VERMONT SUPERIOR COURT

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CIVIL DIVISION

Case No. 215-12-20 Oscv

Vitale et al vs. Bellows Falls Union High School et al

Opinion and Order on Defendants' Motions to Dismiss

The Plaintiffs in this case include three sets of parents of school-aged children residing in the towns of Athens, in Windham County; Glover, in Orleans County; and Chelsea, in Orange County (together, "Plaintiffs"). The gravamen of Plaintiffs' Amended Complaint is that 16 V.S.A. §§ 821 and 822, which give school districts the discretion to operate their own schools or pay tuition for students to attend another public or independent school, or both, are unconstitutional because they violate the Common Benefits Clause, Vt. Const. ch. I, art. 7, and the Education Clause, Vt. Const. ch. II, § 68. Plaintiffs named as defendants: (1) the State of Vermont, Daniel French in his official capacity as Secretary of the Vermont Agency of Education, and the Vermont State Board of Education (together, the "State Defendants"), and (2) Windham Northeast Union Elementary School District, Bellows Falls Union High School District #27, Lake Region Union Elementary School District, and First Branch Unified School District (together, the "School

District Defendants"). The State Defendants and the School District Defendants each filed a motion to dismiss Plaintiffs' Amended Complaint. The Court will address each motion separately, but it will first set forth the statutes and constitutional provisions that are at issue in both motions as well as the guidelines courts use in resolving motions to dismiss.

I. Applicable Legal Provisions

A. 16 V.S.A. § 821

This statute applies to elementary grades, statutorily defined as grades K-6, see 11 V.S.A. § 11(a)(4), and provides:

> (a) Each school district shall maintain one or more approved schools within the district in which elementary education for its resident students in kindergarten through grade six is provided unless:
>
> > (1) the electorate authorizes the school board to provide for the elementary education of the students by paying tuition in accordance with law to one or more public elementary schools in one or more school districts;
> > (2) the school district is organized to provide only high school education for its students; or
> > (3) the General Assembly provides otherwise.
>
> (b) [Repealed].
>
> (c) Notwithstanding subsection (a) of this section, without previous authorization by the electorate, a school board in a district that operates an elementary school may pay tuition for elementary students who reside near a public elementary school in an adjacent district upon request of the student's parent or guardian, if in the board's judgment the student's education can be more conveniently furnished there due to geographic considerations. Within 30 days of the board's decision, a parent or guardian who is dissatisfied with the decision of the board under this subsection may request a determination by the Secretary, who shall have authority to direct the school board to pay all, some, or none of the student's tuition and whose decision shall be final.

(d) Notwithstanding subdivision (a)(1) of this section, the electorate of a school district that does not maintain an elementary school may grant general authority to the school board to pay tuition for an elementary student at an approved independent elementary school or an independent school meeting education quality standards pursuant to sections 823 and 828 of this chapter upon notice given by the student's parent or legal guardian before April 15 for the next academic year.

16 V.S.A. § 821.

B. 16 V.S.A. § 822

This statute applies to high school grades, statutorily defined as grades 7-12, *see* 16 V.S.A. § 11(a)(4), and provides as follows:

(a) Each school district shall maintain one or more approved high schools in which high school education is provided for its resident students unless:

(1) the electorate authorizes the school board to close an existing high school and to provide for the high school education of its students by paying tuition to a public high school, an approved independent high school, or an independent school meeting education quality standards, to be selected by the parents or guardians of the student, within or outside the State; or

(2) the school district is organized to provide only elementary education for its students.

(b) For purposes of this section, a school district that is organized to provide kindergarten through grade 12 and maintains a program of education for only the first eight years of compulsory school attendance shall be obligated to pay tuition for its resident students for at least four additional years.

(c)(1) A school district may both maintain a high school and furnish high school education by paying tuition:

(A) to a public school as in the judgment of the school board may best serve the interests of the students; or

(B) to an approved independent school or an independent school meeting education quality standards 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.

(2) The judgment of the board shall be final in regard to the institution the students may attend at public cost.

