

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

# **REPORT**

*Of the*  
**Advisory Committee**  
*On*  
**Fair Competition with Private Enterprise**

*Maine Association of Community Service Providers*  
*v.*  
*Maine Department of Education*

Thursday, September 6, 2012  
Room 300, Cross Office Building  
Augusta, ME 04333

September 9, 2012

Honorable Douglas A. Thomas  
Honorable H. David Cotta  
Members of the Joint Standing Committee on State and Local Government  
Cross Office Building, Room 26  
Augusta, ME 04333

Dear Senator Thomas, Representative Cotta and Members of the Committee:

Pursuant to the requirements of Title 5 M.R.S.A, §55, I am herewith submitting this final report of the Advisory Committee on Fair Competition with Private Enterprise relative to a complaint filed by the Maine Association for Community Service Providers (MACSP), alleging that unfair competition exists between its membership and Child development Services within the Department of Education.

As the report explains, the Advisory Committee met on several different occasions to discuss the complex issues presented through testimony, and has issued a Final Report consisting of a Majority recommendation (signed by 5 members); and a Minority recommendation (signed by 2 members). The remaining two members were unavoidably absent.

Respectfully Submitted,

David F. Emery  
Deputy Commissioner, DAFS  
Chair, Advisory Committee on Fair Competition  
with Private Enterprise

cc: Committee Members  
Governor Paul LePage  
Speaker of the House, Robert Nutting  
Senate President, Kevin Raye  
Commissioner Department of Education, Stephen Bowen  
Maine Association for Community Service Providers, Mary Lou Dyer

# Summary of Advisory Committee Action

The Advisory Committee on Fair Competition with Private Enterprise met to consider a complaint brought by the Maine Association for Community Service Providers under Title 5 M.R.S.A., §55. MACSP alleged in the complaint that Child Development Services (CDS), administered by the Maine Department of Education, has adopted policies and procedures that have adversely impacted certain private-sector Community Service Providers through unfair competition by CDS, a government entity.

The full Advisory Committee met on five different occasions during 2012: March 20 (organizational meeting), April 17, May 2 (quorum not present), May 24, June 15, and September 6. Testimony was taken from representatives of the Maine Association for Community Service providers; several MACSP members; and representatives of the Maine Department of Education.

The Advisory Committee compiled a list of specific MACSP complaints and related issues, with comments and rebuttals provided by each side, as a method for the Advisory Committee to understand and evaluate the question before it. That document is included herein.

At the June 15 meeting, the Advisory Committee asked the two sides to meet independently of the Committee for the purpose of attempting to arrive at a joint resolution that would reflect MACSP's concern about government competition; and would reflect the Department of Education's commitment to full compliance with federal and existing state laws and regulations. Both sides expressed willingness to seek a middle ground, but that proved to be difficult and was not achieved.

The Chair (DAFS Deputy Commissioner David Emery) asked MACSP and DoEd to draft motions for consideration of the Advisory Committee at its September 6<sup>th</sup> meeting that would reflect, respectively, the positions of each side. Consequently, two motions were drafted and distributed:

Motion A was presented by the Maine Department of Education

Motion B was presented by the Maine Association for Community Service Providers

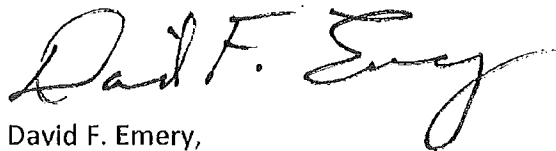
After attendance was taken and a quorum was determined to be present, both motions were offered and seconded (Motion A was presented by member Timothy Poulin; Motion B was presented by member Donald McIntire). After a brief debate, member Neil Martin suggested that an attempt ought to be made by Advisory Committee members to draft another approach that would more accurately capture and reflect to Advisory Committee's views. The Committee recessed for about half an hour for the purpose of drafting a third motion, which became known as Motion C. After another brief discussion, a roll-call vote was held, yielding the following results:

Motion C received 5 votes (the MAJORITY Report);  
Motion A received 2 votes (the MINORITY report); and,  
Motion B received no votes.

Two Advisory Committee members were absent and did not vote. Member Dirk DeHaan, however, expressed his view in favor of Motion A through an e-mail communication which is appended to the report. His vote, however, is not counted in the official result.

### **Record of Committee Votes - 9/6/2012**

	<b><u>Attendance</u></b>	<b><u>Vote</u></b>
Bickford, Jane	Present	Motion C
DeHaan, Dirk	Absent	---- (see attached communication)
Emery, David (Chair)	Present	Motion C
Martin, Neil	Present	Motion C
McIntire, Donald	Present	Motion C
Pietroski, Joseph	Present	Motion A
Poulin, Timothy	Present	Motion A
Ray, Douglas	Present	Motion C
Volk, Derek	Absent	----



David F. Emery,  
Deputy Commissioner, DAFS  
Chair, Advisory Committee on Fair Competition with Private Enterprise

# Complaint

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH  
PRIVATE ENTERPRISE**

**Complaint Form Under Title 5, Section 55  
Required Information**

▪ **Contact person for Private Enterprise**

Name: Mary Lou Dyer, Esq., managing director, Maine Association for Community Service Providers

