

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 783
(Senators Zucker and Patterson)
Education, Health, and Environmental Affairs

Special Education - Judicial Actions - Attorney's Fees and Related Costs

This bill authorizes a court to award reasonable attorney's fees and related costs, including expert witness fees and costs, to the parent of a child with a disability, if the parent prevails in a proceeding 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. **The bill takes effect July 1, 2020.**

Fiscal Summary

State Effect: Expenditures of State agencies involved in due process proceedings under the bill are not significantly affected. Revenues are not affected.

Local Effect: Beginning in FY 2021, some local school systems each year may be required to cover attorney's fees and other costs awarded under the bill. The total amount awarded will vary considerably each year and most likely be incurred by relatively large school systems with high numbers of special education students. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary: More specifically, the award of reasonable attorney's fees and related costs by a court to a parent prevailing in a proceeding generally 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 14 days before the start of the proceeding;
- the settlement offer is not accepted within 14 days; and
- the court finds the relief finally obtained by the parent is not more favorable to the parent than the settlement offer.

Nevertheless, if the parent was substantially justified in rejecting the settlement offer and is the prevailing party, an award may be made.

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 OAH to the federal District Court for Maryland or to the circuit court for the county in which the child resides.

Maryland regulations authorize (but do not require) the courts to award reasonable attorney's 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 attorney's 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 more than 210 special education hearing requests in each of fiscal 2015 and 2016, more than 260 requests in each of fiscal 2017 and 2018, and 322 in 2019. However, on average, there were fewer than 30 fully adjudicated hearings each year during this time period. 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 proceeding incurs the costs of any awarded attorney's fees and related costs. 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 proceeding 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 attorney's fees and some related costs does not generate a significant increase in the number of hearings that are brought to full adjudication in a given year.

Local Expenditures: In the great majority of due process proceedings covered by the bill, the local education agency is a party to the dispute (along with the parent). Therefore, any award of attorney's fees and related costs under the bill is at the expense of the local school system. According to the analysis above, in as many as six cases each year the parent may be the prevailing party and be awarded attorney's fees and related costs. 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 courts in awarding these costs alone, 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 attorney's fees and related costs in any given year.

Additional Information

Prior Introductions: A similar bill as amended, HB 140 of 2019, passed the House and received an unfavorable report from the Senate Education, Health, and Environmental Affairs Committee.

Designated Cross File: HB 184 (Delegate Luedtke) - Ways and Means and Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Maryland School for the Deaf; Office of Administrative Hearings; Department of Legislative Services

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