

## **Vermont Constitutional Provisions**

### **Chapter I Article 7. [Government for the people; they may change it]**

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

### **Chapter II § 68. [Laws to encourage virtue and prevent vice; schools; religious activities]**

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.

## Provisions from Vermont's Public Accommodations Act

### 9 V.S.A. § 4500. Legislative intent

(a) The provisions of this chapter establishing legal standards, duties and requirements with respect to persons with disabilities in places of public accommodation as defined herein, except those provisions relating to remedies, are intended to implement and to be construed so as to be consistent with the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and rules adopted thereunder, and are not intended to impose additional or higher standards, duties, or requirements than that act.

(b) Subsections 4502(b) and (c) of this title shall not be construed to create or impose on governmental entities additional or higher standards, duties, or requirements than that imposed by Title II of the Americans with Disabilities Act.

### 9 V.S.A § 4501. Definitions

As used in this chapter:

(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) "Physical or mental impairment" means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; or endocrine.

(B) Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental condition, and specific learning disabilities.

(C) The term "physical or mental impairment" includes diseases and conditions such as orthopedic, visual, speech, and deafness or being hard of hearing,

cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, developmental disability, emotional disturbance, and substance use disorders, including drug addiction and alcoholism. An individual with a disability does not include any individual with a substance use disorder who, by reason of current alcohol or drug use, constitutes a direct threat to property or safety of others.

(4) "Owner" includes any person having a legal or beneficial interest in real estate which gives him or her the right to possession thereof.

(5) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(6) "Public assistance" includes any assistance provided by federal, state, or local government, including medical and housing assistance.

(7) "Auxiliary aids and services" mean the following:

(A) qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices and systems, hearing aid compatible telephones, closed caption decoders, open and closed captioning telecommunications devices for persons who are deaf, videotext displays or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, audio recordings, Braille materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) modification of equipment or devices; and

(D) other similar services and actions.

(8) "Public accommodation" means an individual, organization, governmental or other entity that owns, leases, leases to or operates a place of public accommodation.

(9) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, the factors considered in determining whether an action is an undue burden pursuant to subsection (10) of this section apply.

(10) "Undue burden" means significant difficulty or expense. In determining whether an action would result in an undue burden, the following factors shall be considered:

(A) the nature and cost of the action needed;

(B) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures, or any other impact of the action on the operation of the site;

(C) the geographic separateness and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(D) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type and location of its facilities; and

(E) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

#### **9 V.S.A § 4502. Public accommodations**

(a) An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

(b) An owner or operator of a place of public accommodation or his or her employee or agent shall not prohibit from entering a place of public accommodation:

(1) an individual with a disability accompanied by a service animal; or

(2) an individual who is training an animal to perform as a service animal for an individual with a disability.

(c) No individual with a disability shall be excluded from participation in or be denied the benefit of the services, facilities, goods, privileges, advantages, benefits, or accommodations, or be subjected to discrimination by any place of public accommodation on the basis of his or her disability as follows:

(1) A public accommodation shall provide an individual with a disability the opportunity to participate in its services, facilities, privileges, advantages, benefits, and accommodations. It is discriminatory to offer an individual an unequal opportunity or separate benefit; however it is permissible to provide a separate benefit if that benefit is necessary to provide an individual or class of individuals an opportunity that is as effective as that provided to others.

(2) A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting which is appropriate for the needs of the individual.

Notwithstanding the existence of separate or different programs or activities, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different. Nothing in this subsection shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which the individual chooses not to accept.

(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.

(4) Repealed.]

(5) A public accommodation shall make reasonable modifications in policies, practices, or procedures when those modifications are necessary to offer goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(6) A public accommodation shall take whatever steps may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden on the public accommodation.

(7) A public accommodation shall not be required to provide to individuals with disabilities personal devices, such as wheelchairs, eyeglasses, hearing aids or readers for personal use or study, or personal services to assist with feeding, toileting, or dressing.

(8) Notwithstanding the provisions of this section, if a place of public accommodation has an architectural or communication barrier, in order to comply with this section, the public accommodation shall remove the barrier, if removal is readily achievable, or shall make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those alternative methods are readily achievable. Nothing in this subsection shall be construed to alter

architectural barrier removal requirements under the federal Americans with Disabilities Act and its regulations as they relate to governmental entities.

(9) Any public accommodation that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

(d) This section shall not prohibit an owner or operator of an inn, hotel, motel, or other establishment which provides lodging to transient guests, and which has five or fewer rooms for rent or hire, from restricting such accommodation on the basis of sex or marital status.

(e) It is a violation of this section for a gas station or other facility which sells gasoline or other motor vehicle fuel for sale to the public to fail to comply with the provisions of section 4110a of this title.

(f) It is a violation of this section for a public accommodation to fail to comply with the provisions or rules pertaining to public buildings pursuant to 20 V.S.A. chapter 174.

(g) This chapter shall not apply to:

(1) special education claims and issues covered by federal and State special education laws, regulations, and procedures, pursuant to 20 U.S.C. § 1404 et seq. and 16 V.S.A. chapter 101; or

(2) an insurer underwriting risks, classifying risks, or administering risks that are based on or are not inconsistent with 8 V.S.A. §§ 4724 and 4084 or other applicable State laws.

(h) This section shall not be construed to require a public accommodation to permit an individual to participate in or benefit from the services, facilities, goods, privileges, advantages, and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others. For the purposes of this subsection, "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation shall make an individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain:

(1) the nature, duration, and severity of the risk;

(2) the probability that the potential injury will actually occur; and

(3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

(i) Nothing in this section shall be construed to prohibit a public accommodation from excluding a person engaged in disruptive behavior which the place of public accommodation has reason to believe is the result of alcohol or illegal drug use.

(j) Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be.

(k) A police officer, a firefighter, or a member of a rescue squad, search and rescue squad, first response team, or ambulance corps who is accompanied by a service dog shall be permitted in any place of public accommodation, and the service dog shall be permitted to stay with its master. For the purposes of this subsection, "service dog" means a dog owned, used, or in training by any police or fire department, rescue, or first response squad, ambulance corps, or search and rescue organization for the purposes of locating criminals and lost persons, or detecting illegal substances, explosives, cadavers, accelerants, or school or correctional facility contraband.

( l ) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others.

**16 V.S.A. § 166. Approved and recognized independent schools**

(a) Authority. An independent school may operate and provide elementary education or secondary education if it is either approved or recognized as set forth herein.

(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 the Board's rules for approved independent schools. 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.

(1) On application, the State Board shall approve an independent school that offers kindergarten but no other graded education if it finds, after opportunity for hearing, that the school substantially complies with the Board's rules for approved independent kindergartens. The State Board may delegate to another State agency the authority to evaluate the safety and adequacy of the buildings in which kindergartens are conducted, but shall consider all findings and recommendations of any such agency in making its approval decision.

(2) Approvals under this subsection (b) shall be for a term established by rule of the Board but not greater than five years.

(3) An approved independent school shall provide to the parent or guardian responsible for each of its students, prior to accepting any money for a student, an accurate statement in writing of its status under this section, and a copy of this section. Failure to comply with this provision may create a permissible inference of false advertising in violation of 13 V.S.A. § 2005.

(4) Each approved independent school shall provide to the Secretary on October 1 of each year the names, genders, dates of birth, and addresses of its enrolled students. Within seven days of the termination of a student's enrollment, the approved independent school shall notify the Secretary of the name and address of the student. The Secretary shall notify the appropriate school officials as provided in section 1126 of this title.

(5) The State Board may revoke or suspend 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 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.

(6) This subdivision (6) applies to an independent school located in Vermont that offers a distance learning program and that, because of its structure, does not meet some or all the rules of the State Board for approved independent schools. In order to be approved under this subdivision, a school shall meet the standards adopted by rule of the State Board for approved independent schools that can be applied to the applicant school and any other standards or rules adopted by the State Board regarding these types of schools. A school approved under this subdivision shall not be eligible to receive tuition payments from public school districts under chapter 21 of this title.

(7) Approval for independent residential schools under this subsection is also contingent upon proof of the school's satisfactory completion of an annual fire safety inspection by the Department of Public Safety or its designee pursuant to 20 V.S.A. chapter 173, subchapter 2. A certificate executed by the inspecting entity, declaring satisfactory completion of the inspection and identifying the date by which a new inspection must occur, shall be posted at the school in a public location. The school shall provide a copy of the certificate to the Secretary of Education after each annual inspection. The school shall pay the actual cost of the inspection unless waived or reduced by the inspecting entity.

(c) Recognized independent schools. Upon filing an enrollment notice, a recognized independent school may provide elementary or secondary education in Vermont. The enrollment notice shall be on a form provided by the Secretary and shall be filed with the Secretary no earlier than three months before the beginning of the school year for the public schools in the town in which the applicant proposes to locate.

(1) The enrollment notice shall contain the following information and assurances:

(A) a statement that the school will be in session an amount of time substantially equivalent to that required for public schools;

(B) a detailed description or outline of the minimum course of study for each grade level the school offers, and how the annual assessment of each student will be performed; and

(C) assurances that:

(i) the school will prepare and maintain attendance records for each student enrolled or regularly attending classes;

(ii) at least once each year, the school will assess each student's progress, and will maintain records of that assessment, and present the result of that assessment to each student's parent or guardian;

(iii) the school's educational program will include the minimum course of study set forth in section 906 of this title;

(iv) the school will have teachers and materials sufficient to carry out the school's educational program; and

(v) the school will meet such State and federal laws and regulations concerning its physical facilities and health and safety matters as are applicable to recognized independent schools.

(2) If the Secretary has information that creates significant doubt about whether the school would be able to meet the requirements set forth in this subsection (c), the Secretary may call a hearing. At the hearing, the school shall establish that it can meet the requirements for recognized independent schools. Failure to do so shall result in a finding by the Secretary that the school must take specified action to come into compliance within a specified time frame or the children enrolled must attend another recognized independent school, a public school, an approved independent school, or a home study program, or be declared truant unless absent with legal excuse.

(3) A recognized independent school shall provide to each student's parent or guardian a copy of its currently filed statement of objectives and a copy of this section. The copy shall be provided when the student enrolls or before September 1, whichever comes later. Failure to comply with this subsection may create a permissible inference of false advertising in violation of 13 V.S.A. § 2005.

(4) A recognized independent school shall renew its enrollment notice annually. An independent school shall be recognized for a period not to exceed five years by the Secretary without need for filing an annual enrollment notice if:

(A) it is recognized by an organization approved by the State Board for the purpose of recognizing such school; or

(B) it is accredited by a private, state, or regional agency approved by the State Board for accrediting purposes; provided, however, nothing in this subdivision (4) shall be construed to prohibit the Secretary from initiating a hearing under this subsection (c).

(5) If the Secretary has information that creates significant doubt about whether the school, once in operation, is meeting the requirements for recognized independent schools, the Secretary may call a hearing. At the hearing, the school shall establish that it has met the requirements for recognized independent schools. Failure to do so shall result in a finding by the Secretary that:

(A) the school may not be in operation for the remainder of the school year and that the children are truant unless absent with legal excuse or enrolled in a public school, an independent school, another recognized independent school, or a home study program; or

(B) the school must take specified action to come into compliance within a specified time frame or the school will not be permitted to operate for the remainder of the school year.

(6) Each recognized independent school shall provide to the Secretary on October 1 of each year the names, genders, dates of birth, and addresses of its enrolled students. Within seven days of the termination of a student's enrollment, the recognized independent school shall notify the Secretary of the name and address of the student. The Secretary shall notify the appropriate school officials as provided in section 1126 of this title.

(7) After the filing of the enrollment notice or at a hearing, if the school is unable to comply with any specific requirements due to deep religious conviction shared by an organized group, the Secretary may waive such requirements if he or she determines that the educational purposes of this subsection are being or will be substantially met.

(d) Council of Independent Schools. A Council of Independent Schools is created consisting of 11 members, no fewer than three of whom shall be representatives of recognized independent schools. The Secretary shall appoint nine members from within the independent schools' community. The Secretary shall appoint two members from the public-at-large. Each member shall serve for two years and may be reappointed for up to an additional two terms. The Council shall adopt rules for its own operation. A chair shall be elected by and from among the members. The duties of the Council shall include advising the Secretary on policies and procedures with respect to independent schools. No hearing shall be initiated under this section before the State Board or by the Secretary until the recommendations of the Council have been sought and received. The recommendations of the Council, including any minority reports, shall be admissible at the hearing.

(e) Harassment, hazing, and bullying policies. The board of trustees of an approved or recognized independent school operating in Vermont shall adopt harassment, hazing, and bullying prevention policies, establish procedures for dealing with

harassment, hazing, and bullying of students, and provide notice of these. The provisions of chapter 9, subchapter 5 of this title for public schools shall apply to this subsection, except that the board shall follow its own procedures for adopting policy.

(f) An approved independent school that accepts students for whom the district of residence pays tuition under chapter 21 of this title shall bill the sending district monthly for a State-placed student and shall not bill the sending district for any month in which the State-placed student was not enrolled.

(g) An approved independent school that accepts students for whom the district of residence pays tuition under chapter 21 of this title shall use the assessment or assessments required under subdivision 164(9) of this title to measure attainment of standards for student performance of those students. In addition the school shall provide data related to the assessment or assessments as required by the Secretary.

**16 V.S.A. § 828. Tuition to approved schools; age; appeal**

A school district shall not pay the tuition of a student except to a public school, an approved independent school, an independent school meeting education quality standards, a tutorial program approved by the State Board, an approved education program, or an independent school in another state or country approved under the laws of that state or country, nor shall payment of tuition on behalf of a person be denied on account of age. Unless otherwise provided, a person who is aggrieved by a decision of a school board relating to eligibility for tuition payments, the amount of tuition payable, or the school he or she may attend, may appeal to the State Board and its decision shall be final.



Vermont Independent  
Schools Association

## VISA Responses to State Board of Education Rule Proposals

May 10, 2016

### **SBE Proposal: Fiscal Accountability**

“The law requires the state board to assure that each school has adequate resources. The board considers that current rules are insufficient to meet this statutory requirement. The board requests that independent school financial data and budgets be submitted annually in a common statewide electronic format, that GAAP procedures be employed and that independent auditors be periodically employed.”

### **VISA Response: Existing System Works Well. SBE Proposal is Excessive.**

The reason the SBE must assure that schools have adequate resources is explicitly stated in 16 V.S.A. § 166 (b): “to meet [a school's] stated objectives.” From our perspective, the AOE's recently adopted standards for independent school financial resource review appear to be working well.

