



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNCIL

**MEMORANDUM**

To: Senator Tim Ashe, Senate President Pro Tempore  
From: Peter Griffin, Damien Leonard, and Jennifer Carbee, Legislative Counsel  
Date: May 9, 2017  
Subject: Governor's health care proposal for school employees

You asked for an analysis of Governor Phil Scott's proposal to negotiate the health care benefits for school employees at the statewide level.

We understand the Governor's proposal to include the following aspects:

- Negotiate health care benefits for school employees at the State rather than the local level beginning with plan year 2018
- Utilize existing plans offered through the Vermont Education Health Initiative (VEHI) for plan years 2018, 2019, and 2020, which will have lower actuarial values and lower premiums than plans in 2017 and earlier
- Use health savings accounts and health reimbursement accounts to hold school employees harmless for any increase in out-of-pocket exposure
- Have districts and supervisory unions report the difference between budgeted health care costs in plan year 2018 and actual health care costs
- Use the difference between these reported budgeted and actual numbers to calculate the amount of health care savings in plan year 2018 for each district
- Hold the amount of these savings back from the 2018 education payments to each district in which savings were realized
- Use the retained savings in fiscal year 2018 in three ways—one-third to fund teachers' retirement obligations, one-third to be transferred to the General Fund, and one-third to reduce property taxes<sup>1</sup>

The Governor has said this plan should result in up to \$26 million in annualized savings due to reduced education spending. Since the new health care provisions of school employee contracts would not go into effect until January 1, 2018 at the earliest, the total savings claimed for fiscal year 2018 is \$13 million.

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<sup>1</sup> As discussed below, the separate proposals by Representative Beck and Representative Webb use the savings for priorities in fiscal year 2019.

The Governor has proposed language to the General Assembly to enact this plan. This language has been modified by subsequent proposals made by Senator Degree, Representative Beck, and Representative Webb. For the purpose of this memorandum, we have analyzed the Governor's proposal as submitted, but we also have identified ways in which the language has been changed in these separate legislative offerings. We have included an initial summary of the legal and practical issues raised by the Governor's proposal with a more in-depth discovery of those issues below.

The legal and practical issues with the Governor's proposal that we have identified include:

- With respect to labor relations, there are legal questions regarding how the negotiations would occur between the Governor and the school employees' unions, whether a statewide agreement on health care would be subject to legislative approval of necessary appropriations as are other agreements under the State Employees Labor Relations Act, whether the Governor would be subject to the unfair labor practices provisions, how an agreement would be ratified by school employees, and the effect of a change in the law on ongoing and already settled negotiations.
  - There have also been questions raised regarding whether a strike could legally occur in relation to the statewide negotiations, but as explained below, we do not believe that this is a significant concern.
  - There are also practical labor relations issues raised in relation to how the unions would conduct joint negotiations, potential conflicts among the interests of bargaining units within a statewide union, how significant a role smaller unions will play, how to address bargaining units that vote contrary to the rest of the State, how an agreement would impact schools and employees that are not unionized, and the impact a change in the law will have on negotiations that are already well underway.
- With respect to the health plans, the primary issues relate to the manner in which teachers will be held harmless with the proposed changes, whether increased out-of-pocket costs in the plans will actually be borne by teachers and result in decreased utilization of health care, and where school districts will be able to obtain coverage under a statewide agreement and what that coverage might include.
- With respect to the fiscal aspects of the plan, there is a significant question regarding how much savings will actually be realized and how a shortfall in projected savings could be addressed. There are also questions regarding whether savings can be accurately measured before the end of FY 18, how districts can be prevented from simply applying any savings to other spending priorities, and how savings will be addressed in FY 19 and after.

Labor issues:

