

MEMORANDUM

TO: Superintendents, Special Education Directors, Business Managers, Principals
FROM: Daniel M. French, Ed.D., Secretary of Education *DMF*
SUBJECT: State Board of Education Rule Related to Special Education Placement Waivers
and Contracted Services
DATE: August 23, 2022

Purpose

In conjunction with the transition from a special education reimbursement model to the new census-based funding model, the Agency of Education (AOE) has reviewed the existing policies, procedures and guidance for the field regarding allowable expenditures for special education. That review has identified a past practice that is out of compliance with existing State Board of Education rules as well as amended rules that will take full effect on July 1, 2023.

This AOE practice relates to the placement of a student by an LEA in an approved independent school for special education services. In both the existing and amended rules, an LEA may only place a student in an approved independent school or an approved tutorial program. This memo will describe the rules that apply to these placements and the way the AOE will implement these rules going forward.

Background

In all cases, both prior to implementation of Act 173 and under the new framework established by the Act, a student may only be placed by an LEA in an independent school approved by the State Board of Education (SBE) or a tutorial program approved by the SBE. (SBE Rule 2363.10). Additionally, both existing and amended SBE rules require that the approved independent school must be approved for special education purposes.

Act 173 amended the criteria and process for special education approval. The historic criteria and process, which remain in place until July 1, 2023, include a strict requirement that a student may only be placed in an approved independent school that is also approved for the student's particular disability category or categories. Starting on July 1, 2023, according to Act 173, the strict match between student disability for placement will no longer be required. Instead, placements by LEAs will be permitted if the school is approved for special education and approved for public tuition by the SBE.

Historically, SBE rules for approved independent schools have permitted the AOE to grant waivers that permit placement of a student by an LEA when a school is approved by the SBE but lacks approval for the student's particular disability category. The new rules also include the ability of AOE to grant a waiver and permit placement in a school approved by SBE but

lacking the additional approval from SBE for special education and public tuition eligibility. See the [two versions of the SBE rule side by side](#).

Waivers for School Year 2022 – 2023

The AOE will continue to accept and evaluate waiver requests from LEAs for placement of a student in an approved independent school that is not approved for the student’s particular category of disability. Waivers will be granted in [exceptional circumstances](#), and may include conditions under which the placement is to be carried out. The AOE will not grant waivers for placements in programs that are not granted the status of “approved independent school” or “approved tutorial program” by the SBE because this practice is not and has never been permitted by SBE rule. This practice will remain in effect until July 1, 2023, when full implementation of the rules will be in effect.

The AOE’s review of past practice identified that students have, in some cases, been educated at a non-approved program (off LEA premises) for partial or full school days. SBE approval includes review and assurances of student safety and health protections such as occupancy and fire code requirements, nondiscrimination protections, hazing, harassment and bullying prevention and investigation, and restraint and seclusion prohibitions. The practice of paying for full day educational services delivered on the premises of a non-approved program or entity is not permitted.

The use of contracted services that do not constitute a placement are not impacted by this guidance and may include payment for services from entities, businesses or programs that have not been approved by the SBE. However, LEAs must use contracted services only in a manner that does not result in a student attending full day programming off LEA premises or outside the supervision of LEA staff.

For special education fiscal questions, please contact Jennifer Perry at jen.perry@vermont.gov.

For questions about the waiver process, please contact Alicia Hanrahan at alicia.hanrahan@vermont.gov.

For questions about IDEA allowability and the implications of this guidance on special education programmatic work, please contact Jacqui Kelleher at jacqui.kelleher@vermont.gov

For questions about the implications of this guidance for independent schools, please contact Deb Ormsbee at deb.ormsbee@vermont.gov.

Placement Prohibition State Board of Education Rule and Updated Rule Side-by-Side

Rule 2228 – in effect until July 1, 2023	Rule 2230 – takes effect July 1, 2023
<p>(1) Placement Prohibition.</p> <p>No responsible agency, as defined by Rule 2360.3, shall make a special education placement in an independent school that has not been approved for special education purposes nor shall such a placement be made in an independent school that serves special education children who are in a category of disability different from that under which the child was determined to be eligible for special education unless the placement is pursuant to:</p> <ul style="list-style-type: none"> (a) Subsection (2) of this rule, (b) A court order, or (c) A hearing officer order. <p>(2) Exceptional Circumstances - Approval Process</p> <p>Upon application by a responsible LEA, the Commissioner may permit, in exceptional circumstances, a special education placement in an independent school that is approved pursuant to Rule 2200, but has not received approval for special education purposes pursuant to Rule 2228.1. Notwithstanding Rule 2366.2.2(7), in instances in which the Commissioner grants such approval, tuition and associated otherwise allowable costs shall be reimbursable under subchapter 2 of Chapter 101 of Title 16 of the Vermont Statutes Annotated. Any person aggrieved by the Commissioner's decision may file an appeal with the State Board of Education pursuant to 16 V.S.A. § 828.</p> <p>(a) Exceptional circumstances exist when:</p> <ul style="list-style-type: none"> (i) After reasonable efforts, the LEA cannot locate an appropriate public or independent school approved for special education purposes pursuant to Rule 2228.1 to serve children with the category 	<p>Placement Prohibition</p> <p>No responsible agency, as defined by SBE Rule 2360.3, or LEA shall make a special education placement in an independent school that has not been approved to receive public tuition pursuant to the conditions in Rule 2229, unless the placement is pursuant to:</p> <ul style="list-style-type: none"> (a) Rule 2230.1; (b) A court order; or (c) A hearing officer's order. <p>2230.1 Exceptional Circumstances - Approval Process.</p> <p>Upon application by a responsible LEA, the Secretary may permit, in exceptional circumstances, a special education placement in an independent school that is approved pursuant to SBE Rule 2223, et seq. but that has not been approved to receive public tuition under Rule 2229. In instances in which the Secretary grants such approval, tuition and associated otherwise allowable costs shall be reimbursable under subchapter 2 of Chapter 101 of Title 16 of the Vermont Statutes Annotated. Any person aggrieved by the Secretary's decision may file an appeal with the State Board pursuant to 16 V.S.A. § 828.</p> <p>(a) Exceptional circumstances exist when:</p> <ul style="list-style-type: none"> (1) After reasonable efforts, the LEA cannot locate an appropriate public or independent school approved for special education purposes pursuant to SBE Rule 2229 to serve children with the category of disability under which the child was determined to be eligible for special education; and

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<p>of disability under which the child was determined to be eligible for special education; and</p> <p>(ii) The proposed placement is deemed appropriate by the child's IEP team.</p> <p>(b) The Commissioner may specify conditions under which the placement is to be carried out.</p>	<p>(2) The proposed placement is deemed appropriate by the child's IEP team.</p> <p>(b) The Secretary may specify conditions under which the placement is to be carried out.</p>