No independent school has closed unexpectedly due to financial problems in a very long time, if ever. The recent Austine School closure was not unexpected; the school had made its problems known to the state repeatedly. The sudden failure of the Vermont Center for the Deaf & Hard of Hearing was a surprise and concern about Burlington College's finances is reasonable. However, neither of these are independent schools subject to the 2200-Series rules now under review. Sudden or unexpected failure has not been a problem among independent schools.

The proposed remedy—annual submission of financial data and budgets in a common statewide format—goes beyond any reasonable need to assure that a school is capable of meeting its stated objectives. Also, common statewide electronic format reporting will be difficult to achieve in any circumstance and the agency may not have the resources needed to set up a system or monitor responses.

As independent schools are non-profit organizations, usually organized under IRS rule 501 (c) (3), their annual Form 990 financial reports to the U.S. government are public documents and are available online at no cost. The filings are quite detailed and may be entirely sufficient to assure the SBE of a school's ability to meet its stated objectives. Perhaps if schools routinely file their Form 990s with the AOE, the SBE will be more comfortable with financial matters.

**SBE Proposal: Equal Opportunity & Equity**

“Currently, the provisions for assuring equal access and admission to private schools are not sufficient. It is the view of the state board that equal opportunities must be available to all in admissions, program availability and discipline; and that the rules explicitly address these issues.”

**VISA Response: Different Standards Necessarily Must Apply for Independents**

All Vermont independent schools are prohibited by federal and state law from discriminating on the basis of protected classes and are covered by the Vermont Public Accommodations Act (9 V.S.A. § 4502), which parallels Title III of the Americans with Disabilities Act.

Unlike the public schools, which are public institutions with a mission to provide comprehensive educational programs open to all within their districts, independent schools are non-profit non-governmental organizations with different, often narrower missions.

The NEASC independent school accreditation Standard 3 requires independent schools to have enrollment policies and practices that ensure *“that those students who enroll are appropriate, given the school’s mission, and are likely to benefit from their experience at the school.”* Independent schools welcome and actively encourage a diversity of students whose values and needs align with the schools’ missions.

Conversely, a school compelled to enroll students who do not fit the school’s mission would see its mission performance undermined because it would have to focus outside of its principal intended services.

No Vermont approved independent school uses an admissions test. Schools do occasionally choose not to enroll a student, almost always because the student needs specialized services not available at the independent school. This is no different than public school finding it cannot meet the needs of a student with extreme disabilities or behavioral problems.

The Vermont independent schools that operate with a mission to educate students whose needs or learning styles have not been well served in a local public school should not be compelled to modify their programs to accommodate academically strong students. Schools such as LEARN in Lyndonville and Compass School in Westminster fit this model.

Vermont has seven winter sports academies, several of which have gained world-class recognition for their success in training and educating students. These schools should not be compelled to enroll a student who cannot meet their physical strength and ability standards or who is without interest in the school’s non-academic program.

Kindle Farm School in Newfane and Laraway School in Johnson are among the independent schools that serve only students with specific disabilities. These and their peers should not be required to enroll students with different disabilities, or no disabilities. And, schools such as

Thaddeus Stevens School in Lyndon and Maple Street School in Manchester, that voluntarily accommodate a disabled students without need for formal special education services should be recognized and praised for their commitment and success.

A school that follows an educational philosophy not available in Vermont's public schools (*e.g.*, Waldorf, Montessori, Coalition for Essential Schools) should not be required to enroll students whose needs or interests may not fit that philosophy. Vermont has several very successful Waldorf schools including Lake Champlain Waldorf which now enrolls 250 students and Orchard Valley Waldorf School in East Montpelier which enrolls 170 (both very large by Vermont independent school standards).

**SBE Proposal: Use of External Evaluators**

"The Board considers a robust external evaluation system to be essential for independent private schools which draw down public funds. The board requests that independent schools be evaluated periodically using a NEASC system."

**VISA Response: VISA Supports NEASC Evaluation.**

VISA endorses the NEASC accreditation process as highly beneficial to schools. Thirty-seven of Vermont's 63 approved independent schools, enrolling 72% of all approved independent school students, have NEASC accreditations earned through a rigorous self-study and third-party review process.

However, the cost of NEASC membership and accreditation frequently is impractical for small schools. The approved independents without NESAC accreditation are small. Their median enrollment is 26, compared to a median of 114 for the accredited schools.

VISA currently is working with NEASC to develop a financial accreditation system that would address these schools' needs while satisfying the AOE's requirements.

**SBE Proposal: Special Education**

"Approved independent schools shall provide special education services reasonably equivalent to those that would normally be provided in a traditional public school. The board realizes that certain schools may specialize in providing services for certain handicapping conditions, and that circumstances will vary."

**VISA Response: Clarification Needed on Rule Intent. Rule Could Be Constructive.**

If this proposal means adding a rule that independent schools must provide special education services as state-approved special education providers, then it is not reasonable. However, if the proposal means that schools currently providing services to special education-eligible students without billing for the added service would be recognized for their work, then it is a substantial step forward that VISA will readily endorse.

Federal law places the entire responsibility for educating disabled students on students' home LEAs. Because of this, independent schools are treated very differently in statutes, particularly if a school has not sought state approval to bill for providing special education services.

Some Vermont independents now successfully accommodate special education-eligible students without need for special education-certified teachers or for billing for added services. This accommodation usually is a result of a school's capacity to provide greater individualized attention to students and of the skills of a school's faculty and administrators. The schools that perform these services have gone without recognition. A rule that promotes such recognition would be very worthwhile.

On the other hand, a rule requiring independent schools to be state-approved to provide new services would impose an unfunded mandate. Schools without adequate physical spaces would need to build new facilities. The current AOE/SBE process by which independent schools seek special education approval is challenging and costly, particularly for schools first entering the process. Also, smaller independents might find dealing with the bureaucratic and occasionally litigious nature of special education to be more than they reasonably can bear.

Adding new special education capacity in an era of declining school enrollments may be counter-productive statewide. Availability of qualified special education instructors to staff expanded programs is questionable.

**Proposed Rule Change:**

SBE Rule 2226 opens with the statement: "The Board may approve an independent school if it finds that: ..."

VISA proposes that the word "may" be replaced by the word "shall." This change will make Rule 2226 consistent with the wording in the first sentence of 16 V.S.A. 166 (b) which begins: "On application, the Board **shall** approve an independent school ..." [*emphasis added*].

**Conclusion: Independent Schools Are a Positive Resource.**

The success of independent schools fundamentally is tied to their ability to be different and to provide opportunities to Vermont students to experience services and educational philosophies unlike those of the public education system. Schools such as St. Johnsbury Academy, Green Mountain Valley School, Rice Memorial High School, the Vermont School for Girls, Putney School, Hilltop Montessori School, Kurn Hattin Homes, Thaddeus Stevens School and

Greenwood School are examples of the range of services and diverse educational philosophies available in the Vermont independent schools community that are unavailable anywhere in the Vermont public system.

Commenting on the benefits of diverse opportunities, the head of a Vermont independent high school that serves struggling low-achieving students recently wrote: *"Beyond special education and other support services, students not successful in a given school take up time for administration and teachers with evaluations, discipline meetings, creation of special plans and programs and other disruptions to what should be a purposeful and focused, high quality educational program. **There is nothing either cost effective or equitable about this for students whose learning style or needs may be incongruent with their local school's approach, and the struggles it inevitably results in for these children are predictable.**" [emphasis added]*

*The Vermont Legislature and the Vermont State Board of Education have consistently encouraged the development of strong independent schools. Indeed, the State Department of Education, State Board, Legislature and many citizens cooperated in 1988-89 in re-writing 16 V.S.A. § 166. These new changes became effective as of July 1, 1990.*

— Vermont Independent School Guide, May 2009

The general thrust of the SBE proposals is to make approved independent schools operate more like the public schools and to imply that independent schools have unmet duties to students and the state. This thrust, which runs counter to explicit state policy is counter-productive and is an improper characterization.

We invite the SBE to engage constructively with the independent schools community on these subjects, instead of immediately invoking a new rules process. We ask the SBE to recognize that independent schools are a different kind of educational institution operating in an educational environment substantially different from the public schools. The independent environment is characterized by voluntary student attendance (school choice), flexibility to adapt curriculum and faculty to student and community needs and providing a range of opportunities often unavailable in the public system. The SBE should support and encourage the benefits flowing from that difference.

Finally, the AOE and SBE must decide if more recognized and fewer approved independents are in the public interest. One should not assume all approved independent schools will choose to comply with rules that are financially intrusive, that eliminate control of enrollment policy and require more special education services. Some schools will instead choose to shift from *approved* to *recognized* status. Recognized schools operate with much less SBE or AOE oversight and are not responsive to availability of any public funds.

✦ ✦ ✦



February 14, 2017

Mr. Stephan A. Morse, Chairman  
 Vermont State Board of Education  
 219 North Main Street, Suite 402  
 Barre, Vermont 05641

Dear Stephan:

We have reviewed the Discussion Draft of the SBE Proposed Rule 2200 Series dated 1/31/17. We appreciate the work of the stakeholders thus far and efforts by members of the Board to address concerns that have been expressed. The draft contains many positive changes from the perspective of the independent schools' community, and we believe there are several areas where we might achieve consensus with some modification.

In our view, however, there are several changes in the draft that require much greater discussion before moving forward with rule changes, particularly those around special education services. New provisions on open enrollment and discipline, which were not in the Board's initial rules proposal, are unacceptable in their entirety.

We address each provision below and look forward to a continuing dialogue. Given the significance of the impact of these proposals on independent schools, we urge the Board not to advance the rulemaking process without further discussion with independent schools. In addition, a process outside the context of this rulemaking is needed for continued dialogue with independent schools regarding special education services.

**2220 Statement of Purpose (p.1 and p.2)**

**Fiscal Accountability.** We request that the last sentence, which reads "*The Board requests that independent school financial data and budgets be submitted annually in a common statewide electronic format determined by the Secretary, that GAAP procedures be employed, and that independent auditors be periodically employed,*" be struck to align and be consistent with the actual language proposed in the discussion draft, found at 2222.1(a)(v) on page 4.

**Equal Opportunity and Equity.** We request that the first clause of the first sentence, which reads "*As evidenced by current enrollment patterns,*" be struck. No evidence or data has been presented to support such an assertion.

2200 Definition (p.2)

In our letter to you dated January 3, 2017 we requested that the definition of “approved independent schools” make accommodation for sectarian schools. Although these schools do not receive public funds, many desire to achieve approval status if they comply with the standards. Religious schools have always been able to achieve approved status if they meet the minimum standards for approval. By their very nature, they cannot receive public funds as a matter of constitutional law. This needs to be addressed. We suggested language in our letter of January 3, 2017. If that is unacceptable, we’d like to discuss possible alternatives.

The definition section now includes a definition of “specialized independent school”. We appreciate the recognition that our winter athletics schools and schools that focus their resources on providing certain special education services likely could not meet a number of the proposed approval standards. We request two minor changes to the definition:

“Specialized independent schools” are approved independent schools providing focused, differentiated and specialized instruction to students with behavioral and learning challenges/disabilities in an alternative environment to the public school setting. An independent school with a significant focus on the instruction of focused **athletic** skills and development of students in an identified **sport activity** may be considered a specialized independent school.

2222.1(a)(i) Tuition from Public Funds (special education p.3) and 2223 Special Education Approval for General Education Schools (p.8)

We are passionate about educating students, and we are willing partners in the effort to ensure that each child is educated in a manner that best suits his or her needs, including those who require special education services. While the new draft attempts to address some of the issues independent schools have raised with respect to provision of special education services, particularly the cost of employing licensed special educators and time and expense of the approval process, we cannot support the revised provisions.

Independent schools would like to engage in a robust and detailed discussion to identify areas where children are having difficulty accessing special education services, with the goal of designing a system of care made up of public and independent schools available to meet their needs.

The proposed rules do not strive to create educational centers of excellence, nor do they acknowledge and embrace alternative and highly effective methods of educating students with special needs outside the standard IEP model at lower cost and with less stigma.

The proposed rules also assume that the only expertise in special education rests within the public-school system. That is simply not true. We have many independent schools that specialize in providing these services, and many general education independent schools that excel in serving students with special needs. Testimony in the Senate Education Committee on February 9, 2017 highlighted the fact that the federal government believes Vermont is under-performing in special education. The Dartmouth College Rockefeller Center has concluded that Vermont’s special education system has a number of deficiencies.

This discussion will take time, as it should, if we are truly interested in creating a system that meets the unique needs of our students. We propose that the SBE not advance any changes to the special education requirements of the rules at this time, and engage the independent school community and others in a serious and thoughtful effort to design a system that will improve opportunities and outcomes. We share the goal, but this is not the right direction.

**2222.1(a)(ii) Tuition from Public Funds (accreditation p. 3)**

The new draft acknowledges the challenges and expense for small schools in achieving accreditation. However, we would like clarity on whether the Board has the authority to require independent schools to support the cost of reviews. If that is so, we would recommend the Secretary establish cost after consultation and consent of the Council of Independent Schools. This would be consistent with the review team approach in which investigations of compliance with approval standards are conducted pursuant to 2222.6 Investigations.

In addition, based on continuing discussions with independent schools, we request the proposed rule be modified as follows to ensure a clear process:

(ii) the school is approved by an accrediting entity recognized by the State Board pursuant to Rule 7320 of the State Board's rules, or is approved through state evaluation methods as available and described in ~~16 VSA §165~~ **following a school visit by the Agency of Education, or a review team of at least three members appointed by the Secretary, including a member of the Council of Independent Schools, or an independent reviewer appointed by the Secretary and Council of Independent Schools, to ensure that the school meets the minimum standards set forth in these rules. The review team or independent reviewer shall submit a written recommendation for approval to the Secretary of Education upon completion of the school visit. In the event the review team or independent reviewer finds that the school does not meet the minimum standards set forth in these rules, the review team or independent reviewer shall provide the school with written notification specifying why the school does not meet such standards within 10 business days following the school visit and prior to submission to the Secretary of Education. The school shall be provided the opportunity to submit a response and/or a compliance plan to the review team or independent reviewer no later than 10 days following receipt of such written notification. The review team or independent reviewer may modify the report based upon the school's response prior to submission of the final report to the school and the Secretary of Education. The school shall have the opportunity to submit a response and/or a compliance plan no later than 10 days following receipt of the final report. The Secretary of Education shall consider the response and may conduct additional review prior to making a final recommendation to the State Board of Education. The State Board of Education shall provide the school with a reasonable opportunity to respond to recommendations of the Secretary of Education before any hearing or decision regarding the school's approval.** The cost of such evaluations shall be paid by the independent school and may include tiered levels based on school size as defined by the Secretary. 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 accrediting agencies are listed in Rule 7320.

