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VIA FACSIMILE AND EXPRESS MAIL

Theresa DeFrancis, Esq.
Connecticut State Department of Education
P.O. Box 2219
Hartford, CT 06145

Re: Comments on Proposed Revision to the State Special Education Regulations

Dear Attorney DeFrancis:

On behalf of the School Law Practice Group at Shipman & Goodwin LLP, we write to comment on the proposed revisions to the State Special Education Regulations ("Regulations"). We find many of the proposed revisions to be positive in their alignment with the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"). This alignment will minimize the confusion that has resulted for many years from school districts being required to comply with two sets of regulations, which may differ dramatically. We also appreciate the Department taking into consideration the comments with which it was provided in relation to the 2007 proposed regulations, as well as the comments provided in relation to the 2008 addition of provisions regarding physical restraint and seclusion; we noted a variety of modifications that were made based on those comments.

Nevertheless, we still have several concerns regarding the newly proposed revisions, as well as the restraint and seclusion regulations that have been in effect since 2008. After discussions with members of our Group and our clients, we respectfully submit comments and suggested amended language for several of the proposed revisions.[1]

[1] All citations refer to the regulation section in the proposed revisions to the State Special Education Regulations.

1. Regs. Conn. State Agencies 10-76a-1(11): Definitions

The proposed regulations revise the definition of a planning and placement team ("PPT") meeting to align with IDEA definition. Yet, the proposed regulations also purport to retain the current state definition of a PPT for purposes of evaluating, identifying or determining the specific educational needs of a child who may be gifted or talented. This distinction will undoubtedly result in confusion over appropriate membership at PPTs or force school districts to continue to convene all PPTs consistent with current practice to ensure attendance of a representative from each of the "teaching, administrative and pupil personnel staffs." This is contrary to the intent of the proposed changes, which presumably is to simplify the process and align state procedures with federal requirements.

Suggested Change:

Delete last sentence of 10-76a-1(11).

2. Regs. Conn. State Agencies § 10-76b-8: Use of Seclusion in Public Schools, Requirements

We believe that most of the changes made to the Regulations regarding physical restraint and seclusion, prior to their initial adoption, addressed our concerns and the concerns of our clients, in general. However, the issue of whether physical restraint may be included in a student's individualized education plan ("IEP") has remained unanswered by the Department. This area of the law has caused significant confusion for districts and should be clarified in the Regulations.

The confusion stems mainly from the law's silence in this area. While the statute specifically provides that seclusion may be included in a student's IEP, it neither permits nor prohibits the inclusion of physical restraint in an IEP. As the law clearly permits the use of physical restraint in emergency situations we see no reason why such emergency planning should not be included in an IEP. Indeed, inclusion of such strategies will put staff on notice of a student's potential to act in an unsafe manner and will thus provide a safer environment for all students and school personnel. This change will also assist in putting parents on notice that such strategies may be used with their children in extreme situations. While parents already receive notice, at the initial PPT meeting, that physical restraint may be used with their children, this notice is provided to all parents, regardless of a child's disability or tendency to engage in unsafe behaviors. Providing specific notice to parents whose children may actually require

physical restraint will allow schools to be proactive and specific in informing parents of the behavior strategies used with their children, rather than only providing parents with the general information regarding physical restraint and then sending home an incident report after the fact.

We understand that physical restraint of a student should always, under all circumstances, be an action of last resort; both the law and appropriate behavior management strategies dictate this requirement. However, permitting districts to include physical restraint in a student's IEP only as a measure of last resort will provide needed clarification to school districts.

Suggested Change

Include a new subsection (b) in § 10-76b-8 to read as follows:

(b) EXCEPT FOR AN EMERGENCY INTERVENTION TO PREVENT IMMEDIATE OR IMMINENT INJURY TO THE PERSON AT RISK OR TO OTHERS CONFORMING TO THE REQUIREMENTS OF SUBSECTION (a) OF SECTION 46a-152, NO PROVIDER OR ASSISTANT PROVIDER MAY USE PHYSICAL RESTRAINT ON A PERSON AT RISK. THE USE OF PHYSICAL RESTRAINT ON A PERSON AT RISK AS AN EMERGENCY INTERVENTION TO PREVENT IMMEDIATE OR IMMINENT INJURY TO THE PERSON AT RISK OR TO OTHERS MAY BE INCLUDED IN THE IEP OF THE PERSON AT RISK, PROVIDED THAT THE LANGUAGE IN THE IEP MUST INCLUDE THE STATEMENT PROVIDED IN SECTION 46a-152(a)(1).

3. Regs. Conn. State Agencies § 10-76d-3(b): Extended School Year

Although this provision requires each board of education to "ensure that extended school year services are available in accordance with the IDEA," it still does not clarify whether the services are a continuation of the prior school year's services, or part of the upcoming school year's services. This lack of clarity becomes an issue especially when a student transfers from one district to another, which frequently occurs in the summer months. Is the sending district responsible for providing ESY that has already been planned for (i.e. staffing, etc.), or is the receiving district responsible when the district has no knowledge of, or planning for, the child? Neither the IDEA nor the Regulations provide answers in this respect.

