

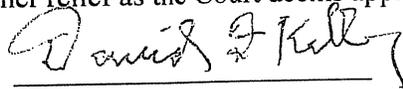


1. On December 20, 2018, Appellant-Plaintiffs filed an administrative appeal and complaint asserting affirmative claims for declaratory relief, and preliminary and permanent injunctive relief.
2. Appellant-Plaintiffs seek a prohibitory preliminary injunction preserving the status quo and preventing Defendants from:
  - a. Taking any action designed to, or having the effect of, dissolving Plaintiff town school districts, against their will, and contrary to electorate votes in any of the town school districts in the proposed union school districts, absent legislative enactment or approval of the electorate in each town.
  - b. Taking any action designed to, or having the effect of, filing union school certifications with town clerks, warning, calling to order, swearing in, and constituting unelected transitional boards for new union school districts designated in the Board's November 30, 2018 Order, or designating someone else to do the same, or taking any action to invite, encourage and sanction the exercise of municipal powers by unelected transitional boards.
  - c. Taking any action designed to, or having the effect of, imposing and enforcing a non-statutory, Board-created, January 29, 2019 deadline for organizational meetings.
  - d. Taking any action designed to, or having the effect of, endowing or recognizing an unelected transitional board's exercise of municipal power, including borrowing and spending power, which necessarily implicate taxing power, the ability to warn meetings, and to warn amendments to articles;

- e. Taking any action designed to, or having the effect of, enforcing any of the provisions and processes invented in the default Articles of Agreement, including the non-statutory rules and processes for creating an amendment committee that supplants Act 49's provision that school "districts subject to merger," and not designated new union districts, are entitled to form study committees, non-statutory rules and processes for amending articles, and the process for budget development by unelected officials;
- f. Taking any Agency action designating and certifying districts to the Secretary of State as union school districts, and dissolving town school districts, prior to a ruling on the merits of both the appeal and the affirmative claims in this action;
- g. Taking any action designed to, or having the effect of, preventing or discouraging town school districts from forming 16 V.S.A. § 706 Study Committees, or rendering that option a nullity by warning the formation of union organizational boards, because Act 49, Section 8 clearly and unambiguously provides for a 90-day period beginning November 30, 2018 when town school districts must be able to exercise that right;
- h. Taking any action designed to, or having the effect of, forcing Plaintiff town school district boards, against their will, and contrary to electorate votes, to sign over or transfer, assets, liabilities, monies, or contractual rights and liabilities to Unified Union School Districts.

- i. Taking any action designed to, or having the effect of, forcing Plaintiff unmerged elementary school districts to dissolve and merge their elementary grades with a MUUSD; taking any action certifying the results of any singular commingled vote, as described in the Agency's guidance as a substitute for the statutory two-step 16 V.S.A. § 721 procedure; and taking any action to guide, advise, coach, or sanction an Agency-devised alternative to § 721 processes; and taking any action to certify such mergers with the Secretary of State.
- j. And granting such other and further relief as the Court deems appropriate.

Dated: December 21, 2018



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## MEMORANDUM OF LAW

The Vermont State Board of Education issued a Final Report of Decisions and Order on November 30, 2018 which calls for the permanent and irreversible abolition of plaintiff-appellant town school districts, calls for the dissolution of duly elected district school boards, purports to strip them of statutory powers, seeks to forcibly transfer and redistribute their property, assets (including monies) and financial liabilities, to transfer contractual obligations and rights, and creates a new system of taxation and Unified Union districts. In short, it calls for the most drastic and radical change to Vermont's educational governance system in over a century.

The Order, the so-called "default" Articles of Agreement appended to it, and the processes leading to their promulgation, violate long-existing Vermont statutes, the Vermont Constitution, as well as the U.S. Constitution, as well as the plain text of the very laws the Board claims to be following, and Plaintiffs are likely to succeed on claims asserting these violations. Furthermore, Defendants' actions and contemplated future actions to enforce the order are ultra vires and have no basis in statute, proper rulemaking, or any other authority. Unless a preliminary injunction and stay issue, Plaintiffs will suffer irreparable harm, including constitutional harm, by the irreversible dissolution of their school districts, and irreversible spending, borrowing, and organizational decisions by unelected transition boards, and will have no adequate remedy at law. An injunction or stay is in the public interest, because the public is served by maintaining currently successful education for Vermont's children, by maintaining a status quo that is supported by electoral votes, and Defendants would suffer no harm from maintaining the status quo, a status that Acts 46 and 49 specifically authorize by the maintenance

of town school districts as currently constituted, and an injunction and stay are in the public interest.

Despite the Board and Agency of Education being well aware of significant legal challenges to its actions, the Board and Agency are now rushing the formation and swearing-in of unelected transitional boards for new districts as early as January 3 and January 9, 2019. Despite the absence of any general or special legislation authorizing the warning of such meetings without the statutorily required electorate votes consenting to unification, the Board and Agency have taken unprecedented steps to warn organizational meetings and appoint transitional boards, and have done so prior to the expiration of the 90-day period provided in Act 49.

The Board's November 30, 2018 Order appends "Default Articles of Agreement" which purport to confer newly created municipal powers, including spending and borrowing powers, and major decision-making powers affecting our schools and children, to individuals that were not elected to perform such newly defined duties, and who are in some cases unwilling to act in this unelected role, or to act contrary to the duties they owe their electorate, which voted against merger. The Board's effective appointment of current town school board members to exercise municipal powers for a new entity is an unconstitutional exercise of un-delegated legislative authority to create public offices and make appointments to public office, and violates separation of powers principles. Town school board members were elected to serve their constituents in town school district matters and not any other matter, or on behalf of any other entity. Furthermore, the composition of the Transitional Board and the Initial Board to be elected before June is also, for many districts, patently in violation of the constitutional requirement of

proportional representation. The Agency's plan is to warn all organizational meetings before January 29 and install unconstitutional and ultra vires Transitional Boards, that will be sworn in to assume and exercise ultra-vires municipal powers.

Fourteen days later, a deadline invented in the default Articles of Agreement, the Transitional Boards are required to meet and conduct an "Initial Meeting" to elect a Chair and Clerk for the Transitional Board. *See* Article 9(B). The Transitional Board is conferred with all the powers of a New Union District Board, as defined by "these Articles of Agreement" and "otherwise by law." *See* Article 9(C). Precisely which law remains unspecified, but the authority is clearly designed to be broad, and could mean all the municipal powers normally asserted by school boards and municipalities in general.

All of the above is a radical departure from the status quo.

Furthermore, the State's position is that these actions will be irreversible. And the ultimate operation of union districts and dissolution of town school districts in July 2019 will be irreversible. Appellants on the other hand seek to maintain the status quo, seeking only prohibitory relief, pending the outcome of this appeal and a decision on its affirmative claims for relief. An immediate preliminary injunction is warranted pending a ruling on the merits. In addition, or in the alternative, a stay pending resolution of the appeal is warranted.

