

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

Senate Bill 779 (Senator Montgomery, *et al.*)
Education, Health, and Environmental Affairs

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

This bill places the burden of proof on the public agency 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. Public agencies include the Maryland State Department of Education (MSDE), local school systems, the Maryland School for the Blind, the Maryland School for the Deaf, or any other State agency responsible for providing education to students with disabilities. The bill states that it is not intended to change federal law regarding recordkeeping requirements or what constitutes a free appropriate public education.

The bill takes effect July 1, 2014.

Fiscal Summary

State Effect: General fund expenditures for MSDE and the Office of Administrative Hearings (OAH) may increase to the extent that the bill increases the number of due process complaints and due process hearings in the State, thereby increasing personnel and hearing transcription costs.

Local Effect: To the extent that the bill increases the number of due process complaints and due process hearings, local expenditures including attorney fees will increase. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: None.

Analysis

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. 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.

State Fiscal Effect: Parents of children with disabilities may believe that their chance of prevailing in a due process hearing is improved under the bill, which would tend to result in a greater number of due process complaints and hearings. Further, some parents may be less likely to agree to a less costly resolution process, or to accept the results of such a process, if they sense a greater chance of prevailing in a due process hearing. However, a shift in the burden of proof will not change the evidence that each party must present in order to meet the preponderance of evidence standard.

Although MSDE anticipates an increase in the number of due process complaints and hearings, neither MSDE nor OAH is able to estimate the degree of change in the number of complaints or hearings. OAH advises that its cost per case has averaged approximately \$3,400 for the hearings covered by the bill. OAH received 270 special education hearing requests in fiscal 2011, 249 in fiscal 2012, and 237 in fiscal 2013, but according to MSDE only 17 hearing requests result in a fully adjudicated hearing in fiscal 2013. (The others are withdrawn or resolved through mediation, resolution sessions, or other agreements informally reached.) The number of fully adjudicated hearings annually has averaged about 18 for the past several years. Therefore, the annual cost to OAH of these hearings is approximately \$61,200. If the number of hearings increases by 10%, OAH expenditures increase by \$6,100 annually for fully adjudicated hearings. OAH has indicated that if the number of additional due process hearing requests increases significantly, an additional administrative law judge would need to be hired at a cost of \$98,900 in fiscal 2015 to cover salary, benefits, equipment, and travel, with costs increasing to \$148,000 by fiscal 2019 due to annualization and inflation.

MSDE advises that it will need to hire a part-time (0.5) education program specialist and a part-time (0.5) administrative specialist to maintain due process hearing files and to collect and report required data to the U.S. Department of Education and will need to double its contractual expenditures to provide transcripts (at no cost per federal law) to parties involved in each hearing. This would result in expenditures totaling \$141,500 in fiscal 2015 and increasing due to annualization and inflation to \$195,100 by fiscal 2019.

However, MSDE estimates are based on a substantial increase in the number of due process complaints and hearings. The Department of Legislative Services finds that the increase in due process complaints and hearings may be relatively modest, and based on New Jersey's experience, the bill may not have a lasting significant effect on the number of due process hearings in Maryland. A contractual staff person may be required to deal with an initial increase in hearings following the bill's enactment.

MSDE's current personnel costs (for three employees) and contractual costs are covered by federal IDEA funds. However, MSDE advises that federal funds will not increase under the bill, therefore necessitating State funds to cover increased costs associated with the bill.

To the extent that shifting the *burden* of proof to the State and local school systems results in additional final rulings that students did not receive a free appropriate public education, both State and local costs for special education increase since the State and local school systems share in the costs of providing free education to students with disabilities.

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: HB 1198 (Delegate Braveboy, *et al.*) - Ways and Means.

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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