

Summary of MPAS Comments to ESY and Complaint Regulations and Jail and Detention Facility Policy

Michigan Protection and Advocacy Service, Inc. (MPAS) is Michigan's designated protection and advocacy program, mandated to serve persons with disabilities in the Great Lakes State. MPAS receives over 7,000 requests for help each year; 30-40% relate to problems involving children with disabilities under IDEA. MPAS is pleased to comment on the proposed state regulations governing extended school year services, the complaint process, and education in jails and detention centers.

Extended School Year Regulations

MPAS has commented on ESY guidelines before and is pleased to support language suggested by our previous comments and added in proposed rule 340.1721e. Specifically, we support:

- Reference to "current" annual goals in subsection (3)(a).
- Reference to the "potential" for regression in subsection (3)(a)(i), though we are concerned that "serious" potential is ambiguous and could be interpreted to deny services improperly.
- Reference to "skills" beyond "life skills" in subsection (3)(a)(iii).
- Reference to "any" of the criteria being sufficient to justify provision of ESY services in subsection (3)(b).
- Reference to "timeliness" in subsection (3)(f), though additional clarification could be added to make "timely" more specific.

MPAS disagrees with the proposed language limiting provision of services in the least restrictive environment in subsection (3)(e) and recommends it be stricken.

MPAS reiterates its comment that the ISD planning rules must also be amended to require formal planning for ESY services at either the state or ISD level. See our comments to the ESY guidelines in November 2007:

We are concerned that ISD plans and existing service systems do not provide for the necessary availability of ESY services, including both instruction and related services, in varied settings. Current ESY services are provided mostly in center-based SXI and SCI programs to match the current state legal requirements, but there is little indication that local districts or other providers have the ability to make appropriate services and supports available when needed. The guidance should be accompanied by a standard requiring modification of ISD plans, with public input, to ensure that the appropriate continuum of alternatives is available for any student who might need ESY services under the new guidance.

Complaint Regulations

MPAS supports the concept of unifying complaint investigation into a single step. The state has legal responsibility for conducting complaint investigations and investigating complaint findings, and the regulations reflect that responsibility.

- Proposed Section 1851(3) should be amended as follows:

“A state complaint shall be delivered to the department and the public agency by mail, by fax, or by hand. The department will transmit the complaint to the public agency.”

The suggested amendment comports with 34 CFR 300.153(d) which requires the public agency to receive a copy of the complaint, while providing predictability in when the complaint timeline starts for each complaint.

- Proposed Section 1852(1)(b) should be amended as follows:

“Inform the person making the allegation that ~~the filing of a state complaint may be delayed so that mediation or other informal dispute resolution may be attempted~~ they have the opportunity to engage in mediation and that doing so will delay the complaint investigation.”

The proposed language correctly states the standard set forth in 34 CFR 300.152(b) that mediation is available and extends the timeline for complaint investigation, not the timeline for filing a complaint. Under the current language, if a person engages in mediation before filing a complaint, they may lose the right to file a complaint if mediation fails because the 1-year statute of limitations does not stop running during mediation.

- Proposed Section 1852(1)(d) should be amended as follows:

Offer to assist the person in filing a state complaint and to submit additional information, orally or in writing, about the allegations in the complaint.

The proposed language comports with 34 CFR 300.152(a)(2) which assures that a person may not only file a complaint but may offer to supplement the complaint with additional information.

- Proposed Section 1853(1) should be amended as follows:

The department and the intermediate school district... pertaining to state complaints, and the letter and intent of the federal regulations implementing the Individuals...

The proposed language incorporates the language from the comments to the federal regulations at 71 Fed.Reg. 46601 (8/14/06) regarding (a) the scope of issues subject to complaint investigations, and (b) the power to make independent determinations on the issues investigated. The current complaint process as implemented does not consistently recognize the authority of complaint investigators to investigate any matter arising under Part B of the Act, nor is it always implemented to allow complaint investigators to make independent determinations of educational benefit as set forth in the comments.

- Proposed Section 1853(6) should be amended as follows:

The department may grant an extension of time if exceptional circumstances exist with respect to a particular state complaint. A denial of an extension request is a final administrative determination subject to review under applicable state and federal law. Any such extension shall include findings of fact to support the extension and should address the need for maintenance of the educational status, program placement, or service at issue in the complaint as set forth in subsection (4) above.

The proposed language places procedural limits on department discretion to find exceptional circumstances. Under the current rules, such findings are not limited by any standard bounds of administrative procedure or due process, including notice and opportunity to contest. Such findings may also ignore the need for “stay put” in situations where complaint investigations extend beyond 60 days – situations where the risk of prejudice to the rights and well-being of students increases.

- Proposed Rule 1854(1) should be amended as follows:

The public agency shall correct violations as directed by the department. Corrective actions must, at a minimum, be appropriate to address the needs of the child (including compensatory services and monetary reimbursement) and to address the future needs of all students with disabilities.

The proposed language comports with 34 CFR 300.151(b).

Policy on Services to Youth in Jails

MPAS supports the issuance of policy in this area, as there is confusion in the field about the service responsibility to youth in confinement in jails and detention facilities.

The title of the policy should be changed to remove the word “incarceration.” The term has a specific limiting meaning in IDEA – see, e.g., 34 CFR 300.102(a)(2) which refers to incarceration in adult correctional facilities. Using “incarceration” in the jail context may lead some facilities to misunderstand their responsibilities since jails are among the settings where FAPE must be provided without the limiting conditions placed upon those incarcerated in adult correctional facilities.

The policy as a whole does not set forth any of the obligations under federal law, but rather suggests that the duty to provide FAPE is recommended, or that the services must only be provided to the extent possible. Such limitations do not comport with the state assurance of FAPE under 34 CFR 300.101. Accordingly, the policy should be redrafted to meet these assurances.

Thank you for considering these comments. Please contact Mark McWilliams at (517) 487-1755 or mmcwill@mpas.org if you have questions.