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**MEMORANDUM**

DATE: June 7, 2012

TO: All Members of the Delaware State Senate  
and House of Representatives

FROM: Ms. Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: H.B. 365 [Special Education "Costs" Legislation]

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 365 which allows parents and guardians who successfully challenge the denial of services to their children with special needs to recover the costs of expert witnesses that they needed to hire to advocate for their children. SCPD strongly endorses the proposed legislation and has the following observations.

The IDEA was amended in 1986 to authorize a court to award a parent prevailing in IDEA administrative or judicial proceedings to cover attorney's fees and costs. However, 20 years later, in 2006, a split Supreme Court narrowly interpreted the law to disallow recovery of expert witness fees and costs of tests and evaluations. Senator Harkins includes the following summary in the attached "Statement of Senator Harkin on Introducing the IDEA Fairness Restoration Act, S.613, on March 17, 2011":

When Congress amended IDEA in 1986 it recognized the financial barriers that parents face in pursuing due process to resolve disagreements with their school and specified in the Conference Committee Report that when the court finds in favor of the parents a judge could award attorney's fees, including "reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case." For years, parents who prevailed in judicial proceedings were awarded these fees, as Congress intended. But in 2006, the U.S. Supreme Court ruled in *Arlington Central School District v. Murphy* that courts could no longer award these fees because Congress made its intention explicit in the Conference Report rather than in the statute. As a result, many parents are discouraged and even prevented from pursuing meritorious cases to secure the rights of

their children. Low- and middle- income families are particularly hard hit.

At 1.

Federal legislation was first introduced in 2007 and most recently in 2011 to enable parents to recover their expert witness and evaluation costs. See attached Wikipedia article. The article provides many examples of other laws authorizing recovery of expert witness fees, including the ADA. Unfortunately, statistics show that only 3% of all Senate bills are enacted. See attached summary in [www.govtrack.us/congress/bills/112/s613](http://www.govtrack.us/congress/bills/112/s613). Thus, the federal IDEA Fairness Restoration Act has scant prospects for enactment in 2012.

The draft State legislation would achieve the effect of the federal bill for Delaware IDEA students. Consistent with the attached DOE Website excerpt, only a few due process administrative hearings are decided each year and parents “win some and lose some”. Therefore, the bill will not result in numerous awards of expert witness and evaluation costs against public schools. However, the low number of hearings underscores parental discouragement with challenging public schools given the disparity in resources. The Harkins’ Statement cites some statistics showing that more than 1/3 of children with disabilities lived in households with incomes of \$25,000 or less. Thus, any action that would help “level the playing field” would enhance the viability of the administrative hearing process.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position or observations on the proposed legislation.

cc: Ms. Susan Haberstroh  
Mr. Brian Hartman, Esq.  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

hb 365 ed cost recovery 6-7-12

**Statement Of Senator Harkin On Introducing the IDEA  
Fairness Restoration Act, S.613, on March 17, 2011**

Ensuring that all students, regardless of background or ability, receive an education that gives them the opportunity to live a successful and fulfilling life has always been a major focus of my career in public service. To achieve this goal, I have fought especially hard for students with disabilities to have access to the general education curriculum and the services and supports they need to succeed, and to safeguard their rights under the Individuals with Disabilities Education Act (IDEA). That is why I am pleased to introduce the IDEA Fairness Restoration Act, which my colleague Rep. Van Hollen will also be introducing in the House today. This critical legislation will remove the financial barrier that families, especially low- and middle-income families, face as they pursue their children's rights to the free, appropriate public education they deserve and are entitled to under the Fourteenth Amendment.

When Congress originally passed IDEA, we recognized the vital importance of parent and school collaboration in special education and required they jointly develop an Individualized Education Plan (IEP) to identify goals to promote the academic achievement of students with disabilities. In general, this partnership has served students well. There are, however, times when schools have not fulfilled their responsibilities to provide an appropriate education. In these cases, IDEA provides parents the right to challenge the schools through mediation and due process. To make their argument, families often need access to expert witnesses who can assess the student's needs and testify about whether the current IEP meets those needs. These expert witnesses are a resource that many families cannot afford, but without access to them, families may be unable to make their case.