16 V.S.A. § 822.

C. 16 V.S.A. § 701

In an effort "to provide equal educational opportunities for all children in Vermont," the legislature has "authorized two or more school districts, including an existing union school district, to establish a union school district for the purpose of owning, constructing, maintaining, or operating schools . . . with all of the rights and responsibilities that a town school district has in providing education for its youths." 16 V.S.A. § 701. School districts are defined as "town school districts, union school districts, interstate school districts, city school districts, unified union districts, and incorporated school districts, each of which is governed by a publicly elected board." 16 V.S.A. § 11(a)(10). Local school districts vote to decide whether or not to join a proposed union school district. See 16 V.S.A. §§ 706a-706d.

A union school district is known as a "unified union district" if it "provides for the education of resident prekindergarten-grade 12 students" by operating a school for each grade, operating one or more schools for all students in one or more grades and paying tuition for the students in the other grades, or paying tuition for all grades. 16 V.S.A. § 722(a).

D. The Education Clause

The Education Clause of the Vermont Constitution provides:

> Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.

E. The Common Benefits Clause

The so-called Common Benefits Clause states 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. 7.

F. Analysis Applied to Motions to Dismiss

Both the State Defendants and the School District Defendants filed motions to dismiss Plaintiffs' Amended Complaint based on Plaintiffs' failure to state a claim upon which relief can be granted. *See* Vt. R. Civ. P. 12(b)(6).[1] Motions to dismiss are not favored and are subject to an exacting standard. When ruling on a

[1]The School District Defendants also base their motion on Vt. R. Civ. P. 12(b)(1), claiming the court lacks jurisdiction over the subject matter. The Court assumes this argument is based on the argument that Plaintiffs failed to exhaust their administrative remedies prior to initiating this lawsuit and that, pursuant to Vt. R. Civ. P. 75(c), a "trial court lacks subject matter jurisdiction to hear a case if a party fails to exhaust administrative remedies," *Mullinnex v. Menard*, 2020 VT 33, ¶ 8, 212 Vt. 432 (internal quotation omitted). Plaintiffs have clarified that they are asserting solely a facial challenge. As noted in text, the exhaustion requirement does not apply to facial constitutional challenges.

motion to dismiss for failure to state a claim, the Court assumes that the facts asserted in the Amended Complaint are true and makes all reasonable inferences in favor of the plaintiff. *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514 (citing *Mahoney v. Tara*, LLC, 2011 VT 3, ¶ 7, 189 Vt. 557 (mem.)). "A court should grant a motion to dismiss for failure to state a claim only when 'it is beyond doubt that there exist no facts or circumstances that would entitle [the plaintiff] to relief.'" *Id*. (quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002)). "The purpose of a dismissal motion 'is to test the law of the claim, not the facts which support it.'" *Id*. (quoting *Powers*, 173 Vt. at 395).

G. Plaintiffs' Constitutional Claims

Though unclear at the outset, Plaintiffs have made plain through filings and at oral argument that they are asserting solely a facial constitutional challenge to the statutes at issue and are not making an as-applied challenge. This distinction is important because the legal analysis is different depending on the type of challenge being asserted. "In a facial challenge, a litigant argues that 'no set of circumstances exists under which [a statute or regulation] [c]ould be valid.'" *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22, 212 Vt. 554; *see State v. VanBuren*, 2018 VT 95, ¶ 19, 210 Vt. 293. If a facial challenge succeeds, the remedy a court will provide is to invalidate the statute at issue. *Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22 (citing *Killington, Ltd. v. State*, 164 Vt. 253, 261 (1995)). Facial challenges are primarily for the benefit of society, are not limited to the way in which the statute or regulation affects the particular plaintiff(s), and are not

dependent upon any facts particular to the named plaintiffs. *Weissman v. Fruchtman*, 700 F. Supp. 746, 753 (S.D.N.Y. 1988) (cited with approval by *Killington*, 164 Vt. at 261).

In contrast, a litigant making an as-applied constitutional challenge contends that a statute or regulation is invalid when applied to the facts of his or her particular case. *Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22. An as-applied challenge is not ripe for judicial review until the complainant "has sought administrative relief through government procedures." *Killington, Ltd.*, 164 Vt. at 260-61. The remedy a court will provide in an as-applied challenge case is tailored to the complainant(s), but it will not typically be so broad as to invalidate the statute or regulation at issue. *Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477 (1995)).

