

Memo

To: Vermont Legislative Committee on Administrative Rules

From: Rebecca Holcombe, parent and Vermont resident

Date: April 5, 2022

Re: Rule 21-P23 State Board of Education's Independent School Program Approval Rules (2200 series)

With the new proposed 2200 rules, the Vermont State Board of Education is reducing universal education standards for private schools that serve students with disabilities, raising taxes and preventing transparency.

I am writing to encourage the Committee to move to object to the State Board of Education's Final Proposed Rules for Independent School Program Approval. If you object, they may still promulgate these rules, but without strong legal authority. They will be incentivized to strengthen these rules and come back to you again with a stronger draft that provides better protection for students with disabilities and for taxpayers. I encourage you to object or at least delay pending resolution of the following three issues:

- 1) The proposed independent school rules are beyond the authority of the agency (3 VSA Section 842(b)(1) and reduce standards for students with disabilities who are placed in Vermont independent schools;
- 2) The proposed independent school rules are contrary to the intent of the Legislature (3 VSA Section 842(b)(2); and fail to prioritize the high quality universal instruction necessary to prevent inflation of special education needs, numbers and costs.
- 3) The proposed independent school rules fail to recognize a substantial economic impact of the proposed rules on public schools and the SBE has failed to include an evaluation and statement of costs to local school districts required by section 838 of Title 3.

Each of these reasons will be explained separately below.

### **Beyond the State Board's Authority**

**The state board does not have the authority to waive federal requirements for private schools serving students with disabilities.**

34 CFR Section 300.146 and 300.147 require the state to monitor the compliance of private schools serving students with disabilities when those students have been placed or referred to a private school for special education.

Most importantly, private schools serving students with disabilities must provide an education that *meets the standards that apply to education provided by the SEA and LEAs*. The assurances in 2229.3 are *inadequate*.

This specific language existed in the prior rule series and was removed. (*See former Rule 2228.3 "In order to obtain special education approval, an independent school shall meet standards that apply to state and local education agencies."*)

The assurances in 2229.3 are not adequate as a replacement, and reflect weak knowledge of special education law and processes. As an extremely well-respected special education expert in Vermont said to me, the language of these assurances:

“...demonstrates a lack of understanding about both the complexities of implementing the rules under IDEA or the basic premises underlying the purpose and function of the IEP Team. The independent school cannot be an independent decision maker about the IEP development, implementation and or evaluation of the program. This is a TEAM function including parents and the LEA.” (The LEA is the local school district.)

Moreover, the weaknesses in these assurances put school districts (which are the legally responsible entity) in a risky position. Beyond the question of how independent school staff “demonstrate understanding” of special education requirements, note that “agreeing to communicate” about a list of practices cited is not the same as following the law and abiding by LEA decisions. This matters, because the LEA is ultimately responsible for the IEP implementation, even in private “independent” schools. The independent school is not where the legal buck stops. When the independent school doesn’t follow the IEP, the LEA is liable, not the independent school. And in my observation, the results can be both harmful to the child and quite expensive to remedy for the LEA. Similarly, for the independent school to “participate” in the dispute resolution process is not the same as being answerable to the LEA in the provision of a Free Appropriate Public Education (FAPE).

Students don’t go to school for special education. **They go to school for universal education, and specialized services and sometimes specialized settings exist to provide access to that universal education.** Any approved private school should be required to deliver that universal education, consistent with approved academic education standards. Some private settings do a good job, and some are quite concerning. Consider what it says about the attitude of a private school towards a child and towards reintegration of the child into a community if that school’s progress report for a child grades them on “Don’t be an a\*\*hole.”<sup>1</sup> As these rules are written, there is no way to tell the difference. And, a “minimum course of study” is not the same as universal education, tied to state standards for academic subjects. With weak regulations and lack of attention to regular education in specialized settings, the state board is effectively setting lower standards for these students with disabilities when they are placed in private, specialized schools.

**The state board does not have the authority to lower the educational standards for independent schools in Vermont which serve students with disabilities.** Federal law requires schools serving students with disabilities placed by a public agency to meet the same educational standards as public schools. Some of these students have the most complicated needs and minds in the state. They deserve robust, transparent efforts to protect both their safety and learning, not weak assurances.