When Congress amended IDEA in 1986, it recognized the financial barriers that parents face in pursuing due process to resolve disagreements with their school and specified in the Conference Committee Report that when the court finds in favor of the parents a judge could award attorney's fees, including "reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case." For years, parents who prevailed in judicial proceedings were awarded these fees, as Congress intended. But in 2006, the U.S. Supreme Court ruled in *Arlington Central School District v. Murphy* that courts could no longer award these fees because Congress made its intention explicit in the Conference Report rather than in statute. As a result, many parents are discouraged and even prevented from pursuing meritorious cases to secure the rights of their children. Low- and middle-income families are particularly hard hit.

This IDEA Fairness Restoration Act clarifies Congress' express intent that parents should recover expert witness fees, as they currently can do with attorneys' fees, if they prove that the school system has wrongfully denied their child an appropriate education as defined by IDEA. By including "reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case" and reestablishing the right of judges to award such fees to parents who prevail in IDEA cases, as Congress intended, this legislation will level the playing field and restore the ability of low- and middle-income parents to be effective advocates for their children's educational needs.

**This legislation is an essential step for protecting the rights of students with disabilities and ensuring that all families, regardless of their financial resources, can advocate for and protect their children's rights through due process.**

# IDEA Fairness Restoration Act

From Wikipedia, the free encyclopedia

The **IDEA Fairness Restoration Act** is an American legislative proposal first introduced in the United States House of Representatives on November 14, 2007 as H.R.4188.<sup>[1]</sup> The bill was most recently reintroduced on March 17, 2011 in the Senate as S.613<sup>[2]</sup> and in the House as H.R. 1208<sup>[3]</sup> The primary sponsors are Senator Tom Harkin (D-IA), Chair of the Senate Health Education Labor and Pensions Committee,<sup>[4]</sup> Congressmen Chris Van Hollen (D-CT), and Congressman Pete Sessions (R-TX).<sup>[5]</sup> The bill would enable parents of children with disabilities to recover their expert witness fees in due process hearings under the Individuals with Disabilities Education Act (IDEA).<sup>[6]</sup>

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## Background

When a school district fails its legal obligations to students with disabilities, the Individuals with Disabilities Education Act permits the parent to seek a hearing before an impartial hearing officer. A school district may also request a due process hearing against parents.<sup>[7]</sup> Hearings are rare. Only 5 in 10,000 students seek a hearing.<sup>[8]</sup>

Expert witnesses have a critical role at due process hearings. They provide the technical expertise about the student's disability and the care and educational services the student needs in the classroom.<sup>[9]</sup>

In 1986, Congress passed the Handicapped Children's Protection Act, allowing parents who prevail in due process hearings and litigation under the IDEA to recover their legal fees and costs. The language was modeled on similar provisions in the Civil Rights Act of 1964 (42 U.S.C. 2000e-5k).<sup>[10]</sup> Congress' Joint Conference Committee Report explained that the courts would have discretion to award attorneys' fees as part of the costs of litigation. It noted that "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding."<sup>[11]</sup> The statute also directed the GAO to study the costs to parents, including costs of "attorneys and consultants" in IDEA proceedings.<sup>[12]</sup>

In 2006, however, the Supreme Court decided the case of *Arlington Central School Dist. Bd. of Ed. v. Murphy*. The Court ruled that because the statutory text of the IDEA did not explicitly state that expert witness fees were covered, parents could not recover them. The Court reasoned that because the IDEA was enacted under the Spending Clause of the Constitution, Article I, Section 8, the law must "unambiguously" give notice in its statutory text that parents could recover fees. This meant Congress had to declare in the body of the statute that parents could recover expert witness fees.<sup>[13]</sup> The IDEA Fairness Restoration Act will amend the statutory text of the IDEA to permit recovery of expert witness fees. Until Congress does, parents must pay their own expert witness fee expenses, even when they prevail.<sup>[14]</sup>

## Description of the Bill

The IDEA permits parents who prevail in IDEA cases to recover reasonable attorneys' fees.<sup>[15]</sup> The IDEA Fairness Restoration Act will enable them to also recover the reasonable costs of expert witnesses. It will amend Section 615 (i)(3) of the IDEA by adding the following at the end, "Inclusion of expert witness fees and other expenses as attorneys' fees. In this paragraph, the term 'attorneys' fees' shall include the fees of expert witnesses, including the reasonable costs of any test or evaluation necessary for the preparation of the parent or guardian's case in the action or proceeding."<sup>[16]</sup> Parents can recover expert witness fees only when they prevail, and the school system has been found, after an impartial hearing, to have wrongfully denied a child an appropriate education as defined in IDEA. fees. Parents cannot recover fees if they do not prevail.<sup>[17]</sup>