Address: P.O.Box 149, Hallowell, ME 04347

Telephone: 207.623.5005 e-mail: mldyermacsp@msn.com

▪ **Private Enterprise(s) impacted (one entity, group, statewide impact)**

Business/Group Name Maine Association for Community Service Providers

Address: same as above

Telephone: same as above

▪ **Government Agency causing impact**

Agency Name: Child Development Services (CDS), Department of Education (DOE)

Address (if known): 23 State House Station, Augusta, ME 04333

**Location of activity (if different):**

Statewide, at non regional sites: CDS First Step (Androscoggin), Aroostook County, CDS Reach (Cumberland County), Mid-Coast Regional CDS, Opportunities, Project PEDS, Two Rivers, Child Development Services Downeast, and York County.

**Contact Person (if known):**

Commissioner Stephen Bowen

▪ **Type of Impact (loss of work, market fluctuation, etc.)**

Child Development Services has created a business environment in which that agency controls assessment of children, determines the level of service and provider of care, controls payment for services, and controls the ability of private enterprise to offer competitive, higher-quality, and

more cost-effective service options for children and families through contracting and provider approval processes.

Member agencies deliver services to children from birth to five years of age who have developmental disabilities, developmental delays, and autism. The agencies provide these services in center/preschool settings. Members have suffered from declining enrollments, delayed payments, and declining reimbursements. As a result, programs have closed.

▪ **Duration of impact (start date if known, end date if known)**

The problem has been growing over the last fifteen years and continues through today.

▪ **Support – facts/proof**

1. CDS assesses children for need and unilaterally determines the level of service and, in recent years, increasing restrictive levels of service for 'extended school year' services. This practice often does not meet the level of service and continuity of care indicated by impartial evaluators.
2. CDS controls referrals to member agencies and increasingly self-refers first before referring to private providers. This is restrictive to parent choice and the ignores federal statute for team-based recommendations.
3. For the last five years CDS has delayed payments for weeks, months, to over a year, causing closure of programs due to the lack of revenue for services provided in accordance with state-approved plans.
4. CDS/DOE pays itself first before reimbursing private providers. This creates an unfair business environment wherein state and federal resources are not managed well.
5. Because of its quasi-state agency status, CDS has access to the DOE budget to defray its delivery and overhead costs, especially during overruns. CDS has never been required to operate under a business model requiring efficiency and effectiveness.
6. CDS appears to be more cost effective because it does not include the centralized functions of payroll, billing, data collection, etc, in its program budgets. This contributes to an unfair business environment by presenting an unrealistic budgetary picture to policymakers.
7. Due to its close relationship with state government, CDS is able to pay higher salaries with better benefits, state benefits. This creates an unfair hiring advantage with the public sector.
8. CDS conducts and controls the process by which private providers can become an 'approved special purpose program'. It does not have to go through the same costly approval process which it forces on to private providers. It controls and restricts its competition, and effectively limits parents' choice and the development of private enterprise.
9. CDS consistently fails to offer MaineCare-funded program alternatives to parents at Individualized Educational Planning meetings. This is in violation of the MaineCare Billing Manual, which stipulates member choice in provider. It also does not consistently comply with



the 'KS v. Harvey' lawsuit, which requires referrals to the MaineCare program for services which CDS will not fund, but will benefit the child.

10. CDS moves children from existing community-based private programs into its own programs without parental informed consent. This decreases member agency's service base.

11. CDS completely controls the contracting process with private providers. The contract is one-sided, including a nonpayment clause.

12. By administrative letter (avoiding the Administrative Procedures Act public process), CDS adds bureaucratic requirements, deadlines, changes in program requirements, etc., thereby creating unfunded mandates for compliance. See administrative letters Numbers 11, 12, 13, and 21 as examples. These letters can be found at <http://www.maine.gov/education/specced/cds/adminlett.html>

13. CDS has regularly used the emergency rule-making process to "surprise" providers, and parents, with program changes and requirements. Again, this undermines any public process and may be in violation of the Administrative Procedures Act.

14. Without public discussion or input, CDS adopted the "primary provider/coaching" model of service delivery. This unilateral action ignores other research and professional opinions describing other early intervention models, and in many regions has created a situation where CDS is the only provider of service.

#### **Requested resolution**

CDS should return to the original model where it was the assessment and referral entity, and not the actual provider of services. Contracting and payment should occur under the auspices of another entity. Program approval should be managed by an impartial entity or be included as part of the DHHS licensing process.

We welcome the opportunity to discuss in more detail possible solutions to this problem that is destroying the early intervention program that had been so successful in Maine.

