STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Orleans Unit **Docket No. 215-12-20 Oscv**

Sara Vitale and Louis Vitale, as parents and next friends of K.V., L.V., and T.V.;
Marisa and Benjamin Trevits, as parents and next friends of V.T., R.T., and E.T.; and
Cindi and Fredrick Rosa, as parents and next friends of E.R. and D.R.,

Plaintiffs,

v.

State of Vermont;
Daniel French, in his official capacity as Secretary of the Vermont Agency of Education;
Vermont State Board of Education;
Windham Northeast Union Elementary School District;
Bellows Falls Union High School District # 27;
Lake Region Union Elementary School District; and
First Branch Unified School District,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO SCHOOL DISTRICTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs, Sara and Louis Vitale; Marisa and Ben Trevits; and Cindi and Fredrick Rosa (the "Parents"), file this Response in Opposition to the Motion to Dismiss filed on February 10, 2021, by Defendants Windham Northeast Union Elementary School District, Bellows Falls Union High School District #27, Lake Region Union Elementary School District, and First Branch Unified School District (the "Districts") and state the following in support:

The Common Benefits Clause and the Education Clause in the state constitution (Vt. Const. Ch. I, Art. 7 and Ch. II § 68, respectively) protect the right to equal educational benefits and opportunities. *Brigham v. State*, 166 Vt. 246, 268 (1997). This equality requirement is

separate and independent from whether an individual student's state-funded education is "adequate." *Id.* at 267. Accordingly, once the state offers one type of education benefit or opportunity, it cannot withhold the same from other students. *Id.* at 249.

Here, Vermont has enacted "Town Tuitioning" statutes, which authorize local governments to provide one type of educational benefit and opportunity, tuition to attend an independent school, while authorizing others to withhold the same. 16 V.S.A. §§ 821-22. Thus, on their face, the Town Tuitioning statutes distribute the unique benefit and opportunity to enjoy taxpayer support to attend an independent school to some students but not others. Whether students enjoy the benefit and opportunity of these taxpayer funds depends solely on where they live in Vermont. This unequal distribution of Town Tuitioning violates the state constitution's educational equality requirement.

Therefore, the Parents have stated a plausible claim for relief. Additionally, because they allege the Town Tuitioning statutes are unconstitutional on their face, they are not required to exhaust administrative remedies, and their claims are not time barred. The Districts' motion to dismiss fails for these reasons.

LEGAL STANDARD

"A motion to dismiss for failure to state a claim upon which relief can be granted . . . challenges the sufficiency of the complaint and admits all factual allegations well pleaded by the nonmoving party." *White Current Corp. v. Agency of Transp.*, 140 Vt. 290, 291 (1981). "In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Colby v.*

Umbrella, Inc., 2008 VT 20, ¶5 (quotation and citation omitted). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Id*. Indeed, at this stage Plaintiffs' burden is not to definitively win their argument on the law, as in summary judgment, but only to state a "cognizable legal claim." *Wentworth v. Crawford & Co*., 174 Vt. 118, 120 (2002). Put differently, "[t]o sustain dismissal, the court must have no doubt that the alleged facts, if proven would not entitle the plaintiff to relief *under any legal theory*." *Brigham v. State* ("*Brigham II*"), 2005 VT 105, ¶ 11 (emphasis added). Indeed, the Supreme Court's decision in *Brigham II* shows that the Defendant districts, like the State Defendants, have a very high bar to clear at this stage to stop Plaintiffs' claims on behalf of their children to equal educational opportunity. *Id*. at ¶ 13.

ARGUMENT

A. The Districts' motion to dismiss should be denied because the Parents state valid claims by alleging that offering Town Tuitioning in some districts but not others violates the state constitution's Education and Common Benefits clauses.

