

SB 390

# **Department of Legislative Services**

## Maryland General Assembly

### 2015 Session

## FISCAL AND POLICY NOTE

Senate Bill 390

(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. However, if a parent seeks tuition reimbursement for a unilateral placement of a student by the parent, the burden of proof in these hearings is placed upon the parent. 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, and any other State agency responsible for providing education to students with disabilities. The bill states that it is not intended to change federal or State law regarding recordkeeping requirements or what constitutes a free appropriate public education.

The bill takes effect July 1, 2015.

## Fiscal Summary

**State Effect:** General fund expenditures for MSDE and the Office of Administrative Hearings (OAH) may increase modestly, 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 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 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 was required to study concerns about equity between the parties in special education due process hearings and potential methods for improving the process.

**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 2016 State budget includes \$272.2 million in State special education formula aid, as well as for \$120.9 million for nonpublic placements.

*Commission on Special Education Access and Equity*

According to the report of the Commission on Special Education Access and Equity, dated June 30, 2014, the commission voted against recommending a change to current law regarding the burden of proof in due process hearings. The commission did recommend a statement calling for, in part, "...a greater emphasis on the role of parents as a valued and integral part of the IEP team," and indicated that the recommendation could be achieved through the issuance of guidance. The commission also recommended that the State "study the lack of access to legal advocacy and other resources for low income families who otherwise would not be able to afford representation at all levels of the special education process from IEP meeting through due process, and to make recommendations to address this issue."

**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.

MSDE anticipates an increase in the number of due process complaints and hearings, while OAH does not anticipate a significant change in the number of 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.

OAH advises that its cost per case has averaged approximately \$3,500 for the hearings covered by the bill. 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 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. Therefore, the annual cost to OAH of these hearings is approximately \$66,500. If the number of hearings increases by 10%, OAH expenditures increase by \$6,700 annually for fully adjudicated hearings. Further, MSDE advises that it is rare for a hearing to involve a parent unilaterally placing a student in a nonpublic school with the intent of later recovering the associated tuition costs; the related provision of the bill therefore is not expected to significantly impact the number of hearings. 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 \$154,800 in fiscal 2016 to cover salary, benefits, equipment, and travel, with costs increasing to \$160,200 by fiscal 2020 due to inflation.

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.

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## Additional Information

**Prior Introductions:** SB 779 of 2014, a similar bill, received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken. Its cross file, HB 1198 passed the House with amendments and was referred to the Senate Rules Committee. SB 691 of 2013, also 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 344 (Delegate A. Washington, *et al.*) - Ways and Means.

**Information Source(s):** Maryland State Department of Education, Office of Administrative Hearings, Department of Legislative Services

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