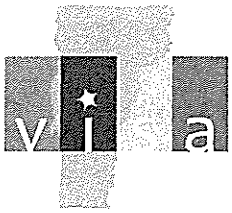

Vermont Independent
Schools Association

July 28, 2021

To: State Board of Education Rules Subcommittee

From: Mill Moore, Executive Director

Re: SBE Policy Conditions on Independent School Approvals

The five business-day reporting requirement the Board imposes when granting independent school approvals is impractical and burdensome for schools and for the Agency of Education. VISA requests the subcommittee to recommend a modification that will reduce burdensome reporting and data collection while not materially altering Board awareness of significant developments.

Modification does not require a rules change. The requirement is a matter of SBE policy. Note however that 16 V.S.A. § 166 (b) (8) (A) (i)-(vii)—quoted on p.2—requires a school to report "within five days after its knowledge" any of a series of adverse financial events. (This statute is repeated verbatim in proposed Rule 2223.8.)

The Board policy states: "*This approval is conditioned on the requirement that the school reports to the Agency of Education* ***within five business days*** *whenever any changes occur in enrollment, programs, policies, facilities, financial capacity, staffing or administration during the approval period.*"

Problems with this requirement came to light during the therapeutic school rate-approval rule stakeholder meetings with Agency of Education. Therapeutic schools experience frequent short-term enrollment changes because students come and go due to the federal "least restrictive environment" requirement for fulfilling an IEP. Aiming to illustrate this short-term enrollment variability, VISA sought the AOE records of therapeutic school enrollment change reports. The Agency replied that it does not retain the reported data.

Though the particular focus was on the enrollment change reporting requirement, the situation calls into question all of the five-day reporting requirements, except for those events specified in 16 V.S.A. § 166 (b) (8) (A).

Requiring reports on a five business-day deadline causes burdensome, unproductive work with no clear benefit that could not also be realized within a longer deadline. VISA recommends extending the deadline to 30 days. The policy requirement to report changes in "financial capacity" could be deleted entirely, as it now is covered by statute and a proposed rule (presuming the Secretary of Education promptly forwards any such reports to the Board).

A 30-day deadline is sufficient for the Board and Agency of Education to remain well informed about changes occurring at approved independent schools while also diminishing the reporting burden on the affected schools and on the Agency.

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§ 166. Approved and recognized independent schools

(b) (8) (A) If an approved independent school experiences any of the following financial reporting events during the period of its approved status, the school shall notify the Secretary of Education within five days after its knowledge of the event unless the failure is de minimis:

(i) the school's failure to file its federal or State tax returns when due, after permissible extension periods have been taken into account;

(ii) the school's failure to meet its payroll obligations as they are due or to pay federal or State payroll tax obligations as they are due;

(iii) the school's failure to maintain required retirement contributions;

(iv) the school's use of designated funds for nondesignated purposes;

(v) the school's inability to fully comply with the financial terms of its secured installment debt obligations over a period of two consecutive months, including the school's failure to make interest or principal payments as they are due or to maintain any required financial ratios;

(vi) the withdrawal or conditioning of the school's accreditation on financial grounds by a private, State, or regional agency recognized by the State Board for accrediting purposes; or

(vii) the school's insolvency, as defined in 9 V.S.A. § 2286(a).

SBE Proposed Rules – 2200 Series

Independent Schools

August 2, 2021

William J. Mathis

Independent schools are contractors to the state. The state cannot delegate the Constitutional responsibility for providing and monitoring the quality of education but it can contract out the delivery of services and establish contractual conditions. In fact, it is the state's inescapable responsibility to do so. The relation between the state and independent schools has waxed and waned across the years. There is, however, general agreement that the rules need to be reviewed.

An earlier state board (2017), explicitly sought to address particular concerns:

- Financial accountability – Some private schools had financial difficulty and closed at great inconvenience and disruption to all concerned.
- Equal opportunities - Some independent schools were said to employ unequal admissions practices particularly for special education children.
- The Agency of Education does not (and still does not) have the resources to properly conduct the application, renewal and evaluative processes. The resulting fog obscured the proper addressing of the previous two concerns.

This effort came to naught.

Now comes the recomposed state board with a new effort at revising these rules. Reflecting a good deal of commendable work and effort they, nevertheless, fail to properly address important deficiencies.

Some specific comments:

- An overworked two-person review team(s) does not represent sufficient capacity to evaluate and monitor independent schools (proposed rule 2223).
- The curriculum requirement is unacceptably weak (16 VSA 906).
- The enrolling of special education students (2223.3 and 229) is ambiguously worded, of questionable legality and it's wrong.
- Having the Independent Schools be judge and jury of offenses of their colleagues (222.32), even with an SBE appeal written in, is inappropriate and creates an impression of impropriety. To be saddled with this process in a potentially tense time invites trouble. A recent case of the independent schools as investigatory body was overly late, and in some eyes, of insufficient thoroughness.
- "Lacks financial capacity." A vitally important criterion but the term lacks specificity. Again, this invites trouble.

- Tuition section (22254) – Suggest waiting until the Maine case is decided by the U. S. Supreme Court and the implications are digested. Setting more "unprecedents" simply traps the state board and entangles an already unpredictable situation.
- Special education (229 & 229.3) – This will prove problematic. "Assurances" is too weak a phrase and open to interpretation.
- Out of district placement – The section seems redundant and may conflict with federal and state law. Opening to unilateral placements (or the appearance thereof) has resulted in expensive procedures .

It is surprising to not find any reference to the state auditor's report of last month (July 2021) which addresses these same rules. Whether the 25 recommendations are solid in whole or part requires consideration.. With the rules open, failure to consider these recommendations may be an error that will take years to correct.

William J. Mathis spent more than a quarter century working with and teaching these rules. He served on the Vermont state board of education during the previous effort of reviewing these rules.

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AOE Suggestions for Further Amendment to Draft Rule 2200

Background

After these draft rules were pre-filed with ICAR, several items of further rule development were jointly identified by members of the State Board Subcommittee on Rule Series 2200 and Agency of Education staff. In each instance, the Agency believes that the proposed amendment is noncontroversial. In addition, all of the following proposals have been reviewed in at least one publicly warned meeting. The Agency is presenting the language which appears below during the public hearings on draft rule 2200 so that the public can receive notice of these proposals and the language can be vetted through the rest of the APA rulemaking process. Anyone with questions about these proposals or suggestions for alternate language can contact Emily Simmons, AOE General Counsel at emily.simmons@vermont.gov.

Note that when, as here, a section of the draft rule is under consideration that involves multiple instances of amendment, it can be quite confusing to denote which marked-up text has already been adopted by the State Board at the initiation of the rulemaking process and which marked-up text is part of a new proposal. For this document, the text of the rule is marked-up (i.e. strikethrough of deleted language and underline of new language) as appears in the ICAR filing. Further mark-up that was not part of the ICAR filing is highlighted.

1. Proposals Related to the State Auditor's March 2021 Report

The Auditor's report identified two instances where requirements for approved independent schools were clearly mandated in statute, but were not clearly included as part of the independent school approval process. This proposal would add a reference to the minimum course of study (16 V.S.A. § 906) and a reference to the requirement to conduct background checks for certain hires and contractors.

***

Section 2227~~6~~ Approval~~.~~

The Board shall approve an independent school that offers elementary or secondary education if it finds, after opportunity for hearing, that the school provides a minimum course of study pursuant to 16 V.S.A. ~~section~~ § 906 ~~of this title~~ and that it substantially complies with the Board's rules for approved independent schools.

In order to be approved, an independent school that operates a boarding program, enrolls students as boarding students, or operates a residential treatment program shall be accredited by a state or regional agency recognized by the State Board for accrediting purposes or shall be licensed as a residential child care facility by the Department for Children and Families. This requirement does not apply to an independent school that enrolls only day students.

The board must make the following findings prior to approval:

~~The board may approve an independent school if it finds that:~~

2227~~6~~.1 The description of the school in the approval application is accurate.

2227~~6~~.2 The course of study offered is adequate to meet the educational purposes of the school and to provide a minimum course of study that is age and ability appropriate

2227~~6~~.3 The school has available support services necessary to meet the he requirements of a minimum course of study and its educational purposes, including but not limited to library services, administrative services, guidance and counseling services and a system of records by which pupil progress may be assessed.

2227~~6~~.4 The school has classroom, laboratory, library and other facilities necessary to operate its program,

2227~~6~~.5 The school employs professional staff who are qualified by training and experience in the areas in which they are assigned as measured by the following:

2227~~6~~.5.1 For teachers, a minimum of a bachelor's degree in their field of instruction or substantially equivalent time in training and experience in their field of instruction.

2227~~6~~.5.2 For all professional staff, relevant experience and/or training in other programs not related to teaching or administrative duties to which they are assigned.

2227~~6~~.6 The school has an adequate program of continuing professional staff development as demonstrated in the application.

2227~~6~~.7 The school employs a sufficient number of professional staff for the population served.

2227~~6~~.8 The school satisfies lawful requirements relative to its facilities, fire drills, and the immunization of its pupils against disease.

2227~~6~~.9 The school maintains a register of the daily attendance of each of its enrollment.

2227~~6~~.10 The school maintains an operating schedule that includes a total number of instructional hours each year which is not less than that required of a public school serving the same grades.

2227~~6~~.11 The school has the financial capacity to carry out its ~~educational purposes~~stated objectives for the period of approval. For purposes of these rules, "financial capacity" shall mean anticipated revenue and funds on hand sufficient to meet a school's stated objectives.

2227.12 The school complies with the requirements of 16 V.S.A. §255 relating to criminal record checks and checks of the Child Protection Registry and the Vulnerable Adult Abuse, Neglect, and Exploitation Registry.

***

2. Proposal Initiated by VHEC to Amend Postsecondary Accreditation Timeline

In 2018, the Vermont Higher Education Council requested that the State Board address language in the rules for postsecondary certification that may constrain the ability of a new institution to begin operations in Vermont. The current rule requires that an institution must obtain accreditation prior to receiving renewal of its original certificate of degree granting

authority. It is practically impossible for an institution to obtain accreditation in the current timeline. The Agency has identified a solution that would allow up to 10 years for the school to receive its accreditation and then seek renewal from the State Board.

***

2243.3 Renewal of Certification

A school seeking renewal of certification shall apply in writing to the Secretary no later than six months prior to the end of any period of certification. Where appropriate, the school may incorporate by reference its prior application or any portion thereof. Certification of a school completing timely application shall extend until the State Board acts on further certification. Any school seeking renewal, that has obtained initial approval to offer or operate a program of college or professional education for credit or degree, on or after January 1, 2015, shall obtain accreditation from an accrediting entity recognized by the US Department of Education, in order to be considered eligible for renewal by the State Board within the first 10 years of operation.

***

3. Proposal Related to the Public Accommodations Act

On July 28, 2021, State Board Chair Olsen wrote to Secretary French regarding ways to strengthen alignment between the process of independent school approval and the statutes that apply to approved independent schools. In his letter, Chair Olsen correctly pointed out that Vermont's Public Accommodations Act (PAA) prohibits any school in Vermont from discriminating on the basis of race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity. 9 V.S.A. § 4500 – 4502. Current Rule 2225.6 states that an independent school must adhere to all lawful requirements relating to facilities in order to be approved, and the PAA is an example of such a requirement. In order to make it clearer that compliance with the lawful requirements relating to facilities includes compliance with the PAA, the Agency suggests the following language.

***

Section 2226~~5~~ Application.

An application for initial approval or renewal of approval shall contain the following:

2226~~5~~.1 The name and address of the school.

2226~~5~~.2 A statement of the school's philosophy and purpose.

2226~~5~~.3 A description of the school enrollment including a statement of how~~whether~~ it is designed to serve children ~~with a particular disability or~~ with disabilities ~~generally~~.

2226~~5~~.4 A description of the plan of organization for the school including its governance, faculty, and student body, and the names and addresses of the governing board.

2226~~5~~.5 A description of the curriculum, methods of instruction, evaluation procedures and special services ~~which~~ that the school has designed to achieve its educational objectives and to provide a minimum course of study as defined in 16 V.S.A., ~~Section~~ § 906.

2226~~5~~.6 A description of physical facilities including plant, materials and equipment and assurances that the facilities meet all applicable ~~s~~State and federal requirements, including compliance with Vermont's Public Accommodations Act, 9 V.S.A. § 450 - 4506.