2222.1 (a)(iii) Tuition from Public Schools (anti-discriminatory enrollment policies p.3)

We accept this provision, but highlight a potential drafting error in the last sentence. The reference to subsection 2222.1(iii) should read 2222.1(a)(i).

2222.1 (a)(iv) Tuition from Public Schools (health and safety p.3)

We accept this provision and appreciate removal of language in this provision that would have required independent schools to comply with all federal and state laws and regulations applicable to public schools.

2222.1 (a)(v) Tuition from Public Schools (financial capacity p.4)

We agree it is important to ensure that our independent schools are financially solvent. The revised proposal generally achieves this goal; however, since our last discussion we have heard from smaller independent schools that will still struggle to demonstrate solvency under this language. In addition, VISA members have consulted with Licensed Certified Public Accountants to determine how financial capacity provisions would be applied in the field. Based on those discussions, we request the following substituted language which will allow for greater flexibility for these schools:

**1. (a) For purposes of approval, the school demonstrates financial capacity to operate its school and for a period of five years by submitting to the Secretary of Education one of the following with its application for approval:**

**(i) A statement of financial capacity by an accrediting agency recognized by the State Board at Rule 7320; or**

**(ii) A statement of financial capacity or letter by a licensed certified public accountant (LCPA) or licensed certified public accounting firm (LCPA firm), from the present or prior year, describing financial capacity for a period of five years; provided, that the LCPA or LCPA firm examine the school's current or projected budget, most recent federal tax filing associated with the school, value of assets and income which may be available to the school, ongoing expenses of the school, liabilities of the school, status of school enrollment, and stated school objectives; or**

**(iii) An audit from the present or prior fiscal year performed by a licensed public accounting firm or licensed certified public accountant; or**

**(iv) The school's Form 990 submitted to the Internal Revenue Service; or**

**(v) A statement of financial capacity by a peer review team or independent reviewer(s) issued pursuant to 2222.14 (a)(ii)**

**(b) The State Board of Education may require a school, seeking approval for the first time, to provide the Secretary of Education with evidence of financial capacity consistent with Rule 2222.14 (a) (v) on a periodic basis during the approval period. No school shall be required to provided evidence of financial capacity more than once per 12- month period during a 5-year**

approval term.

- (c) The State Board of Education may only require a school, seeking re-approval, to periodically within the 5- year approval provide the Secretary of Education with evidence of financial capacity consistent with Rule 2222.14 (a) (v) if the financial capacity statement filed in connection with its application for re-approval provides reasonable cause to believe that the school may lack financial capacity to operate for five years. A school shall not be required to provide evidence of financial capacity more than once within a 12-month period during a 5- year approval term. Reasonable cause arises where the individual(s), firm or entity authoring a letter or statement describing financial capacity, pursuant to Rule 2222.14 (a) (v)1 (a)(i),1(a)(ii),1(a)(iii),and1 (a)(v), recommends that the State Board of Education periodically review the financial capacity of the school, or, the Secretary of Education, having first consulted with the school about the information giving rise to reasonable cause and the impact of more frequently filing evidence of financial capacity pursuant to 1 (a) of this rule, concludes that an annual review of the school's financial capacity is necessary to assist the State Board in determining whether the school has the financial capacity to operate for a full five years . Upon its own motion, upon request of the school or request of the Secretary of Education the State Board of Education shall remove the requirement of more frequent filings of financial capacity if the State Board of Education finds the school has sufficient financial capacity for the remainder of the approval term.
- (d) The head of school or equivalent thereof, the chief financial officer or equivalent thereof, and the school administrator charged with the school's finances or budget shall, within 5 business days, report to the Secretary of Education any significant change in finances that they believe will materially and adversely affect the school's ability to pay all the school's expenses for more than 30 days or pay any of the federal or state payroll tax obligations due.
- (e) If the Secretary of Education has probable cause to believe that a school lacks financial capacity to operate, the Secretary of Education shall, prior to taking any action or making any recommendation to the State Board of Education, first notify the school in writing describing the reasons for his/her belief and permit the school a reasonable opportunity to respond and demonstrate financial capacity pursuant to 1(a) or 2 of this rule. If the Secretary of Education, after having provided the school a reasonable opportunity to respond and demonstrate financial capacity, does not find that the school has satisfactorily responded or demonstrated financial capacity, the Secretary of Education, with the written consent of the school, may ask the Council of Independent Schools to establish a review team and conduct a school visit to assess a school's financial capacity and submit a report of their findings and recommendations to the Secretary of Education or take any action that is authorized by law or rule that the Secretary of Education deems reasonable and necessary, including requiring the school to periodically submit evidence of financial capacity which shall be not exceed once every 12 months within the approval term.
- (f) If the State Board of Education has probable cause to believe that a school lacks financial capacity to operate, the State Board of Education shall, prior to taking any action, first notify the school in writing describing the reasons for his/her belief and permit the school a reasonable opportunity to respond and demonstrate financial capacity pursuant to 1(a) or 2 of this rule. If the State Board of Education, after having provided the school a reasonable opportunity to respond and demonstrate financial capacity, does not find that the school has satisfactorily

responded or demonstrated financial capacity, the State Board of Education, may take any action that is authorized by law or rule that the State Board of Education deems reasonable and necessary, including requiring the school to periodically submit evidence of financial capacity which shall be not exceed once every 12 months within the approval term.

2. Nothing in this section prohibits a school from voluntarily submitting other information related to its financial capacity to the State Board of Education or the Secretary of Education or prohibits the State Board of Education or the Secretary of Education from concluding or recommending that a school has demonstrated financial capacity based upon such a submission.3. Information that a school may elect to provide to a review team, independent reviewer, Agency of Education or the State Board of Education pursuant to this section, that reveals and identifies a school's specific financial information, such as the amount or location of assets on hand, shall be treated as confidential and exempt from public inspection or copying pursuant to 1 V.S.A. § 317 (c)(1), (c)(2) and (c)(9). This subsection shall not apply to a school's Form 990 since it is a federally designated public record and it is not intended to apply to broad conclusions or statements that a school has or does not have the financial capacity to operate.

2222.1 (a)(vi) Tuition from Public Schools (open enrollment p.5-7)

This is an entirely new provision, not contained in the original draft rules proposed. The new draft is a tremendous step backward in this respect from the proposed rules as originally presented. Not only does it interfere with admissions policies, it seeks to control discipline as well. Such policies are integral to a school's culture and climate. We are opposed to the entirety of this provision.

Vermont has a long history of making mission-based education accessible to students. Our independent schools are diverse, just like our students. A diversity of educational options available to serve a diversity of students makes for a healthy educational ecosystem. Mandating open enrollment policies will have a tremendously negative impact on independent schools across Vermont. If schools cannot comply due to misalignment with mission, they will not be able to accept publicly funded students. The resulting impacts on choice are very clear, legitimate and real; student choices will certainly be diminished and in some cases eliminated. We are puzzled by the Board's continued reluctance to acknowledge the consequences of the proposed action. These proposed policy changes are not good for students and families; independent school education will become accessible only to wealthy families that can afford to pay tuition. That cannot be the outcome our state policy seeks to achieve.

Independent schools are already subject to federal and state antidiscrimination laws. Those laws have been restated in 2222.1 (a)(iii) above, and that is certainly acceptable.

2222.1 (a)(vi) Tuition from Public Schools (out of state school p. 7)

We have expressed our concerns about applying Vermont requirements on out-of-state schools, considering implications for other states to prohibit use of tuition dollars in Vermont. This could have a tremendous financial impact on Vermont independent schools that have out-of-state students. At this time, we cannot support this provision with such significant proposed rule changes around special education, enrollment and discipline policies being discussed.

Transition Provisions (p. 21)

These provisions certainly reflect an acknowledgment that many schools will need time to comply with significant changes. However, these time frames are likely far too aggressive for schools to be able to achieve timely compliance with requirements such as accreditation, particularly from a third party entity such as NEASC. Once there is consensus around the scope of the substantive rule changes, there will be a better ability to determine a reasonable compliance time frame.

As educational leaders in our communities, we desire to work with the Board and others to ensure Vermont's educational system is one that provides robust and rigorous opportunities for all students, and demonstrates to the rest of our nation that Vermont is an educational center for excellence. There are areas of this proposal where we can all find common ground in the short term, and there are areas that need much more extensive and meaningful thought and discussion. We look forward to a continued dialogue.

Sincerely,



Mark Tashjian  
Headmaster, Burr & Burton Academy  
Chair, Council of Independent Schools



Tom Lovett  
Headmaster, St. Johnsbury Academy



CJ Spirito  
Headmaster, Rock Point School



**VT Human Rights Commission**  
14-16 Baldwin Street  
Montpelier, VT 05633-6301  
<http://hrc.vermont.gov>

[phone] 802-828-2480  
[fax] 802-828-2481  
[tdd] 877-294-9200  
[toll free] 1-800-416-2010

**Karen L. Richards**  
**Executive Director**  
[direct line] 802-828-2482  
Fax 802 828-2481  
[karen.richards@vermont.gov](mailto:karen.richards@vermont.gov)

February 17, 2017

Stephan A. Morse, Chair  
Vermont State Board of Education  
Agency of Education  
219 North Main Street, Suite 402  
Barre, VT 05641

RE: Response to New Provisions and Changes to Rule 2200

Dear Chairman Morse and Members of the State Board of Education:

Thank you for the opportunity to address the Committee with regards to the proposed changes to Rule 2200.

The Vermont Human Rights Commission (VHRC) has jurisdiction pursuant to 9 V.S.A. §4500 et seq. to investigate complaints of discrimination in all schools, public and independent, whenever a student with a disability is denied the same services and benefits offered to other non-disabled students.

Statistics concerning the percentage of students without disabilities who are admitted to independent schools and the percentage of students receiving IEP services who are admitted suggest that students with disabilities may be being treated differently than non-disabled students. Given that, the VHRC supports the Open Enrollment Provision under Rule 2222.1 (a)(vi), in that a non-discriminatory lottery system for determining which students may attend an independent school prevents the indirect discovery of a student's disability and/or special education needs. It assures equal access to the services and benefits offered by independent schools to all students in Vermont. This is consistent with the non-discriminatory provisions of The Vermont Public Accommodations Statute (9 V.S.A. § 4500 et seq.).

Thank you again for the opportunity to provide input on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen L. Richards", written over a horizontal line.

Karen L. Richards  
Executive Director

Cc: Secretary Rebecca Holcombe, AOE  
Nicole Mace, VSBA  
Jeffrey Francis, VSA

# BURR AND BURTON ACADEMY

OFFICE OF THE HEADMASTER



May 9, 2016

Rebecca Holcombe  
Secretary of Education  
Vermont Agency of Education  
120 State Street, 4<sup>th</sup> Floor  
Montpelier, VT 05602-2501

Dear Secretary Holcombe:

We write this memorandum in response to your request for comment from the Council of Independent Schools regarding the State Board of Education directive to review the rules governing independent school approvals. This letter is organized as follows:

- Overview: the landscape of independent schools
- SBE Questions and CIS Feedback
- Conclusion

We look forward to reviewing this memorandum with you.

## **Overview: the landscape of independent schools**

Vermont has a rich tradition of supporting students and communities through a combination of independent schools and public schools. For certain communities, independent schools educate virtually all students, while in other locales, the public schools meet that need, at times in conjunction with independent schools. Vermont has a history of supporting local control for the schooling of its students, and this philosophy has led to diverse approaches, tailored to the needs of each community.

Indeed, the General Introduction for Independent Schools for the AOE begins with the words, *“The Vermont Legislature and the Vermont State Board of Education have consistently encouraged the development of strong independent schools.”* The final paragraph of the introduction concludes, *“At present there are a number of independent schools that reflect the variety of needs and educational philosophies that exist in the state. It is through this unique network that special needs and educational alternatives are able to flourish. The Vermont State Board of Education views these schools as an important element of our educational system offering learning opportunities to students in Vermont.”*

The independent school landscape is diverse. The overwhelming number of independent schools in the state are small – less than 100 students, with many being less than 50 students. Independent schools come in all shapes and colors. Many specialize in serving the unique needs of a particular group (for example, students with particular learning differences; emotionally challenged students; students skilled in skiing and snowboarding). Some schools focus on a pedagogical approach – for example, progressive or constructivist schools,

Montessori schools, Waldorf schools, or farm schools. Some schools, including the largest independent schools in the state, focus on serving entire communities and educate the vast majority of students across the full spectrum of needs.

Within this diversity, what these schools have in common is a mission-based approach, a commitment to serving a student population consistent with their mission, the flexibility to manage their educational approach to best serve their students, governance and fiduciary oversight driven by a board of trustees, and accountability directly to the students and families that they serve.

### **SBE Questions and CIS Feedback**

The State Board of Education provided the Agency of Education with a directive to review the approval process for independent schools. In your memorandum, you charged us as co-chairs of the Council of Independent Schools to seek input and perspective from the CIS membership on each of the issues outlined below:

- Antiquated Language
- Fiscal Accountability
- Equal Opportunity and Equity
- External Evaluation
- Special Education

On March 28, we held a CIS meeting at the Agency of Education solely and specifically to review these issues. Here are our findings:

***Antiquated Language:*** Language should be understandable. The membership fully supports updating language if it increases clarity regarding the intent of any specific rule.

***Fiscal Accountability:*** The issue in the SBE memorandum that garnered the most attention was the notion that independent schools need to show "assurance of adequate resources." The reaction among CIS members was one of confusion: what is the intent regarding any fiscal review? Are there specific financial benchmarks that are appropriate to each and every school, regardless of size or length of existence? What does "adequate resources" mean – in other words, is this an assessment of whether the school has the financial wherewithal to complete the school year, or is the intent to delve into the financial details of school operations to make a judgment about how resources are utilized? Is the SBE suggesting that debt of a certain size or a deficit of a certain size would result in loss of approved status? What would be the process for corrective action if a school was deemed to have "inadequate" resources?

Many independent schools operate on a shoestring, especially the smaller ones, and the cost of an independent audit is daunting. For others, especially those that already undergo NEASC accreditation, the accreditation process includes a rigorous financial review.

