Testimony of Attorney Andrew A. Feinstein
To Committee on Education
On Various Raised Bills
March 16, 2017

Chairman Fleischmann, Ranking Member Lavielle, Chairman Slossberg, Chairman Boucher and members of the Committee,

I am pleased to be able to present my opinion to this committee on eight bills subject to hearing today before this Committee. I am an attorney in private practice in Mystic, whose entire practice revolves around representing children with disabilities. I have worked with the Committee to develop legislation and appreciate the many courtesies shown me by Representatives Lavielle, Currey, and McCarthy Vahey.

I will address the bills in the order on the agenda. H.B. 7255 is the scaled down version of S.B. 542 about which the Insurance Committee has already held hearings. I have attached my testimony before that committee. To put it simply, I do not see how creating a private insurance company through which school districts could secure reimbursement for special education costs helps children with disabilities. In the proposal, however, I see a great deal of potential for harm. H.B. 7255 creates a Task Force to study the feasibility of the proposal. The Task Force is made up primarily of school district officials. Students with disabilities, their parents and their advocates have no seat on the Task Force. With that kind of Task Force recommending the creation and administration of the cooperative, I doubt the profound risks inherent in the proposal to students with disabilities will be addressed. H.B. 7255 moves us pretty far down the road to creation of the cooperative. I urge the committee to step back at this point and not move this proposal forward.

S.B. 1008 reverses the cruel policy adopted by the Department of Developmental Services (DDS) to refuse to pay for any residential placements of young adults under age 21. DDS unilaterally decided to stop paying the cost of residential placements of students, attempting to saddle local school boards with the cost. Local school districts are not willing or required to fund non-educational costs. Let me describe the effect. I have a client I will call Emily. She has a variety of diagnoses -- autism, anxiety disorder, intermittent explosive disorder – and is prone to such violence that she cannot live at home and desperately needs a residential treatment facility. She is now inpatient in the Greater Bridgeport Mental Health Center, which is a psychiatric hospital, run by DMHAS. The professionals at the Bridgeport facility will not release her to home because it is not safe for her or her family. DDS will not pay for a residential placement such as Adelbrook. The local school district will pay for educational costs at a residential facility, but not the residential costs. As a result, it now looks like Emily will spend the next 16 months, until she turns 21, in a psychiatric hospital, funded by DMHAS, in spite of the fact that everyone agrees that the hospital is the wrong setting for her. The enactment of S.B. 1008 would permit Emily to get the treatment she needs in an appropriate institution.

I fully support H.B. 7252. This bill has been a long time in development. In 2005, the United States Supreme Court, in a case called *Schaffer v. Weast*, ruled that, absent state law to the contrary, the burden of proof in a due process hearing rests with the party bringing the

hearing. Since more than 90% of due process hearings are brought by parents against the school district, this effectively makes the parents responsible for showing that the school district's program for their children with disabilities was inadequate, despite the fact that the school district possesses most of the relevant information and has a cadre of professionals to testify on behalf of its program. Connecticut, however, had a regulation squarely placing the burden of proof on school districts. Then Attorney General Richard Blumenthal ruled that the Connecticut regulation stood.

So, school superintendents, Boards of Education, through CABE, and special education directors started lobbying this committee to change the burden of proof in Connecticut. This discussion led to a more general discussion of how to resolve special education disputes in a more efficient, less costly manner. Last session, Chairman Fleischmann worked diligently to secure support for H.B. 5552 which set up an adjudications system. My colleagues and I opposed this legislation for three reasons: it was mandatory, it added a new procedural step which would delay the convening of any special education hearing, and the recommendation of the adjudicator would be admissible in any subsequent due process hearing.

H.B. 7252 avoids these issues. One overriding concern remains. It is virtually impossible to find anyone knowledgeable about the arcane world of special education who has not previously been a school board employee or a lawyer for parents. Knowledgeable neutrals do not appear to exist. So, this legislation establishes a panel, with equal representation of students with disabilities, their parents and advocates, to design procedures for the selection and training of adjudicators. This provision goes a long way to assuring parents and school officials that the adjudicators are fair, neutral, and competent.

