STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 33-1-19 Frcv
ATHENS SCHOOL DISTRICT, et al., Plaintiffs, v. VERMONT STATE BOARD OF EDUCATION, et al., Defendants.	

RULING ON MOTIONS TO DISMISS
(Paper Nos. 12 and 13)

On March 4, 2019, the Court denied the Plaintiffs' Motion for a Preliminary Injunction (hereinafter "Preliminary Injunction Ruling"). In that motion, Plaintiffs sought to stay the implementation of actions required by the Vermont Board of Education's Final Report of Decisions and Order on Statewide School District Merger Decisions Pursuant to Act 46, Sections 8(b) and 10 (dated November 28, 2018) (hereinafter the "Final Report"). Familiarity with the Preliminary Injunction Ruling is presumed.

In the course of responding to Plaintiffs' Motion for a Preliminary Injunction, the Defendants simultaneously submitted arguments addressing their belief that Plaintiffs' entire suit is subject to dismissal pursuant to V.R.C.P. 12(b)(6). See, e.g., Defendants' Memorandum of Law in Support of their Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction (filed January 31, 2019). The Court did not address the Defendants' arguments for dismissal, but instead instructed the Defendants to file formal motions to dismiss. On March 25, 2019, the Court held a hearing on the Defendants' Motions to Dismiss (both filed March 11, 2019). Upon consideration of the parties' arguments and supplemental briefing, and for the reasons set forth below, the Defendants' Motions to Dismiss are *granted in part and denied in part.*

I. Background

V.R.C.P. 12(b)(6) permits the Court to dismiss a complaint for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion tests the legal, not the factual, viability of a claim. See, e.g., Levinsky v. Diamond, 140 Vt. 595, 442 A.2d 1277 (1982) (On a Rule 12(b)(6) motion, a court should consider the bare allegations of the complaint.), overruled on other grounds in Muzzy v. State, 155 Vt. 279 (1990). All facts alleged in the complaint are taken as true. See Amiot v. Ames, 166 Vt. 288, 291, 693 A.2d 675 (1997). Accordingly, a Rule 12(b)(6) motion "may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Kaplan v. Morgan Stanley & Company, Inc., 2009 VT 78, ¶ 7, 186 Vt. 605 (mem.) (citations and quotation marks omitted).

As a general matter, a court should not consider matters outside the pleadings because to do so would convert a motion to dismiss into a motion for summary judgment under V.R.C.P. 56. See Nash v. Coxon, 152 Vt. 313, 565 A.2d 1360 (1989). However, where, as here, a complaint refers to and relies upon certain documents outside the pleadings, and those documents are central to a plaintiff's claims, such documents may become part of the pleadings and the Court may consider them on a Rule 12(b)(6) motion. Kaplan, 2009 VT 78, ¶ 10 n. 4. As indicated infra, the Court will limit its review to issues of law and to the Board's Final Order; it will not consider affidavits or other documents outside the pleadings which raise disputed factual issues. See Huluwazu v. Snyder, No. 17-CV-03386 LHK, 2017 WL 5991865 * 3 (N.D. Cal. Dec. 4, 2017) ("[A] court need not accept as true allegations contradicted by judicially noticeable facts.").

As this Court has observed:

> The Plaintiffs object on a variety of grounds to Act 46 and Act 49. This legislation implements the State's plan to overhaul how Vermont's education system is organized and governed in order to "provide [Vermont PreK-12 students] substantial equity in the quality and variety of educational opportunities" in light of rising costs and plummeting student populations. See 2015 Vt. Laws No. 46, § 2(1); see also 16 V.S.A. § 1 ("[I]t is the policy of the State that all Vermont children will be afforded educational opportunities that are substantially equal although educational programs may vary from district to district.").
>
> While in some places individual school closures eventually may be a consequence of school district and board mergers, at this point, which schools, if any, may close is speculation. In fact, Act 46 is not a reflection of the State's attempt to close small schools, but rather to ensure that the States' education system as a whole is able to remain viable while offering all

students access to expanded educational opportunities and resources. See 2015 Vt. Laws No. 46 §S 1(i), 3.