#### I. REASONS A PRELIMINARY INJUNCTION SHOULD ISSUE.

A party seeking a preliminary injunction under V.R.C.P. 65 must demonstrate (1) threat of irreparable harm to the movant, (2) lack of potential harm to other parties, (3) a likelihood of success on the merits, and (4) that an injunction is in the public interest. *In re: J.G.*, 160 Vt. 250, 255 n.2 (1993); *Hagan v. City of Barre*, 2009 Vt. Super. LEXIS 27 (2009) (granting preliminary

injunction where potential homelessness constituted irreparable harm and claim municipal action went beyond scope of law likely to succeed).

Under V.R.C.P. 75, pending review of governmental action by a state agency, the court “may order a stay upon such terms and conditions as are just.” V.R.C.P. 75(c). Absent an automatic stay, courts examine “the traditional criteria, and other relevant factors” including “(1) a strong likelihood of success on the merits (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public.” *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995). Vermont courts have “recognized before, when considering a motion for a stay,” that “we bring the ‘likelihood of success on the merits’ standard into play as a test only when the movants’ appeal ‘is so tenuous that its invalidity is suggested on the fact or the matter, or the [appeal] smacks of bad faith or frivolousness.’” *In re Lathrop*, 2014 Vt. Super. LEXIS 131, \*\*4-5 (2014) (citing *Petition of Allied Power & Light Co.*, 132 Vt. 544, 556 (1974) (finding, in stay-pending-appeal context, that where court was not assured its determinations will withstand all challenges on appeal, standard was satisfied).

Under V.R.C.P. 62(a)(3)(C), providing for an automatic stay prior to appeal, “any stay shall be granted upon such terms as the court considers necessary to protect the interests of any party.” V.R.C.P. 62(a)(3)(C).

Here, for the reasons that follow, Plaintiffs clearly satisfy the standard for a preliminary injunction. Time is of the essence, and this Court should schedule an expedited preliminary injunction hearing and grant preliminary injunctive relief that will enjoin both the Board and Agency. And because Plaintiffs also satisfy any standard for a stay pending review of agency action, a stay of the Board’s order is also warranted.

**A. PLAINTIFFS ARE THREATENED WITH IMMEDIATE IRREPARABLE HARM  
ABSENT AN INJUNCTION.**

Plaintiffs are threatened with immediate irreparable harm absent an injunction.

Courts in other jurisdictions have held preliminary injunctions were warranted for the types of statutory and constitutional harms alleged in this case, which are not compensable by money damages.

A superior court in New York held that where a county government official's "actions, or threatened actions, are ultra vires and a violation of the doctrine of separation of powers, [this] provides sufficient predicate for a finding of irreparable harm." *Orange County Legislature v. Diana*, 968 N.Y.S.2d 319, 331 (2013) (granting injunction where county executive lacked municipal and statutory power to unilaterally close nursing home without legislature's approval).

Unconstitutional government action that violates the separation of powers supports a finding of irreparable harm. A federal district court in the Northern District of California has held that counties satisfied the preliminary injunction standard where an executive order would cause them "constitutional injuries by violating the separation of powers doctrine" and also because the order "caused budget uncertainty by threatening to deprive the Counties" of substantial "federal grants that support core services in their jurisdictions." *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Ca. 2017). In *County of Santa Clara v. Trump*, an executive order establishing procedures to strip sanctuary jurisdictions of federal grants for failure to comply with immigration enforcement was enjoined on a sufficient showing that it

violated the separation of powers, threatened the county's Tenth Amendment interest in exercising sovereign power, and that the threatened loss of grants and uncertainty had "thrown their budgeting process into uproar" preventing the ability to make informed decisions, and forcing contingency plans to deal with potential loss of funds, including placing funds on reserve. *Id.* at 526. The district court noted that the executive "cannot 'repeal or amend[] parts of duly enacted statutes' after they become law." *Id.* at 530.

Similarly, a Commonwealth Court of Pennsylvania substantially upheld a preliminary injunction in favor of plaintiff judges on potential separation of powers grounds, enjoining the county from producing judicial records in response to public records requests. *Grine v. County of Centre*, 138 A.3d 88, 100-102, 2016 Pa. Commw. LEXIS 169 at \*\*25-30 (Pa. Commw. Ct. 2016).

Plaintiffs will be unable to recover money damages for any of their claims (indeed they don't seek money damages) because "sovereign immunity protects the State and its component from liability for money damages unless immunity is waived by statute." *Wool v. Menard*, 2018 VT 23, 2018 Vt. LEXIS 25 (2018).

Plaintiffs are faced with immediate irreparable harms and have well-founded reasons to believe the Defendant Board and Agency will enforce the terms of the default Articles of Agreement and soon constitute unelected Transitional Boards at organizational meetings called for each district before January 29, 2019, ultimately register unified districts with the Secretary of State, and dissolve town school districts and enforce the transfer of their assets and liabilities and contractual rights and obligations, without any electorate vote or legislative approval.

The most immediate of the irreparable harms Plaintiffs face is the ultra-vires and

unconstitutional appointment of existing town school board members to a Transitional Board, an entity invented by the Articles, that has no precedent or support in Vermont statute, which the state intends to have exercise, inter alia, municipal spending and borrowing powers (i.e., the power to tax immediately and for the long term), contracting powers, budget preparation and presentation. This is irreparable harm per se. The unconstitutional appointment is effected by Article 9 of the “default” Articles of Agreement, and the recent warnings for January 3 and 9 organizational meetings reflect the State’s position is that those Transitional Boards are already created by operation of the issuance of the Board’s Order and Articles, and the only business remaining is that they be “sworn in.” (See Art. 9.) The transitional board has all the authority granted to it in Article 9 and all the authority granted the New Union District Board by the articles and “by law.” (Id.) It appears the state’s position is that the Transitional Board will have the general powers given to the legislative branch of a municipality. It appears the Transitional Board will necessarily be in place for several months, from the date of any January organizational meeting, through the election of any initial board members, contemplated to be on Town Meeting day, and until the date of the initial elected board’s first meeting, sometime in the fourteen days after Town Meeting. See Naylor Decl., Ex. 2, Agency Guidance. The unelected Transitional Board will necessarily have to made the budget decisions to present to the Initial Board, and the Initial Board, under the Agency’s recommended timeline, will have little time to make any practicable revisions or amendments to the budget (likely it will have between two and three weeks), because the Agency is urging and advising that a unified budget be warned by April 1st in order to be voted upon by May 1st, 2019. This signifies that unelected officials, appointed by the Board of Education, will be making critical budget decisions for a

yet-unconstituted electorate and a yet-unconstituted entity. This harried, break-neck, ultra-vires, unconstitutional scheme has been devised by the Board and Agency because it is nearly impossible to have actual duly elected officials go through the election process, be seated, and prepare a unified budget before July 1, 2019. While the impediments to having duly elected officials properly exercise municipal and budgeting power may be an unforeseen consequence of the hastily enacted Acts 46 and 49 and their timelines, these impediments do not justify, excuse, or erase the constitutional harms, and the ultra vires harms, the Transitional Board scheme effects on an electorate's right to have elected officials exercise municipal power on their behalf.