***

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AOE Suggestions for Further Amendment to Draft Rule 2223

After these draft rules were pre-filed with ICAR, an additional rule development was identified by members of the State Board Subcommittee on Rule Series 2200 and Agency of Education staff. The Agency believes that the proposed amendment is noncontroversial. In addition, the following proposal has already been reviewed in at least one publicly warned meeting. The Agency is presenting the language that appears below during a public hearing on draft rule 2200 so that the public can receive notice of this proposal and the language can be vetted through the rest of the APA rulemaking process. Anyone with questions about this proposal can contact Donna Russo-Savage, Staff Attorney, at Donna.RussoSavage@vermont.gov.

Background

Vermont law requires the State Board of Education to approve independent schools offering elementary or secondary education if the Board finds that the school "provides a minimum course of study pursuant to section 906 of [Title 16] and that [the school] substantially complies with the Board's rules for approved independent schools." State Board Rule 2223 permits the Board to grant approval to an independent school that is accredited by an agency recognized for those purposes by the State Board and listed in Rule 7320, without the need for additional evaluation or process.

In March 2021, the Executive Director of the Association of Independent Schools in New England ("AISNE") asked the State Board to include AISNE on the Rule 7320 list of currently recognized accrediting agencies. AISNE representatives attended a meeting of the Rule 2200 Subcommittee where they presented an overview of the organization and responded to questions.

The Subcommittee determined that adding AISNE to the list of recognized accrediting agencies would assist smaller independent schools, particularly independent elementary schools, to achieve "approved" status under current State Board rules. The AISNE accreditation process is of similar rigor to that used by the New England Association of Schools and Colleges ("NEASC"), but it is more specifically geared to elementary schools and is a more affordable option for smaller independent schools. By accepting AISNE accreditation, the State Board would provide an additional pathway by which an independent K-8 school could demonstrate compliance with current approval requirements.

The Rule 2200 Subcommittee had further discussion of the proposed recognition of AISNE at the Subcommittee's meeting on August 2, 2021. Among other issues, the Subcommittee considered the need to update other names currently on the 7320 list, the intent either to amend the Rule 2200 Series to include substantive requirements and a process by which agencies would be recognized or to incorporate the 7320 list into the Rule 2200 Series, and the desire not to delay the recognition of AISNE. The Executive Director of the VT Independent Schools Association was present and indicated the Association's support for recognizing AISNE as soon as possible.

The Subcommittee asked the Agency to prepare draft documents initiating rulemaking to add AISNE to the 7320 list of currently recognized accrediting agencies. Subsequently, the State Board's Chair and Vice-Chair suggested a different approach to accomplish the multiple inter-related goals discussed at the Subcommittee's August 2 meeting in a simpler and more efficient manner. The new approach would also repeal all other rules in the Rule 7000 Series because they provide no independent content, but rather cite statutes and other rules that address the topic.

The newly-proposed, multi-step process is as follows:

1. During the public comment period for the Rule 2200 Series in August, the Agency will:
    a. Propose to amend Rule 2223 to explicitly identify AISNE as a recognized accrediting agency.
    b. Propose to amend the sentence in Rule 2223 that cross-references the list of currently recognized agencies in Rule 7320 to indicate the Board's intent to repeal Rule 7320 effective July 1, 2024.
2. For the State Board's consideration in September, the Agency will prepare drafts of all documents necessary to initiate rulemaking to:
    a. Repeal Rule 7320, effective July 1, 2024 (or on a different date subsequently set out in adopted rule or statute).
    b. Repeal all other rules in the 7000 Series, effective 15 days after the amendment's adoption per 3 V.S.A. § 845.
3. During the second phase of Rule 2200 Series amendments, which is anticipated to occur in 2022, the State Board will propose amending Rule 2223 to:
    a. Remove the cross-reference to Rule 7320.
    b. Include in the 2000 Series, either (i) substantive requirements and a process by which the State Board would recognize accrediting agencies or (ii) a list of State Board-recognized accrediting agencies.

Proposed Language that the Agency Offers as Public Comment to Rule 2223

In furtherance of item #1 above, the Agency offers the following revised language:

> Section 2223 Reciprocity.
> Approval may be granted without committee evaluation and the approval process in the case of any school accredited by a state or regional agency recognized by the State Board for accrediting purposes. ~~Such~~ In addition to the accrediting agencies ~~are~~ listed in Rule 7320 of the Board Manual of Rules and Practices, which the Board shall continue to recognize until July 1, 2024, the State Board recognizes the Association of Independent Schools in New England. Any accreditation from a recognized accrediting agency that is valid for more than five years must be supplemented with an interim report from the accrediting agency which should be submitted to the Department of Education by the accrediting agency or the school during the last year of its five-year approval. This interim report must provide such information as is necessary to assure the State Board that the school is meeting the approval standards. If such proof of compliance with approval standards cannot be shown the school must undergo the approval process.

PUBLIC COMMENT

TO: Board of Education of the State of Vermont
SBE.PublicComment@vermont.gov
FROM: Megan R.C. Calla, Esq.
MeganRCCalla@gmail.com
DATE: September 18, 2021
RE: Suggestions for Further Amendment to Draft Rule 2200;
21P023: Independent School Program Approval

I write this comment as a member of the public, a citizen of Vermont, and as someone interested in potentially founding an independent school. I have structured my comment in stages: my general impression of the proposed amendments including a concern I would like the Board to address, though I do not have proposed language to offer, and some minor language adjustments to improve readability of the rule that I believe will serve professionals as well as the public going forward.

I was very interested to learn of the current status of the rules (before the drafted amendments), and, on a personal note, I am very happy with the direction that the Rule Series 2200 changes have taken. There has obviously been care taken in meeting the needs of all of Vermont's students while addressing the reality that not all schools will be able to adequately meet the needs of every student, while staying flexible in the face of a changing legal landscape.

My main concern is in the rather vague references to the LEA's determination of whether or not the enrollment of a student who requires additional support is "appropriate" as referenced in draft Rule 2229.4(b)[1]. It is reasonable to assume that "appropriate" is left vague intentionally, allowing it to encompass compliance with state and federal law while taking other factors into consideration. "[A]n appropriate placement" is also used in 2229.1.[2] There is some language[3] in this section set to be struck from the rule that hints at a definition of "appropriate," there is no clear guidance as to what complete standards an IEP team or an LEA might use in their determination. I would be very happy to see a definition added to Section 2222 to clarify this issue.

[1] 2229.4 Procedure for Publicly Funded Students Receiving Special Education Services to Enroll in an Approved Independent School. "(b) The student's IEP team or the LEA shall determine whether the enrollment is an appropriate placement and least restrictive environment."
[2] 2229.1 Enrollment: Requirements for Independent Schools, Students, and LEAs.
[3] a determination that its staff, programs and facilities meet state and federal special education standards

Proposed Language Changes

The following highlighted sections are my recommended updated to the rules for the sake of consistency and readability. I noticed in some sections that the rules were parenthetically explained.[4] I would like to encourage this, even if the Board determines that it is only appropriate for the Definitions section. I have included it in Rule 2223.3 where I found it most helpful. Further, I found the word choice in Section 2229.4 to be unclear as to the meaning of the section. I have suggested a different word based on my understanding of the intended meaning.

Section 2222 Definitions.

Special Education Fees: means funds paid by an LEA (school district or supervisory union) to an approved independent school for special education services beyond those covered by general education tuition, as defined in 16 V.S.A. § 2973(b)(2)(B).

...

2223.3 General Conditions for Approval.

Approval shall be recommended for an independent school offering elementary or secondary education that provides a minimum course of study pursuant to 16 V.S.A. § 906 and that substantially complies with all statutory requirements for approved independent schools and the Board's rules for approved independent schools. An independent school that intends to accept public tuition shall be recommended for approval only on the condition that the school meets the requirements of SBE Rule 2229. A school meeting approval requirements in SBE Rules 2226 (Application) and 2227 (Approval) but choosing not to enroll students requiring special education services may be recommended for approval but may not receive public tuition. ~~agrees, notwithstanding any provision of law to the contrary, to enroll any student who requires special education services and who is placed in or referred to the approved independent school as an appropriate placement and least restrictive environment for the student by the student's individualized education program team or by the local education agency; provided, however, this requirement shall not apply to an independent school that limits enrollment to students who are on an individualized education program 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 local education agency and the school.~~

...

[4] An example is the definition in Section 2222 of "Approved Independent School: means an independent school that meets the requirements in Rule 2223.3 as well as the requirements in SBE Rule 2225 (tuition from public funds)."

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 conditioned ~~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.

Thank you to the Board for taking the time to read my comment. I look forward to seeing the rulemaking process resolve.

Fw: VISA adopts non-discrimination statement

Olsen, Oliver <Oliver.Olsen@vermont.gov>
Thu 9/30/2021 4:56 PM
To: Simmons, Emily <Emily.Simmons@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>; Cutler, Judy <Judy.Cutler@vermont.gov>

FYI - we should add this to the public comment log.

From: Mill Moore <mill@vtindependentschools.org>
Sent: Tuesday, September 28, 2021 9:51 AM
To: Olsen, Oliver <Oliver.Olsen@vermont.gov>
Subject: VISA adopts non-discrimination statement

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Oliver,

FYI, here is the text of a statement recently adopted by the Vermont Independent Schools Association:

> VISA does not support use of public funds in any school with discriminatory enrollment or hiring practices.

Mill

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Vermont Independent Schools Association
Mill Moore, Executive Director
802-436-2112
www.vtindepenentschools.org

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FW: Independent School rule comments

SBE - Public Comment <SBE.PublicComment@vermont.gov>
Wed 11/3/2021 9:55 AM

To: Olsen, Oliver <Oliver.Olsen@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>; Lovett, Tom <Tom.Lovett@vermont.gov>
Cc: Simmons, Emily <Emily.Simmons@vermont.gov>

Good morning,
Attached please find a written comment from Alicia Hanrahan re: the proposed 2200 Rule Series revisions submitted to the SBE's public comment email box.

Thank you,
Judy

Judith Cutler
Investigator / Public Records Officer
Vermont Agency of Education
1 National Life Drive|Davis 5|Montpelier, VT 05602-2501
O) (802) 828-0079 | E) Judy.Cutler@vermont.gov
Pronouns: She/Her/Hers

From: Alicia Hanrahan <aliciaamh@gmail.com>
Sent: Tuesday, November 2, 2021 5:08 PM
To: SBE - Public Comment <SBE.PublicComment@vermont.gov>
Subject: Independent School rule comments

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Please accept my comments for the independent school rule review. Thank you.

Alicia Hanrahan
936 VT Route 12 North
Randolph, VT 05060

802-522-9629
aliciaamh@gmail.com

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SBE Language	Question/Comment	Implications/Recommendations
Approved Independent School: means an independent school that meets the requirements in Rule 2223.3 as well as the requirements in SBE Rule 2225 (tuition from public funds).	Does this mean that every independent school can receive public funding?	If this is the case, then schools like: Lake Champlain Waldorf, Good Shepherd Catholic School, Killington Mountain School, Mater Christi, Mt Mansfield Ski Club and Academy, Mt Snow Academy, independent Kindergartens etc... are eligible for students to attend at public expense.
Same as above	Does this mean that a student eligible for special education can attend any independent school in VT?	If so, then a special education student could attend an independent/recognized school that isn't approved for special education. How would the students receive their special education services?
Therapeutic Approved Independent School (or Therapeutic Independent School or Therapeutic School): means an approved independent school that limits enrollment to students who are on an IEP or 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 an LEA and the school. These schools are eligible to receive public tuition, which is inclusive of both general and special education services and is at a rate approved by the Agency of Education.	Not all students who are on an IEP need a therapeutic school...so why would we categorize all of them to be Therapeutic Approved Schools? For example, Inspire for Autism is a school for kids with significant needs...specifically kids with Autism. It's not therapeutic in the Mental Health sense. Also, the Greenwood School is for kids with learning disabilities. They are not a therapeutic school. Only CERT schools are considered to be therapeutic.	eliminating the word therapeutic
Same as above	Does this mean that every independent school must be approved for all disabilities? Some schools are only for specific disabilities. Inspire for Autism is specifically for kids on the Autism Spectrum...why would they take a student who has a learning disability? Greenwood takes	Language should be clear if a school will be approved for all disabilities or if they can pick and choose.

