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October 19, 2020

Via E-mail and U.S. Mail

Chairman John Carroll
Vermont State Board of Education
P.O. Box 305
Norwich, VT 05055

Chairman Mark Tashjian
Vermont Council of Independent Schools
Burr & Burton Academy
57 Seminary Avenue
P.O. Box 498
Manchester, VT 05254

Re: Response to October 8, 2020 Secretary French Letter.

Dear Chairman Carroll and Chairman Tashjian:

On behalf of New England Kurn Hattin Homes for Children (“Kurn Hattin”), we appreciate Chair Carroll extending Kurn Hattin an invitation to attend the Vermont State Board of Education’s (“Board”) regular monthly meeting. We also appreciate your recognition of Kurn Hattin’s long history of service to youngsters. We will accept that invitation, with me attending as counsel for Kurn Hattin, along with Executive Director Stephen Harrison, and Assistant Executive Director Sue Kessler.

We are also writing to respond briefly to Secretary French’s recommendation for a review of Kurn Hattin’s status as an approved independent school by the Council of Independent Schools (“Council”) and, in the interim, a review by the Board.

We understand that the Board will consider this request at the October 21st meeting. We are confident that the Board will conclude that a formal review is not necessary. Kurn Hattin would suggest that the better course would be to instead work collaboratively with the Board and Council to identify and promptly remedy any concerns with your constructive help. Kurn Hattin has had an excellent responsive working relationship with the Board, and sees no need for the formal review suggested by the Secretary.

I understand that your agenda has slated one-hour for this matter, and we would ask that we are afforded sufficient time for my clients to speak briefly, and then answer any questions of the Board relating to Secretary French's October 8 Letter. If your schedule does not allow for sufficient time, perhaps we could be provided further time at your November meeting before the Board votes on undertaking a review. Regardless, as explained below, I understand that this is not an evidentiary hearing, and that we would be afforded a full APA hearing at some later date if necessary. If I am incorrect, please let me know. We think working collaboratively will be the most efficient way to answer Board questions and address any concerns.

We would also appreciate the opportunity to provide information to the Council as appropriate, prior to it making any recommendation regarding this matter.

The purpose of this letter is to: (1) provide an introduction to Kurn Hattin, (2) briefly discuss the specific concerns that are raised by Secretary French, and (3) discuss the legal framework which governs the substance and process for any review.

I. Kurn Hattin's Mission in Vermont.

Kurn Hattin is a charitable organization, which operates a residential school located on a 280-acre campus in Westminster, Vermont. For over 125 years, Kurn Hattin has served children ages 5-15, whose families are experiencing a period of need or instability. Kurn Hattin provides children a safe, caring, and fun environment where they can excel academically, grow as individuals, and experience the joy of childhood.

Kurn Hattin is an Approved Independent elementary and middle school academic program. The school's classrooms are equipped with state-of-the-art educational technology. With a remarkably low student to teacher ratio of 8:1, students are provided with individualized support to meet each student's needs.

The school's academic program includes art, music, and physical education. In addition, there are numerous extra-curricular activities, including band, choir, horseback riding, arts and crafts, and competitive and intramural sports. In addition to the academic buildings, the campus includes nine residential cottages, a working farm, equestrian center, and athletic facilities.

Children come to Kurn Hattin Homes from Vermont, New Hampshire, and throughout the Northeast. Referrals come from a variety of sources, including many from former children and their families whose lives have been positively transformed by their experience at Kurn Hattin.

Kurn Hattin has typically served approximately 100 children at a time for several years. More recently, that number has been reduced to approximately 80 children in order to lower the number of children supervised by the house parents in each cottage. Currently, in response to concerns about the pandemic and after consideration of the best child to staff ratio both residentially and academically, Kurn Hattin Homes has further reduced its population to approximately 60 children.

Most of Kurn Hattin's families pay little or nothing to attend. Approximately 95% of the school's funding comes from charitable contributions from outside supporters and alumni. Kurn Hattin is on very solid financial footing and is an extremely valuable resource to the children and families it serves.

