

Testimony of Attorney Andrew A. Feinstein
On RB 6501
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My name is Andrew Feinstein and I am an attorney in Mystic who represents children with disabilities and their parents in seeking free appropriate public educations. I attend Planning and Placement Team meetings with parents, I negotiate in mediation sessions, and I bring due process hearings. As such, I am well aware of how the special education process works in practice, as well as in statute.

Simply put, a child who has a disability that interfere with his/her ability to access the educational curriculum effectively is entitled to special education and related services. The federal law identifies thirteen different disabilities, but the most common one is a specific learning disability. The statute defines a specific learning disability as “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 USC 1401 (30). The statute contains two other special rules on eligibility. In 20 USC 1414(b)(5), the law states “a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of appropriate instruction in reading ... math ... [or] limited English proficiency.” Then, as to specific learning disabilities, 20 USC 1414(b)(6)(B) states “In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.”

The Connecticut State Department of Education (CSDE) has embarked on its own Response to Intervention program, as initially mandated in the No Child Left Behind legislation, known as the Scientific Research-Based Initiative (SRBI). CSDE has taken narrow, permissive language, related to early elementary school students and to reading alone and has expanded it in SRBI to cover reading, writing, math, and social and emotional behavior. The SRBI program is complicated, time-consuming and expensive. It requires classroom teachers to maintain, analyze and present a substantial amount of data on each child. Based on that data, children are funneled into increasingly intense levels of instruction when they fail to make adequate grade level progress in the regular classroom. Interventions are supposed to be research-based, but the scientific basis is rarely evident in practice. In concept, the SRBI program has a great deal to recommend it.

CSDE issued Guidelines for determining eligibility for special education based on a specific learning disability last spring. The Guidelines rely on SRBI as the first screen to determine which students need intensive interventions and to mandate that districts provide those interventions. Essentially, the Guidelines state that a student cannot qualify for special education designation, and the legal protections, added interventions, and accountability that come with a special education designation, until and unless the student fails to make progress throughout the entire SRBI program. In three fundamental ways, this reliance is misplaced.

First, it will take the average student a year or two to go through all the tiers of support under the SRBI program. Only then will the student be designated as eligible for special education. The educational research is clear that, for students with learning disabilities, early intense intervention is the best and, at times, the only way for the student to learn to read competently. By delaying special education designation for a year or two, we may well be sacrificing the student's long-term literacy.

Second, the special education program requires a high level of parental participation. The SRBI program has no requirement for parental participation. The way SRBI has been implemented in most districts to date affords no role for parents. This is unfortunate. Parents often know their children best and can add a great deal to the educational planning for their child. Moreover, any effective learning program at the lower grades requires a significant home component. By cutting parents out of the SRBI program, districts are insuring that the program is far less successful than it could be.

Third, the Guidelines state that, if the child fails to make grade-level progress because the district had an inadequate SRBI program, the child cannot qualify for special education designation. So, the draft Guidelines sentence children with learning disabilities in the weakest schools to double punishment: no effective SRBI and no special education services. This is a violation of child find, directly contrary to the intent of both Connecticut and federal special education law, and inconsistent with the language of the IDEA. More fundamentally, this policy is immoral.

There is nothing whatsoever in the IDEA to support this exclusion. The federal statute does not sanction the policy of refusing to designate a student as eligible based on a failed Response to Intervention program. Section 20 U.S.C. §1414(b)(6)(B) provides that SRBI may be used as one factor in determining eligibility, not as a way to delay eligibility. The ability to use response to SRBI as one factor in determining eligibility is radically different from saying that a child who has been victimized once by poor implementation of SRBI by a school district cannot be said to be learning disabled.

Note that, however sound the SRBI program is in theory, SRBI has been weakly executed in a significant number of Connecticut schools. SRBI is an intensively data-driven program requiring weekly and, at times, daily data collection, data maintenance, analysis, and presentation. A teacher with twenty or twenty-five children in the classroom does not have the time to implement the SRBI program with fidelity. Yet, many districts do not routinely provide aides. Where there are aides, they are often poorly trained. More to the point, the State is not providing any additional funding to districts to implement SRBI. SRBI also imposes a large change in the way education is provided and necessitates a change in the culture of schools. Cultural changes take time and tremendous encouragement. And, the State is doing very little training of administrators, teachers, and aides to administer the SRBI program. The program is complicated. Determining what data to collect and how to analyze it is difficult. Establishing a serious SRBI program in all the school districts in Connecticut is a time-consuming and very expensive proposition. As the United States Department of Education advised, in its letter of July 27, 2007, it is unwise to require the use of an RTI process for purposes of special education

designation until the program has been successfully scaled up, in an incremental manner, over time.

When I wrote Commissioner McQuillen on April 13, 2010 concerning this, he responded saying that I had misread the Guidelines. He wrote, "If there is any question or suspicion that a child may have a learning disability, a comprehensive evaluation must be performed even if the child did not receive appropriate instruction or the district did not provide appropriate interventions through their SRBI process. In addition, as specified in IDEA 2004, families and school personnel always have the right to refer a student for consideration of eligibility for special education services by requesting an evaluation at any time, including prior or during the SRBI process. The PPT must respond to all referrals by holding a PPT meeting to determine whether a comprehensive evaluation is warranted." These reassuring words are contradicted by the language of the Guidelines, which require that the PPT should, prior to any evaluation, ask, "Are there additional general education strategies and interventions that should be in place and tried before a comprehensive evaluation is considered?" Guidelines, page 24. The effect of this language on school districts has been to give them license to say no to evaluations because the child has not been through the entire SRBI process.

CSDE's publications are ambivalent on the issue of using SRBI for delay. CSDE acknowledges that SRBI should not delay a referral to special education, yet apparently contradicts itself on page 30 of the *2010 Guidelines for Identifying a Child with a Specific Learning Disability* by listing as an eligibility criteria, "The child does not make sufficient progress to meet age or state approved grade level standards ... when using a process based on the child's response to scientific research-based intervention." CSDE is trying to have it both ways. In doing so, CSDE licenses local school boards to pick which approach they want to use. To save money, local school districts opt to delay special education evaluation and special education designation until the end of the SRBI process, that is, the option that damages the child with a disability.

The Connecticut Special Education State Advisory Committee's (SAC) 2010 Annual Report reported, "We also heard from Council members that some districts in the state are denying services to special education students in the name of SRBI. One cited example was a student who was exited from special education because all the tiers of interventions in SRBI had not been completed prior to the student being referred to special education." Indeed, the federal Office of Special Education Programs (OSEP) issued a memorandum on January 21 of this year acknowledging that RTI strategies were being used to delay or deny a comprehensive evaluation and warned that this practice was inconsistent with IDEA.

The bill under consideration, RB 6501 simply fails to address this central issue. While it reaffirms the need for a prompt evaluation, it does not preclude school districts from delaying eligibility determinations until after the completion of a lengthy SRBI process. Indeed, it authorizes parents to consent to delay, an authority which is nowhere found in federal law. And it adds language about the local school board suspecting a disability, seemingly eliminating the right of a parent to initiate a referral. The bill needs to be revised to state that a local school

board cannot use the SRBI process to delay an evaluation or a determination of eligibility of a student.

This legislation is needed even in light of the OSEP memorandum of January 21. A Connecticut law speaks far more loudly and dispositively than does an OSEP memorandum. Violations of a Connecticut law are a clear violation of FAPE, while violation of an OSEP memorandum is not. More importantly, the Connecticut State Department of Education has issued internally contradictory policy. As the oversight body, the Legislature is obliged to remedy this.

Thank you for your consideration of this issue.