	kids with learning disabilities, why would they want to be approved for Emotional Disturbance or Autism?	
Section 22232 Procedure. Every person or entity desiring to operate an approved independent elementary or secondary school shall apply in writing to the Secretary of Education. Independent schools which are recognized as provided for in 16 V.S.A., § 165a rather than approved are not required to comply with the procedures set forth in this section. An application shall meet the requirements of § SBE Rule 22265 below. Upon receipt of an application for initial approval or renewal of approval, the commissioner Secretary shall appoint a review committee of at least two persons.	The two person team should include one person who has knowledge and experience in special education if the school wants to be approved for special education	Recommend modifying the language of 2 person team to include one person with knowledge and experience in special education if the school wants to be approved for special ed.
The committee shall present a written recommendation regarding approval to the Commissioner Secretary. A copy of their recommendation shall be provided at the same time to the applicant. The applicant shall be given 30 days to respond before the Secretary makes a recommendation regarding approval is made by the Commissioner Secretary to the State Board. The report shall contain the findings of other agencies of state government which that inspect such facilities.	Is it a report or a written recommendation?	Recommend that a detailed report is written that includes a recommendation. This should accompany the SBE paperwork that is written up and provided. Should be a separate document.
22254.23 Tuition for Out of State Schools In order for tuition to be paid to an independent school in another state, the school must be accredited or approved by the	Does the Host State need to be approved by their AOE for specific disabilities?	

host state or by an accredited or approved by the host state or by an accrediting agency recognized by the State Board. The Board reserves the right to refuse payment of tuition, if after review it determines any such school does not provide the minimum course of study, is unsafe, or does not have faculty qualified by training and experience in the instructional area in which they are assigned.		
22265.3 A description of the school enrollment including a statement of how it is designed to serve children with disabilities	All independent schools will be required to be approved for all disabilities, or no disabilities?	Makes no sense for all indep special education schools to be approved for all disabilities. The schools will not have the capacity or expertise to cover all of the disability categories.
In order to be approved, an independent school that operates a boarding program, enrolls students as boarding students, or operates a residential treatment program shall be accredited by a state or regional agency recognized by the State Board for accrediting purposes or shall be licensed as a residential child care facility by the Department for Children and Families. This requirement does not apply to an independent school that enrolls only day students.	DCF does not license all residential facilities/schools...Greenwood school for example is not licensed by DCF.	
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.	Does this mean that each of the Academies (STJ, LI, B&B and Thetford) must enroll ALL students who apply there? How will school choice work?	Modify language to be more clear.

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	Does this mean that indep schools that are approved for IEP/504 students are not eligible for public funding? Is it all special education funded?	Modify language to be more clear
An approved independent school is not required to demonstrate that it has the resources to serve every category of special education as defined under Board rules in order to be approved or retain its approval to receive public funding for general tuition.	Is the school required to demonstrate that they have special education staff to cover the disabilities that they will be approved for?	Indep schools should demonstrate if they have sufficient staff to cover the disabilities they are being approved for.
The Secretary shall establish minimum standards of services for students receiving special education services in independent schools in Vermont.	This should be an IEP Team decision. If a school cannot provide the services outlined in the IEP, then the school should not accept the student. The Secretary should not be establishing the standards of services.	Eliminate language
(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.	If the school cannot provide the services in the IEP, then the school should not accept the student. The student should not go without services based on what the school can provide. What type of solution would be sufficient? A student going without services?	Eliminate language. It goes against IDEA.
(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.	30 days to figure out a solution? The solution should be that the student cannot attend that school if the school cannot provide the student services.	Eliminate language
If the LEA and approved independent school do not agree on whether the independent school is able to provide the services on the	Why go through all of this? If the school cannot provide services, then the parents can revoke their right to special education...OR, the student	Eliminate language

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.	must go to a different school that can provide the services. What is the point of including a hearing officer? Additionally, why are therapeutic schools not included in this? Currently, there is an exceptional circumstance/waiver process if the LEA cannot place a student in a school that is not able to provide services.	
(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	Again, why allow a student to go to a school that can't meet their needs and then allow the LEA to pay for a school knowing that they can't meet their needs?	Eliminate language

opinion pursuant to subsection (f) of this Rule.		
After receiving approval for public tuition, an independent school shall notify the Secretary of any significant changes to its special education program, professional staff, governance, financial capacity, or facilities. The Secretary may, upon such notification, gather additional information from the school, including by means of a site visit. As a result, the Secretary may return to the Board for a change in the school's approval for public tuition purposes. If the Secretary petitions the Board for a change to an independent school's approval for public tuition purposes, the Council of Independent Schools and the subject independent school shall be notified and have an opportunity to be heard by the Board. If the school disagrees with the proposed change to its approval for public tuition purposes, the Board shall hear the matter in accordance with the requirements of SBE Rule 1230, et seq.	This should include a time frame.	The school should notify the Secretary in 5 business days.
(2) 2230.1 Exceptional Circumstances - Approval Process. Upon application by a responsible LEA, the Secretary may permit, in exceptional circumstances, a special education placement in an independent school that is approved pursuant to SBE Rule 2223, but that has not been approved to receive public tuition	Does this mean that the Secretary can agree to place a student in a school NOT approved for special education, knowing that the student has a need for special education supports and services?	Modify the language so it's clear
2231.1 Agreement as to Costs. The agreement outlines tuition,	AOE does not have their own contract/agreement with	Recommend that AOE has their own contract with residential

room, board, and other costs associated with the child's attendance. For children on an IEP who are placed by a state agency or a designated community mental health agency, or any other agency defined by the Secretary, in accordance with 16 V.S.A. § 2948, the agreement shall be with the Secretary.	independent/residential facilities for students placed by other agencies. AOE agrees to the contract that has been developed by DCF or DMH	facilities when placed by another state agency
2231.2 Agreement as to Non-Instructional Services For children placed by a state agency or a designated community mental health agency, or another agency defined by the Secretary, this agreement shall be with the LEA that has educational planning responsibility for the child.	There is not a written agreement between the LEA and residential facilities. A letter from AOE to the LEA is written if a student has been "cleared" to attend a residential facility Residential facilities do not ask the LEA to enter into a formal agreement (with the exception of Hillcrest in MA)	Recommend eliminating this requirement.
Section 2232 Rate Approval for Therapeutic Approved Independent Schools. Schools that also receive rates from the Agency of Human Services shall submit an application for approval of a new rate to the Secretary by May 1	Is this for day placements? If not, then why would an independent school submit an application if already approved by AHS? For example, the VT School for Girls in Bennington ONLY takes students placed by AHS...no day students. Would they be subjected to submit an application? If so, what would be the point if they don't accept day students?	Language should be clear.
Section 2234 Corrections Education Program Secretary shall conduct his or her review of the Corrections Education Program in accordance with the procedures and standards contained within Rules 2220 through 2229, as if it were an independent school.	If this is referring to Community High School of VT...this is already considered to be a VT indep school. If this is referring to the old Woodside, it's currently not in existence. So what is the purpose of this section?	Eliminate language as it's already considered to be an independent school. Not necessary.
22350.1 Definitions. "Tutorial program" means education	Should say Secretary, not commissioner	Change the language

provided to a pupil student who is placed in a short-term program that is not administered by a LEA. The purpose of the program is to provide evaluation and/or treatment. This does not include home based tutorials, programs operated by a public school or collaborative, or a program of an independent school that has been approved under 16 V.S.A. § 166 . The average length of stay for children in a tutorial program shall be not more than six months. The Commissioner may waive the average length of stay time period for individual programs, based upon needs of the children served by the program.		
Tutorial 22350.2.6 Renewal. Not less than three months prior to expiration of a tutorial program's approval, the Secretary shall send an application packet and a letter notifying the program when a site visit will occur. The completed application shall be received from the tutorial program not later than 30 days prior to the scheduled site visit.		The application should also include information regarding the number of days each student attended. Tutorials unfortunately have a habit of keeping students over 6 months
The tutorial program maintains an operating schedule that includes instruction for no less than ten hours per week unless inconsistent with medical and/or educational recommendations. The operating schedule shall be sufficient to ensure that the instructional services address the individual needs of a child with disabilities and are consistent with the child's IEP.	Should this be 10 hours per week of gen ed services and then special education on top of that? What if a special ed student requires: Math 5x per week for 30 min Reading 5x 30 Writing 5x 30 Then the student only receives 30 min per day of gen ed curriculum?	Recommend 10 hours per week PLUS their special ed services

22350.4 Rate Approval for Tutorial Programs. Each tutorial program shall annually report its rates for tuition, related services, and room and board, if applicable, to the Secretary on a form prescribed for that purpose	Why would 204 Depot, 206 Depot or Mountainside provide AOE with their rate as their rate is not set by AOE? It's set by AHS' Dept of Rate Setting?	Recommend revising language to state that only the AOE rate set tutorials should be included here
Secretary shall review each tutorial program's annual rate report. If the Secretary concludes that a tutorial program's rates are not reasonably related to the services provided, the Secretary shall make a determination...	See above	See above
Section 22383 Definition. A "Distance Learning School"		Add language that reflects that public funds are not to be used for Distance Learning Schools
Indep Kindergartens: 2271.4 Report to the Secretary:. The appointed educator shall present a written recommendation regarding approval to the Secretary. The report of the appointed educator shall incorporate the determination of DCF. concerning compliance with the "DCF Kindergarten Regulations". A copy of the recommendation shall be provided at the same time to the applicant.	Is it a report or a recommendation?	Recommend that a detailed report is written that includes a recommendation. This should accompany the SBE paperwork that is written up and provided. Should be a separate document.
Indep Kindergartens: T- teaching skills and concepts in mathematics, language arts, science, the arts, and health that are consistent with principles of child development	If this is to be consistent with 16 VSA 906/ Course of Study, the language should say: Reading and Writing, not Language Arts. It also does not mention History/Civics/Government or PE	Modify the language to include all of the Courses of Study rules in 16 VSA 906
Indep K	Should there be any language about a discipline policy and whether or not they can suspend/expel a student?	Update language to include a discipline policy

Thank you for considering my comments. If you have any questions, you can reach me by email at aliciaamh@gmail.com or by cell phone at 802-522-9629.

Alicia M. Hanrahan
BA in Speech Correction
MA in Special Education

FW: regarding suggested language for Draft Rule 2200

Simmons, Emily <Emily.Simmons@vermont.gov>
Wed 11/3/2021 9:01 AM

To: Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>; Olsen, Oliver <Oliver.Olsen@vermont.gov>; SBE - Public Comment <SBE.PublicComment@vermont.gov>

More public comment just received. I have added this to my summary document.
-Emily

Emily Simmons
General Counsel
Agency of Education
o) 802-828-1518| c) 802-595-4775
1 National Life Drive| Davis 5 | Montpelier, VT 05620-2501

From: Lisa Purcell <lisa.purcell@comcast.net>
Sent: Wednesday, November 03, 2021 5:15 AM
To: Simmons, Emily <Emily.Simmons@vermont.gov>
Subject: regarding suggested language for Draft Rule 2200

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Dear Ms. Simmons – I'm writing to you in regards to the Agency's suggested language in the Amendment to Draft Rule 2200, specifically regarding the important language prohibiting discrimination.

Here excerpts from your AOE Suggestions for Further Amendment to Draft Rule 2200:
"On July 28, 2021, State Board Chair Olsen wrote to Secretary French regarding ways to strengthen alignment between the process of independent school approval and the statutes that apply to approved independent schools. In his letter, Chair Olsen correctly pointed out that Vermont's Public Accommodations Act (PAA) prohibits any school in Vermont from discriminating on the basis of race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity. 9 V.S.A. § 4500 – 4502.

Current Rule 2225.6 states that an independent school must adhere to all lawful requirements relating to facilities in order to be approved, and the PAA is an example of such a requirement. In order to make it clearer that compliance with the lawful requirements relating to facilities includes compliance with the PAA, the Agency suggests the following language.

22265.6 A description of physical facilities including plant, materials and equipment and assurances that the facilities meet all applicable state and federal requirements, including compliance with Vermont's Public Accommodations Act, 9 V.S.A. § 450 – 4"

Now, why would this important human rights language be stuck on the end of a sentence that begins with "a description of physical facilities"?
I'd encourage you to place this anti-discrimination language more prominently, giving it its own Rule number and thus prominence in the process for Approval of Independent Schools.

Thank you for your consideration.
Lisa Purcell
Chittenden, VT 05737

(8)

FW: Public Comment on SBE Rule 2200 series

SBE - Public Comment <SBE.PublicComment@vermont.gov>
Thu 11/4/2021 8:34 PM

To: Olsen, Oliver <Oliver.Olsen@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>
Cc: Cutler, Judy <Judy.Cutler@vermont.gov>

Hello Oliver and Jen,
Here is public comment that was received today. I will add it to my summary document.

