

RESOLUTION OF DISPUTES REGARDING THE PROVISION OF SERVICES FOR STUDENTS WITH DISABILITIES



DEPARTMENT OF LEGISLATIVE SERVICES 2019

Resolution of Disputes Regarding the Provision of Services for Students with Disabilities

**Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland**

October 2019

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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF POLICY ANALYSIS
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber
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Director

October 22, 2019

The Honorable Thomas V. Mike Miller, Jr.
The Honorable Adrienne A. Jones
Honorable Members of the General Assembly

Ladies and Gentlemen:

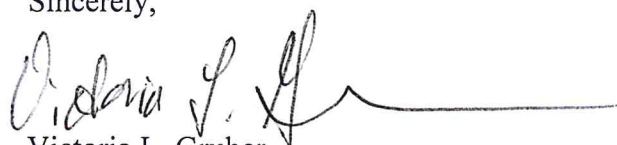
During the 2018 and 2019 interims, the Department of Legislative Services (DLS) reviewed the provision of services to students with disabilities and the options available for the resolution of disputes when they arise. This review resulted in the enclosed report, *Resolution of Disputes Regarding the Provision of Services for Students with Disabilities*, which provides an overview of the development of an individualized education program (IEP), a description of the dispute resolution process in Maryland, and an examination of the issue of which party bears the burden of proving its case in a due process complaint hearing.

Approximately 108,000 full-time students age 3 to 21 years old were enrolled in special education programs in Maryland public schools in the 2017-2018 school year. The federal Individuals with Disabilities Education Act (IDEA) requires students with disabilities be provided a free appropriate public education in the least restrictive environment possible, in accordance with an IEP. There are three options for the initiation of a process for resolving a dispute between the parent of a student with a disability and a local school system relating to a child's IEP: (1) mediation; (2) State complaint; and (3) due process complaint. In the event of a due process complaint, IDEA is silent as to which party bears the burden of proof in due process proceedings. This report reviews each of the dispute resolutions processes and reviews relevant case law and statutes and regulations in other states on this topic. Lastly, the report reviews Maryland legislation on assigning the burden of proof to the local school system that has been introduced in the General Assembly since 2013. The report establishes a basis for future research, monitoring, and decision-making in Maryland.

The Honorable Thomas V. Mike Miller, Jr.
The Honorable Adrienne A. Jones
Honorable Members of the General Assembly
October 22, 2019
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Stacy M. Goodman, Alistair M. Johnston, and Lynne Blume Rosen of the Office of Policy Analysis wrote the report, which was reviewed by Victoria L. Gruber and Sara C. Fidler. Mindy L. McConville was responsible for the production of the manuscript. DLS trusts that this report will be useful to members of the General Assembly in future deliberations about dispute resolution issues in special education.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria L. Gruber", followed by a long horizontal line extending to the right.

Victoria L. Gruber
Executive Director

VLG/mlm

Enclosure

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Resolution of Disputes Regarding the Provision of Services for Students with Disabilities

The federal Individuals with Disabilities Education Act (IDEA) is a set of laws that requires students with disabilities be provided a free appropriate public education (FAPE) in the least restrictive environment possible, in accordance with an individualized education program (IEP). The education program for a student with a disability must be designed to meet the student's individual needs and could include specially designed instruction in classrooms, at home, or in private or public settings. Examples of these services include speech, occupational and physical therapy, psychological counseling, and medical diagnostic services that are necessary to a student's education. Approximately 110,000 full-time students age 3 to 21 years old were enrolled in special education programs in Maryland public schools in the 2018-2019 school year.

Implementation of the federal and state laws and regulations under IDEA is complex and may lead to disputes on any matter relating to the identification, evaluation, or educational placement of a student with a disability. The law provides three options for the initiation of a process for resolving a dispute between the parent of a student with a disability and a local school system¹ relating to a child's IEP: (1) mediation; (2) State complaint; and (3) due process complaint.

In the event of a due process complaint, IDEA is silent as to which party bears the burden of proof in the proceedings. In Maryland, legislation has been introduced for a number of years, beginning in 2013, that sought to explicitly place the burden of proof on local school systems in at least the majority of due process proceedings. To date, no bill has passed the General Assembly.

This report provides an overview of the IEP and dispute resolution process in Maryland and examines the controversial issue of which party bears the burden of proving its case in one type of dispute resolution process – the due process hearing. The report also reviews relevant case law and statutes and regulations in other states on this topic. Lastly, the report reviews Maryland legislation on assigning the burden of proof to the local school system that has been introduced in the General Assembly since 2013. The report is intended to establish a basis for future research, monitoring, and decision-making in Maryland.

History of IDEA

In *Brown v. Board of Education*², the United States Supreme Court established the right to equal educational opportunity. Although the decision addressed the rights of racially segregated

¹ Throughout this paper the term “local school system” is used, rather than “public agency” which is used in federal and State law. Similarly, this paper uses the term “student with a disability” rather than “child with a disability” which is used in federal and State law. The terms have identical meanings, but those used here were selected for clarity's sake.

² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

students, the Supreme Court explained that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”³ Two later federal court cases are also often cited as support for the right to education for children with disabilities: *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC)*⁴ and *Mills v. Board of Education of the District of Columbia*.⁵ *PARC* and *Mills* established that students with disabilities are required to receive access to an adequate, publicly supported education but are not required to receive a specific substantive level of education. The cases also established lengthy procedures to develop personalized education programs for children with disabilities.⁶ In response to the various court decisions relating to the education of children with disabilities, the U.S. Congress enacted The Education for All Handicapped Children Act in 1975.⁷ Congress amended the name of the statute to IDEA in 1990. The Individuals with Disabilities Education Improvement Act of 2004 further amended IDEA and reauthorized the law through 2011.⁸ As of July 2019, the U.S. Congress has not reauthorized IDEA.

Overview of the IEP Process

Free Appropriate Public Education of a Student with a Disability

A student with a disability who is between the ages of 3 and 21 who receives special education and related services under IDEA is eligible for a FAPE.⁹ Although federal law requires that students with disabilities receive a FAPE, the meaning of what constitutes a FAPE has been open to interpretation. Courts have differed in how to define the standard of an “appropriate” education a student is entitled to receive. Until 2017, the controlling interpretation of the standard of an “appropriate” education was derived from the Supreme Court’s 1982 opinion in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.¹⁰ In *Rowley*, the Supreme Court ruled that The Education for All Handicapped Children Act of 1975 (the predecessor of IDEA) guarantees a substantively adequate program to all eligible students with a disability, and that this requirement is fulfilled if the student’s IEP is “reasonably calculated to enable the child to receive educational benefits.”¹¹

On March 22, 2017, the Supreme Court revisited this determination in *Endrew F. v. Douglas County School District RE-1*.¹² In *Endrew*, the Court held that “to meet its substantive

³ *Id. at*, 347 U.S. at 493.

⁴ 334 F. Supp. 1257 (E.D. Pa. 1971), *amended*, 343 F. Supp. 279 (E.D. Pa. 1972).

⁵ 348 F. Supp. 866 (D.C. 1972).

⁶ *Board of Education v. Rowley*, 458 U.S. 176 and *The Individuals with Disabilities Education Act (IDEA), Part B: Statutory and Regulatory Provisions*, Congressional Research Service, March 11, 2016.

⁷ 20 U.S.C. § 1400 *et seq.*

⁸ Pub. L. No. 108-446 (2004).

⁹ *The Individuals with Disabilities Education Act (IDEA), Part B: Statutory and Regulatory Provisions*, Congressional Research Service, March 11, 2016, page 4.

¹⁰ 458 U.S. 176 at 204 (1982).

¹¹ *Id.* At 458 U.S. at 204.

¹² 580 U.S. __ (2017).

obligation under IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹³ The Court further opined that the adequacy of the IEP turns on the unique circumstances of the child for whom it was created. The "reasonably calculated" qualification acknowledges that an IEP is developed by the prospective judgment of informed expert school officials and the child's parents, and that reasonable does not mean ideal.

The impact of this new interpretation on local school systems is unknown. It is possible that more parents will seek IEPs or revisions to existing IEPs for their children that comply with the Supreme Court ruling. It is further unknown if these will be more costly than the special education services provided prior to the ruling in this case.

Under Maryland law, a FAPE means special education and related services that:

- are provided at public expense, under public supervision and direction;
- meet the standards of the Maryland State Department of Education (MSDE) and federal law;
- include an appropriate preschool, elementary school, or secondary school education; and
- are provided in conformity with an IEP that meets the requirements of State and federal law.¹⁴

Identification, Evaluation, and Eligibility of a Student with a Disability

In order to provide a FAPE to a student with a disability, the student must be identified and evaluated. Maryland has an obligation under federal law to administer the system that is used to identify, locate, and evaluate all students with disabilities in the State who are in need of special education and related services. This obligation is known as "child find."¹⁵

In general, an evaluation is the process of reviewing information from parents, existing data, and the results of assessment procedures used to determine if a student has a disability and the special education and related services that are appropriate for the student. An evaluation may include a review of the content of an existing IEP at any subsequent meeting of an IEP team and other qualified professionals, as appropriate.¹⁶

A local school system is required to evaluate a student who has been identified as having or possibly having a disability. After receiving the consent of the student's parent, the student is evaluated to determine if the student has a disability and what are the educational needs of the student before the student receives any special education services.¹⁷ This is an initial evaluation.

