

MERGERS AND IMPOSITIONS: A CRITICAL LOOK AT VERMONT’S ACT 46

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INTRODUCTION

In Vermont, enrollment in public schools is declining.¹ At the same time, the state is plagued with academic inequity—a trend that violates the state’s constitutional obligation to provide all Vermont students with equal educational opportunities.² A major driver behind this academic inequity is wealth: schools with concentrations of disadvantaged students tend to be in locations where students are from low-income families.³ Further, as the

1. Vermont’s student population in grades K–12 declined from 103,000 in 1997 to 78,300 in 2015. 2015 Vt. Acts & Resolves 475, § 1.

2. The Vermont Constitution’s common-benefit clause requires the state to ensure substantial equality of educational opportunity throughout the state. *Brigham v. State*, 166 Vt. 246, 256, 268, 692 A.2d 384, 390, 397 (1997) (holding the “substantial funding differences” varying from town to town in Vermont for education—and based off of each town’s property taxes—affect students’ opportunities to learn and violate the common benefits clause of the Vermont Constitution); *see also* VT. CONST. ch. I, art. 7 (“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”); Nancy Remsen, *State Struggles to Offer Big Opportunities at Small Schools*, SEVEN DAYS (Apr. 20, 2016), <https://www.sevendaysvt.com/vermont/state-struggles-to-offer-big-opportunities-at-small-schools/Content?oid=3306290> (“[A]cademic inequities violate [Vermont’s] obligation to provide all students with equal educational opportunities.”).

3. Tiffany Danitz Pache, *Act 46: Poverty Drives Rift Between Upper Valley School Districts*, VTDIGGER (July 5, 2016) [hereinafter Pache, *Poverty Drives Rift*], <https://vtdigger.org/2016/07/05/act-46-poverty-drives-rift-between-upper-valley-school-districts/>.

Vermont legislature has acknowledged, “Vermont lacks cohesive governance and delivery systems” in its schools.⁴ Unlike in other states, most Vermont school districts consist of a single school in one town, rather than multiple schools in one or more towns.⁵ As a result, many schools “are not well-suited to achieve economies of scale” and “lack the flexibility to manage, share, and transfer resources, including personnel, with other school districts and to provide students with a variety of high-quality educational opportunities.”⁶ Without this flexibility, Vermont has been forced into a model with the highest student-to-teacher ratio in the country—10.55 students for every teacher—and employs one adult for every four children in the state’s public school system.⁷ Hoping to mitigate this socioeconomic disparity and the lack of cohesion in school governance, as well as cut down the administration costs of so many schools, the Vermont legislature passed Act 46, which lawmakers claim is designed to “provide substantial equity in the quality and variety of educational opportunities statewide” and overhaul how education is governed, directed, and organized.⁸ The hope is not only to improve academic achievement, but also to see students—who might not otherwise be able to take advanced placement courses or other electives like foreign languages—have more opportunities under Vermont’s new plan to merge and consolidate school districts.⁹

4. 2015 Vt. Acts & Resolves 475, § 1(e).

5. See Anne Galloway, *Historic Changes to Structure of Vermont School System Approved by House Panel*, VTDIGGER (Mar. 24, 2014), <https://vtdigger.org/2014/03/24/historic-changes-structure-vermont-school-system-approved-house-panel/> (quoting State Representative Johanna Donovan, who said “[w]e don’t want to go back to the one-room schoolhouse,” and noting that, as of 2014, “Vermont has the lowest student to school board member ratio in the nation: One school board member for 57 students”).

6. 2015 Vt. Acts & Resolves 475, § 1(e).

7. Tiffany Danitz Pache, *Holcombe: Districts Must Cut Teaching, Support Staff*, VTDIGGER (Oct. 18, 2017), <https://vtdigger.org/2017/10/18/holcombe-districts-must-cut-teaching-support-staff/>.

8. 2015 Vt. Acts & Resolves 476, § 2(1); MANCHESTER JOURNAL, *Act 46: What Is It All About? An Overview* (Nov. 16, 2015), www.manchesterjournal.com/stories/act-46-what-is-it-all-about-an-overview,58976.

9. MANCHESTER JOURNAL, *supra* note 8. Many small schools have been forced to cut advanced curricular offerings, such as Advanced Placement courses in specialty areas, because they lack the financial resources or a sufficient number of students to justify dedicating the instructional time. See John Tulenko, *To Cut Costs and Strengthen Public Schools, Vermont Plans Massive Consolidation*, PBS NEWSHOUR (May 31, 2016), <https://www.pbs.org/newshour/show/to-cut-costs-and-strengthen-public-schools-vermont-plans-massive-consolidation> (comparing Enosburg High School with the significantly smaller high school in Richford before Act 46 and noting the difference in opportunities available to students). By forcing the combination of small schools into larger districts, Act 46 aims to provide the increased numbers of students to justify advanced curricular offerings, as well as the financial flexibility to dedicate teachers to these classes. MANCHESTER JOURNAL, *supra* note 8.

While attempting to address these motivating concerns through Act 46, the Vermont legislature identified the size of Vermont schools as a potential issue.¹⁰ Although “[n]ational literature suggests that the optimal size for student learning is in elementary schools of 300 to 500 students and in high schools of 600 to 900 students,” 205 out of the 300 public schools in Vermont “have 300 or fewer enrolled students[,] and 64 have 100 or fewer enrolled students. Of those 64 schools, 16 have 50 or fewer enrolled students.”¹¹ And—according to the Vermont legislature—school size does not just matter in terms of academic achievement, but in terms of financial efficiency: whereas “[n]ational literature suggests that the optimal size for a school district in terms of financial efficiencies is between 2,000 and 4,000 students,” Vermont’s smallest school district “has an average daily membership (ADM) of six students, with 79 districts having an ADM of 100 or fewer students. Four Vermont school districts have an ADM that exceeds 2,000 students.”¹² Within these small schools, staff members are forced to “fulfill an array of human services functions” due to, among other things, the state’s opiate epidemic, which is partly responsible for the increase in students with severe emotional needs.¹³ Vermont taxpayers are also shouldering the financial burden of keeping these schools open: the legislature annually appropriates millions of dollars in small-school grants to maintain these schools.¹⁴

Although paved with good intentions, local communities in Vermont are justifiably critical of Act 46 and the local ramifications it portends.¹⁵ Act 46 has deeply divided many communities, who grapple with what the Act means and how they can implement it.¹⁶ In addition to its complex

10. 2015 Vt. Acts & Resolves 475, § 1(g).

11. *Id.*

12. *Id.* § 1(h). “ADM means the number of students who *live* in a district *for whom the district is providing education* (by operating a school or paying tuition for the student).” VT. AGENCY OF EDUC., ADM VERSUS ENROLLMENT 1 (2016), <http://education.vermont.gov/sites/aoe/files/documents/edu-governance-guidance-adm-versus-enrollment.pdf>. ADM is different from enrollment, which is the “headcount of the students enrolled in a school on October 1, regardless of their district of residence.” *Id.* (emphasis omitted).

13. 2015 Vt. Acts & Resolves 475, § 1(c). “The proportion of Vermont students with severe emotional needs has increased from 1.5 percent of the population in fiscal year 1997 to 2.3 percent in fiscal year 2015.” *Id.*

14. See Anne Galloway, *House Votes to Phase out Small Schools Grant*, VTDIGGER (Apr. 4, 2014), <https://vtdigger.org/2014/04/04/house-votes-phase-small-schools-grant/> (noting that the small-school-grant program, as of 2014, cost \$7.7 million).

15. See Tiffany Danitz Pache, *School Board Members Slam Vt. Law*, VTDIGGER (Apr. 7, 2017) [hereinafter Pache, *School Board Members Slam Vt. Law*], www.vnews.com/LOCAL-SCHOOL-BOARD-MEMBERS-SLAM-ACT-46-IN-HEARING-9145925 (depicting community members’ criticism of Vermont’s top-down approach to reforming school governance).

