

Complaint Conflicts: How Michigan’s State Complaint Oversight Fails to Protect Students with Disabilities

EMILY B. GARCIA *

To separate [students] from others of similar age and qualifications solely because of race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.¹

Ever since Chief Justice Earl Warren’s statement in the landmark case, *Brown v. Board of Education*, Americans have broadly recognized that students of all races should enjoy the privileges of public education. Despite the ubiquitous acceptance of racially integrated schools, wide disparities remain in access to meaningful and inclusive public education for students with disabilities. In Michigan, students with disabilities are often prevented from accessing the educational supports and services they need to obtain an appropriate education. The quality of education for students with disabilities differs significantly from the education provided to their non-disabled peers. This disparity is disturbingly similar to the “feeling of inferiority” articulated in *Brown*.

To address this concern, attorneys and advocates have worked with students and their families to file special education State complaints to the Michigan Department of Education (MDE). In the 2016-2017 school year, MDE received 272 complaints from parents, attorneys, and advocates regarding special education issues in Michigan school districts.² Unfortunately, MDE’s complaint process fails to appropriately remedy many of these students’ concerns. This article seeks to (1) show how MDE’s complaint procedures are inconsistent with the Individuals with Disabilities Education Act of 2004 (IDEA) and the Michigan Administrative Rules for Special Education (MARSE), and (2) recommend reforms for improving the system.

Special education in Michigan is governed by the IDEA and MARSE.³ The IDEA places two categorical demands on public schools.

*† J.D. Candidate, University of Detroit Mercy School of Law, 2020; B.A., Augustana University (formerly Augustana College), 2007. I want to thank Kristin Totten of the ACLU of Michigan and Laura Athens, Attorney and Mediator, PLC, for their guidance in writing this article and passion for students with disabilities.

1. *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954).

2. U.S. Dep’t of Educ. *EA Part B: Dispute Resolution*, IDEA DATA CTR., <https://idc.clicdata.com/v/AcBZnY6N1j61> (last accessed Apr. 18, 2019).

3. See Mich. Dep’t of Educ., *Michigan Administrative Rules for Special Education (MARSE) with Related IDEA Federal Regulations*, (Feb. 2019),

First, it requires that school districts provide each student in special education with a “free appropriate public education” (FAPE) that is “designed to meet their unique needs and prepare them for further education, employment, and independent living”⁴ The U.S. Supreme Court has recently interpreted the FAPE provision to ensure that each student with a disability receives an education that is “appropriately ambitious in light of his circumstances.”⁵

Second, the IDEA requires that students with disabilities receive their education in the “least restrictive environment” (LRE).⁶ The LRE requirement ensures that students with disabilities are educated with their non-disabled peers “to the maximum extent appropriate.”⁷ The statute further states that placement in “special classes, separate schools or other removal of children with disabilities from the regular education environment” should only occur “when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁸ The IDEA requires that the school memorialize its education plan for each qualifying student in an individualized education program (IEP).⁹

Each state that receives special education funds from the federal government is responsible for designating one agency to oversee special education services within its jurisdiction.¹⁰ This oversight agency is called the “state educational agency.”¹¹ The Michigan Department of Education, Office of Special Education (MDE-OSE) acts as the state education agency in Michigan.¹² When an individual feels that a school district has failed to meet either the FAPE or LRE standard, has violated any provision of the IDEA, MARSE, or has failed to comply with the child’s individualized education plan, the party has three options. First, they may file a State complaint. Second, they may request mediation. Or third, they may file a request for a due process hearing.¹³ Though the rules articulate these three

https://www.michigan.gov/documents/mde/MARSE_Supplemented_with_IDEA_Regs_379598_7.pdf.

4. 20 U.S.C. § 1400(d) (2010); 34 C.F.R. § 300.101(c)(1) (2006).

5. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

6. 20 U.S.C. § 1412(a)(5)(A) (2005).

7. *Id.*

8. *Id.*

9. *See* 34 C.F.R. § 300.320(a) (2007).

