Vermont Independent
Schools Association

Statement to the Vermont State Board of Education

by Mill Moore, Executive Director
Vermont Independent Schools Association

October 20, 2015

Reports reaching me from heads of independent schools around Vermont speak of confusion and misinformation among superintendents, members of school boards and involved citizens concerning the school choice provisions in Act 46 — particularly with respect to Section 4.

Superintendents and board members believe their options for retaining school choice have been altered, if not altogether eliminated.

Among the more startling reports are of a superintendent telling school choice districts they must *designate* a high school and instances of superintendents or school board members believing that school choice is no longer an option for existing choice districts.

All of these instances are incorrect.

Though Act 46 itself is very clear, this Board's September 15 statement, and subsequent news reports, have created confusion instead of clarity.

Two problems: First, this Board's statement that *"There is no authority in Act 46 that authorizes a newly formed district/preferred model, to both operate and pay tuition, for the same grade level(s)."*

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Second, the quotation attributed to Chairman Morse in a VPR news account: "*You either have to continue to run and operate a school, or offer choice. You cannot do both under the current statute."*

Contrast those statements with this paraphrase from Section 4(a): *All governance transitions … shall preserve the ability of a district that … provides … education … by paying tuition to continue … and shall not require the district to limit the options available to students if it ceases to exist as a discrete entity.*

And from Section 4(c): *Nothing in this act shall be construed to restrict or repeal, or to authorize, encourage or contemplate the restriction or repeal of the ability of a school district that … provides for the education of all resident students … by paying tuition … or by operating a school.*

I want to emphasize, a few words in that last sentence: *nothing shall … encourage the restriction or repeal of the ability of a school district …* . A school district must be left to work out its policy on its own.

Counter-arguments, such as Deborah Bucknam's op-ed published in several news outlets recently, now are raising very substantial doubt of this Board's interpretation of Section 4 concerning mixed choice and operating district mergers.

Several other attorneys with whom I have consulted are unable to reconcile the Board's statement with the language in the Act. Each of these attorneys says Section 4 is absolutely clear: the Board's interpretation is inconsistent with the Act.

One of the attorneys with whom I consulted is my association's legal counsel: Elizabeth Grant of Grant Norten Associates in Montpelier. Grant is a very experienced attorney with a practice in education law. She is a former General Counsel to the Department of Education.

In a letter, Grant writes: *"Act 46's language explicitly protects the rights of the merging entities to continue their systems in place at the time of the merger. Merging districts cannot be forced to change their systems or to limit the options available to their students."*

Part of Attorney Grant's analysis is that one need not be a skilled interpreter of statutory construction to comprehend Section 4. She wrote: "*In our opinion, few statutes are so manifestly clear."* And, she adds, *Act 46, Section 4 provides plain language that is remarkably unambiguous and does not require a resort to legislative history or any other approach to determining its meaning."*

I will not read more of Grant's letter, but I request it be placed on the record as evidence of a thorough and expertly reasoned legal analysis reaching a conclusion contrary to this Board's opinion.

This much is clear: We have no consensus on Act 46. The understanding of Section 4 is in dispute.

But, no matter what one's position may be, I hope members of this Board will agree that misunderstanding and misinformation can only lead to bad results.

And, because the work that school boards must do during the next few months will be a critical period of foundation building in their communities, those

boards must have an accurate and thorough understanding of Act 46. Now — not weeks or months from now.

In view of this urgent need, the Vermont Independent Schools Association asks this Board to do two things:

1) Adopt a neutral position on whether Act 46 permits mixed choice and operating districts and revise the Board's September 15 statement accordingly; and,

2) Make no policies or decisions based on opinions of the constitutionality of any provision in Act 46. Statutes must be presumed constitutional as enacted and executive branch officials must support the statutes.

Perhaps the General Assembly or the courts will settle what must be done with choice and operating districts. That opportunity is at least several months distant however.

Meanwhile, plans must be written and decisions must be made.

For now, I hope an explicitly-made neutral position from this Education Board will enable a better Act 46 planning and compliance process.

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Via email to mill@vtindependentschools.org

October 16, 2015

Mr. Mill Moore
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Re: Act 46 Implementation

Dear Mill,

In light of the questions raised by others, you have requested that GNA provide the Vermont Independent Schools Association ("VISA") with an opinion as to the meaning of Section 4 of Act 46. We understand that you wish to pass our opinion along to others and that you intend a limited waiver of the attorney/client privilege on behalf of VISA but only with respect to this opinion and not in connection with any other matter. Similarly, this firm will also make a limited waiver, at your request, of the protection afforded by the attorney work product doctrine but only with respect to this opinion and not in connection with any other matter.

