

Summary of Comments/Responses

Department of Education

Provisionally Adopted Maine Department of Education Reg. 101
“Maine Unified Special Education Regulation”

A public hearing on the proposed Department of Education Regulation 101, entitled “Maine Unified Special Education Regulations Birth to Age Twenty”, was held on November 20, 2012. At the hearing, two individuals commented on the proposed regulation.

The deadline for submission of written comments was December 26, 2012. Twenty (20) sets of written comments were submitted by that date. Written comments were received from the following:

1. Anne Bureau, School Psychologist
2. Nancy Moulton, Program Director, Education Services for the Blind and Visually Impaired
3. Pauline Pinkos, Licensed Psychological Examiner
4. John McMahon, Director of the Blind and Visually Impaired
5. Barbara Pineau, Special Education Director, Unorganized Territories
6. Karen Farber, Disability Rights Center
7. Edward Green, President, Homeschoolers of Maine
8. Eric Herlan, Drummond Woodsum
9. Kathleen Powers, Maine CITE
10. Department of Education
11. Rachel Belanger, School Psychological Specialist
12. Hilda Ives Wiley, School Psychologist
13. Lucy Millar, Director of Special Services, AOS 94
14. Hillary Brumer, Assistive Technology Specialist
15. Danny Rice, Part C Program Officer for Maine, US Department of Education, Office of Special Education Programs
16. Scott Richardson, Special Education Director, RSU 50
17. Will Burrow, Special Education Director, RSU4
18. Jill Adams, Executive Director MADSEC
19. Patti Rapaport, Special Education Director, Bangor
20. Alan Cobo-Lewis, parent

Contextual Framework

The Department of Education Regulation 101 has been amended to address the following:

- Change all references to the CDS regional site Boards which no longer exist due to statutory revision throughout the rule;
- Add specific Part C new regulation language regarding evaluation and assessment, transition to an IEP, qualified personnel for nutrition and vision services, and policies related to public and private insurance;
- Add language about who is responsible for childfind and FAPE at Governor Baxter, Education in the Unorganized Territory, Maine School of Math and Science, and Charter schools;
- Clarified the change in eligibility in Section VII;
- Revised the FAPE choice provision to reflect the State statutory revision of IEP determination;
- Revised the “highly qualified” chart in Section X; and
- Added references to the Common Core in the two places that the Maine Learning Results were referenced;
- Modified the case management and caseload language regarding special education teachers;
- Added qualifications for an Assistive Technology Professional and a Board Certified Behavior Analyst; and
- Refined the Dispute Resolution section to be more reader friendly

GENERAL

1. Comment (#6): Commenter has the following comments listed by page number as found in the Fall 2012 Proposed document. Please note that **bold** text indicates federal regulatory language not included in the proposed revisions to *M.U.S.E.R. 101*.

a) Page 8, #21. Informed Clinical Opinion

The proposed language is missing the word ‘must’ which is present in the federal definition of Informed Clinical Opinion. For consistency with the federal language, the sentence should read: “Informed clinical opinion **must** be used by qualified...” rather than “Informed clinical opinion is used by qualified...”

b) Page 10, #30. Qualified professional

The proposed language does not match the federal definition; it is missing the words: “state approved or recognized.” To ensure consistency with federal requirements, we propose that the definition be modified to meet the federal language as follows: “A qualified professional must meet the **state approved or recognized** specific qualifications such as...”

c) Page 17, Consent

A definition of the term Consent has been mistakenly placed on page 17. It is not relevant to this section.

d) Page 18, E(1)(a) Health

The citation within the proposed language is missing a “.” between the Roman and Arabic numerals. Its readability will be improved if this is added: “VII.1(A)(1)”

e) Page 19, top of page

The paragraph contains the phrase: “IV.D of this rule.” However, this cite does not exist. The correct citation is IV.1.D.

f) Page 20, Family Assessment

The proposed sentence at *M.U.S.E.R. 101 §IV.1.E(1)(c)(ii)* is not consistent with the corresponding federal language, the federal language reads: “Any assessment that is conducted must be voluntary on the part of **each family member participating in the assessment.**” We propose that the state language duplicate the federal.

