

May 30, 2008

*By Facsimile to the Disability Rights Center  
621-1419 and First Class Mail*

Diane Smith, Esq.  
Disability Rights Center  
P.O. Box 2007  
Augusta, ME 04338-2007

**Re: *In re Penobscot County CDS, 08.083C***

Dear Attorney Smith:

This letter is in response to the Dispute Resolution Request Form seeking an investigation of the practices of CDS Penobscot County received by the Department of Education on May 14, 2008 and completed<sup>1</sup> on May 19, 2008 (the “Complaint”). The Complaint alleges violations of Maine’s Unified Special Education Regulation (“Chapter 101”) that you contend are systemic in nature, and includes in the addendum eleven specific children’s cases that you reference throughout the Complaint as examples of the systemic violations. The Complaint also seeks individualized relief for the children whose cases are included in the addendum and who have not received an individualized relief through a previous due process complaint investigation or successful mediation. Pursuant to Section XVI.4 of Chapter 101, upon receipt of a complaint alleging violations of federal or state special education laws or regulations, the Department is required to carry out an onsite investigation if the Department determines that such an investigation is necessary. In this case, I have determined that no onsite investigation is necessary, and that a corrective action plan will be put in place immediately with no further investigation or fact-finding other than what is described below in connection with the corrective action plan. The site is found to be in non-compliance with procedural and substantive requirements of Chapter 101 based on the allegations in the Complaint as limited by Sections I and II below, and the corrective action plan outlined in Sections III and IV below will be in effect as of the date of this decision.<sup>2</sup>

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<sup>1</sup> The Dispute Resolution Request Form as initially filed did not contain all of the information required by Section XVI.4.B.2 of Chapter 101 as it made allegations of violations regarding specific children without providing their names and addresses.

<sup>2</sup> My decision to declare the CDS Penobscot site out of compliance without providing them an opportunity to respond to the Complaint is based on the fact that the site is governed not by an independent Board but by an appointee of the Commissioner assisted

## I. The Contents of the Complaint: Individual vs. Systemic Relief.

As you acknowledge in the Complaint, several of the families whose children are used as specific examples in the addendum to the Complaint have previously participated in due process proceedings. When the staff of the Due Process Office reviewed the Complaint after receiving the identities of the individual children contained in the addendum, they determined that six of the ten families had requested some form of due process within the past two years with two of them having complaint investigations (one of which subsequently resulted in a request for a due process hearing that was successfully mediated) and three of them having successful mediations. The sixth family sought a complaint investigation and mediation, but subsequently withdrew their request. While I appreciate your concern that the resolution of individual cases may not lead to the identification and correction of deficiencies on a site-wide basis, I am troubled by the notion that the successful resolution of individual cases could lead to subsequent due process proceedings regarding the same issues in the form of a systemic complaint. As you are well aware, the lynchpin of mediation is compromise – in essence, the site gives up its right to defend its actions in the context of a hearing or complaint investigation in order to resolve the issue with the family in a timely, mutually agreeable manner – and as such a mediated resolution cannot be construed as a finding of noncompliance. Nor should the underlying allegations that lead to the mediated agreement be allowed to be revived as evidence of noncompliance – simply stated, I am loathe to send a message to a CDS site (or any school administrative unit) that there is no reason to participate in mediation because the allegations may reemerge as evidence of noncompliance in a future proceeding. As such, I will not consider any allegations raised by the families who have successfully mediated their disputes with CDS Penobscot County as evidence of systemic violations.

Regarding the two complaint investigations, in one case the complaint resulted in a finding of compliance regarding the issue brought to the Department (the violation found was raised by the complaint investigator as an ancillary issue), and a subsequent request by the family for a due process hearing was settled at mediation. That settlement agreement contained a full release of claims against CDS Penobscot as of the date of the settlement, and, as such, I am giving you and this petitioning family **10 days from the date of this letter** to show cause why I should not dismiss the allegations related to this child from the Complaint. The other complaint investigation resulted in findings and a corrective action plan; I do consider these violations to be evidence of systemic violations by CDS Penobscot County.

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by Department of Education and State IEU staff. If the site was independently governed, no findings or determinations would be made without giving the site the opportunity to respond. In addition, to the extent Chapter 101 requires that the complainant(s) be allowed to submit additional information, I view that requirement to be inapplicable in this situation where the site is being deemed systemically non-compliant, and the availability of individualized relief includes the ability to submit additional information relating to each child as detailed in Section III below.

