



## The Learning Disabilities Association of Maine

Toll Free: 1-877-208-4029 or 207-465-7700 Fax 207-465-4844

E-MAIL: [info@ldame.org](mailto:info@ldame.org) Web: [www.ldame.org](http://www.ldame.org)



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**LIST SERVE:** Please advise us at anytime if you wish to be removed from our "Friends of LDA-ME" list serve.

### **SPECIAL ALERT E-NEWS from LDA of Maine**

Dear Friend of LDA of Maine,

This **SPECIAL ALERT** is being sent to inform you of **your opportunity to comment** on the **new changes to Maine's Special Education Rules** proposed by the Department of Education (DOE). I have posted the public hearing below plus the **Stakeholder Reports on Adverse Effect** for your review. As a member of the Stakeholder Group I would like to take this opportunity to thank all who participated with their hard work including members of the public such as Senator Peter Mills and Lou McIntosh. **Special thanks go out to the Stakeholder Co-chairs Mary Jo "MJ" Laniewski and Alfreda Fournier for their time, energy, hard work, and commitment to our children with special needs plus for fairly and accurately representing the group in their final report.** I was proud to have them represent us with their dedication and professionalism. Now we must all do our part to **support the Final Report By the Stakeholder Group to Study Adverse Effect by raising your voice** at the public hearing and/or your written comments to these changes.

Sincerely,

Brenda

Brenda M. Bennett, Executive Director

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### **E-NEWS SPECIAL ALERT from LDA of Maine**

**New changes to Maine's Special Education Rules are being proposed by the Department of Education (DOE).**

Chapter 101 Proposed Amendments  
Public Hearing  
**Monday November 26, 2007**  
Room 103 of the Cross Office Building  
111 Sewall Street, Augusta Maine  
**9:00AM to 10:30 AM**

The public hearing will also be available via ATM at the following locations on **Monday**, November 26, 2007 from 9:00AM – 10:30AM at: Gorham High School ATM Studio / Bangor High School ATM Studio / Presqui Isle High School ATM Studio

**Written comments will be accepted until 5:00 p.m. on Friday, December 10, 2007.**

Send your comments to:

Jaci Holmes  
Federal Liason,  
Maine Department of Education  
State House Station 23  
Augusta, Maine 04333

Or send via email to [jaci.holmes@maine.gov](mailto:jaci.holmes@maine.gov)

A copy of the rule with the amendments underlined can be found at  
<http://www.maine.gov/education/rulechanges/ch101.pdf>.

**The proposed changes include:**

1. Some corrections to make sure sections of the regulation are in agreement with certain requirements. These corrections reflect changes that were required by LD-1900, which was passed at the end of the legislative session last June and signed by the Governor. These corrections include:
  - In order to comply with the requirement in LD-1900 that parents asked for last spring the new regulations change the amount of time for determination to be 55 calendar days instead of 40 school days (pg 46)
  - In order to comply with the requirement in LD-1900 that parents asked for last spring the new regulations change the statute of limitations to request a hearing from 2 to 4 years. (pg 164)
2. **New language** regarding the determination of **“adverse effect”** for purposes of deciding a child’s eligibility for special education services. The eligibility for Special Education- Determination for Adverse Effect (pgs 78-81) includes:

- Adds determination of “adverse effect” as **a third and separate requirement** (known as a “prong”) for deciding if a child is eligible for special education in all eligibility categories. The federal government chose not to define “Adverse Effect.”
- The proposed State Rule changes would **substitute three “prongs” for the two “prongs”** in federal law regarding **eligibility determination** and apply this new three-prong **determination requirement for all 14 categories.**
- **Defines Adverse Effect** requiring **“a distinctly measurable and persistent gap between the demands of the educational setting and the child’s educational performance.”** The first district court ruled that *any negative impact* is enough. The federal government chose not to define Adverse Effect.
- Requires that the determination of adverse effect be based upon the results of at least 2 assessments or data sources.
- The process of determination must be documented.
- **Adds a new definition of “need” for measuring “needs special education services.”** It **defines Need as** needing “special education and related services when, because of the disability, the child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program in spite of other services available to the child. The need is best established through evidence of a distinctly measurable and persistent gap in the child’s educational or functional performance” The federal government chose not to define Need.

