

# SENATE BILL 691

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By: **Senators Montgomery and Benson**

Introduced and read first time: February 1, 2013

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  
5 in due process hearings that are held to resolve a dispute relating to the  
6 provision of a free appropriate public education to children with disabilities; and  
7 generally relating to the burden of proof in certain due process hearings.

8 BY repealing and reenacting, with amendments,  
9 Article – Education  
10 Section 8–413  
11 Annotated Code of Maryland  
12 (2008 Replacement Volume and 2012 Supplement)

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

15 **Article – Education**

16 8–413.

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

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

21 (3) “Due process complaint” means a written request for a due process  
22 hearing filed by the parent of a child with a disability, as defined in § 8–412 of this  
23 subtitle, or a public agency, to resolve a dispute over the identification, evaluation,

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 educational placement, or the provision of free appropriate public education, in  
2 accordance with federal law.

3 (4) "Federal law" means the Individuals with Disabilities Education  
4 Act and regulations adopted under that Act.

5 (5) "Parent" means:

6 (i) A child's natural or adoptive parents, a guardian, or a  
7 person acting as a parent of a child, such as a relative or a stepparent with whom the  
8 child lives;

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

12 (iii) Another individual who is legally responsible for the child's  
13 welfare; or

14 (iv) A parent surrogate appointed in accordance with § 8-412 of  
15 this subtitle.

16 (6) "Public agency" means the State Department of Education, a local  
17 school system, or any State agency responsible for providing education to students  
18 with disabilities, including the Maryland School for the Blind and the Maryland  
19 School for the Deaf.

20 (7) "Resolution session" means a preliminary meeting the public  
21 agency shall convene with the child's parent in accordance with federal law.

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

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

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

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

33 (5) Mediation shall be conducted in accordance with departmental  
34 regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (8) **A PUBLIC AGENCY SHALL HAVE THE BURDEN OF PROOF IN A**  
8 **DUE PROCESS PROCEEDING CONDUCTED UNDER THIS SECTION.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10                   (ii) Open the hearing to the public.

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

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

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

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

22                   (iii) Caused a deprivation of educational benefits.

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

26           (i) If, at the time of the due process complaint, the child who is the subject of  
27 the hearing is not enrolled and attending an approved educational program or, if the  
28 due process complaint is over the placement or manifestation determination of a child,  
29 due to a violation of the rules of conduct, an expedited hearing shall occur within 20  
30 school days of the date the hearing is requested and shall result in a decision within  
31 10 school days of the hearing.

32           (j) Within 120 calendar days of the issuance of the hearing decision, any  
33 party to the hearing may file an appeal from a final decision of the Office of

1 Administrative Hearings to the federal District Court for Maryland or to the circuit  
2 court for the county in which the child resides.

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

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

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

17 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
18 October 1, 2013.