The notion that every school should submit its budget in some predetermined format, without any knowledge of what that format would be, how the data would be assessed, and for what purpose struck the membership as a one-size-fits-all approach that met with great resistance.

The group was clear regarding one specific issue: line item budget decisions need to be made by each school, and fiduciary responsibility rests with each board of trustees. Every single

school expressed a deep commitment to serving students under its mission, and it is our boards of trustees that are charged with determining whether resources are allocated appropriately.

The bottom line is that we recognize the desire to assure that each school has the financial strength to fulfill its commitment to students and families. NEASC review provides this assurance. A periodic audit could provide this assurance. However, financial assurance under this definition is limited strictly to an assurance of solvency. Any financial oversight and decision making beyond determining solvency rests with our respective boards of trustees.

***Equal Opportunity and Equity:*** This item generated a great deal of discussion with a very clear perspective: each independent school is different, unique, and mission driven. To apply a one-size-fits-all approach under the guise of “equal opportunity and equity” would be destructive to the independent school landscape. We already operate under anti-discrimination laws; this directive seems to seek to go beyond the law.

During the discussion, we went around the room and every single participant discussed the mission of his or her school, and explained how students were able to attend. There is a myth that Vermont’s independent schools are somehow “elitist,” and that myth was shattered as we heard from independent schools doing important work with a diverse range of students at the center of every decision.

The CIS recognizes the need for every student in Vermont to have access to educational opportunity. However, equal access does not mean that every single student must be able to attend every single school. This would be a gross injustice to the students themselves as it would lead to the dilution in effectiveness of so many schools. Students with extraordinary needs deserve to access education suited to those needs, and many independent schools do just that, whether those needs are emotional, physical, athletic, psychological/therapeutic, or academic. Not every public school is able to successfully fulfill the needs of every single child, and independent schools cannot accomplish this either. Independent schools do, however offer a wide range of opportunities for Vermont schoolchildren and have done so for many decades. They form an integral part of Vermont’s educational landscape. One specific comment in the CIS discussion captured this sentiment well: *the same for all does not mean the best for all.*

The CIS is committed to equity of opportunity, and Vermont’s system of school choice ensures that the opportunity to find the right school for one’s child is not limited to the wealthy. Every child, not just the most wealthy or the most educationally needy, should be able to attend the school that is best for him or her.

Ultimately, the CIS asks that the SBE recognize, and the rules reflect, that Vermont’s students and families are better off having the range of options and opportunities fostered by the existing combination of public and independent schools as a whole, while also recognizing that forcing independent schools to serve every single student would be destructive to the overall network of independent schools while decreasing the effectiveness of individual schools.

This issue was viewed as extremely important as it gets to the core of each school's ability to meet its mission.

**External Evaluation:** The membership was confused by this item. Many believed it was already being done by the Agency of Education and NEASC accreditation. We support external evaluation as a way to ensure that schools reflect on their performance in serving students according to their mission, and a strong system is already in place.

**Special Education:** This item was viewed similarly to the “equal access” item: it would be destructive to impose a requirement that independent schools serve every single student, regardless of learning or emotional needs. It is unrealistic to think that this could be done well, and it would impose a one-size-fits-all approach on an independent school landscape that exhibits educational diversity. That diversity should be viewed as a strength, not as something to be challenged.

Within the landscape of independent schools, there are many that serve students with special needs, some exclusively so. A number of Vermont’s independent schools provide services that our public schools cannot. However, many of these schools specialize in a specific need. Would this require them to serve students outside of their clearly stated mission? Would a small Montessori school be required to be approved in all special-education categories?

The CIS position is that this requirement would be counterproductive to the landscape of independent schools; we are strongly opposed to this approach.

### **Conclusion**

One cannot sit in a room with dedicated leaders of independent schools throughout the state without being struck by the commitment that each individual and each school has to serving its students well. The independent school landscape enhances educational opportunities for young people in Vermont, and any revisions to the current rules should protect this unique system, ensuring as well the opportunity for new independent schools to form in the future as our student population continues to evolve.

*It is through this unique network that special needs and educational alternatives are able to flourish.*

We are deeply concerned that the SBE rules review could undermine this unique network, reduce choices available to families, and undermine the long tradition of local control regarding educational matters. Doing so would be a huge loss for the students, families and communities of Vermont. We ask for your support.

Respectfully submitted,



Mark H. Tashjian, Headmaster  
Burr and Burton Academy  
Co-Chair  
Council of Independent Schools



Michael Livingston, Head of School  
The Sharon Academy  
Co-Chair  
Council of Independent Schools

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN  
CHIEF ASST. ATTORNEY  
GENERAL



STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

TEL: (802) 828-3171  
FAX: (802) 828-3187  
TTY: (802) 828-3665

<http://www.ago.vermont.gov>

February 9, 2017

Stephan Morse, Chair  
State Board of Education  
219 North Main Street, Suite 402  
Barre, VT 05641

Re: Public Accommodations and Independent Schools

Dear Mr. Morse:

Thank you for your request for a legal opinion on the applicability of Vermont's Public Accommodations Act to independent schools defined in Title 16 that receive public funding. It is our opinion that the Act applies to approved independent schools, as set forth below.

An independent school is "a school other than a public school, which provides a program of elementary or secondary education, or both." 16 V.S.A. § 11(8). To receive public funds, an independent school must be "approved" by the State Board of Education. *See* 16 V.S.A. § 166(a) (authorizing the operation of approved or recognized independent elementary and secondary schools); 16 V.S.A. § 166(b) (establishing requirements for approval of independent schools); 16 V.S.A. 828 (authorizing payment of public tuition funds to "an approved independent school"). Thus, the question is whether Vermont's Public Accommodations Act, 9 V.S.A. chapter 139 applies to approved independent schools.

Vermont's Public Accommodations Act (the Act or VPAA) applies to "places of public accommodation." 9 V.S.A. § 4500(a). The Act defines "place of public accommodation" as "any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public." 9 V.S.A. § 4501(1). To determine whether an approved independent school is covered by the VPAA, we must determine whether it is a "place of public accommodation." As discussed below, several factors support the conclusion that an approved independent school is a place of public accommodation covered by the VPAA.

First, private schools are public accommodations under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (the ADA). The VPAA provides that it is “intended to implement and to be construed so as to be consistent with [the ADA].” 9 V.S.A. § 4500(a); *see also, Dep’t of Corrections v. Human Rights Comm’n*, 2006 VT 134, ¶ 25 (holding that the VPAA should be read to incorporate Title II of the ADA, which applies to all governmental entities, including state prisons). Thus, it is appropriate to look to the federal ADA when construing provisions of Vermont’s Public Accommodations Act. The ADA expressly defines “public accommodation” to include private schools. *See* 42 U.S.C. § 12181(7)(J); *but see* 42 U.S.C. § 12187 (exempting “religious organizations and entities controlled by religious organizations, including places of worship” from coverage under the APA). Approved independent schools that are not controlled by religious organizations are considered public accommodations under the ADA. This weighs heavily in favor of VPAA coverage of these independent schools.

Another factor favoring VPAA coverage of approved independent schools is the Act’s remedial purpose. The Vermont Supreme Court has stated that “[a]s a remedial statute, the [VPAA] must be liberally construed in order to suppress the evil and advance the remedy intended by the Legislature.” *Washington v. Pierce*, 2005 VT 125, ¶ 13 (quoting *Human Rights Comm’n v. Benevolent & Protective Order of Elks*, 2003 VT 104, ¶ 13). In *Washington*, the Court held that a student-student harassment claim was viable under the VPAA, given the Act’s remedial purpose and legislative history, but affirmed dismissal of the claim against a public high school principal because the plaintiff had failed to exhaust administrative remedies. The Court also noted that the VPAA defines “place of public accommodation” to include “any school,” *Washington*, 2005 VT 125, ¶ 20, and stated that, unlike Title IX, which applies requirements only to schools that choose to receive funding, “the VPAA requires all Vermont schools to comply.” *Id.*, ¶ 29. Although the Court has not directly addressed whether an approved independent school constitutes a “public accommodation” under the VPAA, it has taken a broad view of the Act’s applicability. *See also, Bhatt v. Univ. of Vermont*, 2008 VT 76, ¶ 13 (holding that disabled medical student expelled for repeated falsification of academic and professional records had failed to state a claim under the VPAA because expulsion was not related to his disability, and noting that the University of Vermont is a place of public accommodation under the VPAA).

In addition, the Vermont Supreme Court has held that the VPAA, like Title II of the ADA, applies to governmental entities. *Dep’t of Corrections v. Human Rights Comm’n*, 2006 VT 134, ¶ 25 (holding that the Legislature intended the VPAA to apply to all governmental entities, including state prisons). Although independent schools are private, some function as public schools. A school district without a public high school can designate an approved independent school as the public school for that district. 16 V.S.A. § 827. Each of these independent schools is public by designation, and serves a governmental purpose. As such, each of these designated public schools constitutes a “public accommodation” under the VPAA.

Accordingly, it is the opinion of this Office that the VPAA likely applies to approved independent schools as set forth herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. E. Griffin', with a stylized flourish at the end.

William E. Griffin  
Chief Assistant Attorney General



Vermont  
Superintendents  
Association

---

To: Stephan Morse, Chair, Vermont State Board of Education  
From: Nicole Mace, Vermont School Boards Association  
Jo-Anne Unruh, Vermont Council of Special Education Administrators  
Jeffrey Francis, Vermont Superintendents Association  
Re: Draft Rule 2200 – Open Enrollment and Special Education Provisions  
Date: January 3, 2017

This memo provides an overview and context for the attached draft language addressing the open enrollment and special education provisions of Draft Rule 2200. Also attached are two graphic illustrations of the demographics of publicly funded tuition students who attend private versus public schools. These data raise serious questions about whether current admissions practices in private schools allow equal access to publicly-funded students.

We commend the State Board of Education for starting this important conversation about how to ensure equal access to publicly funded education. We look forward to working with the Board and other stakeholders to ensure the rules for independent school approval achieve that goal.

**Open Enrollment** – The State Board’s November 13, 2015 request to initiate a review of Rule 2200 asks the Agency to provide language that would address concerns regarding equal opportunity and equity. The memo states, “It is the view of the state board that equal opportunities must be available to all in admissions, program availability and discipline, and that the rules explicitly address these issues.”

In our view, the current draft rules do not adequately ensure equal opportunities to all in admissions, and do not address discipline issues at all. The current draft rules simply restate the non-discrimination requirements that independent schools must follow under state and federal law. Missing is a requirement to follow procedural safeguards that ensure equal opportunities are available to all in admissions.

Representatives of the independent schools promote selective enrollment policies so that they can provide “mission-based education.” The belief is that in order for a school to be effective in fulfilling a mission, the school must be able to deny admission to applicants who do not conform to the school’s mission. This approach to admissions

can allow for both conscious prejudice and unconscious biases to shape who is perceived to be a “good fit” for a school. Extensive research into the science of human cognition indicates that even people who consciously reject prejudice and discrimination have biases that can affect their perception and behavior.

The most common procedural safeguard in this context is for admissions to be open and based on a lottery system. Most states in the country that allow public education dollars to go to private schools require those schools to administer a lottery if demand exceeds capacity.<sup>1</sup> In Vermont, public high schools are required to administer a lottery for admissions under the public high school choice law.<sup>2</sup>

The attached language on open enrollment applies Vermont’s public high school choice procedures *only to independent schools that want to accept publicly-funded students and only for those students who are publicly-funded*. The language also requires due process for suspensions and expulsions of publicly-funded students similar to those provided by public schools.

We believe this language to be consistent with the Board’s stated goal of ensuring equal access in admissions, programs and discipline. This approach does not impose requirements that are more onerous than those applied to charter schools around the country or to Vermont’s public high schools.

The proposed procedures are as follows:

1. The independent school must announce its intent to accept a certain number of publicly-funded students on or before February 1<sup>st</sup>.<sup>3</sup>
2. If more than the allowable number of students wish to attend a school, then the school shall devise a nondiscriminatory lottery system for determining which students may attend.
3. The independent school shall notify students of acceptance by April 1.
4. If an accepted student is eligible for special education services, then the IEP team will meet to make a determination regarding whether the independent school can

---

<sup>1</sup> National Alliance for Public Charter Schools. Available at: <http://www.publiccharters.org/law-database/clear-student-recruitment-enrollment-lottery-procedures/>

<sup>2</sup> See 16 V.S.A. 822a(d): “If more than the allowable number of students wish to transfer to a school under this section, then the board of the receiving high school shall devise a nondiscriminatory lottery system for determining which students may transfer.”

<sup>3</sup> All dates could be modified to conform to the independent school admissions schedule. These are the dates from 16 VSA 822a, which may not make sense in the independent school context.

provide the services required by the student's IEP. This process is detailed in the Special Education provisions below.

5. An enrolled publicly funded student shall be permitted to remain enrolled in the independent school without renewed applications in subsequent years unless:
  - (a) the student graduates;
  - (b) the student is no longer a resident of the district which pays tuition;
  - (c) an IEP team determines that an independent school is unable to provide the services and supports required by a student's IEP; or
  - (d) the student is expelled from school in accordance with this section.
6. Publicly-funded students will have access to disciplinary due process protections similar to those provided in public schools.

**Special Education** – The proposed language on special education is designed to address concerns raised by independent schools regarding the financial burden associated with being approved in all 13 categories of special education. The proposed language would replace the current language in Draft Rule 2223. Draft Rules 2223.1 *et seq.* would remain intact, subject to further refinement through the public comment process.

Our proposed language requires that, in order for an independent school to admit publicly funded students, the school must employ or *have access to* a licensed special educator. This could be accomplished by working with a nearby supervisory union/district or with another independent school.

If a publicly-funded student is admitted to an independent school under the open enrollment process described above, and that student is eligible for special education services, the proposed language requires the IEP team to meet with a representative from the independent school to determine what special education and related services the student will need to be successful in the independent school, and update the student's IEP goals and services accordingly.

If the school district of residence determines the independent school lacks approval in the student's specific disability category, the local educational agency (LEA) and the independent school and the Agency of Education shall work together to determine how services and supports can be provided within the independent school until the independent school obtains Agency approval, provided that the independent school

shall obtain approval for an enrolled student's disability category within the school year when the student first enrolled.