Further, additional clarity is necessary with respect to a parent's ability to challenge the ESY determination made by the PPT. While decisions relating to ESY should be made with sufficient time for parents to object thereto, a specific definition of

"sufficient time" should be added to this section, or the section should be removed in its entirety. Generally, ESY services are determined at the annual review PPT, which is typically held in May or June. Is a determination of ESY services in June "sufficient time" for the parent to object? We believe that the proposed revision will only cause further confusion about what constitutes "sufficient time."

Suggested Change

Revise § 10-76d-3(b) to read as follows:

(b) EACH BOARD OF EDUCATION SHALL ENSURE THAT EXTENDED SCHOOL YEAR SERVICES ARE AVAILABLE IN ACCORDANCE WITH THE IDEA. ***EXTENDED SCHOOL YEAR SERVICES SHALL BE AN EXTENSION OF THE SERVICES PROVIDED TO THE CHILD DURING THE PRIOR SCHOOL YEAR***. ~~EACH BOARD OF EDUCATION SHALL ENSURE THAT CONSIDERATION OF THE CHILD'S ELIGIBILITY FOR, AND THE CONTENT, DURATION AND LOCATION OF THE CHILD'S EXTENDED SCHOOL YEAR SERVICES IS DETERMINED SO AS TO ALLOW THE PARENT SUFFICIENT TIME TO CHALLENGE THE DETERMINATION OF ELIGIBILITY OR THE PROGRAM OR PLACEMENT FOR THE CHILD BEFORE THE BEGINNING OF THE EXTENDED SCHOOL YEAR PROGRAM UNLESS IT IS CLEARLY NOT FEASIBLE TO DO SO.~~

4. Regs. Conn. State Agencies § 10-76d-6: Child Find

We agree with the Department that the IDEA requires all districts to locate all children with disabilities within its borders, including children who are homeschooled or placed privately by their parents. However, the new language the Department proposes regarding a district's child find obligations fails to take into account the language in 34 C.F.R. § 300.300 regarding refusal of consent. Specifically, this federal regulation provides that a district cannot evaluate a child without a parent's consent and that the district may, but is not required to, file for due process if a public school parent refuses consent. Moreover, where a parent of a child who is homeschooled or privately placed refuses consent for evaluation, a district is prohibited from filing for due process against that parent and is not required to find the child eligible for services.

As currently proposed, this Regulation requires all children to be located, identified and evaluated, with no exceptions. While we have no objection to the Department keeping the proposed language, we strongly recommend that additional

language be included in this section to address the issue of consent. The proposed Regulation, as currently written, does not comport with the IDEA.

Suggested Change

Revise § 10-76d-6 to read as follows:

EACH BOARD OF EDUCATION SHALL ENSURE THAT CHILDREN WITH DISABILITIES, INCLUDING CHILDREN WHO ARE EDUCATED AT HOME, HOMELESS CHILDREN, CHILDREN WHO ARE WARDS OF THE STATE AND CHILDREN ATTENDING PRIVATE SCHOOLS, REGARDLESS OF THE SEVERITY OF THEIR DISABILITY, AND WHO ARE IN NEED OF SPECIAL EDUCATION AND RELATED SERVICES, ARE LOCATED, IDENTIFIED AND EVALUATED *IN ACCORDANCE WITH THE IDEA*. THIS RESPONSIBILITY SHALL INCLUDE COOPERATING WITH OTHER AGENCIES IN A POSITION TO IDENTIFY CHILDREN WITH DISABILITIES. SPECIAL EDUCATION SERVICES AVAILABLE FOR PARENTALLY PLACED PRIVATE SCHOOL CHILDREN ELIGIBLE FOR SPECAL EDUCATION SHALL BE PROVIDED IN ACCORDANCE WITH THE IDEA.

5. Regs. Conn. State Agencies § 10-76d-7: Referral

This section discusses the process for making a referral to special education and requires that a standard referral form be used for all referrals. While subsection (a)(3) of the revised language provides that a "parent is not required to submit the standard referral form for a referral," the section does not explain who must complete the form in such a case, although we assume that it should be a board employee. We believe adding specific language requiring a board employee to complete the form in such a case would provide clarity to this section. This additional language is even more logical considering that the proposed revision also provides that "[t]he date of referral is not the date the board referral form is filled out by the board."

Further, subsections (b) and (c) in § 10-76d-7 must be reconciled. While the Department requires the implementation of pre-referral strategies in subsection (b), it also requires in subsection (c) that PPTs must be held promptly for children who have been repeatedly suspended or "whose behavior, attendance or progress in school is considered unsatisfactory or at a marginal level of acceptance." Through a complaint, the Department found a board of education non-compliant for failure to refer to special education a student who had two drug-related suspensions in a period of three months. Pre-referral strategies cannot possibly, or effectively, be implemented when boards of education face non-compliance findings such as these. Boards must be able to identify

students with disciplinary or attendance problems and implement strategies to address these issues without being forced to turn immediately to the PPT. Moreover, current language provides little guidance to boards in cases where the child is not suspected of having a disability and such "marginal" behavior, attendance or progress is not reasonably thought to be related to a disability. Accordingly, subsection (c) must be revised to provide for discretion by the board in relation to the circumstances under which a referral must be made to a PPT.

