VERMONT
AGENCY OF EDUCATION
219 North Main Street, Suite 402
Barre, VT 05641 (p) 802-479-1030 | (f) 802-479-1835

MEMORANDUM

TO: Chair and Members, State Board of Education
FROM: Donna Russo-Savage, Principal Assistant to the Secretary, School Governance
SUBJECT: Analysis: multi-town district providing different opportunities based on town of residence (*including analysis under the Common Benefits Clause*)
DATE: 10/19/2015

The Office of Legislative Council employed me to provide nonpartisan legal advice to the General Assembly from November 1999 through September 2015. I focused on education law during the 2007 - 2015 Legislative Sessions.

Since at least 2010, the year in which RED incentives were enacted in Act 153, members of the General Assembly have questioned whether a multi-town merged district could provide different opportunities to its resident students by, for example, paying tuition for students who lived in what had been a tuitioning district prior to merger, but requiring students to enroll in the district-operated school if they lived in a member town that had been an operating district.

Prior to advising my legislative clients regarding the constitutionality of this arrangement in 2010 and after, I conducted (and updated) legal research and analysis. I I discussed this research and analysis with my colleagues at Legislative Council in detail and also with other legal colleagues.

During the summer of 2015 I formalized my handwritten notes of court cases and outlines of legal analysis by preparing a Memo to the File. Again, I discussed the memorandum and its analysis with colleagues both in and outside Legislative Council.

In order to allow you to review the research and analysis underlying my legal advice to the General Assembly regarding this issue, that analysis follows.

Question:

Two school districts are interested in merging to become a unified union school district: one district operates one or more schools for all resident PK/K–12 students; the other district pays tuition for the students in some or all of those grades. Can the newly merged PK-12 district require resident students who live in the first member town to enroll in a district-operated school but provide the option of enrollment in that school or tuition vouchers (to any public or independent school) to resident students in the same grade who live in the second member town?

Short Answer:

A school district, no matter how many districts have merged to form it, is a single municipality, with one governing body, one budget, one group of voters, and one homestead tax rate. As a practical matter, it would be difficult for a district to provide different educational opportunities to district students in the same grade based upon their town of residence. More significantly, a school district would likely violate the Common Benefits Clause of the Vermont Constitution if it provided specific educational opportunities to one group of resident students and denied them to another group of resident students in the same grade based solely upon where they live.

I. Current Law and Structure

A. A school district is a single entity

A school district:

- is a single municipality, regardless of whether it is a town district, an incorporated district, a union school district (which includes unified union school districts), or a supervisory district;[1]
- has one elected governing body, the school district board, that is responsible for the education of all students residing in the district;
- has a single, district-wide budget approved by a commingled majority of all voters in the district;
- pays for the cost of educating all resident students (by operating a school or paying tuition); and
- has the same statewide education property tax rate for homestead property throughout the district.[2]

A school district is, in all respects, a single entity — even if the students for which it is organized live in different towns or villages within the district.

B. Students in the same grades are not treated differently

Under current law, school districts do not provide educational opportunities for students in one area of the district that are different from the educational opportunities provided to students in the same grade residing in a different area of the district. If the district operates one elementary school, then all resident elementary students enroll in that school; if the district does not operate a grade for which it is organized, then the district pays tuition for all students in that grade.

For example, a district organized to provide education for the students in one town, *e.g.* the Rutland City Supervisory District, does not require all grade 9 students who live on Temple Street to enroll in the high school it operates, but provide tuition vouchers to all grade 9 students who live on Pierpoint Avenue to be used at the public or approved

independent school of their choice. Similarly, a district organized to provide education to students living in more than one town, *e.g.* the Twinfield Unified Union School District, does not require the students living in Plainfield to enroll in the district-operated school and simultaneously pay tuition to the public or independent schools, in or outside the district, chosen by students living in Marshfield.[3]

C. One budget pays for the education of all resident students

Under current law, a single, voter-approved budget pays for the education of all resident students in the grades for which the district is organized. This is as true for a district currently organized to provide for the education of all resident PK/K–12 students (*e.g.*, the Richford, Springfield, and Arlington School Districts, each of which operates PK/K–12; and the Westford, Hartland, and Dorset School Districts, each of which operates PK/K–8 and pays tuition for 9–12) as it is for a district currently organized solely to provide for the education of a subset of all grades (*e.g.*, the Irasburg School District, organized solely for PK/K–8 operating; the Warren School District, organized solely for PK/K–6 operating; and the North Bennington School District, organized solely for PK/K–6 tuitioning).

