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SENATE BILL NO. 46

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 10, 2010)

(Patron Prior to Substitute—Senator Stuart)

*A BILL to amend and reenact § 22.1-214 of the Code of Virginia, relating to special education program for children with disabilities; recovery of attorney fees.***Be it enacted by the General Assembly of Virginia:****1. That § 22.1-214 of the Code of Virginia is amended and reenacted as follows:**

§ 22.1-214. Board to prepare special education program for children with disabilities.

A. The Board of Education shall prepare and supervise the implementation by each school division of a program of special education designed to educate and train children with disabilities between the ages defined in § 22.1-213 and may prepare and place in operation such program for such individuals of other ages. The program developed by the Board of Education shall be designed to ensure that all children with disabilities have available to them a free and appropriate education, including specially designed instruction to meet the unique needs of such children. The program shall require (i) that the hearing of each disabled child be tested prior to placement in a special education program and (ii) that a complete audiological assessment, including tests which will assess inner and middle ear functioning, be performed on each child who is hearing impaired or who fails the test required in clause (i). The school boards of the several school divisions, the Department for the Blind and Vision Impaired, the Department for the Deaf and Hard-of-Hearing, the Department of Health and other state and local agencies which can or may be able to assist in providing educational and related services shall assist and cooperate with the Board of Education in the development of such program.

B. The Board of Education shall prescribe procedures to afford due process to children with disabilities and their parents or guardians and to school divisions in resolving disputes as to program placements, individualized education programs, tuition eligibility and other matters as defined in state or federal statutes or regulations. These procedures shall encourage the use of mediation as an informal means of resolving such disputes. Mediation shall not, however, be used to deny or delay the due process rights of parents or guardians. The procedures shall require that all testimony be given under oath or affirmation administered by the hearing officer.

C. The Board of Education may provide for final decisions to be made by a hearing officer. The parents and the school division shall have the right to be represented by legal counsel or other representative before such hearing officer without being in violation of the provisions of § 54.1-3904.

D. Any party aggrieved by the findings and decision made pursuant to the procedures prescribed pursuant to subsections B and C of this section may, within 180 days of such findings and decision, bring a civil action in the circuit court for the jurisdiction in which the school division is located. In any such action the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.

E. In any action brought pursuant to subsection D, the court, in its discretion, may award reasonable attorneys' fees as part of the costs (i) to a prevailing party who is the parent of a child with a disability; (ii) to a prevailing party who is the Board of Education or a local school division against the attorney of a parent who files a complaint or a subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or (iii) to a prevailing party who is the Board of Education or a local school division against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cause of litigation.

1. Fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

2. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent if (a) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins; (b) the offer is not accepted within 10 days; and (c) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

60 3. Attorneys' fees may not be awarded relating to any meeting of the Individualized Education Plan
61 (the "IEP") Team unless such meeting is convened as a result of an administrative proceeding or
62 judicial action, or, at the discretion of the State, for a mediation described in subsection B.

63 4. Notwithstanding subdivisions 2 or 3, an award of attorneys' fees and related costs may be made to
64 a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

65 5. Except as provided in subdivision 6, wherever the court finds that (a) the parent, or the parent's
66 attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of
67 the controversy; (b) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably
68 exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably
69 comparable skill, reputation, and experience; (c) the time spent and legal services furnished were
70 excessive considering the nature of the action or proceeding; or (d) the attorney representing the parent
71 did not provide to the local educational agency the appropriate information in the notice of the
72 complaint, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this
73 subsection.

74 6. The provisions in subdivision 5 shall not apply in any action or proceeding if the court finds that
75 the Board of Education or a local school division unreasonably protracted the final resolution of the
76 action or proceeding or there was a violation of this subsection.

77 EF. Whenever the Board of Education, in its discretion, determines that a school division fails to
78 establish and maintain programs of free and appropriate public education which comply with regulations
79 established by the Board, the Board may withhold all special education moneys from the school division
80 and may use the payments which would have been available to such school division to provide special
81 education, directly or by contract, to eligible children with disabilities in such manner as the Board
82 considers appropriate.

83 EG. The Board of Education shall supervise educational programs for children with disabilities by
84 other public agencies and shall ensure that the identification, evaluation and placement of children with
85 disabilities and youth in education programs by other public agencies, as appropriate, are consistent with
86 the provisions of the Board of Education's special education regulations.

87 GH. The Board of Education shall prescribe regulations to provide a range of assessment procedures
88 for the evaluation of children with disabilities. These regulations shall include provision for parents to
89 participate, if they so request, in the consideration of the assessment components to be used. However,
90 such regulations shall not require any local school board to exceed the requirements of federal law or
91 regulations for the identification and evaluation of children with disabilities.