STATEMENT OF

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SENATE COMMITTEE ON VETERANS' AFFAIRS

November 18, 2015

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on pending legislation affecting VA's programs, including the following: S. 2106, S. 2134, S. 2170, S. 2253, and a draft bill regarding whistleblower complaints. At this time, VA is unable to develop cost estimates for the "Department of Veterans Affairs Veterans Education Relief and Restoration Act of 2015;" however, we will provide these to you as soon as they are available. Accompanying me this morning are Maureen McCarthy, Acting Assistant Deputy Under Secretary for Health for Patient Care Services, Veterans Health Administration and Meghan Flanz, Deputy General Counsel, Legal Operations & Accountability.

S. 2106

S. 2106, the "Wounded Warrior Employment Improvement Act of 2015," would require the Secretary to develop and publish an action plan for improving VA's vocational rehabilitation services and assistance. Section 2(b) would require the action

plan to include: (1) a comprehensive analysis of, and recommendations for, remedying workload management challenges at VA's regional offices (ROs), including steps to reduce counselor caseloads of Veterans participating in a rehabilitation program, particularly for counselors who are assisting Veterans with traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD), and for counselors with educational and vocational counseling caseloads; (2) a comprehensive analysis to address the reasons for the disproportionately low percentage of Veterans, with service-connected disabilities and military service after September 11, 2001, who opt to participate in a rehabilitation program under chapter 31 of title 38, United States Code (U.S.C.), relative to the percentage of such Veterans who use their entitlement to educational assistance under chapter 33, including an analysis of barriers to timely enrollment in rehabilitation programs under chapter 31 and any barriers to a Veteran enrolling in the program of that Veteran's choice; (3) recommendations for encouraging more Veterans who have military service after September 11, 2001, and have service-connected disabilities to participate in rehabilitation programs under chapter 31; and (4) a national staff training program for Vocational Rehabilitation Counselors (VRC) to include: (a) training to assist VRCs in understanding the profound disorientation experienced by Veterans with service-connected disabilities whose lives and life plans have been complicated due to service-connected disabilities; (b) training to assist VRCs in working in partnership with Veterans on individual rehabilitation plans; and (c) training on PTSD and other mental health conditions and on moderate to severe TBI that is designed to improve the ability of VRCs to assist Veterans with these conditions, including providing information on the

broad spectrum of such conditions and the effect of such conditions on an individual's abilities and functional limitations.

VA does not believe that a new action plan is necessary to improve vocational rehabilitation services and assistance provided under chapter 31 and accordingly does not support S. 2106. VA's recent and planned efforts in this area are already extensive.

The Vocational Rehabilitation and Employment (VR&E) program conducted a business process re-engineering initiative from 2011 to 2014 to examine workload issues, training, roles, responsibilities, and outreach. As a result, workload management strategies were streamlined and a new staffing model was developed. VA has an outreach campaign underway to increase awareness of and access to chapter 31 services. This includes the August 2015 deployment of an online application for chapter 31 and chapter 36 benefits through eBenefits and Enterprise Veterans Self-Service. VR&E places VRCs in colleges and universities across the Nation as part of the VetSuccess on Campus (VSOC) initiative. VSOC VRCs provide information on VA benefits to a variety of populations on campus, including Veterans, Servicemembers, and dependents. VR&E is an integral part of the joint Department of Defense and VA Transition Assistance Program and the Integrated Disability Evaluation System, with VRCs placed on military installations for early outreach and delivery of vocational rehabilitation services to transitioning Servicemembers. VA's national training curriculum for VR&E staff covers a variety of topics related to job duties, which includes information on working with individuals with TBI, PTSD, and other mental health issues. VR&E partners with the Veterans Health Administration (VHA) on many of these specialized trainings.

