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ISSUE BRIEF

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Public Funding of Independent School Tuition and Special Education Services

This report provides an overview of public financial assistance for students attending independent elementary and secondary schools. It summarizes a number of issues surrounding the public funding of independent school tuition and access to special education in independent schools. This brief also offers a quick comparison between Vermont law and voucher programs in other states.

Background

The Vermont State Board of Education (VSBE) has proposed revisions to Rule Series 2200. These rules are intended to ensure independent schools receiving public education dollars are held to the same nondiscrimination policies as their public counterparts, or in their own words, “to assure acceptable educational opportunities for students enrolled in Vermont’s independent schools.”¹ The proposed revisions focus on making sure publicly funded students are not discriminated against in the independent school application process due to a disability.

Overview of Vermont’s Financial Assistance Program

Vermont and Maine are the only two states that offer a town tuitioning program.² Vermont school districts that have no available public schools pay to send their students to approved independent schools or public schools in other districts. Parents from districts that have a school may also petition to send their students to other public or independent schools. Independent schools receiving students under the town tuitioning program must meet basic school approval requirements and be nonsectarian. In order to attend a receiving independent school, students must be from a sending district and gain admission to the school based on the school’s customary criteria.

Scope of Vermont’s Town Tuitioning Program

According to data from Vermont School Boards Association (VSBA) and the Agency of Education, 5,383 Vermont students, seven percent of total students, participated in the town tuitioning program during the 2015–2016 school year. Roughly one-half of those participating used their voucher to attend an independent school or academy while the other half attend public schools.³

¹ Vermont State Board of Education Manual of Rules and Practices: Series 2200 – Independent School Program Approval. Senate Education Witness Testimony 1/10/17. <http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-rules-series-2200.pdf>

² For the purposes of this brief I am referring to the provisions related to tuitioning in 16 V.S.A. §§ 821–836 as the “town tuitioning program.” The U.S. Department of Education and the National Conference of State Legislatures use the same terminology.

³ Nicole Mace, Executive Director, Vermont School Boards Association. *Independent Schools Approval Standards* Senate Education Committee Witness Testimony 1/10/17. <http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Nicole%20Mace~Independent%20Schools%20Approval%20Standards~1-10-2017.pdf>

VSBA and VSBE Concerns with Vermont's Town Tuitioning Program

The Vermont School Boards Association (VSBA) and the Vermont State Board of Education (VSBE) have raised several issues with Vermont's town tuitioning program. One area of concern is that several independent schools offer few, if any, categories of special education. Some require families to finance or contribute to the cost of special education services.⁴ Independent schools could, in theory, deny access to students because they need special education services the school does not offer. The VSBA and VSBE believe this practice or possibility to be a violation of constitutional rights that guarantee disabled students access to the same programs and services as nondisabled students.

Relevant Facts:⁵

- According to the Vermont Agency of Education, as of December, 1 2015, 15.91 percent of Vermont students are actively receiving special education services.⁶
- There are 12 categories of special education⁷ that the State mandates for public schools.
- 2,099 publicly funded students attend one of six independent schools that offer all 12 categories of special education (St. Johnsbury, Lyndon Institute, Burr & Burton, Thetford, The Village School of North Bennington, and the Mountain School at Winhall).
- 323 publicly funded students attend one of the five independent schools that offer 1–11 categories of special education.
- 289 publicly funded students attend one of the 29 independent schools offering zero categories of special education. Four of these schools have publicly funded student populations of 42-87 percent.
- One independent school with 87 percent of students publicly funded offers two categories of special education. Three other independent schools with enrollment rates of publicly funded students as high as 66 percent but averaging 50 percent, offer four, three, or two categories of special education. One of the aforementioned three independent schools offering some categories of special education, but not 12, is the Long Trail School. The Long Trail School notes that it accepts students in four special education categories into which 77 percent of Vermont's special education students fall.⁸
- None of Vermont's seven ski academies offer any special education categories. Notably, only one of the seven has more than 13 publicly funded students enrolled. Four of the seven have two or fewer publicly funded students enrolled.
- 32 additional schools are approved Therapeutic Special Ed Schools with a total enrollment of 810 students.

