

## MEMORANDUM

TO: SENATOR PHILIP BARUTH, CHAIR  
APPROVED INDEPENDENT SCHOOL SUMMER STUDY COMMITTEE  
FROM: SETH BONGARTZ, ELIZABETH SHAYNE, MICHAEL LIVINGSTON  
RE: PROPOSED LANGUAGE FOR FINAL REPORT SUBMITTED BY REPRESENTATIVES OF THE  
INDEPENDENT SCHOOL COMMUNITY  
DATE: DECEMBER 11, 2017

The independent school community submit the following for consideration by the full committee for inclusion in the committee's final report. We submit this early in the week before our final meeting on December 15<sup>th</sup> so that it can be posted and available to all for consideration. The proposed language is consistent in both intent and content with the proposals we have made over the course of the summer with regard to financial capacity and a practical mechanism for the smaller independent schools to provide special education services to those needing them.

From the perspective of the independent school community, the report proposed below is the result of significant compromise and workable proposals. They are responsive to the committee's legislatively established charge and we are hopeful they will be embraced.

### Introduction

Vermont independent school approval criteria have been under review and discussion in the State Board of Education and more recently in this legislatively-mandated study committee.

The committee's charge was to develop language to present to the committees of jurisdiction prior to the start of the 2018 legislative session. In part because the issues are so complex, the summer study committee has determined it more prudent to develop a report focused principally on ways of providing reasonable assurances of independent schools' financial capacity to meet their stated missions and to develop a framework by which approved independent schools could be capable of providing special education services.

The committee therefore focused principally on possible ways of providing reasonable assurances for the ability of independent schools' financial capacity to fulfill their stated missions and develop a framework by which approved independent schools could be capable of providing special education services to students with disabilities.

This report provides context and makes recommendations pursuant to the legislative charge to the committee.

## Financial Capacity

### Analysis

**State law currently requires independent schools to demonstrate their financial capacity to meet their stated objectives as a condition for approval 16 V.S.A. § 166(b).**

Half of Vermont’s 44 state approved non-sectarian general education independent schools are accredited by the New England Association of Schools & Colleges (NEASC). The Agency of Education and the State Board of Education accept NEASC accreditation as a rigorous standard that satisfies the state’s regarding a school’s financial capacity.

The 22 NEASC-accredited schools are the principal independent education providers in Vermont. The 22 approved independent schools without NEASC accreditation are substantially smaller. Details are shown in the table below:

	Accredited Schools			Non-Accredited Schools		
	Total	Public Tuition	Public %	Total	Public Tuition	Public %
Total Enrollment	4,588	2,589	56%	1,106	120	11%
Median	115	34		33	4	
Number of Schools	22			22		

The

accredited schools enroll 91 percent – all but 120 -- of publicly tuitioned students attending approved independent schools. Because of their accredited status, their financial capacity is presumed to have been demonstrated beyond Vermont state standards.

**The financial capacity discussions within the Study Committee apply to the 22 non-accredited schools, enrolling only 120 students with public tuition support.** These 22 schools range in total enrollment size from 4 students (Sugarwood School, Rutland) to 169 students (Orchard Valley Waldorf School, East Montpelier). Half of these schools enroll fewer than 33 students.

The risk exposure to taxpayers and to students involving financial failure of any of these 22 schools is very small, for two reasons. First, independent school closings have routinely been well managed. Though five small approved general education independents closed in the last eight years, none did so in anything other than an orderly manner and no taxpayer funds were lost. Second, the financial impact of a failure of a school with the median of four publically tuitioned students is minimal, one semester of tuition for a small handful of students. On top of that, of course, is the possibility of a lien on school assets or through use of the Vermont False Claims Act 32 V.S.A. §§ 630-640.

Because the financial capacity issue is very narrow and the actual risk very small, new financial capacity requirements should be narrowly tailored. And because resource constraints are a very significant factor in financial capacity determinations, requirements should be designed to minimize resource demands.

NEASC accreditation is too costly for the smaller independent schools. Creating a different yet burdensome financial capacity test that small schools would find difficult or impossible to meet

would be an unnecessary and, as a practical matter, destructive response. And, while the Agency of Education has reviewed independent schools in the past, now neither it nor the State Board of Education have the resources needed to conduct financial capacity reviews.

**New financial capacity requirements should therefore:**

- ◆ Be narrowly tailored to the low risk of loss of public funds due to school failure; and
- ◆ Balance the gauging of financial capacity against the resource constraints of both the state and small independent schools seeking approval.

**Financial Capacity Proposal**

**The independent schools community offers a three-point proposal to meet these constraints.**

**First**, deem any of the following submissions as demonstrating financial capacity:

- ◆ a statement of financial capacity prepared by an accrediting agency (NEASC, e.g.), a licensed CPA or a peer reviewer; or
- ◆ an audit report; or
- ◆ an IRS Form 990 with an accompanying statement of capacity provided by a board of trustees.

