HOUSE BILL 1198

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CF SB 779

By: **Delegates Braveboy, Bates, Carr, Frush, Hixson, Ivey, Kach, A. Kelly, McMillan, A. Miller, W. Miller, Mizeur, B. Robinson, Schulz, Valderrama, Vaughn, and A. Washington**
Introduced and read first time: February 7, 2014
Assigned to: Ways and Means

A BILL ENTITLED

AN ACT concerning

Education – Due Process Hearings for Children With Disabilities – Burden of Proof

FOR the purpose of requiring certain public agencies to bear a certain burden of proof in due process hearings that are held to resolve a dispute relating to the provision of a free appropriate public education to children with disabilities; establishing that a certain provision of law is not intended to change certain record keeping requirements or what constitutes a free appropriate public education under federal law; and generally relating to the burden of proof in certain due process hearings.

BY repealing and reenacting, with amendments,
Article – Education
Section 8–413
Annotated Code of Maryland
(2008 Replacement Volume and 2013 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Education

8–413.

(a) (1) In this section the following words have the meanings indicated.

(2) "Administrative law judge" means an individual serving in the role of an impartial hearing officer as required under the federal Individuals with Disabilities Education Act.

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
[Brackets**]** indicate matter deleted from existing law.

(3) "Due process complaint" means a written request for a due process hearing filed by the parent of a child with a disability, as defined in § 8–412 of this subtitle, or a public agency, to resolve a dispute over the identification, evaluation, educational placement, or the provision of free appropriate public education, in accordance with federal law.

(4) "Federal law" means the Individuals with Disabilities Education Act and regulations adopted under that Act.

(5) "Parent" means:

(i) A child's natural or adoptive parents, a guardian, or a person acting as a parent of a child, such as a relative or a stepparent with whom the child lives;

(ii) A foster parent with whom a child lives if the foster parent has been granted limited guardianship for educational decision making purposes by the court that placed the child in foster care;

(iii) Another individual who is legally responsible for the child's welfare; or

(iv) A parent surrogate appointed in accordance with § 8–412 of this subtitle.

(6) "Public agency" means the State Department of Education, a local school system, or any State agency responsible for providing education to students with disabilities, including the Maryland School for the Blind and the Maryland School for the Deaf.

(7) "Resolution session" means a preliminary meeting the public agency shall convene with the child's parent in accordance with federal law.

(b) (1) The parent of a child with a disability or a public agency may formally request mediation at any time to resolve any disagreement between the parties regarding the child's special education services or program.

(2) If a parent files a due process complaint against a public agency concerning the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education, any party shall be given the opportunity to request mediation of those aspects of the decision subject to dispute.

(3) The request for mediation may not be used to deny or delay the parent's rights under federal law or this section.

(4) Any party to the mediation has the right to be accompanied and advised by counsel.

(5) Mediation shall be conducted in accordance with departmental regulations.

(6) A mediation agreement shall be in writing and is enforceable in a court of competent jurisdiction in accordance with federal law.

(c) (1) Before conducting a due process hearing in accordance with subsection (d) of this section, the public agency shall provide the parent with an opportunity to resolve the due process complaint at a resolution session in accordance with federal law.

(2) A resolution session agreement shall be in writing and enforceable in a court of competent jurisdiction in accordance with federal law.

(3) A written resolution agreement may be voided by the parties within 3 business days of execution in accordance with federal law.

(d) (1) A parent of a child with disabilities shall file a due process complaint with the Office of Administrative Hearings and the public agency.

(2) A public agency shall file a due process complaint with the Office of Administrative Hearings and the parent.

(3) Except as provided in paragraph (4) of this subsection, the complaining party shall file a due process complaint within 2 years of the date the party knew or should have known about the action that forms the basis of the due process complaint.

(4) The statute of limitations described under paragraph (3) of this subsection does not apply to a parent who is prevented from requesting a due process hearing due to:

(i) Specific misrepresentations made by the public agency that it had resolved the problem that formed the basis of the due process complaint; or

(ii) The public agency's withholding of information that the public agency was required to provide to the parent.

(5) In order to conduct a hearing, the Office of Administrative Hearings shall appoint an administrative law judge who:

(i) Is an administrative law judge in the Office of Administrative Hearings; and

(ii) Meets the requirements of a due process hearing officer in accordance with federal law.

(6) Unless the parent and the public agency otherwise agree, during the course of any administrative or judicial proceeding, the child must remain in the last approved placement in accordance with federal law.

(7) If the hearing concerns the initial admission of a child into a public school, the child with the consent of the parent must be placed in the public school program until the proceedings have been completed.

(8) (I) A PUBLIC AGENCY SHALL HAVE THE BURDEN OF PROOF IN A DUE PROCESS PROCEEDING CONDUCTED UNDER THIS SECTION.

(II) NOTHING IN THIS PARAGRAPH IS INTENDED TO CHANGE THE FOLLOWING UNDER FEDERAL LAW:

1. RECORD KEEPING REQUIREMENTS; OR

2. WHAT CONSTITUTES A FREE APPROPRIATE PUBLIC EDUCATION.

(e) (1) The administrative law judge appointed under subsection (d) of this section shall conduct the hearing in accordance with federal law, Title 10 of the State Government Article, and the Office of Administrative Hearings Rules of Administrative Procedure, and may:

(i) After review of the educational records of the child, dismiss any request for review which does not relate to a matter described in subsection (d)(1) of this section;

(ii) Require the parties to attend a prehearing conference prior to the due process hearing;

(iii) Hear any testimony that it considers relevant;

(iv) Require an independent evaluation or call an impartial expert witness in the diagnosis or education of students with disabilities whose testimony shall be on the record and whose costs shall be paid by the State Education Agency; and

(v) Administer oaths to witnesses at the hearing on request of a party.

(2) The provisions of the Family Educational Rights and Privacy Act and 34 C.F.R. Part 99 shall apply to school records sought by the impartial expert witness.

(3) If the parties cannot agree on an impartial expert witness, each party shall be given the opportunity to submit a list of possible experts, and the administrative law judge shall decide which impartial expert witness to call.

(f) (1) Any party to the hearing has the right to:

(i) Be accompanied and be advised by counsel and individuals with special knowledge or training with respect to the problems of children with disabilities;

(ii) Present evidence and confront, cross–examine, and compel the attendance of witnesses;

(iii) Prohibit the introduction of any evidence at the hearing which has not been disclosed to all parties at least 5 days before the hearing;

(iv) Obtain a written or electronic verbatim record of the hearing; and

(v) Obtain written findings of fact and decisions.

(2) Parents involved in the hearings must be given the right to:

(i) Have the child who is the subject of the hearing present; and

(ii) Open the hearing to the public.

(g) (1) The decision of the administrative law judge shall be made on substantive grounds based on the determination of whether the child received a free appropriate public education.

(2) In matters alleging a procedural violation, an administrative law judge may find that the child did not receive a free appropriate public education only if the procedural inadequacies:

(i) Impeded the child's right to a free appropriate public education;

(ii) Significantly impeded the parents' opportunity to participate in the educational decision making process regarding the provision of a free appropriate public education to the parents' child; or

(iii) Caused a deprivation of educational benefits.

(h) The hearing shall be held and a written decision shall be issued within the time periods established by federal law. The administrative law judge may grant a specific extension of time at the request of either party.

(i) If, at the time of the due process complaint, the child who is the subject of the hearing is not enrolled and attending an approved educational program or, if the due process complaint is over the placement or manifestation determination of a child, due to a violation of the rules of conduct, an expedited hearing shall occur within 20 school days of the date the hearing is requested and shall result in a decision within 10 school days of the hearing.

(j) Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the child resides.

(k) (1) A public agency is not required to pay for the cost of education, including special education and related services, for a child with a disability at a private or nonpublic school if the public agency made a free appropriate public education available to the child and the parent of the child elected to place the child in such a school or facility.

(2) If the parent of a child with a disability, who previously received special education and related services under the authority of a public agency, enrolls the child in a nonpublic school or facility without the consent of or referral by the public agency, an administrative law judge or a court may require the public agency to reimburse the parent for the costs of the placement enrollment if the administrative law judge or court determines that the public agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(3) Reimbursement may be reduced or denied by the administrative law judge or court in accordance with federal law.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2014.