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STATE OF VERMONT
REPRESENTATIVE OLIVER K. OLSEN
HOUSE OF REPRESENTATIVES

October 29, 2016

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

Michael Clasen, Chair
Vermont Interagency Committee on Rules
109 State Street, Pavilion Building
Montpelier, VT 05609

TRANSMITTED VIA EMAIL

RE: Proposed State Board of Education Rule Series 2200

Gentlemen:

As a legislator representing four communities (Londonderry, Stratton, Weston, and Winhall) with school choice, I am writing to express grave concerns about the rulemaking process initiated by the State Board of Education (SBE) in relation to proposed amendments to Rule Series 2200 (approved independent schools).

At the July 29, 2016 meeting of the SBE, Chairman Morse characterized the proposed rule changes as "**dramatic**."

I could not agree more.

The SBE proposed rule changes would require independent schools to comply with **all** state and federal laws and rules applicable to Vermont public schools [proposed SBE rule 2222.1(a)(iv)] as a condition for payment of tuition from local school districts. This requirement has far-reaching implications that encroach upon fundamental issues of independent educational mission, governance, and financial structure that have developed over the past 140 years. In essence, this proposed rule would require independent schools to transform themselves into quasi-public schools – or remain independent and

exclude underprivileged students who will not be able to afford to attend the school, since local school districts would be prohibited from paying tuition to independent schools that do not comply with these proposed rules.

Let me be clear: should the proposed amendments to the rules be adopted in their current form, they will have a **devastating impact** on the Manchester & the Mountains region, including the four towns in my legislative district that have school choice. This will have a **negative impact on the range of educational opportunities** available to students in our region, would **harm our local school districts**, including local public elementary schools, **lead to the devaluation of real estate** in the region, and **destabilize the regional economy**.

The most immediate impact of these rules would be to severely restrict access to educational opportunities available to students in our region. To put this into perspective, approximately 95% of high school students in Londonderry, Stratton, Weston, and Winhall attend independent schools, including **Burr & Burton Academy**, **Long Trail School**, and the **Stratton Mountain School**. To the extent that these independent schools are unable to comply with the proposed rule changes, low and middle income students will no longer be able to enroll in these schools (since school districts would be prohibited from paying tuition to schools that do not comply with the new rules), and **school choice as we know it will cease to exist**.

The economic impact to the region – which has already been struggling to recover from the Great Recession – would be tremendous. The potential impact to real estate valuations, alone, should be a cause for immediate concern – **there could be devaluation of the regional residential real estate market in the range of $36 to $194 million**.

I have many constituents who have moved to this region, from out of state – bringing their businesses, jobs, and economic prosperity, along with their children – specifically because they were attracted to the diversity of educational opportunities available through school choice and access to high quality public and independent schools in our region. In an otherwise challenging economic environment, school choice and access to a diverse ecosystem of independent and public schools are viewed as critical assets to be leveraged in our efforts to strengthen and grow the regional economy.

While I appreciate the SBE's commitment to holding one of the public hearings in Manchester, I have a fundamental objection to such a major change of public policy being rushed through an administrative rule change. More tactically, I have concerns about the process leading up to the pre-filing of these proposed rule changes with the Interagency Committee on

Administrative Rules (ICAR), including the lack of economic analysis, and the confusion this rulemaking process will create for the school district merger activity under Act 46.

What follows is a summary of my specific concerns with these proposed rules and the associated rulemaking process, which I will address in turn:

1. There is nothing in the public record to indicate that the SBE 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);
2. There is nothing in the public record to indicate that the SBE has evaluated the cost implications that this rule will have on local school districts, as required under 3 V.S.A. § 832b;
3. The proposed rule changes applicable to in-state independent schools are contrary to legislative intent, as expressed through acts of the General Assembly, which have established and reinforced clear distinctions between public and independent schools over the years;
4. The proposed rule changes applicable to out of state independent schools would have an extraterritorial effect, potentially violating the Commerce Clause of the U.S. Constitution, and is contrary to legislative intent;
5. The proposed transition timeline would be disruptive to students already enrolled in an independent school; and
6. The proposed rule changes will add to considerable public confusion in the context of the Act 46 rulemaking process that is already underway, and would be disruptive to the Act 46 implementation process.

