



Office of The Attorney General
State of Connecticut

October 6, 2010

The Honorable Mary Ann Handley
The Honorable Roberta Willis
Co-Chairs, Higher Education and Employment
Advancement Committee
Legislative Office Building, Room 1800
Hartford, CT 06106-1591

Dear Senator Handley and Representative Willis:

By letter dated June 3, 2010, you asked this office to review whether Chancellor David Carter of the Connecticut State University System ("CSUS") had the authority to remove Southern Connecticut State University President Cheryl Norton without a vote of the CSUS Board of Trustees ("Board") under state law, specifically Conn. Gen. Stat. §§ 10a-20, 10a-89 or 10a-149, or any provision of the Human Resources Policies for the CSUS and University Presidents ("CSUS Policies" or "HR Policies").

You also asked whether the delegation of the authority of the trustees to its chairman to approve the non-continuation of a university president violated these provisions and whether the process by which the CSUS Policies were revised in October 2009 complied with state law.¹

Based on our review of the relevant state statutes and the factual information provided to this office we reach the following conclusions:

- In 2007, the eighteen member CSUS Board of Trustees authorized its eight member Executive Committee to amend its Human Resources Policies, without requiring final approval of such amendments by the Board. The Board of Trustees does not appear to have the statutory authority to delegate to an Executive Committee its power to approve policies governing the Connecticut State University System. According to state statutes, approval of all CSUS policies is the responsibility of the full Board of Trustees.²

¹ You also requested certain personnel documents. The Attorney General's Office is not in possession of the documents requested and respectfully suggests that such request be made to the CSUS System and Board of Trustees.

² As part of my review, Attorney General staff discussed these issues with Chancellor Carter. On September 23, 2010, The Board of Trustees adopted a resolution addressing this issue. I appreciate the quick response and anticipate the Board expeditiously addressing the other concerns raised in this report.

- In 2009, the Executive Committee amended the Board’s Human Resources Policies to authorize the Chancellor, instead of the full Board, to non-continue university presidents. The 2009 policy was not approved by the full Board because of the Board’s 2007 delegation of authority over HR Policies to the Executive Committee. The Executive Committee did not have the legal authority to delegate to the Chancellor the statutory responsibility of the Board of Trustees to govern the State University System and non-continue university presidents. The legislature may wish to consider a statutory revision to make explicit what is implicit in existing law: a vote of the full Board of Trustees is necessary before a university president is subjected to non-continuance.
- Despite the legally questionable delegations of authority made by the Board and the Board’s Executive Committee, President Norton resigned from her position. While the Board of Trustees had the statutory authority to non-continue President Norton, the board was not required to exercise that power because of her resignation.
- The Board should specifically vote to ratify all decisions made by the Executive Committee with which the Board agrees and which have not been affirmatively approved by a vote of the full Board.³

1. Background

On January 26, 2007, the eighteen member Board of Trustees issued Board Resolution # 07-7 which approved a revision to the Human Resources Policies to authorize the Executive Committee to review those policies for the CSUS Chancellor and University Presidents annually and “to make adjustments necessary to these policies that facilitate the effective, efficient, and optimum operation of the Connecticut State University System.” The Board also resolved to “authorize the Executive Committee of the Board to approve amendments to such policy as may be necessary from time to time.” Under Board Resolution #07-7, only Executive Committee approval of policy revisions is necessary to implement such new policies and the vote of the full Board is not required.

The Executive Committee consists of the Chair of the Board, the officers of the Board, the Standing Committee Chairs and, at the discretion of the Board Chair, two members-at-Large appointed by the Chair of the Board. The officers of the Board are the Chair, the Vice-Chair, and the Secretary. The Standing Committees of the Board are as follows: Academic Affairs,

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Audit and Risk Management, Development, Finance and Administration, Student Life, and such additional committees as may be authorized by the Board Chair from time to time for purposes of efficient operations. As a result, the Executive Committee has a minimum of eight members.

By virtue of Board Resolution #07-7, an eight member Committee of the Board can change policies the full eighteen member Board has adopted.