Similarly, it is as true that a single, voter-approved budget pays for the education of all resident students for a district encompassing one city or town (*e.g.*, the Poultney School District, PK/K–12 operating; and the East Haven School District, PK/K–12 tuitioning) as it is for a district that resulted from the merger of all or part of two or more districts located in two or more towns (*e.g.*, the Twinfield Unified Union School District, PK/K–12 from 2 towns; and the Leland and Gray Union High School District, grades 7–12 from 5 towns)

D. Payment of tuition invoices

A district is required to pay its tuition bills. It has little control over the total amount of tuition it will pay, especially if additional tuitioning students move into the district after the voters have approved a final budget for the year. A district that also operates a school can offset the expense of tuition, or a deficit resulting from the unexpected arrival of new students in the prior year, only by reducing the budget for the public school(s) it operates. If, for example, a single district operates a school for all resident PK–8 students and pays tuition to the public or independent school chosen by each of its resident 9–12 students (*e.g.*, the Tunbridge School District), then the district can only control its total budget through that part of its budget allocated to the operation of the PK/K–8 school(s).

II. A district likely cannot offer different educational options to students in the same grade solely on the basis of where the student lives in the district

A. Statutory law and practicality

It is neither authorized by statute nor would it be practical to offer different educational options to students in the same district when the parents and other voters residing on Street X or in Town X are represented by the same school board, vote for the same budget, and have the same tax rate as the parents and other voters residing on Street Y or in Town Y.

Although budget votes are commingled in a merged district, the impracticality of offering differing opportunities to students in the same grade would be exacerbated if one member town or group of towns is significantly larger than another member town.

For example,[4] assume that:

- Prior to merger, District A operated a public high school (School A) that all high school students residing in District A were required to attend
- Prior to merger, Districts B, C, and D paid tuition for their resident high school students to attend the public or approved independent school of the student's choice – some, many, or most did not attend School A
- Districts A–D merge and (we will assume they are constitutionally able to) agree that, after merger, each student residing in Town A will be required to attend School A (now operated and funded by the entire merged district) and each student residing in Towns B–D will have the option of enrolling in School A or receiving a tuition voucher to be used at any public school located outside the district or any approved independent school located inside or outside the district selected by the student

Vermont's long experience with union high school districts suggests that the voters in all member towns eventually view all students enrolled in the union high school as "their" students, regardless of the town in which a student resides. Nevertheless, in the example given above – especially if a large percentage of students in Towns B–D historically had not attended School A – it is at least conceivable that the voters in Towns B–D would have an incentive to keep the district budget as low as possible: the tuition for students residing in their towns would always be paid to the public or independent school of the student's choice and School A would be funded by the balance remaining in the voter-approved budget. By virtue of their combined voting strength, the voters in Towns B–D could potentially approve only a "bare-bones" budget that has the effect of depriving School A of the funds necessary to provide high-quality educational opportunities to the students residing in Town A, all of whom are required to enroll in that school.

Alternatively, and more significantly, even if the voters of Towns A–D consider all students residing in the merged district to be "their" students and want to ensure that School A is adequately funded, the unpredictability of the total amount of tuition to be paid for students residing in Towns B–D may require adjustments to or the elimination of programs or personnel at School A. The Legislature has repeatedly received testimony that tuition-paying districts have little-to-no ability to control their budgets. The unexpected arrival of new students after approval of a tuitioning district's budget is said to be particularly problematic. In fact, the Legislature has tried to lessen the financial burden of this unpredictability for tuitioning districts (*e.g.*, through a series of exemptions from the calculation of excess spending in 16 V.S.A. § 4001(6)(B)(vi) – (viii)). Despite legislative attempts to assist tuition-paying districts, if a merged district cannot predict or control the total amount of tuition it must pay, then necessary budget cuts can only be made to the district's costs of operating a school – which, again in this example, would disproportionately harm the students residing in Town A.

B. Constitutionality

Even if there were no practical concerns, a merged district that offered different educational options to students in the same district solely on the basis of a student's residential address would likely violate the Common Benefits Clause of the Vermont Constitution, Chapter I, Article 7, as it relates to the Education Clause in Chapter II, § 68.

Chapter I of the Vermont Constitution, entitled "A Declaration of the Rights of the Inhabitants of the State Of Vermont," declares in Article 7 (emphasis added):

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

1. Analysis under *Brigham v. State*[5]

The Vermont Supreme Court, in *Brigham v. State* (1997), held that the then-current education financing system was unconstitutional. The Court determined that education in Vermont is "a constitutionally mandated right."[6] It stated that to "keep a democracy competitive and thriving, students must be afforded equal access to all that our educational system has to offer."[7] Therefore, in order to "fulfill its constitutional obligation the [S]tate must ensure substantial equality of educational opportunity throughout Vermont."[8]

Although the *Brigham* Court indicated that Vermont's Common Benefits Clause is "generally coextensive with the equivalent guarantee" of the federal Equal Protection Clause, it declined to determine whether it needed to use the rational basis test or the strict scrutiny test (federal tests) to decide if the then-current funding system resulted in substantial inequality of educational opportunities. Rather, the Court declared:

> Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere fortuity of a child's residence.[9]

In addition, the *Brigham* Court declared:

> [I]n Vermont, the right to education is so integral to our constitutional form of government … that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification.[10]

The State has declared its intent to move towards sustainable models of education governance and to encourage and support local decisions that, among other things, "provide substantial equity in the quality and variety of educational opportunities statewide; … maximize operational efficiencies through increased flexibility to manage, share, and transfer resources; [and deliver educational opportunities] at a cost that parents, voters, and taxpayers value."[11] To that end, Act 46 of 2015 integrated existing incentive programs (REDs and their variations) and new incentives (accelerated mergers in Sec 6 and other voluntary mergers in Sec. 7) into a phased process to encourage the merger of education governance structures.

It is difficult to imagine how any of the three goals listed above would be achieved by a merged district that required students in one member town to enroll in the district's public school but paid tuition for students, who are in the same grade but reside in a different member town, to any school a student chose. Perhaps it could be argued that if this distinct treatment occurred only at the secondary level then it would be possible to "maximize operational efficiencies" and achieve cost savings at the elementary level.

According to testimony to the Vermont Legislature, many citizens who currently reside in a tuitioning district consider the system to be a highly desirable advantage of living in the district and a benefit that attracts new residents to their communities. Therefore, even if the merged structure were able to "maximize operational efficiencies" and achieve cost savings, such a merger structure would create a situation within a single district where students in the same grade were afforded substantially unequal educational opportunities based on "the mere fortuity of [the student's] residence."

In addition, it would probably be insufficient to argue that the students residing in Town A are not harmed because School A provides an education that is at least as good as the public school opportunities provided elsewhere in the State. The *Brigham* Court declared that there is:

> no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused merely because a "minimal" level of opportunity is provided to all. … '[Equal protection] is not addressed to … minimal sufficiency but rather to the unjustifiable inequalities of state action'.[12]

Relying upon the Court's analysis in *Brigham*, a merged district that offered different educational opportunities to resident students in the same grade solely on the basis of where the student lives would likely violate the Common Benefits Clause of the Vermont Constitution.

2. Analysis under Common Benefits Clause decisions issued post-*Brigham*

The Vermont Supreme Court has not analyzed the Common Benefits Clause in connection with the "constitutionally mandated right" to education since it issued the *Brigham* decision. It has, however, considered the Common Benefits Clause in other contexts, including in the decisions *In re Hodgdon*[13] and *Badgley v. Walton*.[14] Both *Hodgdon* and *Badgley* relied upon a three-part inquiry set forth in *Baker v. State*,[15] which the *Hodgdon* Court summarized as:

> (1) what 'part of the community' is disadvantaged by the legal requirement; (2) what is the governmental purpose in drawing the classification; and (3) does the omission of part of the community from the benefit of the challenged law bear 'a reasonable and just relation to the governmental purpose?' Factors to be considered in the third inquiry are the significance of the benefits and protections of the challenged law, whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals, and whether the classification is significantly underinclusive or overinclusive.[16]

Applying the three-part test to the question presented in this memo:

First, students who are required to enroll in the district-operated school are disadvantaged by a district structure that treats students differently based upon the town of residence because these students do not have the opportunity to attend the public or approved independent school of their choice at public expense, which citizens residing in tuitioning districts have testified is a highly desirable advantage of living in the district.

Second, districts with different tuitioning / operating structures might state that the governmental purpose in adopting this structure is to facilitate merger of their governance structures. The State however, has expressed the intent to encourage

mergers and other governance changes where it will support a number of stated purposes.[17] The State is not encouraging merger for the sake of merger.

Third, as discussed above, excluding students in one member town from the benefits conferred upon students in another member town likely would not bear 'a reasonable and just relation to the governmental purpose' or promote the government's stated goals. Although such a system might increase the number of mergers throughout the State, it would create a situation that violates both the "constitutionally mandated right" of substantially equal educational opportunities and also one of the State's enumerated goals of providing incentives for merger: to promote "substantial equity in the quality and variety of educational opportunities statewide."[18]

Therefore, a merged district that offered different educational opportunities to resident students in the same grade solely on the basis of a student's town of residence would likely violate the Common Benefits Clause under this three-part analysis as well.

III. Existing Exception

It is important to note that there is an existing practice in one union school district that proponents could cite in support of permitting a merged district to provide different educational options to students based on the town in which they reside.