Please submit form to:  
Domna Giatas, Chair  
Advisory Committee on Fair Competition  
78 State House Station  
Augusta, ME 04333-0078

# **Comparison of Arguments**

**Complaint under Title 5 Regarding Child Development Services 2012**  
**Side by Side of Statements of Complaint and Responses by Both Parties**

Statements by Complainant	Department of Education Responses	MACSP Responses
<p>1. CDS assesses children for need and unilaterally determines the level of service and, in recent years, increasing restrictive levels of service for 'extended school year' services. This practice often does not meet the level of service and continuity of care indicated by impartial evaluators.</p>	<p><i>Under the federal IDEA and the corresponding Maine Unified Special Education Regulations Birth to Age Twenty, the Child Development Services System under Part C (B-2) is required to ensure that a timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability and a family directed identification of the needs of each family of such an infant or toddler is completed as part of childfind and an individualized family service plan, including service coordination, is completed for each eligible infant or toddler by a team that includes the family. Under Part B (3-5) childfind must be completed, which includes evaluations, and an individualized education program must be developed, reviewed, and revised for each child with a disability by the IEP Team. Further, under state statute, the State IEU, through a network regional sites, engages in childfind activities as required by IDEA, ensures that children birth through age 2 receive early intervention services, and ensure that children 3-5 receive free, appropriate public education services. Teams make the eligibility determinations and make the decisions about the amount of services under IDEA, not individual providers. With regard to the provision of "extended school year" (ESY) services the regional sites are following the regulatory</i></p>	<p>While the description of the statutory authority for CDS is informative, it is not responsive to the complaint. The sentence that begins with "Teams make the eligibility determinations..." and ends with the description of the extended year services describes a process that has not been the experience of our providers and the many parents with whom we work. Parents consistently describe a process by which they are "told" what services their child needs, how often, and who will deliver them. The team process does not appear to us to be a cooperative or collaborative process as required by federal law (see DOE statement to the left). We don't believe that CDS complies with the requirements outlined in its response.</p> <p>Extended school services (ESY) are services delivered in the summer and during typical school vacations. All the research points to the loss of progress both in physical and cognitive development for a child who does not receive these extended services. In our experience, the CDS case manager, rarely with the team, informs the family and providers what, if any, extended services will be provided to the child.</p> <p>Furthermore, it has been our experience since the court settlement that the <u>KS v. Harvey</u> letter and</p>

	<p><i>provisions in the Maine Unified Special Education Regulations, Section x.2.A(7) to ensure that the need is demonstrated by means of three procedural steps. ESY is a federal requirement to be determined by the IEP Team for children 3-20 years of age.</i></p> <p><i>Under Part B of IDEA Child Development Services is functioning in the same manner and under the same federal statutes and regulations as the school administrative units in Maine.</i></p>	<p>the additional services it describes offered by MaineCare has <b>not</b> offered in ANY of the individual educational planning team meetings attended by private providers.</p>
<p><b>2. CDS controls referrals to member agencies and increasingly self-refers first before referring to private providers. This is restrictive to parent choice and the ignores federal statute for team-based recommendations.</b></p>	<p><i>The CDS regional site staff obtain consent from parents and refer children for evaluations and service provision after decisions are made by the individualized teams. These are federal IDEA obligations. Least restrictive environment is a placement decision of the Individualized Education Program (IEP).</i></p>	<p>This response is very baffling. Placement is more often than not a unilateral decision by the CDS site. Parents with whom we work consistently describe that they are “told” where the child will be placed and certainly are not offered any choice. We understand that IDEA does not require parent choice but the team decision process is supposed to be honored. Further, where MaineCare is a payer, choice is a requirement of the program. As far as “least restrictive” placement, the CDS sites appear to be more restrictive than the private community placements. NOTE: it would be helpful to have a list of the CDS programs with numbers of children served who are typically developing and those with disabilities or delays.</p> <p>Most importantly, 22 MRSA §3571 (3): requires that “the Department of Education through the preschool coordination projects shall assure the provision of comprehensive developmental services, including physical therapy, speech and</p>

		<p>language therapy and occupational therapy to preschool handicapped or delayed children. To the maximum extent possible, these programs shall make use of existing 3<sup>rd</sup> party payers and coordinate services with local resources (emphasis added). In instances where needed services are not available, the department shall use authorized funds to enable preschool coordination projects to work with local providers, including public and private agencies and school units to develop new or expand existing service to meet these needs.” While the department maintained that this statute “should have been repealed”, the truth is that this is still the law of the State of Maine.</p>
<p>3. For the last five years CDS has delayed payments for weeks, months, to over a year, causing closure of programs due to the lack of revenue for services provided in accordance with state-approved plans.</p>	<p><i>There have been some delays due to sufficiency of funds in the CDS System , as the Department was working on Supplemental appropriations. There have also been situations where a provider is serving a Medicaid child and needs to submit to Medicaid for the payment of the service(s). If it is determined that the service is not reimbursable by Medicaid then CDS can pay the provider. The CDS System can not pay and then seek reimbursement from Medicaid, the rendering provider must seek reimbursement. Some providers have asked the CDS System to pay for services rendered to a Maine Care client because the provider did not want to enroll with Maine Care. The CDS System encouraged the enrollment, because under IDEA (§1412(a)(12)) the State educational agency is responsible for ensuring “ that all other third parties, including</i></p>	<p>We applaud the work done by the DOE to fortify the funding for CDS in the last budget cycle; however, that is not the whole story. This answer is incomplete and inaccurate. The DOE/CDS have consistently demonstrated a total lack of understanding of the documentation requirements of MaineCare. It also does not understand the financial jeopardy their interpretation and requests for provider to bill MaineCare without the proper documentation inflicts on providers. MaineCare auditors, state and federal, come down on providers who improperly bill for services with speed and the authority to recoup hundreds of thousands of dollars.</p> <p>All that said, the DOE/CDS still owes one of the agencies many thousands of dollars which have been owed for years despite the executive</p>