## History

The language regarding determination of “adverse effect” proposed in the draft regulations last year was an issue of great concern to families. Legislation passed by the legislature last June (LD-1900) required DOE to remove the proposed “adverse effect” language before the new Rules took effect in August, 2007.

**DOE was also required to form a task force** to make recommendations to DOE about new language regarding determination of adverse effect.” The task force met in August and September, 2007, and two reports from the task force were presented to the Commissioner of DOE. **One report represented the opinions of 16 of the 19 members of the task force, and the other report was written by the other three members of the task force (see BOTH below).** DOE did not adopt the language for “adverse effect” proposed in either of the reports presented to the Commissioner by the task force.

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## **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 123<sup>rd</sup> 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 Membership<sup>[1]</sup>:

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**

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.....

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<sup>[1]</sup> Appendix 1

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, 123<sup>rd</sup> 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. <sup>[2]</sup>

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.

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<sup>[2]</sup> Appendix 2

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 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 Resolve<sup>[3]</sup> 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,<sup>[4]</sup> a document describing the Bernstein Shur Government Solutions Group,<sup>[5]</sup> a Resume<sup>[6]</sup> 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.<sup>[7]</sup>

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.<sup>[8]</sup>

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<sup>[3]</sup> Exhibit B

<sup>[4]</sup> Appendix 3

<sup>[5]</sup> Appendix 4

<sup>[6]</sup> Appendix 5

<sup>[7]</sup> Appendix 6

<sup>[8]</sup> Exhibit A

- Exhibit B: a copy of Resolve 2007 Chapter 138, the charter and work requirement for the Stakeholder Task Force.<sup>[9]</sup>
- Exhibit C: a copy of the federal regulation 34 C.F.R. Section 300.8, embodying the federal definition of “child with a disability”.<sup>[10]</sup>
- Exhibit D: a draft definition of “adverse effect” developed by MADSEC for submission to the Stakeholder Group.<sup>[11]</sup>
- 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.<sup>[12]</sup>
- Exhibit F: a definition of adverse effect taken from the Idaho Special Education Manual, 2007.<sup>[13]</sup>

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”.<sup>[14]</sup>

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 Agenda<sup>[15]</sup> for the August 23, 2007 meeting.

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<sup>[9]</sup> Exhibit B

<sup>[10]</sup> Exhibit C

<sup>[11]</sup> Exhibit D

<sup>[12]</sup> Exhibit E

<sup>[13]</sup> Exhibit F

<sup>[14]</sup> Exhibit G

<sup>[15]</sup> Appendix 8

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 Agenda<sup>[16]</sup> 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 definition<sup>[17]</sup> 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.<sup>[18]</sup>

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 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,*

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<sup>[16]</sup> Appendix 9

<sup>[17]</sup> Appendix 10

<sup>[18]</sup> Appendix 11

*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 communication<sup>[19]</sup> 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 definition<sup>[20]</sup> 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,<sup>[21]</sup> 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, the Co-Chairs were

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<sup>[19]</sup> Appendix 12

<sup>[20]</sup> Appendix 13

<sup>[21]</sup> Appendix 14

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

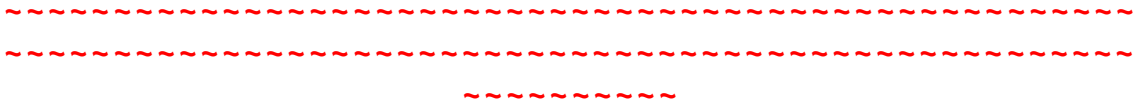
individuals elected for the Stakeholder Group to Study Adverse Effect. Their charge should consist of:

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



**Minority  
Report**

To Susan Gendron, Commissioner of Education

**By MADSEC, MSSA and MPA Representatives to the Stakeholders  
Group to review Adverse Effect**

Convened by Mandate of

RESOLVE Chapter 138, 123rd Maine State Legislature

Emergency Rule 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

The Maine Administrators of Service for Children with Disabilities (MADSEC), the Maine School Superintendent’s Association (MSSA) and the Maine Principals Association (MPA) want to express our sincere regret that the Stakeholder Group established by the Legislature and determined by the Commissioner assigned to “examine the federal and state rules pertaining to the determination of adverse effect for children from 3 to 20 years of age” had to move in the direction of reporting in Majority and Minority format. This was never the intent of MADSEC, MSSA or MPA, as we believed that all members of this Stakeholder Group would remain committed to the consensus model of decision making and reporting. These ground rules were agreed upon at the initiation of this group’s work, but appeared to deteriorate over time, with the Majority taking command of the determinations and final report. MADSEC, MSSA and MPA have made this report neutral of contributors or opinion to insure that credit and or dissention is not recognized so that the Commissioner can review findings and contributions of the group objectively. It was the understanding of MADSEC, MSSA and MPA that the Group was in agreement with this format of presentation, but this was rejected in favor of what our associations consider to be a Majority Report. Any contributions to the Group are identified in the appendices of this report. Because MADSEC, MSSA and MPA remain committed to the foundations and promises of the Group and made a good faith effort to maintain a consensus model, this report will maintain much of the same language and format of the Majority Report, but will reflect MADSEC’s, MSSA’s and MPA’s changes submitted to the Majority Report authors, but were refused for acceptance in their Majority Report.

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## I. ACKNOWLEDGMENTS

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MADSEC, MSSA and MPA wish 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.

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 Chapter 138 of the 123<sup>rd</sup> 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. Stakeholder Group Membership:

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 Robin 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**

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:

**Bobbijo 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 Chapter 138, 123<sup>rd</sup> 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 Regulations 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 passed, 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.

MADSEC, MSSA and MPA agree that 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.

MADSEC, MSSA and MPA agree that 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.

MADSEC, MSSA and MPA agrees that the Group agreed to share language taken from the Idaho Special Education Manual on Adverse Effect amended by one member of the Group to collect input from its constituents. Upon collection of input, MADSEC, MSSA and MPA could not agree to the language as it did not give meaningful, substantial relevance or consistent guidance on eligibility determination to IEP Teams in the State of Maine.

MADSEC, MSSA and MPA agree that the Group did not reach consensus on a definition that could be recommended to the Commissioner for adoption. These organizations also agree that the Stakeholder Group has established the groundwork for continuing productive discussions on clarifying Maine’s eligibility criteria for special education, which should include a definition of Adverse Effect.

### **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 Resolve

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, a document describing the Bernstein Shur Government Solutions Group, a Resume 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 provided two documents relating to Jeff Edelstein, a potential alternative choice for Facilitator.

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, the Department of Education staff shared several documents. At the meeting, by consensus, these documents were assigned "exhibit numbers" for ease of reference, as follows:

1. Exhibit A: a May 22, 2007 draft containing a proposed definition of "adverse effect" crafted by Senator Mills.
2. Exhibit B: a copy of Resolve Chapter 138, the charter and work requirement for the Stakeholder Task Force.
3. Exhibit C: a copy of the federal regulation 34 C.F.R. Section 300.8, embodying the federal definition of "child with a disability".
4. Exhibit D: a draft definition of "adverse effect" developed by MADSEC for submission to the predecessor Eligibility Task Force in 2005.
5. 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 the work of the predecessor Eligibility Task Force.

6. Exhibit F: Definition of Adverse Effect taken from the Idaho Special Education Manual, 2007; provided by the Idaho Department of Education.

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

On August 17, the Co-Chairs received a memorandum indicating: “We believe that some members do not believe that any adverse effect definition is permissible in light of the ruling by the First Circuit Court of Appeals...” The Co-Chairs were asked to “set that issue aside” and it was suggested that the group “...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 Agenda for the August 23 meeting.

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

On August 28, a modified version of the Idaho definition for consideration by the Stakeholder Group was circulated. This version became the basis for the definition that group members brought back to their constituents for input.

At the meeting on August 30, a new proposed definition of Adverse Effect was submitted.

At the end of the August 30 meeting, the Stakeholder Group reached consensus that a proposed definition should be circulated to all members to be discussed with their respective constituencies so that feedback could be gathered and discussed at the September 6 meeting.

On Monday, September 3, 2007, a request via an email communication was made asking that the Assistant Attorney General be consulted regarding the legal sufficiency of the definitions being discussed.

On Wednesday, September 5, 2007, circulation of another proposed definition was shared with the group.

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 both were members of the Stakeholder Group; a third, Sarah Forster, serves as legal representative for the Maine Department of Education; and the fourth, Eric Herlan, provides legal counsel to school districts throughout Maine and who has been providing consultation to MADSEC, MSSA and MPA during the Stakeholders Group activities. This teleconference resulted in a memorandum, prepared by Mr. Herlan, indicating areas of agreement and disagreement among the attorneys in the review of the modified Idaho definition and the other most recent proposal.

