

# SENATE BILL 390

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CF HB 344

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By: **Senators Montgomery, Bates, Benson, Guzzone, Kelley, Nathan-Pulliam,  
Pugh, Ramirez, Raskin, Simonaire, and Waugh**

Introduced and read first time: February 6, 2015

Assigned to: Education, Health, and Environmental Affairs

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## A BILL ENTITLED

1 AN ACT concerning

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

4 FOR the purpose of requiring certain public agencies to bear a certain burden of proof in  
5 due process hearings that are held to resolve a dispute relating to the provision of a  
6 free appropriate public education to children with disabilities; providing a certain  
7 exception that requires a parent or guardian seeking tuition reimbursement for a  
8 unilateral placement of a student by the parent or guardian to bear a certain burden  
9 of proof; establishing that a certain provision of law is not intended to change certain  
10 record-keeping requirements or what constitutes a free appropriate public education  
11 under federal or State law; and generally relating to the burden of proof in certain  
12 due process hearings.

13 BY repealing and reenacting, with amendments,  
14 Article – Education  
15 Section 8–413  
16 Annotated Code of Maryland  
17 (2014 Replacement Volume and 2014 Supplement)

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

20 **Article – Education**

21 8–413.

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

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



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

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

9           (4) “Federal law” means the Individuals with Disabilities Education Act  
10 and regulations adopted under that Act.

11           (5) “Parent” means:

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

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

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

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

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

25           (7) “Resolution session” means a preliminary meeting the public agency  
26 shall convene with the child’s parent in accordance with federal law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (8) (I) **EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II)**  
10 **OF THIS PARAGRAPH, A PUBLIC AGENCY SHALL HAVE THE BURDEN OF PROOF IN A**  
11 **DUE PROCESS PROCEEDING CONDUCTED UNDER THIS SECTION.**

12 (II) **A PARENT OR GUARDIAN SEEKING TUITION**  
13 **REIMBURSEMENT FOR A UNILATERAL PLACEMENT OF A STUDENT BY THE PARENT**  
14 **OR GUARDIAN SHALL HAVE THE BURDEN OF PROOF IN A DUE PROCESS PROCEEDING**  
15 **CONDUCTED UNDER THIS SECTION.**

16 (III) **NOTHING IN THIS PARAGRAPH IS INTENDED TO CHANGE**  
17 **THE FOLLOWING UNDER FEDERAL OR STATE LAW:**

18 1. **RECORD-KEEPING REQUIREMENTS; OR**

19 2. **WHAT CONSTITUTES A FREE APPROPRIATE PUBLIC**  
20 **EDUCATION.**

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

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

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

30 (iii) Hear any testimony that it considers relevant;

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

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

3                   (2)     The provisions of the Family Educational Rights and Privacy Act and  
4 34 C.F.R. Part 99 shall apply to school records sought by the impartial expert witness.

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

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

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

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

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

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

16                   (v)     Obtain written findings of fact and decisions.

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

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

19                   (ii)    Open the hearing to the public.

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

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

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

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

30                   (iii)   Caused a deprivation of educational benefits.

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

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

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

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

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

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

27 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July  
28 1, 2015.