The Human Resources Policies for the CSU Chancellor and University Presidents of the Connecticut State University System adopted by the Board of Trustees on July 22, 2005 provided that university presidents could be non-continued by the full Board of Trustees. The relevant provision stated as follows:

Each President of a university within the CSU System is appointed by the Board and serves at the pleasure of the Board. He or she may be non-continued by the Board without cause or explanation upon a one-year written notice and without recourse to the procedures of Section 10.5.⁴ A President may also be terminated by the Board pursuant to Section 10.5. With concurrence of the Executive Committee of the Board and the Chairperson of the Board or, when the Chairperson is unavailable, with the concurrence of the Vice Chairperson, the Chancellor may suspend a President with or without pay. In such a case, the Chancellor shall appoint an Acting President.

On October 1, 2009, the Executive Committee changed this Human Resources policy -- Section 10.2 -- to allow the Chancellor to non-continue campus presidents without a vote by the Board. The amended policy reads as follows:

Each President of a university within the CSU System is appointed by the Board, supervised by the Chancellor, and serves at the pleasure of the Board. He or she may be non-continued by the Chancellor without cause or explanation and without recourse to the procedures of Article 10. Prior to notifying the President of his/her non-continuation, the Chancellor shall notify the Chairman of the Board of his/her intended action and shall receive the Chairman's concurrence of said action. An employee hired prior to December 8, 2006, may be non-continued upon a one-year written notice, and an employee hired on or after December 8,

⁴ Section 10.5 sets forth the hearing procedures applicable to dismissal for cause and/or suspension of the Chancellor or the presidents, but is specifically not applicable to non-continuation. The procedures allow for a formal hearing before a Committee of three Board members appointed by the Chairperson of the Board. The decision of the Committee is final without any right of appeal.

2006, may be non-continued upon a three-month written notice. In cases where a President is to be non-continued by the Chancellor, the Chancellor shall report such action to the Executive Committee following notification being provided to the President. At the next meeting of the Board of Trustees, the Board may overturn the non-continuation by a majority vote of those in attendance and voting at the Board meeting. If no action is taken at the next Board meeting to overturn the Chancellor's action, the non-continuation shall be implemented as noticed to the Executive Committee and President above. A President may also be terminated by the Board pursuant to Article 10.5. With concurrence of the Executive Committee of the Board and the Chairperson of the Board or, when the Chairperson is unavailable, with the concurrence of the Vice Chairperson, the Chancellor may suspend a President with or without pay. In such case, the Chancellor shall appoint an Acting President.

This new policy, Section 10.2 of the Human Resources Policies, was adopted unanimously by the Executive Committee on October 1, 2009. The new policy allowed the Chancellor to non-continue a president with notice to the Chairman of the Board and the Executive Committee. Effectively, under this new policy, non-continuance of presidents was no longer an affirmative function of the Board of Trustees and a Board vote on non-continuance was no longer required. Instead, the Board of Trustees was given the opportunity to disagree with the non-continuance by voting to overturn the Chancellor's decision at the Board's next meeting. A failure to vote by the Board rendered the Chancellor's non-continuance decision final. The Board was notified of this change in policy at its October 8, 2009 meeting, but did not vote on the change.

Pursuant to this new policy, on November 17, 2009, Chancellor Carter notified President Norton that she would be removed as President, effective December 1, 2010. We have been informed that at the time of this notification of non-continuation, President Norton was offered a separation agreement and the option to resign rather than be non-continued.

Documents provided to us indicate that on December 3, 2009,⁵ the Executive Committee discussed President Norton's non-continuation. Under the new policy, the Board of Trustees had the option to overturn the chancellor's decision by majority vote at its next regular meeting on December 10, 2009. President Norton signed a separation agreement on December 9, 2009.

⁵ Documents provided to us include, among other things, the June 4, 2010 letter from BOT Chairman Krapek and Vice-Chairman Balducci to which was attached a Clarification Summary. This Summary had been submitted to the Higher Education Committee in response to the Office of Legislative Research report issued on May 20, 2010 that was provided to legislators attending the Informational Forum organized by the Committee on Higher Education and Employment Advancement on May 26, 2010, along with Exhibits A through I to the June 4th letter.

The agenda for the Board's December 10, 2009 meeting contained an item noted as "Possible Management Personnel issue," but this item was removed from the agenda during that meeting and never discussed by the Board. Meeting minutes state that the item "was no longer a matter before the Board." The December 10th meeting was the only opportunity for the Board of Trustees to review the Chancellor's actions under the new Human Resources Policy. Because President Norton signed a separation agreement, no Board review took place and President Norton's departure became final.