As discussed in more detail below, the organization has worked very hard to enhance its academic programs and offerings in recent years. Kurn Hattin Homes is also proud of improvements to the residential program, including the hiring of a new Director of Residential Services in January 2020 who brought more than twenty-five years of experience as a residential professional to the program and who has overseen significant enhancements in all areas of residential life. Additional changes in the structure of the counseling and health services departments have occurred to ensure that nurses and counselors are now available during the afternoon and evening hours, which has strengthened the support given to the children each day.

In addition to being an Approved Independent School by the Vermont Agency of Education (“AOE”), Kurn Hattin Homes is also pursuing accreditation by the New England Association of Schools and Colleges.

Kurn Hattin provides a top quality educational program, including individualized attention, low student-teacher ratios, and highly qualified teachers. Kurn Hattin has greatly improved its already robust academic program in recent years. The school is particularly proud of three recent achievements.

First, Kurn Hattin has become a recognized PBiS school (Positive Behavioral Interventions and Support), which is the implementation of a proactive, school-wide, systems approach to strengthening community and improving social and academic competence for all students. In 2019, Kurn Hattin was the only independent School in Vermont to achieve the “Merit School” status with VT PBiS.

Second, Kurn Hattin has implemented restorative practices throughout its program (academic and residential). These practices promote inclusiveness, relationship-building, and problem-solving, through such restorative methods as circles for teaching and conflict resolution as well as conferences that bring all those affected together to address behavioral concerns. Instead of a punitive, consequence-based approach, children are encouraged to reflect on, and take responsibility for their actions and come up with plans to repair harm. These practices allow Kurn Hattin to utilize an 80/20 approach to managing children’s behavior, such that the school spends 80% of its time and resources on proactively building community through circle practices and 20% on intervention.

Third, Kurn Hattin has significantly enhanced its overall curriculum throughout its K-8 program. These enhancements include implementing a new writing curriculum framework, a new literacy intervention program (F&P LLI), Eureka Math programs for the lower school, CPM (College Preparatory Mathematics) for the middle school, and yearlong coaching programs. Coupled with these new curricula the school has implemented the MAP assessment program wide (NWEA) as a progress monitoring tool to inform instruction.

In addition to these enhancements, the school has invested heavily in the professional development of its teaching staff and the technology used in the school. Kurn Hattin’s teaching staff are all highly qualified, and, although not required, most are licensed by the AOE.

Through its relationship with the Westminster School District and the Windham Northeast Supervisory Union, Kurn Hattin participates in several federal programs that provide valuable

support to its students under the Elementary and Secondary Education Act. Specifically, Kurn Hattin receives support for remedial help in math and writing pursuant to Title 1; support for professional development pursuant to Title 2a; and support for student health and wellness programs pursuant to Title 4.

With respect to the finances of Kurn Hattin, there can be no dispute that the school has the financial capacity to carry out its educational mission. As can be determined from the financial statements recently provided to the Board, the school has a very strong balance sheet.

II. The Concerns Raised By the Secretary Do Not Warrant Formal Review.

In his October 8 letter, Secretary French cites two concerns identified in the 2019-2021 Licensing Report by the Department for Children and Families (“DCF”) Residential Licensing and Special Investigations Unit, as a basis for his recommendation for a review. With due respect to Secretary French, these two issues were properly and timely addressed, and do not rise to the level of warranting a formal review. Kurn Hattin is committed to cooperating with the Council and Board to demonstrate this point.

A. Reporting Incidents of Abuse.

All Kurn Hattin employees are mandatory reports of child abuse by law. Kurn Hattin takes this obligation very seriously and educates its employees with respect to this obligation on an ongoing basis and will continue to do so.

The Licensing Report identifies three incidents which occurred in February 2019 and were not reported to DCF until April 2019. DCF made a conclusion that the three incidents were not timely reported to DCF based solely on the facts that the incidents were said to have occurred in February 2019, but not reported to DCF until April 2019. This conclusion is wrong.