g) Page 21, Records of Post-referral

There is a typographical error in F(2)—a missing letter ‘t’—“post-referral activities.”

h) Page 41, V. Evaluation and Reevaluations

See discussion on page 1 of this letter.

i) Page 74, Informed Clinical Opinion

We encourage the Department to replace the word “is” with the word “must” assuring greater consistency with the federal language in the sentence that “...informed clinical opinion **must** be used by qualified early intervention personnel...” The word ‘must’ more adequately reflects the Part’s requirements.

j) Page 93-94 Eligibility for FAPE for 5-year-olds

See discussion on page 2 of this letter.

k) Page 117, Teacher of Record

We do not understand the sentence: “The teacher of record, who is also the highly qualified teacher in a specific content area, provide the student grade for specialized instruction.”

l) Pages 158, regarding Stand-alone Mediation

The proposed language found at page 158 *M.U.S.E.R. 101 §XVI.2(4)* indicates that the requirements for stand-alone mediations are defined at “*XVI(3)(A and B)*.” [Note, the parentheses around the numeral ‘3’ are incorrect; this citation should read *XVI.3(A) and (B)*.] We believe the Department’s likely intent was to also include *§XVI.3(C)* regarding the impartiality of mediators. Therefore, we propose that the sentence at *M.U.S.E.R. 101 §XVI.2(4)* read: “Requirements—See Section *XVI.3(A)*, *(B)* and *(C)* of this rule.”

m) Page 201 (b)(i)

The last sentence contains a reference to the regional CDS governing boards. We propose this be changed to the IEU.

Response: The following are the responses to each item in the list:

- a) The word “must” has been added.
- b) The words “state approved or recognized” has been added.
- c) The US Department of Education requested that definition be added in this section. No change made as a result of this comment.
- d) All other references to sections of the rule are done without quotes. No change made as a result of this comment.
- e) Citation has been corrected.
- f) The word “each” and the phrase “member participating in the assessment” have been added to IV.(1)(E)(1)© (ii).
- g) The missing “t” has been added.
- h) See Comment and Response in Section V.
- i) The phrase “must be” has replaced “is”.
- j) See Comment and Response in Section VIII. of this Summary.
- k) This sentence was added to be clear about the responsible highly qualified teacher, under NCLB, to provide the grade. No change made as a result of this comment.
- l) The Sentence has been corrected to reflect the “Requirements – *XVI.(3)(B)* and *(C)*.”
- m) The phrase “governing board of a regional CDS site” has been changed to “State IEU”.
- n) See Comment and Response in Section XVIII. Of this Summary.

2. Comment (#17): Commenter supports the changes made to the regulation.

Response: No change made as a result of this comment.

I. POLICY AND PURPOSE

II. DEFINITIONS

1. Comment (#15): Commenter requested that the federal definition for multidisciplinary (303.24) and for native language (303.25) be included in the definition section of the rule.

Response: These federal definitions have been added to Section II. Cross references have been made to those terms in Section IV.1.E

2. Comment (#18): Commenter suggests the following change to definition #30: “Qualified Personnel: Qualified personnel are personnel with Maine approved or recognized certification, licensing, registration, endorsement, or authorization for the professional discipline in which those personnel are providing assessments, including diagnostic impressions, special education services, or related services.”

Response: See Comment and Response in General Section item 1.b) above. No change made as a result of this comment

III. GENERAL EDUCATION INTERVENTION

1. Comment (#10): Commenter has received informal guidance from the US Department of Education that funds for Coordinated Early Intervening Services (CEIS) are to be used to provide services only to students who need additional academic and behavioral support, and not to students who currently receive special education and related services.

Response: A note has been added at the end of Section III which states “School administrative units must ensure that coordinated early intervening services (CEIS) funds are used to provide services only to students who need additional academic and behavioral supports, and not to students who currently receive special education and related services.”