¹³ Id. at p. 9-16.

¹⁴ COMAR 13A.05.01.03(27).

¹⁵ 20 U.S.C. §1414(a).

¹⁶ COMAR 13A.05.01.03(25).

¹⁷ Ibid.

A parent or a local school system may also request an evaluation of a student with a suspected disability.¹⁸ The local school system may refuse a request for an initial evaluation of a student if it does not believe that the student has a disability. In this scenario, the local school system is required to provide written notice to the parents explaining the reasons for a refusal. A parent who disagrees with the refusal may appeal the decision by requesting mediation or a due process hearing.¹⁹

IEP Team

In Maryland, an IEP team is formed to evaluate whether a student has a disability and, if so, is tasked with creating an IEP for the student. A local school system appoints the IEP team. Each team includes the following members:

- the parents of a student with a disability;
- at least one nonspecial education teacher, if the student participates in the regular education environment;
- at least one special education teacher or special education service provider;
- a representative of the local school system who is qualified to provide or supervise the provision of special education and has knowledge of the general curriculum and the availability of public resources;
- an individual qualified to interpret the results of an evaluation of the student;
- other individuals who may have knowledge relating to the student; and
- if appropriate, the student with the disability.²⁰

In performing an evaluation, the IEP team must consider information from a variety of sources, including existing data; current classroom-based, local, and statewide assessments; parent input; and observations by teachers and related service providers. After conducting the evaluation, the IEP team issues a written decision that includes:

- information provided by the parent;
- assessment results;
- a statement regarding the validity of the assessment procedures; and
- a determination as to whether the student has a disability.²¹

¹⁸ COMAR 13A.05.01.04A.

¹⁹ COMAR 13A.05.01.04B(3).

²⁰ COMAR 13A.05.01.07A.(1).

²¹ COMAR 13A.05.01.06C.

Federal law requires only that the initial evaluation be conducted by the local school system, not that it be conducted by an IEP team.²² Additionally, while the default timeframe for an initial evaluation is 60 days, federal law allows for states to establish their own timeframes.²³

Under Maryland law, the IEP team is required to complete the initial evaluation of a student within 60 days of the parent's consent for an assessment and within 90 days of the local school system's receipt of a written referral. These deadlines do not apply if the parent of the student repeatedly fails or refuses to produce the student for assessments or a student enrolls in another local school system before the completion of the initial evaluation. If a student is being enrolled in a different school, the exception to the required timeframes only applies if the first local school system is making sufficient progress to ensure prompt completion of the evaluation and the parent and the local school system to which the student transfers agree to a specific time to complete the evaluation.²⁴

Maryland regulations prohibit an IEP team from deciding that a student has a disability if the determinant factor for the decision is a lack of appropriate instruction in reading or math, or the student has limited English proficiency. Further, the fact that the student does not meet the definition of "child with a disability" under federal law also may not be the determinant factor.²⁵

During an evaluation, the local school system may determine if a student has a specific learning disability (SLD). If a student is suspected of having a SLD, the IEP team prepares a written report that includes the basis for the team's determination, any relevant behaviors, the relationship of the behaviors to the academic functioning of the student, and any educationally relevant medical findings.²⁶

Development of an IEP

Once an IEP team determines that a student has a disability, the IEP team meets again to develop the IEP within 30 days of the initial evaluation of the student.²⁷ The IEP serves a number of different functions: it is a commitment of resources necessary to ensure a student with disabilities receives a FAPE; it is a management tool that can provide guidance to educators and others serving the student; it is an evaluative document that can help measure a student's progress; and, in the event of a dispute, it can help adjudicators decide what a FAPE for an individual student should look like. The IEP specifies the components of the special education and related services that will be provided by the local school system to meet the student's individual needs.²⁸ The IEP must include:

²² 34 C.F.R. 300.301 and 304.

²³ 34 C.F.R. 300.301(c)(1).

²⁴ COMAR 13A.05.01.06A.

²⁵ COMAR 13A.05.01.06C and 34 C.F.R. § 300.8.

²⁶ COMAR 13A.05.01.06 D.

²⁷ COMAR 13A.05.01.08A.

²⁸ 20 U.S.C. § 1414(b) and (d).

- a statement of the student's current levels of academic achievement and functional performance;
- measurable academic and functional annual goals, including benchmarks or short-term instructional objectives;
- special education and related services and supplementary aids and services, including staffing support, to be provided to the student;
- program modifications or supports for school personnel that will be provided to the student to enable the student to (1) attain annual goals; (2) be involved and make progress in the general curriculum; (3) participate in extracurricular and other nonacademic activities; and (4) be educated with students with disabilities and without disabilities;
- an explanation of the extent, if any, to which the student will not participate in school activities for students without disabilities, including in a nonspecial education classroom and activities outside the classroom;
- a statement of any accommodations that are needed to measure the student's achievement on statewide or local school systemwide assessments;
- if an IEP team determines that a student may not participate in a statewide or local school systemwide assessment, documentation of why the assessment is not appropriate, how the student will be assessed, and why another assessment is appropriate;
- projected dates for initiation of services and any modifications, if needed, including the anticipated frequency, location, and duration; and
- the method by which the student's parent is to be informed of the student's progress toward annual goals.²⁹

As soon as possible after the establishment of the IEP, the local school system is required to begin providing the special education and related services to the student.³⁰ Once an IEP is established, an IEP team meets periodically, but not less than annually, to review and revise the IEP and to determine the extent to which the student is progressing toward meeting the student's annual IEP goals. A parent or a local school system may request a meeting at any time to review and, as appropriate, revise a student's IEP. After the annual IEP meeting, a parent and a local school system may agree to develop a written document amending or modifying a student's IEP without convening an IEP team meeting.³¹

Reevaluation of a Student with a Disability

A local school system must ensure that a reevaluation of each student with a disability is conducted (1) if the local school system determines that the educational and related services are in need of reevaluation; (2) the student's parent or teacher requests a reevaluation; or (3) prior to determining a student with a disability no longer has the disability. A reevaluation must occur at least every three years unless the parent and local school system agree that the reevaluation is

²⁹ COMAR13A.05.01.09A

³⁰ 34 C.F.R. § 300.323(c)

³¹ COMAR13A.05.01.08B

unnecessary. However, a reevaluation may not occur more than once a year unless the parent and local school system agree to a different timetable.³²

During the annual review, the IEP team reviews existing assessment data and receives input from the student's parents. Based on this information, the IEP team decides whether any additional data is needed to determine:

- if the student continues to be a student with a disability;
- the educational needs of the student;
- the current levels of academic achievement and related developmental needs of the student;
- if changes to the special education and related services are needed to enable the student to meet the annual goals in the student's IEP and to participate in the general curriculum; and
- if the student continues to need special education and related services.

If the IEP team concludes it is in need of additional data, the local school system will conduct additional assessments. The IEP team then uses the assessment results to review and, as appropriate, revise the IEP within 90 days of the IEP reevaluation meeting.

When a student's eligibility for services ends, either because the student graduates from secondary school or ages out of the program, federal law requires a local school system to provide the student with a summary of the student's academic achievement, functional performance, and recommendations on how to assist the student in achieving postsecondary goals.³³

Procedural Safeguards

A local school system that receives federal financial assistance under IDEA is required to establish and administer the procedural safeguards expressly set forth in federal and State law.³⁴ These procedural safeguards include a parent's³⁵ right to:

- examine records, participate in IEP meetings, and obtain an independent educational evaluation of the parent's child;
- receive written notice, in the parent's native language unless clearly not feasible to do so, when the local school system proposes or refuses to initiate or change the child's IEP;
- resolve a dispute through mediation; and

³² COMAR 13A.05.01.06E.

³³ 34 CFR § 300.305(e)(3).

³⁴ 20 USC § 1415 and COMAR 13A.05.01, COMAR 13A.08.03, and COMAR 13A.13.01.

³⁵ For the purposes of IDEA, "parent" is defined as "(a) a natural, adoptive, or foster parent of a child...; (b) a guardian ...; [or] (c) an individual acting in the place of a natural or adoptive parent ... with whom the child lives, or an individual who is legally responsible for the child's welfare.. ." 20 USC § 1401(23). Under certain unique circumstances, such as when a child is a ward of the State, or a parent cannot be located, a surrogate will be appointed for certain processes required by IDEA. *See, e.g.*, 20 USC § 1415(b)(2).

- present a complaint relating to the identification, evaluation, or educational placement of the child or the FAPE of the child.

A local school system responsible for the provision of a FAPE to a student with a disability is required to provide notice of the procedural safeguards to the parents of a student with a disability once a year. The procedural safeguards notice includes a full explanation of each safeguard.³⁶ A copy of the procedural safeguards is also provided to parents on (1) initial referral; (2) parental request for evaluation; (3) receipt by MSDE of an individual's first State complaint in the school year; (4) the parent's first due process complaint in a school year; and (5) parental request.³⁷ MSDE also publishes a copy of the *Maryland Procedural Safeguards Notice* on its website.

Maryland law provides for an additional opportunity to safeguard some of a parent's procedural rights. If during an IEP team meeting a parent disagrees with the student's IEP or the special education services provided to the student, the IEP team must provide the parent with, in plain language:

- an oral and a written explanation of the parent's right to request mediation contact information that a parent may use to receive more information about the mediation process; and
- information about pro bono representation and other free or low-cost, legal-related services available in the area.