	<i>State Medicaid, be accessed" before using IDEA funds.</i>	director's diligent efforts to receive payment.
4. CDS/DOE pays itself first before reimbursing private providers. This creates an unfair business environment wherein state and federal resources are not managed well.	<i>The CDS State IEU is responsible for the centralized salary and benefits for the CDS system personnel pursuant to 20-A MRSA §7209(3).</i>	We stand by our statement. This goes to the heart of our complaint. When a quasi-state agency, provides the same services for which it contracts with private providers, the result is a conflict of interest and an unfair advantage. The provision of services by CDS are not required by state or federal statutes
5. Because of its quasi-state agency status, CDS has access to the DOE budget to defray its delivery and overhead costs, especially during overruns. CDS has never been required to operate under a business model requiring efficiency and effectiveness.	<i>Any adjustments of funding for the CDS System go through the Legislative process. The centralization of the human resources, data, and fiscal in the statutory revisions of 2006 were legislatively intended to create a more efficient, effective model. The substantive reduction in State General Fund to CDS in 2006 has not been sustainable given the federal obligations under IDEA.</i>	Actually, representatives of MACSP have attended every CDS appropriations briefing over the last eight years. Two years ago, Sen. Roger Katz, the co-chair of OPEGA who demanded the review of CDS, expressed amazement and was quite taken back when he heard that the legislature did NOT review or approve the CDS budget. The only reason the CDS budget came before the appropriations committee was for approval of transfers from DOE accounts to cover over expenditures.
6. CDS appears to be more cost effective because it does not include the centralized functions of payroll, billing, data collection, etc. in its program budgets. This contributes to an unfair business environment by presenting an unrealistic budgetary picture to policymakers.	<i>The CDS System budget includes all the expenses of the system, administrative, case management and direct services. As individual sites develop their budgets they reflect the programmatic costs (i.e. space, utilities, supplies, etc.) within their direct services components of their budgets.</i>	The assertion by DOE may or may not be true. Since the legislature only sees the transfers to the CDS accounts from the DOE general fund accounts and charts that show money flows but no account by account listing of the revenues and expenditures of the program, it is difficult to ascertain the actual costs of these programs. Further, it will be interesting to see how LD1843, requiring certain quasi state entities, including CDS, to RFP its contracts, plays out. CDS maintains that private providers will have to respond to RFPs for children's services. Will

		<p>CDS respond to the request for proposals where it also delivers the same services? It appears to us that this really highlights the unfair competition and conflicts of interest that exist when this quasi state entity also delivers the identical services of the private providers.</p> <p>Also, private providers do fund-raising and apply for grants to continue to provide the highest quality of services. These community-based businesses have proven over many decades to be flexible and nimble in their business model approach and in their dedication to providing high quality services to families and children.</p>
<p>7. Due to its close relationship with state government, CDS is able to pay higher salaries with better benefits, state benefits. This creates an unfair hiring advantage with the public sector.</p>	<p><i>The CDS system went through collective bargaining, as required by state statute to determine the salary and benefit levels. The CDS employees do not have the State benefit package. The starting salary for a first year teacher in CDS is \$24,000.00 as compared to \$30,000.000 in the public school.</i></p>	<p>Once again DOE/CDS is misdirecting the discussion and comparing salaries to public school salaries. It also did not respond to the issue of benefits. Private providers report that through the hiring process they learn that the CDS staff earn much higher wages with better benefits when they are not willing to work for much less in the private sector.</p> <p>One last point on this issue, not all CDS employees work twelve months with many do not working in the summer (as with public school employees). One comparison is with a southern Maine provider whose starting salary for teachers is \$11.50 per hour, which equates to \$20,093 for a year round employee working 35 hours per week. Assuming a 10-month CDS year, their reported \$24,000 annual salary would equate to \$28,800 over a 52-week year. This, in turn, converts to an</p>

