

Final Report

To Susan Gendron, Commissioner of Education

By the Stakeholder Group to Study Adverse Effect

Convened by Mandate of

RESOLVE 2007 Chapter 138, 123rd Maine State Legislature

Emergency Legislation Signed on June 27, 2007

**Regarding Legislative Review of Portions of
Chapter 101: Maine Unified Special Education Regulation Birth to Age Twenty,
a Major Substantive Rule of the
Department of Education**

September 28, 2007

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I. ACKNOWLEDGMENTS

The Stakeholder Group gratefully acknowledges the Department of Education for convening and hosting this process, including the provision of space at the Burton M. Cross Office Building and the provision of outstanding Maine Department of Education support by Jaci Holmes, who served as the Group's note taker and who graciously arranged for closed caption technology to assist Stakeholder individuals with disabilities in processing meeting discussion. This response to individuals' learning styles removed barriers for their work within the Group and demonstrated the value of coming together. Should this Group's work continue in any way, we hope it will be built on this premise of removing barriers for the benefit of our special education children and students.

The Group wishes to express particular thanks to Jeff Edelstein for his facilitation and to Angela Faherty for her leadership and support of the Group's activities on behalf of Commissioner Gendron. The Group also gratefully acknowledges the valuable support and personal participation of Senator Mills, and the input graciously provided to the Co-Chairs by Senator Bowman, Representative Norton, and the other members of the Education Committee who took the time to respond to our questions and to share their insights on our assignment.

The Stakeholder Group consisted of the following 21 appointed members, whose advocacy for children brought them together for 5 weeks to respond to their charge under the RESOLVE 2007 Chapter 138 of the 123rd Legislature, to address the determination of "adverse effect". We commend these Stakeholders for the manner in which they worked together, representing their constituents, and seeking further input on the work in progress. We thank all constituencies who provided feedback and recommendations to the Stakeholders. Members are listed in order of appearance under Section B-1 of the Resolve. Stakeholder Group Membership¹:

Two members who are parents of children with disabilities from birth to 6 years of age.....
Appointed by the Maine Parent Federation were: **Casey Kimball and Robbin Pelletier**

Two members who are parents of children with disabilities between 6 years of age and 20 years of age.....
Appointed by the Maine Parent Federation were: **Elizabeth Collins and Barbara Ives**

One member who is a director of a Child Development Services System regional site.....
Appointed by the CDS Directors Council was: **Alfreda Fournier**

Two members who are special education directors.....
Appointed by the Maine Administrators of Services for Children with Disabilities (MADSEC) were: **Barbara Gunn and Frank Sherburne**

¹ Appendix 1

Two members who are certified special education teachers in a public elementary or secondary school.....

Appointed by Maine Education Association were: **Cindy Fish and Ellen Brochu**

One member who is a principal of a public elementary or secondary school.....

Appointed by the Maine Principals Association was: **Deb Emery**

One member who serves as a superintendent of a school administrative unit.....

Appointed by the Maine School Superintendents Association was: **Sandra MacArthur**

One member who is a provider of related services.....

Appointed by the Associations of the related service personnel was: **Bobbi Jo Yeager**

One member who is an individual with a disability.....

Appointed by the Disability Rights Center was: **Sara Squires**

One member who is a representative on the Maine Advisory Council for the Education of Children with Disabilities.....

Appointed by the Maine Advisory Council for the Education of Children with Disabilities (MACECD) was: **Mary Jo Laniewski**

One member representing the Disability Rights Center.....

Appointed by the Disability Rights Center was: **Diane Smith**

One member representing Pine Tree Legal Assistance.....

Appointed by Pine Tree Legal Assistance was: **Sarah Meerse**

One member representing the Maine Developmental Disabilities Council.....

Appointed by the Maine Developmental Disabilities Council was: **Julia Bell**

One member representing the Learning Disabilities Association of Maine.....

Appointed by the Learning Disabilities Association of Maine was: **Brenda Bennett**

One member representing the Autism Society of Maine.....

Appointed by the Autism Society of Maine was: **Nancy Intrieri-Cronin**

One member representing the Maine Children's Alliance.....

Appointed by the Maine Children's Alliance was: **Dean Crocker**

One member representing the Department of Education....

