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The need to repair
the system for resolving
special education disputes in the
district of columbia

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This has been an unusual project for Piper Rudnick. It is rare for this firm or any law firm to invest major resources in policy-related research and development. It is also unusual for 20 lawyers, including seven partners, to devote over 2,300 hours to any pro bono undertaking. We are grateful to all of them for their willingness to get involved in spite of their busy schedules and to firm management for encouraging them to do so. We also would like to single out Leah Medway, the firm’s Pro Bono Manager, for her invaluable assistance on this project and the firm of SPF45 Design (www.spf45.com) and its principals, Ted Baab and Fil Seaton, who provided all of the design and production services for this report on a pro bono basis.

There is no question that this has been a worthy undertaking. As the report that follows reflects, the problems confronting the District of Columbia in disputes about special education are enormous and required independent review. The fact that we learned that so many of us at Piper Rudnick have been affected personally by special education needs is a reflection of just how widespread and important the issues are.

We are pleased that we could jointly participate in this project with DC Appleseed, a truly impressive organization that, like Piper Rudnick, is committed to improving the quality of life and services in the District of Columbia.

We also appreciate the willingness of DCPS to make its personnel and statistics available to us, knowing full well that our study was to be an independent one and harsh criticism was likely to be forthcoming. There are a lot of dedicated public servants at DCPS working very hard under difficult circumstances to serve children. We are anxious now to move to the next phase: assisting DCPS in implementing the recommendations contained in this report.

Sheldon Krantz



**DC APPLESEED
C E N T E R**

The DC Appleseed Center is an independent non-profit advocacy organization dedicated to making the District of Columbia and the Washington Metropolitan area a better place to live and work, focusing primarily on strengthening the financial health of the District and enhancing the performance of governmental institutions that affect the District. The solutions DC Appleseed presents to the public, civic leaders, and government representatives are based on nonpartisan analysis and include concrete proposals for change. DC Appleseed is one of a number of local centers across the country fostered by the Appleseed Foundation.

The DC Appleseed Center thanks the following for their generous contributions:

- *Members of the DC Appleseed Special Education Project Team*, who volunteered countless hours to convening as a group, researching issues, formulating recommendations, and drafting this report. The names of all project team members are listed in the Appendix of this report.

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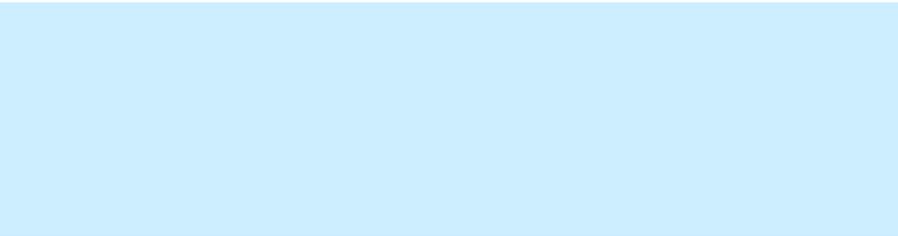
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1 Executive Summary

IT IS WELL-KNOWN THAT THE DISTRICT OF COLUMBIA’S failure to respond effectively to children’s special education needs is one of the most serious problems confronting the nation’s capital. What is less widely appreciated is the negative impact that the ever-growing number of formal special education disputes between parents and the District of Columbia Public Schools (DCPS) is having on this problem. Despite DCPS’ recent concerted efforts to improve the dispute resolution system, much repair work is still needed. And until that work is done, DCPS will continue to divert significant resources away from programs for students and into costly, protracted adversarial proceedings with parents and lawyers.

Without question, the lack of appropriate special education programs and services at the local schools is at the core of most disputes. And as long as available services fail to meet the pressing needs of students throughout the District, disputes are inevitable, and the District will continue to be forced to expend disproportionate resources on subsidizing private school placements, related transportation expenses, and the costs associated with formal due process hearings.

This shortage of available services should be of great concern to the entire District government—not just DCPS—and addressing that shortage should receive the highest priority.

The shortage of services, however, is not the only problem. Failures in DCPS’ dispute resolution process exacerbate and compound the other problems already plaguing the special education system. DCPS’ inability to promptly address parental inquiries and concerns, due often, but not always, to lack of special education services, results in anger and mistrust on the part of parents. Responding to parental concerns earlier and more effectively can minimize this anger and mistrust and, at the same time, reduce costs and permit additional resources to be reallocated to the special education program in local schools. This report offers specific findings and recommendations concerning how this can be done.

DC Appleseed Center for Law and Justice and Piper Rudnick LLP¹ have jointly conducted an extensive and independent 14-month study of the process for resolving special education disputes in the District of Columbia. During the course of this study, through interviews with parents

and their attorneys, as well as DCPS management and staff, among others, we determined that there are far too many due process hearings in the District; that the costs relating to them are already much too high and are escalating; and most importantly, that, as a result, the special education needs of too many children are not being met.

The federal Individuals with Disabilities Education Act, commonly referred to as IDEA, was designed to promote a child's best interests by encouraging parents and school systems to work collaboratively to identify a child's special education needs and to resolve disputes as early as possible. Unfortunately, that goal is not being achieved in the District, despite significant efforts by many administrators, principals, school personnel, and parents.

The following example illustrates what sometimes happens to District students and their parents when the dispute resolution system fails. It underscores the shortcomings of the District's current special education dispute resolution system and shows how childrens' special education needs can go unmet, how their parents become frustrated, and how funds are diverted from student services into adversarial proceedings.

• • •

Joshua is having trouble in school. He is not keeping up academically and is often inattentive and disruptive. In January 2001, on the advice of his pediatrician, Joshua's mother requests that DCPS conduct an evaluation to determine if he is eligible for special education services. In spite of continuing academic and behavioral problems, four months go by and nothing is done. Because DCPS personnel do not respond to her request, Joshua's mother seeks the help of a special education attorney in May 2001. Her attorney then files a request both for mediation and a due process hearing in June 2001.

DCPS does not respond to the request for mediation and a hearing date is set for September 2001. The attorney

for Joshua's mother contacts the DCPS lawyer in August 2001 to see if there may be a way to settle the matter by arranging for an assessment. The DCPS lawyer responds that he has not yet had time to review the case and will get back to her as soon as he has completed the review. He never does, and the case goes to hearing in September.

At the conclusion of the hearing, the hearing officer orders DCPS to conduct the evaluation within 10 days. Joshua's mother again contacts the school when nothing happens for three weeks. The special education coordinator at the school tells Joshua's mother that she has not seen the hearing officer's decision, but that the school cannot respond that quickly regardless of what the hearing officer ordered. In November 2001, her attorney files another hearing request in an effort to compel DCPS to comply with the hearing officer's decision.

While his mother is waiting for a new hearing date, Joshua is suspended for fighting in school. Because his mother works outside the home, she now has to make day care arrangements for Joshua. A new hearing date is finally set for January 2002—a full 12 months after Joshua's mother made her first request for a special education evaluation.

At the end of the second hearing, the hearing officer orders a private assessment at DCPS expense. The child psychologist conducting that evaluation determines that Joshua has Attention-Deficit/Hyperactivity Disorder (ADHD) and a specific reading disability with severe reading and comprehension deficits. She states that the delay in the assessment process has been harmful to Joshua and that he should be placed in a classroom with a low teacher-to-student ratio, receive special instruction for his learning disability, and be evaluated immediately by a psychiatrist for possible bi-polar disorder.

The District has the highest rate of hearing requests in the entire nation.

IDEA's vision of collaborative decision-making and early dispute resolution is failing in the District.

The hearing officer then orders DCPS to develop an Individual Education Plan (IEP) for Joshua and to schedule an IEP meeting with Joshua's mother and her attorney within five days. The IEP meeting is postponed twice and when it is finally held, in May 2002, the school's psychologist and learning disabilities specialist fail to appear. Counsel for Joshua's mother then files a third hearing request in June 2002, which is 17 months after she first sought help for her son.

That hearing is held in September 2002. At the request of the attorney for Joshua's mother, and in view of DCPS' failures to respond in a timely fashion, the hearing officer orders that Joshua be enrolled in a private school and receive special education services for his learning and emotional disabilities. DCPS is then required to pay for the full cost of a private school tutor as well as pay for the necessary transportation, the fees for the attorney for Joshua's mother, and the private assessment -- in addition to the costs for all of the time spent by DCPS personnel and the hearing officers preparing for and participating in the various hearings. These costs will likely exceed \$12,000 for due process, \$10,000 for compensatory education services, and \$55,000 each year for tuition and transportation.

• • •

This example, variations of which occur often, illustrates the delay, frustration, and anger that result when IDEA's vision of collaborative decision-making and early dispute resolution is not realized. It also illustrates the enormous costs that are exacted when that vision is not realized. While this example might be less likely to occur today due to DCPS' recent reform efforts, the fact is that DCPS continues to struggle with a reputation and processes that often discourage parents from even attempting to work with public school staff. As a result, parents far too often simply file a formal due process hearing request at the earliest

opportunity. There are other reasons, too. The due process hearing system is seen by some as a vehicle for obtaining a private school education at public expense. The demand for hearings is now so great that the District has the highest rate of due process complaints and hearings in the entire nation. At the same time, there are very few requests for mediation or other forms of early dispute resolution, and few cases are settled or otherwise resolved prior to a hearing. Significantly, the opposite is true in virtually every other jurisdiction in the United States.

This report recommends ways for DCPS to reduce reliance on due process hearings by implementing IDEA's vision of parent-school collaboration and early dispute resolution. Our findings and recommendations are summarized below and are explained in detail in the report narrative.

Findings

1. DCPS does not have a clear system of accountability for ensuring that disputes are effectively resolved at an early stage, preferably at the school level.

- Special education responsibilities are not well-defined, and lines of accountability are fragmented. Principals lack control over the delivery of services in their schools, and lack the authority to encourage early resolution of disputes and to provide special education services to children who need them.
- Sanctions are not imposed when DCPS personnel violate IDEA requirements, and there are few positive incentives, such as awards, recognition, and professional development opportunities.
- Performance measures for special education program responsibilities have not become a significant part of the staff evaluation process at any level within DCPS administration.

2. The special education decision-making process is undermined by a climate of mistrust and hostility that characterizes the interactions between parents and school personnel.

- Interactions among parents, attorneys, and school personnel are often hostile and adversarial. Some parents believe that school personnel are indifferent and unresponsive to their concerns. Some school personnel believe that parents often only want DCPS to subsidize the cost of private school tuition. They also believe that collaboration is impossible because attorneys demand due process hearings so that they can receive attorneys' fees that may otherwise not be available to them.
- DCPS has not issued policies, offered effective programs, or provided training to its personnel to encourage the collaborative process envisioned by IDEA. This contributes to the problems readily apparent during IEP meetings, which are often unduly contentious and notable for their lack of basic civility and mutual respect among participants. Collaboration is further impaired by essential school personnel who fail to attend meetings, or come unprepared.
- DCPS administrators and schools often fail to assess children, schedule IEP meetings, and comply with hearing officer decisions (HODs) in a timely fashion. These failures cause the majority of due process hearing requests

3. Some plaintiffs' attorneys clearly contribute to the current shortcomings within the dispute resolution and hearings process, and take unfair advantage of the system.

- There are attorneys "gaming" the system and taking advantage of DCPS' inability to respond effectively to due process complaints. There is also a widely-held perception among DCPS personnel that a number of plaintiffs' attorneys behave unethically.

4. DCPS' efforts to resolve special education disputes in an appropriate and cost-effective manner have been inadequate and ineffective.

