



Vermont Independent
Schools Association

Testimony to Senate Education Committee January 10, 2017

For the record, I am Mill Moore, Executive Director of the Vermont Independent Schools Association, otherwise known as VISA.

VISA is an advocacy and support organization representing Vermont's community of 132 independent schools. These schools are engaged in educating approximately eleven percent of all Kindergarten through Grade 12 students in Vermont. That amounts to approximately 92-hundred students in the current school year.

I understand the committee wishes me to address two related topics: the independent school rulemaking proposals now pending with the State Board of Education and the authority of the State Board to engage in that rulemaking.

Rulemaking Proposals

The general effect of these proposals is to apply public school standards to independent schools. The fit is not at all good. This is a square-peg-in-a-round-hole situation. The proposed rules are far more comprehensive and far-reaching than Chairman Morse suggests. This is not a bit of simple housekeeping... sweeping out the cobwebs.

Independent schools operate with different governance plans and different business models and they pursue different educational missions than do the public schools.

These are not minor changes. The proposals would very fundamentally affect every one of the 98 currently approved independent schools, though in different ways because independent schools vary in size, mission and facilities much more than do public schools.

The proposals will force the smaller schools to forego accepting publicly-tuitioned students because they simply cannot comply with the proposals—schools with fewer than 100 to 150. Some of those schools will close, including some of the therapeutic special education schools.

To survive, other schools likely will have to go upscale in their operations, seeking students from upper-income families and tailoring their offerings to a narrow demographic profile. This

definitely will include the seven ski academies, all of which now include publicly-tuitioned students.

Going upscale would be contrary to the philosophies of inclusiveness followed by all independent schools.

When schools close or reduce enrollment, teacher, administrator and school staff jobs will be lost. Unknown impacts will occur on public school district finances because most students no longer attending independent schools show up at public schools. And most importantly we will see notable losses of school choice opportunities for students from the state's school choice districts.

Rulemaking Authority

There's no question that the State Board of Education has statutory authority to write rules for Vermont independent schools. The Board sought and recently received an opinion from the Vermont Attorney General's office that directly affirms the Board's rulemaking authority.

However, the Education Board did not ask the Attorney General to review specifics within its independent school rulemaking proposals. The AG's opinion is only concerned with the Board's general authority. Had the board asked if it has rulemaking authority to adopt the specific proposals I think we would have seen a very different response.

On the question of the Ed Board's authority, last week you heard your legislative council attorney explain that throughout Title 16 distinctions are made between public and independent schools, clearly showing legislative intent that public and independent schools not be subject to the same requirements. He said because of that, one can make a strong argument that the proposed rules contravene that distinction and intent. And last week you heard Chairman Baruth reference S.91, a bill introduced in this committee in 2013 that is very similar to the Ed Board proposals. S.91 died here in this committee; it did not go to the floor; another expression of legislative intent.

Also, I think one can appeal to the principle that with authority goes a responsibility to wield that authority with care. I want to explain now some issues with how the Ed Board handled the rulemaking process that in our opinion demonstrate a disregard for the care one might expect a State Board to exercise.

The Rulemaking Proposals – Procedural Problems

Usually when a state agency or board resolves to enter the rulemaking process the first step is to hold a private dialogue with the principal stakeholders. In this case the number one stakeholder is the independent schools community and other principal stakeholders are representatives of the public education establishment.

The Ed Board did not engage in that private dialogue, or in any stakeholder dialogue for that matter. The Board simply accepted a draft set of rules provided by the Agency of Education and after fewer than five working days from making the proposals public, voted to send the rules directly to the Interagency Committee on Administrative Rules.

If the Ed Board were really interested in accomplishing its goals with a minimum of controversy, it could have invited stakeholders into discussions even before beginning the rulemaking process in November 2015. Or it could have conducted discussions during the nearly six months that elapsed between starting the rulemaking and the time the Agency of Education started drafting rules.