10. *See id.* § 300.149 (2006); Letter from Stephanie S. Lee, Director, Office of Special Education Programs, U.S. Dep’t of Ed., to William L. Librera, Comm’r, N.J. Dep’t of Ed., at 2 (May 26, 2004),

<https://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/tpseagsa.html>.

11. 34 C.F.R. § 300.149 (2006); Letter from Stephanie S. Lee, *supra* note 11, at 3.

12. *See* U.S. Dep’t of Ed., *About Ed. - Contacts*, <https://www2.ed.gov/about/contacts/state/mi.html> (last accessed Apr. 13, 2019).

13. *See* Mich. Dep’t of Educ., *Corrective Action Process for Noncompliance with the IDEA and MARSE*, at 1 (July 25, 18),

avenues for relief, in practice, parents and advocates often elect to file a State complaint due to the costs and barriers associated with mediation and due process.¹⁴

The regulations of the IDEA require that each state education agency have policies and procedures in place for resolving disputes through the State complaint process.¹⁵ Accordingly, MDE-OSE is tasked with investigating all the State special education complaints filed with MDE.¹⁶ If, following an investigation, MDE-OSE determines that a district has failed to comply with special education law, it will issue a Decision itemizing the allegations. If the investigation finds violations, a Corrective Action Plan (CAP) is also included.¹⁷ The CAP directs the district to take specific actions intended to address not only the noncompliance associated with the particular child, but also outlines what steps a district must take in order to ensure “appropriate future provision of services for all children with disabilities.”¹⁸

Following the issuance of the CAP, MDE-OSE is required to continue to monitor the district’s progress in fulfilling the CAP remediations.¹⁹ In Michigan, MDE-OSE has employed the Catamaran system to ensure compliance with a district’s CAP.²⁰ Catamaran is an online tool that allows districts to input data regarding its compliance with a CAP.²¹ MDE-OSE monitors the district’s data in the Catamaran system. Once the district has provided sufficient information to Catamaran, MDE-OSE will review the data and then close the case.²²

Despite its purported compliance with the strictures of the IDEA in its State complaint process, MDE-OSE has failed to adequately meet all its responsibilities toward students with disabilities. This failure can be attributed to the inadequacies of two processes: (1) MDE-OSE’s investigation procedures, and (2) its oversight on school districts once a State complaint

https://www.michigan.gov/documents/mde/TA_CAPOC_Process_588879_7.pdf; Mich. Dep’t of Educ., Office of Special Educ., *Special Education Problem Solving Process*, 7 (Oct. 17, 2018),

https://www.michigan.gov/documents/mde/SpecialEducationProblemSolvingProcess_550395_7.pdf.

14. See *EA Part B: Dispute Resolution*, *supra* note 3.

15. See 34 C.F.R. § 300.151(a) (2006).

16. See *id.* § 300.152(a).

17. *Corrective Action Process for Noncompliance with the IDEA and MARSE*, *supra* note 14 at 5–7.

18. See *id.* at 1–3; 34 CFR § 300.151(b).

19. See *Corrective Action Process for Noncompliance with the IDEA and MARSE*, *supra* note 14 at 1–2.

20. See *id.* at 5; see also *Catamaran Training Website*, CATAMARAN, <https://training.catamaran.partners/> (last accessed Apr. 18, 2019).

21. See *id.*

22. See *Corrective Action Process for Noncompliance with the IDEA and MARSE*, *supra* note 14 at 6–8.

investigation is completed. Unfortunately, students with disabilities are the victims of this ineffective system.

I. MDE-OSE'S STATE COMPLAINT PROCEDURES REMAIN PROBLEMATIC

In 2015, MDE contracted with Pingora Consulting, an educational consulting company that assists state agencies in developing IDEA-compliant policies and procedures.²³ MDE contracted with Pingora in order to understand whether MDE was “adequately addressing [its] obligations [to IDEA].”²⁴ Pingora spoke with stakeholders statewide to gather data and impressions relating to MDE-OSE's dispute resolution program.²⁵ As a result of its investigation, Pingora produced a report detailing the steps that MDE-OSE should take to become compliant with the IDEA's dispute resolution requirements.²⁶ With respect to the issue of oversight, Pingora recommended that MDE,