On Thursday, September 6, 2007, the Stakeholder Group met to consider constituent feedback on the proposed definition circulated after the August 30 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, 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 comment upon the proposed Draft Report to the Commissioner. The Majority report reflects revisions made by the Co-Chairs in response to the Majority feedback received from membership.

#### **IV. AREAS OF CONSENSUS**

A. MADSEC, MSSA and MPA agree that 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.

B. MADSEC, MSSA and MPA agree that 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.

## **V. ISSUES REMAINING TO BE ADDRESSED**

A. MADSEC, MSSA and MPA agreed that 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.**

B. MADSEC, MSSA and MPA agreed that 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 clarity through definition 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.

C. MADSEC, MSSA and MPA agree that the Stakeholder Group **did not achieve consensus on whether quantitative or substantive language such as “below the broad range of average” could or should be included in a definition of Adverse Effect.**

D. MADSEC, MSSA and MPA agree that the Stakeholder Group **did not reach consensus on whether specific guidance on Adverse Effect is relevant to the determination of eligibility for special education.** Some 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 amount of adverse effect required for eligibility should be included within a regulatory definition in Chapter 101. These

members felt that this guidance would support the IEP Team's work and insure 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.

## **VI. RECOMMENDATIONS**

A. In view of the absence of consensus on a definition of Adverse Effect MADSEC, MSSA and MPA recommend the Commissioner of Education report to the Legislature that this group was not able to accomplish its task within the time frame required. The Commissioner of Education should present to the legislature her recommendations in the absence of a consensus definition using the documentation provided by the Stakeholders Group, which is included in this report.

B. The modified Idaho definition that was most widely endorsed by stakeholders for feedback from constituents was the version distributed after the August 30 meeting. This definition did not receive support from MADSEC, MSSA or MPA because there was no substance to support IEP Teams in making decisions and allowed for any interpretation to be acceptable. MADSEC, MSSA and MPA did not believe that this definition would reduce the likelihood of litigation and could potentially increase it due to its lack of specific language. MADSEC, MSSA and MPA agreed to share this definition with their constituents for the purpose of review and comment. After MADSEC, MSSA and MPA received feedback, consensus could not be achieved on this definition.

## **VII. NEXT STEPS**

MADSEC, MSSA and MPA strongly encourage 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. Continued study of a definition of Adverse Effect with the outcome being a definition with clearly defined expectations from the legislature if this is their intent for the Group.
2. 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.
3. Establishing a system of training for IEP Team members to facilitate decision-making in a well-informed and uniform manner across the State.
4. MADSEC, MSSA and MPA believe that the issues identified 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’re legally, morally, and ethically mandated to do.
  - The commitment that all children have as equal a right not to be identified for Special Education as they do to be identified.

## **VIII. APPENDICES**

### Exhibits

- A - Senator Mills May 22, 2007 Draft
- B - Resolve, Chapter 138
- C - Federal Regulations §300.8 Child with a disability
- D - MADSEC 8/13/07 Definition of Adverse Effect
- E - Documentation of Discussions on Adverse Effect Prepared by Julia Bell
- F - Definition of Adverse Effect Taken From the Idaho Special Education Manual
- G - Garda Article

### Appendices

- 1 - Wall Street Journal article
- 2 - Agenda - August 13, 2007
- 3 - Description of Bernstein Shur Governmental Solutions
- 4 - Resume for Kay Rand Proposed facilitator
- 5 - Stakeholder Membership
- 6 - Jeff Edelstein document as a proposed second consideration for facilitator
- 7 - First Circuit Opinion
- 8 - Agenda and Preparation for Discussions on August 23, 2007
- 9 - August 30, 2007 Meeting Preparation
- 10 - Two MADSEC Adverse Effect Proposals
- 11 - Maine Interpretation of Adverse Effect Definition prepared by Diane Smith
- 12 - Agenda - August 30, 2007
- 13 - Proposed Consensus Definition from August 30<sup>th</sup>
- 14 - Consideration of AG Review of the Proposed definition
- 15 - MADSEC Feedback on Proposed Definition
- 16 - MADSEC 9/5/07 Proposed revised definition
- 17 - Memo Regarding the Legal Issues Relating to the Proposed Definition
- 18 - Combined Definition 9/6/07 Version
- 19 - Combined Definition Reviewed 9/13/07
- 20 - MADSEC Compromise Language 9/11/07
- 21 - MADSEC Further Refined Definition 9/13/07
- 22 - MADSEC Definition with federal and state regulatory and statutory citations
- 23 - Educational Alliance Proposed Definition and Procedure 9/12/07
- 24 - Jeff's final Combined Definition and Procedures 9/13/07