IV. RESPONSIBILITY FOR CHILDFIND, EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES

1. Comment (#6): Commenter suggests “First, by limiting the language found in *M.U.S.E.R. 101 §V. Evaluations and Reevaluations* (refer to page 41) to Part B, the Department has eliminated a number of significant evaluation requirements found in federal regulation for Part C. Specifically, *34 CFR §303.321* includes the following Part C evaluation requirements which have been eliminated for Part C in the proposed *M.U.S.E.R. 101*:

- 1) A comprehensive, multidisciplinary evaluation must be performed;
- 2) The evaluation must be conducted in a nondiscriminatory manner;
- 3) Evaluation tools are to be selected and administered so as not to be racially or culturally discriminatory;
- 4) Evaluation procedures must include a review of educational and other records; and
- 5) Personal observations of the child are to be included in the evaluation process.

Therefore, we propose that the Department add to *M.U.S.E.R. 101* the federal language found in *34 CFR§303.321* to ensure compliance with the federal Part C requirements related to evaluation and assessment.

Response: Section V has been re-titled to include “For Children 3-20” because the whole section addresses the federal Part B regulatory language. The federal Part C language is included in Section IV (1). The multidisciplinary evaluation language and review of

records are already in the regulations. The following Part C regulatory language is being added as two new items under 1.(E)(1)(b)(iv):

- “(IV) be conducted by qualified personnel, in a nondiscriminatory manner, and selected and administered so as not to be racially or culturally discriminatory;
- (V) include personal observations of the child.”

2. Comment (#7): Commenter suggest that Section IV.4.H(3) be amended to allow greater access to special education services for children who are home schooled and recommends language be amended, as follows:

"IV.4.H.(3) Opportunity to Access Service Children who are enrolled in home instruction programs do not have an individual right to receive some or all of the special education and related services that they would receive if enrolled in a public school. Should a child enrolled in a home instruction program, ~~who chooses to enroll in specific day school classes at the public school,~~ request access to special education and related services in a public school within their SAU, the provisions of 20-A MRSA §5021 shall apply and the Individual Education Program Team will meet to develop an individual service plan for services provided in a public school. A child enrolled in a home instruction program shall be classified as a parentally placed private school child for purposes of determining eligibility for special education and related services, and the child shall not be required to enroll in any public school classes in order to establish eligibility."

Response: The federal Individuals with Disabilities Education Act (IDEA) at 34 CFR 300.2 discusses the applicability of IDEA to State and local agencies, specifically public agencies and private schools to which public agencies refer or place a child sot to which parents parentally placed a child. Home instruction is not included as an area of applicability. Further home instruction is not considered a private school as defined in State statute. The State statute at 20-A MRSA §1.22 definition states “Private school means an academy, seminary, institute or other private corporation or body formed for educational purposes covering kindergarten through grade 12 or any portion thereof.” No change made as a result of this comment.

3. Comment (#10): Commenter recommends that the language of Section IV.1.F be revised to reflect the following language which is practice in the field: “Records of Referral and Post Referral Procedures B-2. For any child who is referred documentation in that child’s cumulative record file shall specify:

- (1.)The date, the regional site and the person who coordinated the Referral and Post-Referral procedures.
- (2.)A description or example of the activities, procedures, forms or instruments used; and
- (3.)The results of the Referral and Post-Referral procedures including any recommendations to the IFSP team.

When the results of a child’s Post Referral procedures no not indicate a possible need for Early Intervention, a notation shall be entered in the child’s cumulative record file documenting the post-referral procedures, the date, and the regional site where those procedures took place.”

Response: The language of Section IV.1.F has been revised to reflect the text above.

4. Comment (#18): Commenter states that “ on page 40, Section IV.2.K “Paragraph 4 language is not in Title 20-A MRSA section 2414, subsection 2 as is stated after the paragraph. If this language is not in Title 20-A it should not be added to MUSER.”

Response: The fourth paragraph has been amended after ‘services is as’ to state designated in the legal structure established among the school boards. Maine Regulation Chapter 140, Sec 2.7. The remainder of the original proposed sentence has been deleted.