A parent may request this information at any IEP team meeting. Additionally, while federal law requires that notice of procedural safeguards must be provided in a parent's native language, "unless clearly not feasible to do so,"³⁸ federal law does not define this standard. Maryland law makes clear that if the native language spoken by a parent who requests the specified information is spoken by more than 1% of the student population in the local school system, the parent may request that the information be translated into the parent's native language.³⁹

Prior Written Notice

A local school system is required to provide to the parent of a student with a disability written notice before the local school system proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student, or the provision of a FAPE to the student.⁴⁰ The notice must include:

- a description of the action proposed or refused;

³⁶ 34 CFR § 300.504.

³⁷ COMAR 13A.05.01.11.

³⁸ 34 CFR § 300.503(c) and 504(d).

³⁹ § 8-405(b)(4) and (5) of the Education Article.

⁴⁰ 34 CFR § 300.503 and COMAR 13A.05.01.12.

- an explanation of why the local school system proposes or refuses to take the action;
- a description of the options the local school system considered and the reasons for rejection of the options;
- a description of each assessment procedure, test, record, or report the local school system used as a basis for the proposal or refusal;
- a description of any other factors relevant to the proposed or refused action;
- a statement that the parent has protections under the IDEA procedural safeguards and how the parent may obtain a copy of the safeguards; and
- a list of sources a parent may contact to obtain assistance in understanding the provisions of federal law⁴¹ and the corresponding State regulations.⁴²

If the action proposed by the local school system requires parental consent, the local school system may provide the written notice at the same time it requests consent. The notice is required to be written in language that is understandable to the general public and provided in the native language of the parent, unless it is clearly not feasible to do so. If the native language of the parent is not a written language, the local school system shall ensure that the notice is translated orally or by other means to the parent and the parent understands the content of the notice.⁴³

Parental Consent

Parental consent is an essential component in the framework of IDEA. In general, federal law requires a local school system to obtain parental consent before (1) the initial evaluation; (2) the initial provision of services; and (3) a reevaluation.⁴⁴ A local school system must also obtain written parental consent before conducting any assessment procedures.⁴⁵

If a parent refuses consent for initial assessment procedures or assessment procedures as part of a reevaluation, a local school system may decide to continue pursuing assessment through mediation or due process. A local school system is prohibited from providing special education and related services if a student's parent refuses to consent for the initiation of special education or related services or fails to respond to the request for consent.

If a parent refuses to provide the initial consent or revokes previously given consent, under federal law the local school system may not be considered to be in violation of the requirement to make a FAPE available to the student because of a failure to provide the student with special education and related services. Further, the local school system is not required to provide the student with the special education and related services, or similar services for which the local school system sought consent, and is not required to convene an IEP team meeting to develop an

⁴¹ 20 U.S.C. § 1415.

⁴² COMAR 13A.05.01.12B.

⁴³ Ibid.

⁴⁴ 34 CFR § 300.300.

⁴⁵ 34 CFR § 300.300 and COMAR 13A.05.01.13.

IEP.⁴⁶ If the parent revokes consent in writing after the provision of services has begun, the local school system may not continue to provide special education and related services to the student but must first provide prior written notice (as discussed in the previous section) before ceasing the provision of services.⁴⁷

Procedural Safeguards – Independent Educational Evaluation

If a parent of a student with a disability disagrees with the initial evaluation provided by the local school system, the parent may obtain an independent educational evaluation.⁴⁸ On request of a parent, a local school system is required to provide information about where an independent educational evaluation may be obtained and the criteria applicable for an independent evaluation consistent with federal law.⁴⁹ If a parent disagrees with the evaluation conducted by the local school system, the parent may request an independent evaluation at public expense.

When a parent requests an independent evaluation at public expense, the local school system is required to provide an independent evaluation or file a due process complaint to demonstrate that the local school system's evaluation is appropriate. If an impartial hearing officer determines that the evaluation obtained by the local school system is appropriate, the parent may not obtain an independent evaluation of the student at public expense. If the impartial hearing officer determines that the evaluation obtained by the local school system is *not* appropriate, the cost of an independent evaluation is required to be at public expense. The results of any independent evaluation are required to be considered by an IEP team in making any decision regarding the provision of a FAPE for the student and may be presented as evidence at a due process hearing.

Options to Resolve a Dispute

If either the parent of a student with a disability or the local school system responsible for a student's education is dissatisfied with the student's special education program and related services, there are three options set forth in law to resolve a dispute. To resolve an issue, IDEA permits either party to seek mediation or to file a due process complaint. A third option is a State complaint, an option that is open to a parent or any individual or organization, including those outside of Maryland. A party may not file a civil action in court without first exhausting the processes provided in IDEA.

State Complaint

A State complaint may be used to resolve the broadest range of issues over which a dispute involving special education might occur. A State complaint can resolve any issue involving a

⁴⁶ 34 CFR § 300.300.

⁴⁷ 34 CFR § 300.300(b)(4) and COMAR 13A.05.01.13B.(5).

⁴⁸ COMAR 13A.05.01.14.

⁴⁹ 34 CFR § 300.502.

violation of Part B of IDEA or the federal regulations implementing it. Unlike the other methods of dispute resolution, a State complaint is only available to the parents, not to the local school system involved in a student's IEP. It is also available to other individuals or organizations and not only those who have a specific injury that personally affects them. It functions by alerting MSDE to a possible problem with a local school system that can be resolved by the State agency. The State complaint process can be a better avenue for certain complaints, for instance, procedural violations that do not rise to the level required for a due process hearing.

MSDE is required to review a State complaint and respond with a decision within 60 days. During that time period, MSDE must carry out an independent on-site investigation, if it deems that process necessary. Prior to making an independent determination about the case, MSDE must give the complaining party the opportunity to submit additional information, provide the local school system with the opportunity to respond and review all relevant information. If there are issues in a State complaint that are also being considered in a due process hearing, the issues will not be considered in the State complaint process. An alleged violation must have occurred within the last year to be considered for a State complaint.

Mediation

Mediation can be used to reach a mutually acceptable resolution of an issue. Unlike a State complaint, a due process hearing, or a civil lawsuit, mediation is more likely to result in a compromise resolution. Mediation is conducted in front of an objective third party who does not have any power to impose a decision on the parties but instead works to guide them to an agreement.

A parent of a student with a disability or a local school system may formally request mediation at any time to resolve any disagreement about special education services, an IEP, or any other violation of the federal regulations governing the IEP process. A parent may obtain a form from a local school system or the MSDE website to request mediation. A request for mediation must be made in writing to the other party and to the Office of Administrative Hearings. A trained employee of the Office of Administrative Hearings will conduct the mediation. MSDE is required by State law⁵⁰ to make a staff member available to assist a parent in understanding the mediation process.⁵¹

Mediation is voluntary and may not be required by a local school system as a prerequisite to a more formal due process hearing; although, a resolution session is often required as part of a more formal due process complaint. A resolution session can be waived by mutual agreement of the parties. Additionally, if a local school system does not schedule a resolution session within 30 days, a parent can appeal to the due process hearing officer to bypass the resolution session. If

⁵⁰ § 8-405(b)(3) of the Education Article.

⁵¹ If a parent disagrees with an IEP or the special education services provided to the parent's child, Chapter 271 of 2016 requires the IEP team to provide the parent with, in plain language (1) an oral and written explanation of the parent's right to mediation; (2) contact information for receiving information on the mediation process; and (3) information regarding pro bono representation. The parent may request this information at any IEP team meeting and MSDE is required to make staff available to assist a parent in understanding the mediation process.

mediation is pursued, both parties must reach agreement on the final outcome. There are no formal time limits required for mediation, but Maryland regulations state that reasonable efforts must be made to schedule a mediation session within 20 calendar days after a written request for mediation has been received.

Mediations are closed and confidential proceedings. The discussions that occur within this type of proceeding cannot be used in subsequent due process hearings or civil actions. Participants may be asked to sign a confidentiality pledge. A mediation agreement is binding, must be in writing, and is enforceable in State and federal court.⁵²

Compared to the other available methods for dispute resolution, mediation is fairly straightforward, with few additional procedural requirements and no time limit on reaching resolution. Research shows that mediation can be less time-consuming, less expensive, and less emotionally costly for both parties.⁵³ The process does not include extensive procedural requirements or expensive expert witnesses. Further, parties are generally not represented by attorneys although either party may choose to be represented by an attorney.

