

MEMORANDUM

To: Vermont State Board of Education Members
Meagan Roy, Act 173 Advisory Group Chair
Agency of Education Secretary Dan French

From: Oliver Olsen, State Board of Education Chair

Date: November 29, 2021

RE: Proposed Updates to Rule Series 2200

Introduction

The public comment period for the proposed updates to Rule Series 2200 closed on November 5th, 2021, and the State Board of Education (SBE) is in the process of reviewing public comment that has been received. This memo provides relevant background, a summary of public comment received, timelines, and suggested next steps to bring this iteration of rulemaking to a conclusion. Because the start of this rulemaking process predates the tenure of several SBE board members, I start with a summary of the history of this rulemaking.

Background & Context

As some of you may know, a prior effort to update these rules in 2016 was met with significant opposition from many Vermonters, including educators, school board members, students, and parents of disabled and non-disabled children. Comments from hundreds of ordinary citizens were offered in writing and at two public hearings that were attended by over a thousand people in total. The General Assembly brought this rulemaking to a halt with Act 49 of 2017. A subsequent act of the General Assembly (Act 173 of 2018) directed the SBE to initiate rulemaking for Rule Series 2200 with guidance from an Advisory Group established under the Act.

Between 2020 and 2021, at the recommendation of the Agency of Education (AOE), and with the support of the Advisory Group, stakeholder groups were convened to develop draft proposals for updates to Rule Series 2200¹. This process ultimately resulted in a proposal for updates to Rule Series 2200 that was presented to the SBE as a consensus recommendation in two stages: on March 17, 2021 and on April 21, 2021.

In addition to the work performed on Rule Series 2200 by the Advisory Group, a committee of the SBE was established in December of 2020 to identify opportunities for improving other aspects of Rule Series 2200 that were not specifically within the scope of the Advisory Group's statutory charge. Early in this process, the SBE Rule 2200 Committee organized its effort into two phases. "Phase One" work contemplated proposed changes that could be integrated into the Advisory Group's recommendations

¹ [January 8, 2021 Report](#) of the Act 173 Advisory Group



with minimal complexity or disruption to the Act 173 timeline, while "Phase Two" would tackle more challenging issues in a wholly new rulemaking process to follow the completion of the rulemaking mandated by Act 173. Key stakeholders, namely the Vermont School Boards Association, the Vermont Superintendents Association, and the Vermont Independent Schools Association have been regularly involved with these committee meetings.

At its May 19, 2021 meeting, the SBE consolidated the proposal that came out of the Advisory Group process with additional "Phase One" changes recommended by the SBE Rule 2200 committee. At this same meeting, the SBE moved the amalgamation of proposed changes into the formal APA rulemaking process. Four virtual public hearings were scheduled during the months of August, September, and October at various times and days of the week to maximize the opportunity for public input. A deadline of November 5, 2021 was established for the submission of written public comment.

Summary of Public Comment for 2021 Rulemaking

Excluding formal comment offered by AOE staff (which came out of discussions of the SBE Rule Series 2200 Committee), there were a total of nine members of the public who offered comment. Three members of the public who submitted public comment are members of the Advisory Group as representatives of various advocacy organizations (Vermont Legal Aid – Disability Law Project, Vermont Independent Schools Association, and the Vermont School Boards Association). Three other members of the public who submitted comment were directly involved in the terminated 2016 rulemaking process (former AOE secretary, former SBE member, and AOE staff attorney). One other member of the public is an AOE employee with significant professional experience and expertise working with independent schools that serve students on IEPs. With regard to these latter two comments offered by AOE employees (which were clearly submitted in their capacity as private citizens), the AOE Secretary has confirmed that these comments do not reflect the AOE's position on the proposed rules.

It is notable that no members of the public identified themselves as being a student, parent of a student, or school board member and only one member of the public identified herself as an educator – a stark contrast from the 2016 rulemaking experience. The relatively small number of public comment submissions is also testament to the high level of public engagement and quality of work generated from the Advisory Group process, which was undertaken over many months in numerous public meetings by organizations identified by the General Assembly as having the greatest collective background and expertise in considerations regarding the delivery of special education services in school districts.

