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James C. Condos, Secretary of State
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MEMORANDUM March 31, 2016

TO: House and Senate Committees on Government Operations
House and Senate Committees on Education

FR: Chris Winters, Deputy Secretary of State

RE: H.562, An Act Relating to Professions and Occupations ("The OPR Bill"); and
S.217, An Act Relating to the State's Organization of Professional Regulation

This memo is a follow-up to recent conversations regarding educator licensing as it may relate to the above-named bills and to respond to the letters submitted to various committees by Secretary Holcombe, Vermont Standards Board Chair (VSBPE) Steven John, and Agency of Education (AOE) Attorney Greg Glennon.

Conspiracy theories abound this legislative session about empire building and hostile takeovers by the Secretary of State and the Office of Professional Regulation. Last week, in oral testimony by its general counsel, accompanied by written commentary titled *Agency of Education Comments Regarding S.217 and H.562,* the AOE claimed that underlying this year's annual OPR bill (H.562) is a secret and devious plot to take over all teacher licensing in Vermont. This was news to all of us at the Secretary of State's Office and OPR, so I thought it appropriate to speak to the actual legislation before you. While I cringe at tit-for-tat bickering before committees with important work to attend to, AOE's claims are so thoroughly confused that they cannot stand without correction.

Let me be clear:

- **Nowhere in H.562 is there any attempt, whether express or implied, to take teacher licensing away from the Agency of Education;**
- **Neither H.562 nor S.217 waters down educator quality in any way;**
- **AOE/VSBPE would retain their expert role in determining education-specific qualifications for educator licensure, and could require LSB approval as an endorsement criterion pursuant to an administrative rule approved by LCAR as consistent with State policy;**
- **OPR gains NOTHING financially from this move to eliminate duplicate regulation, and school districts will be the dominant beneficiaries of streamlined licensure, to the extent they bear the costs of employee licensure fees; and**
- **Continuing the status quo on SLP dual licensure has a significant economic impact and repels SLP graduates, who are defecting to healthcare, private practice, and other states.**

What H.562 does:

- revises the process for reviewing the necessity and extent of ongoing professional regulatory programs at OPR;
- transfers state licensing and enforcement functions of one profession (Drug and Alcohol Counselors) from the Department of Health to OPR by mutual agreement; and

- transfers state licensing and enforcement functions of two occupations (Potable Water Supply and Wastewater System Designers and Pollution Abatement Facility Operators) from the Agency of Natural Resources to OPR, again by mutual agreement.

The regulatory-review sections in H.562 revise the current periodic review process ("sunset review") for professions regulated at OPR, ensuring that ongoing state regulation is still necessary. It's quite simply a good government practice to take a look at the necessity and appropriateness of ongoing regulation. The current review process rarely has been used, because it requires either house of the General Assembly to direct Legislative Council to conduct studies and file reports. This is not only an awkward role for Legislative Council, but it overlooks the fact that OPR, with its primary role in the sunrise review process, is very well situated to review and report on the necessity and extent of ongoing regulation for professions regulated at OPR.

H.562 has absolutely nothing to do with public education. Rather, it allows OPR to study the efficiency, efficacy, and necessity of its licensure programs pursuant to long-established analytical criteria found at 26 V.S.A. § 3105. H.562 gives OPR no authority to analyze programs outside its own domain without an express request from the Legislature. *See* H.562, §1. And once an analysis is done, the bill gives OPR no authority to do anything more than write a report and send it to the Legislature. This already happens in the context of sunrise review. Every year, the Government Operations committees deploy OPR to review the necessity for regulating a profession. See OPR legislative reports on massage therapists, art therapists and foresters for recent examples of our work vetting professions before the debate happens in front of the Legislature. Contrary to some very confused and unfortunate assertions by AOE, report-writing is not a constitutional duty exclusive to any branch of government, and H.562 is constitutionally sound.

What S.217 does:

- ends the double licensure and double fee requirements for speech-language pathologists (SLPs) and other clinical treatment professionals (such as school nurses and social workers) primarily licensed through OPR who also practice in public schools; and
- requires reporting within state government to assess where and how the State administers professional and occupational licensing programs required by state law.

