



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Representative Oliver Olsen
From: Peter Griffin; Donna Russo-Savage
Date: May 29, 2015
Subject: H.361 of 2015 - Sec. 37

You asked for a memorandum on the constitutionality of the spending threshold in Sec. 37 of H.361 of 2015, as passed the House and Senate.

Current law:

Under current law, if a district's modified education spending¹ is more than 123% of the statewide per pupil average, its spending above that threshold is counted twice for the purpose of calculating statewide education property tax rates. See 32 V.S.A. § 5401(12); see also 16 V.S.A. § 4001(6).

Sec. 37 of H.361 of 2015:

For fiscal years 2017 and 2018 only, Sec. 37 redefines the current excess spending threshold. Instead of basing the excess spending threshold on a percentage of the statewide average, Sec. 37 bases the threshold on a percentage of the district's prior year spending.

Sec. 37 includes a formula that calculates an "allowable growth percentage," which is the percentage by which a district's spending may exceed its prior year's spending. This formula allows an increase for each district on a sliding scale. The highest spending district in the prior year is allowed no increase in its modified education spending, the lowest spending district is allowed an increase of 5.5%, and the remaining districts fall on a straight-line spectrum between these two points.

The excess spending thresholds in Sec. 37 create a disincentive for increased statewide education spending by creating an excess spending threshold that is more likely to apply to each district. As under current law, a district may still spend as much as it wants in fiscal year 2017 and 2018. The only consequence for spending that exceeds the district's allowable growth is that its spending above that threshold is counted twice for the purpose of calculating the district's tax rates.

¹ As used in this memorandum, the term "modified education spending" means education spending as defined in 16 V.S.A. § 4001(6), minus the amounts excluded from education spending for the purposes of calculating excess spending under current law. See 16 V.S.A. § 4001(6)(B).

Constitutional question:

You asked whether Sec. 37 is consistent with the State’s obligation to “ensure substantial equality of educational opportunity throughout Vermont” under the Vermont Constitution. See Brigham v. State, 166 Vt. 26 (1997). Specifically, under Sec. 37, it is at least theoretically possible that two districts spending the same amount per pupil could have different statewide education property tax rates, based on each district’s prior spending. For example, a district that spent \$17,000 in fiscal year 2016 could spend \$17,001 in fiscal year 2017 without incurring any tax rate penalty. However, a district that spent \$12,000 in fiscal year 2016 would incur a tax rate penalty if it spent \$17,001 in fiscal year 2017.

In order to address this question, this memorandum will discuss the scope of the State’s obligation under Brigham, and touch on the history of district education spending. While it is impossible to predict whether a particular statutory provision may be challenged or overturned, there is a strong argument that the spending thresholds in Sec. 37 are consistent with the Vermont Supreme Court’s decision in Brigham.

Discussion:

- **Brigham likely does not preclude the spending thresholds in Sec. 37.**

The Vermont Constitution places an obligation on the State to “ensure substantial equality of educational opportunity throughout Vermont.” Brigham v. State, 166 Vt. 246, 268 (Vt. 1996). The Brigham Court concluded that the then-current Foundation Plan did not fulfill this obligation, and struck it down.

In its decision, the Brigham Court gave the Legislature significant latitude in creating a remedy to the inequities of the Foundation Plan.

[W]e underscore the limited reach of our holding. 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. at 268. The Court was also careful to note that “substantially equal” does not mean perfectly equal.

[A]bsolute equality of funding is neither a necessary nor a practical requirement to satisfy the constitutional command of equal educational opportunity. As plaintiffs readily concede, differences among school districts in terms of size, special educational needs, transportation costs, and other factors will invariably create unavoidable differences in per-pupil expenditures. Equal opportunity does not necessarily require precisely equal per-capita expenditures, nor does it necessarily prohibit cities and towns from spending more on education if they choose, but it does not allow a system in which educational opportunity is necessarily a function of district wealth.

Id. at 268.

The Brigham Court declined an opportunity to consider the plaintiff's argument that the Vermont Constitution specifically requires tax rate equity for all districts. Id. at 268. As a result, there is nothing in the Brigham decision that requires absolute tax rate equity for all districts at all times. Brigham leaves open the possibility that a substantially equitable funding system could still include some variation in tax rates for towns with equal spending, as long as those variations are not based on a district's property wealth.