- The language of the Governor’s initial proposal provided that the Secretary of Administration would negotiate with each local union regarding health care coverage on behalf of all school boards statewide. This was addressed in Senator Degree’s and Representative Beck’s proposals, which clarified that the Governor would negotiate a single agreement for all school employees with representatives of the statewide unions that represent school employees.
- The Governor’s proposal provided that school employees would be deemed to be State employees solely for the purpose of addressing unfair labor practices, and made subchapters 2 and 4 of the State Employees Labor Relations Act (SELRA) applicable. It did not expressly address strikes, which are prohibited for State employees pursuant to 3 V.S.A. § 903(b) in subchapter 1 of SELRA. While the Governor’s proposal did not explicitly address this issue, 3 V.S.A. § 962(9) makes it an unfair labor practice for an employee to engage in activities prohibited by 3 V.S.A. § 903. Thus, if school employees engaged in a strike related to the health care benefits under the Governor’s proposal, it would be reasonably likely to be ruled an unfair labor practice by the Vermont Labor Relations Board (VLRB), which could issue an order to stop the strike.
  - Both Senator Degree’s and Representative Beck’s proposals address this issue by providing that the statewide negotiations would be subject to subchapters 2 and 4 of SELRA for purposes of both impasse resolution and addressing unfair labor practices. Impasse resolution under SELRA does not provide a unilateral final option like the Labor Relations for Teachers and Administrators Act (LRTA), which permits contract imposition or a strike if no agreement is reached within 30 days after the fact finder’s report is delivered. *See* 16 V.S.A. § 2008. Under SELRA, when an impasse occurs, the parties must proceed to mediation, followed by fact-finding and binding arbitration before the VLRB. Thus, SELRA never permits a deadlock, since the parties must “continue to use dispute resolution procedures until agreement is reached or a settlement is imposed.”<sup>2</sup> By expressly incorporating SELRA’s impasse resolution procedures, Senator Degree’s and Representative Beck’s amendments imply an intent to resolve impasse without resorting to contract imposition or strikes, making it reasonably likely that a strike in relation to statewide negotiations would be found to be unlawful.
  - With respect to unfair labor practices, they can be committed by either an employer or a union. In this case, the Governor is not the actual employer of the employees that would be subject to the statewide agreement and it is unclear whether the VLRB or a Court would construe the unfair labor practice provisions in subchapter 4 to apply to the Governor.

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<sup>2</sup> Timothy Noonan, The Evolving Vermont Labor Relations Law, 3d edition, VLRB, 2015.

- As mentioned above, the Governor’s proposal did not specifically address whether impasse would be resolved under SELRA or LRTA. Assuming it would be addressed under SELRA, as proposed by Senator Degree and Representative Beck, 3 V.S.A. § 982(c) provides that, except with respect to agreements for the Vermont State Colleges and UVM, the Governor shall request sufficient funding from the General Assembly for an agreement between the State and a union, and § 982(d) requires the VLRB to request sufficient funding from the General Assembly for an agreement that is imposed through arbitration. In those instances, the General Assembly may appropriate less funding than is requested, which would require renegotiation of the agreement based on the amount actually appropriated. It is unclear whether the VLRB or a Court would construe this language to require the Governor or VLRB to request funding for the statewide health care benefits, and, if the language were construed to require such a request, what the potential ramifications would be for school budgets or school employees’ health care coverage if the General Assembly were to appropriate a different amount.
- As noted above, the language of the Governor’s initial proposal provided for negotiations between the Governor and each local union. Assuming negotiations occurred between the Governor and statewide unions acting on behalf of local unions, as provided by Senator Degree’s and Representative Beck’s proposals, there are a couple of potential issues:
  - The interests of the employees represented by a union may vary from district to district. Further, some local unions may have historically pursued increased compensation in lieu of greater health benefits, or vice versa, which could result in winners and losers within the membership of a single statewide union. This could create difficulties for union negotiators at the statewide level.
  - Different unions may have different interests. None of the proposals addresses what happens if one union refuses to agree to a proposal that the other unions favor. In other words, could a single union cause an impasse, or could the union be “outvoted” by the others with which it is negotiating jointly? Another question is, should the size of the union’s membership matter? Some unions may only represent one or two bargaining units, while others, such as NEA, represent a relatively large number of bargaining units.
  - The statewide agreement would apply to all teachers, administrators, and other school employees who could elect to collectively bargain, whether or not they are currently part of a bargaining unit. Thus, some independent schools and teaching employees that have not unionized would be subject to the statewide agreement but would not have a voice in the negotiation or ratification of the agreement.
- The Governor’s proposal provided that ratification of an agreement would “require a vote of all school employees,” without specifying the amount of support required or whether “all school employees” included only union members or all school employees regardless of union membership. Senator Degree’s and Representative Beck’s proposals clarify that ratification would require a statewide majority vote of

school employees who are represented for purposes of collective bargaining and provide procedures for voting and tabulation of results. However, under all of the proposals, the ratification process could lead to a majority of employees in a particular district or bargaining unit having voted against an agreement and still being subject to it because the majority of employees statewide support it.

- The Governor’s proposal did not have an effective date, but would have required the Secretary of Administration to begin negotiations regarding plan year 2018 health care coverage with the representatives of school employees immediately following passage. Because several contracts have already settled, the Governor’s proposal would raise potential issues under the Contracts Clause of the U.S. Constitution if the terms of the statewide agreement were deemed to supersede the terms of the already settled contracts that relate to health care coverage.<sup>3</sup> This was addressed in Senator Degree’s and Representative Beck’s proposals, which would take effect on passage and apply to negotiations for collective bargaining agreements that will take effect after that date.
  - With respect to the ongoing negotiations, which would be affected by all of the proposals, school employees’ new health care plans will begin on January 1, 2018 while collective bargaining agreements for schools take effect between July 1 and September 1, 2017. This means that negotiations are likely well under way in all school districts. A number of districts have reportedly reached impasse because of differences regarding health care coverage. While it is unclear precisely what impact modifying the subjects for bargaining would have on specific negotiations at this relatively late date, the removal of health care coverage from the subjects for bargaining could substantially negate negotiating strategies of either school boards or unions that focused heavily on addressing health care coverage that would now be addressed by the statewide agreement.