That's not what happened. Instead, the rules were made public when the agenda for the July 29 Ed Board meeting was published, just four and one-half working days ahead of the scheduled vote.

I attended that meeting. The Board's minutes show the letter I submitted, asking for more time for consultation. But, without comment the Board unanimously refused.

The Board wanted to be at ICAR in August and into public hearings by September. These Board actions give the appearance of wishing to speed the rules through the rulemaking procedures as quickly as possible, and without consultation with the affected parties.

So, VISA and some other interested parties then took the unusual step of making an appeal at the ICAR hearing. We showed the Ed Board had failed to conduct stakeholder discussions and that it had missed some other important procedural requirements including financial impact statements and small business impact analyses.

Normally, ICAR filings are pretty much pro-forma. But in this case ICAR listened carefully and at length and then it agreed with our statements. That committee rejected the Ed Board's proposal in late November.

Activity in the weeks since then has been largely focused on fixing the deficiencies cited by ICAR. Seeking an Attorney General's opinion was one ICAR recommendation, as was holding stakeholder meetings.

The Rulemaking Proposals – Substantive Problems

In general, the independent schools community has said the Ed Board's proposals do not take account of the underlying very substantial differences in mission, governance model and business model of the non-profit organizations that operate independent schools, as compared to public schools.

The most obvious examples here are that public schools have taxing authority while independents do not and that every independent school student attends by choice and has the option to withdraw at any time and to claim their education entitlement from a public school instead.

Here are two simple examples of how that mismatch played out in the proposals:

One proposal would have defined an “approved independent school” as a school eligible to receive public funds and which then meets standards set by the rules. Right away that created a big problem. Nineteen of the 98 currently approved Vermont independent schools are religious schools. They are ineligible to receive public funds for constitutional reasons.

This definition would have excluded these 19 schools from the benefit of demonstrating to their constituencies that they meet Ed Board standards—to no discernable benefit to the State.

I doubt if those who wrote or reviewed that rule realized its implication for the religious schools. It was an error, a blunder.

Also, I think Ed Board members have not accepted the fundamentals of the difference between public and independent schools. Public schools are supposed to be comprehensive and consistent statewide. But independent schools are mission-driven individualists. Independent schools arise entrepreneurially to meet local needs. They succeed or fail entirely on the basis of their performance.

So, what did we see in the proposals that was most objectionable?

The most stunning provision said “the school complies with *all other state and federal laws and rules applicable to public schools* including, without limitation providing a learning and residential environment that is safe and healthy...” 2222.1 (iv)

Encountering that for the first time was a jaw-dropping moment. It says independent schools have to obey all other state and federal laws applicable to public schools...”

Later we learned from Board members the intent of that section was to address only health and safety requirements. Another drafting error perhaps. But those requirements have applied for years and schools are fully in compliance. Who was responsible for knowing that ahead of time?

Two errors occurred there: A misunderstanding of current requirements, and what we are being told is a syntax error that extends to the independent schools public school requirements such as licensing of faculty and administrators and public school Education Quality Standards. More blunders.

Despite having had several months to reconsider and vote, the Board has not corrected those errors. That doesn't boost our confidence that stakeholder input is being taken seriously.

Open Admissions

Next, two examples of how the mission-driven nature of independent schools creates difficulties or logical impossibilities: The open admissions proposal and the special education proposal.

The open admissions proposal says any student who applies must have an equal chance of being enrolled.

Seven Vermont approved independent schools are winter sports academies. Though each is somewhat different, in general their missions are to provide college preparatory education while training students to national or world class levels of athletic proficiency.

Imagine some students ask to enroll saying they really like to ski, but only one or two days a week and not on sub-zero days, and definitely no-thank-you to all the very demanding physical training in which students in these schools are expected to participate. Being required to enroll students of that sort would so compromise the schools' cultures and operations that their ability to fulfill its mission would disappear.

Or, what about the approved independents with missions to rescue and engage students who are failing in their original schools. These are the students who need expert counsel and individualized attention from teachers who understand how to get past failing students' damaged self-image and limited ambitions.

