

To: Deputy Mayor Victor Reinoso, State Superintendent of Education Deborah Gist,
District of Columbia Public Schools General Counsel James Sandman

CC: Robert Bobb, President, State Board of Education; State Board of Education
Members William Lockridge, Lisa Raymond, Laura Slover, Ted Trabue, Sekou Biddle,
Mary Lord

From: Judy Berman (DC Appleseed); Jim Rathvon (DLA Piper & DC Appleseed);
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Date: December 1, 2008

RE: Burden of Proof in Special Education Due Process Hearings

THE SUBJECT OF THIS MEMO

In DC Board of Education Resolution SR 06-31, DC Appleseed and DLA Piper were asked to analyze the effects of shifting the burden of proof to the parent in the special education due process system. Specifically, they were asked to determine whether the shift had curbed attorney abuses – its avowed purpose – and whether it had any negative, unintended consequences.

OUR METHOD

DC Appleseed and DLA Piper promptly appointed a committee to investigate these issues. As an initial matter, the committee (“we”) sought clarification from District of Columbia Public Schools (“DCPS”), specifically from the Office of General Counsel (“OGC”), as to the “abuses” with which the Board of Education was concerned. After some discussion, the OGC identified the following as the most serious abuses:

filing on minutiae (very minor procedural issues); attorneys/advocates not cooperating in scheduling meetings, esp. MDT/IEP meetings; advising parents not to cooperate in meetings; failing to make student available for testing.

In order to evaluate the effect of the shift on those behaviors and to look for other consequences, we decided to collect data in three distinct ways. First, we obtained all hearing decisions for the month of February 2006 (five months before the shift) and February 2007 (seven months following the shift). We read each of these decisions, keeping statistics regarding settlement and, for litigated cases, the issues raised and the outcomes for each. Second, we obtained the daily scheduling sheets for both months so that we could develop additional statistics regarding such matters as the number of complaints filed, withdrawn, continued, and dismissed. Third, and finally, we interviewed a number of stake holders – OGC attorneys, hearing officers, public interest attorneys, and private attorneys with significant special education case loads.

OUR FINDINGS AND CONCLUSIONS

A. The Interviews – Observations re: Shift in the Burden of Proof.

All of the interviews, except the one with the OGC attorneys, took place against a background of common understanding that DCPS has traditionally been notably unprepared at hearing. The hearing officers noted that this consistent lack of preparation was often the fault of the client (*i.e.*, the school involved), not the individual attorney. In any case, everyone agreed that the shift has made it more expensive and more time consuming for a parent’s attorney to prevail because now DCPS’s lack of preparation has

no effect on the parent's presentation. Prior to the shift, the parent often could proceed directly to the remedy phase of the hearing because DCPS had failed to present adequate proof that the school was fulfilling its obligation to provide a free appropriate public education ("FAPE"). Now the parent's attorney must present the parent's case in full at the outset. This means that the parent will often need to offer expert evidence that the school is not providing FAPE. Not only is this a major expense; but even if the parent prevails, expert fees are non-reimbursable under *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005). Although the extra time and expense is not outcome determinative if the parent has significant resources, it *is* outcome determinative if the parent lacks the resources. In that situation, the parent simply will not file the complaint and DCPS thus will "win." Even those parents represented by public interest attorneys are affected. These attorneys have been bringing fewer cases following the shift because the resources of their organizations are limited. The shift is also, of course, outcome determinative when the parent is represented by less able attorneys. As the hearing officers put it, the shift changes the outcome when both parties are unprepared.

According to both hearing officers and public interest attorneys, the shift has had a particularly noticeable effect on compensatory education ("comp ed") cases, where the percentage of settlements has decreased. The public interest attorneys explained that, before the shift, when DCPS had the burden and could not prove FAPE, it often would negotiate regarding the comp ed award. Now, however, DCPS usually does not settle,

putting the parent to his or her proof instead. Accordingly, the parent now must, under *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), present expert evidence establishing exactly what is required to place the student in the situation she would have occupied but for the denial of FAPE. Again, with rising expense and time requirements for obtaining a comp ed award, the cases are less attractive to pursue and fewer parents can afford to do so.

The public interest attorneys pointed out another change caused by the shift. According to these attorneys, DCPS is typically nonresponsive with respect to providing the child's records, often because the school has not kept or cannot find the records. Called upon to carry the burden of proof and thus prove that DCPS is not providing FAPE, the parent who cannot afford an expert and cannot prove his or her case through the school's documents truly faces a difficult predicament. The only way to prevail would be for the parent to be such a good witness that, without any documentation, he or she can refute the testimony of the school's witnesses. This is unlikely.