Provide targeted technical assistance to complaint investigators and mediators regarding the requirements of IDEA, appropriate investigatory techniques and standards, appropriate mediation techniques and standards, and the expectations of OSE for timely, thorough, professional complaint investigations and mediations; [and]

Provide targeted technical assistance to state monitors and state staff on a comprehensive system of general supervision, addressing noncompliance from all sources, and IDEA compliance tied to improving outcomes for students with disabilities.²⁷

Pingora issued its report in February 2016,²⁸ at approximately the same time as Former-Governor Snyder's Special Education Reform Task Force found that changes were required to MDE-OSE's complaint procedures.²⁹ Despite the Task Force's findings and the guidance from Pingora, the superintendent of MDE stated that MDE-OSE was issuing a “strategic pause” on these recommendations.³⁰ Since this time, it is unclear what changes MDE-OSE has made to its State complaint procedures. While advocates have noted informal changes to these procedures, MDE-OSE has not developed formal policies and procedures that reflect the Pingora rec-

23. See *Prof'l Serv.*, PINGORA CONSULTING, <http://www.pingoraconsulting.com/professional-services-2/regulatory-compliance/> (last accessed Feb. 7, 2019); Deposition of Teri Chapman, D.R. ex rel. Richardson v. Michigan Dep't. of Educ., ED-MI_0007, at 60, (2016) (on file with the University of Detroit Mercy Law Review) [hereinafter “*Chapman Deposition*”].

24. *Chapman Deposition*, *supra* note 24, at 60.

25. See PINGORA CONSULTING, *supra* note 24, at 2.

26. See generally PINGORA CONSULTING, *supra* note 24.

27. *Id.* at 20.

28. *Id.* at 1.

29. See SPECIAL EDUC. REFORM TASK FORCE, FINAL REPORT TO THE GOVERNOR (Jan. 2016); *Chapman Deposition*, *supra* note 24, at 57.

30. PUB. SECTOR CONSULTANTS, FINAL REPORT: SPECIAL EDUCATION STAKEHOLDER SURVEY 4 (Mar. 3, 2017); *Chapman Deposition*, *supra* note 24, at 79–80.

ommendations. Problems remain with school districts that force complainant parents into due process hearings and the dependence MDE-OSE places on intermediate school districts in State complaint investigations.

A. Forced due process fails to produce beneficial outcomes for students.

The IDEA's implementing regulations require "each [state education agency to] adopt written procedures for resolving any complaint"³¹ Parents and advocates who exercise the right to file a State complaint expect that MDE-OSE will take steps to resolve the issues set forth in the complaint. Advocates have become concerned about a developing practice in which the more expensive due process litigation is forced upon families by the school district.³² Although the IDEA allows school districts to request a due process hearing in lieu of a State complaint,³³ school districts have been using this to gain leverage over complainant families. This practice has been denounced by the U.S. Department of Education, stating in a 2015 "Dear Colleague Letter" that:

Public agencies that seek to force parents who have already exercised their right to file a State complaint into a potentially more adversarial due process hearing harm the 'cooperative process' that should be the goal of all stakeholders. Moreover, [this practice] is contrary to Congressional intent in the 2004 amendments to the IDEA's dispute resolution procedures...³⁴

Forced due process hearings are problematic on two fronts. First, it places an undue burden on both parents and students with disabilities. Often, parents are ill-equipped to effectively advocate for their son or daughter in the court-like venue of a due process hearing against the school district's savvy legal team.³⁵ Because school districts are able to tap into insurance benefits to cover legal fees associated with due process, there is virtually no disincentive against due process from a school district's perspective. As a result, parents are faced with an impossible choice of either hiring an attorney or attempting to represent their child on their own.

Second, the filing of due process requests by school districts takes away MDE-OSE's responsibility for general supervision. Every state edu-

31. 34 C.F.R. § 300.151(a) (2006); see MICH. ADMIN. CODE r. 340.1851 (2018).

32. See Pingora Consulting, *Dispute Resolution Program Review*, at 7 (Feb. 2016) (this report was prepared for the Michigan Department of Education, Office of Special Education) (on file with the University of Detroit Mercy Law Review).

