Vermont Independent
Schools Association

Vermont Independent Schools Association Input

ICAR Meeting, November 14, 2016

The proposed changes to the manner in which Vermont independent school are approved are sweeping in scope, profound in potential impact, contrary to statute, and at variance with decades of historical practice.

If adopted as proposed, many independent schools would be forced to close, and many jobs would be lost, yet the analysis of the rules' potential impact on small business, as is required by 3 V.S.A. § 832a is not included in the SBE's ICAR forms. 3 V.S.A. § 801(b)(12) defines a "small business" as one with 20 or fewer employees. Fourteen currently approved schools have 20 or fewer employees. Several other schools that may someday wish to be approved also have 20 or fewer employees.

If adopted as proposed, the closure of many independent schools would result in a loss of school choice in many of Vermont's 93 school districts that currently enjoy school choice at some or all grade levels, thereby curtailing student opportunities, increasing commuting times, and placing a greater burden on parents' work schedules.

If adopted as proposed, the loss of school choice would have a significant and adverse impact on property values in districts which presently have school choice, thereby decreasing the State of Vermont's grand list, and depressing tax collections. See Attachment F to Representative Oliver Olsen's letter dated October 29, 2016, which appears to project an annual loss of revenue of between $36 and $194 million, only within the twelve towns in or near Representative Olsen's district. Half of this revenue loss would affect the education fund, and half would reduce available local municipal revenues, yet a thorough analysis of the rules' potential impact on the education fund that is required by 3 V.S.A. § 832b is not included in the SBE's ICAR forms.

3 V.S.A. § 800 directs that "agencies maximize the involvement of the public in the development of rules." Custom and practice across Vermont agencies is to incorporate robust stakeholder input into the rule drafting process, *prior to*, and *in conjunction with*, the actual drafting of the rules. That has not occurred in this instance, notwithstanding VISA's repeated requests that it occur. The stakeholder process that VISA has been involved in to date has involved only a 60-minute meeting of the VISA Executive Director and the co-chairs of the Council of Independent Schools with the Secretary of

204 Brothers Road
Hartland VT 05048

802-436-2112
mill@vtindependentschools.org

Education, and the opportunity to submit a written position paper to the Agency of Education,. In neither case did either AOE or the SBE enter into a substantive dialogue about any of the issues that were raised by VISA.

3 V.S.A. § 820(b) states that, "The duties and responsibilities of [ICAR] shall be those established under this section or those directed by the governor and shall include review of existing and proposed rules of agencies designated by the governor for *style, consistency with the law, legislative intent* and the *policies of the governor*."

Taking these four issues in reverse order, as far as "policies of the Governor" are concerned, VISA has been informed that the Secretary of Education has been directed to be neutral on the proposed rules. As a result, AOE staff is not available to answer questions about the intent or interpretation of particular language, or to discuss its possible revision. Further reflective of this state of affairs is the fact that AOE has declined to provide the services of its legal staff to the SBE for this rulemaking effort, and as a result, the SBE has been forced to contract with outside counsel for this purpose.

As far as "legislative intent" and "consistency with law" are concerned, ICAR's Chair, the SBE's Chair, and the Secretary of Education have received a 9-page letter from Representative Oliver Olsen, with attachments approximating an additional 145 pages, voicing strong opposition to the rulemaking proposal. ICAR's attention is particularly drawn to Attachment G of the Olsen letter, an October 28, 2016 legal analysis prepared by Legislative Counsel which speaks for itself, but basically, expresses the opinion that the proposed rules would contravene numerous statutory provisions of Title 16 of the Vermont Statutes Annotated and would envision a regulatory scheme that is contrary to the overall public/independent school statutory structure and intent. ICAR is also in receipt of an October 6, 2016 letter from ten Northeast Kingdom Senators and Representatives expressing their view that the proposed rulemaking is contrary to legislative intent. Finally to this point, S.91 of the 2013 legislative session, which proposed to enact a portion of what the proposed rules envision, died in committee.

As far as "style" is concerned, without going into detail, the grammar, syntax, logic, order and consistency of the proposed rules are in need of significant editing. This is one of the roles of stakeholder input during the drafting stage. Refusal of the SBE and AOE to engage in this process is in direct contravention of the customary practices and statutory requirements of rulemaking principles.

