STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 33-1-19 Frcv
ATHENS SCHOOL DISTRICT, et al., Plaintiffs, v. VERMONT STATE BOARD OF EDUCATION, et al., Defendants.	Vermont Superior Court MAR - 4 2019 FILED: Franklin Civil

RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs represent a number of Vermont school districts, school boards, and citizens who object on a variety of grounds to the implementation of Act 46 (2015), as amended by Act 49 (2017). See Amended Complaint (dated January 14, 2019 and filed pursuant to Entry Order filed January 22, 2019). In this action filed pursuant to V.R.C.P. 75, they ask the Court to review the Final Report of Decisions and Order on Statewide School District Merger Decisions Pursuant to Act 46, Sections 8(b) and 10 (dated November 28, 2018) (hereinafter the "Final Report").

Plaintiffs seek a preliminary injunction which would preserve the status quo and otherwise stay implementation of any of the action's outlined in the Vermont Board of Education's Final Report. See, e.g., Motion for Preliminary Injunction and Stay Pending Review (filed December 21, 2018) at 2-4; see also V.R.C.P. 75 (c) (Court may stay governmental action pending review.). On February 15, 2019, the Court held a hearing on the Motion for Preliminary Injunction. At that hearing, the parties did not proffer witness testimony or additional evidence and acknowledged that the resolution of the pending motion only requires the Court to consider the parties' legal arguments. See V.R.C.P. 75 (d) ("Otherwise all questions as to which by law review is available shall be tried to the court"); see also V.R.C.P. 65 (b)(2) ("[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.") Upon consideration of the current record and the parties' arguments, and for the reasons set forth below, the Motion for Preliminary Injunction is *denied.*

I. Preliminary Injunction Standard

The Vermont Supreme Court has explained:

> A preliminary injunction is an extraordinary remedy never awarded as of right. . . In each instance, [the court] must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. . . The movant bears the burden of establishing that the relevant factors call for the imposition of a preliminary injunction . . . [T]he main factors guiding its review under Vermont law [are]: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the inherent likelihood of success on the merits; and (4) the public interest.

Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 178 A.3d 313 (citations, quotation marks and footnote omitted).

Vermont's standard "is sufficiently flexible to allow for a preliminary injunction in cases in which the court cannot definitely conclude that the movant is likely to prevail on the merits, but the balance of other factors tips strongly in favor of an injunction." Id. at n. 3; see V.R.C.P. 75(c) ("[T]he court may order a stay upon such terms and conditions as are just."). However, some courts have suggested that, in a case like this one, it is particularly important for a court to consider thoughtfully the plaintiff's likelihood of success:

> Whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief. . .. Otherwise a claim that appears meritorious at a preliminary stage but is ultimately determined to be unsuccessful will have precipitated court action that might needlessly have injured the public interest.

Time Warner Cable of New York City v. Bloomberg, L.P., 118 F.3d 917, 929 (2d Cir. 1997) (citations omitted); see Taylor, 2017 VT 92, ¶ 39 ("Although our analysis of the [failure to show likelihood of success on] the merits likely resolves the preliminary injunction appeal, we also conclude that the plaintiffs would not suffer an irreparable injury. . . ."); accord Hackett v. Town of Franklin, No. S7711, 2012 WL 11828903 *1, Entry Order (Vt. Super. March 2, 2012) (Maley, J.) ("Regarding the Article III Claim, the parties both present strong arguments for their interpretation of the Vermont Constitution and the Court believes this renders a preliminary injunction inappropriate."); Hagan v. City of Barre, No. 320-5-09 Wncv, 2009 WL 6551407, Ruling on Motion for Preliminary Injunction (Vt. Super. June 29, 2009) (Toor, J.) ("[B]ecause in this case the moving party seeks a preliminary

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.") (citations and quotation marks omitted).

II. Background

The Plaintiffs object on a variety of grounds to Acts 46 and Act 49. This legislation implements the State's plan to overhaul how Vermont's education system is organized and governed in order to "provide [Vermont PreK-12 students] substantial equity in the quality and variety of educational opportunities" in light of rising costs and plummeting student populations. See 2015 Vt. Laws No. 46, § 2(1); see also 16 V.S.A. § 1 ("[I]t is the policy of the State that all Vermont children will be afforded educational opportunities that are substantially equal although educational programs may vary from district to district.").

While in some places individual school closures eventually may be a consequence of school district and board mergers, at this point, which schools, if any, may close is speculation. In fact, Act 46 is not a reflection of the State's attempt to close small schools, but rather to ensure that the States' education system as a whole is able to remain viable while offering all students access to expanded educational opportunities and resources. See 2015 Vt. Laws No. 46 §S 1(i), 3.

Through Act 46, the Legislature has challenged localities to voluntarily consolidate their governance structures and resources. New governance structures should be "designed to encourage and support local decisions and actions" that meet the following Goals:

> (1) provide substantial equity in the quality and variety of educational opportunities statewide;
>
> (2) lead students to achieve or exceed the State's Education Quality Standards, adopted as rules by the State Board of Education at the direction of the General Assembly;
>
> (3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff;
>
> (4) promote transparency and accountability; and
>
> (5) are delivered at a cost that parents, voters, and taxpayers value.

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

2015 Vt. Laws No. 46, § 2. Accordingly, Act 46 embodies the State's goal to move "toward sustainable models of educational governance" and "to ensure that [small] schools have the opportunity to enjoy the expanded educational opportunities and economies of scale that are available to schools within larger, more flexible governance models." 2015 Vt. Laws No. 46, §§ 2, 3(b).

To accomplish these stated Goals, Act 46 establishes a scheme of incentives designed to encourage the abandonment of local school boards and the creation of new merged union and regional boards. See, e.g., 2015 Vt. Laws No. 46, § 5 et seq. When first passed, Act 46 provided a period in which districts could receive tax and other incentives by merging into defined preferred governance structures. See 2015 Vt. Laws No. 46, §§ 6,7. The Plaintiffs' complaints arise from the second phase outlined in Act 46, which provides for involuntary aligning and merging of remaining school districts not already merged into preferred structures. See 2015 Vt. Laws No. 46, § 10.