Plaintiffs concede that they have not exhausted their administrative remedies and that they are not, therefore, positioned to bring an as-applied challenge to the statutes at issue. *See, e.g.,* 16 V.S.A. § 828 ("Unless otherwise provided, a person who is aggrieved by a decision of a school board relating to eligibility for tuition payments, the amount of tuition payable, or the school he or she may attend, may appeal to the State Board and its decision shall be final."); Vt. R. Civ. P. 75(c) (party must file Amended Complaint seeking judicial review of administrative decision within thirty days after notice of agency decision).

Plaintiffs note that the various factual assertions of the families are provided only for purposes of example and not as actionable individual claims.[2]

As Plaintiffs point out, however, they are not required to exhaust their administrative remedies when alleging only that a statute is unconstitutional on its face. *See Killington*, 164 Vt. at 261. The Court agrees.

II. School District Defendants' Motion to Dismiss

In their Amended Complaint, Plaintiffs allege the following against the School District Defendants:

- The Windham Northeast Union Elementary School District is responsible for educating students in Westminster, Athens, and Grafton, and it operates Grafton Elementary School, a public school serving grades pre-K through 6, as well as other elementary schools. It provides town tuitioning[3] for its students to attend the school of their choice for grades 7 and 8. Students who choose not to participate in town tuitioning are sent to neighboring Bellows Falls Middle School.

[2] If that were not the case, Vermont and/or federal statutes could provide potential relief to Plaintiffs. Those laws, however, would also require that Plaintiffs first present their factual claims to the schools and exhaust all administrative remedies. For example, some Plaintiffs have asserted that the School Districts failed to protect their children from bullying or failed to provide adequate special education services. Such claims are subject to exhaustion under 20 U.S.C. § 1415(1) and the Vermont Public Accommodations Act, 16 V.S.A. § 570f(b).

[3] Plaintiffs use the term "town tuitioning" to refer to the School District Defendants' decisions to pay the tuition of its students to attend a school outside of the school district, pursuant to either 16 V.S.A. § 821 or 16 V.S.A. § 822.

- Bellows Falls Union High School District # 27 is responsible for educating students in grades 9-12 who live in Grafton, Rockingham, Westminster, and Athens. All students in grades 9-12 are required to attend Bellows Falls High School.
- The Lake Region Union Elementary School District is responsible for educating students in Albany, Barton, Brownington, Glover, Irasburg, Orleans, and Westmore. Among other schools, it operates the Glover Community School, a public school serving students in grades pre-K-8.
- The First Branch Unified School District is responsible for the education of students in Chelsea and Tunbridge. It operates the Chelsea Public School, which includes an elementary school serving students in grades K-6 and a middle school serving students in grades 7-8. It also operates Tunbridge Central School, serving students in grades K-8.

In their Amended Complaint, Plaintiffs describe the negative experiences their children have undergone at the schools the School District Defendants have provided to the school-aged children residing in the defendants' districts. Only one set of parents, Marisa and Benjamin Trevits, met with a school board to request that it provide town tuitioning for their children to attend a different school. The school board (Lake Region Union Elementary School District) refused the Trevitses' request, and the Trevitses took no additional action to appeal the school board's decision.

Plaintiffs assert that providing the benefit of town tuitioning to students based on "the mere fortuity of their residence" and denying it to other students is patently unfair and violates the Common Benefits and Education clauses. Plaintiffs do not allege, however, that the School District Defendants are responsible for the statutes at issue or that the School District Defendants are not adhering to the requirements of the statutes. Plaintiffs made clear at oral argument that they are pursuing a facial challenge, contesting the constitutionality of the statutes at issue, and are not pursuing an as-applied constitutional challenge to the statutes. As a result, they are not eligible to receive individualized relief tailored to the needs of their particular children. See *Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22.

Plaintiffs maintain that the School District Defendants are proper defendants because of the "policies" they have adopted. The only "policies" at issue, however, are the decisions of the local communities to maintain a local school or tuition students. In other words, localities, not the School District Defendants, have merely made choices as allowed by Vermont law. Plaintiffs' claim is that such an overarching system is inherently unconstitutional.

Because the State, not the School District Defendants, is responsible for the laws of Vermont, because Plaintiffs are pursuing a facial rather than an as-applied constitutional challenge, and because full relief can be afforded to Plaintiffs on their facial challenge via the State Defendants, the Court grants the School District Defendants' motion to dismiss. *See Buttolph v. Osborn*, 119 Vt. 116, 119 (1956) ("[E]ducation is a function of the state as distinguished from local government.").

