

MEMORANDUM

TO: Senator Brian Campion, Chair, Senate Education Committee
Senator Martine Gulick, Vice Chair, Senate Education Committee
Members of the Senate Education Committee

FROM: Jennifer Deck Samuelson, Chair, Vermont State Board of Education

RE: Rule Series 2200 and Rule Series 2000

DATE: February 12, 2024



This memorandum responds to testimony provided to the Senate Education Committee by Amanda Garces on Tuesday, January 30, 2024. I am writing to correct the record related to State Board of Education (“Board”) activity in addressing nondiscrimination provisions of Rule Series 2000: Education Quality Standards (“EQS”) and Rule Series 2200: Independent School Program Approval Process (“2200”).ⁱ

As an initial matter, I want to acknowledge Ms. Garces’ contribution, as co-chair of the Act 1 Working Group (“Working Group”), to the substance of the proposed updates to EQS and 2200. Her dedication to the Working Group’s efforts and her passion to see these updates through to completion is clearly evident. Moreover, the Working Group’s recommended changes to EQS were largely accepted by the Board with respect to proposed updates to both EQS and 2200. Proposed updates to both rule series have greatly benefited from a high degree of review and input from the field, and this has definitely made the Board’s job easier as we move through the APA rulemaking process. On behalf of the entire Board, I continue to thank and appreciate Ms. Garces and her work.

Before jumping into the substance of Ms. Garces’ testimony, it is important to understand the timeline of the Board’s rulemaking activities with regard to both EQS and 2200:

- On **May 12, 2022**, the Working Group submitted its proposed updates to EQS to the Board for its consideration and adoption. These proposed updates included a recommendation that the EQS be extended to approved independent schools.
- **Over the next year**, the proposed updates to EQS were considered, in the first instance, by the Board’s specially designated EQS Committee.
- At the Board’s monthly meeting on **May 17, 2023**, the EQS Committee brought its recommendations regarding proposed updates to the EQS to the full Board for its review and consideration. Notably, the EQS Committee did not make a recommendation as to whether the Board should adopt the Working Group’s suggestion that EQS be extended to approved independent schools. The issue was discussed by the full Board at the May 17th meeting and the Board decided that, although it agreed that the principles and goals of Act 1 should be applied to approved independent schools, the EQS rule series was not the proper legal vehicle to do this. This is because the Board’s statutory authority to adopt the EQS is grounded in 16 V.S.A. §165 and, pursuant to 16 V.S.A. §165(f), the EQS only applies to independent schools if they seek designation as an “independent school meeting education quality standards.” Act 1 did not address or change this. Thus, the Board did not accept the Working Group’s recommendations to extend the application of EQS to all approved independent schools.

Instead, it opted to apply the principles and goals of Act 1 to all approved independent schools using a different source of statutory authority (16 V.S.A. §164(14)) and initiated a separate rulemaking process for Rule Series 2200 to achieve that aim.

- On **June 12, 2023**, the proposed updates to EQS were presented to the Interagency Committee on Administrative Rules (“ICAR”). ICAR accepted the proposed updates with two recommended changes to the Coversheet and Economic Impact Statement. The Board followed ICAR’s recommendations and subsequently filed its proposed updates to EQS (“Proposed EQS Rule”) with the Secretary of State on **July 25, 2023**.
- Meanwhile, the Board began its work applying the principles and goals of Act 1 to approved independent schools by reopening 2200. Because the applicable “Act 1” sections of the Proposed EQS Rule had been extensively vetted, first by the Working Group and second by the Board’s EQS Committee, the 2200 Committee adopted a “lift and shift” approach whereby provisions related to Act 1 from the Proposed EQS Rule were inserted into the appropriate sections of 2200. Provisions related to nondiscrimination and inclusion were included in this work.
- On **August 16, 2023**, Attorney Sarah Buxton, whom the Board retained to assist it in updating 2200, raised concerns to the 2200 Committee that the definitions of “discrimination” that appeared in the Definitions section and language in the Statement of Purpose, as “lifted” from EQS and “shifted” to 2200, could be read to expand the number of protected classes beyond those provided in state and federal law. She advised that the language, if left unchanged, could lead to unintended consequences in the application of the rules and may risk litigation. The 2200 Committee agreed with Attorney Buxton’s analysis and her proposed revisions to the definition of “discrimination” in the Definitions section and language in the Statement of Purpose, and it voted to bring these updates before the full Board for the Board’s discussion and approval.
- On **August 18, 2023**, the full Board unanimously voted to advance the proposed revisions to 2200, including the proposed revised sections related to discrimination, as its Proposed 2200 Rule and authorized the commencement of the formal APA rulemaking process.
- After being postponed by ICAR at its September 11, 2023, meeting, the Proposed 2200 Rule was accepted by ICAR on **October 9, 2023**, with two recommended changes to the Coversheet. The Board followed ICAR’s recommendations and subsequently filed its Proposed 2200 Rule with the Secretary of State on **October 13, 2023**.
- The public comment period for the Proposed EQS Rule ended on **October 25, 2023**. The public comment period for the Proposed 2200 Rule ended on **December 5, 2023**. Because of the substantial volume of language that is mirrored in both rule series, the Board repeatedly advised the public that the Board would accept and consider comment related to either proposed rule during both comment periods (see more detail below).

Turning to the content of Ms. Garces’ testimony, Ms. Garces suggested that the Board is planning to lower standards for nondiscrimination, as first set forth in the Proposed EQS Rule, in its Final updates to EQS on the theory that (a) the robust language initially proposed in EQS could not be applied to approved independent schools for reasons associated with their non-public status and (b) given the Board’s well-documented commitment to ultimately applying substantially the same Act-1 related language to both rule series, it was thus obligated to “lower the nondiscrimination standard” for public schools to match what had been proposed for approved independent schools. This is untrue.