The Parents adopt their Response in Opposition to the State's Motion to Dismiss as if set forth fully herein. That Response answers the District's arguments concerning *Mason v. Thetford School Board*, 142 Vt. 495 (1983). *See* Pls.' Resp. Opp. State Def's. Mot. to Dismiss at 3-7 (distinguishing *Mason*). To summarize, *Mason* does not foreclose Plaintiffs' claims because it was not a constitutional case, which is what the Parents bring here. *Id.* at 4. Nor does its dicta address the Parents' demand for equal treatment in educational opportunities. *Id.* at 4-5.

Vermont's Town Tuitioning statutes, which sanction a system where some school districts provide tuition assistance and others refrain from doing so, violate the Vermont Constitution's Education Clause (Vt. Const. Ch. II, § 68) and Common Benefits Clause (Vt. Const. Ch. I, Art. 7). The Education Clause protects a "right to education [that] is so integral" to Vermont's system of government "that any statutory framework that infringes upon the equal

enjoyment of that right bears a commensurate heavy burden of justification." *Brigham*, 166 Vt. at 256. Accordingly, there is a "long and settled history" of "education" as a "fundamental obligation of [the] state government" in Vermont. *Id.* at 264. Given this right's venerable status, a "more searching" equal protection scrutiny is appropriate under the Common Benefits Clause when a statute burdens it. *Id.* at 265. At the very least, the Education and Common Benefits Clauses enshrine a "right to equal educational opportunities." *Id.* at 268. Thus, resources spent on education cannot be distributed on something as capricious as the "mere fortuity of a child's residence." *Id.* at 265.

The Town Tuitioning statutes violate this equality principle just like the disparate funding of public schools did in *Brigham*. There, the state mostly left public funding to local governments. *Id.* at 249. This resulted in students in wealthier school districts receiving more education funding than those in poorer school districts because wealthier districts had greater tax revenues. *Id.* at 249, 253-55. When students challenged this in court, the State defended this arrangement by arguing that the Education Clause did not require the right to education to be distributed equally. *Id.* at 266. It also argued that funding disparities did not matter so long as school districts provided a "minimally 'adequate' education." *Id.* at 267.

The Vermont Supreme Court rejected this argument and held that the funding disparities between different localities violated both the Education and Common Benefits Clauses. *Id.* at 268. It reasoned that the funding disparities created outcomes that "fall[] well short of achieving reasonable educational equality of opportunity." *Id.* The Court acknowledged that absolute equality in funding is not required, but the state constitution's equal education requirements do foreclose systems where students' geographic location affects the educational opportunities available to them and determines the quality of their education. *Id.* at 265, 268.

The Court rejected the State's argument that the Education Clause doesn't mandate equality in educational benefits because "as early as 1828 the scope of the state's duty to educate was defined in terms of fundamental equality." *Id.* at 266. The Court also rejected the State's attempt to justify the funding disparities by claiming that students in poor districts still received an "adequate" education because the adequacy of one's education has nothing to do with whether the state provides education benefits equally. *Id.* at 267.

The constitutional flaws the court found in *Brigham* with the state's public school funding system mirror those of the Town Tuitioning system here. Just as public school funding levels depended on students' geographic location in *Brigham*, the level of Town Tuitioning a student receives depends on them living in a school district that offers this benefit. As a result, some students in the state receive Town Tuitioning but others do not, just as some students in *Brigham* received greater public school funding than others. In both *Brigham* and here, a student's educational opportunities and benefits depend on where a student lives, and *Brigham* held something as "capricious" as this cannot be the basis for what type of education a student receives. *Id.* at 265. Thus, just as the funding disparities between public schools in *Brigham* violated the equal education requirement, the disparities in Town Tuitioning between school districts in Vermont violates the state constitution.

Brigham answers the Districts' attempts to defend the flawed Town Tuitioning statutes. The Districts claim that the right to an equal public education is all that the Vermont Constitution protects and that it says nothing about the state distributing other types of educational benefits and opportunities, such as Town Tuitioning. School Defs.' Mot. to Dismiss 6-7 ("Districts' Br."). But *Brigham's* interpretation of the Education and Common Benefits Clauses primarily focused on education benefits and opportunities being distributed equally. The Districts acknowledge this

by stating "the State must make educational opportunity available on substantially equal terms, which it has traditionally done through the provision and maintenance of public schools." Districts' Br. 7. This logically implies that while public schools are the traditional vehicle that delivers education in Vermont, the end the constitution protects is equality of educational benefits and opportunities, not just equal public schools.