III. The State Defendants' Motion to Dismiss

Courts are to "'presume a statute is constitutional absent clear and irrefragable evidence to the contrary,'" *Athens School District*, 2020 VT 52, ¶ 37, 212 Vt. 455 (quoting *State v. Curley-Egan*, 2006 VT 95, ¶ 27, 180 Vt. 305), and "we must accord deference to the policy choices made by the Legislature." *Badgley v. Walton*, 2010 VT 68, ¶ 38, 188 Vt. 367. The statutes at issue in this case require school districts to maintain elementary and high schools unless their electorates authorize them to pay tuition instead to another district or independent school. 16 V.S.A. §§ 821 & 822. The school districts do not act on their own without the support of the districts' voters.

For the elementary grades, each district's electorate must provide the district with authorization before the district can "pay[] tuition in accordance with law to one or more public elementary schools in one or more school districts." 16 V.S.A. § 821(a)(1). Alternatively, "the electorate of a school district that does not maintain an elementary school may grant general authority to the school board to pay tuition for an elementary student at an approved independent elementary school or an independent school meeting education quality standards . . . ." *Id.* § 821(d).

Similarly, for the high school grades 7-12, the electorate may "authorize[] the school board to close an existing high school and to provide for the high school education of its students by paying tuition to a public high school, an approved independent high school, or an independent school meeting education quality standards, to be selected by the parents or guardians of the student, within or

outside the State . . . ." *Id*. § 822(a)(1). In addition, a district's school board has statutory authority to determine whether to "both maintain a high school and furnish high school education by paying tuition . . . to a public school as in the judgment of the school board may best serve the interests of the students." *Id*. § 822(c)(1)(A).

Lastly, electorates who chose to maintain their own schools may decide to join union districts or unified union districts. 16 V.S.A. § 701.

A. The Education Clause

Plaintiffs are correct in asserting that education is a fundamental obligation of the State.

> From the earliest period in this State, the proper education of all the children of its inhabitants has been regarded as a matter of vital interest to the State, a duty which devolved upon its government and which should be fulfilled at the public expense.
>
> The constitution of the State especially enjoins upon the legislature the duty of passing laws to carry out this object, and declares that a competent number of schools ought to be maintained in each town, for the convenient instruction of youth.
>
> The legislature of the State, in obedience to this injunction of the constitution, have from the first, taken this subject in hand, and provided by law for the support of schools at the public expense, and it has always been understood to be one of the first and highest duties of the government.

Williams v. School District No. 6, in Newfane, 33 Vt. 271, 274 (1860) (cited with approval by *Brigham v. State*, 166 Vt. 246, 263 (1997)).

The State Defendants are also correct, however, in noting that the Education Clause has never been interpreted to require the State to reimburse parents who

choose to send their children to a private school. In *Mason v. Thetford Sch. Bd.*, our High Court held that there "is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent." 142 Vt. 495, 499 (1983). Plaintiffs assert that this decision was decided long ago and that its determination in that regard should not be viewed as a holding of the case. The Court disagrees with the latter point. To resolve the appeal in *Mason* and address the appellants claims that they could pursue declaratory or other relief, the Supreme Court necessarily determined that there was no viable constitutional claim presented. *Id.*

While the *Mason* decision predates the Court's more recent rulings on education issues, Plaintiffs have pointed to nothing in those rulings that would challenge the result in *Mason* as to their Education Clause arguments. On the contrary, cases such as *Chittenden Town Sch. Dist. v. Dep't of Educ*, 169 Vt. 310, 316 (1999), though questioned on other grounds, suggest no change in that understanding of the Education Clause. *See id.* ("Whether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court."). Cases from other jurisdictions also support that result. *See, e.g., Stevenson v. Blytheville Sch. Dist*. No. 5 800 F.3d 955, 967 (8th Cir. 2015) (finding no precedent supporting view that a "parent's ability to choose where his or her child is educated within the public school system is a fundamental right or liberty"); *Doe v. Sec'y of Educ.*, 95 N.E.3d 241, 255 (Mass. 2018) ("there is no constitutional entitlement to attend charter schools").

