

Report of Approved Independent Schools Study Committee

December 2017

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I. EXECUTIVE SUMMARY

In November 2015, the Vermont State Board of Education proposed a series of amendments to the existing 2200 Series of its Rules and Practices, those governing the approval of independent schools in Vermont. Whatever their actual merits or demerits, the amendments proved controversial, both within the independent school community and within the administration of then-Governor Shumlin.

As a result, the administrative process of approval (movement of the proposed amendments from ICAR to LCAR, specifically) was slowed substantially.

In January 2017, the Senate Committee on Education began taking testimony on the proposed amendments to the 2200 series, with an eye toward facilitating agreement between the State Board (and representatives of public schools) and representatives of the independent school community. After several months of committee testimony, and consultations between the State Board and the independent school representatives, it became clear that agreement would remain elusive. As a result, the Senate Committee on Education drafted and passed legislative language designed to clarify the intent of the General Assembly with regard to the issues and proposed amendments at issue. The House agreed to that language and it was incorporated into 2013 Acts and Resolves No. 49, commonly called Act 49.

Accordingly, Act 49 charged this study committee to seek a way forward on three areas of concern: whether receiving state tuition dollars should be conditioned on open enrollment; how independent schools should deliver special education services, and in which categories; and what forms of financial disclosure should be mandatory for approved independent schools.

Section 42(f) of Act 49 makes clear that it is the intention of the Vermont General Assembly to resolve these contentious issues in as direct a manner as possible. It states, in part, “It is the intent of the General Assembly to resolve the issues raised by the State Board of Education’s proposed amendments to the 2200 Series of its Rules and Practices initiated by the State Board on November 13, 2015 (Rules for Approval of Independent Schools) after taking into account the report of the Committee required under subsection (e) of this section.” The committee’s charge also specifically mentions that this report should include “recommendations for any amendments to legislation.”

To this end, and at the discretion of the Chair, the study committee spent a good deal of its time working through bullet-point presentations by several of its participants, and then attempting to turn those presentations—or the elements of them that seemed to elicit the most mutual agreement—into workable drafts of legislative language.

While in this way the committee was able to make substantial headway on language setting forth strengthened requirements for financial disclosure, it was unable to reach a similar level of agreement and progress toward language on the delivery of special education services by approved independent schools in Vermont.

The study committee did agree, unanimously, that Vermont students with disabilities should be free to attend the schools that they, their parents, and their local education agency deem best suited to them.

In large part, the remaining disagreements are financial and bureaucratic in nature. Our charge as a committee was to deliberate not over whether approved independent schools should deliver special education services but how they might best do so. The representatives of the approved independent schools on the committee made it clear from the start that they wished to deliver those services, but in order to ensure the viability of these schools, any additional financial and administrative burdens incurred by the schools in delivering those services would need to be addressed adequately. Their worry was that the extension of a general special education mandate might put smaller independent schools out of business if not properly backed with public resources. Other committee members worried that such an extensive provision of public resources might adversely affect the public school system in general, and that independent schools do not currently have in place the cost containment measures similar to those found in public schools.

The committee as a whole had several other worries: that there may be an insufficient supply of qualified special education teachers and administrators to staff approved independent schools; that the Agency of Education would be unable to process the sudden flood of independent school applications for special education qualification; and that any intervention into the current system of delivery might inadvertently run afoul of complex Federal requirements surrounding the delivery of special education services.

Section V of this report contains the draft legislative language mentioned above. It does not at this point represent a consensus product of the study committee, but rather an indication of where our efforts to reach consensus broke off.

II. THE COMMITTEE

The Approved Independent Schools Study Committee was established by 2017 Acts and Resolves No. 49, Sec. 42. *See* Appendix A.

The Committee consisted of ten members:

- (1) One current member of the Senate appointed by the Committee on Committees: Senator Philip Baruth, *Chair*.
- (2) One current member of the House of Representatives appointed by the Speaker of the House: Representative Emily Long.
- (3) The Chair of the State Board of Education or designee: Bonnie Johnson-Aten.
- (4) The Secretary of Education or designee: Rebecca Holcombe.
- (5) The Executive Director of the Vermont Superintendents Association or designee: Jeffrey Francis.
- (6) The Executive Director of the Vermont School Boards Association or designee: Nicole Mace.
- (7) The Executive Director of the Vermont Independent Schools Association or designee: Seth Bongartz.
- (8) Two members of the Vermont Council of Independent Schools, chosen by the Chair of the Vermont Council of Independent Schools: Michael Livingston and Liz Shayne.
- (9) The Executive Director of the Vermont Council of Special Education Administrators or designee: Jo-Anne Unruh.