Suggested Change

Revise § 10-76d-7(a)(3) as follows:

(3) A PARENT IS NOT REQUIRED TO SUBMIT THE STANDARD REFERRAL FORM. A CONCERN EXPRESSED IN WRITING FROM THE PARENT TO SUPERVISORY OR ADMINISTRATIVE PERSONNEL OF THE BOARD OF EDUCATION OR A TEACHER OF THE CHILD THAT THE CHILD MAY BE A CHILD WITH A DISABILITY OR A WRITTEN REQUEST THAT THE CHILD BE REFFERED FOR A SPECIAL EDUCATION EVALUATION OR THE USE OF OTHER TERMS WHICH CLEARLY INDICATE A CONCERN THAT A CHILD MAY BE A CHILD WITH A DISABILITY AND THE CHILD SHOULD BE EVALUATED FOR SPECIAL EDUCATION SHALL BE ACCEPTED BY THE BOARD OF EDUCATION AS A REFERRAL. THE DATE OF REFERRAL FOR PURPOSES OF THIS SUBSECTION AND SECTION 10-76d-13 IS THE DATE BOARD PERSONNEL RECEIVE SUCH A REQUEST. ***WHERE A PARENT DOES NOT SUBMIT THE STANDARD REFERRAL FORM, BUT INSTEAD SUBMITS A CONCERN AS EXPLAINED ABOVE, THE STANDARD REFERRAL FORM SHALL BE COMPLETED BY AN EMPLOYEE OF THE BOARD OF EDUCATION AFTER THE WRITTEN CONCERN HAS BEEN RECEIVED.*** THE DATE OF REFERRAL IS NOT THE DATE THE BOARD REFERRAL FORM IS FILLED OUT BY THE BOARD. EACH BOARD OF EDUCATION SHALL DEVELOP A PROCESS FOR ACCEPTING REFERRALS FROM PARENTS WHO CANNOT PUT THEIR REQUEST IN WRITING.

Revise § 10-76d-7(c) as follows:

(c) PROVISION SHALL BE MADE FOR THE PROMPT REFERRAL TO A PLANNING AND PLACEMENT TEAM OF ALL CHILDREN WHO HAVE BEEN SUSPENDED REPEATEDLY ***OVER A SHORT PERIOD OF TIME FOR SUBSTANTIALLY SIMILAR BEHAVIORS***; OR WHOSE BEHAVIOR, ATTENDANCE, INCLUDING TRUANT BEHAVIOR, OR PROGRESS IN SCHOOL IS CONSIDERED UNSATISFACTORY OR AT A MARGINAL LEVEL, ***AS DETERMINED BY THE PROFESSIONAL JUDGMENT OF THE STUDENT'S***

TEACHERS AND/OR SCHOOL ADMINISTRATORS WHEN SUCH SCHOOL PERSONNEL HAVE REASONS TO SUSPECT THE CHILD MAY BE A CHILD WITH A DISABILITY WHO MAY REQUIRE SPECIALIZED INSTRUCTION.

6. Regs. Conn. State Agencies § 10-76d-9(a): Independent Educational Evaluations

We understand the Department's decision to align the language regarding independent evaluations entirely with the IDEA. However, we strongly recommend that the Department include additional language in this section addressing a specific time limitation for parents to request an independent educational evaluation ("IEE") from districts.

The current and proposed regulations are silent regarding the time limitation for requesting an IEE. We have consistently argued, and have been supported in this argument by the Department, that federal and state statutes and regulations imply, at most, a two-year window in which an IEE can be requested based on a parent's disagreement with a district evaluation. This implication stems from the two-year statute of limitations for raising claims under the IDEA; if a claim cannot be raised in a due process hearing regarding the alleged inappropriateness of a district evaluation, then provision of an IEE to dispute the district's evaluation is not required. In that case, we consistently recommend that the PPT offer to re-evaluate the student in the requested area. If the parent disagrees with the re-evaluation, an IEE can then be requested. Indeed, educators recognize that the educational skills of students, especially young students, can change dramatically during even short periods of time. To allow lengthy gaps in time between a district evaluation and an IEE will certainly reveal varying test scores or behaviors because the student has actually changed, not because the district's evaluation was inappropriate. The evaluation of students through unnecessary IEEs proves costly, and an unnecessarily disruptive and potentially deleterious interruption of a student's educational program.

Other states have adopted similar timelines regarding independent evaluations. For example, in Massachusetts, 603 CMR 28.04(5)(c)(6) provides as follows: "The right to this publicly funded independent education evaluation . . . continues for 16 months from the date of the evaluation with which the parent disagrees." Setting a timeline such as this would eliminate much confusion among district and parents regarding the provision of IEEs. We do recommend, however, that the time period in Connecticut be set at one year. Allowing longer than one year to repeat the same evaluation will likely yield results demonstrating a change in the student's overall educational picture, rather than reveal inaccuracies in the district's evaluation.

In addition, feedback from school districts indicates that even if parents make timely requests for IEEs, the IEEs may not be completed or received by the district until many months, or up to a year, after the district evaluations which gave rise to the IEE requests. Instead of providing an opportunity for a "second opinion," an IEE that is conducted well after the initial evaluation, or received many months, or even a year, later either becomes a second "updated" evaluation of the student, or its utility to the planning process is undermined by the lack of timeliness in its receipt by the district. Thus, we further suggest that the proposed regulations include a provision to require an IEE to be completed and provided to the board within a reasonable timeframe, in order to ensure that the IEE serves the function contemplated by the IDEA.

