

TO: State Board Committee on Rule 2200  
CC: Act 173 Advisory Group  
FROM: Emily Simmons, AOE General Counsel  
SUBJECT: Proposal for Rule 2229.4 (Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School  
DATE: February 7, 2022

## Background

Following public comment on Rule 2200, the SBE Committee requested that the Act 173 Advisory Group take up several topics raised by the public comments, all of which were connected to language in the proposed rule originally approved by the Act 173 Advisory Group. One of these topics was the content of draft Rule 2229.4, which outlines the enrollment process to be followed by approved independent schools, LEAs and students when a publicly funded student is eligible for special education services and seeking to attend an approved independent school. For resolution of this topic, the Act 173 Advisory Group asked several of its members (the subgroup members) to meet and draft a proposal that would be acceptable to independent schools, special education advocates and LEAs.

These subgroup members presented a new draft of Rule 2229.4 to the SBE Committee at its meeting on February 1, 2022. The subgroup members noted that they continued to be in disagreement about a specific phrase within Rule 2229.4(a)(2), which, as filed with ICAR reads, "A school shall enroll all publicly funded students on a first come first served basis until capacity is reached."

At the February 1 SBE Committee meeting, both subgroup members and SBE Committee members identified examples of how the rule as drafted was unclear in the context of approved independent schools' existing enrollment practices (e.g., sibling preference policies, admission timelines, mid-year enrollments). As a result, the SBE Committee asked for a new draft of Rule 2229.4 that would more clearly define steps in the enrollment process, the minimum requirements of an approved independent school's written enrollment policy, and conform to the nondiscrimination requirements typically used by school districts when admitting non-resident students. These concepts were supported by the consensus of the group at the February 1 meeting.

Accordingly, this memo contains three versions of Rule 2229.4: 1) the draft as was originally filed with the Interagency Committee on Administrative Rules (ICAR); 2) the draft as proposed by the Act 173 subgroup members; and 3) a new draft that I have prepared based on the consensus identified in February 1 SBE Committee meeting.

## **1) Draft Rule 2229.4 as Filed with ICAR**

### **2229.4 Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School.**

(a) The student or the student's parent shall voluntarily request the enrollment.

(1) In this subsection, to "enroll" a student means that an approved independent school will offer a position in the school to a student, provided that the provisions of this subsection relating to LEA responsibilities are met and the student meets the other requirements of the school's enrollment policies.

(2) A school shall enroll all publicly funded students on a first come first served basis until capacity is reached.

(b) The student's IEP team or the LEA shall determine whether the enrollment is an appropriate placement and least restrictive environment.

(c) The student's IEP team and the LEA shall comply with all applicable federal and State requirements.

(d) If the student's enrollment, pursuant to subsection (b) of this Rule, is based on provision of certain services in the student's IEP, then the LEA and the school shall work collaboratively to identify a solution.

(e) Within 30 days the LEA and the school must determine if they have identified a solution that will enable the student's enrollment to proceed.

(f) If the LEA and approved independent school do not agree on whether the independent school is able to provide the services on the student's IEP, then the LEA and independent school shall jointly contract with a hearing officer to conduct a hearing to make a determination which shall be final. The cost of the hearing officer shall be shared equally between the parties.

(g) If either a hearing officer, or the LEA and the school, certify that the independent school is unable to provide the required IEP services due to an inability to retain qualified staff, the LEA shall immediately make another appropriate placement that satisfies the federal and State requirements to provide the student with a free and appropriate public education in the least restrictive environment. If these conditions are satisfied:

(1) The approved independent school shall not be subject to any disciplinary action or revocation of its approval by the Board under SBE Rule 2223.8 due to its failure to enroll or continue to enroll the student; and

(2) No private right of action shall be created on the part of the student or the student's family or any other private party to require the LEA to place the student with the approved independent school or to require the school to enroll the student.

(h) This Rule 2229.4 shall not apply to a therapeutic independent school.

(i) For enrollments sought after the start of the school year, the LEA shall agree to pay tuition for the enrollment sought by the student until agreement is reached with the school or until the hearing officer issues an opinion pursuant to subsection (f) of this Rule.