"As of May 1, 2017, voters in 105 Vermont towns have voted to merge 113 school districts into slightly larger, more sustainable governance structures, resulting in the creation of 23 new unified districts (serving prekindergarten-grade 12 students)." 2017 Vt. Laws No. 49, § 1(c). According to the Legislature, "[t]hese slightly larger, more flexible unified union districts have begun to realize distinct benefits, including the ability to offer kindergarten-grade 8 choice among elementary schools within the new district boundaries; greater flexibility in sharing students, staff, and resources among individual schools; the elimination of bureaucratic redundancies; and the flexibility to create magnet academies, focusing on a particular area of specialization by school." 2017 Vt. Laws No. 49, § 1(d).

However, the Legislature has recognized that some districts, including Plaintiffs herein, have either resisted merger or are experiencing difficulties satisfying Act 46 requirements. "The range of complications is varied, including operating or tuitioning models that differ among adjoining districts, geographic isolation due to lengthy driving times or inhospitable travel routes between proposed merger partners, and greatly differing levels of debt per equalized pupil between districts involved in merger study committees." 2017 Vt. Laws. No. 49, § 1(e).

In response, Act 49 was passed to make changes both to Act 46 timelines and to allow more flexibility in adopting alternative governance structures. 2017 Vt. Laws No. 49, § 1(f); § 3 (now allowing "three by one side by side structure") and § 4 ("two-by-two-by-one side by side structure"). During this second phase, districts not participating in a preferred governance structure are required to work with other districts to formulate "Section 9" plans and "enter into another model of joint activity." 2015 Vt. Laws No. 46 § 9(a)(3)(A). The Secretary of Education was charged with reviewing such plans, and the State Board of Education directed then

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

to "review and analyze the Secretary's proposal" and "approve the proposal either in its original form or in an amended form . . .." 2015 Vt. Laws No. 46, § 10 (a), (b).

Thus, to implement Acts 46 and 49, the Legislature delegated to the Vermont Board of Education the responsibility of approving "more efficient and sustainable school governance structures and thereby improving student access to quality PreK-12 education in Vermont and enhancing the ability to meet the other [five] goals of Act 46 [Sec. 2]". See Final Report at 4 (footnote omitted omitted). In titling its Final Report, the Board noted the particular guidance provided under Sections 8 and 10 of Act 46:

> Sec. 8. EVALUATION BY THE STATE BOARD OF EDUCATION
>
> (a) School districts. When evaluating a proposal to create a union school district pursuant to 16 V.S.A. chapter 11, including a proposal submitted pursuant to the provisions of Secs. 6 or 7 of this act, the State Board of Education shall:
>
> (1) consider whether the proposal is designed to create a sustainable governance structure that can meet the goals set forth in Sec. 2 [noted supra, p. 3] of this act; and
>
> (2) be mindful of any other district in the region that may become geographically isolated, including the potential isolation of a district with low fiscal capacity or with a high percentage of students from economically deprived backgrounds as identified in 16 V.S.A. § 4010(d).
>
> (A) At the request of the State Board, the Secretary of Education shall work with the potentially isolated district and other districts in the region to move toward a sustainable governance structure that is designed to meet the goals set forth in Sec. 2 of this act.
>
> (B) The State Board is authorized to deny approval to a proposal that would geographically isolate a district that would not be an appropriate member of another sustainable governance structure in the region.
>
> (b) Supervisory unions. 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, including transparency and accountability in relation to the supervisory union budget, which may include a process by which the

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

electorate votes directly whether to approve the proposed supervisory union budget.

Sec. 10. TRANSITION TO SUSTAINABLE GOVERNANCE STRUCTURES; PROPOSAL; FINAL PLAN

(a) Secretary of Education's proposal. In order to provide educational opportunities through sustainable governance structures designed to meet the goals set forth in Sec. 2 of this act pursuant to one of the models described in Sec. 5, the Secretary shall:

(1) Review the governance structures of the school districts and supervisory unions of the State as they will exist, or are anticipated to exist, on July 1, 2019. This review shall include consideration of any proposals submitted by districts or groups of districts pursuant to Sec. 9 of this act and conversations with those and other districts.

(2) On or before June 1, 2018, shall [sic] develop, publish on the Agency of Education's website, and present to the State Board of Education a proposed plan that, to the extent necessary to promote the purpose stated at the beginning of subsection (a), would move districts into the more sustainable, preferred model of governance set forth in Sec. 5(b) of this act (Education District). If is not possible or practicable to develop a proposal that realigns some districts, where necessary, into an Education District in a manner that adheres to the protections of Sec. 4 of this act (protection for tuition-paying and operating districts) or that otherwise meets all aspects of Sec. 5. (b), then the proposal may also include alternative governance structures as necessary, such as a supervisory union with member districts or a unified union school district with a smaller average daily membership; 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).

(b) State Board's plan. On or before November 30, 2018, the State Board shall review and analyze the Secretary's proposal under the provisions in subsection (a) of this section, may take testimony or ask for additional information from districts and supervisory unions, shall approve the proposal either in its original form or in an amended form that adheres to the

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

provisions of subsection (a) of this section, and shall publish on the Agency's website its order merging and realigning districts and supervisory unions where necessary.

On November 28, 2018, the Vermont Board of Education issued its Final Report, which represents its vote to merge of a number of school boards, including those represented by the Plaintiffs. In their Amended Complaint, the Plaintiffs raise a number of legal objections to their forced mergers which, for purposes of analysis, can be grouped as follows:

1. The Board's Final Report and forced mergers constitutes an unconstitutional delegation of legislative authority. See Amended Complaint at 60-61, 69-71.

2. The Board's Final Report is arbitrary and capricious in that it is "standardless and inconsistent," does not reflect "the best model to achieve Vermont's education goals," does not determine forced mergers to be "necessary," and does not account for factors such as geographic isolation and differing levels of indebtedness among merged districts. See Amended Complaint at 39-51, 54-60, 62-64, 68-69.

3. The Board's Final Report violates 16 V.S.A. § 701a et seq. by imposing Default Articles of Agreement on districts subject to forced merger. See Amended Complaint at 51-52.