That leaves four families who have not had the opportunity to participate in dispute resolution – although I was surprised to learn that while this response was being prepared, one of these families filed a separate request for a complaint investigation regarding both the issues described in the addendum to the Complaint and others, assigned 08.086C, which I have directed be administratively consolidated with this Complaint. Given this procedural history, I believe that it is appropriate to proceed on a case-by-case basis with these families to ensure that the children receive individualized relief I have laid out the corrective action plan with regard to these individual cases in Section III below. In addition, if any of the families who have already participated in dispute resolution believes that they are entitled to additional individualized relief for claims arising subsequent to their mediation agreements or corrective action plan (“CAP”) or if the family who sought due process and then withdrew it wishes to reinstate their claim for individualized relief, they may participate in the corrective action plan for individual cases in Section III as detailed below. I will also consider these families’ allegations to be evidence of systemic violations in Section IV below.<sup>3</sup>

## II. The Contents of the Complaint: Legal Issues.

The addendum to the Complaint lists four “general categories” of systemic violation. Two of these categories are listed as “limiting parent input into decision-making regarding their child/ren’s program(s)” and “limiting access to certain facilities/ programs.” Your proposed actions that would resolve the Complaint include “parents to be provided a list of ALL contracted, state-eligible providers so that they are able to make an informed decision about placement.” To the extent that one or all of these items refer to the failure of CDS Penobscot County to allow the parent(s) to choose their service provider(s), I need to be clear that the Department’s position is that neither the IDEA nor Chapter 101 provides parents the right to choose their providers. I am particularly surprised that this issue has been raised in a complaint filed by the Disability Rights Center, given that Advocate Karen Farber made this point explicitly in the DRC newsletter last fall when she wrote “[t]he actual selection of a provider or program is essentially a personnel decision made by CDS. Once there is ECT consensus on what the services are and what the Least Restrictive Environment looks like, the provider or personnel decision is in the hands of CDS. A parent is not entitled to make that decision any more than a parent is permitted to pick their child’s elementary school teacher.” Ms. Farber’s statement is an accurate description of the law presented in a family-friendly manner and I commend her for assisting families in understanding this important distinction.

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<sup>3</sup> In sum, after eliminating the mediated cases, the specific issues of non-compliance identified in the addendum remaining (*i.e.* with supporting facts from the unresolved cases) are: 1 - 7, 11, 12, and 15 (2<sup>nd</sup> issue).

In addition, the addendum lists “general issues regarding management/administration of the site” as an area of systemic violation and proposes corrective action that is (1) purely administrative or managerial in nature – *e.g.* phone message systems and policies regarding time requirements for responding to messages, (2) involves disciplinary action against individual employees, or (3) is in excess of any requirement of IDEA or Chapter 101 – *e.g.* a requirement that case managers contact families at least monthly regardless of individualized needs. Matters of general administration are not violations of IDEA or Chapter 101 and will not, in and of themselves, be considered for purposes of corrective action.

### III. Individual Corrective Action.

In order to expediently resolve any early intervention or FAPE issues relating to the individual children whose parents have not already accessed due process, as well as any additional individual child’s issues that were not raised or resolved by any prior due process proceeding, the following corrective action must be taken:

#### A. For all petitioning families:

1. For any petitioning family who has not previously resolved their individual claims against the site through due process an IEP Team or IFSP Team meeting must be convened **within 30 days of the date of this letter**. Prior to the meeting, the parents, their attorney or advocate (if the parent wishes), and the designated representative of the CDS site (as defined below) shall have a telephone conference to: (1) develop a comprehensive list of the topics to be addressed at the meeting, (2) agree on the meeting participants to include, but not be limited to those required by Chapter 101,<sup>4</sup> and (3) provide the parents the opportunity to submit additional information to the designated representative prior to the meeting that is not already in the child’s education record and relates to one or more of the topics to be discussed at the meeting. The telephone conference must be held sufficiently in advance of the meeting to allow flexibility in the scheduling of the date and time of the meeting, and a written summary of the telephone conference shall be prepared by the designated representative and included with the Advance Written Notice of the Team meeting.

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<sup>4</sup> To the extent that a child is currently receiving services outside the CDS system and/or using a provider who is not under contract to CDS and that individual is identified as a participant in the meeting – CDS is obligated to invite the individual to the Team meeting and make a good faith effort to secure their attendance, but will not be deemed non-compliant based on the refusal of such a provider to participate in the meeting.

For children who are being served pursuant to Part C of the IDEA, the designated representative of CDS Penobscot County must be either Cindy Brown or Liz Keach. For children who are being served pursuant to Part B of the IDEA, the designated representative must be either State CDS Director Debra Hannigan or Erica Thompson, Distinguished Educator with the State Intermediate Educational Unit.