The three incidents referred to in the Licensing Report are incidents in which a student was alleged to have acted inappropriately with three other students in separate incidents occurring in February 2019. As the Licensing Report notes, the students who made these reports did not report them when they occurred, but waited until after the alleged perpetrator was no longer enrolled at Kurn Hattin. She was discharged from Kurn Hattin on March 8, 2019. Further, the three incidents were reported to DCF on two different dates – one report was made on April 2, 2019 and two were reported on April 9, 2019, which, we believe, demonstrates that they were reported to DCF when Kurn Hattin learned about the incidents. Otherwise, all three incidents would have been reported to DCF at the same time.

Even if it is found that these incidents were not timely reported, Kurn Hattin can ensure the Council and the Board that remedial action has been taken to educate employees on the policies and practices regarding this important obligation.

B. Background and Out-of-State Child Abuse Registry Checks.

We would also like to set the record straight on four issues raised by DCF regarding background and out-of-state child abuse registry checks. First, Kurn Hattin does (and always has) conducted background checks on new hires as required by the Board's statute, 16 V.S.A. § 255. The Licensing Report however, faults Kurn Hattin for failing to renew background checks on several employees within three years after the initial background check upon hire. A renewal of background checks is not required for approved independent schools.

Second, the Licensing Report also faulted Kurn Hattin for failing to conduct out-of-state child abuse registry (the "Registry") checks for employees pursuant to recent changes to the Family First Prevention Services Act ("FFPSA"). The 2018 changes to the FFPSA amended Title IV-E of the Social Security Act requiring Registry checks. Kurn Hattin did not conduct these checks for a period of time because it was not clear whether a school such as Kurn Hattin, which does not receive federal funds pursuant to Title IV-E, is required to do so pursuant to the FFPSA. Kurn Hattin was also waiting to hear if Vermont had opted for the two-year delay, under the terms of the FFPSA, for the implementation of these requirements if they were indeed required. Such checks are fully in effect currently.

Third, the statement that Mr. Harrison directed human resources to not follow FFPSA requirements is misleading and not accurate. As Mr. Harrison will further explain, his instruction was to wait for clarity regarding the question of whether Kurn Hattin was required to conduct these checks before conducting them as the process is cumbersome and time consuming. Once that question was answered in the affirmative, Kurn Hattin conducted these checks as required.

Finally, the Licensing Report incorrectly infers that new hires were potentially left alone with children prior to Kurn Hattin receiving the results of background checks. This inference was made solely on the basis that Kurn Hattin noted that, on some occasions, employees begin work before the background check results are received because it typically takes 30-45 days to obtain results. DCF's inference is wrong. All new hires at Kurn Hattin undergo an extensive training process, which includes direct supervision for several weeks. Accordingly, there is ample time to receive the results of background checks before new hires complete training and are left with children unsupervised.

As indicated above, we provide this information informally to persuade the Board that the issues have been addressed and do not warrant a more formal review.

III. The Legal Framework and Process Regarding Approval and Board Oversight.

Independent schools' constitutional right to exist and parents' constitutional right to send their children to such schools have long been established. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 45 S. Ct. 571 (1925). However, the State may impose reasonable regulations on such schools. *Id.* at 534. Under Vermont law, an independent school must either be approved or recognized in order to operate in the state. We think a brief discussion of the scope and standards with respect to any review will be helpful to frame the issues prior to the October 21 meeting.

A. Approval and Oversight by the Board.

The Board's jurisdiction to take certain actions, just like any other state agency, is governed by statute and must be construed strictly according to the legislative intent. *See In re Mountain Top Inn & Resort*, 2020 VT 57 (Vt. July 24, 2020) (holding that a state agency's authority in a specific domain is limited to the authority delegated to it by the legislature.); *see also In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 444 A.2d 1349 (1982) ("an agency must operate for purposes and within bounds authorized by its enabling legislation, or court will intervene.").

Pursuant to statute, the Board:

shall approve an independent school that offers elementary or secondary education if it finds, after opportunity for hearing, that the school provides a minimum course of study pursuant to section 906 of this title and that it substantially complies with the Board's rules for approved independent schools.

