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## HOUSE BILL NO. 2463

Offered January 9, 2019

Prefiled January 9, 2019

*A BILL to amend and reenact §§ 22.1-214 and 22.1-214.2 of the Code of Virginia, relating to children with disabilities; due process hearings; burden of proof.*

Patrons—Tran and Hope

Referred to Committee on Education

**Be it enacted by the General Assembly of Virginia:**

- 1. That §§ 22.1-214 and 22.1-214.2 of the Code of Virginia are 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. *In any due process hearing before a hearing officer pursuant to subsection C, the local school division has the burden of proof, including the burden of production and the burden of persuasion, provided that:*

*1. In any due process hearing brought by a parent, the parent shall establish a prima facie case before the burden of persuasion falls on the local school division; and*

*2. In any dispute in which a party seeks tuition reimbursement for a unilateral placement, such party seeking tuition reimbursement has the burden of production and the burden of persuasion solely on the issue of the appropriateness of the unilateral placement.*

E. Any party aggrieved by the findings and decision made pursuant to the procedures prescribed pursuant to subsections B and C 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.

~~D.~~ F. In any action brought pursuant to subsection ~~D~~ E, the court, in its discretion, may award reasonable attorney 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.

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HB2463

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

62 E. G. Whenever the Board of Education, in its discretion, determines that a school division fails to  
63 establish and maintain programs of free and appropriate public education which comply with regulations  
64 established by the Board, the Board may withhold all special education moneys from the school division  
65 and may use the payments which would have been available to such school division to provide special  
66 education, directly or by contract, to eligible children with disabilities in such manner as the Board  
67 considers appropriate.

68 F. H. The Board of Education shall supervise educational programs for children with disabilities by  
69 other public agencies and shall ensure that the identification, evaluation and placement of children with  
70 disabilities and youth in education programs by other public agencies, as appropriate, are consistent with  
71 the provisions of the Board of Education's special education regulations.

72 G. I. The Board of Education shall prescribe regulations to provide a range of assessment procedures  
73 for the evaluation of children with disabilities. These regulations shall include provision for parents to  
74 participate, if they so request, in the consideration of the assessment components to be used. However,  
75 such regulations shall not require any local school board to exceed the requirements of federal law or  
76 regulations for the identification and evaluation of children with disabilities.

77 **§ 22.1-214.2. Definition of "supervise" as related to educational programs provided for or by**  
78 **Department of Behavioral Health and Developmental Services.**

79 For the purposes of subsection F H of § 22.1-214 as related to the educational programs provided for  
80 or by the Department of Behavioral Health and Developmental Services, "supervise" shall mean  
81 providing active support in (i) designing mechanisms for maintaining constant direct contact and the  
82 sharing of ideas, approaches and innovations between the Department of Behavioral Health and  
83 Developmental Services and the facility staff responsible for providing educational services; (ii)  
84 providing consistent oversight, with particular attention to the mental health programs, to ensure that the  
85 availability of educational resources and the distribution of funds clearly reflect the needs of the  
86 different student populations residing in the various facilities; (iii) developing guidelines, in cooperation  
87 with the Department of Behavioral Health and Developmental Services for the evaluation of the  
88 performance of the education directors or other education supervisors employed by the Department of  
89 Behavioral Health and Developmental Services; (iv) developing and implementing, in cooperation with  
90 the Department of Behavioral Health and Developmental Services, programs to ensure that the  
91 educational and treatment needs of dually diagnosed children in state facilities are met; and (v) ensuring  
92 that the expertise of the Department of Education is utilized by providing technical assistance to the  
93 education programs provided for or by the Department of Behavioral Health and Developmental Services  
94 in the areas of selection and acquisition of educational materials, curriculum development including  
95 career and technical education, when appropriate, and applications for federal grants.