Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 373 (Howard County Delegation)
Ways and Means

Howard County – Due Process Proceedings for Children With Disabilities – Burden of Proof Ho. Co. 2–23

This bill places the burden of proof on the Howard County Board of Education 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 student otherwise would be required to enroll in a public school in Howard County but a parent or guardian seeks tuition reimbursement for the unilateral placement of a student by the parent or guardian, the burden of proof in these hearings is on the parent or guardian. 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, 2023, and terminates June 30, 2026.**

Fiscal Summary

State Effect: None. The Office of Administrative Hearings (OAH) can train its administrative law judges regarding the change of law and handle any change in the number of due process complaints using existing resources.

Local Effect: To the extent that the bill increases the number of due process complaints and due process hearings, Howard County expenditures, including attorney fees, may increase through FY 2026.

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 child with disabilities be provided a free appropriate public education in the least restrictive environment from birth through the end of the school year in which the student turns 21 years old, in accordance with an individualized family service plan (IFSP) or IEP specific to the individual needs of the child. An IFSP is for children with disabilities from birth up to age 3, and up to age 5 under Maryland's Extended IFSP Option if a parent chooses the option. An IEP is for students with disabilities from age 3 through 21. Local school systems are required to make a free appropriate public education available to students with disabilities from age 3 through 21. However, the State, under its supervisory authority required by IDEA, has the ultimate responsibility for ensuring that this obligation is met.

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. The Maryland State Department of Education must 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 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).

Local Expenditures: Howard County parents of children with disabilities may believe that their chance of prevailing in a due process hearing is improved under the bill, which may 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.

Under legislation approved in January 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.

OAH estimates the number of due process hearings will increase by between 5 and 10 per year under the bill. The Department of Legislative Services believes that the increase in due process complaints and hearings may be relatively modest, and based on New Jersey's experience, and given the bill's termination date, the bill may not have a lasting significant effect on the number of due process hearings in Howard County. Nevertheless, to the extent it does have a short-term effect, expenditures for Howard County Public Schools increase, for up to three years, for legal services and related expenses.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See HB 865 of 2022.

Designated Cross File: None.

Information Source(s): Howard County; 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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