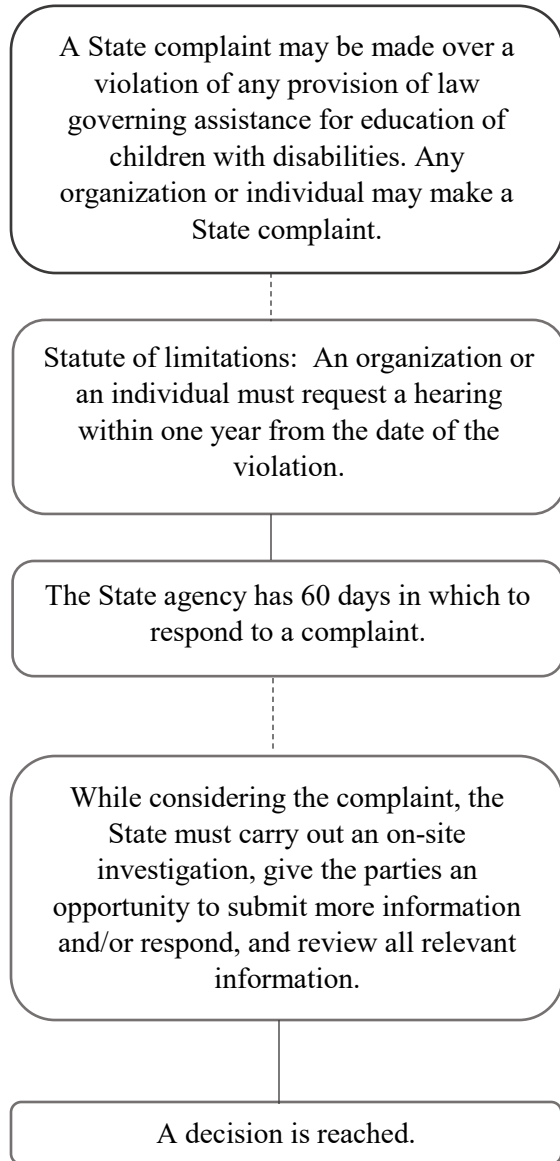
Exhibit 1 demonstrates the parallel processes of a State complaint and mediation.

⁵² 34 C.F.R. § 300.506.

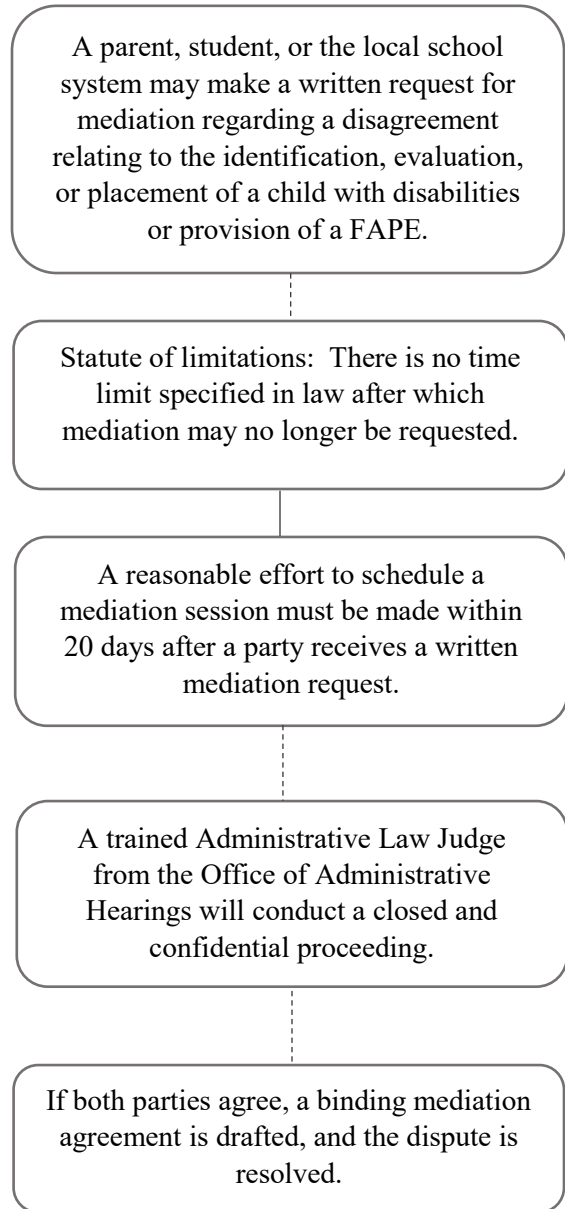
⁵³ See, Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, XX (Journal of Law and Education. 501, 533 (Summer 2013).

Exhibit 1
State Complaints and Mediation (Parallel Processes)

State Complaint



Mediation



FAPE: free appropriate public education

Source: Department of Legislative Services

Due Process Complaint

A due process complaint may be initiated by either a parent or a local school system. However, if a parent refuses to consent to an IEP, the local school system may not seek due process relief. Although both parties are afforded the opportunity to initiate a due process complaint, in practice, parents are far more likely to do so.

A due process complaint may be initiated for substantive matters “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,”⁵⁴ and for material procedural matters. A due process complaint must be made within two years of a violation or of when a party should have known of a violation. The filing of a due process complaint triggers a series of other processes, including objections to the complaint, responses to the complaint, deadlines for amending complaints and for the introduction of evidence, and the resolution session.

Resolution Session Associated with Due Process Complaint

Following a due process complaint, before the parties may proceed to a due process hearing, a resolution session must be attempted unless the local school system fails to participate or the parties mutually agree to waive the resolution session. The resolution session is an attempt to come to a mutually satisfactory resolution for a dispute. If the local school system is unable to obtain the participation of the parent at the end of a 30-day period, or if a parent does not make a good faith attempt to participate, the local school system may request that a hearing officer dismiss the complaint⁵⁵ and the parent may be precluded from seeking further relief through the due process complaint procedures.⁵⁶ Whether a complaint is dismissed is at the discretion of the hearing officer. A resolution session is not confidential.

On receipt of a parent’s complaint, the local school system is required to convene a resolution session with the parent and relevant members of the student’s IEP team. If the local school system fails to hold the resolution session within 15 days of receipt of the complaint or fails to participate in the session, the parent may seek the intervention of the impartial hearing officer to begin the due process timeline. The timeline for a resolution session is 30 days from the initial complaint. The length of the resolution session can be shortened or lengthened if both parties agree to the change. The local school system may not involve an attorney in a resolution session unless the parents are also accompanied by one.

⁵⁴ 20 U.S.C. § 1415(b)(6)(A).

⁵⁵ 34 C.F.R. § 300.511(b)(4).

⁵⁶ See, e.g., *Marinetta School District*, 47 IDELR 143 (Wi. SEA 2007). In that case, the parent sought to extend the window for the mediation beyond the 30-day limit on the theory that the officer appointed to oversee the due process hearing was no longer impartial because the local school system had disclosed information gathered during negotiations around the resolution session *Id.* at 143. The parent cited the federal rules of civil procedure in making this argument. *Id.* The hearing officer held that those rules did not apply to this administrative setting and, after reviewing the legislative history surrounding the reauthorization of IDEA found that the legislature intended the parties to cooperate by introducing the resolution process. *Id.* at 144. The hearing officer further found that the parent’s refusal to continue with the current process was not cooperative and dismissed the due process hearing request. *Id.*

If the parties reach resolution on the dispute, they are required to execute a legally binding agreement. Each party has 3 business days after the execution of an agreement to cancel. If no agreement is reached after 30 days from the initial receipt of the complaint, the resolution session ends and the due process hearing begins.

Due Process Complaint Procedures

Once a due process complaint has been filed, the party who has not filed a complaint has 10 days to respond to the complaint.⁵⁷ A local school system writing a response is required to (1) explain why the school system refused or proposed to take a specific action that was raised in the complaint; (2) describe other options the IEP team considered and the reasons why they were rejected; (3) describe each evaluation, procedure, assessment, record, or report that the local school system used as a basis for proposed or refused action; and (4) describe the factors that are relevant to the proposed or refused action. Parents are only required to respond specifically to address the issues raised in the complaint.⁵⁸

A due process complaint must be sufficient, and will be deemed to be sufficient unless the responding party objects. To be sufficient, a complaint must contain all of the following: (1) the name of the child; (2) the address of the child (or available contact information if the child is homeless); (3) the name of the child's school; (4) a description of the problem related to the proposed or refused change; and (5) a proposed resolution to the problem.⁵⁹ An objection to the sufficiency of a complaint must be filed within 15 days and must argue that the complaint does not contain one or more of the items listed above.⁶⁰ Within 5 days of receiving a response arguing that a due process complaint is insufficient, the impartial hearing officer must make a determination whether the complaint was sufficient and immediately notify both parties.⁶¹ If the impartial hearing officer determines that the complaint is insufficient, the complaining party may only amend the complaint if (1) the other party consents in writing and gives the opportunity to resolve the complaint through the resolution session or (2) the impartial hearing officer grants permission.⁶² Once a complaint has been amended, the timeline for the due process hearing begins again from the time the amended complaint is filed.⁶³ By responding to a complaint, the responding party is not precluded from arguing that a complaint is insufficient.⁶⁴

All of the response deadlines discussed above run concurrently with the deadlines required for a resolution session. Any evidence that will be used in a due process hearing must be disclosed

⁵⁷ 34 C.F.R. § 300.508(e) and (f).

⁵⁸ It is not clear what happens if the responding party does not file a response. Some due process hearing officers have required that the responding party does so and that this party reimburses the complaining party. The plain text of the statute requires a response in the case of the local school system. See 20 U.S.C. § 1415(c)(2)(B)(i)(I).

⁵⁹ 34 C.F.R. § 300.508(b).

⁶⁰ 34 C.F.R. § 300.508(d)(1).

⁶¹ 34 C.F.R. § 300.508(d)(2).

⁶² 34 C.F.R. § 300.508(d)(3). The impartial hearing officer may give permission at any time, except no later than 5 days before the due process hearing begins.

⁶³ 34 C.F.R. § 300.508(d)(4).

⁶⁴ 34 C.F.R. § 300.508(e)(2).

to the other party within five business days of the hearing.⁶⁵ Any evidence that is not disclosed before this deadline is prohibited from being introduced in the due process hearing. Additionally, issues may not be raised at the due process hearing that were not raised in the initial due process complaint.⁶⁶

Due Process Hearing

A due process hearing is a formal proceeding held before an impartial hearing officer. Unlike a mediation, there are formal rules of procedure that govern the conduct of a due process hearing, analogous to a formal court proceeding. The scope of dispute is also narrower in a due process hearing and specifically related to a FAPE. This limitation is unlike a mediation, which can be initiated over any violation of the federal regulations governing the IEP process.