16 V.S.A. §166(b). The Board has adopted a series of rules regarding independent school approval. *See* School Board of Education Rules 2220 – 2227, and 2228 (herein after "SBE Rule").

When considering an application for approval, the Board must grant the application if it meets the following requirements set forth in SBE Rule 2226:

- the description of the school in the approval application must be accurate;
- the course of study offered is adequate to meet the educational purposes of the school as provided by 16 V.S.A. §906 and provide a minimum course of study that is age and ability appropriate;
- the school has available support services necessary to meet the requirements of a minimum course of study and its educational purposes, including but not limited to library services, administrative services, guidance and counseling services and a system of records by which pupil progress may be assessed;
- the school has classroom, laboratory, library and other facilities necessary to operate its program,
- the school employs professional staff who are qualified by training and experience in the areas in which they are assigned as measured by the following:
 - For teachers, a minimum of a bachelor's degree in their field of instruction or substantially equivalent time in training and experience in their field of instruction.
 - For all professional staff, relevant experience and/or training in other programs not related to teaching or administrative duties to which they are assigned.
- the school has an adequate program of continuing professional staff development as demonstrated in the application;

- the school employs a sufficient number of professional staff for the population served;
- the school satisfies lawful requirements relative to its facilities, fire drills, and the immunization of its pupils against disease;
- the school maintains a register of the daily attendance of each of its enrollment;
- the school maintains an operating schedule that includes a total number of instructional hours each year which is not less than that required of a public school serving the same grades;
- the school has the financial capacity to carry out its educational purposes for the period of approval.

As pointed out by the Secretary in his October 8 letter, Kurn Hattin's application for approval also required it to supply evidence of compliance with local, state and federal requirements pertaining to health and safety of students. *See* SBE Rule 2225.7. Kurn Hattin has satisfied all of these requirements and its approval was last renewed on June 22, 2017 and expires on June 30, 2022.

Following approval, the Board is authorized to "revoke, suspend, or impose conditions upon the approval of an approved independent school, after having provided an opportunity for a hearing. . . ." 16 V.S.A. § 166(5). The grounds for taking such action are a finding that: (1) the school substantially fails to comply with the minimum course of study, (2) fails to demonstrate that the school has the resources required to meet its stated objectives, (3) fails to comply with statutory requirements or the Board's rules for approved independent schools, or (4) fails to report required information regarding its enrolled students pursuant to 16 V.S.A. 166(b)(4). Further, SBE Rule 2222.7 specifically provides that "[a]pproval of an independent school shall be revoked . . . by the board based on a finding that the school no longer meets the criteria for approval listed in section 2226."

The Secretary cites SBE Rule 2225.7 (compliance with local, state, and federal requirements pertaining to health and safety of pupils) as the basis for the Board's authority consider revocation, suspension or imposition of conditions on Kurn Hattin's approval. Kurn Hattin agrees that the issues raised by the Secretary fall within this provision of the Rule.

However, it must be noted that the scope of any review must be limited to those issues specifically enumerated as requirements for approval and further limited to the relevant period of time which begins in June 2017 when Kurn Hattin's approval was last renewed.

B. The APA Hearing Process.

As we understand it, the October 21st meeting has not been noticed as an evidentiary hearing, and the Board is not commencing a hearing to take evidence on the record. Chair Carroll's October 13th email indicates that the October 21st meeting will allow the Secretary to present "evidence", but we infer not in the formal sense of affording Kurn Hattin with the required evidentiary hearing on the record, and the fair opportunity to be heard as provided by 16 V.S.A. § 166(b)(5)

and SBE Rule 2222.8. Kurn Hattin has not been allocated any time for witnesses or the presentation of evidence, nor have we been afforded the opportunity to cross-examine witnesses that would be testifying before the Board. Furthermore, the Council has not yet provided any recommendation as required by the Board Rules and Practices. SBE Rule 2222.7.

If a formal review does proceed after the October 21st meeting, however, we would appreciate confirmation on the following process.

