STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 33-1-19 Frcv

ATHENS SCHOOL DISTRICT, et al..
Appellants-Plaintiffs,

v.

VERMONT BOARD OF EDUCATION, et al.,
Appellees-Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

STATE OF VERMONT

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PRELIMINARY STATEMENT

Plaintiffs' complaint misconstrues the rights and responsibilities of the State and its subdivisions and should be dismissed in its entirety. The State is constitutionally responsible for education in Vermont and may delegate authority to subdivisions of the State when carrying out its obligations. However, by doing so, the State does not grant local school districts a permanent right to veto future education policy changes. To the contrary, the State has broad power over its subdivisions and can merge or eliminate school districts at any time.

The legislature passed Act 46 after a vigorous democratic debate in response to a decline in Vermont's student population "from 103,000 in fiscal year 1997 to 78,300 in fiscal year 2015." 2015 Vt. Laws No. 46 § 1(a)-(b). Act 46 is intended to consolidate school districts, not schools, to enable the resulting larger districts to achieve economies of scale and provide students with a broad range of high-quality educational opportunities. *See*, *e.g.*, *id.* § 1(i)(it "is not the State's intent to close its small schools" but to ensure that they enjoy "expanded educational opportunities and economies of scale" by joining larger districts); Windham Northeast Elementary School District Articles of Agreement, Articles 3-4 (barring moving students and closing schools for two years without a vote by town).

Act 46 began with a voluntary phase through which districts that merged into preferred operating structures could receive tax and other incentives. The second phase of Act 46 was involuntary and led to the order challenged by Plaintiffs. Section 9 of Act 46 required every district not in a preferred structure as defined by the Act to conduct a self-evaluation and make a proposal as to its future to the Secretary of Education. Section 10 required the Secretary to propose a plan to the Board, and the Board to publish an order merging and realigning districts, as described in that section.

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The Secretary prepared a thoughtful 189-page plan and, after holding a series of public meetings, the Board issued a 38-page order merging 45 districts, conditionally merging four districts, and leaving the governance structure of 47 districts unchanged.[1] Because the Board made a decision within its area of expertise, and was charged with making that decision by the legislature, the Board's order is presumed valid and subject to deferential review. Count I.1 of the complaint should be dismissed because the Board correctly construed the provisions of Acts 46 and 49 relating to "preferred" and "alternative" governance structures. The Board acted well within its authority when it discussed and applied the provisions of Acts 46 and 49: (1) describing "preferred" structures as "preferred," (2) allowing the Board to approve supervisory unions only if they were "the best means" of meeting Act 46's goals in a region, (3) asking whether proposed alternative structures have "the smallest number of member school districts practicable" after merging districts subject to merger, and (4) requiring alternative structures to be designed to meet five specific goals.

Count I.2 should be dismissed because the legislature did not require the Board to elaborate on the statutory standards for evaluating alternative governance proposals and Plaintiffs have identified no instances in which the Board applied higher or inconsistent standards to alternative proposals. Plaintiffs' allegations about the geography of Montgomery are misplaced. The Board ordered Montgomery to merge for the reasons discussed in the Secretary's plan, which discussed the geographic concerns raised by Montgomery in some detail.

Count I.3 fails because Plaintiffs' claim that the Board did not consider whether seven districts had "greatly differing levels of indebtedness" is meritless. Public records

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[1] The Secretary's proposed plan, including its supporting appendices, can be found at https://education.vermont.gov/content/secretarys-proposed-plan-under-act-46-sec-10. The report is available at https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

unambiguously confirm that the Board requested, and considered, a tax analysis of the impact of varying levels of indebtedness among these districts before concluding they did not rise to the level of the statutory guideline. The tax analysis correctly identifies which districts currently carry debt as does a correction the Secretary promptly made after initially transposing Enosburg and Richford in its initial proposal.

Count I.4 fails as a matter of law because it is directly contradicted by the text of Act 49. Section 8 of Act 49 expressly provided that Board's order "shall include Default Articles of Agreement" and that they would apply "unless and until new or amended articles are approved." The Board's order complied with this mandate, which applied only to newly created districts that did not have existing articles of incorporation. Plaintiffs have not alleged that they attempted to draft new articles within Act 49's 90-day window and new articles can be adopted in any event at any time by following the procedure described in 16 V.S.A. § 706n.

Count I.5. conflates separate and distinct legal entities – modified unified union school districts and elementary school districts. Modified union districts are exempt from involuntary merger pursuant to Section 10(c) of Act 46. Elementary districts that did not voluntarily merge under Act 46, or prior voluntary merger legislation, are not. Accordingly, the Board was well within its Section 10 authority to order elementary districts to merge with modified unions if, and only if, the modified unions voted to accept them.

The Agency's Plan and the Board's order are objectively reasonable and therefore not arbitrary and capricious. Count I.6. fails because the Board's order was rationally derived from substantial evidence, including the Secretary's 189-page plan, and the voluminous additional materials considered by the Board. The Board's order is entirely consistent with the relevant statutory authority and Plaintiffs' protests about how the Board considered the statutory factors

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ignore the considerable deference owed to the Board's interpretations of statutes it was tasked with implementing by the legislature.

Count II fails as a matter of law because subdivisions of the state are "creatures of the state, holding and exercising powers and privileges subject to the sovereign will" and can be merged or destroyed by the legislature at any time. *Village of Hardwick v. Town of Wolcott*, 98 Vt. 343, 129 A. 159, 161 (1925). The legislature can also properly delegate its authority to alter or merge school districts "to administrative bodies" as it did here. *See, e.g.* 65 A.L.R. 1523 Sec. II.a; 78 C.J.S. Schools and School Districts § 16 (a "state may, by legislation, delegate authority to merge or change school districts to state boards or agencies").

Count III should be dismissed because Section 10 of Act 46 unambiguously provides the Board with involuntary merger authority and when mergers in Vermont form a unified union all prior districts within its borders "cease to exist." 16 V.S.A. § 722. Financial transfers caused by involuntary mergers, in turn, are constitutional because property held by school districts is State property and can be transferred by the State without compensation.

The small schools grant claim in Count IV is not ripe and must be dismissed because Plaintiffs do not allege that any Plaintiff district will not receive a small schools grant in fiscal year 2020. Count IV also fails on the merits under either rational basis or intermediate scrutiny review because the voluntary merger incentives it challenges are closely related to the legitimate policy goals of Act 46. Indeed, more than 150 districts voted to voluntarily merged after Act 46 was passed.

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The due process claim Plaintiffs raise in Count V fails for three independent reasons. First, Plaintiffs do not have a cognizable liberty or property interest in the continued operation of subdivisions of the State, which the State can terminate at any time. Second, procedural due

process requirements do not apply to administrative processes that are legislative, or quasi-legislative, as was the process here. Finally, Plaintiffs have not alleged that they were denied notice and an opportunity to be heard. Rather, Plaintiff seek to dispute the substantive merit of the Board's decisions.

Count VI should be dismissed because the text of the Education Clause, and the leading Vermont Supreme Court case applying it, confirm that primary responsibility for education rests with the State. This, in turn, is consistent with the broad power held by Vermont, which is not a home rule state, to merge or eliminate its subdivisions.

Plaintiffs' motion for a preliminary injunction should also be denied. Plaintiffs have failed to carry their burden of establishing that any of the relevant factors support their motion. First, Plaintiffs have failed to demonstrate that they will suffer any harm that could not be avoided or remedied by a merits decision issued by June 30, 2019. As described in the Default Articles of Agreement imposed by the Board's Order, the Plaintiff districts will continue to exist and operate until that date and Plaintiffs cannot establish irreparable harm simply by alleging that the transition process is constitutionally flawed.

Second, Plaintiffs' requested injunction would cause substantial harm to a number of nonparties. Roughly half of the districts as to which the Board took action have not filed suit and a preliminary injunction would cause substantial harm by blocking transition steps necessary for the nonparties that will be educating students living in those districts to prepare for the next fiscal year. For the same reason, the public interest weighs against Plaintiffs' requested injunction.

Finally, Plaintiffs have failed to demonstrate a likelihood of success on the merits for substantially the reasons described in Defendants' motion.

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STRUCTURE AND BACKGROUND OF ACT 46

A. The Legislature Thoughtfully Exercised Its Education Policymaking Discretion through Act 46

The legislature passed Act 46 after a vigorous public debate following a drop in Vermont's K-12 population "from 103,000 in fiscal year 1997 to 78,300 in fiscal year 2015" without a corresponding decrease in school related personnel. 2015 Vt. Laws No. 46 § 1(a)-(b). At the time, Vermont had many school districts that were limited in their ability "to achieve economies of scale," share resources, and "provide students with a variety of high-quality educational opportunities." *Id.* § 1(e)(1)-(2). The legislature thoughtfully considered the information available to it, including national literature suggesting that many Vermont school districts were much smaller than the optimal district size. *Id.* § 1(h).

The legislature was also aware that prior reform attempts in Vermont had met with only limited success. Act 46 was not the State's first attempt to address its fragmented education governance structures in response to demographic pressures. Act 153 of 2010 created a purely voluntary school district merger incentive program. *See* 2010 Vt. Laws No. 153 §§ 2-4. And in 2012, legislature again addressed voluntary mergers in Act 156 of 2012. *See* 2012 Vt. Laws No. 156. The impact of these initial efforts was limited – a decline in the number of districts in the State from 276 to 267. Report on Act 46 of 2015 ("Act 46 Report"), Appendix C.[2]

Act 46, therefore, created a more robust two-phase process to move Vermont "toward sustainable models of education governance" at the district level. 2015 Vt. Laws No. 46 § 2. The first phase was voluntary and it combined grants, expense reimbursement, and tax incentives to encourage mergers. *See* 2015 Vt. Laws No. 46 §§ 6, 7. The second phase was involuntary. It

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[2] The Act 46 Report is available at https://education.vermont.gov/documents/report-act46-merger-activity-2019.

required the Secretary of Education to propose a plan that would move districts into more sustainable governance models and the Board of Education to review the plan and publish an order merging and realigning districts under specified conditions. *Id.* § 10.

When considering Act 46, it is important to distinguish between schools and school districts. Act 46 expressly "recognizes the important role" of small schools in Vermont. *Id.* § 1(i). It "is not the State's intent to close its small schools, but rather to ensure" that they can "enjoy the expanded educational opportunities and economies of scale that are available to schools within larger, more flexible governance models." *Id.* § 1(i). Act 46 is intended to consolidate school districts, not schools, to create districts that can achieve economies of scale and provide students with a broad range of high-quality educational opportunities.

Act 46 requires the State to "provide educational opportunities through sustainable governance structures designed to meet" five goals by July 1, 2019. *Id.* § 5(a). Act 46 defines the "preferred education governance structure in Vermont" as a single district responsible for educating all resident students with an average daily membership of at least 900. *Id.* § 5(b)(1)-(3). To be a preferred structure, a district must operate schools for all of its students, operate schools through grades 6 or 8 and pay tuition for older students, or pay tuition for all of its students instead of operating schools. *Id.* § 5(b)(1)-(4).

Act 46 describes as a potential alternative structure a "supervisory union with member districts." *Id.* § 5(c). As modified by subsequent legislation, it states that the preferred structure "may not be possible or the best model to achieve Vermont's education goals in all regions of the State. In such situations, a supervisory union composed of multiple member districts" with separate boards "may meet the State's goals, particularly if:" five criteria are met. *Id.* § 5(c), as amended by 2017 Vt. Laws No. 49 § 7. Those criteria are: (1) member districts consider

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themselves collectively responsible for educating all supervisory union students, (2) the supervisory union "maximizes efficiencies through economies of scale" in resource management "which may include a common personnel system" to increase student to staff ratios, (3) the supervisory union "has the smallest number of member school districts practicable, achieved wherever possible" by merging districts "with similar operating and tuitioning patterns," (4) "after consideration of greatly differing levels of indebtedness among the member districts" and (5) the supervisory union has an average daily membership of not less than 900. *Id.* § 5(c)(1)-(4), as amended by 2017 Vt. Laws No. 49 § 7.

Section 2 describes the five goals sustainable governance structures must meet, explaining that Act 46 "is designed to encourage and support local decisions and actions that:" (1) "provide substantial equity in the quality and variety of educational opportunity statewide," (2) "lead students to achieve or exceed" state education quality standards, (3) "maximize operational efficiencies through increased flexibility" to share resources "with a goal of increasing the district level" student to staff ratio, (4) "promote transparency and accountability," and (5) "are delivered at a cost that parents, voters, and taxpayers value." *Id.* § 2(1)–(5).

The first phase of Act 46 was voluntary and included incentives to encourage voluntary mergers. 2015 Vt. Laws No. 46 §§ 6, 7. Consistent with the Act's intent to allow small schools to "enjoy the expanded educational opportunities and economies of scale" available to schools in larger districts, *id.*, § 1(i), the incentives included a permanent annual grant for any new district operating a school previously supported by a small school grant. *Id.* § 6(b)(2); 7(b)(2). Act 46 also made future small schools grant eligibility for districts that did not voluntarily merge depend in part on their academic strength, efficiency, and location relative to other schools. *Id.* § 20.

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The voluntary phase was substantially successful. More than 150 districts voted to consolidate by forming 38 new union school districts after Act 46 was passed. Act 46 Report, Appendix C.

The second phase required the Secretary of Education to propose a sustainable statewide plan to the Board, which the Board would approve or modify. During this phase, every district with "a governance structure different from the preferred structure" was required to perform a detailed self-evaluation and "submit a proposal" either alone or with other districts proposing "to retain its current governance structure," "to work with other districts to form a different government structure," or "to enter into another model of joint activity." 2015 Vt. Laws No. 46 §§ 9(a); 9(a)(3)(A). These proposals are referred to below as Section 9 proposals. Alternative governance proposals were required to demonstrate "through reference to enrollment projections, student-to-staff ratios" and other data how they could "meet or exceed" each Section 2 goal and identify "detailed actions" to improve performance. *Id.* § 9(a)(3)(B)-(C).

The Secretary was charged with reviewing all existing structures "includ[ing] consideration of" alternative governance proposals "and conversations" with districts submitting them and publishing a plan that would either "move districts into the more sustainable, preferred method of governance" or "include alternative governance structures as necessary." *Id.* § 10(a)(1)-(2). The Secretary was required to move districts into a preferred structure "to the extent necessary to promote the purpose" of providing "educational opportunities through sustainable governance structures" to meet the Section 2 goals. *Id.* §§ 10(a)(2); 10(a).

"If it [was] not possible or practicable to develop a proposal that realigns some districts" into preferred structures in light of statutory restrictions, or that otherwise met all aspects of the preferred structure, "the proposal [could] also include alternative governance structures." *Id.* § 10(a)(2). Alternative governance structures could only be proposed if they were designed to

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comply with statutory restrictions and promote providing "educational opportunities through sustainable governance structures designed to meet" the Section 2 goals. *Id.* § 10(a)(2); § 10(a).

Act 46 tasked the Board with reviewing the Secretary's proposal and provided it "may take testimony or ask for additional information from districts and supervisory unions" and "shall approve the proposal" in its original or an amended form and publish an "order merging and realigning districts and supervisory unions where necessary." *Id.* § 10(b). Districts that voluntarily merged into preferred structures under Act 46, or that voluntarily merged under prior voluntary merger legislation were exempt from the involuntary Section 10 process. *Id.* § 10(c).

Several bills to alter Act 46 were proposed the year before the involuntary phase was to begin and only one passed. Act 49 amended Act 46 to add "consideration of greatly differing levels of indebtedness" to the alternative governance structure guidelines and reduced the size guideline for alternative structures to an average daily membership of 900. 2017 Vermont Laws No. 49 § 7, amending 2015 Vt. Law No. 46 § 5. Act 49 also added certain involuntary merger exemptions, but no Plaintiff ordered to merge contends that any of these exemptions applied to them. *Id.* §§ 3, 4, 8. Act 49 did *not* add an exemption for districts that voted against merging voluntarily.