Preliminary Injunction Ruling at 3.

The Plaintiffs' Amended Complaint (filed January 22, 2019) is over 70 pages long, exclusive of its numerous attachments. See Amended Complaint at ¶ 61 (listing attachments, declarations, and affidavits a-n). It presents six counts which may be summarized as follows:

Count I: This count incorporates six subparts and primarily presents an appeal of the Board's actions pursuant to V.R.C.P. 75. See Vermont State Employees' Association, Inc. v. Vermont Criminal Justice Training Council, 167 Vt. 191, 704 A.2d 769 (1997) ("When, as here, legislation is silent on whether review is available, we have permitted appeal under Rule 75 so long as review would have been available under any one of the extraordinary writs, such as mandamus . . . "). In Count I, the Plaintiffs claim that Board's Final Order is contrary to the Legislature's intent in enacting Acts 46 and 49, is arbitrary and capricious, and otherwise fails to follow the Board's own guiding rules. (Amended Complaint at 38-60).

Count II: The Board's Final Order forcing mergers violates Chapter II, Sections 5 and 6 of the Vermont Constitution, which vests the Legislature alone with authority to constitute towns, boroughs, cities and counties. (Amended Complaint at 60-61).

Count III: Board's Final Order distributes debts and assets in a way that violates 16 V.S.A. §§ 706(d) and (f), 24 V.S.A. §§ 1755 and 1786 (a); Chapter I, Articles 7 and 9 and Chapter II, Section 6 of the Vermont Constitution; and Amendments Five and Fourteen, Section 1 of the U.S. Constitution. (Amended Complaint at 62-64).

Count IV: The Board's Final Order forcing mergers constitutes disparate financial treatment of schools, taxpayers and students (alleging, for example, inequitable distribution of small school grants) in violation of the Common Benefits Clause, Chapter I, Article 7, of the Vermont Constitution and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. (Amended Complaint at 64-68).

Count V: The Board's Final Order forcing mergers violates Chapter I, Article 4 of the Vermont Constitution and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. (Amended Complaint at 68-69).

Count VI: The Board's Final Order forcing mergers violates Chapter II, Article 68 of the Vermont Constitution. (Amended Complaint at 69).

At the March 25, 2019 hearing, the parties focused their arguments primarily on issues related to the constitutionality of the Legislature's delegation and the propriety and effects of the redistribution of school district debt and assets. The parties also acknowledged that the delegation question, presented primarily in Counts II and VI, predominates this litigation and constitutes a threshold legal issue subject to resolution on a Rule 12(b)(6) motion.

II. Discussion

A. Counts II and VI-Constitutionality of Delegation to the Board

The Defendants argue that Count II should be dismissed because "[t]he Legislature's delegation of authority was consistent with longstanding practice in Vermont, the text of the Vermont Constitution, and law and practice in similar jurisdictions." Defendants' Corrected Reply in Support of Motion to Dismiss (filed March 6, 2019) at 5. The Plaintiffs counter that "the General Assembly cannot delegate, wholesale, all discretion and authority to dissolve and constitute new municipal school districts to an administrative agency, nor the whole plan for their formation and implementation." Plaintiffs' Sur-Reply in Opposition to the State's Motion to Dismiss (filed March 20, 2019) at 4. Plaintiffs' also argue that Acts 46 and 49 violate the Education Clause of the Vermont Constitution, Ch. II. § 68, because implementation of these Acts may result in the failure to maintain a school in each town. See Plaintiffs' Sur-reply at 38. The Plaintiffs' further maintain that "[i]n promulgating Default Articles of Agreement[,] the Board violated separation of powers . . .," thereby impermissibly delegating the power to legislate. See Plaintiffs' Sur-reply at 17, 19.