2. Any petitioning family who has already participated in dispute resolution through the Department's Due Process Office and who seeks additional individualized relief must notify Cindy Brown (for Part C) or Debra Hannigan (for Part B) **within 10 days of the date of this letter** of their desire to have a Team meeting which must follow the procedures outlined in 1 above and must take place **within 30 days of their notification to the appropriate representative of the site.**
3. **Within 5 business days** of the IEP or IFSP Team meeting, a Written Notice, a copy of the new or amended IEP or IFSP (where appropriate), and copies of any other written agreements between CDS Penobscot County and the petitioning family must be sent to the family.
4. For each individual case, copies of the summary of the telephone conference, the Notice of the Team meeting, the Written Notice, the new or amended individualized plan (where appropriate), and any other written agreements between CDS Penobscot and the petitioning family must also be sent to Susan Parks, Due Process Consultant at the Due Process Office of the Department of Education **within 40 days of the date of this letter.**
5. Any family who is dissatisfied with the results of the process outlined above retains the right to their due process options; however, if the family requests a complaint investigation regarding their individualized claims, CDS Penobscot County will immediately file for a due process hearing in order to finally resolve any remaining disputes without delay.

B. Part C Meetings:

The designated representatives of CDS Penobscot County who will conduct meetings regarding children being served under Part C must consider the following:

1. Given that time has passed between some of the allegations in the Complaint and the present, reference to the former Chapter 180 may be required in addressing the provision of early intervention services prior to August 3, 2007; and

2. Sections X.1 and XI of Chapter 101 permit the use of consultation, a primary service provider model, and direct therapy as modes of service provision for early intervention services pursuant to Part C – the IFSP Team is charged with determining the results or outcomes for the child and family, and then determining the early intervention services needed in order to assist the child and family to achieve the outcomes; as such, the need for a particular type of service and mode of service delivery must be determined by the Team based on the results or outcomes identified in the IFSP and the individualized needs of the child and family.

C. Part B Meetings:

The designated representatives of CDS Penobscot County who will conduct meetings regarding children being served under Part C must consider the following:

1. Given that time has passed between some of the allegations in the Complaint and the present, reference to the former Chapter 180 may be required in addressing the provision of FAPE prior to August 3, 2007; and
2. Chapter 101 requires that a group of persons including the parent and other persons knowledgeable about the child be responsible for determining the educational placement of the child – a list of program settings is included at Section X.2.C. CDS Penobscot County is then authorized to identify the particular provider of services; that provider must be consistent with the educational placement determination by the Team. If CDS Penobscot County chooses to offer the parent an opportunity to visit different providers and indicate their preferences to the site, the designated representative must explain to the parent that expression of a preference for a particular provider does not override CDS's authority to select the provider of services for the child.

IV. Systemic Corrective Action.

Notwithstanding my concerns with the contents of the Complaint articulated in Sections I and II above, I believe that taken as a whole, the Complaint, particularly when read alongside the monitoring reports for the Penobscot site (available online at the Department of Education's website) indicate systemic deficiencies at the site that must be corrected.

An additional factor has influenced my decision to implement broad, systemic corrective action. On May 21, 2008, a management change occurred at the Penobscot site. Cindy Brown of CDS-Piscataquis County and Liz Keach of Project PEDS assumed co-management responsibility for the site, and I want to do everything possible to ensure that any deficiencies that may have occurred in the past do not make their way into the site's future.

The following corrective action must be taken:

A. Development of corrective action plan. **Within 30 days of the receipt of this letter**, Ms. Brown and Ms. Keach must submit a corrective action plan which has been approved by Ms. Hannigan to me, with copies to Susan Parks of the Due Process Office, counsel, and each of the petitioning families. A copy of the plan must be prominently posted at all CDS Penobscot County offices and site-run early childhood education programs, and available to families served by the site and the general public upon request. The plan must address the following areas and meet the following timelines:

1. Compliance with statutory/regulatory timelines for initial evaluations, determinations of eligibility, and development of IEPs and IFSPs. The plan must include steps to be taken to ensure that by **no later than July 1, 2008**:

- Every new Part C referral will comply with the timelines of Chapter 101. The plan must include a definition of what “receipt” of a referral means, and must utilize a standardized tracking form - - which will be supplied by the Department and will become part of the child’s education record -- to record the date of the referral and all subsequent timelines, and indicate whether each deadline was met, and if it was not, the reason(s) why. These tracking forms must be reviewed by Ms. Brown or Ms. Keach on a monthly basis, and copies must be provided to Ms. Hannigan and reviewed at the meeting described in subsection C below.
- Every Part B referral will comply with the timelines of Chapter 101. The plan must include a written policy regarding referral to the IEP Team, and a written definition of the “school year” for purposes of Part B in order to determine the 45 school-day deadline for individual children. The plan must include use of a standardized tracking form -- which will be supplied by the Department and will become part of the child’s education record -- to record the date of referral and all subsequent timelines, and indicate whether each deadline was met, and if it was not, the reason(s) why. These forms must be reviewed by Ms. Brown or Ms. Keach on a monthly basis, and copies must be provided to Ms. Hannigan and reviewed at the meeting described in subsection C below.