The separation agreement called for Dr. Norton to "file with the Office of the Chancellor of the System a letter of resignation for the purposes of retirement by Friday, December 11, 2009." President Norton submitted her resignation letter to Chancellor Carter that date, effective May 31, 2011. On April 8, 2010, the Board approved President Norton's administrative leave from June 1, 2010 through November 30, 2010, and sabbatical leave from December 1, 2010 through May 31, 2011. Because this sabbatical leave concludes on President Norton's announced retirement date, the return requirement at the conclusion of her leave was waived pursuant to applicable human resources policies. Upon the completion of her leave on May 31, 2011, President Norton will be officially retired from CSUS and the University.

2. Human Resources Policy Revisions Must be the Responsibility of the Full Board of Trustees.

Board Resolution # 07-7, passed by majority vote of the Board on January 26, 2007, delegated to the Executive Committee the power to to amend HR Policies without subsequent Board confirmation.

According to the Board of Trustees' Clarification Summary, every Board member receives copies of the agendas and minutes of every Board committee meeting and the Executive Committee has always notified the Board of changes to the HR Policies the Committee has adopted. However, Resolution 07-7 contains no requirement for such notice, nor is there provision for subsequent approval of the Executive Committee amendments or revisions by the Board of Trustees.

Board Resolution #07-7's broad delegation of authority to the Executive Committee appears to be contrary to the Board's statutory authority. Conn. Gen. Stat. § 10a-20, entitled "Jurisdiction over professional staffs of the state system of higher education. Personnel guidelines," provides as follows:

Notwithstanding the provision of any general statute or special act to the contrary, the selection, appointment, assignment of duties, amount of compensation, sick leave, vacation, leaves of absence, termination of service, rank and status of the individual members of the respective professional staffs of the system of higher education shall be under the sole jurisdiction of the respective

boards of trustees within available funds. The Board of Governors of Higher Education shall, in consultation with the Boards of Trustees of the Community-Technical Colleges and the Connecticut State University System and the Board for State Academic Awards, develop personnel guidelines for the central office staffs of said boards of trustees.⁶ The Board of Governors of Higher Education and the constituent unit boards shall each determine who constitutes the professional staffs of their respective units and establish compensation and classification schedules for their professional staffs. Each constituent board shall annually submit to the Commissioner of Administrative Services a list of the positions which it has included within the professional staff.

The specific powers and duties of the Board of Trustees are prescribed in Sections 10a-87 through 10a-101 and Sections 10a-149 through 10a-156a of the Connecticut General Statutes. Conn. Gen. Stat. § 10a-89(a) provides that the Board of Trustees shall, among other things: “(1) Make rules for the government of the Connecticut State University System and shall determine the general policies of the university system... (3) establish policies of the university system and for the individual institutions under its jurisdiction.” With respect to the presidents of the universities, Conn. Gen. Stat. § 10a-89(a) provides: “The board of trustees may appoint or remove the chief executive officer of each institution within its jurisdiction, and with respect to its own operation the board of trustees may appoint and remove a chancellor and executive staff.” The statutes appear to make the Board of Trustees solely responsible for adopting policies governing the State University System, including those policies for non-continuing a university president.

These duties are virtually identical to those of the Board of Trustees of the University of Connecticut proscribed in Conn. Gen. Stat. 10a-104(a). As to those duties, we opined “that the Legislature evidenced an intent therein to clothe the Board of Trustees of the University of Connecticut with sole jurisdiction over the affairs of the University in all phases. Section 3274 [the predecessor to Conn. Gen. Stat. §10a-104] grants the Board of Trustees authority to make regulations for the government of the University, power to determine the general policies thereof, and to direct the expenditures of the University’s funds.” 29 Conn. Op. Atty Gen. 125 (11/21/55). “In essence, the Board of Trustees governs all aspects of the college within its domain.” 2000 Conn. AG LEXIS 3 (3/8/00).

⁶ We understand that there are no separate personnel guidelines established by the Board of Governors governing the firing or non-continuance of a president.

