

AGENCY OF EDUCATION

Barre, Vermont

TEAM: School Governance Team

ITEM: Will the State Board of Education approve the proposed State Board Rule 3400 series regarding “Alternative Structures” under Act 46 (2015), as revised in response to public comments received, and authorize the Agency of Education to continue the administrative rule-making process by filing the final proposed rules with the Office of the Secretary of State and submitting them to the Legislative Committee on Administrative Rules for its review?

SECRETARY’S RECOMMENDED ACTION:

That the State Board of Education approve the draft revisions to the proposed State Board Rule 3400 series regarding “Alternative Structures” and authorize the Agency of Education to continue the administrative rule-making process by filing the final proposed rules with the Office of the Secretary of State and submitting them to the Legislative Committee on Administrative Rules for its review.

STATUTORY AUTHORITY: 16 V.S.A. § 164; 2015 Acts and Resolves No. 46

BACKGROUND INFORMATION; PUBLIC COMMENTS; PROPOSED RULE REVISIONS:

In Act 46 of 2015, the Legislature declared that a school district is best able to meet the educational and fiscal goals identified in that Act (“Goals”) if the district:

- It is *responsible* for the education of its students in prekindergarten through Grade 12;
- Is its own supervisory district (i.e., a single-district supervisory union);
- Has an average daily membership (“ADM”) of at least 900; and
- Is organized in one of the four most common operating/tuitioning structures.

The Legislature acknowledged, however, that such “preferred structures” were not always “possible or the best model to achieve [the Goals] in all regions of the State.” In these situations, Act 46, Sec. 5(c), stated that an “alternative structure” – which it defined as a *supervisory union with multiple member districts* – can meet the Goals, particularly if it manifests certain specified characteristics.

Act 46 incorporated several existing programs and created two new ones to provide tax rate reductions and other transitional assistance to unified union school districts created under the longstanding process set out in 16 V.S.A. §§ 701-724. These “voluntary merger” programs include several that explicitly support creation of “alternative structures” – such as the Regional Education District (“RED”), Side-by-Side, and Modified Unified Union School District programs.

If a school district will not be in a newly merged district by July 1, 2019, then Act 46, Sec. 9 requires the school board of the district to perform three tasks:

1. Self-evaluate the district's current ability to meet the Goals;
2. Have conversations with other nearby districts to discuss how the goals can be met regionally; and
3. Submit a proposal, individually or jointly with other districts, that:

(A) proposes to retain [the district's] current governance structure, to work with other districts to form a different governance structure, or to enter into another model of joint activity;

(B) demonstrates, through reference to enrollment projections, student-to-staff ratios, the comprehensive data collected pursuant to 16 V.S.A. § 165, and otherwise, how the proposal in subdivision (A) of this subdivision (3) supports the district's or districts' ability to meet or exceed each of the goals set forth in Sec. 2 of [Act 46]; and

(C) identifies detailed actions [the district] proposes to take to continue to improve its performance in connection with each of the goals set forth in Sec. 2 of [Act 46].

Section 9 requires that school boards complete these tasks by November 30, 2017.

This is important for two very basic reasons. First, the State Board needs districts to tell it with whom they would like to be partnered, or the State Board will not be able to support local intent to the full extent possible. Second, *all* districts need to do due diligence to make sure that if they can collaborate, they do so in ways that improve support for children and are affordable. For example, some regions have yet to fully take advantage of unification of special education to improve services and reduce costs. The process under Act 46, Sec. 9 is a chance to look at available evidence locally to double check they have done all they can to ensure better value for children, given existing structures.

Act 46, Sec, 10 contemplates that the Secretary will review the proposals and have "conversations" with the districts when developing the *proposed* statewide education governance plan (due June 1, 2018). Section 10 authorizes the State Board to take testimony regarding these proposals when preparing the *final* statewide plan (due November 30, 2018).