The Agency's Guidance proposes a timeline where the Special Meeting of the District, and the election of initial members of the New Unified District Board, will take place on Town Meeting Day, March 5, 2019, the same day that town school board members are elected, for either one-year or three-year terms. Those public offices, even if mergers go through, remain in existence until the dissolution of the town school municipality. The fact that two sets of ballots will be presented to an electorate on the same Town Meeting Day is likely to create confusion for voters and burden the fundamental right to vote. If the Special Meeting takes place on a day other than Town Meeting, but soon before or after, the confusion to voters will not be mitigated, because it will still be unclear how the town school board members and the union board members can co-exist, and it will create an even greater burden on voting rights, because voters will be less likely to turn out in equal numbers for both elections, especially the more elderly population that attends Town Meeting. Courts routinely deem restrictions on fundamental voting rights irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (noting

that racially discriminatory burdens on voting rights (not alleged in this action) were viewed with even greater scrutiny.)

Nothing in Act 46 or Act 49 provides for the formation, nor the appointment of individuals to, a transitional board empowered to exercise general municipal powers. Nor has the legislature delegated authority to either the Agency, the Secretary, or the Board of Education, to expand 16 V.S.A. § 563, which defines the powers of duly elected school boards, to individuals appointed to an unelected board that is totally undefined by statute. Even when town school districts follow statutory § 706 study committee processes for union school formation, §§ 701a-724 make no provision for unelected transitional boards. The organizational meeting provided for in § 706i and § 706j is attended by the electorate of an already recorded union district and its elected board members. The creation of Transitional Boards is entirely ultra vires. In addition, the Agency Secretary, by warning an organizational meeting and creating a transitional board, and the Board by operation of its Articles of Agreement, is depriving school districts of their statutorily vested right to negotiate a whole new set of articles of agreement in the 90-day period following the Board's November 30, 2018 Order. Act 49, Section 8(d)(1) ("districts subject to merger", not merged districts, have 90 days to form a study committee). In 2016 and 2017, many small-town school districts lost their voting and municipal power the minute they joined § 706 Study Committees where larger towns held controlling votes. Many districts were unable to negotiate articles that protected small schools from closure, or other articles that benefited smaller towns. Others simply did not form study committees. Now, those districts could be in a better position to negotiate more favorable articles than those submitted to voters in years prior, or that would be submitted to voters under the default Articles.

Unless the “default” articles are declared ultra vires and void, and if they have the force of law, the first meeting of an unelected transitional board launches the operations of the new union district. This is irreparable harm.

Irreparable Harm by the Imminent Formation of Designated Union Districts

Given the Agency’s urged timeline, which contemplates a union district electorate vesting elected unified board directors with broad municipal powers imminently -- as early as Town Meeting Day, on March 5, 2019 -- and the dissolution of lame-duck town school districts on July 1, 2019, the Board’s Order and the Agency’s implementation of it must be enjoined immediately because a Court is unlikely to be able rule on the merits of all causes of action before Town Meeting Day, or even before July 1, 2019. The Agency and the Board’s interpretations of Acts 46 and 49 are inconsistent with and a wild departure from long-existing statutes, and the Board’s Order is contrary to law, to the Constitution, and was the product of countless arbitrary and capricious decisions and processes, for all the reasons cited below supporting Plaintiffs’ assertion are likely to succeed on the merits.

The process of union formation is permanent and irreversible. There is no statute providing for dissolution or exit from a Unified Union District where there are no component town school districts because they have been dissolved. There is no process for recovering or reforming assets, liabilities, and contracts assigned to the unified school district. As explained above, money damages are unavailable to compensate for the deprivations. This constitutes irreparable harm that cannot be undone, even if Plaintiffs succeed on the merits of their claims.

Irreparable Harm to Barnard and Windham’s Designation to Merge with MUUSDs

Town school districts designated to join MUUSD (Modified Unified Union School District) structures are faced with immediate irreparable harm by the ultra-vires, and wholly invented, special, unlegislated scheme to have MUUSD electorates vote, pursuant to a modified 16 V.S.A. § 721 process, that skips the statutorily required vote by the “additional district” proposed for merger with the union district. Those votes, and the designation of the new union district to the Secretary of State, are also irreversible and non-compensable. Furthermore, the Board’s failure to recognize those districts are exempt from the state plan is contrary to the plain text of Act 49, which exempts districts that receive incentives under Act 153 and 156. A MUUSD is such a district that receives incentives under Act 153 and 156, and the statutory definition of the district, laid out in Section 17 of Act 156, very clearly includes towns like Barnard and Windham in its definition. The Agency and Board have attempted to create a nomenclature and quasi-statutory status for Barnard and Windham that fixes this problem – they call such districts NMEDs (Non-Merged Educational Districts) in Agency literature in an attempt to distinguish them and set them apart and outside the MUUSD. This has no basis in statute, for nowhere does Section 17, which defines MUUSDs, provide that the town school district served only for high school grades is not in fact part of the MUUSD. The whole purpose of Section 17 was to create a novel structure where all participants could co-exist as a district. The Agency and Board treat the town elementary districts as part of the MUUSD for every other purpose – the Barnard and Windham districts are sufficiently part of the MUUSD that they must be required to vote on the MUUSD’s acceptance of the districts’ elementary school grades into the unified structure. They are so much a part of it, in fact, that the MUUSD’s electorate vote is commingled, with no separate tally or accounting of NMED votes. The Board and Agency,

cannot argue to the contrary, because cannot have it both ways. Thus, if the “NMED” is indeed wholly outside the definition of the MUUSD, the Board’s devised process calling for a commingled vote is ultra-vires and should be enjoined for that alternative reason, because the electorate cannot be said to be a part of the MUUSD. The Board and Agency must be enjoined from certifying any vote pursuant to this wholly agency- and board-invented ultra-vires non-statutory process for voting on a question of exceptional importance.

Irreparable Harm From Uncertainty in Budgeting Process

Furthermore, many small, rural town school boards, statutorily charged with developing a budget for town school districts, are struggling with uncertainties in the budgeting process. Act 46 has left schools that have not already merged, pursuant to Section 6 and Section 7, uncertain about the receipt of small school grants. On the one hand, those sums are guaranteed in perpetuity to school districts that merged voluntarily pursuant to Section 6 and 7. School districts that filed alternative governance proposals or that could not merge had to satisfy a new and different set of criteria—a process that would ultimately reward some of the wealthiest school districts in the State with funds from the pockets of the poorest school districts.

