

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 140
Ways and Means

(Delegate Luedtke)

Education, Health, and Environmental Affairs

**Special Education - Administrative Proceedings and Judicial Actions - Attorney's
and Expert Witness Fees and Related Costs**

This bill authorizes a court to award reasonable attorney's fees and related costs to the parent of a child with a disability, if the parent prevails 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. However, such an award may not be made after the date a written offer of settlement is made to the parent, under certain conditions, unless the parent was substantially justified in rejecting the settlement offer. A court may also award reasonable expert witness fees to the parent who is the prevailing party in these hearings. **The bill takes effect July 1, 2019.**

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 2020, some local school systems each year may be required to cover attorneys' fees and other costs 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.

Small Business Effect: None.

Analysis

Bill Summary: The award of reasonable attorney's fees and related costs by a court to the parent of a child with a disability prevailing in a hearing (described above) may not be made after the date a written offer of settlement is made to the parent, if:

- the settlement offer is made to the parent more than 10 days before the start of a relevant proceeding;
- the settlement offer is not accepted within 10 days; and
- the judge finds that the settlement offer was more favorable to the parent than the final relief obtained by the parent under the proceeding.

However, such awards may be made if the parent was justified in rejecting the settlement offer.

Current Law: 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 Individualized Education Program 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. Chapter 271 of 2016 requires the Maryland State Department of Education (MSDE) to make staff available to assist a parent in understanding the mediation process.

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 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. Within 120 days of the issuance of a hearing decision, any party to the hearing may file an appeal from a final decision of the OAH to the federal District Court for Maryland or to the circuit court for the county in which the child resides.

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.

Background: OAH received over 210 special education hearing requests in each of fiscal 2015 and 2016, and over 260 requests in each of fiscal 2017 and 2018, but the number of fully adjudicated hearings annually during this time period averaged less than 30 per year. According to MSDE data, in recent years the parent has prevailed in less than 20% of these hearings. The Administrative Office of the Courts is unable to provide data on the number of these disputes that come before federal court or circuit court upon appeal or otherwise.

State Expenditures: 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.

It is further 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.

Local Expenditures: 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, any award of attorneys' fees and other costs under the bill will be at the expense of the local school system. According to the analysis above, in about two to 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, depending on the discretion of administrative law judges and courts in awarding these costs, for every 100 billable hours for a given case, the local school system may be required to pay up to \$60,000. School systems with relatively large special education student populations are more likely to bear attorneys' fees costs in any given year.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Anne Arundel County Public Schools; Montgomery County Public Schools; Prince George's County Public Schools; St. Mary's County Public Schools; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Maryland School for the Deaf; Maryland Department of Disabilities; Office of Administrative Hearings; Department of Legislative Services

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