Economic Impact Statement

Although an economic impact statement was submitted with the pre-filing to the ICAR (included with this letter as Attachment E), there is nothing in the public record to demonstrate that the SBE has actually undertaken an assessment of the potential economic impact of the proposed rule changes.

I have reviewed all of the SBE meeting agenda, minutes, and video recordings, going to back to the initial SBE request on November 17, 2015 for the AOE to draft proposed amendments to the 2200 Series Rules. There is no record of the SBE ever requesting an economic impact assessment or authorizing the development of an economic impact statement. Furthermore, I could find no evidence that an economic impact assessment or statement was ever presented to, or reviewed by, the SBE, in conjunction with the proposed rule changes.

The economic impact statement received by ICAR on September 7, 2016 was not part of the SBE agenda packet for its July 29, 2016 or August 23, 2016

meetings (Attachments A & C); and from the video recordings of those meetings, there is nothing to suggest that this was ever presented to, or reviewed by, the board. Additionally, there is no reference to an economic impact statement in the minutes of either meeting (Attachment B & D). By all appearances, the economic impact statement presented to ICAR is procedurally defective, in that it was never part of the SBE public record, was never reviewed by the SBE, and was not attached to the proposed rule change that the SBE authorized for pre-filing on July 29th and August 23rd. In summary, the SBE never authorized the submission of the economic impact statement that was transmitted to ICAR – at least not in a public meeting, which would be required under Vermont's public meeting law, 1 V.S.A § 312(a)(1):

> *"No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting..."*

Setting aside the procedural concerns, the pre-filing with ICAR is substantively defective, in that it lacks the specificity required under 3 V.S.A § 838(c)(1):

> *"The economic impact statement shall analyze the anticipated costs and benefits to be expected from adoption of the rule. Specifically, each economic impact statement shall, for each requirement in the rule:*
>
> *(A) List categories of people, enterprises, and government entities potentially affected and estimate for each the costs and benefits anticipated.*
>
> *(B) Compare the economic impact of the rule with the economic impact of other alternatives to the rule, including no rule on the subject or a rule having separate requirements for small business."*

The statute clearly requires an itemization of *each* requirement, coupled with estimates of *expected costs and benefits that each requirement* will have on categories of people and entities impacted. The economic impact statement submitted to ICAR only includes a vague statement that schools seeking approval under the proposed rules would incur increased costs of seeking accreditation, and an equally non-specific statement that students, parents, and school districts would see a benefit.

The economic impact statement fails to identify the expected costs from the numerous other requirements that would be imposed on independent schools, should proposed rule 2222.1(a)(iv) be adopted. The rule is very broad, in that it would require approved independent schools to comply with *"all other state*

and federal laws and rules applicable to Vermont public schools..." in order to accept tuition payments from school districts. A summary of these requirements are enumerated in a document from the AOE (included with this letter as Attachment H). Many of these requirements would have quantifiable cost impacts, yet none of them are addressed in the economic impact statement, as required by 3 V.S.A § 838(c)(1).

The proposed rule changes would have a macro-level economic impact that extends beyond the direct costs that would be incurred by independent schools conforming to the rules. To the extent that independent schools are unable or unwilling to meet these proposed requirements, and the availability of school choice and access to independent schools is curtailed, there will be secondary economic impacts that need to be assessed, including the impact on the tax base, specifically owners of residential property.

Real estate professionals in this region can speak to the premium that is built into residential real estate valuations for communities that have access to a robust ecosystem of independent schools with school choice. Published academic research has quantified the value of this premium in the range of 3% to 16%. I have included a copy of this study, which was published in Volume 24, No. 1 of the Journal of Housing Research in 2015, as Attachment F. By applying the premium identified by this study to the aggregate residential grand list of the following towns in our region, it is reasonable to conclude that these rules have the potential to trigger a devaluation in residential real estate values within our region in the range of $36 - $194 million:

TOWN	TOTAL RESIDENTIAL PROPERTY VALUE*	POTENTIAL 3% LOSS OF VALUE (LOW)	POTENTIAL 16% LOSS OF VALUE (HIGH)
DORSET	$ 260,704,500	$ 7,821,135	$ 41,712,720
LANDGROVE	$ 30,735,100	$ 922,053	$ 4,917,616
MANCHESTER	$ 393,499,800	$ 11,804,994	$ 62,959,968
PERU	$ 44,964,500	$ 1,348,935	$ 7,194,320
SANDGATE	$ 23,910,800	$ 717,324	$ 3,825,728
SUNDERLAND	$ 80,592,000	$ 2,417,760	$ 12,894,720
WINHALL	$ 71,106,500	$ 2,133,195	$ 11,377,040
DANBY	$ 78,611,500	$ 2,358,345	$ 12,577,840
MT. TABOR	$ 11,967,300	$ 359,019	$ 1,914,768
LONDONDERRY	$ 133,104,400	$ 3,993,132	$ 21,296,704
STRATTON	$ 24,124,700	$ 723,741	$ 3,859,952
WESTON	$ 60,606,000	$ 1,818,180	$ 9,696,960
TOTAL	**$ 1,213,927,100**	**$ 36,417,813**	**$ 194,228,336**

* *Based on 2015 Grand List Values (Non-Equalized)*

Real estate values are but one example, and at the leading edge of the dramatic economic impact that these proposed rules would have, but would

almost certainly lead to a destabilization of the regional economy. These economic impacts need to be more fully assessed and quantified to ensure that the public engagement process is fully informed.

Without a complete economic impact statement that has been duly authorized by the SBE, the pre-filing with ICAR is incomplete, and should be returned to the SBE, so that the SBE can undertake the necessary analysis to develop and approve a full and comprehensive economic impact statement for submission with the proposed rule changes to ICAR.

Furthermore, without a full and comprehensive economic impact statement, it will be difficult for ICAR to fully assess the breadth and depth of impact, which is necessary to develop the most appropriate strategy for maximizing public input during the rulemaking process.

Cost Implications on Local School Districts

The same procedural concerns I have raised with respect to the economic impact statement apply to the school district impact statement required under 3 V.S.A. § 832b:

> *"...the agency proposing the rule shall evaluate the cost implications to local school districts and school taxpayers, clearly state the associated costs, and report them in a local school cost impact statement..."*

There is no evidence in the public record to show that the SBE ever evaluated these cost implications or authorized the submission of the statement that was submitted to ICAR. The statement that was pre-filed with ICAR fails to identify any cost implementations, and only includes a vague statement about "benefits". The SBE has not considered the very real cost impacts that will accrue to school districts that pay tuition to independent schools that are able to comply with the proposed SBE rules, even though the economic impact statement submitted to ICAR acknowledges unspecified increased costs to independent schools. If there are increased costs for independent schools to comply with the proposed rule changes, those costs will be passed along to local school districts through increased tuition rates.

Once the SBE has quantified the economic impact on independent schools, it will need to evaluate the implications of those costs being passed onto local school districts, which should include projections of the impact to tax rates in impacted school districts.

Based on discussions with local educational leaders, these changes are likely to have a negative impact on our local public elementary schools. For example, the Mountain Town RED, which operates a public elementary

school, has actually experienced a slight increase in student enrollment in recent years, in contrast to the downward statewide trends we have seen. By restricting access to the wide range of secondary school options that students now have access to, there will likely be a negative impact on incoming enrolment in the public elementary school, which will drive up the cost per student, resulting in higher education tax rates for the district.

Again, without a full and comprehensive school district impact statement, it will be difficult for ICAR to fully assess the breadth and depth of impact, which is necessary to develop the most appropriate strategy for maximizing public input during the rulemaking process.

In-State Independent School Rules Contravene Legislative Intent

The SBE has no legal authority to promulgate rules that circumvent an act of the General Assembly or otherwise contravene legislative intent. Considering the extensive legislative history and statutory framework that distinguishes independent schools from public schools, the SBE proposed rule changes represent a significant deviation from legislative intent.

I recently asked Legislative Council to prepare a preliminary analysis of the enforceability of these proposed rules, should they be adopted in their current form, which you will find enclosed with this letter (Attachment G). This analysis, which was prepared by Jim DesMarais, Esq., outlines very serious problems with the proposed rule changes. Note that this analysis looked at the potential issues that could be raised in the courts – this analysis did not evaluate the proposed rule changes within the context of a Legislative Committee on Administrative Rules (LCAR) proceeding, which would likely look to a much higher standard for conformance with legislative intent.