As the merger process moves forward, capital reserve accounts are comingled, debts and assets are transferred, and budgets are blended, and it becomes impossible to untangle these forced marriages. It is imperative the status quo be preserved because

B. DEFENDANTS WILL SUFFER NO HARM IF AN INJUNCTION MAINTAINS THE STATUS QUO.

The balance of hardships clearly favors issuance of preliminary injunctive relief

because Appellant-Plaintiffs seek only to maintain the status quo, as it has existed for decades, and seek only prohibitory, not mandatory, injunctive relief. Under the status quo, Vermont school children in the Plaintiffs' districts will continue to receive the excellent education their town school districts and local school boards and communities currently provide. There is no incremental burden on the Defendants if the status quo is maintained.

If Appellant-Plaintiffs do not prevail on their claims, the Defendants will be able to force the merger of districts at a later date. However, if an injunction does not issue, the Appellant-Plaintiffs will be subjected to action by the Board and Agency that is ultra-vires, unconstitutional, violates the separation of powers, and is arbitrary and capricious, and the electorate will be deprived of its constitutional right to proportional representation.

**C. SUBSTANTIAL LIKELIHOOD PLAINTIFFS WILL PREVAIL ON THE MERITS OF THEIR CLAIMS.**

There is a substantial likelihood Plaintiffs will prevail on the merits of their claims, which raise serious legal, statutory, and constitutional questions.

**First Cause of Action – Administrative Appeal**

Plaintiff-Appellants are likely to succeed in their first cause of action, the appeal of the Board of Education's Final Report of Decisions and Order of November 30, 2018. The Report and Order violate the plain text of Acts 46 and 49, as well as the legislative intent underlying those Acts, and they effectively promulgate, in violation of separation of powers, a set of special agency-created laws and rules that are contrary to and violate 16 V.S.A. § 706n and 16 V.S.A. § 721(b), and other applicable statutes. The Report and Order evidence that the Board's decisions

were arbitrary and capricious and unmoored to any guiding principle. The Board even failed to follow its own rules.

The Vermont Supreme Court has held that a state agency “*has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.*” *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941) (emphasis added). The Supreme Court has also held that “an agency has *no discretion* to ignore statutory policy.” *Petition of Town of Sherburne*, 154 Vt. 596, 607 (1990) (emphasis added). Thus, all Board action must follow statutory directive and legislative intent.

Furthermore, any agency decision made “without reference to any standards or principles is arbitrary and capricious” and “denies the applicant due process of law.” *In re Miserocchi*, 170 Vt. 320, 325 (2000). The Vermont Supreme Court has consistently required clear, applicable standards, that are “neutral, predictable, and universal.” *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 20, 203 Vt. 274; *see also, e.g., In re Handy*, 171 Vt. 336, 349 (2000). Courts also require prior notice to parties of applicable standards. *See, e.g., In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, ¶ 16, 196 Vt. 175, 95 A.3d 999 (holding that when an agency action was “clearly erroneous” when it “imposed additional nonstatutory eligibility criteria” on a project “without prior notice”); *Royalton Coll., Inc. v. State Bd. of Ed.*, 127 Vt. 436, 450, 251 A.2d 498, 508 (1969) (holding that the State Board of Education cannot impose “essentially, a new condition” without first raising it during the proceedings). The inconsistency of the Board’s decisions warrants vacation, for the Vermont Supreme Court will “find error when

a regulation is inconsistently applied” and an agency fails to “treat like cases alike.” *In re Stowe Cady Hill Solar, LLC, 2018 VT 3.*

In the instant case, the Board of Education ignored the Legislature’s explicit directive in Act 46 to analyze and allow alternative governance structure proposals where a merger “may not be possible or the best model to achieve Vermont’s education goals in all regions of the State.” Act 46, Sec. 5(c). The Board’s Final Report evidences it misunderstood its mandate, which was not to call for “preferred structures *wherever possible,*” as the Board asserted (Final Report at 6), but rather to do so only where it was deemed “necessary” and only to “the extent necessary.” Act 46, Sec. 10(a)(20). Acts 46 and 49 promulgated several sections devoted entirely to alternative governance criteria and processes, and required actual consideration of the proposals. Compl. ¶ 206. It prohibited the Board from imposing “more stringent requirements than those in this act” when evaluating alternative governance proposals. Act 49, Sec. 20. Act 46 intended to allow alternative pathways to reach its goals of academic quality, fiscal efficiency, transparency, and sustainability. Compl. ¶ 207.

Neither the Agency of Education, nor the Board of Education, established any yardstick, standard, or measure for evaluating whether an alternative structure proposal meets the goals of Section 2. Any such measure could not be more stringent than the requirements of Acts 46 and 49, by statute. Nine months after Alternative Governance Proposals were due, when the Board began deliberation over the fate of unmerged districts and their section 9 proposals, it considered adopting “guiding principles” it would use to evaluate those proposals, but, after being informed that such guiding principles would need to go to the Legislative Committee on Administrative Rules, the Board purportedly abandoned them and did not openly rely on them. ¶ 233, 269. The

four criteria, however, remain to this date on the State Board's website. ¶ 233. Consequently, school districts, who had submitted proposals long ago with no guidance ex-ante or post hoc, were left to guess the fate of their districts, and many found out for the first time they were slated for merger only at the end of the process, in October of 2018, when the Board took provisional votes. ¶ 272. This standardless process warrants vacation of the Order.

The final Report of Decisions and Order of November 30, 2018, did not take formal action on any Section 9 proposals. It only accepted or rejected the Agency's recommendations. If the Board rejected a recommendation, it then approved a separate course of action, accepting the district's desire not to merge, but without approving any Section 9 proposal. The Board accepted the Agency's recommendation to merge 31 districts. Eleven districts were forced to merge, despite the recommendation not to merge (for Athens-Grafton-Westminster and EMUU-Stowe), or no recommendation (for 6 districts in Orleans Southwest).

The Board's final Report only identified three Section 9 proposals the Board claimed failed to meet Act 46 requirements, and yet it chose not to merge those districts (Cabot, Danville, and North Country). The Board never voted on these in its deliberations.