		hourly wage of <b>\$13.85</b> for a 40-hour week. For a 35-hour week the wage would be \$15.82 per hour. This equates to significantly higher hourly rates than the private provider can pay. This does not include benefits. NOTE: salary is more disparate in regions north, east, and west of southern Maine.
8. CDS conducts and controls the process by which private providers can become an 'approved special purpose program'. It does not have to go through the same costly approval process which it forces on to private providers. It controls and restricts its competition, and effectively limits parents' choice and the development of private enterprise.	<i>Under state statute 20-A MRSA §7204.4, the Commissioner shall approve plans for all early intervention and special education programs. The criteria set forth in that section of statute have been incorporated in Section XII. Program Approval, of the Maine Unified Special Education regulations, which have gone through many APA processes. All CDS site programs have gone through the program approval process.</i>	<p>Interesting response. At this time CDS has not followed this requirement consistently for all programs for at least two years. Some private providers were approved two years ago. They completed a time consuming, lengthy process. Those approvals have lapsed and renewal information has been submitted with no response from CDS until last week when the attached e-mail was received by providers.</p> <p>While there had been a list of approved providers on the CDS website, currently it is unavailable. QUERY: it would be helpful to know of the 400 private providers, how many are approved programs.</p>
9. CDS consistently fails to offer MaineCare-funded program alternatives to parents at Individualized Educational Planning meetings. This is in violation of the MaineCare Billing Manual, which stipulates member choice in provider. It also does not consistently comply with	<i>The Department of Education and Department of Health and Human Services staff developed informational documents after the lawsuit, which are provided to families at the team meetings to make very clear what the families' rights are. The documentation was reviewed with all the CDS sites in the Fall of 2011 with Assistant Attorney General James Fortin as a reminder that KS vs. Harvey remains in effect and that CDS sites continue to distribute the information required as a result of the lawsuit.</i>	Once again, the committee must decide who to believe. On a conference call last week, two agencies reported that in the last two years, no mention or documentation of <u>KS v. Harvey</u> was shared. In one agency in May, there were 8 individual education planning meeting and NO information about MaineCare services as required by <u>KS v. Harvey</u> was shared. This is a graphic example of the statewide experience of noncompliance with the law suit settlement agreement. Sharing the information is important



the 'KS v. Harvey' lawsuit, which requires referrals to the MaineCare program for services which CDS will not fund, but will benefit the child.		because many young children may qualify for additional services and hours of service including physical therapy, occupational therapy, and speech and language therapy to help them improve their life skills.
10. CDS moves children from existing community-based private programs into its own programs without parental informed consent. This decreases member agency's service base.	<i>The CDS Regional sites take their responsibility about a change in the location of services very seriously, and routinely talk with families about placement options. Should that discussion with the parent lead to a decision to consider a change in location, a team is conferred about the change in the location.</i>	While IDEA does not require choice of services (MaineCare does require consumer choice of providers), parental and team involvement is critical to the success of work with young children. Parents are often in the terrifying position of fearing complete loss of services if they insist on involvement in the placement of their children. Often they are still reeling from the news that their child is not "perfect" and find the role of advocating for the best services for their child overwhelming. Frequent reports from parents describe CDS staff pushing them into services with little or no discussion or consultation.
11. CDS completely controls the contracting process with private providers. The contract is one-sided, including a nonpayment clause.	<i>Under Part C of IDEA the system is responsible for having a policy pertaining to contracting or making other arrangements with service providers to provide early intervention services. Under Part B of IDEA there are federal obligations related to and methods of ensuring services that include having appropriate vehicles/instruments for such. Under state statute 20-A MRSA §7209(3)(F) the state IEU shall perform the following statewide coordination and administration function " establish a standard, statewide template for regional site contracts with</i>	<b>We absolutely agree with the statement from the department – which is our whole point.</b> The CDS is required to control the contracting process while it delivers directly competing services. If it delivered services on an exception basis, we might not have the same concerns. For example, after the CDS site had canvassed the area for the necessary services and could not procure them, then it delivered those services, there would be less concern.  Again, see the attached forwarded e-mail with

	<p><i>therapeutic service providers, including policies and procedures for the review of contracts.” Therefore, the system is following both federal and state requirements, as the system is required to do so.</i></p>	<p>attachments giving less than a month to complete the “approval” process with the threat of loss of contracts for services. CDS sites continue to use disparate contracts some of which limit the services a private provider may deliver.</p>
<p>12. By administrative letter (avoiding the Administrative Procedures Act public process), CDS adds bureaucratic requirements, deadlines, changes in program requirements, etc., thereby creating unfunded mandates for compliance. See administrative letters numbers 11, 12, 13, and 21 as examples. These letters can be found at <a href="http://www.maine.gov/education/speced/cds/adminlett.html">http://www.maine.gov/education/speced/cds/adminlett.html</a></p>	<p><i>Administrative letters, which are enforceable, are reviewed by the Department’s AAG before disbursement, and are utilized to provide clarification of public policy and regulatory provisions.</i></p>	<p>This is legally incorrect. In the early 1990s, then Deputy Attorney General Cab Howard issued an advisory attorney general’s opinion that analyzed state/public agencies authority in relationship to statutes, regulations, and advisory memoranda/guidance letters. He was very clear that regulations had to be based on the authority of the state statute and that the so-called guidance, advisory, or administrative letters had no authority of law. He reasoned that the administrative procedures act allowed for public notice and public input before requiring the public to conform to agency requirements. These are the essence of due process not to mention the new trendy term of government “transparency”. It is almost impossible to run businesses (which is what private providers do) when the rules change abruptly and in unpredictable ways.</p>
<p>13. CDS has regularly used the emergency rule-making process to “surprise” providers, and parents, with program changes and requirements. Again, this undermines any public process and may be in violation of the</p>	<p><i>The Department has promulgated two emergency regulations of Chapter 101, June 22, 2009 as required by the Legislative Resolve after the rule went through the full Legislative and APA process, and January 19, 2010 in order to begin immediate savings in areas where the regulation exceeded the federal requirements.</i></p>	<p>One piece of evidence that the use of emergency rule making has been abused is the fact that when each of these rule makings were required to be reviewed the Joint Standing Committee on Educational and Cultural Affairs, the rules were major and substantively changed. Again, the department affects small businesses in Maine with little notice.</p>