- DCPS does not have an effective program for addressing parent complaints at the local school level.
- In 2002, DCPS created the Parents' Special Education Service Center, a centralized call center designed to provide parents with an opportunity to express their concerns, which, in turn, could be referred to individual schools for a response. Unfortunately, until the spring of 2003, the existence of the "call center" was not well publicized and its potential value as a means for early dispute resolution has not been realized.
- A number of jurisdictions resolve special education disputes at early stages through the assistance of neutral facilitators and mediators who participate at critical points in the process, including at IEP meetings where many disputes initially arise. DCPS does not employ any neutral facilitators, and generally mediators are only available after a hearing has been requested.
- Mediation is infrequently utilized because it is not publicized as a dispute resolution option and because DCPS does not systematically respond in a timely fashion when mediation is requested. In addition, there is a widely-held perception among parents and their attorneys that mediation agreements are often not honored by DCPS and the mistaken, but predominant view, that such agreements are unenforceable.
- Until recently, DCPS lacked a formal intake system to screen out and resolve complaints in uncontested matters. In addition, little emphasis has been given to pursuing settlement discussions or taking other

steps to avoid unnecessary, time-consuming, and expensive due process hearings.

5. The District's due process hearing system is in a state of disrepair and continues to operate poorly despite DCPS' recent efforts to improve it.

- In spite of recent attempts to address its shortcomings, the Student Hearing Office continues to lack the resources necessary to properly manage the hearing process. Even though the backlog of due process hearings has been significantly reduced, a number of plaintiffs' attorneys are concerned that imposition of strict time limitations on individual hearings does not provide them with sufficient time to adequately present a case.
- In 2002, DCPS increased the minimum professional requirements for hearing officers and also decided not to renew contracts with a number of experienced hearing officers. The new hearing officers may be knowledgeable about conducting administrative hearings but have not been adequately trained on special education requirements. In the view of many parents' attorneys, this has led to a decline in the quality of due process hearings and hearing officer decisions (HODs) and an increase in the number of appeals filed in federal court.
- DCPS has not taken appropriate steps to ensure that schools comply with HODs. This, in itself, contributes to the high volume of due process complaints since an estimated one-third of those complaints concern failures to comply with HODs.
- Although a new Office of Administrative Hearings (OAH) will be handling special education due process hearings in the future, DCPS cannot ignore the existing flaws in the hearing system as long as it remains responsible for administering the process.

- Normal rules of decorum and the required attendance of DCPS witnesses have not been part of due process hearings. Key DCPS witnesses, for example, often fail to arrive at hearings on time or fail to appear at all. This has created enormous problems for DCPS attorneys. In addition, in many instances, basic equipment for a hearing, such as tape recorders, have not been available.

Recommendations

Due to recent efforts by DCPS administrators, some progress is being made. Hearings are now generally scheduled on time, weekly reports are produced that track each school's compliance with IDEA, and caseloads (and consequently, turnover) of attorneys in the DCPS Office of the General Counsel (OGC) have been reduced.

At the same time, however, these administrative improvements have not translated into significant, tangible results for children in the classroom or, for that matter, greater parental satisfaction with the system. The overwhelmingly negative perception of parents, attorneys, and the general community remains. And the number of hearing requests has steadily increased rather than decreased.

We recognize that turning the system around will take time, and we commend the hard work and dedication of the DCPS managers and staff who are striving to make progress. Yet we also believe, as do they, that there is much more to be done. To that end, we offer a series of recommendations designed to improve the dispute resolution process, so that parental complaints can be resolved earlier, more effectively, and at less cost to the District, and—more importantly—so that children, like Joshua, can receive the special education supports and services they need in a more timely and appropriate fashion. Our recommendations follow.

1. Provide the Necessary Resources to Meet Special Education Needs in the Neighborhood Schools.

▪ The excessive costs relating to the special education dispute resolution process will continue to be inordinately high until there are resources to address the existing deficiencies in assessment and placement services. The remediation of this deficit should be afforded substantial and immediate attention by DCPS and the District government. In addition, because of the need to comply with existing court orders in special education class action lawsuits, the special education program should generally be exempt from arbitrary cost-saving measures, such as across-the-board budget cuts, hiring freezes, and reorganizations. Such measures will only result in greater costs in the long run, and will serve to needlessly erode DCPS’ credibility in the courts.

2. Establish Clear Lines of Authority for Special Education Program Responsibilities and Make DCPS Personnel Accountable for Matters Assigned to Them.

▪ Responsibility for early resolution of special education disputes and for ensuring compliance with IDEA should begin with school principals. Principals should be required to develop a special education accountability plan as part of their school’s annual plan. This plan should designate the staff members responsible for specific special education responsibilities and duties, including those staff members assigned to early dispute resolution.

▪ Central administration must be held accountable for implementing IDEA requirements within its control, and outside the control of individual principals, such as managing service providers and scheduling assessments.

▪ Performance measures should be developed for all DCPS personnel with responsibilities related to

special education and should become an important part of staff evaluations at every level of the DCPS bureaucracy.

▪ DCPS should develop a system of incentives to encourage early and effective resolution of special education disputes, including monetary rewards, special recognition, and professional development opportunities.

▪ DCPS must provide principals with sufficient resources to comply with both hearing officer decisions and agreements reached in mediation, settlement, or other forms of dispute resolution. When principals do not have the resources to comply, there should be an established policy and procedure that requires notification to the central Office of Special Education, which must then be held accountable for ensuring required services and supports are delivered to the student.

▪ DCPS, either on its own, or with outside assistance, should conduct periodic audits so that it can prepare “report cards” on whether its policies on early and effective resolution of special education disputes are being implemented.

3. Focus Reform Efforts on Positive Improvements instead of Blaming Attorneys.

▪ Blaming the lawyers will not solve the problems confronting special education. The solution lies in DCPS putting in place effective procedures to address parents’ concerns early in the process, and having DCPS attorneys in place to respond to overreaching by plaintiffs’ lawyers when it occurs.

▪ DCPS should modify its regulations and improve its hearing request form so that attorneys are required to consolidate all complaints regarding a particular student’s educational program.

The District is now spending millions of dollars on a dispute resolution system that is not working.

Over-reliance on the contentious hearing process generates enormous costs and diverts resources from needed services.

- The District government should seek ways to support nonprofit legal service providers, including area law school clinics, to increase representation by attorneys motivated entirely by the public interest.

4. Provide and Publicize Procedures for Resolving Disputes at an Early Stage

- DCPS should provide training to principals and others at the neighborhood school level (including front office staff and regular education teachers, as well as those with special education responsibilities) and to parents on special education collaborative problem-solving and early dispute resolution techniques.
- DCPS should devise and implement a public education outreach program that provides easy-to-understand information regarding the District’s commitment to collaborative problem-solving and early special education dispute resolution. Outreach materials should explain the special education program and the options available to parents who are interested in special education services for their children. DCPS should also provide direct financial support to one or more independent parent organizations to assist them in offering separate training on IDEA requirements for parents.
- DCPS should support the work of the Parents’ Special Education Service Center by effectively publicizing its services. It should also establish state complaint procedures that are timely and enforceable. DCPS must ensure that these procedures are perceived as neutral and effective. They must be readily available to parents to help resolve their complaints even when attorneys are not involved.

- DCPS should provide mediation and facilitation services through an independent dispute resolution organization that offers trained mediators and facilitators who are knowledgeable about special education issues. Mediators and facilitators can either be qualified professionals or trained volunteers, including parent and teacher volunteers.

- DCPS should establish pilot programs in a number of schools to help develop and evaluate training and early dispute resolution programs. These pilot programs should be designed with the assistance of a task force that includes parent, school, and community representatives. Through such initiatives, DCPS should establish new programs designed to achieve early resolution of special education disputes. Such programs should enhance complaint procedures at individual schools by making neutral facilitators and mediators available to help resolve differences before, during and after IEP meetings; offering pre-hearing conferences; and expanding mediation programs.

- DCPS should continue to support the newly reconstituted Dispute Resolution Committee by providing adequate, properly trained staff with appropriate authority to ensure that accurate screening decisions are made and that hearings are reserved for cases that cannot be resolved through other forms of dispute resolution.

- To remove unnecessary barriers to early resolution of special education disputes, applicable regulations should be revised to permit attorneys’ fees for successful mediations and other settlement negotiations.

5. Improve the Administration of Due Process Hearings.

- The special education hearings process should be transferred to the Office of Administrative Hearings (OAH) at the earliest possible opportunity. Prior to the transfer, however, administrative law judges must receive appropriate training on special education issues and IDEA requirements.
- During the transition, DCPS must address the most urgent needs of the Student Hearing Office, which are to enhance the case docketing and tracking system, and to provide training to existing hearing officers on special education issues and requirements.
- Because effective dispute resolution may be time-consuming, DCPS should assess whether the Office of General Counsel is staffed to effectively handle its dispute resolution and hearing responsibilities.
- DCPS and the Office of the Corporation Counsel must develop guidelines for determining when to appeal adverse Hearing Officer Decisions.

Cost Analysis

In addition to determining the most important causes of the due process crisis, and developing recommendations to address those causes, we also analyzed the costs of maintaining DCPS' current process for resolving disputes and the potential savings if the necessary improvements are made. We found that the District is now spending over \$13 million on a dispute resolution system that is not working. Another \$137 million—over half the special education budget—is budgeted for private school tuition and transportation. And these millions do not even begin to capture the collateral costs of failing to get needed services to children in a timely fashion. While some of our recommendations will require short-term increases in spending, the long-term

savings should be substantial—both in terms of redirecting the funding that currently supports litigation to the actual delivery of educational services and in avoiding the escalating costs that occur when children's educational needs are neglected.

The Next Step

At the outset of this project, DC Appleseed and Piper Rudnick made it clear to DCPS that we did not wish to simply conduct another study. There have already been enough studies of special education in the District. Instead, we committed not only to finding out why the dispute resolution system was not working effectively, but also to determining specifically what could be done to repair it—and then staying involved to help DCPS bring about necessary changes, including assistance in identifying the financial support to make these reforms actually happen. We are also prepared, for example, to assist in drafting regulations, developing pilot programs, and participating in making our recommended new initiatives work. While special education problems will never be resolved until appropriate educational support and services are provided to children in a timely fashion, we are convinced that, if implemented, our recommendations will help repair the system for resolving special education disputes in the District of Columbia. We are also convinced that this will allow the District to redirect resources to needed programs and help deliver appropriate services to more students more quickly. We look forward to working with DCPS, school staff, and parents to help make that happen.



2 Introduction

IT IS OFTEN SAID THAT THE SPECIAL EDUCATION system in the District of Columbia is “broken.” That statement means different things to different people. To some it means that far too much money is being spent on special education, taking money away from other District programs, including from regular education; to others it means that parents and lawyers are taking advantage of the system and requiring the District and its taxpayers to pay for expensive private schools; and to still others it means that students needing special education services—services they are entitled to by law—are not receiving them. Paradoxically, after studying the issue for over a year, we concluded that the District’s special education system is broken in all these ways—and more. In fact, it was fairly easy to determine that was so.

What is much more difficult is to determine ways to actually fix this broken system. We were not so presumptuous as to think we could do so. Many who know much more about special education than we do have written more reports on that subject than we can count—yet the problems remain. The special education program in the District of

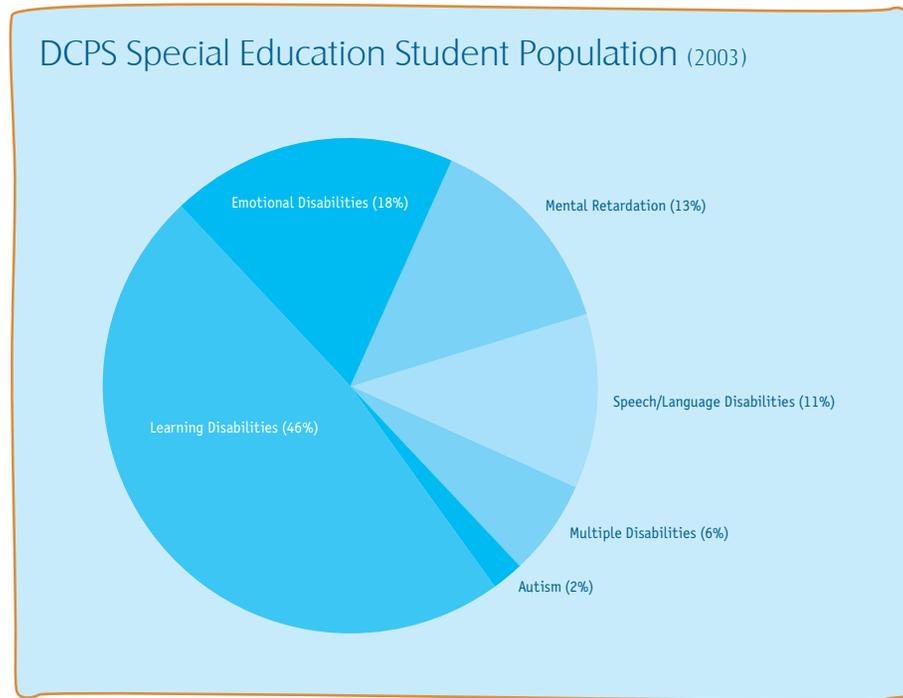
Columbia Public Schools’ (DCPS) faces numerous challenges, including a lack of state-operated programs, a high-poverty student population, and outdated facilities, to name only a few. There are no easy fixes. But what we thought we could do is address one piece of this system, study it with care, and develop fairly detailed recommendations about how to improve it. That is what we have tried to do.

