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TO: Senate Education Committee

FROM: Sue Ceglowski, Executive Director, Vermont School Boards Association  
Jeff Fannon, Executive Director, Vermont-NEA  
Jeff Francis, Executive Director, Vermont Superintendents Association  
Jay Nichols, Executive Director, Vermont Principals' Association

RE: S.219 - Use of Public Funds for Tuition and Dual Enrollment

DATE: February 23, 2022

As the largest organizations in Vermont representing public school boards, educators, superintendents, and principals, we are united in our belief that the State is constitutionally compelled to provide all Vermont students with an equitable, quality education in order “to keep [] democracy competitive and thriving.” *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997). In order to meet this mandate, the State must ensure that all schools that receive public dollars reflect our framers’ vision of public education by being inclusive and providing quality instruction that gives children the tools they need in order to succeed.

The best approach for the State to take to address the issues in S.219 is to fund only public schools. The debate over this legislation, the testimony that has been provided to the Committee, and pending litigation in Vermont amply illustrate that funding private schools requires the State to navigate a morass of complicated legal and logistical issues.

However, within the State’s current construct of funding private schools, we support imposing religion-neutral accountability and non-discrimination requirements on those schools to ensure they advance the State’s interest in providing a quality public education.

Unfortunately, S.219 does not do this effectively, for two reasons.

## **S.219 Lacks Specificity and Enforcement Mechanisms**

First, we applaud the Committee's attempts to address anti-discrimination in S.219. But the bill's attempt to impose accountability requirements on private schools is under-inclusive and lacks the necessary specificity and enforcement mechanisms.

Although we believe anti-discrimination requirements are critically important for all schools, other accountability measures should be included in the State's contracts with private schools as well. For example, private schools receiving public tuition should be required to meet basic requirements around curriculum, staff qualifications, open meetings and public records requirements, fiscal accountability, and student assessment. As Vermont increasingly works to improve education quality, transparency and fiscal accountability, it stands to reason that all institutions receiving public monies should participate in those efforts.

As to the anti-discrimination requirements themselves, the bill lacks clarity on which specific laws apply, and *how* they apply. For example, it is not apparent that S.219 includes disability-related laws such as Individuals with Disabilities Education Act (IDEA) and Section 504, and the many other education anti-discrimination laws that are not enumerated, such as the Equal Educational Opportunities Act (EEOA). These requirements, which are ingrained in the public education delivery system, should be ingrained for all publicly funded education as well.

The bill also does not specify who (students, parents, school employees, etc.) is protected by the non-discrimination provisions. Nor is it made clear enough that all provisions of anti-discrimination laws apply (i.e., not just admissions non-discrimination, but also appropriate services for students). For example, regarding students with disabilities, the draft mentions admission of students with IEPs, but does not address provision of services in the IEP or compliance with other substantive provisions of IDEA such as disciplinary due process protections.

The anti-discrimination provisions of S.219 do not provide for a robust enforcement mechanism by the State, nor do they address the applicability of enforcement mechanisms that currently exist in state and federal anti-discrimination laws. For example, it is unclear who, besides the state (e.g., parents, students, employees, school districts), may be able to sue or otherwise enforce the provisions of the bill, and in what forum. Just as the State has implemented accountability provisions with requirements and sanctions for public schools, private schools entering into contracts with the State

should also be subject to State monitoring of compliance and sanctions in cases where necessary.

#### S.219 Conflates Religious Neutral Restrictions and Religious Use Restrictions

Second, it is premature to attempt to impose restrictions on religious use of public tuition until pending litigation is resolved. We do not know whether and how the Supreme Court's *Carson* decision will impact S.219's proposed language. So we think it is prudent to wait until *Carson* is decided to consider any legislation addressing adequate safeguards and religious use.

Moreover, there is pending litigation in Vermont that could impact the proposed legislation - particularly the Second Circuit's mandamus ruling in *In re A.H.*, which found that religious school students "are entitled to TTP [Town Tuition Program] funding to the same extent as parents who choose secular schools for their children, regardless of [the schools'] religious affiliation *or activities*." 999 F.3d 98 (2d Cir. 2021) (emphasis added). Even the federal district court in Vermont is unclear about how the coming U.S. Supreme Court decision will impact this litigation, as evidenced by the fact it put summary judgment proceedings in *A.H.* on hold pending the outcome in *Carson*.

While religion-neutral accountability requirements for schools that receive public funds ought to be permitted regardless of the outcome in *Carson* and *A.H.*, including those requirements in the same bill as the religious use restrictions risks conflating these two separate topics.

Thank you.