

Why MABE Opposes House Bill 140

“Special Education - Administrative Proceedings and Judicial Actions – Attorney's and Expert Witness Fees and Related Costs

March 21, 2019

The Maryland Association of Boards of Education (MABE), representing all of the State's local boards of education, opposes House Bill 140, not only because it would impose a cost burden on local school systems to compensate fees for expert witnesses and attorneys in special education disputes in a manner not required under federal law, but also because it could be expected to promote such litigation. As amended in the House, MABE primary opposition to House Bill 140 is the awarding of expert witness fees.

The Supreme Court has ruled on the subject matter of the pending bill. The Supreme Court in *Arlington Cen. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), ruled that the Individuals with Disabilities Education Act (IDEA) does not require school districts to reimburse parents for expert witness fees even when the parent prevails in a special education dispute. This Supreme Court decision was written by Justice Samuel Alito, with Justice Ruth Bader Ginsburg concurring.

The Court found that IDEA's specific provision for the awarding of attorney's fees does not make the school district responsible for other costs such as expert witness fees.

Why not?

Because the school system is already obligated to pay for independent educational evaluations (IEEs) which are intended to fully inform the decision-making process of parents and educators crafting special education programs for students. IDEA and its regulations already protect parents who do not agree with the results of an evaluation performed by school personnel or with a decision made by their child's IEP team. Specifically, the regulations implementing IDEA provide that parents may request at any point in the process that an independent educational evaluation (“IEE”) be conducted for their child by an independent evaluator, a qualified professional examiner who is not employed or otherwise associated with the school district, without undue delay, and at the school district's expense.

Why is paying for independent education evaluations (IEEs) preferable to paying for experts in litigation?

- **Authorizing the award of expert fees conflicts with congressional intent to reduce litigation costs under the IDEA.**
- **Litigation expenditures divert valuable resources from special and general education.**
- **“Expert witnesses” hired by parents are by definition not independent and do not advance IDEA's collaborative intent.**

Background on independent education evaluations (IEEs)

- **IDEA’s collaborative scheme provides parents early access to independent experts by allowing parent to request at the IEP development stage an independent educational evaluation (IEE) at school district expense.**

When a parent requests an IEE at school district expense, the school district must without undue delay. This provision allowing IEEs at public expense is one of the key protections afforded to parents under the IDEA. By providing parents with access to an independent educational expert at district expense, this provision “levels” what many parents argue is an otherwise “unlevel” playing field.

Expert witnesses by their very function and purpose do not play a collaborative role. In the case of disputes under the IDEA, parents retain an expert witness to advance the parent’s position in the form of advocacy. Allowing parents to recoup the cost of expert witness fees will encourage parents to take a “no holds barred” approach to due process hearings and to be less inclined to resolve issues in a cooperative fashion during development of the IEP or through informal dispute mechanisms such as the resolution session, mediation or settlements (see more at pp. 16-17, *infra*). Authorizing such awards would give parents an additional opportunity to obtain expert input at public expense that Congress did not explicitly include in the statute.

The availability of expert fees could in fact undermine the effectiveness of the mechanism Congress did provide - the right to IEEs - by encouraging expert shopping. If the results of an IEE do not support the parents’ position or desired outcome for their child, the parents would have every incentive to find and hire yet another expert who will support their views and then to push the issue into formal proceedings in the hopes of recovering the expert’s fees. When the payment of expert witness fees is at stake, both parties likely will become more firmly entrenched in their positions because the potential financial stakes become that much higher.

Conclusion

Again, MABE opposes House Bill 140 not only because it would impose a cost burden on local school systems to compensate fees for expert witnesses in special education disputes in a manner not required under federal law, but also because it could be expected to promote litigation.

MABE respectfully requests that the legislature defer consideration of imposing any new cost, particularly a cost not relating directly to the delivery of teaching and learning for students, including the new mandate to pay for expert witness fees in litigation arising from special education disputes. In the alternative, MABE requests that the expert fee provision in lines 26-27 be removed from the bill, which otherwise pertains to the recovery of attorney’s fees which is already required under other law and regulations.

For these reasons, MABE requests an unfavorable report on House Bill 140.

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