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To: Senate Committee on Education
From: Nicole L. Mace, Executive Director
Re: S. 229
Date: February 9, 2018

Thank you for the opportunity to testify on Draft 1.1 of S.229. In many ways it constitutes a significant step forward in ensuring equal access to educational opportunity for Vermont's publicly-funded tuition students.

When Jeff Francis and I testified regarding fiscal oversight of independent schools earlier this session, we shared with you the VSBA/VSA/VCSEA testimony to the independent schools study committee. The testimony I offer you today is based on the content of that memo.

Section 1 of Title 16 states: "The right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights. Further, the right to education is fundamental for the success of Vermont's children in a rapidly-changing society and global marketplace as well as for the State's own economic and social prosperity. To keep Vermont's democracy competitive and thriving, Vermont students must be afforded substantially equal access to quality basic education . . ."

Since the outset of this two-year process, our approach has been consistent. We have conferred with our members, we have reviewed laws, regulations and testimony, we have sought to understand the position of the independent schools and we have sought information from school officials and families who have specific experience in the interaction with independent schools.

Our areas of focus have centered on the three principle issues referenced in S.229: special education; and enrollment/retention and discipline; and financial capacity.

Important Distinctions/Clarifications:

For the purposes of this discussion, we find it critical to clarify that there are three types of approved independent schools. They are:

- *Approved independent schools providing general education to publicly-funded students* through Vermont's tuition program - special education students enrolled are entitled to FAPE
- *Approved independent schools providing general education exclusively to privately-funded students*; these schools accept no public tuition dollars. In this context, privately-placed students with disabilities lose entitlement to FAPE, and are eligible for very limited funding for an Individual Services Plan (ISP). Individual services are determined by the district where the independent school is located after gathering input from all independent schools within that district.
- *Approved Independent schools serving a specialized population of students with disabilities only* - generally such schools in Vermont accept only students who are placed by the Local Education Agency (LEA); these students are publicly-funded and entitled to FAPE.

Within the first type of approved independent schools - those that accept publicly-funded tuition students, there are two more categories: those that are approved to serve all special education categories, and those that are approved for a limited (or no) category(ies) of disabilities.

Independent Schools Approved in All SpEd Categories

Independent schools that serve all categories of disability for students ages 3 through 21 have licensed special education staff and have sought and received approval from the Agency of Education (AOE) to serve all students in all applicable categories of disability.

However, this does not mean that these independent schools that are approved in all categories necessarily serve every student with a disability who applies. In some cases, a limit is placed on the number of special education eligible students admitted.

In other cases, a student is denied admission because the independent school determines that the student is not a "good fit" or does not meet the "mission" of the school. In still other cases, both the LEA and the independent school - through the IEP process - determine that the independent school cannot serve the student appropriately and that another school or placement is determined to be necessary to provide FAPE to the student.

Independent Schools Choosing Not to Serve All SpEd Categories

A significant subset of independent schools that accept publicly-funded students choose not to serve all SpEd categories. This practice creates unequal access for students with disabilities whose peers are able to attend an independent school that is not available to them. In this context, it is the experience of some special education administrators that the sense of rejection and isolation for students and their families for those not admitted is heightened.

Sometimes an effort is made on the part of the independent school to change the disability category of the student seeking admission to one that would allow the child to attend if this is a student they are inclined to enroll. This practice is in violation of Vermont Special Education Regulations.

Special Education – Access Issues

Public schools have well defined obligations with regard to the identification, evaluation, eligibility and provision of services to children who are suspected of having a disability or have been determined to be eligible for special education.

A free, appropriate public education (FAPE) at no cost to the parent is a foundational concept in both the Federal Individuals with Disabilities Education Act and Vermont's Special Education Regulations.

An additional foundational concept is that the services provided to a special education student must take place in the Least Restrictive Environment (LRE). LRE means that "A student eligible for special education services shall be educated with his or her non-disabled chronological age peers to the maximum extent appropriate **in the school he or she would attend if he or she did not have a disability...**"

Vermont law does not require independent schools accepting public tuition vouchers to be approved to serve students with disabilities. Current regulations, however, prohibit a school district from paying tuition to an independent school that is not approved in a disability category required for a specific student.

This means that publicly-tuitioned students with disabilities do not have access to the same independent schools that their non-disabled peers have access to.

Nevertheless, some independent schools have resisted the requirement to obtain special education approval, raising concerns regarding the financial burden associated with being approved in all 13 categories of special education.

Recommended Solution to the Study Committee: In order for an independent school to admit publicly funded students, the school must employ or *have access to* a licensed special educator. This could be accomplished by working with a nearby supervisory union/district or with another independent school.