Appointed by the Commissioner of Education was: **Angela Faherty**

II. EXECUTIVE SUMMARY

The Stakeholder Group to Study Adverse Effect, mandated by Resolve 2007 Chapter 138, 123rd Maine State Legislature, met five times during August and September 2007. The Stakeholder Group's mandate is set forth in Section B-5 of the Resolve:

Sec. B-5. Duties. Resolved: That the stakeholder group shall examine the portions of "Chapter 101: Maine Unified Special Education Regulation Birth to Age Twenty," the provisionally adopted rule submitted for legislative review during the First Regular Session of the 123rd Legislature by the Department of Education, that pertain to the determination of adverse effect and shall develop recommendations to the Commissioner of Education regarding any necessary changes to the Chapter 101 rules regarding the determination of adverse effect. In completing this task, the stakeholder group shall make every effort to avoid duplicating work already completed by the Task Force on Eligibility convened by the State Board of Education[.]

The Stakeholder Group was assigned the task of examining the portions of the "proposed" language in Chapter 101 pertaining to the determination of adverse effect, making the necessary changes to Chapter 101 as finally adopted, and providing any additional recommendations to the Commissioner of Education. The Group was also given a copy of Senator Mills' work drafted on May 22, 2007. Neither the originally proposed language nor any other prior language served as the foundation of the Group's work. Instead, the Group focused on defining "adverse effect" in order to determine what necessary changes should be made to Chapter 101. The group decided at its first meeting that it would attempt to make all decisions by consensus and at its second meeting accepted the facilitator's suggested method for determining consensus.²

The Stakeholder Group **reached consensus** that there is **no federal statutory, regulatory, or judicial requirement** for Maine to define the term "adverse effect" as it pertains to eligibility for special education. The Stakeholder Group also **reached consensus** that **nothing in statute or case law prohibits Maine from adopting such a definition** as long as it does not transgress the minimum federal requirement for eligibility.

While the Stakeholder Group did not reach consensus as to whether a definition was either necessary or helpful, the Group **succeeded in crafting some definition language** that appeared to satisfy members' concerns about legal compliance and to reflect the language of current case law. This language was circulated to Stakeholder constituency groups for review and comment to determine if consensus could be reached.

This definition received support from the following constituencies: adults with disabilities, Associations of Related Services Personnel, Autism Society of Maine, CDS Directors' Council, Disability Rights Center, Learning Disabilities Association of Maine, Maine Advisory Council for the Education of Children with Disabilities (MACECD), Maine Children's Alliance, Maine Developmental Disabilities Council, Maine Education Association, Maine Parent Federation, and Pine Tree Legal Assistance. Representatives of these organizations reported receiving a large volume of input by telephone and email from their own memberships and were in favor of recommending this definition to the Commissioner. This definition did not receive support from the following constituencies: Maine Administrators of Services to Children with Disabilities (MADSEC), Maine Principals' Association, and Maine Superintendents' Association. Representatives of these organizations reported that, "Our members expressed great concern with the negative impact/negative influence terminology in isolation. There is zero consideration

² Appendix 2

of the disability causing the impact, and even then, to what degree it would be compared with peers. There are other states that have much stronger language in their definitions of adverse effect, indicating that the child's progress must be impeded by their disability to the extent that the educational performance is significantly and consistently below the level of similar age peers. This definition carries no such substance." The Group did not reach consensus on a definition that could be recommended to the Commissioner for adoption, but the Stakeholder Group believes that groundwork has been laid for continuing productive discussions on clarifying Maine's determination of adverse effect.

The Group concluded its fifth and final meeting with a test for consensus on the following language:

Proposed Definition:

The term "adverse effect on educational performance" is broad in scope. An adverse effect is defined as a negative impact on educational performance.

Educational Performance includes performance in academic areas (for example, written literacy skills, math, communication), functional areas of performance (how the child demonstrates his/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas), and for a child age 3-5, age appropriate developmental activities across five domains of development (communication, physical, cognitive, self-help/adaptive, and social/emotional) in the educational setting/learning environment.

Consideration of all facets of the student's condition that adversely affect educational performance involves determining negative influences that the disability has on the student's academic, functional or developmental (for children ages 3-5) activities.