The Secretary's proposed plan is a necessary compilation of local proposals and intent of Act 46, and will be the starting point for State Board discussions of proposals submitted by school boards under Sec. 9. The year interval between the submission of school board proposals (November 30, 2017) and State Board adoption of a final plan (November 30, 2018) allows time for public review, discussion, additional information, and any necessary adjustment.

Although Act 46 recognizes the possibility of "alternative structures" in addition to those that are eligible under the voluntary merger programs, and although it includes some related requirements and guidance, the State Board determined that the process by which a district or group of districts will propose an "alternative structure" under Act 46, Section 9 lacks the level of specificity that is required for "voluntary mergers" under 16 V.S.A. §§ 701-723.

In response to public requests for more information regarding the process and criteria under which Section 9 proposals would be reviewed, the State Board approved a motion on June 21, 2016 to “develop and adopt rules regarding the criteria and processes” for considering proposals for an “alternative structure” in the context of the final statewide education governance plan. As part of the same motion, the State Board requested the Agency to prepare draft rules and related draft guidance for its review.

The State Board approved the draft guidance at its July 29, 2016 meeting. The State Board chose to issue this guidance so that districts would have some preliminary information even as the rules worked their way through the State Board’s rule-making process.

At its August 2016 meeting, the State Board approved the initial draft of proposed State Board Rule 3400. The draft proposed rules represented the Agency’s best effort to reflect the Board’s June 21, 2016 motion by grounding the rules in the requirements and guidance provided in law and reflecting the State Board’s discussion, analysis, and recommendations about how to implement the law as written made during its 2016 annual retreat and incorporated into the July 29, 2016 guidance.

At the State Board’s direction, the Agency initiated the administrative rule-making process by pre-filing the first draft of the proposed rules with the Interagency Committee on Administrative Review (ICAR) on August 30, 2016.

At its October 10, 2016 meeting, the ICAR reviewed and approved the proposed rule, with three minor recommended changes (one typographical error and two instances of clarification).

The Office of the Secretary of State issued a Memorandum on October 21, 2016 stating that it:

- had received the proposed rules
- would publish an advertisement regarding the proposed rules on November 3, 2016, and
- had established an adoption deadline of June 21, 2017.

Shortly thereafter, the Agency posted links to data sets, spreadsheets, and other materials in one location on its School Governance / Guidance webpage that provide the data necessary both for study committees to analyze and prepare a merger proposal under Title 16 and for school districts to analyze and prepare a proposal under Act 46, Sec. 9.

A hearing at which the public could provide testimony in person or by conference call was held at the Agency offices on December 12, 2016. Forty-five individuals submitted written comments, either directly to the Agency or through the Vermont School Boards Association. In some cases the written comments represented the written version of the verbal testimony provided on December 12.

The public comment period concluded on December 20, 2016.

The Agency created a detailed table that directly quoted all of the written comments received and responded in detail to each comment ("[Table](#)"). The Agency also prepared a draft revised version of the proposed rules that incorporated each suggestion that could be made under existing law

("Draft Proposed Rules Revisions"). Some requested changes could not be made because they were not consistent with statute as written and the State Board does not have authority to change the law. For example, the draft revisions could not include a requested extension of the November 30, 2017 deadline by which school boards must submit proposals because the Legislature established that date in Act 46, Sec. 9.

In contrast, among other things, the Draft Proposed Rules Revisions:

- substantially simplify and clarify the proposed rules as requested by the public
- clarify that districts that have formed an “alternative structure” under one of the voluntary merger programs are considered to have complied with Act 46, Sec. 9 without the need for further self-analysis, regional conversations, and proposals under Sec. 9
- change the “tone” of the rules to respond to complaints that the first version was confrontational
- remove any description or paraphrasing of the process or criteria that the public could regard as the State Board’s interpretation of Act 46 and replace them with simple, direct quotes from the Act
- clarify that the State Board expects that study committees proposing mergers review and analyze precisely the same data that the rules expect districts making Sec. 9 proposals to review and analyze (Note: this is data that is easily available locally or on the Agency’s School Governance / Guidance webpage)
- remove references to any data not *easily* accessible on the Agency’s School Governance / Guidance webpage or otherwise

In addition to replying directly to public comments, the response column of the Table provides: information and links to grants available to reimburse consulting and legal services incurred in connection with preparation of a Sec. 9 proposal (\$5, 000, \$10,000; and \$20,000); links to the data on the Agency’s School Governance / Options webpage; and links to examples of merger proposals that included analysis of the data in different ways.