Historically, Connecticut has been one of the nation's leaders in the use of mediation to resolve special education disputes. Notwithstanding, the federal Office of Special Education Programs told Connecticut a year ago it had to stop using consultants from the State Department of Education as mediators, due to possible bias. The Department is currently in the process of hiring, by contract, private mediators.

The mediation process involves working to bring the parties together to a mutually distasteful compromise position. That is often made more difficult because of unrealistic expectations on one side or the other. The Connecticut courts have long used a non-binding arbitration system where the arbitrator, after reviewing the filing and talking with the parties, recommends an appropriate settlement. H.B. 7252 would provide the same system for special education disputes. Note that, in a hearing, the hearing officer has to find the district's program appropriate or inappropriate. The adjudicator, in these cases, could split the baby, thereby facilitating settlement.

The way H.B. 7252 is drafted it appears that this new adjudication system is a substitute for the current mediation system. The federal IDEA requires the state to have a mediation system, so a total substitution is not possible consistent with federal law. Further, parents may be chary of using this new system at first, especially since using the new adjudication system will certainly involve more preparation to convince the adjudicator of the merits of their case. So, creating this adjudication system as an option to mediation is the best way forward.

I have one other requested change. The adjudication system created by this legislation needs to strike a delicate balance between the desire for swift and low-cost resolution of disputes and the opportunity for parents and the school officials to lay out the substance of their case before the adjudicator. I recommend that the panel created in C.G.S §10-76h (f)(4) be tasked with developing procedures for the adjudication process. Specifically, I think it would make sense for each party to present its case to the adjudicator separately, much as is now done in mediation. I think no witnesses should be sworn or called. And, any documents shared with the adjudicator by one party must be shared with the other party. Finally, I would expect a time limit of, perhaps, one hour for each party to present its case to the adjudicator, with a half-hour for the adjudicator to question each party about the other party's presentation, before the adjudicator makes a recommended resolution. All these details need to be established, but they need not be established in the authorizing legislation.

H.B. 7252 does more than just create the adjudication system: it creates the first ever statutory right for parents and their professional advisors to observe their children in school. Parents are supposed to be full partners in designing educational programming for their children with disabilities. To be effective, they need information. And, sometimes, parents have real and legitimate questions about what school officials are telling them. This is particularly the case where school officials tell the parents that their child can perform things at school that the parents do not see at home. School officials have some legitimate concerns about excessive parental observation. This legislation addresses those concerns.

In sum, I strongly support passage of H.B. 7252 after it is amended to make the adjudication system an alternative to, not a replacement for, mediation and to provide that the panel specify procedures for the adjudication process.

S.B. 1007 is concerning. It imposes new reporting requirements on school districts, but provides that the reports are not public records. While we need to protect the privacy of individual students, there is no justification for keeping vital information about special education secret. Section 1 of the bill seems to be designed solely to make the case that special education is expensive. This seems to play into Judge Moukawsher's agenda of eliminating special education services for the profoundly disabled. Such an approach is illegal and immoral. Indeed, subsection (3) of section 1 requires the reporting of individual expenditures on each child. This is unduly intrusive. I ask that section 1 of S.B. 1007 be stricken in its entirety.

Section 2 of S.B. 1007 asks for the costs attributable to students whose education costs various times the average per student cost for the school district, with an eye to the effect of reducing the threshold for excess cost reimbursement from 4 ½ times average per pupil cost to some lower figure. This is necessary information to have if the excess cost grant threshold is to be changed. Still, it would be more efficient to collect this information through a sampling methodology, rather than imposing a new general reporting requirement. More to the point, however, there is no reason to change the excess cost threshold unless new money is added to the grant. If the threshold were lowered for 4 ½ times per pupil costs to three times per pupil costs, I would guess that, with current funding, reimbursements to districts would drop from 75% to less than 25%. Currently, districts file approximately $190 million in excess cost claims, based on the 4 ½ times per pupil formula. My guess is that, were the threshold lowered to three times per pupil, the total level of claims would be between $550 and $600 million. If the current

appropriation of $135.6 million were continued, the reimbursement rate would be between 22.6% and 24.7%. At that level, many more districts would not apply for excess cost reimbursement because the time and effort to apply might be higher than any benefit received by the school district. Further, lowering the threshold would likely discourage school districts from trying to build new capacity in district. I would like to have the information that section 2 of S.B. 1007 attempts to gather. Still, there are many questions to answer before I would agree with lowering the excess cost threshold. Indeed, the Governor's budget goes exactly the opposite direction and eliminates the excess cost grant altogether.