16. *Id.*

structure, the Act fails to recognize or reward alternative approaches to school governance that lawmakers did not include in the four corners of the bill, and ignores the geographic and financial reality of many Vermont areas that struggle to comply with the new law.¹⁷ Further, and more tangible, some towns claim that the law sets unrealistic deadlines for the revamping of school systems that have educated generations of Vermonters.¹⁸ The expense of implementing this legislation is also problematic, and comes at a time when Vermont Governor Phil Scott is seeking to cut education spending and lower property tax rates.¹⁹ Towns that previously received small-school grants may no longer receive this aid. Additionally, those towns may miss out on grants or the tax incentives offered by the legislation because they do not meet the state’s “preferred structure” criteria, or because their plan to merge was rejected by other towns.²⁰

This Comment will examine these criticisms of Act 46. Section I of this Comment will first give a basic overview of the legislation—including its subsequent amendments—by summarizing its provisions on school-district consolidation. Section II of this Comment will then provide a critique of Act 46, focusing primarily on the top-down approach that defies some of Vermont’s basic realities, its unrealistic deadlines, and the ability of one town—because of its voting power—to sink the plans of other small towns seeking to comply with the law.

17. *Id.*; see also Howard Weiss-Tisman, *As Deadline Looms, Schools Still Struggling With Act 46 Consider “Alternative” Option*, VPR NEWS (Apr. 5, 2017) [hereinafter Weiss-Tisman, *As Deadline Looms*], <http://digital.vpr.net/post/deadline-looms-schools-still-struggling-act-46-consider-alternative-option#stream/0> (showing the districts most challenged by Act 46 are the smallest and most rural areas in Vermont).

18. See Howard Weiss-Tisman, *School Districts Scramble To Meet New Act 46 Deadline*, VPR NEWS (Sept. 18, 2017), <http://digital.vpr.net/post/school-districts-scramble-meet-new-act-46-deadline#stream/0> (noting how, even with an extended deadline after amendments to Act 46, several school districts “[s]cramble[d]” to satisfy the legislation’s timeframe).

19. Anne Galloway, *UPDATED: Scott Level Funds State Budget, Education Spending*, VTDIGGER (Jan. 24, 2017), <https://vtdigger.org/2017/01/24/scott-level-funds-state-budget-education-spending/>.

20. Pache, *School Board Members Slam Vt. Law*, *supra* note 15; see also Tiffany Danitz Pache, *Fewer Districts Will Be Eligible for Small School Grants*, VTDIGGER (Sept. 27, 2017), <https://vtdigger.org/2017/09/27/fewer-districts-will-be-eligible-for-small-school-grants/> (“As of July 1, there were approximately 40 districts that had not yet merged and that until now have received small school grants. Only seven of those schools will be considered geographically isolated . . . [and thus eligible for small school grants].”).

I. VERMONT'S ACT 46: AN OVERVIEW

The Vermont legislature outlined four goals of Act 46, all to be achieved “at a cost that parents, voters, and taxpayers value” by July 1, 2019.²¹ The legislature designed Act 46 “to encourage and support local decisions and actions that:”

- (1) provide substantial equity in the quality and variety of educational opportunities statewide;
- (2) lead students to achieve or exceed the State’s Education Quality Standards, adopted . . . at the direction of the [legislature];
- (3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff; [and]
- (4) promote transparency and accountability²²

The overarching goal of Act 46 is thus to simplify Vermont’s school district structures and ensure that—regardless of location—Vermont students receive the same educational benefits across the state.²³ The Vermont legislature sought to ensure that students in small towns and rural areas are not at a disadvantage due to the size of their town or the relative wealth of their community.²⁴ Act 46 provides incentives to school districts that propose governance structures purporting to achieve these goals.²⁵

A. Sustainable Governance: Preferred vs. Alternative Structures

Under the Act, the state must provide “sustainable governance structures” for all school districts to ensure Vermont achieves the goals of the legislation on a statewide basis by July 1, 2019.²⁶ The legislation defines “preferred structures” and “alternative structures,” and creates

21. 2015 Vt. Acts & Resolves 476–77, §§ 2, 5(a).

22. *Id.* at 476, § 2.

23. *Id.*

24. See Pache, *Poverty Drives Rift*, *supra* note 3 (alluding to the real and perceived bias against “poorer” towns and the options available to those with more financial means).

25. 2015 Vt. Acts & Resolves 478–81, §§ 6(b), 7(b).

26. *Id.* at 477, § 5(a).

different incentives and timelines for each.²⁷ Additionally, the law—particularly after significant amendments in the spring of 2017—allows Regional Education Districts (REDs) and RED variations to receive tax incentives.²⁸

1. Preferred Structures

Act 46 defines a “preferred structure” as a school district that:

- (1) is responsible for the education of all resident prekindergarten through grade 12 students;
- (2) is its own supervisory district;
- (3) has a minimum average daily membership of 900; and
- (4) is organized and operates according to one of the four most common governance structures²⁹

The four most common governance structures are districts: (1) with one or more schools that educate all resident PreK–12 students; (2) with one or more schools that educate all resident PreK–8 students and pay tuition for students in grades 9–12; (3) with one or more schools that educate all resident PreK–6 students and pay tuition for students in grades 7–12; or (4) that have no schools, but pay tuition for all students in grades PreK–12.³⁰ The Vermont State Board of Education (SBE) has interpreted the “preferred structure” provision to mean that like districts must merge with like districts, i.e., that choice districts may not maintain school choice *and* merge with districts that operate schools if they wish to be considered part of a preferred structure.³¹ Instead, Act 46 would categorize such a merger as an alternative structure, as outlined in the next subsection.³²

27. *Id.* at 477–80, §§ 5(b)–(c), 6.

28. 2017 Vt. Acts & Resolves 279–82, §§ 3–4.

29. 2015 Vt. Acts & Resolves 477, § 5(b).

30. *Id.*

31. Tiffany Danitz Pache, *Decoding Act 46: What It Means, How It Works*, VTDIGGER (Nov. 10, 2015) [hereinafter Pache, *Decoding Act 46*], <https://vtdigger.org/2015/11/10/decoding-act-46-what-it-means-how-it-works/>. “School choice” in Vermont generally means that students in towns without a middle school or high school can choose from a group of schools, public or private, and usually in nearby towns, once they successfully complete the last available grade in their town. *See* VT. STAT. ANN. tit. 16, § 822 (2014) (“Each school district shall maintain one or more approved high schools in which high school education is provided for its resident students unless . . . [it pays] tuition to a public high school, an approved independent high school, or an independent school meeting school quality

Later amendments to Act 46 provide for preferred structures that are two-by-two-by-one multi-district supervisory unions and three-by-one side-by-side mergers.³³ These differing structures are known as REDs, or RED variations.³⁴ A RED is responsible for the education of all PreK–12 students.³⁵ Generally, a RED either has a minimum average daily membership of 1,250 or is created by the merger of at least four school districts.³⁶ Waivers for smaller school districts are also available to qualify as a RED.³⁷ RED variations include side-by-side mergers, modified unified union school districts (MUUSD), and layered mergers.³⁸ Section 7 governs these structures, and not Section 6: Section 6 governs the initial phase of Act 46 and requires the governance structures of all member districts to create “one unified union school district”—with one school board and one budget—in order to receive the applicable tax incentives; Section 7 does not require districts to have one unified school board, as would be the case

standards . . .”); *Vermont School Choice 101*, VPR NEWS: VT. EDITION 0:20 (Feb. 23, 2017), <http://digital.vpr.net/post/vermont-school-choice-101#stream/0> (noting the difference between Vermont towns without a high school that allow students to choose where to attend school and towns that designate a specific school district as a receiving school for the town’s students). The student’s town is then required to pay “tuition” to the receiving school on behalf of the student, with the student’s parents shouldering no additional financial burden (if the receiving school is a public school) or a very small one (if the receiving school is a private school). See VT. STAT. ANN. tit. 16, § 822 (requiring each school district to either maintain a high school or pay tuition to receiving schools); Howard Weiss-Tisman, *AG Says Board Of Education Can Write Rules For Private Schools*, VPR NEWS (Dec. 21, 2016), <http://digital.vpr.net/post/ag-says-board-education-can-write-rules-private-schools#stream/0> (indicating that students use Vermont’s school-choice program to help pay for their tuition at private schools); Tulenko, *supra* note 9 (“Many . . . parents in Montgomery, Vermont, send their children to public and private high schools . . . using school choice vouchers worth some \$14,000 each.”).

32. Pache, *Decoding Act 46*, *supra* note 31.

33. A two-by-two-by-one multi-district union allows two recently created unified union school districts to add a town school district. 2017 Vt. Acts & Resolves 281, § 4(a)(1). A three-by-one side-by-side merger allows a recently created union school district—made up of three districts that merged—to add a fourth district under certain circumstances. *Id.* at 279, § 3(1).