Significantly, during our interviews, the only stakeholders who commented on the issue of attorney "abuses" indicated that they believed that the shift had had little effect on curbing them. In particular, several interviewees noted that some attorneys file complaints based on DCPS's failure to hold a meeting when the parent (or attorney) him or herself had obstructed the scheduling of the meeting, and that this abusive practice

seems to be continuing.¹ This touches on a very significant matter for DCPS. As a result of serious problems with the implementation of hearing officer decisions (“HODs”), DCPS has been operating under a consent decree for many years and struggling with a huge backlog of unimplemented HODs. To the extent that parents or their attorneys obstruct the implementation of HODs (by, for example, making it impossible to schedule IEP or MDT meetings ordered by the Hearing Officer), they exacerbate the backlog issue. Although we can appreciate DCPS’s eagerness to address this costly problem, the change in burden of proof does not appear to have produced any change in this behavior.

B. The Data

Given our conversations with the various stakeholders, we expected to see evidence that fewer complaints were being brought or at least that DCPS was prevailing more often. In fact, as shown in the chart below, the number of cases filed in our sample periods remained constant, as did the percentage of litigated cases in which the parents prevailed. What changed drastically, however, was the percentage of cases settled; that declined sharply. The other drastic change is the increased number of withdrawals. We would point out that the net effect of the substantial decrease in settlements is that DCPS “prevailed” more often because a settlement could be understood to represent a parent “win.” Presumably the decline in settlements flowed from the significant advantage

¹ OGC mentioned obstructing meetings as a serious abuse both before and after the shift, and the hearing officers specifically said that they had seen no change in the number of such cases.

DCPS now has in not having to prove FAPE unless the parent has established a denial of FAPE. Accordingly, DCPS has lost one of the most important incentives to settle.

We wonder whether these statistics reflect the concerns that our interviewees cited regarding the chilling effects of the shift: parents or their attorneys may be deciding not to pursue cases when they cannot obtain records and they cannot afford experts. We would liked to have obtained information regarding individual students' eligibility for free lunches because that would have given us a way to evaluate whether the chilling effects of the shift were more severe for low income children. We were unable to do this, however. Below is the chart of our statistics followed by our observations and conclusions:

Analysis of DCPS Due Process Cases: Feb. 2006 v. Feb. 2007

Totals	Feb. 2006	Feb. 2007	% Change
Complaints filed	320	320	0%
Hearing hours requested	724	1526	+111%
Withdrawals	61	82	+34%
“Last minute” withdrawals ²	13	35	+169%
Continuances	71	84	+18%
Total “cases”³	167	118	-29%
Cases w/o Settlement Agreement (SA) or hearing	7	9	+29%
Total cases settled (%)	86 (51%)	25 (21%)	-71% (-59%)
-- on the record (%)	79 (92%)	7 (28%)	-91% (-70%)
-- privately (%)	7 (8%)	18 (72%)	+157%(+800%)
Total hearings (inc. SA) (%)	153 (92%)	91 (77%)	-41% (-16%)

² “Last minute” withdrawals were those dated within two days of the scheduled hearing.

³ There were several unofficial continuances, such as snow day rescheduling, that cause the number of cases not to match the number of complaints minus the withdrawals and continuances.

Litigated hearings (no SA)	74 (153-79)	84 (91-7)	+14%
% litigated hearings	40%	92%	+130%
Total issues litigated	117	120	+3%
– Parent prevails (%)	78 (67%)	82 (68%)	+5% (+1%)
– DCPS prevails (%)	39 (33%)	38 (32%)	-3% (-3%)
Total litig'd: placement (%)	38 (32%)	17 (14%)	-55% (-56%)
– Parent prevails (%)	26 (68%)	14 (82%)	(+21%)
– DCPS prevails (%)	12 (32%)	3 (18%)	(-44%)
Total litig'd: conduct eval's (%)	20 (17%)	18 (15%)	-10% (-12%)
– Parent prevails (%)	15 (75%)	11 (61%)	(-19%)
– DCPS prevails (%)	5 (25%)	7 (39%)	(+56%)
Total litig'd: HOD/SA implemt (%)	18 (15%)	32 (27%)	+78% (+80%)
– Parent prevails (%)	16 (89%)	27 (84%)	(-6%)
– DCPS prevails (%)	2 (11%)	5 (16%)	(+45%)
Litigated cases Parent prevails (based on issue prevail rate)	50 (67%)	57 (68%)	14% (1%)
Total cases Parent prevails (wins + SA)(assumes SA is Parent "win")	136 (81%)	82 (69%)	(-15%)

Observations and Conclusions

- Same number of complaints filed, 2/06 and 2/07 (320). Shift in the burden of proof did not dampen the filing of due process hearing requests.
- Same number of complaints, but huge increase in hearing hours requested. (Similarly, ten-fold increase in cases involving requests for multiple time slots.) This appears to be a direct result of burden of proof shift. Reflects greater time needs for Parent to carry burden. Shift appears to impose significant additional resource burdens on Parents and on the system.
- Sharp decrease in number of settlements, as well as in percentage of cases that settle. Shift in burden of proof gives DCPS less incentive to settle and greater incentive to put Parents to their proofs.