When considering the Plaintiffs' Motion for a Preliminary Injunction, the Court found "the delegation under Acts 46 and 49 is constitutional, and that the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards to guide its decisions and to permit this Court's review" of whether the agencies' actions were otherwise arbitrary and capricious. Preliminary Injunction Ruling at 13. Applicable Vermont case law, while sparse, supports this conclusion.

The Vermont Supreme Court has explicitly held that in Vermont, the obligation to provide a public education is a State, not a local, obligation. Brigham v. State, 166 Vt. 246, 256, 692 A.2d 384 (1997). In this case, the State determined that it will meet that obligation by delegating the administration of Acts 46 and 49 to the Vermont Board of Education. See State v. Auclair, 110 Vt. 147, 4 A.2d 107, 114 (1939) ("An agency charged with the duty of administering a statute enacted in

pursuance of the police power of the State may be vested with a wide discretion . . .."). The Legislature's delegation of the implementation of Acts 46 and 49, including the modification of existing governance bodies, is properly encompassed in that obligation to provide a public education. See Village of Hardwick v. Town of Wolcott, 98 Vt. 343, 129 A. 159 (1925) (property held by municipalities for public purposes belongs to State).

The Plaintiffs again assert that In re Municipal Charters, 86 Vt. 562, 86 A. 307 (1913) provides relevant precedent for their argument that the delegation under Acts 46 and 49 violates the Vermont Constitution. In re Municipal Charters is an advisory opinion wherein the Vermont Supreme Court opined that an act delegating authority to the Public Service Commission to charter villages violated the powers expressly reserved to the Legislature under Ch. II. § 6 of the Vermont Constitution. 86 Vt. at 562. Because the power to "constitute towns, boroughs, cities, and counties" in § 6 requires the Legislature to exercise its own judgment and "no authority is given to delegate it," the Court advised that the legislature could not delegate village charter creation. However, the Court further observed:

> This, however, is not saying that the Legislature can delegate nothing concerning this matter, for there are undoubtedly some things pertaining to it that the Legislature can delegate. But we are not called upon to draw the line between the delegable and the nondelegable, nor to suggest a way in which the desideratum of a general law for the incorporation of villages can be attained.

Id. Accordingly, to the extent In re Municipal Charters has precedential value, it is inapposite to the present situation and does not foreclose otherwise proper delegation by the Legislature.

An examination of relevant provisions of Ch. II further indicates that Count II of the Amended Complaint is insufficient as a matter of law. Chapter II, § 5 outlines that the "Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." While the General Assembly cannot delegate its legislative functions, it nevertheless may delegate to administrative agencies, such as the Board of Education, the power to apply general provisions of the law to particular circumstances. See Vincent v. Vermont State Retirement Board, 148 Vt. 531, 535, 536 A.2d 925 (1987). On its face, § 5 does not embody a broad prohibition on the Legislature from making a proper and lawful delegation of powers. See, e.g., Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 560-61, 730 A.2d 573 (1999) (mem.).

Ch. II, §6 sets forth the limitation on the Legislature's ability to delegate addressed in In re Municipal Charters. In relevant part, Ch. II, § 6 provides that the Senate and House of Representatives

> may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs [sic], cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish or infringe any part of this Constitution.

Contrary to the Plaintiffs' assertion, Ch. II, § 6 does not require one to conclude that Acts 46 and 49 are a "whole-cloth delegation" allowing the Board to establish chartered "municipal corporations" in the form of merged school districts. See Plaintiffs' Reply Memorandum at 14 et seq. As examined in In re Municipal Charters, § 6 is a provision which authorizes the Legislature to "grant charters of incorporation" or otherwise "constitute," in the sense of establishing, governmental subdivisions such as towns and cities. See, e.g., Merriam Webster Online. Retrieved April 5, 2019, from www. Miriam-webster.com (constitute means to set up or establish). It does not set forth a non-delegable duty, relating to school boards, of the type examined in In re Municipal Charters. This conclusion is further supported by Vermont Constitution Ch. II. § 68, which in relevant part more specifically states:

> 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.* (emphasis added).

