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Agency of Education

August 19, 2019

Thomas J. Montemagni, Chair  
Stratton School District Board of Directors  
9 West Jamaica Road  
Stratton, VT 05360

Dear Mr. Montemagni:

I write in response to the July 3, 2019 request of the Stratton School District Board of Directors for an opinion under 16 V.S.A. § 563(2) regarding the District's proposed tuition-payment policy.

Subdivision 563(2) states that a school board:

*May take any action that is required for the sound administration of the school district. The Secretary, with the advice of the Attorney General, upon application of a school board, shall decide whether any action contemplated or taken by a school board under this subdivision is required for the sound administration of the district and is proper under this subdivision. The Secretary's decision shall be final.*

After consultation with the Attorney General, I reach the following determinations pursuant to § 563(2): In general, it is possible to conclude that a tuition-payment policy is required for the sound administration of a district. The proposed Stratton policy, however, does not meet this standard because it does not further the accurate identification of a student's legal residence, and the language as written would have the unintended consequence of excluding payment to otherwise eligible schools.

The Stratton School District ("District") is organized to provide for the education of its resident students in prekindergarten through grade 12. The Stratton voters have chosen to fulfill this obligation by paying tuition to the public or approved independent school in which students in all grades enroll, rather than by operating a school offering one or more grades.



It is my understanding that the Stratton School Board ("Board") is concerned about an increase in the number of families that have moved into the district in recent years, especially from other states. Specifically, the Board is troubled by the apparent correlation between the number of new students in the district and the amount of publicly funded tuition dollars the district now pays to approved independent schools in and outside of Vermont that have some sort of competitive or selective admissions practice, including specialty ski academies (collectively, "specialty academies").<sup>1</sup>

Vermont statutes state that tuition "shall be paid by the district in which the student is a resident." 16 V.S.A. §§ 823(a) and 824(a). If a student is not a resident of the Stratton School District, then the Board has a fiduciary duty to the taxpayers to ensure that the district pays tuition for only those students who meet the statutory definition of residency.

Vermont statutes define "legal residence" in 16 V.S.A. § 1075, including the legal residence of a student when one parent lives outside the state. In general, a school board's policies and procedures that support accurate identification of a student's legal residence are within the authority granted to a school board by § 563. For example, residency determinations for districts within the neighboring Bennington-Rutland Supervisory Union are made pursuant to a detailed, comprehensive policy that includes forms to be completed by a student's parents or guardians.<sup>2</sup>

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<sup>1</sup> From FY09 through FY17, Stratton's average daily membership ("ADM") averaged just under 31 students annually, with counts ranging from 28 to 33 during those nine years. Stratton's ADM increased from 31 in FY17 to 47 in FY18 (with approximately three times as many added to Grades 9-12 as to K-6). In FY19, the district's ADM rose to 56 (the ADM doubled for Grades 7-8; a smaller number of the increased ADM are attributable to Grades 9-12).

Budgets after FY17 changed accordingly, with increases over the prior year of 21%, 49%, and 15% in FY18, FY19, and FY20 respectively. Equalized pupils (used to determine tax rates) lagged the ADM by a year, but the increased count in FY19 helped ameliorate a large homestead rate increase that year, even though education spending increased. In FY20, however, the additional increase in the budget, compounded by a drop in offsetting revenues, caused education spending to rise and increased the equalized homestead tax rate from \$1.584 to \$1.809.

From FY14 through FY18, the Stratton School District paid tuition almost exclusively to Vermont independent schools, with a handful attending Vermont public schools. Data for FY19 (academic year 2018-2019) have not yet been collected.

<sup>2</sup> Although not explicitly referenced in the Stratton School Board's request, it is important to note that if a student is a "legal resident" as defined by statute, then under current law it is immaterial whether the student's family moved into the district for the sole purpose of obtaining publicly funded tuition support. Families throughout the state make decisions about where they will live based upon the quality of a district's public schools or the availability of public tuition dollars. Even a family already living in Vermont that moves to a different school district with the intention of residing in that community permanently might leave within a year or two for reasons unrelated to their student's education.



For these reasons, I conclude that, as a general matter, a school board's policies and procedures that support accurate identification of a student's legal residence are within the authority granted to a school board by § 563.

The proposed Stratton policy under review states:

*Tuition shall be paid to receiving schools that enroll any and all students deemed to be a resident of the District. No tuition payment shall be made to any school that limits enrollment based on special education eligibility, a student impairment or disability or race, religion, ethnicity, national origin, sexual orientation, gender identify, gender or other protected characteristic.*

The first sentence seems intended to address both areas of apparent concern: (a) legal residency, and (b) increasing demand to pay tuition to specialty academies.

