

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE

House Bill 668  
Ways and Means

(Delegate McConkey, *et al.*)

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Education - Due Process Hearings for Children With Disabilities - Attorney's Fees

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This bill requires an administrative law judge or a court to award reasonable attorney's fees to a prevailing parent in a due process hearing that is held to resolve disputes about the identification, evaluation, or educational placements of children with disabilities or the provision of a free appropriate public education.

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Fiscal Summary

**State Effect:** Expenditures of State agencies involved in due process hearings under the bill are not significantly affected. Revenues are not affected.

**Local Effect:** Beginning in FY 2016, some local school systems each year will be required to cover attorneys' fees as awarded under the bill. The total amount awarded will vary considerably each year, and will most likely be incurred by relatively large school systems with high numbers of special education students. Costs per fully adjudicated hearing may exceed \$100,000, but the frequency of awards may be less than five per year.

**Small Business Effect:** None.

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Analysis

**Current Law:** The federal Individuals with Disabilities Education Act (IDEA) requires that a student with disabilities be provided a free appropriate public education (FAPE) in the least restrictive environment, in accordance with an Individualized Education Program specific to the individual needs of the student. IDEA (and regulations adopted under the law) governs much of the process and procedures related to FAPE for children with disabilities, including due process hearings. Chapter 233 of 2006 established a Maryland

process for resolution sessions that can be used to settle disputes about the identification, evaluation, and educational placements of children with disabilities, consistent with IDEA provisions for dispute resolution. Before conducting a due process hearing, the parent must have an opportunity to resolve a due process complaint at a resolution session.

A parent of a child with a disability or a public agency may request mediation to resolve any disagreement regarding the child's special education services or program, including mediation to resolve a due process complaint filed by a parent against a public agency. A parent of a child with disabilities may file a due process complaint with the Maryland Office of Administrative Hearings (OAH) and the public agency. Similarly, the public agency may file a due process complaint with OAH and the parent. OAH appoints an administrative law judge to conduct a due process hearing. The decision of the administrative law judge must be made on substantive grounds based on whether a child has received a free appropriate public education.

The Code of Maryland Regulations authorizes (but does not require) the courts to award reasonable attorneys' fees to the prevailing party in a due process dispute under circumstances described in specified provisions of IDEA statute and related regulations (20 U.S.C. § 1415(i)(3) and 34 C.F.R. § 300.517). IDEA authorizes the federal District Court for Maryland or the State circuit court in the county in which the child resides to award reasonable attorneys' fees as part of the costs to the prevailing party, which may be the parent, or may be a State or local agency if the parent's complaint or cause of action is found to be frivolous or presented for any improper purpose (*e.g.*, to increase the cost of litigation.) The award amount must be based upon the prevailing rates in the community in which the action or proceeding arose for the kind and quality of services furnished.

**State Fiscal Effect:** OAH received 270 special education hearing requests in fiscal 2011, 249 in fiscal 2012, 237 in fiscal 2013, and 225 in fiscal 2014, but according to the Maryland State Department of Education (MSDE) only 23 hearing requests resulted in a fully adjudicated hearing in fiscal 2014. (The others were withdrawn or resolved through mediation or resolution sessions, or other agreements were informally reached.) The number of fully adjudicated hearings annually has averaged about 19 for the past several years. MSDE advises that the parent prevails in approximately 20% (or four) of the fully adjudicated hearings in a given year. Because the likelihood of success appears not to be high, it is assumed that the prospect of recouping some portion of attorney's fees will not generate a significant increase in the number of hearings that are brought to full adjudication in a given year. Therefore, State costs with respect to holding hearings will not be substantially affected.

The public agency involved in the due process hearing would incur the cost of the awarded attorney's fee. The number of students with disabilities under the direct supervision of a State agency (as opposed to a local school system) is small. It is assumed that in many

years there will be no instances in which a parent prevails in a hearing involving a State agency, and that the number of instances is not likely to be much above one per year.

**Local Fiscal Effect:** In the great majority of due process hearings covered by the bill, the local education agency is a party to the dispute (along with the parent). Therefore, the award of attorneys' fees will be at the expense of the local school system. According to the analysis above, in about four cases each year the parent will prevail in a due process hearing and be awarded attorneys' fees. OAH advises that it finds that attorneys in the State may charge anywhere from \$350 to \$600 per hour. Thus, for every 100 billable hours for a given case, the local school system may be required to pay up to \$60,000. It is assumed that attorneys' fees would be awarded for pre-hearing preparation, as well as for hours spent in a hearing. School systems with relatively large special education student populations are more likely to bear attorneys' fees costs in any given year.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Maryland State Department of Education, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Maryland School for the Deaf, Department of Legislative Services

**Fiscal Note History:** First Reader - March 3, 2015  
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Analysis by: Scott P. Gates

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510