34. Pache, *Decoding Act 46*, *supra* note 31.

35. VT. AGENCY OF EDUC., SUMMARY OF PHASE 2 VOLUNTARY MERGERS 2 (2016), <http://education.vermont.gov/sites/aoe/files/documents/edu-governance-summary-phase2-voluntary-mergers-reds-variations.pdf>.

36. *Id.*

37. *Id.*

38. Pache, *Decoding Act 46*, *supra* note 31. Side-by-side mergers include two-by-two-by-one structures and three-by-one structures. 2017 Vt. Acts & Resolves 279–82, §§ 3–4. MUUSDs are structures where “the majority of elementary school districts that send their students to the same union high school district join together and merge with the high school district.” Pache, *Decoding Act 46*, *supra* note 31. Layered mergers occur “when a majority of elementary school districts that are members of a union high school district come together to form a union elementary school district that offers all grades not offered by the union high school district.” *Id.* A layered merger “is different from a MUUSD because the elementary districts do not merge with the union high school districts, they merge with each other.” *Id.*

with REDs and RED variations.³⁹ However, REDs and RED variations are still considered preferred structures and given tax incentives, even if they do not qualify for the initial Act 46 phase.⁴⁰

2. Alternative Structures

In addition to preferred structures, the legislation adds that “alternative” structures may meet the state’s goals.⁴¹ The rationale for including this exception to mandatory merger is that, as the Vermont legislature recognized, the preferred structure may not be the best model to achieve equity, quality, efficiency, and transparency in all regions; further, the preferred structure may not be feasible in certain areas.⁴² The Act provides that “a supervisory union composed of multiple member districts” may “meet the State’s goals, *particularly* if:”

- (1) the member districts consider themselves to be collectively responsible for the education of all prekindergarten through grade 12 students residing in the supervisory union;
- (2) 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;
- (3) the supervisory union has the smallest number of member school districts practicable, achieved wherever possible by the merger of districts with similar operating and tuitioning patterns; and

39. Compare 2015 Vt. Acts & Resolves 478, § 6(a)(1) (“A newly formed school district shall receive the incentives set forth in subsection (b) . . . if it . . . [merges] the governance structures of all member districts of a supervisory union *into one unified union school district* pursuant to . . . 16 V.S.A. chapter 11 . . .” (emphasis added)), with 2015 Vt. Acts & Resolves 480, § 7(a)(1) (“A newly formed school district shall receive the incentives set forth in subsection (b) of this section if it . . . is formed pursuant to the processes and requirements of 16 V.S.A. chapter 11 (union school district formation) . . .”).

40. 2015 Vt. Acts & Resolves 480, § 7(a).

41. *Id.* at 477–78, § 5(e).

42. *Id.*; see also Pache, *Decoding Act 46*, *supra* note 31 (summarizing an interview with Nicole Mace, executive director of the Vermont School Boards Association, who argued that the preferred model will not be the best or most feasible model in every instance).

- (4) the combined average daily membership of all member districts is not less than 1,100.⁴³

The most straightforward definition of an alternative structure is a supervisory union “composed of multiple member districts, each with its separate school board.”⁴⁴ Under Act 46, if a school district wants to propose an alternative structure, the school board of that district must: (1) evaluate the district’s “current ability to meet or exceed each of the [Act’s] goals”; (2) “meet with the boards of one or more other districts to discuss ways to promote improvement throughout the region” pertaining to the Act’s goals; and (3) “submit a proposal to the Secretary of Education and the [SBE]”⁴⁵ In its guidance for alternative structure proposals, the SBE firmly emphasized that alternative structures must meet Act 46’s goals to be considered: “Act 46 contemplates that a non-merging district’s . . . proposal for an ‘alternative structure’ is considered *only in connection with the development of the statewide governance plan.*”⁴⁶

B. The Four Phases of Voluntary Mergers and Their Respective Incentives

Act 46 outlined four phases for voluntary mergers: (1) an accelerated phase for preferred structures; (2) a phase for REDs and RED variations; (3) a phase for “conventional mergers” after the accelerated activity deadline; and (4) a phase for alternative governance structures.⁴⁷ The school districts that wished to propose to the SBE a governance structure fitting in one of these categories had a defined window of time to do so.⁴⁸ The law provides that, once these phases have expired, the SBE will create a new

43. 2015 Vt. Acts & Resolves 477–78, § 5(c) (emphasis added).

44. VT. STATE BD. OF EDUC., GUIDANCE: PROPOSALS BY ONE OR MORE NON-MERGING DISTRICTS FOR AN “ALTERNATIVE STRUCTURE” UNDER ACT 46, at 2 (2015), <http://education.vermont.gov/sites/aoe/files/documents/edu-governance-guidance-alternative-structures.pdf>.

45. *Id.*; 2015 Vt. Acts & Resolves 482, §§ 9(a)(1)–(3).

46. VT. STATE BD. OF EDUC., *supra* note 44, at 3.

47. 2015 Vt. Acts & Resolves 478–82, §§ 6–8. Although the second and third phases—i.e., the timeframe for (1) REDs and RED variations and (2) conventional structures outside the accelerated timeframe—are treated in the same section of the Act without any differentiation, this Comment parses out the two sets of structures to give each its own “phase” for purposes of description. *See* Pache, *Decoding Act 46*, *supra* note 31 (describing these phases as “buckets” into which different school-merger plans fall). The first phase is the accelerated phase: this only allows the preferred model. *Id.* The second phase is for the REDs and their variations. *Id.* The third phase, which the Agency of Education is “now calling conventional, is for anyone who wants to use the preferred model after the accelerated phase” *Id.*

48. Pache, *Decoding Act 46*, *supra* note 31; Tiffany Danitz Pache, *State Ed. Board Looks Hard at Merger Proposals*, BRATTLEBORO REFORMER (Oct. 6, 2017) [hereinafter Pache, *State Ed. Board*], <http://www.reformer.com/stories/state-ed-board-looks-hard-at-merger-proposals,521377>.

map of school districts in 2019 for those districts that have not consolidated or have not been designated as geographically isolated areas.⁴⁹ As outlined below, all phases under Act 46 have now expired.⁵⁰

1. Phase 1: Accelerated Phase for Preferred Structures

The first phase of Act 46 ran from July 2015 to July 2016.⁵¹ The legislature designated this phase for preferred structure arrangements only.⁵² The arrangements under the first phase must create a single, PreK–12 school district with one board and one budget.⁵³ School districts that developed an SBE- and voter-approved preferred structure arrangement within this timeframe received the following incentives: (1) a decreased equalized property tax rate according to a set year-by-year schedule; (2) a guarantee that, for each year of the first five years of the new district, each town’s property tax rates shall not increase by more than 5%; (3) a “merger support grant” if one of the merging school districts was a “small school”; and (4) a transition-facilitation grant of at least \$150,000.⁵⁴

This first phase was intended to process several mergers in the first year, mostly those potential districts—like Westford, Essex Town, and Essex Junction—that had already considered merging when the law was passed in 2015.⁵⁵ The newly merged Westford-Essex district meets the criteria of a preferred structure, partly since the new district is organized according to one of the most common governance structures outlined in

49. Pache, *Decoding Act 46*, *supra* note 31.

50. *Id.* The last three phases expired in November 2017. 2017 Vt. Acts & Resolves 286, § 11.

51. 2015 Vt. Acts & Resolves 478, §§ 6(a)(2)–(6).

52. *Id.* §§ 6(a)(3)–(6).

53. Pache, *Decoding Act 46*, *supra* note 31.

54. 2015 Vt. Acts & Resolves 478–79, § 6(b). A newly formed district in this phase will have a single tax rate adjusted for the local common levels of appraisal—“an equalization process where the state’s estimation of actual market value is compared with local assessments to ensure properties are not over or under valued.” Pache, *Decoding Act 46*, *supra* note 31. The equalized property tax rate will be decreased \$0.10 in the first fiscal year of operation; \$0.08 in the second fiscal year; \$0.06 in the third fiscal year; \$0.04 in the fourth fiscal year; and \$0.02 in the fifth fiscal year. 2015 Vt. Acts & Resolves 478–79, § 6(b)(1)(A). For the merger-support grant, Vermont defines a “small school” as “a school with an average grade size of 20 or fewer students” VT. STAT. ANN. tit. 16, § 4001(6)(B)(iv) (2014). For the transition-facilitation grant, the qualifying district will receive the lesser of “[1] five percent of the base education amount” (\$6,800 per pupil, and adjusted as required under VT. STAT. ANN. tit. 16, § 4011), “multiplied by the greater of either [(i)] the combined enrollment or [(ii)] the average daily membership of the merging districts on October 1 of the year in which the successful [merger] vote is taken; or [(2)] \$150,000.00.” 2015 Vt. Acts & Resolves 479, § 6(b)(3); VT. STAT. ANN. tit. 16, § 4001(13) (2014). The transition-facilitation grant will “be reduced by the total amount of reimbursement paid for consulting services, analysis, and transition costs” 2015 Vt. Acts & Resolves 479, § 6(b)(3).