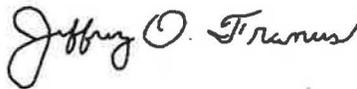
We believe this approach maintains the role of the IEP team and the LEA required by state and federal law. It also allows a school district to pay tuition to an independent school, even if the school does not have special education approval in a specific category of disability, so long as the school is able to obtain that approval within a year. If the open enrollment provisions are adhered to, and the IEP retains ultimate decision-making authority with respect to placement and services, we believe this process will ensure equal access to publicly-funded openings for students with disabilities.

We appreciate the opportunity to provide our input into Draft Rule 2200. We anticipate providing more comprehensive feedback once a new draft of the rules is published. Please let us know if you have any questions.

Sincerely,



Jo-Anne Unruh  
VCSEA



Jeffrey Francis  
VSA



Nicole Mace  
VSBA



219 North Main Street, Suite 402, Barre, VT 05641  
 (p) 802-479-1030 | (f) 802-479-1835

## Independent School Approval Process in our Neighboring States of Maine, Connecticut, Massachusetts, New York and New Hampshire

### Maine:

1. Maine's law explicitly prohibits private schools from discriminating on the basis of disability. Both the law and regulations provide for a complaint and investigation by the Maine Human Rights Commission. Maine defines "unlawful educational discrimination" as:
  2. *Unlawful educational discrimination on the basis of physical or mental disability. It is unlawful educational discrimination in violation of this Act solely on the basis of physical or mental disability to:*
    - C. *Deny admission to any institution or program or fail to provide equal access to and information about an institution or program through recruitment; or [1987, c. 478, §4 (NEW).]*
2. In Maine's law, "educational institution" is defined as:
  - 2-A. *Educational institution. "Educational institution" means any public school or educational program, any public post-secondary institution, any private school or educational program approved for tuition purposes if both male and female students are admitted and the governing body of each such school or program. For purposes related to disability-related discrimination, "educational institution" also means any private school or educational program approved for tuition purposes. [1995, c. 393, §4 (AMD)].*
3. Maine requires schools to be approved prior to receipt of tuition. In Maine, the process is similar to Vermont, either through accreditation by recognized entity (i.e., NEASC) or State Accreditation (site review process through phases and over time--up to 5 year process) by Maine's DOE. The State Accreditation Standards are set by Rule. See attached DOE Rule 05-071, Chapter 138.

### Connecticut

1. In CT, the State Board of Education can approve "an incorporated or endowed high school academy which meets the requirements of public high schools.
2. Connecticut requires schools to be approved prior to receipt of tuition.
3. CT is currently debating a bill that would require independent schools that receive public dollars to give a seat on their boards to districts that pay them tuition.

## New York

1. New York law provides for registration of nonpublic/private schools. Some public funding is permissible via grants including:
  - 21<sup>st</sup> Century Community Learning Centers (federal funds for programs during non-school hours, high poverty, low performing schools)
  - Academic Intervention for Nonpublic Schools (AIS)—100% state funded grant created to assist teachers and administrators of nonpublic schools administer English Language Arts and Math exams—grants were for professional development.
  - Comprehensive Attendance Policy (CAP)—state reporting requirements and policy requirements where a nonpublic school may receive funding for compliance with this mandate.
  - Learning Technology Grant—competitive state grant for sustained professional development; given to public schools who are required to include all nonpublic schools in their boundaries opportunity to participate.
  - Mandated Services Aid—state reimbursement program for nonpublic schools that participate in state mandates regarding data reporting, pupil testing and evaluation. In order to be eligible for reimbursement, nonpublic school must comply with section 3204 of the Education Law, require students to attend full time according to section 3205 of Education law, not be recipients of other state or local aid directly or indirectly; and be a not-for-profit. (There are 17 state level mandates eligible for reimbursement under this program.)
2. Nonpublic school students in New York are entitled to some publicly funded services, which are either provided by the school district in which the student resides or the district within which the nonpublic school is located. State-funded programs and services include: Health Services, Homebound Instruction, Textbook Loan Program, Computer Software Loan Program, School Library Materials Loan Program, Transportation (students must reside within 15 miles of the nonpublic school), Special Education Services, Dual Enrollment Programs, and Mandated Services Reimbursement (MSA).
3. New York does require registration for nonpublic schools in certain circumstances:
  - The commissioner of education governs the registration of nonpublic high schools. 8 *Codes, Rules and Regulations of the State of New York (CRR-NY)* §13.1.

- Nonpublic schools are permitted to register. Only registered nonpublic high schools may issue diplomas and administer Regents Examinations. 8 CCR-NY 100.2(p).
  - A nonpublic school may be registered as a nursery school and/or kindergarten. Change in ownership nullifies the registration. 8 CCR-NY 125.10. Requirements for those schools are found in 8 CCR-NY Part 125.
  - Registration may be placed under review when students in a registered nonpublic school scores are below the criteria list in 8 CCR-NY 100.2(p)(13).
  - A nonpublic school must submit information and allow an on-site visit to the school by a staff member in the New York State Education Department's Bureau of School Registration in order to register with the Board of Regents per New York State Education Department Manual for New Administrators of Nonpublic Schools, State Requirements and Programs.
3. Discrimination—religious schools are permitted to limit enrollment based on religion; single sex schools are also permitted. However, all other nonpublic schools must publish a nondiscrimination policy/notice as follows:
- The M school admits students of any race, color, national and ethnic origin to all the rights, privileges, programs and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."*
4. Special education is provided by the district of residence for nonpublic school student. The provision of services requires coordination as to location (at public or nonpublic location depending on funding source and sectarian nature/non-sectarian nature); state and local funds may not be used to provide services at a sectarian school.

### Massachusetts

1. Massachusetts, by constitutional amendment, prohibits state aid to private and religious schools.

*Section 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and*

*support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.*

2. Massachusetts does permit public funding of special education to a nonpublic school under certain circumstances. If appropriate, publicly funded eligible students with disabilities requiring special education may be placed in a public or approved private special education program in accordance with 603 CMR 28.09 (1). *Mass. Gen. Laws c. 71B, §10.*

School committees may authorize the prepayment of tuition of a publicly place student with disabilities, for a period not exceeding three months, to any approved private school. *Mass. Gen. Laws c. 71, §71D.*

Eligible students with disabilities who attend private school at private expense are entitled to special education designed to meet their needs. The school district where the student with disabilities is a resident must provide genuine opportunities to participate in the public school special education program consistent with the state constitutional limitations. Eligible students are entitled to an individualized education program (IEP). Services provided or arranged for by the district pursuant to an IEP, if paid for with state or local funds, must be provided in a public facility or other public or neutral site. If services are funded only with federal monies, they may be provided on private school grounds. Administrative Advisory SPED 2007-2: IDEA-2004 and Private School Students (Updated July 2008).

3. Nonpublic schools in Massachusetts are approved, for compulsory education requirements, by the local educational agency. The school committee/school board where the private/nonpublic school is located is the approval authority.

### **New Hampshire**

1. The New Hampshire State Board of Education, like Vermont's SBE has an approval process for private or nonpublic schools through accreditation or State Board approval. The New Hampshire Board approval process involves different levels of approval: approved, conditionally approved, preliminarily approved, delay in full compliance, and denial of approval.
2. Special Education and students with disabilities: Like Vermont, by New Hampshire law, no state or federal money may be paid to a nonpublic school serving students with disabilities unless the private/nonpublic school is

approved by the State Board. Unlike Vermont, in New Hampshire, by law, all educational programs are approved, monitored and issued corrective action by the State Board including private/nonpublic schools:

*The state board of education shall adopt rules establishing a process and standards for the approval and monitoring of programs of education that are maintained by school districts, regional special education centers, and private organizations or state facilities for the benefit of children with disabilities, including chartered public schools, home-based programs and alternative schools or programs; except, however, that approval of education programs for the special district established in RSA 194:60 shall be pursuant to the standards set forth in the interagency agreements between the department of corrections and the department of education.*

3. Corrective action by the State Board in New Hampshire can include withdrawal of approval for operation and “in the case of a private provider of special education or other non-school district based program, ordering all school districts with students placed in the private provider of special education to relocate the students for whom each district is responsible to other programs or facilities that are in compliance with state and federal law.” RSA § 186-C:5.
4. First time approval requires budget submission: First year budget indicating:
  1. Anticipated expenses which shall include but not be limited to:
    - (i) Facility acquisition;
    - (ii) Facility maintenance and operations;
    - (iii) Insurance;
    - (iv) Salaries and benefits; and
    - (v) Equipment and supplies;
  2. Anticipated revenues; and
  3. Sources of revenue;
5. Renewal applications require:
  - (f) The nonpublic school shall provide the following information relative to its physical and financial resources:
    - (1) A description of the school's physical facilities and any off-campus facilities used for the program;
    - (2) A copy of the school's current approved operating budget and operating statement, which shall clearly demonstrate the availability of resources to support the program as described above; and
    - (3) A description of the way the operating budget is developed and approved.



www.lyndoninstitute.org

From: Karen Kennedy, Director of Specialized Instruction *KK*  
 To: Sending District Directors, District LEA's and Case managers  
 Date: January 11, 2017  
 Re: Transitioning students to Lyndon Institute

It is the intention of Lyndon Institute to provide services that best meet the needs of all students, as outlined in our Purpose, Promise and Principles. As you know we offer special education programs approved by the state of Vermont, and strive to meet the many unique needs of the students from several sending districts. Oftentimes we are asked to assist with the process of transitioning students from 8<sup>th</sup> grade to high school, as it can be a challenging shift for some. We are happy to do so, and find that allowing some students the opportunity to experience high school in advance can make a big difference in their ability to succeed when they do enroll full time.

However, in recent years, the number of students with Individualized Education Plans applying to Lyndon Institute has increased significantly. At the current rate of special education enrollments, we are exceeding our capacity. For this reason, we want to clarify the process for accepting and transitioning students to LI in the future.

In order for a student to be transitioned to LI prior to the end of their 8<sup>th</sup> grade year, they must first be accepted. This means their families have submitted an application and all appropriate documents to our admissions office, and have received a letter of acceptance. Once I have received notification of their acceptance I will work with sending school personnel and the LEA representative to develop a transition process that meets the needs of individual students. A fee may be charged for some services.

In addition, because we are exceeding capacity in terms of numbers of students approved for our programs and available space to provide services, it may be necessary to limit the number of students accepted for the 2017-18 school year.

It is my hope to meet with some of you in the coming weeks to discuss some of the issues we are all dealing with in regard to meeting the needs of our students in the best ways possible. I look forward to those conversations.

PRIVACY & CONFIDENTIALITY NOTICE: This message is for the designated recipient only and may contain privileged, confidential, or otherwise private information. If you have received it in error, please notify the sender immediately and delete and/or destroy the original. Please store in a secure and locked facility. The attached information may contain information protected under the Family Educational Rights and Privacy Act (FERPA) or the Health Insurance Portability and Accountability Act (HIPAA). If this information contains confidential and/or privileged health or student information and you are not entitled to access such information under FERPA or HIPAA, federal regulations require that you destroy this letter, email, fax or memo without reviewing it and you may not forward it to anyone.



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNCIL

**MEMORANDUM**

To: Representative Oliver Olsen  
From: Jim DesMarais, Legislative Counsel  
Date: October 28, 2016  
Subject: Proposed State Board of Education Rules on Approval of Independent Schools, Private Kindergarten Programs, and Tutorial Programs

**I. Introduction**

This memorandum responds to your request for an analysis of the merits of a legal challenge to the proposed amendment of State Board of Education (SBE) Rule 2200 series and Rule 700 series. These proposed rules address the requirements for approval by the SBE of independent schools, private kindergarten programs, and tutorial programs, and would condition approval on compliance with all State and federal laws and rules applicable to Vermont public schools. Approved status is required in order for a school district to pay tuition to these schools and programs.

In addition to discussing the legal merits of arguments that a party could assert in challenging the proposed rules, this memorandum also identifies a few arguments that a party could assert, without providing an analysis of their legal merits. I understand that these arguments are of less interest to you at this point, but please let me know if you would like me to explore them further.

Please note that this memorandum is preliminary in nature pending our further discussion. We have not fully researched all relevant case law and legislative history.

**II. Current law and SBE proposed rules**

**A. Approval of independent schools providing elementary or secondary education**

Pursuant to 16 V.S.A. § 164(4), the SBE shall “adopt rules for approval of independent schools.” This authority to adopt rules does not distinguish between a Vermont and an out-of-state independent school. Pursuant to 16 V.S.A. § 166, the SBE shall approve an independent school if it determines that the school “provides a minimum course of study pursuant to section 906 of this title and ... substantially complies with the Board’s rules for approved independent schools.” The SBE’s rules must “at minimum” require that an independent school have adequate resources, trained and qualified staff, and appropriate physical facilities. 16 V.S.A. § 166(b).

Under current SBE rules, the SBE considers a number of factors in deciding whether to approve an independent school. These factors include whether: the course of study offered is adequate and age appropriate; the school has adequate support services and physical facilities; and the school employs professional and qualified staff. An independent school is not required to provide special education services, but if it does, it must obtain SBE approval for each category of special education service offered. If the independent school is out-of-state, the school must be accredited or approved by its host state or by an accrediting agency recognized by the SBE. SBE Rules 2224, 2226, and 2228.

Proposed rule 2222.1 sets forth a number of new conditions that would be required for approval of an independent school in Vermont. I address three of these conditions in this memorandum:

1. Special education condition: subdivision (a)(i) would require the independent school to be approved for special education purposes, and rule 2223 would require that in order for the school to receive this approval, it must offer services to students with disabilities in each special education category of disability as defined in SBE rules (there are 13 categories of disability);
2. Open enrollment condition: subdivision (a)(iii) would require the independent school to have an enrollment policy that does not limit the ability of any student to enroll based upon any disability, or race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity pursuant to any applicable State or federal law; and
3. Public school condition: subdivision (a)(iv) would require the independent school to comply with all other State and federal laws and rules applicable to Vermont public schools, including providing a learning and (as applicable) residential environment for students that is safe and healthy, unless otherwise provided by law.

Under proposed rule 2222.2, in order for tuition to be paid to an independent school outside Vermont, the school would have to comply substantially with the approval standards for Vermont independent schools. Therefore, in substance, these conditions would also apply to an out-of-state school.

## **B. Approval of private kindergarten and tutorial programs**

Private kindergarten programs are included in the definition of elementary education. Therefore, the discussion in this memo concerning approval of an independent school applies to kindergarten programs. In addition, 16 V.S.A. § 166(a)(1) states that “the State Board shall approve an independent school that offers kindergarten but no other graded education if it finds, after opportunity for hearing, that the school substantially complies with the Board’s rules for approved independent kindergartens.”