- Of cases that settle, dramatic increase in private settlements. DCPS apparently concluded that private settlements are preferable to “on the record” settlements.
- Significant increase in withdrawals, including last-minute withdrawals. Some withdrawals (in both ‘06 and ‘07) may in fact represent private settlements that were not recorded by the Student Hearing Office (SHO). To the extent the withdrawals represent private settlements, the observed decline in settlements from 2/06 to 2/07, though still substantial, would not be quite as dramatic as would appear from SHO records alone.
- The jump in withdrawals from ‘06 to ‘07 may also reflect difficulties of Parents in securing witnesses and documents necessary to carry the burden of proof, although some evidence points to “forum shopping” based on hearing officer preference. If true, the increase in the number of these “forum shopping” cases between February ‘06 and ‘07 would suggest possible discrepancies in how hearing officers apply the burden of proof. This issue deserves further inquiry.
- Modest increase in continuances, which may also reflect Parents’ concerns about meeting the burden of proof.
- Although substantially fewer “cases” in 2007 than 2006, much higher percentage, and higher actual number, went to hearing. Again, this reflects the sharp decline in settlements.
- Of cases that went to hearing in 2/07, no increase in success rate of DCPS. Parents continued to prevail in two-thirds of litigated cases.
- Although no decline in Parents’ success rate in litigated cases, Parents’ success rate overall, as percentage of all complaints or of all “cases” declined somewhat, due to increases in withdrawals and continuances and decrease in settlements. Again, this may reflect an impact of burden of proof shift.
- Significant decrease in percentage of litigated cases concerning placement, but Parents prevailed in a higher percentage of those cases. Reasons for these changes are not obvious. Decrease in placement cases may reflect Parents’ concern of lower likelihood of success, but that concern is not confirmed by Parents’ actual success rate in these disputes, which was very high in 2007 (82%) – indeed, higher than 2006 (68%). It may be that only the strongest placement cases are going forward, but it may also be that only parents with sufficient resources are now able to bring these cases.

- DCPS achieved a modest increase in success rate in cases concerning student testing/evaluation issues. This may reflect greater burden on Parent to demonstrate that Parent cooperated and did not interfere with DCPS' attempts to schedule testing. May also reflect greater burden – and expense -- of demonstrating that additional testing is required beyond what was provided, and/or that DCPS is performing better in providing timely and appropriate evaluations.
- Significant increase in number of cases seeking to enforce prior HOD or SA, and Parents continued to prevail in the vast majority of those cases, although the Parent success rate declined slightly.

FINAL THOUGHTS

Considering the OGC's concerns regarding attorney behavior labeled as abusive, it seems to us that the shift has had virtually no effect on the behavior at issue. First, although the OGC cited filing on minor procedural issues as an important abuse, the shift clearly has had no impact on that behavior. Since the decision of *Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006), parents have had the burden of showing that a procedural violation resulted in a "loss of educational opportunity." In other words, the burden had already shifted for cases involving procedural violations so the DC Board of Education's action had no impact in this area. Moreover, having read a substantial number of cases filed both before and after the shift, our committee can say that we simply did not find many cases involving only minor procedural issues.

Second, we cannot see any connection between the shift and OGC's other primary concerns – which revolve around the perception that parents obstructed the scheduling of meetings and testing ordered by an HOD and then subsequently filed complaints about DCPS not implementing the HOD. It is hard to see why a shift in the burden would

affect this behavior. Moreover, the hearing officers whom we interviewed indicated that they were seeing the same number of these cases as before. Nonetheless, given the problems that DCPS has regarding unimplemented HODs, finding a way to effectively discourage parents from obstructing their implementation would be very worthwhile.

As indicated above, however, we are concerned that the shift has had a chilling effect on parents' ability to redress school failures to provide FAPE. The parents of low income children were already at a substantial disadvantage because of (1) the \$4000 cap on attorneys' fees for which a prevailing party may be reimbursed and (2) case law making expert fees non-reimbursable. Both of these factors deserve attention in their own right. The fee cap is a function of congressional control over DC appropriations. By all accounts, Congress may soon lift the DC fee cap; however, no action is currently anticipated, either by Congress or by the DC Council, to address reimbursement of expert fees.

In any case, the shift in the burden of proof means that it is even more expensive and time-consuming for a parent to litigate, and this presumably has had a chilling effect by itself. The most harmful result effect of the shift, however, may be the effect on parents' cases when DCPS can not or will not provide records. If the burden rested with the schools, they would either have to produce the records or bear the consequences of not having the documents available to prove their cases. Now that the burden is on the

parent, the school's inability or unwillingness to produce records can completely shut off the parent's case.

In sum, it seems to us that the shift has had little effect on what OGC saw as attorney abuses, but has had an adverse effect on parents' ability to secure FAPE, particularly in light of other factors such as the fee cap, non-reimbursable expert expenses, and access to records. We assume that the parents of disadvantaged children are the most seriously prejudiced, although we were not given the data necessary to determine whether we are correct in that assumption.