

To: Chair Jennifer Samuelson and members of the VT State Board of Education

From: Amanda Garces and Mark Hage

Date: Oct 15, 2023

Re: Public comment: Rule 2000 – State Board Memo, Alignment of Select Language in Both Sets of Proposed Rules 10/12/2023

Dear Chair Samuelson and members of the State Board:

This is a formal response to your memorandum of October 12 (“*Alignment of Select Language in Both Sets of Proposed Rules*”) on behalf of the State Board of Education. Our concerns, questions, and recommendations are informed by nearly four years of research, dialogue, and deliberation as co-chairs of the Act 1 Working Group and by extensive interactions with many Vermonters who followed and commented on our work products and processes.

At the outset, we must state emphatically that the Working Group was unanimous in its endorsement of the “Statement of Purpose” and the definition of “discrimination” presently found in the revised EQS Manual. We oppose any substitution of the proposed EQS language in your memorandum with that in the same memorandum from the proposed 2200 Rules. We also urge you **to extend the public comment period for the rulemaking process** to accord members of the Act 1 Working Group and those who endorse the EQS Manual in its current iteration an opportunity to testify and submit written comments about the language substitutions you are weighing with respect to the manual and the 2200 Rules.

In your memorandum, Ms. Samuelson, you write:

*When the Board approved the revised language in the 2200 Series Rules on August 18, 2023, it was clear that its commitment to adopting the same substantive language in both sets of rules for Act 1 related amendments had not changed and that **it intended to refer to the revised language in the 2200 Series Rules when it considered final updates to the EQS Rules.***

*Since the public comment periods for these sets of rules [EQS Manual and 2200 Rules] will not overlap as the Board had hoped, I feel it is important to expressly point out the exact language revisions that were unanimously approved by the Board in the 2200 Series Rules. **In keeping with the Board’s stated goal to promote consistency between the rules, the counterparts identified below will be revisited by the Board before it proposes the final EQS Rules.***

The pursuit of consistency between these different rules should never come at the cost of substantively weakening or diluting proposed changes to the proposed **EQS Manual** that define discrimination, expressly prohibit it, and expand protections against it. That is what will come to pass, we fear, if the 2200 Rules language in the October 12th memorandum replaces its counterparts in the EQS Manual. Respectfully, the State Board must not let that happen.

Proposed Statement of Purpose: 2200 Rules

The Board believes that any distinction, exclusion, classification, restriction or preference based on any ground, such as race, ethnicity, skin color, sex, sexual orientation, gender identification, language, religion, political or other opinion, disability, national, social or geographic origin, citizenship or immigration status, income or property, birth or other status, which has the purpose or effect of denying or impairing the

recognition, enjoyment, or exercise of fundamental rights and freedoms in the political, economic, social, cultural, civil or any other field should be carefully considered and rejected if it results in unlawful discrimination or interferes with the delivery of effective, available, and equitable educational opportunities. The Board recognizes that discrimination is practiced by individuals and groups, and it is expressed systemically through the structures, laws, practices, and policies of public and private institutions, employers, and organizations.

1. This language opens with a declaration of what the **State Board** “believes” rather than with an unequivocal statement that directs independent/non-public schools to anchor their policies and practices to a set of anti-discriminatory values. Values inspire and shape standards of behavior and action. Stating what the State Board “believes,” however well intended, misses the point. What is needed is the exercise of your rulemaking authority to clearly define discrimination and the forms it takes, and to stipulate that public and independent/non-public schools must identify and combat discriminatory behavior and policies so that all Vermont students can achieve equal access to a quality education.
2. Building off this first point, the proposed 2200 Rules language, unlike that in the proposed EQS Manual, does not include the word “**prohibit.**” This is a glaring and fundamental omission, and it runs counter to anti-discrimination policies adopted by most public and private institutions. We suggest you re-read the extensive [supplemental report](#) we produced in 2022 at the State Board’s request. It contains commentary and links to research that influenced and gave shape to our engagement with the question of what “discrimination” means and how it should be understood by our public schools and the local communities they serve.
3. The proposed EQS Manual’s Statement of Purpose also identifies the “student” as the primary focus of anti-discrimination policies and actions. **There is no mention of “student” or “students” in the highlighted section above in the proposed 2200 Rules.**
4. A public school’s mission is not to “interfere” with discrimination or to complacently accept discrimination that state and federal law in their present state cannot be deployed to challenge and stop. Our public schools must do their utmost to prohibit discrimination in all its manifestations, and swiftly rectify its deleterious consequences, which are often traumatic for victims and destructive of social and educational relationships. We must be committed to these objectives to ensure that no child is denied a high-quality education, personal security, and dignity. This is why we revised the proposed EQS Manual as we did.