Thus, it is explicitly within the Legislature's constitutional authority to pass laws like Acts 46 and 49, and, with sufficient guidance and direction, authorize the Board to implement "other provisions" to provide Vermont students instruction. Accord 16 V.S.A. § 821 (a)(3) ("Each school district shall maintain one or more approved schools . . . unless . . . the General Assembly provides otherwise."); cf. Brigham, 166 Vt. at 264 (Education Clause is silent on means of supporting and funding schools, "which can and should be modified if it no longer fulfills its purpose.".); Dresden School District v. Norwich Town School District, 124 Vt. 227, 232, 203 A.2d 598 (1964) ("The power of the Legislature to create necessary agencies to implement and administer governmental functions is unquestioned, so long as constitutional prohibitions are observed. . ..").

Finally, the Plaintiffs argue that construing Acts 46 and 49 as permitting the Board to formulate and implement the Default Articles of Agreement will result in

an unconstitutional delegation of the General Assembly of its power to legislate. See Plaintiffs' Sur-reply at 19. "Act 49 provides that districts subject to involuntary merger under the Final Report have 90 days to adopt their own articles of agreement; otherwise, those districts are subject to the Board's Default Articles of Agreement." Preliminary Injunction Ruling at 20. On its face, Act 49, § 8 (d) specifically authorized the Board to formulate Default Articles of Agreement and to implement them, if needed, stating: "The statewide plan required by subsection (b) of this section shall include default Articles of Agreement to be used by all new unified union school districts created under the plan unless and until new or amended articles are approved." Under these circumstances, this authorization is not a delegation of the Legislature's power to pass laws. Rather, Act 49, § 8 permissibly grants authority necessary to implement the Legislature's delineated goal of moving "toward sustainable models of educational governance." 2015 Vt. Laws No. 46, § 2; see Stowe Citizens, 169 Vt. at 560-61 ("Nor is the [delegation] doctrine violated when the Legislature gives municipalities the authority or discretion merely to execute, rather than make, the laws."); Royalton College, Inc. v. State Board of Education, 127 Vt. 436, 449, 251 A.2d 498 (1969) ("The provision for the adoption of rules and regulations to implement the duties of the board are sufficient indicia that the legislature had in mind that these powers must be reasonably exercised and the demands of procedural due process respected.").

For the reasons set forth in the Preliminary Injunction Ruling, and as further examined herein, the Court finds the Legislature's delegation of the implementation of Acts 46 and 49 does not violate the Ch. II, §§ 5, 6 and 68 of the Vermont Constitution. Counts II and VI are dismissed for failure to state a claim upon which relief can be granted.

B. Count V-Due Process Violations

The Plaintiffs also allege that the Board's procedures when implementing Acts 46 and 49 violated their due process rights, as protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Chapter I, Art. 4 of the Vermont Constitution. See Plaintiffs' Sur-reply at 37-38. Plaintiffs' Count V fails to state a claim upon which relief can be granted for several reasons.

"To evaluate [a] due process claim, [the Court] must first determine whether [Plaintiffs'] were deprived of a constitutionally protected interest in life, liberty, or property." Hegarty v. Addison County Humane Society, 2004 VT 33, ¶ 15, 176 Vt. 405. As the Court noted in its Preliminary Injunction Ruling, "Plaintiffs do not have a fundamental right to any particular form of school governance, and it is well within the State's legislative authority to oversee statewide education administration." Preliminary Injunction Ruling at 23; see Parker v. Town of Milton

