also considered how other state appellate courts have approached the educational quality issue. See 295 Conn. at 299-310.

[2] Connecticut's former school finance system, like the former system in Vermont, was founded upon raising revenue mainly through local property taxes.

in some form of litigation which ultimately results in further appellate review by the Vermont Supreme Court of the Education Clause and Common Benefits *vis a vis* the minimum quality of education to which each Vermont child may be entitled to receive.

QUESTION # 2

"What, if any, are the legal problems (per federal civil rights law) and constitutional problems (per Brigham) of privatizing a public school?"[3]

- "Can a municipality renounce a delegated state function?"
- "Does such renunciation absolve the state of its constitutional responsibility?"

A. FEDERAL CIVIL RIGHTS LAW

Individuals With Disabilities Education Act

The issue of whether private schools are bound by the obligations of the IDEA when a private school admits a publicly tuitioned student under Vermont's school choice law has already been subjected to judicial review. See St. Johnsbury Academy v D.H., 240 F.3d 163 (2nd Cir. 2001). There, the Second Circuit Court of Appeals held that in all cases, the obligations placed upon LEA's with regard to the IDEA fall upon the sending "public agency," not the private school. Id. at 171. "IDEA expressly contemplates that children will be 'placed in... [private] schools or facilities by the State or appropriate local educational agency as the means of' complying with the statute, and with respect to such children, the statute obligates the 'State'--not the private school--to 'ensure' that such children 'are provided special education and related services, in accordance with an individualized education program.'" 20 U.S.C. § 1412(a), (a)(10)(B)(i) (emphasis added); see also 34 C.F.R. §§ 300.400, 300.401. Id. The D.H. Court further held that a private school, like St. Johnsbury Academy, is not an LEA for purposes of IDEA. Id. at 172.

Section 504(a) of the Rehabilitation Act

The D.H. Court also set out a test for determining whether private educational institutions are in compliance with Section 504(a) of the Rehabilitation Act:

[3] Please see Brigham analysis in response to Question #1.

"By its terms, § 504(a) does not compel private educational institutions to 'disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.'" Id. at 173, quoting Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). "The law requires only that an 'otherwise qualified individual with a disability' not be 'excluded from participation in a federally funded program solely by reason of'" his disability. Id. (quoting § 504(a)). This prohibition means "only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." Id. "The test for determining whether a person is otherwise qualified under the statute 'is well settled." Id. "The person must be "'able to meet all of a program's requirements in spite of his handicap.'" Id. The definition does not include someone "who would be able to meet the requirements of a particular program in every respect except as to the limitations imposed by their disability." Davis, 442 U.S. at 406.

"Under the catch-all regulatory definition that is applicable to private school services, a disabled student is qualified if he 'meets the essential eligibility requirements for the receipt of such services.'" Id. at 173-174, quoting 34 C.F.R. § 104.3(l)(4).

"We would be presented with a different case if the program requirement at issue were 'unreasonable and discriminatory," and "did not represent a legitimate academic policy with respect to the school's students, disabled and non-disabled alike." Id. at 174. Otherwise, "nothing in the [Rehabilitation] Act requires an educational institution to lower its standards." Id. at 174.

While there may be other federal civil rights considerations attendant to the privatization of a public school, including, without limitation, the Americans with Disabilities Act and/or the Vermont Public Accommodations Act,[4] the existing precedent from the 2nd Circuit decision in the D.H. case provides your committee with a roadmap to assess the interplay between questions around privatization and the current state of the two main federal civil rights laws that primarily affect the delivery of education related services to students with disabilities in Vermont. See St. Johnsbury Academy v D.H., 240 F.3d 163 (2nd Cir. 2001).

[4] The applicability of the Vermont Public Accommodations Act to this analysis may be rendered moot by the exclusion written into 9 V.S.A. § 4502 for "special education claims and issues covered by federal and State special education laws, regulations and procedures, pursuant to 20 U.S.C. § 1404 et seq. and 16 V.S.A. Chapter 101."

B. CAN A MUNICIPALITY RENOUNCE A DELEGATED STATE FUNCTION? DOES SUCH A RENUNCIATION ABSOLVE THE STATE OF ITS CONSTITUTIONAL RESPONSIBILITY?

As you know, a municipality in Vermont can choose not to maintain an elementary school or a high school. See 16 V.S.A. §§ 821-822. This is not facially inconsistent with Chapter II, § 68 of the Vermont Constitution which provides, in relevant part:

> "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth (emphasis supplied)."

With regard to the related questions you have posed, the critical language seems to be very last part of the first sentence of the Education Clause –

> "unless the general assembly permits other provisions for the convenient instruction of youth"

This language has never been interpreted by the Vermont Supreme Court. However, the plain language of Chapter II, § 68 seems to give rise to a legitimate question about what actually constitutes "other provisions for the convenient instruction of youth" in the context of discussions around privatization. This is particularly so in the following hypothetical:

> consider a child who has grown up in a community, and has attended the same school for a period of time, established peer relationships and teacher-student relationships, engaged in extracurricular activities, and has otherwise been enjoying any of the various component parts that comprise a quality basic education; juxtapose this with the inability of that same child to matriculate at the same school which becomes privatized because the child happens to be on an Individualized Education Program (IEP) and the new school lacks the requisite endorsement area(s) for special education and is unable to serve the child's needs. In this hypothetical, the issue is whether the "other provision for the convenient instruction of youth" is satisfied if some, but not all of a town's

youth can continue with their education at the newly privatized school because the school is unable to serve every child in the town.

Without any case law precedent as a guide, we simply do not have a predictor on how the Vermont Supreme Court might decide this or related questions around the "other provision for the convenient instruction of youth," to the extent there is an occasion for the Court to do so. However, it seems like a logical concern worthy of a thorough discussion.

QUESTION # 3

"What legislative responses do you suggest?"

Any decisions about the questions raised in your memorandum rightly rest with the legislature. With that said, it may be prudent, upon consultation with your legislative legal staff, to keep in mind the potential legal and constitutional considerations discussed above as you and your members debate the issues related to the privatization of public schools.

Please feel free to contact me with any questions or concerns.

Sincerely,

Gregory J. Glennon, Esq.
General Counsel, Agency of Education

cc: Members of the Senate Education Committee
Rep. Johannah L. Donovan, Chair, House Education Committee
Rep. Peter Peltz, Vice-Chair, House Education Committee
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Donna Russo-Savage, Esq.