4. The Board-ordered forced mergers violate Equal Protection under the U.S. and Vermont Constitutions. See Amended Complaint at 64-69.

II. Discussion

A. Likelihood of Success on the Merits

1. Is the Delegation of Legislative Authority Constitutional?

As the parties admitted at the February 15, 2019 hearing, the threshold question underlying the Plaintiffs' arguments is whether Acts 46 and 49 represent an unconstitutional delegation of authority. See Defendants' Memorandum of Law (filed January 31, 2019) at 40; Plaintiffs' Reply Memorandum of Law (filed February 13, 2019) at 12.

Most authorities recognize that "[t]he creation, enlargement, consolidation, alteration, and dissolution of school districts are legislative functions. As a general rule, few, if any, restrictions are placed on the legislative power in school affairs by state constitutions; therefore, the legislature has almost unlimited power to abolish,

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

divide, or alter school districts." 67B Am. Jur. 2d Schools § 36 (WL January 2019 update) (footnotes omitted). "Although the courts have the inherent authority to determine whether statutes are constitutional, a court does not have the power to substitute its judgment for that of the legislature in determining the wisdom and efficiency of the educational system." 67B Am Jur. 2d School § 9 (WL January 2019 update). Moreover, "[i]n the absence of constitutional restrictions or express statutory provisions, a legislature may alter existing school districts without making any provision for the apportionment of their debts or adjusting the equities between the districts and may take the school facilities in one district and transfer them to another district without requiring compensation." 67B Am. Jur. 2d Schools § 47 (WL January 2019 update) (footnote omitted).

In addition, most jurisdictions have found legislative delegations of authority to reorganize school districts constitutional.

> A legislature may delegate its authority to create, enlarge, consolidate, alter, or dissolve school districts. The power to change boundaries may be conferred by the legislature on administrative agencies, cities or towns, local boards or officers—including local school boards, town boards, or county boards or officers – a state superintendent of schools, or a state board of education. . .. [However, i]n the exercise of properly delegated authority with regard to school district boundaries, a school board or other agency acts as the agent of the legislature, its power is limited by the statute vesting the authority, and the interpretation of the statute defining that power is a judicial question.

67B Am. Jur. 2d Schools § 37 (WL January 2019 update) (footnotes omitted).

Vermont law reflects these general principles. Although there is no fundamental right to an education under the U.S. Constitution, the Vermont Supreme Court has found such a right in the Vermont Constitution, holding that, "in Vermont the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification." Brigham v. State, 166 Vt. 246, 256, 692 A.2d 384 (1997). Specifically, the Education Clause "requires that a school be maintained in each town unless the Legislature permits otherwise. . .." Id. at 259. Significantly, it is a State, not a local, obligation to provide public education. Id. In Acts 46 and 49, the Legislature has delegated authority relating to lawful oversight of Vermont education policy; such delegation to the Board is presumptive lawful under Vermont Constitution. Cf. Village of Hardwick v. Town of Wolcott, 98 Vt. 343, 129 A. 159, 161 (1925) (State created subdivisions "remain the creatures of the state, holding and exercising powers and privileges subject to the sovereign will.").

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

Nevertheless, the Plaintiffs maintain that Chapter II §§ 5 and 6 of the Vermont Constitution prohibit delegation to the Board of Education in this case. Under Ch. II, § 5, the "Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." In relevant part, Ch. II, § 6 provides that the Senate and House of Representatives

> may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, boroughs, cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish or infringe any part of this Constitution.

Citing In re Municipal Charters, 86 Vt. 562, 86 A. 307 (1913) and Thompson v. Smith, 119 Vt. 488, 129 A.2d 638 (1957), Plaintiffs assert that changes to school governance imposed by the Board of Education constitute § 6 "municipal charter formation to remain vested in the legislature and to be non-delegable" in light of § 5. Plaintiffs' Reply Memo at 18. In re Municipal Charters was an advisory opinion which examined an act delegating certain authority related to creation of villages, expressly reserved to the Legislature under Ch. II, § 6. 86 Vt. at 562. By contrast, "a school district is a corporate entity, separate and distinct from the town," and the creation of such districts, unlike the creation of towns and cities, is not expressly addressed in Ch. II, § 6. Lewis v. Town of Brandon, 132 Vt. 37, 39, 313 A.2d 673 (1973).

Furthermore, as addressed infra, Acts 46 and 49 do not delegate legislative authority but instead reflect assignment of the implementation of legislatively mandated policies, guided by specified goals and standards. See Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 576, 730 A.2d 573 (1999) (mem.) ("Nor is the [delegation] doctrine violated when the Legislature gives municipalities the authority or discretion merely to execute, rather than make, the laws."). When examining the validity of a South Burlington ordinance, the Supreme Court in Thompson v. Smith noted:

> The Town of South Burlington in common with all other cities and towns in the State was created for the purpose of performing such governmental functions as the state might devolve upon that municipality. . .. While it can receive and translate powers properly delegated to it, its sovereignty is restricted to the specific governmental functions confided to it by the legislature. . .. The power of a municipality to accomplish zoning exists by virtue of authority delegated from the State. . ..

119 Vt. at 498 (citations omitted).

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

Accordingly, it is difficult to see how either In re Municipal Charters or Thompson v. Smith support the Plaintiffs' argument that the delegation here to the State Board of Education is patently unconstitutional. In fact, after In re Municipal Charters, the Vermont Supreme Court explained:

> It is a fundamental principle of the American constitutional system, clearly expressed in our own State Constitution, c. 2, § 5, that the legislative, executive and judicial departments of government are separate from each other, and therefore such functions of the Legislature as are purely and strictly legislative cannot be delegated, but must be exercised by it alone. . .. But the doctrine of the separation of governmental departments does not mean an absolute and entire separation [,] for the efficient exercise of the police power inherent in the people of this state is not to be frittered away by overnice speculations upon the distribution of the powers of government. . .. Since legislation must often be adapted to complex conditions involving a host of details, with which the law making body cannot deal directly, the Legislature may, without abdication of its essential functions, lay down policies and establish standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply . . . An agency charged with the duty of administering a statute enacted in pursuance of the police power of the State may be vested with a wide discretion, but such discretion must not be unrestrained and arbitrary. It is essential to the validity of the statute that it shall establish a sufficient basic standard-a definite and certain policy and rule of action for the guidance of the agency created to administer the law. . .. Only after having fixed a primary standard may the Legislature clothe an administrative body to fill up the details by prescribing reasonable rules and regulations appropriate to the accomplishment of the purpose of the act.