Of course, none of these Vermont 2200 rules apply to out of state independent schools into which students with disabilities are placed. As written, these rules thus also set up different standards for VT schools and out of state schools.

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<sup>1</sup> Report also recovered through a records request.

### **Contrary to the Intent of the Legislature**

When the legislature passed Act 173, it rejected the reimbursement funding model for special education in favor of the census-based model of funding. This is because fee-for-service models for special education, as in health care, incentivize more services and more expensive services over early intervention and attention to outcomes. The existing fee-for-service special education reimbursement model was preventing districts from adequately investing in early intervention to prevent the need for more expensive interventions after challenges compounded, which was not previously possible in a reimbursement model. The intent of Act 173 was to support districts in providing extra support to struggling students, complementing the implementation of Multi-Tiered Systems of Support, and to allow supervisory unions and school districts to use state special education funds to do that. This, and the evidence of the educational effectiveness of this approach, was the premise on which school districts embraced Act 173.

Specifically, in changing the funding model and drafting Act 173, the Legislature found the reimbursement model was limited in that it is, as stated in statute:

- 1) administratively costly for the State and localities;
- 2) is misaligned with policy priorities particularly with regard to early intervention, multi-tiered systems of support and positive behavioral interventions and supports;
- 3) creating misplaced incentives for student identification, categorization, and placement;
- 4) discouraged cost containment; and
- 5) was unpredictable and lacked transparency.

The proposed rules in their current format, with respect to rate-setting for independent schools, allow these limitations to continue because it is still based on reimbursement. **And, in a census (capitated) model, uncontrolled costs associated with placement in private for-profits and nonprofit schools will crowd out the intended prioritization of early intervention and focus on inclusive, multi-tiered systems of support for struggling learners for students in school districts.**

**The proposed rules for independent schools serving students with disabilities do not discourage cost containment and efficient use of dollars for stated outcomes, but rather ensure special education cost expansion.** As such, the proposed rules are contrary to the intent of the Legislature, and likely to be injurious to efforts to implement early intervention and multi-tiered systems of support. And, they create a high risk of financial abuse of the Education Fund.

To understand why, you may need a little context. The maximum rate for tuition for students placed in for-profit and nonprofit independent schools that specialize in services for students with disabilities, for example, is set by taking total costs at the school, and dividing them by the FTE student capacity, or 90% of capacity if not fully enrolled. The school provides a worksheet with its costs to the Agency. Since all costs are included as the Secretary sets this maximum allowed tuition rate, school districts should not be receiving large bills in excess of this maximum approved rate. [See Rate Approval Instructions FY21 ([vermont.gov](http://vermont.gov))] But again, they basically propose their own tuition by adding up their total proposed expenses for a proposed number of students. The current rules prohibit independent schools from charging school

districts more than the maximum rate for tuition set by the Secretary, and the new proposed rules continue that prohibition.

**Documented abuses of this prohibition exist and will continue to exist, because the state board declined to require transparency in accounting practices and provided no means of punishing bad behavior** (e.g. no enforcement mechanism for agency regulators). There are two main categories of abuse: 1) billing beyond the maximum tuition and 2) use of opaque cost categories to evade public assurance review of costs. Neither of these can be addressed without greater transparency. As an internal communication received through a records request and shared with the state board during public comment revealed, Agency of Education staff do not feel they have the transparency and enforcement authority they need to provide this basic public assurance.

In fact, starting in FY21, designated agency fees began to exceed allowability thresholds, costs are shifting to opaque categories (and away from education categories), and responses for clarification were not addressed.<sup>2</sup> As the agency staff person stated to her supervisor in the memo, some of the private school CFOs do not answer her requests for information and refuse to do the required time studies to show administrative staff time dedicated to duties other than education. In other words, she cannot verify that the stated expenses on education are actually incurred for education. That is a problem when these costs are passed on to taxpayers statewide.