Our VR&E program has also recently implemented two major initiatives to improve services to Veterans and ensure that those services are accurately measured. The first, TeleCounseling, fielded nationwide in May 2015, is an optional method of coordinating case management and supportive services for Veterans participating in a program of vocational rehabilitation. This initiative allows the VRC and Veteran to have more frequent face-to-face contact. The second, the implementation of new performance measures, fielded nationwide in July 2015, ensures that the daily activities and operations of employees who provide direct service to Veterans are linked to program measures that define successful outcomes for those Veterans. VR&E is developing a new case management system (CMS), VRE-CMS, that will streamline responsibilities, enable a paperless environment, and improve data integrity.

The cumulative impact of these processes, trainings, outreach programs, and initiatives encourages more Servicemembers and Veterans with service-connected disabilities to participate in chapter 31 services by ensuring that VR&E staff understands the specialized needs of Veterans with service-connected disabilities; provides appropriate and timely rehabilitation services to meet those needs; provides Servicemembers and Veterans information necessary to make an informed choice on available VA benefits to which they may be entitled; and removes barriers to accessing rehabilitation services.

The chapter 33 program is an educational benefit for individuals who served on active duty after September 10, 2001. The chapter 31 program is a benefit that assists individuals with service-connected disabilities meeting certain statutory guidelines, with a focus on obtaining and maintaining employment and/or achieving the maximum

possible level of independence in daily living. Congress has mandated that, in addition to a service-connected disability, the Servicemember or Veteran must also have an employment handicap, defined as impairment to one's ability to prepare for, obtain, or retain employment, to qualify for services under chapter 31. Also, chapter 31 is required by law to ensure that the vocational goal for which services are provided is a suitable goal. The training that individuals receive for a specific occupation should assist them in performing the duties of that occupation. Not all Veterans with a service-connected disability will meet these criteria or have an interest in pursuing a suitable vocational goal. For those individuals, chapter 33 is often the program of choice, as it provides access to education benefits regardless of level of impairment or suitability of the educational or vocational goal.

There are no mandatory costs associated with this legislation. To conduct a new analysis and develop an action plan as outlined in the proposed legislation, VA would need to use administrative funds to procure a contract. The estimated cost to procure a contract for these services is approximately $2 million.

S. 2134

S. 2134, the "Grow Our Own Directive: Physician Assistant Employment and Education Act of 2015," would establish a pilot program to provide educational assistance to certain former members of the Armed Forces for education and training as physician assistants within the VA. While VA supports the concept, the cost associated with the legislation would cause concern within our available resources.

S. 2134 would require the Secretary to provide information on the pilot program to eligible individuals. An eligible individual would be defined as an individual who: (1) has medical or military health experience while serving as a member of the Armed Forces; (2) has received a certificate, associate degree, baccalaureate degree, master's degree, or post-baccalaureate training in a science related to health care; (3) has participated in the delivery of health care services or related medical services; and (4) does not have a degree of doctor of medicine, doctor of osteopathy, or doctor of dentistry.

S. 2134 would also require the Secretary to select no less than 250 eligible individuals to participate in the program with a minimum of 35 scholarship participants per year. Priority would be given to: individuals who participated in the Intermediate Care Technician Pilot Program of the Department that was carried out by the Secretary between January 2011 and February 2015, and individuals who agree to be employed as a physician assistant for VHA in a community designated as a medically underserved population and in a State with a per capita Veteran population of more than 9 percent. Although VA supports the minimum requirement of scholarship participants, VA is concerned that the applicant pool of eligible individuals may be insufficient to meet the required number.

S. 2134 would also require the Secretary, in carrying out the pilot program, to provide educational assistance to individuals participating in the program to cover the costs to the individuals of obtaining a master's degree in physician assistant studies or a similar master's degree. The legislation would call for the use of the

Health Professionals Educational Assistance Program (HPEAP) and other educational assistance programs the Secretary considers appropriate, to administer a 5-year pilot program.

