MABE
MARYLAND ASSOCIATION OF BOARDS OF EDUCATION

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BILL: **House Bill 1240**
TITLE: **Individualized Education Programs - Burden of Proof in Due Process Hearings and Studies**
POSITION: **OPPOSE**
DATE: **April 5, 2017**
COMMITTEE: **Education, Health, and Environmental Affairs Committee**
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The Maryland Association of Boards of Education (MABE), representing all twenty-four of the state's local boards of education, opposes House Bill 1240, which would result in the shift of the burden of proof in IEP due process hearings to local school systems. MABE appreciates the measured approach taken in this bill to first study, then act to modify the burden of proof, but must object to the eventual outcome to impose on local school systems the burden of proof in the litigation of special education disputes.

MABE is particularly concerned with two provisions of this legislation. First, as amended, the bill no longer clearly excludes cases in which a parent or guardian is seeking tuition reimbursement for the placement of a student in a nonpublic special education school. Second, the bill has been amended to include a new provision which would shift the burden of proof in cases arising from proposed changes to the child's Individualized Education Program (IEP) at the annual review meeting. This provision may be interpreted to include a broad array of complaints and requests, including the disputes over nonpublic placements intended to be prevented by the bill's original language.

Local boards of education place a very high priority on ensuring that students receive high quality special education programs and instruction to meet the unique needs of every disabled student. MABE, on behalf of all local boards of education, assures the General Assembly that Maryland's professional educators and school administrators are working within a very comprehensive federal and state legal and educational framework to serve special education students, without the need for shifting the burden of proof in due process hearings as proposed in this legislation.

Maryland's public school systems are mandated to provide a wide array of special education services in accordance and compliance with the federal Individuals with Disabilities Education Act (IDEA) and corresponding federal and state regulations. IDEA requires that all eligible disabled students receive special education and related services if they are between the ages of 3 and 21, meet the definition of one or more of the categories of disabilities specified in IDEA, and are in need of special education and related services as a result of the disability.

The special education services required to be provided under IDEA must meet the legal standard of providing a Free Appropriate Public Education, or FAPE, and do so in the least restrictive environment. A student is identified as disabled for purposes of receiving special education services based on having one or more disability which adversely affects the student's educational performance. These include intellectual disabilities; hearing, speech or language, or visual impairments; emotional disturbance; autism; and other specified impairments and learning disabilities. The specially designed instruction called for under FAPE refers to the adaptation of content, methodology, or delivery of instruction to address the unique needs of the student to ensure his or her access to the general curriculum, so the student can meet the educational standards that apply to each student in the school system.

The determination of what is an "appropriate" education under IDEA is decided on a case-by-case basis. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court identified a two-part analysis in determining FAPE: (1) Has the school system complied with IDEA's procedures, and (2) Is the Individualized Educational Program (IEP) developed through these procedures reasonably calculated to enable the child to receive educational benefit?

Most recently, the Supreme Court decided a case on the definition of FAPE for the first time in a generation. In *Endrew F. v. Douglas County School District*, the Supreme Court was asked to once again answer the question:

> *What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?*
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Federal Circuit Courts of Appeals were split over the standard that should be applied to show a student is receiving FAPE. In the Tenth Circuit, where Endrew F. lives, the court held that an IEP provides FAPE if "it is calculated to confer an 'educational benefit [that is] merely … more than de minimis." The Supreme Court disagreed. This decision will impact special education cases arising in Maryland given the standard applied by the Fourth Circuit Court of Appeals in which Maryland is located.

An Individualized Educational Program (IEP) is an educational plan designed for the unique needs of each special education student and is formed by parents, teachers, administrators, related services personnel. The IEP is a legally binding document and constitutes the foundation for the educational services provided to every student with a disability. Each IEP states the student's present levels of academic performance, and states how the disability affects the student's involvement and progress in the general curriculum; and the IEP must include academic and functional annual goals, and benchmarks or instructional objectives.

School systems take very seriously the responsibility for identifying and evaluating students with disabilities; developing, reviewing, or revising an IEP for a student with a disability; and determining the placement of a child with a disability in the least restrictive environment. IEP teams, comprised of professional educators and parents, meet to develop the initial IEP and at least once a year thereafter to ensure that the IEP includes the services needed for the student to make progress on the specified annual goals.

Given the complexity and individualized nature of IEPs, disputes do arise between parents and teachers and other educators working in the school system. To accommodate such disputes, IDEA and state regulations provide parents the full protections of a state regulated complaint and enforcement process, and access to due process hearings before an Administrative Law Judge. In Maryland, the party initiating the action in a special education due process hearing, whether the parents or the school system, bears the burden of proof. This is consistent with a 2005 Supreme Court case which arose from a complaint against the Montgomery County school system (*Schaffer v. Weast*, 546 U.S. 49 (2005)). In *Schaffer v. Weast*, the Supreme Court held that the burden of proof in an administrative hearing challenging a student's IEP is properly placed upon the party seeking relief, whether the moving party is school system or the student's parent or guardian.

As the U.S. Supreme Court has observed and held, in *Rowley* and *Endrew F.*, the legislative intent and operation of IDEA is to guarantee substantial rights to students identified as requiring special education services. Shifting the burden of proof to the school system to defend the appropriateness of the IEP, which is developed by professional special educators in collaboration with parents and in accordance with strict federal and state laws, is therefore unnecessary to ensure that students in Maryland continue to receive individualized and high quality special education services.

Local boards of education have great respect and appreciation for the dedication and commitment of educators and parents who are collaborating throughout the school year to ensure that the educational needs of students qualifying for special education services are being met. MABE is concerned with the potential unintended consequences of shifting the burden of proof; including the increase in cost and duration of IEP challenges and the resulting delay in students receiving the services they need until the completion of the dispute. These outcomes are not in the best interests of students, families, and the educators involved in the collaborative and intensive process mandated under the current law.

For these reasons, MABE urges this Committee to issue an unfavorable report on House Bill 1240.