In Connecticut State Employees Ass'n v. Board of Trustees of the University of Connecticut, 165 Conn. 757, 781 (1974), our Supreme Court observed that the general statutory powers of the Board of Trustees of the University of Connecticut contained in Conn. Gen. Stat. § 10-119 (now § 10a-104), are “stated in the broadest possible terms, evidencing an obvious intent to clothe the board of trustees with sole jurisdiction over the University in all phases.”

Section 1-1 of the General Statutes provides that “[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language.” State v. Benson, 153 Conn. 209, 214, 214 A.2d 903. Webster’s Third New International Dictionary defines “government as “the act or process of governing: authoritative direction or control.” “Policy” is defined as “a definite course or method of action selected (as by a government,...) from among alternatives....” “Direct” is a synonym of “administer” and is defined to mean “to guide and supervise: to carry out the organizing, energizing and supervising of, especially in an authoritative capacity.”

Id. at 761-62.

In an opinion to the trustees of the Connecticut Agricultural College, we stated that they could not delegate to the Secretary the power to certify for them the expenditures of monies by certain organizations under the Smith-Lever Act of 1914, 38 Stat. 372, 7 U.S.C. §341 et seq., as amended by Public Law 107-293: “[i]t is a fundamental principle of law that where powers are delegated to an administrative body requiring the judgment of its members of the existence or non-existence of a certain state of facts, that such body must be the sole judge of the facts upon which their judgment is based, and any powers delegated to it cannot be delegated to anybody else.” 11 Conn. Op. Atty. Gen. 77 (1/8/20). Moreover, “a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. An enumeration of powers in a statute is uniformly held to prohibit the things not enumerated.” Id. See also 1983 Conn. AG. LEXIS 116 (10/3/83)(“As a state agency the Board of Trustees has only those powers which are conferred by statute.”); 1982 Conn. AG LEXIS 21 (4/7/82)(“The Board of Trustees of the State Colleges has only such statutory authority as has been specifically granted it by the general assembly or by necessary implication. Executive and administrative officers, boards, departments, and commissions have no powers beyond those granted by express provision or necessary implication.”)(citing 30 Conn. Op. Atty. Gen. 128).⁷

⁷ See also Faculty of the City University of New York Law School at Queens College v. LaRue, 149 A.D.2d 315, 539 N.Y.S2d 367, 1989 N.Y. App. Div. LEXIS 4387(1989)(Under New York State Education law § 6206(7), the CUNY Board of Trustees has the exclusive, nondelegable power to grant tenure. Chancellor is without authority to deny tenure by refusing to forward applications which have been favorably recommended to the Board of Trustees); Matter of Rodriguez-Abad v. Kibee, 71 A.D.2d 588 (1st Dept 1979)(impermissible delegation of duties to Chancellor was void as against public policy); Federated Publications, Inc. v. Board of Trustees of Michigan State

Therefore, under state law, it does not appear that the Board had the authority to adopt Board Resolution #07-7 delegating to a subset of the Board of Trustees -- the Executive Committee -- the Board's power to amend the University System's policies without approval of such amendments by the full Board. While the minutes of the Board meeting of October 8, 2009, indicate that the revision to Section 10.2 of the Policies by the Executive Committee was reported to the full Board by the Chairman, no questions were raised on this matter. In addition, the Chairman advised all present at the October 8th Board meeting that a CD containing a full copy of the updated policy was provided to each Board member and university president. The updated policy was also posted on the CSUS website, although the date of posting is unknown to us. However, amendments to HR Policy Section 10.2 made by the Executive Committee were not voted on by the Board of Trustees at the October 8, 2009 meeting, nor at any other time.

Because the Board did not have the authority to delegate its statutory duties to the Executive Committee through Board Resolution #07-7, the Executive Committee did not have the authority to revise Section 10.2 of the HR Policies without a vote by the full Board approving such revisions.

3. Decisions to Remove a University President Are the Responsibility of the Full Board of Trustees.

The new HR policy provides that a university president may be non-continued by the Chancellor after the Chancellor reports such action to the Chairman of the Board and the Executive Committee, but not to the Board, further removing the Board from the exercise of its statutory responsibilities. The Board, however, did not have the authority -- even if the full Board had approved the Executive Committee's 2009 revisions to section 10.2 -- to delegate its authority to non-continue university presidents to the Chancellor, as section 10.2 attempts to do. Non-continuing a university president is solely the responsibility of the Board and it cannot be delegated to any other entity or official. Conn. Gen. Stat. §10a-89(a).