A tutorial program is defined in 16 V.S.A. § 11(27) as “education provided to a student who is placed in a short-term program for evaluation and treatment purposes.” Under

16 V.S.A. § 828, a tutorial program is eligible to receive public tuition dollars if it is “approved by the SBE.” Title 16 does not grant express authority to the SBE to adopt rules for the approval of tutorial programs.

As to both private kindergartens and tutorial programs, under its current rules, the SBE considers a number of factors in deciding whether to approve a program. For example, as to kindergarten programs, the SBE considers whether the course of study is adequate and age appropriate; the school is in compliance with health and safety requirements; the school has adequate physical facilities; and the school employs professional and qualified staff. SBE Rule 2272. As to tutorial programs, the SBE considers whether the instruction is age and ability appropriate; the program has adequate support services and physical facilities; and the program employs professional and qualified staff. SBE Rule 2230.3.

Under proposed rule 2270, all three of the conditions listed in this memo would apply to private kindergarten programs and under proposed rule 2226.2 two of those conditions (the public school compliance and special education conditions) would apply to tutorial programs. Therefore, as with the approval of independent schools, under the proposed rules, private kindergarten and tutorial programs would be subject to substantially the same new requirements.

### **III. Legal Discussion**

#### **A. Approval of independent schools providing elementary or secondary education**

Pursuant to 16 V.S.A. §§ 164 and 166, the SBE has authority to adopt rules concerning approval of independent schools. There is no statute that explicitly prohibits the SBE from adopting the proposed rules. For example, there is no current law that explicitly states that the SBE shall not require an approved independent school to have open enrollment policies. Therefore, it could be argued, and I assume the SBE will argue, that it has authority to issue the new rules concerning approval of independent schools.

However, the proposed rules could still be challenged, see 16 V.S.A. § 807, on four grounds: (1) the proposed rules exceed the authority of the SBE; (2) the proposed rules are contrary to the General Assembly’s intent; (3) the delegation of rulemaking authority by the General Assembly to the SBE is contrary to the Vermont Constitution as a violation of either the nondelegation doctrine or the separation of powers clause (Vt. Const. Ch. II, § 5); and (4) as applied to an out-of-state independent school, the proposed rules have an extraterritorial effect and are invalid under the Commerce Clause of the U.S. Constitution (U.S.C.A. Const. Art. 1 § 8, cl.3).

This memorandum discusses the legal merits of the first two grounds only.

#### **1. The proposed rules exceed the authority of the SBE**

“[A]gency actions, including the promulgation of rules, enjoy a presumption of validity.” Vermont Assoc. of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991). However, rules must be “reasonably related to its enabling legislation in order to withstand judicial scrutiny.” In re Club 107, 152 Vt. 320, 322 (1989). The Vermont Supreme Court has stressed that

“an administrative agency’s power to promulgate regulations may extend only as far as its legislative grant of authority.” Martin v. State, 175 Vt. 80, 87 (2003).

There is no language in 16 V.S.A. §§ 164 and 166 that explicitly limits the breadth of the authority granted to the SBE to adopt rules concerning approval of independent schools. Section 166 only requires that the SBE rules at a minimum include certain elements. While this grant of authority is broad, it is not necessarily unconstrained. A court may look beyond the scope of the authority to the spirit and purpose of the law. See In re Club 107, at 322.

The General Assembly has adopted laws in Title 16 that apply only to public schools and laws that apply equally to both public and independent schools. For example, public schools are required to hire licensed teachers, to provide special education services to all eligible resident students, and to collect various forms of data for filing with the AOE. Approved independent schools are not subject to these requirements. On the other hand, both public and approved independent schools are subject to the hazing, harassment, and bullying prevention provisions of Title 16. Exhibit A contains further examples of these differences.

Therefore, there is a good argument that (i) the distinctions made by the General Assembly throughout Title 16 between public and independent schools establish a statutory scheme that reveals a legislative intent that independent schools should not be subject to all of the public school requirements; and (ii) the proposed rules contravene this statutory scheme and intent by requiring, for the first time, that approved independent schools satisfy the special education, open enrollment, and public school conditions that currently apply only to public schools.

As the Supreme Court stated in Martin, rules may extend only as far as its legislative grant of authority, and an administrative agency should not use a general grant of authority to promulgate rules that are contrary to legislative intent. 175 Vt. at 87-88. “The fundamental principle served by these tenets is the separation of powers.” *Id.*, at 87.

## 2. Legislative intent

### (a) Standard of review

If the rules proposed by the SBE were challenged, the court would seek to determine whether the rules are contrary to the General Assembly’s intent.

Courts apply two principles for interpreting whether a statute is contrary to legislative intent. The same principles apply for interpreting whether a rule is contrary to legislative intent. Slocum v. Dep’t of Social Welfare, 154 Vt. 475, 478 (1990).

The first principle of interpretation is that “...we look first to the statute’s language. We will enforce the plain meaning of the statutory language where the Legislature’s intent is evident from it.” In re Appeal of Carroll, 181 Vt. 383, 387–88 (2007).

The second principle is that if doubts exist as to the intent of the plain meaning, “the real meaning and purpose of the Legislature is to be sought after and, if disclosed by a fair and reasonable construction, it is to be given effect.’ The intent should be gathered from a consideration of ‘the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law.’” *In re Appeal of Carroll*, 181 Vt. 383, 387–88 (2007). (internal citations omitted)

**(b) Plain meaning**

Therefore, a court would start by determining if the plain meaning of 16 V.S.A. §§ 164 and 166 indicated that the SBE exceeded its authority. As discussed in this memo, there is no language in these sections that limits the breadth of the authority granted to the SBE to adopt rules concerning approval of independent schools. Section 166 only requires that the SBE rules, at a minimum, include certain elements.

A party arguing for the validity of the proposed rules would argue that the General Assembly’s intent is evident from the plain meaning of these sections, which do not constrain the scope of the SBE’s rulemaking authority. A party arguing against the validity of the proposed rules would argue that the General Assembly’s intent is not clear from the plain meaning of these sections. The basis for this argument may be that section 166 sets out minimum requirements that provide some indication of the intended limited scope of the authority granted, or that the scope must inherently be limited so as to at least prevent the SBE from adopting arbitrary or capricious conditions for approval.

*In re Estate of Gerald Thomas COTE*, 176 Vt. 293, 296 (2004) held that “[h]ere, however, both parties’ interpretations are plausible, and therefore we must ascertain legislative intent through consideration of the entire statute, including its subject matter, effects and consequences, as well as the reason and spirit of the law. All relevant parts of the applicable statutory scheme are to be construed together to create, if possible, a harmonious whole.” (internal citations omitted)

Whether a court would look beyond the plain meaning of 16 V.S.A. §§ 164 and 166 is unclear. A court may find from a literal reading of these sections that the General Assembly intended to grant broad authority to the SBE, and not look further for other evidence of legislative intent. On the other hand, a court following *In re Estate of Gerald Thomas COTE* may find two plausible interpretations of these sections, and therefore go on to ascertain legislative intent through consideration of the entire statutory scheme and spirit of the law. I believe that the better argument is that a court would look beyond the plain meaning, but cannot say with a degree of certainty what a court may decide.

**(c) Further consideration of legislative intent**

If a court decides to look beyond the plain meaning of 16 V.S.A. §§ 164 and 166, it would consider other evidence of legislative intent.

As discussed, the proposed rules would require an approved independent school to comply with all of the requirements that have been, by statute, imposed by the General

Assembly only on public schools. If the General Assembly intended these statutes to apply to an approved independent school, it could have done so.

In addition, the General Assembly has considered, and rejected, legislation that would have require independent schools to comply with some of the same requirements imposed on public schools. The General Assembly has also considered, and rejected, legislation that would have limited student access to out-of-state approved independent schools. However, courts, in assessing legislative intent, generally do not to give weight to bills that were not enacted. Tarrant v. Department of Taxes, 169 Vt. 189, 202 (1999). Therefore, it is doubtful that a court in reviewing the proposed rules would give significant weight to the fact that these bills were not passed. Despite the weakness of this argument from a legal perspective, it may be logical to contend that where members of the General Assembly have proposed, but the General Assembly has declined, to impose certain requirements on independent schools, it is perhaps inappropriate for a regulatory body to do so.

Finally, in determining legislative intent, a court should also consider the “effects and consequences” of a statute or rule. In re Estate of Gerald Thomas COTE, 176 Vt. 293, 296 (2004); In re Appeal of Carroll, 181 Vt. 383, 387–88 (2007). The imposition of the special education, open enrollment, and public school conditions would likely have a significant impact on the ability of approved independent schools to carry out their missions—especially those with specialized missions—and would increase their compliance costs, perhaps substantially. These schools may as a result have to change their missions or may no longer be able to operate.

Given that the proposed rules would require an approved independent school to comply with all of the requirements that have been, by statute, imposed by the General Assembly only on public schools and the potential significant impact these rules may have on the ability of approved independent schools to carry out their missions, there is a good argument that the proposed rules are contrary to legislative intent. As noted, a court would have to look beyond the plain meaning of 16 V.S.A. §§ 164 and 166 to consider this argument.

## **B. Conditions for tutorial program approval**

Tutorial programs are limited in time and may be specialized in nature in order to meet the needs of certain students. In considering legislative intent, a court would likely consider these limitations in contrast to the breadth of the requirements imposed by the public school and special education conditions.

Given the lack of clear statutory authority for the SBE to adopt rules for the approval of tutorial programs and the specialized nature of these programs, there are good arguments that the proposed rules exceed the authority of the SBE and are contrary to legislative intent, in line with the arguments made in this memo with respect to approved independent schools.

## Exhibit A

Examples of laws in Title 16 that apply only to public schools and laws that apply equally to both public and independent schools:

### *Statutes that apply only to public schools*

- the SBE is empowered and required under section 164 to (i) make regulations governing attendance and records of attendance of all students and the department of students attending public schools; and (ii) if deemed advisable, determine educational standards for admission to and graduation from public schools;
- public schools are required to meet the education quality standards set out in section 165;
- public schools are required to comply with the periodic release time requirements set out in chapter 24;
- public schools are required to comply with the school year and school day requirements set out in section 1071.

### *Statutes that apply both to public schools and independent schools*

- the flexible pathways to secondary school completion provisions of chapter 23, subchapter 2;
- the hazing, harassment, and bullying prevention provisions of chapter 9, subchapter 5; and
- the driver training course requirements of section 1045.

Bill Talbott, CFO and Deputy Secretary of the AOE, gave testimony to the House Committee on Education on February 3, 2015 that described the differences in public and independent school requirements. His testimony is linked below:

<http://legislature.vermont.gov/assets/Documents/2016/WorkGroups/House%20Education/Vermont%20Independent%20Schools/W~William%20Talbott~Independent%20Schools%20and%20Public%20Schools%20%E2%80%93%20Differences%20in%20Requirements~2-3-2015.pdf>

# Vermont Legislative Joint Fiscal Office

One Baldwin Street • Montpelier, VT 05633-5701 • (802) 828-2295 • Fax: (802) 828-2483

## ISSUE BRIEF

Revised: 4/25/17

Prepared by: Tim Harris, JFO Intern

### Public Funding of Independent School Tuition and Special Education Services

This report provides an overview of public financial assistance for students attending independent elementary and secondary schools. It summarizes a number of issues surrounding the public funding of independent school tuition and access to special education in independent schools. This brief also offers a quick comparison between Vermont law and voucher programs in other states.

#### Background

The Vermont State Board of Education (VSBE) has proposed revisions to Rule Series 2200. These rules are intended to ensure independent schools receiving public education dollars are held to the same nondiscrimination policies as their public counterparts, or in their own words, “to assure acceptable educational opportunities for students enrolled in Vermont’s independent schools.”<sup>1</sup> The proposed revisions focus on making sure publicly funded students are not discriminated against in the independent school application process due to a disability.

#### Overview of Vermont’s Financial Assistance Program

Vermont and Maine are the only two states that offer a town tuitioning program.<sup>2</sup> Vermont school districts that have no available public schools pay to send their students to approved independent schools or public schools in other districts. Parents from districts that have a school may also petition to send their students to other public or independent schools. Independent schools receiving students under the town tuitioning program must meet basic school approval requirements and be nonsectarian. In order to attend a receiving independent school, students must be from a sending district and gain admission to the school based on the school’s customary criteria.

#### Scope of Vermont’s Town Tuitioning Program

According to data from Vermont School Boards Association (VSBA) and the Agency of Education, 5,383 Vermont students, seven percent of total students, participated in the town tuitioning program during the 2015–2016 school year. Roughly one-half of those participating used their voucher to attend an independent school or academy while the other half attend public schools.<sup>3</sup>

<sup>1</sup> Vermont State Board of Education Manual of Rules and Practices: Series 2200 – Independent School Program Approval. Senate Education Witness Testimony 1/10/17. <http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-rules-series-2200.pdf>

<sup>2</sup> For the purposes of this brief I am referring to the provisions related to tuitioning in 16 V.S.A. §§ 821–836 as the “town tuitioning program.” The U.S. Department of Education and the National Conference of State Legislatures use the same terminology.

<sup>3</sup> Nicole Mace, Executive Director, Vermont School Boards Association. *Independent Schools Approval Standards* Senate Education Committee Witness Testimony 1/10/17. <http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Nicole%20Mace~Independent%20Schools%20Approval%20Standards~1-10-2017.pdf>

## **VSBA and VSBE Concerns with Vermont's Town Tuitioning Program**

The Vermont School Boards Association (VSBA) and the Vermont State Board of Education (VSBE) have raised several issues with Vermont's town tuitioning program. One area of concern is that several independent schools offer few, if any, categories of special education. Some require families to finance or contribute to the cost of special education services.<sup>4</sup> Independent schools could, in theory, deny access to students because they need special education services the school does not offer. The VSBA and VSBE believe this practice or possibility to be a violation of constitutional rights that guarantee disabled students access to the same programs and services as nondisabled students.

