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Testimony of Marilyn A. Mahusky, Staff Attorney
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House Education – Special Education Funding
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Good morning. Thank you for the opportunity to speak with you this morning. I am an attorney with Vermont Legal Aid's Disability Law Project. I have represented students in special education matters for over twenty-five years. I have participated in numerous IEP meetings, 504 meetings, and Manifestation Determinations. I have represented students in Mediation and have filed for Due Process on their behalf. I have advocated for services in the classroom to promote the ideals of inclusion and for placement in out-of-state residential schools, depending on the needs of the individual child. In the past three years, the Disability Law Project has provided counsel and advice or representation to approximately 336 students in special education related matters.

In addition to a career in advocacy on behalf of people with disabilities, I serve on a school board. I will continue to Chair the Chester Andover Elementary School Board until June 30, when the district dissolves and becomes part of the Green Mountain Unified School District (GMUSD). I am Vice Chair of the GMUSD and recently Chaired the Finance Committee as we put together our first budget for the voters. I also serve on the Two Rivers Supervisory Union (TRSU) Board and am on the TRSU's Executive Committee. I participated in our supervisory union's Act 46 study committee. I am also the parent of a child with a mild learning disability who because of intensive supports in early elementary school has become a successful college junior. Fortunately for her, she had robust advocacy by a sophisticated parent. Not all students are so lucky. Wearing these hats, I would like to share with you my thoughts relative to the special education funding bill under consideration.

1. Students with disabilities who meet the eligibility criteria are entitled to special education and related services under the IDEA and Section 504.

Let me preface my remarks by saying that as a parent, a taxpayer and a school board member, I am mindful of Vermont's shrinking student population and the need for fiscal responsibility. As an advocate for children with disabilities, I am mindful of the local school district's obligation to ensure that children with disabilities are timely identified, evaluated and provided with the special education and related services to which they are entitled under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq.*, its predecessor, the Education for

All Handicapped Children's Act (EAHCA), passed by Congress in 1975, Public Law 94-142, and Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §794. In considering changes to Vermont's special education funding formula, it is important to be reminded of these historic pieces of civil rights legislation. The EAHCA was passed in response to Congressional findings that children with disabilities were often not being educated at all, or were not receiving specialized services within the general education environment. I recall my father telling me about his younger sister. My aunt who was born in 1926 was never educated. She was sent home on her first day of school and never returned. She had an intellectual disability. Had she been born even 50 years later, she would have gone to school. Had she been born 20 years ago, she would have gone to school and in all likelihood, been employed upon graduation. Fortunately, because of my grandmother's determination, she was able to live relatively independently.

Today, under the IDEA's Child Find requirements, states are required to ensure that children with disabilities, regardless of whether they are homeless, wards of the state or in private schools, are identified, located and evaluated to determine whether they are in need of special education and related services. 34 C.F.R. §300.111(a). Included within the Child Find requirements are children who are *suspected* of having a disability and in need of special education even though they are advancing from grade to grade, and highly mobile children, including migrant children. *Id.* at (c).

Once a child is determined, subsequent to an evaluation, to be in need special education and related services, the local education agency (LEA), meaning the local school district, is required to provide that child with a Free and Appropriate Public Education (FAPE). FAPE means that the child's special education and related services, including, OT, PT, SLP services, counseling services, social work services, parent counseling and training, and transportation services, among others, are provided to public school students, and at no cost to the parent. "Appropriate," over which much litigation has ensued, means that, "a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District Re-1*, - U.S. -, 137 S.Ct. 988 (March 22, 2017). In arriving at this holding, the U.S. Supreme Court emphasized the requirement "that every child should have the chance to meet challenging objectives." *Id.*, at ___. The IEP is the mechanism by which a student's specialized instruction and related services is documented and delivered.

2. Inadequate state appropriations for special education funding does not relieve school districts from their legal obligation to identify and serve children with disabilities under the IDEA and Section 504.

As this Committee considers major changes to Vermont's special education funding mechanism, I encourage you keep in mind the state's and the local education agencies' obligations within the

legal framework I just outlined. Regardless of whether the state appropriates sufficient funding for special education, local education agencies are not relieved of their obligation to ensure, not only that children with suspected disabilities are timely identified, but also that they are provided with the individualized services to which they are entitled. Insufficient state funding puts significant pressure on already financially strapped and stressed school districts and leaves children vulnerable to delays and denials in identification of suspected disabilities, and may well deprive them of an appropriate education.