Suggested Changes

Revise Regs. Conn. State Agencies § 10-76d-9(a) as follows:

(a) THE BOARD SHALL CONDUCT AN INITIAL EVALUATION OR REEVALUATION CONSISTENT WITH THE PROVISIONS OF THE IDEA. A PARENT'S RIGHT TO AN INDEPENDENT EVALUATION SHALL BE PROVIDED CONSISTENT WITH THE IDEA. ***THE PARENT'S RIGHT TO AN INDEPENDENT EVALUATION CONTINUES FOR ONE YEAR FROM THE DATE OF THE EVALUATION WITH WHICH THE PARENT DISAGREES. IF A PARENT REQUESTS AN INDEPENDENT EDUCATION EVLAUATION AT PUBLIC EXPENSE, SUCH EVALUATION MUST BE CONDUCTED, AND THE EVALUATION RECEIVED, WITHIN SIXTY DAYS OF THE BOARD'S CONSENT TO PUBLICLY FUND SUCH INDEPENDENT EDUCATIONAL EVALUATION, SUBJECT TO ANY CONTRACTUAL ARRANGEMENT WITH THE BOARD OR UNUSUAL CIRCUMSTANCES WHICH JUSTIFY AN EXTENSION OF THIS TIMELINE.***

7. Regs. Conn. State Agencies § 10-76d-9(c)(2): Gifted and Talented

This new provision permits parents to challenge through a due process complaint the results of a board's evaluation of a child for identification as gifted and talented. We fail to understand the purpose of permitting a parent to challenge the results of such evaluation when, under Connecticut law, boards of education are not required to provide services to gifted and talented students. Including this provision in the Regulations will result only in an influx of due process complaints to the Department from parents who wish to put pressure on districts to label their children as gifted and talented. Districts have limited resources to defend themselves at due process hearings. Districts should be compelled to expend scarce resources only for concerns regarding the identification of a student as eligible for special education

services or the provision of a free appropriate public education to special education students. The only remedy a hearing officer in this situation can provide is identification of the child as gifted and talented. With the recent barrage of complaints challenging the identification and delivery of services to children relating to special education needs, the resources of the Department and its hearing officers are wasted in hearing cases relating to the identification of students as gifted and talented where, most likely, no services will be provided.

Further supporting this argument is the Department's recent elimination of its Gifted and Talented consultant because of lack of funding. Districts should not be forced to expend scarce resources on due process hearings for these students without appropriate support from the Department.

Suggested Change

Eliminate the last sentence of the proposed language in § 10-76d-9(c)(2).

8. Regs. Conn. State Agencies § 10-76d-11(b): IEP Development

This section requires all districts to use the IEP form developed by the Department in planning programs for special education students, and eliminates the language providing for Department approval of IEP forms. At this time, we are aware of only one client that uses an IEP form that differs slightly from the sample form developed by the Department. We are unclear as to why this district (and we do not believe there are many others) will be required to change its form after many years of training on, and development of, their current form. We also do not imagine that form approvals are causing significant difficulties for Department consultants, as most districts use the standard form. Also, it is unclear from the language in this section as to when use of the Department's form must commence. For example, will the Department form be required only for new IEPs, or will districts be required to convene PPTs to convert all IEPs into the Department's form? Without answers to these questions, the proposed language should be eliminated.

Moreover, the process for review and revision of the state's IEP forms in light of legislative and regulatory changes at the federal level is a lengthy one. A regulation requiring use of the state form may have the unintended effect of forcing local districts that undertake a timely review and revision of their own forms to continue to use state forms that are legally inappropriate due to changes at the federal level.

Suggested Language

Eliminate the newly proposed language in subsection (b) of § 10-76d-11, and reinstate the original language, so that the Regulation reads as follows:

(b) INDIVIDUALIZED EDUCATION PROGRAM FORM. EACH BOARD OF EDUCATION SHALL USE ~~THE~~ ***A STANDARDIZED*** INDIVIDUALIZED EDUCATION PROGRAM FORM ~~DEVELOPED BY THE STATE DEPARTMENT OF EDUCATION~~. ***SAID FORM SHALL BE SUBJECT TO THE APPROVAL OF THE STATE BOARD OF EDUCATION.***

9. Regs. Conn. State Agencies § 10-76d-12(b): Transfer of Rights

This proposed language provides that, pursuant to the IDEA, the rights of the parent transfer to the child on the child's eighteenth birthday, but adds that the child may inform the Department in writing that the parent retains the right to make his or her educational decisions. This language raises serious concerns relating to the capacity of the child to unilaterally appoint the parent as educational decision-maker. Under this very simple language, a child, no matter how high his or her cognitive abilities, can assign his or her rights away to a parent.

While we truly believe that most parents have their child's best interest at heart and would make only appropriate decisions for the child, we are all too familiar with families that have done actual harm to their children from the horrific educational decisions they have made. Under the proposed language, there is nothing to prevent a parent in this situation from writing a waiver for the child and submitting it as the child's.

Under Connecticut law, a conservator must be appointed by the Probate Court to override the decision-making ability of an adult who lacks capacity to make financial, health and other life decisions. See Conn. Gen. State § 45a-644 et seq. It fails to reason why an incapacitated adult would be able to merely notify the Department of his or her desire to have a parent retain educational decision-making power, when, to obtain any other life decision-making power for the incapacitated adult a parent would be required to go through the Probate Court. While parents are most often well-intentioned, the Department must ensure that the well-meaning parent does not overstep his or her bounds and infringe upon the rights of his or her child. At this point in the individual's education, an independent third party should be brought in to determine whether a guardianship or conservatorship is required.

