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MEMORANDUM

TO:	The State Board of Education
FROM:	Owen McClain, Sheehey Furlong & Behm P.C.
DATE:	September 1, 2022
RE:	Assignment of the Lincoln School District to a Supervisory Union

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This Memorandum sets forth our legal analysis of the State Board of Education's ("SBE") statutory authority and obligations pursuant to 16 V.S.A. 261 regarding the provision of supervisory services for the Lincoln School District ("LSD"), which has withdrawn from the Mount Abraham Unified School District ("MAUSD").

On May 18, 2022, the SBE approved Lincoln's withdrawal from the MAUSD, without conditions. It further notified all interested parties that it would "review [supervisory union ("SU") boundaries] on its own initiative" pursuant to 16 V.S.A. § 261(a) at its regular September 2022 meeting, during which the SBE would decide whether to:

1. Assign the Lincoln School District to an existing, multi-district SU;
2. Create a new SU that includes the Lincoln School District and one or more other town school districts and/or union school districts; or
3. Designate the Lincoln School District as a supervisory district in order to provide its own supervisory services.

In a subsequent email sent on July 21, 2022, from SBE Board Member Jennifer Samuelson, the SBE asked the LSD to submit in writing, by September 1, its preferences to receive SU services among the below options:

1. Assign the Lincoln School District to an existing, multi-district Supervisory Union
2. Create a new SU that includes the Lincoln School District and one or more other town school districts and/or union school districts
3. Designate the Lincoln School District as a supervisory district in order to provide its own supervisory services
4. Deconstruct a Supervisory District into an SU that will provide supervisory union services to the Lincoln School District

In order to assist the SBE in reaching a sound decision, consistent with Vermont law, regarding Lincoln's SU assignment, we offer the following comments regarding each of the four above-referenced options. (Please note that this memorandum addresses the ***four*** options set forth in the July 21, 2022 email from Ms. Samuelson.)

It is worth noting at the outset that the SBE is ***obligated*** by 16 V.S.A. § 261 to make SU assignments, and do to so "in such manner as to afford increased efficiency or greater convenience and economy and to facilitate prekindergarten through grade 12 curriculum planning and coordination as changed conditions may seem to require." The SBE must also make assignments that "***ensure reasonable supervision.***" *Id.* § 261(b)(3) (emphasis added).

It should also be noted that Chair Olsen's recent comments to the effect that the SBE does not have the "tools" to deal with Lincoln without further "legislative action" are wrong as a matter of law under Section 261. The SBE not only has the statutory authority to assign Lincoln to a supervisory union that will be workable and promote efficiencies for both Lincoln and other school districts—it is obligated by law to ensure that its SU assignment will secure adequate supervisory services for Lincoln students.

As explained below, and in the LSD's September 1, 2022 letter to the SBE, Option #1 is the best option at this time. Option #2 is not viable given the SBE's findings regarding Ripton and Ripton's potential return to a unified district. Option #3 is foreclosed by Vermont law. Option #4 may comport with Section 261; however, Lincoln has some reservations about this path.

Option # 1: Assignment to an existing, multi-district SU.

There are several viable options for assignment of Lincoln to an existing, multi-district SU. Lincoln recognizes that the Rutland Northeast Supervisory Union ("RNESU") and the White River Valley Supervisory Union ("WRVSU") have both articulated their reluctance to take on another town district in their SUs. The SBE appears to believe that this "reluctance" somehow limits its authority to assign Lincoln to one of those existing SUs; however, this conclusion is wrong as a matter of law. The SBE has complete statutory authority to assign Lincoln to an SU—even if the SU is reluctant—if that assignment is the best available option to provide successful supervisory services.

The only statutory language that discusses an existing SUs preference is Section 724, and that statute does not change the above conclusion. In particular, Section 724(d)(B)(iv)(II) provides that a withdrawal committee's report shall contain a statement from potential SUs regarding their "ability and willingness to accept the proposed new school district as a member district." This language does not limit the SBE's assignment of Lincoln to a willing SU for several reasons.

First, the withdrawal process contemplated under Section 724, as amended, does not apply to Lincoln's withdrawal because it withdrew prior to the statute's enactment. Accordingly, there is nothing mandating that the willingness of another SU even be considered in Lincoln's withdrawal process, let alone adhered to as if it were the law.