2. File review and technical assistance: Part C. The plan shall include steps to be taken to ensure that by **September 1, 2008**, the case manager(s) responsible for serving infants and toddlers with disabilities have had the opportunity to review all of their open files with the guidance and assistance of either Ms. Brown or Ms. Keach regarding the procedural and substantive requirements of Part C. The plan shall provide that starting on September 2<sup>nd</sup>, parents of infants or toddlers receiving Part C services must receive notice that those wishing to have their child's file reviewed by their IFSP Team – even if it is not time for an annual meeting or a six-month review – may contact the case manager assigned to their family and schedule an IFSP Team meeting that must take place within 60 days of their request.
3. File review and technical assistance: Part B. The plan shall include steps to be taken to ensure that by **September 1, 2008**, the case manager(s) responsible for serving children with disabilities have had the opportunity to review all of their open files with the guidance and assistance of a certified special education administrator regarding the procedural and substantive requirements of Part B. The plan shall provide that starting September 2<sup>nd</sup>, parents of children receiving Part B services shall receive notice that those wishing to have their child's file reviewed by their IEP Team – even if it is not time for an annual meeting – may contact the case manager assigned to their family and schedule an IEP Team meeting that must take place within 60 days of their request. All IEP Team meetings must include an authorized representative of CDS Penobscot County who meets the requirements of Section VI.2.B.4 of Chapter 101.
4. Contract management. The plan shall include the steps to be taken to ensure that by **September 1, 2008**, Ms. Brown and Ms. Keach will have reviewed all existing contractual relationships with service providers and determined which contracts they wish to continue in their current state, which contracts they wish to amend, and which contracts they wish to terminate. While neither federal or state law or regulation requires that the Penobscot County site contract with any particular public or private service provider, the plan must ensure that the group of providers available to the Penobscot County site (including employees of the site, employees of public schools, and contracted public and private service providers), taken as a whole, represents both appropriate geographic diversity across the catchment area, and program/placement diversity in order to ensure placements in the natural environment for all infants and toddlers with disabilities B-2 and in the least restrictive environment for children with disabilities 3-5.



5. Administration and Site Management. The plan shall include the steps to be taken to ensure that by **September 1, 2008**, the Penobscot region will be divided administratively between Project PEDS and CDS-Piscataquis County (which will adopt a new non-geographically related name). The plan must divide the area so that the two sites serve approximately the same number of students while ensuring consistency with existing school administrative unit boundaries or, where possible, boundaries of proposed regional school units or alternative plans. The plan must include the addition of representatives from the Penobscot region to the Board of Project PEDS and to the advisory board of CDS Piscataquis County as appropriate. The plan may not eliminate either the Bangor or the Millinocket office. If the administrative division of the Penobscot County site involves reassignment of case managers, every effort must be made to coordinate the reassignment of case managers and the file reviews contained in paragraphs B and C above. The plan must include notifying every family receiving services from CDS Penobscot County on or before September 1, 2008 of the site to which their child has been administratively assigned and the name and contact information for Ms. Brown and/or Ms. Keach, and their child's case manager.
- B. Technical assistance. The Department of Education and the State IEU will provide assistance to the site including, but not limited to, the following: the identification of and payment for the certified special education administrators who will assist the Part B case managers, the development of the standardized tracking forms for compliance with timelines, and assistance with the development of any other policies or procedures included in the plan or deemed necessary or useful by Ms. Brown or Ms. Keach. The Department's Assistant Attorney General will be available to Ms. Brown, Ms. Keach and all of the mentors by telephone, and in person at the Penobscot County site on at least two mutually convenient days between now and September 1, 2008, to assist with legal questions that arise during the implementation of the corrective action plan and /or individual file reviews.

C. Review of implementation of corrective action plan; additional action. I will schedule a meeting with Ms. Hannigan, Ms. Thompson, Ms. Brown, Ms. Keach, counsel for the petitioning families, and counsel for the Department **on or about September 15, 2008** to review the site's compliance with both the individual and systemic corrective action plans. At that time, additional corrective action may be ordered to address compliance issues that have not been fully addressed in the corrective action plan as implemented.

Sincerely,

Susan A. Gendron  
Commissioner

cc: Ten Petitioning Families  
Debra Hannigan, State CDS Director  
Cindy Brown, Co-Manager, CDS Penobscot County  
Liz Keach, Co-Manager, CDS Penobscot County  
Sarah Forster, Esq., Assistant Attorney General  
David Noble Stockford, Team Leader, Special Services Team  
Pauline Lamontagne, Esq., Due Process Coordinator  
Susan Parks, Due Process Consultant