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Via email: Oliver.Olsen@vermont.gov

Oliver Olsen
Chair, State Board of Education

Dear Board Chair Olsen,

I write regarding your request for an Attorney General Opinion related to the Town of Stowe's vote to withdraw from the Lamoille South Unified Union School District ("the Unified District").[1] The Unified District was involuntarily formed pursuant to Act 46 (2015) by order of the State Board of Education. You have asked whether the proposed withdrawal is permissible under Vermont law, and if so, whether the Board's jurisdiction and role specified in 16 V.S.A. § 724(c) applies.

I have reviewed the following materials related to this request:

1. Statutes and legislative materials:
    a. Acts 46 (2015) and 49 (2017);
    b. Chapters 3 and 11 of Title 16;
    c. Pending bills and proposals related to withdrawal from school districts;

2. The Board's November 2018 order pursuant to Act 46;

3. Caselaw related to Acts 46 and 49;

4. Materials provided to the Board and Attorney General's Office, including the following letters:
    a. Attorney Dina Atwood, Esq., to Town Manager Charles Safford, March 4, 2021;
    b. Agency of Education General Counsel Emily Simmons to Stowe Selectboard Chair William Adams, April 9, 2021;
    c. Representative Heidi Scheuermann to General Donovan, January 20, 2022;
    d. Legislative Delegation to the Board of Education, February 2, 2022;
    e. Selectboard Chair William Adams to Chair Olsen, February 7, 2022.

5. Memorandum of Agency of Education Staff Attorney Donna Russo-Savage to Board of Education, April 15, 2021, regarding analysis of certain withdrawal requests.

[1] Correspondence related to Stowe's withdrawal request has come from different sources. The Selectboard, through its Chair, wrote to the Board as "community leaders" describing how "the Town of Stowe voted overwhelmingly to approve the withdrawal and both of the other communities ratified it by substantive margins." Selectboard Chair Adams to Chair Olsen, February 7, 2022. It urged the Board to take up and grant the request. Legal arguments described herein regarding withdrawal following the local voting process have been presented by members of the General Assembly and others. These arguments are identified as those of "interested citizens" as opposed to those of "the Town."

Context for the Board's Request

Interested citizens argue that 16 V.S.A. § 724 governs withdrawal from the Unified District. Following the favorable vote of Stowe and the other member towns, Elmore and Morristown, interested citizens now ask the Board to take up and approve the proposed withdrawal pursuant to § 724(c). They provide a letter by the Town attorney concluding that "the language 'that voted' in Section 724(a) does not clearly preclude a vote by the voters of Stowe on the question of withdrawal from" the Unified District. Letter of Dina Atwood, Esq., to Town Manager Charles Safford, March 4, 2021. The letter states that "limiting the ability to withdraw by vote to only those towns which voluntarily merged (and prohibiting towns in forced mergers to remain merged) is discriminatory."

The Agency has opined that § 724 does not apply. A letter from its General Counsel to the Selectboard states that "[t]he plain language of § 724 would permanently prohibit a member of a State Board-created [unified union school district] from pursuing withdrawal / dissolution because the forming districts of these [unified union school districts] did not 'vote to form.'" The letter concludes that "[u]ntil the Legislature clarifies its intent" the plain language of § 724 coupled with the absence of a withdrawal provision in Act 46 supports the conclusion that the Unified District may not dissolve. Letter of Agency General Counsel Emily Simmons to Stowe Selectboard Chair William Adams, April 9, 2021.

Section 724 of Title 16, entitled "Withdrawal from or dissolution of a unified union school district," states in relevant part:

> A town or city corresponding to a preexisting school district that voted to form a unified union school district may vote to withdraw from the district if one year has elapsed since the unified union school district became a body politic and corporate as provided under section 706g of this title.

16 V.S.A. § 724(a). Subsection (b) of § 724 outlines voting process, and subsection (c) describes the process and considerations the Board is to apply before declaring a town has withdrawn.

Acts 46 and 49 do not speak to withdrawal.[2] For the most part, they were not codified into statute. Chapter 11 of Title 16, which contains statutes about formation of and withdrawal from school districts, has not been substantively amended since Acts 46 and 49. Most of Chapter 11 has not been updated in decades. Other than through technical amendments, § 724 is unchanged since enactment in 2008.