State v. Auclair, 110 Vt. 147, 114, 4 A.2d 107 (1939) (citations and quotation marks omitted). Like police power, education oversight resides with the State and, when accompanied by sufficiently specified policies and standards, the State may properly delegate to the Board of Education.

Plaintiffs also maintain that Acts 46 and 49's stated goals and directives do not supply necessary guidance and therefore render any decision by the Board either arbitrary or unreviewable. A delegation is proper if the legislation provides sufficient guidelines and standards which permit a reviewing court to determine whether a decision resulting from the delegation was arbitrary and capricious. See In re MVP Health Insurance Co., 2016 VT 111, ¶ 26, 203 Vt. 274. A review of a board's decision should indicate that it considered the provided statutory guidelines. See Evergreen School District No. 114, Clark County v. Clark County Committee on

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

School District Organization, 27 Wash. App. 826, 831, 621 P.2d 770 (Wash. App. 1980).

As noted, Acts 46 and 49 supplied five broad legislative goals and outlined a variety of "Preferred," "Alternative," and other governing structures the Legislature determined to be consistent with its stated goals. See, e.g., 2015 Vt. Laws No. 46, § 5, as amended by 2017 Vt. Laws No. 49, § 7 (b) and (c). In addition, in conjunction with its assessment of Proposals for Alternative Structures, the Board of Education also has passed "Series 3400" Rules and Practices, which include the following provisions:

> **3440.6** On or before November 30, 2018, pursuant to Act 46, Sec. 10(b), the State Board of Education shall "publish... its order merging and realigning districts and supervisory unions where necessary" either:
>
> (1) by approving the Secretary's proposed Statewide Plan in its original form; or
>
> (2) by approving the Secretary's proposed Statewide Plan in an amended form under the same standards required for the Secretary's proposal.
>
> **3440.7** The purpose of the Statewide Plan is to "provide educational opportunities through sustainable governance structures designed to meet the" Goals. Act 46, Sec. 10(a).
>
> **3440.8** The Statewide Plan:
>
> (1) Shall include changes to the extent necessary to meet the Goals.
>
> (2) Shall include changes to the extent "possible and practicable" in the Region.
>
> (3) Shall not include a change that would require a district to alter its current operating or tuitioning structure.
>
> [subsection (4) omitted].
>
> *Act 46, Secs.8 and 10*
>
> **3440.8.1** "If it is not possible or practicable [for the Statewide Plan to merge Remaining Districts, where necessary, into a Preferred Structure] in a manner that adheres to the... protection for tuition-paying and operating districts[] or that otherwise meets all aspects of Sec. 5(b), then the [Plan] may also include alternative governance structures as necessary, such as a supervisory union with member districts or a unified union school district with a smaller average daily membership."

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

(A) Under this circumstance, the Statewide Plan may include an Alternative Structure "provided that" the Alternative Structure is designed:

(i) To "ensure adherence" to protections for operating and tuition paying districts. Only a district, by a vote of its electorate, can decide whether to operate a school or pay tuition for its students, and at which grade(s).

(ii) To "promote" the Goals.

Act 46, Sec. 10

3440.9 Act 46, Sec. 8(b) states that 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] in a particular region; and

(2) ensures transparency and accountability for the member districts and the public at large...."

3440.10 When developing the proposed and final Statewide Plan, the Secretary and State Board may incorporate a proposal submitted under Act 46, Sec. 9 in its entirety; may incorporate the proposal in an amended form; or may decline to incorporate any aspect of the proposal. Act 46, Secs. 8 - 10

3440.11 The State Board evaluates every type of education governance 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. See, e.g., 16 V.S.A. § 706c(b); Act 46, Secs. 8 - 10

3440.12 Act 46 instructs the State Board to "be mindful" of actions that would result in the geographic isolation of a district from other districts of like structure, "including the potential isolation of a district with low fiscal capacity or with a high percentage of students from economically deprived backgrounds." Act 46, Sec. 8

In this case, the delegating legislation provided the Board sufficient statutory guidance, and the Board's related regulations are consistent with the delegation. By comparison, in In re B&M Realty, LLC, 2016 VT 114, 158 A.3d 754, the Vermont Supreme Court reviewed a developer's challenge to the district environmental commission's denial of its request for an Act 250 permit. The applicant argued, inter alia, that the 2007 Regional Plan was inapplicable to its application because its project would not have "substantial regional impact" as defined by the

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

commission. Id. ¶ 26. Applicant claimed the definition of "substantial regional impact" was "arbitrary and unconnected to actual regional impacts of development." Id. ¶ 27. Rejecting these arguments, the Supreme Court opined:

> We find these arguments without merit. First, there can be no claim of "unconstitutional delegation of legislative power" where a statute "establish[es] reasonable standards to govern the achievement of its purpose and the execution of the power which it confers." . . . We conclude that the Vermont Planning and Development Act provides ample guidance to regional commissions regarding the development of regional plans. . .. The law identifies a legislative purpose for planning generally, . . . it lists specific goals with which regional plans must be consistent, . . . it identifies the duties of regional planning commissions and required elements for regional plans, . . . and it provides procedural requirements for adopting plans, including the opportunity for public hearing and comment. . .. Given this extensive statutory scheme, we reject applicant's unsupported suggestion that requiring regional commissions to define "a substantial regional impact" as part of developing its regional plan constitutes an unlawful delegation.

Id. ¶ 28 (citations omitted).

Accordingly, the delegation under Acts 46 and 49 is constitutional, and that the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards to guide its decisions and to permit this Court's review.