B. The Secretary and Board Fully Complied with Act 46

The Secretary and Board responded thoroughly and thoughtfully to Act 46. The Secretary, along with Agency of Education staff, considered 44 Section 9 proposals and held 42 formal conversations with school board representatives about those proposals. *See* Proposed Statewide Plan for School District Governance, 2015 Acts and Resolves No. 46, Sec. 10(a).[3] The Secretary then proposed a 189-page plan to the Board of Education.

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[3] The Secretary's proposed plan, including its supporting appendices, can be found at https://education.vermont.gov/content/secretarys-proposed-plan-under-act-46-sec-10.

The plan was accompanied by extensive supporting appendices, including a 142-page discussion of Section 9 proposals and conversations and a 201-page analysis of common data points for districts that submitted proposals. The plan ultimately made 43 recommendations about individual districts or groups of districts. It specifically proposed merging 18 groups of districts, deferring to three ongoing voluntary mergers, and not merging 22 groups of districts.

"The Board and each of its members invested a significant amount of time reviewing and contemplating" the plan "as well as the Section 9 Proposals and all other written materials submitted to the Board." Final Report at 7. Although it was not required to do so, the Board asked every district that submitted a Section 9 proposal to respond to a set of questions and identify any errors they believed the Secretary's plan contained. *See* July 11, 2018 Memorandum at 3.[4] The Board also provided each group of districts an opportunity to discuss their proposal, and respond to questions from the Board for up to 20 minutes, during a series of full-day public meetings. *Id.* at 1.

The Board held then five additional public meetings to review the Secretary's plan. When transcribed, these five meetings alone occupy 1,290 transcript pages. The Board ultimately published a 38-page final report and order, together with Default Articles of Agreement for each new unified district.[5] The order merged 45 districts, conditionally required an additional four transitions, and did not alter the governance structure of 47 districts.

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[4] The memorandum is available at https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-memo-school-districts-submitted-section9-proposals-update-july11.pdf.

[5] The report and Default articles are available at https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

ARGUMENT

Plaintiffs have filed both a complaint and a motion for a preliminary injunction. For the reasons described below, the complaint should be dismissed in its entirety and the motion for a preliminary injunction should be denied.

I. The Complaint Should Be Dismissed in Its Entirety Because The State – Not Its Subdivisions – Is Constitutionally Responsible for Education in Vermont

Plaintiffs' complaint rests in significant part on misconception of the rights and responsibilities of the State and its subdivisions. The seminal education case in Vermont is *Brigham v. State*, 166 Vt. 246, 249 (1997), which found unconstitutional a system for funding public education that depended primarily on local property taxes. *Brigham* flatly rejected the argument "that the primary constitutional responsibility for education rests with the *towns* of Vermont" rather than the State, stating "[t]his argument fundamentally misunderstands the state's constitutional responsibility . . . for public education." 166 Vt. at 264.

Rather, the State bears constitutional responsibility for education in Vermont. When carrying out its education obligation, the State "may delegate" authority "to local governments, which are themselves creations of the state" but cannot "abdicate the basic responsibility for education." *Id.* In sum, the legislature must "make educational opportunity available on substantially equal terms" throughout Vermont, but "the specific means of discharging this broadly defined duty is properly left to its discretion." *Id.* at 268.

The complaint's assumptions that, if the State has delegated authority by creating local school districts, these subdivisions of the State have a permanent veto right over its future policy choices is both fundamentally undemocratic and meritless. Although the Legislature chose to provide a robust process for district input through Act 46, it had no legal obligation to do so.

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When the State creates subdivisions, "they remain the creatures of the state, holding and exercising powers and privileges subject to the sovereign will." *Village of Hardwick v. Town of Wolcott*, 98 Vt. 343, 129 A. 159, 161 (1925). The State can "'modify or withdraw'" their powers, take property they hold in a governmental capacity "'without compensation,'" and merge or destroy them "'at its pleasure.'" *Id.* (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). Consistent with this framework, subdivisions of the State do not have federal equal protection, due process, or takings rights against the State. *See Town of Brighton v. Town of Charleston*, 114 Vt. 316, 321-22 (1945) (collecting cases). Indeed, with limited exceptions, local governments cannot sue the State to challenge state legislation at all. *See Town of Andover v. State*, 170 Vt. 552, 553 (1999). The state also may "by legislation, delegate authority to merge or change school districts to state boards or agencies" as it did here. 78 C.J.S. Schools and School Districts § 16.

A. Because The Board Followed Acts 46 and 49, It Did Not Exceed Its Authority and Count I Should Be Dismissed.

Throughout its final decision and order, the Board closely followed the mandates of Acts 46 and 49. Plaintiffs' suggestion that by stating once that it "create[ed] preferred structures wherever possible," the Board ignored all other laws and rules is meritless. Compl. ¶ 226. Considered as a whole, the Board's order confirms that the Board made its decisions with painstaking attention to the language and standards of the law. The Board's 3400 rule series further confirm its adherence to the letter of the law. Those rules elaborate on the standards created by Acts 46 and 49, thereby providing additional guidance for applicant school districts, without imposing any more stringent requirements than those stated in the Acts. Plaintiffs erroneously interpret Acts 46 and 49 to be more permissive of alternative governance proposals

than the plain language of those Acts allows. The Board's decision and order are lawful as written and should be affirmed.

This is particularly true because Board's merger decisions should receive heightened deference from this Court. An agency's action on the merits of an application before it receives heightened deference when it is an "action[] wherein an agency is relying on its particular expertise to make a determination that is legislatively entrusted to the agency." *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, ¶ 16, 182 A.3d 53. "A strong presumption of validity" applies to agency decisions under such deference, *id.* ¶ 15, and a Court must "presume[] a given administrative action is valid and correct absent clear and convincing evidence to the contrary." *In re S-S Corp./Rooney Housing Developments*, 2006 VT 8, ¶ 5, 179 Vt. 302, 896 A.2d 67. Plaintiffs have not met this heavy burden.

The Board's interpretation of Acts 46 and 49 should also be upheld. This Court must "defer to an agency's interpretation of a statute that the agency is tasked with interpreting," although the Court may ultimately determine the statute's meaning to be different. *In re Stowe Cady Hill Solar*, 2018 VT 3, ¶ 20. Similarly, courts will "defer to an agency's interpretation of its own regulation," so long as it is not inconsistent with the authorizing statute and not inconsistently applied. *Id.* ¶¶ 20-21.

An agency's legal conclusions must be upheld if "rationally derived from a correct interpretation of the law and findings of fact based on substantial evidence." *In re S-S Corp.*, 2006 VT 8, ¶ 5 (quotation omitted). Factual findings must be reviewed for clear error. *In re Stowe Cady Hill Solar*, 2018 VT 3, ¶ 15. "Under the deferential standard of review accorded administrative and quasi-judicial bodies in [Rule 75 proceedings], it is not for the superior court to independently weigh the evidence to make its own factual findings. Rather, the superior court .

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. . [m]ust uphold factual findings if any credible evidence supports the conclusion by the appropriate standard." *Tunley v. Town of Vernon*, 2013 VT 42, ¶ 11, 194 Vt. 42, 71 A.3d 1246. Other kinds of agency action, such as procedural decisions, are reviewed for abuse of discretion—which should be found only if the "agency has declined to exercise its discretion or has done so on untenable or unreasonable grounds." *In re Stowe Cady Hill Solar*, 2018 VT 3 ¶ 17; *Butler v. Huttig Bldg. Prods.*, 2003 VT 48, ¶ 9, 175 Vt. 323, 830 A.2d 44; *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88, 643 A.2d 1204, 1206-07 (1994).

1. Count I.1 Fails Because The Board Faithfully Followed The Standards Of Acts 46 And 49 Relating to Alternative Structure Proposals.

Plaintiffs fault the Board for stating, in the "background" section of its decision and order, that it was "creating preferred structures wherever possible," without reciting what Plaintiffs characterize as the key standard of involuntary mergers under Act 46, the word "necessary." Mot. at 19, 21 (citing 2015 Vt. Laws No. 46, sec. 10(a)(2) (misidentified as sec. 10(a)(20))). Plaintiffs cherry-pick words and phrases from both the Board's decision and the law. Each, when read as a whole, reveals an entirely different picture than the one Plaintiffs have painted.

The question raised by Count I.1 is whether Plaintiffs have overcome "the strong presumption of validity" that attaches to the Board's determination of matters legislatively entrusted to it under a standard of review deferential to both the board's factual and legal assessments. *In re Stowe*, 2018 VT 3, ¶¶ 15, 20. "'It is a venerable principal that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" *Id.* ¶ 20 (quoting *Comm. to Save the Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc.*, 137 Vt. 142, 150-51 (1979). Acts 46 and 49: (1) define potential structures as "preferred" and "alternative," (2) allow the Board to approve a supervisory union

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only if this alternative structure is "the best means" of meeting Act 46 goals in a particular region, (3) ask whether proposed alternative structures have "the smallest number of member school districts practicable, achieved wherever possible" by merging districts after consideration of listed factors, and (4) require alternative structures to be designed to meet five specific goals. 2015 Vt. Laws No. 46 § 5, as amended by 2017 Vt. Laws No. 49 § 7. There are no "'compelling indications'" that the Board was wrong when it ordered the merger or conditional merger of 49 districts, while leaving the governance structure of 47 districts unchanged, after considering these statutory requirements. *In re Stowe Cady Hill Solar*, 2018 VT 3, ¶ 20.

First, Acts 46 and 49 are much less permissive of alternative governance structures than Plaintiffs claim, and the Board correctly interpreted Acts 46 and 49 to prefer one type of structure over another. For one thing, Act 46 identifies the different structures as "preferred" and "alternative." 2015 Vt. Laws No. 46 § 5(b)-(c).[6] These terms are not equivalent options under the law, as Plaintiffs seem to claim. Rather, Act 46's definition of an alternative structure begins by noting that the preferred model "**may** not be possible or the best model to achieve Vermont's education goals in all regions of the State. In such situations, [an alternative structure] **may**[7] meet the State's goals . . ." 2015 Vt. Laws No. 46 § 5(c), as amended by 2017 Vt. Laws No. 49 § 7 (emphasis added). The repeated use of "may" indicates that the alternative structures should be used *only* where the preferred structure is not "possible or the best model."

Further confirming that alternative structures are not preferred, Act 46, sec. 8 sets forth different standards by which the Board shall evaluate proposals for preferred structures versus alternative structures. When evaluating a proposal to create a preferred structure, the Board shall

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[6] The definition of "preferred" is "used or wanted in preference to others." *Preferred*, Merriam-Webster, https://www.merriam-webster.com/dictionary/preferred (last visited Jan. 17, 2019).

[7] In the original Act 46, this "may" was written as "can." Act 49 changed it to "may," thereby reaffirming the Board's discretion regarding alternative structures.

"consider whether the proposal is designed to create a sustainable governance structure that can meet the goals set forth in Sec. 2" and "be mindful of any other district in the region that may become geographically isolated . . ." 2015 Vt. Laws No. 46 § 8(a). By contrast, when considering a proposal for an alternative structure, Act 46 states: "The State Board shall approve the creation, expansion, or continuation of a supervisory union **only** if the Board concludes that this alternative structure: (1) is the **best means** of meeting the goals set forth in Sec. 2 of this act in a particular region; and (2) ensures transparency and accountability for the member districts and the public at large . . ." 2015 Vt. Laws No. 46 § 8(b) (emphasis added). Under this section, an alternative structure proposal must affirmatively establish that it is the best means of meeting the section 2 goals. The Board emphasized this provision specifically in its order. Final Report at 7.

> Moreover, the Act further provides that an alternative structure:
>
> may meet the State's goals, particularly if:
>
> (1) the member districts consider themselves to be collectively responsible for the education of all prekindergarten through grade 12 students residing in the supervisory union;
>
> (2) the supervisory union . . . maximizes efficiencies through economies of scale and the flexible management, transfer, and sharing of resources among the member districts, which may include a common personnel system, with the goal of increasing the ratio of students to full-time equivalent staff;
>
> (3) the supervisory union has the smallest number of member school districts practicable, achieved wherever possible by the merger of districts with similar operating and tuitioning patterns;
>
> (4) the supervisory union has the smallest number of member school districts practicable after consideration of greatly differing levels of indebtedness among the member districts; and
>
> (5) the combined average daily membership of all member districts is not less than 900.

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2015 Vt. Laws No. 46 § 5(c), as amended by 2017 Vt. Laws No. 49 § 7.

Thus, to be approved by the Board, (1) an alternative structure must be proposed in an area in which a preferred structure is not possible or the best model for achieving the State's goals under section 2, (2) the alternative structure itself must be the best means of meeting the goals of section 2, and (3) the alternative structure should meet some or, ideally, all of the criteria of section 5(c). And the criteria of section 5(c) are not necessarily easy to satisfy—particularly criterion 5(c)(3), which states that the alternative structure should have "the smallest number of member school districts practicable, achieved **wherever possible** by the merger of districts with similar operating and tuitioning patterns." 2015 Vt. Laws No. 46 § 5(c)(3) (emphasis added). The "wherever possible" in that criterion indicates that, even if the entire structure is unable to merge into a preferred structure, the Act still strongly prefers that individual districts be merged wherever structurally possible.

The Board emphasized this point in its Rules for alternative structures: "A supervisory union with 'the smallest number of member school districts practicable' means that, to the full extent current governance structures permit, districts merge into (i) a [unified union school district], (ii) a union elementary school district, or (iii) a union high school district." Rule 3430.2.2. Even with alternative structures, the Act prefers fewer districts, presumably to "maximize efficiencies through economies of scale," as described in criterion 5(c)(2). 2015 Vt. Laws No. 46 § 5(c)(2)

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The Board emphasized this point again in its order: "The final attribute of the alternative structure (smallest number of member districts) was a key factor in the Board's decision-making process with respect to locally opposed mergers within alternative structures." Final Report at 6. And later, the Board stated:

> It is notable that a majority of the formal Section 9 Proposals requested a continuation of existing school district structures, rather than consolidation. Yet, for an alternative governance structure (i.e., a multi-district [supervisory union]), the law clearly points to an expectation that supervisory unions should have the fewest number of member school districts, to be achieved through the consolidation of school districts with similar operating and tuitioning patterns.

Final Report at 7. The Board was well within its authority and expertise to emphasize this factor in its interpretation and execution of the Acts it was legislatively tasked with interpreting.

Plaintiffs focus on the first and second uses of the word "necessary" in Act 46 section 10(a)(2), which they claim requires the Board to use its power to create involuntary mergers more sparingly than it did. But that section does not advance Plaintiffs' cause. Section 10(a)(2) states that the Secretary of Education:

> shall develop . . . a proposed plan that, to the extent **necessary** to promote the purpose stated at the beginning of this subsection (a), would move districts into the more sustainable preferred model of governance . . . . If it is not possible or practicable to develop a proposal that realigns some districts, where **necessary**, into [a preferred structure] in a manner that adheres to the protections of Sec. 4 of this act . . . or that otherwise meets all aspects of [a preferred structure], then the proposal **may** also include alternative governance structures **as necessary** . . . provided, however, that any proposed alternative governance structure shall be designed to:
>
> (A) ensure adherence to the protections of Sec. 4 of this act; and
>
> (B) promote the purpose stated at the beginning of this subsection (a).

2015 Vt. Laws No. 46 § 10(a)(2) (emphasis added). Section 10(a)(2) uses the word "necessary" to refer to both preferred and alternative structures and in both cases contemplates promoting "the purpose stated at the beginning" of 10(a), which is providing opportunities "through sustainable governance structures" designed to meet five specified goals. Because every district subject to Section 10 must end up in a preferred or alternative structure, and the word "necessary" is used to refer to both, the use of the word "necessary" does not establish that one type of structure should be used more sparingly than the other.