169 Vt. 74, 80, 726 A.2d 477 (1999) ("Individual property rights are not at issue at the public information meeting; rather, the stated purpose of the meeting is to determine whether the encroachment will adversely affect the public good."). Moreover, the Vermont Supreme Court has suggested that "[t]he power of the state [is] unrestrained by the contract clause or the 14th Amendment, [when exercising authority] over the rights and property of cities held and used for governmental purposes. ... The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the 14th Amendment." Town of Brighton v. Town of Charlestown, 114 Vt. 316, 321-22, 44 A.2d 628 (1945). Under similar circumstances, other courts have reached similar conclusions. Cf. Friends of Lake View District Incorporation No. 25 of Phillips County v. Beebe, 578 F.3d 753, 762 n. 13 (8th Cir. 2009) (Plaintiffs' challenge to a state statute which required small school districts to be annexed, to achieve economies of scale, did not violate federal equal protection or substantive due process, and therefore failed to state a claim upon which relief can be granted.). Accordingly, in Count V the Plaintiffs have failed to set forth the violation of a constitutionally protected right.

During oral argument on March 25, 2019, the Plaintiffs seemed to suggest that in rendering its Final Order, the Board exceeded its statutory rulemaking authority. Here, 2017 Vt. Laws No. 49 § 20, amending 2015 Vt. Laws No. 46 § 8, states:

> (c) The State Board may adopt rules designed to assist districts in submitting alternative structure proposals, but shall not by rule or otherwise impose more stringent requirements than those in this act.

Consistent with that authority, the Board adopted Rule Series 3400, Proposals for Alternative Structures Under Act 46, the stated purpose of which is as follows:

> 3420 Statement of Purpose.
>
> Act 46 recognizes the possibility of Alternative Structures and incorporates into its overall design the ability for districts to create a new Alternative Structure through voluntary merger under Act 153 or Act 156. Act 46 also includes some requirements and guidance for Alternative Structure proposals submitted under Sec. 9 by districts that will not be merging. This guidance, however, lacks the specificity available for voluntary mergers, which are governed by a decades-old statutory process and by additional, explicit criteria in Act 46, Act 153, and Act 156, and Act 49. These rules are intended to provide (1) a process by which school districts can propose to be in an Alternative Structure when the proposal does not include voluntary merger and (2) details about some of the supporting information that a district should consider when self-evaluating for purposes of presenting a proposal to

merge or a proposal under Act 46, Sec. 9 and that the State Board considers when reviewing mergers proposals and will be considering when reviewing proposals under Sec. 9 and creating the Statewide Plan.

Thus, Rule Series 3400 provides guidance for entities submitting Section 9 proposals in order to assist the Board in meeting its statutorily delegated obligations. See 3 V.S.A. § 801(b)(14) ("'Guidance document' means a written record that has not been adopted in accordance with sections 836-844 of this title and that is issued by an agency to assist the public by providing an agency's current approach to or interpretation of law or describing how and when an agency will exercise discretionary functions."); 3 V.S.A. § 800 (6) ("When an agency adopts policy, procedures, or guidance, it shall not do so to supplant or avoid the adoption of rules" [as defined under § 801(b)(9)].).

To the extent the Plaintiffs raise a procedural due process argument, the Vermont Supreme Court also has held that "[d]ue process requirements apply to the procedures that must be used in reaching agency determinations only if they are adjudicative, rather than rulemaking or legislative, in nature." Appeal of Stratton Corporation, 157 Vt. 436, 442, 600 A.2d 297 (1991). To distinguish a legislative decision from an adjudicative one, Vermont courts examine:

> (1) whether the inquiry is of a generalized nature, rather than having "a specific, individualized focus"; (2) whether the inquiry "focuses on resolving some sort of policy-type question and not merely resolution of factual disputes"; and (3) whether the result is of "prospective applicability and future effect."

Gould v. Town of Monkton, 2016 VT 84, ¶ 21, 202 Vt. 535 (quoting Stratton, 157 Vt. at 443).

