

TO: State Board of Education Members  
FROM: Emily Simmons, AOE General Counsel  
SUBJECT: Summary of Amendments to Draft Rule 2200 Related to Non-Discriminatory Enrollment Requirements – ITEM H  
DATE: February 14, 2022

## Overview

A significant theme of public comment on Rule 2200 included requests for the draft rule to include prohibitions on discrimination on the part of approved independent schools. This memo summarizes the relevant provisions that have been added or amended by the State Board's 2200 Rules Committee following public comment.

## Application Requirements for All Approved Independent Schools

The following requirement applies to any school seeking approval, whether it intends to receive public funds or not. It is to be added to Rule 2226 (application for approval):

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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 and the Vermont Fair Employment Practices Act, Title 21 Vermont Statutes Annotated, Chapter § 495.
- (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.

## Requirements of Act 173

Act 173 has a new requirement for any approved independent school that intends to receive public tuition funds. These schools must enroll any student with an individualized education program who requires special education services and who is placed in the approved independent school as an appropriate placement and least restrictive environment for the student by the student's IEP team or by the LEA. Importantly, this enrollment requirement does not apply to therapeutic independent schools.

The State Board's 2200 Rules Committee discussed whether this new requirement also means that schools accepting public tuition must offer open enrollment. Act 173 did not discuss open enrollment or the specific procedures that would be required to facilitate enrollment of publicly funded students, whether eligible for special education or not. The General Assembly could have required blind enrollment or non-selective enrollment practices at approved independent schools, but it did not. For example, in 16 V.S.A. § 822a, the statutes describe a lottery process that a public school must employ when interest in public school choice exceeds capacity. The same section also outlines the specific capacity limits that may be placed on the program. No similar requirements for approved independent schools exist in Act 173.

## Rule 2229 Amendments to Enrollment Process

The provisions of Rule 2229 included below are the steps that approved independent schools, LEAs and families/students must follow in the process of enrollment by a publicly funded student in an approved independent school.

As Originally Proposed to ICAR	As Recommended by 2200 Committee
<p><del>Section 22298 Special Education Approval of Independent Schools. Approval to Receive Public Tuition, Special Education Approval.</del>  <del>22298.1</del>  <del>2229.1(1) Enrollment: Requirements for Independent Schools, Students, and LEAs.</del></p> <p><u>In order for an in-state independent school to receive public tuition, it shall enroll any student with an individualized education program who requires special education services and who is placed in the approved independent school as an appropriate placement and least restrictive environment for the student by the student's IEP team or by the LEA. This requirement shall not apply to an independent school that limits enrollment to students who are on an IEP or a plan under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and who are enrolled pursuant to a written agreement between the LEA and the school. approval for purposes of Rules 2224.2 and 2228.2</u></p>	<p><del>Section 22298 Special Education Approval of Independent Schools. Approval to Receive Public Tuition, Special Education Approval.</del>  <del>22298.1</del>  <del>2229.1(1) Enrollment: Requirements for Independent Schools, Students, and LEAs.</del>  <del>In order for an in-state independent school to receive public tuition, it shall enroll any student with an individualized education program who requires special education services and who is placed in the approved independent school as an appropriate placement and least restrictive environment for the student by the student's IEP team or by the LEA. This requirement shall not apply to an independent school that limits enrollment to students who are on an IEP or a plan under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and who are enrolled pursuant to a written agreement between the LEA and the school. approval for purposes of Rules 2224.2 and 2228.2 and 16 V.S.A. 2958(e), it shall obtain</del></p>

and ~~16 V.S.A. 2958(e)~~, it shall obtain general independent school approval pursuant to Rule 2200, and also receive approval for special education purposes from the State Board of Education after a determination that its staff, programs and facilities meet state and federal special education standards.

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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 provide the following:

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

2) Any special considerations or requirements for a student's acceptance or enrollment, none of which shall disadvantage a student based on the student's membership in a protected class, the student's actual or suspected disability, or the student's socioeconomic status;

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

4) 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

	<p><u>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.</u></p> <p><u>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.</u></p> <p><u>d) The procedures in this section, 2229.1, shall not apply to a therapeutic independent school.</u></p>
<p><b><u>2229.4 Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School.</u></b></p> <p><u>(a) The student or the student's parent shall voluntarily request the enrollment.</u></p> <p><u>(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.</u></p> <p><u>(2) A school shall enroll all publicly funded students on a first come first served basis until capacity is reached.</u></p> <p><u>(b) The student's IEP team or the LEA shall determine whether the enrollment is an appropriate placement and least restrictive environment.</u></p> <p><u>(c) The student's IEP team and the LEA shall comply with all applicable federal and State requirements.</u></p> <p><u>(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.</u></p>	<p><b><u>2229.4 Procedures for Ensuring the Provision of Special Education Services to Publicly Funded Students Enrolled in Independent Schools.</u></b></p> <p><u>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.</u></p> <p><u>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.</u></p> <p><u>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</u></p>

(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.

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 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.

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.

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.

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