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Reading the Board's decision and order as a whole further illustrates that the Board did not simply create preferred structures "wherever possible." The Board notes in its introduction that "[a]s the Board approached and made each tough decision, it repeatedly went back to the language of Act 46, as amended, for guidance and goals." Final Report at 4. Indeed, in describing its process and its understanding of the law, the Board quotes and references the Acts at length. *See, e.g.*, Final Report at 4 n.1 (quoting the section 2 goals); 5 (quoting the section 2 goals and summarizing the key attributes of preferred and alternative structures). The Board notes that, although Act 46 designates one structure as "preferred," the Board followed the constraints of the law and created several alternative or non-preferred structures.

Plaintiffs claim, in essence, that the Board ignored their alternative structure proposals. Compl. ¶¶ 211-17. The Board's order reveals this is not true. The Board's order repeatedly references and incorporates the voluminous record before it, stating explicitly: "The Board and each of its members invested a significant amount of time reviewing and contemplating the Secretary's Proposed Statewide Plan, including its 'Background' and 'Summary of Process' sections, as well as the Section 9 Proposals and all other written materials submitted to the Board," and "the testimony of the previous three months." Final Report at 7.

The Board states:

> Section 9 of Act 46 . . . provided remaining districts with the opportunity to submit proposals . . . to the Secretary and the Board . . . in which the districts proposed to retain or redefine their existing governance structures in a manner consistent with the requirements of the law, including demonstrations of how the proposal supported the ability to meet or exceed the Act 46 goals and identification of detailed actions to support improvements.

Final Report at 6-7. In other words, given the preference of the Acts for preferred structures, the districts proposing alternative structures carried the burden of showing why their alternative structures met the requirements of the Act. And, as the Board noted repeatedly, alternative

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structures are expected to have the "smallest number of member school districts practicable, achieved wherever possible by the merger of districts with similar operating and tuitioning patterns." 2015 Vt. Laws No. 46 5(c)(3). As also noted by the Board, most alternative structure proposals did not propose any such mergers. Final Report at 7.

Plaintiffs argue strenuously that Act 49 "acknowledged that geographic isolation would be a barrier to merger" and that, therefore, the Board's merger of certain districts that raised this concern was improper. Compl. ¶¶ 219-21; 234. This objection is baseless, for several reasons. First, Act 49 acknowledges that "geographic isolation due to lengthy driving times or inhospitable travel routes between proposed merger partners" can create difficulties for achieving preferred structures. 2017 Vt. Laws No. 49 § 1(e). However, it does not then prohibit the Board from merging any district that is geographically isolated from its neighbors. Nor does Act 49 include geographic isolation in any list of factors to be weighed by the Board in considering alternative structures. Rather, it designates special types of districts ("three-by-one side-by-side structure" and "two-by-two-by-one side-by-side structure") that will be exempt from the requirements of Act 46 altogether, as a result of containing a district that is geographically isolated. 2017 Vt. Laws No. 49 §§ 3, 4. Act 49 does not otherwise address geographic isolation of districts.[8] Plaintiffs have not alleged that any of them have attempted to claim status under these specially exempt district structures.

Second, to the extent that the Board is required to consider geography as a practical barrier to merger, it is just one of many factors that the Board must consider, and not the absolute bar that Plaintiffs imply. The Board's decision merged districts, not schools, and does not mean

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[8] The only sense in which Act 46 addresses geography is that it instructs the Board to "be mindful of any other district in the region that may become geographically isolated" as a result of merging districts. *See* 2015 Vt. Laws No. 46 § 8(a)(2).

that any students will have to travel over inhospitable routes or be unable to attend a school in their town. Indeed, the Board's order includes Default Articles of Agreement for new districts that expressly preclude moving students from the school they otherwise would have attended for two years, except at the request of their parent or guardian. *See, e.g.,* Windham Northeast Elementary School District Articles of Agreement, Article 3.[9]

Third, the Board was cognizant of geography in making its decisions. The Board noted that "[g]eographic realities . . . have limited the Board's ability to create true preferred structures." Final Report at 6. But Plaintiffs' claim that the Board acted arbitrarily by not merging some districts due to geographical considerations and not merging others that had the "same circumstances" is incorrect. Compl. ¶¶ 220-21. No two districts' geographical circumstances are the same. And, taking into account all of the other, non-geographical factors the Board was obliged by law to consider, no two districts' circumstances could possibly be the same.

The balanced analysis conducted by the Board, which ordered the merger or conditional merger of 49 districts, while leaving the structure of 47 districts unchanged, was well within its discretion. Count I.1 of Plaintiffs' complaint fails to state a claim and must be dismissed.

2. Count I.2 Fails Because The Board Did Not Act Outside Its Authority Under Acts 46 and 49.

Plaintiffs fault the Board repeatedly for not "establish[ing] any yardstick, standard, or measure for evaluating" alternative structure proposals under the Acts. Mot. at 19. Plaintiffs' concern has no basis in law or fact.

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[9] The Default Articles of Agreement for each new district are contained in Appendix B of the Board's order, which can be found at https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

First, the Acts themselves provided the standards for evaluating alternative proposals, and the Board was under no obligation to elaborate on those standards. The Board determined that this was an appropriate interpretation of the Acts: "In the end, the Board opted to focus on the text of Act 46, as amended, and did not adopt any additional guiding principles,[10] concluding that the Legislature authorized the State Board to make judgments based on the goals and guidance of the Acts." Final Report at 7. Again, the Board was well within its expert authority to interpret its authorizing statute in this way. Plaintiffs emphasize the Act 49 language that states: "The State Board may adopt rules designed to assist districts in submitting alternative structure proposals, but shall not by rule or otherwise impose more stringent requirements than those in this act." 2017 Vt. Laws No. 49 § 20. As Plaintiffs note, this prohibition on "more stringent requirements" makes the requirements of Acts 46 and 49 into "both a floor and a ceiling" for alternative structure proposals. Compl. ¶ 230.

Second, the Acts permitted—but did not require—the Board to adopt rules "designed to assist districts in submitting alternative structure proposals." 2015 Vt. Laws No. 46 § 8, as amended by 2017 Vt. Laws No. 49 § 20. Even though it was not required to do so, the Board nonetheless adopted and followed its 3400 series of Rules. As the Board explained in the Rules:

> These rules are intended to provide (1) a process by which school districts can propose to be in an Alternative Structure when the proposal does not include voluntary merger and (2) details about some of the supporting information that a district should consider when self-evaluating for purposes of presenting a proposal to merge or a proposal under Act 46, Sec. 9 and that the State Board considers when reviewing mergers proposals and will be considering when reviewing proposals under Sec. 9 and creating the Statewide Plan.
>
> Rule 3420 (Statement of Purpose).

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[10] Presumably "additional" means beyond the 3400 series of Rules, discussed below.

Plaintiffs' suggestion that the Board applied a more stringent set of draft criteria when considering the geography of Montgomery is misplaced. *See* Compl. ¶¶ 233-36. Plaintiffs acknowledge, as they must, that the Board expressly "stated it would not use those criteria." Compl. ¶ 233. Those criteria are also not referenced anywhere in the Board's decision, which states, to the contrary, that it decided "not [to] adopt any additional guiding principles," instead relying on the text of the Acts. Final Report at 7.

Rather, the Board agreed with the Secretary's proposal and ordered Montgomery to merge for the reasons "articulated in the Secretary's Proposed Plan for the Montgomery School District" and discussed by the Board at an October 29, 2018 meeting. The Secretary explained that Montgomery's alternative governance proposal "focused primarily on the geographical reasons" it discussed. Sec.'s Plan at 167. The Plan went on to discuss geographic issues in some detail, including the length of existing bus routes, distances and driving times between existing schools, and the schools currently attended by Montgomery high school students. *Id.* at 167, 171. The Board correctly found the Secretary's discussion compelling based on the alternative governance standards contained in Act 46.

The Board's decision is presumed valid. Considering Plaintiffs' allegations, together with the corresponding public records, confirms that Plaintiffs have not overcome that presumption. Count I.2 should be dismissed as a result.

3. Count 1.3 Fails Because The Board Did Not Violate Act 49, Sec. 7's Direction To "Consider[] Greatly Differing Levels of Indebtedness."

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Plaintiffs allege that the Board ignored Act 49's direction to consider greatly differing levels of indebtedness among member districts, but this argument is without merit. In fact, the Board noted explicitly that it "wrestled with . . . how to properly consider Act 49's guidance that

a 'supervisory union has the smallest number of member school districts practicable after consideration of greatly differing levels of indebtedness among member school districts.'" Final Report at 7.

As an initial matter, as the Acts are written, "greatly differing levels of indebtedness" is just one of several factors that the Board needed to weigh in creating the final statewide plan. Contrary to Plaintiffs' implication, the Acts do not say that districts with a specific level of disparity in debt must never be merged, or that the districts in the Washington Central Supervisory Union specifically must not be merged due to their differing levels of indebtedness. And, as the Board interpreted its legislative mandate, it determined that this factor did not outweigh all the other factors that supported the merger of districts with differing levels of debt. This decision was proper and within the Board's discretion under the law. As a result, Count I.3 does not allege a violation of law and must be dismissed.

In any event, the Board had ample evidence in the record before it that levels of indebtedness should not be a bar to merger. Plaintiffs even acknowledge that the Board "got some numbers on tax rates and total indebtedness from the Agency[.]" Compl. ¶ 218. In fact, the Board received more than just "some numbers." The Board requested and received detailed spreadsheets,[11] which described each forming district's debt level and calculated each district's equalized tax rate before and after merger. The Board discussed the resulting tax rate differentials at its October 17, 2018 meeting, and incorporated that discussion into its Final Decision and Order. *See, e.g.*, Final Report at 13.

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[11] Spreadsheets evaluating debt levels for proposed unified union high school districts, modified unified school districts and their forming districts and unlike members of union high school districts are available at: https://education.vermont.gov/documents/state-board-agenda-item-101718-f-uhsd, https://education.vermont.gov/documents/state-board-agenda-item-101718-f-musd and https://education.vermont.gov/documents/state-board-agenda-item-101718-f-group, respectively.

Plaintiffs fault the Board specifically for merging the Washington Central Supervisory Union despite the lack of existing debt in two towns, Worcester and Calais, while the other three forming towns all carry debt. But, Plaintiffs acknowledge that the Board discussed levels of debt within the Washington Central Supervisory Union specifically, and that the conclusion of that discussion was that those districts did "'not meet[] the threshold' for greatly differing levels of indebtedness." Compl. ¶ 218. At the October 17 meeting, Board Member Peltz stated: "in terms of the indebtedness what we're seeing is that the two towns that were perhaps most concerned, Worcester and Calais, I don't think those are exceptionally high tax rates and if they did merge, I would expect that to go down just out of efficiency and sharing as we've seen in other districts." Declaration of David A. Boyd, Ex. A (Tr. at 150).

He went on to note that "Worcester and Calais schools do need work in terms of just physical work," meaning that those towns may need to add debt for capital improvements regardless. *Id.* Board Member Olsen also discussed the debt differential, stating "I'm drawn to the word, you know, greatly, and I'm having a hard time seeing that it meets that threshold . . . perhaps I could be persuaded if the end result was a dramatic difference in the tax rate, but it all seems to come out in the wash." *Id.* at 152. Plaintiffs may disagree with the Board's conclusion, but there is no question that the Board considered levels of debt within the Washington Central Supervisory Union specifically and found that those districts did "'not meet[] the threshold' for greatly differing levels of indebtedness." Compl. ¶ 218; Final Report at 12-13 ("While there is clearly a differential in debt, the Board does not find that it meets the threshold in the law of 'greatly' differing levels of debt.").

Plaintiffs further fault the Board for approving the Secretary's decision to merge Enosburgh and Richford, where the Secretary's June 1 proposal contained a mistake as to which

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of those districts carried debt and which did not. Compl. ¶¶ 247-48. But the Secretary acknowledged and corrected this error on June 7, 2018. *See* Secretary's Proposed Plan under Act 46 Section 10: Errata, available at https://education.vermont.gov/documents/secretarys-proposed-plan-under-act-46-section-10-errata. The Board appropriately concurred with the Secretary's conclusion and corrected analysis. In addition, as with its decisions for other districts, the Board did not rely solely on the Secretary's proposal. The Board noted that Enosburgh voters had recently "approved merger by a margin exceeding 2-to-1 and the Richford voters defeated the proposal by nine votes." The Board also incorporated its discussion of this merger at its October 29, 2018 meeting.

4. Count 1.4 Fails Because The Board Properly Imposed The Default Articles Of Agreement, And Plaintiffs Have Ample Opportunity To Change Them.

Act 49 contains the following instruction to the Board regarding Default Articles of Agreement:

> The statewide plan . . . shall include Default Articles of Agreement to be used by all new unified union school districts created under the plan unless and until new or amended articles are approved.
>
> (1) After the State Board of Education issues the statewide plan under subsection (b) of this section, districts subject to merger shall have 90 days to form a committee with members appointed in the same manner and number as required for a study committee under 16 V.S.A. chapter 11, and which shall draft Articles of Agreement for the new district. During this period, the committee shall hold at least one public hearing to consider and take comments on the draft Articles of Agreement.
>
> (2) If the committee's draft Articles of Agreement are not approved within the 90-day period, then the provisions in the State Board's Default Articles of Agreement included in the statewide plan shall apply to the new district.

2017 Vt. Laws No. 49 § 8, amending 2015 Vt. Laws No. 46, sec. 10.

The Board properly adopted Default Articles of Agreement for all newly-formed unified union school districts created under its plan. Final Report at 37, App. 1-11. Plaintiffs complain

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that "[t]he Default Articles . . . cannot apply to forcibly merged districts that include a union or other district that already has existing articles of agreement," because such an application "violates 16 V.S.A. § 706n," which provides that articles of agreement currently governing unified school districts "may be amended only at a special or annual union district meeting." 16 V.S.A. § 706n. As a result, Plaintiffs contend, the Board may not impose new articles on any district that had pre-existing articles without achieving voter approval.

Plaintiffs' objection to the Default Articles fundamentally misapprehends this part of Act 49, which states: "The statewide plan . . . shall include Default Articles of Agreement to be used by all **new unified union school districts** created under the plan." 2017 Vt. Laws No. 49 § 8 (emphasis added). New unified union school districts do not have articles of agreement, because they are new. Some of the original, or "forming," school districts may have been operating under old articles of agreement. But in the course of merging the forming districts into a new unified union district, Act 46 is clear that the forming district will "cease to exist" when the unified union district becomes operational. 2015 Vt. Laws No. 46§ 44; *see also* 16 V.S.A. § 722(b). Thus, the Default Articles imposed by the Board are not amending any existing articles of any forming district, as Plaintiffs claim can only happen pursuant to 16 V.S.A. § 706n. Rather, any existing articles will cease to exist along with their associated forming district, while the Default Articles are created to apply to a brand new unified union district that has not adopted anything different.

Consistent with the provisions of Act 49, the Board's order only creates Default Articles of Agreement for newly-created unified union school districts—or, in a few instances, newly-created unified union elementary school districts. *See* Final Report at 37 (listing school districts subject to Default Articles of Agreement); Final Report at 30-34 (designating newly-created

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unified union school districts and newly-created unified union elementary school districts). The forming school districts in each of these new unified districts will shortly cease to exist. Where the Board has approved of adding new districts to existing unified or modified unified districts, the existing unified or modified unified districts will continue to operate pursuant to their preexisting articles of agreement. *See* Final Report at 34-37. Plaintiffs have not identified any district with existing articles of agreement that will (a) continue to exist after July 1, 2019 under the Board's plan and (b) be subject to Default Articles of Agreement. Further, they have not identified any such district that is also a Plaintiff of this lawsuit. Count I.4 should be dismissed for this reason alone.

