

House Bill 2944

Sponsored by Representative GARRETT (at the request of Cynthia Mohiuddin)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes presumption that parent acts in best interest of child in hearing or civil action involving special education and related services.

A BILL FOR AN ACT

1
2 Relating to special education proceedings; creating new provisions; and amending ORS 343.165,
3 343.167 and 343.175.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 343.165 is amended to read:

6 343.165. (1) A hearing shall be conducted pursuant to rules of the State Board of Education if:

7 (a) *[The]* **A parent of a child** requests a hearing to contest the determination of the school dis-
8 trict concerning the identification, evaluation, individualized education program, educational place-
9 ment or the provision of a free appropriate public education to the child; or

10 (b) *[The]* **A school district** requests a hearing to obtain a decision regarding whether its iden-
11 tification, evaluation, individualized education program or educational placement of the child is ap-
12 propriate or whether the district's proposed action is necessary to provide the child with a free
13 appropriate public education.

14 (2) Notwithstanding subsection (1)(b) of this section, a school district may not request a hearing
15 if a parent refuses consent for placement in a program providing special education and related ser-
16 vices.

17 **(3) In a proceeding conducted under this section, there is a presumption that the parent**
18 **of the child acts in the best interest of the child.**

19 *[(3)(a)]* **(4)(a)** Except as provided in paragraph (b) of this subsection, a hearing described in
20 subsection (1) of this section must be requested within two years after the date of the act or omis-
21 sion that gives rise to the right to request a hearing under subsection (1) of this section.

22 (b) The timeline described in paragraph (a) of this subsection does not apply to a parent if the
23 parent was prevented from requesting the hearing due to:

24 (A) Specific misrepresentations by the school district that it had resolved the problem forming
25 the basis of the complaint; or

26 (B) The school district withholding from the parent information that the district was required
27 to provide under this chapter.

28 *[(4)]* **(5)** The State Board of Education shall adopt rules that establish when a school district is
29 obligated to initiate a contested case hearing to ensure that a student with a disability is provided
30 with a free appropriate public education.

31 *[(5)]* **(6)** The board's rules in subsection (1) of this section shall be as consistent as possible with

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 the procedures applicable to a contested case under ORS chapter 183. However, the board's rules
2 shall provide that:

3 (a) Any party to a hearing has the right to prohibit the introduction of any evidence that has
4 not been disclosed to that party at least five business days before the hearing; and

5 (b) The hearing officer may prohibit the introduction of any evidence regarding evaluations and
6 recommendations based on those evaluations that a party intends to use at the hearing, if the evi-
7 dence has not been disclosed to the other party at least five business days before the hearing, unless
8 the other party consents to the introduction of the evidence.

9 [(6)] (7) Notwithstanding subsection [(5)] (6) of this section, in an expedited hearing the evidence
10 must be disclosed to the other party not later than two business days before the hearing.

11 [(7)] (8) The parent shall be entitled to have the child who is the subject of the hearing present
12 at the hearing and to have the hearing open to the public.

13 [(8)] (9) An expedited hearing shall be held if:

14 (a) In a dispute over a disciplinary action for a child with a disability, the child's parent disa-
15 grees with a determination that the child's behavior was not a manifestation of the child's disability
16 or with any decision regarding the child's educational placement; or

17 (b) The school district believes that maintaining the current placement for the child is substan-
18 tially likely to result in injury to the child or others.

19 [(9)] (10) The hearing shall be conducted by an independent hearing officer appointed by the
20 Superintendent of Public Instruction. The hearing officer:

21 (a) Shall not be:

22 (A) An employee of a school district involved in the education or care of the child;

23 (B) An employee of the Department of Education; or

24 (C) A person having any personal or professional interest that would conflict with the person's
25 objectivity in the hearing.

26 (b) Shall possess:

27 (A) Knowledge of, and the ability to understand, the provisions of state and federal special ed-
28 ucation laws, regulations and legal interpretations by federal and state courts;

29 (B) The knowledge and ability to conduct hearings in accordance with appropriate standard le-
30 gal practice; and

31 (C) The knowledge and ability to render and write decisions in accordance with standard legal
32 practice.

33 **SECTION 2.** ORS 343.167 is amended to read:

34 343.167. (1) If the finding at the hearing held under ORS 343.165 is that the identification, eval-
35 uation and educational placement by the district are appropriate and that the child is being provided
36 a free appropriate public education, the hearing officer shall:

37 (a) Decide in support of the determination of the district[.]; and

38 (b) **Include findings of fact supporting the rebuttal of the presumption described in ORS**
39 **343.165 (3) that the parent is presumed to act in the best interest of the child.**

40 (2) If the finding at the hearing is that the identification, evaluation or educational placement
41 is not appropriate or that the child is not being provided a free appropriate public education, the
42 hearing officer shall grant appropriate relief within the hearing officer's scope of authority.

43 (3) In matters alleging a procedural violation, a hearing officer may find that a child did not
44 receive a free appropriate public education only if the procedural inadequacies:

45 (a) Impeded the child's right to a free appropriate public education;

1 (b) Significantly impeded the parents' opportunity to participate in the decision-making process
 2 regarding the provision of a free appropriate public education to the child; or

3 (c) Caused a deprivation of educational benefits.