There are at least three pending proposals to amend 16 V.S.A. § 724, including H. 180, H. 493, and a submission by the Board taken up for legislative consideration on January 26, 2022. The first bill, H. 180, was introduced in February 2021 and is entitled "An act relating to the dissolution of or withdrawal from a unified union school district formed by order of the State Board of Education under Act 46." It would strike "voted to form" in 16 V.S.A. § 724(a) and otherwise preserve the statute as written. H. 180, As Introduced, https://legislature.vermont.gov/bill/status/2022/H.180.

The second bill, H. 493, was introduced on January 7, 2022, and is entitled "An act relating to withdrawal from a unified union or union school district and to electoral functions of a union school district where a member district is also a union school district." It would make several changes to withdrawal provisions in Chapter 11 of Title 16, including 16 V.S.A. § 724 and § 721a. Among other changes to § 724, the bill would strike the "voted to form" language, similar to H. 180. H. 493, As Introduced, https://legislature.vermont.gov/bill/status/2022/H.493. It would amend other subsections of § 724 and require the local school board and the Board of Education to consider, among other things, "how the town's

[2] Act 49 temporarily amended 16 V.S.A. § 721a regarding withdrawal from union school districts. Act 49 § 5. This temporary amendment has expired by its terms and is not at issue here.

or city's withdrawal from the unified union school district satisfies the goals of 2015 Acts and Resolves No. 46, as amended, including the provisions of the act that permit alternative structures if applicable." *Id.*

An additional proposal, also in the House and first taken up for consideration on January 26, 2022, would thoroughly rewrite § 724. This proposal, not yet a bill, is currently known as DR 22-0275.[3] It would remove "that voted to form" from § 724 and make it applicable to any "petitioning town." In one version, it provides a process for withdrawals initiated by towns under the version of 16 V.S.A. § 724 now in effect. This proposal would prospectively overhaul the withdrawal process, such that voters seeking withdrawal would first petition a school board for a study committee. The committee would consider how the district "promotes or fails to promote the State policy" of § 701 and provide a written report to the Education Secretary. The Secretary, in turn, would provide the report with recommendations to the Board of Education. Ultimately, the electorate would only vote on withdrawal after the Board approved the report.

Declination to Issue Formal Opinion

The Attorney General's Office has successfully defended Acts 46 and 49, the Board, members of the Board, the Agency, and the Education Secretary in cases challenging the validity of the Acts and the Board's November 2018 order. The Office must balance its duty of defending state statutes, agencies, and officials with its other statutory responsibilities. Typically, we do not issue opinions on matters that are likely to result in litigation – this policy is designed to avoid potential prejudice to defense of state actors and statutes. For this reason, the Office declines to issue a formal opinion here.

That said, there is uncertainty regarding the forum in which to address the withdrawal request – be it the Board, the General Assembly, or the courts. This letter does not take a position on the policy of withdrawal from or dissolution of involuntarily merged districts. What follows is a summary of current law to assess how a court might rule if it were presented with a case seeking to compel the Board to act or, alternatively, a case seeking to enjoin the Board from acting.

Summary of Relevant Case Law, Statutes, and Pending Legislation

Limited Authority of the Board

The Board, like other agencies, is limited to powers conferred by the Legislature.[4] "[U]nder our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government." *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 36 (quoting and citing *In re Agency of Admin.*, 141 Vt. 68, 75 (1982)).

As warned by the Supreme Court, "[a]n agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene." *In re Agency of Admin.*, 141 Vt. at 75. "[T]he Legislature has made it clear that administrative departments may exercise only those powers expressly conferred, and that authority cannot arise through implication." *In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 117 (quotation and citation omitted). "Jurisdiction is accordingly not presumed in favor of an agency's jurisdiction." *Id.* (quotation and citation omitted).

The Board's "general powers and duties" are in 16 V.S.A. § 164. Among other responsibilities, the Board is to "act in accordance with legislative mandates." 16 V.S.A. § 164. It may adopt rules

[3] DR 22-0275 is available at: https://legislature.vermont.gov/committee/document/2022/10/Bill/378584#documents-section.
[4] The Board and its gubernatorial appointees operate in the context of various legal provisions. *See, e.g.*, 16 V.S.A §§ 161, 164; Executive Order 19-17. The Board is without its own counsel, *see* 16 V.S.A. § 163, and I understand it has requested advice pursuant 3 V.S.A. § 159 in the interest of ensuring it acts consistent with its legal authority and responsibilities.

pursuant to the Administrative Procedures Act "to carry out the powers and duties of the Board as directed by the General Assembly, within the limitations of legislative intent." 16 V.S.A. § 164(7).[5]