### **Relevant Facts:<sup>5</sup>**

- According to the Vermont Agency of Education, as of December, 1 2015, 15.91 percent of Vermont students are actively receiving special education services.<sup>6</sup>
- There are 12 categories of special education<sup>7</sup> that the State mandates for public schools.
- 2,099 publicly funded students attend one of six independent schools that offer all 12 categories of special education (St. Johnsbury, Lyndon Institute, Burr & Burton, Thetford, The Village School of North Bennington, and the Mountain School at Winhall).
- 323 publicly funded students attend one of the five independent schools that offer 1–11 categories of special education.
- 289 publicly funded students attend one of the 29 independent schools offering zero categories of special education. Four of these schools have publicly funded student populations of 42-87 percent.
- One independent school with 87 percent of students publicly funded offers two categories of special education. Three other independent schools with enrollment rates of publicly funded students as high as 66 percent but averaging 50 percent, offer four, three, or two categories of special education. One of the aforementioned three independent schools offering some categories of special education, but not 12, is the Long Trail School. The Long Trail School notes that it accepts students in four special education categories into which 77 percent of Vermont's special education students fall.<sup>8</sup>
- None of Vermont's seven ski academies offer any special education categories. Notably, only one of the seven has more than 13 publicly funded students enrolled. Four of the seven have two or fewer publicly funded students enrolled.
- 32 additional schools are approved Therapeutic Special Ed Schools with a total enrollment of 810 students.

## **VSBE Proposed Revisions to Rules Regarding Independent School Approval**

---

<sup>4</sup> Ibid.

<sup>5</sup> All enrollment data are Vermont Independent Schools Association (VISA) Testimony to the Vermont Senate Education Committee on January 10, 2017 (unless otherwise noted). <http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Bills/S.130/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Mill%20Moore~Spreadsheet-%20Independent%20School%20enrollments,%20tuitioned%20students%20and%20special%20ed%20approvals~1-10-2017.pdf>

<sup>6</sup> Agency of Education Child Count Report <http://education.vermont.gov/documents/child-count-report-by-su-2015>

<sup>7</sup> The twelve categories of disability for special education are: autism, deaf-blindness, emotional disturbance, hearing loss, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury and visual impairment. Development delay is a category for children birth to age 3 (can be used up to age 9 per 34 CFR 300.8) and not included in the categories above for ages 3-21.

<sup>8</sup> Testimony before Senate Education Committee, Friday, January 13, 2017. <http://longtrailschool.org/proposed-state-board-of-education-rule-series-2200/>

VSBE states that the proposed revisions are not intended to affect Vermont's historical tuition system or affect the right of school districts to tuition students at any public school or approved independent school. They attempt to ensure that approved schools are "willing and able" to serve all students from tuitioning districts.<sup>9</sup> Proposed rule 2222.1 establishes a number of new conditions required for approval of an independent school in Vermont. The most important, or controversial, new requirements for independent school approval are addressed below:

- Special Education Condition: An independent school must offer services to students with disabilities in all 12 categories of special education disability. This does not mean independent schools would be required to maintain standing staff in all 12 areas of disability unless they have students who require all 12 categories. If an independent school does not have a child of a particular disability in attendance, it only needs to have a plan in place for how it would respond if a student with a certain disability enrolled.
- Special purpose schools: These schools may continue as special purpose schools under the new regulations and will not be required to accept additional categories of disability. For example, a school serving only students with autism may continue to serve only students with autism.
- Open Enrollment Condition: An independent school must have an enrollment policy that does not hinder the ability of a student to enroll based on any disability, race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity.
- Public School Condition: Independent schools must comply with all other state and federal laws applicable to Vermont public schools regarding health and safety unless otherwise provided by law.<sup>10</sup>

### **VISA Concern with VSBE Revisions to Rules for Approving Independent Schools**

Many in the Vermont Independent School Association (VISA) consider the proposed rules, at least as they were drafted, to go above and beyond the intentions of the VSBE. Even the VSBE considers certain statements in the draft of proposed rules to have been overly broad, such as the Public School Condition.<sup>11</sup> Objections have been raised to both the substantive contents of the VSBE's proposed rules and the procedural process via which revisions are being made.

Substantive Issues:

- VISA believes the mission-driven nature of independent schools creates "difficulties or logical impossibilities" with respect to the proposed open enrollment and special education conditions.
- VSBA has considered proposing a lottery system to prevent independent schools from discriminating against students from sending towns. VISA opposes this plan on the grounds that the decision of an independent school to accept students from a sending public school is often a lengthy process designed to make sure the school is the right fit for an individual. This could affect the decision of out-of-state parents to move to an area so their children can go to an independent academy school in Vermont. Academically rigorous schools believe if they are not allowed to choose which public school applicants will attend, their mission or quality of education

---

<sup>9</sup> Vermont State Board of Education Statement on November 29, 2016.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-letter-on-rule-2200-series.pdf>

<sup>10</sup> Memo From Jim DesMarais, legislative counsel to Representative Oliver Olsen. Witness Testimony to Senate Education Committee 1/10/17

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~James%20DesMarais~Proposed%20State%20Bd.%20of%20Ed.%20Rules%20on%20Approval%20of%20Independent%20Schools,%20Private%20Kindergarten%20Programs,%20and%20Tutorial%20Programs~1-10-2017.pdf>

<sup>11</sup> Vermont State Board of Education Statement on November 29, 2016.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-letter-on-rule-2200-series.pdf>

could suffer. Likewise, a school mandated to accept a student with a rare disability may not fit that student's needs.<sup>12</sup>

- Independent schools organized around engaging and rescuing students failing in their original schools often specialize in serving students in one or a few categories of special education. Under the special education and open enrollment provisions, these schools, generally small and specialized, might be forced to take on a child with a disability they did not previously service. Such a development could potentially impact the quality of care offered to other disabled students or students from disadvantaged backgrounds or failing public schools for which the independent school might be seeking to provide other specialized services.
- VISA expressed concern that if every approved independent school needed to be ready to hire staff for every potential special education category, already limited State special education resources could become spread too thinly. Multiple members of VISA have expressed concern that public schools are already reluctant to cooperate with independent schools when independent schools are seeking to hire special educators.<sup>13</sup>

### Procedural Issues

- VISA has urged VSBE to correct a few admitted errors in the draft of the proposal.
- Though the VSBE unquestionably has the authority to make rules according to the Vermont Attorney General, VISA disputes that the Attorney General would permit the VSBE to make the specific rules the VSBE has drafted.<sup>14</sup>
- VISA notes legislative intent has shown in the past that public and independent schools should not be subject to the same requirements.
- VISA states that the rulemaking process usually includes a private dialogue with stateholders, and that the VSBE “did not engage in that private dialogue, , or in any stakeholder dialogue.”<sup>15</sup> AOE disagrees with this statement.<sup>16</sup>
- VISA raised the issue to the Interagency Committee on Administrative Rules (ICAR) that nothing in the public record indicates the VSBE has assessed the economic impact of the proposed rules which would be necessary to inform the economic impact statement required under 3 V.S.A. § 838(a)(2). Nor has the VSBE evaluated the cost implications of the proposed new rules on local school districts as required under 3 V.S.A. § 832b.
- Representative Oliver Olsen quantified the potential loss of residential property value to his district to range between three percent and 16 percent, or \$36 million–\$194 million.<sup>17</sup>
- Additionally, if the proposed rule changes apply to out-of-state independent schools, this could potentially have an extraterritorial effect. This would potentially raise issues with the Commerce Clause of the U.S. Constitution.<sup>18</sup>

---

<sup>12</sup> Thomas Lovett SJA, Long Trail School, Daren Houck Lyndon Institute, Testimony before Senate Education Committee, Friday, January 13, 2017

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Thomas%20Lovett~Testimony~1-13-2017.pdf>

<sup>13</sup> Ibid; Mill Moore Vermont Independent Schools Association Testimony to Senate Education Committee, January 10, 2017.

<http://legislature.vermont.gov/committee/document/2018/24/Date/1-10-2017>

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> See Letter from Secretary Holcombe dated March 2, 2016, to Headmasters of The Sharon Academy and Burr & Burton Academy with a courtesy copy to Mill Moore of VISA, soliciting input.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-item-041817-j-rule-2200.pdf>

<sup>17</sup> Letter from Representative Oliver Olsen to ICAR.

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Mill%20Moore~Rep.%20Oliver%20Olson%20Letter%20to%20VSBE%20and%20ICAR~1-10-2017.pdf>, and VSBE Testimony to Senate Education Committee January 10, 2017

<http://legislature.vermont.gov/committee/document/2018/24/Date/1-10-2017>

**Comparison between Vermont Law and Laws in other States**

The only other state with a voucher program focused on rural schools, like Vermont’s, is Maine. Twenty-seven states, including Vermont and Maine, have some form of a school voucher program that supports students attending independent schools. Many of these programs specifically target students with disabilities as part of their program eligibility requirements. The federal Individuals with Disabilities Education Act (IDEA) ensures that students with a disability are provided a public education tailored to their individual needs. Under this law, students who accept vouchers and enroll in independent schools waive their rights and protections under IDEA, including their right to a Free and Appropriate Public Education and to an Individualized Education Program. States can impose requirements on independent schools accepting voucher students, mandating schools provide similar services and support for students with disabilities to those they would receive in a public school. No state requires independent schools to accept all students with disabilities that apply. An overview of states with some form of school voucher program can be seen below.<sup>19</sup>

**States providing vouchers, scholarships, or some form of compensation to private schools**

\*10 state programs the NSCL knows about could not be located\*

Town Tuitioning	Poverty Based	Special Needs Based	Both Poverty and Special Needs Based
Maine	North Carolina	Arizona	Indiana
Vermont	Washington D.C.	Arkansas	Louisiana
	Wisconsin	Florida	North Carolina
		Georgia	Ohio
		Mississippi	
		Oklahoma	
		Utah	

Source: <http://www.ncsl.org/research/education/voucher-law-comparison.aspx>

<sup>18</sup> Memo From Jim DesMarais, legislative counsel to Representative Oliver Olsen. Witness Testimony to Senate Education Committee 1/10/17.  
<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~James%20DesMarais~Proposed%20State%20Bd.%20of%20Ed.%20Rules%20on%20Approval%20of%20Independent%20Schools,%20Private%20Kindergarten%20Programs,%20Qand%20Tutorial%20Programs~1-10-2017.pdf>

<sup>19</sup> Josh Cunningham, School Voucher Contact NSCL

**States with programs or rules similar to those proposed by VBSE**

State	Overview	Key Similarities	Key Differences
Arizona	Authorizes \$2.5 million for students with disabilities to use for tuition at private schools. Private schools will not be state-approved if they discriminate on the basis of race, color, family status, disability or national origin	Private schools that discriminate will not be state-approved.	Public funding only allotted to students with disability.
Georgia	Citizens and corporations may donate to Georgia Student Scholarship Organizations (SSOs) that provide scholarships to parents to help cover the cost of attendance at qualified Georgia private schools. Private schools are qualified if accredited by a state-approved agency, physically located in Georgia, adhere to provisions of the <i>Federal Civil Rights Act of 1964</i> , and satisfy Georgia state law private school requirements.	Private schools that discriminate will not be state-approved.	Discrimination is based on adherence to provisions of Federal Civil Rights Act of 1964, and Georgia state law requirements as opposed to additional requirements set by the state.  Unclear if disabled students are eligible for scholarships.
Wisconsin	Under the Milwaukee Parental Choice Program, private schools must admit all students who apply unless the number of applicants exceeds the amount of school space. In such a case, the school must conduct a random lottery among the applicants.	Private schools are mandated to accept as many applicants as they can. If there are more applicants than available space, the schools do not have the option to choose who gets in, or discriminate.	Poverty based rather than disability based.

*Facts in table from NCSL*

## **Other States Offering Tuition-Like Assistance to Students with Disabilities**

### **Arkansas:**

Students with disabilities are granted state-funded scholarships to attend private schools. The private schools must notify the state about grades of disabled students and specific services they provide for disabled students. Schools must administer state assessment to participating students.

### **Florida:**

The John M. McKay Scholarships for Students with Disabilities Program (2001) provides funding to students with disabilities seeking to attend a private school.

### **Georgia: Special Needs Scholarship Program (2007)**

Georgia authorizes a scholarship to students with disabilities to attend a public or private school that their parents view as best meeting their needs.

### **Indiana:**

The Indiana Choice Scholarship Program (2011) provides students with an IEP and a household income not exceeding 200 percent of the federal poverty level a voucher to attend a participating private school of their choice. Participating private schools must administer state assessments to scholarship recipients and must evaluate teacher performance. Participating students have their grades monitored.

### **Maine:**

Maine's tuitioning program is similar to Vermont's, except schools that enroll 60 percent or more of their students via public funding are subject to the statewide assessment to evaluate student academic achievement.

### **Ohio:**

Ohio offers state-funded scholarships for students with autism.

### **Utah:**

Utah offers a fixed number of scholarships for students with disabilities to attend a specialized private school.



December 6, 2016

James M. Diaz, Esq.  
Staff Attorney / Public  
Advocate  
T/802.223.6304  
jdiaz@acluvt.org

Vermont State Board of Education

**Re: ACLU of Vermont Comment on VSBE Proposed  
Rulemaking on Independent School Approval**

**Board of Directors**

*James Morse, president*  
*Julie Kalish, vice president*  
*Pamela Marsh, secretary*  
*Bernie Lambek, treasurer*  
*Robert Appel*  
*Peter Asch*  
*Denise Bailey*  
*Euan Bear*  
*Traci Griffith*  
*Ana Hernandez*  
*Geoffrey Jones*  
*Brad Myerson*  
*David Putter*  
*Tony Pyle*  
*Richard Saudek*  
*Bill Sayre*  
*Bill Schubart*  
*Abe Sender*

To the esteemed members of the Vermont State Board of Education:

On behalf of the ACLU of Vermont, I write to encourage the State Board to move forward with its proposed rulemaking regarding Vermont-based Independent Schools. The ACLU of Vermont is a legal non-profit which advocates for the civil liberties and civil rights of Vermont residents under the Vermont and U.S. Constitutions. We have over 2,000 members across the state. During our fifty year history, ACLU of Vermont lawyers and advocates have sought to uphold Vermonters' constitutional right to an equitable education, among other constitutional rights and democratic imperatives.

With its proposed rules, the State Board is proactively taking steps to ensure that an equitable education is available to all publicly funded students, publicly funded students' constitutional rights are upheld wherever they attend school, and government remains transparent. We applaud these efforts and hope to see the rules move forward.

Open enrollment policies and special education services are the hallmark of an equitable school. The proposed rules ensure that students cannot be discouraged from enrolling because of their sexual orientation, gender identity, national origin, disability, race, or other protected class status.

They will also help ensure that students showing previous academic challenges will not be excluded. Such discouragement can turn schooling into a two-tier system where the students who need the most resources receive the fewest. While we appreciate the flexibility independent schools need to develop unique learning environments and pursue innovative pedagogical approaches, these special traits need not come at the cost of the most vulnerable students. In fact, the vulnerable students may benefit most from these innovative educational philosophies.