The bill will align the IDEA with other civil rights statutes that permit recovery of expert witness fees, including Title VII,<sup>[18]</sup> and the Americans with Disabilities Act of 1990.<sup>[19]</sup> Several federal laws permit recovery of expert witness fees, including Voting Rights Act of 1965, Consumer Product Safety Act, Toxic Substances Control Act, Petroleum Marketing Practices Act, Telemarketing and Consumer Fraud Abuse and Prevention Act, Endangered Species Act, the Patent and Copyright Acts, PROTECT Act, Congressional Accountability Act of 1995, Presidential and Executive Office Accountability Act, and the Whistleblower Protections for Contractor Employees of Department of Defense, Coast Guard, and National Aeronautics and Space Administration Act.<sup>[20]</sup>

## Statement of Senator Harkin on introduction

When Senator Harkin introduced the bill, he explained the reasons for enactment. He said, "This critical legislation will remove the financial barrier that families, especially low- and middle-income families, face as they pursue their children's rights to the free, appropriate public education they deserve and are entitled to under the Fourteenth Amendment...There are . . .times when schools have not fulfilled their responsibilities to provide an appropriate education. In these cases, IDEA provides parents the right to challenge the schools through mediation and due process. To make their argument, families often need access to expert witnesses who can assess the student's needs and testify about whether the current IEP meets those needs. These expert witnesses are a resource that many families cannot afford, but without access to them, families may be unable to make their case."<sup>[21]</sup> A 2002 study found that more than 1/3 of children with disabilities lived in households with incomes of \$25,000 or less, compared to 24% of the general population, and 2/3 of children with disabilities lived in families that earned less than \$50,000 a year.<sup>[22]</sup>

## Legislative history

The IDEA Fairness Restoration Act was first introduced the House of Representatives in 2007 by Congressman Van Hollen and Congressman Sessions.<sup>[23]</sup> The bill was introduced again in 2009.<sup>[24]</sup> The bill was most recently re-introduced on March 17, 2011, in both the House and Senate as S.613 and H.R. 1208.

## References

1. ^ HR4188 (<http://hdl.loc.gov/loc.uscongress/legislation.110hr4188/>), H.R. 4188 (U.S. House of Representatives, 110th Congress). Retrieved 18 April 2011.
2. ^ S613 (<http://hdl.loc.gov/loc.uscongress/legislation.112s613/>), S.613 (U.S. Senate, 112th Congress). Retrieved 18 April 2011.
3. ^ HR1208 (<http://hdl.loc.gov/loc.uscongress/legislation.112hr1208/>), H.R. 1208 (U.S. House of Representatives, 112th Congress). Retrieved 18 April 2011.
4. ^ S613 (<http://hdl.loc.gov/loc.uscongress/legislation.112s613/>), S.613 (U.S. Senate, 112th Congress). Retrieved 18 April 2011.
5. ^ HR1208 (<http://hdl.loc.gov/loc.uscongress/legislation.112hr1208/>), H.R. 1208 (U.S. House of Representatives, 112th Congress). Retrieved 18 April 2011.