Very best,
Emily

Emily Simmons
General Counsel
Agency of Education
o) 802-828-1518| c) 802-595-4775
1 National Life Drivel Davis 5 I Montpelier, VT 05620-2501

From: Clare O'Shaughnessy <clareosh63@gmail.com>
Sent: Wednesday, November 03, 2021 6:53 PM
To: SBE - Public Comment <SBE.PublicComment@vermont.gov>
Subject: Public Comment on SBE Rule 2200 series

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Please see attached.

v/r,

Clare O'Shaughnessy
Concerned Vermont Taxpayer

(9)

Rule	Concern/Comment
Section 2222 Definitions	"Therapeutic" label is inappropriate. Independent school rules should either use a generic label or distinguish between approved schools which provide treatment and those that do not. To label all approved schools which limit enrollment to IEP/504 students gives a state-approved imprimatur to schools which is tantamount to false advertising. Other states rely on Vermont's approval standards to enroll out-of-state students in Vermont approved schools and labelling schools as therapeutic when they do not provide treatment services for students is false. Vermont DOES have therapeutic schools which are approved by the state to provide treatment for students. These schools go through a more rigorous process (Concurrent Education Rehabilitation and Treatment (CERT)) than is included here, in part to satisfy MEDICAID requirements for treatment services. In order to provide treatment for students, the schools must have appropriately licensed/professional, clinical staff. If an approved IS does not have licensed clinical staff to provide treatment to students, it should not be labeled "therapeutic" anymore than a public school that has a social worker and a counselor on staff should be labeled "therapeutic." The VT Department of Mental Health has established minimum standards for children's mental health which should be linked to a determination that a school provides "therapeutic" services. Those schools which do provide treatment are associated with Designated Agencies. Only schools with qualified staff to provide treatment should be labeled "therapeutic" otherwise the label falsely implies services which are not available to students and is misleading. Link to standards and PNMI rules for a sample to go by for robust fiscal accountability: https://mentalhealth.vermont.gov/sites/mhnew/files/documents/Manuals/CMH_Guidance_2020_FINAL_9.10.2020.pdf https://dvha.vermont.gov/sites/dvha/files/doc_library/Adopted%20V.P.N.M.I.R.%20Effective%209.8.15.pdf
	"Tuition" definition links to SBE 2225.2 "Tuition for Out of State Schools" which does not makes sense. Tuition defined here only refers to the provision of general education. There is no definition for special education "tuition" only "special education fees"; these definitions are inconsistent with Section 2232 which purports to set tuition rates for schools serving IEP/504 students which uses the term tuition. If the intent is to provide these schools with "tuition", based on the definition section, the school is receiving funds for general education. The schools could then receive "special education fees" on top of general education tuition (generally the way the large academies work, tuition plus excess costs for special education or a separate program which may establish a separate tuition pursuant to 16 VSA 826. All schools should receive general education tuition as all schools must provide general education. The payment for special education should be clearly defined in these rules as excess costs or special education tuition. There is inherent inconsistency in schools which meet education quality standards and all the rest of the schools which do not meet those standards. There is inconsistency between statute rule and practice. There is no way for the state as a whole to manage special education costs without a breakout and identification of those costs from general education costs. There currently exists four different cost identification mechanisms (none of which use the same

	criteria): rate-setting in schools which only serve IEP/504, CERT rates, excess costs and announced separate special education tuition at independent schools meeting EQS. The move by the legislature to achieve parity in costs per 16 VSA 2973(b)(2)(B)(ii) is not reflected uniformly in these rules. There is no parity or direct-cost ratios for schools which limit enrollment and there should be. The consideration of direct-cost rates in Rule 2232(g) is not available because the proposed rate application elements do not require the appropriate level of detail (and breakdown of expenses/proposed budget) to enable this calculation.
Rule 2232 Rate Approval	The initial rate set for an independent school should be robust and mirror the CERT rate process or the Private Non Medical Institution (PNMI) rate process because of the level of detail required in those existing state-run processes. These 2200 series rules do not distinguish between non-profit and for profit schools. The PNMI rules, at least, limit revenue by for profit business to 5% annually. Excess revenues are recaptured and off-set operating expenses in the following year. Since education is an essential government service, the use of for profit businesses (privatizing an essential government service) the State Board can establish a reasonable cap on profits for schools. These rules do not make any effort to protect the Vermont taxpayer and the education fund from fraud, waste and abuse. These rules should state how much profit is reasonable for a for profit institution to earn from public funds. Use of private entities or contracts with private entities for essential government services should be accompanied by efficiencies/economies and equivalent quality of service. If the service is neither quality or economically advantageous for the state, then it results in a waste of precious resources and prevents Vermont from reaching any standard of affordability. Since there is a lack of disclosure of expenditures required by the proposed rate-setting process, profit/revenues in excess of actual expenses is impossible to determine. The board should establish what level of profit is included in "costs reasonably related to the level of services provided by the school" and a mechanism to recapture revenue in excess of that level.
Rule 2232(d)(1)	The use of broad categories of expenses in a rate application is unhelpful in determining a limited-enrollment independent school's alignment with direct-cost rates because of the necessary break-down in labor costs. For a school to list salaries for all employees in one category, it is impossible to distinguish administration, support, teaching, janitorial, clinical and non-teaching support staff. In order to determine alignment with direct-cost rates, the budget detail has to include costs by position/qualification/service. At a minimum, the budgets submitted by limited-enrollment independent schools should include the level of detail that public school budgets publish to voters. Since taxpayers do not get to vote down limited-enrollment independent school budgets, the oversight must be shouldered by the state. These rules do not provide sufficient detail of expenditures to enable the state to ensure limited public resources are not wasted. The lack of transparency in using broad categories in a rate-application, as set forth in these rules does not enable cost comparison, cost containment (forced efficiencies) and protect from fraud, waste and abuse.
	There are no provisions in these rules requiring accountability. A rate application should be signed under penalty of perjury by the limited enrollment director, owner and board chair to ensure an appropriate level of accountability for proposed budgets.

	There are no provisions in these rules to required reporting of actual expenditures on an annual basis.
Rule 2232 (j)	There are no provisions in these rules to hold schools accountable for inappropriate billing practices. To prohibit a school from exceeding the maximum tuition rate without an enforcement mechanism is hollow. Schools which exceed maximum tuition rates without permission from the Secretary should be required to refund the payments to school districts whose budgets are approved by taxpayers which include payments to independent schools.
	There are no provisions in these rules which distinguish between schools which operate on a school calendar similar to public schools (175 days) and those operating "year round" (220 days). The problem with the lack of distinction is the impact on what is included in "annual tuition." These rules do not account for the existing practice of independent schools charging extended school year (ESY) services outside of annual tuition. Since the max rate process includes ALL expenses divided by capacity, schools which charge districts for ESY services are using staff whose salaries were included in the max rate. This is double billing and these rules do not prohibit this practice. Similarly, these rules do not prohibit an approved limited-enrollment school from charging "consulting fees" on top of tuition. If labor and operational costs are fully paid for using the maximum tuition, any additional charges to a school district for any services (regardless of what they are called) is using tax-payer funding personnel to generate revenue in excess of expenditures (proposed budget). This practice is not prohibited by these rules. If a school receives public revenue from tuition to provide a educational services the school should not be able to "sell" additional services to school districts because there is no separation of budgets and personnel between the "business" and the school. This can only be accomplished at the state level as individual school districts do not have visibility of the "big picture" as total costs are spread over sending districts. Visibility of these practices can only be seen and regulated at the state-level. In simpler terms, one entity should not receive revenue for its total operational and labor costs from public funds and simultaneously operate a business selling services to public schools which are the source of the original public funds using the same staff/building/operations, etc. Those services were already paid for once. In order to have transparency a business budget must be separated from the school budget with separate personnel to protect the taxpayers and the education fund.
Rule 2232(d)	These rules do not define "restricted revenue sources"
Rule 2232(d) (1)	The rules do not specify or provide clarification on operational costs. The opacity leads to dilution of the education fund. Ex. Fees included in tuition rates paid to parent designated agencies which operate schools. This is only visible at the state level during rate setting. The rules permit such fees to be rolled into operational costs without scrutiny for their reasonable relationship to the level of services provided to students served. These rules do not provide guidance or clarification regarding program costs as to what expenditures may be included that are reasonably related to the level of services provided to students served.

Rule 2232(d) (2)	The rule does not provide for appropriate staffing ratios. Neither the Vermont Standards Board for Professional Educators (VSBPE) or the SBE has established appropriate and measurable staffing ratio standards (i.e., case load limits for special educators, case managing and providing specially designed instruction). In order to a school to be able to adequately serve students on IEPs, the amount of FTE's of qualified staff must be directly governed by the services required to be delivered by the school. Staffing ratio standards would have to consider the levels of student need (moderate, intensive needs etc.)
Rule 2229.6 and Rule 2232(d) (1)	All schools receiving public funds must be required to establish and maintain a financial management system which provides for adequate internal control assuring the accuracy of financial data, safeguarding of assets and operational efficiency. In addition, prior to receiving approval to receive public funds, all schools must be required to provide documentation to both sending schools and the state upon request to prove educational services were appropriately delivered. This includes attendance, transcripts, progress reporting, grades, etc., including documentation logs showing the delivery of special education and related services were delivered in accordance with IEPs/504 plans. All schools must be required to maintain student records and upon closure provide for the storage, maintenance and upkeep of those records, especially student transcripts/permanent records.

FW: Public Comment: Rules Series 2200

SBE - Public Comment <SBE.PublicComment@vermont.gov>
Fri 11/5/2021 5:19 PM

To: Olsen, Oliver <Oliver.Olsen@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>
Cc: Cutler, Judy <Judy.Cutler@vermont.gov>

Hi Oliver and Jennifer,
This public comment was received today.

Very best
Emily

Emily Simmons
General Counsel
Agency of Education
o) 802-828-1518| c) 802-595-4775
1 National Life Drivel Davis 5 | Montpelier, VT 05620-2501

From: Sue Ceglowski <sceglowski@vtvsba.org>
Sent: Friday, November 05, 2021 11:35 AM
To: SBE - Public Comment <SBE.PublicComment@vermont.gov>
Cc: Sprague, Suzanne <Suzanne.Sprague@vermont.gov>
Subject: Public Comment: Rules Series 2200

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Please find attached public comment from the Vermont School Boards Association regarding Rule Series 2200.

Thank you,

Sue Ceglowski, Esq.
Executive Director, Vermont School Boards Association
(802) 223-3580 ext. 113
(802) 275-8666 (cell)
Pronouns: she/her/hers (why)

10

VERMONT
SCHOOL BOARDS ASSOCIATION
Great Governance, Excellent Education, Strong Communities

TO: State Board of Education

FROM: Sue Ceglowski, Executive Director, Vermont School Boards Association

RE: Public Comment: Rule Series 2200 Independent School Program Approval

DATE: November 5, 2021

On November 4, 2021, the Vermont School Boards Association held its annual business meeting. At the meeting, the voting delegates passed the following resolution which addresses independent school program approval. We respectfully request that the State Board take this resolution into account in the Rule 2200 rulemaking process.

Section III, Subsection K Equal and Equitable Opportunities in Any School Receiving Public Funds

WHEREAS: recognizing the imperative value of education in sustaining a democracy, Vermont was one of the earliest states to enshrine a universal education guarantee in its state Constitution, and

WHEREAS: this purpose was first achieved through a network of post-colonial public, private, and religious schools, and

WHEREAS: national and state recognition of equity and equality demands that publicly funded initiatives and institutions be free of all forms of discrimination, and

WHEREAS: since Brown v. Topeka (1954), the state and the nation have a long and proud tradition of adopting and non-discriminatory laws, policies and practices, and

WHEREAS: the increasing awareness of discrimination on the basis of ability, socioeconomic status, racial group, school choice or other groups raise anew the issues of equity and equality,

WHEREAS: our work remains undone.

THEREFORE BE IT RESOLVED:

That the Vermont School Boards Association requests the General Assembly guarantee, through law, that all public and independent schools receiving public funds adopt and exercise, equal and equitable opportunities in admissions, programs and practices in order to operate in the state of Vermont, and

That the state invigorate the moribund school approval processes for public and independent schools to assure operational, financial, and educational accountability and excellence.

FW: Public comment on state board rule making in response to Act 173

SBE - Public Comment <SBE.PublicComment@vermont.gov>
Fri 11/5/2021 5:18 PM

To: Olsen, Oliver <Oliver.Olsen@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>
Cc: Cutler, Judy <Judy.Cutler@vermont.gov>

Hi Oliver and Jennifer,
This public comment was received today.