33. See 20 U.S.C. § 1415(f)(i) (2005).

34. Letter from Sue Swenson, Acting Assistant Sec'y, U.S. Dep't of Educ., and Melody Musgrove, Dir., Office of Special Educ. Programs, to Dear Colleague, Use of Due Process Procedures After a Parent Has Filed a State Complaint, at 4 (Apr. 15, 2015), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf> [hereinafter "Dear Colleague Letter"].

35. See Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Arden Advocates*, 3 NW. J.L. & SOC. POL'Y. 263, 264 (2008).

education agency is responsible for ensuring compliance with the IDEA.³⁶ A State complaint can alert MDE-OSE to noncompliance. However, a due process hearing request on the same issue requires the state to set aside its complaint investigation, effectively circumventing MDE-OSE's review of the issue. Additionally, due process requires that an independent hearing examiner adjudicate and resolve disputes between parents and school districts in individual, fact-based cases.³⁷ An independent hearing examiner must have knowledge of the IDEA as it pertains to an individual case, but is powerless to ensure districts' systemic compliance with the IDEA.³⁸ Consequently, the independent hearing officer's decision cannot enforce the rights of *all* students with disabilities to ensure the district meets its obligations to all students under IDEA. If school districts routinely respond to State complaint investigations by filing a due process hearing request on the same issue, the State's ability to identify and correct noncompliance will be undermined.

Furthermore, forcing complainant families into due process is contrary to congressional intent to ensure parents have access to a dispute resolution system less costly and adversarial than a due process hearing.³⁹ School districts enjoy extensive access to legal representation, as well as a bevy of experts on the school staff. Consequently, there are fundamental inequities in due process hearings between parents and school districts. In the end, it is the child with the disability who is harmed due to the burden these stressors place on the family, which is already experiencing significant distress as a result of the school district's failure to meet the child's needs.

Parents who elect to file State complaints should feel assured that when they file a State complaint, MDE-OSE will investigate and remediate the issues under its complaint procedures. Parents should not fear that their choice to file a State complaint will cause them to face a forced due process hearing without the resources for fair participation.

B. MDE-OSE fails to perform independent investigations.

Each school district in Michigan is a constituent of an intermediate school district (ISD). The ISD is a county-level government agency that "assists local school districts in providing programs and services."⁴⁰ An ISD is responsible for ensuring that each of its constituent districts create a "plan for special education that provides for the delivery of special education programs and services designed to meet the individual need of each

36. See 20 U.S.C. § 1412(a)(11) (2016).

37. See 34 C.F.R. § 300.511(c) (2006).

38. See 34 C.F.R. § 300.511(c)(1)(ii) (2006) ("[m]ust possess knowledge of, and the ability to understand, the provisions of [IDEA] Federal and State regulations pertaining to [IDEA], and legal interpretations of [IDEA] by Federal and State courts.").

39. See Dear Colleague Letter, *supra* note 35, at 4.

40. *About OAISD*, OTTAWA AREA ISD, <https://www.oaisd.org/oaisd/aboutus/whatisanisd/> (last accessed Apr. 13, 2019).

student with a disability.”⁴¹ In addition to this responsibility, the ISDs play a key role with respect to State complaints because each ISD assists in investigating State complaints that arise in its constituent school districts.⁴²

The IDEA requires that each state education agency have procedures to “carry out an *independent* on-site investigation...”⁴³ MDE-OSE’s partnership with the ISDs for State complaint investigations is problematic in light of the “independent” mandate of the IDEA because conflicts of interest exist between the ISD in its role as a supervisory agent of individual school districts and its investigatory role.

A direct conflict of interest exists when the ISD is delivering some or all of the special education programming and related services the student receives. While the rules require that the investigator have no direct authority over the program at issue⁴⁴ and MDE-OSE may “independently initiate and investigate a State complaint,”⁴⁵ it is unknown how MDE-OSE ensures that the ISD investigator is truly independent.