The part of the system we have addressed is the part where the system’s failure may be the most readily apparent—its inability to address and resolve problems before they develop into full blown due process hearings and the District begins to spend its limited funds on lawyers and adversarial proceedings rather than on services for students. The District has the dubious distinction of leading the nation in the number of due process complaints that are filed against its special education system and it pays dearly for that distinction. It spends millions on these proceedings and much more on the private placements and associated transportation costs that often result. And because it spends those millions, it has less money available to provide services to other students who need them, causing more complaints to be filed, thereby perpetuating the vicious cycle.

Therefore, we have tried to answer this question: why are there so many due process complaints in the District? More specifically, we have tried to determine how these complaints can be resolved at an earlier stage, so that services are delivered more quickly and the huge costs of the due process machinery are re-directed back to programs for students.

The report addresses these questions in the following order. In the first section of the report, we offer general background information concerning special education, a description of our methodology and the members of our project team, the legal framework governing special education, and the specifics of

DCPS' special education history. In the second section, we state specifically what we found to be the causes and consequences of the inordinate number of due process complaints. After each set of findings, we offer recommendations for addressing each of the problems found. In the third section—our cost analysis—we explain why we believe that implementation of our recommendations will actually save money for the District in the long run, in addition to delivering more services to more students more quickly. Finally, in the concluding section we describe some next steps that DCPS, DC Appleseed, and Piper Rudnick could take together to implement the recommendations.





3 Background

A. Description of the Problem

ABOUT 11,500 STUDENTS HAVE BEEN IDENTIFIED AS needing special education services in the District, or about 17.5% of the total student population of 67,522.¹ This percentage has grown significantly in recent years, from 11.4% in 1999 to 15.4% in 2001 to the current rate. Of these students, 46% have been classified as having learning disabilities, 18% emotional disabilities, 13% mental retardation, 11% speech/language disorders, 6% multiple disabilities, and 2% autism.²

There is considerable disagreement about the role of the following factors in this substantial and escalating rate of special education enrollment in DCPS: the historical failure to accurately identify students in need of special education supports and services; over-identification of some students in recent years; and deficits in the quality of instruction provided in the general education program. But it is noteworthy that the percentage of special education enrollment in other high-poverty urban school districts is somewhat lower than that in DCPS—between 12% and 16 % of the student population.³ According to a recent report by the US

General Accounting Office, DCPS' special education population exceeds the average in 100 of the largest urban school districts in the nation.⁴ The percentage of special education enrollment in DCPS is comparable to Arlington and Alexandria, local school districts with diverse, high-poverty populations.⁵ Thus, while DCPS' percentage of students in special education is high, it is not unique.

What is unique to the District is the school system's extraordinary reliance on formal due process hearings to resolve disputes concerning the appropriate educational program for special education students. The evidence establishes that the due process hearing system is virtually the exclusive mechanism for resolving such disputes, notwithstanding that this mechanism delays the delivery of services to students and is far more time-consuming and costly than informal dispute resolution procedures.

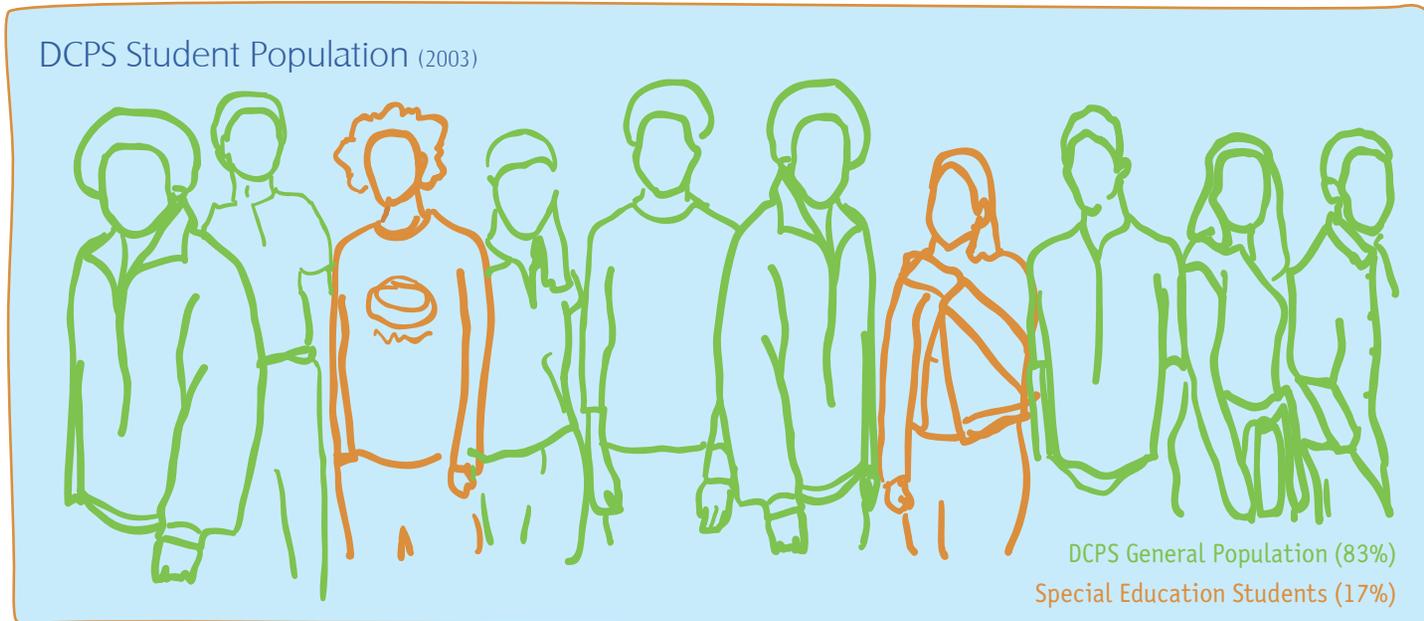
In fact, as noted, DCPS leads the nation in the number of special education due process hearings requested by parents and advocates.⁶ Moreover, the evidence shows an alarming escalation in the incidence of due process proceedings at DCPS.⁷ In fiscal year 2001, the number of hearing requests

was 2,402. In 2002, this number increased to 3,044.⁸ The result is that the District has a far higher ratio of disputes per number of special education students than any state. And, not surprisingly, DCPS has the highest percentage of disputes that are disposed of through due process hearings.⁹

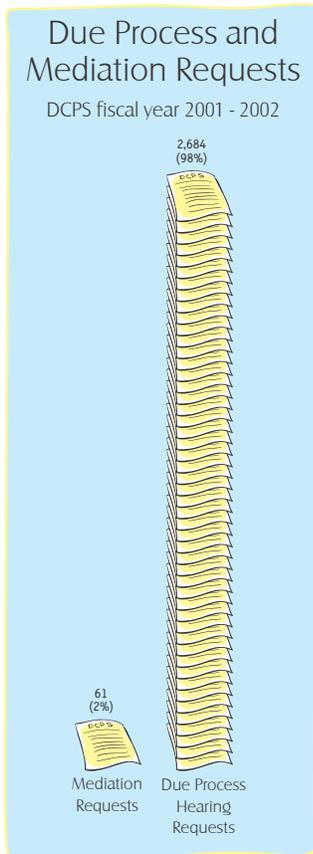
To provide some perspective regarding the disproportionate local reliance on due process hearings, during the past year about 2,500 DCPS students were referred for special education.¹⁰ Special education supports and services for approximately 1,000 of these students were ultimately determined through formal due process hearings¹¹ instead of the collaborative partnership envisioned by the Individuals with Disabilities Education Act (IDEA) through the Individualized Education Program (IEP) process. DCPS, with a total special education enrollment of 11,492, had a greater number of hearings last year than the entire state of California, with a total special education enrollment of approximately 670,000.¹²

Nationally, the trend is toward resolving a greater number of complaints outside the formal hearing process. Between 1995 and 2000, the number of hearing requests nationwide rose by an average of 10% each year, while the number of hearings actually held decreased at an average rate of 4% each year. Only about 12% of all special education complaints nationwide are resolved through due process hearings, and about 16% are resolved through an agreement reached as a result of a mediated settlement.¹³

In contrast, in DCPS nearly all special education complaints result in the filing of a hearing request and about half of those requests are resolved by a Hearing Officer Decision (HOD).¹⁴ In fiscal year (FY) 2001, 28% of hearing requests were resolved by a hearing, 50% were resolved by settlement and 1% by mediation.¹⁵ In FY 2002, 59% were resolved by HOD, 15% were resolved by settlement and 0.7% by mediation.¹⁶



There are enormous costs—in both fiscal and human terms—that flow from this over-reliance on due process hearings. As explained later in this report, the dollar costs are substantial and serve to decrease the available public funding that could otherwise be used to bolster the quality of instruction and deliver badly needed supports and services to children in their neighborhood schools. In short, the millions that are spent by DCPS on adversarial proceedings with students and their parents could and should be far better spent on providing educational services. In addition, because the school system does not respond in a timely way to disputes over the appropriate services for students, it ultimately spends more for those services—sometimes much more—than it would have if it had responded promptly. And worse, by relying on a cumbersome, expensive, poorly-functioning due process system to resolve disputes, the school system delays delivery of services to students who most need them, often at incalculable human cost.



The majority of due process hearings are conducted for the purpose of determining placement, including whether a private placement¹⁷ is appropriate, and other IEP-related implementation issues.¹⁸ In addition, DCPS data show that the failure to implement settlement agreements and the failure to implement HODs from prior hearings also contribute substantially to the hearing volume. In fact, our interviews with staff from DCPS' Office of General Counsel (OGC) and members of the plaintiffs' bar suggest that up to one-third of all requests for hearings stem from the failure to implement previous HODs and the failure to honor the terms of settlement agreements.

These two sources of due process complaints are themselves the subject of a separate class action lawsuit currently pending against DCPS.¹⁹

As will be later described, this predominance of due process hearings in the District is the result of serious dysfunction in the DCPS special education system. And this is so even though there have been considerable efforts recently to address the dysfunction. Part of the dysfunction arises from the fact that DCPS does not have available in its own schools the services that are needed to meet the needs of all its special education students. But wholly apart from the lack of services, the dysfunction is also characterized by (1) the absence of an administrative structure that supports the accurate tracking and monitoring of students from the time of referral through disposition and thereafter; (2) the absence of a management structure that fosters accountability for implementation of each student's IEP — including those developed as a result of HODs and mediated settlements; (3) the absence of incentives to engage in informal dispute resolution to resolve individual special education issues; and (4) the prevalence of incentives favoring formal complaints and hearings, including the ability to obtain expensive private school placements and attorneys' fees, all to be paid for by the school system.

These systemic deficits have created a culture of mistrust that promotes an adversarial approach to problem-solving—pitting parents and their attorneys against educators and their attorneys—at an unjustifiable cost to the quality of instruction and to the lives of our children.

This report addresses each of these systemic deficits and, in turn, makes a series of recommendations to correct them. The report also offers an analysis of the costs needed to implement those recommendations. The goal of the recommendations is to help ensure that special education disputes are resolved in a timely and effective fashion and that the disproportionate funds DCPS now spends on due process complaints and hearings will be redirected to the delivery of services to children.