As a result, if the state provides Town Tuitioning benefits it must do so on an equal basis. *Brigham* says as much: "[educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 166 Vt. at 249-50. This is true when the state offers Town Tuitioning because the constitution requires equality whenever the state offers an educational benefit regardless of whether it uses a traditional public school or Town Tuitioning to deliver it.

The Districts miss *Brigham's* point again when they claim there's no constitutional violation because the public schools are being funded equally. Districts' Br. 8. Public schools and Town Tuitioning are different classes or types of benefits. Many students prefer public schools outside their district or even independent schools for a whole host of reasons, which some of the Parents' stories in this case exemplify. A public school that is funded equally with others throughout the state does not satisfy these needs and cannot replace the benefit of Town Tuitioning as the Districts claim. The Plaintiffs' stories reveal a difference in the educational quality of the schools available to them through Town Tuitioning and those schools they are forced into when they are denied access to Town Tuitioning.

Next, the Districts defend the Town Tuitioning statutes' inequality by appealing to the legislature's discretion to choose the means by which to provide education benefits. Districts' Br. 5. While the constitution gives the legislature discretion in the means it uses, it has foreclosed the

means of choosing to withhold one type of education benefit while providing it to others. The means the legislature uses to provide education must still satisfy the constitution's educational equality requirement. Having offered the benefit of Town Tuitioning to some, the legislature must offer it to all, and its denial to do so must survive strict scrutiny.

The Districts double down on their argument that the legislature can do what it wants by arguing that the Education and Common Benefits Clauses are judicially unenforceable. Districts' Br. 8-9. But *Brigham II* rejects that argument. 2005 VT at ¶ 9, (*per curiam* order). In that case, the State had argued it is up to the legislature to decide how to fulfill the equality principle announced in *Brigham I*, and the trial court agreed and dismissed the case based on "judicial self-restraint." *Id.* at ¶ 1. But the Vermont Supreme Court reversed and held that the lower court had "abdicated its duty to uphold the Vermont Constitution by refusing to entertain plaintiffs' claim." *Id.* at ¶ 10. It reasoned that courts may adjudicate whether the legislature's recent law had fixed the constitutional deficiencies identified in *Brigham I*. *Id.* at ¶ 13. Thus, courts may scrutinize both the legislatures' ends and means to ensure they satisfy the constitution's commands.

As a result, the Districts are also wrong that the rights in the Education and Common Benefits clauses are vindicated through the political process exclusively. Indeed, those clauses contain individual rights that are placed beyond the whims of the democratic process and are judicially enforceable, as *Brigham I* & *II* and *Baker* demonstrate. In sum, the Town Tuitioning statutes violate the state constitution, and this Court must adjudicate that claim.

B. The Districts' attempts to be excused from this case based on procedural grounds fail because the Parents are not obligated to exhaust administrative remedies for their claims that the Town Tuitioning statutes are facially invalid, nor are the claims barred by a statute of limitations.

1. Travelers Indemnity Company v. Wallis

The Districts are incorrect that the Parents must exhaust administrative remedies. When a plaintiff alleges that a statute is unconstitutional on its face, he or she may seek a remedy directly from a court and does not have to exhaust administrative remedies. *Travelers Indem. Co. v. Wallis*, 176 Vt. 167 (2003). This legal doctrine is adopted by courts because agencies have no power to determine the constitutional validity of statutes. *Alexander v. Town of Barton*, 152 Vt. 148, 151 (1989) (citing *Westover v. Village of Barton Electric Dept.*, 149 Vt. 356 (1988)).