55. Pache, *Decoding Act 46*, *supra* note 31.

Section 5 of Act 46: the district has one or more schools—throughout Westford, Essex, and Essex Junction—that educate all resident PreK–12 students.⁵⁶ Under the Westford-Essex merger, students in Westford—who previously enjoyed school choice after eighth grade—will attend Essex High School unless they receive “special permission for school choice.”⁵⁷ This phase of Act 46 is “the strictest in terms of what type of school unions are acceptable”: it requires that districts merge into a preferred structure with a single district, one school board, and one budget.⁵⁸ However, this phase also “provides the largest tax break” to those who took advantage.⁵⁹

2. Phase 2: REDs and RED Variations

The second phase of Act 46 began in July 2015 and ended on November 30, 2017.⁶⁰ The legislature designated this phase for REDs and RED variations, which do not meet the requirements of the first phase because they do not have one unified union school district.⁶¹ School districts that developed one of these preferred structure arrangements and voted to approve it by November 30, 2017 received: (1) decreased equalized property tax rates; (2) a guarantee that, for each year of the first five years of the new district, each town’s property tax rates “shall not increase or decrease by more than five percent”; and (3) a “merger support grant”—if one of the merging school districts is a “small school”—in the amount that the small school received during the two years before the

56. 2015 Vt. Acts & Resolves 477, § 5(b); Amy Ash Nixon, *Essex, Westford May Create First Unified District Under New Law*, VTDIGGER (July 1, 2015), <https://vtdigger.org/2015/07/01/essex-westford-may-form-first-unified-district-under-new-state-law/>.

57. Haley Dover, *Essex, Westford OK District Merger*, BURLINGTON FREE PRESS (Nov. 3, 2015), www.burlingtonfreepress.com/story/news/local/2015/11/03/essex-westford-ok-district-merger/75108796/. In November 2015, voters in Essex Town approved the unified district with 1,854 residents voting yes, and 183 residents voting no. *Id.* 1,000 residents in Essex Junction voted in favor of the merger, while only 123 voted in opposition. *Id.* In Westford, 422 residents voted in favor of the merger, with 207 opposed. *Id.*

58. Pache, *Decoding Act 46*, *supra* note 31.

59. *Id.*

60. Subsequent amendments to Act 46 extended the deadline for so-called side-by-side mergers from July 1, 2017 to November 30, 2017. 2015 Vt. Acts & Resolves 480, §§ 7(a)(2), (4); 2017 Vt. Acts & Resolves 286, § 11.

61. 2015 Vt. Acts & Resolves 478, 480, §§ 6(a)(1), 7(a)(3); Pache, *Decoding Act 46*, *supra* note 31.

merger.⁶² The tax incentives under this phase are lesser than in the first phase since the equalized property tax rates start a year later.⁶³

Under subsequent amendments to Act 46—known collectively as Act 49—three-by-one side-by-side mergers allow a recently created union school district—made up of three districts that merged—to add a fourth district (on the other “side” of the “side by side” model) “if it is geographically isolated or if [it] has a different operating and tuitioning pattern from neighbors.”⁶⁴ One example of an added district is Alburgh, a town on a peninsula extending from Canada into Lake Champlain: three school districts in the Champlain Islands—Grand Isle, North Hero, and Isle La Motte—voted to merge in the fall of 2016, and then proposed that Alburgh be allowed to join.⁶⁵ The SBE approved the plan, which now allows Alburgh to remain its own school district and maintain its own school board.⁶⁶

Act 49 also provides a way for two recently created unified union school districts to add a town school district—creating a two-by-two-by-one multi-district supervisory union.⁶⁷ For example, the two new unified union school districts of West River Valley and River Valley proposed adding the Marlboro School District to their supervisory union in October 2017.⁶⁸ In November 2017, Marlboro residents approved the plan, which allowed the town to join forces with the two new school districts while still maintaining (1) its status as an independently governed district; (2) its own middle school; and (3) its own school board.⁶⁹

Although both Alburgh and Marlboro will maintain their respective school boards, the SBE will not—after approving each respective RED structure—move these towns to another district when it remaps districts statewide come 2019.⁷⁰ The “anchor” towns in the Champlain Islands’ three-by-one structure—Grand Isle, North Hero, and Isle La Motte—will

62. 2015 Vt. Acts & Resolves 480–81, §§ 7(b)(1)–(2); 2017 Vt. Acts & Resolves 286, § 11. The equalized property tax rates will be decreased by \$0.08 during the first fiscal year of operation; \$0.06 during the second fiscal year; \$0.04 during the third fiscal year; and \$0.02 during the fourth fiscal year. 2015 Vt. Acts & Resolves 480, § 7(b)(1)(A).

63. 2015 Vt. Acts & Resolves 478–80, §§ 6(b)(1)(A), 7(b)(1)(A).

64. Pache, *State Ed. Board*, *supra* note 48.

65. *Id.*

66. Tiffany Danitz Pache, *UPDATED: Education Board Sharpens Scrutiny of School Merger Proposals*, VTDIGGER (Oct. 1, 2017) [hereinafter Pache, *Board Sharpens Scrutiny*], <https://vtdigger.org/2017/10/01/education-board-sharpens-scrutiny-of-school-merger-proposals/>.

67. Pache, *State Ed. Board*, *supra* note 48.

68. *Id.*

69. Mike Faher, *Marlboro Voters Endorse New Act 46 Merger Option*, VTDIGGER (Nov. 9, 2017), <https://vtdigger.org/2017/11/09/marlboro-voters-endorse-new-act-46-merger-option/>.

70. Pache, *Board Sharpens Scrutiny*, *supra* note 66.

retroactively receive the tax breaks and state funds for the transition as outlined in Section 7 of Act 46, as will the town of Alburgh.⁷¹ The towns in the West River Valley and River Valley school districts, as well as Marlboro, will also retroactively receive these same incentives for their two-by-two-by-one structure.⁷²

3. Phase 3: Conventional Mergers

Act 46 creates a third phase: this window accounts for conventional mergers, or preferred structures adopted after the accelerated phase that merge two or more districts into one unified union school district with its own supervisory district.⁷³ Like Phase 2 for REDs and RED variations, this phase ran from July 2015 until November 2017.⁷⁴ Districts with approved preferred structures during this time period received: (1) decreased equalized property tax rates; (2) a guarantee that, for each year of the first five years of the new district, each town's property tax rates "shall not increase or decrease by more than five percent"; and (3) a "merger support grant"—if one of the merging school districts is a "small school"—in the amount that the small school received during the two years before the merger.⁷⁵ The tax incentives received for this phase are lesser than in the first phase since the equalized property tax rates start a year later.⁷⁶

An example of one school district merger in this window was the Bethel and Royalton merger, which was originally part of a larger side-by-side plan that included the towns of Granville, Hancock, Rochester, Chelsea, and Tunbridge.⁷⁷ Although Bethel and Royalton failed to agree to a merger before the July 2016 deadline, their preferred structure arrangement came just in time for the November 2017 deadline under Phase

71. *Id.*; 2017 Vt. Acts & Resolves 281–82, § 4(a).

72. 2017 Vt. Acts & Resolves 279–80, § 3.

73. Pache, *Decoding Act 46*, *supra* note 31; VT. AGENCY OF EDUC., SUMMARY OF PHASE 3 VOLUNTARY MERGERS 1 (2016), <http://education.vermont.gov/sites/aoe/files/documents/education-governance-summary-phase3-voluntary-mergers-conventional.pdf>.

74. 2017 Vt. Acts & Resolves 286, § 11.

75. 2015 Vt. Acts & Resolves 480–81, §§ 7(b)(1)–(2); 2017 Vt. Acts & Resolves 286, § 11. The equalized property tax rates will be decreased by \$0.08 during the first fiscal year of operation; \$0.06 during the second fiscal year; \$0.04 during the third fiscal year; and \$0.02 during the fourth fiscal year. 2015 Vt. Acts & Resolves 480, § 7(b)(1)(A).

76. 2015 Vt. Acts & Resolves 478–80, §§ 6(b)(1)(A), 7(b)(1)(A).

