

**Department of Legislative Services**  
Maryland General Assembly  
2014 Session

**FISCAL AND POLICY NOTE**  
**Revised**

House Bill 1198  
Ways and Means

(Delegate Braveboy, *et al.*)

Rules

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**Education - Children With Disabilities - Due Process Hearings**

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This bill establishes a goal of the General Assembly that a parent or public agency request mediation before filing a due process complaint concerning the identification, evaluation, or educational placement of a child with a disability or the provision of a free appropriate public education. Within two days after filing a due process complaint, or receiving notice that a parent has filed a due process complaint, a public agency must provide to the parent a document that (1) informs the parent of the right to request all documents relating to the subject matter of the complaint in accordance with regulations adopted by the Office of Administrative Hearings (OAH) and (2) describes how the parent can request these documents. The bill also expands the scope of the study that must be conducted by the Commission on Special Education Access and Equity and requires the Maryland State Department of Education (MSDE) to report on certain items to specified committees of the General Assembly.

The bill takes effect June 1, 2014.

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**Fiscal Summary**

**State Effect:** MSDE can meet the administrative and reporting requirements of the bill with existing resources.

**Local Effect:** None.

**Small Business Effect:** None.

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## Analysis

**Bill Summary:** The Commission on Special Education Access and Equity must study arguments for and against shifting the burden of proof from a party seeking relief to a public agency in a 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. The commission must also study the implications on a public agency's workload, resources, staff, and ability to serve all students of shifting the burden of proof from a party seeking relief to a public agency, as well as the best practices of specified states regarding methods of shifting the burden of proof.

The commission must hold at least two meetings devoted to discussing study items related to shifting the burden of proof and at least one hearing on issues relating to the burden of proof in a due process hearing. The commission must report findings and recommendations on the items added by the bill to the Governor, the Senate Education, Health, and Environmental Affairs, and the House Ways and Means Committee by October 31, 2014. Accordingly, the effective period of the original Act that established the commission is extended to November 30, 2014.

MSDE must by December 1, 2016, report to the Senate Education, Health, and Environmental Affairs and the House Ways and Means Committee on:

- the per pupil cost of educating a special education student as opposed to a general education student for each county in the State;
- the adequacy of State funding for special education to meet per pupil costs;
- the average workload, caseload, and paperwork requirements related to the special education process of educators in providing a free and appropriate public education; and
- best practices of other jurisdictions in assisting special education teachers to meet their caseload while having adequate time for planning, teaching, and grading.

**Current Law:** Maryland statute does not specifically designate which party has the *burden* of proof in the due process hearings addressed by the bill. However, the State follows the ruling in *Schaffer v. Weast*, 546 U.S. 49 (2005). In *Schaffer v. Weast* the U.S. Supreme Court ruled that the “burden of persuasion in an administrative hearing challenging an Individualized Education Program (IEP) is properly placed with the party seeking relief, whether that is the disabled child or the school district.”

The federal Individuals with Disabilities Education Act (IDEA) requires that a student with disabilities be provided a free appropriate public education in the least restrictive environment, in accordance with an IEP specific to the individual needs of the student.

Chapter 233 of 2006 established a 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 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 *standard* of proof in the due process hearings addressed by the bill is the preponderance of evidence, as specified by the State's Administrative Procedures Act, which governs resolutions of disputes through administrative proceedings. (The party with the *burden* of proof must meet this standard to prevail.)

Chapter 671 of 2013 established a Commission on Special Education Access and Equity to study the extent to which parents and guardians of students with disabilities are made aware of their rights under IDEA and State law and regulations relating to children with disabilities and potential ways to improve the awareness of these rights. Among other matters, the commission must study concerns about equity between the parties in special education due process hearings and potential methods for improving the process, as well as the effects of workload, caseload, and paperwork requirements related to the special education process on the ability of educators to provide a free and appropriate education. The commission must report its findings and recommendations by June 30, 2014.

**Background:** The majority opinion of the court in *Schaffer v. Weast*, which involved a disabled student enrolled in the Montgomery County Public Schools (MCPS) and the MCPS Superintendent, indicated that because both IDEA and Maryland law (statute and regulations) are silent regarding the placement of the burden of proof, the "default rule" placing the burden on the plaintiff applies. In dissenting, Justice Ginsberg argued that there are factors including "policy, convenience and fairness" reasons that may contribute to departing from the default rule, and that these factors indicated in *Schaffer v. Weast* that the burden of proof should be assigned to the school district.

