VERMONT LEGAL AID, INC.

DISABILITY LAW PROJECT

56 MAIN STREET SUITE 301
SPRINGFIELD, VERMONT 05156
(802) 885-5181 (VOICE AND TTY)
FAX (802) 885-5754
(800) 769-9164

OFFICES:
BURLINGTON
RUTLAND
ST. JOHNSBURY

OFFICES:
MONTPELIER
SPRINGFIELD

April 4, 2018

Senator Phillip Baruth, Chair
Senate Education Committee
Statehouse
Montpelier, VT 05602

Re: H.897

Dear Senator Baruth:

In response to your request for proposed language, the Disability Law Project offers the following comments and suggested changes to the Working Version of H.897.

You may recall from my prior testimony that I was concerned about three things: 1) the failure of the House version of the bill to make clear that students with disabilities are entitled to special education and related services under the IDEA; 2) the bill failed to make clear that school districts are not relieved of their obligation to ensure that children are timely identified, evaluated and provided with the special education to which they are entitled, and 3) the bill failed to provide supports to districts to assist them in shifting to a multi-tiered system of suports (MTSS) and adopting school-wide positive behavioral intervention systems (PBIS).

The current version of the bill is substantially improved, especially with respect to item #1. The working version more plainly makes clear that students with disabilities have entitlements. However, there is still inadequate emphasis on school district's obligation to ensure that children are *timely identified, evaluated and provided* with the special education and related services to which they are entitled, especially as children move through the multi-tiered system of supports (MTSS). This ties into my remaning concerns with respect to ensuring that districts not only commit to implemeting MTSS and PBIS, but have the tools necessary to make this monumental shift. These tools include leadership and direction from the AOE, assistance with teacher training and recruitment of highly qualified teachers. At the same time, schools must continue to meet their obligations under the IDEA. This will also require the state to commit to a realistic timeframe for implementation and assurances of adequate funding.

We propose insertion of the following language:

1. MTSS may not be used to delay or deny a timely initial comprehensive special education evaluaton for children suspected of having a disability.
2. The AOE shall adopt clear and consistent policies and procedures to ensure that evaluation of children suspected of having a disability is not delayed or denied because of

implementation of a MTSS, including defining what level of progress is sufficient for a child to stop receiving instructional services and supports through MTSS, and guidance on how long children are served in each tier. This requires as well that AOE adopt rules or guidance on how children are measured to ensure that progress is being made.

3. The AOE shall develop and provide to supervisory unions information to share with parents of children suspected of having a disability, that describes the differences between a MTSS, Section 504 and the IDEA, including how and when school staff and parents of children having a suspected disability may request interventions and services under those programs.

These additions are important to ensure that school districts understand not only their obligations to children currently receiving special education and related services, but that their obligations under Child Find, 42 U.S.C. §1412(a)(3) and 34 C.F.R. §300.111, remain. Despite implementation of a MTSS, districts must ensure that all children with disabilities, including children with disabilities who are homeless or wards of the State, and children with disabiliies attending private schools, regardless of the severity of their disability, who are in need to special education and related services, are "identified, located and evaluated." *Id*.

Briefly, let me remind you of the monitoring that occurred in Texas by the U.S. Department of Education. The DOE determined that the Texas State Education Agency (SEA) had violated the child find requirements, denied students a Free and Appropriate Public Education (FAPE) and violated their rights under Section 504 by operation of a monitoring system designed to monitor the needs of "struggling" learners. Texas had adopted a census based funding formula, and implemented a MTSS similar to Vermont's. The Office of Special Education Programs (OSEP) noted that Texas had relied on MTSS as the sole component for evaluating students under the IDEA, and failed to conduct comprehensive evalautions of children whom the local education agency (LEA) suspected had a disability, and continued to implement MTSS even when it was clear that children were not making adequate progress. OSEP also found that school boards pressured administrators not to identify students with disabilities.

While Vermont is not Texas, the results of the OSEP monitoring are instructive: 1) they highlight 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) they reflect an example of a MTSS 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. 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 servics.

A related concern is the lack of a requirement that supervisory unions actually implement MTSS and PBIS. Title 16, provides that "[w]ithin each school district's comprehensive system of educational services, each public school shall develop and maintain an educational support system for students who require additional assistance in order to succeed or to be challenged in the general education environment." 16 V.S.A. §2902. However, there is no requirement that SUs adopt and implement MTSS and PBIS envisioned by the District Management Group. This can be remedied in part by inserting the following:

4. On page 3, line 21 insert after "Report": "and consistent with a MTSS provided in 16 V.S.A. §2902."
5. On page 4, line 13 insert after "Report": "and consistent with a MTSS provided in 16 V.S.A. §2902."

Alternatively, language could be inserted to ensure that SUs adopt and implement the best practices recommended by DMG.

Other proposed language changes:

6. On page 5, line 21 revise last sentence to read (by adding "not' and replacing "facilitate" with "interfere"): The changes to State funding for special education and the delivery of special education services as envisioned under this act are "not" intended to "interfere" with the exercise of this entitlement.
7. On page 13, revise the Policy and Purpose section, lines 7-13 as follows: "It is the policy of the State to ensure equal educational opportunities for all children in Vermont. This means that children *who struggle shall be provided with early intensive intervention services consistent with this act and positive behavioral intervention services, and that children with disabilities shall be timely identified and provided with the special education and related services to which they are entitled.* (Delete third sentence). The purpose of this chapter is to enable the Agency of Education to *meet the educational needs of all children, including children who struggle, children with disabilities and children suspected of having disabilities.*

We agree with the AOE and with the Developmental Disabilities Council President, Mirim Scholz, that section 2961(c)(2) (page 16) should be deleted, and replaced with language directing the AOE to provide guidance to SU/SDs to ensure that the disability-related needs of students are met first, and that any remaining amounts may be allocated to support the shift to MTSS and PBIS second. The due process protections emboddied in the IDEA are only as good as the ability to exercise those rights. The due process hearing process is complicated, time consuming and costly. Mediation is an option certainly, but it is stressful for parents especially when they are unrepresented. Districts have access to legal counsel whether they are present in the room or not during mediation and to educational experts. At IEP meetings, parents often feel unheard and overwhelmed. We cannot rely on the good intentions of school boards, administrators and staff when it comes to protecting the legal entitlement of children with disabilities and suspected disabilities.

Finally, funding and implementation must be addressed. It may not be realistic for the AOE and local school districts and supervisory unions to shift their operations and implement MTSS and PBIS with fidelity without a significant infusion of state financial support. The closure of the Brandon Training School was successful in large part because of the state's commitment to deinstitutionalization and the simultaneous development of a home and community-based system of supports. Until de-institutinoalization was realized the state operated two systems of support, one in the institution and one in the community. The same thing may need to occur here. The state may need to operate under its current reimbursement model while shifting to a census based model. When the census based model becomes fully operational, there will likely be savings as suggested by both the DMG and UVM reports.

The Developmental Disabilities Council concurs with these comments.

Thank you for the opportunity to share our concerns and offer suggestions. We appreciate your thoughtful approach in working toward a positive outcome for our children.

Sincerely,

Marilyn A. Mahusky
Staff Attorney