S. 2134 would also require each individual participating in the pilot program to enter into an obligated service agreement with the Secretary to be employed as a physician assistant with VHA for a period of time that is either specified in the HPEAP or other educational assistance program or, if the individual is participating through a program where an obligated service period is not specified, a period of at least 3 years or such other period as the Secretary considers appropriate.

The bill would also provide that where an individual who participates in the pilot program fails to satisfy the period of obligated service, he or she shall be liable to the United States, in lieu of the obligated service, for the amount that has been paid or is payable to or on behalf of the individual under the pilot program, reduced by the proportion that the number of days the individual served for completion of the period of obligated service years to the total number of days in the period of obligated service of such individual.

The bill would also require the Secretary to ensure that a physician assistant mentor or mentors are available for individuals participating in the pilot program at each facility of VHA at which a participant in the pilot program is employed.

The bill would require the Secretary to seek to partner with not less than 15 institutions of higher education that offer a master's degree program in physician assistant studies or a similar area of study accredited by the Accreditation Review Commission on Education for the Physician Assistant. These institutions would also

agree to guarantee seats in such master's degree program for pilot program participants, and to provide pilot program participants with information on admissions criteria and process. VA recommends that it be granted flexibility with the final number of partnerships/affiliates as less than 15 institutions may be sufficient to meet these requirements.

The bill would also require four new employees to administer the pilot program: a Deputy Director of Education and Career Development of Physician Assistants; a Deputy Director of Recruitment and Retention; a recruiter; and an administrative assistant. All positions would be aligned with VHA's Office of Physician Assistant Services.

This pilot program would require scholarship recipients to complete a service obligation at a VA health care facility after graduation and licensure/certification. VHA has had difficulty recruiting and retaining physician assistants for several years. Additionally, VHA Workforce Succession Strategic Plan and Reports have listed physician assistants in the top ten critical occupations, and VA's Office of Inspector General's Critical Occupation Staffing Shortage Report has listed physician assistants in the top five most critical occupations shortages.

The total cost of the Health Professional Scholarship Program for 450 awards over 5 years would be $56,573,810.

The total cost associated with administering the pilot program over 5 years would be $2,764,667.

The total cost associated with establishment of pay grades for physician assistants and the requirement of providing competitive pay would be $374,921,436 over 10 years

S. 2170

Section 2(a) of S. 2170, the "Veterans E-Health and Telemedicine Support Act of 2015," would amend title 38, U.S.C., to add a new section 1730B, which would permit a covered health care professional to practice their health care profession at any location in any State, regardless of where such health care professional or the patient is located, if the health care professional is using telemedicine to provide treatment under chapter 17 of title 38. New section 1730B would specify that this authority would apply regardless of whether the covered health care professional is located in a facility owned by the Federal Government. In addition, new section 1730B would state that nothing in that section would be construed to alter any obligation of the covered health care professional under the Controlled Substances Act (21 U.S.C. 801 et seq.). New section 1730B would define "covered health care professional" to mean an individual "authorized by the Secretary to provide health care under [Chapter 17 of title 38], including a private health care professional who provides such care under a contract entered into with the Secretary, including a contract entered into under section 1703 [of title 38]" and "licensed, registered or certified in a State to practice the health care profession of the health care professional." In addition, "telemedicine" would be defined to mean "the use of telecommunication technology and information technology to provide health care or support the provision of health care in situations in which the patient and health care professional are separated by geographic distance."

Section 2(b) would provide a clerical amendment to the table of sections at the beginning of chapter 17 of title 38.

Section 2(c) would require the Secretary, not later than 1 year after the date of enactment of the Act, to submit to Congress a report on VA's effective use of telemedicine. The report would require specific elements such as the assessment of the satisfaction of Veterans and health care providers with VA telemedicine; the effect of VA-funded telemedicine on the ability of Veterans to access health care, the frequency of use by Veterans of telemedicine, the productivity of health care providers, wait times for appointments, and any reduction in the use of other services by Veterans; the types of appointments for telemedicine that were provided; the number of requested appointments for telemedicine disaggregated by Veterans Integrated Service Networks; and any VA savings, including travel costs.