77. Tiffany Danitz Pache, *Royalton, Bethel Agree to District Merger*, VTDIGGER (Oct. 26, 2017) [hereinafter Pache, *Royalton, Bethel Agree*], <https://vtdigger.org/2017/10/26/royalton-bethel-agree-district-merger/>; Tim Camerato, *Royalton Voters Defeat Towns' Proposed School Mergers*, VALLEY NEWS (Apr. 12, 2017), www.vnews.com/White-River-Valley-Towns-Vote-on-School-District-Unification-9233398.

3.⁷⁸ Bethel and Royalton will therefore qualify for Act 46's tax incentives under this phase.⁷⁹

4. Phase 4: Alternative Governance Structures

The fourth and final phase of Act 46 began in July 2015 and ended in November 2017.⁸⁰ The Vermont legislature designated this phase for alternative governance structures.⁸¹ School districts that submit proposals for alternative governance structures do not receive any of the tax incentives received in Phases 1–3; nor do they receive any of the grants.⁸² In addition, only school districts deemed “geographically isolated,” or districts that “can demonstrate academic excellence while keeping costs down” will continue to get a small-school grant if they vote for an alternative governance structure.⁸³ By only giving tax incentives to non-alternative governance structures, Act 46 gives districts with preferred governance structures great advantages over other districts, and thus strongly encourages merger over merely unionizing the districts.⁸⁴ The only motivation behind proposing an alternative governance structure, it appears, is the promise to remain an untouched, independent school district when the SBE remaps districts in 2019.⁸⁵

One town that has proposed an alternative governance structure is the town of Cabot.⁸⁶ Cabot filed an alternative governance structure proposal and asked the state for permission to operate an independent district for PreK–12 students.⁸⁷ Part of Cabot's plan is to recruit out-of-state students, who will live with host families in the town and focus on project-based learning.⁸⁸ Cabot filed this proposal after voters rejected a plan to merge with Danville and Twinfield, which would have required closing Cabot's high school of 55 students.⁸⁹

78. Pache, *Royalton, Bethel Agree*, *supra* note 77.

79. *Id.*

80. 2015 Vt. Acts & Resolves 482, § 9(a).

81. *Id.*

82. Pache, *Decoding Act 46*, *supra* note 31.

83. *Id.*

84. *See id.* (explaining that alternative governance structures do not receive any tax incentives under Act 46).

85. *Id.*

86. Amy Kolb Noyes, *Cabot Asks State To Approve School Plan, Including Proposal For Boarding Structures*, VPR NEWS (Dec. 22, 2017), <http://digital.vpr.net/post/cabot-asks-state-approve-school-plan-including-proposal-boarding-students#stream/0>.

87. *Id.*

88. *Id.*

89. *Id.*

II. VERMONT'S ACT 46: A CRITIQUE

While the ambitions behind Act 46 are admirable—including the goal of addressing the “glaring disparity between well-resourced and under-resourced” Vermont schools—many within Vermont’s small communities believe the legislation disregards the “humanistic side of education.”⁹⁰ These Vermonters philosophically condemn Act 46 because, despite the legislature’s insistence that it does not intend to close Vermont’s small schools, Act 46 still goes too far in this direction: it diminishes small towns’ control over larger schools to which they send their children, and dismisses the community support many consider vital to education in Vermont’s small towns.⁹¹ For many of these small towns, “communities form around raising children,” and the focal point of numerous Vermont communities is—and has been for centuries—their local community schools.⁹² A great deal of emotion and town identity is tied up in Vermont’s small schools, and venturing to close some of those schools through merger plans hurts more than Vermonters’ sense of nostalgia.⁹³

This emotional and historical line of thinking is not the only critical viewpoint concerning Vermont’s new school-governance law. Other criticisms of the Act have deeply divided many communities within the state.⁹⁴ This section will outline those criticisms of Act 46 and the law’s subsequent amendments.

90. Jim Masland, Commentary, *Act 46 Overlooks Importance of Community Involvement*, VTDIGGER (Dec. 3, 2017), <https://vtdigger.org/2017/12/03/jim-masland-act-46-overlooks-community-involvement/>. Jim Masland is a Vermont State Representative who represents the Windsor-Orange 2 district. *Id.*

91. *Id.*; 2015 Vt. Acts & Resolves 476, § 1(i).

92. Masland, *supra* note 90. Suzanne Hull-Parent, a school board member in Montgomery, Vermont, says the closure of small schools would be “devastating”: “You’re losing the heart of many communities. [The schools are] where [the communities] meet. That’s where [the communities] have functions that aren’t even school[related]. That’s where families in need get support services. I think it just is going to be devastating to communities. I think they’re going to change the landscape of Vermont with that.” Tulenko, *supra* note 9.

93. *A Look Back At The First Week Of The 2018 Legislative Session*, VPR NEWS: VT. EDITION (Jan. 5, 2018) [hereinafter *A Look Back*], <http://digital.vpr.net/post/reporter-roundtable-politics-and-priorities-start-2018-legislative-session>. In his 2018 State of the State Address, Governor Scott seemed to defend mergers under Act 46 by calling for a school system “based on the needs of our kids and not nostalgia” Gov. Phil Scott, State of the State Address (Jan. 4, 2018), in VPR NEWS, Audio & Full Transcript: Gov. Phil Scott’s 2018 State of the State Address (Jan. 4, 2018), <http://digital.vpr.net/post/audio-full-transcript-gov-phil-scotts-2018-state-state-address#stream/0>.

94. Pache, *School Board Members Slam Vt. Law*, *supra* note 15.

A. Act 46's Top-down Approach

By giving tax breaks to those areas embracing preferred structures and giving no incentive to Vermont towns proposing alternative structures, Act 46 fails to reward the approaches to school government that lawmakers did not create themselves.⁹⁵ This flaw is particularly problematic since the process for writing and submitting an alternative plan was less clear than the process for preferred structures: rules on alternative structures were not approved until June 2017, just months before the deadline for proposals in November.⁹⁶ In this way, the law seems to be either punishing certain towns' residents for operating their towns the way they do and for living where they live, or ignoring Vermont's geographic realities.⁹⁷ The alternative-structures provision in Act 46 *should*—but does not wholeheartedly—reflect the reality that is Vermont's geography and history.⁹⁸ Rebecca Holcombe, Vermont's Secretary of Education, admits that many of the districts most challenged by Act 46 are the smallest and most rural towns in Vermont.⁹⁹ Yet the legislation fails in multiple ways to safeguard these communities.¹⁰⁰

95. *Id.*

96. Weiss-Tisman, *As Deadline Looms*, *supra* note 17; Tiffany Danitz Pache, *Act 46 Alternative School District Merger Rules Approved*, VTDIGGER (June 10, 2017) [hereinafter Pache, *Alternative District Merger Rules*], <https://vtdigger.org/2017/06/10/act-46-alternative-school-district-merger-rules-approved/>.

97. Weiss-Tisman, *As Deadline Looms*, *supra* note 17. For instance, the Town of Rochester struggled with how to comply with Act 46. Tiffany Danitz-Pache, *Tale of Three Towns: Act 46 Realities Pressure Small Schools*, VTDIGGER (June 19, 2017), <https://vtdigger.org/2017/06/19/tale-three-towns-act-46-realities-pressure-small-schools/>. The town knew that its tiny high school would have to close, but wanted the tax incentives of a preferred structure. *Id.* It also knew it had no good options for merger with other towns: the closest high school was located over ten miles away, which would require students to traverse a narrow and winding mountain pass on a bus every day to get to school. Molly Walsh, *How a Vermont High School Ended Up With Only Two Students*, SEVEN DAYS (Nov. 22, 2017), <https://www.sevendaysvt.com/vermont/last-gasp-how-a-vermont-high-school-ended-up-with-two-students/Content?oid=10443044>. Rochester first voted to merge with Royalton and Bethel in a plan that would see their students bussed nearly 20 miles to South Royalton High School; the town then re-voted not to merge after determining that school choice would be a better option. Tiffany Danitz Pache, *White River Valley School District Merger Fails*, VTDIGGER (Apr. 13, 2017), <https://vtdigger.org/2017/04/13/white-river-valley-school-district-merger-fails/>; Tiffany Danitz Pache, *Ludlow and Rochester Close High Schools in Last-chance Merger Votes*, VTDIGGER (Nov. 30, 2017), <https://vtdigger.org/2017/11/30/last-chance-merger-votes-see-two-high-schools-closing/>.