B. Methodology

THIS REPORT IS BASED ON AN EVALUATION OF THE special education dispute resolution process that was coordinated by staff and board members from DC Appleseed and Piper Rudnick LLP.²⁰ Both entities are completely independent of DCPS and of the District government.

DC Appleseed's work on this project was funded in part by specific grants from the Graham Fund and the Harman Foundation, as well as general operating support from the Fannie Mae Foundation, the Meyer Foundation, and the England Family Foundation. Piper Rudnick LLP attorneys and paraprofessionals participated in the project on a pro bono basis. Attorneys, educators, as well as special education, mediation and public policy experts from the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Georgetown U. Law Center, the DC Board of Appeals and Review, the Jack Kent Cooke Foundation, and the Center for Negotiations and Conflict Management at the U. of Baltimore also volunteered on the project team.

The evaluation has been on-going since April 2002 and has included over 100 interviews with parents of special education students; DCPS administrators, principals, teachers, attorneys, special educators, and school Board members; District and federal government officials; special education experts; due process hearing officers; and attorneys who represent students and parents in special education litigation.²¹ The evaluation also included on-site school visits and observations of IEP meetings. In addition, subject to a confidentiality agreement, team members reviewed student records and analyzed data derived from the DCPS Special Education Tracking System (SETS)—the electronic data base used to collect special education data—for the period beginning September 2001 and ending June 2002. Finally, the team reviewed applicable statutory, regulatory and case law as well as certain “best practices” in other jurisdictions

and expert reports on both local and national issues in special education.²²

C. Legal Framework for Special Education Dispute Resolution

ORIGINALLY ENACTED IN 1975, IDEA ESTABLISHES the process whereby public agencies identify, assess, provide services, and resolve disputes concerning special education.²³ At its core, IDEA establishes the right of students with disabilities to a “free and appropriate public education” (FAPE), in the “least restrictive environment” (LRE), tailored to the student's individual needs, with a preference for placement in a neighborhood school. The Supreme Court has interpreted these requirements to mean that a child must receive personalized instruction with sufficient support services to enable the child to benefit educationally from that instruction. Such instruction must meet state educational standards, approximate grade levels, and comport with the individual child's education plan. The Court has further held, however, that parents are not entitled to determine the specific placement or services for the child so long as the school district provides a placement that meets IDEA's free and appropriate public education (FAPE) requirements.²⁴

IDEA and the federal implementing regulations require that each state establish a system for the identification and placement of children with disabilities and also mandate implementation of a “practical method” for determining which children with disabilities should be provided special services.²⁵ The applicable federal regulations define the eligibility determination process, requiring that after the local school receives parental consent to conduct assessments, the school is required to: (1) complete the assessment, (2) make an eligibility deter-



mination, (3) if the child is deemed eligible for special education and related services, develop an IEP that defines the child’s educational needs and specifies how those needs will be addressed, and (4) begin providing the services.²⁶

IDEA was intended to encourage collaborative problem-solving, with parents and school systems working together to identify and meet a child’s special education needs. This concept is reflected in the structure of the IEP meeting at which parents and educators work together as a team to determine a child’s individual needs and to design an appropriate educational plan to accommodate them.

The IDEA Dispute Resolution Structure

In order to safeguard the right to meaningfully access and utilize special education services, IDEA encourages early dispute resolution when there are disagreements about special education needs. This is reflected in the 1997 amendments to IDEA, which encourage the use of mediation²⁷ because of the favorable results obtained for children in those jurisdictions that invested in effective mediation programs.²⁸

The Act establishes a dispute resolution structure with the following features:

Mediation

State Education Agencies (SEAs) that receive IDEA funds are required to offer mediation to all parties.²⁹ Participation in mediation must be voluntary. However, a state may require parents who have initially requested a due process hearing to meet with a disinterested entity for advice about the benefits of mediation.³⁰

Due Process Hearing

“[A] parent or a public agency may initiate a hearing on any of the matters....relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.”³¹ When a hearing has been requested, the public agency must inform the parent of the

availability of mediation as well as any free or low-cost legal or other relevant services available.³²

Hearings must be conducted by an impartial hearing officer.³³ At those hearings, all parties have the right to (1) be accompanied and advised by counsel and by individuals with special knowledge, (2) present evidence, (3) confront and cross-examine witnesses, and (4) compel the attendance of witnesses.³⁴ Courts may award attorneys’ fees to parents if they are the prevailing party.³⁵

The public agency must ensure that no later than 45 days after the receipt of a hearing request, a final decision is reached and a copy of that decision is mailed to each party.³⁶ These decisions may be appealed to either the SEA or the federal court.³⁷ Additionally, “a complaint alleging a public agency’s failure to implement a due process decision must be resolved by the SEA.”³⁸

State Complaint Procedures

IDEA requires the SEA to establish written state complaint procedures in order to receive and attempt to resolve all special education-related complaints, including enforcement of hearing officer decisions (HODs), within 60 days of receipt.³⁹

D. The DCPS Special Education Program

DCPS’ Status as Both LEA and SEA

Because of the unique status of the District, DCPS functions as both a local education agency (LEA) and a state education agency (SEA).⁴⁰ This dual role generates substantial financial, administrative, and service delivery burdens for the District.⁴¹ For example, in a state, a school district can turn to other school districts in the same state for help placing a child. For parents, DCPS’ dual role means appellate remedies are limited. They do not currently have an effective appeal to a separate and impartial SEA if they are dissatisfied with a DCPS ruling or hearing officer decision. Instead, their only meaningful recourse is in federal court.

Status of Compliance with IDEA Dispute Resolution Requirements

Both the United States Department of Education (DOE) and the United States District Court have found substantial deficits in DCPS' implementation of IDEA requirements, including deficits in DCPS' special education dispute resolution process. In 1997, DCPS entered into an agreement with the DOE. The agreement, which promised full compliance with IDEA by 2000, provided that DCPS would deliver assessments and related services as required by IDEA, issue due process hearing decisions within 45 days, establish a system for identifying children with disabilities, develop state complaint procedures, provide transition services to older youth, establish a State Advisory Panel, and provide adequate services to limited English proficient students with disabilities.⁴²

In 2001, DOE's Office of Special Education Programs (OSEP) conducted a week-long review to determine the status of compliance with this agreement. The resulting report concluded that unless certain conditions were fulfilled by June 2002, DCPS would be ineligible for the federal IDEA grant award. Thereafter, following the 2002 assessment, DOE determined that DCPS (1) had met the requirements to provide related services as specified in students' IEPs and to provide transition services to students ages 14 and older; and (2) "had made progress in achieving compliance" in five additional areas.⁴³ However, these improvements did not support a finding of full compliance. Accordingly, the 2002 federal grant award to DCPS was only conditionally approved, subject to additional requirements. DOE is expected to soon issue its determination addressing whether these conditions have been met.

During the past decade, DCPS' failure to comply with IDEA, including implementation of due process hearing officer decisions (HODs), has led to several protracted and costly class action lawsuits which in turn have resulted in system-wide injunctions governing critical aspects of the

DCPS special education system, including the dispute resolution function.⁴⁴ As mentioned earlier, in 1999 the District's failure to hold timely due process hearings, implement settlement agreements, and carry out HODs served as the basis for *Blackman v. District of Columbia* and *James Jones v. District of Columbia* (or, *Blackman-Jones*), a major class action lawsuit that has resulted in substantial federal court intervention in DCPS operations.⁴⁵ *Blackman-Jones* provides individual plaintiffs with an accelerated procedure for obtaining federal court orders requiring DCPS to conduct hearings and enforce HODs. This procedure permits individual plaintiffs to seek immediate relief when DCPS fails to schedule a due process hearing within 45 days, fails to comply with an HOD, or fails to comply with a settlement agreement. *Blackman-Jones* requires plaintiffs to submit petitions for relief to the court-appointed Special Master who hears the complaint and makes a recommendation to the federal judge assigned to the *Blackman-Jones* case. Thereafter, the judge may order immediate injunctive relief.

DCPS has made recent improvement in both the scheduling of hearings and compliance with HODs:

Blackman

Last year, DCPS reported 233 hearing requests pending for more than 35 days; of these, 119 were overdue by 65 days or more. On May 31, 2003, DCPS reported 63 requests pending over 35 days; of these, 45 had been pending over 65 days. According to DCPS, as of June 20, 2003, all but one of these 63 cases have either been heard and an HOD has been issued or is pending, or the cases have been continued at the request of both parties.

Jones

For May 2003, DCPS reported compliance was achieved for 342 HODs and settlement agreements (SAs). This represents an increase over April 2003 when compliance was achieved in 229 cases. As of May 31, 2003, there were 2,152 HODs and SAs pending implementation and at least 1,392

of these were not in compliance with the HOD implementation deadline. DCPS says that this number will decrease after the due process hearing backlog is eliminated, because the number of HODs issued will decrease.

Administration and Management

Responsibility for IDEA compliance is shared by the schools and the central administration.

In recent years, DCPS has moved toward a decentralized, school-based system of governance. The Weighted Student Formula provides individual schools with funding based on the number of students enrolled each year, with additional funding provided for students with greater needs who are low-income, limited English proficient, and/or receiving special education services.

Based on this allocation of funds, principals are responsible for developing their school's budget and determining staffing. This means that a principal must decide whether to budget for specific positions such as a counselor, librarian, art teacher, or an assistant principal. For purposes of the special education program, principals have discretion about which staff to hire, including whether to hire a special education coordinator. At a minimum, they are required to designate an existing staff position as the SETS Coordinator. In most schools this duty is assigned to the special education coordinator or to a clerical worker.

The principal has the authority to determine how special education funds will be spent in the school. Every spring, the principal must submit for review and approval an Annual Plan that includes the school's budget.

Each school is responsible for identifying children in need of special education services. When a child exhibits learning or emotional problems in the classroom, the school convenes a Teacher Assistance Team (TAT) meeting to determine appropriate interventions. These interventions may include a special education assessment.

The school is also responsible for responding to parental requests for special education assessments. Assessments are arranged by central administration staff from the Office of Special Education (OSE), who contract with related service providers.⁴⁶ In part, this is designed to reduce the number of timeline violations⁴⁷ because central administration can schedule assessment teams at schools based on the date of the referral—which is the date that triggers IEP timeline requirements. However, this also means that principals do not control the related services provided in their schools, thereby limiting the school system's ability to hold principals accountable for IDEA timeline violations related to assessments.

Once the assessment is completed, the school and parents receive the results and the school is responsible for scheduling an IEP meeting. A central administration Special Education Specialist (SES) facilitates the meeting if his/her schedule permits.⁴⁸ If the SES is unavailable, the Special Education Coordinator or other school staff will facilitate. At the IEP meeting, special education eligibility as well as appropriate services for the child are determined. If the child's needs cannot be met in the school, an outside placement may be recommended. The IEP will then be reviewed by a central administration committee to determine whether an outside placement complies with IDEA's Least Restrictive Environment (LRE) requirements.

Finally, central administration is responsible for resolving disputes between parents and schools, and monitoring school performance. These functions are assigned to multiple offices within the DCPS central administration.⁴⁹ The DCPS Office of Management Service includes an Office of Compliance⁵⁰ which oversees the Student Hearing Office (SHO). Among other duties, the SHO administers the special education due process hearings. In addition, the Office of General Counsel (OGC) defends DCPS in all due process hearings, and negotiates settlement agreements.

Each OGC attorney is assigned to a set of specific schools, corresponding to DCPS' six school divisions. The General Counsel reports directly to the Superintendent.

The Chief of Special Education Reform, a Cabinet-level position created in 2002, reports directly to the Superintendent and is the highest ranking DCPS administrator in the Special Education program. The Chief oversees both the Office of Special Education (OSE) and Medicaid. The OSE has five divisions: SETS, Program Development, Mediation and Compliance, Nonpublic Programs, and School Support. The OSE Division of Mediation and Compliance includes the DCPS mediation program. It is staffed with four Compliance Specialists, each of whom is responsible for up to 40 schools. The Compliance Specialists monitor schools' compliance with all HODs and settlement agreements.