Public comment broadly falls into the following categories:

- Specific recommendations to improve the readability, clarity, and interpretation of text
- General statements of desired objectives without specific comment on the proposed rules
- Comments regarding non-discrimination requirements
- Objections to the use of the term "Therapeutic School"
- Objections to changes that are mandated by Act 173 (and therefore not subject to discretion in the rulemaking process)
- Comments on statutory law (which the SBE has no authority to change)
- Comments on the process for school approval
- Comments on IEP placement in independent schools
- Comments on rate setting and financial accountability
- Recommendation to change the enrollment process at independent schools



The public comment received is available online (<https://education.vermont.gov/documents/edu-state-board-rule-2200-public-comment-111521>) and should be reviewed in its entirety.

Much of the substantive public comment was submitted in the last three days of the written public comment period, so there was little opportunity for other members of the public to respond with alternative comment. One member of the public submitted an addendum after the deadline – I have asked that this to be included in the record as it only missed the deadline by a few days.

Overall, the public comment submitted reflects a high level of knowledge and expertise on the part of the citizens who took the time to offer their perspectives. Several comments offered very specific suggestions for changes or clarifications, while some were more general in nature. A majority of the more specific comments challenge proposed rules that reflect the consensus achieved by the Advisory Group process. Some of the more general comments speak to larger policy questions that extend beyond this particular rulemaking (as they are not unique to the independent school domain) and are potentially outside the scope of the SBE's statutory authority.

Timeline and Next Steps

In December 2020, the SBE reviewed a timeline² for Rule Series 2200 rulemaking with the following milestones:

- June 2021 - Initiate APA rulemaking process
- September 22, 2021 – Public comment period ends, following three public hearings
- October 20, 2021 – SBE considers public comment and agrees on any revisions
- November 17, 2021 – SBE reviews and approves final draft 2200 rules and moves to LCAR

At its May 19, 2021 meeting, the SBE reviewed an updated timeline³ with minor adjustments to the public comment period, but otherwise retained the planned milestone of November 2021 for final approval. Following the initiation of rulemaking, a fourth public hearing was added, and the public comment period was extended to November 5, 2021 to maximize opportunity for public comment.

In view of the extended public comment period, and after conferring with Vice-Chair Samuelson, I anticipate an extension of the original timeline by three months to allow the SBE additional time to consider the public comment and potential revisions at upcoming meetings. I plan to set the agenda for upcoming SBE meetings according to the following timeline:

- December 2021 – SBE to review public comment and agree on high level approach to response
- January 2022 – SBE reviews proposals for revisions and agrees on changes
- February 2022 – SBE reviews and approves final draft rules for submission to LCAR

Given that much of the public comment was directed at proposals that came out of the Advisory Group process, I am inviting the Advisory Group to review comments concerning issues that are within its purview (i.e. those mandated by Act 173) and to provide the SBE, in advance of its January 2022 meeting, with consensus recommendations on any changes it thinks are warranted. I suggest that the Advisory Group identify those comments that address topics within its statutory remit, and then separate those issues into two subcategories: issues that have already been discussed and resolved through the Advisory Group process, and new issues that were not addressed during the Advisory Group

² https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-item-h-12_16_20.pdf

³ <https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-item%20L-2200%20timeline-05-19-2021.pdf>



process. From there, the Advisory Group can identify what recommendations it feels can be addressed by the SBE as part of the current “Phase One” rulemaking as well as those that the SBE might better address in its “Phase Two” rulemaking.

I am also asking the SBE Rule Series 2200 Committee to review comments concerning matters that fall outside the Advisory Group’s domain, and to provide a recommendation for any changes at the SBE’s January 2022 meeting. If necessary, the SBE may ask the AOE to provide recommendations on specific issues.

We should be cautious about creating major policy through rulemaking, particularly in response to public comment at the tail end of a multi-year process. There is an art to rulemaking: the General Assembly sets broad policy with statutory mandates that provide a sketch, and the SBE is tasked with the work of filling in the detail. Past legislative history reinforces the need for the SBE to color within the lines. And lest there be any doubt, just this year, the General Assembly explicitly removed reference to the SBE’s role in policymaking in Title 16.

Since the start of this year, the SBE has expressed clearly that it intends to start a new rulemaking effort concerning Rule Series 2200 (what we have referred to as the “Phase Two” effort) after the completion of the rulemaking before us now (“Phase One”) that is dictated by the timelines imposed by Act 173 and formal APA rulemaking process. There will be an opportunity to take up some of the more complex issues raised in this round of public comment, with opportunity for comprehensive public engagement, during the Phase Two effort.

I anticipate that some people will complain that we are further delaying the completion of this rulemaking, while others will say that we are going too fast. At the end of the day, we need to balance competing demands for the board’s time, while ensuring a good process that yields high quality output. This approach seeks to strike that balance.