98. See Weiss-Tisman, *As Deadline Looms*, *supra* note 17 (“[T]he towns that are pursuing this pathway [should not] be penalized.”).

99. *Id.*

100. See *id.* (“Act 46 came with some pretty detailed guidelines—and tax incentives—for the districts that could consolidate. But the process for writing and submitting an alternative plan is less clear, and there are no tax breaks being offered.”).

One major struggle small, rural towns face with Act 46 is the issue of school choice.¹⁰¹ The SBE has interpreted Act 46 to mean that “preferred structures” cannot include a merger between districts that wish to maintain school choice and districts that operate schools.¹⁰² Some contend that school choice is partly to blame for academic inequity throughout the state since choice patterns can be “based on the socio-economic status of the parent and [the parent’s] ability to provide transportation to the school of choice.”¹⁰³ However, others criticize the Act’s staunch inflexibility when it comes to merging schools of different “types.”¹⁰⁴ This camp of Vermonters claims the law forces citizens to choose between tax breaks and the ability to find the best fit for their child, particularly when the best fit for their child might be in a neighboring town three miles away that uses a different educational model.¹⁰⁵ This lack of flexibility is one example of how the law fails to promote local communities’ ingenuity in finding ways to comply with Act 46.

Another way the Act fails to safeguard small, rural towns is its potential to erode the democratic function and process of local school boards by forcing certain districts to merge now that the window for tax incentives has closed.¹⁰⁶ In Vermont, school board meetings “can get into the minute details of whether a group of students needs a new curriculum[um] or if a particular school bus is outdated.”¹⁰⁷ Many town residents participate in these meetings.¹⁰⁸ However, when the state forces a smaller town to merge into a district with larger towns, that small town may have less representation on the new school board.¹⁰⁹ For example, the Westminster School Board passed a motion asking the Vermont Legislature to rescind

101. Howard Weiss-Tisman, *How Vermont’s Act 46 District Merger Plans Fared On Town Meeting Day*, VPR NEWS (Mar. 8, 2017) [hereinafter Weiss-Tisman, *Act 46 on Town Meeting Day*], <http://digital.vpr.net/post/how-vermonts-act-46-district-merger-plans-fared-town-meeting-day#stream/0>.

102. Pache, *Decoding Act 46*, *supra* note 31.

103. Pache, *Poverty Drives Rift*, *supra* note 3.

104. Tiffany Danitz Pache, *School Choice Proponents Want Tweaks to Act 46*, VTDIGGER (Apr. 10, 2016), <https://vtdigger.org/2016/04/10/school-choice-proponents-want-tweaks-to-act-46/>.

105. *Id.*

106. Daarel Burnette II, *Consolidation Push Roils Vermont Landscape*, EDUC. WK. (Feb. 16, 2016), <https://www.edweek.org/ew/articles/2016/02/17/consolidation-push-roils-vermont-landscape.html>.

107. *Id.*

108. *Id.*

109. See Tiffany Danitz Pache, *With Second Merger Vote Looming, Royalton Asks, “What If?”*, VTDIGGER (June 1, 2017) [hereinafter Pache, *What If?*], <https://vtdigger.org/2017/06/01/second-merger-vote-looming-royalton-asks/> (discussing a revote in Royalton on a school merger with Rochester and Bethel in the summer of 2017, and noting Royalton’s alternative of merging with Randolph or Hartford and thereafter losing influence on any subsequent school board).

Act 46, highlighting the law's negative impact on Westminster's "town meeting form of government."¹¹⁰ The motion read:

In consolidating school governance in one multi-town board, Act 46 will eliminate any real power we the citizens of Westminster have to shape our schools at town meeting, and this may in fact substantially weaken our entire town meeting form of government. We value the tradition of participatory democracy, where we, at town meeting, decide how best to educate our children. We also value the community participation in our schools that accompanies our empowered and involved citizens. Therefore, we, the Westminster School Board, ask that the Legislature rescind Act 46 and work with us and the other towns of the state to meet the need for equity and efficiency in the education of our children, while at the same time honoring our need and tradition of participatory democracy.¹¹¹

By emphasizing that the Vermont legislature "work with" the town, Westminster's school board called for an end to the top-down approach to school governance embodied in Act 46.¹¹² This call to action summarizes the problem with the top-down approach: the democratic process—a bottom-up approach in many towns' traditional experiences—will likely suffer.¹¹³ Further, by incentivizing preferred and not alternative structures, Act 46 appears to punish, or at least ignore, the geographic reality of rural Vermont towns.¹¹⁴

B. Setting Unrealistic Deadlines

Proponents of Act 46 claim the State of Vermont did not intend to impose any structures on Vermont towns: instead, the state "created study

110. *Letter: Rescind Act 46*, BRATTLEBORO REFORMER (Oct. 9, 2015), <http://www.reformer.com/stories/letter-rescind-act-46,300008>.

111. *Id.*

112. *Id.*

113. See Burnette, *supra* note 106 (emphasizing the importance of local residents' voices on school boards and quoting one Middlesex resident: "There's a sense that the government is a 'we,' not a 'they'").

114. See Weiss-Tisman, *As Deadline Looms*, *supra* note 17 ("[T]hese alternative structures are a reality of Vermont's geography and history, and the towns that are pursuing this pathway shouldn't be penalized."). Act 49 appeared to acknowledge this downfall of Act 46 by acknowledging that "[s]ignificant areas of the State . . . have experienced difficulty satisfying the goals of Act 46. The range of complications is varied, including . . . geographic isolation due to lengthy driving times or inhospitable travel routes between proposed merger partners . . ." 2017 Vt. Acts & Resolves 278, § 1(e).

committees for every town” to facilitate change.¹¹⁵ However, these study committees could not legally look to *alternatives* to mergers: instead, the committees were responsible for preparing proposals to create a unified union school district, or preferred structures, as directed by the statute.¹¹⁶ Further, the Act required monumental change that—according to many who opposed the law—had to come at “breakneck speed [and] with little concern for the public process.”¹¹⁷ The legislation required that all proposals—whether for preferred or alternative structures—be in the hands of the SBE by November 2017, less than thirty months after the Act was signed into law by Governor Peter Shumlin.¹¹⁸ All proposals had to be approved by a town vote—a rightful requirement, but one that added even more haste to the Act 46 deadlines.¹¹⁹ Additionally, those districts that merge voluntarily must have their structures and systems functioning by July 2019—or, in the case of the accelerated phase, by July 2017.¹²⁰

Yet even those districts that tried to create a suitable merger plan on time did not always have success the first go-around. Vermont’s Agency of Education sent Windham Southwest Supervisory Union back to the drawing board in 2016 after denying its initial merger plan.¹²¹ Additionally, not all town voters were receptive to proposed merger plans, even if denial meant foregoing important tax incentives and school grants.¹²² For example, two small southern Vermont towns—Pownal and Woodford—voted as late

115. Derek Carson, *ACT 46: Schools’ Future Up to Voters*, BENNINGTON BANNER (Oct. 27, 2017), www.benningtonbanner.com/stories/act-46-schools-future-up-to-voters,523078.

116. Elizabeth Adams, *Act 46: To Merge or to Collaborate, That Is the Question*, BRATTLEBORO REFORMER (Nov. 3, 2017), www.reformer.com/stories/act-46-to-merge-or-to-collaborate-that-is-the-question,523673; see also VT. STAT. ANN. tit. 16, § 706 (2014) (stating that study committees are “established to study the advisability of forming a *union school district*,” and that school districts can informally explore other options *before* forming a study committee (emphasis added)).

117. Howard Weiss-Tisman, *Upcoming Merger Votes Will Put Vermont’s Act 46 To The Test*, VPR NEWS (Feb. 25, 2016) [hereinafter Weiss-Tisman, *Merger Votes*], <http://digital.vpr.net/post/upcoming-merger-votes-will-put-vermonts-act-46-test#stream/0>. Act 46 is monumental because it seeks to change Vermont’s school governance structure, which has not happened since the 1890s. *Id.*

118. 2015 Vt. Acts & Resolves 478, 480, 482, §§ 6(a), 7(a), 9(a); 2017 Vt. Acts & Resolves 286, § 11; Carson, *supra* note 115.

119. 2015 Vt. Acts & Resolves 478, 480, §§ 6(a)(2), 7(a)(2). Vermont requires a 30-day warning period for local elections. VT. STAT. ANN. tit. 17, § 2641 (2012).

120. 2015 Vt. Acts & Resolves 478, 480, §§ 6(a)(8), 7(a)(4).