The Committee was staffed by: Jim DesMarais, Office of Legislative Council, and Suzanne Sprague, Agency of Education.

III. THE COMMITTEE'S CHARGE

2017 Acts and Resolves No. 49, Sec. 42 created the Approved Independent Schools Study Committee “to consider and make recommendations on the criteria to be used by the State Board of Education for designation as an ‘approved’ independent school.” Act 49 provided that the Committee should “consider and make recommendations on the criteria to be used by the State Board of Education for designation as an ‘approved’ independent school, including the following criteria:

- (1) the school's enrollment policy and any limitation on a student's ability to enroll;
- (2) how the school should be required to deliver special education services and which categories of these services; and
- (3) the scope and nature of financial information and special education information that should be required to be reported by the school to the State Board or Agency of Education."

Act 49 directed the State Board of Education to suspend further development of the amendments to its rules for approval of independent schools, pending receipt of the report of the Committee, and to develop further these amendments after considering the Committee's report.

The Committee was authorized to meet up to seven times and directed to file a report of its recommendations and any proposals for legislative action with the House and Senate Committees on Education and the State Board of Education.

IV. MEETINGS AND WITNESSES

The Committee met seven times in 2017: May 30, July 19, August 14, October 13, November 3, November 17, and December 15.

The following witnesses appeared before the Committee:

Molly Bachman, General Counsel, Agency of Education

Susan Marks, Agency of Education Special Education Consultant, WestEd National Center for Systemic Improvement

Karen Price, Vermont Family Network

Erin Maguire, Council of Administrators of Special Education

Rick Gordon, Compass School

Randi Kulis, Bennington-Rutland Supervisory Union

Jim DesMarais, Legislative Counsel, Office of Legislative Council

In addition to witness testimony, members of the Committee also made presentations to the Committee.

V. FINDINGS AND RECOMMENDATIONS

The scope and nature of financial information and special education information that should be required to be reported by approved independent schools to the State Board

The Committee was unable to reach agreement on proposed legislative language concerning the scope and nature of financial information and special education information that should be required to be reported by approved independent schools to the State Board. Set forth below is the last draft of the proposed legislative language that was discussed by the Committee. The main areas of disagreement among Committee members on this language concerned whether the information to be submitted to the State Board would be sufficiently robust to facilitate a meaningful review of the school's financial capacity and the degree to which the State Board would have discretion to determine whether the material submitted demonstrated the school's financial capacity.

Proposed legislative language considered by the Committee (not agreed to):

16 V.S.A. § 166(b) is amended to read:

* * *

(5) The State Board may revoke, ~~or~~ suspend, or impose conditions upon the approval of an approved independent school, after opportunity for hearing, for substantial failure to comply with the minimum course of study, for failure to demonstrate that the school has the resources required to meet its stated objectives, for failure to comply with the Board's rules for approved independent schools, or for failure to report under subdivision (4) of this subsection (b). Upon revocation or suspension, students required to attend school who are enrolled in that school shall become truant unless they enroll in a public school, an approved or recognized independent school, or a home study program.

* * *

(8)(A) An independent school shall seek to demonstrate its financial capacity for approval under this subsection by providing to the State Board with its application for approval:

(i) a statement of financial capacity for the school's current or immediately preceding fiscal year issued by:

(I) an accrediting agency recognized by the State Board;

(II) a licensed certified public accountant or licensed certified public accounting firm; or

(III) a peer review team or independent reviewer appointed by the [Council of Independent Schools] and approved by the Secretary of Education;

(ii) an audit report for the school's current or immediately preceding fiscal year issued by a licensed certified public accountant or licensed certified public accounting firm; or

(iii) IRS Form 990 for the school's current or immediately preceding fiscal year.

(B)(i) The State Board shall find that an independent school that submits any of the documentation under subdivision (A) of this subdivision (8) has demonstrated the financial capacity for approval under this subsection if it finds that:

(I) the documentation demonstrates that the school has the financial capacity to meet its stated objective for the period covered by the documentation; and

(II) the documentation does not contain information that causes the State Board to believe that the school would likely be unable to maintain its financial capacity to meet its stated objective during the period of State Board approval.