Administrative Procedures Act.		
<p>14. Without public discussion or input, CDS adopted the “primary provider/coaching” model of service delivery. This unilateral action ignores other research and professional opinions describing other early intervention models, and in many regions has created a situation where CDS is the only provider of service.</p>	<p><i>This provision, the primary service provider/coaching model which is researched based, went through the full Administrative Procedures Act process for a major and substantive regulation, which includes a full public hearing and comment period before filing as a provisional regulation prior to Legislative session, followed by a legislative hearing and in this case over eight work sessions for the whole rule culminating a Resolve that went for passage to the Legislature for review in both chambers twice. A number of people made comment in the formal comment period and in the Legislative work sessions. Therefore there was no unilateral action taken by the Department. It is the IFSP Team that determines the services for an eligible child B-2.</i></p>	<p>We have checked our files and are unable to discover the notice of the adoption of this model. <b>We respectfully request a copy of the public comments and the department’s responses to them as required by the APA.</b></p>
	<p><b>Additional Important Fact:</b> Over 10 years ago the Internal Revenue Service issued an advisory about independent contractors. If an independent contractor performed services under the jurisdiction of an entity for more than 50% of their time they were not independent and were operating like an employee. The CDS System was advised that they needed to look very carefully at the independent contractors that they worked with to be sure that there was not an issue related to the advisory.</p>	<p>This fact is not in dispute. We cannot speak to the employment status of individuals who might be in employee status. This may apply to physical therapists, occupational therapists, speech pathologist, etc. There has never been any question that the private providers represented by MACSP are independent corporations or other private business category. Once again, the department is confusing the issues at hand</p>

Implications of the MaineCare policy changes over the last several years		While this change did have significant mostly negative impact on early intervention services, it really is not relevant to our complaint. The financial implications to the system have been major but again the competition complaint was in existence before the policy changes.

#### Case Study #1: Treasured Tots, Rochelle S. Harriman

June 8, 2012

What my business was:

- Inclusive pre-k program with extended care/after school care
- Licensed for 12 children
- Nationally accredited
- Highest level on Maine's Quality rating scale -
- Contracted with CDS as a special education site
- Specialized in autism, downs syndrome and most challenging of diagnoses.

I as the director have background as:

- RN
- Special education certification (282) for birth to grade 8.
- Bachelors in Child Development
- Certified teaching certification for Pre-K
- Trained health consultant
- BHP (Behavioral Health professional) certification (as required by the state)
- Master's degree in Education

What program provided:

- Mainstreaming/inclusion for all children. Reputation of taking children no other provider would take – seizures/tube feeding/behaviors and children who had been expelled from other programs
- Scientifically based Applied Behavioral Analysis (ABA) for children with autism
- Collaboration for other specialties – Physical Therapists, Occupational Therapists, psychologists, and CDS case managers.
- Collaboration and carry over with families into their homes
- Highly qualified staff, bachelor degrees in related field
- SUCCESSFUL outcomes – children who required little to no special education services within a year of starting kindergarten. Happy families, reputation. Children who were believed to never walk are, never talk do and medical support to sort out why a child was so continuously overcome with seizures and then support intervention.

My journey with CDS...

Stressful, intense and even reviewing for today brings back gut/nauseated feeling

I met new requirements a long the way.

- Required bachelor's – back to school and did classes one at a time
- Ed tech status of all staff – done
- Required 282 (Department of Education required special education certification - Initially not needed then needed. I then went back to school for Special Ed classes to meet these new requirements.
- Referrals stopped?? !! Always question of why?
- Program approval came -
  - Needed Master's degree - expense again: completed
  - Health consultant needed– CDS finally accepted me as an RN
  - Trained as a health consultant – time/travel
  - HOURS of administrative time to get all information required
  - Structure changes – bathroom rail, ramp, playground
- Time and stress were huge but kids were still thriving

Maine Care Section 28 was instituted to replace former early intervention MaineCare section 27.

- More requirements but didn't fit (school based, CDS based or special purpose)
- BHP - \$\$\$\$ and time.
- Already special ed site and had a Board Certified Behavioral Analyst (BCBA) and staff willing but cost was prohibitive
- I did the Behavioral Health Professional (BHP) training at \$900 using the on line program.

- CDS discouraging me from section 28 but without it I was not getting referrals for children I worked with and provided best services to.
- Met with DHHS as an option for section 28 services and they asked me if I had considered other options for servicing children – not encouraging me either.