## **2) Draft Rule 2229.4 as Proposed by Act 173 Subgroup Members**

### **2229.34 Enrollment in an Independent School by Students with Disabilities Living in Choice Districts. Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School**

1) The student or the student's parent shall voluntarily request the enrollment.

a) In this subsection, to "enroll" a student means that an approved independent school will offer a position in the school to a student, ~~provided that the provisions of this subsection relating to LEA responsibilities are met and~~ the student meets the other requirements of the school's enrollment policies.

~~2) b). - For an independent school to receive public tuition it shall enroll all publicly funded students on a first come first served basis until capacity is reached. A school shall enroll any student all publicly funded students on a first come first served basis, until capacity is reached. The student or the student's parent shall voluntarily request the enrollment.~~

~~(3) Once a student is enrolled in an independent school, if the student qualifies for services under the IDEA, 20 U.S.C. 1400 et seq., or Section 504, the student's IEP or 504 team shall meet to determine how the student's services shall be provided. The Independent School shall designate personnel as members of the IEP or 504 team.~~

### **2229.4 Procedures for Ensuring the Provision of Special Education and Section 504 Services to Students who live in Choice Districts Enrolled in Independent Schools.**

a. ~~Upon the enrollment of a student with an individualized education program or 504 plan in an independent school the LEA of the student's residence shall promptly convene an IEP or 504 team meeting. The meeting shall be held prior to the start of the academic year in which the student is enrolled. The Independent School shall designate personnel to participate in the IEP or 504 meeting. At the meeting, the team, which includes the parent, and the student where appropriate, shall determine how to ensure the provision of a free and appropriate public education in accordance with the student's IEP or 504 plan.~~

b. ~~The LEA of the student's residence and the Independent School together with the student's IEP or 504 team shall work collaboratively to ensure the student's services are provided in accordance with state and federal law.~~

c. ~~For placement purposes under the IDEA, the IEP team shall ensure the IEP process reflects the student's choice of enrollment in the independent school, notwithstanding SBE Rule 2354.3(a)(2). In this context, "placement" refers not to the specific site of the educational placement, but to the provision of special education and related services.~~

d. ~~The student's special education and related services shall be provided in the least restrictive environment.~~

e. ~~The LEA and the Independent School shall work collaboratively to ensure the provision of the student's special education and 504 services.~~

f. To ensure the provision of services in the student's IEP or 504 plan, the Independent School and the LEA may use any or all of the methods listed below to ensure the provision of those services, including.

1. The Independent School recruiting and hiring special educator or other professional or paraprofessional staff;

2. The Independent School contracting directly with service providers to provide the services at the independent school if the services are not otherwise available at the independent school.

3. The Independent School contracting with the LEA to provide the services;

4. The LEA providing the services at a public school operated by the LEA or another public school; or

5. If the student requires transportation to and/or from the independent school before, or after, or during the school day in order to receive the services in the student's IEP or 504 plan, the LEA and Independent School shall collaborate to ensure the transportation is provided.

g. If there is a dispute between the LEA and the Independent School over whether the student's special education services can be provided in accordance with the student's IEP at the Independent School or otherwise, the LEA shall initiate a due process hearing before an independent hearing officer the costs of which shall be borne equally between the LEA and the Independent School within 30 days of the impasse. The parent, or where appropriate the student, shall be a party to the proceeding.

h. If the hearing officer determines the Independent School cannot meet the student's special education needs, the LEA shall immediately convene an IEP meeting to consider alternatives.

1. The approved independent school shall not be subject to any disciplinary action or revocation of its approval by the Board under Rule 2223.8 due to its failure to enroll or continue to enroll the student.

i. This Rule 2230.3 shall not apply to a therapeutic independent school.

j. For enrollments sought after the start of the school year, the LEA shall agree to pay tuition for the enrollment sought by the student until agreement is reached with the school or until the hearing officer issues an opinion pursuant to subsection (f) of this rule.