2. Is the Board's Final Report Arbitrary and Capricious?

When reviewing agency action under the "arbitrary and capricious" standard, Federal courts have "insist[ed] that an agency examine the relevant data and articulate a satisfactory explanation for its action." Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502, 513, 129 S.Ct. 1800 (2009) (citations and quotation marks omitted). Similarly, the Vermont Supreme Court has indicated that the arbitrary and capricious standard requires a court to 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 Hydroelectric Project, 2006 VT 11, ¶ 10, 179 Vt. 606. "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. Board of Dental Examiners, 167 Vt. 110, 114, 702 A.2d 124 (1997) (citation omitted). Under this standard, mere disagreement with the agency's decision is insufficient; a court should not substitute its judgment for that of the agency's and should even "uphold a decision of less than ideal clarity if the agency's path may reasonably be

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

discerned." FCC v. Fox Television, 556 U.S. at 513-14 (citation and quotation marks omitted).

Vermont case law suggests that the applicable standard of review under Rule 75 is similar to the "arbitrary and capricious" standard. V.R.C.P. 75(a) provides:

> Any action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74 of these rules or Rule 4 or 5 of the Vermont Rules for Environmental Court Proceedings may be reviewed in accordance with this rule if such review is otherwise available by law.

For example, in Garbitelli v. Town of Brookfield, 2011 VT 122, ¶ 6, 191 Vt. 76, a taxpayer appealed a board of abatement's denial of his request for a tax abatement. The Court noted that generally

> [a] court reviewing governmental action 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. . .. Applying this standard, review is normally limited to answering legal questions raised by the factual record developed in the administrative proceeding. (citations and quotations omitted).

Likewise, in Turnley v. Town of Vernon, 2013 VT 42, ¶ 11, 194 Vt 42, a police chief sought review of the towns decision to terminate his employment. The Supreme Court explained:

> Under V.R.C.P. 75, a review in superior court by way of appellate review or certiorari is virtually synonymous. . .. This review is confined to questions of law and encompasses the consideration of evidentiary points only insofar as they may be examined to determine whether there is any competent evidence to justify the adjudication, much as in the case of a motion for directed verdict. . .. Discretionary rulings may be set aside only for abuse and the judgment is not reviewable on the merits. . . . 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. (citations and quotation marks omitted).

Here, the State Board of Education issued its Final Report on November 28, 2018. In part, the Board explained its review and decision as follows:

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

> As noted above, Act 46 identified the "preferred structure" for sustainably meeting the identified educational and fiscal goals as a unified union school district that is its own supervisory district (SD). In several regions of the state, the Board's Final Report of Decisions and Order does not create the preferred structure as it is defined in Act 46, but instead creates a unified union school district that is a member, with one or more additional districts, of a larger supervisory union (SU). Geographic realities, variations in operating structures, and the requirement that any district that is not its own SD must be assigned to a multi-district SU have limited the Board's ability to create true preferred structures, given the authority granted to it by the Act. In response, the Board has chosen to hew as closely to the intent of the Act as that authority will allow, creating preferred structures wherever possible, and in all other cases, creating sustainable governance structures with the fewest number of districts possible and practicable.

Final Report at 6. The Board further explained:

> Act 49 further directed the Board to adopt rules governing the submission of Section 9 Proposals, which the Board promulgated as Rule Series 3400 in 2017. Nothing in Act 46, Act 49 or Rule Series 3400 conveys any special exemptions or "off ramps" to districts submitting a Section 9 Proposal. 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 SU), 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. In fact, Act 46, Sec. 8(b) permits the Board to "approve the creation, expansion, or continuation" of a multi-district SU "only if the Board concludes that this alternative structure ... is the best means of meeting" the goals of Act 46.
>
> The Proposed Statewide Plan, which was issued by the Secretary of Education on June 1, 2018, was the starting point for the Board's review. In addition to providing specific recommendations, the Secretary's Proposed Plan provided extensive background information on each of the remaining districts, including a summary of discussions that the AOE had with each district, financial and performance data, and a summary and analysis of each Section 9 proposal submitted. The Board's review was further augmented by the testimony it heard, and the supplemental material and comments received, from school districts, administrators, students, and other members of the public. The State Board also explicitly invited local boards to identify

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

what they believed the Secretary's Proposed Plan got wrong or missed when analyzing their districts.

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. Once the Board concluded listening to local reactions to the plan at its July, August, and September meetings, the Board began to process the testimony of the previous three months and explored potential development of defining principles. While it was relatively straightforward to decide that it was "possible" to merge a district in the sense of *legally* "possible," it was sometimes tougher for the Board to determine when a merger was "practicable." The Board wrestled with whether and how to give weight in the final phase of Act 46 to local opposition votes cast at various stages of the process and 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 the member districts." (Act 49, Sec. 5)

In the end, the Board opted to focus on the text of Act 46, as amended, and did not adopt any additional guiding principles, concluding that the Legislature authorized the State Board to make judgments based on the goals and guidance of the Acts. The Board has striven to do so in an equitable way consistent with the law.

After careful review and deliberation, the Board chose to support many of the Secretary's proposals, but there are several instances where the Board came to different conclusions and chose to depart from those recommendations. In each of these instances, the Board has outlined its rationale within this Report. In constructing the final statewide plan, the Board looked for opportunities to create preferred structures, but where this was not possible (e.g., due to dissimilar operating structures, which cannot be merged under the law) or practicable (e.g., due to a lack of geographic cohesiveness), the Board chose to implement an alternative structure with the attributes specified in the law (including that supervisory unions have the smallest number of school districts practicable).

Final Report at 7-8

Thus, a review of the Board's Final Report indicates that it accepted and considered a variety of evidence and evaluated that evidence in light of statutory guidelines. See Evergreen School District, 27 Wash. App. at 831; cf. School District of Waukesha v. School District Boundary Appeal Board, 201 Wis.2d 109, 117, 548

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

N.W.2d 122 (Wis. App. 1996) (While the Board "is statutorily bound to consider all of the factors enumerated in § 117.15, STATS., the agency may, in its discretion, consider information from other sources as well."). So long as a statute like Act 46 is validly adopted, the Legislature is granted wide latitude in conferring authority regarding the manner and method of execution of the statute. See Hunter v. State, 2004 VT 108, ¶ 27, 177 Vt. 339; see also Stowe Citizens, 169 Vt. at 559, 730 A.2d at 576. The Court finds no basis in the current record for concluding the Board's Final Report constitutes an arbitrary and capricious decision.