A final decision must be made by an impartial hearing officer within 45 days after the due process complaint and hearing procedures end. During this period, the student is required to remain in his or her current educational placement, unless both parties agree otherwise.⁶⁷ During a due process hearing, parents have the right to represent themselves or to be represented by an attorney and to be accompanied by people with special knowledge of the problems associated with students with disabilities. Once an impartial hearing officer has reached a decision, the parties have 120 days to appeal that decision by initiating a civil suit.

Exhibit 2 demonstrates the timelines and options associated with a due process complaint and a due process hearing.

⁶⁵ Federal reference: 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.512(b)(1); State reference § 8-413(f)(1)(iii) of the Education Article.

⁶⁶ 34 C.F.R. § 300.511(d).

⁶⁷ See 34 C.F.R. § 300.518(a) and COMAR 13A.05.01.15(C)(19).

Exhibit 2 Due Process Complaint and Hearing Procedures



FAPE: free appropriate public education
Source: Department of Legislative Services

Dispute Resolution Process Activity in Maryland and Other States

IDEA requires states and entities receiving federal funds to report each year on each of the types of dispute resolution processes used in that state to the U.S. Department of Education Office of Special Education Programs. Exhibits 3, 4, and 5 provide a snapshot of the dispute resolution activity in Maryland, including a comparison to activity in other states, for the 2016-2017 school year. **Exhibit 3** details Maryland's dispute resolution activities for the 2016-2017 school year for the actual number of filings or requests and relative to the dispute resolution activities of other states. In Maryland, State complaints were filed at twice the national average, mediation was requested at almost twice the national average, and due process complaints were filed at only slightly above the national average. The number of actual filings and requests in Maryland represents less than 3% of the actual number of State complaints, mediation requests, and due process complaints filed in all 50 states and territories in each category for the 2016-2017 school year.

Exhibit 3
Maryland Dispute Resolution Events
2016-2017

	<u>Maryland</u>		<u>Comparator 50 States</u>	
	<u>Number Reported</u>	<u>Events Per 10K*</u>	<u>Events Per 10K*</u>	<u>Number Reported</u>
<u>Written State Complaints</u>				
Written State Complaints Filed	157	14.7	7.8	5,195
Reports Issued Total	131	12.3	5.2	3,465
Reports with Findings	103	9.6	3.0	2,010
Reports within 60-day Timeline	105	9.8	4.9	3,273
Reports within Extended Timelines	3	0.3	0.2	127
Total Reports within Timelines	108	10.1	5.1	3,400
Written State Complaints Pending	4	0.4	0.2	116
Complaints Pending a Due Process Complaint	0	0.0	0.1	48
Complaints Withdrawn or Dismissed	22	2.1	2.4	1,614
<u>Mediations</u>				
Mediation Requests Total	293	27.4	16.0	10,634
Mediations Held	163	15.3	9.3	6,215
Due Process-related Mediations	75	7.0	5.2	3,437
Due Process-related Mediation Agreements	52	4.9	2.8	1,888
Mediations Not Related to Due Process	88	8.2	4.2	2,778
Mediation Agreements Not Related to Due Process	61	5.7	3.1	2,089
Total Mediation Agreements	113	10.6	6.0	3,977
Mediations Pending	8	0.7	1.7	3,316
Mediations Withdrawn or Not Held	122	11.4	5.0	1,103
<u>Due Process Complaints</u>				
Due Process Complaints Filed	282	26.4	24.3	16,175
Resolution Meetings Held	88	8.2	13.7	9,107
Resolution Meeting Agreements	46	4.3	2.2	1,458
Fully Adjudicated Hearings	15	1.4	1.6	1,099
Hearings Held within 45-day Timeline	15	0.9	0.4	257
Decisions within 45-day Timeline	10	0.5	1.1	733
Decisions within Extended Timelines**	5	1.4	1.5	990
Due Process Complaints Pending	28	2.6	6.6	4,415
Due Process Complaints Withdrawn, Dismissed or Resolved Without a Hearing	239	22.4	16.0	10,661

Notes:

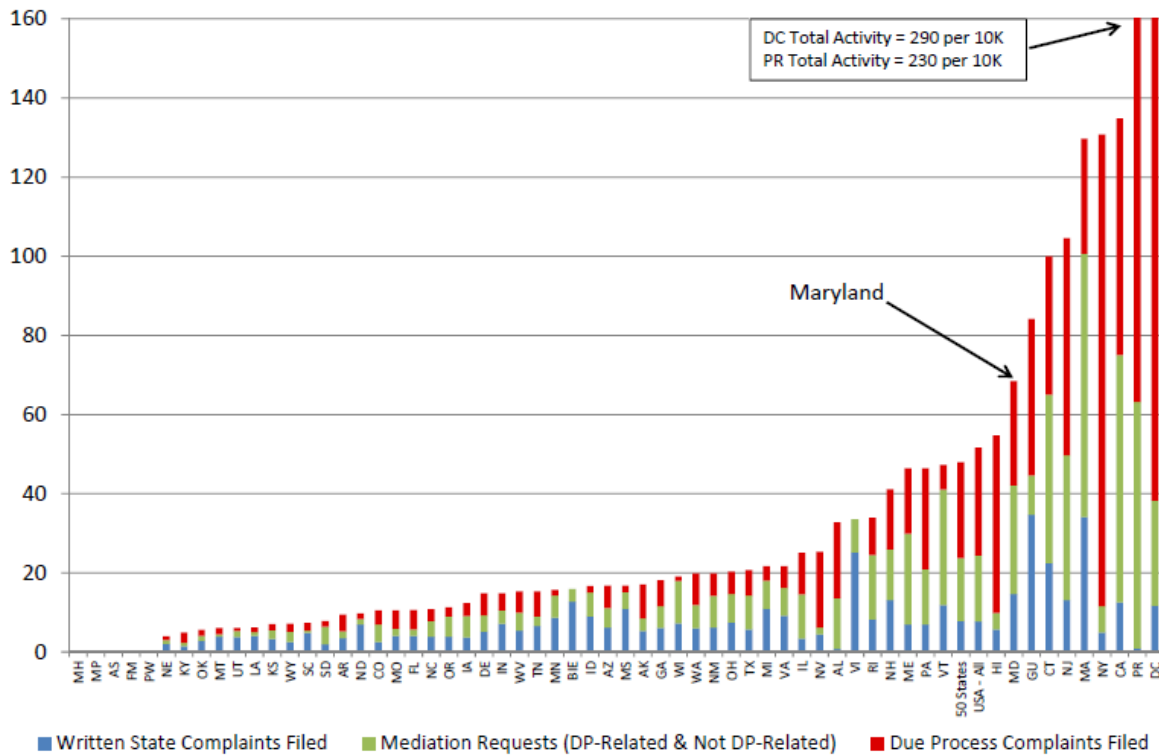
* “Per 10K” values are computed by dividing the number of events by the number of children (ages 3-21 years) times 10,000; these “per capita” rates allow comparisons of activity across states.

** The counts reported under “decisions within extended timelines” represent the number of written decisions from a fully adjudicated hearing that were provided to the parties in the due process hearing more than 45 days after the expiration of the 30-day or adjusted resolution period but within a specific time extension granted by the hearing officer at the request of either party. No data is collected on the length of these time extensions.

Source: The Center for Appropriate Dispute Resolution in Special Education; Department of Legislative Services

Exhibit 4 shows the total dispute resolution activity by state or entity per 10,000 children with an IEP ages 3 to 21. Maryland had the ninth highest number of total dispute resolution activity compared with other states and territories of the United States. These top 10 states and territories account for more than 90% of all due process hearings.