Current Reform Initiatives

Although this report finds serious dysfunction in DCPS' dispute resolution system, it should be noted that DCPS has worked hard to improve its special education programs as well as its internal management. In particular, the Offices of Special Education and General Counsel have demonstrated strong leadership and dedication. At present, the school system is engaged in several major reform initiatives designed to improve the timeliness and quality of special education delivery. These initiatives are described below.

Seven-Point Plan

In August of 2001, following the discovery of a substantial deficit in the agency operating budget, DCPS developed a Seven-Point Plan for the reform of special education. This Plan emphasizes accountability, communications, training, service enhancement, and improvements in management. According to DCPS, the Plan produced savings of \$6 million in 2002 by increasing Medicaid recovery, reviewing and renegotiating attorneys' fees, capping fees for independent evaluations, and reviewing invoices for contracted services.

DC Special Education Task Force

In June 2002, the DC Council enacted the Special Education Task Force Emergency Act of 2002. This Act created a city-wide task force charged with "serving as a collaborative body of District agencies that will monitor, support, and implement Special Education reform within the District of Columbia Public Schools."⁵¹

The primary functions of the task force are to: (1) approve a Reform Plan developed by DCPS; (2) monitor and assist in the progress of the Reform Plan; and (3) determine cost savings targets. The Task Force recently approved the Seven Point Plan. It is also considering problems related to transportation, as well as expanding SETS to capture data on charter school students.

New Contract Policies

In an effort to standardize procedures, collect data necessary for federal reporting and Medicaid recovery, and control costs, DCPS has launched an initiative to enter into contracts with all private schools serving DCPS special education students. DCPS expects this initiative to facilitate preparation of an "approved provider" list so that the school system can play a more active role in designating appropriate placements and services for students.

Inter-Agency Collaboration

DCPS' Chief of Special Education Reform has worked closely with the Director of the Department of Mental Health (DMH) and the DMH Director of the School Mental Health Program. A task force has been established to increase collaboration between these two agencies and to clarify their responsibilities for the delivery of mental health services in schools. Interagency collaboration has also improved between DCPS and the Family Court, due to the addition of a full-time attorney in OGC dedicated to representing DCPS in all Family Court hearings.



Findings & Recommendations

THE FINDINGS AND RECOMMENDATIONS IN THIS report address the major systemic problems that have contributed to the dysfunction of the DCPS dispute resolution system. Taken together, these problems have produced an unduly adversarial system at DCPS with a never-ending wave of due process complaints and hearings—all of which undermine IDEA’s core goals and divert precious financial and human resources away from the delivery of student services.

We address these problems through five sets of findings and recommendations. The first two findings focus on the problems at the school level, because it is at the school level where all special education disputes arise and should be resolved. The first finding addresses the system’s failure to hold DCPS personnel accountable for IDEA violations as well as the failure to provide schools with adequate support. This leads to the second finding, the lack of responsiveness by school-based staff and the pervasive mistrust among them, parents, and attorneys. The third finding addresses another contributor to those adversarial interactions: the plaintiffs’ attorneys. The fourth finding describes the current dispute resolution processes and how those processes can be im-

proved. The last finding describes the hearing process and the capacity of the Office of General Counsel.

We begin with a discussion of accountability and management. While the focus of this report is dispute resolution, we found that resolving disputes at the school level is absolutely critical to increasing parent satisfaction and reducing the number of hearings—before a parent ever feels the need to hire an attorney. This core goal cannot be realized unless management and accountability systems are improved.

Finding #1

The absence of an effective administrative structure that monitors students from the time of referral, combined with the absence of a management structure that promotes accountability for IEP development and implementation, contributes to a high volume of disputes.

A. SETS has improved DCPS’ management of data but has not been effective in improving compliance with IDEA.

In January 2000, DCPS began implementation of the Special Education Tracking System (SETS)—an electronic database with the capacity to track and monitor students

from the time of referral. SETS is a powerful management tool that can also be used to manage providers and support revenue maximization initiatives.

The leadership in the Office of Special Education (OSE) report that in its first few years of implementation, SETS has dramatically improved DCPS' ability to track cases and monitor staff performance. The data system produces regular reports for the *Blackman-Jones* case, including information about hearing requests, case closures, and outstanding HODs. SETS also generates reports for the US Department of Education that include eligibility and assessment data. Information about individual schools is reported regularly to Division Assistant Superintendents who are responsible for evaluating the performance of principals.

While SETS has had a significant impact on special education management, it has not affected the number of due process hearings or their disposition. In our interviews, central administration staff outside of OSE commented on their limited access to SETS. They believe SETS is not structured in a way that will make their work easier. For example, SETS is not currently used for developing a master hearing schedule, which would facilitate the work of OGC attorneys. In addition, school personnel required to enter data into the system complained about the amount of time needed to enter the data and the complexity of the software. They reported spending hours on the telephone with SETS specialists because the system was not working or because it was incomprehensible to them.

Additionally, a number of plaintiffs' attorneys commented that the SETS data are unreliable, because schools do not enter the data accurately. We were told by DCPS staff that SETS consultants conduct annual audits of every school to check for accuracy. According to the 2002 Audit Report, 122 of 151 schools were 98-100% accurate. Only six schools scored below a 90% accuracy level. It is probable that SETS data will become more accurate over time,

as school personnel grow more experienced with the system. OSE staff have told us that SETS training sessions are offered multiple times during the year. Staff participation in these sessions is at the discretion of the school principal. SETS personnel occasionally provide hands-on support to schools that experience problems or need to improve accuracy.

B. Special education responsibilities are poorly defined throughout DCPS.

At present, the process of identifying, evaluating, and providing services for special education students, or complying with HODs, involves the central DCPS administration and a team of related service providers, none of whom is accountable to the school principal. In each school, the OSE assigns a Compliance Specialist, an SES, and a rotating set of related service providers. There is no direct line of accountability between the school principal and these professionals. As a result, there is no one with the clear authority to direct the delivery of required services at the school level, and no one who truly "owns the problem." This absence of clear authority undermines accountability, encourages managers and staff to deflect blame when a breakdown occurs, and inevitably induces complaints when special education issues arise.

Indeed, this was a consistent theme that emerged from our interviews with the non-DCPS interviewees. They characterized typical responses from DCPS personnel to complaints about special education as nonresponsive, defensive, and full of "finger-pointing." Our interviews with DCPS management and staff support these claims. Many DCPS interviewees attributed a significant portion of the current problems to "self-interested parent attorneys" who they say manufacture business, manipulate the system, and exploit its weaknesses for personal gain. But when DCPS interview-

There is no one with clear authority to direct the delivery of required services.

Principals are not generally held accountable for IDEA violations.

ees were questioned about the system’s internal weaknesses, they typically pointed to other parts of the bureaucracy, conveying the view that they were not responsible for solving problems related to special education.

In part, these attitudes result from a systemic failure to define clearly—for all DCPS personnel—the authority and responsibilities for special education. When a violation of IDEA is alleged through a due process complaint, there is no established DCPS procedure for determining which staff member(s) should be held responsible at the school level, or whether the breakdown occurred at the central administration level.

Because every principal is responsible for hiring, evaluating and defining the roles for school staff, there are schools that lack full-time special education coordinators, SETS coordinators, and counselors. And our investigation suggests that even when such positions are filled, staff are often diverted from their proper roles and assigned to unrelated functions. For example, interviews with DCPS central administrators, as well as with school staff, indicated that the time of school-based special education staff is often spent on such tasks as patrolling hallways or collecting standardized tests, rather than providing the services prescribed in a child’s individualized education plan.

C. DCPS personnel, particularly principals, are not held accountable for IDEA violations.

Notwithstanding the well-settled proposition that the principal should be accountable for everything that happens in the school, principals are not generally held accountable for IDEA violations that result from school-based performance deficits. Principals are currently evaluated according to a broad range of performance measures, but special education measures are an insignificant part of the

evaluation. DCPS is cognizant of this problem. Enhancement of both principal and teacher evaluations is the first step in the system’s Seven Point Plan. Indeed, an advisory group is currently working to integrate special education performance measures into the evaluation process. Such evaluation measures could serve as a powerful incentive for principals to resolve special education disputes at an early stage and ensure that appropriate supports and services are delivered to their students.

The lack of accountability at the school level ultimately contributes to the excessive number of due process hearings, and this phenomenon is not limited to a handful of “problem schools.” According to SETS data, nearly every DCPS school was involved in one or more hearing requests from September 2001 to June 2002. Nearly half of all DCPS schools had 10 or more hearing requests, and 18 schools generated 20 or more requests. These schools are a combination of elementary, middle, senior, and special education schools. This suggests a problem that is pervasive.

The problem is complicated by the DCPS management structure. Principals have no authority over related service providers who actually work in the schools but whose assignments and duties are coordinated by the central Office of Special Education (OSE). The role of related service providers is critical to improving service delivery and reducing the number of complaints (e.g., they are frequently the cause of delayed IEP meetings, as will be discussed), yet they are not accountable to principals, and the central administration makes insufficient effort to determine when a school or a service provider is at fault.

The schools are divided into six divisions, and principals are directly accountable to their respective divisional Assistant Superintendents. Whenever administrators in OSE or OGC have a concern regarding a particular school, they communicate their concern directly to the appropriate Assistant Superintendent, who has authority to discipline the

principal. However, we discovered no evidence that reports provided to Assistant Superintendents resulted in direct consequences for school principals or noticeably changed behavior. Indeed, the continuing increase in hearing requests suggests that further measures are necessary.

Notwithstanding these structural problems, a number of principals are doing a good job of providing special education services. And ultimately, no school can do a good job unless it has access to the resources needed to deliver appropriate services. After all, as we frequently heard, principals cannot deliver services they do not have. At the same time, however, if structures are not in place to ensure accountability for delivery of services, violations of IDEA will occur even when services are available.

D. There are substantial disincentives for school administrators to provide special education services in the neighborhood schools.

Incentives for encouraging strong performance by school administrators in special education matters do not currently exist. In fact, notwithstanding IDEA's preference to serve children with special education needs in their neighborhood schools, several factors actually encourage school administrators to transfer special education students to either private schools or charter schools.

Evaluation and Test Scores

Current federal education law places great pressure on school districts to increase student performance on standardized testing. Accordingly, principals are evaluated largely on student test scores. And special education needs tend to consume resources that can otherwise be used to improve test results. For example, the category of emotionally disturbed (ED) children identified and sent to private schools is increasing rapidly. In DCPS, 32% of children diagnosed as ED are in private placements,¹ compared with 5% nationwide.² Both teachers and principals have a

strong incentive to refer these children to special education, because children with emotional and behavioral disorders tend to require greater time and resources, and are often disruptive to classroom teaching. DCPS and non-DCPS interviewees informed us that principals sometimes tell parents to consult with an attorney so their children can be placed in a private school, thereby avoiding responsibility for a "problem child."

The Funding Formula

The per-pupil funding formula used by DCPS operates as a disincentive for schools to provide services for special education students. The formula provides additional funds to schools for special education students based on the October enrollment census. It is intended, in part, to give principals an incentive to keep special education children, because the schools receive additional funding. However, these allocations provide for an average cost per student, classified by four levels of severity. In practice, the allocations do not always cover the actual costs of serving a specific child, leaving schools to cover the balance out of their own budgets. In addition, the funding a school receives is not adjusted for children identified or enrolled after October, thus requiring schools to assume additional special education responsibilities during the course of the school year without additional funding. Because funding levels change every year, there is little incentive for schools to develop long-term programs.³

Absence of Support

Teachers and administrators may be reluctant to start an identification process if they suspect they will not receive the support to follow through on recommendations or they do not have the training or experience necessary to take on additional responsibilities.⁴ There is virtually no incentive

The present system is not designed to encourage schools to identify and take responsibility for special education needs.

An estimated one-third of all due process hearings arise out of DCPS's failure to comply with a previous HOD or to implement a settlement.

for them to do so.

In sum, the present system is not designed to encourage school staff to identify and take responsibility for students with special education needs. As a result, the system generates substantial complaints about its failures to address those needs. And in the current system, those complaints lead to the inordinate number of due process hearings.

E. The lack of accountability and support for schools frequently results in two IDEA timeline violations: the failure to conduct IEP meetings and the failure to comply with Hearing Officer Decisions (HODs).

These limitations on accountability, combined with the absence of incentives, directly affect the priority that principals ascribe to IDEA implementation; this, in turn, affects virtually all school-based aspects of special education. Several of the principals we interviewed did not appear to appreciate the seriousness of IDEA violations, notwithstanding the negative impact of such violations on the quality of education for their students and notwithstanding the fact that such violations ultimately cost DCPS millions of dollars.

The evidence shows that activities which affect IDEA timelines, such as the scheduling of IEP meetings, are not afforded sufficient priority. Our interviews and observations indicated that school staff and related service providers regularly arrive late or fail to attend IEP meetings, which results in frequent last-minute meeting cancellations, even after parents and their counsel arrive at the school. At one school we visited, an IEP meeting was canceled without any advance notice because the classroom teacher went on a field trip. While we recognize the difficulty in taking teachers away from the classroom during the school day, such practices result in requests for due process hearings, thereby delaying services to children and escalat-

ing costs for DCPS. Indeed, according to SETS data, in School Year 2001-02, 122 hearing requests were filed based on DCPS' failure to hold timely IEP meetings.⁵

In addition, an estimated one-third of all due process hearings arise from DCPS' failure to comply with a previous HOD or to implement a settlement agreement.⁶ Significantly, when DCPS fails to implement an HOD, attorneys may seek a preliminary injunction in federal court under the *Blackman-Jones* class action, which results in much higher attorney fee costs for the District.

One factor that contributes significantly to DCPS' failure to comply with HODs is the lack of services available for special education students. Because DCPS has not inventoried available capacity, there is confusion at the school-based level about whether services can actually be delivered. As a result, there is often an assumption by school-based staff that they cannot comply with the terms of the hearing officer decision. And regardless of service availability, school-based staff are not held accountable for HOD implementation.

The Office of Mediation and Compliance, under the Division of Special Education, is responsible for overseeing compliance. When an HOD is issued, it is assigned to one of four compliance specialists in this office. According to the Director of this office, in January 2003 there were about 2,000 outstanding HODs, which translates into 500 HODs per specialist.⁷ This workload obviously makes it very difficult for the specialists to monitor implementation to ensure timely compliance with each HOD requirement.

Beyond this staffing deficit, HOD implementation is further compromised by the DCPS management structure. The principals do not report to the Division of Special Education, but rather to their respective Divisional Assistant Superintendents. As a result, the Office of Mediation and Compliance has no authority over principals for HOD implementation or for any other matter.

During our interviews, principals informed us that they often do not receive copies of HODs, or notice of their contents, in a timely manner. In addition, principals and other DCPS staff pointed out that many HOD deadlines are unreasonable and unrealistic. Our examination of HODs confirmed this concern. Some of the HODs that we reviewed required that IEP meetings be conducted within three or five days after the decision—a schedule that in most cases would be virtually impossible to meet. Notwithstanding the reported frequency of this practice, an internal process for requesting an appeal or reconsideration of an HOD decision has not been established. We were advised that on occasion a compliance specialist will contact an attorney to negotiate a more reasonable timeline. Yet this strategy is effective in only a small number of cases in which communication between the school and the central office is ongoing and the parent’s attorney is willing to be flexible.

While the need for resources and the development of adequate programs are the primary cause of special education disputes, the problems described here—the lack of clear accountability for carrying out the requirements of IDEA, the need for incentives to foster compliance with those requirements, the absence of an effective system for tracking IEPs and HODs, and the failure to assess program and service capacity—virtually ensure that the system will be inundated with complaints.

Recommendations for Finding #1

A. Principals and Related Service Providers Must be held Accountable for Addressing Special Education Needs

Many DCPS personnel and related service providers are responsible for certain aspects of the special education program, but clear lines of authority and responsibility are not in place to ensure that all necessary tasks are brought to conclusion. The solution lies in organizational changes that assign the ownership of the task to a specific individual, give

the individual the authority to implement the steps necessary to complete the task, and hold him/her accountable for both successful and unsuccessful outcomes. While this is no simple task, such organizational restructuring is needed in each of the administrative stages involved in preventing, responding to, and resolving special education disputes. This restructuring should include the following:

Authority must be vested in the school principal, who must be given a clear mandate from the Superintendent to improve special education services. Each principal should be required to submit an annual special education accountability plan for his or her school, as part of the annual Weighted Student Formula Plan that is already required, based on the current population in the school plus a predictable number of new referrals. Among other requirements, this plan must designate the specific staff responsible for all aspects of the special education screening, referral, and placement process. At the time of its issuance, parents of children with special education needs should receive a copy of the plan with contact names and phone numbers. Principals should also provide parents with frequent updates regarding compliance with the plan. We also support increasing principals’ access to resources and explain this in more detail later in the report.

Principals should continue to have discretion about school staffing determinations, but DCPS should limit this flexibility if a school fails to comply with IDEA. As stated earlier, principals have discretion whether to hire a special education coordinator. However, DCPS must provide some oversight of school staffing decisions related to special education. Principals face difficult decisions regarding the best use of limited resources, and an arbitrary rule will not serve the interests of every school. A school that is responsible for a large number of special education disputes should be required, and provided the requisite funding, to have a full-time special education coordinator; schools with a smaller

special education population and fewer complaints should have the discretion to hire half-time personnel or share personnel with other well-performing schools. Regardless, the coordinator, or the principal if a coordinator is not hired, must be held responsible for coordinating, convening, and ensuring the implementation of IEPs; maintaining records related to special education students; serving as a liaison between the school, OGC, and outside contractors; and acting promptly on requests for assessment. Staff responsible for these tasks should not be diverted to clerical or other administrative responsibilities.

B. Additional Support and Incentives should be Provided for the Individual Schools

Use of the Special Education Specialists should be improved. DCPS' use of Special Education Specialists (SES) is a promising mechanism for supporting school-based special education programs. However, the position should be reformulated so that the SES has the authority to respond to complaints and provide additional resources as needed. In particular, the SES must be responsive to principals' concerns about related service providers assigned to their schools. Moreover, SES staffing should be increased so that each SES is assigned to no more than five schools, depending on the number of special education students in those schools. In addition, one or two specially-trained SESs could be assigned to schools that generate the highest number of disputes. As will be discussed in Finding #4, SESs would also benefit from dispute resolution training to improve the facilitation of IEP meetings.

Additional SETS support should be provided to schools. In order to make SETS accurate and to improve its usefulness, school staff need increased training and technical support. The SETS office should ensure that every school has well-trained staff to input and analyze SETS data. The principal must be responsible for making staff available for training. Principals should be trained to use SETS to make

data-driven decisions. And the SETS office should increase hands-on support for schools, perhaps by assigning staff responsibility for groups of schools in the same manner as the Special Education Specialists. SETS should include a master hearing schedule so that school staff are promptly notified of any hearings that are scheduled.

A system of incentives will help to promote achievement. DCPS should make a small amount of funds available to reward schools that meet and exceed their special education responsibilities. We also believe that non-monetary rewards will be effective in fostering enthusiasm and motivating superior performance in assignments related to special education. These incentives could include annual recognition for schools that serve high percentages of special education students who live in the area, demonstrate high levels of parent satisfaction, and do not generate due process hearings (or generate a reduced number). Any system of incentives should also consider whether a school faces greater challenges due to external variables such as poverty, the ability of parents to provide support and resources, and defects in the physical plant.

C. Performance Measures should be Established

DCPS should organize discrete special education tasks in a manner that specifically identifies responsibility for completing them. The following areas should be addressed: identification, assessment, service provision, and placement relating to special education.⁸ Specifically, the organizational workflow should establish concrete standards for every person involved in these activities, identifying the task, the responsibility assumed, the time frames within which the task should be completed, and procedures to be followed when compliance is not feasible due to events outside that person's control. The performance of all personnel responsible for special education functions must then be evaluated based on the established standards.

Evaluations of all staff, including principals, must include components that reflect the special education responsibilities of identifying, evaluating, and providing effective services for children with special education needs.⁹ Evaluations of principals should consider effective implementation of the Teacher Assistance Team (TAT) process, the numbers of referrals and hearing requests generated at the school, effective use of SETS, timely scheduling of IEP meetings, and staff attendance at those meetings. Additionally, success in the early and effective resolution of special education disputes should be incorporated as a performance measure for teachers, special education professionals and coordinators, and principals. The performance of school-based professionals (e.g., school psychologists, therapists, counselors) should meet national standards in their respective fields.

Personnel evaluations should include input from multiple offices. One of the complaints we frequently heard was that a given person in a certain office was not accountable to others in the school system. Yet there is no reason why a principal or an administrator should not be evaluated by personnel in multiple offices. For example, when a principal is evaluated by the Assistant Superintendent, input can be solicited from the appropriate SES, Compliance Specialist, and OGC attorney. Similarly, there should be a mechanism for OSE, OGC, and other central administration staff to contribute to the evaluations of their peers, and also for schools to provide input into evaluations of central administrators and service providers who work in their schools. While there should be clear lines of authority, there should not be the sense that a person in one office has no input into the evaluation of a person in another office, where working together is critical to making the system work properly for students.

Central administration should conduct periodic audits to determine the success of DCPS' attempts to resolve special education disputes more expeditiously. Currently, DCPS uses SETS to create weekly school performance reports on IDEA compliance. Periodic audits should incorporate these reports, as well as consider how the school is using its special education funds and whether adequate personnel are assigned to special education responsibilities. DCPS should issue "report cards" on school performance in specific aspects of IDEA. (Note, however, that principals must have the ability to specify when a violation occurred due to factors outside their control, as is frequently the case.) Schools that do well should be honored; those that do not should be publicly identified and, where appropriate, staff should be trained, disciplined, or even replaced.

D. Increase Compliance with Settlement Agreements and Hearing Officer Decisions (HODs)

DCPS should clarify how the Compliance Specialist and SES work together to ensure the implementation of HODs and settlement agreements (SAs), including mediation agreements. At present, the Compliance Specialists are tasked with this responsibility, yet they have many more schools to work with and much less knowledge of the schools than the Special Education Specialists. The Compliance Specialist should be responsible for (1) determining that the school develops a plan that meets the legal requirements of the HOD or SA; and (2) monitoring every step in the plan to ensure compliance. Any HOD with a deadline of five days or less should be scrutinized immediately, either for the possibility of appeal, or to ensure timely delivery of services. If there is a legal question about the HOD, the Compliance Specialist should contact the appropriate OGC attorney.

The SES, on the other hand, should be responsible for determining whether a school has the capacity to comply with the HOD or SA, and for assisting the school in what-

ever way necessary to ensure compliance. In particular, the SES must ensure that related service providers, and other necessary resources, are made available to the school.

School principals should receive HODs immediately and then be responsible for submitting an “HOD Compliance Form” to their Compliance Specialist. We suggest this be accomplished within two business days of the principal’s receipt of the hearing officer decision. Such a form would require a plan that shows how the school will implement the decision. If a school lacks capacity to implement the HOD, this form could be used to request assistance from DCPS. If the principal does not submit this form, the principal should bear full responsibility and should be disciplined appropriately for noncompliance. If the principal makes a valid request for assistance, and it is not provided, the SES should be held accountable. For this to be effective, DCPS will need to ensure that the SES has the authority and ability to provide the resources required for compliance.

In sum, the due process problem in DCPS should first be addressed at its roots, by establishing systems that will reduce the number of complaints.

Finding #2

The absence of a functional dispute resolution process is due, in part, to a “culture of mistrust” between DCPS personnel and parents and their attorneys.

The special education dispute resolution process has been compromised by a widespread perception that DCPS is indifferent to parental concerns. It is exacerbated by the predominant view within DCPS that parents and their attorneys are taking advantage of the system. Together, these mutually antagonistic perceptions have produced a “culture of mistrust” and a highly adversarial atmosphere that fosters formal complaints, and hearings. This culture is a result of the accountability problems described in the previous finding and additional contributing factors.