The staff person responsible for this public assurance oversight wrote: “The opacity of draft rules will significantly inhibit the ability of responsible AOE personnel from tuition rate setting and program oversight with fidelity, for purposes of setting a fair rate, cost containment and appropriate relegation of costs to IDEA, gen ed fund or treatment costs through Department of Mental Health CERT rate processes.”

What does this mean for payment of state Education Fund dollars for specific schools for-profit and nonprofit schools? Here are two examples, one from a for-profit school, and one for a nonprofit Designated Agency school.

In 2020, a for-profit independent school with a census of 15 FTE students charged school districts about \$400,000 over its maximum set tuition rate for those students, or about \$27,000 more per child than that maximum allowed tuition rate for this school. The maximum tuition rate for this school was \$82,000<sup>3</sup> annually, but the school charged districts *on average* \$27,000 above its maximum rate per student.

However, costs over \$60,000 per child (and indexed to inflation after FY23) are 95% reimbursable by the education fund to school districts. **Because school districts are excluded from the rate setting process, AND these excess costs are reimbursable, they have no knowledge and less incentive to push back on excess billing.** In the case of this for-profit school above, the districts paid the special education costs and the state reimbursed districts from the education fund for 95% of costs over their initial \$60,000 expenditure. Again, neither of the

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<sup>2</sup> Note: DMH allows the Designated Agency schools to allocate all overhead expenses to education, and not just those necessary for running the school. However, not all overhead expenses are allowable education expenses for the purpose of special education reimbursement, This creates a federal auditing risk. For example, DAs have included legal fees in the DA fees, which is never an allowable special education cost.

<sup>3</sup> A maximum tuition rate of \$82,000 per year correlates to an annual budget of \$1.23 million. The overcharges result in a single year expenditure of \$1.8 million dollars to educate 15 students.

entities directly involved in this transaction locally is strongly incentivized to practice efficient use of dollars for outcomes.

**The state board also refused to provide limits on profits taken by for-profit independent schools that are funded by taxpayers.** And, there are no disincentives for this behavior to stop as noted in the legislative findings on reimbursement under Act 173. Since most of the independent schools serving students with disabilities have tuition rates above \$60,000 annually, the practice will continue.

As noted above, concerns are not limited to for-profit schools. As pointed out to the state board in previous public comments on these rules, in FY20, Designated Agencies<sup>4</sup> which operate independent schools in Vermont charged the Education Fund over \$2.2 million dollars in “designated agency fees”- fees not attached to any specific education purpose. These fees will continue under the proposed rules as the independent schools need only categorize “operational expenses” without any scrutiny or relationship to the level of services provided to the students. These fees are hidden from school districts and taxpayers as they are included in a school’s maximum tuition rate and not broken out as a cost category. The rapid one year increases in this cost category for some programs, as flagged by Agency staff, are out of proportion to cost increases in education categories and raise public assurance concerns. **Internally, an agency staff person described 12 programs as “high level of concern programs.”**

During public comment, the State Board received comment with respect to these concerns, including from state employees who provided public comment in their capacity as private citizens, potentially putting themselves at risk. In response, in several cases, the state board deferred back on the issues to the Act 173 Advisory Committee. Note that the members of this committee included vendors (schools) who stand to benefit financially from weak rules, and that members in general have little or no experience or background in rate-setting, which is a separate, state governmental financial function.<sup>5</sup> A district special educator cannot reasonably be expected to be an expert on state-level rate setting. Their input, and the input of vendors (private schools) is valuable, but the decision responsibility lies with the State Board, not vendors, for a reason. There was no discussion of the public comment in this January 3, 2022 meeting of the Advisory Group. In fact, the minutes reveal the group did not want to revisit issues which had previously been discussed.<sup>6</sup> This is an abrogation of the state board’s responsibility.

The state board as the promulgating authority is required to address the public comments and not delegate that function to a separate committee, let alone one that includes vendors who benefit from the decisions. As the statute reads “The agency (in this case the state board) shall consider fully all written and oral comments concerning the proposed rules...” 3 VSA Section 840(d). Instead of fully considering these comments, the state board provided the following statement of their abdication:

*Rule 2232 as proposed for public comment represents a difficult compromise among representatives of LEAs, the AOE and approved independent schools. The*

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<sup>4</sup> Howard Center, Northeastern Family Institute (NFI), Washington County Mental Health Services (WCMHS) and Health Care and Rehabilitation Services (HCRS).