Moreover, Plaintiffs have not alleged that they have been unable to draft and approve new articles within 90 days from the Board's order, or that they have even tried to do so.[12] The Board's order issued on November 28, 2018. Under Act 49, the districts subject to Default Articles have until February 26, 2019 to draft and approve new articles. Plaintiffs have not alleged that they have tried to do so. Rather, Plaintiffs spent some of that 90-day period filing this lawsuit in an attempt to avoid merger altogether. Plaintiffs subsequently refused to consent to a realistic briefing schedule to address their combined 112-page complaint and motion unless Defendants agreed to delay their organizational meetings, at which they might have warned a vote to allow voters to approve new articles of agreement.

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[12] This is unsurprising as the Stowe Plaintiffs have already followed the Act 49 drafting process and timely warned a meeting to vote on new articles. *See* https://www.stoweschoolsvt.com/blog/lssu-e-newsletter-january-10-2019.php. Plaintiffs do assert that an Assistant to the Secretary of Education testified that "there would be no time within 90 days to adopt alternative articles" and argue that "[t]his violates Act 49." Compl. ¶ 252. However, Act 49 simply sets forth a 90-day time period in which a new district may try to draft new articles, and provides contingencies if those articles do not get approved within 90 days. 2017 Vt. Laws No. 49 § 8. One witness's opinion about that timeline does not invalidate the reasoning or authority of the Legislature to adopt that timeline.

And finally, new articles of agreement can be adopted outside of the 90-day window notwithstanding Plaintiffs' litigation strategy. As a recent Agency of Education guidance document explains, new districts may still vote to amend their Default Articles of Agreement after those articles go into effect and before the new district becomes operational on July 1, 2019. They may do so under the process for amending existing articles of agreement described in 16 V.S.A. § 706n. *See* Vt. Agency of Educ., Transition Timeline – FAQs, https://education.vermont.gov/sites/aoe/files/documents/edu-transition-timeline-faqs.pdf (Jan. 11, 2019) ("Although the postponement of the Organizational Meeting makes it impossible to warn a vote on proposed amendments prior to the Act 49 deadline, it is still *possible for the voters to approve proposed amendments that will take effect before July 1, 2019* – and it is even possible for those amendments to be identical to what a currently active Amendment Committee is preparing."). As a result, Plaintiffs can claim no injury related to the 90-day timeline, as they have an alternative legal avenue for changing the Default Articles before those articles go into effect. Count I.4 must be dismissed for failure to state a claim.

5. Count 1.5 Fails Because The Board's Plan For Merging Smaller Districts With Modified Unified Union School Districts (MUUSDs) After The MUUSD Approves The Merge By Vote Is Legal and Consistent With Acts 46 and 49 and 17 V.S.A. § 721.

Plaintiffs argue that elementary districts cannot be merged with Modified Unified Union School Districts, but this argument conflates separate and distinct legal entities. It is possible in Vermont for several individual school districts "to establish a union school district." 16 V.S.A. § 701. A union district responsible for educating all resident students is a "unified union district" and when such a district is created it "supplants all other school district within its borders," which "cease to exist." 16 V.S.A. § 722. In contrast, individual districts that create a union district to operate only some grades continue to exist to operate the remaining grades. This

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concept is recognized both generally and in the context of potential district mergers. For example, "if a union school district votes to participate" in a planning committee for a potential merger "its member districts shall not participate on the study committee." 16 V.S.A. § 701b(b).

In 2012, the legislature recognized the existence of modified unified union school districts and made modified districts created by voluntary merger eligible for incentives. *See* 2012 Vt. Laws No. 156 § 17(a)-(c). Act 156 provided that, if "a majority but not all" of a group of elementary districts that were members of a union upper school voted to establish a K-12 unified union, a modified unified union would instead be established. *Id.* § 17(a)(1)(B). The modified unified union would then educate all students residing in the districts that voted to create it and continue to provide upper school education for students in the elementary districts that voted against its creation. *Id.* § 17(a)(2). Consistent with this structure, creation of a modified union "dissolve[s]" "the union high school district" and "the elementary school districts that voted in favor of establishing the unified union school district," but does not dissolve the elementary school districts that voted against unification. *Id.* § 17(b)(1)-(2).

The involuntary merger phase of Act 46 was designed to complement both the voluntary phase of Act 46 and prior voluntary merger legislation. To accomplish this goal, Section 10 of Act 46, which required the Board's merger order, exempts from its scope districts that timely voluntarily merged into preferred structures or became eligible for incentives by voluntarily merging under Act 156. 2015 Vt. Laws No. 46 § 10(c)(3). A "modified union school district is eligible" for incentives under Act 156 and is, therefore, exempt from Section 10 of Act 46. *See* 2012 Vt. Laws No. 156 § 17(c); 2015 Vt. Laws No. 46 § 10(c)(3).

Elementary districts that voted against unification are separate legal entities that are not eligible for incentives. Because they are not eligible for incentives they are not exempt from the

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involuntary merger provisions of Act 46. *See* 2015 Vt. Laws No. 46 § 10(c)(3) (listing exemptions). As the Board explains in its Rules an "elementary school district that is a member" of a modified unified union school district for only some grades "is not a member of a Unified Union School District, is not exempt from the Statewide Plan, and is subject to the provisions of these rules." Rule 3422.2.2.

Unsurprisingly, the Secretary and Board agreed with most of the voters in several modified union districts that a complete merger should occur. Because elementary districts that voted against a complete merger were not exempt from Section 10, but modified unions were, the Board ordered several elementary school districts to merge with modified unions if the modified unions voted to accept them. Final Report at 34-37. As an example, the Board's order for the Barnard School District states that the Board:

> *Designates* the **Barnard School District** as a **prekindergarten through grade 12 member** of the Windsor Central Modified Unified Union School District ***provided that*** a majority of the voters of the Windsor Central Modified Unified Union School District present and voting at an annual or special meeting warned for the purpose on or before July 1, 2019 vote to approve the addition of the Barnard School District as a prekindergarten through grade 12 member pursuant to 16 V.S.A. § 721 . . .

Final Report at 34. The statute referenced in the order, 16 V.S.A. § 721, provides a voluntary process for merging an additional district with an existing union district. Like other voluntary merger statutes, it contemplates all of the districts to be merged voluntarily voting to merge. *Compare* 16 V.S.A. § 721 *with e.g.* 16 V.S.A. § 706g ("If a majority of the voters voting in each district that is designated . . . as necessary . . . vote to establish the proposed union . . . those districts" and any districts designated as advisable that also so voted "shall constitute a union school district."). Plaintiffs' attempt to rely on § 721 to create a local Act 46 veto is no different than Plaintiffs' attempt to rely on statutes like 706g to create a local Act 46 veto. It fails because

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Section 10 of Act 46 expressly contemplates the involuntary merger of districts that vote against voluntarily merging and Plaintiffs cannot read Section 10 out of Act 46.

The only distinction is that the Board can only involuntarily order the elementary school districts to merge. For that reason, the Board's order applies its involuntary merger power only to designated elementary school districts,[13] and will result in their merger if, and only if, the modified unions referenced in the Board's order hold a § 721 vote and voluntarily accept them. This is a harmonious application of Act 46's involuntary merger provision to the districts subject to it and § 721's voluntary merger to the districts subject to it and should be upheld accordingly. *See, e.g.*, *In re K.A.*, 2016 VT 52, ¶ 10, 202 Vt. 86, 147 A.3d 81 ("[S]tatutes that relate to the same matter are considered to be *in pari materia* and must be read together as a whole . . .").

Plaintiffs attempt to muddy the waters of this process by pointing to an Agency of Education guidance document and claiming that the State has ordered a "radical departure" from the statutes by calling for "a single commingled vote of an electorate." Compl. ¶¶ 262-63 (citing Agency of Educ., Modified Unified Union School Districts and their Non-Member Elementary Districts, https://education.vermont.gov/sites/aoe/files/documents/edu-sbe-act46-mmusd-nmed-guidance.pdf (June 15, 2018)). Plaintiffs imply that the Board has invented a new kind of vote, one not authorized by any law. This is not true.

Again, this is an attempt by Plaintiffs to conflate separate and distinct legal entities. There is nothing novel about the concept of a single voter potentially being able to vote as a constituent of multiple distinct entities. For example, a registered voter can separately vote at the town, state, and national levels. The same is true for voters who reside in an area covered by an elementary district for elementary grades and a modified union district for upper grades.

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[13] Specifically, the Barnard, Cambridge, Huntington, Orwell, and Windham School Districts.

16 V.S.A. § 721 contains a voluntary merger procedure that can be initiated either by a district outside of a union district, or by a union district itself. *See* 16 V.S.A. § 721(a), (b). In either case, two separate votes, one by the union district and one by the nonunion district, would be required to produce a merger. *Id.* In the case of a voluntary merger involving a modified union, this would result in some voters voting twice as members of separate legal entities. More specifically, voters within an elementary district that sends students to a modified union for upper grades could vote once as part of the elementary district and once as part of the modified union in the same way that a voter can vote once at the town level and once at the state level.

The agency's guidance document does not commingle anything. Rather, it explains what happens when an elementary district subject to involuntary merger has been ordered to merge if accepted by a modified union that has not been ordered to merge. The answer is technical, but straightforward. If the modified union board concludes that the merger should occur, a single vote of the entire modified union district is held pursuant to 16 V.S.A. § 721(b). All voters within the modified union can vote, including voters who live within the elementary district. However, voters who live within the elementary district can vote only once and only as members of the modified union. Because the elementary district has been ordered to merge involuntarily, there is not a second separate elementary district vote in which the elementary district can veto the merger.

As the guidance explains, "the vote in this instance would be one-half of the § 721 process: Does the existing union school district accept the new member? A State Board requirement [under Acts 46 and 49] that the [elementary district] must merge if the MUUSD accepts it would replace the other part of the § 721 process." *Id.* The Board has not "invented"

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this process "whole cloth," as Plaintiffs allege, but rather drawn its authority from the two laws that apply to the two different types of districts.

Plaintiffs further attempt to claim that "isolated" elementary districts "cannot be subjected to any Board action or order pursuant to the Plan." Compl. ¶ 265. This claim fails because Plaintiffs cite no authority, and make no allegations, suggesting that any Plaintiff district ordered to merge with a modified union is isolated in any manner relevant to Act 46 or Act 49. These districts are not, for example, "geographically isolated" in the sense that there are no other nearby schools with which they might collaborate. Elementary districts are not exempt from Acts 46 and 49 just because they have previously refused to join with their neighbors in collective responsibility for educating the elementary grades. If that were the case, Section 10 of Act 46 would be pure surplusage. Districts are exempt from involuntary merger under Section 10 only if they are subject to a specific exemption from involuntary merger under Section 10.

Count I.5 of Plaintiffs' complaint fails to state a claim and must be dismissed.

6. Count I.6 Fails Because The Actions of the Agency and Board Were Not Arbitrary and Capricious

"Out of respect for the expertise and informed judgement of agencies, and in recognition of [the courts'] proper role in the separation of powers, [they] accord agency decisions substantial deference." *In re Conservation Law Found.*, 2018 VT 42, ¶ 15, -- Vt. --, 188 A.3d 667, 672-73.[14] Accordingly, in appeals from administrative actions or decisions, the Superior Court "should review the record and overturn the agency's determination only if it finds

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[14] *See also In re Verizon New Eng., Inc.*, 173 Vt. 327, 334, 795 A.2d 1196, 1202 (2002) ("We apply a strong presumption of validity to board orders and will accept its conclusions and findings unless they are clearly erroneous"); *Town of Groton v. Agency of Natural Res.*, 172 Vt 578, 579, 772 A.2d 1103, 1105 (2001) ("[T]he board has wide discretion in making its findings and conclusions as long as they are not inconsistent with legislative and agency policy.").

it arbitrary and capricious." *Town of Victory v. State*, 2004 VT 110, ¶ 22, 177 Vt. 383, 392, 865 A.2d 373, 380; *see also In re Town of Sherburne*, 154 Vt. 596, 603, 581 A.2d 274, 278 (1990) (finding that function of superior court in reviewing decision of State Water Resources Board was "to determine whether the Board acted arbitrarily, unreasonably or contrary to law.").

"The United States Supreme Court has defined an 'arbitrary' decision as one '[f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . .'" *Lewandoski v. Vt. State Colls.*, 142 Vt. 446, 453-54, 457 A.2d 1384, 1388 (1983) (quoting *United States v. Carmack*, 329 U.S. 230, 243-44 n.14 (1946)). To claim then that a State agency or board action was 'arbitrary and capricious' represents a "substantive challenge[]" to the administrative decision and "the scope of [judicial] review is extremely limited." *Id.*, 142 Vt. at 453, 457 A.2d at 1388.[15]

"To determine whether [an administrative] Board acted 'arbitrarily,' [a court] must decide whether the decision makes sense to a reasonable person – even if the reviewing court might have weighed the [applicable statutory] factors differently." *Town of Sherburne*, 154 Vt. at 605, 581 A.2d at 279. "Even if the record of the Board's proceedings contains conflicting evidence, the Board's finding on the issue will ordinarily be upheld" and not deemed arbitrary so long as it "explain[s] its reasons for finding as it does . . . ." *Id.* Thus, "[a]n administrative decisionmaker like [a] Board must also 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' but even an explanation of less-than-ideal clarity will be upheld so long as the agency's path may be

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[15] *Cf. Garbitelli v. Town of Brookfield*, 2011 VT 122, ¶ 6, 191 Vt. 76, 80, 38 A.3d 1133, 1136 ("Rule 75 is . . . the 'modern equivalent' of extraordinary relief, such as certiorari" and "[a] court reviewing governmental action" under V.R.C.P. 75 "is typically limited to review of questions of law. Review of evidentiary questions is limited to 'whether there is any competent evidence to justify the adjudication'" (citations omitted)).

reasonably discerned." *Beyers v. Water Resources Bd.*, 2006 VT 65, ¶ 12, 180 Vt. 605, 608, 910 A.2d 810, 814 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

In this case, the Agency's Plan and the Board's Order would manifestly "make[] sense to a reasonable person" and are, therefore, not arbitrary and capricious. The Agency and Board decisions provide detailed and reasoned explanations for their conclusions and choices on each district merger. In reaching their decisions, the Agency and Board rationally applied their factual findings on the practicalities, benefits and drawbacks of both preferred and alternative governance structures proposed for each Plaintiff district to the legal standards, criteria and guidelines of Acts 46 and 49, as well as the Board's Series 3400 Rules. At worst, Plaintiffs point out isolated instances in the Agency's Plan and the Board's Order that, to their reading, provide explanations of "less-than-ideal clarity" or that may be subject to "conflicting evidence." However, Plaintiffs cannot seriously maintain that the Agency and Board, on the whole, failed to articulate any reasoned explanation for their decisions untethered to facts, legal standards or policy principles.

In determining whether an administrative decisionmaker, such as a board or agency, "acted arbitrarily, unreasonably, or contrary to law," a reviewing court must also determine whether "the factual findings are supported by substantial evidence, and the ruling is consistent with governing statutes and prior Board policy." *In re Clyde River Hydroelec. Project*, 2006 VT 11, ¶ 10, 179 Vt. 606, 609, 895 A.2d 736, 740. "Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate to support the particular conclusion." *Braun v. Bd. of Dental Exam'rs.*, 167 Vt. 110, 114, 702 A.2d 124, 126

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(1997) (internal citation omitted).[16] As the Supreme Court has noted, "[w]e will not disturb [an administrative] Board's findings of fact if there is substantial evidence in the record to support them . . . . we must defer to the Board when its findings are supported – even if the record contains contradictory evidence – and when its conclusions are rationally derived from its findings and based on a correct interpretation of the law." *In re Southview Assocs.*, 153 Vt. 171, 177-78, 569 A.2d 501, 504 (1989).

Here, the Agency's Plan and Board's Order made factual findings to support each district merger decision that were rationally derived from "substantial evidence," that is, relevant evidence that a reasonable person would deem adequate or credible to support such findings. In their Complaint and Motion for Preliminary Injunction, Plaintiffs merely raise what they view as additional "contradictory evidence" and insist that the Court independently re-weigh the facts for each contested merger. Such a *de novo* factual inquiry is well beyond the deferential and highly limited scope of Rule 75 review of an agency or board decision and must be rejected.

