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STATE OF VERMONT
HOUSE OF REPRESENTATIVES

January 16, 2019

The Honorable Kathryn Webb, Chair, House Committee on Education
The Honorable Philip Baruth, Chair, Senate Committee on Education
Vermont State House
115 State Street
Montpelier, Vermont 05633-5301

Dear Chairs Webb and Baruth,

We are writing today to respectfully request that the House and Senate Education Committees hold hearings on the proposal to delay the implementation of the involuntary school district mergers that are part of the State Education Plan released in November by the State Board of Education.

While all of us have concerns in general about the involuntary mergers put into place, we are not requesting at this time that they be invalidated.

Rather, we believe strongly that the state must either place a moratorium on the July 1, 2019 deadline until the lawsuits underway are adjudicated, or simply extend the deadline by one year, to July 1, 2020, so that we allow the legal challenges to continue, and so that the legislature will more fully understand the true implications of these mergers – constitutional and otherwise.

There are, after all, significant legal issues that the lawsuits allege if these forced mergers go into effect. These issues include the following:

1. Section 10(a)(2) of Act 46 states clearly that the Board was to impose mergers *"to the extent necessary"* to accomplish the goals of this Act." The State Board of Education violated this portion of the law in its November 30, 2018 Order (page 6) by stating that they created preferred structures (i.e.: merged districts) *"wherever possible."* Obviously, these are very different orders and intents.
2. Section 9 of Act 46 made clear that there was no reason to merge districts that were already meeting the goals outlined in Act 46 Section 2. But, it became clear during the process that the Board made no attempt to evaluate the Section 9 proposals on their merits as required by Board Rule 3440.11 in terms of whether or not they met the goals. The Board never even established standards by which they might measure whether or not these proposals met the goals. So, in violation of the intent of the law, mergers were ordered on districts that already met – and even exceeded – the goals of Act 46. While Donna Russo Savage told the Senate Education Committee yesterday that 47 districts had their Section 9 proposals honored and were not merged, what Ms. Savage did not tell the Committee was that most of those districts (38 of them) could not be merged because of their operating structure--not because of their Section 9 proposal. Ms. Savage also told the Senate Education Committee in yesterday's testimony that it was not part of the Board's legal mandate to approve or deny Section 9 proposals but only to accept or refuse the Secretary's recommendations. A quick perusal of Act 46, Section 8(a)(2)(B) and (b) shows that this testimony was patently incorrect. The Board's mandate was to review each proposal on its merits. [*See also Board Rule 3440.11.]*

3. The Legislature cannot delegate the authority to dissolve local governments (school districts are municipalities) to the Executive or Judicial branches of government.
4. The "Default Articles of Agreement" from the Agency of Education violate the Equal Protection Clause and Due Process Clause of the US Constitution and the Common Benefits Clause of the Vermont Constitution. Voting is a fundamental right. It is illegal to take debt that was approved by one community that was given the right to consider and vote on that debt, and transfer any of that debt to another individual (neighboring community) who was denied the right to vote to incur that debt.
    1. Of immediate concern is the fact that there is enormous confusion in districts being involuntarily merged. Because of information sent out by the Agency of Education, some districts believe they must adopt the so-called "Default Articles of Agreement." On the other hand, another "Transition Timeline" was sent out by the Agency indicating that 16 V.S.A. 706(n) was operative and the original 90 day window for adopting Articles other than the Default Articles was no longer meaningful. Now that they have been told that Section 706(n) is operative many are asking if 706(f) is operative, which would require votes of each existing district before debt could be transferred, and if not, why not? Neither section was repealed or amended by the General Assembly.

    2. The Chairs of both House and Senate Education Committees recognized these potential problems with voting rights and directed the Agency, the School Boards Association and the Superintendents Association to recommend amendments to address these important transitional issues. [*See Act 49, Section 8, adding Section 10(d)(3) to Act 46.]* In March 2018, the Executive Director of the School Boards Association wrote to both chairs and said no changes were necessary. That was incorrect, and has created a process by which the Agency, itself, is writing law.

    3. With Town Meeting Day fast approaching, some of these still existing districts are being told they must develop one merged budget, even though the Attorney General's office has agreed to postpone organizational meetings. Furthermore, Vermont state law requires local school districts to present and vote on local district budgets at Town Meeting. *[See 16 VSA s 422, 428.]* If the appellants prevail in court, untangling merged debt and capital reserves will wreak havoc with the budgeting process. On the other hand, if the State prevails, merging budgets of the various existing districts would be a relatively simple process.

Finally, there seems to be some confusion regarding current Vermont statute with regard to the possibility of legislation to address the involuntary mergers put into place as part of the State Education Plan released in November by the Vermont State Board of Education.

Specifically, there is an argument being made right now that no legislation is allowed at this time because there are lawsuits underway regarding Act 46 and the involuntary mergers. This argument specifically cites 1 V.S.A § 213.

> **1 V.S.A. § 213 Pending suits unaffected –** "Acts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage."

We have investigated this matter, and would, in fact, disagree, with the assertion that 1 V.S.A §213 precludes any legislation in this area at this time.

In fact, from what we understand, this statute has been misinterpreted as preventing the Legislature from taking action while a case in court. Since the State is a defendant here, and the plaintiffs are almost all municipal corporations, and one of the main claims of the appeal is that Act 46/49 is being unconstitutionally applied, there is nothing prohibiting the Legislature from amending the law to halt forced mergers. From what we understand, section 213 was designed primarily to protect the interests of private parties to a lawsuit. The legislation needs only simply to begin: "Notwithstanding any other provision of law to the contrary, ..."

In addition, our investigation has revealed that the legislature has, in fact, passed legislation related to an issue that was in the process of being litigated. Here are the two most recent example that we have found:

1) In 2014, Governor Peter Shumlin signed into law the country's first mandatory-labeling law for genetically modified organisms. The law was scheduled to go into effect on July 1, 2016. Immediately following the passage of this law, various industry groups filed a lawsuit against Vermont. In May of 2016, the Legislature delayed the effective date of the GMO labeling law by one year to July 1, 2017. The lawsuit was dismissed later (in September 2016) only after the passage of a federal law on July 29, 2016 that pre-empted state GMO laws like Vermont's.

2) Act 47 of 2011 amended 30 VSA s20(b) to allow bill-back by the then Department of Public Service by adding a new (b)(15) in legal proceedings brought by a utility in state or federal court to charge that utility for the State's costs in the case. This law was debated and enacted in direct response to Entergy Vermont Yankee suing the Public Service Board and State officials in federal court over the closing of Vermont Yankee.

We thank you very much for your consideration, and hope you find our request favorable. We are more than willing to assist in identifying witnesses who can further detail some of the significant risks involved if the Legislature decides to do nothing to extend the July 1, 2019 involuntary merger deadline.

Very Sincerely,

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