This apparent improper delegation of authority is not saved because Section 10.2 allows the Board of Trustees to overturn the non-continuation at a subsequent Board meeting. Section

University, 221 Mich. App. 103, 561 N.W.2d 433, 1997 Mich. App. LEXIS 9 (1997)(Board cannot delegate ultimate authority to select a president to another body or person); Blanchard v. Lansing Community College, 142 Mich. App. 446, 370 N.W.2d 23, 1985 Mich. App. LEXIS 2720 (1985)(authority to discharge faculty members was expressly committed to the discretion of the board by statute and could not be delegated to a subordinate or representative; authorization in statute for board to appoint an administrator to perform "such duties as the board may determine" merely permits board to assign the administrator ministerial duties. The statutory language does not indicate a legislative intent to permit the board to delegate to the administrator powers expressly committed to the board's discretion.); Sittler v. Board of Control of the Michigan College of Mining and Technology, 333 Mich. 681, 53 N.W.2d 681, 1952 Mich. LEXIS 526 (1952)(Board of Supervisors cannot delegate such powers as the law requires to be submitted to their corporate discretion and judgment to some subordinate or representative of the board. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.).

10.2 does not require the full Board to vote on a non-continuation. Instead, Board silence makes the Chancellor's decision final. Such a procedure is inconsistent with state statutes which make the Board affirmatively responsible for non-continuation decisions. These statutory requirements cannot be fulfilled by Board inaction.

The Clarification Summary states: "After the notification of non-continuation is communicated to the president, the eight-member Executive Committee of the Board of Trustees is notified, in accordance with Board policy, by their next meeting... The next step in the process, according to Board policy, is for the full Board to discuss action on a pending non-continuation if it chooses to do so. The Board could vote to overturn a non-continuance." The Clarification Summary appears to state that non-continuation of a university president can be approved by the Board's silence on the matter. As stated above, such "silent ratification" is not in accord with the Board's statutory responsibilities.⁸ Only the Board has the authority to non-continue university presidents and Board policy must require a Board vote on such non-continuation decisions, rather than silence.

Section 10.2 states that the non-continuance will be implemented if no board action takes place at the next Board of Trustees meeting to overturn the Chancellor's action. That section fails to provide notice to the university president of the right to appeal to the Board or seek Board action. The Clarification Summary does state, however, that "no formal action of the Board of Trustees is necessary if written communication is received prior to the Board meeting indicating that a president is resigning or retiring. If such written communication is not received, the full Board, in Executive Session, is provided with the details of the matter for their consideration as to whether or not to vote to overturn the non-continuation. In further compliance with state statutes, the university president must be offered the opportunity to be present and, if he/she desires, to request the meeting be conducted in open session."⁹ While the clarification summary attempts to justify the delegation in Section 10.2 by providing an opportunity for a hearing, in practice it appears that the only way the Board retains authority over a non-continuance of a President is if the President pursues an appeal to the Board. In all other cases, the authority is

⁸ In certain particular circumstances, dependent on the facts of individual cases, a Board may ratify an action of its agent without an affirmative vote. Fisher v. First Stamford Bank and Trust Co., 751 F.2d 519, 522 (2d Cir. 1984). For instance, if a board acquires or is charged with knowledge of an unauthorized act undertaken by someone on its behalf and does not repudiate that act within a reasonable time, but instead acquiesces in it, the board is bound by the act and is deemed to have ratified it. Community Collaborative of Bridgeport, Inc. v. Ganim, 241 Conn. 546, 698 A.2d 245 (1997), Hudson United Bank v. Cinnamon Ridge Corp., 81 Conn. App. 557, 845 A.2d 417 (2004). It is imprudent to rely on "silent ratification" as a general basis for implementing university policies and personnel decisions.

⁹ Nothing in the minutes of the Board of Trustees meeting of December 9, 2009, indicates that this matter was reported to the full Board by the Committee Chairperson. Rather, it was taken off the agenda. In fact, there is no mention of President Norton in the Board minutes until the Board's meeting of April 8, 2010, when it approved President Norton's administrative/sabbatical leave.

vested in the Chancellor, with the concurrence of the Chairman of the Board.¹⁰ This practice and procedure appear to be contrary to the Board's statutory authority.