VA supports section 2(a) of the bill. Section 2(a) would allow VA employed or contracted health care professionals who are professionally licensed in a State and practicing within the scope of their VA employment or contract, to provide health care and to support the provision of health care to the VA patient by telemedicine, without regard to where the health care professional is licensed or where the patient and the health care professional are physically located. Section 2(a) would also permit VA employees and contract health care professionals and VA patients to be located anywhere during such telemedicine, including in a non-VA facility. In addition, section 2(a) would clarify that the title 38 licensure requirements apply to both VA employed or contracted telemedicine practitioners during the performance of their official duties, whether they are on-station or not. In these ways, Section 2(a) would

remove the barriers that might be imposed by local licensure laws of the places where the patient or the covered health care professional are located, or the State of licensure of the health care professional. Further, section 2(a) would make clear that any telemedicine services that involve prescribing controlled substances would have to be provided in accordance with the Controlled Substances Act.

VA supports section 2(c) of the bill in part. Specifically, VA supports reporting on elements identified in paragraphs (A); (C) subparts (i), (ii), (iii), and (v); and (D) of section 2(c)(2). However, VA does not support the reporting required elements in paragraphs (B), (C) subpart (iv), (E), and (F) of section 2(c)(2). Reporting on these elements would be overly burdensome on VA operations because VA lacks the resources to routinely measure and assess this type of data over the reporting period.

VA does not have a cost estimate for section 2(a) of the bill at this time. VA estimates that implementation of the one-time reporting requirement in section 2(c) of the bill would cost $17,000.

S. 2253 – Department of Veterans Affairs Veterans Education Relief and Restoration Act of 2015

This bill would amend title 38, U.S.C., to provide Veterans affected by school closures with certain relief and restoration of education benefits. The bill would add a new subsection (d) to section 3312 of title 38, U.S.C., to allow for the restoration of entitlement to educational assistance and provide other relief for Veterans affected by a school closure. More specifically, no payment of educational assistance would be charged against an individual's entitlement to educational assistance under the Post-

9/11 GI Bill, or counted against the aggregate period for which an individual may receive educational assistance under two or more programs, if VA finds that the individual was forced to discontinue a course or courses as a result of a permanent school closure and did not receive credit, or lost training time, toward completion of the program of education being pursued at the time the school closed.

S. 2253 also would amend section 3680(a) of title 38, U.S.C., authorizing VA to prescribe regulations allowing VA to continue a monthly housing allowance stipend under the Post-9/11 GI Bill during a temporary school closure or for a limited period following a permanent school closure. The housing allowance would be payable until the end of the term, quarter, or semester during which the school closure occurred, or 4 months after the date of the school closure, whichever is sooner.

VA supports S. 2253, as it would allow VA to restore entitlement and continue monthly housing allowance stipend payments to Post-9/11 GI Bill beneficiaries impacted by school closures. While VA currently has authority to continue payments to beneficiaries when schools are temporarily closed due to an emergency or under an established policy based on an Executive Order of the President, there is no similar statutory authority upon which to continue benefit payments in the event of a permanent school closure. Furthermore, regardless of whether a school closure is temporary or permanent, there is no statutory authority that allows VA to restore entitlement for a term, quarter, or semester for which a beneficiary fails to receive credit toward program completion due to such a closure. VA would interpret the bill to apply only to a course or courses in which an individual was enrolled in FY 2015, and all current or future enrollments. VA would also interpret the bill as currently written to provide that the

portion of a course or courses that a beneficiary has participated in through the time of the school's closure (e.g., the portion of an incomplete college semester that has already passed at the time of a school closure) is not charged against the beneficiary's entitlement. We note that there appears to be a discrepancy between the new subsection (d)(2), which applies to an individual who meets the criteria of both (A) and (B) of that subsection, and the applicability provision in section 2(a)(2) of the bill, which describes new subsection (d) as applying if the criteria of either paragraph (A) or paragraph (B) of subsection (d)(2) are met.