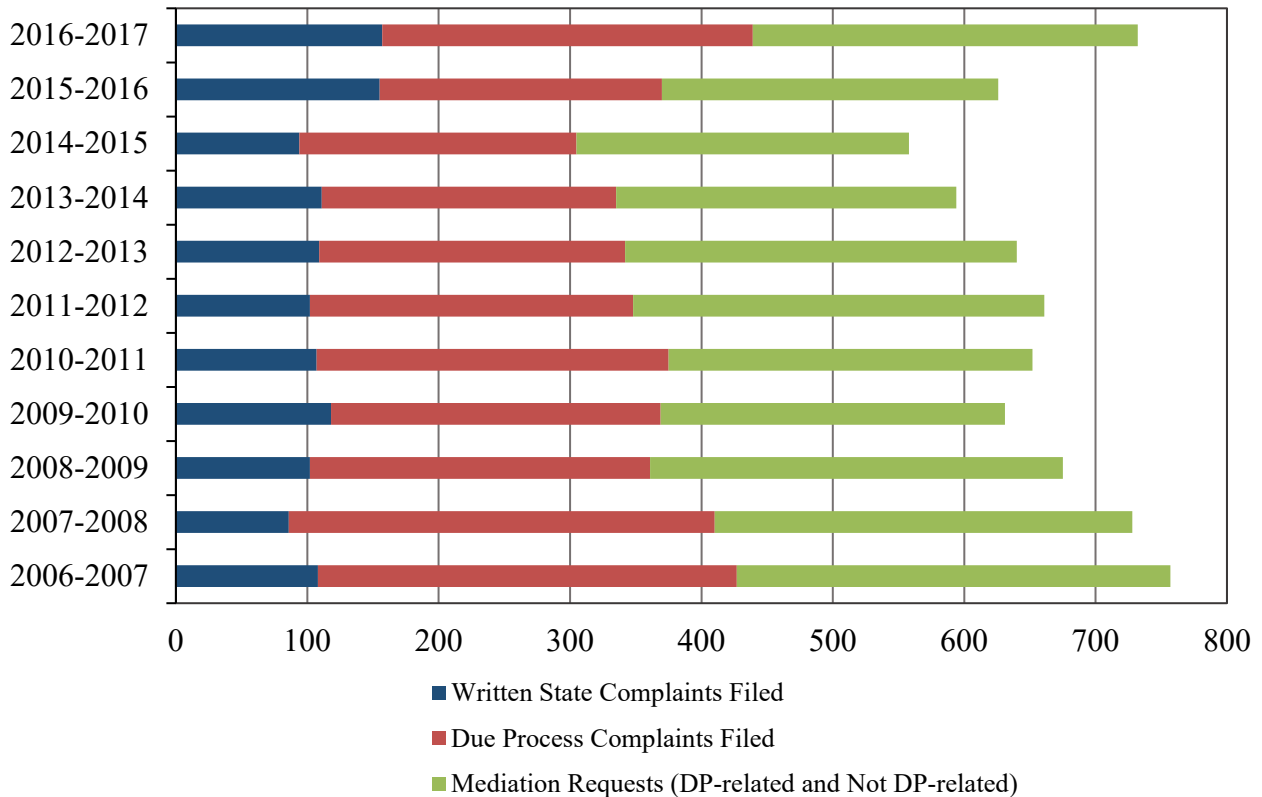
Exhibit 4
Total Dispute Resolution Activity by State/Entity per 10,000 Children
2016-2017



Source: The Center for Appropriate Dispute Resolution in Special Education

Finally, **Exhibit 5** displays the relative use of all dispute resolution options in Maryland from the 2006-2007 school year to the 2016-2017 school year. In Maryland, mediation requests and due process complaints account for approximately 80% of the dispute resolution activity for special education in the State, with each consistently making up half for each. The use of State complaints has risen slowly from just over 10% of all activity in 2006-2007 to just over 20% in 2015-2016 and 2016-2017.

**Exhibit 5
Aggregate Use of Dispute Resolution Options in Maryland**



DP: due process

Source: The Center for Appropriate Dispute Resolution in Special Education

Burden of Proof in Due Process Hearings

As discussed in the previous section, a due process hearing is a formal proceeding to resolve a dispute between the parents of a student with a disability and a local school system relating to the student’s IEP and related services. A due process hearing is governed by formal rules of procedure to facilitate the orderly introduction and consideration of evidence in support of each party’s position. One important rule of procedure in a due process hearing and other formal legal proceedings is which party bears the burden of proof during the proceeding.

The burden of proof is a legal term that historically includes two different burdens of responsibility: the *burden of persuasion* and the *burden of production*. The burden of persuasion is the requirement to prove the validity of a party’s legal claims. For example, in a criminal trial, the prosecution bears the burden of persuading the judge or jury that the evidence presented

supports an alleged violation of the law. The burden of production is the duty placed on a party to produce evidence at different points in the proceeding.⁶⁸ Unless otherwise noted, the discussion of this paper will be about the burden of persuasion.

While IDEA authorizes the option of a due process hearing to resolve a dispute, the law does not specify the rules for conducting the hearing. This silence in IDEA means that Congress did not specify which party bears the burden of persuasion in a due process hearing. The states have interpreted this silence in the law as authority to establish their own laws or regulations for conducting due process hearings. As a result, some states have chosen to assign the burden of persuasion to a specific party; however, most states have mimicked the federal law by making no specific choice in law or regulation.

In general, the lack of a specific rule assigning the burden of persuasion does not have a major impact on the resolution of a due process proceeding when the evidence presented strongly supports one party or the other party's position in the dispute. However, in a dispute where the evidence is closely balanced, this rule of procedure will make the difference as to which party prevails in the dispute. The party required to bear the burden of proof or persuasion has the more difficult duty of proving its claims in accordance with the required legal standard. In a case with closely balanced evidence, if the party that is assigned the burden fails to meet it, that party will not prevail.

Schaffer v. Weast, 2005

In 2005, the Supreme Court addressed IDEA the issue of assigning the burden of proof in *Schaffer v. Weast*.⁶⁹

Holding

In *Schaffer*, the seminal case on burden of proof or persuasion in IDEA due process hearings, the Supreme Court held that where the statute is silent on assignment of burden of proof, the burden of persuasion in a due process hearing challenging an IEP is properly placed on the party seeking relief, whether that party is the student with a disability or the local school system. The Court restricted this holding to the case it considered.

Factual Background

The plaintiff of *Schaffer* was Brian Schaffer, a middle school student from Montgomery County, Maryland. From prekindergarten through seventh grade, Brian attended private schools and struggled academically. The private school officials told his parents that Brian would need another school that could better accommodate his needs. Brian's parents approached the Montgomery County Public Schools System (MCPSS) seeking a placement for him the following school year. He was evaluated by MCPSS, and an IEP team was convened. An initial IEP was

⁶⁸ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

⁶⁹ 546 U.S. 49 (S.Ct. 2005).

created, and Brian was offered a placement option at one of two middle schools. Brian's parents determined that the offered IEP was insufficient for his needs. The Schaffers enrolled Brian in a new private school, initiated a due process hearing challenging the IEP, and sought compensation for the cost of Brian's private middle school placement. After a hearing conducted by an impartial hearing officer, the officer held that the evidence was very closely balanced, and that the parents bore the burden of persuasion. Therefore, the officer ruled in favor of MCPSS.

The Schaffers brought a civil action challenging the ruling. During the years the case moved through the court system, MCPSS offered Brian a placement at a high school with a special learning center. The Schaffers accepted the placement, and Brian remained there until his graduation from high school. (The lawsuit continued because the Schaffers were seeking compensation for the cost of his placement in a private middle school.) Also during this period, the original impartial hearing officer was required to reconsider the initial case at the direction of the District Court. During the reconsideration, the impartial hearing officer determined that the evidence presented was in true " equipoise " (*i.e.* in substantially equal balance between the parties) and ruled instead in favor of the Schaffers, determining that the burden of persuasion should be on MCPSS, the local school system. Following several more years of litigation, the Supreme Court granted *certiorari*.

Majority Decision

The Supreme Court found the text of IDEA silent on the assignment of the burden of persuasion. It started its analysis from the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims," with recognition that there are exceptions and affirmative defenses that sometimes shift the burden to the other party. However, decisions that place the entire burden of persuasion on the opposing party at the beginning of a proceeding are rare, and the Court did not find it necessary in this case.

The Court determined that the collaborative process established by IDEA through its extensive procedural protections, including parental notice, participation, and consent requirements, allows parents to play a significant role in the IEP process. If the burden of persuasion was assigned to the local school system, the scarce money allocated to education for students with disabilities, intended to be spent on education, may instead be spent on IEPs in preparation for litigation and administration expenditures. Further, by requiring the complaining party to bear the burden of persuasion, the collaborative process enacted by Congress is preserved until a stalemate is reached as intended. Finally, the Court noted that parents are entitled to an independent education evaluation of their child at public expense if the parent disagrees with the public school's evaluation, and they may recover attorney's fees if they prevail in a civil proceeding. The Court found that all these protections ensure that the local school system bears no unique informational advantage.

Dissenting Opinions

There were two dissents to the majority opinion in *Schaffer*. Justice Breyer's dissent takes the view that cooperative federalism should control the rules for due process hearings. This is the

belief that cooperating governments benefit from each other's special capabilities while preserving the value of the divided authority. In this case, IDEA "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility."⁷⁰ He wrote that IDEA's silence on the issue of burden of persuasion meant that the issue was left to the states to decide. The Act specifically states that the "establish[ment] of procedures" is a matter for the state and its agencies.⁷¹ In her own dissent, Justice Ginsburg argued that IDEA's statutory scheme placed the affirmative duty to educate these children on local school systems. In contrast, she would have placed the burden of persuasion on the local school system based on "policy considerations, convenience, and fairness."⁷²

Post-Schaffer Landscape

Different states have different laws and regulations assigning the burden of persuasion in due process proceedings. Alaska, Alabama, Connecticut, Delaware, District of Columbia, New Jersey, New York, and West Virginia have laws or regulations requiring the local school system to bear the burden of persuasion. Conversely, Hawaii, Indiana, and Kentucky require the party seeking relief to bear the burden. This aligns with the holding of *Schaffer*. In Georgia and Minnesota, the party that bears the burden varies depending on the remedy sought. Maryland, similar to the majority of other states, makes no assignment in law or regulation.

Federal courts have made clear that a state statute or regulation must contain explicit burden of proof or persuasion language to avoid preemption under IDEA as interpreted in *Schaffer*, not language derived from state court decisions or in case law. However, a legal split may be emerging in the courts as to whether *Schaffer* preempts existing state laws and regulations.

