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Testimony of Sherrie Brunelle

Senate Education Committee

April 6, 2015

Madam Chair and Committee Members:

I want to thank you for providing me with the opportunity to share with you the Disability Law Project's (DLP) concerns about the way we determine eligibility for special education under our current special education rules, particularly our concerns about the "adverse effect" criterion. I will try to keep my comments succinct and brief so that I may be available for any questions you may have.

To begin, we have been trying to get the Agency of Education to address the negative impact of the current rule since, at least, 2004 when the IDEA was reauthorized. Under the reauthorization, it is clear that educational performance is more than academic performance. Indeed, it also includes functional performance. When the state rules implementing the 2004 changes were being promulgated, we asked to address the adverse effect criterion. We were told that there was insufficient time to address the adverse effect criterion and were promised an opportunity to do so at a later point. Nothing happened. The Vermont rules were revised again in 2009 and in 2012. Again we asked to address concerns about the adverse effect criterion. Yet, again we were told there was insufficient time and were promised an opportunity to address adverse effect after that round of rule revisions were completed. Nothing happened.

In July of 2014, a coalition of special education advocates sent a letter to Secretary Holcombe asking to initiate a discussion of the issue outside of a rulemaking process. There was no action regarding our request until we were invited in October of 2014 to share our concerns with the Special Education Advisory Council. We presented our concerns to the Council and participated in subsequent meetings to flesh out the issue. The result was the unanimous conclusion that there is a problem with the adverse effect criterion and its implementation in Vermont school districts, though there was no true consensus as to what to do to address the problem. The Council sent a letter to Secretary Holcombe dated January 30, 2015 recommending, among other things, that a work group be created to look at the issue of adverse effect in greater detail. It is my understanding that an invitation to participate in the work group was sent out to selected

participants last Friday by State Director of Special Education, Cindy Moran. The Disability Law Project is not among those invited, despite our long time efforts to address the problem and our expertise in special education law.

The Disability Law Project's position is that the only way to adequately address this problem is through rulemaking to bring the Vermont rules into compliance with federal law and guidance. We have little hope, even with the institution of the work group, that rulemaking will happen at any time in the foreseeable future. History tells us otherwise. Without a rule that clearly allows for consideration of functional performance in the determination of adverse effect and special education eligibility, adjudicators must rely on the rule and not on any guidance that comes from the Agency. The current rule only looks at educational performance from an academic perspective. This leaves many children with emotional behavioral disabilities and Autism Spectrum disorders with no access to specialized instruction to meet their unique educational needs.

We truly appreciate that this committee has taken interest in our concerns following the compelling testimony shared with you on Autism Awareness Day. We understand that there is interest in trying to address the concerns raised that day through an amendment to H. 361. If the committee is so inclined, I would like to suggest that this committee propose an amendment to 16 VSA § 2942 that adds a definition of the term "educational performance" and I have taken the liberty of drafting some proposed language for your consideration. (Handout)

A statutory definition of educational performance will accomplish several things:

- It will give us a statutory basis for compelling the Agency of Education to engage in rulemaking to remedy the disparity between Vermont's eligibility determination process, Congressional intent, and federal law and guidance/interpretation pertaining to the IDEA;
- It will help to bring Vermont into line with the way 49 other states determine eligibility for special education;
- It will serve to make the special education rules consistent with the *Vermont Framework of Standards and Learning Opportunities* and the *Common Core Standards* for all students.
- It will help to ensure that all students with disabilities receive the supports and services they require to succeed in school and prepare them for further education, employment, independent living and community participation, which is the goal we espouse for all of Vermont's children graduating from high school.

Again, thank you for the opportunity to speak with you today. If you have any questions, I am available to answer them today or at a future date.