No additional review or analysis would be required on the part of the state; financial capacity is verified by those with expertise, such as an accrediting agency, Certified Public Accountant, or independent peer reviewer, or attested to by a board of trustees having a fiduciary obligation.

**Second**, establish criteria for events that must be reported to the AOE within five days and which then could trigger inquiry into a school’s financial capacity and possible subsequent action including conditional approval or denial of approval. Such events include:

- ◆ failure to pay federal/state payroll tax obligations;
- ◆ failure to make required retirement contributions;
- ◆ use of designated funds for non-designated purposes;
- ◆ withdrawal or conditioning of accreditation for financial reasons;
- ◆ filing a petition for bankruptcy.

**Third**, develop a state-level peer review process similar to that performed by NEASC, that would come into play at the request of the AOE should one of the above-described events occur at an approved independent school. This proposal accesses the expertise within the Council of Independent Schools (CIS)—the statutory advisory body to the AOE—whose members have from time to time been accessed by the Secretary for peer review activities. CIS members are heads of independent schools, some of whom are NEASC members who conduct reviews of independent schools for accreditation purposes. The review report would potentially find a lack of financial capacity, find that there is sufficient financial capacity or perhaps something in between. In the event the review report found something less than financial capacity it would, unless the review committee were to find no reasonable potential for remediation, set forth a plan for strengthening/insuring financial capacity.

**Special Education and Open Enrollment**

## Analysis – The Independent Schools

**Independent schools are prohibited from engaging in discriminatory admissions practices** by federal and state nondiscrimination and public accommodations statutes. Independent schools must provide reasonable accommodation and it is impermissible for an independent school to ask direct or indirect questions about an applicant’s disability or to make unnecessary inquiries related to the existence of a disability.

In addition, federal law is clear that the obligation to provide a free appropriate public education (FAPE) through special education services and to disburse special education resources rests solely with the Local Education Authority (LEA, which in Vermont is the supervisory union). Federal law bars independent schools from having the direct access to special education resources that is enjoyed by public schools.

Eleven of Vermont’s 44 approved independent schools have special education approvals in some or all disability categories. These schools enroll 2,422 publicly-tuitioned students, which is 89 percent of all students publically-tuitioned to independent schools. Put differently, **only 287 publically-tuitioned students -- eleven percent -- attend an independent school currently without a special education approval.** Details are shown in the table below.

	<b>Number of Schools</b>	<b>Total Enrolled</b>	<b>Publicly Tuitioned</b>	<b>Public %</b>
Schools with all Approvals	6	2,651	2,099	79%
Schools with some Approvals	5	532	323	61%
Schools without Approvals	33	2,511	287	54%

The five schools with approvals in fewer than all categories are approved in categories containing the largest populations of students with disabilities. This means a school with approvals in two categories is capable of providing special education services to 46 percent of all students with disabilities. A school with approvals in four categories is capable of serving 77 percent of all students with disabilities. The five least populated disability categories together include only 2.9 percent of all Vermont students with disabilities.

While the data above show 33 schools without special education approvals, **one should not assume these schools are doing nothing to support students with disabilities or unusual needs.** Quite the contrary, many students eligible for special education or just short of eligibility are attending an independent school of their choice because their families believe the school is meeting their student’s needs in ways they had not previously been met. In some cases, these are students whose families were dissatisfied with services provided in a general-purpose school. Many independent schools include within their mission a focus on highly individualized instruction and a culture of inclusion of students with unusual needs. Thus, while they may not have special education approvals, they are meeting often highly particularized needs that have not been or cannot be met in a general-purpose school.

Many approved independents include in their mission support for students who have done poorly in other schools. While many of these students are not special education-eligible, they definitely need a school with sensitivity to their struggles and the patience and expertise

needed to reawaken them to their potential for success. Statistics on these schools do not show up in AOE reports, but the students often saved are very real.

Several of the 33 schools without special education approvals have so few publically-tuited students that they will find it easy to give up their general education approvals and stop taking publically-tuited students if special education requirements are made too stringent. This would have the perverse effect of denying to students of low-income families access to the specialized education they need in order to thrive.

### **Analysis – The Resources and Burdens**

#### **Special education poses very challenging administrative burdens for independent schools.**

The independent schools community has pointed out that the AOE's administration of the independent school special education approval process has often been slow, particularly onerous for first-time applicants and sometimes inscrutable. This general regulatory situation has been a strong disincentive for schools to gain and manage special education programs.

