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March 25, 2009

Education Committee
Room 3100, Legislative Office Building
Hartford, CT 06106

Re: Letter of Support for RB 1142

Dear Sen. Gaffey, Rep. Fleischmann, and Education Committee Members:

Please accept this letter in lieu of my testimony in support of Raised Bill No. 1142. I would like to express my support for the entire bill, but I will speak only to certain sections here. I support Section 1 of the bill, which would extend until July 1, 2011, the time period for implementation of the in-school suspension requirement, since this will give school districts much-needed time to secure funding for and put in place adequate supervision for in-school suspension programs that must be expanded far beyond the capacity in most school districts right now. Section 2 is also important, since it would allow school districts until May 1st to notify non-tenured teachers of non-renewal for the following school year, corresponding with the time when most districts are able to make staffing decisions for the following year. Section 5 is a key provision as well, since it would return the state to providing special education programming to students only through their 21st birthday, rather than the current inequitable state of affairs in which some children, by accident of their birthdays, actually receive an entire extra year of services as compared to their peers born a few days earlier.

Perhaps most importantly, I wish to express support for Section 4 of the bill, which makes a critical change to place the burden of proof on the party requesting the hearing in a special education due process hearing. This change would bring Connecticut in line with the language of the federal Individuals with Disabilities Education Act (IDEA) and with the decision of the United States Supreme Court in the case of Schaffer v. Weast, 546 U.S. 49 (2005). While we understand that the parent advocacy community is opposed to this change, we would like to emphasize that placing the burden of proof on the party requesting the hearing is consistent with the fundamental principles of the American judicial system, which imposes the burden of proof on the plaintiff in almost every civil action. Simply put, if you sue a business or an individual in a tort claim, a products liability claim, or almost any other type of action, you as the plaintiff bear the burden of proving your allegations against that company or individual, regardless of any perceived inequity in the resources of the company or individual against whom you have brought your claim. As pointed out by the United States Supreme Court, in the absence of some compelling reason to the contrary, the same burden of proof can and should apply to plaintiffs in special education due process hearings. In fact, in most states, the plaintiff in the case, usually the parent, does bear the burden of proof, and this has not

caused any major problems for parents in enforcing their rights under IDEA in those states where this is the rule.

While we understand that parents and their advocacy groups claim that placing the burden of proof on the plaintiff in a due process hearing is unfair because the school district has access to the information needed by the parent to pursue his or her claim, I must point out that this same argument was made to the United States Supreme Court and was rejected by a majority of the Court. The argument was rejected precisely because of the number of procedural safeguards contained within the IDEA that level the playing field for parents. Parents have the right to review all educational records concerning their child, and the school district may not discard or destroy educational records without notification to the parents. Parents have the right to request an independent educational evaluation at the expense of the school district, and the school district must provide an outside independent expert to evaluate the child and provide an opinion that may potentially contradict the previous recommendations of the school district for that child. In Connecticut, given the array of expertise available to parents in the form of outside expert opinion, it is particularly likely that the parent will be able to force the school district to fund an outside expert opinion that contradicts opinions previously presented by the school district. When a hearing is requested, school districts must answer the charges made by the parents in writing, and must disclose to the parents all evaluations and information that the district intends to rely upon at the hearing, giving the parent access to all of the school district's information. These protections, according to the United States Supreme Court, ensure that the school district has no informational advantage over the parents and also ensures that the parent has access to expert witness testimony at the expense of the school district.

The Supreme Court also pointed out, not insignificantly, that placing the burden of proof on the school district to prove that the program offered to the student is appropriate has the effect of presuming that the program is inappropriate unless and until the school district proves otherwise. This runs completely contrary to the structure and intent of the IDEA itself. The function of the IDEA is to provide funding to states to provide appropriate special education programming to students with disabilities, and it does this by funding special education teachers, related service providers, and qualified administrative personnel who have the ability and the expertise to provide special education programming. We should not start out each query by assuming that these people, who work so hard for our districts and our children every day, have not done a good job or fulfilled their responsibilities. It not only sends the wrong message to the school personnel and to the parents of children with special needs, it is also counterproductive in the hearing process.

As noted by the Supreme Court, placing the burden of proof on the school district has the effect of making an already expensive litigation process all the more expensive by requiring districts to prove issues on which the parents have made only the barest allegations. Driving up the cost of dispute resolution runs counter to the spirit and intent of the law, which contains multiple provisions for resolving disputes quickly and without burden and expense, such as through mediation or resolution meetings occurring prior to

the start of the due process hearing. Although the Supreme Court expressed dismay that the average due process hearing cost \$8,000-\$12,000 in a nationwide study, we would venture to guess that the average cost to a school district in Connecticut of litigating a full due process hearing (and winning, despite the uphill battle presented by the burden of proof) is closer to \$20,000-\$30,000. Our hearings are longer and more costly in this state as compared to other states where the burden of proof is on the plaintiff, and there is no evidence to suggest that these lengthy and costly due process hearings do anything to raise the bar for children with disabilities or improve outcomes for disabled children. There is evidence to suggest that the longer the hearing, the more the plaintiff's counsel benefits from the collection of attorney's fees, either from the parents of children with disabilities or from the school district if the parent prevails and collects attorney's fees from the school district. In cases where the school district loses a due process hearing to the parent and must pay prevailing party attorney's fees, the total cost to the district can be close to \$100,000 independent of any costs associated with providing programming to the child such as tuition. Parent attorneys exploit this fact by encouraging parents to unilaterally place children in private schools and then demanding settlement payments equal to the district's cost of proceeding to a hearing, knowing that the school district will often pay such a demand to avoid a lengthy and costly battle with an uncertain outcome. This only contributes to the public perception that special education is becoming a sort of voucher system for paying for private school tuition for those who know how to exploit the system.

We urge the Committee to stand firm on the provision returning the burden of proof to the plaintiff in the due process hearing in the face of what we know will be opposition from parent advocates, and send the message to our schools that the legislature believes that school personnel do have the expertise to be able to provide excellent program for children with and without disabilities. Schools will repay this confidence by putting the money that would have been spent on needless litigation into providing programming for children and raising expectations, which will improve outcomes for children with disabilities.

Thank you for your consideration. I am available to answer questions or provide additional information upon request.

Sincerely,

Brian Farrell