Suggested Language

Revise § 10-76d-12(b) as follows:

(b) IN ACCORDANCE WITH THE PROVISIONS OF THE IDEA, THE RIGHTS OF A PARENT TRANSFER TO A CHILD WITH A DISABILITY WHEN THE CHILD TURNS EIGHTTEN, *UNLESS OTHERWISE DETERMINED BY A COURT OF LAW.* ~~A CHILD WITH A DISABILITY MAY, IN WRITING, NOTIFY THE BOARD OF EDUCATION THAT THE PARENT CONTINUES TO HAVE THE RIGHT TO MAKE EDUCATIONAL DECISIONS ON BEHALF OF THE CHILD NOTWITHSTANDING THE FACT THAT THE CHILD HAS TURNED EIGHTEEN YEARS OF AGE.~~

10. Regs. Conn. State Agences § 10-76d-13: Timelines

We appreciate the Department's desire to align the Regulations, in some respect, with the federal law concerning timelines for evaluation and program implementation. However, with respect to the requirement that a PPT be convened within fifteen calendar days of referral, as well as the sixty calendar day time period for evaluation, some of our clients have expressed serious concern, and appropriately so, regarding the resulting requirement to convene PPTs and conduct evaluations over the summer months. Specifically, districts want and need to have appropriate staff members in attendance at PPT meetings over the summer and to have appropriate staff members conduct evaluations. A majority of PPT members, however, are ten-month employees by contract; contracts that are negotiated and agreed-to several years in advance. We do understand that teachers and other staff members can and should be asked to come in over the summer to assist with these matters, but this request must, at this point, be entirely voluntary. Districts will not be able to mandate that teachers come in over the summer unless such is agreed-to through collective bargaining with the unions. Should the Department decide to keep the sixty calendar day requirement, we recommend that a provision be included regarding evaluations over the summer months to ensure appropriate staff are available to attend PPTs and conduct evaluations.

Further, we are surprised and confused as to the Department's decision to require PPTs to be convened within fifteen days of receipt of a written referral as well as to require IEPs to be implemented fifteen calendar days after eligibility determinations. First, the fifteen day provisions (for convening a PPT as well as for implementing an IEP) do not take into account school vacations nor do they address the practical realities associated with providing an appropriate response to initial referrals made over the summer. In fact, the proposed regulations eliminate current language

which guides districts as to how to proceed when referrals are made "in between school years." Whether or not staff are available to participate in a meeting during the vacation (see discussion above regarding collective bargaining agreements), most parents also plan trips during school vacations which would prevent parent participation in the relevant PPT meetings.

Additionally, more often than not it will take a team multiple meetings to draft an initial IEP. Every evaluation must be reviewed and every aspect of the IEP must be drafted, discussed and amended as needed. As the Department knows, parents, private evaluators and district personnel often disagree about various elements of the IEP or decide that more information is necessary to put together an appropriate program. The team would then have less than two weeks to gather the relevant information, redraft the IEP and coordinate numerous schedules to have another meeting. We fear that this short, strict timeline would cause districts to draft "basic" IEPs, or IEPs that are not entirely thought-through or complete, with the intention of revising the IEP at a later date. We believe that a thorough, thoughtful IEP that may take a little longer to draft is far superior to one that is thrown together for the sake of time and then essentially forgotten because of heavy workloads or other burdens on time.

Finally, we are unclear as to why the Department decided to align with the federal regulations regarding the time for evaluation, but to shorten significantly the time for IEP implementation as compared to the thirty days permitted by the federal regulations. We strongly believe that a thirty day time period would allow for additional PPT meetings to draft the IEP, if necessary, and would solve the difficulties caused by school vacations.

<u>Suggested Language</u>

Revise § 10-76d-13 (a), (b) and (c) as follows: [2]

(a) UPON RECEIPT OF AN INITIAL REFERRAL IN ACCORDANCE WITH section 10-76d-7 OF THESE REGULATIONS, THE BOARD OF EDUCATION SHALL SCHEDULE A PPT MEETING NO LATER THAN 15 DAYS AFTER RECEIPT OF THE REFERRAL. ***IN INSTANCES WHERE A REFERRAL IS MADE DURING A SCHEDULED SCHOOL VACATION, THE PPT SHALL BE SCHEDULED WITHIN 15 DAYS OF THE FIRST DAY OF SCHOOL FOLLOWING THE VACATION.***

(b) AN INITIAL EVALUATION TO DETERMINE IF A CHILD IS A CHILD WITH A DISABILITY SHALL BE CONDUCTED WITHIN SIXTY DAYS OF THE

[2] We note that this section includes two subsections (c). We refer here to the first subsection (c).