121. Mike Faher, *Education Board Chair Hails “Huge Success” of Act 46*, VTDIGGER (Nov. 29, 2016), <https://vtdigger.org/2016/11/29/education-board-chair-hails-huge-success-act-46/>.

122. See *id.* (noting the Act 46 process has not “all gone smoothly,” in part since “the results of Act 46 merger votes on Election Day were a mixed bag”); Weiss-Tisman, *Act 46 on Town Meeting Day*, *supra* note 101 (showing that Wells defeated the Wells Spring proposal (146 in favor, 147 opposed); Wardsboro did not support the River Valleys Unified School District plan; and three out of four towns rejected the Windham Northeast Unified School district plan on Town Meeting Day 2017).

as November 2017 against merging into the Mount Anthony Unified School District.¹²³ Opponents to that merger perceived a lack of local control under a unified regional board and raised questions as to how costs would be shared under the plan.¹²⁴ For those districts that could not meet the preferred structure formula, the guidelines for proposing an alternative structure did not come through until June 2017, only months before the November 2017 deadline.¹²⁵

One example that showcases the rushed deadline—particularly when towns are grappling with what model will work best and serve their individual needs—can be found in the Washington Central Supervisory Union.¹²⁶ There, a committee tasked with developing a coordinated response to Act 46 for Berlin, Calais, East Montpelier, Middlesex, and Worcester tried to fashion an Act 46 proposal in seven weeks after the five towns failed to vote on any proposal after two years.¹²⁷ In the end, the committee made the case to maintain the “status quo” in the Washington Central Supervisory Union, thereby defending the supervisory union’s multi-board governance structure.¹²⁸ Although the supervisory union board flirted with the idea of sending a separate proposal, it “reluctant[ly]” signed onto the committee’s proposal to “send a unified message” to the SBE.¹²⁹ Those involved still recognize that the SBE may reject the proposal and create its own plan for the area.¹³⁰ And, even if the affected schools embraced a possible merger, those schools would have to share existing debt, which is a “major obstacle to [the] immediate consolidation” Act 46 requires.¹³¹

By setting a fast-paced timeline, Vermont’s legislature asked its towns to change decades- if not centuries-old structures; potentially close small schools that constitute the heart of many communities; and give up influence over local school boards to make way for new governance

123. *Two Towns Scuttle Act 46 Merger*, BARRE MONTPELIER TIMES ARGUS (Nov. 22, 2017), <https://www.timesargus.com/articles/two-towns-scuttle-act-46-merger/>. In Pownal, 214 voted against the merger while 210 voted in its favor. *Id.* Woodford voted 38–36 against the merger. *Id.*

124. Derek Carson, *4 Votes in Pownal, 2 in Woodford Sink Act 46 Proposal*, BENNINGTON BANNER (Nov. 7, 2017), www.benningtonbanner.com/stories/4-votes-in-pownal-2-in-woodford-sink-act-46-proposal,523990.

125. Pache, *Alternative District Merger Rules*, *supra* note 96.

126. David Delcore, *New Act 46 Panel Short on Time*, BARRE MONTPELIER TIMES ARGUS (Sept. 21, 2017), <https://www.timesargus.com/articles/new-act-46-panel-short-on-time/>.

127. *Id.*

128. David Delcore, *U-32 Board Joins Act 46 “Consensus,”* BARRE MONTPELIER TIMES ARGUS (Dec. 22, 2017), <https://www.timesargus.com/articles/u-32-board-joins-act-46-consensus/>.

129. *Id.*

130. *Id.*

131. *Id.*

structures that no one with certainty can say will spur major improvements.¹³² Vermont State Senator Dick McCormack, who voted against Act 46, admitted that “[c]onsolidation may be a very good idea in some districts, maybe in most districts,” but that he does not “have a scientific basis for concluding that. [There is] nothing stopping communities from consolidating[,] anyway. They [did not] need to be pressured. The idea that [this is a] top-down, heavy-hand[ed] approach of the state struck me as gratuitous.”¹³³ Further, Act 46’s complex structure does not lend itself to a fast turnaround, especially given the requirement of voter approval and the emotional, controversial subject of children’s education throughout the entire state.¹³⁴ One of the Act’s major flaws is thus setting unrealistic deadlines, while presumably expecting unrealistic outcomes after towns rushed to comply with its measures.

C. Hamstrung Towns

Under Act 46, all towns involved in a proposed merger had to approve a preferred structure by a town vote before the towns could be eligible to receive tax incentives or merger grants.¹³⁵ This requirement was necessary to ensure each proposal was democratically approved. However, the voting power of one town could—and did—topple merger plans for other towns. Given the strict deadlines, toppled merger plans resulted in models that were not always the best fit for the towns involved, but more of a compromise driven by the tax-incentive deadlines in the statute.¹³⁶

One example of this took place in Bethel, Rochester, and Royalton.¹³⁷ Originally, the three towns voted on a proposal to merge into a new White River Unified School District.¹³⁸ Elementary students in all three towns would attend elementary school in their town, students in grades 6–8 would attend a middle school in Bethel, and high schoolers would attend South

132. Tulenko, *supra* note 9; Weiss-Tisman, *Merger Votes*, *supra* note 117; Pache, *What If?*, *supra* note 109; Burnette, *supra* note 106.

133. Burnette, *supra* note 106.

134. *A Look Back*, *supra* note 93.

135. 2015 Vt. Acts & Resolves 478, 480, §§ 6(a)(2), 7(a)(2).

136. See *Royalton Prepares For Revote On Act 46 School Merger Plan*, VPR NEWS (June 9, 2017) [hereinafter *Royalton Prepares for Revote*], <http://digital.vpr.net/post/royalton-prepares-revote-act-46-school-merger-plan#stream/0> (noting in a report before the revote that, if the Royalton-Bethel-Rochester merger plan does not move forward, the unfavorable vote would kill two other merger plans involving four other towns).

137. *Id.*

138. Matt Hongoltz-Hetling, *After Defeat, Royalton Residents Seek New Merger Vote*, VTDIGGER (Apr. 26, 2017), <https://vtdigger.org/2017/04/26/defeat-royalton-residents-seek-new-merger-vote/>.

Royalton High School.¹³⁹ There would also be an experiential environmental high school program in Rochester, which consisted of a partnership with the U.S. Forest Service and would have been one of the most innovative magnet high school programs in the state.¹⁴⁰ The three towns were not the only ones involved in the merger plan: the side-by-side RED would have formed the White River Valley Supervisory Union and contained four additional towns: Chelsea, Tunbridge, Granville, and Hancock.¹⁴¹ Chelsea and Tunbridge would have merged into a new PreK–8 district; the high school in Chelsea would have closed; and students in both towns would have received school choice.¹⁴² South Royalton was hoping that the Chelsea and Tunbridge choice students might attend the new union high school in South Royalton, and designed their high school program to accommodate more choice students from these and other surrounding towns.¹⁴³ Further, Granville and Hancock would have formed a non-operating school district that gave their students school choice in all grades.¹⁴⁴

The plan was defeated, however. At first, the defeat came once Royalton voted against it in April 2017—the only town to have done so during that particular vote.¹⁴⁵ Mostly because of the “tight timetable” under which all districts in the state were operating, the towns sought a revote instead of an improved plan—especially when Royalton voters expressed their regret and some misunderstanding of the plan, and it seemed that a revote in South Royalton might yield a positive vote the second time around.¹⁴⁶ Just months later, Royalton voted to *approve* the same plan—

139. *Id.*

140. See WHITE RIVER SUPERVISORY UNION, REPORTS OF ACT 46 STUDY COMMITTEES: PROPOSAL TO CREATE THREE “SIDE-BY-SIDE” SCHOOL DISTRICTS 41 (Jan. 31, 2017), www.chelseaschoolvt.org/wp-content/uploads/2017/02/WHITE-RIVER-VALLEY-SUPERVISORY-UNION-STUDY-COMMITTEES-Final-Report-2-6-17.pdf (stating that the planned “Outdoor Experiential Learning Program” in Rochester “is designed to provide students with rigorous, place-based learning opportunities by accessing the unique resources within the White River Valley, the current Rochester School Forest and the Green Mountain National Forest”).

141. Hongoltz-Hetling, *supra* note 138.

142. *Id.*

143. See WHITE RIVER SUPERVISORY UNION, *supra* note 140, at 17 (“The proposed Unified School District will realize the [supervisory union’s] vision by operating exceptional student-focused . . . programs that will serve the students of Bethel, Rochester, and Royalton, and be the educational programs of choice for parents and students in other towns [that] choose to tuition their students.”).