For the narrow slice of practitioners covered by S.217 who are already licensed at OPR, the bill requires OPR to provide both the underlying license it already offers, as well as the educational endorsement required by AOE, at the direction of AOE, at no additional cost to these licensees.

To understand the intent of S.217, one must first recognize that an AOE educational endorsement is not required for an OPR licensee to work with public school students right now. Through a widely-used system of independent contracting, Vermont schools routinely employ licensed SLP contractors, for instance, who have no educational endorsements. OPR's license, on the other hand, is required for practice in the profession everywhere in the State. In other words, **an AOE endorsement is not required to practice a Title 26 profession within a public school; it is required to be employed directly by a school district as teacher eligible for retirement benefits.**

In this regard, S.217 simply eliminates duplicate, overblown, and unnecessary licensing administration, otherwise known as red tape, for a small group of licensees. It does this by allowing one state agency, not two, to do the licensing. Importantly, and contrary to the written comments supplied to the Senate Education Committee by the Chair of the Vermont Standards Board for Professional Educators (VSBPE), **educational licensing standards are unaffected by the bill,** AOE and VSBPE continue to have jurisdiction to establish and further revise them. All S.217 does is authorize OPR to provide the licensing administration services to meet the

licensing standards already established for this miniscule segment of teachers. To quote Chairman John's letter: "In my view, it is perfectly appropriate that the licensing process be viewed as demanding. It should be." We disagree. We can (and do) maintain high standards without putting licensees through an administrative wringer.

Government silos are the enemies of efficiency and positive change. S.217 also calls for a statewide study of professional licensing programs aimed at finding efficiencies, sharing best practices, optimizing the use of IT infrastructure, and assessing whether disparate licensing systems should be consolidated. This reporting requirement has no more to do with teachers than it does with plumbers, and no more to do with public education than with bridge maintenance. Every state agency that issues professional licenses, in every field, from liquor control to elevator repair, is merely asked to report data so that the Legislature may make an informed decision about how the State of Vermont delivers licensing services. **S.217 doesn't get rid of teacher licensing agencies or teacher licensing.**

The interagency collaboration and work that lead up to the transfer of professions in H.562 should be applauded, not denigrated by fearmongering. H.562 and S.217 are examples of smart government solutions when it comes to the State's professional licensing services. Sometimes transferring professional licensing duties to OPR is an efficient and effective choice for those agencies whose core mission is not professional licensing administration. This way, each agency focuses on its core mission and Vermont's approach to professional licensing is consistent, predictable, and harmonized across agencies and professions.

<u>Rulemaking, Transparency and Accountability:</u>

Finally, I would like address my concern that the educational endorsements at issue in S.217 were not developed in the manner required by Vermont's Administrative Procedure Act. The absence of formal rulemaking continues to cause confusion, as SLPs learn of new fees and changing continuing-education hours by word of mouth and memoranda from AOE, rather than through structured outreach, opportunities for public comment, and publication in the Administrative Code.

By letter to legislative committees dated March 11, 2016, AOE expressed the view that licensing standards set out in endorsements do not need to be adopted through formal rulemaking. As the Deputy Secretary in the agency overseeing and facilitating rules filings for state, and as an office whose elected Secretary is a champion of government transparency, I strongly disagree. AOE takes the view that it may adopt and change requirements governing who may work in Vermont schools without using the administrative rulemaking process, and therefore without subjecting proposed regulation of the schools to full public transparency, accountability, fiscal-impact analysis, and oversight by the Legislative Committee on Administrative Rules.

By assigning itself authority to make requirements outside rulemaking, AOE assigns itself authority to impose expensive *administrative* mandates upon our schools that appear for all the world to be *legislative* mandates, masking administrative choices as statutory requirements.

"'Rule' means each agency statement of general applicability which implements, interprets, or prescribes law or policy and which has been adopted in the manner provided by" the APA. 3 V.S.A. § 801(b)(9). "Where due process or a statute directs an agency to adopt rules, the agency shall initiate rulemaking and adopt rules in the manner provided by" the APA. *Id.* § 831.