The closure of educational institutions while GI Bill beneficiaries are actively pursuing approved programs of education or training negatively impacts Veterans and eligible dependents in a number of ways. First, their monthly housing benefits are suddenly and unexpectedly discontinued in the middle of the term. In many cases, these payments are the primary (or sole) source of funds for paying for housing, food, utilities, and other basic necessities while attending school. Second, while VA can pay benefits for the term, quarter, or semester up to the time of the school's closure, the student is still charged entitlement for that period, even though he/she does not earn any credit toward program completion. In some instances, this could result in a beneficiary exhausting his/her entitlement before being able to complete his/her program at another institution.

We will be pleased to provide for the record an estimate of the cost of enactment of this bill.

Draft Bill Regarding Whistleblower Complaints

Section 2 of the draft bill would add a new subchapter to title 38, U.S.C. on whistleblower complaints. Section 731 would define a "whistleblower complaint" to include not only a VA employee's disclosure of wrongdoing, but also a complaint made by a VA employee assisting another employee to disclose wrongdoing.

Section 732 would establish a process for employees to file whistleblower complaints with their immediate supervisors; require supervisors to notify employees in writing, within 4 business days of receiving a complaint, whether there is a reasonable likelihood the disclosure meets the statutory definition of whistleblowing; permit employees to elevate complaints if the employee determines the action taken was inadequate; require the Secretary to notify whistleblowing employees of the opportunity to transfer to another position; and establish a Central Whistleblower Office, which is not a part of VA's Office of the General Counsel, that would be responsible for investigating all whistleblower complaints.

Section 733 would require the Secretary to discipline any employee found to have committed an offense listed in subsection 733(c), with a first offense punishable by at least a 12-day suspension and a second offense punishable by removal, and would limit the notice and reply period associated with such discipline to not more than 5 days. Section 733 would also limit the appeal rights of employees who are removed so that they would match the limited appeal rights of VA Senior Executives under 38 U.S.C. § 713.

Section 734 would require the Secretary to consider protection of whistleblowers when evaluating supervisors' performance, prohibit payment of an award to a supervisor within a year after the supervisor is found to have committed an offense

listed in subsection 733(c), and require the Secretary to recoup an award paid to a supervisor for a period in which the supervisor committed such an offense.

Section 735 would require the Secretary to coordinate with the Whistleblower Protection Ombudsman to provide annual training to all VA employees on whistleblower rights and protections, including the right to petition Congress regarding a whistleblower complaint. Section 736 would require annual reports to Congress on the number and disposition of whistleblower complaints filed with VA supervisors and through other disclosure mechanisms, and would also require the Secretary to notify Congress of whistleblower complaints filed with the U.S. Office of Special Counsel (OSC).

Section 3 of the draft bill would amend section 312 of title 38, U.S.C., to require that whenever the Inspector General, in carrying out the duties and responsibilities established under the Inspector General Act of 1978, issues a work product that makes a recommendation or otherwise suggests corrective action, the Inspector General shall submit the work product to: (1) the Secretary; (2) the Committee on Veterans' Affairs, the Committee on Homeland Security and Governmental Affairs, and the Committee on Appropriations of the Senate; (3) the Committee on Veterans' Affairs, the Committee on Oversight and Government Reform, and the Committee on Appropriations of the House of Representatives; (4) if the work product was initiated upon request by an individual or entity other than the

Inspector General, that individual or entity; and (5) any Member of Congress upon request. Section 3 would also require that the Inspector General post the work product on the Inspector General's Internet website no later than 3 days after the work product is submitted in final form to the Secretary.