More fundamentally, Independent schools have raised strong concerns regarding the lack of special education professionals—special educators, speech & language pathologists, etc. — to serve students in small independent schools. Both the AOE and the Council of Special Educators have acknowledged this reality. In fact, as a practical matter, the challenge is currently insurmountable.

Additionally, the independent schools have expressed concerns over the complex, lengthy process required to obtain special education approvals. Concerns have been expressed in the study committee with respect to the AOE's capacity to conduct special education approvals for independent schools expeditiously. It has also been brought to the attention of the study committee that the process for approving independent schools for special education is more burdensome than it is for public schools.

Finally, the independent schools have raised issues with regard to the rate-setting procedures, particularly as they relate to the provision of special education services.

Given all of the foregoing, one may reach several general conclusions:

- ◆ Large independent schools with diverse mission objectives have already included special education services in their programs.
- ◆ Few publically-tuited students are attending schools that are unapproved for any special education services.
- ◆ Smaller schools with limited administrative resources find the challenge of gaining special education approvals and managing the substantial administrative overhead to be more than they can reasonably manage.
- ◆ There is an acute shortage of qualified special educators, making it effectively impossible for the smaller independent schools to access this special category of educators, especially in view of the fact that need may arise infrequently or never in any given small independent school.

- ◆ The AOE's rate setting procedures are a further impediment to small independent schools offering special education services.
- ◆ Excessively stringent special education requirements likely will result in fewer school choice opportunities when schools choose to give up approvals, thus taking choice from moderate and low-income families.

Independent schools view the landscape described above as a very narrow issue. **The goal in their view should be to remove barriers to providing special education services to which students are entitled.** Streamlining the special education approval process and rate-setting process should be the first step.

**The independent schools have proposed a collaborative resource sharing model with the LEAs.** This model acknowledges two key realities: Special education is a student-based federal entitlement for students with disabilities; and professional special education resources are by federal law housed within the LEAs.

The members of the independent school community, like all professionals involved in this conversation, wish to insure that special education services are delivered properly and that the students in need of these services are well-served. This can be accomplished regardless of location assuming the proper staff is involved. In order for small independent schools to deliver these services, independent schools must have equal access to special education resources to which the students are entitled.

These two initiatives—removal of barriers and equal access to resources—would make it practically possible for those schools that are not currently approved for special education to provide services.

**Independent schools (also) believe diversity in educational offerings is important.** Small independent schools tend to come into existence to meet particularized student needs that are not/cannot be met via general-purpose schools. They have expressed concerns about proposals that would create uniformity, or would undermine the good work that many independent schools are doing for students that have struggled in other settings. It does not make sense to force an independent school that is serving students well in an alternative model to conform to a special education model that is not right for the student as a condition of receiving public dollars. It is critical that these considerations not be lost in the conversation.

### **Special Education Proposal**

Independent schools should have equal access to the special education funds and resources managed by Supervisory Unions, and the Agency of Education should simplify its rate-setting and either simplify or eliminate as unnecessary its approval processes so that schools are not deterred from engaging in special education due to unmanageable administrative burdens.

IEP Teams should give equal consideration to public and to independent schools when considering placement recommendations for disabled students eligible to choose an independent or public school.

Home LEAs should make available the necessary teachers, administrative support and other resources that make up the special education service entitlement of any student with a disability who chooses to enroll in an independent school.

LEAs, in consultation with independent schools, should adopt a standardized protocol for special education resource accountability and financial transactions. This requirement is intended to ease the administrative burden on independent schools that serve disabled students from multiple LEAs.

LEAs, in consultation with independent schools, should adopt a collaborative resource sharing model that addresses protocols for oversight and supervision of staff, compliance with school policies, etc.

The Agency of Education should fulfill its special education rate setting responsibilities in a timely manner, so that independent schools have adequate time before the beginning of a school year to arrange their services and manner of delivery. The Agency's recent difficulty in doing so have created notable inconvenience and significant added costs for schools currently providing special services and are a disincentive to other schools considering adding special education services.

A new independent school tuition rate ceiling formula that more properly compensates independent schools for educating publically-tuited students should be adopted. The current tuition rate-setting formula does not adequately provide for the added administrative overhead involved in the provision of special education services.

## **Conclusions**

Often lost in this discussion is a sound understanding of the outcomes independent schools deliver for the young people we serve. The vast majority of publically-tuited students served are at schools that are both nationally accredited and are approved in all special education services. This is therefore a very narrow issue in terms of school size and number of publically-tuited students.

The independent schools community is committed to properly calibrated education reforms that offer strategies for demonstrating financial capacity as well as those that address questions about special education services.

The special education proposal in particular—to permit students with disabilities to enroll in any approved independent school—is a major change and is very responsive to the long-standing requests from the public education establishment.