The final Report and Order failed to address any Alternative Governance proposal on the merits, contrary to its own rules (Rule 3400), nor did it make any findings concluding these districts failed to meet the requirements and goals of Act 46. The Section 9 proposals for these districts, however, demonstrate they are meeting Act 46 goals and requirements. And again, the Board never took any action on the proposals. Courts routinely overturn agency actions when an agency "not only failed to provide an adequate response to [a party's] argument, it failed to take seriously its responsibility to respond at all." *NorAm Gas Transmission Co. v. F.E.R.C.*, 148 F.3d

1158, 1165 (D.C. Cir. 1998); *see also, e.g., In re New Haven GLC Solar, LLC*, 2017 VT 72, ¶ 21, 175 A.3d 1211 (holding that an agency erred when it failed to consider comments that were timely filed). That is precisely what happened here. The Alternative Governance Structure proposals contain lengthy arguments explaining why each non-merged district would best serve the goals of Act 46 by remaining independent. The Board failed to address these arguments.

In its final Order, the Board stated it chose to create “preferred structures *wherever possible*.” Final Order at 6 (emphasis added). In contrast, Act 46, Section 10(a)(20) provides the Board could plan to realign districts only where it was deemed “necessary.” Courts have held that “[a]n agency decision cannot be sustained...where it is not based on the agency’s own judgment, but on an erroneous view of the law.” *Prill v. N.L.R.B.*, 755 F.2d 941, 947 (D.C. Cir. 1985). With this erroneous construction, in essence a more stringent standard than that required by Act 46, the Board purports to forcibly merge dozens of school districts that are functioning incredibly well, including districts like Franklin and Montgomery, which have some of the best test scores in the State and obtain those results at low per-pupil costs. There is no basis for finding – nor did the Board provide – that any of these mergers were “necessary.” The word “necessary” does not even appear in any merger discussions, and appears only once, in a heading, in the Final Report. Compl. ¶ 216. The use of a more stringent standard violates Act 49’s explicit prohibition, set out in Section 20.

The Board’s final Report and Order overlooked vast amounts of data, analysis, and other information districts submitted in their AGS proposals. The record reveals most Board members likely did not even read the Alternative Governance Structure proposals. Compl. ¶ 211.

The Boards Report and Order also contains numerous inconsistencies and errors. For instance, the Board relied on erroneous information from the Agency regarding which of two towns, Richford and Enosburg, had capital debt and which did not, and failed to address or consider the disparity in debt, or the fact that the debt would be shifted from a higher-income town to a lower-income town. *See Complaint*, ¶¶ 138, 139; see also ¶ 222 detailing factual errors in the plan. The Board Report provides no explanation for why Northeast Kingdom districts and other small districts, both with small population density, were treated disparately. ¶¶ 140, 221. The Board provided no explanation or standards for its decisions to merge across supervisory unions, or when to keep supervisory unions separate. ¶ 141. The Board provided no explanation of how it evaluated differing levels of indebtedness. ¶ 218, 238-240, 242-50. The Board provided no explanation for how it evaluated districts' geographic isolation or why it reached different conclusions for geographically isolated districts. ¶ 219-220. It appears to have imposed more stringent metrics for geographic isolation than those required by the Act. ¶¶ 235-36. The Board provided no explanation for why it rejected a "rigorous" and "compelling" case for remaining independent. ¶ 225.

The Board failed to engage with in-depth analysis of each district, providing each *group* of districts mere 20-minute time slots, reserving ten minutes for presentation, and ten minutes for questions. ¶ 142.

The Board's Order is so thinly reasoned, and so riddled with inconsistencies and contradictions, that its rationale cannot be discerned. The Board's failure to address the factual matters before it, and failure to make any findings on those matters, violate Vermont law. "We cannot conclude, based on the record before us, that [Board] has given us an adequate

explanation to determine the reasons for [it's] decision and how they are consistent with the statutory standards." *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 26, 203 Vt. 274, 155 A.3d 1207.

The Board's decision is also arbitrary and capricious because it fails to consider the record that was before it, and entirely ignores substantial evidence that is directly contrary to the Board's conclusions. An agency must "explain why it rejected evidence that is contrary to its finding." *Carpenters & Millwrights, Local Union 2471 v. N.L.R.B.*, 481 F.3d 804, 809 (D.C. Cir. 2007). As the United States Supreme Court has held, 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." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). The Board's decision comes nowhere near meeting this standard.

Neither the Agency nor the Board adequately addressed all of the evidence put forth in the alternative governance structure proposals demonstrating that those proposals would best meet the goals of Act 46.

Appellants are substantially likely to prevail on their claim that the Board's November 30, 2018 Report of Decisions and Order is arbitrary and capricious, contrary to law, and be granted a declaration that the Order should be vacated. Appellants are entitled to a stay and a preliminary injunction against any action by defendants to effectuate the order.

#### Second Cause of Action – Violation of Separation of Powers

There is a substantial likelihood Plaintiff-Appellants will succeed in their second cause of

action, which asserts that the Board and Agency's acts violate Constitutional separation of powers principles. The Board's Order goes wildly beyond the scope of what is permitted by the Constitution and State statute, in violation of separation of powers principles.

The power to create or dissolve municipalities is constitutionally reserved to and exercised by the Legislature, not an unelected Board of the executive branch. Municipal mergers accomplished not by state action, but by assent and contract, are powers statutorily vested in the electorate. Act 46 and Act 49 must be interpreted in *pari materia* with the Vermont Constitution, and the long-existing statutory scheme that requires electorate assent to Articles of Agreement, as opposed to legislatively enacted municipal charters.

Chapter II, Section 5 of the Vermont Constitution provides: "The Legislative, Executive, and Judiciary departments shall be separate and distinct, so that neither exercise the power properly belonging to the others." The Constitution expressly vests the power to "constitute towns, boroughs, cities and counties" in the Legislature. Vermont Constitution, Chapter II, Section 6. Furthermore, "[t]he charters that govern all of Vermont's municipal subdivisions require the approval of the General Assembly in order to take effect." Special Preface, 24 V.S.A. app at xix (2008); *see also* 17 V.S.A. § 2645(d) (noting that charter amendments "shall become effective upon affirmative enactment of the proposal, either as proposed or as amended by the general assembly"). Act 46 and Act 49 should be construed consistently with this constitutional and non-delegable power.

Furthermore, there is nothing in Act 46 that expressly abrogates or repeals long existing statutes providing for an alternate means of merger formation by other than state actors, namely by agreement of the electorate. Chapter 11, Title 16, §§ 701-724 provide for union school

formation by means of study committees that prepare a report “in the form of an agreement between the member districts for the government of the proposed union school district.” § 706(b). Only if “a majority of the voters in each district which is designated in the final report as necessary to the establishment of the proposed union vote to establish the proposed union, those districts . . . which voted by a majority of those voting to establish the proposed union district, shall constitute a union school district.” § 706(g). Elsewhere, Vermont statute similarly provides for formation of interstate school districts, using a similar statutory process for preparation of “Articles of Agreement,” that must be approved by “a majority of the voters present and voting in each member district” considering the Articles. 16 V.S.A. § 772.