Second, even if the SBE decides to consider the willingness and ability of other SUs, which would appear consistent with its underlying Section 261 authority anyhow, Section 724, as amended, expressly contemplates that the SBE shall assign a new district to an SU regardless of whether the SU is willing or the assignment requires the deconstruction of an existing

Supervisory District into an SU. In particular, Section 724(h)(3)(A) provides that, in "addition to the considerations set forth in Section 261," the SBE shall "consider the potential positive and negative consequences on all affected districts and supervisory unions" if SU services are provided by either:

(i) a union district serving as its own supervisory district to become a member of a multidistrict supervisory union; or
(ii) a neighboring supervisory union to accept one or more additional districts that the supervisory union testifies it is not able to accommodate.

In short, the Legislature has already contemplated the challenges the SBE is currently grappling with—including the potential unwillingness of an SU or the deconstruction of an existing SD. Far from expressing its will that neither of these assignments should occur, the Legislature has expressly directed to SBE consider the impacts when exercising its authority under Section 261. Moreover, even in the face of a district that votes to withdraw from a unified district against the advice of the SBE, Section 724 expressly directs the SBE to consider these options for supervisory services even though other policy preferences may cut against such an assignment. In light of the foregoing, the SBE cannot conclude that it has any statutory authority to avoid assignment to an existing SU based merely on the preferences of the assigned SU. The statutory authority mandates the opposite conclusion. The SBE must make such an assignment if it is the best way to ensure that all students have access to adequate supervisory services.

Option #2: Creation of a new SU that includes Lincoln and one or more other town school districts and/or union school districts:

As noted in the LSD Board's letter, this option is no longer viable given the SBE's findings regarding Ripton, Ripton's potential return to a unified district, and the potential that Starksboro's withdrawal from the MAUSD will be unsuccessful.

Option #3: Designate Lincoln as a supervisory district in order to provide its own supervisory services.

This is not an option for the SBE because it does not comport with the requirements of Section 261. Pursuant to Section 261, the SBE must assign Lincoln to an SU which will result in reasonable supervision of the school—plainly meaning that the SU assignment must be plausible and workable. The assignment must allow Lincoln to provide the necessary services, such as special education, and to disburse federal and state funds, implement curriculum, and establish policies for the professional development of teachers. *See Winburn v. Bennington-Rutland Supervisory Union*, 732 F. Supp. 29, 30 (D. Vt. 1990).

The SBE itself has acknowledged that Ripton was not large enough to establish a viable SU that meets the requirements of Section 261 and would not even be large enough to meet the requirements of Section 261 if combined with Lincoln. Accordingly, the SBE may not assign Lincoln as its own SU under Section 261 because the statute is clear that the SBE may *only* designate a school district as its own "supervisory district" where the size of the district is sufficient to sustain the services necessary: "(c) The State Board may designate any school

district, including a unified union district, as a supervisory district if it will provide for the education of all resident students in prekindergarten through grade 12 and **is large enough to support the planning and administrative functions of a supervisory union**." 16 V.S.A. § 261(c). Given the SBE's public acknowledgement that a district of Lincoln's size is not large enough to "support the planning and administrative functions of a supervisory union" it cannot designate Lincoln as its own supervisory district without clearly contravening its own Legislative mandate in violation of Section 261.

Moreover, the SBE cannot assign Lincoln as its own SD as a so-called last resort based on the perceived lack of other options or other policy priorities. For example, while Act 46 articulates a "preference" for an SD structure, that is only true where the district has "a minimum average daily membership [defined, in relevant part, by § 4001(1) of Title 16 as full-time equivalent enrollment of students who are legal residents of the district] of 900." *Id.* § 5(b)(3). Lincoln's enrollment will not be that large. Accordingly, the SD structure is not preferred under Act 46 in Lincoln's case.

Additionally, Act 46 provides that a "supervisory union with member districts" can "meet the State's goals, particularly if . . . the supervisory union operates in a manner that maximizes efficiencies through economies of scale and the flexible management, transfer, and sharing of nonfinancial resources among the member districts." *Id.* § 5(c)(3). Such efficiencies will be achieved by assigning the LSD to an existing SU with member districts and cannot be achieved by requiring Lincoln to provide its own supervisory services.

