To: House Committee on Government Operations
From: Nicole Mace, Associate Director for Legal Services, Vermont School Boards Association
Re: Testimony on H. 497
Date: February 5, 2014

As legal counsel for the VSBA one of my roles is to provide legal information and support to school board members and superintendents around the state. A large portion of the calls and requests I receive are related to the open meeting law. Most boards do a very good job of adhering to the legal requirements, but there is often confusion about application of those requirements, particularly given the rise of electronic communications, as well as document-sharing and virtual meeting platforms. We welcome any efforts to provide clarifications to the law.

Currently, our guidance to board members is that they should refrain from sending email communications to a quorum of the board members, and especially from hitting "reply all" to such a communication, which could lead to a discussion. In Section 1 of the bill, the clarification of the definition of "meeting" is helpful to the extent that it makes clear that certain email communications –those that are between members of a public body for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting – do not constitute a meeting. However, I am not clear whether this language allows for some discussion of those specific topics, or whether one-way communications of this type are allowed only. Further clarification would be useful.

Along those same lines, what significance does the language on page 5, lines 10-13 have? What constitutes distribution of written correspondence and email communication to members of a public body? Would group editing of a policy document in advance of a board meeting "circumvent the spirit or requirements" of the open meeting law?

One question I get a lot from boards is whether document-sharing platforms like Google docs could be used for planning purposes in between meetings. Would the language as written permit that conduct to occur? Under current law that would not be permissible, since the use of such platforms facilitates discussion among board members who are "discussing the business of the public body." If it is permissible under the language in this bill, to what extent are boards permitted to use these platforms? When does one cross the line from planning to discussion?

This issue particularly comes up when dealing with working committees – hiring committees, policy committees, etc. It can be very difficult to get busy people to come to committee meetings and board members have indicated to me that being able to share documents and even edit them online would facilitate more effective committee processes. One option would be to allow committee "planning" to be conducted using an online open platform. Any planning documents would be made public through a link on the website of a school district and any member of the

public could view the draft and comments made by committee members. Discussion of a refined proposal and final decisions would have to be conducted in open meeting.

The clarification regarding electronic meetings in Section 2 of the bill is also helpful. Current law does not provide specifics with respect to public participation and the need for everybody to be heard on the "call" simultaneously. The clarifications here are consistent with the guidance we have been giving boards. One question I have is about the 24-hour notice requirement – does that mean that a board could hold a regular board meeting electronically as long as it provides 24 hours notice, or does the ability to hold electronic meetings apply only to special meetings?

With respect to the requirement to post agendas, my sense is that most boards attempt to do this – many seem to believe it is a requirement already. I strongly support allowing adjustments to the agenda to be made as the first act of business, which allows some flexibility if a topic comes up that needs to be discussed by the board. It is important to balance the need to be transparent with the need for boards to be able to learn about or take action on items that come up at the last minute.

The executive session clarifications in Section 3 are good. We get many questions related to executive session. I am unsure of the significance of allowing some items to be "considered" versus "discussed and considered." It is important to allow discussion of student and academic records in executive session due to confidentiality concerns. We appreciate the inclusion of school safety protocols in the exemptions – under current law it is hard to justify having planning discussions under the clear and imminent peril exception, but for obvious reasons it is critical to not have to disclose school lockdown protocols and other security measures to the general public.

The only concern I have relative to the new language on executive session is the requirement that boards can only enter into closed session to discuss "pending litigation" with their attorney present. Boards need to be able to consult with their attorney well before litigation is pending; effective legal counsel is needed to help boards make informed decisions about potential civil litigation before a lawsuit is filed. We respectfully request the committee to consider changing the term "pending" to "potential."

In Section 4, we appreciate the inclusion of a requirement that the public body be notified of specific allegations of violations of the open meeting law and the "good faith" exception to attorneys' fees and litigation costs. However, I have some concern that the framework established in this bill could result in boards having to hold more meetings to respond to allegations in a tight time frame. In order to respond to the allegation, the body would have to meet to take action – that's the way I interpret the current language. Then, if it is a non-procedural violation, the

board will have to meet again to both void and then subsequently ratify the voided action.

It would be preferable to require the board to acknowledge the violation within a certain time frame and then ratify the action in the same meeting - assuming it is held in accordance with the open meeting law - rather than to include an intermittent "voiding" step. I am not clear what happens to an action once it has been voided under the current language. This is particularly concerning with respect to student discipline and personnel actions. Avoiding the interim step would provide greater clarity for all parties involved.

Thank You.