V. EVALUATIONS AND REEVALUATIONS

VI. INDIVIDUALIZED PLAN TEAM MEMBERSHIP

1. Comment (#9): Commenter states “On pages 58 and 64 of the proposed rule, we fully support the clear guidance on post secondary transition planning. “Beginning not later than 9th grade the IEP Team will start the transition plan and it will be updated annually thereafter—“.

Response: No change made as a result of this comment.

2. Comment (#9): Commenter states “On page 60, Transition to preschool and other programs: please consider adding language to assure that *if a child is using necessary assistive technology (AT) device(s) that the AT will follow them on to preschool in order to support a smooth transition and this is identified in the transition plan/IEP that is developed by CDS.*

Response: A new item (3) has been added to VI.2.C(1)(b) with the following language: *if a child is using necessary assistive technology (AT) device(s) that the AT will follow them on to preschool in order to support a smooth transition and this is identified in the transition plan/IEP that is developed by CDS.*

VII. ELIGIBILITY CRITERIA DEFINED AND PROCEDURES FOR DETERMINATIONS

1. Comment (#1, 11, 12, 18): Commenters voiced support for the additional language under the procedure for identifying Specific Learning Disability addressing English language Learners.

Response: No change made as a result of this comment.

2. Comment (#3): Commenter does not feel that the additional statement is appropriate and warrants further discussion amongst the organizations of psychologists.

Response: No change made as a result of this comment.

3. Comment (#8, 16, 17, 18): Commenter suggested VII.4.D(2) should be removed which states that “no general education intervention would be required if the child’s progress lessens during the same school year as a change in eligibility.”

Response: The language was meant to reflect that a child who has not progressed after dismissal could be re-referred without going through the general education intervention a second time. The proposed language of the sentence has been amended to be clearer. The sentence now reads: “No general education intervention **shall** be required **before re-referral** if the child’s progress...” Bolded words are the changes.

4. Comment (#13): Commenter suggests that in Section VII.4.D items #1 and #2 should be deleted.

Response: These are clarifications in wording regarding change in eligibility. No change as a result of this comment.

5. Comment (#18): Commenter welcomes the addition of the language clarifying a child’s need for special education.

Response: No change made as a result of this comment.

6. Comment (# 20): Commenter prefers the original language of Section VII.4 of the rule and feels that some of the new language implies that the adverse effect requirement applies more broadly.

Response: A regulation needs to be read as a whole. Item #3 of this section is to be read with the proposed provisions of #4. No change made as a result of this comment.

VIII. ELIGIBILITY FOR FAPE FOR FIVE YEAR OLDS BY IEP DETERMINATION

1. Comment (#6): Commenter states “with regard to eligibility for FAPE from CDS for 5-year-olds (refer to pages 93-94), we understand *20-A MRSA §7001(2-A)*, enacted by *PL 2001 Chapter 477 Part F §1*, to require the commissioner to adopt rules with which IEP Teams must be in accord when determining a 5-year-old’s eligibility for FAPE from CDS. However, the proposed rule language here offers nothing beyond the statutory statement that the commissioner will adopt such rules. What is the timeframe for the Department putting forth these rules?”

Response: The intent when the language was enacted was that Section VI. Regarding Individualized Plan Team of the regulation would be followed. No change made as a result of this comment.

2. Comment (#20): Commenter indicated that the change in the FAPE choice provision was to be done in accordance with rules adopted by the Commissioner. Further the commenter proposed specific language.

Response: See the response to #1 above. No change made as a result of this comment.

IX. INDIVIDUALIZED PLANS

1. Comment (#9): Commenter suggests that “On page 100, section (h) (ii): add the *consideration of assistive technologies* in the descriptive list of transition services.”

Response: The phrase “or consideration of assistive technologies.” Has been added to the parenthetical list in (h)(ii).