Very best
Emily

Emily Simmons
General Counsel
Agency of Education
o) 802-828-1518l c) 802-595-4775
1 National Life Drivel Davis 5 l Montpelier, VT 05620-2501

From: Rebecca Holcombe <rebecca.holcombe@gmail.com>
Sent: Friday, November 05, 2021 12:56 PM
To: SBE - Public Comment <SBE.PublicComment@vermont.gov>
Subject: Public comment on state board rule making in response to Act 173

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Please see attached my public comment on the proposed state board rules
Thank you for your service to the state.
Rebecca Holcombe

11

To: The Vermont State Board of Education
From: Rebecca Holcombe
Date: Nov 5, 2021
Re: Public comment on Rule 2200 series for Act 173 legislative changes

I am writing to offer public comment on proposed changes to the Rule 2200 series for Act 173 legislative changes.

It is both ironic and policy incoherent that even as Vermont (and the administration) work hard to move away from fee-for-service and to a value-based system of care in health care, VT is also moving to expand a weak architecture for fee-for-service for special education in private schools. The experience of health care is that fee-for-service has been more costly and led to worse outcomes for Vermonters by incentivizing expensive and sometimes unnecessary treatments, rather than preventative care.

Beyond the obvious reasons, this is problematic because at the same time as the state proposes to implement a census-based special education model for public school districts, it is doing the opposite for taxpayer funded private schools. Through Act 173, the state is putting public school districts on a budget, incentivizing them to focus on early intervention and prevention, and holding them accountable for the value and outcomes they deliver to students. At the same time, through the fee-for-service model for private schools, the state undermines that effort by leaving taxpayers statewide and public school districts responsible for paying private vendors (private schools) through a model that fragments care, incentivizes billable treatments and is not accountable for outcomes.

In most contracting relationships, the entity contracting for services can use competitive bidding to choose vendors, can specify the terms of a contract, and negotiate on price. Vendors can be required to justify expenses, provide proof of services and required to meet performance standards.

In this contractual relationship, which is defined in state board rules, school districts have very little leverage. School districts pay private vendors (private schools) for services for which:

1. districts are not allowed to negotiate or set prices,
2. districts have limited leverage to ensure services are proactively focused on value and prevention in ways that prevent high billable costs later, after problems have escalated, and
3. districts retain responsibility for the cost of remediation if the private school fails to provide services required by the IEP.

With respect to specialized private schools associated with the state Designated Agencies, districts are not afforded the opportunity to challenge billing in opaque budget categories (e.g. sudden increases in administrative charges or additional contracted services for students for whom they have paid full tuition). And, private schools associated with Designated Agencies are allowed to precipitously raise fees, while providing no justification. In such cases, school budgets may experience significant increases in cost, without commensurate improvements in service or outcomes.

As in health care, not only are many private options more expensive, but paying for special education services this way incentivizes provision of more services and more expensive services regardless of student need. This is particularly true when a partner uses education dollars to draw down a medicaid match. Again, this arrangement may actually lead to worse outcomes for students who would benefit from other services that are more likely to be provided under a lower margin business model, such as census-based budget models. For example, students who receive SLP services individually under a fee-for-service model, might receive them in social, evidence-supported (and less expensive) group settings in a value-based contest. And, instead of applying more one-to-one aides to children with challenging behaviors, a practice that is widespread and often associated with worse outcomes, schools in a value-based model might be incentivized to rely on other interventions with a more robust research base.

Given that fixing this incoherence may be a job that needs to be addressed by the legislature, the state board here can best serve the state, students and taxpayers statewide by addressing known risks of fee-for-service models, including:

1. the incentive to increase service volume and high margin (expensive) services,
2. the risk to taxpayer and districts of lack of transparency and accountability for vendors,
3. the tendency of vendors to prioritize more costly, defensive treatments after problems arise rather than early (less lucrative) intervention to prevent problems from arising and escalating out of control,
4. the challenge of managing a coherent system of care, and
5. the incentive for vendors to select clients/students that fit their business model at the expense of the equitable functioning of the system overall.

Private schools in Vermont are under no obligation to enroll students with disabilities, and they are not required to enroll taxpayer-funded students. However, if they choose to depend on public dollars and taxpayer-funded students, they are choosing to be a vendor of a public good, and should be accountable to the interests of Vermonters statewide, and not just the interests of the vendor's enrolled students and trustees.

In this memo, I will provide examples related to two of the risks inadequately addressed in this rulemaking process: **inequitable access** to publicly-funded services due to vendor (private school) enrollment practices in this market, and the resulting impact on the equitable function of VT's investment in publicly-funded education, and 2) **fee-for-service and the related risks posed by lack of transparency and accountability** for the use of taxpayer funds by vendors (private schools) in this sector. I will address these issues separately.

1. Equitable access:

The Problem:

The current rules draft undermines inclusive intent by preserving the requirement that any student with disabilities meet other enrollment criteria,so long as the "student meets the **other requirements of the school's enrollment policies**." So long as these students are not allowed to

enroll in a taxpayer-funded school because of criteria set by the school, **this is not a system of school choice, but a taxpayer-funded system of private schools that choose which students to serve.**

Proposed solution: Adopt equitable enrollment policies. I recommend that at a minimum, you consult the state of CA's requirements for enrollment in charter schools in CA, and use these as a model.

If a school is funded by taxpayers, during the enrollment process, the only information the taxpayer funded school should be able to request is the name of the student and contact information. Once the student has been enrolled, the private school can request records, including information related to economic status and disability status, and can work with the LEA on the placement. This practice is not without precedent. For example, the California Charter Schools Act states that: "A charter school shall admit all pupils who wish to attend the charter school" up to the school's operational capacity.[1] I encourage the state board to consult this brief by School and Colleges Legal Services in California, which explains CA's more equitable admissions process for taxpayer-funded schools: https://sclscal.org/authorizers-role-in-ensuring-charter-school-admissions-and-enrollment-processes-and-procedures-are-legally-compliant-k-12/

Rationale:
Currently, private schools that are taxpayer-funded have no obligation to equitably enroll students. In fact, many have enrollment policies that steer students towards other schools. This has the effect of de facto segregation of those other schools.

Here are a few examples of how taxpayer-funded private schools currently slant their enrollment, including in ways that will disproportionately sort students with disabilities away from many private schools. These policies direct students with disabilities back to more inclusive schools, primarily public schools. In the end, such practices don't need to be overtly discriminatory to be segregating in impact.

1. **Fees.** Many schools require fees beyond tuition for enrollment. In VT, where disability status is correlated with family economics, this criteria may disproportionately discourage enrollment of students with disabilities. Students who are economically disadvantaged may be deterred from even applying to some private schools because of extensive fees that are not covered by the tuition voucher. For example, on its website, MSJ states that families that enroll students are responsible for paying additional fees that add up to about $1,500 per child. Parents with means have the option of "buying" their way out of a $500 dollar fundraising obligation. Families pay an application fee, even though the school sent voucher

[1] California Education Code § 47605(d)(2)(A) (as amended Oct. 13, 2017)

districts invoices for about $600 more than the school's own stated cost per pupil cost of education (e.g. turning a profit on voucher-funded students). Simply posting a fee schedule like the one below is a deterrent to some families, because it communicates an implicit message about what the school expects of wealthy and less wealthy families.

- **New Student Registration/Enrollment Fees:** $125.00 per student, not to exceed $250.00 per family.
- **Re-enrollment for existing students:** $25.00 Early Registration Fee (before April 15, 2021, $125.00 after April 15, 2021.
- **Technology Fee:** $50.00
- **Lab Fee:** $75.00
- **Family Fundraising Obligation:** $650.00 ($0 if full participation) opt out for $600.00
- All Families are expected to fully participate in the (3) Fundraisers throughout the year. Once your family fundraising obligation is fulfilled, any additional money raised will be credited to your owed tuition only.
- **Textbooks:** $300.00**

Additional Financial Considerations For New Students:
Approximate Cost of School Uniforms: $250.00**

*There are additional fees for international and non-local students.
**This is an estimated cost for textbooks. Actual costs may be significantly lower or a bit higher.

If you have any questions about scheduling tuition payments, please contact Denise Watson via email at dwatson@vermontcatholic.org

In Vermont, people with disabilities are overrepresented in the population of people living in poverty, and people who live in poverty are more likely to have disabilities. Enrollment practices that discourage or make less wealthy families feel less welcome are also likely to disproportionately affect people with disabilities.

2. **(Not so) subtle steering.** Many non-public schools inquire about disability status as part of the application before students are admitted. In some states, charter schools are not allowed to ask about disability status until after students are enrolled, precisely to prevent steering or discouragement based on disability status. This is important: existing research on special education applicants and charter schools found they are less likely to return application queries from parents with students with significant disabilities.[2] Since taxpayer-funded private schools in Vermont have even fewer public obligations than charter schools, it is plausible the empirical pattern of lack of responsiveness to families of children with significant disabilities occurs here.

3. **Capping of enrollment of students with disabilities.** When some schools are inclusive of students with disabilities, whether public or private, and other nearby schools are not, tuition

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2 https://www.edweek.org/leadership/charter-schools-more-likely-to-ignore-special-education-applicants-study-finds/2018/12

schemes can concentrate students with disabilities in schools that are more welcoming. For example, Thetford Academy and Lyndon Institute serve a disproportionate number of students with disabilities in their market region. In 2017, the headmaster of Lyndon Institute wrote that because of increasing numbers of students with disabilities trying to enroll, her school would limit enrollment of students with disabilities who do not meet other acceptance requirements (a condition preserved in the proposed rules) and wrote: *"In order for a student to be transitioned to LI [Lyndon Institute] prior to the end of their 8th grade year, they must first be accepted."* [3] Where do students who are turned away go to school?

This freedom to decide who to accept persists in the draft rules:

> 2229.4 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.
>
> b) A school shall enroll 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. **Messaging:** Even without active exclusion, programs can discourage students with disabilities from applying through how they communicate about their program and about students with disabilities. For example, in a 2021 article in VTDigger, Christy Bahrenburg, director of advancement and communications for Rice Memorial High School, a parochial school in Burlington, told a reporter that Rice, "as a largely college preparatory-oriented school, does not offer any disability programming."[4] Implicit in this statement is the erroneous implication that having a disability is inconsistent with a college-preparatory program, and that the school's program is therefore not appropriate for students with disabilities. Messaging like this can deter students with disabilities from applying, which means they are likely to systematically "choose" public or more inclusive private schools instead, a form of segregation by "choice."

4. **Requiring test scores as part of the application and reviewing them for enrollment purposes:** When schools select for enrollment based on measures like standardized test scores, on which students with disabilities VT score lower on average, they disproportionately suppress enrollment of students with disabilities. For example, in 2018, the mean score on the SB ELA test for students with disabilities was 2460, but was 2598 for students without disabilities.

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[3] https://education.vermont.gov/sites/aoe/files/documents/edu-approved-independent-school-committee-additional-material_0.pdf

[4] https://vtdigger.org/2021/07/05/driven-by-covid-more-students-left-burlington-high-than-arrived-in-2020-21/

State of Vermont	Disability	No Special Ed	SB English Language Arts Grade 08	4925	2598.0
State of Vermont	Disability	Special Ed	SB English Language Arts Grade 08	904	2460.0

It's worth noting that some 50 percent of score variance in scores is explained by family wealth, gender and race, so when schools use test scores to select students, they will tend to skew their enrollment on those measures as well. [5] Even asking for these scores can discourage some candidates from applying.