VSBE Proposed Revisions to Rules Regarding Independent School Approval

⁴ Ibid.

⁵ All enrollment data are Vermont Independent Schools Association (VISA) Testimony to the Vermont Senate Education Committee on January 10, 2017 (unless otherwise noted).

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Bills/S.130/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Mill%20Moore~Spreadsheet-%20Independent%20School%20enrollments,%20tuitioned%20students%20and%20special%20ed%20approvals~1-10-2017.pdf>

⁶ Agency of Education Child Count Report <http://education.vermont.gov/documents/child-count-report-by-su-2015>

⁷ The twelve categories of disability for special education are: autism, deaf-blindness, emotional disturbance, hearing loss, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury and visual impairment. Development delay is a category for children birth to age 3 (can be used up to age 9 per 34 CFR 300.8) and not included in the categories above for ages 3-21.

⁸ Testimony before Senate Education Committee, Friday, January 13, 2017. <http://longtrailschool.org/proposed-state-board-of-education-rule-series-2200/>

VSBE states that the proposed revisions are not intended to affect Vermont's historical tuition system or affect the right of school districts to tuition students at any public school or approved independent school. They attempt to ensure that approved schools are "willing and able" to serve all students from tuitioning districts.⁹ Proposed rule 2222.1 establishes a number of new conditions required for approval of an independent school in Vermont. The most important, or controversial, new requirements for independent school approval are addressed below:

- **Special Education Condition:** An independent school must offer services to students with disabilities in all 12 categories of special education disability. This does not mean independent schools would be required to maintain standing staff in all 12 areas of disability unless they have students who require all 12 categories. If an independent school does not have a child of a particular disability in attendance, it only needs to have a plan in place for how it would respond if a student with a certain disability enrolled.
- **Special purpose schools:** These schools may continue as special purpose schools under the new regulations and will not be required to accept additional categories of disability. For example, a school serving only students with autism may continue to serve only students with autism.
- **Open Enrollment Condition:** An independent school must have an enrollment policy that does not hinder the ability of a student to enroll based on any disability, race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity.
- **Public School Condition:** Independent schools must comply with all other state and federal laws applicable to Vermont public schools regarding health and safety unless otherwise provided by law.¹⁰

VISA Concern with VSBE Revisions to Rules for Approving Independent Schools

Many in the Vermont Independent School Association (VISA) consider the proposed rules, at least as they were drafted, to go above and beyond the intentions of the VSBE. Even the VSBE considers certain statements in the draft of proposed rules to have been overly broad, such as the Public School Condition.¹¹ Objections have been raised to both the substantive contents of the VSBE's proposed rules and the procedural process via which revisions are being made.

Substantive Issues:

- VISA believes the mission-driven nature of independent schools creates "difficulties or logical impossibilities" with respect to the proposed open enrollment and special education conditions.
- VSBA has considered proposing a lottery system to prevent independent schools from discriminating against students from sending towns. VISA opposes this plan on the grounds that the decision of an independent school to accept students from a sending public school is often a lengthy process designed to make sure the school is the right fit for an individual. This could affect the decision of out-of-state parents to move to an area so their children can go to an independent academy school in Vermont. Academically rigorous schools believe if they are not allowed to choose which public school applicants will attend, their mission or quality of education

⁹ Vermont State Board of Education Statement on November 29, 2016.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-letter-on-rule-2200-series.pdf>

¹⁰ Memo From Jim DesMarais, legislative counsel to Representative Oliver Olsen. Witness Testimony to Senate Education Committee 1/10/17

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~James%20DesMarais~Proposed%20State%20Bd.%20of%20Ed.%20Rules%20on%20Approval%20of%20Independent%20Schools,%20Private%20Kindergarten%20Programs,%20Qand%20Tutorial%20Programs~1-10-2017.pdf>