The court's written majority opinion noted confusion surrounding the term "burden of proof," stating that it has historically included both a "burden of persuasion" and a "burden of production." The "burden of persuasion" indicates which party loses if the evidence is closely balanced and the "burden of production" has to do with the obligation to produce evidence at various points in the proceeding.

In *Schaffer v. Weast*, the court explicitly declined to rule on whether a state may override the default rule (discussed above), though it noted that several states "have laws or regulations purporting to do so, at least under some circumstances." Justice Breyer dissented on this point, arguing that because IDEA is an example of cooperative federalism that affords each state some discretion over various procedural matters with respect to the Act, and because IDEA does not specify a uniform rule regarding the placement of the burden of proof, states may vary in the allocation of the burden of persuasion. The court did reject the argument that "in effect,...every IEP should be assumed to be invalid until the school district demonstrates that it is not."

Under legislation approved in January of 2008 (Chapter 331), New Jersey shifted the burden of proof and burden of production in due process hearings from the party seeking relief back to the school districts, where it had been prior to the *Schaffer* decision. Based on data in New Jersey's annual performance report to the U.S. Department of Education, there was an initial surge in the number of due process hearings within the first year after enactment, but data for three subsequent years indicates that the number of due process hearings returned to a level at or below the level reached prior to the 2008 legislation. In 2007 New York passed legislation that shifted the burden from the party seeking relief by placing the burden of proof on the school district or relevant state agency except the parent has the burden of proof in cases where a parent seeks tuition reimbursement for a unilateral parental placement of a child. The change in the law did not clearly alter the general downward trend in the number of due process hearings in New York.

### *Special Education and Nonpublic Placements*

The State's special education formula provides additional aid based on the number of students with disabilities in each school system. The formula is calculated using special education enrollment and 74% of the per pupil foundation amount. The State also funds a share of the cost of placing students with special needs in nonpublic school facilities. The costs vary depending on the number of students and the cost of the services provided for students placed in the program. In fiscal 2010, the State share of funding for nonpublic placements was reduced from 80% to 70% of the costs exceeding the base local contribution (*i.e.*, local share plus 200% of the basic cost). The Governor's proposed fiscal 2015 State budget includes \$405.3 million in State funds for special education (including \$110.9 million for nonpublic placements) and \$201.9 million in federal funds.

## *Maryland Education Finance and Adequacy Study*

State financing of public schools changed considerably beginning in fiscal 2004 with the implementation of new funding formulas established by Chapter 288 of 2002, the Bridge to Excellence in Public Schools Act. The financing structure established by the Act is based on the concept of “adequacy” – an empirical estimate of the amount of funding needed by schools and local school systems in order to obtain the resources needed to reasonably expect that students can meet the State’s academic performance standards. State education aid formulas incorporate the adequacy concept by ensuring a minimum per pupil funding level, providing additional funding based on enrollments of at-risk students, and granting additional aid to local school systems with higher educational resource costs.

The original 2002 law called for another adequacy study. The Maryland State Department of Education, in consultation with the Department of Budget and Management and the Department of Legislative Services, must contract with a public or private entity to conduct a study of the adequacy of education funding in the State. The study must be conducted in phases, with the first phase beginning no later than June 30, 2014, and the final phase being completed by December 1, 2016.

**State Fiscal Effect:** MSDE can absorb the costs of expanding the responsibilities of the Commission on Special Education Access and Equity, including holding required meetings and hearings, with existing resources. The items that the bill requires MSDE to report on by December 1, 2016, largely align with current law (including reporting due dates) regarding (1) the commission’s responsibilities to study concerns about the equity between parties in special education due process hearings as well as special education workload, caseload, and paperwork, and (2) provisions of the adequacy study regarding per pupil education funding and costs, including funding and costs related to special education. Therefore, it is assumed that MSDE finances are not materially affected by the bill.

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### **Additional Information**

**Prior Introductions:** SB 691 of 2013, a similar bill, received a hearing in the Senate Education, Health, and Environmental Affairs Committee but was subsequently withdrawn. Its cross file, HB 1286, received a hearing in the House Ways and Means Committee but was subsequently withdrawn.

**Cross File:** SB 779 (Senator Montgomery, *et al.*) - Education, Health, and Environmental Affairs.

**Information Source(s):** National Center on Dispute Resolution in Special Education, Maryland State Department of Education, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Department of Legislative Services

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