The motion to dismiss the Education Clause claim is granted.

B. The Common Benefits Clause

Resolution of Plaintiffs' Education Clause claim does not fully resolve the matter. Plaintiffs' cause of action under the Common Benefits Clause is of equal constitutional moment. Even if there is no direct right to tuitioning under the Education Clause, the State's tuitioning system may still fall afoul of the Common Benefits Clause if it adversely impacts a segment of society without adequate justification.

The Common Benefits Clause is "intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons 'who are a part only of that community.'" *Baker v. State*, 170 Vt. 194, 212 (1999). Although Plaintiffs suggest, at some points, that the statutes at issue here must be subject to "strict scrutiny," the *Baker* Court eschewed reliance on the federal equal protection framework in deciding matters under the Common Benefits Clause. Instead, the *Baker* Court established the following test:

> When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection....
>
> We next look to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

> We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.

Id. at 212–14. *Baker* also confirmed that courts are still to afford deference to "legislation having any reasonable relation to a legitimate public purpose." *Id*. at 204; *see Badgley v. Walton*, 2010 VT 68, ¶ 21, 188 Vt. 367, 377–78 (noting same).

Plaintiffs here face insurmountable hurdles in that analysis. As an initial matter, the Legislature has not determined which districts will have their own schools and which will tuition. Instead, the electorate in each district makes that choice, and the law applies equally to all. Unlike the case in *Baker*, where the plaintiffs were challenging a law limiting marriage only to unions of one man and one woman, 170 Vt. at 198-99, the statutes at issue in this case apply to all school districts throughout the State and are not limited to only some school districts.

Plaintiffs write that "the Education and Common Benefits Clauses bar the legislature from picking winners and losers and discriminating in favor of some children while denying the same opportunity to others." The Court agrees with this statement, but, because the statutes apply with equal force to all school districts across the State, the Court rejects Plaintiffs' contention that the Legislature is engaging in such discrimination. Contrary to Plaintiffs' argument, the State

Defendants are not mandating town tuitioning for any school district; rather, the State is merely providing the *option* of town tuitioning for those districts where the electorate decides it makes sense. It is a case-by-case analysis conducted, not by the State, but by the electorate of the districts.

Plaintiffs rely heavily on *Brigham v. State*, 166 Vt. 246 (1997), to support their argument that the town tuitioning statutes are unconstitutional. The issue in *Brigham* was whether the system then in place for funding public education deprived the children of Vermont of an equal educational opportunity in violation of the Education and Common Benefits Clauses. *Brigham*, 166 Vt. at 249. When *Brigham* was decided, public schools were primarily financed through assessments by the cities and towns on property located therein as well as by state funds that were distributed under a complex formula that was referred to as the Foundation Plan. *Id*. at 253. Although the Foundation Plan "boost[ed] the capacity of the poorest districts," it still left "substantial deficiencies in overall equity." *Id*.

Importantly, the State conceded the fact that "the funding scheme denie[d] children residing in comparatively property-poor school districts the same 'educational opportunities' that [were] available to students residing in wealthier districts." *Id*. at 255. The question was whether these disparities in educational opportunities violated Vermont law. *Id*. at 256.

The *Brigham* Court noted that "the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes on the equal enjoyment of that right

bears a commensurate heavy burden of justification." *Id.* The Court wrote that, although the State could "delegate to local towns and cities the authority to finance and administer the schools within their borders," it could not "abdicate the basic responsibility for education by passing it on to local governments." *Id.* at 264.

The *Brigham* Court concluded that, although the State Constitution does not require "exact equality of funding among school districts or prohibit minor disparities attributable to unavoidable local differences," *id.* at 267, the then-current educational financing system in Vermont violated both the Education and Common Benefits Clauses, *id.* at 268. The Court explained:

> [D]ifferences among school districts in terms of size, special educational needs, transportation costs, and other factors will invariably create unavoidable differences in per-pupil expenditures. Equal opportunity does not necessarily require precisely equal per-capita expenditures, nor does it necessarily prohibit cities and towns from spending more on education if they choose, but it does not allow a system in which educational opportunity is necessarily a function of district wealth. Equal educational opportunity cannot be achieved when property-rich school districts may tax low and property-poor districts must tax high to achieve even minimum standards. Children who live in property-poor districts and children who live in property-rich districts should be afforded a substantially equal opportunity to have access to similar educational revenues. Thus, as other state courts have done, we hold only that to fulfill its constitutional obligation the state must ensure *substantial* equality of educational opportunity throughout Vermont.