To avoid possible legal questions associated with the Executive Committee's actions taken pursuant to Board Resolution #07-7, the Board should review all decisions made by the Executive Committee which the Board has not affirmatively approved by a vote of the full Board. The Board should specifically vote to ratify those Executive Committee decisions with which it agrees.

4. President Norton's Resignation Made Action by the Board Unnecessary

Although the Board's delegation of authority to the Executive Committee to amend its Human Resources Policies and the Executive Committee's delegation of the Board's authority to the Chancellor to non-continue university presidents appears to have exceeded the authority set forth in state statutes, it was unnecessary for the Board to take action under these policies with regard to President Norton. Because she resigned, the Board was not required to vote on any possible non-continuance. Nevertheless, state statutes should be revised to make explicit what is implicit in existing law: a vote of the Board of Trustees itself is necessary before a university president is subjected to non continuance.

Conclusion

While Chancellor Carter may have acted in accordance with the Executive Committee's revised policy, the decision to non-continue President Norton without a vote of the Board and the delegation of the Board's duties to the Chancellor and the Chairman without Board approval appear to have been without legal authority.

¹⁰An "appointing authority", as that term is used in Conn. Gen. Stat. 5-240(c), is defined in section 5-196 as "a board, commission, officer, commissioner, person or group of persons having the power to make appointments by virtue of a statute or by lawfully delegated authority." "From this it follows that a person holding lawfully delegated authority may properly be empowered to appoint and dismiss." Tomlin v. Personnel Appeal Board, 177 Conn. 344, 347 (1979). It should be noted that "[t]he resignation of a public officer does not become effective until it is presented to the proper authority, and accepted by it. In the absence of a specific regulation to the contrary, the proper authority to accept a resignation is that which has the power to fill the vacancy." 28 Conn. Op. Atty. Gen. 168 (4/2/54). See also 21 Conn. Op. Atty. Gen. 355 (8/8/39). See generally 63C Am Jur 2d Public Officers and Employees § 154 (2009)("In the absence of a statutory direction, a public officer should tender his or her resignation to the tribunal having authority to appoint a successor."). Pursuant to Conn. Gen. Stat. § 10a-89(a), the Board is charged with the appointment of the President of each constituent university. See also Article IV, § 1 of the BOT Bylaws "Appointing Authority." No vote was taken by the Board to non-continue President Norton. The only affirmative approval noted in the Board minutes was the approval of Dr. Norton's administrative/sabbatic leave request on April 8, 2010.

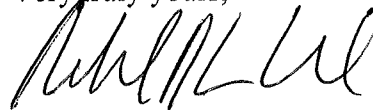
We note that the new policy adopted by the Executive Committee attempted to provide the Chancellor a level of authority that is uncommon in most states, according to a report issued by the State Office of Legislative Research in May 2010. That report indicates that most university systems require action by a board of trustees or governor in order to dismiss a president, and only four of thirty-five university systems reviewed had policies similar to that of CSUS. In many systems, board policy simply states that the presidents serve at the pleasure of the board. Additionally, one university system allows the chancellor, in consultation with the board chair, to remove a president. However, the removal must be for cause, and the president has the right to appeal. Another university system has a similar policy, but does not require approval of the board chair.

We understand that in a January 22, 2010, letter to Southern Connecticut State University Faculty Senate President Brian Johnson, Board of Trustees Chairman Karl Krapek stated that the purpose of the revised policy is to handle such matters discreetly without a board vote “for the noble purpose of protecting the privacy of a president in such a situation and to serve the mutual best interests of both the individual employee (president) and the greater university as a whole.” However, the law already honors these concerns by allowing personnel matters to be discussed in executive session unless the subject individual exercises the opportunity to require that the matter be discussed in public.

We recommend that the Board’s policies be reviewed to ensure that the Board completely and directly exercises the powers given to it by the legislature.

We trust the foregoing responds to your concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Richard Blumenthal', written in a cursive style.

RICHARD BLUMENTHAL

cc: The Honorable Ed Meyer, State Senator