The plain text meaning of “agreement” and “Articles of Agreement” in Vermont statute is that they are an agreement, i.e., a contract, to adopt articles as a charter to govern a newly formed district. *In re Burlington Airport Permit*, 2014 VT 72, \*P21 (2014) (citing rule of statutory construction that word used throughout an act or statutes in pari materia ‘bear[s] the same meaning throughout the act], unless it is obvious that another meaning was intended.’”)

Any agreement or contract requires the mutual assent of all parties to it. This meaning is borne out in Vermont statutory processes, which provide for assent of all parties to articles of agreement before they govern any municipality.

If the legislature had intended to permit the Board to adopt or grant, and impose, a charter of incorporation not subject to electorate vote, it would not have used the term “articles of agreement.” The legislature has formed municipalities by enactment. Modification of charters can be achieved by powers expressly reserved to the legislature in the Constitution, or vested in

the electorate by statute. For instance, the legislature has provided for electorate votes to “adopt, repeal, or amend a municipal charter.” 17 V.S.A. § 2645.

Act 46 of 2015 provides for and incentivizes the formation of new union districts, “formed by merging the governance structures of all member districts of a supervisory union into one unified union school district pursuant to the processes and requirements of 16 V.S.A. chapter 11” (Section 6) for accelerated mergers, or “formed pursuant to the processes and requirements of 16 V.S.A. chapter 11” for non-accelerated merger activity (Section 7). Act 46 required “an affirmative vote of all ‘necessary’ districts” by July 1, 2016 for accelerated activity, and required the same for other merged districts to become operational after July 1, 2017, on or before July 1, 2019. Section 6(a)(1)-(2), Section 7(a)(1)-(2).

The legislature never expressly repealed §§ 701-724 processes for entering into Articles of Agreement nor has it redefined the statutory term of art “Articles of Agreement” to call for any process not adopted by affirmative electorate vote of all districts named in said articles.

When the legislature has intended to temporarily amend and/or repeal certain Chapter 11 processes, the legislature has done so expressly and unambiguously, using unambiguous language of amendment and repeal. See Act 49, Section 23 “Elections to Unified Union District Board” (stating “Notwithstanding any provision to the contrary under 16 V.S.A. § 706k,” and providing for election of unified district board director elections to be held at annual meeting in accordance with “articles of agreement,” and stating “Notwithstanding any provision to the contrary under 16 V.S.A. § 706l,” and providing for process for filling board vacancies, and expressly stating those processes were repealed on July 1, 2018). *See also* Act 11, Sec. E.500.8 of the Special Session of 2018 (temporarily re-enacting elections provisions).

While Act 49 calls for “default” Articles of Agreement to be “used” and to “apply” to a proposed district, there is virtually nothing in Act 49 that expressly eliminates, or amends, or repeals the need for electorate votes, and the assent of component districts for union school formation, before they are to be “used” or “apply.”

The legislature has never expressly declared that the “default” Articles of Agreement referred to in Act 49 could be imposed without an electorate vote. Without express amendment or repeal of union school formation statutes, the Board utterly lacks authority to order school mergers without an electorate vote or enactment of its recommendations by the legislature. Plaintiffs are likely to get a declaration that the plain text of Acts 46, 49, and 16 V.S.A. §§ 701 et. seq. require consent by the electorate of each town school district before districts can be merged into a unified district, and that the Board lacks statutory authority to order school mergers or impose default Articles of Agreement.

Plaintiffs should be awarded a preliminary injunction against any action by defendants that would seek to, or have the effect of, merging town school districts without consent by the electorate of each town school district, or enactment by the legislature. There should be an electorate vote on any Articles of Agreement the Board wishes to force on districts, otherwise they can only take effect upon legislative enactment.

Furthermore, the Board’s default Articles of Agreement far exceed its grant of authority under Acts 46 and 49 and amount to legislation in violation of the separation of powers. Where the legislature intends to repeal or revise or alter statutes regarding unified union formation, it has shown that intent with express language of repeal or amendment. The legislature has indicated it would consider any proposal to amend § 706n. *See* Act 49, Section 8. No such

proposal was forthcoming. *See* Attachment B to the Complaint, March 29, 2018 letter from Nicole Mace to chairs of House and Senate Education Committees.

Instead, the agency and Board decided it was easier to effectuate legislative amendments by fiat, and devised a set of rules that function, frankly, as alternative special laws, to supplant the statutory provisions in § 706n. The quasi-legislative scheme regarding authority to amend the Board's Articles, circumventing 706n, is laid out in Article 14, with Section A defining the authorities to amend articles and Section B defining the processes for amendment. Nothing in Act 46 or 49 repealed section 706n, no statute has delegated legislative power to the Agency or Board, and nothing authorized the Agency or Board to devise alternatives or exceptions to § 706n. Even if such authority had been given (and it was not), and even if agencies rules could circumvent enacted legislation (and they cannot), there was virtually no rulemaking for the statutory exceptions the Articles purport to adopt.

The Articles also ignore that Act 49 expressly provided that school districts, and not the Transitional Board, could form a § 706 study committee to propose new Articles of Agreement to govern a new district. Instead, the Articles appear to foreclose the ability of any district-initiated study committee to propose articles and instead create, by fiat, "Specific Duties" of the Transitional Board to amend the default articles. (Article 9, Section D.) These call for warning a unified district vote on amendments, not individual town votes as provided for in § 706 and Act 49. This is an act of pure legislation, is in direct contravention to (i.e., it quite simply ignores) what the legislature plainly stated in Act 49, and is a violation of separation of powers, pure and simple.

The Articles of Agreement therefore are unconstitutional and violate the separation of powers, and their application and enforcement should be enjoined.

The Report and Order, in purporting to designate the Barnard and Windham elementary schools merged with MUUSDs, violate Act 49, Section 8(e), which exempts Modified Unified Union School Districts from the State Plan. *See* Act 49, Section 8(e) (providing state plan “shall not apply to” unified union school district that began to operate between June 30, 2013 and July 2, 2019 and is a regional education district or *any other district eligible to receive incentives* pursuant to 2010 Acts and Resolves No. 153, as amended by 2012 Acts and Resolves No. 156); *see also* Act 156, Section 17(c) (providing a Modified Unified Union School District is “eligible for the incentives provided to a regional education district (“RED”) in Sec. 4 of that act [Act 153]” provided the effective date of the merger is within the period required for RED formation). Barnard and Windham are elementary school districts within eligible MUUSDs and cannot be subjected to any Board action or order pursuant to the Plan. The Board’s designations are ultra vires and violate separation of powers.