As you know, the Act 1 Working Group added language to the proposed EQS Manual that increased the categories of anti-discrimination protection, building on the foundations of state and federal law. We offered [this explanation](#):

*With this language, the Working Group asserts the need to broaden the categories of protection against discrimination in both public and approved independent schools beyond what is stipulated in Section 2113. **These new categories, to be clear, reflect the personal, educational, and professional experiences of our members, their children and families, and their communities, and they are plainly unacceptable barriers to the attainment of an equitable, antiracist, anti-discriminatory, culturally***

responsive and inclusive education. “Religion” was added because “creed” in Section 2113 is a term many do not understand in this context as being inclusive of and protecting religious practices and beliefs or religious minorities. “Religion,” on the other hand, is a term most people do understand.

It must be restated as well that the proposed EQS Manual’s Statement of Purpose explicitly denotes that there is no **“private right of action.”** This is a longstanding provision in the manual that shields school districts from incurring legal liability arising from the manual’s rules, and this covers the broader definition of discrimination.

5. The list of anti-discrimination categories in the proposed 2200 Rules largely mirrors that in the proposed EQS Manual. But the former’s protocol on when it is permissible or necessary to act against discrimination is narrowly constricted by virtue of its deference to the parameters of anti-discrimination law at the state and federal level. We also find key terminology troublingly vague.

The rules stipulates that the evidence and effects of discrimination on the multiple grounds cited *“should be **carefully considered and rejected** if it results in unlawful discrimination or **interferes** with the delivery of effective, available, and equitable educational opportunities.”* There is no definition of “carefully considered,” “rejected” or “interferes” in the proposed 2200 Rules. Since the word “prohibit” is not present, it is reasonable to infer that “reject” and “interfere” have a different meaning or purpose than “prohibit” and, therefore, may represent by design a lower bar of accountability. *Why did you resort to these terms, when you could have simply added an unambiguous prohibition on discrimination?*

We want to expand on our objection to the concept of interference in the proposed 2200 Rules. The Act 1 Working Group, as previously noted, expanded the scope of anti-discrimination protections in the proposed EQS Manual because of well-documented forms of discrimination that afflict our students today and, regrettably, are not expressly prohibited by law. Students from low-income families, for example, are not a protected class, but familial poverty can and does generate discrimination. The same is true for children who face discrimination because of their immigration status or because their first language is not English. But the State Board knows this, which is why, we presume, you inserted *“...or interferes with the delivery of effective, available, and equitable educational opportunities.”* This new language, however, will not serve as a potent second firewall against discrimination where statutory protections do not yet exist.

The 13th Amendment to the U.S. Constitution and historic civil rights legislation in the 1960s and beyond were not enacted to “interfere” with slavery, racism, and other forms of discrimination. But to end their immoral, exploitative, degrading, violent, and socially pernicious consequences. Meriam-Webster defines “interfere” this way: *“to slow or stop (something); to make (something) slower or more difficult.”* So, how should we understand “interfere” in the context of an assessment of the presence and effects of discrimination on the delivery of educational opportunities in independent/non-public schools? In other words, what are you requiring precisely?

Turning again to Meriam-Webster’s definition of “interfere,” are you saying independent/non-public schools must undertake anti-discrimination interventions if certain behaviors, policies, or actions **“stop”** the delivery of educational opportunities...or if they **“slow”** the delivery of them...or if they just

make that delivery “**more difficult**”? Additionally, placing the accent here on the “*delivery of effective, available, and equitable educational opportunities*” as a standard for fighting discrimination, rather than on how discrimination affects (directly and indirectly) the wellbeing and aspirations of **students**, is misguided. It’s not hard to imagine scenarios where a particular lesson plan or educational program is **delivered** effectively, made **available** to all students, and is comprised of constituent parts and objectives that are **equitable**. And yet discrimination can still be present in multiple ways and harm **students** (or potentially local families and school staff).