The Parents challenge the facial validity of 16 V.S.A. §§ 821-22 just as the Parents in *Travelers Indem. Co. v. Wallis* challenged the validity of a statute. 2003 Vt. at 176. There, an insurance company that issued workers' compensation policies challenged several interim orders of a state agency that required it to pay compensation after the company had denied a claim. The insurance company filed the lawsuit before the agency held a hearing. *Id.* at 168-69. It challenged the facial validity of the statute that gave the agency the power to issue the interim orders. *Id.* at 175. The agency claimed that the court lacked jurisdiction because the company had not exhausted its administrative remedies. *Id.* at 174-75. The Vermont Supreme Court agreed that the company was required to exhaust its remedies in its challenge to the agency's orders themselves, despite the constitutional overtone of its argument. *Id.* at 176. But the Court also held that the company did not have to exhaust its remedies to bring a facial challenge to the statute's authorization of interim orders and reversed the lower court on that point. *Id.* at 176.

Just as the insurance company in *Wallis* challenged the statute authorizing interim orders, the Parents here challenge 16 V.S.A. §§ 821-22 because they authorize an unequal distribution of Town Tuitioning benefits on their face. Specifically, 16 V.S.A. § 821(a) gives school districts the option to deny Town Tuitioning to their students. It also permits districts to condition Tuitioning

on the convenience of a student's residence to a district school. *Id.* § 821(c). Alternatively, a district without a public school may provide Tuitioning for public schools in other districts or for independent schools. *Id.* § 821(c) and (d). Additionally, under § 821(c) a parent may appeal a school's decision not to provide Tuitioning for students in rural areas, which face a burden that students with automatic tuition assistance do not face. Thus, the challenge to these statutes is facial in nature, and under *Wallis*, the Parents do not have to exhaust their administrative remedies to bring this lawsuit.

2. IDEA

The two statutes the Districts rely upon, the Individuals with Disabilities in Education Act (IDEA) and the Vermont Public Accommodation Act (VPAA), do not change this result.

The IDEA's exhaustion provision by its very terms does not apply to claims arising under state law. Rather, it applies only to claims "available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other *Federal* laws . . . ." 20 U.S.C. §1415(l) (emphasis added). This provision excludes state law claims because it references only the U.S. Constitution, specific federal statutes, and other "Federal laws." That Congress did not intend to include state law in its recitation is also seen by its use of the term "State law" in the very next subsection. 20 U.S.C. §1415(m)(1) (defining the "age of majority" for ending benefits). The latter use is evidence that Congress knew how to include the term yet chose not to do so in the prior subsection. Not surprisingly, *Fry v. Napoleon Public Schools*, 137 S. Ct. 743, 748 (2017), cited by the Districts, dealt with whether IDEA required exhaustion under a federal statute. For that reason, it is inapposite. Here, the Parents' claims arise exclusively under Vermont state law, and IDEA's exhaustion requirement does not apply.

Also, IDEA does not apply here because this case is not about whether the Parents' children received "a free and appropriate public education," which is what IDEA requires for children with diagnosed disabilities. As explained above, the Parents seek the same Town Tuitioning benefit that the State, through the Districts, provides other students. Their facial challenge is based on the equal educational opportunity found in *Brigham* and is in no way contingent on their children's alleged disabilities.

Thus, IDEA's exhaustion requirement does not apply because it "hinges on whether a lawsuit seeks relief for the denial of a [free appropriate public education]." *Fry*, 137 S. Ct. at 754. Accordingly, if the suit does not seek a remedy for the denial of an adequate education, the IDEA exhaustion requirements do not apply. *Id.* The Supreme Court in *Fry* reasoned that a plaintiff "could not get any relief in that situation" even if the "suit arises directly from a school's treatment of a child with a disability." *Id.* Thus, the *Fry* Court suggested that a special needs child who brought suit under a federal public accommodations law did not have to exhaust any remedies because what she really wanted was to bring her dog to class regardless of whether the school provided an adequate education. *Id.* at 758. Just as the special needs child sought something more than an "adequate" education in *Fry*, the Parents here seek more than an adequate education. They seek the same tuition assistance that other towns provide; thus, no exhaustion is required.