Section 3 of S.B. 1007 would penalize districts that "intentionally or knowingly" under-budget for special education. The IDEA already requires the state to cut off funding for districts that do not follow the law. Despite well-documented cases of improper conduct by certain districts, the state has never even threatened such a cut-off. I assert that creating this new penalty will follow the same path. It would be an act of legislative bluster.

I have little to say about H.B. 725, except that the need for clarifying the proper role of local boards of education is a crying need throughout the state, both in alliance districts and in non-alliance districts. We have local boards of education meddling in the administration of special education programs. We have local boards of education that are so racked with infighting that they cannot get anything done. And we have local boards of education which are little more than cheering squads for the superintendent. None of these models work for the benefit of students.

Sections 1 and 2 of S.B. 1009 are unobjectionable, requiring hearing officers to be trained in state and federal special education laws. I am concerned that hearing officer training has been rather one-sided to date and has focused on procedural compliance, not substance. Frankly, we pay hearing officers so poorly and so irrationally that we do not attract the type of high level attorneys needed to deal with this complex area of the law. We need to substantially increase the skill level and judgment of our hearing officers and training in the law alone will not do it.

Section 3 of S.B. 1009 is, to my mind, bizarre and profoundly ill-informed. I do not know what the term "optimal caseload" means. Optimal for whom? The last thing we need, it seems to me, is state standards for how many special education students can be in a class. Each special education student is different and each class is different. We are committed to including children with disabilities in the regular classroom with the accommodations and modifications that each child needs. Too often, special education students are dumped in a low-level collaborative classroom. At the same time, we need differentiated instruction at all levels so that all students are properly challenged and not held back by their classmates. Setting uniform standards would counterproductive.

Section 4 of S.B. 1009 appears to address the decision of the Avon Superintendent of Schools to fire all the social workers in the district. His action was unjustified and worked a serious hardship on many children. Still, I do not think imposing a statewide recommended ratio for social workers to students makes any sense.

H.B. 7254 requires new teachers to have completed a program of study in the diagnosis and remediation of reading and language arts. This is a step forward but does not undo the

damage done by S.B. 953, on which the Committee held hearings on March 3, which removes the language from Public Act 15-97 requiring in-service professional development in "the growth and development of exceptional children, including handicapped and gifted and talented children and children who may require special education, including, but not limited to, children with attention-deficit hyperactivity disorder or learning disabilities, and methods for identifying, planning for and working effectively with special needs children in a regular classroom, including, but not limited to, implementation of student individualized education programs," as well as "the detection and recognition of, and evidence-based structured literacy interventions for, students with dyslexia." S.B. 953 emerged from the task force recommendations on professional development, proving that creating task forces is not just a safe way of kicking the can down the road. Here, a task force made up exclusively of superintendents, teacher unions, teachers and State Department of Education consultants, recommended elimination of a variety of required areas of professional development, including dyslexia. The need for continued training in all areas is desperate. I would ask that H.B. 7254 be amended to restore the training requirements of C.G.S. 10-220a, as they relate to special education.

H.B. 7253 is a miscellany of various provisions. Sections 6 and 7 augments the current audit requirement of private providers of special education services. What needs to be added here is that the audit ensures that the private provider is providing the services for which it is getting paid. We have received numerous reports of state-approved special education placements billing for IEP services that were never provided. Further, the State Department of Education has not audited the excess cost submissions of various districts. We have provided information to the Department about districts billing for services never provided, but the Department has done nothing with that information.