5. **Requesting discipline records.** Many non-public schools in VT also request information related to academic or discipline problems during the application process. In general, students with disabilities (and students who are economically disadvantaged) experience the greatest disproportionality in discipline in VT.[6]

Table 8 – Excluded Student Population Data by 504 Status Students Experiencing at Least One Exclusionary Action School Years 2013-2015					
School Year	**Total**	**Not Eligible for 504**		**Eligible for 504**	
Enrollment		**Enrollment**	**Percent of Enrollment**	**Enrollment**	**Percent of Enrollment**
2013	79,801	76,372	95.7%	3,429	4.3%
2014	78,867	75,281	95.5%	3,586	4.6%
2015	77,763	74,227	95.5%	3,536	4.6%
2013-2015	**236,431**	**225,880**	**95.5%**	**10,551**	**4.5%**
Exclusions		**Exclusions**	**Percent of Students Excluded**	**Excluded**	**Percent of Students Excluded**
2013	4,589	4,188	91.3%	401	8.7%
2014	4,246	3,849	90.7%	397	9.3%
2015	3,726	3,416	91.7%	310	8.3%
2013-2015	**12,561**	**11,453**	**91.2%**	**1,108**	**8.8%**
	Comparison of Excluded Students	**Proportional Difference in representation between general and excluded population: (percent of Exclusions/percent of Enrollment)**			
2013		95.4%	Neutral	202.3%	Large Overrepresentation
2014		95.0%	Neutral	204.4%	Large Overrepresentation
2015		96.1%	Neutral	182.4%	Large Overrepresentation
2013-2015		**95.4%**	**Neutral**	**197.3%**	**Large Overrepresentation**

[5] https://pubmed.ncbi.nlm.nih.gov/26752444/

[6] https://education.vermont.gov/sites/aoe/files/documents/edu-legislative-report-exclusionary-discipline-response.pdf

Table 9 – Excluded Student Population Data by IEP Status Students Experiencing at Least One Exclusionary Action school years 2013-2015					
School Year	Total	Not Active IEP		Active IEP	
Enrollment		Enrollment	Percent of Enrollment	Enrollment	Percent of Enrollment
2013	79,801	65,916	82.6%	12,025	15.1%
2014	78,867	64,876	82.3%	12,110	15.4%
2015	77,763	63,681	81.9%	12,176	15.7%
2013-2015	**236,431**	**194,473**	**82.3%**	**36,311**	**15.4%**
Exclusions		Exclusions	Percent of Students Excluded	Excluded	Percent of Students Excluded
2013	4,589	3,209	69.9%	1,380	30.0%
2014	4,246	2,966	69.9%	1,280	30.0%
2015	3,726	2,476	66.5%	1,250	33.5%
2013-2015	**12,561**	**8,651**	**68.9%**	**3,910**	**31.0%**
	Comparison of Excluded Students	Proportional Difference in representation between general and excluded population: (percent of Exclusions/percent of Enrollment)			
2013		84.7%	Slight Underrepresentation	199.1%	Large Overrepresentation
2014		84.9%	Slight Underrepresentation	195.4%	Large Overrepresentation
2015		81.2%	Slight Underrepresentation	213.9%	Large Overrepresentation
2013-2015		**83.7%**	**Slight Underrepresentation**	**201.9%**	**Large Overrepresentation**

Simply asking for these records can deter applications from students with these records, who are disproportionately likely to be students with disabilities.

Has this student had academic or discipline problems in school? Yes_____ No_____ If yes, please explain: _____

_____

6. **Dismissal of students based on student behavior:** Private schools can reserve the unilateral discretion to dismiss (or suggest parents withdraw) students, as captured in this Long Trail School policy:

> **Dismissal/Withdrawal:** Dismissal of a student is at the discretion of the Head of School. At the Head of School's discretion, parents may be offered the option of withdrawing their child. If a student is dismissed or withdraws because of circumstances surrounding a discipline case, s/he may not return to campus until the following school year, unless permitted by the Head of School. Dismissal or required withdrawal will be noted on the student's official LTS transcript.

Grounds for dismissal are not spelled out. So long as no reason is given, or the reason given is not the child's disability, there is no remedy. And, any loss of service for a student on an IEP is the responsibility (and liability) of the sending district, and not the private school.

7. **Dismissal of students based on behavior of parents:** A private school can reserve the right to disenroll a taxpayer funded student, including a student with disabilities, based on unilateral discretion as to whether a parent's behavior is acceptable. For example, the Long Trail School recently added language to its handbook reserving the right to unenroll families if parental behavior was deemed unacceptable (see language in green below.).[7] A sending voucher district is responsible for any loss of services to a child with a disability if the child is unenrolled due to parental behavior.

> Any parent who acts unacceptably (e.g., untruthful or misleading on health or safety, uncivil or disrespectful, harassing, threatening, or causing disruption to the professional or academic climate) towards any faculty, staff, or student may be banned from the school grounds and/or school activities. In addition, such behavior may constitute grounds for the unenrollment of the family. LTS in its discretion will determine if and when this consequence is appropriate.

8. **Religious requirements and statements of faith** that must be signed as part of the application process can also separate students from taxpayer-funded services. For example, Grace Christian School asks applicants where they go to church, and requires applicants to sign a statement of religious faith to enroll, which includes statements like "We believe that God wonderfully and immutably creates each person as male or female. These two distinct, complimentary genders together reflect the image and nature of God. (Gen. 1:26-27)." This pledge is likely to discourage enrollment by members of other faiths, and by anyone who disagrees with the school's beliefs related to LGTBQ people, including students with disabilities. Yet, according to the VDH, people who are LGTBQ are disproportionately likely to also have a disability.[8] Title IX prohibits sexual harassment, failure to provide equal athletic opportunities, sex-based discrimination in courses and programs, and discrimination based upon pregnancy or parenting. However, Title IX doesn't apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization, as is the case in some approved religious schools.

9. **Exclusion of students eligible for 504 plans**: While the focus of rulemaking has been on how private schools will be compensated for services for students with disabilities, students with physical and mental disabilities also have a right to access to quality education, even though their particular disabilities are not covered by special education. These students'

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7 https://www.benningtonbanner.com/local-news/long-trail-school-board-of-trustees-resignation-letter-made-public-alleges-bullying-tactics/article_3ffb281e-2886-11ec-8bfa-1b32c922153d.html

8 https://www.healthvermont.gov/sites/default/files/documents/pdf/HSVR-BRFSS-2019-DisabilityDemographics-DataBrief.pdf

rights are protected by section 504 of the Americans with Disabilities Act, and all schools that receive federal funding, including related to school meals, are required to provide reasonable access to these students, including providing accommodations to support their access. Public schools do not receive special education funding for these students, and are incentivized to work proactively to provide access and prevent compounding challenges. In theory, federal regulations prohibit private schools from excluding students with disabilities for whom they are able to provide an appropriate education with "minor adjustments". But how this works in practice needs to be monitored, and can be dependent on the skill and robustments of the private school. To the extent that a private school unilaterally decides it cannot serve a child who may be eligible for services under section 504, this responsibility is shifted into other schools. (See email exchange in Appendix A.) For example, when St. Francis Xavier unenrolls a child, where does that child go? What is the impact on neighboring programs of this school's "inability" to provide access to education for a student with more challenging needs? To the extent that the state fails to track and address this kind of sorting "out" of some taxpayer-funded private settings, with commensurate concentration of need in more inclusive settings, the state is potentially funding segregation, in violation of the intent of Act 173.

B. Transparency and Accountability

The Problem:

The second major risk embedded in the rules is the risk to taxpayers posed by lack of accountability and transparency of private schools, including schools that specialize in serving students with disabilities. For just one recent example, in an internal October 2021 memo (see Appendix B), J. Deborah Ormsbee, Independent School Program Coordinator at the AOE, wrote to her supervisors: "I am unable to appropriately process and set tuition rates for approved independent schools associated with designated agencies." She explained:

> "Requests for clarification and accompanying support documentation, by AOE staff responsible for rate setting, **have not been addressed sufficiently, or at all,** by most designated agency finance divisions, during rate setting cycles, FY20 – FY22.
>
> Many designated agency schools **refuse to complete annual time studies**, to determine the actual percentage of time any designated agency employee devotes, to a school (in some cases multiple schools) to determine appropriate FTE salaries, corresponding benefits and to determine correct percentage of agency fees, per school program, to ensure compliance with State Board threshold, per expenditure as "reasonably related to the cost of the academic program." (Emphasis added.)

What do fee trends associated with opaque budget categories look like in practice? For one example, the Baird school, which has fewer than 11 students, charged no fees in FY20, but requested agency fees of $216,069 in FY22, with no justification.

This is but one example of the challenge of protecting the taxpayer interest in knowing that special education funds are only used for allowable purposes. Under the rules, as Ormsbee

documents in her letter (Appendix B), the AOE is not able to determine if fees are reasonable, and if billed costs are driven by allowable expenses.

The rules must ensure greater transparency and accountability for schools that are taxpayer -funded, and greater regulatory oversight to assure that Education Fund dollars are only used for approved educational purposes. The agency needs to be able to compel reporting that it needs to meet its statutory obligations with respect to oversight. And, it needs the capacity to withhold funding in cases where expenses cannot be substantiated. As Ormsbee noted:

> "The proposed tuition rate setting section of draft rules, will further restrict agency tuition rate oversight, under "role-up" category language, and reduce even further appropriate AOE leverage for obtaining clarity on tuition rate costs. Proposed Rules also strictly proscribes the types of document requests the agency may submit to any independent school applying for a tuition rate. The opacity of draft rules will significantly inhibit the ability of responsible AOE personnel from tuition rate setting and program oversight with fidelity, for purposes of setting a fair rate, cost containment and appropriate relegation of costs to IDEA, gen ed fund or treatment costs through Department of Mental Health CERT rate processes."

Currently, Private Nonmedical Institutions for Residential Child Care (PNMI) and Department of Mental Health CERT procedures are quite robust. They offer a stark contrast to the weak oversight provided in the state board's proposed rules for taxpayer-funded private schools. As a result, if there is cost shifting or excess billing, it will be to the Education Fund and to the less well protected education taxpayers.

Proposed solution: For special education services purchased from private schools, adopt rules that are comparable to the robust rate-setting standards and procedures used for setting rates for Private Nonmedical Institutions for Residential Child Care (PNMI) and Department of Mental Health CERT programs.

Rationale:

While many private partners do an excellent job of serving some of the state's most vulnerable children, this is not always the case. In my time at the Agency, we were aware of group-delivered services being billed at the higher rate for individual services, of unsubstantiated overhead and administrative billing, and of the agency's inability, given lack of transparency, to evaluate off-setting revenues to ensure non-duplication of payments. While the agency could, and did, withhold payment to school districts until they had resolved problems related to financial controls and appropriate uses of public dollars, the agency has no similar robust authority to compel private schools to substantiate costs and prove that expenses are allowable.

I have referenced Ormsbee's memo and circumstances specific to specialized schools for students with disabilities, but it is worth mentioning that this lack of transparency is a systemic issue. Across the education fund and all districts, lack of transparency adds risk to expenditures in voucher districts. While public school budgets are put together by democratically-elected boards, published, and then approved (or rejected) by voters, independent schools have few transparency obligations and thus present a different set of risks to the state.

Districts are required to use competitive bidding processes for contracts and subject to regulations related to conflicts of interests. In contrast, Vermont currently has few safeguards to ensure that independent schools use taxpayer dollars for students instead of private benefit. The lack of transparency makes it easier to hide excessive administrative costs and makes fraud and abuse much harder to detect.

Consider what is currently permissible in Vermont's taxpayer-funded private schools and their sending districts, all of which could be considered problematic:

- A private school associated with a Designated Agency (e.g. can refuse to complete annual time studies, to determine the actual percentage of time any designated agency employee devotes, to a school (in some cases multiple schools) to determine appropriate FTE salaries, corresponding benefits and to determine correct percentage of agency fees, per school program, to ensure compliance with State Board threshold, per expenditure as "reasonably related to the cost of the academic program." (See attached letter from Ms. Ormsbee at the AOE)
- A program that serves under 11 children that charged no fees in addition to tuition in FY20 can request $216,069 in opaque fees in FY22, and refuse requests for information that would justify the fee change. (See attached letter from Ms. Ormsbee at the AOE, referenced above.)
- A board chair in a public school district can also be the director of a private school that receives the lion's share of its funding from the district in which he or she is the board chair.
- A private school headmaster and trustees can set up a separate development corporation which compensates them as directors. Those same individuals, in their school administrator roles, can invest tuition dollars paid by the state [taxpayers] into the development corporation, which they oversee in their development corporation roles, where they can be used for non education purposes (e.g. investing in a wood chip business, for example). These public dollars can also be used to develop goods or services (e.g., real estate or curriculum) which the corporation can then sell or rent back to a taxpayer-funded school. The development corporation can compensate the school headmaster and board members in their roles as directors or trustees of the development corporation. See this link for an analysis by Dr. Preston Green of the risks and potential for self-dealing associated with this kind of related-party transaction[9].
- A person with a special education credential could set up a school for students with disabilities in his home, extensively renovate the home, put in a therapeutic pool, charge districts that place students there for the full cost of the renovation through tuition bills, then close the school with no obligation to repay the renovation expenses. There is no mechanism in the current rules for recapturing that cost to the taxpayers.

[9] https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1080&context=alr

Our children and our education fund are our public trust. You have been appointed to regulate a system of education that represents almost 80,000 kids and elected school boards across the state. You are custodians of the equity of this system, as well as the fiscal integrity of this system

Thank you for considering better protections both for students and for taxpayers as you engage in rulemaking.

Appendix A: Communications between AOE and St. Francis Xavier regarding the exclusion of a student likely to be eligible for a 504 plan

On Fri, Jul 16, 2021 at 9:11 AM Ormsbee, Deborah <Deborah.Ormsbee@vermont.gov> wrote:

Good Afternoon Mr. Hill,

It was recently brought to my attention that a parent of a student, enrolled at St. Francis Xavier who may be entitled to a 504 plan, was notified their child has been refused accommodations for his/her disability by your school. Specifically, the parent shared that refusal of accommodations for the disability was predicated by St. Francis School on the belief that 504 requirements do not pertain to their independent school's program.