#### FINALLY

- Change in reimbursement for ed tech – was losing money
- Not getting paid – July to November.
- Struggle to get even basic materials such as a PEC's book (\$20 binder), adaptive equipment. Stress, refinance of my home, hours of crying and I shut down.

My passion for working with children with special needs continues. My sadness of having loss Treasured Tots will always be.

#### **Case Study #2: Woodfords Family Services Rockland Preschool (Paul Nau, CEO)**

Bancroft NeuroHealth, a New Jersey non-profit, began providing intensive Applied Behavioral Analysis (ABA) services to kids in MidCoast many years ago – prior to 2001, when I came to the state to operate their programs. These were services provided to children with autism aged 2 to 5 in their own homes. Bancroft had an excellent reputation and several highly trained staff.

In 2002/2003 the Director of the CDS Knox County site approached Bancroft to help them open a preschool to serve this same population. We provided a consultant who set up the curriculum, trained staff, developed individualized treatment plans, etc.

However, when a new CDS site Director came on board we were told our services were no longer required. CDS took over all aspects of the operation. We continued to provide home-based services.

In April 2004, we opened a preschool for children with autism in a small space in the Rockland Recreation Center. CDS, state-wide, was moving to supporting a model in which Children aged 3-5 received their services in a preschool rather than in home. This was deemed to be the more natural, “least restrictive” setting for a child this age, so we made this move to provide what was considered to be best practices and to ensure that we received continued referrals. Most of our children enrolled at that time were transferred from in-home to preschool services. We also had several typical children who provided an inclusion experience, as requested by CDS.

In July, 2004, Bancroft NeuroHealth transferred ownership of all its programs in Maine to Woodfords Family Services. The Rockland Preschool continued operation, and I took on the responsibilities as the Director of Program Services for all Woodfords Programs.

This was a very small space – essentially a one-room schoolhouse. With a census of 15 special needs children and several typical children, the building was cramped and overcrowded and as early as 2006 we began the search for a larger site that would better meet the needs of our children and allow us to meet the capacity demands.

During a portion of that time, we worked with several other providers in an attempt to develop a jointly operated space, these included CDS Knox County, Penquis CAP and Broadreach Family Services, all of whom needed additional space to serve children in the MidCoast area. This was the “OneRoof” concept, in which all agencies would share space and children could easily move from one service provider to another, as appropriate. The organizations looked at several sites together. The last site we looked at was a daycare site formerly operated by MBNA on the Rockland waterfront. However, it was a small space and Woodfords’ involvement came to an end when the CDS Director indicated that she was unwilling to compromise on space sufficient to accommodate our needs.

Woodfords then initiated a search for its own site, and located a site in Rockport on Route 1 in July 2008.

After we moved referrals dried up and our census dwindled. During the 2009 Fiscal Year we admitted only 3 children, and in FY 2010 another 3. With children graduating to public schools every September, these admissions were not sufficient to maintain our census, which during the time between our move to the new site and our closing decreased from an average of 14 students to 8. Between 7/1/09 and 6/30/11, our losses were \$301, 094.

In the meantime, we learned that CDS was increasing the census in their own programs and had opened a new site on route 1 in Rockland.

I had several conversations with the local CDS Director about the lack of referrals and the impact on our preschool. Initially I was told that there just were no children being diagnosed with autism in MidCoast Maine.

Finally, under pressure from my Board of Trustees, in late summer 2010 I spoke to the Director and told her that we were on the verge of closing due to lack of census. She indicated that it was important that our program continue to remain open in order to provide children with autism an ABA option in the MidCoast. She said she would try to send us some referrals.

In September, we received two referrals. We received two more referrals after Christmas, but our losses were unsustainable by that time. We decided to close the program on March 31, 2011.

We gave one month’s notice. I went to the new CDS offices to meet with the Director. Before I announced the decision received a tour of their new building and its extensively remodeled program space.

We then went to her office and I gave her my news. Her response was to ask me what steps she needed to follow to open her own Autism program.

When we closed, she took the children in our program and hired most of our staff to provide the services. Soon after, their Board Chair also sent me a letter inquiring if I was willing to donate our preschool playground equipment to them for use at their new building.

We are still responsible for the preschool site we leased in Rockport, and will be subletting it at a loss until 7/31/13.

**Case Study #3: United Cerebral Palsy:** Bobbijo Yeager, executive director

UCP History with Preschool:

1. UCP was started in 1954.
2. Our first service was a school which we closed in 1976 after Public Law was passed creating IDEA.
3. After closing the school we started a preschool program.
4. We helped start CDS through a pilot project called Penobscot Preschool Project in 1984.

Program in Dover-Foxcroft:

1. In 2002, started a satellite preschool in a church in Dover-Foxcroft.
2. CDS worked with us to relocate to a remodeled building next door to them in 2004.
3. We purchased new playground equipment for over \$5,000, hired therapists, hired a receptionist, and signed a long-term lease.
4. Started experiencing decline in referrals. We were told no eligible children for our services.
5. At the same time CDS was hiring for Occupational Therapy as our OT sat with openings, we noticed advertisements for Developmental Therapists, while our staff (same qualifications) sat with no work. We offered to provide developmental therapy in homes. We offered the preschool service to typically developing children to make the service inclusive, declines continued.
6. By 2006, we had to close the program due to lack of referrals. Within 1 week CDS was renting the space we occupied and was offering preschool services.
7. To get out of the lease we had to pay \$10,000, CDS purchased most of our toys and office equipment paying us pennies on the dollar. We laid off more than 10 staff.