We recommend that the Commissioner provide administrative guidance that explains the importance of using assessments that are appropriate to identify any area of educational performance that may be negatively influenced by the child's disability.

Consensus-testing votes on this language were 16 in support, with three vetoes, as follows:

- **2 votes:** "Unqualified 'Yes'. This is a great decision."
- **14 votes:** "There are some things I dislike about the decision, but I can live with it."
- **0 votes:** "I have some strong concerns about this decision but defer to the wisdom of the group and the need to move on. I promise not to sabotage it."
- **3 votes:** "I veto this decision. We definitely need to discuss the matter further."

This Final Report describes the process of the Stakeholder Group's deliberations

and the definition language that was reviewed. It also describes areas of disagreement that remain among Stakeholders and the reasons for those disagreements.

III. DELIBERATIONS AND DISCUSSION

Meetings of the Stakeholder Group took place on August 13, August 23, August 30, September 6, and September 13, 2007, at the Burton M. Cross State Office Building in Augusta, Maine. The Legislative Resolve³ establishing the Stakeholder Group and defining its membership and its task is included as an Appendix to this report.

In preparation for the first meeting, Jaci Holmes (Department of Education staff to the Stakeholder Group) sent a message to the Stakeholder Group that included an Agenda,⁴ a document describing the Bernstein Shur Government Solutions Group,⁵ a Resume⁶ for Ms. Kay Rand, Esq., and a list of the appointed membership of the Stakeholders' Group, all of which are included as Appendices to this Report.

In an email on August 12, 2007, and in person at the meeting on August 13, 2007, one member (a parent) provided two documents relating to Jeff Edelstein, a potential alternative choice for Facilitator.⁷

The first meeting was held on August 13, 2007. At this meeting, the Stakeholder Group selected Jeff Edelstein as Facilitator, and elected two Co-Chairs: Alfreda Fournier, a member representing CDS Site Directors, and Mary Jo Laniewski, a representative on the Maine Advisory Council on the Education of Children with Disabilities (MACECD).

Prior to, and during this meeting, several documents were shared by the Department of Education staff. At the meeting, by consensus, these documents were assigned "exhibit numbers" for ease of reference and were to be reviewed as baseline information for discussion at the next meeting. Following are the exhibits:

- Exhibit A: a May 22, 2007 draft containing a proposed definition of "adverse effect" crafted by Senator Mills.⁸
- Exhibit B: a copy of Resolve 2007 Chapter 138, the charter and work requirement for the Stakeholder Task Force.⁹
- Exhibit C: a copy of the federal regulation 34 C.F.R. Section 300.8, embodying the federal definition of "child with a disability".¹⁰

³ Exhibit B

⁴ Appendix 3

⁵ Appendix 4

⁶ Appendix 5

⁷ Appendix 6

⁸ Exhibit A

⁹ Exhibit B

¹⁰ Exhibit C

- Exhibit D: a draft definition of “adverse effect” developed by MADSEC for submission to the Stakeholder Group.¹¹
- Exhibit E: a packet entitled “Documentation of Discussions Re Adverse Effect Language for Chapter 101 Regulations”. This packet contains numerous materials circulated between December 27, 2005 and January 19, 2007 relating to determination of adverse effect.¹²
- Exhibit F: a definition of adverse effect taken from the Idaho Special Education Manual, 2007.¹³

On August 14, 2007, one member (a parent) distributed a copy of a court case, *Mr. & Mrs. I. v. M.S.A.D. #55*, **480 F.3d 1** (1st Cir. 2007), discussed by the Stakeholder Group as “the LI case”.¹⁴

On August 17, 2007, the co-chairs received a memorandum from two members (special education directors) stating (in part): “We are aware that some task force members do not believe that any adverse effect definition is permissible in light of the ruling by the First Circuit Court of Appeals...It seems we should agree to set that issue aside... We should then leave it up to the Maine DOE legal counsel to advise the DOE on whether any proposal we may come up with is legal.”

The newly appointed Facilitator, Jeff Edelstein, circulated an email on August 20, 2007, with an attached Agenda¹⁵ for the August 23, 2007 meeting.