After seeking guidance from the AOE's legal division, and a lengthy review of any school's responsibility, the issue as to the applicability of Section 504 to St. Francis is a matter of the school's status as a recipient of federal funds from the US Dept. of Education, St. Francis is still prohibited from discriminating against a student with a disability by Vermont law.

Therefore, to assist your school's administration to better understand the legal requirements for students with disabilities, I have inserted Vermont statutory requirements, expected of all schools in the state ***including independent schools***, to ensure compliance with ADA education requirements and state law prohibitions on discrimination.

1. Students with disabilities fall under programing, guidance and protection of the Federal Americans with Disabilities Act, which is very broad in its application. These students are not IEP students. However, there may be overlap with IDEA for some students with disabilities which are eligible for special education under IDEA but this issue will not be addressed in this email. Vermont law also specifically addresses expectations and requirements of both public and independent schools regarding access to education for all students with disabilities.

2. **§§4501 Vermont Public Accommodations Law Defined:**

    1. "Place of public accommodation" means any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.

    2. "Disability", with respect to an individual, means:
        a. A physical or mental impairment which limits one or more major life activities
        b. A history or record of such an impairment or
        c. Being regarded as having such an impairment

3. **§§4501 Public Accommodations**

    3. A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
    (Source: Vermont Education Lawbook, Vermont School Boards Association, 2020 edition)

The Agency of Education's 504 Handbook includes, in the introduction, a clear delineation between Federal ADA requirements and educational requirements for ***all schools***- public and independent.

> "Section 504 prohibits discrimination on the basis of disability which is defined in the Rehabilitation Act as a failure to provide students with disabilities the same opportunity to benefit from educational programs, services, or activities as provided to their nondisabled peers. This means that districts/schools must make programs and activities accessible as well as the buildings and grounds. As a civil rights statute, Section 504 focuses on ensuring a level of access to educational services (including both academic and extra-curricular activities) that is equal to the level of access provided to non-disabled students. This includes providing eligible students who have a physical or mental disability with a free appropriate public education (FAPE). "

(To access Agency of Education 504 Handbook go to: https://education.vermont.gov/sites/aoe/files/documents/edu-special-education-504-guide.pdf)

I hope clarification of these legal obligations of non-discrimination will assist St. Francis Xavier's staff with ensuring enrolled and future students are educationally protected in accessing their educational rights under The Americans with Disabilities Act and Vermont law. If staff at St. Francis Xavier require any additional information or assistance with meeting student requirements for non-discrimination on the basis of disability or would like to request educational resources, please contact me.

Best Regards,

J. Deborah Ormsbee
Independent School Program Coordinator II
Agency of Education
National Life Drive, Davis 5
Montepelier, VT 05602
802-828-1226
deborah.ormsbee@vermont.gov

From: Craig Hill <chill@sfxvt.org>
Sent: Tuesday, July 20, 2021 7:57 AM
To: Ormsbee, Deborah <Deborah.Ormsbee@vermont.gov>
Cc: Robin McCormick <robinmccormick@sfxvt.org>; Jeanne Gearon <jgearon@vermontcatholic.org>
Subject: Re. Student 504 Plans & Independent School Requirements

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Dear Deb,

Thank you for your email regarding our school's obligations under Section 504. You indicate in your note "that a parent of a student, enrolled at St. Francis Xavier who may be entitled to a 504 plan, was notified their child has been refused accommodations for his/her disability by your school."

While you do not mention the specific child or family, I am presuming I know the family to which you refer and I will respond based on that presumption. I will not identify the child or family by name on the off chance that perhaps you are referring to some other student of whom I am unaware.

The child in question does not have a physical disability, but rather has issues involving social, emotional, and behavioral matters. Our teachers, staff members, and administrators have worked continuously over the past four years to provide an environment and support system that would allow this student to succeed in the classroom. Sadly, these efforts proved unsuccessful as this student requires much more intensive help than we can provide.

The introduction of the state handbook on Section 504 states the following:

> Schools receiving federal funds, directly or indirectly, are individually responsible for compliance with Section 504. Federal regulations prohibit recipient independent schools from excluding students with disabilities for whom they are able to provide an appropriate education with **"minor adjustments."** (emphasis added)

As you know, the following are not considered "minor adjustments", however, would be necessary in order for this student to remain enrolled at Saint Francis Xavier: hiring additional personnel to work with the disabled student only, dealing with persistent disruption of classes resulting in other students' learning being hindered, and taking significant time away from the teacher's, principal's, student advocate's, and school health coordinator's regular responsibilities.

Saint Francis Xavier School is not an appropriate school for the student in question because we do not have the tools to meet this student's needs and we do not receive public funding to provide those services. No accommodations were denied to this student as your message suggests. The reality is that this student requires more than Saint Francis Xavier has the ability to provide. We are a private, Catholic school with very limited resources. We have gone above and beyond to fulfill any duty we had to the student in question. Our teachers and staff hope and pray the student's family will find an educational environment in which the student can thrive. It is clear that Saint Francis Xavier School is not that place.

Best,

Mr. Craig Hill
Principal
Saint Francis Xavier
chill@sfxvt.org
www.sfxvt.org

On Tue, Jul 20, 2021 at 8:42 AM Ormsbee, Deborah <Deborah.Ormsbee@vermont.gov> wrote:

Good Morning Mr. Hill,
Although it may seem like splitting hairs, language in regards to legal requirements for providing access to education matters. St. Francis will need to clarify with the parent the language used by your school in "denying" Section 504 student support services.

St. Francis School's inability to provide services for this particular student, as described in your follow-up email, is much different that stating that Federal Section 504 and Vermont's public accommodations laws do not apply to St. Francis; which is incorrect.

I encourage St. Francis School's administrators to proactively contact the AOE's legal team with questions regarding independent school requirements in serving future student populations that fall within any protected category identified by the Americans with Disabilities Act. The AOE's website, in particular the special education pages, provide applicable information for all schools in Vermont (public and independent) on matters relating to IEP and Section 504 students.

You may access these free resources and legal educational requirements by going to these resources:

https://education.vermont.gov/sites/aoe/files/documents/edu-series-2360-special-education-rules.pdf

https://education.vermont.gov/student-support/vermont-special-education/resources-for-special-educators-and-administrators

Please do not hesitate to contact me with any additional questions or concerns you may have.

Regards,

J. Deborah Ormsbee
Independent School Program Coordinator II
Agency of Education
National Life Drive, Davis 5
Montepelier, VT 05602
802-828-1226
deborah.ormsbee@vermont.gov

? **Craig Hill** <chill@sfxvt.org> Tue, Jul 20, 3:44 PM
to Ormsbee, Deborah

Greetings Deb,

Thank you for your attention to this matter and for the follow up email to me.

As an FYI, we have already conveyed this to the family as the family opted to have their attorney contact us. We have provided the attorney with the same information we provided to you. Namely that we did not deny the student accommodations. We provided the student the accommodations we are able to provide and that the student's needs exceed what our school is able to offer.

Best,

Mr. Craig Hill
Principal
Saint Francis Xavier
chill@sfxvt.org
www.sfxvt.org

Appendix B: Internal AOE communication explaining why the AOE staff person in charge of rate setting does not believe she can do her job, given lack of transparency and accountability, and providing specific examples.

VERMONT
AGENCY OF EDUCATION
1 National Life Drive, Davis 5, Montpelier, VT 05620-2501
(p) 802-828-1130 | (f) 802-828-6430 | education.vermont.gov

MEMORANDUM

TO: Patrick Halladay, Director & Josh Soulière, Assistant Director
Education Quality Division
FROM: J. Deborah Ormsbee, Independent School Program Coordinator, II
SUBJECT: Designated Agency Fees & Collaborative DMH CERT RATE setting Concerns
DATE: October 14, 2021

Work Supervision Request

I am unable to appropriately process and set tuition rates for approved independent schools associated with designated agencies. Designated agency school applications submitted in FY22 are reflective of on-going programming concerns on administrative agency fees as part of the tuition rate setting process for CERT rate schools.

Designated agency tuition rate applications do not meet current SBE Rules on allowability or align with agency of education policies regarding transparency of expenditures related to designated agency administration costs. As a result of increasing tuition rate setting pressures, I am requesting supervision assistance from leadership to:

- provide guidance regarding the current level of authority AOE rate setting personnel have for requesting clarity of designated agency fees as submitted in tuition rate applications, as well as process steps for non-compliance by an applicant for FY22 and subsequent rate setting cycles

- provide guidance regarding issue of opaque designated agency fees including program allocations, building allocations, program infrastructure fees, and in-direct administration costs

- assistance under proper authorization, establishing an internal system of rate setting under new Independent School Rule Series 2200, expected to be implemented FY23, regarding designated agency fees and in general- opaque cost categories that include supplies, equipment, contracted services, travel, staffing, benefits, operational costs, and requirement to include all off-setting revenues to ensure non-duplication of payments.

Context:

Contact Information:

If you have questions about this document or would like additional information, please contact:

J. Deborah Ormsbee, Independent School Program Coordinator, II deborah.ormsbee@vermont.gov

Prior to 2019, the Agency of Education and Department of Mental Health set CERT rate and tuition rates for approved special education independent schools, associated with a designated agency, using separate applications. Designated agency schools often applied for annual CERT rates before submitting a tuition rate application, resulting in artificial inflation of education tuition.

Prior to 2019, program costs not allowable under Department of Mental Health CERT application processes were, by default, passed onto and included in Agency of Education tuition rate calculations, due to schools having already received an official CERT rate letter from Department of Mental Health.

In March 2019 a process was developed between DMH and AOE to streamline and ensure that treatment and education costs would be correctly apportioned, per application for: staffing, benefits, operational expenses, and other program cost expenditures.

The new collaborative rate process was implemented FY20. All designated agency schools were provided with instructions, tech assistance by both agencies, as needed, and an application. Members of rate setting committees in both sister agencies, review CERT/Tuition rate application processes annually.

On-going Problems of Practice:

By FY21 designated agency fees included in rate applications began to exceed allowability thresholds established by State Board Rule Series 2200 and AOE policies for education portion of the collaborative DMH CERT application. Costs began to shift from academic programming, gen ed and special ed, to administrative, operational, and designated agency fees. Inclusion of new expenditures inserted in FY21 and FY22 applications include opaque definitions, such as: building allocation, program infrastructure, program allocation costs, as well as several varieties of in-direct administration agency fees not previously included. To illustrate this practice, several FY22 Washington County Mental Health tuition applications do not allocate any funding for either prerequisite general education, or special education academic programming in school budgets beyond FTEs. Significant program increases are relegated to two cost categories: staffing and administrative agency fees. For example, the FY22 tuition rate application for the Individual Program at WCMHS, includes a requested tuition rate for non-Medicaid eligible students in the amount of $193,000.00, FY22. The official tuition rate set by the AOE for special ed and general ed students for the IPS program, FY21, was $59,868.40.

Requests for clarification and accompanying support documentation, by AOE staff responsible for rate setting, have not been addressed sufficiently, or at all, by most designated agency finance divisions, during rate setting cycles, FY20 – FY22.

Many designated agency schools refuse to complete annual time studies, to determine the actual percentage of time any designated agency employee devotes, to a school (in some cases multiple schools) to determine appropriate FTE salaries, corresponding benefits and to determine correct percentage of agency fees, per school program, to ensure compliance with State Board threshold, per expenditure as "reasonably related to the cost of the academic program."

Currently, the Laraway School and East Valley Academy are the only designated agency schools that annually provide imbedded time-study data to ensure appropriately apportioned FTEs and corresponding benefits between treatment and education costs. Laraway is the only designated agency school that does not include agency fees, of any kind, or any other administrative costs, as part of the school's annual tuition rate application.

East Valley Academy is associated with The Clara Martin Center in Randolph and underwent CERT rate approval process through The Department of Mental Health, FY20. Both of EVA's CERT/Tuition rate applications included properly apportioned FTEs, benefits, and other program costs were equally transparent. The designated agency's administrative fees are a new addition to the EVA's tuition rate application; however, due to proper apportionment of staffing, fees do not currently necessitate additional

scrutiny or raise concerns The following three year data charts are reflective of agency fee trends, per designated agency, and fees are listed as either verified or unverified expenditures- meaning, requests for clarification by the AOE have not been met during tuition rate cycles, FY20 – FY22.