Program in Bangor:

1. In 2008, our preschool program that was started in the 70's was closed due to lack of referrals. We attempted to work with CDS for several years trying to build better relationships. Additional staff was laid off.
2. In 2010, our Bridges program which was a preschool for children with Autism was down to 3 children. Again, we had to lay off very qualified well trained staff.
3. In 2011, we adopted the Maine Care Medical Model and started getting private referrals from other social service agencies and doctors' offices. We received no referrals from CDS during that year.
4. This year we have started receiving a limited amount of referrals from CDS. Funding for these services has continued to come from Maine Care.

TODAY:

CDS is currently funding 2 children. The staff of our program has expressed to me great fear that the very tentative relationship they are starting to build will be destroyed by my continuing involvement with this complaint. Retaliation is something they fear and that CDS will once again not send referrals to UCP.

**Next Meeting on June 15, 2012, the Department of Education will provide (1) the independent contractors by type of services rendered and the types that stopped serving and (2) the referrals from CDS to independent contractors and to employed CDS staff.**

# Motions

# MOTION A

*Prepared by the Maine Department of Education  
Adopted by a MINORITY (2) of the Advisory Committee*

September 6, 2012

I move that the Advisory Committee on Fair Competition with Private Enterprise recommend to the governor that he require the Department of Education to prepare a report, to be delivered to both the legislature and the governor's office by February 1, 2013, which describes in detail the policies and procedures the Department and CDS will have put into place to standardize the employment and use by the CDS system of both hired staff and contracted providers. In particular, the report is to describe the following:

- The standards and process by which the Department and CDS determine whether an individual CDS site is to hire additional staff as opposed to private providers.
- The standards and process by which individual CDS sites determine whether a student is to be served by its own staff as opposed to private providers.

Further, I move that the Committee recommend that the governor establish that the goal in the development of these policies by the Department and by CDS should be to preserve and expand, to every extent possible, the significant role that private providers play in the provision of services to Maine's children through the CDS system.

# **MOTION B**

***Requested by the  
Maine Association for Community Service Providers  
Not supported by any Advisory Committee member***

September 6, 2012

The Committee on Fair Competition recommends to the Governor (and/or the Maine Legislature) the following:

1. Part C services (for birth to two) which are currently provided by CDS sites under the coaching model would move to private providers by contract and, where appropriate, the community agencies would be recognized as the natural environments for these services.
2. CDS centers could transition into private independent entities that would compete on an equal footing with the current community providers.
3. All newly identified children will be referred to external agencies at the time of the initial individual educational plan (IEP); all children currently in service will be referred to private providers at the time of their annual review. CDS will provide services when there is no available community provider. There will be an independent review of referral records by an impartial entity to be determined.
4. All contracts will be from the state CDS with no local CDS site contracts. The contracts will list all the services the provider is qualified to provide.
5. Within one week providers will receive notice of "site review" (delayed payment) and the reason for rejection.
6. Beginning immediately, the program approval process will be discontinued. It may be resumed when an appropriate process is in place to allow for efficient and timely approval determination.
7. Any approved provider will be engaged in a review with input prior to the release of any administrative letters.
8. Regulatory changes that are promulgated through the Administrative Procedures Act will be reviewed by the Children's Services Subcommittee of the MaineCare Advisory Committee.

# **MOTION C**

*Drafted and Adopted by a MAJORITY (5) of the Advisory Committee*

September 6, 2012

We, the Committee on Fair Competition with Private Sector recommend to the Governor that we recognize the federal mandate for providing services for children from birth to the age of five, and in order to protect the federal funding for this mandate, we want to assure that these services be provided, by:

- A. By private providers whenever possible while maintaining the current C.D.S. structure as a safety net whenever those services can not be provided by the private sector.
- B. We further recommend that both parties be held to equal criteria in service delivery and all of the provisions of the I.D.E.A.
- C. We ask that a copy of the annual C.D.S. report be sent back to this committee.

## **Statement submitted by Advisory Committee member Dirk DeHaan**

September 5, 2012

I am sorry to say that I won't be able to attend tomorrow's meeting.

However, I wish to share my opinion regarding this issue. If I have to select between the two proposals my vote would be to go with the DOE proposal. It provides a more balanced approach to the issue and should outline the rules and regulations that CDS has to work under to serve the special needs children of Maine.

However, I believe that the committee's recommendation could incorporate at least some of items in both motions. As part of the DOE report to the Governor, it should include some stipulation that CDS must take in account potential private service providers in selecting services for children. If that option is feasible it should be given serious consideration.

Also, adding contractual language describing the services that the provider is qualified to provide also seems like a good idea.

Again I'm sorry that I can't attend the meeting but wanted to share my thoughts.

/s/ Dirk DeHaan