The issue was most recently raised by the Vermont State Board of Education at its September 15, 2015 meeting, where the Board opined that newly merged districts must, post-merger, be entirely either operating or tuitioning.[1]

The Plain Meaning of Act 46

In our opinion, Act 46, Section 4 provides plain language that is remarkably unambiguous and does not require a resort to legislative history or any other approach to determining its meaning (indeed, any such "interpretation" is prohibited). As the Vermont Supreme Court has emphasized:

> While we may explore a variety of sources to discern [legislative intent], it is also a truism of statutory interpretation that where a statute is unambiguous we rely on

> the plain and ordinary meaning of the words chosen. We rely on the plain meaning of the words because we presume they reflect the Legislature's intent.

Baker v. State, 170 Vt. 194, 199 (1999) (punctuation and citations omitted).

First, the statute defines the word "district" to mean a pre-merger district, more specifically, a district that was in existence as of the effective date of Section 4.

Second, the statute refers to a merger as a "governance transition," i.e., a transition to new Articles of Association governing the merged districts.

For purposes of analysis, we will refer to a school district with school choice as District A and a district without school choice as District B. Section 4(a) clearly states that, with respect to any governance transitions occurring as the result of a merger between District A and District B:

1. The new Articles of Association must preserve District A's power to tuition its students (school choice) unless all of the parties to the merger (including District A) agree that District A will no longer have school choice; and, conversely:
2. The new Articles of Association cannot require District A to give up school choice if it merges with District B.

Section 4(b) mandates the same treatment with respect to District B:

1. The new Articles of Association must preserve District B's power to (if District B chooses to do so) meet its statutory obligations by operating a school; and

2. The new Articles of Association cannot require District B to offer school choice if it merges with District A.

Thus, in our opinion, the language of the statute could not be plainer, and it requires no interpretation whatsoever.

Subsection 4(c) actually emphasizes this plain language by providing that the Act: (a) cannot be construed "to restrict or repeal" the rights of either District A or District B; or (b) cannot "authorize, encourage, or contemplate" any restriction or repeal of the pre-existing rights of either District A or District B.

Thus, Section 4 comes at the preservation of school districts' pre-merger rights from every possible angle. No "interpretation" is necessary, and the legislature has effectively proscribed any approach to Section 4 that goes beyond the plain language.

Hence, the governing Articles of Association of a newly merged District A and District B must preserve: (i) the merging entities' pre-merger rights to tuition or operate a

school; and (ii) the options available to the students of District A and District B. Minimally, the status quo must be preserved unless District A or District B choose not to (for their own reasons, not because of Section 4 in any way).

Here, the legislature has said, in effect, "look at the plain language" of Section 4 – stated painstakingly in three ways – "and don't do anything else." Notwithstanding the teaching of *Baker* (quoted above) as to statutory interpretation, the Act effectively prohibits any "exploration of a variety of sources." In our opinion, few statutes are so manifestly clear, and consequently, with all due respect, the Vermont State Board of Education's conclusion, at its September 15, 2015 meeting, (again, to the effect that newly merged districts must, post-merger, be entirely either operating or tuitioning) is clearly erroneous as running counter to the plain language of the statute. Instead, Act 46's language explicitly preserves the rights of the merging entities to continue their systems in place at the time of the merger. Merging districts cannot be forced to change their systems.

No Constitutional Issue Is Raised by Section 4

Although Legislative Counsel Donna Russo-Savage suggests – in her memorandum dated July 2, 2015 – that the plain meaning of Section 4 "would likely" violate the Common Benefits Clause of the Vermont Constitution, she offers no analysis in support of this notion. The Common Benefits clause provides as follows:

> 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.

Vt. Const. ch. I, art. VII.

Perhaps Attorney Russo-Savage was focusing on the word "common" and was interpreting that term to mean "same." In our opinion, "common" means "mutual" in this context; accordingly, the plain meaning of Section 4 raises no issue under the Common Benefits Clause because it preserves not only the rights of District A but also the rights of District B. Tuitioning districts may very well wish to continue sending their students elsewhere, and operating districts will likely desire to carry on in their operations. Because both categories of districts are free to satisfy their respective desires, Section 4 assures that its benefits are evenly distributed in mutual fashion.

Moreover, a fundamental rule of statutory interpretation is that statutes must be construed to be constitutional if at all possible. *In re T.S.S.*, 2015 VT 55, ¶ 25 (Vt. Apr. 10, 2015).

Hence, any speculation that Section 4 might be unconstitutional should be nipped in the bud.

Conclusion

In our opinion, Section 4 of Act 46 is an example of the legislative process at its finest, and no agenda of any kind should be allowed to limit a district's reliance upon its plain language in considering merger.

We note that hope this aids VISA with respect to its advocacy to the Vermont State Board of Education and in other forums, particularly in light of the alternative interpretations of Act 46 that are being advanced at this crucial time, i.e., when tuitioning school districts are considering mergers with operating districts.

Sincerely,

/s

Elizabeth J. Grant

/s
Stephen G. Norten

[1] In reaching this conclusion, the Board contradicted its own Governance Committee, which had previously determined that Act 46 provides no impediment to a merged district having school choice even where that district includes an operating district.