<sup>5</sup> [AOE Template Basic Single Page \(vermont.gov\)](https://www.vermont.gov/doc/act-173-2020-2021/act-173-template-basic-single-page)

<sup>6</sup> [Act 173 Advisory Group \(vermont.gov\)](https://www.vermont.gov/doc/act-173-2020-2021/act-173-advisory-group)

*CBFAG accepts the compromise that was achieved, and the SBE adopts its recommendation to retain the language as proposed.*

Again, the Advisory Committee members<sup>7</sup> do have direct experience with the receipt and costs of providing special education through payments to independent schools, but not of how the costs are regulated (and set) by the Secretary, nor the systems level impact of having no or weak incentive for ensuring those dollars are used efficiently for education purposes (not overhead) and for specified outcomes. Given that the entities making and receiving payments are reimbursed for costs above \$60,000, so pass that cost on to taxpayers statewide, the State has a separate public assurance responsibility to make sure those high costs are serving an educational need— one that can be substantiated to the federal government and to taxpayers. And, as written, these rules leave the Education Fund vulnerable to waste, fraud and abuse.

### **Economic impact on school districts and taxpayers statewide**

The state board has included the following as its economic impact on school districts:

*The enabling legislation will have impacts on public education. These impacts are not known with specificity. The impacts will depend in large part upon how independent schools that are currently approved to receive public tuition respond to the new mandates related to special education. Some independent schools may choose to forego public tuition rather than comply with Act 173 requirements. Independent schools that receive public tuition will charge excess costs of providing special education to each student's district of residence. This could cause school district budgets and thus tax rates, to increase. However, these rules are tightly aligned to the Act itself.*

This is a bit of a red herring. Excess costs for special education are provided for in law now without the need for rules and school districts already pay excess costs for special education provided to students in independent schools. The economic impact statement does not even attempt to address extraordinary expenditure cost reimbursement. It only addresses excess costs, and excess costs and extraordinary expenditure reimbursements are two different things in law.

Consider this example. The Sharon Academy already charges school districts for excess costs (above tuition) for the cost of services for the students with disabilities it enrolls. In contrast, INSPIRE for Autism charges a maximum rate set by the Secretary. As noted above, the main risk is not associated with the maximum tuition rate (assuming full disclosure is made by private schools of expenses and revenues in their applications.) The main risk is with excess billing beyond that rate, with opaque cost categories that cannot be challenged, and with accounting for-profits in for-profit schools. These rules do not address those risks, and the impact of that omission is not addressed in this impact statement. **Passing the rules as is opens the door to future abuses of taxpayer dollars through this excess billing.** While the LEA in theory can challenge a private school that bills excessively, they may not have other options and the cost is reimbursed anyway, so

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<sup>7</sup> One individual working on the recommendations for the advisory committee was affiliated with the for-profit school that overcharged districts in 2020.

they have little incentive to do so. As we have seen in Vermont, once that door is opened to a weakly regulated cash stream, it is very difficult to close.

There is no analysis in the proposed statement of financial impact, only a suggestion of tax increases, and the state board blames that on the legislature. This economic impact analysis does not conform to the requirements of the law as the state board has not included “specific and clearly demarcated evaluation of the cost implications to local school districts and school taxpayers and shall clearly state the associated costs.” 3 VSA Section 838. There is no demarcated evaluation of cost implications, only a weak suggestion of tax rate increases.

What is ironic about this rule submission is the knowledge and ability of the Chair to do just such an analysis. Then-Representative Olsen submitted 152 pages<sup>8</sup> of economic impact to the state board when he opposed the prior independent school rules. Olsen challenged the board’s failure to include economic impact analysis in its proposal in 2016. Now, as board chair, he makes the same mistake. Then, the economic impact claim was devaluing of real estate in towns with school choice if the state board made schools comply with non-discrimination in enrollment and standards for student health and safety (comparable to public schools).<sup>9</sup> Now, the economic analysis is merely that taxes *might* increase.