Every child and their family should know and trust that their public schools are sincerely and passionately committed to protecting them from discrimination. This requires, at a minimum, a categorical standard of prohibition against discrimination. The absence of such a prohibition in the 2200 Rules Statement of Purpose is a profound flaw and will send the wrong message to Vermonters and their children. If you elect to stay with it for the proposed 2200 Rules, please do not endorse it for the EQS Manual.

Definition of Discrimination: 2200 Rules

“Discrimination” is intended to describe any exclusion, restriction, or preference based on any protected class consistent with state and federal law that has the purpose or effect of denying or impairing the recognition, enjoyment, or exercise of an individual’s fundamental rights. Discrimination is practiced by individuals and groups, and it is expressed systemically through the structures, laws, practices, and policies of public and private institutions, employers, and organizations.

Definition of Discrimination: EQS Manual

“Discrimination” means any distinction, exclusion, classification, restriction or preference based on any ground, such as race, ethnicity, skin color, sex, sexual orientation, gender identification, language, religion, political or other opinion, disability, national, social or geographic origin, citizenship or immigration status, income or property, birth or other status, which has the purpose or effect of denying or impairing the recognition, enjoyment or exercise of fundamental rights and freedoms in the political, economic, social, cultural, civil or any other field. Discrimination is practiced by individuals and groups, and it is expressed systemically through the structures, laws, practices, and policies of public and private institutions, employers, and organizations.

1. To state the obvious, “discrimination” has a meaning. To remove the verb “mean” in the proposed 2200 Rules and replace it with “intended to describe” strips the definition of the concreteness, emphasis, and simplicity that the verb “mean” conveys. The verb “mean” is in the proposed EQS Manual definition and we want it to remain there.
2. The proposed 2200 Rules definition of “discrimination” is, again, too narrowly construed, grounded as it is to “protected classes” in state and federal law. As stated earlier, we owe it to Vermont’s students in our public schools to protect them from discriminatory harm in all circumstances, even when state and federal law do not provide us with the tools to conduct anti-discrimination interventions outside the parameters of “protected classes.” In time, in the ongoing

struggle to overcome discrimination as defined in the proposed EQS Manual, we are confident every public and private institution will follow the lead of our public schools and their local communities. Thus, the language above in the proposed **EQS Manual**, in red, beginning on line two through most of line 4, delineates categories of discrimination that must be understood, confronted, and stopped by our public schools, local communities, and people of conscience. This should be communicated in no uncertain terms in the proposed EQS Manual.

3. The language in red in the proposed **EQS Manual**, including that on lines 5-6, which is absent in the proposed **2200 Rules** definition of “discrimination,” is found in the proposed **2200 Rules** “Statement of Purpose,” together with a reference to discrimination. Why is it acceptable in the proposed 2200 Rules Statement of Purpose but not in its definition of “discrimination”?
4. We do not understand why “caste” is not in the proposed **EQS Manual’s** definition of “discrimination,” since it is in the manual’s “Statement of Purpose.” We assume an oversight of some kind, perhaps on our part, explains this. We ask, please, that you add it to the proposed **EQS Manual’s** definition.

Candidly, the omission of “caste” from the proposed **2200 Rules** is a mistake. Caste discrimination is not confined to Southeast Asia. It is a serious problem in the [United States](#) and worldwide, as we noted in a report to the legislature and in another to the [State Board](#). [Cal State Universities](#), the largest public university system in the country (23 campuses), added caste to its anti-discrimination policy in 2022, following the lead of the city of Seattle. Vermont’s public and independent/non-public schools should add their name to this socially responsible and educationally constructive initiative.

Conclusion

In closing, we implore the State Board not to alter the wording of “Statement of Purpose” or the definition of “discrimination” in the proposed EQS Manual. We reiterate, too, the importance of extending your rulemaking’s public comment period so that the matters delineated in your memorandum of October 12 and in this letter can be addressed in a fair and transparent manner by those who invested so much time, hope, reflection, and faith in the revision process for the proposed EQS Manual and educational projects related to it.

Thank you for receiving and giving due consideration to our commentary and recommendations.

Sincerely,

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