2. Comment (#15): Commenter indicated in Section IX.1.D(8)(a) and (a)(ii) the reference to 34 CFR 303.211 be deleted as Maine does not have an opt out policy.
Response: The citation in (a) has been deleted and (a)(ii) has been deleted and the item below it renumbered.

X. EARLY INTERVENTION/ SPECIAL EDUCATION SERVICES AND SETTINGS

1. Comment (#5, 16): Commenter is confused about the proposed regulatory changes to clarify case load and case management.

Response: The regulation was changed to indicate that when an individual is responsible for the case management of a child the total case management case load for that individual is 35 students. No change made as a result of this comment.

2. Comment (#8, 16, 18): Commenter suggests that the proposed language regarding BCBA's in Section X.2(A)(6) should be moved to another section of the rule.

Response: The proposed language has been moved to page 143 just after the chart of the related services.

3. Comment (#13): Commenter feels that tutoring is not a special education service and should not be considered as such.

Response: Tutorial instruction was refined in an earlier rulemaking, at which time it was clarified that tutorial instruction is to be used in conjunction with abbreviated school day or Discipline of Children with Disabilities (Section XVII.), but in no other circumstances. No change made as a result of this comment.

4. Comment (#13): Commenter states that BCBA services are not a type of special education, rather it is a related service.

Response: See Comment and Response #2 above.

5. Comment (#18): Commenter appreciates the change in the caseload language.

Response: No change made as a result of this comment.

6. Comment (#18): Commenter questions why the Teacher of Record was added.

Response: This was added to provide clarity of NCLB highly qualified. No change made as a result of this comment.

7. Comment (#19): Commenter questioned the ratios in self-contained classrooms.

Response: That piece of Section X is not part of this rulemaking. No change made as a result of this comment.

8. Comment (# 19): Commenter wondered if the HOUSSE rubrics could be extended for a couple of more years.

Response: The HOUSSE rubrics have been amended to reflect the current federal requirements. No change made as a result of this comment.

XI. EARLY INTERVENTION SERVICES FOR YOUNG CHILDREN B-2 AND RELATED SERVICES FOR CHILDREN THREE TO TWENTY

1. Comment (#2,4): Commenter suggest that for provision of vision services for both children birth through 2 and 3-20 that a Teacher for the Visually Impaired be considered a qualified provider.

Response: The regulation reflects the federal language. There is an endorsement #291 for Teacher of the Blind and Visually Impaired. Teacher of the Blind and Visually Impaired has been added in italics to reflect State policy to include these individuals as qualified.

2. Comment (#9): Commenter suggests that “On page 133, Vision Services: (ii) include *the need and use of assistive technology* as a supplement to visual travel skills and (iii) low vision aids *and assistive devices* (iv) other concepts, techniques, tools *and assistive technologies* .

Response: The language in the table is the Part C regulatory language which is verbatim. The suggested additional language is not part of the federal regulatory language. No change made as a result of the comment.

3. Comment (#9): Commenter indicates that “On page 138/139, Assistive Technology: we commend the DOE and fully support the addition of *certified AT Professionals* as qualified providers of AT assessments and training... in addition to licensed occupational therapists, physical therapists and speech pathologists.”

Response: No change made as a result of this comment.

4. Comment (#14): Commenter is pleased to see specific language regarding what constitutes a qualified person to conduct AT services in the proposed regulation changes.
a) Commenter feels the language of a qualified person for AT evals should also include Special Education Consultants who are actively working in AT. The rationale for this is that there are AT Specialists in the state that are AT practitioners that are certified Special Education Consultants.

b) Commenter questions as an AT specialist in her school district does her current certification qualify her as a qualified person or will she have to obtain RESNA Certification to continue?

c) Will the state be considering adopting an AT Specialist certification as one of their endorsements?

Response: a) and b) The proposed regulatory language states” a provider who is already qualified to provide services and consultation on the use of assistive technology in the provider’s practice is not required to also have this National certification.” In reviewing the language of the certification rule for special education consultant, it states that “services are limited to the holder’s areas of training and expertise.” Therefore the AT specialists that are certified as special education consultants with training and expertise in AT could do evaluations and would not be required to have the National certification. No change made as a result of these comments.

c) The State will not be adopting an AT Specialist certification, as we are going to recognize the national. No change made as a result of this comment.