As you review these rules, you deserve to be informed of the risks.

There are three main threats posed by poor regulation in this sector.

The first is the risk to students placed in for-profit and nonprofit private independent schools because:

- a) these vendors are financially incentivized not to implement multi-tiered systems of support, as intended by Act 173, but to provide many and fragmented billable services. To see where this is headed, reflect on our health care sector, which has higher costs and worse and more inequitable outcomes than models used in other nations.
- b) the dollars that follow them are increasingly used on overhead and profit, and not on direct services. These vendors are financially incentivized to hire lots of administrators (e.g. one for-profit school has 25 students and 5 administrators, none of whom is licensed or eligible to provide direct services).

The second is the risk to taxpayers of weak incentives for schools and districts to use dollars efficiently.

The third is the risk that if the regulators at the Agency of Education lack the regulatory tools to provide oversight of these dollars, they may not be able to meet state and federal expectations for public assurance around the use of these dollars.

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<sup>8</sup> [edu-letter-representative-olsen-to-sbe-icar-102916.pdf \(vermont.gov\)](#)

<sup>9</sup> National research finds a correlation between school quality and housing prices that is independent of vouchers.

Given the lack of transparency in the rate-setting process and the disincentive to contain costs through reimbursement to independent schools which serve students with disabilities, the future is certain. Taxes **will** increase and Vermont **will** be less affordable, because the state board will not hold independent schools accountable to the education standards of public schools. Moreover, because this accountability for the use of special education dollars is required by federal law if students are placed in private schools, this failure of accountability potentially has implications for federal dollars as well.

If these rules go through, that is a choice the board and legislature can make, and for which the board and legislature (not school districts) must be accountable to students and taxpayers. And of course, despite any safeguards put into these rules for private schools out of state, none of these rules and safeguards apply out of state.

I understand the need to move forward, but want to be clear that in adopting these rules, the state of Vermont is setting the stage for the failure of Act 173 and exacerbating our affordability challenge.

At the very least, here are a few recommendations for what the General Assembly could pursue:

1. Consider clarifying: do all public accommodations and anti-discrimination statutes apply to all taxpayer-funded private “independent” schools? Currently, the State Board chair has been stating that they do throughout the process of developing these rules. Legislative counsel seems to have a different understanding. Both of those opinions also need to be compared with an opinion issued by Bill Griffin of the Attorney General’s office on this same topic. It is difficult to know if children are protected if the interpretation of statute is inconsistent.
2. Consider disallowing for-profit schools from being eligible to receive education funding. The history of for-profit education nationally is extremely poor, and littered with examples of waste, fraud and abuse. High costs in the for-profit sector also divert dollars from improvement of the public education on which most students depend.
3. Instead of asking private schools for assurances that they can provide a rigorous program, require them to provide an education that ***meets the standards that apply to education provided by the SEA and LEAs***. And, provide sufficient regulatory authority and staffing to the agency to ensure they do. If private schools refuse to respond to requests from regulators about questionable billing, they should be excluded from receiving Education Fund dollars.
4. Address the inequity caused by having different rules for approval to receive taxpayer funding for private schools in state and out of state.
5. Fund a research to evaluate the impact on quality, outcomes and costs of serving the most vulnerable students in different settings. What evidence do we have that spending \$1.8 million for 15 student FTEs in a private school is more effective and affordable than, for example, serving similar students in public programs like Burlington's alternative programs and Hartford's hosting interstate collaborative alternative programs. These programs may be more cost effective, and voters



would get to see the district's expenditures in the budgets. In contrast, no one oversees the independent school budgets.

6. To the extent that VT continues to try to provide essential government services through private sector markets, consider using the tools of markets to enhance efficiency and improve quality. In every other aspect of government spending using private vendors, there is a competitive bidding process and the government entity picks the bidder who can do the best job at the lowest price. In special ed and in districts that don't operate public schools, the vendors increasingly set the prices and taxpayers statewide have to pay.

cc: House Ed Chair, Senate Ed Chair