(ii) Nothing in this section prohibits an independent school from voluntarily submitting additional information related to its financial capacity to the State Board or prohibits the State Board from finding that the school has demonstrated its financial capacity based upon this additional information.

(iii) If the State Board does not find that the school has demonstrated its financial capacity for approval under this subsection, the State Board may approve the school subject to conditions imposed by the State Board that are designed to provide the State Board with assurance that the school will have the financial capacity to meet its stated objective within a reasonable period of time as determined by the State Board.

(iv) The State Board may require an independent school that is seeking approval for the first time to provide it with updated documentation under subdivision (A) of this subdivision (8) on a periodic basis during the approval period, provided that the school shall not be required to provide this documentation more than once in any 12-month period.

(C) If an approved independent school believes that it is or likely will become financially impaired, as defined in subdivision (D) of this subdivision (8), during the period of its approved status, the school shall notify the Secretary of Education within five days of making this determination.

Annually, on or before August 1, an approved independent school shall compare its student enrollment for the current school year to the immediately preceding school year and, if its student enrollment has declined by 10 percent or more over this period, shall notify the Secretary of Education within five days of its determination. If an approved independent school has failed to file its federal or State tax returns when due (after taking into account permissible extension periods), it shall notify the Secretary of Education within five days of the due date.

(D) As used in this subsection, the term “financially impaired” means:

(i) the school’s failure to pay debts as they become due in the ordinary course of business, including the school’s failure to meet its payroll obligations as they are due, to pay federal or State payroll tax obligations as they are due, or to pay any of its other expenses within 30 days of their due date;

(ii) the school’s failure to comply with the financial terms of its debt obligations, including the school’s failure to make interest or principal payments as they are due or to maintain any required financial ratios;

(iii) 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

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

(E) If the State Board reasonably believes that an approved independent school lacks financial capacity to meet its stated objectives during the period of its approved status due to its financial impairment, then the State Board shall notify the school in writing of the reasons for this belief and permit the school a reasonable opportunity to respond. If the State Board, after having provided the school a reasonable opportunity to respond, does not find that the school has satisfactorily responded or demonstrated its financial capacity, the State Board may, with the written consent of the school, request the [Council of Independent Schools] to establish a review team and conduct a school visit to assess the school's financial capacity and submit a report of its findings and recommendations to the State Board. The State Board may also require the approved independent school to submit updated documentation under subdivision (A) of this subdivision (8), provided that the school shall not be required to provide this documentation more than once in any 12-month period. If the State Board concludes that an approved independent school lacks financial capacity to meet its stated objectives during the period of its approved status due to its financial impairment, the State Board may take any action that is authorized by this section.

(F) In considering whether an independent school lacks financial capacity to meet its stated objectives during the period of its approved status due to its financial impairment and what actions the State Board should take if it makes this finding, the State Board may consult with, and draw on the analytical resources of, the Vermont Department of Financial Regulation.

(G) Information provided by an independent school to demonstrate its financial capacity under this subsection that is not already in the public domain is exempt from public inspection and copying under the Public Records Act and shall be kept confidential.

The school's enrollment policy and any limitation on a student's ability to enroll and how the school should be required to deliver special education services and which categories of these services

The Committee was unable to reach agreement on proposed legislative language concerning an approved independent school's enrollment policy and any limitation on a student's ability to enroll and on how the school should be required to deliver special education services and which categories of these services it would be required to deliver. Set forth below is the last draft of the proposed legislative language that was discussed by the Committee. The main areas of disagreement among Committee members on this language concerned the extent to which an approved independent school should be required to accept students with disabilities (i.e., any student with a disability vs. any student who requires special education services who is placed in the approved independent school by the local education agency) and the degree to which approved independent schools would be compensated for the delivery of these services.

Proposed legislative language considered by the Committee (not agreed to):

16 V.S.A. § 166(b) is amended to read:

* * *

(b) Approved independent schools. On application, the State 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 section 906 of this title and that it substantially complies with all statutory requirements for approved independent schools and the Board's rules for approved independent schools. Notwithstanding any provision of law to the contrary, an approved independent school shall enroll

any student requiring special education services who is placed in or referred to the approved independent school as an appropriate placement and least restrictive environment for the student either by the local education agency (LEA) or by the Secretary of Education. The State Board shall refuse to grant approval to an independent school if the school's enrollment policy does not comply with this requirement. Except as provided in subdivision (6) of this subsection, the Board's rules must at minimum require that the school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any State or federal law or regulation. Approval may be granted without State Board evaluation in the case of any school accredited by a private, State, or regional agency recognized by the State Board for accrediting purposes, provided that the State Board shall determine that the school complies with all student enrollment provisions required by law.