3. <u>VPAA</u>

The Districts' argument that some of the Parents must exhaust administrative remedies because the VPAA covers "conduct that amounts to harassment based on gender identity" is baseless. Districts' Br. at 18. For this proposition, the Districts cite *Allen v. Univ. of Vt.*, 185 Vt. 518 (2009) and *Washington v. Pierce*, 179 Vt. 318 (2005). But in both cases the plaintiffs

brought claims under the VPAA, a statute on which none of the Parents rely in this case. The VPAA does not have a "could have brought" standard, in which a plaintiff must exhaust his or her remedies when the plaintiff has a claim under the statute but seeks relief only under other theories. *Compare Allen*, 185 Vt. at 524, *with Fry*, 137 S. Ct. at 748. Nothing in the VPAA's text, *Allen*, or *Washington* suggest the VPAA's exhaustion requirements sweep that broadly. This is especially so given the general rule in *Wallis* that facial challenges do not require the exhaustion of remedies.

4. V.R.C.P. 75 statute of limitations

The fact that the Parents bring a facial challenge here also means their claims are not time barred under V.R.C.P. 75's 30-day statute of limitations. When a statute is discriminatory on its face, each action or inaction taken based on the statute's authority tolls the statute of limitations for the original violation. *See Lee v. Univ. of Vt.*, 173 Vt. 626, 626 (2002) (citing *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994)).

Although not a Rule 75 case, *Lee* is instructive. There, a student sued the University of Vermont for violating anti-discrimination law when it dismissed him for allegedly poor academic performance. *Id.* at 626. He filed suit more than six years after the university had dismissed him, which exceeded the deadline for civil suits under 12 V.S.A. § 511. *Id.* The student claimed his suit was timely because the university had a "continuous practice and policy of discrimination," and its subsequent actions in furtherance of its discriminatory policy, like denying his repeated attempts to get readmitted, created its own limitations period. *Id.* at 626-27. Although the lower court held that the claims were time barred, the Vermont Supreme Court reversed and adopted the student's "continuing violation" theory. *Id.*

Here, like the university in *Lee* furthering its continuous practice and policy of discrimination, the State and Districts fail to provide Town Tuitioning benefits to all students based on the statutes. On their face, those statutes codify a continuous practice and policy of distributing certain educational benefits to some students but not others. Each day that passes in which the State and Districts fail to provide Town Tuitioning to the children of these Parents and other parents is a separate violation of the constitution.

Just as the *Lee* court recognized an implicit "'continuing violation' exception" to the statute of limitations for civil suits, this Court should recognize one for the Rule 75 limitations period. This is especially so when a statute is facially invalid. Otherwise, agencies like the Districts could violate citizens' rights by failing to provide ongoing benefits that the constitution requires simply because they choose not to challenge the initial denial of benefits. Because the Parents seek to remedy continuing violations of their ongoing right to receive equal education opportunities, their claims are not time barred under Rule 75.

In any event, the Parents have also brought suit under the Declaratory Judgments Act (V.S.A. Title 12, Chapter 167) and this Court's inherent common law jurisdiction to award equitable relief. Neither of those avenues for relief have statutes of limitations. Thus, even if their claims are not timely under Rule 75, the Parents still may request that this Court declare the Town Tuitioning statutes unconstitutional and enjoin the State and Districts to provide equal educational benefits.

In sum, the Districts are wrong that the constitution permits them to provide Town Tuitioning benefits to some students but not to others. Their attempts to dismiss the case on grounds of exhaustion of remedies and statute of limitations also fail. The statutes they cite have no application here, and the timeliness bar is inapplicable.

CONCLUSION

For the foregoing reasons, the Districts' motion to dismiss should be denied and this case should move forward to cross-motions for summary judgment.

Dated: March 8, 2021

Respectfully submitted,

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