In 2006, the General Assembly enacted Act 182, Sec. 28,[19] which authorized "a town school district which is a member of a union school district and which has historically paid tuition for resident grade 7–12 students attending public and independent schools outside the union high school district, as authorized by the attorney general's opinion No. 13 of July 30, 1954 and section 4339, V.S. 1947," both to be a member of a union high school district and concurrently to pay tuition for resident students in grades 7–12. It is our understanding that the authority applies solely to Vernon and was not granted to, or requested by, any other member of the Brattleboro Union High School District or any member of another then-current or proposed union school district. Act 182, Section 28 granted formal, legislative approval to a long-standing practice originally validated on July 30, 1954 by Opinion No. 13 of the Vermont Attorney General. Act 182, Section 28 emphasized the limited nature of the authority it conferred:

> It is the intent of the general assembly to authorize a town school district which has historically both belonged to a union school and provided for education of its students by paying tuition to continue the practice and not to authorize the practice in other school districts.[20]

Although legislatively authorized in this one, narrow instance, if the authority granted by Section 28 were to be challenged in court under the Common Benefits Clause, it is unclear whether the Vermont Supreme Court would find that the limited and long-standing nature of the provision is constitutionally permissible or whether the analysis in Section II of this memorandum would require the repeal of Act 182, Section 28.[21]

[1] *See, e.g.,* 1 V.S.A. § 126 and 16 V.S.A. §§ 551, 701, 722.

[2] The rate in a multi-town district is adjusted by each town's unique common level of appraisal (CLA), however, because appraisals are conducted at the town level.

[3] *See*, however, Section III for a current exception.

[4] For the sake of simplicity, this example assumes that the merger is of two high school districts and does not address the education of PK–8 students.

[5] In *Brigham v. State*, 166 Vt. 246 (1997), the Vermont Supreme Court held that the then-current education financing system "deprive[d] children of an equal educational opportunity in violation" of both Chapter I, Article 7 and Chapter II, § 68 of the Vermont Constitution.

[6] *Id.* at 267.

[7] *Id.*

[8] *Id.* at 268(emphasis in the original).

[9] *Id.* at 265 (emphasis on "fortuity" in the original).

[10] *Id.* at 256.

[11] 2015 Acts and Resolves No. 46, Sec. 2.

[12] *Id.* at 267–68, quoting Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, at 89(1973).

[13] 189 Vt. 265 (2011).

[14] 188 Vt. 367 (2010).

[15] 170 Vt. 194 (1999). The *Badgley* Court stated that in *Baker*, it had "rejected the rigid, multi-tiered analysis of the federal Equal Protection Clause analysis in favor of 'a relatively uniform standard, reflective of the inclusionary principle at [the Common Benefits Clause's] core.'" *Badgley* at 377, quoting *Baker* at 212.

[16] *Hodgdon* at 281, quoting in part *Badgley* at 377-78 and *Baker* at 212-14 (citations omitted).

[17] *See* discussion on pages-5-6 under "1. Analysis under *Brigham v. State*."

[18] In holding that the mandatory retirement of public safety officers at age 55 bears a reasonable and just relation to the State's objective of ensuring that the officers are mentally and physically capable of performing their duties, the *Badgley* Court stated that the "right to work as a state-employed police officer is not as significant a governmental interest as … the right to educational opportunities addressed in Brigham v. State." *Badgley* at 380.

[19] Sec. 28. TOWN SCHOOL DISTRICT; AUTHORIZED TO PAY TUITION

Notwithstanding the restrictions of 16 V.S.A. § 822(c), a town school district which is a member of a union school district and which has historically paid tuition for resident grade 7–12 students attending public and independent schools outside the union high school district, as authorized by the attorney general's opinion No. 13 of July 30, 1954 and section 4339, V.S. 1947, may continue to do so in accordance with the provisions of 16 V.S.A. § 824. The town school district shall pay a tuition amount which does not exceed the average announced tuition of Vermont union school districts for grades 7 and 8 or grades 9–12 as appropriate. It is the intent of the general assembly to authorize a town school district which has historically both belonged to a union school and provided for education of its students by paying tuition to continue the practice and not to authorize the practice in other school districts.

[20] 2006 Acts and Resolves No. 182, Sec. 28 (emphasis added).

[21] Note that when considering the constitutionally protected right to proportional representation on union high school boards, the United States District Court for the District of Vermont stated that an unconstitutional plan is not transformed into a constitutional one (1) by the majority vote of the electorate or of a properly apportioned legislature or (2) by the fact that the unconstitutional plan serves a useful purpose (*e.g.*, inducing small school districts to merge with larger ones). *Leopold v. Young*, 340 F. Supp. 1014, 1018-1019(D. Vt. 1972), and also quoted in *Barnes v. Board of Directors, Mount Anthony Union High School District (No. 14)*, 418 F. Supp. 845, 851(D. Vt. 1975).

Note further that the Supreme Court may also take into consideration Opinion No. 93-4 of the Attorney General, dated January 13, 1993 and addressed to the then-Superintendent of the Lamoille North Supervisory Union, stating that statutory changes to 16 V.S.A. §§ 821 and 822 "render inapplicable the 1954 opinion of the Attorney General to this contemporary analysis."