* * *

16 V.S.A. § 2973 is amended to read:

§ 2973. INDEPENDENT ~~SCHOOL TUITION RATES~~ SCHOOLS

(a) Subject to subsection (e) of this section and notwithstanding any provision of law to the contrary, an approved independent school shall enroll any student requiring special education services who is placed in or referred to the approved independent school as an appropriate placement and least restrictive environment for the student by the local education agency (LEA).

The terms “special education services” and “LEA,” as used in this section, shall have the same meanings as defined by State Board rules.

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

(c)(1)(A) An approved independent school that enrolls a student requiring special education services under this section shall, as determined by the Secretary, be entitled to an amount for tuition, room and board or to reimbursement of expenses. Prior to enrollment of the student, the LEA, the student’s district of residence, and the approved independent school shall enter into a written contract:

(i) identifying the special education services that will be provided;

(ii) specifying whether the services will be provided on the basis of an amount paid for tuition, room and board or on the basis of expense reimbursement; and

(iii) specifying the cost, or in the case of reimbursement the factors for determining the costs, of those services.

(B) The Secretary of Education shall set, after consultation with independent schools in Vermont, the maximum rates to be paid for tuition, room, and board based on the level of special education services provided. The amount charged by an approved independent school for tuition, room and board shall reflect the school's actual or anticipated costs of providing special education services to the student and shall not exceed the maximum rates set by the Secretary, provided that the Secretary may permit charges in excess of these maximum rates where the Secretary deems warranted.

(C) An approved independent school that receives reimbursement for expenses shall receive the same amount of reimbursement for its costs in providing those services as is provided to public schools for providing special education services under this chapter. The sources of this reimbursement to approved independent schools shall be the same as for public schools under this chapter. Costs of providing special education services that are unreimbursed under this chapter shall be paid by the student's district of residence in the same amount as if those services were provided by a public school.

(2)(A) The Secretary of Education may require an approved independent school to provide such reports to the Secretary as the Secretary deems necessary in order to ensure that amounts payable under this section to the school are reasonable in relation to the special education services provided by the school.

(B) The Secretary may withhold, or direct an LEA or school district to withhold, payment under this subsection (c) pending the Secretary's receipt of a required report under subdivision 2(A) of this subsection, or, subject to subsection (e) of this section, to the extent that the Secretary determines that the amounts claimed under this subsection (c) by an approved independent school are not reasonable in relation to the special education services provided by the school.

[subsection (d) is a placeholder pending recommendation from the Secretary]

[(d) Subject to subsection (e) of this section, if an approved independent school enrolls a student under this section but does not have State Board approval to provide special education services in the specific disability category required by the student, then the LEA, in consultation with the approved independent school and the Agency of Education, shall determine how services and supports shall be provided by the approved independent school, and the approved independent school shall provide those services and supports in accordance with the LEA's determination until such time as the school obtains State Board approval for the specific disability category.]

(e)(1) Before a decision is made by the LEA under subsection (a) or (d) of this section or by the Secretary of Education under subsection (c) of this section, an approved independent school shall have the right to consult with:

(A) under subsection (a) of this section, the LEA with regard to its determination that the approved independent school is an appropriate placement and least restrictive environment for the student;

(B) under subsection (c) of this section, the Secretary of Education with regard to the Secretary's determination:

(i) as to whether the school shall receive an amount for tuition, room and board or reimbursement for expenses; and

(ii) that amounts claimed under that subsection by an approved independent school are not reasonable in relation to the special education services provided by the school; and

[subdivision (C) is a placeholder pending recommendation from the Secretary]

(C) under subsection (d) of this section, the LEA with regard to its determination as to the services and supports required to be provided by the approved independent school pending approval by the State Board for the specific disability category.

(2)(A) The deciding party under subdivision (1) of this subsection shall notify the approved independent school within 10 days of making its decision and shall include in its notification the basis for its decision.

(B) If the approved independent school disagrees with the decision, it shall notify the deciding party of its disagreement and the basis for its disagreement within five days of its receipt of the notification of the decision.

