Outline of Testimony of Attorney Patti Page
On bill draft 7.1 (1-31-18 8:39 a.m.)
Wednesday February 14, 2018 (9 a.m.)
House Education Committee

1. Introductory Remarks.

- **Speaker's background**. Attorney concentrating in education and special education law since 1989. Representing with school districts and supervisory unions Statewide.
- **Terminology.** During this testimony, the term "SEA" (State Education Agency) is used to refer to the State Agency of Education, and the term "LEA" (Local Education Agency) is used to refer to Supervisory Unions/School Districts.

2. Law. Federal special education law informs special education practice, funding, services, and substantive and procedural standards at the State and local levels. Yet it does not appear that federal special education law has been taken into consideration in the development of this proposed bill.

- **Mandate**. Where SEA receives federal IDEA funds, federal law mandates provision of a Free and Appropriate Public Education (FAPE) to students who are eligible for special education. Cost alone is not an accepted basis for denying an essential service.
- **Maintenance of Effort:** Federal law requires the SEA and LEAs to "maintain funding at a level of effort at or above the previous year's funding amount or risk reduction of its IDEA Part B grant." UVM Report at 77. 34 C.F.R. §300.202-300.205. While the UVM report acknowledges this, and that a loss of federal funding can result if funding is not maintained, it does not appear to take the loss into account in its calculations. Id.

  It is not clear from the proposed legislation whether this concern has been identified, explored, and addressed in a way to ensure that federal funds will not be lost. Any bill must be designed not to run afoul of federal law.
- **Loss of Funding.** Failure by local and State educational agencies to comply with extensive federal special education regulations can result in the loss of federal funding.
- **The UVM report does not acknowledge the role of federal special law on the issues the report addresses: funding levels, identification of children with disabilities, and levels of service for such children.** It does not appear that the law informed or affected the recommendations of the UVM report.
- **The Agency of Education does not have a special education attorney.** It does not appear that that the authors of either the UVM report or the DMG report consulted with a special education attorney.

- **MTSS and EST**. These are worthwhile systems to address needs of all learners. Planning should reflect, however, that federal law requires that if there is a reason to "suspect a disability," the child should promptly be referred for a special education evaluation.
- **Knowledge Base.** Unless there is full knowledge of the legal and practical consequences of the suggested massive reduction in special education spending, a bill proposing such cuts cannot be written prudently.

3. Assumptions of Unproven Facts. The proposed bill appears to be based on an assumption that students are being over-identified as eligible for special education, or that they are being provided with a level of service that is excessive. Yet, the UVM report acknowledges that it is not clear whether either of these propositions is correct. UVM at 71. Proposing drastic cuts in special education funding, implicitly based on unproven assumptions, in hopes of containing costs is not only unlawful, but will likely result in denial of rights of children with disabilities and/or in the need for new local taxes to fund necessary services.

4. Purpose and Policy. Vermont children with disabilities are not going to go away. There is no current reason to believe that numbers of children with disabilities is going to drop. Vermont in fact has a growing number of children with severe and complex disabilities resulting in a growing need for intensive services, special day placement, or residential placements. LEAs, State social service and mental health agencies are currently overwhelmed by the widespread need. The UVM report does not address how the needs of these students will be addressed if there are large cuts in funding.

- **Exacerbating Factors.** The severity of disabilities represented, rather than numbers of eligible students, is the chief driver of costs of serving children with disabilities. Poverty, limited resources in rural settings, high numbers of students who are English Learners, increasing instances of early childhood trauma resulting from abuse and neglect, and transience of families coping with poverty, dysfunction and/or parental mental health or addiction issues, exacerbate the complexity of issues..
- **Placement Continuum.** Vermont's limited continuum of placements currently results in long waiting lists for children who require intensive emotional, psychological, and behavioral intervention in order to be able to learn. This is true even in Vermont's denser population centers, such as Chittenden County.
- **Purpose and Policy.** If the "purpose and policy" section of the Draft Bill 7.1 is intended to do more than pay lip service to the State's commitment to "meet[ing] the needs of children with disabilities," the need to fund high costs of addressing the above factors must be included in any changes to the funding system.