The Board’s Final Report and Order also devises an alternative to long-standing statute, 16 V.S.A. § 721, governing the inclusion of additional school districts in unified union schools, which has been in place since 1976. The Board’s Order designates that Windham School District and Barnard School District shall be subsumed by the MUUSD, provided a majority of voters of the MUUSD vote to approve the district’s addition to that district pursuant to 16 V.S.A. § 721. *See* Final Report, pp. 34, 36.

16 V.S.A. § 721(b) provides that a union school district may take action to initiate the inclusion of additional school districts. But § 721(b) first requires the union board to submit its

plan for incorporation to the Board of Education for approval, then warn a meeting of its union electorate, and if a majority of that electorate votes in favor of inclusion, the additional district is required to warn a meeting to vote on the plan. Section 721(b) requires “a majority of the voters voting at the meeting of the additional district” must vote in favor of inclusion, for the inclusion to take effect.

The Agency of Education's position is that the Board of Education's November 30, 2018 Order has suspended the applicability of 16 V.S.A. § 721, and that an agency-devised alternative to, and modification of, the § 721 statutory process can take place. In that alternative process, a single commingled vote of an electorate, yet-unformed in Windham's case, rather than the statutorily required two-step § 721 voting process which gives the elementary school district the power to veto being subsumed into the unified district, can take place. *See* State Agency of Education Guidance on MUUSDs and NMEDs, available at <https://education.vermont.gov/sites/aoe/files/documents/edu-sbe-act46-mmusd-nmed-guidance.pdf>, and appended to the Board's Final Plan under the caption “Other Documents.” This is a radical departure from long-standing Vermont statutes governing union school formation and enlargement, and the Agency's interpretation, and the Board's implementation of it, have been invented whole cloth, amount to pure legislation, and are in violation of separation of powers. Nothing in Act 46 or Act 49 contemplates or permits the rewriting of existing Vermont statutes, or the creation of a parallel, agency-created set of special laws governing union formation.

The Board's default Articles of Agreement also improperly legislate and exercise legislative power in creating transitional boards, (essentially creating a new unelected public office), appointing individuals to populate those transitional boards, and awarding them novel

statutory and municipal powers relating to a yet-unformed district, including spending and borrowing power. The Articles appoint the existing Chair and Clerk of town school boards to the transitional boards. Nothing in Acts 46 or 49 purport to authorize the creation of the transitional boards, this new public office, or the power to appoint to the office. Act 46 and Act 49 make no mention on organizational meetings, or deadlines for them. Creation of the Transitional Boards violates the Separation of Powers. The Board, as a state agency, cannot simply create a new public office, and appoint existing officials to it, effectively expanding their statutory duties beyond those defined by statute. The creation of the office, and the appointment, are generally unconstitutional because they are inconsistent with our representative form of government. Only the Legislature can create a new public office out of whole cloth.

“It is axiomatic that an administrative agency’s power to promulgate regulations may extend only as far as its legislative grant of authority. *Martin v. Agency of Transp. DMV*, 175 Vt. 80, 87 (2003). “If an agency operates outside its bounds, or for purposes other than those authorized by the enabling legislation, ‘this Court will intervene.’” *Id.* The fundamental principle served by these tenets is the doctrine of separation of powers,” and “agency action that transcends the delegation will not be sustained.” *Id.* at 87.

The Board cannot write Articles of Agreement that declare existing statutes are a nullity, nor can it alter or amend statutes, or temporarily repeal them. The Board cannot create an unelected public office, or expand the statutory duties that a sitting public officer currently has to include service to a yet-unformed municipality. The Articles are ultra vires and unconstitutional. An executive agency or board, and the executive itself, is prohibited from taking “action that

either repeals or amends parts of duly enacted statutes.” *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (invalidating line-item veto for violating presentment clause, not reaching question of separation of powers violation found by lower court).

The earliest warned organizational meeting of a transitional board is scheduled for January 3, 2019, for the Orleans Southwest Union Elementary School District, and January 9 at 7:00 p.m., for the yet-unformed Windham Southeast Unified Union School District. All four towns that would form the designated Windham Southeast district voted overwhelmingly against merger last year. The warning for Windham Southeast does not entirely comport with §§ 706i and 706j, defining the notice and contents of a warning of an organizational meeting for a union school formed by normal § 706 processes. First, the triggering condition precedent for the warning, certification of union formation with the Secretary of State, before certifications are sent to town clerks, has reportedly not occurred. *Compare* § 706g.

The warnings cite the business to be conducted as follows:

- i. To elect a temporary presiding officer and clerk of the District from among the qualified voters of the district.
- ii. To swear in the members of the Transitional Board created in Article 9 of the District’s Articles of Agreement, who shall immediately assume office and serve until the voters of the District elect the initial members of the Board of Directors and those members are sworn in and assume their duties.
- iii. To adopt Robert’s or other rules of order, which shall govern the parliamentary procedures of the organizational meeting and all subsequent annual and special meetings of the District.
- iv. To elect the following officers of the District from among the qualified voters of the district, which officers shall assume office upon election and serve for a term of one year or until their successors are elected and qualified:
  - Moderator
  - Clerk
  - Treasurer
- v. To determine a date and location for the first annual meeting of the District and all subsequent annual meetings, which shall be not earlier than February 1 and not later than June 1 in each year.

- vi. To determine whether to vote on the District's budget and all other public questions by Australian ballot.
- vii. To determine whether to elect members of the District Board by Australian ballot.
- viii. To determine and approve compensation, if any, to be paid to officers of the District.
- ix. To determine and approve compensation, if any, to be paid to members of the District Board.
- x. To establish provisions for the payment of any expense incurred by the District before it becomes operational on July 1, 2019 under a voter-approved budget for the fiscal year beginning on that date.
- xi. To authorize the District to borrow money pending receipt of payments from the State Education Fund by the issuance of its notes or orders payable not later than one year from date; provided, however, that the District is authorized by Vermont Statutes to borrow sufficient funds to meet pending obligations.
- xii. To determine whether to authorize the Board of School Directors, pursuant to the provisions of 16 V.S.A. § 563(10) & 11(c), to provide mailed notice to residents of the availability of the Annual Report and proposed school budget in lieu of distributing the Annual Report and proposed budget.

Dated this 4<sup>th</sup> day of December, 2018.

Daniel M. French, Ed. D. /s/ Secretary of Education  
12/8/18

The warning omits the election of three auditors. *See* § 706i.

And it is unclear why the question of voting directors by Australian ballot will be on the agenda. The legislature has passed no special law exempting union district directors from election by Australian ballot, such that the possibility of not electing directors by Australian ballot could be put to the voters of a proposed union district. 16 V.S.A. §§ 706e, 706k(a).

The warning points to Vermont statute, presumably 16 V.S.A. § 706j, as the governing authority that confers on a unified district the power to “borrow sufficient funds to meet pending obligations. 16 V.S.A. § 706j(8). That statute confers borrowing powers on normally elected

union board members. Nothing in that statute suggests it could confer the same powers on an unelected official.

