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MEMORANDUM

To: Education Committee of the Connecticut General Assembly

From: Donald P. Fiftal, Superintendent of Schools

Date: March 5, 2010

Subject: **Testimony in Support of House Bill #5425 (Burden of Proof).**

I am Don Fiftal, Superintendent for the Darien Public Schools. I speak not only on behalf of the Darien Board of Education, but also as a representative of the Fairfield County Superintendents' Association, and as a representative of the Connecticut Association of Public School Superintendents.

As an individual Superintendent, and as a representative of the above named groups, I present this testimony in support of Raised House Bill #5425, which seeks to amend Section 3d, subdivision (1), subsection (d) of statute 10-76h of the general statutes.

Specifically House Bill #5425 seeks to clarify that for issues in dispute between school districts and parents, the burden of proof rests with the party requesting the hearing.

As Special Education is governed by both Federal and State Law, the Federal IDEA and Connecticut Statute 10-76 each provide both students and their parents with many procedural safeguards, educational benefits and a clear forum to remedy a dispute between the school and parent. These safeguards include due process provisions where disputes can to be resolved via a series of steps, all the way to and including a hearing held before an impartial hearing officer.

To help clarify the issue of due process, in 2005, a Supreme Court decision (Shaffer v Weast, 2005) ruled that the party requesting the hearing bears the burden of proof in any dispute between a parent and school district. The Supreme Court was decisive in this ruling that, because IDEA is silent on the allocation of the burden of proof, the ordinary default rule applies whereby the party seeking relief for claims bears the burden of proof regarding the essential aspects of their claims. This element is fundamental in our judicial system.

Across the country, in state after state, the standard exists whereby the burden of proof defaults to the party requesting the hearing. However, this is not the case in Connecticut, where state department regulation does not require the party requesting the hearing to bear the burden of proof. Taken alone, the Supreme Court decision does not override the Connecticut regulation, and in 2006 the Commissioner of Education informed school districts that we would continue to bear the burden of proof unless and until school district concerns are addressed to the General Assembly.

Therefore, I present this testimony today to respectfully gain the support Of the Education Committee of the General Assembly for statutory relief to Connecticut's maverick burden of proof regulation that runs counter to the Supreme Court decision of 2005. Connecticut's administrative regulation has set up a system where parents and their attorneys can, in effect, claim: "School District, I charge you with my claim of educational malfeasance against my child. Now, prove yourself innocent." Though this statement is hyperbole, to drive home my point, it is symptomatic of the way special education hearings are structured and produces very real negative outcomes, particularly in costs to local communities.

For instance, school districts have been experiencing mounting costs for long hearings that can go on for 8 or 10 days or more. Or, to avoid the costly hearings under the backwards due process regulation, school districts have been forced into the position to settle unilateral outside placements by parents, because districts are cornered into paying those costs simply as a business decision, rather than face the legal fees to go to full hearing. Such fees for one single hearing, by the way, can easily equal the value of two full teacher's salaries. So rather than expend the \$100,000 it would cost to counter Connecticut's backwards burden of proof regulation, a District will choose to pay a settlement of say, \$25,000, for example. The settlement is paid, not because the district agrees its own program is inappropriate, but simply because the backward application of burden of proof in Connecticut costs so much. This circumstance has generated a mounting cottage industry of paid parent advocates who have developed adept strategies to attack teachers and school districts with accusations of inappropriate programs and instruction. Darien is a school district reputed for the excellence of all its educational programs for all students, including those with disabilities. Yet in Darien, as a direct result of the backward burden of proof regulation, we have had to establish a position for a legal compliance assistant to deal with on-going needs to assist our special education director and our legal counsel in coping with the litigiousness that has been spawned by how easy it is to make accusations against a school district in a system that then forces the district to prove its innocence, instead of requiring the accusing party to bear the burden of proof.

It is not a coincidence, then, that in the years since the Commissioner issued her circular letter on this topic, special education costs in public education have escalated exponentially. To a person, I encourage you to speak with school superintendents, and they will tell you that burgeoning legal costs and settlement costs in special education can be attributed to the fact that Connecticut has not brought its regulation on this matter in alignment with the Supreme Court's ruling of 2005. Connecticut's backward burden of proof regulation has had the effect of an unfunded mandate, whereby the costs of this irregularity are costing local communities increasingly large sums of money that get needlessly directed into due process and away from children, both those with disabilities and those without disabilities.

On behalf of the Darien Board of Education, the Superintendents of Fairfield County, and the Superintendents across the State of Connecticut, I urge the Education Committee members to remedy this situation by reporting this legislation favorably to the General Assembly to enact Raised House Bill #5425. This Raised House Bill will assure compliance with the Supreme Court finding of 2005, it will do what the Education Commissioner suggested had to be done back in 2006, and it will help make special education due process consistent with the judicial norm in America: that the burden of proof rests with the party initiating a legal action.

I thank you for your attention.