(C) The deciding party shall convene a meeting with the approved independent school and other interested parties to consider the matter and any information provided by these parties within 30 days of its receipt of the notification of the approved independent school's disagreement with the decision.

(D) The deciding party shall make its final decision and, within five days of the meeting, notify the approved independent school and other parties of the basis for its final decision.

(3) If an approved independent school disagrees with a decision under this subdivision (1)(A) or (C) of this subsection, it may appeal the decision to the Secretary of Education, who shall consider the matter in the Secretary's capacity as the Secretary of Education for children with disabilities under section 2943 of this title. The decision of the Secretary of Education on a matter under subdivision (1)(A) or (C) of this subsection shall be final. The decision of the Secretary of Education on a matter under subdivision (1)(B) of this subsection shall not be subject to appeal and shall be final.

~~(b)~~(f) Neither school districts nor any State agency shall pay rates for tuition, room, and board, for students receiving special education in independent schools outside Vermont that are in excess of allowable costs approved by the authorized body in the state in which the independent school is located, except in exceptional circumstances or for a child who needs exceptional services, as approved by the Secretary.

~~(e)~~(g) The State Board is authorized to enter into interstate compacts with other states to regulate rates for tuition, room, and board for students receiving special education in independent schools.

Appendix A

2017 Acts and Resolves No. 49, Section 42

* * * Approved Independent Schools Study Committee * * *

Sec. 42. APPROVED INDEPENDENT SCHOOLS STUDY COMMITTEE

(a) Creation. There is created the Approved Independent Schools Study Committee to consider and make recommendations on the criteria to be used by the State Board of Education for designation as an “approved” independent school.

(b) Membership. The Committee shall be composed of the following ten members:

(1) one current member of the House of Representatives who shall be appointed by the Speaker of the House;

(2) one current member of the Senate who shall be appointed by the Committee on Committees;

(3) the Chair of the State Board of Education or designee;

(4) the Secretary of Education or designee;

(5) the Executive Director of the Vermont Superintendents Association or designee;

(6) the Executive Director of the Vermont School Boards Association or designee;

(7) the Executive Director of the Vermont Independent Schools Association or designee;

(8) two members of the Vermont Council of Independent Schools, who shall be chosen by the Chair of the Vermont Council of Independent Schools; and

(9) the Executive Director of the Vermont Council of Special Education Administrators or designee.

(c) Powers and duties. The Committee shall consider and make recommendations on the criteria to be used by the State Board of Education for designation as an “approved” independent school, including the following criteria:

(1) the school’s enrollment policy and any limitation on a student’s ability to enroll;

(2) how the school should be required to deliver special education services and which categories of these services; and

(3) the scope and nature of financial information and special education information that should be required to be reported by the school to the State Board or Agency of Education.

(d) Assistance. The Committee shall have the administrative, technical, and legal assistance of the Agency of Education.

(e) Report. On or before December 1, 2017, the Committee shall submit a written report to the House and Senate Committees on Education and the State Board of Education with its findings and any recommendations, including recommendations for any amendments to legislation.

(f) Continuation of rulemaking. It is the intent of the General Assembly to resolve the issues raised by the State Board of Education's proposed amendments to the 2200 Series of its Rules and Practices initiated by the State Board on November 13, 2015 (Rules for Approval of Independent Schools) after taking into account the report of the Committee required under subsection (e) of this section. Therefore, notwithstanding any provision to the contrary under 16 V.S.A. § 164, the State Board of Education shall suspend further development of the amendments to the Rules for Approval of Independent Schools, pending receipt of the report of the Committee, and shall further develop these amendments after considering the Committee's report.

(g) Meetings.

(1) The Secretary of Education shall call the first meeting of the Committee to occur on or before May 30, 2017.

(2) The Committee shall select a chair from among its members at the first meeting.

(3) A majority of the membership shall constitute a quorum.

(4) The Committee shall cease to exist on December 2, 2017.

(h) Reimbursement.

(1) For attendance at meetings during adjournment of the General Assembly, legislative members of the Committee shall be entitled to per diem compensation and reimbursement of expenses pursuant to 2 V.S.A. § 406 for no more than seven meetings.

(2) Other members of the Committee who are not employees of the State of Vermont and who are not otherwise compensated or reimbursed for their attendance shall be entitled to per diem compensation and reimbursement of expenses pursuant to 32 V.S.A. § 1010 for no more than seven meetings.