



Maryland Association for Justice, Inc.

2021 Position Paper

Special Education – Judicial Actions – Attorney’s Fees and Related Costs HB 405 – UNFAVORABLE

Under the traditional “American Rule,” parties to litigation generally bear their own costs. The American Rule keeps civil justice accessible for most people in our society – because most people do not have financial resources to pay their own costs **and** their opponent’s costs if, for whatever reason, they do not prevail in a claim or defense.

House Bill 405 creates an exception to the American Rule, authorizing state courts to award expert witness fees and costs to the parent of a child with a disability who prevails in an action brought to enforce the provisions of the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400 *et seq.* (“IDEA”).

The IDEA currently authorizes an award of reasonable attorney’s fees to the prevailing party – a parent of a student with a disability or a state or local education agency. Maryland has adopted these fee-shifting provisions of the IDEA by regulation. COMAR 13A.05.01.15C(22) (adopting the provisions of 20 U.S.C. § 1415(i)(3) and 45 C.F.R. § 300.517). The IDEA does not currently permit an award of expert witness fees to a prevailing party. Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006). By authorizing an award of expert witness fees and costs, HB 405 takes Maryland law further than current federal law.

While MAJ acknowledges that students with disabilities and their parents in IDEA cases are certainly a sympathetic class of litigants, the American Rule plays a vital role in maintaining the accessibility of civil justice for Maryland citizens.

Allowing any prevailing party – even sympathetic ones – to recover expert witness fees and costs or litigation erodes the civil justice protections afforded by the American Rule, and endangers access to civil justice for everyone.

Other ways to make IDEA litigation affordable should be explored, such as requiring court-appointed neutral experts whose fees and costs are shared by the parties, or subsidized by the State. Exceptions to the American Rule must be a last resort.

**The Maryland Association for Justice respectfully requests
an UNFAVORABLE report on HB 405.**