In evaluating whether an administrative decisionmaker acted "contrary to law" reviewing courts "give deference to [a] Board's interpretation of statutes it implements and its rules." *In re GMPSolar-Richmond, LLC*, 2017 VT 108, ¶ 19, – Vt. – , 179 A.3d 1232, 1239.[17] "[W]here a statute is silent or ambiguous regarding a particular matter this Court will defer to agency interpretation of a statute within its area of expertise as long as it represents a permissible

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[16] *Cf. Turnley v. Town of Vernon*, 2013 VT 42, ¶ 11, 194 Vt. 42, 47-48, 71 A.3d 1246, 1251 ("Under the deferential standard of review accorded administrative and quasi-judicial bodies in these circumstances, it is not for the superior court to independently weigh the evidence to make its own factual findings. Rather, the superior court on a Rule 75 appeal must uphold factual findings if any credible evidence supports the conclusion by the appropriate standard.").

[17] See *also In re Verizon New England Inc.,* 173 Vt. at 334, 795 A.2d at 1202 ("Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its particular area of expertise").

construction of the statute." *In re Smith*, 169 Vt. 162, 169, 730 A.2d 605, 611 (1999). However, "an agency has no discretion to ignore statutory policy. Thus, [an administrative] Board must consider all the criteria required by its statute, although it retains discretion in determining the relative weight to give each criterion." *Town of Sherburne*, 154 Vt. at 607, 581 A.2d at 280. Ultimately, "[a]n administrative agency's conclusions of law will be upheld on appeal if they are fairly and reasonably supported by findings of fact, and absent a clear showing to the contrary, any decisions it makes within its expertise are presumed correct, valid and reasonable." *Caledonian Record Publ'g Co. v. Dep't of Emp't & Training*, 151 Vt. 256, 260, 559 A.2d 678, 681 (1989) (internal citation omitted).

In this case, and as more fully explained above, the Agency's Plan and Board's Order have not been shown to be contrary to statute, regulation or State policy concerning school district mergers. At most, Plaintiffs attempt to conjure ambiguities in the relevant statutes and quarrel with the weight or importance that the Agency and Board have assigned to various statutory and regulatory factors used to evaluate preferred and alternative governance structures. However, such arguments ignore the considerable deference accorded to the Agency and Board by reviewing courts to interpret and harmonize statutes (as well as their own rules) relevant to school district governance, especially in instances when they are seemingly unclear or contradictory. Plaintiffs' objections also completely ignore the wide discretion given to the Agency and Board "in determining the relative weight of each criterion" that is legally germane to a district merger decision. In light of this deference and discretion, Plaintiffs can point to no clear and compelling indication of error in the Agency's or Board's legal interpretations sufficient to overcome the presumption that they are correct, valid and reasonable.

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B. The Legislature Permissibly Delegated Authority to the Secretary and Board so Count II Must Be Dismissed

Count II fails as a matter of law because, contrary to Plaintiffs' assertion, the legislature permissibly delegated authority over school districts to the Secretary and Board of Education. Plaintiffs contend that the Agency, the Board, or both, exceeded their authority with respect to mergers, Default Articles of Agreement, and as to Modified Unified Union School Districts. *See* Compl. ¶¶ 288-99; Motion at 23-34. None of these arguments as merit.

Plaintiffs first suggest that the legislature could not authorize the Agency and Board to act as they did, but when the State creates subdivisions, "they remain the creatures of the state, holding and exercising powers and privileges subject to the sovereign will." *Village of Hardwick v. Town of Wolcott*, 98 Vt. 343, 129 A. 159, 161 (1925). Therefore, the State can merge or eliminate them at any time. "Inasmuch as school districts are subdivisions of the state and creatures of the legislature, the latter has an almost unlimited power to abolish, divide or alter them. It has generally been recognized that this broad discretionary power to change the boundaries of school districts may be delegated by the Legislature to administrative bodies, to be exercised under certain conditions." 65 A.L.R. 1523 Sec. II.a. Put another way, a "state may, by legislation, delegate authority to merge or change school districts to state boards or agencies" and may also "require state agency or official review and approval of lower decisions." 78 C.J.S. Schools and School Districts § 16 (Dec. 2018 Update).[18]

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[18] It is unclear whether Plaintiffs seek to rely on *In re Municipal Charters*, 86 Vt. 562 (1913), which is cited by the Stowe Plaintiffs, but not by the Plaintiffs in this case. If they do, *Municipal Charters* is inapposite, because it addressed villages, not school districts, and found problematic a specific statute, without attempting to provide general perspective guidance. *Id.* ("we are not called upon to draw the line between the delegable and the nondelegable"). There is a divide in authority outside of Vermont about delegation of authority to create municipal corporations, but even in states on the more restrictive side, Courts recognize that states "may, by legislation, delegate authority to merge or change school districts." *Compare, e.g.* 56 Am. Jur. 2d Municipal Corporations § 18, n.5 (citing cases viewed as restrictive including cases from Iowa, Nebraska, and Wisconsin); 78 C.J.S. Schools and School Districts §

Ignoring the fact that school districts are creatures of the State, Plaintiffs assert that only local votes could have produced the challenged mergers, Motion at 24-25, but this argument is impossible to reconcile with the text and structure of Act 46. As described in more detail in Section I.B., Act 46 contemplated a two-phase process. The first phase was to be voluntary. Sections 6 and 7 provided a range of incentives for voluntary mergers, 2015 Vt. Laws No. 46 §§ 6, 7 and more than 150 districts voluntarily merged after Act 46 was passed.

The second phase was not. Act 46 required every district not in "the preferred structure" after the voluntary merger phase to propose a future structure to the Secretary and the Secretary to propose a plan to move such districts into the preferred structure under specified circumstances. *Id.* §§ 9(a)(3), 10(a)(2). It then required the Board to publish an order "merging and realigning districts" under specified circumstances. *Id.* § 10(b). Section 10 of Act 46 cannot plausibly be read to address anything other than involuntary mergers because it expressly exempts from its scope all districts that voluntarily merged, *id.* § 10(c) and there would be no need in any event to order districts that already voluntarily merged into preferred structures to merge into preferred structures. *Id.*[19]

There was nothing unlawful about Act 46's express delegation of authority "to merge or change school districts" to a "state board," the Vermont Board of Education, and a state agency,

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16, n.1, n.2 (citing cases for the quoted prospect, including cases from Iowa, Nebraska, and Wisconsin). *Municipal Charters* was also an advisory opinion, and as such would not be binding even if it was on point. *In re Opinion of the Justices*, 115 Vt. 524, 530 (1949).

[19] 16 V.S.A. § 421, which is cited in the complaint, but not the motion, is not to the contrary. *See* Complaint ¶ 291. § 421 is a statute, not the Vermont Constitution, and would not have precluded the legislature from passing Act 46 even if the statutes were in conflict and they are not. "There is no question that a school district is a corporate entity, separate and distinct from the town" even when the two cover the same geographic area. *Lewis v. Town of Brandon*, 132 Vt. 37, 39 (1973). § 421 addresses only one of many possible types of school districts in Vermont – a district coterminous with a single town – and in that situation "[a] town shall constitute a school district." 16 V.S.A. § 421. Vermont has long permitted many types of districts that are not coterminous with towns, such as regional education and union districts.

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the Vermont Agency of Education. 78 C.J.S. Schools and School Districts § 16; 65 A.L.R. 1523 Sec. II.a.; *cf Hardwick*, 129 A. at 161. Nor was there anything undemocratic. Act 46 was passed at the State level after a robust democratic debate. Its mandate cannot now be individually vetoed by local districts that were unsuccessful in pursuing their policy preferences at the State level.

Plaintiffs next suggest that the legislature did not authorize Articles of Agreement to be put into place any way other than voluntarily, Motion at 25-29, and goes so far as to state that the legislature "never expressly declared that the 'Default' Articles of Agreement . . . could be imposed without an electorate vote." Motion at 27. Yet the text of Act 49 directly contradicts Plaintiffs' assertions. The Board's plan "*shall* include Default Articles of Agreement" that are "to be used . . . unless and until new or amended articles are approved." 2017 Vt. Laws No. 49 § 8 (emphasis added). If new articles are not approved within 90 days, "then the provisions in the State Board's Default Articles of Agreement shall apply to the new district" indefinitely. *Id.*

Plaintiffs' assertion that the Board legislatively amended Act 49 and 16 V.S.A. 706n on the subject of the creation and amendment of Articles of Agreement also fails as a matter of law. Motion at 27-28. Act 49 required the Board to draft Default Articles and provided forming districts the option to form a committee with members appointed "in the same manner and number as required for a study committee under 16 V.S.A. chapter 11" to draft alternative articles. 2017 Vt. Laws No. 49 § 8 (amending 2015 Vt. Laws No. 46 § 10 to add (d)(1)). "If the committee's draft Articles of Agreement are not approved within the 90-day period" the Default Articles "shall apply." *Id.* (amending § 10 to add (d)(2)). Finally, Act 49 directed the Vermont School Boards Association and Vermont Superintendents Association to consult with the Agency of Education and propose legislation addressing how articles proposed by any committee should be approved and amending 16 V.S.A. § 706n. *Id.* (amending § 10 to add (d)(3)).

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The School Boards and Superintendents Associations concluded that no amendments were necessary and sent a letter to the legislature explaining why. *See* Compl., Attachment B at 2-3. The Board then drafted Default Articles that can be amended in a manner consistent with existing statutes. Plaintiffs are incorrect that the Default Articles preclude forming districts from forming a committee and instead task a transition board with drafting articles. Motion at 28. To the contrary, the Default Articles make one transition board duty warning a meeting "at which the voters shall consider whether to approve any amendments to the Articles of Agreement that may be proposed by the committee" as contemplated by Act 49. *See, e.g.* Windham Northeast Elementary School District Articles of Agreement, Article 9.D.ii.b. The Articles go on to quote at length from Act 49 to explain how the committee process should proceed. *Id.*, Article 14.B.i.[20]

What articles can be amended, and by whom, is also consistent with existing statutes. Consistent with Act 46's contemplation of Default Articles applying only to new districts created pursuant to the Court's Section 10 order, which is to say applying only to new districts created by involuntary merger, the Default Articles do not allow amendments that would undo the ordered merger. *Id.*, Article 14.A.i. For example, the Default Articles do not permit amending the identity of the districts to be merged. *Id.*

With two exceptions, the Default Articles permit the remaining articles to be amended by majority vote of voters within the new district consistent with 16 V.S.A. § 706n(b). First, the board of the new district can amend the name of the new district, which Plaintiffs do not appear to contend could harm them. *See, e.g.* Windham Articles, Article 14A.iv. Second, consistent

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[20] The Default Articles of Agreement for each new district are contained in Appendix B of the Board's order, which can be found at https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

with Act 46 § 1(i)'s statement that "[i]t is not the State's intent to close its small schools," but to give them enhanced opportunities, the Default Articles preclude listed changes to the grades and schools the new district will operate for two years, and allow amendment of these articles only with town by town voter approval. *Id.* Article 14.A.iii.[21]

Plaintiffs also argue that the Board's Default Articles "improperly legislate" by describing temporary transition boards, suggesting that they are "a new unelected public office" that is awarded "novel statutory and municipal powers." Motion at 30-31. Yet, as described above, Act 49 expressly provided that the board's plan "shall" include Default Articles that would apply "unless and until new or amended articles are approved." 2017 Vt. Laws No. 49 § 8 (amending 2015 Vt. Laws No. 46 § 10 to add (d)). The articles Act 49 required the Board to draft provide for the temporary creation of a transitional board, which is to exist only "[u]ntil the voters of the New Union District elect" a permanent board and its members are sworn. *See, e.g.* Windham Articles, Article 9.A.

And, in any event, transition board members *are* elected officials, specifically the "Chair and Clerk of the board" of each forming district unless the district board by majority vote designates alternative members to serve. *Id.* Transition boards are given three specific duties, none of which are novel: (1) prepare a first draft of a proposed budget for consideration by a permanent elected board, (2) warn a meeting to elect a permanent board, and (3) warn a meeting for voters to consider any committee proposed amendments to the Default Articles of Agreement. *Id.* Article 9.D. The Board did not exceed its mandate to publish an order merging

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[21] Plaintiffs' motion next challenges the portion of the Board's order designating the Barnard and Windham school districts as part of modified unified union school districts if they are accepted by the modified union districts. Although this discussion appears in a portion of Plaintiffs' motion titled "Second Cause of Action – Violation of Separation of Powers" it is identical in substance to the argument raised in Count I.5 of the complaint. In the interest of avoiding duplication, Plaintiffs' argument relating to Barnard and Windham is addressed only once in Section I.B.5. above.

districts that included Default Articles of Agreement by doing exactly that and including in the articles a procedure designed to allow the election of a permanent board and modification of the Default Articles in the specific manner contemplated by Act 49.

Finally, the warnings issued for initial organizational meetings are proper, contrary to the assertions on pages 32-34 of Plaintiffs' motion. New districts formed by Section 10 order were not formed by the voting and certification process contained in 16 V.S.A. § 706g. Their existence was properly designated pursuant to Act 46, which expressly authorized the Board to publish an order "merging and realigning districts," 2015 Vt. Laws No. 46 § 10(b) and Plaintiffs do not contest that certifications were subsequently sent to town clerks.

Plaintiffs' suggestion that whether to vote for directors by Australian ballot should not be on the agenda for organization meetings fails because Australian balloting does not apply by default in Vermont unless "specifically required by statute." 17 V.S.A. § 2680(a). 16 V.S.A. § 706e and § 706k(a) address Australian balloting in the context of districts created pursuant to a study committee report and voting process. The new districts created by the Board's order were created through a different process – a Section 10 ordered merger. When preparing Default Articles, the Board correctly left the Australian balloting choice to voters in the absence of a specific contrary statutory requirement. Finally, Plaintiffs' motion correctly notes that distributing financial information is the default for new districts, but is incorrect that a new district cannot vote on that issue at an organizational meeting. 16 V.S.A. § 563(11)(C) allows a district to vote on whether to provide notice of the availability of financial information instead of distributing it at any special meeting.

Act 49 required the Board to draft Default Articles of Agreement and it did so in a manner consistent with both the authority it was expressly given and existing statutes.

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C. Count III Fails Because the State Can Merge Its Subdivisions

In Count 3, Plaintiffs suggest that the Board's order was improper because it will result in the transfer of assets and liabilities and the dissolution of school districts without the consent of voters within those districts and amounts to an unconstitutional taking. Compl. ¶¶ 301-08. Acts 46 and 49 tasked the Board with publishing an order "merging and realigning districts" under specified circumstances and established that a district responsible for pre-K-12 education of all resident students is the "preferred education governance structure in Vermont." 2015 Vt. Laws No. 46 §§ 5(b), 10(b). The Board was required to publish its order after the deadline for voluntary formation of preferred structures had expired and all districts that voluntarily merged into preferred structures were exempt from the order. There is no question that Section 10 of Act 46 conveyed to the Board the authority to order involuntary mergers.

The consequences of an involuntary merger that extinguishes an existing district are equally straightforward. When a unified union district is formed in Vermont, it "supplants all other school districts within its borders," which "cease to exist." 16 V.S.A. § 722. Absent a contrary agreement, the unified union "gains title to the assets and assumes the existing contractual obligations and other liabilities" of the forming districts, which must transfer to the union "the full amount of the balance" in school accounts and "all outstanding notes and contracts in force." 16 V.S.A. § 723. In sum, the legislature conveyed to the Board the authority to order involuntary mergers that extinguished existing districts, and caused new districts to assume assets and liabilities, on the terms specified in Act 46.

