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December 4, 2014

Representative Michelle Cook, Chairperson
ATTN: M.O.R.E. Commission
Special Education Committee
Legislative Office Building
Hartford, CT 06106

Re: Burden of Proof in Special Education
December 4, 2014 Panel Discussion

To Whom It May Concern:

On behalf of the School Law Practice Group at Shipman & Goodwin LLP, and the Connecticut Council of School Attorneys, I respectfully submit the following comments for review by the Connecticut Legislature at its December 2, 2014 legislative hearing regarding the burden of proof in special education hearings. Briefly, we strongly support the enactment of legislation to place the burden of proof on the party that files for the special education hearing, rather than on the board of education in all cases, as supported by the United States Supreme Court's decision in Schaffer v. Weast, 546 U.S. 49 (2005).

Connecticut is among a minority of states in the country in its regulation of the burden of proof in special education hearings. We are aware of only fifteen states that assign, by statute or regulation, the burden of proof in special education due process proceedings. Connecticut, New York, New Jersey, Delaware, Illinois, Nevada, and West Virginia place the burden on the board of education in essentially all cases; while, Alaska, Minnesota, Alabama, Hawaii, Kentucky, Vermont and Washington, D.C. place the burden on the party seeking relief.[1] In all other states, the burden is assigned to the

[1] See Regs. Conn. State Agencies § 10-76h-14; N.Y. Educ. Law § 4404(1); N.J. Stat. Ann. § 18A:46-1.1; Del. Code Ann. tit. 14, § 3140; 105 Ill. Comp. Stat. Ann. 5/14-8.02a(g); Nev. Rev. Stat. § 388.507; W. Va. Code R. § 126-16-11-.3(A); Alaska Admin. Code tit. 4, § 52.550; ."); Minn. Stat. Ann. § 125A.091; Ala. Admin. Code § 290-8-9.08(9)(c); Haw. Code R.§ 8-60-66(2); Ky. Rev. Stat. Ann. §§ 13B.090(7), 157.224(6); Code of Vt. Reg. § 2365.1.6.15(e); 5 D.C. Code Mun. Regs. § 3030.14. Although Georgia assigns the burden to the party seeking relief, it permits the hearing officer to assign the burden to a different party in extraordinary or unusual circumstances; Arkansas gives the hearing officer authority to determine the burden. See Ga. Comp. R. & Regs. § 160-4-7-.12(3)(n); 005 18 CARR 010 (Arkansas).

party requesting relief, in accordance with the decision in Schaffer. Clearly, a significant majority of the country understands the importance and appropriateness of the Schaffer decision. Indeed, Congress crafted and then reauthorized an extensive, procedurally detailed piece of legislation through the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"); if Congress had intended the burden to shift from the party on which the burden usually falls, it would have done so explicitly. It is time that Connecticut amends this regulation in accordance with Congress's intent, and aligns our state with the rest of the country with respect to this issue.

Our experience over the past several years has been that special education due process hearings in Connecticut have become akin to civil litigation and have complicated, and sometimes destroyed, relationships between districts and parents. The process is antagonistic. No one wins. We strongly believe that the placement of the burden of proof on boards of education -- in essentially all cases -- has been a significant factor in the destruction of what was intended by Congress to be a meaningful, productive manner in which to resolve educational disputes.

Assigning the burden of proof to the school district in all cases creates the presumption that the program developed by the district is inappropriate. Our educators are our experts; they work tirelessly and collaboratively with parents, year after year, to develop educationally sound, appropriate programs for their students. In due process, however, educators and parents alike receive the message that educators are not the experts and such educators are placed on the defensive, forced to defend their professional judgment and actions. This process undermines the expertise of our educators and leads to long, costly hearings. Boards must prove the appropriateness of every aspect of their programs which has caused hearings in Connecticut to extend for more then ten days, and in at least one case twenty-five days, at a cost of between $30,000 and $100,000. See Testimony of Donald Fiftal in Support of H.B. 5425 before the Education Committee of the CT General Assembly (Mar. 5, 2010). Given the costs, districts are forced -- for economic reasons alone -- to resolve disputes by agreeing with parents' demands, often contradicting the educational judgments of experienced and caring educators.

Placing the burden of proof on the school district further undermines the language and process outlined by the IDEA. Congress included significant procedural protections for parents through the IDEA, and both reaffirmed and strengthened those protections through the reauthorization of the Act in 2004. 20 U.S.C. § 1415. The school district is required by law to go through extensive procedures in locating, evaluating, identifying and developing appropriate programs for students with disabilities; "the party attacking its terms should be prepared to overcome a presumption of validity that these procedures bestow." White, William, "Where to Place the Burden: Individuals with Disabilities

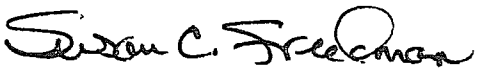
Education Act Administrative Due Process Hearings," 84 N.C.L. Rev. 1013, 1043 (2006).

In Connecticut, the parents of special education students are amply supported. A strong parent bar readily assists parents in presenting due process complaints throughout the state. Further, parent advocates serve throughout the state to provide educational expertise to support parents who wish to demonstrate the inappropriateness of a school district's program. Legal aid and other non-profit groups frequently assist parents who cannot afford to obtain private legal counsel, and extensive publication of the availability of such resources, including publication through public means such as SERC, ensure parental access to the resources they need to hold districts accountable under the IDEA. Most significantly, the IDEA clearly provides -- and parents are aware and take advantage of this provision -- that the school district must pay the parents' legal fees if the parents succeed in any aspect of their due process claim. Congress has armed parents to battle if they so choose. Placing the burden of proof in all cases on the school district, with the significant cost to boards, is entirely unnecessary. Moreover, assigning districts the burden of proof actually disproportionately shifts special education resources to those parents who threaten due process, given the disproportionate effect of even one special education hearing on a school district's budget.

The special education process in Connecticut is broken. We have hearings that continue over many months and cost districts tens of thousands of dollars, and parents and school districts that have bitter relationships. Something needs to change. The United States Supreme Court and a significant majority of the jurisdictions in this country have placed the burden, appropriately, on the party requesting relief. We believe that aligning Connecticut law with the majority of the country would be a significant step in fixing this broken system.

We appreciate the opportunity to present our arguments on this contentious, yet important, issue. Please contact us if you have any questions.

Very truly yours,



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