6. ^ Disability Scoop (<http://www.disabilityscoop.com/2011/03/21/congress-idea-cases/12624/>) , Michelle Diamant. "Congress to Consider Parent Financial Burden in IDEA Cases," Disability Scoop, March 21, 2011. Retrieved 18 April 2011.
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8. ^ GAO 03-0897 (<http://www.gao.gov/new.items/d03897.pdf/>) , United States Government Accountability Office. "GAO Report 03-897," September 2003. Retrieved 18 April 2011.
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11. ^ 132 Congressional Record 16823-25 (1986).
12. ^ Murphy J. Souter Opinion (<http://www.law.cornell.edu/supct/html/05-18.ZD.html/>) Arlington Central School District v. Murphy, 548 U.S. 291 (2006) (Justice Souter, Dissent) (quoting Handicapped Children's Protection Act, Public Law 99-372, Section 4(b)(3), 100 Stat. 796, 797-98 (1986)). Retrieved 18 April 2011.
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14. ^ Analysis IDEA Fairness Act (<http://www.autcom.org/pdf/briefing-memo-idea-fairness.pdf>) Autism National Committee. Analysis, IDEA Fairness Restoration Act. Retrieved 18 April 2011.
15. ^ 20 USC 1415 (<http://www.law.cornell.edu/uscode/20/1415.html/>) 20 United States Code 1415(i)(3)(B).
16. ^ S613 (<http://hdl.loc.gov/loc.uscongress/legislation.112s613/>) , S.613 (U.S. Senate, 112th Congress). Retrieved 18 April 2011.
17. ^ Cong Rec 2007 ([http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E2419&dbname=2007\\_record/](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E2419&dbname=2007_record/)) , Congressman Chris Van Hollen. "Introduction of the IDEA Fairness Restoration Act," Congressional Record, November 14, 2007. Retrieved 18 April 2011.
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19. ^ ADA ([http://www.law.cornell.edu/uscode/42/usc\\_sec\\_42\\_00012205----000-.html/](http://www.law.cornell.edu/uscode/42/usc_sec_42_00012205----000-.html/)) 42 United States Code 12205.
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21. ^ Cong Rec 2011 ([http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S1834&dbname=2011\\_record/](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S1834&dbname=2011_record/)) Senator Tom Harkin, Congressional Record, March 17, 2011. Retrieved 18 April 2011.
22. ^ SEELS Report ([http://www.seels.net/designdocs/SEELS\\_Children\\_We\\_Serve\\_Report.pdf](http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf)) M. Wagner, C. Marder, J. Blackorby, & D. Cardoso. The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households (Sept. 2002). Retrieved 2 May 2011.
23. ^ 110hr4188/ HR4188 (<http://hdl.loc.gov/loc.uscongress/legislation.>) , H.R. 4188 (U.S. House of Representatives, 110th Congress). Retrieved 18 April 2011.
24. ^ HR2740 (<http://hdl.loc.gov/loc.uscongress/legislation.111hr2740/>) H.R. 2740 (U.S. House of Representatives, 111th Congress). Retrieved 18 April 2011.

## External links

- S613 (<http://hdl.loc.gov/loc.uscongress/legislation.112s613/>) , Full text of S. 613 via THOMAS
- HR1208 (<http://hdl.loc.gov/loc.uscongress/legislation.112hr1208/>) , Full text of H.R.1208 via THOMAS
- CCD Letter (<http://www.autcom.org/pdf/ccd-idea-act-letter.pdf>) , Consortium of Citizens with Disabilities. Letter in Support of IDEA Fairness Restoration Act. March 30, 2011. Retrieved 18 April 2011.
- Analysis IDEA Fairness Act (<http://www.autcom.org/pdf/briefing-memo-idea-fairness.pdf>) Autism National Committee. Analysis, IDEA Fairness Restoration Act. Retrieved 18 April 2011.

Retrieved from "http://en.wikipedia.org/w/index.php?title=IDEA\_Fairness\_Restoration\_Act&oldid=469160027"

Categories: Special education | Special education in the United States | 2006 in United States case law

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CONGRESS > BILLS > S. 613

## S. 613: IDEA Fairness Restoration Act

112th Congress, 2011-2012

A bill to amend the Individuals with Disabilities Education Act to permit a prevailing party in an action or proceeding brought to enforce the Act to be awarded expert witness fees and certain other expenses.

Sponsor: Sen. Thomas "Tom" Harkin [D-IA]

Status: Introduced

Bill titles and summaries are written by the sponsor. S. stands for Senate bill.

### TRACK THIS BILL

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## BILL OVERVIEW

<b>STATUS:</b>	Introduced	Mar 17, 2011
	Referred to Committee	(not yet occurred)
	Reported by Committee	(not yet occurred)
	Passed Senate	(not yet occurred)
	Passed House	(not yet occurred)
	Signed by the President	(not yet occurred)

This bill is in the first stage of the legislative process. It was introduced into Congress on March 17, 2011. It will typically be considered by committee next.