The Agency presented the Table and Draft Proposed Rules Revisions to the State Board at its February 21, 2017 meeting, with the expectation that the Board would discuss, amend, and possibly approve the revised rules at its March 21, 2017 meeting.

The March 21, 2017 agenda published in advance of that meeting included as Item M the Board’s intention to discuss and potentially vote on the Draft Proposed Rules Revisions so that the rules could be advanced to the Legislative Committee on Administrative Rules for its review. The Board took testimony on the proposed rules from citizens who appeared at the March 21, 2017 meeting. Eleven individuals, including several who had provided verbal testimony and/or written comment during the public comment period, requested the opportunity to testify verbally. The State Board heard the testimony, accepted the written version of the testimony when provided by the individual testifying, and accepted an additional five pieces of written testimony submitted by individuals not in attendance. ([March 2017 written comments](#))

As a result of the public testimony given during the March meeting, and because the Board welcomed two new board members at that meeting, the Chair decided to delay the proposed

discussion and vote on the Draft Proposed Rules Revisions to its April 18, 2017 meeting. This decision gave Board Members more time to reflect on the proposed rules.

The verbal and written comments provided in connection with the March 21 hearing predominantly repeat the same concerns expressed in the comments provided during the public comment period, for example:

- The presumption that the State Board:
 - will review the proposals submitted under Sec 9 through a “one-size-fits-all” lens
 - will not value the benefits of rural and small schools
 - will not review the proposals in a “fair and transparent” manner
- Dissatisfaction with and requests that the State Board:
 - Extend legislatively-established deadlines
 - Include an additional period of time (which would require an extension of the legislative deadlines) during which the State can see if already merged districts achieve the goals before requiring other districts to comply with the three items in Sec. 9
 - Authorize creation of experimental municipal structures not currently permitted under Vermont law
- Requests that the State Board consider *particular* factors not *explicitly* listed in proposed rules 3450.5 – 3450.18 (i.e., the examples of factors that the State Board will consider when reviewing a proposal)
 - NOTE: There have been and continue to be written and verbal complaints that the rules are too long and “require” an overwhelming list of data and analysis not similarly required of merger proposals. As a result, the Draft Proposed Rules Revisions have addressed requests to include other particular factors itemized in public comments as follows:
 - Immediately preceding the list beginning at 3450.5:
 - A bold-faced, large-font statement: “The following, non-exclusive list of information, which is the foundation of a study committee’s proposal to create a UUSD, is fundamental to a district’s self-evaluation, conversations with other districts, and proposal under Act 46, Sec. 9”
 - A separate italicized statement: “FERPA NOTE: If demographic or other information cannot be made public without violating [FERPA] or other federal or Vermont law, then data can be referenced in another manner – e.g., by multi-year aggregates.”
 - Proposed rule 3540.18, the final rule in this series, states: “Any other data or analysis that the district(s) wishes to include”

Public comments given in connection with the March 21, 2016 meeting also reflect dissatisfaction with the results of Town Meeting Day merger votes, with the legislatively-created merger options approved by the voters on that day, and with Act 46 in general.

In addition, similar to submissions made during the formal public comment period, the verbal and written March 21 statements reveal a presumption that the State Board will respond in a particular manner to any specific proposal that might be offered under Section 9, even though the district's analysis and proposal are as yet hypothetical.

Comments from March 21 and otherwise have stated a need to obtain preliminary judgement from the State Board regarding whether a district's proposal is likely to be included as part of the Board's final statewide plan to be issued by November 30, 2018. To date, the Agency's and State Board's attention has been primarily focused on voluntary merger proposals because: (1) merger proposals are statutorily-required to obtain State Board approval before they can be presented to the voters in time to meet voter-approval deadlines of either July 1, 2016 or July 1, 2017 and (2) proposals under Sec. 9 are not due until November 30, 2017, and are thereafter considered as part of the year-long process to develop the Secretary's proposal and the State Board's final proposed plan by November 30, 2018.