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The legislature did so constitutionally because: (1) the State can terminate the existence of its subdivisions without the consent of their residents and (2) no taking is involved if it does so because property held by subdivisions of the State is property of the State. The Plaintiff school

districts here are subdivisions of the State exercising delegated authority. *See Brigham v. State*, 166 Vt. 246, 264 (1997) (observing that the State "may delegate" education authority "to local governments, which are themselves creations of the state"). When the State creates subdivisions, "they remain the creatures of the state, holding and exercising powers and privileges subject to the sovereign will." *Village of Hardwick v. Town of Wolcott*, 98 Vt. 343, 129 A. 159, 161 (1925).

The State can "'modify or withdraw'" the powers of its subdivisions, take property they hold in a governmental capacity "'without compensation,'" and merge or destroy its subdivisions "'at its pleasure.'" *Id.* (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). "The power of the state, unrestrained by the contract clause or the 14th Amendment, over the rights and property of cities held and used for governmental purposes cannot be questioned." *Town of Brighton v. Town of Charleston*, 114 Vt. 316, 321-22 (1945) (citing *City of Trenton v. New Jersey*, 262 U.S. 182 (1923)). The powers of the State extend equally to the revenue of its subdivisions, which "are not the property" of the subdivision and are "subject to the control of the Legislature." *Id.* at 322-323 (so explaining with respect to counties). The principles announced in *Hardwick* are well-settled in Vermont, particularly as to property held by a subdivision of the state in its governmental capacity. *See Village of Morrisville Water and Light Dep't v. Hyde Park,* 134 Vt. 325, 332 (1976) (Hardwick "has stood for over 50 years without serious attack").

School districts perform a quintessential government function. *Palmer v. Bennington Sch. Dist.,*, 159 Vt. 31, 37 (1992) ("education is an essential government function"). The State can transfer property held by a school district for educational purposes to a different district or agency for educational purposes without compensation. *See, e.g. New Castle Cty. Sch. Dist. v. State*, 424 A.2d 15, 17-18 (Del. 1980) (finding that no taking occurred where a school district

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was directed to transfer property for one dollar); *People ex rel. Dixon v. Community Unit Sch. Dist. No. 3*, 118 N.E. 2d 241, 247 (Ill. 1954) (a school "district owns no property, all school facilities, such as grounds, buildings, equipment etc., being in fact and law the property of the State and subject to the legislative will"); *Hazlet v. Gaunt*, 250 P.2d 188, 192 (Co. 1952)("We believe the law to be well-settled that consent of particular districts, or the inhabitants thereof, is not necessary as a constitutional prerequisite" to the "dissolution or division of school districts" or "to the transfer of assets from an existing school district" to a larger district.); *Central Sch. Dist. No. 1 v. Colchester*, 237 N.Y.S. 2d 682, 683 (N.Y. App. Div. 1963) (A district "was not entitled to compensation" for lands held by the "school district for school purposes and thus in a governmental capacity").

The cases cited by plaintiffs are not to the contrary. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) was a lawsuit brought by an individual who was disenfranchised by law requiring prospective school district voters to own or lease property, or have custody of children enrolled in local schools. *Id.* at 622. The Board's order does not preclude any eligible voters from voting in newly created districts and *Kramer* has nothing to do with the rights of existing subdivisions of the State as against the State.

United States v. Town of Nahant, 153 F. 520, 521 (1st Cir. 1907) was a case in which the United States took property from a separate sovereign and was required to pay compensation. 153 F. at 521. *Nahant* is distinguishable because there are no separate sovereigns and the assets transferred here are State assets. *Burnett v. Sacramento*, 12 Cal. 76, 83 (1859) and *People v. Mayor of Brooklyn*, 4 N.Y. 419, 424 (1859) both involved arguments that money could not be taken from individuals by the government by eminent domain and have nothing to do with the relationship between Vermont and its subdivisions.

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The plaintiff districts are subdivisions of the State and the State may merge or destroy them at any time, with or without the consent of their residents. *Hardwick*, 161 A. at 161; *Dixon*, 118 N.E. 2d at 246 ("With or without the consent of the inhabitants of a school district . . . the State may take the school facilities . . . and vest them in other districts or agencies."); *Hazlet*, 250 P.2d at 192. The State may also transfer assets and liabilities relating to school districts at any time without compensation. *See Hardwick*, 161 A. at 161 (property held by a subdivision in a governmental capacity "in a legal sense, belongs to the state" and the State may vest it in other entities at any time without compensation); *New Castle*, 424 A.2d at 17-18; *Dixon*, 118 N.E. 2d at 247; *Central*, 237 N.Y.S. 2d at 683. Count III should be dismissed.

D. Count IV Fails Because Plaintiffs' Small Schools Grant Claim Is Not Ripe and the Tax Classifications Adopted by Act 46 Are Rational

Count IV seeks to challenge a change made to the eligibility definition for future small schools grants and two merger incentives contained in Act 46. Turning to the first aspect of Count IV, Plaintiffs' small school grant challenge is not ripe and must be dismissed.

Prior to Act 46, eligibility for small schools grants was determined by reference to two size-based metrics. 16 V.S.A. § 4015(a)(1)(A)-(B). The amount of the grant was the greater of the product of two statutory formulas. 16 V.S.A. § 4015(b)(1)-(2). Act 46 amended the eligibility definition and required the Board to publish metrics "by which it will make determinations whether to award small school support grants . . . on and after July 1, 2019." 2015 Vt. Laws No. 46 §§ 20-21. Act 46 also provided for permanent merger support grants for districts created by voluntary merger where at least one forming district was small school grant

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eligible. *Id.* §§ 6(b)(2), 7(b)(2). The Board subsequently published metrics and, due to a delay in data availability, decided to use existing data to determine fiscal year 2020 eligibility.[22]

Plaintiffs do not, and cannot, allege that any Plaintiff district will not receive a small schools grant in FY2020 and any claim by Plaintiffs that they may apply for a small schools grant in a future year and not receive it, "is purely speculative and not properly before this Court." *In re Robinson/Keir P'ship*, 154 Vt. 50, 57 (1990). "Claims are ripe when there is a sufficiently concrete case or controversy." *State v. M.W.*, 2012 VT 66 ¶ 11 (quotations omitted). A controversy "that is hypothetical or abstract," in turn, is not ripe. *Id.* Any claim by Plaintiffs that in a future year, the Board's five-factor, 16-point test may be applied adversely to them based on data that does not yet exist is necessarily hypothetical, abstract, and speculative.

Count IV also fails on the merits. Plaintiffs suggest that Count IV should be analyzed in the same manner that the Vermont Supreme Court analyzed the claims at issue in *Brigham v. State*, 166 Vt. 246 (1997). *Brigham* did not specify what level of scrutiny it was applying. However, the Vermont Supreme Court has subsequently characterized *Brigham* as applying a more uniform and flexible test than either rational basis or strict scrutiny review. *Baker v. State*, 170 Vt. 194, 206 (1999). According to *Baker*, this intermediate approach required a more stringent "reasonableness inquiry than was generally associated with rational basis review," but "did not override the traditional deference accorded legislation having any reasonable relation to a legitimate public purpose." *Id.* at 203-04. Rather, it required a meaningful case specific analysis to ensure that any alleged exclusion "from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals." *Id.* Under this intermediate

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[22] The Board's metrics are available at https://education.vermont.gov/documents/sbe-determining-eligibility-small-school-grants. Minutes of the meeting in which the Board determined to use existing data to determine eligibility for fiscal year 2020 are available at https://education.vermont.gov/documents/state-board-draft-meeting-minutes-from-01162019.

standard, statutes continue to be "presumed to be constitutional" and "presumed to be reasonable" and "the proponent of the constitutional challenge has a very weighty burden to overcome." *Badgley v. Walton*, 2010 VT 68 ¶ 20.

Defendants respectfully submit, however, that the proper analytical lens for Count IV is the rational basis test applied to tax claims in Vermont. In fact, Plaintiffs' primary objection is to the potential tax consequences of Act 46. Every year, the State fully funds all portions of the budgets that districts adopt that are not paid by other sources, like federal funds. *See* 16 V.S.A. § 4011(c) ("[a]nnually, each school district shall receive an education spending payment"); 16 V.S.A. § 4001(6)("'[e]ducation spending' means the amount of the school district budget" plus additional specified amounts "excluding any portion of the school budget paid for from any other sources" including federal funds). In other words, Plaintiffs' objection is that, if they spend the same amount going forward as they historically have, their taxes will not go down because they did not voluntarily merge, and could hypothetically increase if they do not satisfy State Board metrics based on future data.

Taxpayer claims under the Proportional Contribution Clause are subject to ""the rational basis test used for federal equal protection analysis."" *USGen New England, Inc. v. Town of Rockingham,* 2003 VT 102 ¶ 15 (quoting *Alexander v. Town of Barton*, 152 Vt. 148, 157 (1989). "[P]laintiffs face a heavy burden because they must overcome the presumption that the law is constitutional and demonstrate that there is no set of facts or circumstances that support the legislative classifications at issue." *Schievella v. Dep't of Taxes*, 171 Vt. 591, 592 (2000). "[R]easonable schemes of taxation must have flexibility and some differences of treatment between citizens is virtually inevitable." *Id.* at 593. The rational basis standard "is especially deferential in the context of classifications made by complex tax laws" with respect to which

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states "have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *USGen*, 2003 VT 102 ¶ 17. However, the distinction is ultimately not significant, because Count IV fails under either analysis.

Plaintiffs specifically seek to challenge two aspects of Act 46 through Count IV, temporary tax incentives made available for voluntary mergers and merger support grants for voluntary mergers involving districts that were previously eligible for small schools support grants. Tax incentives to encourage specific actions are lawful in Vermont if they are "reasonable tax classification[s]" that are "based upon a difference having a substantial relationship to the object of the legislation." *Vermont Motor Inns, Inc. v. Town of Hartford*, 134 Vt. 52, 56 (1975). Act 46's incentive structure was unquestionably rationally related to its goals. More than 150 districts voted to consolidate by forming 38 new union school districts after Act 46 was passed. Act 46 Report, Appendix C.

In significant part because of the incentives, many more districts voluntarily voted to merge than were ultimately considered by the Board in the subsequent involuntary phase of Act 46. The incentives thus directly accomplished the Act 46 goals by moving districts voluntarily into sustainable governance structures and substantially reduced the scope of the subsequent involuntary phase and the inevitable subsequent litigation. The Board's Order ultimately merged 45 districts, conditionally required an additional four transitions, and left 47 districts in their current governance structure. Final Report at 28-29.

The Act 46 incentive structure would be equally lawful if analyzed under intermediate scrutiny. Under this framework, the changes challenged by Plaintiffs are "presumed to be constitutional" and "presumed to be reasonable" and Plaintiffs have failed to carry their "very weighty burden." *See Badgley*, 2010 VT 68 ¶ 20. Act 46's combination of tax incentives and

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merger support grants "bear a just and reasonable relation to the legislative goals." *Baker*, 170 Vt. at 204. Temporary tax incentives for districts that voluntarily merge into preferred structures "bear a just and reasonable relation" to the goal of moving districts into preferred structures by encouraging districts to move into preferred structures. *Id.* The merger support grants "bear a just and reasonable relation" to both moving districts into preferred structures and protecting small schools by ensuring that they "have the opportunity to enjoy the expanded educational opportunities and economies of scale" available to schools in larger governance models. 2015 Vt. Laws No. 46 § 1(i). The merger support grants encourage the voluntary creation of larger districts including small schools while supporting the small schools with an annual ongoing revenue stream keyed to their operation. *See* 2015 Vt. Laws No. 46 §§ 6(b)(2)(B) 7(b)(2)(B).

The close relationship between Act 46's incentives and its goals is also confirmed by the contrast between the impact of Act 46's voluntary merger phase and prior voluntary merger legislation in Vermont. The voluntary phase of Act 46 reduced Vermont's districts count by more than 100 by encouraging a broad range of communities to work together as compared to a net reduction of fewer than 10 districts under Acts 153 and 156. Act 46 Report, Appendix C.

E. Count V Fails Because The Agency and Board Did Not Violate Due Process Rights

"To evaluate [Plaintiffs'] due process claim, [this Court] must first determine whether [Plaintiffs] were deprived of a constitutionally protected interest in life, liberty, or property" by virtue of the Agency's Plan or the Board's Order. *Hegarty v. Addison Cnty. Humane Soc'y*, 2004 VT 33, ¶ 15, 176 Vt. 405, 410, 848 A.2d 1139, 1143. Plaintiffs' procedural due process claim fails at the outset because, as discussed above, school districts and their residents have no legally cognizable liberty or property interest in the continued existence of these municipal arrangements, which exist at the State's sufferance.

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As another threshold issue, "the requirements of due process apply only to agency decisions that are adjudicative, not legislative." *Parker v. Town of Milton*, 169 Vt. 74, 80, 726 A.2d 477, 482 (1998); *see also Gould v. Town of Monkton*, 2016 VT 84, ¶ 20, 202 Vt. 535, 544, 150 A.3d 1084, 1090 ("Procedural due process requirements apply only with respect to governmental adjudicative decisions rather than legislative decisions."). "[A] policy determination, involving general facts, and having a prospective application" is "characteristic of the legislative function." *Parker*, 169 Vt. at 80, 726 A.2d at 482. The rationale for this limitation is that "[t]hose who disagree with the adoption of a legislative enactment can pursue relief through the democratic political process." *Gould*, 2016 VT 84, ¶ 20.[23]

Here, Plaintiffs contend that the formation and dissolution of school districts is an essentially legislative function that was improperly delegated to the Agency and Board. *See* Compl. ¶¶ 288-99; Pltfs. Mot. at 24-27. As discussed above, Defendants maintain that this delegation was both legislatively intended and constitutional, but do not dispute that the school district merger process is legislative in nature, rather than adjudicative. As a result, procedural due process requirements do not apply to the Agency's Plan and Board's Order.

Three factors are assessed in determining whether an administrative action is adjudicative or legislative:

> (1) whether the inquiry is of a generalized nature, rather than having "a specific, individualized focus"; (2) whether the inquiry "focuses on resolving some sort of policy-type question and not merely resolution of factual disputes"; and (3) whether the result is of "prospective applicability and future effect."

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[23] *See also Bi–Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.").

Appeal of Stratton Corp., 157 Vt. 436, 443, 600 A.2d 297, 301 (1991) (quoting 1 C. Koch, Administrative Law & Practice § 2.3, at 61–62 (1985)). The first factor asks whether the administrative action "involves examination of generalized issues beyond the scope of the immediate parties, rather than issues of fact focused primarily on the rights and duties of these parties." *Id.* (internal citation omitted). "As a general rule, a party may not challenge a legislative enactment through the courts simply because that enactment particularly or disproportionately affects that party." *Gould*, 2016 VT 84 ¶ 21.

Here, the Agency's Plan and Board's Order providing for the mandatory merger of the Plaintiff districts involve "examination of generalized issues" of statewide educational policy and regional school governance that are focused beyond the particular rights, duties and interests of the Plaintiff districts and of the particular parent and student Plaintiffs who have chosen to sue. For example, these decisions are concerned, in part, with "provid[ing] substantial equity in the quality and variety of educational opportunities statewide." 2015 Vt. Laws No. 46 § 2(1) (emphasis added).

The Agency and Board also examined whether continuation of supervisory unions in lieu of district mergers was "the best means of meeting the [State educational] goals set forth in . . . this act in a particular region" as well as "ensur[ing] transparency and accountability for the member districts and the public at large." *Id.* § 8(b) (emphasis added). In evaluating alternative governance proposals, the Board interpreted Act 46 to require its assessment of each district or district group's proposal "not only on its own merits, but also on the impact it may have on the students, the districts, the Region and the State." Board Rule 3440.11 (emphasis added). Thus, the Agency's Plan and Board's Order broadly concern and directly affect not just those school districts, parents and students who are named Plaintiffs, but the interests of many school districts,

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parents, students and taxpayers in the same geographic region and statewide who are not before the Court.