Id. at 268.

The State suggested in *Brigham* that the local electorate should be able to make education decisions. In rejecting that argument, the Court concluded that the great disparities that concededly existed between property-poor and property-rich towns made reliance on the electoral system untenable. In other words, towns could

elect persons who wanted to spend more on education, but they could not overcome the grand list values and advantages of property-rich towns. As a result, their children were at an obvious disadvantage. *Id*. at 266 (describing such alleged "fiscal free" as "a cruel illusion" (internal quotation omitted)).

Unlike *Brigham*, however, Plaintiffs do not contend that the instant statutes lead to unequal curricular or technological opportunities at the schools that the School District Defendants provide to their children. *See id*. at 255. Rather, Plaintiffs contend that the State Defendants and School District Defendants should let them choose which school is best for their children and then pay the tuition for that particular school. As explained above, however, Plaintiffs are pursuing a facial challenge, not an as-applied challenge, and they are, thus, not entitled to a remedy tailored to their particular situation. *See Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22.

Further, the statutes at issue here do not involve state funding of the schools, as was the case in *Brigham*. Rather, they involve decisions by school districts about which schools the districts will provide to the children residing in the districts, whether the schools are operated and located within the particular district or whether the schools are operated and located outside the district.

Lastly, unlike *Brigham*, the Plaintiffs here do not assert that there is some inherent factor (such as widely disparate grand lists) that would undermine the validity of district decisions and make illusory the idea of "local choice." *See* 166 Vt. at 266.

A case more useful in this context is *Athens School District v. Vermont State Board of Education*, 2020 VT 52. There, the Supreme Court considered whether the involuntary merger of school districts violated the Education and Common Benefits Clauses. *Athens School District*, 2020 VT 52, ¶ 1. The law at issue in *Athens School District* concerned the creation of a supervisory union with member districts when school districts, standing alone, were unable to meet the State's educational goals. *Id.* ¶ 5. The plaintiffs in that case argued that the Education Clause prevented the legislature from mandating the closure of town schools, which would inevitably be the result of the creation of supervisory unions with member districts. *Id.* ¶ 51. The Court rejected this argument, reiterating that education in Vermont is "a fundamental obligation of state government" and that the plaintiffs had not shown that the creation of supervisory unions with member districts would lead to insufficient levels of education. *Id.* Similarly, the Court rejected the plaintiffs' Common Benefits argument because they were unable to show that the creation of the supervisory unions would lead to students not receiving equal educational opportunities. *Id.* ¶¶ 52–53.

In addressing the plaintiffs' arguments, the *Athens School District* Court recognized the differences among school districts in Vermont. *Id.* ¶¶ 3–6. These differences help to explain why Vermont cannot apply a one-size-fits-all approach to educating its youth. Between 1997 and 2015 Vermont's K-12 student population had declined from 103,000 to 78,300; the State had thirteen different types of school district governance structures; and many school districts were not able to achieve

economies of scale and lacked the flexibility to manage, share, and transfer resources. *Id*. ¶ 3. The Court acknowledged the prevailing wisdom that the optimal student population for learning was 300-500 for elementary schools and 600-900 for high schools and that the optimal size for school districts to reach financial efficiencies was between 2,000 and 4,000 students. *Id*. When *Athens School District* was decided in 2020, seventy-nine school districts in Vermont had an average daily student population of one hundred or less. *Id*. This wide range among the State's school districts demonstrates that what may work for one school district in a populated urban area will not necessarily work for another school district in a rural, less populated, part of the State. Just so here.

