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November 5, 2010

The Honorable Dan Malloy
Governor-Elect
State of Connecticut
2074 Park Street, Suite 21
Hartford, Connecticut 06106

By Facsimile (860-570-1195), E-mail, and First Class Mail

Dear Mr. Governor-Elect:

I write as an attorney who devotes his entire practice to representing children with disabilities in seeking appropriate educational services. I congratulate you on your election. Those in the special education community should be especially proud to have a Governor who is a former special education student himself. You are living proof that our efforts on behalf of children with disabilities pay off for all the citizens of Connecticut.

I write to ask that you intervene to reverse the misguided policies of the State Department of Education (SDE) in the area of designation of children as eligible for special education services on the basis of a specific learning disability. A little background is necessary. When Congress passed No Child Left Behind in 2001, it included requirements that scientific research based interventions be utilized as part of the Reading First program, established in 20 USC §6361 et. seq. This language was subsequently incorporated in the Individuals with Disabilities Education Act (IDEA) when it was reauthorized in 2004 in 20 USC §1414(b)(6), which provided, "In determining whether a child has a specific learning disability, a local education agency may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures describe in paragraphs (2) and (3)."

The State Department of Education (SDE) has taken this narrow, permissive language, related to reading alone and supported by academic research only for children in early elementary grades, and has expanded it to create a Connecticut Scientific Research Based Initiative¹ (SRBI) program covering reading, writing, math, and social and emotional behavior

¹ The use of the term "scientific research based" is misleading. What research has been done relates to cadres of students and the effect of interventions on the average student in that cadre. There is virtually no research base for the effect of actual interventions on individual children.

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and equally applicable in high school and middle school as it is in elementary school. The SRBI program is highly controversial. On the positive side, it requires individualized, data-based education for all children and provides a program of progressive more intense interventions for all students showing deficits, whether those deficits rise to the level of special educational eligibility or not. On the negative side, the SRBI program is complicated, time-consuming and expensive². It requires classroom teachers to maintain, analyze and present a substantial amount of data on each child. Teachers are not trained in using scientific research based methods of instruction, they are not trained in how to design a sound data collection program, and they are not provided the resources they need to implement the program with any level of fidelity. Further, districts often keep data on easy to measure items, like decoding, but neglect to keep data on more challenging issues like phoneme awareness or comprehension. In many cases, what is measured has little to do with the child's disability.

This letter is not directly about the soundness of the SRBI program, although that is another area that warrants your attention. Even beyond the conceptual and practical weaknesses of the SRBI program, the SRBI program utilizes a tremendous amount of resources. Even if the SRBI program were as great an educational innovation as its advocates claim, there is a serious question about whether it is sound public policy to devote limited educational resources to SRBI when our schools in Hartford, New Haven, Bridgeport, and Waterbury are failing so spectacularly. While our urban children lack books and pencils, does it make sense to spend money on better data collection systems for suburban schools?

Instead, what this letter concerns is the Guidelines for determining eligibility for special education based on a specific learning disability issued by SDE last spring. The Guidelines rely on the 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 may take a student two years to go through all three tiers of support under the SRBI program. Only then can the student be designated as eligible for special education. The

² I teach Special Education Law in the graduate program at Central Connecticut State University. My class is made up of working teachers. They report that the SRBI program is a bureaucratic nightmare, that they are provided with no training, that they are not clear on their responsibilities, that they find the SRBI requirements a direct interference with their ability to teach effectively.

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 competently³. By delaying special education designation for two years, we may well be sacrificing the student's long-term literacy. Note that the SRBI program is not limited to literacy and is not limited to the early grades. At all grades and in all aspects of learning disabilities, SRBI will serve to delay a determination of eligibility.

Second, the special education program mandates a high level of parental participation. The SRBI program has no requirement for parental participation. The way SRBI has been implemented in most school districts 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 program⁴, 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 the school district's Child Find obligations under the IDEA, directly contrary to the intent of both Connecticut and federal special education law, and inconsistent with the language of the IDEA. More fundamentally, a policy that inflicts additional injury on children attending poor schools is immoral.

There is nothing whatsoever in the IDEA to support this exclusion. 20 U.S.C. § 1401(30) and 20 U.S.C. §1414(b)(6) provide substantial legal parameters for determining what is a specific learning disability. In neither of these provisions does the federal statute permit 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 "In determining whether a child has a specific learning disability, a local education agency may use a process that determines if the child responds to scientific, research-based interventions as a part of the evaluation procedures." The ability to use response to SRBI as one factor in determining eligibility is radically different than 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.

³ To delay known effective interventions is to condemn a child to lose critical time that cannot be made up or undone. Often the experience of frustration and escalating anxiety can cause a child to give up before appropriate interventions are implemented.

⁴ Federal law requires that a child cannot be designated as a child with a learning disability if the child's deficits are due to a "lack of appropriate instruction," 20 U.S.C. §1414(b)(5). It is a huge leap for the SDE to define appropriate instruction as an adequate SRBI program.

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Note that, even were the SRBI program sound in theory, SRBI has been poorly implemented throughout the state. As noted above, 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. Most school districts do not routinely provide aides to assist with data collection. Where there are aides, they not trained in SRBI implementation. The State is not providing any additional funding to school districts to implement SRBI. Further, SRBI also imposes a large change in the way education is delivered and necessitates a change in the culture of schools. Cultural changes take time and continuous reinforcement. 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. As the United States Department of Education advised, in its letter of July 27, 2007, it is unwise to require the use of a response to intervention program, such as SRBI, 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 issue, he responded that I had misread the Guidelines. Commissioner McQuillen 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 from the Commissioner 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 given them license to say no to evaluations because the child has not been through the entire SRBI process⁵.

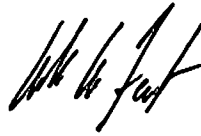
What has happened is that a cadre of well-meaning but out-of-touch unelected civil servants have taken hold of a good, but limited idea and expanded it far beyond what the federal law permits, far beyond the scientific underpinning of research based interventions, and far beyond the bounds of good public policy. While you have many pressing issues to address as Governor, I urge you to place this issue on your list of priorities.

⁵ This issue arises again and again as colleagues work with parents seeking to have their children designated as having a learning disability. Every week I receive reports from attorneys, advocates and parents that their requests for evaluation were rebuffed with comments from school officials to the effect that the State says they do not have to evaluate until the child fails in the SRBI process.

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I have heard you speak, on many occasions, about your own experience with special education. Under the learning disabilities eligibility Guidelines promulgated by the SDE, it is not clear that you would have received the interventions that have allowed you to become Governor of the State of Connecticut. I, and many of my colleagues, would be pleased to speak with you or your staff about this issue and about ways that we can ensure that sound education policies are in place for all Connecticut's public school students, both those with disabilities and those without.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Andrew A. Feinstein". The signature is written in a cursive style with a large, stylized initial "A".

Andrew A. Feinstein