Adequate constitutional safeguards in school safety and governance rules, including a discipline plan that meets the constitutional standards of due process, are also necessary to ensure publicly funded students receive the equal protection of law. I have personally represented students who were suspended and expelled from independent schools for

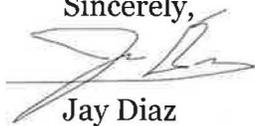
minor infractions without any process whatsoever. One such incident was detailed in a report I drafted, entitled *Kicked Out! Unfair and Unequal Student Discipline in Vermont's Schools*. These summary denials of Vermonters' educational rights teach students that they are not welcome and that there is nothing they can do about it. This is not how a democratic society teaches its children.

Finally, with these rules, the ACLU of Vermont hopes Vermonters will be able to acquire a better understanding of the educational outcomes of publicly funded students. Data collection, analysis, and comparison are vital to understanding the status of our education system – where it is working and where it isn't, including in independent schools. Data also allows local schools to share knowledge and more quickly determine which pedagogical approaches are the most effective. Vermont must be able to aggregate educational data for all publicly funded students in order to know how best to teach the next generation.

In the interest of civil rights, civil liberties, and government transparency, the ACLU of Vermont hopes the board will move forward with the proposed rulemaking. As a society and a state, we need to affirm our commitment to equity, individual rights, and transparency, now more than ever.

Please do not hesitate to contact me with questions.

Sincerely,



Jay Diaz  
Staff Attorney / Public Advocate

**WILLIAM H. SORRELL**  
ATTORNEY GENERAL

**SUSANNE R. YOUNG**  
DEPUTY ATTORNEY GENERAL

**WILLIAM E. GRIFFIN**  
CHIEF ASST. ATTORNEY  
GENERAL



**STATE OF VERMONT**  
**OFFICE OF THE ATTORNEY GENERAL**  
**109 STATE STREET**  
**MONTPELIER, VT**  
**05609-1001**

TEL: (802) 828-3171  
FAX: (802) 828-3187  
TTY: (802) 828-3665

<http://www.ago.vermont.gov>

December 19, 2016

Stephan Morse, Chair  
State Board of Education  
219 North Main Street, Suite 402  
Barre, VT 05641

Re: State Board of Education Rule 2200 Series

Dear Mr. Morse:

Thank you for your request for a legal opinion on the authority of the State Board of Education to promulgate rules concerning independent schools in Vermont. As set forth below, it is our opinion that the State Board of Education has this authority.

As an administrative body, the State Board of Education is authorized to promulgate rules within the scope of its legislative grant of authority.<sup>1</sup> Thus, the question is whether the enabling legislation, in Title 16 of the Vermont Statutes Annotated, provides this rulemaking authority and whether the draft rules on independent schools are reasonably related to the intent of that law.<sup>2</sup> "Where the Legislature's intent can be ascertained from the plain meaning of the statute," it is appropriate to "interpret the statute according to the words the Legislature used."<sup>3</sup> The plain language of the statute authorizes the Board to promulgate rules concerning independent schools.

---

<sup>1</sup> *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208, 210-211 (2002) ("To determine the scope of authority vested in an administrative agency by a statutory grant of power, we look to its enabling legislation.") (citing *Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110, 113 (1995); *In re Agency of Admin.*, 141 Vt. 68, 76 (1982)); see also, *Martin v. State*, 2003 VT 14, ¶13 (citing rule that administrative agency's rulemaking authority extends only so far as its legislative grant of authority) (citations omitted); *Delozier v. State*, 160 Vt. 426 (1993) (stating that rule will be upheld on appeal absent compelling indication of error, but cannot be sustained to the extent that the rule conflicts with the statute) (citing *In re Peel Gallery of Fine Arts*, 149 Vt. 348, 350, 543 A.2d 695, 697 (1988)); *Petition of Vermont Welfare Rights Organization*, 132 Vt. 622, 627 (mem.) ("any rule-making authority of an individual agency must be found in that agency's enabling legislation").

<sup>2</sup> *Vermont Verde*, 174 Vt. at 211 (citing *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 638, 481 A.2d 1274, 1275 (1984)).

<sup>3</sup> *Rueger v. Natural Resources Board*, 2012 VT 33, ¶7 (citing *Herald Ass'n v. Dean*, 174 Vt. 350, 354 (2002)).

Vermont law requires the State Board of Education to “establish and advance education policy for the State of Vermont,” among other duties.<sup>4</sup> The Board’s enabling statute expressly authorizes and also requires the Board to adopt rules “for approval of independent schools.”<sup>5</sup> Title 16 provides for two types of independent schools, recognized and approved.<sup>6</sup> Of these, only approved independent schools are eligible for public tuition funds.<sup>7</sup> The Board’s enabling statute also requires that the Board adopt rules “as necessary or appropriate for the execution of its powers and duties and of the powers and duties of all persons under its supervision and control.”<sup>8</sup>

The draft proposed State Board of Education Rule 2200 Series, in relevant part, sets standards and a process for Board approval of independent schools. The governing statute provides that rules for approved independent schools must, “at minimum, require that the school has the resources required to meet its stated objectives,” including the following:

- 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.<sup>9</sup>

The draft proposed Series 2200 Rule includes requirements for these elements:

- Financial capacity is addressed at Section 2222.14(a)(v), 2224.1 (General Education Review and Approval and Fiscal Review of Independent Schools with a Specific State Purpose), Section 2226.2(c) (Secretary shall require a tutorial program to provide assurances and documentation that specifically describe the ability of the program to remain fiscally solvent during period of approval); and Section 2270 (iv) (private kindergarten programs).
- Faculty qualification is addressed at Section 2226.2 (b) (authorizing the Secretary to employ an independent evaluator or to require accreditation by an accrediting entity recognized by the State Board), and Section 2223.4 (Educator Licensure Requirements for Special Educators).

---

<sup>4</sup> 16 V.S.A. § 164. Section 164 also requires the State Board to “evaluate education policy proposals, including timely evaluation of policies presented by the Governor and Secretary; engage local school board members and the broader education community;” and to carry out the duties enumerated at subsections (1) through (21).

<sup>5</sup> 16 V.S.A. § 164(14).

<sup>6</sup> 16 V.S.A. § 166(a) (“An independent school may operate and provide elementary education or secondary education if it is either approved or recognized as set forth herein.”).

<sup>7</sup> 16 V.S.A. § 828. The draft rules for approved independent schools, therefore, apply only to independent schools that seek eligibility for public funding. *See, e.g.*, Section 2222.1(a)(setting conditions for receipt of public tuition funds).

<sup>8</sup> 16 V.S.A. § 164(7).

<sup>9</sup> 16 V.S.A. § 166(b).

- Facilities are also addressed in the draft proposed rule, at Section 2222.1(a)(iv) (requiring compliance with state and federal laws applicable to public schools, including those requiring a safe and healthy learning environment). Special services, or more specifically, special education services, are addressed throughout the draft proposed rule, including at Section 2222.1(a)(i)(requiring state approval for special education purposes), Section 2222.1(a)(ii) (requiring a nondiscriminatory enrollment policy), Section 2223 (requiring general education independent schools to offer special education services to students in each category of disability), Section 2223.1 (out-of-state independent schools), Section 2223.2 (procedural requirements for independent schools in providing special education), and Section 2226.3 (requiring tutorial programs to meet special education standards). Thus, the draft proposed rule is consistent with the enabling statute.

Additional statutory authority for the draft proposed rule's special education provisions is found in Title 16, Chapter 101, which requires the State Board of Education to "establish minimum standards of services for students receiving special education in independent schools" and set maximum rates to be paid by the Agency of Education for such services after consultation with independent schools in Vermont,<sup>10</sup> and "adopt rules governing the determination of a child's eligibility for special education, accounting and financial reporting standards, program requirements, procedural requirements, and the identification of the district or agency responsible for each child with a disability."<sup>11</sup> The public policy codified at 16 V.S.A. § 2973a states that "integrated special education services are recognized as an essential responsibility of the educational system that benefits all students and contribute to the good of the State." The draft proposed Series 2200 Rule would appear to fulfill the Board's rulemaking mandates in a manner that supports the State's policy goals as expressly provided in Chapter 101.

Title 16 also provides more generally that it is "Vermont's policy that all Vermont children will be afforded educational opportunities that are substantially equal in quality."<sup>12</sup> The statute establishes a framework for and a process for administering education quality standards for public schools,<sup>13</sup> and provides that independent schools must participate in the education quality process to receive designation as an independent school meeting education quality standards.<sup>14</sup> Nothing in the draft proposed Series 2200 rules is inconsistent with this statutory framework.

---

<sup>10</sup> 16 V.S.A. § 2973(a).

<sup>11</sup> 16 V.S.A. § 2959(a).

<sup>12</sup> 16 V.S.A. § 165(a); *see also*, 16 V.S.A. § 2941 (stating that it is State policy "to ensure equal educational opportunities for all children in Vermont," and that "children with disabilities are entitled to receive a free appropriate public education").

<sup>13</sup> 16 V.S.A. § 165(a) and (b).

<sup>14</sup> 16 V.S.A. § 165(f).

It is a basic principle of administrative law that an agency is authorized to implement, and interpret any ambiguity in, its enabling statute by promulgating rules.<sup>15</sup> The State Board of Education has implemented and interpreted its enabling statutes on approved independent schools in the draft proposed Series 2200 Rule. Moreover, the Legislature has authorized the Board to adopt rules as necessary to fulfill its duties,<sup>16</sup> and, as the Vermont Supreme Court has stated:

[W]here the empowering provisions of a statute authorize an agency to make such rules and regulations as may be necessary to carry out the provisions of the act, the validity of such rules or regulations will be sustained so long as they are reasonably related to the purposes of the enabling legislation.

*Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc.*, 137 Vt. 142, 150 (1979) (citing *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652 (1973)). Insofar as the draft proposed rules on independent schools are necessary for the execution of the Board's powers and duties, they are entitled to such a presumption of validity. As set forth herein, the draft proposed rule is authorized by and consistent with Vermont statutes governing independent schools.

This opinion is based on a general review of the enabling statutes in Title 16 and the provisions of the Series 2200-draft proposed rule related to independent schools. The complete draft proposed rule touches on dozens of provisions of current or proposed Board rules in this series. If you would like our office to render an opinion regarding any specific provision in or aspect of the draft proposed rule, please let us know.

Sincerely,



William E. Griffin  
Chief Assistant Attorney General

---

<sup>15</sup> *City of Arlington, Tex. v. F.C.C.*, --- U.S. ---, 133 S.Ct. 1863, 1874-1875, 185 L.Ed.2d 941 (2013) (stating that if the agency's interpretation "is based on a permissible construction of the statute, that is the end of the matter") (quoting *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778 (1984)).

<sup>16</sup> 16 V.S.A. § 164(7).

**16 V.S.A. § 164. State Board; general powers and duties**

The State Board shall evaluate education policy proposals, including timely evaluation of policies presented by the Governor and Secretary; engage local school board members and the broader education community; and establish and advance education policy for the State of Vermont. In addition to other specified duties, the Board shall:

(1) Establish such advisory commissions as in the judgment of the Board will be of assistance to it in carrying out its duties. Advisory commission members shall serve with or without compensation at the discretion of the Board but shall receive actual expenses incurred in pursuance of their duties.

(2) Have the authority to enter into agreements with school districts, municipalities, states, the United States, foundations, agencies, or individuals for service, educational programs, or research projects.

(3) Examine and determine all appeals that by law are made to it and prescribe rules of practice in respect thereto, not inconsistent with law.

(4) Review and comment on an Agency budget prepared by the Secretary for the Governor.

(5) [Repealed.]

(6) Make regulations governing the attendance and records of attendance of all students and the department of students attending public schools.

(7) Adopt rules pursuant to 3 V.S.A. chapter 25 as necessary or appropriate for the execution of its powers and duties and of the powers and duties of all persons under its supervision and control.

(8) [Repealed.]

(9) Implement and continually update standards for student performance in appropriate content areas and at appropriate intervals in the continuum from kindergarten to grade 12 and methods of assessment to determine attainment of the standards for student performance. The standards shall be rigorous, challenging, and designed to prepare students to participate in and contribute to the democratic process and to compete in the global marketplace. The standards shall include a standard for reading level proficiency for students completing grade three.

(10) [Repealed.]

(11) If deemed advisable, determine educational standards for admission to and graduation from the public schools.

(12) [Repealed.]

(13) Be the State Board for the program of adult education and literacy and perform all the duties and powers prescribed by law pertaining to adult education and literacy and to act as the State approval agency for educational institutions conducting programs of adult education and literacy.

(14) Adopt rules for approval of independent schools.

(15) Establish criteria governing the establishment of a system for the receipt, deposit, accounting, and disbursement of all funds by supervisory unions and school districts.

(16) In cooperation with the Secretary, ensure that the Agency develops information, plans, and assistance to aid in making technology and telecommunications available and coordinated in all school districts. The State Board shall develop guidelines for distribution of federal, State, or private funds designated for the development or expansion of distance learning technologies. The guidelines shall encourage, consistent with any terms or conditions established by the funding source, collaboration between schools and school districts to realize economic and educational efficiencies.

(17) Report annually on the condition of education statewide and on a school-by-school basis. The report shall include information on attainment of standards for student performance adopted under subdivision (9) of this section, number and types of complaints of harassment, hazing, or bullying made pursuant to chapter 9, subchapter 5 of this title and responses to the complaints, financial resources and expenditures, and community social indicators. The report shall be organized and presented in a way that is easily understandable by the general public and that enables each school to determine its strengths and weaknesses. The Secretary shall use the information in the report to determine whether students in each school are provided educational opportunities substantially equal to those provided in other schools pursuant to subsection 165(b) of this title.

(18) Ensure that Vermont's students, including students enrolled in secondary career technical education, have access to a substantially equal educational opportunity by developing a system to evaluate the equalizing effects of Vermont's education finance system and education quality standards under section 165 of this title.

(19) [Repealed.]

(20) Pursuant to section 806g of this title, constitute the State Council for the Interstate Compact on Educational Opportunity for Military Children and appoint to

the Council a Compact Commissioner and Military Family Education Liaison, who may be the same person. The Board may appoint additional members.

(21) Report annually to the Governor and the General Assembly on the progress the Board has made on the development of education policy for the State.

## H. 513, Sec. 42

**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.