

August 11, 2006

VIA E-MAIL [MDE-OSE@mi.gov](mailto:MDE-OSE@mi.gov)  
AND SURFACE MAIL

Public Comment  
Office of Special Education and Early Intervention Services  
Michigan Department of Education  
P. O. Box 30008  
Lansing, MI 48909

**RE: Comments on Special Education Due Process Procedures (2006-055ED)**

Dear Friends:

Michigan Protection and Advocacy Service, Inc. (MPAS) is the designated protection and advocacy program serving persons with disabilities in Michigan. MPAS is pleased to comment on the proposed "Special Education Due Process Procedures." Nearly 40% of MPAS' 8,000 requests for assistance each year concern special education services and we are happy to share what insights we have on the topics covered by the changes.

**Time Considerations**

Initially, MPAS thanks the Department for the expedited issuance of these proposed permanent regulations. The proposed regulations are designed to address problems brought about by the Department's designation of the State Office of Administrative Hearings and Rules (SOAHR) as the program that will hear special education due process hearings. Hopefully, with the changes recommended below, the transition will be completed and the hearing process will operate smoothly and fairly. We look forward to issuance of the final rules within the period prescribed by law.

That being said, MPAS is concerned about the timeline for providing public comments to the due process rules. It is very difficult to get information out to parents in such a short period of time during the summer.

### **Integration of Interagency Agreement Terms**

There are terms contained in the Interagency Agreement between the Department and SOAHR which need to be part of the final rules or, at the very least, included as an appendix to the rules. Parents and districts should not need to obtain and review the Agreement to determine procedures related to due process proceedings. MPAS recommends that the following Agreement provisions be integrated into the rules or otherwise made available in an appendix to the rules:

- Paragraph 2(A)(8)(a)(iii) of the Agreement provides that SOAHR will provide parties with “a statement of hearing rights.” Reference to this “statement” should be made in the rules being promulgated so that parents and districts are aware of their hearing rights. When the Department transfers this language into the rules being promulgated, the Department should include the right of parents to be represented by non-attorney advocates in due process hearings. Michigan has a long history of allowing such representation for districts and parents, giving the practice the force of law, and IDEA allows such representation. This right should be codified in the rules.
- Paragraph 2(A)(8)(e) of the Agreement provides that SOAHR will conduct an evidentiary hearing in accordance with IDEA 2004 and state rules. This should be part of the rules currently being promulgated with an explanation as to what constitutes an “evidentiary hearing.” While lawyers may be familiar with the terms, parents need to know what it means as well. MPAS also is concerned about the prospect that SOAHR staff may choose to conduct due process hearings in accordance with the Administrative Procedures Act (“APA”) and Executive Order 2005-01. A number of provisions contained in the APA and the Executive Order conflict with IDEA 2004 and state special education rules.
- Paragraphs 2(A)(9)(a) and (b) of the Agreement describe the manner in which state level review will be conducted and decided (for the short time period when state level review is still provided in IDEA cases). These terms should be written into R340.1724g. Parents and districts should not be required to refer to the Agreement to determine the procedures governing state level review.
- Paragraphs 3(B)(4)(b), (c) and (d) of the Agreement also need to be incorporated into the rules since the terms affect the manner in which the due process hearing is initiated and/or conducted. Of significance in the paragraphs is the authority granted to SOAHR regarding timeliness and adequacy of the complaint, discovery decisions, and the exercise of ALJ authority.

Terms from the Agreement which cover the matters written in Rules 340.1724f and 1724g need to be addressed in the rule as well. MPAS recommends these provisions be incorporated into a new Section R340.1724j or as an appendix to the rules.

### **Hearing Requests**

The grounds for a hearing should conform to federal law. Section 1724f(3)(j) should be added to reflect the applicability of due process procedures to students not yet identified as eligible students but who have rights under IDEA at 20 USC 1415(k)(5). MPAS recommends the following language:

*1724f(3)(j) Issues related to children not yet found eligible for special education and related services to the extent provided under federal law.*

In addition, the proposed rules should include a provision allowing appointment of an independent hearing officer in situations when the department itself is a party. 20 USC Section 1415(f)(3) raises questions about the hearing unit's ability to hear cases when the department is a party. MPAS recommends:

*1724f(4) ... and R340.1883 to R340.1885. The department shall, in cases in which it is a party, appoint a hearing officer who is not a department employee or contractor to hear the case.*

### **Statute of Limitations**

IDEA 2004 provides a 90 day timeline for appealing a final decision to a court of competent jurisdiction. An alternative timeline is authorized "if the State has an explicit time limitation for bringing such action under this part, is such time as the State law allows." In Michigan, the state's special education statutes do not have any timeline for appealing a final decision of a hearing officer and do not grant specific authority by themselves to adopt a new statute of limitations unconnected to special education law. Without such direction, the state law should follow IDEA. See *Renner v. Ann Arbor Public Schools*, 185 F.3d 635 (6<sup>th</sup> Cir. 1999). The 60 day timeline borrowed from the state Administrative Procedures Act may have sufficed as a substitute statute of limitations prior to IDEA 2004, but it is far from the explicit time limitation described in the new law and should be discarded in favor of the IDEA timeline.