#### Health care issues:

- The Governor proposes to make teachers whole by using health reimbursement accounts (HRAs) or health savings accounts (HSAs), or both. Depending on each teacher’s actual health care utilization over the course of the plan year, the funds in the HRA or HSA may not be sufficient to cover a teacher’s out-of-pocket costs to the same extent as they would have been covered under a plan with a higher actuarial value. Current plans offered through the VEHI average an actuarial value of 96 percent and provide first-dollar coverage for most services; the Gold Consumer-

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<sup>3</sup> The Contracts Clause provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts....” That happens when a legislature enacts a statute that trumps the terms of an existing collective bargaining agreement. A state may modify a contract by legislation if it is “reasonable and necessary to serve an important public purpose,” but that justification is subject to heightened scrutiny if the legislation would relieve the state of its own financial obligations. See Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 Buff. J. Int’l L. 1 (2011).

Driven Health Plan (CDHP) on which the Governor's financial assumptions are based offers an 81 percent actuarial value and requires some amount of cost-sharing for many services. Even if the amount of assistance provided through HRAs and HSAs is sufficient to hold teachers harmless for cost-sharing exposure to the same degree as under current plans, the existence of the new cost-sharing structure is projected to decrease their health care utilization. But the cost-sharing structure is only expected to decrease utilization if districts allow their employees to bear some responsibility for spending their health care dollars wisely. If districts agree to provide HRA or HSA funding for the entire deductible amount or even more, then utilization is unlikely to decrease and premiums will probably rise for future plan years.

- The Governor's original proposal would have directed the Secretary of Administration to contract on behalf of school boards with an insurance company or nonprofit association for group insurance, as State law requires for the State employees' health plan in 3 V.S.A. § 631. The amendments proposed by Senator Degree and Representative Beck do not include that requirement. For plan years 2018, 2019, and 2020, their proposals limit the statewide negotiations to the premium split for 2018 VEHI plans, contributions to HRAs and HSAs, and other terms and conditions of health coverage. Nothing in the language of any of the proposals actually requires participation in VEHI plans, which means that districts could potentially arrange coverage outside VEHI, provided the coverage complies with the terms of the statewide agreement. Health care benefits and coverage would be excluded from local collective bargaining and the statewide negotiation provisions do not specify covered services or plan design as subjects for negotiation. It thus seems possible, especially with potential health care changes at the federal level, that a district could comply with the statutory requirements by securing less expensive coverage outside VEHI that meets the standards for contributions to HSAs and HRAs and the premium split in the statewide contract but provides limited coverage for many health care services or has a low actuarial value, or both.

#### Fiscal and tax issues:

- There is considerable question about how much savings will actually be realized by the Governor's plan. For example, if unions receive less in health care benefits, they may attempt to negotiate for more salary or other benefits at the local level. The Joint Fiscal Office could conduct a separate analysis on this question. We simply note that the Governor's plan uses the predicted savings from this proposal for actual spending priorities in fiscal year 2018. If the entire \$13 million in savings is not realized in fiscal year 2018, these spending priorities will likely be underfunded. The proposals by Representative Beck and Representative Webb mitigate this problem by using any savings for priorities in fiscal year 2019, instead of 2018. Under the Beck and Webb proposals, any shortfall in savings could more easily be remedied through the fiscal year 2019 budget process.

- The Governor's proposal assumes that the actual health care savings for the second half of fiscal year 2018 can be measured. It is unclear how a district could provide the amount of its actual health care spending prior to the end of the 2018 plan year.
- The Governor's proposal contains a provision designed to prevent local districts from using health care savings for other spending priorities. As drafted, it is not clear how this requirement could be enforced. The proposals from Senator Degree and Representative Beck both drop this language. However, the proposal from Representative Webb creates a different mechanism for ensuring that the health care savings for fiscal year 2018 are used only for the reduction of property tax rates in fiscal year 2019. The Webb proposal does this by sending health care savings back to individual districts as a grant to reduce property taxes in the following fiscal year.
- The Governor's proposal contains language attempting to identify continuing savings in fiscal year 2019 and after. However, since future savings will likely be built into a rebased school budget starting in fiscal year 2019, rather than showing up on the bottom line of a school budget, this language was dropped in subsequent proposals.

cc: Luke Martland