A number of the Plaintiffs' arguments involve the statutes' use of the word "necessary." One of the Plaintiffs' overall arguments is that the Board did not sufficiently explain how the mergers ordered in its Final Report were "necessary." See Plaintiffs' Reply Memorandum at 34 et seq. According to the Plaintiffs, "[t]he State Board's decision overlooked vast amounts of data, analysis, and other supporting information that the school districts proposed in their lengthy Alternative Governance Structure proposals," and "most Board members likely did not read the Alternative Governance Structure proposals submitted by the districts," presumably hindering the Board's determination as to which forced mergers were "best" and therefore "necessary." Amended Complaint at ¶¶ 134, 134.

"Courts generally presume that an agency's action is valid. . . and will defer to the agency's judgment in applying a statute that it is charged to execute." Hunter, 2004 VT 108, ¶ 46 (citations omitted). When examining agency action, the court must consider the entire provision, not just isolated words and phrases. See In re K.A., 2016 VT 52, ¶ 10, 202 Vt. 86 ("[S]tatutes that relate to the same matter . . . must be read together as a whole. . . "); State v. Chambers, 144 Vt. 234, 239, 477 A.2d 110 (1984) (Court "must examine the entire section, and not just the subsection in question, to determine whether sufficient standards exist.")

Contrary to the Plaintiffs' assertion, Act 46 does not require the Board to find that the mergers to which they are subject are the only or best means of meeting the Goals set forth in Acts 46 and 49. Properly understood, one overarching objective of Act 46 is to merge school districts; the Legislature already has made the determination that such mergers are necessary to achieve, among its stated Goals, economies of scale and quality education for Vermont's student population. See, e.g., 2015 Vt. Laws No. 46 §§ 5(c)(2), (3) (suggesting alternative structure mergers "achieved whenever possible"). Again, viewed overall, Acts 46 and 49 reflect the Legislature's strong preference that individual school districts be merged, when possible, to create "sustainable models of education governance." 2015 Vt. Laws No. 46, § 2.

Thus, the word "necessary," as used in the provisions about which Plaintiffs complain, reflects a recognition that the Board will have to take certain actions to achieve mergers, which in turn, will meet the Legislature's stated Goals. See

Vermont Superior Court
MAR - 4 2019
Filed Franklin Civil

Definition of necessary. (2019). In Oxford Dictionaries Online. Retrieved February 21, 2019 from en.oxforddictionaries.com (first listed meaning as "Needed to be done, achieved or present; essential"). There is no individual "necessity" finding required that is divorced from the Act 46 directive that the Board should take feasible actions to merge schools into a preferred or alternative governance structures. See, e.g., 2015 Vt. Laws No. 46 § 10 (a)(2) ("If it is not possible or practicable to develop a proposal that realigns some districts, where necessary, into an Education District . . . then the proposal may also include alternative governance structures, as necessary, such as a supervisory union with member districts . . ..").

Plaintiffs' related suggestion that the Board did not read or sufficiently consider its proffered evidence on issues such as geographic distance before issuing its Final Report is not supported by the current record. See Final Report at 6 (mentioning Board's consideration of "[g]eographic realities"). As noted, the Final Report evidences that the Board did consider relevant evidence. Under Acts 46 and 49, the Board was required to consider proposals for a number of alternative governance structures and apply them in diverse situations, at times over the strong objections of those affected. The Final Report indicates that the Board was aware of and did consider the report of the Secretary and evidence presented by interested parties.

In another case reviewing similar school board decision-making, the Supreme Court of South Dakota explained:

> In the instant case, the school board's administrative power to make the decision is not at issue; however, in deciding whether the board's decision was arbitrary, capricious or an abuse of discretion, the circuit court is required to determine only whether there was substantial evidence to support the school board's decision. . .. [I]t does not need to justify the school board's decision by a preponderance of the evidence received. . . Substantial evidence has been defined as "such relevant and competent evidence as a reasonable mind might accept as adequate to support a conclusion."

Oelrichs School District 23-3 v. Sides, 1997 S.D. 55, ¶ 10, 562 N.W.2d 907 (citations omitted).

Here, the Board was authorized to do as it did, that is, accept or reject some or all of the Secretary's recommendations related to the Section 9 plans. See 2015 Vt. Laws No. 46, § 10(b). The Plaintiffs' disagreement with the Board's Final Report and Decision does not constitute an abuse of discretion unless that decision is based "on untenable or unreasonable grounds." In re Stowe Cady Hill Solar, LLC, 2018 VT 3, ¶ 17, 182 A.3d 53; see In re S-S Corporation/Rooney House Developments, 2006 VT 8, ¶ 13, 179 Vt. 302 ("We will not equate a grant of agency discretion with ambiguity, nor will we afford to appellant a presumption of

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

ambiguity where the outcome of a determination depends to some extent upon agency discretion that has been conferred by statute."); but see Royalton College, Inc. v. State Board of Education, 127 Vt. 436, 451, 251 A.2d 498 (1969)(Although the Board had authority to order suspension, the Court vacated the decision to suspend degree granting power where the record left the basis for its action unclear.). When effectuating a policy change, an agency "need not demonstrate to the court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." FCC v. Fox Television, 556 U.S. at 515 (emphasis omitted).

Finally, Plaintiffs object to decisions which they maintain shift property and impose additional debt on some municipalities as a result of forced merger. See, e.g., Amended Complaint at 38 et seq. They argue that implementation of the ordered forced mergers ignores the probability that they will be saddled with the debt of other districts and deprived of their education-related property.