As this Committee considers adopting a census-based funding model, I want to make you aware of a recent monitoring report by the U.S. Department of Education. Earlier this month, on January 11, 2018, the U.S. Office of Special Education Programs (OSEP) sent the Commissioner of the Texas Education Agency a letter detailing the results of a 2017 monitoring visit. *See, <https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-enclosure.pdf>* (Attached). OSEP determined that Texas had violated the IDEA's child find requirements, denied students FAPE and violated their rights under Section 504 by operation of a performance based monitoring and analysis system (PBMAS). Texas uses a census-based funding formula. Under that formula, districts with a performance indicator of 8.5% or higher were presuressed to under identify and under serve children with disabilities. OSEP determined that Texas had developed a Response to Intervention System (RTI) which is similar to Vermont's Multi-Tiered System of Supports (MTSS). Implementation of this strategy, designed to meet the needs of "struggling" learners, resulted in the delay or denial of evaluations for children suspected of having a disability who need special education and related services. OSEP Monitoring Visit Letter, page 5. OSEP noted that while RTI may be appropriate for students with a specific learning disability, and can be used as a tool in evaluating a student's educational needs, it cannot be used as the sole component of an individual evaluation under the IDEA and "does not replace the need for a comprehensive evaluation of a child whom the LEA suspects has a disability and needs special education and related services." 34 C.F.R §300.304(b). OSEP also found in some cases that school boards pressured administrators to not identify students with disabilities, and to continue to implement RTI even when it was clear that children were not making adequate progress.

The results of OSEP's monitoring report is relevant for two reasons: 1) it is an example of the risk inherent in a census based model of disincentivizing the number of students identified, evaluated and provided with special education and related services; and 2) it is an example of an MTSS system that was not carefully monitored by the state agency, and did not have clear guidelines for determining when and how a child moved through the multi-tiered system. Again, the result was a "delay and denial" in the timely evaluation of children suspected of having a disability and in need of special education and related services.

The November 2017 District Management Group Report, *Expanding and Strengthening Best-Practice Supports for Students who Struggle*, posits that by shifting to a multi-tiered system of supports (MTSS) and implementing it across supervisory unions and school districts, with fidelity, Vermont can achieve savings and at the same time ensure the early intervention and identification of students with more complex needs. Built into this model is a fundamental shift in practice and must be assurances that there will be no delay in the identification, evaluation and provision of specialized instruction and related services to students with disabilities.

Turning to the proposed bill itself, I recommend the following:

1. Slow down. It is important to do this right. To improve Vermont's educational system for all students, and to ensure that students with disabilities who require specialized instruction and related services are timely identified, evaluated and provided with the services to which they are entitled under federal law, Vermont needs adequate time and resources to fully implement the recommendations in the DMG Report. According to DMG, shifting to an MTSS best practices model of supports will take "1-3 years of close planning, research, and communication." DMG has identified that "[m]any [Supervisory Unions and School Districts] will require additional outside support to build capacity and support the shifts in current practices." DMG Report, page 8.
2. Once the MTSS model is fully operational in every school district, begin the shift to a census-based funding model. The Kolbe study makes clear that, "To achieve savings without potential harmful impacts for students, a move to a census-based funding mechanism must be tightly coupled with shifts in practice and service delivery models."
3. Adequately fund the Vermont Agency of Education for the period of time it takes to implement MTSS and shift to a census based funding mechanism. The authors of the Kolbe study acknowledge that "in the near term, AOE may require additional resources to accomplish these goals [shifts in practice.]" The current proposal does not address resource issues at the AOE which are necessary to support supervisory unions in establishing and enhancing best practices such as MTSS, PBIS and early literacy training.
4. Ensure adequate funding for Extraordinary Services Reimbursement. Section 2962. I understand the rationale behind a tiered system of reimbursement (higher for in-district program, lower for out-of district program). My concern with this tiered system is that currently many districts do not have the capacity to meet the needs of many high-needs students, in part, because they do not have a continuum of supports as required by the IDEA. To ensure FAPE for a student, the IEP team must have the ability to place students in out-of-district placements without penalty. I also question whether it is appropriate to establish an administrative process for review of extraordinary services reimbursement. Section 2962(d). IEP teams do not lightly make the decision to place students out of district, and should not be penalized for doing so when it necessary to provide the student with a FAPE.

5. In Section 2969(c), the language is not consistent with the language in the the disability categories listed in Vermont's Special Education Rules. *See* Section 2362.1(c). To make it consistent, delete, in the first sentence, "or behavioral problems" and change to read: "For the purpose of meeting the needs of students with emotional disturbances, each fiscal year ..."

Thank you for the opportunity to testify on this important topic.