- **A court would consider whether any inequities created by Sec. 37 are outweighed by a legitimate State purpose**

The Brigham Court did not clearly specify the precise legal test that applied to the claims brought under the Vermont Constitution's educational provisions. Id. at 265. The Court noted that challenges under the Equal Protection Clause of the U.S. Constitution and the Common Benefits Clause of the Vermont Constitution normally call for a rational basis test, under which "distinctions will be found unconstitutional only if similar persons are treated differently on wholly arbitrary and capricious grounds." Id. at 265 (citations omitted). However, if a court decided that the spending thresholds in Sec. 37 implicated a fundamental constitutional right or involved suspect classifications, it could choose to analyze Sec. 37 under a "strict scrutiny" test, which would require the State to put forth a compelling state interest, and to demonstrate that the spending thresholds were narrowly tailored to meet that interest.

Sec. 37 would likely pass scrutiny under either test. While Sec. 37 does allow for some variation of property tax rates, those variations are not based on property wealth, but on prior spending patterns for that specific district. This is consistent with the overall purpose of Sec. 37, which seems designed to slow the overall rate of statewide education spending. Basing a disincentive to continued education spending growth on prior spending habits seems reasonably related to the State's goal of slowing statewide education spending, and would likely pass muster under a rational basis test.

Although a strict scrutiny test is a significantly higher legal test, Sec. 37 could still meet that test, although it would be more difficult. The State could argue that it has a compelling state interest to fulfill its constitutional obligation to provide an education to all Vermonters. Looking to the history of property tax increases and spending increases, the State could argue that controlling spending through the Sec. 37 thresholds is necessary to ensure it can deliver educational services to all Vermonters on a substantially equal basis, consistent with the resources the State has at its disposal. Since the magnitude of any property tax variation under Sec. 37 is likely to be small, the State could argue that the thresholds are narrowly tailored to create as little inequity as possible.

- **It seems unlikely that any inequity created by Sec. 37 would be significant**

The allowable growth permitted by Sec. 37 is based on a percentage of the district's modified education spending in the prior year. In the 17 years since Act 60 was first passed, individual district spending patterns have settled into fairly consistent ranges. For example, after accounting for inflation, statewide education spending for all districts has increased by an average of only 1.225% over each of the past four fiscal years (FY 2013 to FY 2016). While it is possible that some districts may have anomalous increases in a particular year, it seems more likely that most individual districts will see relatively modest increases on a year to year basis.

Recently, there have been examples discussed in the press that compare districts with very different spending histories. The argument that these examples support is that if a lower-spending district wanted to increase its spending by 30–50% from one year to the next, it would be heavily penalized. Given the history of district spending over the past four years, an increase of that magnitude would be an unusual occurrence.

Even if such an increase were to materialize, any inequity would be mitigated because Sec. 37 treats each district the same, at least in regards to spending. It does not matter if a district is a low-spending district or a high-spending district—any district with an increase of 30–50% of education spending will have a significant tax rate penalty to pay.

- **The current statewide education property tax system currently allows tax rate inequity, based on factors other than property wealth**

A legal challenge to Sec. 37 would most likely be premised on an argument for perfect tax rate equity. The argument would likely be that Brigham requires equal tax rates for equal per pupil spending.

However, under current law, it is possible for two districts to have the same tax rate, but receive different per pupil revenues. For example, 16 V.S.A. § 4010 allows a district that loses students to keep its per pupil count artificially high. These “phantom students” have the effect of keeping a district's tax rate lower than it would be if only the district's actual students were counted. Therefore, these districts are able to spend more money for each actual student, for the same tax rate, than a district without “phantom pupils.” Similarly, although it is calculated on the budget-side rather than the tax rate-side, small schools grants allow qualifying schools to spend more money for each actual student, for the same tax rate, than a district without a small schools grant.

Both of these examples seem consistent with Brigham, because neither of these variations from perfect tax rate equity are based on the property wealth of the district. Instead, both of these variations are premised on justifiable policy decisions made by the Legislature. In the case of phantom students, a decision was made to cushion the effect for districts that have declining enrollment, regardless of property wealth. In the case of small schools grants, a policy decision was made to bolster small schools, regardless of property wealth.

- **Any legal challenge to Sec. 37 may currently be premature**

To bring a legal challenge against Sec. 37, any prospective plaintiff would likely need to show an actual injury. In order to show an injury, the district will need to vote a budget with a significant increase early in 2016, and the district's tax rate will need to be set by the Agency of Education on June 30, 2016. It seems unlikely that a challenge to Sec. 37 could be brought before the summer of 2016.