Likewise, the facts and outcome of *Buttolph v. Osborn*, 119 Vt. 116 (1956), are highly instructive. The petitioners in that case sued officials of the town of Shoreham to prevent them from closing the local high school and arranging for the students of that town to be educated outside the town. *Buttolph*, 119 Vt. at 116–17. The law the petitioners were challenging allowed the school board to choose whether to maintain a high school in the town or provide higher education elsewhere. *Id*. at 120. The parents and guardians also had a choice, however, and that was where the students would go to school in the event the school directors decided against operating a high school in the town. *Id*. In rejecting the petitioners' argument that the statute at issue violated the Common Benefits Clause, the Court noted that "[t]he school directors of Shoreham were merely putting into effect the plain meaning of the language of the enactment." *Id*. at 121. The Court wrote:

> If this were a case in which the high school of a town had been closed by an official other than a locally elected one, even though that official might be acting pursuant to some act which might hereafter be passed purporting to give him such authority, then we might be presented with a genuine constitutional question. But here we have no such situation. The Shoreham high school has been closed by officials locally elected by the Town of Shoreham. The authority to do this came from the law, but the decision to do it was by a locally elected board. The voters of Shoreham have not been deprived of all control over the situation. They may, in due course, replace their school directors at the end of their respective terms, with others who advocate maintaining a high school and thereby achieve the end they wish. The matter is still in their hands.

Id. at 123; *see also Brigham*, 166 Vt. at 265-66 ("Individual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature."). In sum, the *Buttolph* Court concluded that the remedy for the plaintiffs was "at the next election" and at the courthouse. 119 Vt. at 123.

It has long been the law of this State that:

> Since legislation must often be adapted to complex conditions involving a host of details, with which the lawmaking body cannot deal directly, the Legislature may, without abdication of its essential functions, lay down policies and establish standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

State v. Auclair, 110 Vt. 147, 163 (1939) (quoted with approval by *Athens School District*, 2020 VT 52, ¶40). This is what the statutes at issue here do–they provide guidelines to the local school districts and leave to them and the voters the decision whether it is best to operate a school within the district or pay tuition for the

residents' children to attend school outside the district. If the electorate is unhappy with a particular direction, they can make a different choice at the next election.

The above analysis likely resolves the Common Benefits Clause claim without delving deeper into the specific balancing envisioned by the final aspect of the *Baker* test. Nonetheless, a closer examination of those factors also supports dismissal. Again, the Court does not see a portion of the community that is omitted from the current law. To the extent the creation of local choice on this matter is itself a basis to claim a segregated class under the Common Benefits Clause, that decision "bears a reasonable and just relation" to valid governmental purposes. The State has persuasively argued that the local electorate is in the best position to decide whether it makes economic sense to fund a school for all grades or just some, to create some form of union district for some or all grades, or to allow tuitioning for some or all grades. Those decisions are made to advance the important and sometimes competing interests of enhancing educational opportunities and controlling costs, all the while maintaining some level of local determination. The Court believes those goals are properly served by the law.

The breadth of Plaintiffs' contrary argument was revealed at oral argument. When queried whether, under Plaintiffs' understanding of the Common Benefits Clause, some other set of plaintiffs could compellingly argue that each town must create and maintain its own school system (instead of an existing tuitioning system), counsel for Plaintiffs agreed. In other words, the Common Benefits Clause envisioned by Plaintiffs would require each municipality to have universal

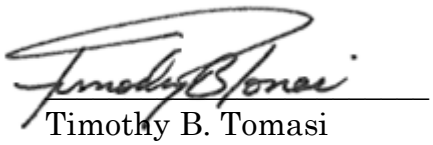
tuitioning and also maintain a public school. It is unclear Plaintiffs would resolve the constitutional issue presented by multiple sets of parents: one that favors a union school district, another that favors a standard school district, and another that favors tuitioning. Indeed, under Plaintiffs' conception of the Common Benefits Clause, resolution of such a dispute would be a practical impossibility. The Court does not believe the Common Benefits Clause mandates such extreme results, nor can it be interpreted to eliminate virtually all local decision making concerning the means through which education is provided to Vermont's children.

In sum, the Legislature has left to the local electorates the decision of whether to create or maintain a local school, a unified district, a unified union district, a partial tuitioning district, or a full tuitioning district. Those various options are the means it has chosen to assure Vermont children attain the end of equal educational opportunity. Plaintiffs have failed to satisfy their burden of showing that such a system violates the provisions of the Common Benefits Clause on its face. *See Buttolph,* 119 Vt. at 123.

III. Conclusion

Plaintiffs' Amended Complaint is dismissed with prejudice against both the State Defendants and the School District Defendants.

Electronically signed on Friday, January 28, 2022, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge