

This rule was filed as 7 NMAC 26.8.

TITLE 7 HEALTH
CHAPTER 26 DEVELOPMENTAL DISABILITIES
PART 8 (APPENDIX B) DISPUTE RESOLUTION PROCESS

7.26.8.1 ISSUING AGENCY: Department of Health, Developmental Disabilities Division, 1190 Saint Francis Drive, Post Office Box 26110 Santa Fe, New Mexico 87502-6110, Telephone No. (505)827-2574
[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.2 SCOPE:

A. This dispute resolution process (DRP) provides for the resolution of disputes concerning the content of or the substantial failure to implement individual program, transition or community plans for class members in *Jackson et al. v. Fort Stanton, et al.*, Civ. No. 87-839 JP.

B. This DRP provides a two-step administrative mechanism for resolving disputes:

- (1) a conciliation or mediation stage; and
- (2) a review by an independent hearing officer.

C. This process does not allow review by the courts of the decisions of the hearing officers. Any court challenge to any facility, community or other plan or the implementation thereof must be by separate de novo action or by a de novo motion in the *Jackson* case as set forth in Paragraph 12.4.9 [now Paragraph (9) of Subsection D of 7.26.8.12 NMAC] of this DRP.

D. Substantial failure to implement plans shall not include the initial decision by the department not to implement or approve implementation of the plans because of cost or because of failure to satisfy constitutional or statutory requirements.

[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.3 STATUTORY AUTHORITY: Section 9-7-6 NMSA 1978.
[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.4 DURATION: Permanent.
[01/15/97; Recompiled 10/31/01]

7.26.8.5 EFFECTIVE DATE: January 15, 1997, unless a later date is cited at the end of a Section or Paragraph.

[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

7.26.8.6 OBJECTIVE:

A. These regulations amend the department's previously adopted provisions for resolution of disputes arising from the community transition plans of individuals residing at Fort Stanton hospital and training school and Los Lunas hospital and training school. They provide a process for informal resolutions and administrative hearings as well as for suspending the implementation of challenged provisions of an individual's transition or program plan during the time period necessary to allow the dispute to be heard and decided. These amendments reflect the department's cumulative experience in resolving disputes arising from the transition process.

B. These regulations are promulgated, in part, to satisfy requirements arising from the implementation of the decision in *Jackson, et al. v. Fort Stanton, et al.*, N.M. Dist. Ct. No. Civ. No. 87-839. The transition process appearing in these regulations has evolved over time, initially appearing as Appendix B to the *Jackson* Management Manual and later as departmental regulations under the title *Jackson* Dispute Resolution (DRP) Process For Individual Transition Plans, Appendix B, DOH 93-01 (DDD). These regulations incorporate certain agreements reached by the parties, including the Department, to the *Jackson* lawsuit.

C. Notice of public hearing on the proposed regulations was given in accordance with NMSA 1978, Section 9-7-6. On January 24, 1994 a public hearing was held in Santa Fe, New Mexico. Both written and oral testimony was accepted from all persons who desired to testify. Public comment was generally favorable and

supported the department's adoption of the proposed amended regulations. The hearing officer made his report thereon, recommending adoption of these regulations.
[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.7 DEFINITIONS:

- A. "Coordinator": The *Jackson* coordinator or the dispute resolution process coordinator or their designees.
- B. "Days": Calendar days, except where otherwise specified.
- C. "Defendants": The defendants in *Jackson et al. v. Fort Stanton, et al.*, Civ. No. 87-839 JP who are represented by the attorney general. If notice is to be provided to the defendants, it shall be provided to the attorney general.
- D. "Department": The New Mexico department of health.
- E. "Division": The developmental disabilities division of the department of health. If notice is to be provided to the division it shall be provided to the *Jackson* coordinator.
- F. "Dispute resolution process coordinator": The developmental disabilities division employee who, under the supervision of the *Jackson* coordinator, is responsible for the coordination and implementation of the dispute resolution process.
- G. "Facility": Fort Stanton hospital and training school or Los Lunas center for persons with developmental disabilities.
- H. "Helper": Someone who knows the individual's capabilities, interests, likes and dislikes, who communicates with the individual and assists the individual with communication. The helper, if any, is to be chosen by the individual or, if none is chosen by the individual and the individual does not object, by the facility's director of social work or the individual's case manager.
- I. "Individual": A person currently residing in Fort Stanton hospital and training school or Los Lunas center for persons with developmental disabilities or a class member who has moved to the community in New Mexico through the ITP process.
- J. "Intervenors": The members of the plaintiff-Intervenor-class in *Jackson v. Fort Stanton*, as they may be defined by the court and who are represented by attorneys Kent Winchester and Vernon Salvador.
- K. "*Jackson* coordinator": The developmental disabilities division employee who is responsible for various aspects of the division's implementation of the court's orders in *Jackson v. Fort Stanton*.
- L. "Parent/guardian": The court-appointed guardian of an adult individual or the custodial parent(s) if the individual is a minor.
- M. "Parties": The individuals and entities identified in Section 9 [now 7.26.8.9 NMAC] who may initiate the DRP. As this term is used in subsequent sections of this DRP, it also includes:
 - (1) The intervenors in their capacity as representative of each parent/guardian of each individual residing in Fort Stanton and Los Lunas who is a member of the plaintiff-intervenor-class, unless the parent/guardian has chosen a representative other than intervenors;
 - (2) The plaintiffs in their capacity as representative of each individual residing in Fort Stanton and Los Lunas who is a member of the plaintiff-class, unless the individual has chosen a representative other than plaintiffs;
 - (3) Any other representative chosen in place of intervenors or plaintiffs; and
 - (4) The office of the attorney general in its capacity as representative of the department or the department's office of general counsel.
 - (5) If a dispute involves a facility IPP or community ISP, the term "parties" does not include the intervenors or the plaintiffs. Intervenors and plaintiffs may participate in a facility IPP or community ISP dispute only as the representative of an individual or parent/guardian who chooses them to be his or her representative.
- N. "Plaintiffs": The members of the plaintiff-class in *Jackson v. Fort Stanton*, as they may be defined by the court in that case, who are represented by protection and advocacy system of New Mexico.
- O. "Plan": The individualized programs developed by the interdisciplinary team (IDT) including, the facility individual program plan (IPP), the individual transition plan (ITP), the interim plan developed when the department does not approve the ITP, and the community individual service plan (ISP).
- P. "Team": The facility interdisciplinary team (FIDT), the transition interdisciplinary team (TIDT) or the community interdisciplinary team (CIDT).

[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.8 APPLICABILITY:

A. Facility IPP: This DRP may be used for the resolution of disputes concerning the content of or the substantial failure to implement individual program plans for residents of Fort Stanton and Los Lunas hospitals and training schools.

B. Transition planning:

(1) If the dispute involves an individual transition plan (ITP) the DRP may not be invoked until Activity 18 of the “individual transition planning process” (Appendix A Amended 04/01/94 to the October 1992 Agreement; Amended 01/15/97 (7 NMAC 26.7) [now 7.26.7 NMAC] (hereinafter “ITP Process”).

(2) Interim plans: This DRP may be used for the resolution of disputes concerning interim plans developed per Activity 19 of the “individual transition planning process” (Appendix A Amended 04/01/94 to the October 1992 Agreement; Amended 01/15/97 (7 NMAC 26.7) [now 7.26.7 NMAC] by the same parties eligible to initiate a dispute concerning the original ITP.