144. Hongoltz-Hetling, *supra* note 138.

145. *Id.*

146. *Id.*; *Royalton Prepares for Revote*, *supra* note 136.

while Rochester changed its mind and rejected it.¹⁴⁷ Rochester’s “no” vote to the merger meant that all seven towns missed the original July 2017 deadline for Phase 2 of Act 46—a deadline that was later extended to November 2017.¹⁴⁸ What followed was a scramble for “Plan B” in the affected towns, particularly since the “no” vote in Rochester simultaneously killed two other merger plans involving four other towns.¹⁴⁹

To be eligible for the tax incentives from Act 46, Bethel and Royalton put together a two-town merger plan, submitted it to the Secretary of Education in late summer 2017, and successfully voted to merge their two school districts before the November 2017 deadline: each town will each keep its PreK–5 elementary school, while all students in grades 6–8 will go to Bethel, and all high school students will attend South Royalton.¹⁵⁰ However, this is not necessarily the best model possible for Bethel and Royalton, let alone Rochester, which will now merge with Stockbridge: the outdoor learning program in Rochester evaporated, and Rochester voters would have saved more on taxes if they had merged with Bethel and Royalton.¹⁵¹ Yet, Rochester’s voting power hamstrung the six other towns involved in the plan, as did Royalton’s initial “no” vote.¹⁵² Needless to say, the outcome of these divisive elections did not result in a positive climate for the community.¹⁵³

147. Tiffany Danitz Pache, *Towns Eye Possible Path out of District Merger Quandary*, VTDIGGER (July 5, 2017) [hereinafter *Merger Quandary*], <https://vtdigger.org/2017/07/05/towns-eye-possible-path-district-merger-quandary/>.

148. 2015 Vt. Acts & Resolves 480, §§ 7(a)(2), (4); 2017 Vt. Acts & Resolves 286, § 11.

149. *Royalton Prepares for Revote*, *supra* note 136.

150. Pache, *Royalton, Bethel Agree*, *supra* note 77; Tiffany Danitz Pache, *Four Tiny High Schools in District Merger Dance*, VTDIGGER (Aug. 31, 2017), <https://vtdigger.org/2017/08/31/four-tiny-high-schools-in-mix-in-district-merger-dance/>.

151. Pache, *Merger Quandary*, *supra* note 147; Tiffany Danitz Pache, *Final Merger Plans Look to Get Under the Wire for Tax Breaks*, VTDIGGER (Oct. 23, 2017), <https://vtdigger.org/2017/10/23/final-merger-plans-look-get-wire-tax-breaks/>; *see also* Pache, *Royalton, Bethel Agree*, *supra* note 77 (reporting that the SBE approved a proposal for Rochester to combine with Stockbridge).

152. *See Royalton Prepares for Revote*, *supra* note 136 (stating that the defeat of the Royalton plan would affect all seven towns involved).

153. *Id.* A similar problem occurred in Chelsea and Tunbridge: after forming a two-town merger plan, residents petitioned for a revote. Matt Hongoltz-Hetling, *Act 46 Votes Upcoming as Tunbridge, Chelsea Modify Proposal*, VALLEY NEWS (Sept. 29, 2017), <http://www.vnews.com/White-River-Act-46-Supervisory-Union-votes-approaching-12816190>. After the concluding the revote in both towns, the towns’ plan changed again, illustrating yet another forced compromise to meet the November 2017 deadline that is possibly not the best educational model for schoolchildren in these two districts. *See id.* (“[I]nstead of moving forward with a merged middle school in 2018, the new board instead ‘will fully explore a merged middle school for the 2019-20 school year.’ Those changes didn’t sit well with members of the [SBE], who called the new proposal a ‘disappointment’ and ‘very watered down’ . . .”).

Given the heavy price tag of school mergers—in terms of divided communities and the cost of financing Act 46’s tax incentives—it seems misguided that Act 46 does not provide more specific benchmarks to measure its own success.¹⁵⁴ Further, the haste with which many districts put forth their proposals does not necessarily guarantee quality outcomes.¹⁵⁵ This lack of certainty surrounding the legislation’s future success—or at least how to measure it—must give any prudent taxpayer pause when faced with a \$31 million bill for the next three years.¹⁵⁶

CONCLUSION

Although the objectives of Act 46 are admirable, the legislation has created major rifts throughout Vermont’s communities, and sets the bar high for fast yet effective action in achieving Act 46’s goals.¹⁵⁷ Although school mergers may make sense in certain areas of Vermont,¹⁵⁸ the Act disregards the geographic and socioeconomic realities of many Vermont towns by denying tax incentives or grants to certain areas forced to propose alternative governance structures.¹⁵⁹

154. See 2015 Vt. Acts & Resolves 476, § 2 (stating that the legislation’s goals are to (1) “provide substantial equity in the quality and variety of educational opportunities statewide”; (2) “lead students to achieve or exceed the State’s Education Quality Standards”; (3) “maximize operational efficiencies”; and (4) “promote transparency and accountability,” all “at a cost that parents, voters, and taxpayers value,” but not setting any quantitative benchmarks).

155. See *supra* Section II.B (criticizing the unrealistic deadlines set by Act 46); Weiss-Tisman, *Merger Votes*, *supra* note 117 (noting the monumental nature of changing Vermont’s school governance structure, and quoting one critical Dummerston town resident: “[Act 46 has] been [a] one-sided, manipulated, overly-restricted process, riddled with insufficient, incomplete and misleading information, and driven at a breakneck speed with little concern for the public process”).

156. See Anne Galloway, *Vt to Spend \$31M on Act 46 Mergers*, BENNINGTON BANNER (Dec. 7, 2017) [hereinafter Galloway, *Vt to Spend \$31M*], www.benningtonbanner.com/stories/vt-to-spend-31mon-act-46-mergers,526508 (“Just how much the mergers will render in savings, however, is not clear. In some cases, local schools have closed, and students are being sent to other towns for schooling.”).

157. See Pache, *Poverty Drives Rift*, *supra* note 3 (noting a rift in towns struggling to come up with a plan for Act 46); Pache, *School Board Members Slam Vt. Law*, *supra* note 15 (quoting John Castle, North Country Supervisory Union superintendent, who argued that amendments to Act 46 “may provide some flexibility, [but] it [still] seems like tinkering with the law to further push square pegs into round holes”).

158. One advantage to merger would be better opportunities for children to work with a larger range of other children: neighboring schools with only five to seven children per grade could come together and offer more in terms of sports teams and educational opportunities if they joined forces. *Lt. Gov. David Zuckerman On Education, Property Taxes and The Tax-And-Regulate Push*, VT. EDITION (Jan. 12, 2018), <http://digital.vpr.net/post/live-noon-lt-gov-david-zuckerman>.

159. See Weiss-Tisman, *As Deadline Looms*, *supra* note 17 (“[A]lternative structures are a reality of Vermont’s geography and history . . .”).

The next wave of activity for Act 46 will be the SBE's remapping of districts that have not voluntarily merged, as well as the SBE's decisions on the alternative school governance structures submitted at the end of November 2017.¹⁶⁰ Since these alternative structures are not eligible for tax incentives, Vermonters can only hope that the SBE will not penalize towns pursuing that pathway by outright rejecting their efforts to comply with this monumental and life-changing Act.¹⁶¹

As school districts begin implementing their merger plans, many questions remain regarding the Act's legacy: will it be effective in improving student performance? How will Vermont *know* that the Act is doing its job in terms of quantitative benchmarks? Will merging schools with the intent of increasing the student-to-staff ratios in public schools result in a dramatic loss of jobs for school employees? Time will only tell how "sustainable" Vermont's new school structures will be in terms of cost savings, particularly given the expense of financing the law's tax incentives over the next few years.¹⁶² But what will Vermont's quintessential small-town governance look like now that many small towns have merged their schools with larger ones? For better or worse, Act 46 has quickly changed the landscape of Vermont, and will continue to shape towns and communities while affecting each and every household for generations to come.

- Amanda E. Quinlan**†

160. Pache, *Board Sharpens Scrutiny*, *supra* note 66; 2015 Vt. Acts & Resolves 482, § 9(a).

161. See Weiss-Tisman, *As Deadline Looms*, *supra* note 17 ("[T]owns that are pursuing [alternative structures] shouldn't be penalized.").

162. Galloway, *Vt to Spend \$31M*, *supra* note 156.

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