### **3) New Draft 2229.4 for SBE Subcommittee Consideration**

#### **2229.3 Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School**

a) Each approved independent school shall maintain and follow a written enrollment policy which, at minimum, shall require the following:

1) The student or the parent of a student seeking to attend the approved independent school shall voluntarily submit an application;

2) If the student satisfies other requirements of the school's enrollment policy, the school shall accept the student as a candidate for admission;

3) Candidates for admission shall be accepted for enrollment in a non-discriminatory manner. No student shall be denied acceptance for enrollment if the reason for denial is that the student is disabled as defined in section 504 of the Rehabilitation Act of 1973 as amended or that the student is in need of special education services. No student shall be denied acceptance for enrollment on the basis of race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity or any other classification protected by federal or state law.

b) Upon the student's acceptance for enrollment, the student's IEP team shall meet to determine how the student's services shall be provided. The approved independent school and the LEA shall follow the procedures in 2229.4, after which the student shall be enrolled in the approved independent school or, upon the decision of the hearing officer in Rule 2229.4(f), below, the IEP team shall consider an alternative enrollment for the student.

c) When a publicly funded student seeks to attend an approved independent school after the start of the school year, the student shall be provisionally enrolled consistent with this rule (2229.3), during which time the LEA of residence shall agree to pay tuition on the student's behalf until the procedures in 2229.4 have been completed and the student is enrolled, or until the hearing officer issues a decision pursuant to subsection Rule 2229.4(f), below.

d) This Rule 2230.3 shall not apply to a therapeutic independent school.

#### **2229.4 Procedures for Ensuring the Provision of Special Education Services to Publicly Funded Students Enrolled in Independent Schools.**

a) Upon the acceptance for enrollment of a student with an individualized education program in an independent school, the LEA of the student's residence shall promptly convene an IEP or 504 team meeting. The meeting shall be held prior to the start of the academic year in which the student is enrolled. The Independent School shall designate personnel to participate in the IEP or 504 meeting. At the meeting, the team, which includes the parent, and the student where appropriate, shall determine how to ensure the provision of a free and appropriate public education in accordance with the student's IEP.

- b) The LEA and the Independent School together with the student's IEP team shall work collaboratively to ensure the student's services are provided in accordance with state and federal law.
- c) For placement purposes under the IDEA, the IEP team shall ensure the IEP process reflects the student's choice of enrollment in the independent school, notwithstanding SBE Rule 2354.3(a)(2). In this context, "placement" refers not to the specific site of the educational placement, but to the provision of special education and related services.
- d) The student's special education and related services shall be provided in the least restrictive environment.
- e. To ensure the provision of services in the student's IEP, the Independent School and the LEA may use any or all of the methods listed below to ensure the provision of those services, including:
1. The Independent School recruiting and hiring special educator or other professional or paraprofessional staff;
  2. The Independent School contracting directly with service providers to provide the services at the independent school if the services are not otherwise available at the independent school.
  3. The Independent School contracting with the LEA to provide the services;
  4. The LEA providing the services at a public school operated by the LEA or another public school.
- f. If there is a dispute between the LEA and the Independent School over whether the student's special education services can be provided in accordance with the student's IEP at the Independent School or otherwise, the LEA shall initiate a due process hearing before an independent hearing officer the costs of which shall be borne equally between the LEA and the Independent School within 30 days of the impasse. The parent, or where appropriate the student, shall be a party to the proceeding.
- g. If the hearing officer determines the Independent School cannot meet the student's special education needs, the LEA shall immediately convene an IEP meeting to consider alternatives.
- h. This Rule shall not apply to a therapeutic independent school.

#### **4) Other Provisions of the Draft Rules Relevant to Rule 2229.4**

The following amendments have been approved by the SBE Committee for addition to the draft rule. This language is likely to be useful in consideration of the options above.

##### **Language to be added to Rule 2226 (Application):**

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2226.6 Demonstration that the school substantially complies with all statutory requirements for approved independent schools, with documentation of the following:

- (1) A statement of nondiscrimination, posted on the school's website and included in the school's application materials, that is consistent with the Vermont Public Accommodations Act, Title 9 Vermont Statutes Annotated, Chapter 141.
- (2) An assurance, signed by the Head of School, that the school complies with the Vermont Public Accommodations Act in all aspects of the school's admissions and operations.

(3) A description of physical facilities including plant, materials, and equipment and assurances that the facilities meet all applicable State and federal requirements.

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**Language to be added to Rule 2227 (Approval):**

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2227.8 The school substantially complies with all statutory requirements for approved independent schools and the Board's rules for approved independent schools including nondiscrimination in admissions and operations and requirements relative to its facilities, fire drills, and the immunization of its students against disease.