BOARD OF EDUCATION RECEIVING A PARENTAL CONSENT FOR THE EVALUATION EXCEPT AS PROVIDED IN SECTION 10-76d-14 OF THESE REGULATIONS. THIS TIMELINE DOES NOT APPLY IF THE PARENT OF A CHILD REPEATEDLY FAILS OR REFUSES TO PRODUCE THE CHILD FOR THE EVALUATION OR A CHILD ENROLLS IN A SCHOOL OF ANOTHER BOARD OF EDUCATION AFTER THE SIXTY DAY TIMELINE FOR EVALUATION HAS BEGUN AND PRIOR TO A DETERMINATION BY THE CHILD'S PREVIOUS BOARD AS TO WHETHER THE CHILD IS A CHILD WITH A DISABILITY. ***SHOULD THE BOARD OF EDUCATION RECEIVE PARENTAL CONSENT FOR EVALUATION AFTER JUNE 1ST IN ANY GIVEN SCHOOL YEAR, THE BOARD SHALL MAKE REASONABLE EFFORTS TO EVALUATE THE STUDENT BEFORE THE END OF THE SCHOOL YEAR OR DURING THE SUMMER. IF, AFTER REASONABLE EFFORTS HAVE BEEN MADE, THE BOARD IS UNABLE TO EVALUATE A STUDENT DURING THE SUMMER, THE BOARD SHALL REQUEST PERMISSION FROM THE DEPARTMENT FOR AN ADDITIONAL THIRTY DAYS TO COMPLETE THE EVALUATION.***

(c) IF IT IS DETERMINED THAT THE CHILD IS A CHILD WITH A DISABILITY, THE PPT MAY DEVELOP THE IEP AT THE MEETING AT WHICH THE CHILD'S ELIGIBILITY IS DETERMINED AND THE IEP SHALL BE IMPLEMENTED NO LATER THAN 15 DAYS AFTER THIS MEETING EXCLUSIVE OF THE TIME NECESSARY TO SECURE PARENTAL CONSENT FOR THE INITIAL RECEIPT OF SERVICES. IN THE EVENT THE IEP IS NOT WRITTEN AT THE PPT MEETING WHERE ELIGIBILITY IS DETERMINED, A PPT MEETING TO DEVELOP AN IEP SHALL BE CONDUCTED AND THE IEP IMPLEMENTED NO LATER THAN ~~FIFTEEN~~ ***THIRTY*** DAYS AFTER A DETERMINATION THAT THE CHILD IS ELIGIBILE FOR SPECIAL EDUCATION AND RELATED SERVICES EXCLUSIVE OF THE TIME NECESSARY TO SECURE PARENTAL CONSENT FOR THE INITIAL RECEIPT OF SERVICES

11. Regs. Conn. State Agencies § 10-76d-15: Homebound Tutoring

We are entirely in favor of the requirement of a child to produce a doctor's note prior to the board of education being obligated to provide the child with homebound instruction. We suggest, however, that the Regulation specify that the child must first be absent for ten *consecutive* school days. As the revised Regulation currently reads, the child may be eligible for homebound instruction after ten absences, no matter when those absences occur. We do not believe that this was the intention of the Department.

The revised Regulation also permits a physician to authorize homebound instruction when a child will be absent for "short, repeated periods of time during the school year." We believe strongly that this provision requires clarification. Specifically, nowhere in the Regulations are the terms "short" or "repeated" defined. This lack of definition will inevitably cause disagreements among districts, parents and physicians. For example, must the short, repeated absences total ten days before the requirement for instruction is triggered? Is one day per week for one month considered short and repeated, or is one day per week for two weeks sufficient? Who will decide what is sufficient to meet the regulatory language?

Further, while we assume here that homebound instruction for short, repeated absences is required to begin on the eleventh day of absence, we are unclear as to how districts will have notice that such instruction must begin when there is no requirement or guarantee that the short, repeated absences will be planned in advance. We fear that districts will be required to plan and provide homebound tutorial services at the last minute, which is neither practical nor advisable given the need to find appropriate tutors and program for students. Thus, we recommend that the provision for short, repeated absences be eliminated.

With regard to medically complex students, we believe that the Department should include additional language in this section requiring that medical documentation evidencing the child's condition and the need for homebound instruction be provided to the PPT. As written, the revised language would permit a parent to declare his or her child medically fragile with no requirement for documentation from the child's physician. The PPT is often left without a child's medical information; while medical information is not always necessary to program academically for a child, the PPT should be entitled to at least a physician's note explaining the child's medical condition when homebound instruction is requested.

Finally, we appreciate the efforts of the Department to include provisions for the school district to speak to a child's treating physician in the event of a dispute concerning the necessity for homebound instruction, particularly the provision requiring parents to execute the necessary consents required for the school district to obtain the medical information sought. However, the proposed Regulation includes no further provision for dispute resolution in the event that the dispute remains, even after the school district's medical advisor and the child's treating physician have conferred. Provision of homebound instruction takes a child away from the fullness of instruction and from interactions with his/her peers. It is also costly. In certain circumstances, a school district medical advisor may not agree with the treating physician's recommendations for homebound instruction. If the medical professionals are in disagreement, the district should not be obligated to provide homebound instruction despite the disagreement. At a minimum, the board should have an opportunity to

review all relevant records and have the child medically evaluated by an appropriately qualified physician to resolve the dispute concerning the necessity for homebound instruction.