The truth is that the Board has been advised that the definitions and language of “discrimination” that appear in the Definitions section and in the Statement of Purpose exceed its authority under state and federal law. If left unchanged, the language as it currently appears in the Proposed EQS Rule could subject the Board to a legal challenge. Litigation would unnecessarily cost taxpayers money and delay implementation of these important rule updates until the legal challenges were resolved. It is important to note that this risk analysis holds true, regardless of whether the language flagged by Attorney Buxton appears in the EQS Rule or the 2200 Rule. That the issue was first raised in Attorney Buxton’s review of 2200 is simply a matter of timing and is unrelated to how the language would apply to a public or approved independent school.

Next, Ms. Garces asserted that the Board belatedly signaled its intent to change the definitions of “discrimination” that appear in the Definitions section and in the Statement of Purpose and waited until the “EQS public comment [period] was about to be closed.” This is also untrue. First, the Board has been consistent in communicating its intent that the Act 1-related changes to EQS and 2200 would be substantively the same and that public comment received in one rule series that was relevant to the other would be considered by the Board in both rule series. Critical to the timeline of events, this was noted at the Board’s May 17th monthly meeting; its August 9th monthly meeting; its August 18th special meeting of the full Board (the meeting where the Board unanimously voted to advance the proposed revisions to 2200, including the proposed revised sections related to discrimination, as its Proposed 2200 Rule); at the September 13th public comment hearing on EQS; at the Board’s September 20th monthly meeting; and the October 3rd public comment hearing on EQS. Second, and to be as transparent as possible, I submitted a memo to the EQS Committee on October 12, 2023, to again restate the Board’s alignment effort, had the memo posted as public comment to again reiterate the Board’s intent, and extended the EQS public comment period to allow the public to review my memo and respond to it as public comment that would be considered by the Board with regard to both rule series.

Finally, Ms. Garces claimed that the Board did not receive any public comment regarding the proposed changes to the definitions of “discrimination” that appear in the Definitions section and in the Statement of Purpose. Again, this is untrue. On October 15, 2023, Interim Secretary of Education Heather Bouchey submitted written testimony that highlighted some of the possible unintended consequences of the proposed EQS language and further observed that the language, as submitted to ICAR and filed with the Secretary of State, may indeed be inconsistent with state and federal law.

That the two sets of rules currently contain different language in some sections related to nondiscrimination and inclusion is an unfortunate consequence of the fact that they are on different rulemaking timelines and their schedules are thus not completely aligned. Statements or suggestions that the Board is intentionally applying a lower standard of protection to children in approved independent schools is simply untrue and flies in the face of the very important work that the Board has done over the last three years to achieve the exact opposite result. The Board is actively working to align the language between the two rule series so that, when rulemaking is complete, both EQS and 2200 will contain the same substantive requirements with regard to Act 1, will be aligned with state and federal law, and will be within the Board’s rulemaking authority.

I have attached the previously mentioned memorandum that I posted as public comment in EQS on October 12th regarding the intention of the Board and its expanded timeframe for receiving comment, as well as the comment received from the Interim Secretary on October 15th. I believe this memo and the attached documents serve to correct the record on this matter, but if you have any further questions, please let me know.

Thank you for the work you do in support of our State's education system, and, particularly, for your commitment to ensuring all of Vermont's children are protected from discrimination. The Board shares your commitment and is keen to see its rulemaking activities through to successful completion so that updates to both EQS and 2200 will become operational on their proposed effective date of July 1, 2025.

¹ Discrimination Language at Issue:

Proposed EQS Language (problematic parts highlighted):

Definition Section

“Discrimination” means any distinction, exclusion, classification, restriction or preference based on any ground, such as race, ethnicity, skin color, sex, sexual orientation, gender identification, language, religion, political or other opinion, disability, national, social or geographic origin, citizenship or immigration status, income or property, birth or other status, which has the purpose or effect of denying or impairing the recognition, enjoyment or exercise of fundamental rights and freedoms in the political, economic, social, cultural, civil or any other field. Discrimination is practiced by individuals and groups, and it is expressed systemically through the structures, laws, practices, and policies of public and private institutions, employers, and organizations.

Relevant Statement of Purpose Language

In addition to the non-discriminatory protections in Section 2113, these rules prohibit discrimination [*as defined above*] against any student pursuing an education or participating in the general life or activities of a school as a result of or based upon, ethnicity, caste, language and linguistic diversity, socio-economic status, religion, housing status, and non-citizenship or immigration status.

This manual adopts a definition of Discrimination that is broader than its legal definition.

Proposed 2200 Language

Definition Section:

“Discrimination” is intended to describe any exclusion, restriction, or preference based on any protected class consistent with state and federal law that has the purpose or effect of denying or impairing the recognition, enjoyment, or exercise of an individual's fundamental rights. Discrimination is practiced by individuals and groups, and it is expressed systemically through the structures, laws, practices, and policies of public and private institutions, employers, and organizations.

Relevant Statement of Purpose Language

In addition to the non-discriminatory protections in Subsection 2223.2 (Nondiscrimination Requirements for Approved Schools), discrimination against any student pursuing an education or participating in the general life or activities of a school as a result of or based upon, ethnicity, caste, language and linguistic diversity, socio-economic status, religion, housing status, and non-citizenship or immigration status, does

not embody the intent of the Board to promote welcoming, inclusive, bias-free environments for learning in Vermont's schools.
