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December 19, 2016

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

Re: State Board of Education Rule 2200 Series

Dear Mr. Morse:

Thank you for your request for a legal opinion on the authority of the State Board of Education to promulgate rules concerning independent schools in Vermont. As set forth below, it is our opinion that the State Board of Education has this authority.

As an administrative body, the State Board of Education is authorized to promulgate rules within the scope of its legislative grant of authority.[1] Thus, the question is whether the enabling legislation, in Title 16 of the Vermont Statutes Annotated, provides this rulemaking authority and whether the draft rules on independent schools are reasonably related to the intent of that law.[2] "Where the Legislature's intent can be ascertained from the plain meaning of the statute," it is appropriate to "interpret the statute according to the words the Legislature used."[3] The plain language of the statute authorizes the Board to promulgate rules concerning independent schools.

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[1] *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208, 210-211 (2002) ("To determine the scope of authority vested in an administrative agency by a statutory grant of power, we look to its enabling legislation.") (citing *Lemieux v. Tri–State Lotto Comm'n*, 164 Vt. 110, 113 (1995); *In re Agency of Admin.*, 141 Vt. 68, 76 (1982)); *see also, Martin v. State*, 2003 VT 14, ¶13 (citing rule that administrative agency's rulemaking authority extends only so far as its legislative grant of authority) (citations omitted); *Delozier v. State,* 160 Vt. 426 (1993) (stating that rule will be upheld on appeal absent compelling indication of error, but cannot be sustained to the extent that the rule conflicts with the statute) (citing *In re Peel Gallery of Fine Arts,* 149 Vt. 348, 350, 543 A.2d 695, 697 (1988)); *Petition of Vermont Welfare Rights Organization,* 132 Vt. 622, 627 (mem.) ("any rule-making authority of an individual agency must be found in that agency's enabling legislation").

[2] *Vermont Verde,* 174 Vt. at 211 (citing *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 638, 481 A.2d 1274, 1275 (1984)).

[3] *Rueger v. Natural Resources Board,* 2012 VT 33, ¶7 (citing *Herald Ass'n v. Dean,* 174 Vt. 350, 354 (2002)).

Vermont law requires the State Board of Education to "establish and advance education policy for the State of Vermont," among other duties.[4] The Board's enabling statute expressly authorizes and also requires the Board to adopt rules "for approval of independent schools."[5] Title 16 provides for two types of independent schools, recognized and approved.[6] Of these, only approved independent schools are eligible for public tuition funds.[7] The Board's enabling statute also requires that the Board adopt rules "as necessary or appropriate for the execution of its powers and duties and of the powers and duties of all persons under its supervision and control."[8]

The draft proposed State Board of Education Rule 2200 Series, in relevant part, sets standards and a process for Board approval of independent schools. The governing statute provides that rules for approved independent schools must, "at minimum, require that the school has the resources required to meet its stated objectives," including the following:

- Financial capacity;
- Faculty who are qualified by training and experience in the areas in which they are assigned; and
- Physical facilities and special services that are in accordance with any State or federal law or regulation.[9]

The draft proposed Series 2200 Rule includes requirements for these elements:

- Financial capacity is addressed at Section 2222.14(a)(v), 2224.1 (General Education Review and Approval and Fiscal Review of Independent Schools with a Specific State Purpose), Section 2226.2(c) (Secretary shall require a tutorial program to provide assurances and documentation that specifically describe the ability of the program to remain fiscally solvent during period of approval); and Section 2270 (iv) (private kindergarten programs).
- Faculty qualification is addressed at Section 2226.2 (b) (authorizing the Secretary to employ an independent evaluator or to require accreditation by an accrediting entity recognized by the State Board), and Section 2223.4 (Educator Licensure Requirements for Special Educators).

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[4] 16 V.S.A. § 164. Section 164 also requires the State Board to "evaluate education policy proposals, including timely evaluation of policies presented by the Governor and Secretary; engage local school board members and the broader education community;" and to carry out the duties enumerated at subsections (1) through (21).
[5] 16 V.S.A. § 164(14).
[6] 16 V.S.A. § 166(a) ("An independent school may operate and provide elementary education or secondary education if it is either approved or recognized as set forth herein.").
[7] 16 V.S.A. § 828. The draft rules for approved independent schools, therefore, apply only to independent schools that seek eligibility for public funding. *See, e.g.,* Section 2222.1(a)(setting conditions for receipt of public tuition funds).
[8] 16 V.S.A. § 164(7).
[9] 16 V.S.A. § 166(b).

