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Agency of Education

MEMORANDUM

TO: State Board of Education

FROM: Gregory J. Glennon

RE: Confidential Attorney-Client Communication

DATE: July 24, 2015

Act 46 of 2015 is generating multiple conversations among Vermont School Districts. There is much preliminary activity happening, which could lead to the formation of study committees and, ultimately, requests from these local committees, to the SBE, for approval to present merger articles to local voters.

Presently, there are two important questions that the SBE needs to answer, in order for the Agency provide direction to superintendents, school board members, and other interested parties. I will address each in turn:

1) What is the meaning of Section 4 of Act 46, in the context of the possible formation of a unified union among districts that presently, have different structures with respect to operating, versus not operating, an elementary school or high school?

Section 4 of Act 46 contains language that addresses outcomes around a "choice" district merging into a new structure that "operates" for grades that, previously, the "choice" district chose not to operate a school.

We have been presented, at the Agency, with a variety of insights about the meaning of Section 4. This appears to be a case of the legislature having spoken, but we aren't sure what they have said.

The Competing Views of Section 4

(i) Section 4 is there to ensure there are no forced transitions but "tuition" district voters can choose to join a different (operating) structure; and that when a new unified union is formed, all residents are under one structure/system of delivering the same educational opportunities to all students.

(ii) Section 4 requires any new structure to maintain choice for residents joining from a choice town, even though some would get choice, while others don't in any new unified union.

(iii) Section 4 forces "birds of a feather to flock together" and precludes the possibility of allowing voters in a "tuition" town to even consider a merger that may result in loss of choice, even a free choice of the voters.

Clearly, Section 4 contains strong language that squarely addresses the ability of voters in a "choice" or "tuition" district to preserve choice. Moreover, in 2019, when the ability of voters to chart their own course expires, and the State Board must assess future options for those districts that exist outside of one of the preferred structures, the SBE cannot mandate an outcome for a tuitioning district that takes away existing tuition options.

Legislative History/Intent

A review of the legislative history, in an attempt to glean the "intent" of the legislature, as to Section 4, does not turn up much evidence. After detailed discussions with staff counsel for the office of legislative council, I have discovered that the language in Section 4 is "carry forward" language from H.883 of 2014. H.883 was the predecessor bill, in many respects to H.361, which has now been signed into law as Act 46. There were robust legislative discussions in 2014 around the "fate" of tuition districts in any school consolidation law passed by the legislature. The discussions in 2014 about the meaning of the language now before you, in Section 4 of Act 46, centered around the concept that no governance transitions could occur, involving tuition districts, that were not freely chosen by the voters of those districts. The simple idea is that the fate of the governance structure for a tuition district lies with the voters. Nothing can be forced upon these districts. That was the purpose of the Section 4 language in the former bill, H.883 of 2014.

The House Education Committee carried this language forward into H.361/Act 46 to simply restate this approach, per staff counsel for the office of legislative council. This accounting is also consistent with the recollections of Agency staff that were present at the relevant education committee hearings in both the 2014 and 2015 legislative sessions, respectively. While the issue was a "hot potato" in deliberations around H.883 in 2014, the issue did not come up, in any substantive way, in debates in the education committees (or on the House or Senate floor) in 2015. The pertinent legislative history will show, basically, that the education committees were apprised of Section 4 being carry forward language from H.883 and the members understood what that meant and did not question or debate the topic, in any significant way, that would provide much useful legislative history; other than an acknowledgment that Section 4 was there for the same purposes as before, in H. 883, as set forth above (i.e.- not to force governance transitions upon tuition districts unless the voters freely choose such a transition).

While the legislative history appears to suggest that the voters in a tuition district can choose to enter a new district that may operate a school, some have asked whether this means that the residents within the (former) tuition district, can retain "choice", as before, even though now part of a municipal corporation/school district, that is an "operating" district that maintains an elementary school, or high school, or both. Once again, in the course of reviewing the legislative history with the office of legislative council, my understanding is that this was not an intended outcome. The notion that some students, but not others, within the same school district, would receive the tangible benefit of a tuition voucher, raises questions of constitutionality. Is it constitutional, under the education and common benefits clauses of the Vermont Constitution for students in the same school district to receive this kind of disparate

treatment? Only a court of law can answer this question. It is not an issue that has been settled by the Vermont Supreme Court. There are rational arguments to be made either way. The better course, to the extent possible, would be to look to the legislative history and intent, to avoid such a debate. Here, that may not be fully possible, given the sparse legislative history from the 2015 session. However, it would not be unreasonable, in my opinion, to acknowledge the fact that there does not appear to be any persuasive legislative history or intent promoting this outcome from 2015 and the 2014 legislative history noted above may also be relevant. See also Opinion of the Attorney General, 93-4 ("the purpose of the formation of union schools is so that town school districts can combine resources to provide an education that would not otherwise be possible at the local school district level given the lack of available resources…if after the formation of a union school, parents could still choose where to send their children to school, the purpose of the formation of the union school district would be defeated.").

Lastly, what if Section 4 means that tuition districts, and operating districts, are precluded from engaging merger discussions in the first instance? Could Section 4 be saying that in order to preserve the ability of a tuition district to maintain that status that there can be no mergers between tuition districts and operating districts?

The office of legislative council reports that this outcome was never discussed nor intended. Once again, a more literal reading of Section 4 may seem to indicate this. However, this would create inherent tension if not ambiguity with entire other sections and policy intentions underlying Act 46. A statute with contradictory terms is ambiguous. Nelson v. Town of St. Johnsbury, 2015 VT 5, ¶ 12. "We therefore must look beyond the plain language to determine the legislative intent, either probing into the legislative history or resorting to canons of statutory construction. Id. Here, there is no legislative history to support such a reading of Section 4 that I am aware of, after consulting with the legislative council, and Agency staff that were present throughout the relevant committee discussions.

2) The Application of Existing Statute, 16 V.S.A. § 822(c)(1), to Act 46 mergers

In recognition of the tricky nature of finding ways for a tuition district and an operating district to merge into one unified union district, some districts are discussing the possibility of continuing operate as a merged structure, while extending high school choice to all students, including those students carrying forward from previous operating district(s). Under existing statute, each school district shall maintain one or more approved high schools in which high school education is provided for its resident students unless the electorate authorizes the school board to close an existing high school, and to provide for the high school education by paying tuition…"

There is an existing caveat, predating Act 46 (since 2006), that a school district may both maintain a high school and furnish high school education by paying tuition:

> (i) to a public school as in the judgment of the school board may best serve the interests of the students;
> (ii) or to an approved independent school if the school board judges that a student has unique educational needs that cannot be served within the district or at a nearby public school. 16 V.S.A. § 822(c)(1).

Historically, since passage of this law, school boards have, at most, considered tuition requests on a case by case basis (with the exception of Concord; Concord has voted to close its high school though).

That has been the mostly universal interpretation/application of this law (i.e.- boards considering case by case requests). Now, the question is whether this law can be used to write *carte blanche* public school choice into articles of agreement for proposed unified union districts that also wish to operate. This is a novel issue. It may require further research and investigation to understand, if possible, legislative history and intent. More generally, the legislature seems to have settled this question through passage of Act 129 of 2011, the "public high school choice" law. This addresses statewide high school public choice already.

Role of the SBE

The SBE retains its role, under Act 46, as the decider of whether proposed merger articles are appropriate to be presented to local voters for a vote on a proposed merger plan. 16 V.S.A. § 706c. Therefore, the SBE needs to decide how Section 4 and 16 V.S.A. § 822(c) should be applied in considering proposed merger articles.