Section 9 of H.B. 7253 adds the Chief Court Administrator to the Interagency Council for Ending the Achievement Gap. The achievement gap is not defined, but seems to be focused on the racial and economic gaps, which are wide. There is also a wide achievement gap between special education students and typical students. The provision of special education services should narrow that gap over time, but the data suggest that no narrowing has taken place. As long as C.G.S. § 10-16nn is being amended, the mandate of the Interagency Council should be expanded to include the disability achievement gap.

Section 14 of H.B. 7253 clarified that charter schools and magnet schools are subject to the same complaint procedure as are other publicly funded schools. This is critical given the numerous complaints that have been made about charter schools in particular.

Thank you for this opportunity to testify. I look forward to continuing to work with the committee.

Testimony of Attorney Andrew A. Feinstein
To Committee on Insurance and Real Estate
On S.B. 542, An Act Establishing the Connecticut
Special Education Predictable Cost Cooperative
February 21, 2017

Chairmen Larson, Kelly and Scanlon, Ranking Member Sampson and Members of the Committee,

I am a private attorney whose practice exclusively represents children with disabilities and their families in seeking appropriate special education services from school districts. I have offices in Mystic and Manchester. I have been practicing in this field for more than 20 years.

I urge the Committee to approach S.B. 542 was extreme caution. The promotional material by the Connecticut School Finance Project is flashy and appealing, but fails to answer some serious questions. And like all major reforms, the Cost Cooperative will have consequences and will create incentives that are hard to predict and may not be desireable.

As a preliminary matter, let's understand that this bill does nothing to help children with disabilities. My concern is whether it would actually harm children with disabilities. Connecticut special education law and the federal Individuals with Disabilities Education Act (IDEA) requires school districts to provide students with a disability with a free appropriate public education. School districts are not permitted to provide an inadequate education because an appropriate education would cost too much. So, the unpredictability of funding or the tightness of town's budgets cannot serve to deprive a child with the education guaranteed by law.

It is undoubtedly the case that school districts see fluctuations in their annual special education funding, due to changes in the student population, due to changes in programming, due to changes in cost of staff and outside services, and due to numerous other reasons. Yet, the fluctuations are not nearly as radical or unpredictable as portrayed in the Connecticut School Finance Project's on-line video. What is a fact is that special education tends to cost around twice as much per student as general education and the costs of education consume a significant portion of municipal budgets. Nothing in S.B. 542 will change that.

Before reporting this bill to the full Legislature, the Committee needs to address the following questions:

School districts can do more that the bare minimum required by law by offering better programs and services for children with disabilities. What about the school district that wants to create a first-rate literacy program, or a center for Applied Behavior Analysis, or an alternative school for students with emotional disturbances? Will an insurance scheme reimburse a conscientious district that wants to offer excellent special education services with funds collected from other school districts that are barely able to provide the minimum required by law?

Is this a voluntary insurance program or a mandatory one? If it is voluntary, one can presume that the relatively low cost districts will not participate and the annual contributions of

the participating districts will skyrocket. If it is mandatory, we appear to be moving to state control of special education, which will certainly lead to standardization of services and a loss of local district initiative. On what basis do we believe that such a centralized, bureaucratic system will lead to better education for children with disabilities.

If this is an insurance program, will there be adjusters? Will these adjusters second guess the decisions of local Planning and Placement Teams in determining what services are provided for each student with a disability? Any such second-guessing of the PPT decision will surely violate the requirements of the IDEA and will undermine the notion of individual education programs. And, it will likely ensure that all students receive no more than the bare minimum required by law.

How is this program going to save any money, except if it serves to lower the bar for appropriate educational services? If the same level of services continue to be provided to each student, the costs remain the same. The only difference is the cooperative will add a new organization that will need to be funded out of the same pot of money, thereby reducing the amount of money available for special education.

What happens when the fund runs out of money in a year? Are school districts back on their own funding required special education programs?

The Governor's Budget provides additional special education funding for certain poorer districts. The Connecticut School Funding Project asserts that the cooperative will lay claim to this money and distribute it. How does that provide more funding for the districts the Governor seeks to help?

Judge Moukawsher, in his decision in *CCJEF v. Rell,* labeled Connecticut's funding of special education as irrational. I see nothing in S.B. 542 that makes it more rational.