- Facilities are also addressed in the draft proposed rule, at Section 2222.1(a)(iv) (requiring compliance with state and federal laws applicable to public schools, including those requiring a safe and healthy learning environment). Special services, or more specifically, special education services, are addressed throughout the draft proposed rule, including at Section 2222.1(a)(i)(requiring state approval for special education purposes), Section 2222.1(a)(ii) (requiring a nondiscriminatory enrollment policy), Section 2223 (requiring general education independent schools to offer special education services to students in each category of disability), Section 2223.1 (out-of-state independent schools), Section 2223.2 (procedural requirements for independent schools in providing special education), and Section 2226.3 (requiring tutorial programs to meet special education standards). Thus, the draft proposed rule is consistent with the enabling statute.

Additional statutory authority for the draft proposed rule's special education provisions is found in Title 16, Chapter 101, which requires the State Board of Education to "establish minimum standards of services for students receiving special education in independent schools" and set maximum rates to be paid by the Agency of Education for such services after consultation with independent schools in Vermont,[10] and "adopt rules governing the determination of a child's eligibility for special education, accounting and financial reporting standards, program requirements, procedural requirements, and the identification of the district or agency responsible for each child with a disability."[11] The public policy codified at 16 V.S.A. § 2973a states that "integrated special education services are recognized as an essential responsibility of the educational system that benefits all students and contribute to the good of the State." The draft proposed Series 2200 Rule would appear to fulfill the Board's rulemaking mandates in a manner that supports the State's policy goals as expressly provided in Chapter 101.

Title 16 also provides more generally that it is "Vermont's policy that all Vermont children will be afforded educational opportunities that are substantially equal in quality."[12] The statute establishes a framework for and a process for administering education quality standards for public schools,[13] and provides that independent schools must participate in the education quality process to receive designation as an independent school meeting education quality standards.[14] Nothing in the draft proposed Series 2200 rules is inconsistent with this statutory framework.

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[10] 16 V.S.A. § 2973(a).
[11] 16 V.S.A. § 2959(a).
[12] 16 V.S.A. § 165(a); *see also,* 16 V.S.A. § 2941 (stating that it is State policy "to ensure equal educational opportunities for all children in Vermont," and that "children with disabilities are entitled to receive a free appropriate public education").
[13] 16 V.S.A. § 165(a) and (b).
[14] 16 V.S.A. § 165(f).

It is a basic principle of administrative law that an agency is authorized to implement, and interpret any ambiguity in, its enabling statute by promulgating rules.[15] The State Board of Education has implemented and interpreted its enabling statutes on approved independent schools in the draft proposed Series 2200 Rule. Moreover, the Legislature has authorized the Board to adopt rules as necessary to fulfill its duties,[16] and, as the Vermont Supreme Court has stated:

> [W]here the empowering provisions of a statute authorize an agency to make such rules and regulations as may be necessary to carry out the provisions of the act, the validity of such rules or regulations will be sustained so long as they are reasonably related to the purposes of the enabling legislation.

Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, 150 (1979) (citing *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652 (1973)). Insofar as the draft proposed rules on independent schools are necessary for the execution of the Board's powers and duties, they are entitled to such a presumption of validity. As set forth herein, the draft proposed rule is authorized by and consistent with Vermont statutes governing independent schools.

This opinion is based on a general review of the enabling statutes in Title 16 and the provisions of the Series 2200 draft proposed rule related to independent schools. The complete draft proposed rule touches on dozens of provisions of current or proposed Board rules in this series. If you would like our office to render an opinion regarding any specific provision in or aspect of the draft proposed rule, please let us know.

Sincerely,

William E. Griffin
Chief Assistant Attorney General

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[15] *City of Arlington, Tex. v. F.C.C.*, --- U.S. ---, 133 S.Ct. 1863, 1874-1875, 185 L.Ed.2d 941 (2013) (stating that if the agency's interpretation "is based on a permissible construction of the statute, that is the end of the matter") (quoting *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778 (1984)).
[16] 16 V.S.A. § 164(7).