Section 4 of the draft bill would add to subchapter I of chapter 7 of title 38, U.S.C., a new section 715 dealing with the treatment of congressional testimony by VA employees as official duty. Section 715(a) would establish that a VA employee is performing official duty during the period with respect to which the employee is testifying in an official capacity in front of either chamber of Congress, a committee of either chamber of Congress, or a joint or select committee of Congress. Section 715(b) would require the Secretary to provide travel expenses to any VA employee performing official duty described in subsection (a).

VA is absolutely committed to correcting deficiencies in its processes and programs and to ensuring fair treatment for whistleblowers who bring those deficiencies to light. The Secretary frequently shares his vision of "sustainable accountability," which he describes as a workplace culture in which VA leaders provide the guidance and resources employees need to successfully serve Veterans, and employees freely and safely inform leaders when challenges hinder their ability to succeed. VA needs a work environment in which all participants – from front-line staff through lower-level supervisors to senior managers and top VA officials – feel safe sharing what they know, whether good or bad news, for the benefit of Veterans.

In recent months, the Department has taken several important steps to improve how we address operational deficiencies, and to ensure that those who disclose such deficiencies are protected from retaliation. In the summer of 2014, the Secretary reorganized and assigned new leadership to VA's Office of the Medical Inspector, which reviews whistleblower disclosures related to VA health care operations. The Secretary also established the Office of Accountability Review to ensure leadership accountability

for whistleblower retaliation and other serious misconduct. VA has also improved its collaboration with OSC, which is the independent office responsible for overseeing whistleblower disclosures and investigating whistleblower retaliation across the Federal Government. VA has negotiated with OSC an expedited process to speed corrective action for employees who have been subject to retaliation. That process is working well, and we are now beginning a collaborative effort with OSC's Director of Training and Outreach to create a robust, new training program to ensure that all VA supervisors understand their roles and responsibilities in protecting whistleblowers.

While we appreciate the Committee's efforts to assist the Department in these endeavors, we believe the specific whistleblower disclosure and protection procedures provided by this bill would be unworkable. We also believe they are unnecessary in light of the long-standing system of OSC authorities, remedies, and programs specifically created to address claims of improper retaliation in the workplace. We believe the current whistleblower protections are effective, and, as noted above, VA is working closely with OSC to ensure that the Department and its employees are gaining the maximum benefits from its remedies and protections.

Turning to what we see as likely unintended consequences of the draft bill, the draft bill's strict notification requirements, short timelines, and severe penalties may create an adversarial relationship between supervisors and subordinates that would likely hinder, rather than foster, sustainable accountability. The draft bill would require the supervisor to notify the employee within 4 days after receiving a disclosure to indicate whether the supervisor has determined that there is a reasonable likelihood the disclosure meets the statutory criteria for whistleblowing. Four days would be

inadequate in many cases for a supervisor to come to an informed conclusion that "there is a reasonable likelihood that the complaint discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific and danger to public health and safety," in the terms of the draft bill. The fact that there are substantial "downstream" effects from these 4-day determinations will, in our view, create unpredictable and destabilizing effects in a workplace where collaboration and trust is paramount.

The draft bill would also impose specific penalties on supervisors found to have engaged in retaliation and would significantly limit the time those supervisors have to defend themselves against the imposition of those penalties. While well-intentioned and designed to protect VA whistleblowers, we believe the cumulative effect of these provisions, in combination with the 4-day notification requirement, would not only raise a host of constitutional and other legal issues, but would also leave supervisors too fearful about the possible penalties for retaliation to effectively manage their employees. We also believe that imposing onerous new requirements on VA supervisors, alone in the Federal Government, would significantly impede the Secretary's efforts to recruit and retain the talented leaders needed to improve service to Veterans.

From a legal perspective, our analysis suggests that portions of the draft bill present due process problems and conflicts with other laws. VA is unable to estimate the costs for the draft bill at this time.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. We would be pleased to respond to questions you or other members may have.