As a matter of law, school district assets lawfully belong to the State; therefore, the State, through its delegate Board of Education and over Plaintiffs' objections, can require transfer of these assets. See Town of Brighton v. Town of Charleston, 114 Vt. 316, 321-22, 44 A.2d 628 (1945) ("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."); Village of Hardwick, 98 Vt. 343, 129 A. at 161 ("Such property as a municipality holds [for public purposes], in a legal sense, belongs to the state."); accord New Castle County School District v. State of Delaware, 424 A.2d 15 (Del. 1980) (Statute requiring transfer of school district property for "$1.00" held constitutional.); People ex rel. Dixon v. Community Unit School District No. 3, 2 Ill.2d 454, 466, 118 N.E.2d 241 (Ill. 1954) ("The 'property of the school district' is a phrase which is misleading. The 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."); Central School District No. 1 of the Towns of Colchester, et al. v. State of New York, 18 A.D.2d 943, 237 N.Y.S.2d 682 (N.Y. App. Div.1963) ("The lands appropriated by filing of map on March 4, 1958, were held by respondent school district for school purposes and thus in a governmental capacity. . . . Consequently, the district was not entitled to compensation upon the taking by the State.") (citations omitted); Hazlet v. Gaunt, 126 Colo. 385, 393, 250 P.2d 188 (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 changing of boundaries, dissolution or division of school districts, or to the transfer of assets from an existing school district to the larger reorganized district of which it becomes a part.").

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

In addition, the Board "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 school districts." Final Report at 7. It appears, therefore, that the Board did consider the impact of local school board indebtedness when making its decisions. However, the Court is troubled by the possibility, though unintended, that the taxpayers of some municipalities may be saddled unfairly with repaying substantial school-related debt voted upon and incurred by voters in other municipalities before the Act 46 merger. See 16 V.S.A. § 562 (9) ("At a school district meeting, the electorate . . . [m]ay authorize the school board to borrow money not in excess of anticipated revenue for the school year by issuing bonds or notes.").

At this time, the post-merger impact on taxpayers in towns with low or no debt that are required to merge with entities which bring substantial debt to the union is unclear. The parties have not sufficiently briefed the issue, and the Court renders no final decision on the merits of claims related to alleged unfair effects on school-tax liability. Rather, the Court finds that, the effects, if any, on property-owners' school tax liability is currently speculative and does not support the granting of an injunction.

3. Do the Default Articles of Agreement Violate 16 V.S.A. §§ 701a et seq.?

Act 49 provides that districts subject to involuntary merger under the Final Report have 90 days to adopt their own articles of agreement; otherwise, those districts are subject to the Board's Default Articles of Agreement:

> The statewide plan required by subsection (b) of this section [the Final Report and Decision] shall include default Articles of Agreement to be used by all new unified 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

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

> Articles of Agreement included in the statewide plan shall apply to the new district. . ..

2017 Vt. Laws No. 49, § 8(d) (amending 2014 Vt. Laws No. 46 § 10).

Despite this language, the Plaintiffs explain that "[t]he Default Articles of Agreement create out of whole cloth a 'transitional board' composed of the Chair and Clerk of each district that is being force-merged." Plaintiffs' Reply Memorandum at 7. They argue that "[n]othing in Act 46 or 49 provides for the formation, nor the appoint of individuals to, a transitional board empowered to exercise general municipal powers . . .." and that "[16 V.S.A.] §§ 701a-724 make no provision for unelected transitional school boards" of the type established by Default Articles of Agreement. See Motion for Preliminary Injunction at 13. They speculate that these transitional boards will unlawfully conduct newly-merged school district business, entering into contracts and spending dissipating assets. Plaintiffs' Reply Memorandum at 8.

Under Article 9D of the Default Articles of Agreement, the transitional board is to prepare a first draft of a proposed budget for the permanent elected board, warn a meeting to elect the permanent board, and warn a meeting for voters to consider any committee proposed amendments to the Default Articles of Agreement. The Board is authorized to establish this transitional board and authorize preliminary action is specially authorized by 2017 Vt. Laws No. 49 § 8 (amending 2015 Vt. Laws No. 46 § 10(d)). Thereafter, it appears Plaintiffs can look to 16 V.S.A. §§ 701a et seq. to elect new members and consider changes to the Default Articles of Agreement.

Basic rules of statutory construction are applicable here:

> Our paramount goal in statutory construction is to give effect to the intent of the legislature. . .. Our goal is to also harmonize statutes and not find conflict if possible. . .. . In looking at any particular statutory scheme, we look to the whole and every part of it, its subject matter, and its effect and consequences in determining intent. . .. We should not construe statutes to reach unreasonable results manifestly unintended by the legislature.

Gallipo v. City of Rutland, 173 Vt. 223, 235, 789 A.2d 942 (2001) (citations omitted).

The Plaintiffs provide no persuasive authority for their apparent belief that the directives of Acts 46 and 49, as implemented under the Default Articles of Agreement, cannot and should not be viewed as complementary to and in harmony with provisions currently in 16 V.S.A. §§ 701a et seq. that relate to formation of permanent boards. They have not shown a likely violation of other applicable provisions of Title 16.

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

4. Do the Forced Mergers Violate Equal Protection?

The Plaintiffs assert that Act 46 will impose disparate educational funding in small schools in violation of Vermont's Common Benefits Clause and the Fourteenth Amendment. See Plaintiffs' Reply Brief at 48. They argue that Brigham v. State of Vermont, 166 Vt at 246, requires the Court to engage in a heightened scrutiny standard of review of these forced mergers.

The Vermont Supreme Court has "held that the Common Benefits Clause in the Vermont Constitution, see Ch. I, art.7, is generally coextensive with the equivalent guarantee in the United States Constitution, and imports similar methods of analysis." Brigham, 166 Vt. at 265. "As a general rule, challenges under the Equal Protection Clause are reviewed by the rational basis test, whereby distinctions will be found unconstitutional only if similar persons are treated differently on wholly arbitrary and capricious grounds." Id. (citations and quotation marks omitted).

Broadly viewed, this matter involves education. In Brigham, the Vermont Supreme Court seemed to suggest that the Plaintiffs' claims might be evaluated using a standard other than the rational basis standard:

> Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny; the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest and is narrowly tailored to serve that objective.