Whatever the time limit, the law should also recognize established legal precedent for tolling such statutes. MPAS recommends the following language:

*1724f(5) Any party .... within ~~60~~ 90 days after the date of the final decision, subject to tolling as required by state law.*

## **Notice and Enforcement**

MPAS recommends:

*1724f(6) ... the decision shall be implemented by the public agency within 15 school days of the agency's receipt of the decision. The special education hearings unit shall notify the parties of the district's responsibilities to provide proof of implementation of any decision or order issued to resolve a due process hearing request initiated under this rule. Failure to implement a due process hearing decision or order is the basis for State Board of Education action under R 340.1852(6).*

## **Application of the Administrative Procedures Act**

Hearings are complex enough when only IDEA standards are applied. Importing Administrative Procedures Act (APA) standards to special education due process hearings threatens to make an already vexing process even more so. Accordingly, any references to “administrative law, administrative procedure” in Rule 1724h must clarify that APA standards are not necessarily applicable to IDEA cases. For example:

- APA hearing rights are limited to “contested cases” as defined in MCL 24.203(3). This definition may differ from the type of case that can be brought under IDEA.
- APA standing may be limited to persons with a “protected interest” as defined in MCL 24.205(6). IDEA allows standing under a different standard.
- APA review may be limited to “rules” as defined in MCL 24.207. IDEA review applies to a different range of issues.
- APA notice and pleading requirements are different from those in IDEA as defined in MCL 24.271.
- APA discovery practice includes depositions and other discovery in MCL 24.274. IDEA practices do not necessarily conform to APA practice.
- APA review may include an abuse of discretion or “unlawful or unreasonable” standard of review under MCL 24.301. IDEA review is different, as hearing officers should apply a de novo review at hearings, while courts apply a modified de novo standard on appeal.
- The APA timeline for review differs from that set forth under IDEA, as discussed previously.

The hearing process should be as simple as possible in order to not further deter parents and districts from using it when no other alternative is available. MPAS recommends the following language:

*1724h The Department ... will be trained, ~~as needed, regarding~~ drawing from resources recommended by diverse stakeholders and from both within and outside government. Annual training shall address, at a minimum, administrative law and procedure as defined in federal law and, when consistent with IDEA, the state Administrative Procedures Act, special education law,*

...

MPAS further recommends that the Department consider adopting alternative rules for IDEA cases in order to simplify them, reduce their cost, and ensure compliance with federally-mandated timelines. For example, the Iowa Department of Education has issued simplified rules for hearings – see Iowa Administrative Rules 281-41.112 through 281-41.125. The U.S. District Court for the Western District of Michigan has issued specific rules for court-annexed arbitration that may provide guidance in developing hearing rules, especially with regard to time limitations. See LCivR 16.6(f), Ct-Annex Arb Program Description (W.D.Mich.). The American Arbitration Association has produced expedited and simplified rules and procedures for consumer and expedited commercial arbitration that may be useful in setting hearing rules. Those can be found at <http://www.adr.org/sp.asp?id=22440> and <http://www.adr.org/sp.asp?id=22014>.

Finally, the rules should set forth a process for designing hearing forms, including request forms, which not only comply with IDEA 2004 notice requirements but also are simple enough for parents to use without hiring an attorney. MPAS recommends that a process for developing and periodically reviewing such forms through an existing body such as the statewide PAC, SEAC, or the family support grantee be included in the rules.

### **Cost Sharing**

The current due process system has a different cost structure than the prior system, and the methodology for determining the costs of each individual hearing is not specified in the rules or the Agreement. It is critical that the cost structure of the proposed hearing process does not create an unintended financial incentive to pursue hearings to completion or disincentive to reach negotiated agreements. The methodology used to calculate costs of each due process hearing should be laid out for everyone to see. The rule should be amended to reflect the methodology used to calculate the cost of each individual due process hearing. MPAS recommends:

*Rule 24i. ... The district of residence or public school academy shall reimburse the State 75% of the costs related to providing the due process hearing. Costs shall be determined using a publicly-available methodology developed by the Department of Education.*

Thank you for considering these comments. Please contact us if you have any questions.

Sincerely,

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