A. Many disputes arise because local school personnel fail to respond to parental requests for special education services.

Our interviews revealed that one of the primary causes of disputes about special education is the failure of school-based staff to respond to parental inquiries and concerns. Specifically, parents reported that they had difficulty obtaining basic and clear information about how to proceed when they believed that their child might be in need of special education services. Parents also indicated that school personnel rarely identified children with possible special education needs on their own, and that when parents sought to refer their children for assessment, school officials often failed to provide adequate instructions or even discouraged them from seeking services.

Parents also indicated that at least some school personnel acted as if a parent’s failure to use a specific form or legal term meant that the school was not responsible for taking action. One parent reported that she had tried to obtain an evaluation of her child for an extended period of time before anyone informed her that she needed to fill out a particular form. Another parent talked to her child’s counselor about having her child assessed, but nothing was done until she submitted a written referral request.

Many of the anecdotes parents shared with us reflected years of service delays. For example, one parent notified the Parents’ Special Education Service Center that she waited two years for a referral for an occupational therapy assessment. Every time the parent called to check on the status of the referral, the teacher responsible for the referral told her that “we are waiting for a response.” Another parent we interviewed reported that she had to battle for two years to get her son tested for special education. A third parent first expressed concerns about her child in the second grade, but the child did not receive an assessment until the ninth grade.

The failure to provide services over long periods of time can have a devastating impact on a child’s development. Indeed, among other findings in this area, the applicable research shows that a child who does not receive reading remediation in the early years of elementary school may never be able to read without difficulty.¹⁰

Often these failures are the result of school-based personnel struggling to provide services with limited time and a scarcity of critical resources. For example, principals must respond to a wide range of pressing demands beyond special education, including testing, disciplinary matters, and problems with the school facilities. Principals told us that while they receive adequate training on IDEA, they receive little practical support for dealing with IEP development, pressure from attorneys, and obtaining appropriate educational materials for special education students. Some teachers and special education professionals told us they find aspects of the special education process to be time-consuming and draining, particularly paperwork requirements and entering data into SETS.

The indifference that many of our parental interviewees encountered is further explained by inadequate assessment capacity, which in turn is exacerbated by the ever-increasing number of referrals. Some DCPS administrators suggested that because school-based staff know that assessments are not readily available, they are hesitant to refer children. The delay in services then poses the risk of increasing the severity of the child’s disability.

In apparent recognition of this, DCPS reports that a “rapid response team” of assessors has been assembled to respond more quickly to assessment requests when a hearing is involved. According to the Director of the School Support Division in the Office of Special Education, DCPS’ ability to conduct assessments has improved considerably. In 1998-99 there was a backlog of 3,000 students who had not received assessments within the 120 day timeline mandated

by local regulations. In April 2003, this backlog was only 150 students.

We also found that DCPS regards some schools as models for special education, and our interviews identified many DCPS staff who are committed to helping students with special education needs. Nevertheless, we found little evidence overall of a systematic attempt to guide all schools in best practices or to use strong principals and teachers to mentor others.

B. Mistrust is exacerbated by poor communication between DCPS and parents.

A major part of the “culture of mistrust” is attributable to poor communication between parents and the school system. We heard frequently that when parents requested an assessment, they were unable to find out the status of their request. Related service providers travel from school to school, so they cannot be reached with questions, and the schools often lack the knowledge to answer the question, or staff simply fail to respond. Frequently, when parents call central administration, they are shuffled from office to office, where no one can give them the information they need. As we conducted our research, we discovered first-hand how difficult it is to obtain information from DCPS. We were routinely transferred to people who could not answer our questions, did not return telephone calls, or did not have working voice mail.

Mistrust is also generated by the school system’s failure to take affirmative steps to disclose important information to parents and the community. For example, we heard that the list of special education programs provided in schools is inaccurate and outdated. There is apparently no opportunity for parents to look at school-by-school offerings in special education to help determine which DCPS school

There is a widespread perception that DCPS is indifferent to parental concerns.

A “culture of mistrust” comes from poor communication between parents and the school system.

their child should attend. And written policies for critical processes such as IEP meetings, mediation, and Preliminary Education Review Meetings (PERM) ¹¹ did not appear to exist. ¹² When school staff and even central administration are unable—or appear unwilling—to provide information about the process, parents and advocates quickly become frustrated and resort to due process complaints to resolve their concerns.

C. Special education interactions, particularly IEP meetings, are often adversarial and unproductive.

Not surprisingly, parents who experience what they consider indifferent treatment from school personnel lose trust in the system and have little reason to believe that they are engaged in a collaborative effort to help students with special needs. Plaintiffs’ attorneys and parents told us that this is why they see the relationship with DCPS as adversarial from the very beginning. They expressed skepticism about the value of trying to work cooperatively with the school system. During our interviews, parents and their attorneys expressed the view that some principals perceive special education students as a financial and management burden they want to avoid. One parent that we interviewed reported that her child’s teachers “considered working with her child to minimize her educational disabilities to be ‘coddling.’”

Correspondingly, DCPS personnel that we interviewed expressed the view that many parents and plaintiffs’ attorneys begin the special education process motivated by a desire for a private placement, and for that reason they do not believe parents are interested in working with the system to resolve disputes. Principals described feelings of being “under attack” from aggressive attorneys, or “ambushed” at due process hearings. DCPS administrators felt that attorneys often overwhelm a school or administrator with demands

until DCPS “slips up” and a private placement can thereby be obtained.

IEP Meetings

The sentiments on both sides, described above, were confirmed by our examination of one of the most critical elements of the special education process, the IEP meeting. Consistently, our DCPS and non-DCPS interviewees told us that IEP meetings were generally adversarial and failed to meet the statutory goal for a collaborative determination of an appropriate educational program for students. We attended one IEP meeting where the SES appeared to have made up his mind about the outcome before the meeting began, and he discouraged open discussion. In another, the school’s special education coordinator seemed to “bully” the child’s teacher into concluding that the child did not need additional services in the classroom.

Further, DCPS staff, including related service providers, sometimes demonstrate a lack of commitment to IDEA by their failure to attend IEP meetings. We attended one IEP meeting where the clinical psychologist did not attend and did not let anyone know that she would not be available. When she was finally reached over 30 minutes after the meeting was scheduled to start, she reluctantly agreed to participate by telephone. Another school canceled an IEP meeting without notice to the parent or attorney. This behavior exacerbates parental frustrations, making it less likely that the team will be able to develop the child’s IEP collaboratively.

However, the absence of a cooperative spirit was not limited to DCPS personnel. We observed meetings in which parents and their counsel lacked basic civility and were disrespectful to the DCPS participants. In one case, counsel for a parent raised repeated procedural objections that prevented school personnel and the parent from even discussing the assessments that had been conducted.

IDEA requires that a representative of the school district take part in IEP meetings.¹³ This representative should be knowledgeable about the availability of supports and services. In DCPS the Special Education Specialist (SES), who works in the Office of Special Education (OSE) and provides support to about seven to nine schools, functions as this representative. However, they are unable to attend every IEP meeting. The absence of an SES increases the risk of an adversarial meeting because they function as facilitators in meetings that are likely to be contentious. The SESs provide important support and expertise to the school, yet their time is very limited. Although they receive training in facilitating IEP development, according to OSE this training is focused on procedure. This was consistent with our observations, where the SES followed a rigid protocol but did not help negotiate an agreement that all parties could accept.

From our observations at the school level, and interviews with parents and their counsel as well as with DCPS personnel, we were persuaded that whatever strides DCPS has recently made, serious mistrust persists between the “sides” and a pervasive adversarial atmosphere often sets in at the first sign of a special education problem. The fact that neither school personnel nor parents have received adequate, if any, training on dispute resolution and collaborative problem-solving contributes to the adversarial nature of these proceedings.

And while our interviews suggest that many parents do not want to hire attorneys and would much prefer to work out their problems through discussions at their local schools, far too many of them believe this is simply not possible and that attempts to do so will be unproductive. We conclude, therefore, that unless significant and highly visible steps are taken to break this “culture of mistrust,” the rush to file ever more due process complaints will not abate.

Recommendations for Finding #2

Improving Trust and Reducing Hostility between Parents and School Personnel.

Point One of the DCPS Seven Point Plan acknowledges the importance of communications and includes the following plans for improvement:

- Distribution of a quarterly newsletter to all constituents regarding activities in special education, including a description of progress measured against goals and the status of actions in the Plan;
- Communication to parents regarding the benefits of mediation and complaint management rather than hearings; and
- Involvement of parents in training sessions so families can be effectively involved in all levels of decision-making for their children.

We strongly support these strategies. However, it is our understanding that the DCPS Office of Communications has not effectively promoted special education outreach. This shortcoming should not be treated lightly. The Superintendent must take on the job of personally and publicly announcing the steps DCPS is and will be taking to address students’ needs. Those steps must include both service delivery and dispute resolution, as described in later sections of this report. Communications with parents and the community about those steps must be positive and straightforward and should serve two functions: first, to inform parents about the services provided to their children; and second, to encourage dialogue about ways to improve the delivery of those services.

DCPS must develop a mission that is positive and proactive, and that focuses on solutions rather than deflecting blame. One component of this mission should be that every DCPS office will be required to take responsibility for

its successes and failures. The development of this mission must include input from parents, teachers, and advocates. The Superintendent should widely and visibly promote this mission, and publicize steps that will be taken to “break the culture of mistrust” that currently exists. Even though DCPS does have a strategic plan for special education reform, the leadership of the school system has not publicly endorsed the plan in a way that engenders public confidence.

A communications or public relations expert should be dedicated to special education outreach. This professional should generate and disseminate public education materials regarding special education in the District. Specifically, parents should be given clear and accurate descriptions of how the process works and what programs are available in every school. Furthermore, a communication mechanism should be established for parents to obtain up-to-date information about their child’s evaluation or services. Mechanisms to engage parents, parent advocates, attorneys, experts and service providers in improving the system must also be established.

DCPS should publish special education policies and procedures through a variety of consumer-friendly media:

- First, DCPS should improve the special education website by including information on policies and services, as well as a site specifically designed for parents.¹⁴
- In addition, DCPS should create and disseminate a regular special education newsletter for parents and advocates that highlights substantive changes in special education programs as well as practical information such as new staff and changes in contact information.
- Finally, DCPS should periodically conduct open public meetings to discuss developments and programs, as well as to answer questions. As staff form

positive relationships with parents, nonprofit attorney groups, parent advocates, and national experts, DCPS should establish formal or informal advisory groups drawing from these populations.

Communications with parents must be improved at the school level. Every school should designate a contact person, which in most cases should be the special education coordinator. Consistent with our earlier recommendations, this person’s name and telephone number should be well-publicized. If related service providers are at a school site only on certain days of the week, parents should have that information.

All staff, at the school and central level, should be able to answer routine questions. Clearly articulated policies that are consistently applied will build public trust in the system, and help to improve accountability.

Finding #3

Although the conduct of a minority of plaintiffs’ attorneys has exacerbated and exploited the dysfunction in the DCPS special education dispute resolution system, curbing their abuses will not solve the underlying problem.

During our interviews with DCPS staff, we were frequently told that part of the special education “problem” is the aggressive advocacy of the plaintiffs’ bar. Special education experts and non-DCPS attorneys agreed that some attorneys are taking undue advantage of the system and some have clearly abused it. The term we most often heard was that some attorneys are “gaming the system.” We also heard that some attorneys are not merely “gaming the system,” but they are behaving unethically.

The evidence we reviewed confirms these claims. It is clear that the orders obtained by some counsel—particularly for unwarranted private placements that are not mandated by law—serve to exacerbate systemic problems because they

contribute to the volume of due process complaints and divert critical fiscal resources away from DCPS.

It is also clear that some attorneys engage in tactics designed to take advantage of a DCPS system unprepared to deal effectively with the volume of complaints it receives. And most regrettably, the evidence also shows—as was recently documented in a DC Auditor’s Report¹⁵—that a small number of attorneys have not only taken undue advantage of the system, but also have engaged in clearly unethical conduct for their own gain.