5. While LEAs are typically the sole or primary focus of efforts to improve efficiency (including financial efficiency) and quality of service, it is a mistake not also to focus on other players in the system who (a) contribute to the cost, inefficiency and/or complexities of

special education services and programming, and/or (b) who should share responsibility for improving services and reducing inefficiencies as recommended in the DMG report.

- These players include the Vermont Agency of Education (which is also subject to the federal mandate); other State agencies responsible for mental health, social services, and support of families and protection of children; our State University and Vermont colleges which provide teacher preparation programs; and the teachers' union and its members, who will need to increase the capacity of general education to address growing numbers of struggling students. See, DMG report.
- The bill should acknowledge and reflect that, if best practice changes of the type suggested in the DMG report are going to be designed and implemented, and service delivery to struggling children is to be more efficient, this will require significant systems-wide changes, at the local *and* State level.
- Broad systems changes take time to design, and even longer to implement. And, a "one size fits all" approach will not work, given the individual characteristics of Vermont's many supervisory unions.

6. Bill 8.1. The legal, societal, educational and financial complexities of the proposed funding and practices changes contemplated in Draft 7.1, warrant a thorough, planful, and thoughtful consideration of the likely effects of the changes; of unanswered legal and factual questions; of the implications of moving to a census- based system that will allow for improved flexibility; and of options for approaching best-practice issues recommendations.

For this reason, although I am not here to testify about the new draft bill that came out yesterday (Draft 8.1), I believe that its approach is preferable to Draft 7.1, because 8.1 provides more time for such considerations , and additional expertise in the form of a proposed Working Group. Draft 8.1 also provides for involvement of an AOE attorney in the process. This is a key need, since knowledge of special education law <u>as it relates to State responsibilities</u> is crucial to developing a workable bill.

7. New Procedural Mechanisms in the Proposed Bill.

a. Proposed Creation of an Extraordinary Special Education Reimbursement Review Team.

- It is not legal for a body other than a child's IEP team to determine the services and placement provided to a child through the IEP process, or to overrule the placement and services decisions of the IEP team. This is an impermissible way to limit funding for special education services.
- Even if the reimbursement review were legal, the proposed team process is not practicable. It is unclear what the makeup of the reimbursement review team would be. It

is a fact that the AOE does not have the current capacity to take on this added task. It is also clear that this will be a time-consuming endeavor, requiring review of substantial numbers of records from the file of each child Statewide for whom extraordinary costs have been incurred, by experts in various fields who will need to be identified, placed under contract, and paid for what will necessarily be many hours of work. Team members who arrive with no knowledge or understanding of the particular circumstances of a student's case, nor of a given LEA's local challenges and circumstances, will nonetheless be asked to second-guess local IEP team decisions.

- Because the decision of the reimbursement review team can have substantial negative financial results for an LEA, the bill should provide for an appeal.
- There is already a State Board Rule under which the AOE, through its Residential Review Team, has an opportunity before a placement is made and monies are expended, to review a residential placement being considered or proposed by an LEA's IEP team, and advise concerning less restrictive alternatives, and/or recommend appropriate but less costly residential programs as a part of the Team's discussion. Rule 2366.9.2.5. A reimbursement review team would be redundant, and less well placed to make a decision about a case.

b. Proposed denial of reimbursement without proof by the LEA that it has "obtained reimbursement from all other available sources, including Medicaid, other federal and State programs, and private insurance."

- It is very much in every LEA's interest to make use of Medicaid and private insurance sources, and they do so to the extent allowed. This provision seems to address a problem that does not exist. And, this proposed language does not take into account that access to Medicaid and private insurance is restricted by federal and State law. See, 34 C.F.R. 300.154(d) and (e). State Board Rule 2360.2.15.

- It is not fair or practicable to make an after-the-fact judgment with respect to accessing "all other available sources," without prior definition. All other available sources would need to be identified for the LEA beforehand, along with the types of funding available from each source for special education.