Suggested Language

Revise § 10-76d-15(a)(1) as follows:

(a)(1) A BOARD OF EDUCATION SHALL PROVIDE INSTRUCTION TO A CHILD ENROLLED IN THE PUBLIC SCHOOLS OF SUCH BOARD WHEN SUCH CHILD IS UNABLE TO ATTEND SCHOOL DUE TO A VERIFIED MEDICAL REASON. THE CHILD'S TREATING PHYSICIAN SHALL PROVIDE A STATEMENT IN WRITING DIRECTLY TO THE BOARD OF EDUCATION AND ON A FORM PROVIDED BY THE BOARD OF EDUCATION STATING: (A) THE CHILD'S TREATING PHYSICIAN HAS CONSULTED WITH SCHOOL HEALTH SUPERVISORY PERSONNEL AND HAS DETERMINED THAT ATTENDANCE AT SCHOOL WITH REASONABLE ACCOMMODATIONS IS NOT FEASIBLE; (B) THE CHILD IS, THEREFORE, UNABLE TO ATTEND SCHOOL DUE TO A VERIFIED MEDICAL REASON AND THE CHILD'S DIAGNOSIS WITH SUPPORTING DOCUMENTATION; (C) THE CHILD WILL BE ABSENT FROM SCHOOL FOR AT LEAST TEN *CONSECUTIVE* SCHOOL DAYS ~~OR THE CHILD'S CONDITION IS SUCH THAT THE CHILD MAY BE REQUIRED TO BE ABSENT FORM SCHOOL FOR SHORT, REPEATED PERIODS OF TIME DURING THE SCHOOL YEAR~~; AND (D) THE EXPECTED DATE THE CHILD WILL BE ABLE TO RETURN TO SCHOOL.

Add the following sentence to the end of § 10-76d-15(a)(2):

THE CHILD'S TREATING PHYSICIAN SHALL BE REQUIRED TO PROVIDE A STATEMENT IN WRITING DIRECTLY TO THE PPT PROVIDING THAT (A) THE CHILD'S TREATING PHYSICIAN HAS CONSULTED WITH SCHOOL HEALTH SUPERVISORY PERSONNEL AND HAS DETERMINED THAT ATTENDANCE AT SCHOOL WITH REASONABLE ACCOMMODATIONS IS NOT FEASIBLE; AND (B) THE CHILD IS, THEREFORE, UNABLE TO ATTEND SCHOOL BECAUSE THE CHILD IS MEDICALLY FRAGILE, AS THAT TERM IS DEFINED HERE, AND THE CHILD'S DIAGNOSIS WITH SUPPORTING DOCUMENTATION.

Revise § 10-76d-15(c) to read as follows:

(c) IN THE EVENT THERE IS A DISPUTE REGARDING THE BASIS UPON WHICH THE CHILD'S TREATING PHYSICIAN HAS ASSERTED THE NEED

FOR INSTRUCTION, THE CHILD SHALL RECEIVE INSTRUCTION PENDING REVIEW OF THE DOCUMENTATION PROVIDED BY THE CHILD'S TREATING PHYSICIAN BY THE SCHOOL MEDICAL ADVISOR OR OTHER HEALTH PROFESSIONAL EMPLOYED BY THE BOARD OF EDUCATION WHO IS QUALIFIED TO REVIEW THE INFORMATION SUBMITTED. THE PARENT SHALL BE REQUIRED TO PROVIDE CONSENT FOR THE SCHOOL MEDICAL ADVISOR OR OTHER QUALIFIED HEALTH PROFESSIONAL EMPLOYED BY THE BOARD OF EDUCATION TO SPEAK WITH THE CHILD'S TREATING PHYSICIAN TO ~~CONFIRM~~ ***ASSESS*** THE NEED FOR INSTRUCTION. THE BOARD IS NOT REQUIRED TO BEGIN INSTRUCTION UNTIL SUCH CONSENT IS PROVIDED. CONSULTATION WITH THE CHILD'S TREATING PHYSICIAN SHALL INCLUDE A REVIEW OF EDUCATIONAL AND MEDICAL RECORDS AND, IF APPROPRIATE, ACCOMMODATIONS AND SCHOOL HEALTH SERVICES THAT CAN BE PROVIDED TO THE CHILD FOR THE CHILD TO ATTEND SCHOOL SAFELY. ***IF A DISPUTE STILL EXISTS AFTER THE REVIEW AND CONSULTATION DESCRIBED HEREIN, THE PARENT SHALL MAKE THE CHILD AVAILABLE FOR MEDICAL EVALUATION AT THE REQUEST OF THE SCHOOL DISTRICT.***

12. Regs. Conn. State Agencies § 10-76d-17: Placement in Private Special Education Facilities

Subsection (a)(5) of this section provides that a child with a disability who is placed in a private facility must have access to extracurricular activities and non-academic programs, including graduation exercises, and has the right to receive a regular education diploma, and the last sentence of this section provides that the PPT "shall consider and make arrangements for the child to so participate." While we appreciate the Department's inclusion of language regarding input by the PPT, the language requires clarification. Specifically, the term "consider" implies that the PPT must review and determine the appropriateness of participation in these activities. However, the provision also requires the PPT to "make arrangements" for the child's participation. It appears from this language that even if the PPT does not think it advisable for the child to participate in specific extracurricular and non-academic activities, the PPT must still make arrangements for the child to participate in those activities. Such a requirement disregards the child's unique needs and abilities and gives complete discretion to the child and his or her parents regarding the appropriateness of the child's participation. Additionally, implementation of this mandate would most likely be logistically impossible and cost prohibitive, as it would require extensive additional transportation and staffing by the district. We recommend deleting this provision in its entirety.

Suggested Language

Delete the revision to § 10-76d-17(a)(5) that begins with "including."