If a publicly-funded student is admitted to an independent school under an open enrollment process (described below), and that student is eligible for special education services, our proposal requires the IEP team to meet with a representative from the independent school to determine what special education and related services the student will need to be successful in the independent school, and update the student's IEP goals and services accordingly.

If the school district of residence determines the independent school lacks approval in the student's specific disability category, the local educational agency (LEA) and the independent school and the Agency of Education shall work together to determine how services and supports can be provided within the independent school until the independent school obtains Agency approval, provided that the independent school shall obtain approval for an enrolled student's disability category within the school year when the student first enrolled.

We believe this approach maintains the role of the IEP team and the LEA required by state and federal law. It also allows a school district to pay tuition to an independent school, even if the school does not have special education approval in a specific category of disability, so long as the school is able to obtain that approval within a year. If open enrollment procedures are adhered to, and the IEP team retains ultimate decision-making authority with respect to placement and services, we believe this process will ensure equal access to publicly-funded openings for students with disabilities.

Recommended Change to S. 229 - S.229 as written appears to be moving in this direction, although there is no time limit associated with the obligation on the part of the LEA to provide staff and other resources to the independent school. See page 10, lines 18-21. We do not support an indefinite obligation on the part of the public school system to provide staff and resources to independent schools.

Special Education - Supervision Issues

Adherence to special education rules and regulations and ensuring best practice in teaching and intervention are necessary elements of responsible special education practice. Overall, there are concerns about the amount of time spent on relationship building with independent schools because clear standards and expectations are not in place in a range of important areas of practice. Communication with the LEA around student needs is frequently lacking, and compliance with state and federal laws and regulations can be uneven.

Recommended Solution to the Study Committee: The rules should clarify the expectations of two different roles – the LEA representative and the special education case manager. The LEA representative must assure that appropriate services, allowable costs and other aspects of assuring compliance with special education law.

A case manager, employed by the independent school, should be responsible for assuring that services are being delivered as required by the IEP and that the classroom teachers are fully apprised of their responsibilities, keeping track of IEP goals and the progress data, and supervising the service delivery by making sure those implementing the services have the professional development and supervision to do so.

Recommended Change to S. 229: S. 229 does not address the need for special education case management services within independent schools. We recommend adding the following language to lines 9-10 of page 9: “(C) subject to subsection (d) of this section, having staff with the required licensure to provide and manage special education services;”

Special Education - Billing Issues

In order to receive reimbursement funds from the state, LEAs must submit extensive documentation describing staffing, professional development, supplies, administrative costs and contracted services to the AOE. This documentation includes completing a time schedule twice a year in which special education staff members document their schedule for the week, the students served, and the services provided. Time schedules are matched to student IEPs to ensure that students received services according to their IEP and that a district's claim for reimbursement is appropriate. This documentation takes considerable time and resources.

Vermont law does not require the same level of oversight for independent schools. Instead, independent schools must only submit bills to the supervisory union for "reasonable" special education costs in excess of tuition.

There are guidelines regarding what can be included in these costs, including salaries, benefits, professional development, supplies and materials, and contracted services. However, there are no restrictions on how much an independent school can charge the LEA for services. LEAs have to determine what is "reasonable" with the independent school on a case-by-case basis. But determining what is "reasonable" can be difficult. There are no established standards for what might be considered a reasonable cost.

The current system also encourages "cost maximization" from independent schools rather than incentivizing them to minimize costs. One example of cost maximization was when an independent school billed the hourly rate for speech language services (\$80.00 per hour) for each student included in a group of five students. As a result, a school district was expected to pay \$400.00 for an hour of service that actually cost the independent school \$80.00.

Recommended Solution to the Study Committee: Require the Agency of Education to publish specific elements that must be included as part of an independent school's invoice for excess special education costs. These elements should be included in every contract a school district has with an independent school.

Recommended Change to S. 229: S.229 moves away from “reasonable costs” to “actual or anticipated costs,” which we believe is a move in the right direction. However, it is still not clear how a school district will enforce this standard; we continue to believe that the Agency of Education should develop model contract/invoice language to provide better guidance regarding how an independent school should document actual or anticipated costs in an invoice to the LEA.

I want to conclude my testimony by discussing additional issues that are not adequately addressed in the current draft of S.229 – enrollment, retention, and discipline.

Public Mission v. Private Mission

Discussion around possible revisions to the rules governing independent school approval has included numerous references to “mission” and “mission-based” or “mission-driven” education.

In our view, the mission of public schools is clear and is clearly articulated in Title 16 Section 1. The mission of public schools is intended to support every child and his or her right to an equal education.