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**Here is NOTICE of the Public Hearing Once Again**  
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**New changes to Maine's Special Education Rules are being proposed by the Department of Education (DOE).**

Chapter 101 Proposed Amendments  
Public Hearing

**Monday November 26, 2007**  
Room 103 of the Cross Office Building  
111 Sewall Street, Augusta Maine  
**9:00AM to 10:30 AM**

The public hearing will also be available via ATM at the following locations on **Monday**, November 26, 2007 from 9:00AM – 10:30AM at: Gorham High School ATM Studio / Bangor High School ATM Studio / Presqui Isle High School ATM Studio

**Written comments will be accepted until 5:00 p.m. on Friday, December 10, 2007.**

Send your comments to:

Jaci Holmes  
Federal Liason,  
Maine Department of Education  
State House Station 23  
Augusta, Maine 04333

Or send via email to [jaci.holmes@maine.gov](mailto:jaci.holmes@maine.gov)

A copy of the rule with the amendments underlined can be found at  
<http://www.maine.gov/education/rulechanges/ch101.pdf>.

**The proposed changes include:**

3. Some corrections to make sure sections of the regulation are in agreement with certain requirements. These corrections reflect changes that were required by LD-1900, which was passed at the end of the legislative session last June and signed by the Governor. These corrections include:
  - In order to comply with the requirement in LD-1900 that parents asked for last spring the new regulations change the amount of time for determination to be 55 calendar days instead of 40 school days (pg 46)
  - In order to comply with the requirement in LD-1900 that parents asked for last spring the new regulations change the statute of limitations to request a hearing from 2 to 4 years. (pg 164)
  
4. **New language** regarding the determination of **“adverse effect”** for purposes of deciding a child’s eligibility for special education services. The eligibility for Special Education- Determination for Adverse Effect (pgs 78-81) includes:

- Adds determination of “adverse effect” as **a third and separate requirement** (known as a “prong”) for deciding if a child is eligible for special education in all eligibility categories. The federal government chose not to define “Adverse Effect.”
- The proposed State Rule changes would **substitute three “prongs” for the two “prongs”** in federal law regarding **eligibility determination** and apply this new three-prong **determination requirement for all 14 categories.**
- **Defines Adverse Effect** requiring **“a distinctly measurable and persistent gap between the demands of the educational setting and the child’s educational performance.”** The first district court ruled that *any negative impact* is enough. The federal government chose not to define Adverse Effect.
- Requires that the determination of adverse effect be based upon the results of at least 2 assessments or data sources.
- The process of determination must be documented.
- **Adds a new definition of “need” for measuring “needs special education services.”** It **defines Need as** needing “special education and related services when, because of the disability, the child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program in spite of other services available to the child. The need is best established through evidence of a distinctly measurable and persistent gap in the child’s educational or functional performance” The federal government chose not to define Need.

## History

The language regarding determination of “adverse effect” proposed in the draft regulations last year was an issue of great concern to families. Legislation passed by the legislature last June (LD-1900) required DOE to remove the proposed “adverse effect” language before the new Rules took effect in August, 2007.

**DOE was also required to form a task force** to make recommendations to DOE about new language regarding determination of adverse effect.” The task force met in August and September, 2007, and two reports from the task force were presented to the Commissioner of DOE. **One report represented the opinions of 16 of the 19 members of the task force, and the other report was written by the other three members of the task force.** DOE did not adopt the language for “adverse effect” proposed in either of the reports presented to the Commissioner by the task force.

.....

Thanks,  
Laura Soule  
Executive Assistant  
Learning Disabilities Assoc. of Maine (LDA of ME)  
PO Box 67  
Oakland, ME 04963  
Phone: 1.877.208.4059 or 207.465.7700  
Fax: 207.465.4844  
Web Site: <http://www.ldame.org>

## Attachments

### MISSION STATEMENT

The Learning Disabilities Association of Maine is dedicated to assisting individuals with learning and attention disabilities through support, education, and advocacy (SEA).