On the merits of a few sections of the proposed rules:

The notion in proposed Rule 2222.1(a)(iv) that all independent schools should comply with, " all other state and federal laws and rules applicable to Vermont public schools..." flies in the face of an overall statutory scheme, and decades of historical practice, that recognize the necessarily separate and complementary roles of public and independent schools. For example, the notion that independent schools can be required to have licensed teachers, as is required of public schools by 16 V.S.A. § 1692, flies in the face of any fair reading of that section. If the Legislature had intended (or been willing to permit) this outcome, it would have said so, and the absence of such a statute is conclusive of the fact that a proposed rule requiring the same constitutes an over-reach by the SBE.

Requiring third party accreditation for all approved independent schools proposes to outsource a regulatory responsibility (independent school approval) that in long-standing practice has been assumed by the AOE. This would impose an onerous new financial burden on independent schools which they (especially the smaller independent schools) cannot afford or will have to pass along to their tuition-paying families. In addition, the principal accrediting organization in Vermont, the New England Association of Schools & Colleges (NEASC), only became aware of this proposed rule very recently, and they report that they do not have the capacity to handle the workload, and that the proposed rule is antithetical to their philosophy of the "independence of independent schools."

As far as the "style" of the rules is concerned, they envision that NEASC accreditation would be a precondition of their becoming "independent schools," and that they could therefore not become eligible to receive public tuition until the NEASC accreditation process was complete. Since this process takes (conservatively) 24 months, an independent school (as envisioned) would have to operate for at least two years before it were to become eligible even to begin the accreditation process and likely would have to wait some four years to receive public tuition. This is a *de facto* prohibition of any new independent school opening with approved status.

Under the new proposed definition of approved independent schools (2220), only independent schools "eligible to receive public funding" would qualify. That would preclude Vermont's 20 religious "approved" schools from qualifying for this status. Even though the United States and Vermont Constitutions forbid them from receiving public tuition, they seek and receive "approval" as an assurance to parents of their quality. Why would the SBE want to deny these schools this approval? We believe that

this provision is another example of the fact that the absence of a stakeholder process threatens to produce a poorly-thought-out proposal.

The proposal that all approved independent schools must serve all special education disability categories completely ignores the realities of the different business models of public and independent schools and the realities of how this federal entitlement is administered. Similarly many other independents are simply too small to manage the administrative overhead of standing in readiness to serve 13 different disability categories. A thoughtful stakeholder process would have surfaced these practicalities. The fact that stakeholder discussions have not happened demonstrates a serious failure of process.

The proposed rules would increase the extent to which independent school would be subject to review of their financial ability to fulfill their missions and would be a new and very great intrusion into the private financial affairs of a group of non-governmental non-profit organizations. Again, this would place increasing burdens on approved independent schools, without any evidence that there is a problem in need of being fixed. The present means through which approved independent school may prove their financial health, which recently was developed in a working relationship between the Agency of Education and VISA, is working fine. This is yet another area relative to which VISA believes that a reasonable stakeholder process could produce an agreement.

None of these proposed changes, including the requirement of "serving all special education categories," are required by federal law.

The proposed public hearing dates, coming during the holiday season, are poorly designed from the standpoint of the availability of schools to accommodate them, and the availability of affected parents, school administrators and interested citizens to attend. VISA requests that the dates be rescheduled for January 2017 or later.

For the foregoing reasons, VISA respectfully requests that ICAR:

1. Not approve the draft rule until the SBE submits a small business impact statement (as required by 3 V.S.A. § 832a) and a local school cost impact statement (as required by 3 V.S.A. § 832b);

2. Ask the SBE to take the draft rule back and consider all of the comments that ICAR has received about the draft rules being inconsistent with the law and with legislative intent, and revise the draft rule accordingly;

3. Require that a thorough stakeholder dialogue take place prior to return to ICAR and initiation of public hearings;

4. Find that the proposed overturning of the long-standing state practice of separate systems of public and independent school is not the proper province of administrative state rulemaking;

5. Determine that the proposed expansion of special education requirements is the province of state and federal law, and not the province of administrative state rulemaking; and

6. Determine that the proposed revisions to the accreditation/approval process would constitute an extra-legal delegation of the AOE's statutory duties under 16 V.S.A. § 166(b), and would be a *de facto* bar to the opening of new approved independent schools.

DATED at Hartland, Vermont, this 11th day of November, 2016.

Mill Moore

VERMONT INDEPENDENT SCHOOLS ASSOCIATION

By: Mill Moore, Executive Director