Similarly, Section 261 expressly demands consideration of cost efficiencies, stating that the SBE must make SU assignments "in such manner as to afford increased efficiency or greater convenience and economy . . . ." The assignment of LSD to its own supervisory district will *not* create efficiencies or benefit from economies of scale. To the contrary, it will create inefficiencies by requiring Lincoln to hire part-time staff and run an entire SU on its own, creating additional administrative infrastructure that is unnecessary and costly.

In short, the SBE cannot fulfill its statutory duties by assigning the LSD as its own supervisory district given the size of the LSD, the inefficiencies that will be created by the assignment, and the workability of that assignment.

Option #4: Deconstruct a Supervisory District into an SU that will provide supervisory union services to the Lincoln School District

The last option is for Lincoln to be assigned to a newly-created, multi-district supervisory union that includes a union district that is currently serving as its own supervisory district. This option has always been available to the SBE under Section 261 and continues to be an available option today. Regarding this option, there are several important considerations.

First, the SBE does not have the statutory authority to avoid this outcome under Section 261 based on provisions of Act 46 that articulate a mere preference for a certain kind of educational governance structure. In other words, the SBE may not legally preserve an existing SD structure simply because it is preferred if the overall result denies students supervisory

services. In particular, the SBE cannot elevate the legislative "preference" for single district Supervisory Districts, as articulated in Act 46, into a bright-line policy mandate that is more important than the statutory mandate set forth in Section 261. The Act 46 preference is merely a legislative preference. Had the Legislature intended for this preference to be a mandate on par with the requirements of Section 261, it would have articulated it as a mandate. *See* Act 46, ¶ 5(b) ("The *preferred* educational governance structure is a school district that . . . is its own supervisory district."). Because the successful provision of supervisory services under Section 261 is law, and the Act 46 guidance is merely a policy preference, the Section 261 mandate trumps the Act 46 preference.

Nor can the SBE take this option off the table merely because the SBE has itself adopted a policy that disfavors the deconstruction of a SD or because the SBE is "loath" to force an unwilling SU or SD into a new arrangement. Such concerns may be valid policy considerations, but they do not provide a legal basis to set aside the overarching statutory mandate set forth in Section 261.

It is no secret that the SBE and Chair Olsen would prefer that Lincoln did not withdraw and continued to pursue a consolidated governance structure within the MAUSD. Chair Olsen, for example, has publicly called the withdrawal reckless. These policy preferences, however, cannot be legally exercised through the SBE's statutory duty under Section 261. In other words, the SBE cannot use its statutory authority under Section 261 to undermine the success of an independent school district by making SU assignments for that district that are doomed to fail. This is because the Legislature has expressly taken such authority away from the SBE. In particular, recent amendments to Section 724 make it abundantly clear that the withdrawal of a district is a matter for the voters—even if the SBE advises strongly against such a withdrawal. Utilizing Section 261 to undermine the success of a withdrawal even after it has occurred is the equivalent of exercising a power that the Legislature has expressly taken away from the SBE under Section 724, as amended. Accordingly, the SBE cannot avoid this statutory option merely because it is not preferred or does not comport with its own policy objectives.

Moreover, the deconstruction of an existing SD, while not Lincoln's preference, may promote the State's interest even if it is not the "preferred" educational structure under Act 46. As stated by the Secretary of Education in guidance provided to the SBE on July 20, 2022:

> ***The State's interest should be in governance stability – especially in a region that has many small schools. Therefore, although a UUSD that serves as its own supervisory district remains the preferred option, if that cannot be achieved in the region then a multi-district supervisory union may ultimately be the structure that provides the most stability.***

For the above reasons, the SBE's assignment of Lincoln to a multi-district supervisory union that includes a union district that is currently serving as its own supervisory district remains a viable option for SU services under Section 261. However, as noted in the letter from the LSD Board, both Lincoln and MAUSD have expressed reservations about this solution.

Finally, we understand that the SBE has a strong preference for towns like Lincoln to go back to a consolidated governance structure, and there is indeed a statutory process for that should Lincoln, in the future, want to pursue joining an existing union. *See* 16 V.S.A. § 721(a). Notwithstanding the SBE's overarching policy objective vis-à-vis district consolidation, however, it is clear through recent statutory amendments to Title 16 that the Legislature has (1) preserved the power of voters to make the ultimate decision regarding withdrawal from a union district—even if the SBE does not agree, and (2) has continued to mandate that SBE draw SU boundaries in a manner that ensures that all students receive adequate supervisory services—even those students who attend small schools in independent districts with a governance structure the SBE disfavors.

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