Applying these three factors, the Board's Final Order is of a general nature in that it reflects decisions affecting a number of schools and school districts. By its nature and intent, the Final Order focuses on resolving the state-wide policy issues addressed in Acts 46 and 49. Finally, the Board's orders are of prospective applicability and future effect. In short, the Board's Final Order reflects "policy determination, involving general facts, and having a prospective application"; this type of administrative action is "characteristic of legislative function" which is not subject to due process protections. Parker, 169 Vt. at 80.

Even if the Board's actions are viewed as "quasi-judicial" in nature, the process implemented by the Legislature and employed by the Board was not governed by the types of procedures which ordinarily govern decisions in contested cases, such as following rules of civil procedure and subpoenaing witnesses. Cf. In re Professional Nurses Service Application for Certificate of Need, 2006 VT 112, ¶¶ 14-15, 180 Vt. 479. At a basic level, the Board was still implementing legislative

directives, and the fact that the Plaintiffs' were provided notice of proceedings and opportunities to be heard in a meaningful time and manner provided them with the process to which they were due. See In Re Miller, 2009 VT 112, ¶ 9, 186 Vt. 505. Act 46, § 10, as amended by 2017 Vt. Laws No. 49, § 8, required the following:

> (c) Process. On or after October 1, 2017, the Secretary and State Board shall consider any proposals submitted by districts or groups of districts under Sec. 9 of this act. Districts that submit such a proposal shall have the opportunity to add to or otherwise amend their proposal in connection with the Secretary's consideration of the proposal and conversations with the district or district's under subsection (a) of this section, and in connection with testimony presented to the State Board under subsection (b) of this section. The State Board may, in its discretion, approve an alternative governance proposal at any time on or before November 30, 3018.

The Plaintiffs submitted their Section 9 proposals pursuant to this procedure. Thus, even assuming due process protections are applicable, it is difficult to discern how Plaintiffs were deprived of due process.

At a minimum, due process presumes "that an individual is entitled to notice and an opportunity to be heard prior to deprivation of a property interest." Hegarty, 2004 VT 33, ¶ 18. A "review of the Board's Final Report indicates that it [conducted hearings,] accepted and considered a variety of evidence and evaluated that evidence in light of statutory guidelines." Preliminary Injunction Ruling at 16. Accordingly, it appears the Plaintiffs were not denied due process. Accord In re Conservation Law Foundation, 2018 VT 42, ¶ 28, 188 A.3d 667 (Procedural due process only comes into play when life, liberty or property is at stake in a proceeding.). Although they obtained a result they believe to be unsatisfactory, the Plaintiffs in this case had notice and the opportunity to have their positions heard and considered.

Plaintiffs also rely on Ch. I, Art. 4 of the Vermont Constitution, which states:

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obligated to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

The Vermont Supreme Court has stated that "Article 4 is the equivalent to the Federal Due Process Clause" but "does not create substantive rights but rather ensure[s] access to the judicial process." Flint v. Department of Labor, 2017 VT 89, ¶ 18, 205 Vt. 558 (citations and quotation marks omitted). The Plaintiffs have not

explained how they have been denied access to the judicial process, nor have they made any argument which under these circumstances distinguishes Article 4's protections from the due process protections afforded under the Federal Constitution. Moreover, "[m]erely citing the Vermont Constitution, without providing any analysis of how the state constitutional provision compares with its federal analog, does not adequately present the issue for [the Court's] review. ..." State v. Brillon, 2010 VT 25, ¶ 6, 187 Vt. 444. Accordingly, the Court assumes that the protections afforded the U.S. and Vermont Due Process provisions are co-extensive and therefore dismisses Count V for failure to state a claim upon which relief can be granted.

III. Conclusion

In relevant part, V.R.C.P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The Supreme Court has identified three prerequisites to directing judgment under Rule 54(b):

> (1) there must be multiple parties or multiple claims for relief, (2) at least one claim or the rights and liabilities of at least one party must be finally decided, and (3) the court must find that there is no just cause for delaying the appeal.

Kelly v. Lord, 173 Vt. 21, 31, 783 A.2d 974 (2001).