The item calling for a decision at the organizational meeting (which could be sparsely attended) regarding whether to provide mailed notice of availability of a budget and annual report, in lieu of actually distributing them, appears to be contrary to statute. By statute such a question can be taken up only at a school district's annual meeting, not an organizational meeting. 16 V.S.A. § 563(10), provides that only "At a school district's annual meeting," the electorate "may vote to provide notice of availability" of the annual financial report required to be produced to the electorate at every annual meeting, "in lieu of distributing the report." § 563(10) (emphasis added).

And 16 V.S.A. § 563(11)(C), provides that only "at a school district's annual or special meeting," the electorate "may vote to provide notice of availability of the school budget," "in lieu of distributing the budget."

In sum, the Board's Articles of Agreement, and the Agency's means of giving them effect, ignore existing statutes and purport to write new ones, in violation of separation of powers principles. A preliminary injunction enjoining them and any effect given to them is warranted as requested in the foregoing Motion.

#### Third Cause of Action – Redistribution of Debts and Assets

The Board's Articles of Agreement seek to compel districts to transfer their debts and assets and contractual obligations without their consent. Districts with no debt are automatically saddled with their neighbors' debt. Nothing in Act 46 or Act 49, or any other statute, empowers either the Agency or the Board to transfer assets and liabilities and contractual obligations from

one municipality to another without an electorate vote. On the contrary, existing statute provides that transfers of property or debt by school districts must be predicated on an affirmative electorate vote. *See* 16 V.S.A. § 706(a)-(o), § 562(7) (entitled “Powers of the electorate” and granting electorate power to sell or otherwise dispose of school building and site), *see also* § 562(9) (electorate authorizes school board to borrow by issuing bonds or notes). Under Vermont law, no municipality can incur liability for bonded debt without the consent of voters. 24 V.S.A. §§ 1755, 1786(a).

The Vermont General Assembly has never authorized the Board or the Agency to ignore long-standing statute requiring that the transfer of debt or property be accomplished by electorate vote. And it is axiomatic that neither an agency nor a board has any powers unless they are explicitly granted by the Legislature. In addition, courts have long recognized that confiscation of property by one government entity from another government entity constitutes a taking. *See United States v. Town of Nahant*, 153 F. 520, 521 (1st Cir. 1907).

Appellant-Plaintiffs are likely to succeed on this cause of action as well, further justifying a preliminary injunction.

Fourth and Fifth Causes of Action – Small School Grants and Constitutional Requirement for Competent Number of Schools

Plaintiff-Appellants have a substantial likelihood of success on their fourth cause of action, the Violation of the Common Benefits Clause and Equal Protection by disparate standards for, and/or failure to articulate a meaningful standard, for the award of small school grants. Both the legislature and the Board have failed to articulate a meaningful standard for the award of

small school grants. There is no rational basis for the disparate treatment of districts in awarding small school grant support funds. This is true regardless of what name the funds are given – the qualifications for their award turn on the existence of a small school in a district. Perpetuation of disparate standards and grounds for awarding funds violates the Common Benefits clause, and Vermont’s educational system cannot live with such a double standard without suffering irreparable harm to small schools.

Plaintiff-Appellants are also likely to succeed on their fifth cause of action but refrain from briefing the merits here as the aforementioned causes of action are more relevant to the preliminary relief sought.

**D. AN INJUNCTION SERVES THE PUBLIC INTEREST.**

There is no question that the public interest is best served by public school consolidation processes that comport with longstanding Vermont statutes, the plain text of which call for Articles to be agreed upon, for districts to have an opportunity to negotiate their own articles, and not consider only articles drafted by the Board, and by the assurance that action by state boards and agencies does not exceed the authority granted to them, and that such action comports with separation of powers principles. The public interest is also served by ensuring that the legislature, and not any other body, exercises the powers reserved exclusively to it.

No public interest in saving money is disserved because the Agency has conceded that initially mergers will not save money – in fact statutory incentives were designed to help offset the increased costs districts will face by merging. The initial reports to the legislature report modest savings in the \$100,000 to \$300,000 range that represent tiny percentages of multi-million dollar consolidated budgets, and fails to give an accounting of whether those

savings are offset by increased costs. There is no data reported on many districts, and the public can presume from the silence that is because no savings were achieved by those mergers.

It cannot be said any public interest in equity is disserved because not only has the legislature never defined equity or how to measure it, neither have the Board nor the Agency of Education. And reports to the legislature regarding already merged districts contain very little to no information on how, or whether, mergers improve equity.

In sum, because the public has an interest in public education governance by local, duly elected officials, governance changes that are carried out in accordance with statutory processes, and that comport with separation of powers principles, consideration of this prong favors issuance of a preliminary injunction.

## II. THE REASONS A STAY SHOULD ALSO ISSUE.

Vermont Rule of Civil Procedure 75(c) grants this Court broad authority to stay the Board's action pending appeal upon such terms and conditions as are "just." The Rule does not set out what terms and conditions the court shall consider in determining whether a stay will be just. However, generally a stay pending appeal is granted to maintain the status quo, in order to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a proceeding on the merits. *Richards v. Town of Norwich*, 169 Vt. 44 (1999); see also V.R.C.P. 62(f) (noting rules governing stays pending appeal "do not limit the power of the Supreme Court . . . to make any order appropriate to preserve the status quo") (emphasis added).

In light of the radical and irreversible restructuring the Board's Order would effect on long-standing governance structures and taxing authorities for the Plaintiff school systems, it

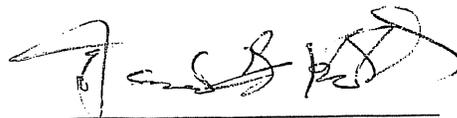
would be just to maintain the status quo pending this appeal. A stay is particularly appropriate in light of the unnecessarily rushed timeline the Board is attempting to force upon the Plaintiff/Appellants, the irreversible decisions that may be made, and the permanent municipal formations and dissolutions, before the legality of the Board's actions can be fully assessed.

CONCLUSION

WHEREFORE, Appellant-Plaintiffs, by and through their undersigned attorneys, pursuant to Rule 65, respectfully request that this Court grant their motion and issue, pending a decision on the merits of Plaintiff's Complaint, the preliminary injunctions set forth in the motion, prohibiting any action designed to, or having the effect of creating new union school districts and conferring municipal power on them, or dissolving town school districts, forcing Plaintiff town school districts, against their will, to merge into Unified Union School Districts or cease operating as town school districts, and further enjoining any action by Defendants to effectuate the Board's Order. For the same reasons, Plaintiffs have demonstrated that a stay of the Board of Education's order on like terms is also just and necessary to maintain the status quo pending resolution of the merits.

Dated:

December 21, 2018



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