As a supervisory agent of individual school districts, the Michigan Legislature has demanded that each ISD work closely with its constituent districts to develop its special education plan.⁴⁶ This mandated cooperation puts the ISD at odds with its role as an independent investigator in the State complaint process. It is difficult to imagine how an ISD is able to act as an independent investigator, given that it is mandated to maintain a close working relationship with individual school districts and that it is often the ISD’s own special education plan at issue in a State complaint.⁴⁷

II. MDE-OSE’S REMEDIATION OVERSIGHT IS INADEQUATE.

MDE-OSE’s oversight of noncompliant school districts fails to ensure that the districts have come into compliance with the IDEA or MARSE. The Special Education Reform Task Force acknowledged as much in its 2016 “Final Report” finding that MDE was non-compliant with the IDEA in its State complaint monitoring procedures.⁴⁸ Practically speaking, MDE-OSE’s policies and procedures fail to ensure that school districts comply with the IDEA violations identified in a State complaint investigation.

41. MICH. COMP. LAW § 380.1711(1)(a) (2017); Mich. Dep’t of Educ., Office of Special Educ., *Guidance for the Development of Intermediate School District (ISD) Plan for the Delivery of Special Education Programs and Services*, at 4 (May 10, 2014), https://www.michigan.gov/documents/mde/ISD_Plan_Guidance_565186_7.pdf.

42. See MICH. ADMIN. CODE r 340.1853 (2018) (mandating that the ISD and the MDE are responsible for carrying out investigations to State complaints); *Chapman Deposition*, *supra* note 24, at 52.

43. 34 C.F.R. § 300.152(a)(1) (2006) (emphasis added).

44. See MICH. ADMIN. CODE r. 340.1853(2) (2018).

45. MICH. ADMIN. CODE r. 340.1853(1) (2018).

46. See MICH. ADMIN. CODE r. 340.1833 (2018).

47. See PINGORA CONSULTING, *supra* note 24.

48. SPECIAL EDUC. REFORM TASK FORCE, *supra* note 30, at 13–14; *Chapman Deposition*, *supra* note 24, at 57.

A. *MDE-OSE's reliance on the Catamaran system is ineffective oversight*

The IDEA requires that the state education agency address a district's "failure to provide appropriate services."⁴⁹ Despite this mandate, stakeholders in Michigan are concerned that MDE-OSE has failed to develop a system which makes certain that the district has remedied violations identified as a result of a State complaint. This failure can partly be attributed to MDE-OSE's reliance on the Catamaran system as a means of ensuring that a district has corrected noncompliance.

The Catamaran system, while useful for gathering data, does not effectively ensure that the district has actually met its substantive IDEA responsibilities to correct noncompliance identified through a complaint investigation. Following the issuance of a CAP, which directs the noncompliant district to take a series of concrete actions, MDE-OSE states that it will "monitor implementation of the corrective action and provide technical assistance" to the district.⁵⁰ After MDE-OSE approves this plan, the district must submit documentation to Catamaran establishing that it completed the activities outlined in its plan.⁵¹ In practice, this requires the school district self-report its activities which purport to address the issues identified in the CAP.⁵² However, there is no independent, substantive review, to determine whether the reported actions actually corrected the non-compliance. MDE-OSE does not speak with parents to inquire whether the circumstances have changed for the child as a result of the CAP. While MDE-OSE states that this process *may* involve on-site visits to schools, MDE-OSE has no obligation do so.⁵³

Effectively, MDE-OSE is relying on a district's self-interested evaluation of its performance in order to ensure compliance with a CAP. It is unknown whether parental contact and an on-site visit from MDE-OSE would be sufficient tools to determine a district's level of compliance. Nonetheless, these steps would, at least, provide some level of independent verification that the district is complying with its CAP remediations.

49. 34 C.F.R. § 300.151(b)(1) (2006).

50. *Special Education Problem Solving Process*, *supra* note 14, at 16.

51. *See Corrective Action Process for Noncompliance with the IDEA and MARSE*, *supra* note 14, at 6.