In January 2008, the U.S. Court of Appeals for the Eighth Circuit read *Schaffer* to support its interpretation that the ruling in *Schaffer* preempted Minnesota law allocating the burden of proof to the local school system in special education due process hearings.⁷³ This was a reversal of a U.S. District Court for the District of Minnesota ruling. In October 2008, the Supreme Court denied a petition of *certiorari* to review this Eighth Circuit decision.

Other courts have determined that *Schaffer* does not preempt existing state statutes or regulations assigning the burden of proof to a specified party. The U.S. District Court for the District of Columbia upheld the validity of the then-current District of Columbia public schools regulation assigning the burden of proof to the local school system.⁷⁴ Similarly, the U.S. District

⁷⁰ *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 183 (1982). For example, the Act mandates cooperation and reporting between state and federal educational authorities. Participating States must certify to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions. 20 U. S. C. §1412(a).

⁷¹ *Schaffer*, 546 U.S. at 70.

⁷² *Id.* at 67.

⁷³ *M.M. v. Special Sch. Dist. No. 1*, No. 06-3572 (8th Cir. 2008).

⁷⁴ *Gellert v. D.C. Public Schools*, 435 F.Supp. 2d 18 (D.D.C.2006).

Court for the Northern District of Georgia,⁷⁵ and the U.S. District Court for the District of Connecticut,⁷⁶ each upheld the rules and regulations in their jurisdictions.

Legislatively, some states have moved to change laws and regulations to comply with the Supreme Court's ruling in *Schaffer*, including Alaska and the District of Columbia. Other states have moved to specifically assign the burden of proof contrary to *Schaffer*. On August 15, 2007, New York's Governor, Elliott Spitzer, signed legislation assigning the burden of proof to the local school system. This legislation was previously vetoed twice by former Governor George Pataki citing compliance with *Schaffer*. On January 14, 2008, New Jersey Governor Jon Corzine signed legislation placing the burden of proof on local school systems in special education due process hearings. Legislation has been introduced in the 2019-2020 Session of the Pennsylvania General Assembly, Senate Bill 664, to assign the burden of persuasion to the local education agency that is responsible for educating the child. The bill has, as of August 2019, been referred to a committee. A 2017 identical version of the legislation, Senate Bill 541 of the 2017-2018 Session of the Pennsylvania General Assembly was referred to committee but never received a vote. In 2019, House Bill 2463 was introduced in the Virginia General Assembly that would have assigned the burden of proof to the local school system. The bill was referred to committee but not voted.

Exhibit 6 summarizes the actions of other states that have enacted laws or regulations that assign the burden of proof or persuasion following the ruling in *Schaffer*.

⁷⁵ *W.C. ex rel Sue C. v. Cobb County School District.*, 407 F. Supp. 2d 1351 (N.D. Ga. 2005).

⁷⁶ *P. ex rel. Mr. P. v. Newington Board. of Education*, 512 F. Supp. 2d 89 (D. Conn. 2007).

Exhibit 6**Summary of Other State Statutes and Regulations That Assign the Burden of Proof in Due Process Hearings Post *Schaffer v. Weast***

<u>State</u>	<u>Summary of Statute or Regulation</u>
Alabama	The party seeking relief has the burden of proof.
Alaska	The party seeking relief has the burden of proof.
Connecticut	The party seeking relief has the burden of production with the evidence. However, in all cases, the local school system has the burden of proving the appropriateness of the student's program or placement.
Delaware	The local school system has the burden of production and persuasion.
District of Columbia	The party seeking relief has the burden of production and persuasion except where: <ul style="list-style-type: none"> • there is a dispute about the appropriateness of the student's program or placement; or • a parent seeks tuition reimbursement for a unilateral parental placement.
Florida	The local school system has the burden of proof in expedited hearings.*
Georgia	The party seeking relief has the burden of persuasion. However, the hearing officer retains the discretion to modify this general principle.
Michigan	The party seeking relief has the burden of proof.
Minnesota	The party seeking relief has the burden of proof.
Nevada	The local school system has the burden of proof and production.
New Jersey	The local school system has the burden of proof and production.
New York	The local school system has the burden of proof, except when a parent seeks tuition reimbursement for a unilateral parental placement.
West Virginia	The party seeking relief has the burden of proof.

* Florida places the burden of proof on the local school system in a limited circumstance. The remainder of Florida law is silent as to the burden of proof. Accordingly, it can be assumed that the burden of proof is on the party seeking relief in all other circumstances.

Source: Various state statutes; Department of Legislative Services

Burden of Proof in Maryland

Maryland law is silent as to which party has the burden of proof in due process hearings. Accordingly, Maryland follows the holding of *Schaffer*. There has been interest in the General Assembly to change this legislatively.

Legislation

During the 2013 session, Senate Bill 691 and House Bill 1286 proposed that State law be amended to place the “burden of proof” on the “public agency” that conducts a due process hearing. Senate Bill 691 was withdrawn and House Bill 1286 was voted unfavorable. **Exhibit 7** details the legislation introduced in the General Assembly on this issue beginning with the 2014 session through the 2019 session.

Exhibit 7 Maryland Legislation Assigning the Burden of Proof in Due Process Hearings: 2014-2019 Sessions

<u>Year</u>	<u>Bill Number</u>	<u>Changes from SB 691/HB 1286 of 2013</u>	<u>Legislative Resolution</u>
2014	SB 779	Clarified that requiring a public agency to have the burden of proof was not intended to change recordkeeping requirements or what constitutes a FAPE under federal law.	Hearing in Education, Health, and Environmental Affairs Committee (EHE); no vote.
2014	HB 1198	As filed, identical to SB 779 of 2014 but was amended to remove the burden of proof requirement and, instead, to (1) state that the goal of the General Assembly was to have a parent or local school system request mediation before filing a due process complaint; (2) include a requirement that a local school system provide a parent with a written document informing parents of their rights to all documents relating to the complaint; and (3) include in the issues the Commission on Special Education Access and Equity (created by Chapter 671 of 2013) considers, the pros and cons of shifting the burden of proof.	Passed favorable with amendments by the House of Delegates. Assigned to the Senate Rules Committee; did not get assigned to a Senate standing committee.

<u>Year</u>	<u>Bill Number</u>	<u>Changes from SB 691/HB 1286 of 2013</u>	<u>Legislative Resolution</u>
2015	SB 390/HB 344	Maintained additions of SB 779 of 2014; added an exception requiring the burden of proof to be placed on a parent or guardian seeking tuition reimbursement for a unilateral placement of a student.	Hearing in EHE; no vote. Hearing in Committee on Ways and Means (WM); no vote.
2017	Chapter 715/ HB 1240	Placed the burden of proof on the complaining party unless, (1) a dispute was over the delivery of services within an IEP, in which case it was on the local school system; (2) a dispute was over tuition reimbursement for a unilateral placement, then placed on the parent; or (3) if law and justice demanded it, on whichever party the officer deemed appropriate. This was coupled with two studies to be conducted on the IEP process (1) the distribution of children with IEPs and special education teachers and (2) efficient funding for special education and best practices for special education teachers. The section of the bill on burden of proof assignment was removed from the bill through amendment, but the creation of the two studies was retained.	Passed favorable with amendments from the House of Delegates. Passed favorable with amendments from the Senate with the burden of proof assignment aspect removed. Signed by the Governor.
2018	HB 1489	This was a reintroduction of SB 390/HB 344 of 2015.	Hearing in WM; no vote.

<u>Year</u>	<u>Bill Number</u>	<u>Changes from SB 691/HB 1286 of 2013</u>	<u>Legislative Resolution</u>
2019	HB 140	<p>As introduced, HB 140 allowed an impartial hearing officer overseeing a due process hearing to award attorney’s fees and reasonable expert witness fees to a prevailing parent but not for fees accrued after a settlement offer if (1) the settlement offer was made more than 10 days before the proceeding; (2) the settlement offer was not accepted within 10 days; and (3) the officer finds the settlement offer more favorable than final relief. A parent could, however, collect attorney’s fees and related costs if the parent was substantially justified in rejecting a settlement offer. Additionally, HB 140 as introduced authorized the court in a judicial action to award attorney’s fees and expert witness fees in the same manner.</p> <p>The bill was amended in WM to remove the language pertaining to an impartial hearing officer awarding fees and leave it in place only for a court awarding those fees.</p>	<p>Passed favorable with amendments from the House of Delegates.</p> <p>Unfavorable report by EHE.</p>

FAPE: free appropriate public education
 IEP: individualized education program

Source: Department of Legislative Services

Other Legislative Initiatives

Commission on Special Education Access and Equity

Although legislation introduced in the 2013 legislative session to assign the burden of proof in due process hearings did not pass, the General Assembly determined various issues related to special education, including burden of proof, needed further study. Consequently, in 2013 the General Assembly established the Commission on Special Education Access and Equity.

The commission was composed of 24 appointed members representing a broad group of special education stakeholders. The commission was charged with studying the extent to which parents know their rights under IDEA and State law and regulations relating to students with disabilities and potential ways to improve the awareness of these rights. Also, although not part of

its initial charge, the commission looked at equity between the parties in due process hearings and potential methods for improving the process. The commission published a final report in 2014 that included 14 recommendations, the majority of which were never implemented due to budgetary considerations. Of these recommendations, the commission affirmatively chose not to make a recommendation regarding assigning the burden of proof in a due process hearing to the local school system. A copy of the report of the Commission on Special Education Access and Equity can be found here: http://archives.marylandpublicschools.org/MSDE/divisions/earlyinterv/commission/docs/07302014/62514_CommissionOnSpecialEdAccessEquity_Report_June302014.pdf.