¹¹ Vermont State Board of Education Statement on November 29, 2016.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-letter-on-rule-2200-series.pdf>

could suffer. Likewise, a school mandated to accept a student with a rare disability may not fit that student's needs.¹²

- Independent schools organized around engaging and rescuing students failing in their original schools often specialize in serving students in one or a few categories of special education. Under the special education and open enrollment provisions, these schools, generally small and specialized, might be forced to take on a child with a disability they did not previously service. Such a development could potentially impact the quality of care offered to other disabled students or students from disadvantaged backgrounds or failing public schools for which the independent school might be seeking to provide other specialized services.
- VISA expressed concern that if every approved independent school needed to be ready to hire staff for every potential special education category, already limited State special education resources could become spread too thinly. Multiple members of VISA have expressed concern that public schools are already reluctant to cooperate with independent schools when independent schools are seeking to hire special educators.¹³

Procedural Issues

- VISA has urged VSBE to correct a few admitted errors in the draft of the proposal.
- Though the VSBE unquestionably has the authority to make rules according to the Vermont Attorney General, VISA disputes that the Attorney General would permit the VSBE to make the specific rules the VSBE has drafted.¹⁴
- VISA notes legislative intent has shown in the past that public and independent schools should not be subject to the same requirements.
- VISA states that the rulemaking process usually includes a private dialogue with stateholders, and that the VSBE “did not engage in that private dialogue, , or in any stakeholder dialogue.”¹⁵ AOE disagrees with this statement.¹⁶
- VISA raised the issue to the Interagency Committee on Administrative Rules (ICAR) that nothing in the public record indicates the VSBE 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). Nor has the VSBE evaluated the cost implications of the proposed new rules on local school districts as required under 3 V.S.A. § 832b.
- Representative Oliver Olsen quantified the potential loss of residential property value to his district to range between three percent and 16 percent, or \$36 million–\$194 million.¹⁷
- Additionally, if the proposed rule changes apply to out-of-state independent schools, this could potentially have an extraterritorial effect. This would potentially raise issues with the Commerce Clause of the U.S. Constitution.¹⁸

¹² Thomas Lovett SJA, Long Trail School, Daren Houck Lyndon Institute, Testimony before Senate Education Committee, Friday, January 13, 2017

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Thomas%20Lovett~Testimony~1-13-2017.pdf>

¹³ Ibid; Mill Moore Vermont Independent Schools Association Testimony to Senate Education Committee, January 10, 2017.

<http://legislature.vermont.gov/committee/document/2018/24/Date/1-10-2017>

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See Letter from Secretary Holcombe dated March 2, 2016, to Headmasters of The Sharon Academy and Burr & Burton Academy with a courtesy copy to Mill Moore of VISA, soliciting input.

<http://education.vermont.gov/sites/aoe/files/documents/edu-state-board-item-041817-j-rule-2200.pdf>

¹⁷ Letter from Representative Oliver Olsen to ICAR.

<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~Mill%20Moore~Rep,%20Oliver%20Olson%20lette%20to%20SBE%20and%20ICAR~1-10-2017.pdf>, and VSBE Testimony to Senate Education Committee January 10, 2017
<http://legislature.vermont.gov/committee/document/2018/24/Date/1-10-2017>

Comparison between Vermont Law and Laws in other States

The only other state with a voucher program focused on rural schools, like Vermont’s, is Maine. Twenty-seven states, including Vermont and Maine, have some form of a school voucher program that supports students attending independent schools. Many of these programs specifically target students with disabilities as part of their program eligibility requirements. The federal Individuals with Disabilities Education Act (IDEA) ensures that students with a disability are provided a public education tailored to their individual needs. Under this law, students who accept vouchers and enroll in independent schools waive their rights and protections under IDEA, including their right to a Free and Appropriate Public Education and to an Individualized Education Program. States can impose requirements on independent schools accepting voucher students, mandating schools provide similar services and support for students with disabilities to those they would receive in a public school. No state requires independent schools to accept all students with disabilities that apply. An overview of states with some form of school voucher program can be seen below.¹⁹