The mission of independent school(s) is generally less clear, and seems, in some cases, to tilt toward the institution and the students who 1) are successfully enrolled in that institution, and 2) succeed in remaining in that institution over time.

The independent schools throughout this process have suggested that enrollment in these private schools must be governed by “best fit,” given the private school’s “mission.” The belief appears to be that in order for a school to be effective in fulfilling a mission, the school must be able to exclude students who do not conform to the school’s mission.

This approach to admissions and retention can allow for both conscious prejudice and unconscious biases to shape who is perceived to be a “good fit” for a school. Extensive research into the science of human cognition indicates that even people who consciously reject prejudice and discrimination have biases that can affect their perception and behavior.

In the public context, there are clear procedural safeguards to prevent unconscious biases from affecting the implementation of enrollment, discipline, and advancement policies. In the private context, it is not clear what safeguards exist to prevent unconscious biases from interfering with a child's right to publicly-funded education.

Enrollment & Retention

While some independent schools accept the overwhelming majority of students that apply, some do not. There is no requirement that independent schools accept every publicly-funded child that seeks enrollment. We are not clear what the specific enrollment policies are for each independent school, even those that state they have an "open enrollment" policy. Some require the completion of an application and/or site visit as part of the enrollment process. We have seen applications that ask parents to disclose the disability status of students seeking to enroll. These practices may create barriers for families seeking to enroll their student at the school.

There is also no requirement that, if accepted, an independent school continue to enroll publicly-funded students. Once a student is accepted in an independent school the experience of some administrators is that students are not always maintained in that placement. It is not uncommon to have students counseled out, again because of reasons of "fit", not meeting the school's "mission" or because of troublesome behaviors or disciplinary action.

At that point, responsibility reverts back to the parents and/or school district to find an appropriate placement. This can sometimes be a real challenge, particularly when the local district/SU doesn't operate a public school for the particular student's grade level.

In the special education context, there are significant differences between the accountability of the LEA and that of the independent schools. The LEA remains responsible for the student regardless of the school - public or private or independent - in which the student is enrolled. The IEP Team is required by law and regulation to locate an appropriate placement and to continue to support that placement both financially and assure that the IEP is being implemented.

This level of responsibility is not required of independent schools. Independent schools can determine the child is not a “match” for the school for reasons of mission or fit. They are not required to participate in a process with the LEA to find an appropriate placement for any child that has been dismissed.

Recommended Solution to the Study Committee: The most common procedural safeguard in the enrollment context is for admissions to be open and based on a lottery system. Most states in the country that allow public education dollars to go to private schools require those schools to administer a lottery if demand exceeds capacity. In Vermont, public high schools are required to administer a lottery for admissions under the public high school choice law.

Once enrolled under a lottery system, the rules should specify that publicly-funded students shall be permitted to remain enrolled in the independent school without renewed applications in subsequent years unless:

- the student graduates;
- the student is no longer a resident of the district which pays tuition;
- an IEP team determines that an independent school is unable to provide the services and supports required by a student’s IEP; or
- the student is expelled from school in accordance with the following section.

Discipline

The degree to which infractions of school rules are treated consistently with the requirements for public schools is unclear. Independent schools do not necessarily report back to the sending school district what occurred and are not required to report disciplinary actions to the AOE in the same manner as is required of public schools. There is also no requirement that independent schools provide due process to students who are suspended or expelled from school.

Administrators report that students enrolled in independent schools have been expelled at the discretion of the headmaster without clear understanding of whether the student is expelled for a specific infraction of the conduct code, or if the student is “not a good fit.”

The discipline process may not be communicated to the parents or the LEA. Instances of expulsion often come as a surprise to the LEA and parents, who have to find a placement for the student with little to no notice. Sometimes the result is expulsion without a deep understanding of the child's behaviors or the interventions that could maintain the child in the independent school setting.

In the context of the expulsion of a student with a disability, a change in the special education student's placement without due process is both against the law and regulation but also costly to the child's education and sense of belonging. It can also exacerbate the underlying difficulties for child and family.

Recommended Solution to the Study Committee: Publicly-funded students should have access to disciplinary due process protections similar to those provided in public schools. Independent schools that accept public tuition dollars should also be required to report to AOE discipline violations, suspensions and expulsions for publicly-funded students as public schools do.

In the context of students with disabilities, independent schools must follow the discipline requirements for students with disabilities in public schools, including manifestation determinations to determine the relationship between the disability and the behavior in question, behavior intervention planning and documentation of violations and progress.

The rules should also require communication with the LEA regarding significant disciplinary infractions so that the LEA can plan proactively for the student's needs, and to access behavioral expertise.