In response to expressed interest by Stakeholder Group members, Jaci Holmes circulated a Law Journal article on August 24, 2007. In addition, an August 24, 2007 email circulated by Jeff Edelstein presented some thoughts on the potential Agenda¹⁶ for the upcoming meeting on August 30, 2007.

On August 28, 2007, one member (representing the Disability Rights Center) circulated a modified version of the Idaho definition¹⁷ for consideration by the Stakeholder Group. This version became the basis for the proposed definition that emerged from discussion on August 30, 2007.

At the meeting on August 30, 2007, one member (representing MADSEC) presented a new proposed definition of Adverse Effect.¹⁸

At the end of the August 30, 2007 meeting, the Stakeholder Group reached consensus that the following proposed definition should be circulated to all members to be discussed with their respective constituencies so that feedback could be gathered and

¹¹ Exhibit D

¹² Exhibit E

¹³ Exhibit F

¹⁴ Exhibit G

¹⁵ Appendix 8

¹⁶ Appendix 9

¹⁷ Appendix 10

¹⁸ Appendix 11

discussed at the September 6, 2007 meeting.

The proposed definition circulated to Stakeholder Group members was:

The term "adverse effect on educational performance" is broad in scope. An adverse effect is defined as a negative impact on educational performance.

Educational Performance includes performance in academic areas (for example, written literacy skills, math, communication), functional areas of performance (how the child demonstrates his/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas), and for a child age 3-5, age appropriate developmental activities across five domains of development (communication, physical, cognitive, self-help/adaptive, and social/emotional) in an educational setting.

Consideration of all facets of the student's condition that adversely affect educational performance involves determining negative influences that the disability has on the student's academic, functional or developmental (for children ages 3-5) activities.

On Monday, September 3, 2007, one member (representing MADSEC) requested via an email communication¹⁹ that the Assistant Attorney General be consulted regarding the legal sufficiency of the definitions being discussed.

On Wednesday, September 5, 2007, one member (representing MADSEC) circulated a new proposed definition²⁰ developed with feedback from MADSEC membership.

Also on Wednesday, September 5, 2007, a teleconference was convened by Facilitator Jeff Edelstein that included four attorneys: Diane Smith, representing the Disability Rights Center; Sara Meerse, representing Pine Tree Legal Assistance; Sarah Forster, legal representative for the Maine Department of Education; and Eric Herlan, who advises MADSEC and provides legal counsel to school districts throughout Maine. This teleconference resulted in a memorandum,²¹ prepared by Mr. Herlan and acknowledged as accurate by the other three attorneys, indicating areas of agreement and disagreement among the attorneys in the review of the modified Idaho definition and the most recent MADSEC proposal.

On Thursday, September 6, 2007, the Stakeholder Group met to consider constituent feedback on the proposed definition circulated after the August 30, 2007 meeting, and to review the legal memorandum. One of the Co-Chairs also provided input from Attorney Richard L. O'Meara, who had not been included in the teleconference but who had received and reviewed the proposed definitions. As an outcome of this meeting,

¹⁹ Appendix 12

²⁰ Appendix 13

²¹ Appendix 14

the Co-Chairs were directed to prepare a draft Final Report of the Stakeholder Group's deliberations and to circulate it to the membership by the close of business on Tuesday, September 11, 2007.

On Thursday, September 13, 2007, the Stakeholder Group convened its final meeting to review and to comment upon the proposed Final Report to the Commissioner. This report reflects revisions made by the Co-Chairs in response to the feedback received from membership.

IV. FINDINGS

The Stakeholder Group **reached consensus** that there is **no federal statutory or judicial requirement** for Maine to define the term "adverse effect" as it pertains to eligibility for special education.

The Stakeholder Group also **reached consensus** that **nothing in statute or case law prohibits Maine from adopting such a definition** as long as it does not transgress the minimum federal requirement for eligibility.

The Stakeholder Group, which had been charged by the Legislature with identifying "any necessary changes to the Chapter 101 rules regarding the determination of adverse effect," **did not reach consensus on whether the adoption of a definition of Adverse Effect was necessary.**

The Stakeholder Group **did not reach consensus on whether adoption of a definition would be helpful.** While many members shared the view that IEP Teams require greater guidance in making eligibility determinations, other members expressed the concern that it was unnecessary to define a term left undefined in federal regulation, and that by doing so Maine would be increasing its risks of litigation.