Data: High Level of Concern School Programs (Note: fees are aggregate of all administrative program fees included in rate applications: administrative, program infrastructure, program allocation, agency allocation and building allocation fees)

Designated Agency	Independent School Program	FY20Agency Fees & # students served	FY21 Agency Fees & # of students served	FY22 Agency Fees & # of students served
Howard Center	Baird Regular Day Program	Students: 43 $868,874.00	Students: 44 $257,844.00	Students: 42 $242,977.00
Howard Center	Baird Intensive Rate- *not currently an approved program -tuition for this program is intended to be additive to regular day tuition	Students: ** No fees charged FY20	Students: ** $129,602.00	Students: ** $216,069.00
Howard Center	Jean Garvin School	Students: 27 $219,504.00	Students: 27 $133,660.00	Students: 27 $204,735.00
NFI (Northeastern Family Institute)	Arlington School	Students: 40 $73,423.20	Students: 40 $170,427.00	Students: 40 $130,833.78
NFI	Cornerstone School	Students: 40 $130,455.00	Students: 40 $149,499.00	Students: 40 $152,007.94
NFI	East Meadows	Students: 18 $65,131.00	Students: 18 $103,686.00	Students: 18 $109,891.00
NFI	Turning Points School	Students: 27 110,423.51	No rate request application submitted	Students: 27 $180,819.00
WCMHS (Washington County Mental Health Services)	Choice High School	Students: 30 $98,774.00	Students: 30 $115,580.00	Students: 30 $219,927.00
WCMHS	Choice Middle School	Students: 16 $49,834.35	Students: 16 $57,573.00	Students: 16 $140,666.00
WCMHS	Beckley Day Program	Students: 12 $69,942.00	Students: 12 $69,942.00	Students: 12 $76,295.00

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WCMHS	Beckley Day Program	Students: 12 $69,942.00	Students: 12 $69,942.00	Students: 12 $76,295.00

WCMHS	IPS Program	Students: ** $96,244.00	Students: ** $96,244.00	Students: ** $112,866.00
WCMHS	Stars Program	Students: ** $99,523.00	Students: ** $99,523.00	Students: ** $90,327.00

Low Level of Concern School Programs

Designated Agency	Independent School Program	FY20 Agency Fee & # of Students Served	FY21 Agency Fee & # of Students Served	FY22 Agency Fee & # of Students Served
The Clara Martin Center	East Valley Academy	Students: 24 No agency fees	Students: 24 $98,604.00	Students: 24 $116,885.00
HCRS (Health Care & Rehab Services)	Kindle Farms Regular Day Program	Students: 37 $200,633.71	Did not apply for rate increase	Did not apply for a rate increase
HCRS	Kindle Farms Intensive 1:1 day program	Students: ** $132,239.68	Did not apply for a rate increase	Did not apply for a rate increase
WCMHS	Laraway	No fees	No Fees	No Fees

Summary Data:

Designated Agency	Agency Fee Totals 2020 -2022	FTE or other services toward academic programs	Services provided to independent school by designated agency staff or programs
The Clara Martin Center	$215,489.00	verified	verified
Howard Center	$2,273,265.00	unverified	unverified
Health Care & Rehabilitation Services	$332,873.39	unverified	unverified
Northeastern Family Institute	$1,376,596.43	unverified	unverified
Washington County Mental Health	$1,493,260.35	unverified	unverified

Laraway as part of WCMHS	No Fees	N/A	N/A
All Agencies	**Total Agency Fees included in Tuition**	**FY20 – FY22**	**$5,457,995.17** **Unverified Costs** **$215,489.00** **Verified Costs**

General Tuition Rate Setting for Designated Agency Schools:

A memo to heads of independent schools, from the Secretary's office in late winter 2019, reminded schools all tuition rate applications, FY20, must separate special education and general education costs to ensure that contracting apportioned costs to the correct source; gen ed fund and IDEA. Under these requirements, tuition rate applications submitted to the AOE FY20, were more transparent and scrutiny of expenditures for determining allowability under SBE Rules supported the Agency's goals for: special education cost monitoring, excess cost containment and to prohibit the comingling of special education expenditures with general education fund tuition costs.

A tuition rate setting memo released by the secretary's office early fall of 2019 rescinded the requirement for separation of special education and gen ed costs within tuition rate setting applications. As a result, current tuition rate calculations include both special education and general education costs. The only costs not included in an official tuition rate, for designated agency schools, are treatment costs associated with CERT rate eligible school programs. Yet, designated agency schools persist with including agency fees as part of regular tuition rate application, without verifying costs as associated with academic programing, only.

The Agency of Education has attempted to address the issue of cost containment, designated agency fee transparency and allowability for quite some time. Formerly released AOE guidance included in this tuition study, provides detailed information issued to both LEAs and approved independent schools, 2013-2019. Other previously released memos on designated agency schools, do not focus primarily on allowability requirements of agency fee costs and are not included in this specific program evaluation. Legal authorities on tuition rate setting specify:

Board Rule Series 2200 requires independent school tuition costs must be "reasonably related to the cost of the academic program." (SBE Rule 2228) Accordingly, Statute 16 V.S.A. §2973 states:

> "The commissioner shall establish minimum standards of services for students receiving special education in independent schools in Vermont; shall set, after consultation with independent schools in Vermont, the maximum rates to be paid by the department and school districts for tuition, room and board based on level of services and may advise independent schools as to the need for certain special education services in Vermont."

Provisions on tuition rate setting as outlined by both legal authorities do not currently address designated agency fee allocations. As a result, current Agency of Education personnel responsible for reviewing applications and setting rates do not have sufficient leverage to ensure correct apportionment of agencies fees as directly and "reasonably related to the cost of the academic program."

Future Concerns

Under current statutory and State Board of Education rules, the process of independent school tuition rate setting lacks specificity on allowable costs for general education, special education, designated agency fees and what other types of administrative fees are allowable as part of a maximum tuition rate specific to education programming.

Special education schools associated with designated agencies do not currently comply with

AOE requests for clarification of costs or provide requested supporting documentation under current rule series, 2360 and 2200.

Independent School Team members are concerned with draft Rule tuition language specific to tuition Rule 2228 requirements, currently open for public comment. The proposed tuition rate setting section of draft rules, will further restrict agency tuition rate oversight, under "role-up" category language, and reduce even further appropriate AOE leverage for obtaining clarity on tuition rate costs. Proposed Rules also strictly proscribes the types of document requests the agency may submit to any independent school applying for a tuition rate. The opacity of draft rules will significantly inhibit the ability of responsible AOE personnel from tuition rate setting and program oversight with fidelity, for purposes of setting a fair rate, cost containment and appropriate relegation of costs to IDEA, gen ed fund or treatment costs through Department of Mental Health CERT rate processes.

Previously Released Agency of Education Guidance, 2013 - 2018:


1291_001.pdf


DebQAliceF1015201 3.pdf


ContractingMemo_0 6062019.docx

FW: Public Comments Rule 2200 Series

SBE - Public Comment <SBE.PublicComment@vermont.gov>
Fri 11/5/2021 5:18 PM

To: Olsen, Oliver <Oliver.Olsen@vermont.gov>; Samuelson, Jennifer <Jennifer.Samuelson@vermont.gov>
Cc: Cutler, Judy <Judy.Cutler@vermont.gov>

Hi Oliver and Jennifer,
This public comment was received today.

Very best,
Emily

Emily Simmons
General Counsel
Agency of Education
o) 802-828-1518| c) 802-595-4775
1 National Life Drivel Davis 5 | Montpelier, VT 05620-2501

From: Marilyn Mahusky <mmahusky@vtlegalaid.org>
Sent: Friday, November 05, 2021 4:12 PM
To: SBE - Public Comment <SBE.PublicComment@vermont.gov>
Cc: mroy <mroy@cvsdvt.org>
Subject: Public Comments Rule 2200 Series

Thank you for your consideration.

Marilyn A. Mahusky
Staff Attorney
Disability Law Project
Vermont Legal Aid, Inc.
mmahusky@vtlegalaid.org
802-495-0494

Sent from Mail for Windows

(12)

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November 5, 2021

Oliver Olsen, Chair
State Board of Education
1 National Life Drive, Davis 5
Montpelier, VT 05620

Via Email: Oliver.Olsen@vermont.gov

Re: Proposed Changes to Rule 2200 (Independent School Program Approval)

Dear Mr. Olsen:

On behalf of the Disability Law Project of Vermont Legal Aid, Inc., I submit the following comments relative to proposed changes to the State Board of Education's Independent School Rules, Series 2200; specifically, those related to section 2229.1 and the definition of "Approved Independent School Ineligible to Receive Public Funds, section 2222.

As you know, the Disability Law Project represents students in matters related to their special education and related services. We also represent students who do not qualify for special education under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400 et seq., but who have disabilities covered by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq. Many of our clients live in school districts with school choice options, and these rules directly impact their right to the same educational opportunities as their non-disabled peers.

While we appreciate the need for rules to ensure Vermont's Independent Schools remain robust, and available to all eligible students, we are concerned about the interplay between the rights of students with disabilities in tuition districts to be admitted, like their non-disabled peers, to the independent schools of their choice.

Changes to Title 16, Section 166(b) effective on July 1, 2023, appear to require, prior to placement in an independent school (and consequent receipt of public funds), IEP teams to "approve" the placement of a student in an independent school prior to his or her application or enrollment, *e.g.*, before he or she decides which school to attend. This effectively precludes the child with a disability from considering the same school as his non-disabled peers or attending the same school as his non-disabled siblings. This is what in part Act 173 intended to address – LEAs determining which schools' students with disabilities can attend. This provision and the proposed implementing rule are not only inconsistent with the IDEA but have the effect of discriminating against students with disabilities by denying them an equal opportunity, if they live in a tuition town, to apply to and attend the school of their choice. 9 V.S.A. §4502(c)(1).

The statutory language is mirrored in proposed Rule 2229.1:

> 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 an approved independent school as an appropriate placement and least restrictive environment for the student by the student's IEP team or by the LEA ...[1]

Rule 2229.1 (as proposed).

Our concern is with the latter phrase, "... *and who is placed in an 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 statutory language and proposed implementing rule conflict with the IDEA and misinterpret the term "placement" as that term is used and understood in the IDEA. "Placement" and "Specific Site" are distinct terms and concepts under IDEA.

Many factors must be considered in making a student's placement determination under the IDEA. 34 C.F.R. §300.116. Placement decisions can only be made after the development of an IEP and in accordance with its terms. 65 Fed.Reg. 36,591 (2000). Equally important is ensuring conformity with the least restrictive environment provisions. 34 C.F.R. §300.116. "What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs." *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994).

"Placement" in the IDEA context is not necessarily in a specific school, or classroom, but refers to the characteristics of the program, including the student to teacher ratio, the availability of supports and services, its nearness to the child's home, among other factors. Importantly, for LRE purposes, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116. For students in tuition towns, often the school he or she would attend if nondisabled is the independent school in their community. What the statute and proposed rule do is treat a student with a disability differently from his or her non-disabled peers. The student would be prevented from applying to or enrolling in an independent school until AFTER the IEP team met and essentially "approved" his or her choice. That is not what the IDEA intended. And, it is not what Act 173 intended.

In adopting Act 173, the General Assembly recognized that "a student on an individualized education program is entitled, under federal law, to a free and appropriate public education in the least restrictive environment in accordance with that program. The changes to State funding for special education and delivery of special education services as envisioned under this act are intended to facilitate the exercise of [and not to interfere with] the exercise of this right." Act 173.

There is nothing under federal law that precludes an LEA from offering a student enrolled in an independent school his or her IEP supports and services in a different setting, or in a different manner. For example, a student needing physical therapy as a related service could receive that

---

[1] We are not concerned with and are not commenting on those students enrolled in independent schools pursuant to a written agreement between the LEA and the school.

service from a traveling physical therapist under a contract with the LEA, or the student could travel to the nearest public school for that service. In fact, these are the kinds of flexibilities intended in changing to a census-based funding model.

Our overarching concern in adopting this rule is that students with disabilities who live in tuition towns will be directed away from independent schools by IEP teams even before they have a chance to apply or enroll. That is the opposite of what was intended by Act 173 and puts the LEA in a position of making "placement" decisions that limit a student's choice. Limiting choice, preventing a child with a disability who lives in a tuition town to choose an independent school, separate and apart from the delivery of his or her IEP services, is problematic. It runs afoul of the antidiscrimination provisions of Section 504 and Vermont's Public Accommodations Act. Both the statute and the proposed implementing rule need to be revised so as to not interfere with the student's right to choose where he or she is educated.

This provision should again be considered by the Census-based Funding Advisory Group prior to adoption.

Thank you for your consideration.

Sincerely,

Marilyn A. Mahusky
Staff Attorney

C: Meghan Roy, Chair, CBFAG