13. Regs. Conn. State Agencies § 10-76h-14: Burden of Proof

No changes have been proposed by the Department to this section of the Regulations, which places the burden of proof in due process hearings on the board of education in all cases. However, given the United States Supreme Court's decision in Schaffer v. Weast, 546 U.S. 49 (2005), the Department should amend the burden of proof in Connecticut.

In Schaffer, the United States Supreme Court ruled that, because the IDEA is silent as to which party bears the burden of persuasion in due process hearings, "the burden of persuasion lies where it usually falls, upon the party seeking relief." Id. at 58. The Supreme Court specifically declined to rule on whether a state may "override the default rule and put the burden always on the school district," id. at 61, and thus Connecticut's current regulation is not unlawful. However, amending Connecticut's regulation to place the burden of proof on the party seeking relief, as determined in Schaffer, would allow Connecticut additional federal support with regard to special education decision-making. Connecticut could easily look to other states, the majority of which place the burden of proof on the party seeking relief, for guidance and persuasive law.

Further, we understand that the Department's decision to maintain the current burden of proof stems essentially from two reasons: (1) boards of education control compliance with procedural safeguards; and (2) boards of education control the development of an appropriate program that confers meaningful benefit to the student. While we do not dispute the boards' control over these elements, we must point out that these reasons exist in the federal IDEA, yet neither the United States Supreme Court nor Congress has decided that these two reasons warrant placing the burden of proof on boards of education in all cases.

Additionally, the manner in which hearings proceed in Connecticut essentially sets up a presumption that a program is not appropriate, without any such presumption being written into the law or being included in the law's legislative history. Specifically, parents have the burden of production in hearings and are thus required to present their cases first. Thus, hearing officers are left to hear the alleged inappropriateness of a program before they hear the point of view of the board, which has the burden of proof. This leads to long, inefficient hearings.

Suggested Change

Revise § 10-76h-14(a) to read as follows:

THE PARTY WHO FILED FOR DUE PROCESS HAS THE BURDEN OF GOING FORWARD WITH THE EVIDENCE~~. IN ALL CASES, HOWEVER, THE PUBLIC AGENCY HAS~~ ***AND*** THE BURDEN OF PROVING THE APPROPRIATENESS***, OR INAPPROPRIATENESS,*** OF THE CHILD'S PROGRAM OR PLACEMENT, OR OF THE PROGRAM OR PLACEMENT PROPOSED BY THE PUBLIC AGENCY. THIS BURDEN SHALL BE MET BY A PREPONDERANCE OF THE EVIDENCE, EXCEPT FOR HEARINGS CONDUCTED PURSUANT TO 34 CFR SECTION 300.521.

We appreciate the opportunity to comment and hope you find these comments and suggestions helpful in the finalization of the Special Education Regulations.

Very truly yours,

Shipman & Goodwin LLP
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September 22, 2010

VIA FACSIMILE AND ELECTRONIC MAIL

Theresa DeFrancis, Esq.
Connecticut State Department of Education
P.O. Box 2219
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Re: Additional Comment on Proposed Revision to the State Special Education Regulations

Dear Attorney DeFrancis:

On September 14, 2010, Susan Freedman submitted comments on the proposed revisions to the State Special Education Regulations ("Regulations") on behalf of the School Law Practice Group at Shipman & Goodwin, LLP. We write again to provide an additional comment relating to homebound tutoring, Regs. Conn. State Agencies § 10-76d-15.

With regard to subsection (e) of § 10-76d-15, we agree entirely with the Department's decision to specify that the homebound tutoring shall "maintain the continuity of the child's general education program." However, we strongly believe that this subsection should be made even more specific, so as to provide that the district is responsible for tutoring only in the core academic subjects required for graduation or advancement in the district of residence.

Magnet schools and other specialized programs have become far more prevalent in our state within the last several years. Many students elect to take advantage of the opportunities provided by these schools, which opportunities include technology, foreign language (such as Japanese and Arabic), and engineering, among others. The teachers in these schools have highly specialized degrees and many have come from the

business community prior to teaching. Requiring the district of residence to maintain this highly specialized level of education during homebound tutoring is unreasonable and unrealistic. The district of residence, which does not offer instruction in the magnet school specialty areas, will not likely have access to the tutors needed to maintain the continuity of the specialized classes. Further, any requirement to contract with these specialists would prove costly for the district of residence. Thus, we recommend revising this subsection to add that tutoring is required only in core academic subjects required by the district of residence for promotion or graduation.

Suggested Change

(e) INSTRUCTION PROVIDED PURSUANT TO THE PROVISIONS OF THIS SECTION SHALL MAINTAIN THE CONTINUITY OF THE CHILD'S GENERAL EDUCATION PROGRAM ***IN THE CORE ACADEMIC SUBJECT AREAS REQUIRED BY THE CHILD'S DISTRICT OF RESIDENCE FOR PROMOTION OR GRADUATION*** AND, IN THE CASE OF A CHILD WITH A DISABILITY, SHALL BE PROVIDED SO AS TO ENABLE THE CHILD TO CONTINUE TO PARTICIPATE IN THE GENERAL EDUCATION CURRICULUM AND TO PROGRESS TOWARDS MEETING THE GOALS AND OBJECTIVES IN THE CHILD'S IEP.

We appreciate this opportunity and hope you find this additional comment helpful in the finalization of the Special Education Regulations.

Very truly yours,

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