The statement that the District shall pay tuition only for a student "deemed to be a resident of the District" are the only words in either sentence that explicitly apply to the residency issue. As written, the quoted phrase does nothing more than restate – perhaps for emphasis or as a reminder – that the District pays tuition only for students who are legal residents. It provides no additional policy or procedural guidance to support the Board when making residency determinations.

The substance of the proposed policy, in both sentences, appears to be an attempt to stabilize student counts, and therefore tax rates, by discouraging families – particularly out-of-state families – from attempting to establish residency in order to receive public tuition payments for specialty academies.

The statutes provide several ways in which a school district can limit the schools to which it pays tuition. For example, a district is required to operate an elementary school (K-6) unless the voters instead authorize the school board to pay tuition to "one or more public elementary schools." 16 V.S.A. § 822(a)(1) (emphasis added). The voters then have an additional choice whether to restrict school enrollment to those "one or more public elementary schools" or instead to expand the number and type of elementary schools to which the district pays tuition by granting "general authority ... to pay tuition [to] an approved independent elementary school ... upon notice given by the student's parent or legal guardian" – in other words, also to pay tuition to any independent elementary school that is statutorily eligible to receive publicly funded tuition. 16 V.S.A. § 821(d) (emphasis added).

Although 16 V.S.A. § 822 does not similarly afford this two-step authorization for grades 7-12, the Legislature has provided a different option for districts that wish to



limit the high schools to which they pay tuition: The voters can authorize a board to designate up to three public and/or approved independent schools to serve "as the public high school or high schools of the district," provided the school is willing to accept designation. 16 V.S.A. § 827.

The first sentence of the proposed Stratton policy permits payments solely to schools that "enroll any and all" resident students. Assuming for the present that a district has legal authority to limit the schools to which it pays tuition beyond the ways set out in statute,<sup>3</sup> these words exceed the Board's apparent intent to discourage new residents from moving to Stratton to receive tuition assistance for their students to attend specialty academies. Rather, the first sentence would prohibit public tuition payments to a school that operates exclusively to provide appropriate educational services to students with specific disabilities, because such a school does not enroll a student who does not have an individualized education program ("IEP") or a student whose IEP does not identify the school as being necessary to meet the student's unique needs. In addition, the first sentence might also prohibit any public tuition payments to a small public or independent school if the school building lacked physical capacity to educate "any and all" Stratton students who wished to enroll.

The second sentence in the proposed Stratton policy prohibits tuition payment to a school that "limits enrollment based on special education eligibility" or other qualities. To the extent that this refers to a school that *discriminates* against a protected class by violating 9 V.S.A. chapter 139, the Public Accommodations Act, then – like the "deemed to be a resident" language – the sentence serves only as a reminder of current law. Even if the second sentence is simply a reminder and is not intended to expand upon chapter 139, it would prohibit tuition payments to schools the Stratton Board may not intend to exclude. For example, if a small approved independent elementary school reached its capacity to serve students in one or more categories of special education or was not

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<sup>3</sup> As discussed earlier, 16 V.S.A. §§ 821 and 822 direct nonoperating school districts to pay tuition to the public and approved independent schools in which the district's resident students enroll. The courts have limited the statutory mandate by prohibiting the use of public education funds to pay tuition charged by sectarian schools.

It is impossible to predict whether a court would approve further limitations on a district's obligation to pay tuition if – for example – a district argued that public tuition payments to certain approved independent schools violate 9 V.S.A. chapter 139, the Public Accommodations Act. For example, a district might claim that a ski school violated the Act if it would not enroll a student with specific physical disabilities. Similarly, a district might assert a violation if a school that granted enrollment in part on entrance examinations would not enroll a student with certain cognitive disabilities.

These are examples of legal issues that only a court can answer. Accordingly, my analysis of the proposed tuition policy under § 563(2) does not speculate whether the policy, if rewritten, could limit the Stratton District's obligation to pay tuition more stringently than set forth by statute or the courts.



approved by the State Board of Education to serve them, then the school would be "limit[ing] enrollment based on special education eligibility" and the proposed policy as written would prohibit the Stratton School Board from paying tuition for *any* student enrolled in that school.

Therefore, although it is possible to determine that a tuition-payment policy is required for the sound administration of a district, I conclude that the proposed Stratton tuition policy does not meet this standard because it does not enhance or support accurate identification of a student's legal residence, and the language as written would have the unintended consequence of excluding payment to otherwise eligible schools.

Please consider this letter a final decision made with the advice of the Attorney General pursuant to 16 V.S.A. § 563(2).

Sincerely,



Daniel M. French, Ed.D.  
Secretary of Education

cc: Attorney General Thomas J. Donovan; Superintendent William Anton