XII. PROGRAM APPROVAL

XVI. DISPUTE RESOLUTION PROCEDURES

1. Comment (#8): Commenter feels that the language at Section XVI.3.B(7) should simply state that the school may not bring a non-attorney advocate to the mediation unless the parent is bringing a non attorney advocate, without reference to who employs that person.

Response: The proposed language has been changed to state the following: School administrative units may be accompanied at mediation by a non-attorney advocate or consultant only when the parent is similarly accompanied by an individual who has been hired by the parent specifically to perform special education advocacy or consultancy, or else is represented at the mediation by an attorney.

2. Comment (#13): Commenter wonders what it means to “encourage the parents” to use mediation.

Response: Encourage is intended to mean ask if the parent will consider mediation. No change made as a result of this comment.

3. Comment (#13): Commenter questions in Section XVI.3.B(7) how schools would know the employment status of an advocate.

Response: School administrative units could ask the advocate. No change made as a result of this comment.

4. Comment (#18): Commenter questions why the language was added to Section XVI.3.B(7).

Response: The intent was to make the opportunity for advocacy to be addressed equally. No change made as a result of this comment.

5. Comment (#15): Commenter has provided the federal citations for the Part C regulations for each of the components of the dispute resolution.

Response: The Part C citations have been added throughout the section.

XVIII. SPECIAL EDUCATION FINANCE

1. Comment (#6): Commenter “continue to be concerned that state regulations contain language specifying rates to be paid to contract providers (refer to page 202 of the proposed regulation)—language which is more appropriate to guidance. The proposed revision appears to mandate the use of the Medicaid rate for comparable services based on the rate on the date of the rule’s adoption, thereby maintaining, into perpetuity, a fixed

rate: "...the Medicaid rate paid for comparable services on the effective date of the final adoption of this rule and must be considered payment in full..."

In addition, the phrase "payment in full" indicates that no more than the Medicaid rate for comparable services may be paid. Yet, the next paragraph, (e), makes clear that the first priority of an SAU is provision of FAPE regardless of the availability of a contracted provider at the Medicaid rate of the date of rule adoption. Therefore, the section contains an inherent contradiction: The SAU must not neglect its obligation to provide FAPE regardless of provider cost but it also may not pay more than the Medicaid rate for comparable services based on the date of the rule's adoption". Commenter further "request that both (d) and (e) on page 202 be removed and the substance of the Department's direction be provided to SAUs via traditional guidance mechanisms such as Administrative Letter."

Response: Section XVIII.(1)(C)(3)(d) has been revised to remove the phrase "on the effective date of the final adoption of this rule. The language in (e) is intended to address those circumstances where a provider cannot be found who is willing to take the Medicaid rate. No further changes made as a result of these comments.

2. Comment (#9): Commenter suggests that "On page 197, Special Education Finance: we note that the *certified AT Professional* needs to be recognized and listed in this section as an allowable cost."

Response: A new table has been added to page 199 labeled National Certifications into which the certified AT professional has been added.

3. Comment(#10): Commenter suggests that the national certification for Board Certified Behavioral Analyst (BCBA) be added to the Certification chart in Section XVIII.1.C(1).

Response: Board Certified Behavioral Analyst (BCBA) has been added to the chart.

4. Comment (#13): Commenter feels that schools should be free of restrictions about rates in contracting with providers.

Response: This provision was implemented in an earlier rulemaking as a means of containing costs. No change made as a result of this comment.

5. Comment (#18): Commenter suggest that Section XVIII.C(3)(d and c) be deleted.

Response: The original language was suggested by a special education director to be consistent with the CDS System rates and to contain costs. No change made as a result of this comment.

6. Comment (#17): Commenter suggests that Certified Employment Specialists be added to the chart of Qualified Licensed Contractors.

Response: Certified Employment Specialists have been added to the chart.