

SENATE BILL REPORT

SSB 5260

As Passed Senate, March 17, 1999

Title: An act relating to the equal access to justice act.

Brief Description: Creating an equal access to justice task force.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Johnson and Thibaudeau).

Brief History:

Committee Activity: Judiciary: 2/1/99, 3/3/99 [DPS].
Passed Senate, 3/17/99, 47-1.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5260 be substituted therefor, and the substitute bill do pass.

Signed by Senators Heavey, Chair; Kline, Vice Chair; Costa, Goings, Hargrove, Haugen, Johnson, Long, McCaslin, Roach, Thibaudeau and Zarelli.

Staff: Penny Nerup (786-7484)

Background: The Access to Justice Act provides for payment of attorneys' fees and other expenses to the prevailing party in an action contesting an administrative agency decision that has been appealed to a Washington court. Such fees and other expenses are mandated to the prevailing party only when the party obtains relief on a significant issue and the court finds the agency's action was not substantially justified or that circumstances would make an award of fees unjust.

Attorneys' fees are calculated based upon prevailing market rates for the kind and quality of services furnished and are capped at \$150 unless the court determines that special circumstances exist for higher fees. "Other expenses" include expert witness fees, which are limited to the highest rates of compensation paid by the state of Washington for expert witnesses. The fee and expenses award cannot exceed \$25,000 and must be paid by the agency over whom the party prevails within 60 days.

The Access to Justice Board of the Washington State Bar Association is concerned that low income residents of Washington, who are denied benefits by an agency and the denial is upheld at an administrative hearing, are insufficiently skilled to provide the type of record at an administrative hearing or administrative review that is necessary to overturn the original agency decision on appeal to the superior courts. Areas of concern, among others, are unemployment benefits; licensing of foster homes, adult family homes and daycare; and child placement decisions.

Summary of Bill: The Access to Justice Act is modified to allow for payment of attorneys' fees and other expenses at administrative hearings under certain specified circumstances. These attorneys' fees and other expenses are paid to the party who prevails on a significant issue at the administrative hearing, if the agency action was not substantially justified or if circumstances exist that make a fee award unjust. Agencies that are exempt from the provisions of the Administrative Procedure Act are exempt from this act.

The total fee and expenses award for the combined proceedings (administrative hearing, administrative review or superior court proceedings) cannot exceed \$25,000.

Lay persons may represent parties at adjudicative proceedings and are entitled to fees, if their representation is permitted as an authorized practice of law.

The Chief Administrative Law Judge of the Office of Administrative Hearings and any agency that conducts its own administrative hearings or reviews have the authority to adopt rules to implement this act. In addition, administrative tribunals (those who conduct adjudicative proceedings) may establish fee and expenses limitations that are reasonable.

Appropriation: None.

Fiscal Note: Requested on January 21, 1999.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Many persons have a considerable financial interest in the outcome of administrative hearings. If these persons are unrepresented, as they often are, due to lack of money to hire an attorney, they often fail to build a decent record that would allow them a successful appeal of an adverse decision in the superior courts. Both owners and residents of adult family homes are in jeopardy when complaints are filed or when they are not in strict compliance with increasing rules regulating these residences. Because the law is complicated, attempting to handle these cases pro se is extremely difficult and time-consuming. Federal law allows attorneys' fees at some specified administrative hearings so there is a huge body of law out there to guide state agencies. Alternate dispute resolution is not always the answer in these cases because most pro se parties have an all or nothing case (either they get the benefits or not). Lawyers can encourage early settlement of valid claims and avoid the administrative process altogether. Lawyers could be made to comply with strict time lines, if they take on these cases. ALJs know when an agency has taken an unreasonable position. This bill should make government more accountable. This bill is based upon fairness. It has the unanimous support of the Access to Justice Board and the Board of Governors of the Washington State Bar Association.

Testimony Against: This is a well-intentioned bill but the devil is in the details. Administrative hearings are set up to be informal and friendly to pro se parties. Often state agencies are not represented at these hearings because the dispute is really between two private parties (employer/employee, father/mother, etc.). Further, it would be very difficult and time-consuming for the administrative law judge to have to determine, on a case-by-case basis whether the agency's action was "substantially justified." This bill is unwieldy and too expensive. This bill also adds additional post-hearing process and time. Some agency action does not, and should not, need to be included in this bill. This bill could be extremely

expensive for agencies depending upon the number of administrative hearings they do each year.

Testified: PRO: Howard Graham, Esq.; Don Powell, Esq., Board of Governors, Washington State Bar Association; Ken Davidson, Esq., Access to Justice Board; Bill Day, Adult Family Home Association; Craig Fredrickson, Adult Family Home Association; Judie Ebbert-Rich, ARC of Washington State; Larry Shannon, Esq., Washington State Trial Lawyers' Association; Jerry Sheehan, Esq., American Civil Liberties Union of Washington; CON: Art Wang, Office of Administrative Hearings; Phil Wozniak, Department of Social and Health Services; Brian Peyton, Department of Health; Selwyn Walters, Department of Labor and Industries.