Once the district has made the necessary corrections outlined in the SLCAP and uploaded supporting documentation to show correction of noncompliance, the district submits the SLCAP in Catamaran to the ISD for verification. The district receives a confirmation email indicating that the SLCAP was submitted to the ISD and the ISD receives a notice that the SLCAP is now available for their review and verification. The ISD will then be able to access the SLCAP, review the uploaded supporting documentation that demonstrates compliance, and may reach out to the district to clarify any other items as needed.

Id.

52. *See Chapman Deposition*, *supra* note 24, at 58.

53. *See id.*

B. There is a lack of effective communication between MDE-OSE and complainants.

MDE-OSE has failed to establish effective communication between itself and complainant families. The failure of communication between MDE-OSE and families arises in two contexts: (1) established procedures in which a complainant may dispute the findings of MDE-OSE in a State complaint investigation, and (2) follow-up with the complainants about the school district's remedial actions.

After MDE-OSE issues a decision to a State complaint, it mails complainants a "final written report" which details the district's CAP.⁵⁴ This is the only direct communication that MDE-OSE has with families regarding the steps the district must take to become compliant with the law.⁵⁵ Admittedly, some issues related to a CAP may be inappropriate to discuss with a student or his representatives (i.e., personnel issues). Yet, MDE-OSE provides the student and parents no way provide input because the district's CAP remediations are a negotiation between MDE-OSE and the school district.⁵⁶ If a parent has concerns about the CAP, MDE-OSE places the burden on parents to contact its office with their concerns.

Furthermore, MDE-OSE's usage of the Catamaran system leaves students and families with no way to knowingly assert whether the school district has made progress on a CAP because families have no access to the Catamaran system.⁵⁷ So, even if a district has in good faith sought to address the issues brought forth in the student's complaint, the student cannot verify this information because MDE-OSE provides him no information of this nature. In effect, the usage of the Catamaran system leaves the student and parents with no party to speak with if the district fails to implement a CAP.⁵⁸

III. MDE-OSE SHOULD TAKE STEPS FOR SUBSTANTIVE IMPROVEMENT.

Each of these failures illustrates adverse consequences for Michigan students with disabilities. Under MDE-OSE's current State complaint structure, these students do not receive a complete vindication of their educational rights. However, MDE-OSE is not without recourse. There are several tangible steps that MDE can implement in order to assure that student complaints are fairly investigated and monitored.

1. MDE should promulgate rules under MARSE that expand the rights of parents when school districts unilaterally elect for a due process hearing despite the parent's choice to file a State complaint. In

54. MCH. ADMIN. CODE r. 340.1853(7) (2019).

55. See *Corrective Action Process for Noncompliance with the IDEA and MARSE*, *supra* note 14 at 8.

56. See *id.* at 3–8.

57. See *id.* at 5.

58. See *id.*; see also CATAMARAN, *supra* note 21.

these instances, the rules should require school districts to fund legal representation for the parent. In addition, the rules should shift the burden of proof from the complainant to the school district.

2. MDE-OSE should take steps to detach the ISDs from their investigatory role and appoint an objective party within MDE-OSE to investigate its State complaints. MARSE as it reads now states that “[MDE] and the intermediate school district shall investigate state complaints.”⁵⁹ MDE should move to change this rule so a district’s ISD plays no role in the investigation of State complaints.
3. School districts’ self-reporting CAP remediations to Catamaran is insufficient to guarantee compliance. MDE should develop more robust policies and procedures to ensure school districts correct noncompliance. MDE-OSE should develop a policy requiring substantive review to verify correction, including parental contact and on-site visits, for *each* substantiated complaint.

IV. CONCLUSION

Unfortunately, MDE-OSE has abrogated its obligations to Michigan students with disabilities by failing to develop fair complaint procedures and ensuring that districts comply with demands of the IDEA and MARSE. This failure has resulted in complaint procedures that are unlikely to improve outcomes for students, depriving Michigan special education students of a meaningful and effective method to assert their educational rights. To dispel the “inferiority” and inequality described 65 years ago in *Brown*, MDE needs to revamp its policies and procedures to ensure that school districts in Michigan comprehensively fulfill their obligations to students with disabilities.

59. MICH. ADMIN. CODE r. 340.1853.