The Board's authority in 16 V.S.A. § 164 was not amended as part of Acts 46 or 49. Act 46 charged the Board with certain actions regarding the Education Secretary's proposal "to move districts into the more sustainable, preferred model of governance." Act 46 § 10(a)-(b). By November 18, 2018, the Board was to review and analyze the proposal, potentially take testimony, approve or amend the proposal consistent with the Act's charge, and ultimately publish an "order merging and realigning districts and supervisory unions where necessary." Act 46 § 10(b). The Board was permitted, but not required, to adopt "rules designed to assist districts in submitting alternative structure proposals." Act 49 § 20 ("State Board Rulemaking Authority"). The Acts do not otherwise speak to Board rulemaking.[6]

Athens School District v. Vermont Board of Education

In *Athens School District v. Vermont Board of Education*, 2020 VT 52, the plaintiffs argued in part that: (a) the Board ignored the plain language of Acts 46 and 49 when it ordered a merger without making a finding of necessity, and (b) it failed to apply preexisting provisions in Title 16 that the plaintiffs felt governed formation of involuntarily merged districts. The case was about formation; it did not address withdrawal or application of 16 V.S.A. § 724. Nevertheless, the Court's analysis may foreshadow its approach to whether 16 V.S.A. § 724 applies here.

As the Court explained, Act 46 "established a presumption that preferred structures are the best means of satisfying the Act's goals" and accordingly "placed on those districts objecting to merger . . . the burden of establishing that their proposed alternative structures provided a superior means of meeting those goals." *Athens*, 2020 VT 52, ¶ 23. The Court agreed with the State[7] that the Board may order a merger without making a threshold necessity finding. *Id.* ¶ 25. The Court considered "the entire statute, including its subject matter, effects and consequences, as well as the reason and spirt of the law," to give effect to legislative intent, *id.* ¶ 19, and it concluded that the plaintiffs' arguments "cannot be reconciled" with the text and purpose of the Acts, *id.* ¶ 23.

The Court agreed with the State that "none of the provisions that plaintiffs rely on" to argue the Board's order conflicted with Title 16 "are applicable in situations involving involuntary state-initiated mergers." *Athens*, 2020 VT 52, ¶ 34. It applied the canon of construction that states, where it is not possible to avoid conflict between statutes, "specific and more recent statutes regarding the same subject matter control over more general and older statutes." *Id.* ¶ 30 (citations omitted). The Court explained:

> [P]laintiffs point to 16 V.S.A. §§ 706d, 706f and 721, provisions which are part of a statutory procedure that has remained largely unchanged since first enacted over forty years ago. 1967, No. 277 (Adj. Sess.), §§10, 12, 35. In contrast to the involuntary mergers of districts to form supervisory districts contemplated by the second phase of Act 46, §§ 706d and 706f concern the voluntary formation of a union school district by vote after a local study committee recommends merging multiple districts.

Id. ¶ 32. The Court accordingly rejected the plaintiffs' argument that Acts 46 and 49 "anticipated giving individual communities a veto power over proposed mergers, pursuant to chapter 11 of Title 16." *Id.* ¶ 31.

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[5] Language regarding the Board's general adherence to legislative mandates in the opening paragraph of § 164 and the specific reference to limitations of legislative intent regarding Board rulemaking in § 164(7) were added last year. Act 66 § 20 (2021).
[6] Act 49 § 42 suspended the Board's rulemaking regarding independent schools; this has since been superseded. Act 173 (2018).
[7] The named defendants were the Board, members of the Board, the Agency, and the Secretary. *Athens*, 2020 VT 52, ¶ 1. n.1.

Athens thus stands for two propositions that inform how a court may approach interpretation of the Board's jurisdiction and 16 V.S.A. § 724 here. First, Acts 46 and 49 must be read to give effect to the Legislature's intent to require districts to merge into "preferred educational governance structure[s]," *id*. ¶ 7, where possible and practicable. *Id.* ¶ 23. Second, provisions of Acts 46 and 49 governing involuntary mergers control over preexisting voting provisions. *Id.* ¶ 34.

16 V.S.A. § 721a – Withdrawal from union school districts

A majority of voters in the Unified District seek to withdraw, or approve of withdrawal, from a "unified union school district," where complete pre-kindergarten through twelfth grade education is offered. In contrast, withdrawal from *union* elementary or *union* high school districts is governed by 16 V.S.A. § 721a. Section 721a was enacted nearly forty years before § 724 and does not contain the same "that voted to form" language. Instead, it provides that "[a] school district that is a member of a union school district may vote to withdraw from the union school district" if one year has passed since becoming a body politic. 16 V.S.A. § 721a(a).