States providing vouchers, scholarships, or some form of compensation to private schools

10 state programs the NSCL knows about could not be located

Town Tuitioning	Poverty Based	Special Needs Based	Both Poverty and Special Needs Based
Maine	North Carolina	Arizona	Indiana
Vermont	Washington D.C.	Arkansas	Louisiana
	Wisconsin	Florida	North Carolina
		Georgia	Ohio
		Mississippi	
		Oklahoma	
		Utah	

Source: <http://www.ncsl.org/research/education/voucher-law-comparison.aspx>

¹⁸ Memo From Jim DesMarais, legislative counsel to Representative Oliver Olsen. Witness Testimony to Senate Education Committee 1/10/17.
<http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Education/Rulemaking%20Authority%20of%20State%20Board%20of%20Education%20and%20Proposed%20Rules/W~James%20DesMarais~Proposed%20State%20Bd.%20of%20Ed.%20Rules%20on%20Approval%20of%20Independent%20Schools,%20Private%20Kindergarten%20Programs,%20Qand%20Tutorial%20Programs~1-10-2017.pdf>

¹⁹ Josh Cunningham, School Voucher Contact NSCL

States with programs or rules similar to those proposed by VBSE

State	Overview	Key Similarities	Key Differences
Arizona	Authorizes \$2.5 million for students with disabilities to use for tuition at private schools. Private schools will not be state-approved if they discriminate on the basis of race, color, family status, disability or national origin	Private schools that discriminate will not be state-approved.	Public funding only allotted to students with disability.
Georgia	Citizens and corporations may donate to Georgia Student Scholarship Organizations (SSOs) that provide scholarships to parents to help cover the cost of attendance at qualified Georgia private schools. Private schools are qualified if accredited by a state-approved agency, physically located in Georgia, adhere to provisions of the <i>Federal Civil Rights Act of 1964</i> , and satisfy Georgia state law private school requirements.	Private schools that discriminate will not be state-approved.	Discrimination is based on adherence to provisions of Federal Civil Rights Act of 1964, and Georgia state law requirements as opposed to additional requirements set by the state. Unclear if disabled students are eligible for scholarships.
Wisconsin	Under the Milwaukee Parental Choice Program, private schools must admit all students who apply unless the number of applicants exceeds the amount of school space. In such a case, the school must conduct a random lottery among the applicants.	Private schools are mandated to accept as many applicants as they can. If there are more applicants than available space, the schools do not have the option to choose who gets in, or discriminate.	Poverty based rather than disability based.

Facts in table from NCSL

Other States Offering Tuition-Like Assistance to Students with Disabilities

Arkansas:

Students with disabilities are granted state-funded scholarships to attend private schools. The private schools must notify the state about grades of disabled students and specific services they provide for disabled students. Schools must administer state assessment to participating students.

Florida:

The John M. McKay Scholarships for Students with Disabilities Program (2001) provides funding to students with disabilities seeking to attend a private school.

Georgia: Special Needs Scholarship Program (2007)

Georgia authorizes a scholarship to students with disabilities to attend a public or private school that their parents view as best meeting their needs.

Indiana:

The Indiana Choice Scholarship Program (2011) provides students with an IEP and a household income not exceeding 200 percent of the federal poverty level a voucher to attend a participating private school of their choice. Participating private schools must administer state assessments to scholarship recipients and must evaluate teacher performance. Participating students have their grades monitored.

Maine:

Maine's tuitioning program is similar to Vermont's, except schools that enroll 60 percent or more of their students via public funding are subject to the statewide assessment to evaluate student academic achievement.

Ohio:

Ohio offers state-funded scholarships for students with autism.

Utah:

Utah offers a fixed number of scholarships for students with disabilities to attend a specialized private school.