4 (4) Nothing in subsection (3) of this section shall be construed to preclude a hearing officer from
 5 ordering a school district to comply with procedural requirements.

6 (5) The decision shall be entered not later than 45 days after the request for hearing is filed
 7 unless an extension has been granted by the hearing officer at the request of the parent or the
 8 school district. Copies of the decision shall be sent to the parent and to the school district accom-
 9 panied by a statement describing the method of appealing the decision.

10 (6) In expedited hearings conducted pursuant to ORS 343.165 [(8)] (9), the State Board of Edu-
 11 cation shall adopt rules that require a hearing within 20 school days of the date the hearing is re-
 12 quested and a determination within 10 school days after the hearing.

13 (7) Pursuant to rules of the State Board of Education, the Superintendent of Public Instruction
 14 shall bill the school district for all reasonable costs connected with the appointment of an inde-
 15 pendent hearing officer and the conduct of a due process hearing. The district shall make payment
 16 to the Department of Education for the cost of the hearing within 30 days of receipt of the billing.

17 **SECTION 3. The amendments to ORS 343.165 and 343.167 by sections 1 and 2 of this 2009**
 18 **Act first apply to hearings commenced on or after the effective date of this 2009 Act.**

19 **SECTION 4.** ORS 343.175 is amended to read:

20 343.175. (1) A decision under ORS 343.165 is final unless the parent or the school district files
 21 a civil action under subsection (2) of this section.

22 (2) Either party aggrieved by the finding and decision of the hearing officer may commence a
 23 civil action in any court of competent jurisdiction.

24 (3) In any action brought under this section, the court shall receive the records from the ad-
 25 ministrative proceeding, shall hear additional evidence at the request of a party and, basing its de-
 26 cision on the preponderance of the evidence **and the presumption that the parent acts in the**
 27 **best interest of the child**, shall grant such relief as the court determines is appropriate.

28 (4) Any civil action brought under this section shall be commenced within 90 days of the date
 29 of the hearing officer's final order.

30 (5) In any action or proceeding brought under ORS 343.165 or in an appeal from any action or
 31 proceeding brought under ORS 343.165, the court, in its discretion, may award reasonable attorney
 32 fees as part of costs to:

33 (a) The parents of a child with a disability, if the parents are the prevailing party;

34 (b) A prevailing party who is the Department of Education or school district against the attor-
 35 ney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable
 36 or without foundation, or against the attorney of a parent who continued to litigate after the liti-
 37 gation clearly became frivolous, unreasonable or without foundation; or

38 (c) A prevailing party who is the Department of Education or a school district against the at-
 39 torney of a parent, or against the parent, if the parent's complaint or subsequent cause of action
 40 was presented for any improper purpose, such as to harass, to cause unnecessary delay or to need-
 41 lessly increase the cost of litigation.

42 (6) Attorney fees awarded under this section shall be based on rates prevailing in the community
 43 in which the action or proceeding arose for the kind and quality of services furnished. No bonus
 44 or multiplier may be used in calculating these fees.

45 (7) Attorney fees may not be awarded and related costs may not be reimbursed under this sec-

1 tion for services performed after a written offer of settlement to a parent if:

2 (a) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Pro-
3 cedure, or in case of an administrative hearing, more than 10 days before the hearing begins;

4 (b) The offer is not accepted within 10 days; and

5 (c) The relief finally obtained by the parents is not more favorable to the parents than the offer
6 of settlement.

7 (8) Notwithstanding subsection (7) of this section, attorney fees and related costs may be
8 awarded to a parent who is the prevailing party and who was substantially justified in rejecting the
9 settlement offer.

10 (9) Attorney fees may not be awarded relating to any meeting of the individualized education
11 program team unless the meeting is convened as a result of an administrative proceeding under ORS
12 343.165, or as a result of judicial action. A resolution session is not considered a meeting convened
13 as a result of an administrative hearing or judicial action, or an administrative hearing or judicial
14 action.

15 (10) Attorney fees may not be awarded for a mediation that is conducted before a request for
16 a hearing under ORS 343.165.

17 (11) The court shall reduce the amount of attorney fees awarded under this section if:

18 (a) The parent unreasonably protracted the final resolution of the controversy;

19 (b) The amount of the attorney fees unreasonably exceeds the hourly rate prevailing in the
20 community for similar services by attorneys of reasonably comparable skill, reputation and experi-
21 ence;

22 (c) The time spent and legal services furnished were excessive considering the nature of the
23 action or proceeding; or

24 (d) In requesting a hearing under ORS 343.165 (1)(a), the attorney representing the parent did
25 not provide written notice to the Superintendent of Public Instruction that included:

26 (A) The child's name, address and school;

27 (B) A description of the problem and facts relating to the problem; and

28 (C) A proposed resolution of the problem.

29 (12) The court shall not reduce fees under subsection (11) of this section if:

30 (a) The school district unreasonably protracted the final resolution of the controversy; or

31 (b) The school district violated the procedural safeguards as set forth in ORS 343.146 to 343.183.

32 **SECTION 5. The amendments to ORS 343.175 by section 4 of this 2009 Act first apply to**
33 **civil actions brought following a hearing that was conducted under ORS 343.165 on or after**
34 **the effective date of this 2009 Act.**

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