At least one union elementary school district that was involuntarily created pursuant to Act 46 has since sought to dissolve. Specifically, voters in Westminster sought to withdraw from the Windham Northeast Union Elementary School District. This request came before the Board in April 2021. At the same time, voters in Ripton sought to withdraw from the voluntarily formed Addison Central [Unified Union] School District. Regarding Westminster, the Agency advised the Board to apply the process in 16 V.S.A. § 721a. Memorandum of Agency Staff Attorney Donna Russo-Savage to Board of Education, April 15, 2021. The Agency noted the difference in "voted to form" language between § 724 and § 721a. *Id*. n.10. Regarding Ripton, the Agency advised the Board to follow the process in § 724. Separately, the Agency provided the Town of Stowe the letter quoted above regarding § 724. Letter of Agency General Counsel Emily Simmons to Stowe Selectboard Chair William Adams, April 9, 2021.

The result is: (a) a town in a union elementary school district that was involuntarily merged pursuant to Act 46 has been permitted to withdraw; (b) a town in a unified union district that was voluntarily formed has been permitted to withdraw; and (c) the town in the unified union district at issue here that was involuntarily merged has not been permitted to pursue withdrawal before the Board.[8]

Pending Legislation to Amend 16 V.S.A. § 724

As described above, there are at least three pending proposals to amend 16 V.S.A. § 724. Each, at a minimum, would remove the "that voted to form" language from the law. This reflects that the General Assembly is considering whether to amend existing law and what the appropriate withdrawal process should be. Practically, one could seek to argue that the pending proposals reflect a particular reading of § 724. Legally, however, the Vermont Supreme Court has strongly suggested that pending legislation cannot be used to interpret existing law. *Insurance Co. of State of Pa. v. Johnson*, 2009 VT 92, ¶ 12 (citing *Town of Killington v. State*, 172 Vt. 182, 194 (2001)).

<u>Additional Arguments of Interested Citizens</u>

Certain interested citizens argue that the "voted to form" language in 16 V.S.A. § 724 is met because the member towns voted on Articles of Agreement. They point to language in the Unified District's Articles of Agreement, which appears in the Board's default Articles, that references 16 V.S.A. § 721 and 16 V.S.A. § 724. They posit that the Board's incorporation of § 724 in the default Articles is

[8] Followers of these developments question how to reconcile them. Such questions are important. They also raise policy and legal arguments beyond the scope of advice sought, and beyond the scope of recognized expertise of administrative bodies. *See, e.g.*, *Athens*, 2020 VT 52, ¶ 20 (Court gives no deference to agency regarding constitutional challenge to application of a statute).

evidence that the Board has interpreted § 724 as permitting withdrawal from unified union school districts involuntarily created by Act 46, at least where towns vote on articles, as the Unified District did here.

The Articles, and the vote on them, must be considered in context. In Act 49, the Legislature charged the Agency and the Board with including "default Articles of Agreement" in the statewide plan required as part of the "transition to sustainable governance structures" under Act 46. Act 49, § 8. If an involuntarily formed district failed to approve articles of agreement within a prescribed time, the default Articles were imposed by law. *Id*. § 8(d)(2).

The language the interested citizens point to in the Unified District's Articles is not unique. It is the same for all districts merged by the Board's 2018 order.[9] Not all involuntarily merged districts voted to amend or approve articles. Had the Unified District not done so, the default Articles would have applied by law. Reviewed in this context, and considering the Supreme Court's *Athens* analysis above, the Unified District's vote on the Articles was not a "vote to form" a unified union school district.

Weight of reference to § 724 in the default Articles of Agreement

The default Articles of Agreement, which reference both § 721 governing formation and § 724 governing withdrawal, pre-date *Athens*. As discussed above, *Athens* rejected the argument that 16 V.S.A. § 721 applies to formation of districts forced to merge pursuant to Acts 46 and 49. 2020 VT 52, ¶¶ 33-34.