Where it is unclear whether an agency must codify its requirements in rule, we look to the statute setting out the agency's duties to see if it directs the agency to adopt rules. In this case, the statute applicable to the VSBPE unambiguously requires the adoption of rules "with respect to the licensing of teachers" 16 V.S.A. § 1694(1). To

most people, that is where the analysis ends: policies concerning "the licensing of teachers" must go through rulemaking, because "a statute directs [the] agency to adopt rules." 3 V.S.A. § 831(a).

By its March 11 letter, AOE takes a different view. It observes that a subpart of § 1694—the same statute that requires rulemaking—authorizes the VSBPE also to "establish standards, including endorsements." *Id.* § 1694(3). Where I and almost anyone looking to the underlying purposes of the APA would tend to see a simple elaboration of what the rule should contain, AOE sees authorization to avoid rulemaking at will by using the labels *standard* or *endorsement* in relation to requirements for licensure. I doubt that was the Legislature's intent. In fact, the definition of "license" found in Title 16 includes "the endorsements the licensee has applied for or possesses." 16 V.S.A. § 1691a(6).

The APA provides that "when an agency adopts policy or procedure it should not supplant or avoid the adoption of rules." 3 V.S.A. § 800(4). But with respect to endorsements, nearly all of the implementation, interpretation and prescription (see definition of "rule" at § 801(b)(9)) is occurring in the endorsement and not through rulemaking.

The prohibition on supplanting or avoiding the adoption of rules is particularly important in the context of school regulation. The Legislature has made two separate and distinct attempts—one in 2003, the other dating to 1989—to make sure school-related rules don't create unfunded mandates, and those clearly anticipate that administrative acts <u>including "standards and "procedures" regulating schools</u> will go through rulemaking:

> *If a rule affects or provides for the regulation of public education and public schools, the agency proposing the rule shall evaluate the cost implications to local school districts and school taxpayers, clearly state the associated costs, and report them in a local school cost impact statement to be filed with the economic impact statement on the rule required by subsection 838(c) of this title. An agency proposing a rule affecting school districts shall also consider and include in the local school cost impact statement an evaluation of alternatives to the rule, including no rule on the subject which would reduce or ameliorate costs to local school districts while achieving the objectives or purposes of the proposed rule. The legislative committee on administrative rules may object to any proposed rule if a local school cost impact statement is not filed with the proposed rule, or the committee finds the statement to be inadequate, in the same manner in which the committee may object to an economic impact statement under section 842 of this title.*
> -3 V.S.A. § 832b.

and

> *Prior to the prefiling by the Standards Board* ***of a licensing standard or procedure*** *proposed for rulemaking pursuant to 3 V.S.A. § 820, the Secretary may object to it before the State Board on the grounds that it would have significant adverse financial or operational impact on the public school system. If the State Board agrees, it may remand the proposed rule to the Standards Board for further deliberations consistent with its written decision. The Secretary may also object on the same grounds to a substantive change to a proposed rule, once initiated, before a final proposal is filed pursuant to 3 V.S.A. § 841.*
> -16 V.S.A. § 1695 (emphasis added).

Under AOE's interpretation of the governing law, the VSBPE may excuse any licensing requirement or regulation not only from APA requirements, but also from specific fiscal scrutiny by the Legislature or the Secretary required by 3 V.S.A. § 832b and 16 V.S.A. § 1695 merely by using the magic words *standard* and *endorsement*.

The general assembly intended by passage of the Administrative Procedure Act that:

> *(1) agencies maximize the involvement of the public in the development of rules;*
> *(2) agency inclusion of public participation in the rule-making processes should be consistent;*
> *(3) the general assembly should articulate, as clearly as possible, the intent of any legislation which delegates rule-making authority;*
> *(4) when an agency adopts policy or procedures, it should not do so to supplant or avoid the adoption of rules.*
> -3 V.S.A. § 800.

At a time when school costs and mandates upon schools are much in the headlines, we would do well to ask whether the more faithful application of existing restraints might put our schools, their students, and our taxpayers on better footing.

OPR has endeavored for over two years now to simplify the process for OPR licensees who also meet the requirements for an AOE educator endorsement. We appear to be at an impasse with the Agency of Education, which leaves these licensees in a very difficult position, a position we believe is unnecessarily burdensome, complicated and expensive.

I hope this information is helpful and would be happy to speak to the committee at its convenience about any of the above.