The Stakeholder Group **did not achieve consensus on whether quantitative or substantive language such as "below the broad range of average" or "below what is expected for typically developing peers" could or should be included in a definition of Adverse Effect.** This topic occupied a significant portion of the group's deliberations. Four members (representing MADSEC, Maine Superintendent's Association, and Maine Principal's Association) felt that any definition that did not at least include the phrase "below what is expected for typically developing peers" would be unacceptable to their groups. However, this view was not shared by other members, many of whom objected that any substantive language would transgress the Federal floor of eligibility. Concern about whether a definition of Adverse Effect would exclude children from eligibility who are currently eligible under existing regulation was expressed as a reason for many members' reluctance to endorse the use of quantitative language.

Likewise, the Group **did not reach consensus on whether specific guidance on**

Adverse Effect is relevant to the determination of eligibility for special education.

Many members indicated a belief that there is a two-prong eligibility test described in federal regulation, and that the second prong – determination by the Team of a student’s “need for special education” – is sufficient to ensure that eligibility determinations are made appropriately. These members felt that any further guidelines needed by IEP teams could be issued separately as guidance rather than as regulation. Further, there was an expressed need for a training component to support guidance elements. Other members believe that specific guidance on the method for determination of adverse effect required for eligibility should be included within a regulatory definition in Chapter 101. These members felt that this guidance would support IEP team work and ensure that consistency in determination of eligibility is applied throughout Maine.

Members of the Stakeholder Group **generally supported the suggestion that additional work on these questions would be beneficial**, and that the work should involve representatives from the Legislature as well as from direct stakeholders and from the Department of Education.

V. NEXT STEPS

The Stakeholder Group strongly urges the Commissioner to convene another study group to continue working on unresolved issues. This group should comprise similar representation as those individuals elected for the Stakeholder Group to Study Adverse Effect. Their charge should consist of:

1. Developing a comprehensive set of guidelines which will give practitioners and parents clear language in understanding the process for determining “adverse effect”. These guidelines should offer a variety of methods used to determine functional, developmental, and educational levels as they relate to the disability and to the learning/educational environment. These methods shall be applied to children ages 3-20.
2. Establishing a system of training for IEP Team members to facilitate decision-making in a well-informed and uniform manner across the State.
3. The Stakeholder Group believes that the issues can be resolved, given a group commitment to:
 - Vow not to make this process harder, but clearer.
 - Promise to provide uniform guidance to all who need it.
 - Commit to providing quality assessments so we can do the job we are legally, morally, and ethically mandated to do.

VI. APPENDICES AND EXHIBITS

1. Stakeholder Group to Examine Adverse Effect: July-September 2007
2. Levels of Consensus Proposed by Jeff Edelstein
3. RESOLVE 2007 Chapter 138
4. Agenda - August 13, 2007
5. Description of Bernstein Shur Governmental Solutions
6. Resume – Kay Rand, Proposed Facilitator
7. Jeff Edelstein Document as Proposed Second Consideration for Facilitator
8. Exhibit A – Senator Mills, May 22, 2007 Draft
9. Exhibit B – RESOLVE 2007 Chapter 138
10. Federal Regulations Section 300.8, Child With a Disability
11. Exhibit D – MADSEC 8/13/07 Definition of Adverse Effect
12. Exhibit E – Documentation of Discussions Regarding Adverse Effect Language for Chapter 101 Regulations
13. Exhibit F – Definition of Adverse Effect Taken from the Idaho Special Ed Manual 2007
14. Exhibit G – Court Case: Mr. & Mrs. I. v. M.S.A.D. #55
15. Agenda – August 23, 2007
16. Potential Agenda – Coming Meeting August 30, 2007
17. Maine Interpretation of Adverse Effect, Prepared by Diane Smith
18. MADSEC Adverse Effect Proposal
19. Email - Consideration of Assistant A.G. Review of the Proposed Definition
20. MADSEC Adverse Effect Proposal
21. Memorandum – Memo Regarding the Legal Issues Relating to the Proposed Definitions