MSDE Workgroup

In the summer of 2016, MSDE convened an informal workgroup with many of the same representatives of stakeholder groups as were a part of the commission. The purpose of the informal workgroup was not to suggest legislation but to bring relevant stakeholders together to explore and discuss areas of contention. The areas discussed included assigning the burden of proof in due process hearings and requiring parental consent before an IEP team may make specified changes to an IEP. No formal recommendations were made by the informal workgroup.

Independent Study of IEP Process in the State

Chapter 715 of 2017 required MSDE, in consultation with the Department of Budget and Management and the Department of Legislative Services, to contract with a public or private entity to conduct an independent study of the IEP process in the State. Chapter 361 of 2019 amended this legislation to include the study of the estimates of the costs of adequately funding education for special education students as part of the initial legislation from the recommendations of the Commission on Innovation and Excellence in Education (Kirwan Commission). MSDE must report the findings and recommendations of the independent study to the General Assembly on or before December 1, 2019.

Assigning the Burden of Proof in Due Process Hearings – Pros and Cons

Proponents of legislation that would assign the burden of proof to the local school system in State law argue that the issue is one of fairness, access to expertise, and costs. Advocates for this legislation contend that placing the burden of proof on parents is unfair because the local school system is in the best position to defend the appropriateness of an IEP developed by the local school system even though there is some input from the student's parents during development. The local school system has access to experts, financial resources, and documentation to prove or disprove a case. Further, disability rights advocates contend that many students with disabilities come from low-income families who are often unable to afford the costs of, or who are unaware of how to access, legal representation necessary to participate in a legal proceeding, including the costs of expert witnesses.

Proponents of maintaining the current law argue that keeping the burden of proof on the party seeking relief works well because, as the majority opinion in *Schaffer* explained, there are procedural safeguards built into IDEA, as well as Maryland law that protect students. Among other protections, these procedural safeguards include the inclusion of parents in the decision-making process, the right of the parents to review all records that the school has in relation to their child, and required communications. The local school systems also assert that an increase in due process claims due to a change in the law could result in increased general fund expenditures as well as possibly imposing an unfunded financial mandate on local government. Local school systems argue that school systems have limited financial resources and additional spending on services for students with disabilities will impact other budgetary needs. The proponents for maintaining the current law agree with the Supreme Court's concerns in *Schaffer* that instead of focusing on developing an IEP most appropriate for the student, the focus could shift either to preparing for litigation or litigation-avoidance measures.

Policy Considerations

The assigning of the burden of proof in due process hearings in State law has significant policy and fiscal implications for lawmakers to consider when determining whether this policy will lead to the best outcomes for students with disabilities receiving special education services. These considerations should include congressional intent regarding the structure and purpose of IDEA, the purposes and costs of due process hearings, the legal standards by which facts are judged at a due process hearing, and the overall goals for resolving disputes related to special education in Maryland.

Congressional Intent

The purpose of IDEA is to provide guidelines and requirements for special education services nationwide and to ensure the right of each student to a FAPE regardless of disability. The law's structure is one of collaboration and cooperation between parents and educators. When inevitable disputes or conflicts arise, Congress provides three options to resolve these disputes: (1) a State complaint; (2) mediation; and (3) a due process hearing. Congress clearly meant for due process to be a last resort for resolving disputes. This is reinforced by the amendments to IDEA in the 2004 reauthorization that encourage mediation and require a resolution session before allowing a due process hearing to move forward.

Due Process Hearing Purposes and Costs

The purpose of a due process hearing is to resolve factual disputes through an objective and fair but adversarial process. Each party presents evidence to a neutral impartial hearing officer using legal rules and procedures to reach a decision. However, this method of resolving disputes among the available options is the most costly in terms of time, fiscal resources, and impact on

relationships between school personnel and parents.⁷⁷ Hearings can cost an average of \$8,000 to \$12,000 per hearing.

Studies on this issue also suggest that the greatest costs are the fractured relationships between parents, the school district, and the student. “Because due process hearings are the final stage in special education dispute resolution, in order to have reached this stage, the parents and school district must have either attempted and failed to resolve the problem at multiple prior stages or mutually opted to bypass other forms of dispute resolution.”⁷⁸ At this point in the process, there is often deep mistrust between the parties, loss of cooperation, and concern for potential for retaliation against the student. The question for stakeholders and policymakers in special education is whether the results of a due process hearing leads to the best or better outcomes for the students that are the subject of these disputes. Additionally, many stakeholders express concern about the costs associated with hiring lawyers and disability education experts that is borne by parents and local school systems either to adjudicate or defend the IEP for students when parents seek additional education services or placement for their children in private school.

Legal Standards

As a matter of law, the standard for determining whether a student with a disability is receiving a FAPE was determined in 1982 in *Rowley*. The Supreme Court ruled that the Education for All Handicapped Children Act of 1975 (the predecessor of IDEA) guarantees a substantively adequate program to all eligible students with a disability, and that this requirement is fulfilled if the student’s IEP is “reasonably calculated to enable the child to receive educational benefits.”⁷⁹ This minimal standard may be a factor in why research shows that local school systems prevail on the vast majority of issues in a due process hearing. When parents did not have attorney representation in a hearing, the local school system prevailed in 98% of hearings. When parents are represented by attorneys, local school systems prevailed in 68% of hearings.⁸⁰

The standard of an “appropriate” education changed with the 2017 decision in *Endrew*.⁸¹ In that decision, the Court held that “to meet its substantive obligation under IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁸² The Court further opined that the adequacy of the IEP turns on the unique circumstances of the child for whom it was created. The “reasonably calculated” qualification acknowledges that an IEP is developed by the prospective judgment of informed, expert school

⁷⁷ William H. Blackwell and Vivian V. Blackwell (2015) *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*. Retrieved from https://www.cadreworks.org/resources/literature-articles?f%5B0%5D=field_literature_process%3A507. Citing Cope-Kasten, C. (2013) Bidding (fairwell to due process: The need for a fairer final stage in special education dispute resolution. *Journal of Law & Education*, 42, 501–540; and Mueller, T.G. (2009). Alternate dispute resolution: A new agenda for special education policy. *Journal of Disability Policy Studies*, 20 4-13.

⁷⁸ Cope-Kasten, C. (2013) Bidding (Fair)well to due process: The need for a fairer final stage in special education dispute resolution. *Journal of Law & Education*, 42, 514 and 515.

⁷⁹ 458 U.S. 176 at 204 (1982).

⁸⁰ Blackwell, W. and Blackwell, V. (2015).

⁸¹ 580 U.S. ___ (2017).

⁸² *Id.* at p. 9-16.

officials and the child's parents, and that reasonable does not mean ideal. Whether this more substantive standard will change outcomes in due process hearings has yet to be determined.

Dispute Resolution Policy Goals

Maryland is one of the top 10 states and territories accounting for more than 90% of all due process hearings across the country. The other jurisdictions include the District of Columbia, Puerto Rico, California, New York, Massachusetts, New Jersey, Connecticut, Guam, and Hawaii. Compared to these other jurisdictions, Maryland's use of due process complaints is much closer to the average of 24.3 events per 10,000 students in the 2016-2017 school year than the top three jurisdictions of the District of Columbia at 252.1 events, New York at 119.2 events, and California at 59.8 events. Maryland had 26.4 events.⁸³ There is no clear pattern showing that state policies either assigning the burden of proof to the local school system or following *Schaffer* contribute to the high rate of use of due process hearings in these states compared to other states.

Altering the burden of proof should include consideration as to whether a change will encourage the use of dispute resolution methods that achieve State goals of efficient use of human and fiscal resources; preservation of cooperative solutions that earn buy-in from parents, educators, and students; timely resolution of disputes; and appropriate educational outcomes for students with disabilities.

⁸³ Center for the Appropriate Dispute Resolution in Special Education. *See* State (Part B) Dispute Resolution Summaries for D.C., California, New York, and Maryland at <https://www.cadeworks.org/resources/cadre-materials/state-part-b-dispute-resolution-data-summaries>. (Retrieved on August 6, 2019).

Appendix. Case Law Summary

	<u>Citation</u>
Free Appropriate Public Education (FAPE):	
<i>Mills v. Board of Education of the District of Columbia</i>	348 F. Supp. 866 (D.C. 1972)
<i>Board of Education of the Hendrick Hudson Central School District v. Rowley</i>	458 U.S. 176 (1982)
<i>Endrew F. v. Douglas County School District RE-1</i>	580 U.S. __ (2017)
Dispute Resolution:	
<i>Marinetta School District</i>	47 IDELR 143 (Wi. SEA 2007)
Burden of Proof in Due Process Hearings:	
<i>Director, Office of Workers' Compensation Programs v. Greenwich Collieries</i>	512 U.S. 267 (1994)
<i>Schaffer v. Weast</i>	546 U.S. 49 (2005)
<i>M.M. v. Special School District No. 1</i>	No. 06-3572 (8th Cir. 2008)
<i>Gellert v. D.C. Public Schools</i>	435 F. Supp. 2d 18 (D.D.C. 2006)
<i>W.C. ex rel Sue C. v. Cobb County School District</i>	407 F. Supp. 2d 1351 (N.D. Ga. 2005)
<i>P. ex rel Mr. P. v. Newington Board of Education</i>	512 F. Supp. 2d 89 (D. Conn. 2007)