First and foremost, the Board's Rules require that all hearings be conducted in accordance with 3 V.S.A. Chapter 25; SBE Rule 1232. As we understand it, the Secretary is required to investigate complaints relating to approval standards, and to our knowledge no such investigation has been commenced or completed, nor has Kurn Hattin been informed of any results. SBE Rule 2222.8. The Secretary is required to appoint at least two investigators including a member of the Council. This is how the Agency and the Board handled previous. At this juncture, the Secretary's October 8 letter cites only to records and conclusions it received from the Department of Children and Families, and the AOE has not yet undertaken a required AOE investigation of the allegations. Simply put, the Secretary must undertake his own investigation, and inform Kurn Hattin of its results, prior to any hearing. SBE Rule 2222.8.

After that investigation is completed, and the results are reported to Kurn Hattin, a hearing officer would be appointed to conduct prehearing conferences, conduct any hearings, and prepare findings of fact and conclusions of law for a decision by the Board. SBE Rule 1236.1. We understand that the Board has appointed hearing officers in the past, and should do so in this case. A first pre-hearing conference would involve discussing information gathering needed and preparations for and timing of any formal hearing. SBE 1236.3. Kurn Hattin would identify subpoenas it wanted issued by the Board to obtain documents and depose witnesses in advance of any hearing. Furthermore, after gathering information, Kurn Hattin would fairly need time to prepare for a formal hearing.

Then, the Board would need to notice a contested case/APA evidentiary hearing. 3 V.S.A. Chapter 25; SBE Rule 1232. All hearings "shall be conducted in accordance with 3 V.S.A. Chapter 25"; SBE Rule 1231. The Board also has a "formal proceeding" rule which applies to 16 V.S.A. § 166 (Independent School Approval), indicating that the Board sits in a quasi-judicial capacity and makes a determination. The State Board of Education Rules and Practices, Series 2200, Independent School Program Approval, promulgated pursuant to authority from 16 V.S.A. § 166 and 16 V.S.A. § 2958(e), sets out the procedure for denial, revocation or suspension of the approval of an independent school.

The notice shall include the time, place and nature of the hearing, the legal authority for the hearing, and a reference to statutes and rules involved, and a statement of the matters at issue. All parties will have opportunity to respond and present evidence and argument on all issues involved. 3 V.S.A. § 809. The Board Chair, or hearing officer appointed by the Board, or a licensed attorney representing a party before the Board, may compel by subpoena the attendance and testimony of witnesses and the production of books and records. 3 V.S.A. § 809(h). The Rules of Evidence as applied in civil cases shall be followed. 3 V.S.A. § 810. A party may

conduct cross-examinations required for a full and true disclosure of the facts. 3 V.S.A. § 810(3).

We would anticipate that we would need four or five days of hearing time to present our evidence and cross-examine other witnesses, and would also want to subpoena witnesses and records in advance of the hearing. We are also afforded the opportunity to file written memoranda in support of our position no later than 5 days following the conclusion of a hearing. This 5-day requirement may be waived by the hearing authority for good cause. SBE Rule 1232.2.7. A written record will be produced. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. 3 V.S.A. § 809(g).¹

IV. Conclusion

As we stated at the outset, Kurn Hattin is fully prepared to work with the Council and the Board to fully address any concern and demonstrate that a formal review is unnecessary. In the event that the Council recommends formal action by the Board, we expect that Kurn Hattin will be provided the full due process rights that the law requires.

We look forward to the opportunity to respond to the Board's questions at the October 21st meeting. Please do not hesitate to contact me if there is any further information we can provide in the meantime.

Yours truly,



Gary F. Karnedy

Cc: Daniel M. French, Ed.D., Secretary, Vermont Agency of Education
Emily Simmons, General Counsel, Vermont Agency of Education

¹ With respect to the issue of confidentiality, we are aware that DCF has provided the Agency of Education with its licensing file regarding Kurn Hattin. Please note that the redactions of these documents are incomplete and, in some instances, improperly disclose the names of children or other identifying information. These documents are confidential and protected from disclosure by law and the Board should not reference them in any proceeding.