It does not make sense for the State Board to review "alternative structure" proposals under Sec. 9 or to commit to specific structures until all proposed merger activity is done, in case there are "orphan districts" that need to be brought into a structure. Once the voluntary merger process is substantially completed in mid-2017, the Board will have time and focus to devote to proposals submitted under Sec. 9.

Significantly, during the first six months of the year-long development phase of the State Plan, the Secretary is required to have "conversations" with the proposing districts and the State Board is authorized to accept testimony and request additional information. *It has been the Agency's assumption that as part of the "conversations" during the first six months, districts would be provided an opportunity to present additional data and analysis to address any questions or concerns raised by the Secretary.* Perhaps it would ease concerns if the rules formalized this assumption through the following amendment:

3440.3 Between November 30, 2017 and June 1, 2018, pursuant to Act 46, Sec. 10(a)(1), the Secretary shall:

- (1) "consider[]" each proposal submitted under Sec. 9 in connection with his or her development of the proposed Statewide Plan; ~~and~~
- (2) have "conversations" with the districts that submitted a proposal under Sec. 9 and other districts; ~~and~~
- (3) accept additional data and analysis offered by a district in response to the Secretary's questions or stated concerns.**

Finally, there have been ongoing complaints that it is impossible for districts to submit a proposal under Sec. 9 by the November 30, 2017 deadline because the State Board's proposed rules are not yet final. The State Board chose to issue guidance and adopt rules to respond to public request for more information. *The most essential pieces of information have remained constant from the guidance issued in July 2016, to the first draft of the proposed rules approved in*

August 2016, to the Draft Proposed Rules Revisions made public in February 2017 and to be discussed and potentially approved in April. For example:

- Act 46, Sec. 9 requires districts that have not voluntarily merged into a preferred or alternative structure to perform the three tasks, which are listed on page 2 of this recommendation, by November 30, 2017
- The Secretary will review the proposals and have “conversations” with the districts while preparing the proposed statewide plan (November 30, 2017 – May 31, 2018) per Act 46, Sec. 10
- The State Board can accept testimony and request additional information while preparing the final statewide plan (June 1, 2018 – November 30, 2018) per Act 46, Sec. 10
- The Secretary and State Board expect that districts performing the three tasks required by Sec. 9 will rely on the same sort of data (listed in the rules and available through the Agency’s School Governance / Guidance webpage) and conduct the same sort of analysis as a study committee that is proposing merger

The Draft Proposed Rules Revisions as written conform closely to the statutory language. Nothing in the rules will be a surprise to those who have closely read the statute.

POLICY IMPLICATIONS: Issuing rules regarding “alternative structure” proposals made per Act 46, Sec. 9 are intended to assist districts to understand the process for developing and submitting those proposals and to supply more detail regarding the data-review and analysis that the State Board expects of study committees presenting a merger proposal and school boards presenting a proposal under Sec. 9.

When the final statewide education governance plan is issued in November 2018, most districts that currently intend to submit a proposal under Act 46, Sec. 9 are going to be a member of a larger supervisory union (even if the State Board requires the district to merge with another district of similar structure).

Proposals submitted under Sec. 9 are an opportunity for each proposing district to provide information supporting its desire to be a member of a particular SU with certain other districts, and to explain how it intends to work with those other districts in a way that strategically and efficiently uses resources to improve opportunities for children and to meet the Act 46 goals throughout the region.

FISCAL IMPLICATIONS: The Secretary of State charges agencies a flat rate of \$2,200 for statutory publication of proposed rules. In addition, the Agency incurred costs for the public meeting it held to solicit public comment. All costs incurred by the Agency are treated as ancillary costs.

STAFF AVAILABLE: Donna Russo-Savage, Principal Assistant to the Secretary, School Governance

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