In this matter, there are both multiple parties and multiple claims for relief. The Court's ruling on dismissed Counts II, V, and VI addresses threshold questions of law, finally deciding the constitutionality of the Plaintiffs' delegation and due process claims.

This Court is mindful of the Supreme Court's well-established policy of avoiding piecemeal appeals. This Court also understands that directing the entry of final judgment now on just three of Plaintiffs' six counts runs a risk that the Supreme Court could be faced with a second appeal in this case later. However, the issues in this case are of unusually great statewide importance, and the time

available to review and decide them is very limited. The Legislature has given the school districts only until June 30th to complete the mergers called for by the Board of Education. Under these circumstances, this Court would be remiss were it not to afford the Supreme Court an opportunity to consider these weighty issues as much in advance of that deadline as possible. In addition, as noted earlier, Counts II, V and VI raise pure questions of law, and the parties agree that final judgment should be entered as to these counts at this time.

Moreover, there appears no just cause for delaying appeal of these determinations. Consideration of these issues by the Supreme Court may result in final resolution of some or all Plaintiffs' claims in this action, without the need for further delay and discovery. Alternatively, the Supreme Court's consideration may narrow remaining issues and avoid protracted proceedings. In other words, "allowing an appeal at this stage will most likely expedite the ultimate termination of the litigation," thereby protecting the interests of parties and non-parties alike. Id. at 33 (citing Hospitality Inns v. South Burlington, R.I., 149 Vt. 653, 657, 547 A.2d 1355 (1988); see also Preliminary Injunction Ruling at 25 (noting "the State and the public have an interest in implementing fully Acts 46 and 49 which is at least as substantial as the Plaintiffs' interest in securing future delays"). Accordingly, there is no just reason for delaying the entry of final judgment as to Counts II, V, and VI.

By contrast, resolution of some or all of the claims remaining in Counts I, III and IV may require the presentation of facts that have yet to be established, and therefore do not present questions which are subject to dismissal at this time pursuant to V.R.C.P. 12(b)(6). Cf. Quinlan v. Five-Town Health Alliance, Inc., 2018 VT 53, ¶ 23, 192 A.3d 390 (suggesting Common Benefits Clause raises questions of fact); In re Pyramid Company of Burlington, 141 Vt. 294, 304, 449 A.2d 915 (1982) ("The certified questions in this case are not questions of 'law,' as the resolution of each of them may be dictated by the facts that are developed at trial.").

Accordingly,

1. Defendants' Motions to Dismiss are *granted as to Counts II, V, and VI and denied as to Counts I, III and IV.*

2. The Court finds there is no just reason for delay in entering final judgment as to Counts II, V, and VI of the Plaintiffs' Amended Complaint (filed January 22, 2019).

3. The Clerk is directed to enter final judgment as to Counts II, V, and VI.

SO ORDERED this 12th day of April, 2019.

Robert A. Mello, Superior Judge

STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 33-1-19 Frcv

ATHENS SCHOOL DISTRICT, et al.,
Plaintiffs

v.

VERMONT STATE BOARD OF EDUCATION, et al.,
Defendants

FINAL JUDGMENT UNDER V.R.C.P. 41(b) AS TO COUNTS II, V AND VI OF PLAINTIFFS' AMENDED COMPLAINT

This action came before the court on Defendants' motions to dismiss, and the court having granted Defendants' motions as to Counts II, V and VI and denied the motions as to Counts I, III and IV of the Plaintiffs' Amended Complaint, the court having find there is no just reason for delay in entering final judgment as to Counts II, V and VI, and the court having directed the Clerk to enter final judgment as to Counts II, V and VI pursuant to V.R.C.P. 41(b),

It is hereby ORDERED and ADJUDGED that Defendants have judgment in their favor on Counts II, V and VI of Plaintiffs' Amended Complaint and that Counts II, V and VI are dismissed with prejudice.

SO ORDERED this 12th day of April, 2019.

Robert A. Mello, Superior Judge