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**Testimony of Marilyn A. Mahusky, Staff Attorney
Disability Law Project, Vermont Legal Aid, Inc.
Funding Of Services For Students Who Require Additional Support
Senate Education – March 20, 2018**

Thank you for the opportunity to speak with you this afternoon. I am an attorney with Vermont Legal Aid's Disability Law Project. I have represented individuals with disabilities in a variety of legal matters, including in Special Education 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 over 360 students in special education related matters.

My interest in special education is not limited to my role as a Staff Attorney with Vermont Legal Aid. I also am the parent of a child with a minor learning disability who because of intensive supports in early elementary school, and robust advocacy by a sophisticated parent, has become a successful college junior. I also serve on a number of school boards. I am Chair of the newly created Green Mountain Unified School District (GMUSD) Board and serve on the Two Rivers Supervisory Union (TRSU) Board. I participated in our supervisory union's Act 46 Study Committee.

I have three concerns with the proposed legislation:

1. The proposed bill fails to make clear that, students with disabilities who meet the eligibility criteria, are entitled to special education and related services under the IDEA.
2. The proposed bill fails to make clear that local school districts are not relieved of their obligations under state and federal law 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 IDEA.
3. The proposed bill fails to provide supports to school districts to assist them in shifting to a multi-tiered system of supports (MTSS) and adoption of school-wide positive behavioral intervention systems (PBIS).

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

The Individuals with Disabilities Education Act (IDEA), 42 U.S.C. §1401 *et seq.*, and its predecessor, the Education for All Handicapped Children's Act (EAHCA), Public Law 94-142, along with Section 504 of the Rehabilitation Act of 1973, are historic pieces of civil rights legislation. The EAHCA was passed in response to Congressional findings that the educational needs of children with disabilities were not being fully met, that children with disabilities were being excluded entirely from the public school system, and that often children with disabilities were forced to seek educational services in segregated settings. Congress specifically determined it was "in the national interest of the Federal Government to assist state and local efforts to provide programs to meet the educational needs of handicapped children in order to ensure equal protection of the law."

The House Bill under consideration by this Committee purports "to enhance the effectiveness, availability, and equity of services provided to all students." In reality, the bill proposes to enhance opportunities for "all" students at the expense of students with disabilities, students who historically were denied an education and who today continue to fight for the services to which they are entitled. I stated earlier that the Disability Law Project has advised or represented over 120 students or their parents or guardians in each of the last three years. Yesterday, I spoke to the parent of a 12-year-old child who was suspended for "talking back" to a teacher. This was his 10th suspension of the school year. The child was on an IEP and had been since the first grade for a learning disability. Two years ago, the child was assaulted. His grades started slipping, and he began to act out. The school district failed to provide the child with any additional supports or to evaluate him to determine whether he might also have an Emotional Disability. I also spoke to a 19-year-old student who was homeless. He had been in DCF custody until he turned 18. DCF had placed him at an out-of-state residential school. He left the school after he too was assaulted and returned to the public school he had been enrolled in only two years prior. The school district refused to enroll him because he was on IEP and they did not have any of his records. It took the school district over a week and a half to schedule an IEP meeting. Meanwhile, the student was left to hang around the local drop-in center while he waited to return to school. Under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. §11431 *et seq.*, and the IDEA, the student should have been permitted to enroll, and immediately provided with services. These are only two examples of the many students and parents we speak to every day who struggle to get the services their children need and are entitled to under our current funding structure.

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." *Endrew 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 are documented and delivered.

- **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 reviews the House Bill, I want to make you aware of a recent monitoring report by the U.S. Department of Education. Earlier this year, 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 pressured 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 needed 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.

While Vermont is not Texas, the results of OSEP's monitoring report are relevant for two reasons: 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 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. 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 proposed legislation focuses almost exclusively on cost containment and reducing the number of students identified with disabilities. It does nothing to advance the policy goals articulated in Title 16 for aligning the delivery of educational services along a continuum of multi-tiered supports. 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 within this shift there 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.

When I testified before the House Education Committee on this bill, I made the following recommendations:

1. Slow down. 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.”

Thank you.