Out of State Independent Schools

SBE proposed rule 2222.2 would apply the same standards to out of state independent schools that would apply to independent schools in Vermont, including proposed rule 2222.1(a)(iv). Effectively this rule would require an out of state independent school to comply with rules and regulations that are specific to Vermont, e.g. educator licensure requirements. This raises serious constitutional questions, given its extraterritorial effect, and potential violation of the Commerce Clause of the U.S. Constitution. As a practical matter, the rule would have the effect prohibiting the payment of tuition to an independent school outside of Vermont, as it would likely be impossible for an out of state independent school to simultaneously conform to Vermont's public school regulations, in addition to regulations within its own jurisdiction.

During this past legislative biennium, the Vermont House of Representatives considered, and rejected, a proposal to substantially limit payment of tuition to out of state independent schools. This was initially included in the bill that was ultimately enacted into law as Act 46. The House, through the action of a majority of our state's elected Representatives, voted to remove the provision that would have restricted payment of tuition to out of state independent schools. As a co-sponsor of the amendment to strike this provision from the bill, I can assure you that the intent was very clear – to ensure that there would not be a prohibition on the payment of tuition to out of state independent schools.

The SBE now proposes to do through administrative fiat what the elected representatives of the people explicitly chose not to do. In summary, this particular rule is contrary to legislative intent and raises serious constitutional questions that need to be addressed prior to the public engagement process.

Transition Timeline & Impact on Current Students

Many of the proposed rule changes take effect on July 1, 2018. Since many independent schools may be unable or unwilling to comply with the proposed requirements, a student currently attending an independent school as a freshman in the 2016/2017 school year would no longer be eligible for tuition from the school district in his or her sophomore year (2018/2019) if that school was not compliant with the rules. The proposed rules do not include any provision to allow these students to complete their studies at the same school in these situations, which would create significant hardship and disruption for students. This would have a disproportionate impact on financially disadvantaged students.

Additionally, the transition provisions do not appear to specify a date for proposed rule 2222.1(a)(iv). In the absence of a specific transition date, the rule could be interpreted as taking effect upon adoption of the rule.

Disruption to the Act 46 Implementation Process

For a variety of reasons, there has been a great deal of confusion over the impact that Act 46 will have on school choice and access to independent schools. Due to the amount of misinformation that continues to circulate, there are a great number of people who have the mistaken impression that there are no merger options that would allow communities to maintain school choice and access to independent schools, or that Act 46 somehow eliminates school choice.

These Act 46 study committees already have enough confusion to navigate through. It is worth noting that the SBE has another rulemaking process

underway concerning Act 46 implementation. These issues are already becoming conflated; further consideration of amendments to the 2200 Rule Series will disrupt many of the Act 46 merger efforts at a critical time in communities with school choice. In the interest of minimizing disruption to the Act 46 implementation process, and to ensure better coordination of changes to statewide policy, I would urge the SBE and ICAR to consider deferring the development and implementation of a public engagement strategy around the 2200 Series Rules until such time as the Act 46 rulemaking process has come to a close and voluntary Act 46 merger activity is substantially complete.

Conclusion

In closing, for the aforementioned reasons, and given the magnitude of the impact, I am asking ICAR to reject the SBE proposed 2200 Rule Series pre-filing, so that the SBE can give further consideration to the substantial legal and economic impacts these proposed rules would have. Furthermore, in the interest of minimizing disruption, I am asking the SBE to consider delaying further action on this rulemaking until the voluntary merger process under Act 46 is substantially complete.

Sincerely,

Rep. Oliver K. Olsen

CC: Rebecca Holcombe, Secretary of Education

Enclosures

Attachment A: Agenda Packet for July 29, 2016 SBE Meeting
Attachment B: Minutes of July 29, 2016 SBE
Attachment C: Agenda Packet for August 23, 2016 SBE Meeting
Attachment D: Minutes of August 23, 2016 SBE Meeting
Attachment E: Economic and School Impact Statement Submitted to ICAR
Attachment F: Study Published the Journal of Housing Research
Attachment G: Legal Analysis Prepared by Legislative Counsel
Attachment H: Summary of Public School Requirements Prepared by AOE