Inclusion of § 724 in the default Articles does not change plain statutory text. Even where the Legislature delegates rule- or policy-making authority, implementation must be permissible. It is likely a court would conclude that, considering the plain language of § 724, the legislative intent to create preferred governance structures under Acts 46 and 49, and factual context, the Articles cannot be interpreted to allow for local voting to withdraw from involuntarily formed unified union school districts.[10]

Ultimately, the question is not how agencies interpret statutes. It is: (a) what would a court conclude the General Assembly intended regarding withdrawal from districts involuntarily formed pursuant Acts 46 and 49, and (b) does the Board have jurisdiction over such withdrawals. In Acts 46 and 49, and in the laws that have followed, the General Assembly has not expressly conferred any rulemaking or other authority to the Board regarding withdrawal from school districts.

With respect to other educational policy, the General Assembly's charge has been explicit. For example, in Act 173 (2018) regarding "equity of services provided to students who require additional support," the Legislature required the Agency and Board to engage in rulemaking to "establish processes for reporting, monitoring, and evaluation designed to ensure":

> (1) the achievement of the goal under this act of enhancing the effectiveness, availability, and equity of services provided to all students who require additional support in Vermont's school districts; and
>
> (2) that supervisory unions are complying with the Individuals with Disabilities Education Act, 20 U.S.C. chapter 33.

Act 173 (2018) § 16.

[9] The Order and Articles are at: https://education.vermont.gov/vermont-schools/school-governance/act-46-state-board-final-plan.
[10] The default Articles cite only § 724 and not § 721a, meaning the four involuntarily formed *union* elementary school districts have Articles of Agreement that appear to erroneously cite the statute governing withdrawal from *unified union* school districts.

Here, by contrast, there is no such charge to establish processes for the Board's continued evaluation of involuntarily merged districts under Acts 46 and 49. Nor is there evidence to support the argument that the Legislature intended the "that voted to form language" in § 724 to apply to involuntarily merged districts that vote to adopt or amend Articles of Agreement. In the absence of express legislative authority, it is unlikely a court would conclude that citation to 16 V.S.A. § 724 in the default Articles of Agreement affords the Board jurisdiction in this context. *See, e.g., In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 117 (administrative authority "cannot arise through implication").

Conclusion:

How Acts 46 and 49 are intended to interact with statutory law would benefit from legislative clarity. The Acts made significant changes to school governance. They do not address withdrawal, and they remain largely as session law. The Agency has interpreted 16 V.S.A. § 721a as applying to involuntarily merged union elementary school districts, while it has read the distinct "that voted to form" language of § 724 to preclude its application to involuntarily merged unified union school districts. This aligns with plain statutory text. Whether this is the Legislature's desired result may be part of the debate over proposals described above. Legally, the Supreme Court would likely hold that such debate cannot be used to interpret existing law. *See Johnson*, 2009 VT 92, ¶ 12.

Ultimately, the Board only has the power conferred to it by the Legislature. The plain language of § 724 makes it, and the Board's jurisdiction, applicable to towns that "voted to form a unified union school district." The language pre-dates Act 46 and 49. While not directly on point, the logic behind the Supreme Court's *Athens* decision supports reading § 724 to apply only to unified union school districts that came into existence by voluntarily voting to form pursuant to statute, as opposed to those that exist involuntarily by virtue of state-formation under Act 46. This is true for at least two reasons.

First, as it did in *Athens*, the Court would likely construe Acts 46 and 49 to give effect to the Legislature's intent to create preferred governance structures through involuntary mergers. From this premise, the Court could conclude that § 724, read together with the Acts, cannot allow for "opting out" of involuntary mergers. While *Athens* addressed the Board's ability to order mergers in the first instance, the Court's analysis could apply equally to withdrawal and dissolution. In other words, reading § 724 to permit communities subject to involuntary mergers to opt out appears inconsistent with the Legislature's intent as determined by the *Athens* Court.

Second, the Court could construe Acts 46 and 49 as controlling over the preexisting voting provisions of Title 16. While *Athens* addressed § 721, which governs formation of union school districts, the statutory analysis for § 724 and withdrawal from unified union school districts is similar. As it did in *Athens*, the Court could reasonably hold that preexisting sections of relatively old statutory law do not afford local communities an override or, in the words of the Court, "a veto power" over involuntary mergers pursuant to the subsequently enacted Acts 46 and 49. *See Athens*, 2020 VT 52, ¶ 31.

This is an area of law under active legislative debate. Following that process, the Board may receive clarity regarding its charge. At this time, based on the information available to date, a court is likely to find that the Board does not have authority to apply the withdrawal process set forth in 16 V.S.A. § 724(c) to a unified union school district formed involuntarily pursuant to Acts 46 and 49.

Sincerely,

Sarah E.B. London
Chief Assistant Attorney General