The second *Stratton* factor centers on whether the agency or "Board's determination involves a policy question concerning the . . . public interest, rather than resolution of a discrete factual dispute" that may "involve[] weighing all public benefits in light of the impact on private rights" as well as "technical expertise and judgment." *Stratton Corp.*, 157 Vt. at 444, 600 A.2d at 301; *see also Lake Bomoseen Ass'n v. Vt. Water Res. Bd.*, 2005 VT 79, ¶ 12, 178 Vt. 375, 380, 886 A.2d 355, 359 ("The eleven statutorily defined functions that the WRB must consider in determining the significance of a wetland for classification purposes implicate the interests of all the state's citizens and its environment, not simply the interests of owners of property adjacent to the wetland."). The fact that the agency or board "applied statutorily defined criteria to its decision does not . . . compel" a conclusion that the administrative decision is adjudicative, rather than legislative or "quasi-legislative" in nature. *Lake Bomoseen*, 2005 VT 79, ¶¶ 13, 9.

In this case, as discussed above, the Agency's and Board's decisions to compel merger of the Plaintiff districts were based on their expert policy assessments of whether the general public interest in effective, equitable and efficient education state- and region-wide would be best served by school district consolidation. The Agency and Board were not primarily charged with, nor limited to, resolving particular factual disputes with Plaintiffs that affect only their private rights.

The final *Stratton* factor simply asks whether the administrative decision establishes "a rule of prospective applicability," or whether it "address[es] past conduct." *Stratton Corp.*, 157 Vt. at 444, 600 A.2d at 301. Here, the Agency's Plan and Board's Order are purely prospective in operation and concerned only with the future effect of regional district consolidation in

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meeting State educational goals, rather than adjudicating past conduct. Because the Agency' Plan and Board's Order are legislative or quasi -legislative in nature, rather than adjudicative, constitutional due process protections do not apply, "Rule 75 jurisdiction would be precluded," *Lake Bomoseen*, 2005 VT 79, ¶ 9, and Plaintiffs' Fifth Cause of Action should be dismissed for failure to state a claim.

Even if Plaintiffs had alleged a liberty or property interest subject to constitutional due process protections that was denied to them in an adjudicative administrative proceeding, Plaintiffs have still failed to state a procedural due process claim. "Fundamentally, due process requires notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *In re Miller*, 2009 VT 112, ¶ 9, 186 Vt. 505, 512, 989 A.2d 982, 988 (quoting *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)). Plaintiffs simply have not alleged a denial of timely notice or that their concerns were not addressed by the Agency or Board in a meaningful manner. Indeed, Plaintiffs do not allege any material deficiencies in the procedures used by the Agency and Board to evaluate school district mergers and alternative governance proposals; they merely dispute the substantive merit of the merger decisions resulting from this process.

In addition, "[t]hose claiming a violation of procedural due process in administrative proceedings, under either the federal or Vermont constitutions, have the burden of showing such a violation by applying a three-part test that balances the various interests and risks involved." *In re Green Mountain Power Corp.*, 2012 VT 89, ¶ 77, 192 Vt. 429, 456, 60 A.3d 654, 674. This test "require[es] balancing of (1) private interest affected by official action; (2) risk of erroneous deprivation of interest through procedures used, and probable value of additional procedures; and (3) government's interest, including function involved and fiscal and

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administrative burdens that additional procedural requirements would entail." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Here, Plaintiffs have failed to make any of the *Mathews* analysis needed to plead and prove a procedural due process violation. They have not identified any "private interest affected" by the Agency's Plan or Board's Order. As noted above, Plaintiffs have also not alleged or shown that any of the "procedures used" by the Agency and Board imposed a substantial "risk of erroneous deprivation" of those private interests. Finally, Plaintiff's have not suggested what different or "additional procedures" should have been used by the Agency and Board to avoid the ostensible due process violations. Plaintiffs' due process claim must therefore be dismissed for failure to state a claim.

F. The Sixth Count Should Be Dismissed Because the Board's Order Does Not Violate Chapter II, § 68 (the "Education Clause") of the Vermont Constitution.

The Education Clause of the Vermont Constitution states: "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." Vt. Const. Ch. II, § 68. The Board's order, as well as Acts 46 and 49 on which it is based, is entirely consistent with this clause.

First, even assuming the Education Clause applies to the Board's Order[24], the Clause plainly states that it is the General Assembly, not the towns, that has the authority to "permit[] other provisions" for education, if the State does not wish to follow a town-by-town approach. This language, which gives primary responsibility for structuring educational governance to the State, also matches the relationship between the State and its subdivisions described above and in

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[24]The Education Clause does not appear to apply to the Board's Order at all because the Order does not change the number of schools in Vermont. As noted above, the Default Articles of Agreement explicitly prohibit school closures in any new unified union school district for at least two years without express approval by the voters. *See* Default Articles of Agreement, Article 4. And, Act 46, § 3(a) also explains that the act is not intended to close any schools or promote the closure of schools.

Village of Hardwick, 98 Vt. 343. Vermont's municipalities and other subdivisions, such as school districts, are creatures of the State and can be eliminated by the State at any time. *See* Vt. Const. ch. II, § 69 ("No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are to be and remain under the patronage or control of the State; but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created."). This is in contrast to those states known as "home-rule" states, in which residents of localities may have the power to create their own local government charter, with powers that cannot be abrogated by the legislature. *See* 1 McQuillin, The Law of Municipal Corporations § 3:43 (3d ed. 2018) (describing home-rule charters); *id.* § 4:28 n.2 (listing state constitutional provisions that authorize such charters).

Second, the Board's Order aligns with the purpose of the Education Clause as interpreted by the Vermont Supreme Court in *Brigham*. Plaintiffs assert that "[t]he entire purpose of the language of Article 68 was to protect a town's ability to maintain local governance even when partnering with other towns." Compl. ¶ 344. This interpretation of the Education Clause was rejected by the Court in *Brigham*. In that case, the State attempted to argue that "the primary constitutional responsibility for education rests with the *towns* of Vermont." *Brigham*, 166 Vt. at 264. The Court decided instead that "[t]his argument fundamentally misunderstands the state's constitutional responsibility . . . for public education. The state may delegate to local towns and cities the authority to finance and administer the schools within their boards; it cannot, however, abdicate the basic responsibility for education by passing it on to local governments, which are themselves creations of the state." *Id.* The Court supported its holding with a thorough review of the history and context of the Education Clause. *Id.* at 258-63. It also reviewed the relevant

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caselaw and determined: "The courts of this state have been no less forthright in declaring education to be a fundamental obligation of the state." *Id.* at 263-64. Altogether, the Court decided that public education in Vermont has a "long and settled history as a fundamental obligation of state government," not municipal government. *Id.* at 264. Accordingly, it found that the Education Clause guaranteed a right to education in Vermont, to be provided by the State. The Court declared: "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 Legislature has answered the Court's mandate, in part, through Acts 46 and 49.

Plaintiffs attempt to rewrite the history of the Education Clause to fit their assertions about local governance. They cite the original Vermont Constitution of 1777 as requiring that "a school or schools shall be established in each town," Compl. ¶ 338, but they leave out the second half of that original 1777 provision, which reads ". . . *by the legislature*, for the convenient instruction of youth." *Brigham*, 166 Vt. at 258 (quoting Vt. Const. of 1777, ch. II, § 40) (emphasis added).[25] Plaintiffs also make much of the 1954 and 1964 amendments to the Education Clause. The 1954 amendment added language that allowed for schools to be maintained in each town, "or by towns jointly with the consent of the General Assembly."[26] The 1964 amendment replaced that language with the current iteration, "unless the General Assembly permits other provisions."[27] These amendments served to clarify that the constitution permits the

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[25] Although a subsequent (1786) revision of the Constitution dropped the specific reference to the legislature when merging the Education Clause with the Virtue Clause, that reference was later added back in and remains as the current reference to the "general assembly." Vt. Const. ch. II, § 68. The Court in *Brigham* did not find these changes to be significant for the purpose of determining that the State bears primary constitutional responsibility for guaranteeing the right to education.

[26] Available at https://www.sec.state.vt.us/media/52186/1951-1.pdf

[27] Available at https://www.sec.state.vt.us/media/52204/1961-3.pdf

Legislature to approve a variety of different school governance structures.[28] They did not change the constitutional obligation of the State to ensure educational opportunity statewide. Indeed, *Brigham* quotes a decision published just a few years after the 1964 amendment took effect, stating that the Education Clause "'imposes on the General Assembly a duty in regard to education that is universally accepted as a proper public purpose.'" *Brigham*, 166 Vt. at 263 (quoting *Vt. Educ. Bldgs. Fin. Agency v. Mann*, 127 Vt. 262, 266, 247 A.2d 68, 71 (1968)).

Because the Education Clause vests responsibility to provide for education primarily with the State, Plaintiffs' claim that the Board's Order violates that Clause fails as a matter of law. Count 6 should be dismissed for failure to state a claim.

II. Plaintiffs Are Not Entitled to a Stay of the Board's Order or a Preliminary Injunction

"An injunction is generally regarded as an extraordinary remedy and will not be granted routinely unless the right to relief is clear." *Comm. to Save the Bishop's House v. Med. Ctr. Hosp. of Vt., Inc.*, 136 Vt. 213, 218, 388 A.2d 827, 830 (1978). The movant for a preliminary injunction or a stay of an order pending appeal has the burden of demonstrating that the following four factors militate in favor of such relief: (1) the threat of irreparable harm to the

[28] In 1958, the Attorney General issued an opinion stating that some school governance structures did not appear to be constitutional. 1958 Att'y Gen. Op. 101. In 1960, the Commissioner of Education referenced that opinion in a public hearing on what would eventually become the 1964 amendment to the Education Clause. *See* Compl., Att. G, at 6. The 1964 amendment was eventually adopted with language acknowledging the Legislature's broad discretion to approve school governance structures. None of these sources say anything about "protect[ing] a town's ability to maintain local governance," as claimed by Plaintiffs. To the contrary, the Attorney General's Opinion is full of historical references to various school governance structures being authorized by the legislature, not by local towns. *See, e.g.*, 1958 Att'y Gen. Op. at 103 ("In 1808 the legislature authorized the creation of school districts composed of parts of two or more towns. . . . [A]s early as 1826 the legislature authorized the towns to put some of their residents, for school purposes, into the school district of an adjoining town."); *id.* at 104 ("[F]or at least 150 years the legislatures of this state have not considered that the constitution required that all the children of a town be educated in schools located therein . . . [b]ut . . . any town wishing to avail itself of the opportunity [of an alternative school structure] must have done so in a manner approved by such legislatures.").

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movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. *See Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 178 A.3d 313, 319; *see also In re J.G.*, 160 Vt. 250, 256 n.2, 627 A.2d 362, 365 n.2 (1993) (standard for determining whether stay of family court transfer order is appropriate is same as four factor preliminary injunction standard).

"The four factor [preliminary injunction] test was originally devised in connection with stays of administrative orders, although it is used in all kinds of cases." *Lyndonville Sav. Bank v. Sec'y of Vt. Agency of Natural Res.*, No. 141-3-199 Wncv, 1999 WL 34841342 (Vt. Super. Ct. June 4, 1999). Thus, "where a preliminary injunction is sought against government action taken in the public interest pursuant to a statutory or regulatory scheme, the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999) (citations omitted). "This higher standard reflects judicial deference toward 'legislation or regulations developed through presumptively reasoned democratic processes." *Id.*

A. Plaintiffs Will Not Suffer Irreparable Harm Prior to a Merits Decision

"Irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.' Accordingly, 'the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999) (citations omitted). "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that, absent a preliminary injunction, they will suffer 'an injury that is neither remote nor speculative, but actual and imminent.' and one that cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (quoting *Rodriguez*, 175 F.3d 227, 234-35).

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Thus, "[a]t the preliminary injunction stage, the only cognizable harms are those that cannot be remedied at the end of trial if the movant were to prevail." *Freedom Holdings*, 408 F.3d at 115. "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief." 11A *Federal Practice & Procedure* § 2948.1.

Here, even if the State's creation, modification or dissolution of municipal school districts could somehow inflict legally cognizable harm, Plaintiffs have failed to demonstrate that they will suffer any such purported harm that could not be avoided or remedied by the Court's decision on the merits by June 30, 2019. Plaintiffs correctly note that the Board's Order sets in motion a transitional process that will eventually "dissolve town school districts and enforce the transfer of their assets and liabilities" to the new union school districts created by the Board's Order. Mot. at 10. Plaintiffs further allege, with no evidence or substantiation, that the effect of the Board's Order "on school boards begins immediately – their powers are already purported to be reduced – and the elimination will be complete by June 30, 2019." Compl. ¶ 118. Plaintiffs contend that the future exercise of "municipal spending and borrowing powers . . . contracting powers, budget preparation and presentation" by the new union school districts prior to July 1, 2019 will somehow inflict "irreparable harm per se" on them. Mot. at 11.

However, Plaintiffs' assertions are refuted by the plain language of the Default Articles of Agreement imposed by the Board's Order. Under those Articles, the Plaintiff school districts "remain responsible for providing for the education of [their] resident students until July 1, 2019" and the existence, authority and operations of the newly created union districts "shall not be construed to limit or alter the authority or responsibilities" of the Plaintiff districts until that

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date. Articles of Agreement, Article 12. Likewise, the Plaintiff districts are not required to transfer operating surpluses, fund balances, debts or school-related real and personal property to the new union school districts until June 30, 2019. *See id.*, Articles 5(A)-(C) & 6(A).

Thus, a merits decision in Plaintiffs' favor from the Court on or before June 30, 2019 invalidating the district mergers would avoid or remedy any supposed harm stemming from the existence, authority or operations of the new union school district prior to that date, thereby obviating the need for a stay or preliminary injunction. Plaintiffs argue that the "Court is unlikely to be able to rule on the merits of all causes of action" by this time, *see* Mot. at 14, but offer no reasoning for their assertion. Given that Plaintiffs' claims raise pure questions of law, or the application of law to a likely undisputed set of material facts, it is realistic to expect that this action could be fully resolved on summary judgment within five months.

Plaintiffs contend, without citation to any authority, that "[t]he process of [school] union formation is permanent and irreversible" because "[t]here is no process for recovering or reforming assets, liabilities, and contracts assigned to the unified school district" by the Plaintiff school districts by June 30, 2019. Mot. at 14. Although Plaintiffs are correct that they "will be unable to recover money damages" against the Board and other State entity defendants on account of their sovereign immunity, *id.* at 10, there is no obstacle to the Court ordering restitution and other equitable relief against the new union school districts to recover Plaintiffs' assets and restore the pre-merger status quo. Presumably, the Plaintiff school districts maintain detailed records of their current assets, debts, and contracts that would enable the Court to craft an appropriate and effective equitable decree to reverse any compelled conveyances or transfers.

The Vermont Supreme Court held in *Taylor v. Town of Cabot* that a plaintiff is not threatened with irreparable harm or entitled to a preliminary injunction if "the plaintiffs' injury

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consists of an allocation of public funds that can be repaid." 2017 VT 92, ¶ 42 (in constitutional challenge by municipal taxpayers to town's use of federally derived grant funds to repair historic church, reversing grant of preliminary injunction for lack of irreparable harm since "this is an alleged constitutional violation that can be 'undone' through repayment of the challenged grant monies back to the Town."). Here too, any assets, debts or contracts that the Plaintiff school districts are compelled by the Board's Order to transfer to the new union school districts by June 30, 2019 (assuming that there is no final merits decision by that date) may thereafter be ordered repaid or restored to Plaintiff school districts, thus negating any likelihood of irreparable harm in the absence of a preliminary injunction.