C. Community ISP: This DRP may be used to resolve disputes concerning the content of or the substantial failure to implement *Jackson* class members’ ISPs following their placements in the community. [04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.9 PARTICIPANTS: This DRP may be utilized by: (1) the individual; (2) his/her parent/ guardian; and/or (3) the department. The participants may be represented by legal counsel or other representatives. [04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.10 LIMITATIONS: The state retains the discretion to provide, within current and future resources, individualized plans which may exceed what is required by law. To this end, the DRP provides guidelines for hearing officer decisions in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC] that go beyond the requirements of the law. Neither the fact that such guidelines are part of the DRP nor the fact that the state agrees in some cases to provide ITPs or other plans that may exceed the state’s legal obligations shall be construed as a waiver of any of the state’s legal defenses in any legal proceeding concerning such plans or as an agreement to provide in other cases, plans that exceed what is required by law. [04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.11 PRELIMINARY MATTERS:

A. Prior to or at the facility IPP or community ISP meeting, the social worker or case manager shall explain the DRP to the individual, the parent/guardian and helper, if any. Prior to or at the initial meeting of the transition interdisciplinary team (TIDT), the case manager shall explain the DRP to the individual, the parent/guardian and helper, if any.

B. Team meetings are intended to be the primary and most effective means of addressing and resolving planning issues. Therefore, all team members are encouraged to participate actively in meetings and in the development of proposed plans.

C. Completed plans shall be distributed as follows:

(1) The completed proposed IPP shall be mailed or delivered, within thirty days of completion, to all team members and to the individual’s and/or the parent’s/guardian’s chosen representative, if any.

(2) The completed proposed ITP shall be mailed or delivered, within fourteen days of completion of the proposed ITP, to all TIDT members, to plaintiffs and to intervenors if the parent/guardian of the individual is an intervenor.

(3) The completed ISP shall be mailed or delivered to all team members and to the individual’s and/or the parent’s/guardian’s chosen representative within 30 days of the meeting.

D. Although the DRP contains time lines requiring rapid response, such time lines are not intended to reduce the potential for resolving disputes or limiting the involvement of the individual. Thus, for good cause, any person who is responsible for accomplishing a task within a specified time described in Section 12 [now 7.26.8.12 NMAC] may request a reasonable extension of time from the *Jackson* coordinator or dispute resolution process coordinator, as appropriate. No extensions of time may be granted to accomplish the informal resolution activities described in Paragraph 12.2 [now Subsection B of 7.26.8.12 NMAC]. Absent extraordinary circumstances, extensions of time for the activities described in Paragraph 12.3 [now Subsection C of 7.26.8.12 NMAC] shall not exceed 20 days. Grant or denial of a request for an extension of time shall be in writing.

E. Any party initiating the DRP may terminate the process at any time as to the matters raised by that party by withdrawing all pending objections.

F. The DRP is ordinarily intended to be accomplished without the involvement of legal counsel, but the parties may be represented by legal counsel of their choosing at their own expense.

G. Implementation of the plan shall proceed even though there is a DRP in progress except as provided below in Paragraph 12.6 [now Subsection F of 7.26.8.12 NMAC].

H. If the individual has a helper who has participated in a meeting on the individual's behalf, such helper may initiate a facilitated conference or administrative hearing and assist the individual in the DRP only on behalf of the individual and consistent with the wishes of the individual.

I. The plaintiffs, intervenors or other chosen representative of an individual or parent/guardian may initiate a facilitated conference or administrative hearing on behalf of the individual or parent/guardian only if doing so is consistent with the wishes of the individual or the parent/guardian.

J. Notice required to be given to the individual shall also include notice to the individual's helper and/or representative, if any. Notice required to be given to the parent/guardian shall also include notice to the parent's/guardian's representative, if any. If notice is to be provided to the intervenors, it shall be provided to intervenor's counsel. If notice is to be provided to plaintiffs, it shall be provided to the protection and advocacy system.

K. Any party claiming substantial failure to implement a plan shall request the QMRP or the case manager, as appropriate, to convene a special meeting of the relevant team members prior to initiating the DRP. The meeting shall be held within 10 days.

(1) The team may adopt additional strategies to fully implement the existing plan.

(2) Any actions or additional strategies adopted by the team shall not affect the party's right to initiate a DRP challenging the failure to substantially implement the plan. The time for filing a DRP shall run from the date of the special meeting.

[04/02/93, 04/29/94; 01/15/97; Recompiled 10/31/01]

7.26.8.12 THE PROCESS:

A. Request for facilitated conference: The DRP is initiated by a request for a facilitated conference by any of the parties identified in Section 7 [7.26.8.7 NMAC] in the capacities specified in that section. The request must be directed to the *Jackson* coordinator or dispute resolution process coordinator and must be received by the coordinator no later than thirty (30) days after the mailing of the completed plan. The request may be made by telephone, in person, or in writing and shall identify any disputed portions of the plan. The coordinator shall record the date of receipt of the request and shall notify the members of the team and the parties of the substance of the dispute. If the request involves an allegation of substantial failure to implement the plan, the request shall be received by the coordinator no later than 30 days after the special team meeting held to address that implementation issue, as provided in Paragraph 11.11 [now Subsection K of 7.26.8.11 NMAC], above. In the event the case manager does not convene the team meeting as requested, or within the time allotted, the DRP must be initiated within 30 days of the request to reconvene the team.

B. Informal resolution: The coordinator shall promptly communicate with the parties and with appropriate team members to determine whether there is a genuine dispute and whether the dispute can be resolved informally without a facilitated conference. If it appears that the dispute can be resolved informally, the coordinator shall attempt to do so. If the dispute is resolved, the coordinator shall notify the members of the team and the parties in writing.

C. Facilitated conference: If the dispute is not resolved informally, the coordinator shall schedule a facilitated conference. The conference shall occur and the resolution or determination shall be distributed within forty-five (45) days of receipt of the request for the facilitated conference. The parties shall be notified of the time and location of the conference at least ten (10) days prior to the conference. The coordinator may request the attendance of team members, professionals, department personnel or other persons whose presence the coordinator believes could assist in resolving the disputed portions of the plan.

(1) The purpose of the facilitated conference is to resolve the dispute to the extent possible and to agree on any material facts. If the conference participants are unable to resolve the dispute issues to the satisfaction of the party who requested the facilitated conference, the coordinator shall make determinations regarding the disputed issues as follows:

- (a) determine that the objection(s) to portion(s) of the plan has merit and either:
 - (i) amend the plan, accordingly; or
 - (ii) remand the plan to the team for revision consistent with the coordinator's

determination; or

(b) determine that the objection(s) to portions of the plan lacks merit and deny the objection(s);
or

(c) determine that implementation of the plan is in substantial compliance with the plan and direct that implementation continue; or

(d) determine that implementation of the plan is not in substantial compliance with the plan and direct that the plan be implemented appropriately.

(2) The coordinator shall reduce the determination to writing and mail or deliver it to all conference participants and non-participating team members. The written determination shall include the reasons for the determination and recite any amendments to the plan and any agreements as to material facts.

D. Administrative hearing:

(1) Request for hearing: If the party who requested a facilitated conference is dissatisfied with the coordinator's determination, that party may request an administrative hearing to review the determination. If the original dispute issue involved an allegation of a substantial failure to implement and the party making the original request believes that there continues to be a substantial failure to implement, that party may request an administrative hearing. Other parties may request an administrative hearing to review the coordinator's determination only if they participated in the facilitated conference and the coordinator's determination resulted in a change in the contents or implementation schedule of the plan. The request must be made to the developmental disabilities division, Attention: *Jackson* coordinator within fifteen (15) days of the date of the coordinator's written determination.

(2) Grounds for hearing: In order for a request to be heard, the party making the request must allege in its request for a hearing that a plan fails to meet at least one of the guidelines set forth in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC], as appropriate. The grounds for requesting an administrative hearing are set forth in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC], below.

(3) Notice of hearing: The division shall provide written notice of the hearing, the issues raised in the request for hearing and the name of the hearing officer to the parties at least twenty (20) days before the hearing date.

(4) Recusal of hearing officer: If any of the parties has reason to believe that the hearing officer assigned to hear a dispute cannot render a fair and impartial decision, that party shall notify the developmental disabilities division, Attention *Jackson* coordinator, of its challenge and the reasons therefore, no later than ten (10) days from the date of the notice of hearing. If the coordinator determines that there is good cause to recuse the assigned hearing officer, the coordinator shall select another hearing officer within seven (7) days of the date the division received the challenge.

(5) Conduct of hearing:

(a) The department shall make any team members who are the department's employees available to testify at a hearing.

(b) The *Jackson* transition representative or another team member will introduce the plan and the coordinator's determination into evidence.

(c) If the contents of a plan are in dispute and the department is not the objecting party, the department will go forward to present evidence in support of the plan. If the department is objecting to the contents of a plan, the party or parties who support the plan will go forward to present evidence in support of the plan.

(d) The party objecting to the contents of the plan will have the burden to prove that the objection has merit and that the plan should be amended in accordance with the objecting party's request.

(e) If a party is alleging that a plan includes a service(s) that is not being provided, that party has the burden to prove that:

(i) The service(s) is not being provided; and

(ii) Such lack of service(s) is a substantial failure to implement the plan.

(6) Evidence:

(a) The hearing officer shall admit all relevant and material evidence, including agreements as to material facts as determined by the Coordinator, that is reasonably likely to assist in the making of a fully informed, fair decision in the dispute. The hearing officer's rulings on evidence are not reviewable. Conformity to legal rules of evidence shall not be necessary.

(b) In all cases the burden of proof shall be established by a preponderance of the evidence.

(7) Guidelines for decisions regarding ITPs and community ISPs: In arriving at a decision, the hearing officer shall utilize the following guidelines in resolving disputed portions of the ITP and community ISP:

(a) The contents of the plan are reasonable and appropriate to meet the individual's needs and promote identified strengths and capacities.

(b) The ITP/ISP reflects the individual's preferences, to the extent appropriate, unless the individual communicates no preference or is incapable of communicating any preference.

(c) The ITP/ISP is designed to utilize services that allow the individual to be more, rather than less, integrated in the community and rely on available generic services to the extent feasible and consistent with the individual's needs.

(d) The ITP/ISP provides services which are least restrictive, not unduly intrusive and not excessive in light of the individual's needs.

(e) The ITP/ISP can be practicably implemented. Except as provided in Paragraph 12.5 [now Subsection E of 7.26.8.12 NMAC], below, practicality or impracticality is to be determined without regard to cost.

(f) The plan includes a service or support that is not being provided and the failure to provide such service is a substantial failure to implement the plan.

(8) Guidelines for decisions regarding facility IPPs:

(a) The contents of the IPP are based on professional judgment and are reasonable and appropriate to meet the individual's needs and promote identified strengths and capacities.

(b) The IPP reflects the individual's preferences, to the extent appropriate, unless the individual communicates no preference or is incapable of communicating any preference.

(c) The IDT considered residential placement, supports, programs, services and activities that would give the individual the opportunity to be more, rather than less, integrated in the community. The IDT's decision to recommend or not to recommend discharge was based upon a consideration of the individual's needs and is consistent with appropriate professional judgment.

(d) The IPP provides services which are least restrictive, not unduly intrusive and not excessive in light of the individual's needs.

(e) The IPP can be practicably implemented. Except as provided in Paragraph 12.5 [now Subsection E of 7.26.8.12 NMAC], below, practicality or impracticality is to be determined without regard to cost.

(f) (Effective June 1, 1994) The plan includes a service or support that is not being provided and the failure to provide such service is a substantial failure to implement the plan.

(9) Decision:

(a) The hearing shall be conducted, and the hearing officer shall render a decision, within thirty (30) days of the *Jackson* coordinator's receipt of the hearing request, or within thirty (30) days of the selection of a new hearing officer if the recusal provisions of Paragraph 12.4.4 [now Paragraph 4 of Subsection D of 7.26.8.12 NMAC] have been invoked. All hearing officer decisions shall contain the following:

(i) The decision on the merits of the dispute; and

(ii) The reasons for the decision, including reference to any guidelines listed in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC], as appropriate.