**PROGNOSIS:** This bill has a 6% chance of being enacted. The following factors were considered:

The sponsor is the chairman of a committee to which the bill has been referred. (+5%)

Companion bill H.R. 1208: There is at least one cosponsor from the majority party and one cosponsor outside of the majority party. (+4%)

Companion bill H.R. 1208: A cosponsor in the minority party has a high leadership score. (+3%)

There is at least one cosponsor from the majority party and one cosponsor outside of the majority party. (+2%)

Companion bill H.R. 1208: 6+ cosponsors serve on a committee to which the bill has been referred. (+2%)

3-5 cosponsors serve on a committee to which the bill has been referred. (+2%)

Just 3% of all Senate bills in 2009-2010 were enacted.

**TEXT:** [Read Bill Text](#)

**COSPONSORS:** [show cosponsors \(7\)](#)

**COMMITTEES:** Senate Committee on Health, Education, Labor, and Pensions

The committee chair determines whether a bill will move past the committee stage.

**SUBJECT AREAS:** Use these subject areas to explore related legislation:

Education  
Civil actions and liability  
Disability and paralysis  
Elementary and secondary education  
Evidence and witnesses  
Legal fees and court costs  
Special education

**RELATED BILLS:** Identical: H.R. 1208: IDEA Fairness Restoration Act  
Related bills above are identified by the Congressional Research Service.

**PRIMARY SOURCE:** THOMAS (The Library of Congress)  
THOMAS is updated generally one day after events occur and events since the last update may not be reflected here.

**CITATION:** This page can be cited in one of these formats (click for details): APA, MLA, Wikipedia Template.

## OFFICIAL SUMMARY

The following summary was written by the Congressional Research Service, a nonpartisan arm of the Library of Congress, which serves Congress. GovTrack did not write and has no control over these summaries.

3/17/2011--Introduced.

IDEA Fairness Restoration Act - Amends the Individuals with Disabilities Education Act to include expert witness fees, including the reasonable costs of any test or evaluation necessary for the preparation of the parents' or guardians' case in the action or proceeding, within the definition of "attorneys' fees" that may be awarded to the prevailing party in a civil action brought under such Act.

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Department of Education : Students Family : Special Education

June 2, 2012

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- [Dissenting Decision](#)

DE DP 10-11R/10-14R Student vs. Red Clay,

DE DP 09-10R Student vs. Red Clay

DE DP 09-12r Student vs. Delaware College Prep

DE DP 10-4R Student vs. Christina

### School Year 2008-2009

DE DP 08-16R Student vs. Colonial

### School Year 2007-2008

DE DP 08-04R Student vs. Christina

DE DP 08-07R Student vs. Seaford

### School Year 2006-2007

DE DP 07-06R Student vs Cape Henlopen

DE DP 07-09R Student vs. Red Clay

DE DP 07-011R Student vs. Woodbridge

DE DP 07-017R Student vs. Brandywine

DE DP 07-20R & 05-02 appeal Student vs. Indian River

### School Year 2005-2006

DE DP 06-04R Student v. Cape Henlopen

DE DP 06-07R Student v. Brandywine

DE DP 06-11R Student vs Appoquinimink

### School Year 2004-2005

DE DP 05-01R Student v. Christina

### Special Education

- **\*NEW\* - Draft 2009 IDEA Part B Application**
- Special Education Leadership Meeting January 23, 2009 - Regulation Review - Prior Written Notice Parental Revocation of Consent for Continued Provision of Special Education Services - Powerpoint
- Final State Special Education Regulations (Effective June 11, 2007)
  - 922 Children with Disabilities Subpart A Purposes and Definitions
  - 923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies
  - 924 Children with Disabilities Subpart C Local Educational Agency Eligibility
  - 925 Children with Disabilities Subpart D Evaluations, Eligibility Determination, Individualized Education Programs
  - 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children
  - 927 Children with Disabilities Subpart F, Monitoring Enforcement and Confidentiality of Information
  - 928 Children with Disabilities Subpart G Use and Administration of Funds
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DE DP 05-02R Student v. Indian River  
DE DP 05-07R and 05-08 Student v. Colonial  
DE DP 05-10R Student v. Appoquinimink  
DE DP 05-26R Student vs Cape Henlopen  
DE DP 05-22R Student v. NCCVT

DE DP 08-04R Student vs. Christina

- Inclusive Schools Initiative
- Federal Regulations: Individuals with Disabilities Education Act 2004 (IDEA 2004)
- NIMAS - National Instructional Materials Accessibility Standard
- Reports, Publications and Forms
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