1. Plaintiffs Have Not Demonstrated any *Per Se* Irreparable Harm from Defendants' Alleged Ultra Vires and Unconstitutional Actions

Plaintiffs assert that "[t]he 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 . . . This is irreparable harm per se." Mot. at 11. However, "the mere allegation that proceedings are unconstitutional or ultra vires cannot satisfy the 'irreparable harm' test" and even "colorable claims that an agency is acting ultra vires or unconstitutionally, do not establish irreparable injury, and are insufficient to trigger judicial intervention." *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 778 (D. Del. 1980).

For example, in *Baird v. Town of Berlin*, plaintiffs sought to preliminarily and permanently enjoin a town school district from holding a meeting of voters, previously warned by the town selectmen, for the purpose of reconsidering a vote authorizing the school board to purchase certain land for purposes of constructing a new school. *See* 126 Vt. 348, 350, 231 A.2d 110, 112 (1967). Plaintiffs argued that the town selectmen were not statutorily authorized to warn meetings of the town school district and that any resulting meeting would, therefore, be

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void and *ultra vires*. *See id.*, 126 Vt. at 354-55, 231 A.2d at 114-15. In affirming the trial court's dissolution of the preliminary injunction and dismissal of the action as a matter of law, the Vermont Supreme Court rejected the *Baird* plaintiffs' legal construction of the pertinent statute and observed:

> We think it well to point out that had the legal defects alleged by the plaintiffs for the purpose of attacking the validity of the proposed meeting been supported, they would have been fatally flawed and the action a nullity. When such grounds are advanced for obstructing a public proceeding, the propriety of the issuance of an injunction is open to question. Certainly, a litigant has not satisfied the burden of demonstrating he will sustain irreparable harm and injury if all he shows is that the meeting if held would be without legal effect.

Id., 126 Vt. at 355, 231 A.2d at 115 (emphasis added).

Likewise, all Plaintiffs allege here is that certain aspects of the Board's Order and Default Articles of Agreement establishing the transition process and effectuating the district merger process by July 1, 2019 are statutorily unauthorized, that is, *ultra vires*, and therefore, as the *Baird* plaintiffs argued, "without legal effect." However, under *Baird*, Plaintiffs' legal contention that the Board's Order and Default Articles of Agreement are *ultra vires* and void does not, in itself, demonstrate irreparable harm sufficient to justify the issuance of a preliminary injunction.

Plaintiffs are also mistaken in their assertion that "[u]nconstitutional government action that violates the separation of powers supports a finding or irreparable harm" in this case. Mot. at 9. "[T]he mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm. Rather, district courts must consider the nature of the constitutional injury before making such a conclusion." *Pinckney v. Bd. of Educ. of the Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996); *see also Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) ("[A] bare assertion of a constitutional injury, without evidence

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'convincingly show[ing]' the existence of noncompensable damages, is insufficient to automatically trigger a finding of irreparable harm") (citation omitted).

"[T]he cases where courts have held that a constitutional deprivation amounts to an irreparable harm 'are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy, or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.'" *Marano v. New York City Transit Auth.*, No. CV-92-5158 CPS, 1993 WL 17434, at *3 (E.D.N.Y. Jan. 19, 1993) (quoting *Public Serv. Co. of N.H. v. Town of W. Newbury,* 835 F.2d 380, 382 (1st Cir.1987)); *cf. Taylor*, 2017 VT 92, ¶ 41 (observing that almost all cases in which it was found that "the violation of a plaintiff's constitutional rights is itself a sufficient irreparable injury to support a preliminary injunction . . . involve a deprivation of liberty or constitutional freedom that cannot be 'undone' through the payment of money" such as "the imposition of cruel and unusual punishment, or the denial of the right of free speech").

In particular, courts have repeatedly rejected the assertion "that any alleged separation-of-powers injury is by its very nature irreparable." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1135 (D.C. Cir. 2017). "In the absence of 'immediate or ongoing harm stemming from [an agency or bureau's] alleged constitutional defects,' the 'violation of separation of powers' by itself is not invariably an irreparable injury." *Id.* (quoting *In re al-Nashiri*, 791 F.3d 71, 79-80 (D.C. Cir. 2015)). "[T]wo circuits have recently reiterated that participating in an administrative proceeding that a challenger contends violates separation-of-powers principles and experiencing the 'expense and disruption' of such proceedings do not inherently qualify as irreparable harm." *Consumer Fin. Prot. Bureau v. Seila L. LLC*, No. 8:17-

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cv-1081, 2017 WL 6502722, at *2 (C.D. Cal. Sept. 1, 2017) (quoting *Tilton v. SEC*, 824 F.3d 276, 286 (2d Cir. 2016) and citing *John Doe Co.*, 849 F.3d at 1135).

Here, Plaintiffs do not demonstrate any "immediate or ongoing harm," *John Doe Co.*, 849 F.3d at 1135, to themselves from the Board's alleged violation of the Vermont Constitution's separation-of-powers provisions. Plaintiffs claim that the Vermont Constitution does not allow "the Board to forcibly merge school districts" because it does "not allow the Legislature to delegate the power to form and dissolve municipal governments to an unelected agency of the Executive Branch." Compl. ¶ 293. However, as discussed above, the Board's creation of the new union school districts does not inflict any immediate or ongoing harm to Plaintiffs because their existence, authority and operations "shall not be construed to limit or alter the authority or responsibilities" of the Plaintiff districts until July 1, 2019. Articles of Agreement, Article 12. Similarly, the Plaintiff districts are not required to transfer operating surpluses, fund balances, debts or school-related real and personal property to the new union school districts until June 30, 2019. *See id.*, Articles 5(A)-(C) & 6(A).

Plaintiffs' other allegations of constitutional violations in connection with the Board's Order do not, in themselves, demonstrate the requisite likelihood of irreparable harm. Plaintiffs' claim that the Board's Order "failed to provide any due process to the merged districts," Compl. ¶ 375, is not *per se* irreparable harm. *See Karen L. ex rel. Jane L. v. Health Net of N.E.*, 267 F. Supp. 2d 184, 191 (D. Conn. 2003) (noting that "[w]ith regard to procedural violations, including constitutional due process claims, a plaintiff must independently establish irreparable harm in order to support preliminary relief"); *see also Barrett v. Harwood*, 967 F. Supp. 744, 746 (N.D.N.Y. 1997) ("Plaintiffs' allegation of a due process deprivation, without more, does not establish irreparable harm").

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Plaintiffs' constitutional takings claim (Compl. Count III ¶¶ 300-15) also does establish "actual and imminent" irreparable harm, *Freedom* Holdings, 408 F.3d at 114, because Plaintiff districts do not allege that any of their assets have been or imminently will be transferred to the new union districts prior to June 30, 2019. Likewise, Plaintiffs fail to establish irreparable harm through their Common Benefits claim's conclusory and speculative allegation that "[t]he students in schools with voluntary mergers receive substantially more favorable financial treatment than the students in schools with forced mergers . . . ." Compl. ¶ 319. "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus, a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." 11A Charles A. Wright, *et al., Federal Practice & Procedure* § 2948.1 (3d ed.).

Plaintiffs fail to quantifiably demonstrate (or even specifically allege) that differing distributions of small school grants and merger incentives currently deny or will imminently "deny substantially equal educational funds to schools and students" in violation of the Common Benefits clause based on whether their school districts accepted voluntary merger. Compl. ¶ 328. Plaintiffs' "[b]road conclusory statements about the likelihood of harm will not suffice" and "[b]are allegations of what is likely to occur are of no value; the movant must, instead, *substantiate* the claim that irreparable injury is likely to occur." *Calif. Ass'n of Private Postsecondary Schs. v. DeVos*, 2018 WL 5017749, at *7 (D.D.C. Oct. 16, 2018) (internal citations and quotation marks omitted).

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Likewise, Plaintiffs fail to substantiate any actual or imminent irreparable harm from Plaintiffs' claim that mandatory school district mergers violate the Vermont Constitution's Chapter II, section 68 requirement that "a competent number of schools ought to be maintained

in each town unless the generally assembly permits other provisions . . . ." *See* Compl. ¶ 343. Plaintiffs do not allege (nor could they) that the Board's Order closes or imminently will cause the closure of any schools in the merged districts. Indeed, the Default Articles of Agreement imposed by the Board's Order expressly bar closure of any schools in the merged districts for at least two school years, absent local electoral approval. *See* Default Articles of Agreement, Article 4; *see also* 2015 Vt. Laws No. 46 § 3(a) ("It is not the State's intent to close schools and nothing in this act shall be construed to require, encourage, or contemplate the closure of schools in Vermont.").

2. Plaintiffs' Alleged Confusion or Uncertainty Over The School Merger Process Does Not Constitute Irreparable Harm

Plaintiffs make the broadly conclusory and unsubstantiated allegation that "[t]he Board's order has created significant confusion among the taxpayers, parents, board members, and schoolchildren in districts being force-merged." Compl. ¶ 198; *see also* Mot. at 12 (speculating that possibility "that two sets of ballots will be presented to the electorate on the same Town Meeting Day" to elect members to the separate boards of both the Plaintiff district school boards and the new unified school districts "is likely to create confusion for voters"); *id.* at 16 (asserting existence of "Irreparable Harm From Uncertainty in Budgeting Process"). However, "[b]y definition, uncertainty falls short of the type of actual and imminent threat needed to show irreparable injury." *Calif. Ass'n of Private Postsecondary Schs.*, 2018 WL 5017749, at *7. Also, "[p]ossible confusion in the minds of the voters is generally not a sufficient basis to enjoin an election because the voters' understanding of the issues is itself a part of the political process." *Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 553 N.W.2d 679, 686-87 (Mich. App. 1996).

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B. Plaintiffs' Requested Injunction Would Harm a Number of Nonparties

When a preliminary injunction is sought, courts "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "The movant bears the burden of establishing that the relevant factors," including the potential harm to other parties, "calls for the imposition of a preliminary injunction." *Id.* Plaintiffs' motion should be denied because the injunctive relief it seeks would cause substantial harm to a number of nonparties.

The Board's Order merged 45 districts and contemplated four additional conditional transitions. Roughly half of the districts as to which the Board took action have not filed suit.[29] Specifically, the Albany, Barre City, Barre Town, Barton, Bennington, Bradford, Brattleboro Union, Brownington Union, East Montpelier, Enosburg, Guilford, Hardwick, Missisquoi Union, Orleans, Oxbow Union, Putney, Shaftsbury, Spalding Union, Swanton, Union High School No. 32, Woodbury, Woodford, Cambridge, and Orwell school districts have not sued. A preliminary injunction would cause substantial harm by blocking transitional steps necessary for the nonparties that will be educating the students residing in most of those districts to prepare for the next fiscal year.

More specifically, the injunction requested by Plaintiffs would block school districts including the Windham Southeast Unified Union, the Franklin Northwest Unified Union, the

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[29] 22 of the districts ordered to merge are Plaintiffs in this case and three more districts are Plaintiffs in related cases. Athens, Barnard, Berlin, Calais, Dummerston, Franklin, Glover, Grafton, Greensboro, Highgate, Irasburg, Lakeview Union, Middlesex, Montgomery, Newbury, Pownal, Richford, Sheldon, Stannard, Westminster, Windham, and Worcester are Plaintiff school districts in this case. Huntington, Stowe, and the Elmore-Morristown Unified Union are Plaintiff school districts in related cases.

Oxbow Unified Union, the Washington Central Unified Union, the Enosburg-Richford Unified Union, Orleans Southwest Elementary, Orleans Central Elementary, and Southwest Vermont Union Elementary, from taking necessary steps to prepare for the next fiscal year and become fully operational. The requested injunction would bar each of these nonparties from electing a board, adopting a budget, and taking all other necessary steps to prepare for next year.

The harm to these new districts that would be caused by Plaintiffs' proposed injunction would be magnified by the number of steps the new districts need to complete to be fully operational by July 1, 2019. Among other things, each new district needs to hold an organizational meeting to swear in a transition board, elect a permanent board, and obtain voter approval for a budget. All three of these steps are subject to 30 to 40-day warning and notice requirements. *See* 17 V.S.A. § 2641. Taking into account the time needed to hold board meetings, and the possibility that an initial budget would fail, requiring a response and an additional vote, the impact of Plaintiffs' proposed injunction on the ability of new nonparty districts to prepare for next year would be particularly severe.

Because the injunctive relief Plaintiffs seek would harm nonparties, Plaintiffs have failed to carry their burden and Plaintiffs' motion should be denied. *See Taylor*, 2017 VT 92, ¶ 19.

C. Plaintiffs Are Unlikely to Succeed on the Merits

The third factor Plaintiffs must establish to pursue preliminary injunction is "likelihood of success on the merits." *Taylor*, 2017 VT 92 ¶ 19. Defendants have moved to dismiss each of the claims Plaintiffs seek to assert for the reasons described in Section I. For substantially the reasons set forth in Section I above, Plaintiff has failed to carry their burden of establishing that they are likely to succeed on the merits in this case. Because Plaintiffs have failed to carry their

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burden of establishing that they are likely to succeed on the merits, their motion should be denied. *Id.*

D. The Public Interest Weighs Strongly Against an Injunction

The final factor Plaintiff must establish is that the injunction they seek would further the public interest. *See Taylor*, 2017 VT 92 ¶ 19. The Order Plaintiffs challenge was the product of an extensive review of existing education governance structures ordered by the legislature in response to a drop in Vermont's K-12 population "from 103,000 in fiscal year 1997 to 78,300 in fiscal year 2015." 2015 Vt. Laws No. 46 § 1(a). The Secretary of Education and State Board of Education reviewed thousands of pages of materials and conducted a detailed review of the structure of districts that were not in preferred structures as defined by Act 46.

After considering a voluminous record and holding formal conversations with school board representatives about alternative governance proposals, the Secretary proposed a 189-page plan to the Board of Education. *See* Proposed Statewide Plan for School District Governance, 2015 Acts and Resolves No. 46, Sec. 10(a).[30] The plan was accompanied by extensive supporting appendices, including a 142-page discussion of Section 9 proposals and conversations and a 201-page analysis of common data points for districts that submitted proposals. *Id.*

"The Board and each of its members invested a significant amount of time reviewing and contemplating" the plan "as well as the Section 9 Proposals and all other written materials submitted to the Board." Final Report at 7. The Board also asked every district that submitted an alternative proposal to respond to questions and identify any errors in the Secretary's plan and provided each district with an opportunity to discuss the proposal again during a public hearing.

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[30] The Secretary's proposed plan, including its supporting appendices, can be found at https://education.vermont.gov/content/secretarys-proposed-plan-under-act-46-sec-10.

See July 11, 2018 Memorandum at 1, 3.[31] After extended deliberations, the Board published a 38-page final report and order, together with Default Articles of Agreement for each new unified district.[32] The order merged 45 districts, conditionally required an additional four transitions, and did not alter the governance structure of 47 districts.

The Board's decision and order were issued pursuant to express statutory authority in pursuit of legitimate public policy goals and are entitled to deference from the Court. *See In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, ¶ 16 (Court should defer when considering an "action[] wherein an agency is relying on its particular expertise to make a determination that is legislatively entrusted to the agency."). The public interest favors enforcing, not enjoining, the Board's order because it is consistent with the legislature's decision through Act 46 about how best to respond to substantial demographic shifts within the State.

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[31] The memorandum is available at https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-memo-school-districts-submitted-section9-proposals-update-july11.pdf.

[32] The report and Default Articles are available at https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.

DATED at Montpelier, Vermont this 30th day of January 2019.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
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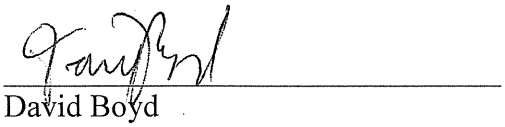
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2019, I served *Defendants' Memorandum of Law in Support of Their Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injuction* by sending same via first class mail, postage prepaid, to the following:

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STATE OF VERMONT

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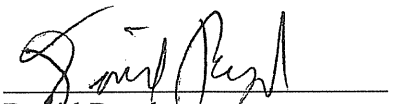
By: 

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