(b) The decision of the hearing officer shall be final as to the plan's compliance with the guidelines set forth in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC], as appropriate, of this DRP.

(c) Any challenge in court to any individual plans or the implementation thereof must be by separate *de novo* action or by a *de novo* motion in the *Jackson* case, where appropriate. In any such challenge the DRP and guidelines set forth in Paragraphs 12.4.7 and 12.4.8 [now Paragraphs (7) and (8) of Subsection D of 7.26.8.12 NMAC], and in Activity 11 of the Individual Transition Planning Process (7 NMAC 26.7) [now 7.26.7 NMAC] shall not be enforced by the court.

(i) The sole basis for any court challenge to any individualized plan or the implementation thereof shall be that the plan on its face or as implemented does not comply with the individual's rights under constitutional or statutory law. Nothing herein shall be deemed a waiver of any of the state's defenses in the event of such action.

(ii) Statements and evidence presented to the coordinator, the decision of the coordinator, the decision of the hearing officer and the record of any hearing shall not be offered as evidence nor be admissible in any proceeding in court.

(10) Notice of decision: The *Jackson* coordinator shall mail the hearing officer's decision to the parties within three working days of receipt of the decision.

E. Review of interim plans:

(1) If the department does not implement an ITP because of cost or because the plan fails to satisfy constitutional or statutory requirements and develops an *interim* plan instead, any party eligible to initiate a DRP of the original plan may initiate a DRP of the interim plan. However, the department's decision regarding the

allocation of resources to any plan or interim plan is final, within the departments's sole discretion and not reviewable in the DRP. DRP hearing officers have no authority to order the department to expend resources beyond those the department allocates to any plan or interim plan.

(2) All DRP procedures and limitations, including but not limited to those set forth in Paragraphs 12.4.9.2 and 12.4.9.3 [now Subparagraphs (b) and (c) of Paragraph (9) of Subsection D of 7.26.8.12 NMAC], will apply except that if the matter goes to a hearing:

(a) The hearing officer cannot be the person who held the hearing on the original plan, and
(b) The grounds for review and the hearing guidelines are modified and limited to whether the interim plan satisfies the guidelines set forth in Paragraph 12.4.8 [now Paragraph (8) of Subsection D of 7.26.8.12 NMAC], above, as appropriate, to the extent possible within the resources allocated by the Department to the individual to implement the interim plan.

F. Delays in implementing plans:

(1) Delay of transition process:

(a) During any stage of the DRP, a party may request that some or all ITP implementation activities be delayed pending resolution of the dispute. A request to delay prior to the administrative hearing must be directed to the *Jackson* coordinator. A party may also request a delay in implementation from the hearing officer at the administrative hearing.

(b) The *Jackson* coordinator or the hearing officer shall order that some or all ITP implementation activities be delayed pending resolution of the dispute if the coordinator or hearing officer determines that:

(i) there are extraordinary circumstances which necessitate delay; or
(ii) the immediate implementation of the ITP would adversely affect the health and/or safety of the individual.

(c) Delays in implementation pending resolution of a dispute shall be terminated automatically when a dispute is resolved by withdrawal of the dispute, agreement of the parties, failure to request an administrative hearing, or upon the determination by the hearing officer.

(2) Delay of facility or community plans:

(a) The request to initiate a DRP regarding any portion of an IPP or ISP shall automatically delay implementation of the disputed portions unless the health and/or safety of the individual would be adversely affected.

(b) Delays in implementation pending resolution of a dispute shall be terminated automatically when a dispute is resolved by withdrawal of the dispute, agreement of the parties, failure to request an administrative hearing, or upon the determination.

[04/02/93, 04/29/94; 01/15/97; Recompile 10/31/01]

HISTORY OF 7.26.8 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: DOH 93-1 (DDD), Jackson Dispute Resolution Process (DRP) for Individual Transition Plans Appendix B, 4/2/93. DOH 94-02 (DDD), Appendix B, Dispute Resolution Process Regulations, 4/29/94.

History of Repealed Material: [RESERVED]