The schools that do this essential work are small; their enrollments typically are around two dozen. They do not have the resources to be fully capable of meeting every special education disability category and they're unlikely ever to see a student with one of the rarer disabilities anyway. These schools also need control over enrollment to make sure their limited resources are applied only to those students whose need is greatest.

Special Education

The special education proposal would require every approved school to provide the full range of special education services. That seems like a fine idea in principle. It does not work at all well in practice and may cause more problems than it solves.

Special ed is a federal entitlement. It has been on the federal books since 1976. It is a mandate on state and local public education administrations, holding them responsible for the proper education of disabled students, even disabled students attending independent schools.

And, because the special ed mandate applies solely to the public education system, the entire body of special ed statutes and rules is written largely for public schools. It treats independent schools as add-on elements rather than as full participants. Independent schools do not participate in distributing the special education funds or resources and have no role in determining placement of special education students.

The largest independent schools—schools with missions that include fulfilling the role of a public school, as well as other functions—are fully special education qualified. Only about 400 tuitioned students attend an independent school that does not have a special education approval.

The small schools, especially those with fewer than 100 students, engage with disabled students differently. They frequently enroll students who formerly were on IEPs and simply by giving them some added individual attention and encouragement in a school culture that values individuality, these schools are getting very good results.

Vermont already has insufficient numbers of special ed-qualified teachers and too little money to meet the needs of special education programs now. If every approved independent school must be fully ready for every special education contingency, then special ed resources will be spread more thinly instead of being concentrated where they can do the most good.

The public schools have no incentive to cooperate with independents, and often they do not cooperate. Special education administrators dislike having to share resources and prefer not to refer special ed-qualified students to independent schools. The incentives in the system are not well structured. If the Ed Board were serious about improving special education equity it might look first to the public schools and the incentive structure.

The House Education Committee plans to examine special education funding this year. A report commissioned by the committee by the Rockefeller Center at Dartmouth College outlines the problems with incentives, spending and administration in the Vermont special education programs.

This is key: many people do not realize that once a student is on a special ed Individual Education Program—an IEP—the student's placement is not controlled by the parents. It is controlled by the public school system's IEP Team. Our independent schools often see situations in which parents ask for referral to an independent school and the IEP Team refuses.

Any requirement for more special education in the independent schools community has to take measures to reconcile the sometimes conflicting interests of the public and independent schools that arise from the requirements of the federal statutes, the differences in organizational structures and the constraints on special ed resources.

Summary

The Ed Board has proposed a radical revision of independent school rules, which will force damaging changes throughout the state including forced alterations to independent schools missions and cultures, losses of professional level jobs, unplanned impacts on local school budgets and diminished student opportunities.

These proposals are like requiring a dentist to perform an appendectomy or requiring an architect to fix a screen door. The aim may be worthy but the agent is inappropriate to the task.

Much of the disruption around the rule proposals could have been avoided had a more customary good-faith preliminary stakeholder consultation been employed.

The controversy also involves serious questions of the limits that state and federal statutes and legislative intent put on the State Education Board's authority to adopt radical rule changes. We're not talking about simple housekeeping or technical rule changes here; the proposals go to the fundamentals of independent school operations and performance.

And we're talking about a Board that is seemingly indifferent to contrary stakeholder opinion and that its exercise of authority is arbitrary and capricious; arbitrary because its actions are not supported by the necessary facts and capricious because it is acting willfully, not negligently.

Some remediation of the early missteps has occurred through the Ed Board's public and private stakeholder meetings, as the ICAR decision said was essential.

That's helpful, though we are displeased that some Ed Board members have publicly discounted what they heard at the recent public meetings. When more than a thousand folks turn out on a couple of winter nights and when several hundred of them speak, their message is worthy of more respect and consideration.

Some progress has been made recently on some topics, but serious disagreement remains, particularly regarding the proposed special education and open enrollment mandates.

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