166 Vt. at 265.

The Court finds the Plaintiffs' claims herein are distinguishable from those raised in Brigham on several grounds. First, the Plaintiffs do not appear to raise a viable equal protection claim. "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 v. Town of Monkton, 2016 VT 84, ¶ 21, 202 Vt. 535. Moreover, "any equal protection claim, whether in the education context or elsewhere, requires an allegation of disparate treatment, not merely disparate impact." King v. State, 818 N.W.2d 1, 24 (Iowa 2012). Here, Acts 46 and 49 reflect Vermont's general, future, state-wide education policies; the fact that these statutes have individualized effects does not automatically suggest an equal protection violation. See Gould, 2016 VT 84, ¶ 20 ("Those who disagree with the adoption of a legislative enactment can pursue relief through the democratic political process."); Cf. Paige v. State, 2018 VT 136, ¶ 13, ___ Vt. ___ ("[T]he transfer of ownership of the town school to a new district and the dilution of control over educational decisions for town students are not injuries personal to

Vermont Superior Court
MAR - 4 2019
Filed Franklin Civil

plaintiff but are shared with taxpayers generally, and do not give him standing to challenge Act 46.").

Second, while their complaints do involve "education," their claims more fundamentally question the legality of State-imposed changes in statewide school governance. The Plaintiffs do not have a fundamental right to any particular form of school governance, and it is well within the State's legislative authority to oversee statewide education administration. By comparison, the Brigham court examined comparative impairment of individual student access to educational opportunities, a quintessential subject for equal protection analysis. See, e.g., Engquist v. Oregon Department of Agriculture, 553 U.S. 591, 602, 128 S.Ct. 2146 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions'."); Brigham, 166 Vt. at 265 ("Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record.").

Accordingly, rational basis review of the Board's Final Report decisions applies here. The State identifies a number of problems it is attempting to address through Acts 46 and 49, including: dwindling student population, uneven access to educational opportunities, administrative redundancies among current school districts, and limited education funding and resources. Consolidation of school districts and their resources provides a rational way to address these issues. Cf. Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe, 578 F.3d 753, 763 (8th Cir. 2009) (measures designed to achieve economy of scale found rationally related to legitimate government interest in a school consolidation case).

B. Threat of Irreparable Harm

"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) (quotation marks omitted).

In its motion and at the February 15, 2019 hearing, the Plaintiffs posited the following irreparable harms: (1) the State's implementation of Acts 46 and 49 is unconstitutional and thus constitutes irreparable harm per se; (2) anticipated costs in excess of $50,000 to comply with Act 46 forced mergers; (3) the administrative confusion of imposed transitional boards; (4) the inability to undo commingling of

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil

towns' funds should Plaintiffs later prevail on the merits; and (5) the imminent closure of smaller schools at the hands of merged boards containing representatives from larger towns.

The State argues that there is no imminent threat of harm in that any transfer of debt or property will not occur until June 30, 2019 under Default Articles of Agreement, §§ 5 and 6, and that in any event, the Plaintiffs' claims of irreparable harm are speculation. The Court agrees that the Plaintiffs' claims of irreparable harm are speculative. Plaintiffs make much of current turmoil regarding the implementation and effects of board merger. However, pressure to comply with Legislative mandates does not constitute irreparable harm for purposes of granting injunctive relief. Cf. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (environmental injury can seldom be remedied by money damages and is often of long duration or permanent).

Whether or not the Board's Final Order is implemented, Plaintiffs will incur expenses associated with school governance, town meetings, the voting of board members, and the like; spending money under these circumstances is hardly an occurrence related to Act 46. Moreover, any alleged effect on residents' taxation in a particular town, at this point, is unclear. As the State points out, the Default Articles of Agreement specifically permit newly merged members to examine and vote on redistribution of any transferred debt. Finally, the Plaintiffs have not carried their burden of showing that that debt and assets would become so tangled that adequate and required record keeping and accounting would not permit the Court to fashion a remedy which would restore the financial status quo, should Plaintiffs eventually prevail on some or all of their claims. The fact that most of these alleged harms involve money militates against a finding that the harm is irreparable for the purpose of granting injunctive relief.

C. Potential Harm to Other Parties and the Public Interest

The State argues that delaying the implementation of Act 46 school district mergers will impair the ability of non-party school districts to meet their obligations to the children they serve. In Hopkins County Board of Education v. Hopkins County, 242 S.W.2d 742 (Ky. Ct. App. 1951), the Court of Appeals of Kentucky addressed a similar argument when examining the validity of a school board merger:

> The next allegation is that many school students will be greatly inconvenienced because of a proposed consolidation of high schools. As we read the record, no actual plans for a change in the school system have been put into effect, and even if so, the inconvenience to certain students as opposed to the welfare of others and the school system as a whole is a matter

Vermont Superior Court
MAR - 4 2019
Franklin Civil

that addresses itself to the Board's reasonable judgment. It is further to be noted that the conditions of consolidation require the merged Board to follow the recommendations of the State Department of Education, which presumptively would not be arbitrary or discriminatory, and that the merger does not irrevocably effectuate a change in the school system.

Id. at 744.

Similarly, in this case, the State and the public have an interest in implementing fully Acts 46 and 49 which is at least as substantial as the Plaintiffs' interest in securing future delays. All agree that the public has an interest in public education governance. It is also evident that all interested parties have spent incalculable hours on issues related to the Legislatures' decision to reform statewide education policy. However, it is unclear whether that interest is better served by requiring compliance with Acts 46 and 49 to proceed or by granting Plaintiffs' request to stay their progress toward compliance and merger. For example, the State asserts that "[r]oughly 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." Defendants' Memorandum of Law at 5. Therefore, these factors do not unequivocally support the granting of a preliminary injunction.

IV. Conclusion

On balance, the Plaintiffs have not demonstrated their entitlement to a preliminary injunction. The Plaintiffs have not shown a substantial likelihood that they will prevail on the merits of their claim that the Board's actions in implementing Acts 46 and 49 are unconstitutional, and their claims of irreparable harm are speculative. The factors of potential harm to others and public interest appear at best neutral: Even assuming the Plaintiffs will suffer some relevant harm in the absence of a preliminary injunction, the current record suggests that the issuance of a preliminary injunction also may adversely affect others who are not party to the suit. Accordingly, the Motion for Preliminary Injunction is *denied.*

So ordered.

Dated in St. Albans, Vermont, this 4th day of March, 2019.

Robert A. Mello
Superior Court Judge

Vermont Superior Court
MAR - 4 2019
FILED: Franklin Civil