That Report found that in a number of instances, attorneys and law firms functioned as the legal representative for special education children and then referred those children to assessment firms and private schools in which they held a proprietary or pecuniary interest.¹⁶ Fees paid to law firms, assessment companies, and private schools with these affiliations amounted to over \$39 million in fiscal years 1999-2003. One private school, affiliated with one law firm, accounted for \$24 million of this sum. The Auditor’s investigation found that assessment firms and private schools that are affiliated with law firms charge rates that are significantly higher than those firms and schools that contract with DCPS. One such assessment firm charged DCPS an average of ten times more for evaluations than DCPS paid to its contracted firms.¹⁷

In addition, several parents expressed the belief that attorneys tend to delay the process in order to increase their fees, rather than trying to resolve issues quickly. For example, one parent cited the fact that instead of calling a school repeatedly to urge them to complete an assessment, the attorney waited until the day the 120-day timeline expired and then filed a hearing request. Another parent reported that an attorney advised her that obtaining services for her child would take at least one to two years. The parent made her own telephone calls to DCPS administrators and actually obtained a placement much more quickly.

DCPS staff believe that on some occasions attorneys have fabricated complaints, such as records violations, knowing that DCPS bears the burden of proof and cannot prove otherwise. Similarly, school personnel claim they have tried to resolve disputes over the phone, which attorneys then claim never happened. And we have heard that some attorneys have claimed to represent parents when in fact they do not.¹⁸ We are concerned—as were many of the plaintiffs’ attorneys we interviewed—both with the ethical violations that have occurred¹⁹ and with the further mistrust they breed.

In addition, in the area of “abusive” tactics, we found two common complaints from DCPS staff relating to the filing of hearing requests. We were told that some attorneys file multiple hearing requests for the same child, knowing that DCPS cannot hold all of the hearings within 45 days. In addition, we heard allegations that attorneys frequently withhold or offer incomplete and misleading information on the hearing request form, so that OGC attorneys will not have the requisite information to adequately prepare for the hearing.²⁰

Nevertheless, overall our investigation convinced us that most special education attorneys behave ethically and do what they are required to do—act in the best interest of the clients they represent. Furthermore, given the current dysfunctional state of DCPS’ special education system, were it not for the aggressive and repeated intervention of attorneys, many students would not be receiving the special education services they need.

In our view, it is a mistake to believe that aggressiveness and overreaching by plaintiffs’ counsel is the primary cause of DCPS’ special education problems or the key factor responsible for the excessive number of due process complaints. Attorneys who are “gaming the system” do so because they can—and because it benefits their clients. They would not be able to do so if DCPS provided the appropriate services to which those clients are entitled. Moreover,

Little is gained
and much is lost
by spending
time and energy
blaming lawyers.

counsel would not persist in filing due process complaints unless they knew they could win those complaints.

We do urge, however, that plaintiffs' attorneys begin to work more collaboratively with DCPS, through existing roundtables, advisory groups, and in other settings. We found that even among those attorneys acting with the best intentions for children, there was significant anger and hostility toward DCPS, and an unwillingness to consider multiple viewpoints. We believe it is ultimately in the best interests of the children—and therefore of their attorneys—for the dispute resolution process to work more effectively. Accordingly, we encourage both sides to work together to improve that system and to focus on their common goal—obtaining a free and appropriate public education for children.

One method used to address the very active plaintiffs' bar and reduce the costs of litigation has been the introduction of a fee cap. Beginning in 1998, Congress has on several occasions placed limitations on the amount of attorneys' fees payable by the District under IDEA.²¹ Both the DCPS Superintendent and the DC School Board have strongly favored the fee caps on the ground that they produce savings needed for school programs.²²

The fiscal year (FY) 2003 DC Appropriations Act imposes the ceiling of \$4,000 in fees per case. This Act also contains provisions designed to regulate the activities of attorneys applying for fees, but does not include an exemption for complex or lengthy representation. The FY 2004 Budget Request Act, which was enacted by the District of Columbia Council on June 2, 2003, includes the identical fee cap. In addition, the current proposals for the reauthorization of IDEA also address the fee cap issue. On April 30, 2003, the House of Representatives passed HR 1350, which affords governors the discretion to determine rates for attorneys' fees in their respective states.²³

Proponents of the fee cap believe it is the best way to police abuses by lawyers and that the much-needed savings can be directed toward better programs for students. In fact, many of these proponents believe that lawyers are the primary cause of the DCPS due process problem. Opponents, on the other hand, believe that in many cases the lawyers may be the only mechanism available for ensuring that students receive the programs to which they are entitled—and that the cap effectively deprives some of the neediest students of the services they need because it deprives them of a lawyer.

While we think the objective of the fee cap—keeping costs down and policing attorney abuses—is an important and legitimate goal, we think there are better and more direct ways of achieving it. In fact, the only way these goals can be achieved in the long term is by addressing systemic deficiencies in programs. Accordingly, while we applaud DCPS' efforts to conduct a consistent, rigorous review of attorney bills based on clearly articulated standards,²⁴ we do not offer a recommendation on this issue, because to do so would deflect attention from the core problem—providing appropriate special education services to children.

Ultimately, the answer to DCPS' problem with the lawyers is to put in place systems to deliver services required by IDEA, to respond in a timely manner to legitimate complaints, and to defend effectively against invalid complaints. In our interviews with DCPS staff, we found that many spent more time blaming attorneys than considering ways to improve DCPS' practices. This project team believes strongly that while attorney practices undoubtedly create problems for DCPS, there is little gained and much lost by spending time and energy blaming the lawyers.

Recommendations for Finding #3

Acknowledge that attorney manipulation of the system can best be addressed by reforming the system.

We recommend that DCPS file complaints with the DC Bar when attorney practices violate professional ethics standards. The DC Auditor’s Report²⁵ went so far as to recommend that DCPS refer attorney conflicts to “the appropriate law enforcement authority to determine whether federal or District laws have been violated and whether criminal prosecution is warranted.” However, DCPS should acknowledge that unethical and arguably abusive practices by attorneys make up only a small part of the problem, and should instead focus its attention on restoring public trust and improving its dispute resolution system. DCPS should also engage the support of the attorneys themselves in improving that system.

We further recommend that certain improvements be made to hearing request procedures and that steps be taken to promote parent and nonprofit advocacy. These recommendations are addressed in turn below.

A. DCPS Should Require Consolidation of Hearing Requests and Redesign the Hearing Request Form.

DCPS should redesign its hearing request forms and amend the corresponding regulations to require a complete description of all complaints pertaining to the individual student. While the current form complies with IDEA regulations, we believe that a redesigned form that requires detailed information would help DCPS to screen and resolve hearing requests more efficiently as well as enhance its ability to defend itself.

DCPS should develop a regulation that fairly requires attorneys to combine multiple complaints in a single hearing request for each student. All related complaints should be consolidated, and if the complaint changes, there should

be a process for amending the complaint and beginning the timeline over again. These changes are consistent with IDEA²⁶ and procedures used in other administrative proceedings.

B. DCPS Should Expand Parent and Nonprofit Advocacy.

The District government should support efforts to increase the number of (1) nonprofit plaintiffs’ attorneys who would operate on salaries rather than attorneys’ fees; and (2) parent advocates. One way to address the high cost of attorneys is for the city government to work with area law schools and legal aid offices to increase the number of attorneys who are salaried and therefore will not need to collect fees from the system (or, if they collect fees, will have less motivation for profit). This will give attorneys the much-needed incentive to use dispute resolution mechanisms other than the hearing process, and to reduce the time spent by DCPS scrutinizing attorney fee bills. Two area law schools, Georgetown and the University of the District of Columbia (UDC), already provide such services through clinics for law students. We recommend that the District collaborate with Georgetown and UDC to find ways to expand their services. All of these schools have a demonstrated interest in education in the District of Columbia. A pro bono program could also be established through local law firms, provided that pro bono attorneys receive adequate training and supervision. We believe that whether such programs provide legal services to plaintiffs or the school system, the law schools, students, and the school system will all benefit.

Additionally, we believe that DCPS should offer greater support for parent advocacy. Parents who are trained well and have an understanding of IDEA can serve as an important resource for other parents, in a way that is less adversarial and less costly than attorneys. As noted earlier, some parents are uncomfortable seeking attorneys because they are concerned about questionable attorney tactics. We recommend that DCPS first evaluate existing parent advocacy

groups for their effectiveness in helping parents resolve special education disputes. Based on such an evaluation, DCPS should make a considerable effort to increase collaboration with those groups that are deemed effective. For example, trained parent advocates could be placed in regional school clusters or in schools with large numbers of hearing requests. Or parent advocates could hold regular public meetings, accompanied by DCPS administrators, where parents could come register complaints. We believe that DCPS should make every effort to facilitate parent complaints, thereby alleviating the need that parents have to hire attorneys.

Finding #4

The absence of an effective pre-hearing alternative dispute resolution system delays the delivery of services and contributes significantly to the high volume of formal due process hearings.

We have just said we do not think the lawyers are the cause of the huge volume of due process hearings in the District of Columbia. The primary cause is the fact that the services to meet the students' needs are simply not in place. The secondary cause, and the one we are addressing here, is that the District has no effective mechanism to resolve special education complaints short of due process hearings and before the involvement of attorneys. While this may not be the root cause of the problem, we believe that the lack of dispute resolution options forces DCPS to expend much time and resources battling an overwhelming number of hearing requests, instead of dealing with the problem of service delivery.

At the outset, as described in earlier sections, there is little attention given by the schools to resolving individual complaints about special education. That is where most of the complaints can and should be resolved, but they are not. This leads to a large number of formal due process complaints. And because DCPS does not have an effective pre-

hearing alternative dispute resolution system—including an effective mechanism for screening due process hearing requests to identify and resolve uncontested issues and settle those that should be settled—the volume of formal hearings is unjustifiably high.

The failure of DCPS to resolve disputes early through less formal mechanisms harms students by delaying the delivery of supports and services. Moreover, as will be discussed in the cost section of this report, the hearing process has a profound fiscal impact, adding roughly \$13 million in expenses and attorneys' fees, which takes away from educational programs.

Currently, DCPS does not provide facilitators to assist in dispute resolution other than for formal mediation, which in the District typically occurs only after a due process hearing is requested. In fact, a request for mediation is nearly always made on the identical form used for requesting a due process hearing. By that time, both sides are frustrated and likely to be locked into their respective positions. At this stage, the likelihood of a successful resolution that would help foster or rebuild a good working relationship between the parties is comparatively low.

The experience in other jurisdictions has shown that broader use of mediation and other alternative forms of dispute resolution, in fact, substantially reduces the time and expense otherwise necessary to resolve disputes through the adversarial due process system, and results in higher levels of satisfaction on all sides. The Iowa Department of Education, for example, offers and widely advertises four pre-hearing opportunities to resolve disputes with many focused at the local school level. Parents may request an early facilitated pre-hearing conference with school officials; request the assistance of a neutral "Resolution Facilitator" to help settle differences between the parties; engage in formal mediation; or file a complaint with the State Department of Education.

Other jurisdictions, including Texas, Massachusetts, Michigan and Wisconsin, give equal emphasis to early dispute resolution. And they save money and improve relationships between parents and school personnel in the process. Texas, for example, spends \$1,000 for the services of a mediator and approximately \$9,000 for the services of a hearing officer. According to the Texas Department of Education, 91% of mediation participants, including school district staff, indicated they were satisfied with the mediation process. Similarly, in Wisconsin, a survey of the Special Education Mediation System found that 82% of participants either agreed or strongly agreed that they would use mediation again.

As noted earlier, IDEA encourages parents and school systems to work collaboratively to identify a child's special education needs, arrange for appropriate services, and resolve disputes as early as possible. In our view, DCPS simply must put in place mechanisms to achieve earlier resolution and cease relying almost exclusively on the prolonged, expensive, cumbersome hearing process.

A. The Parents' Special Education Service Center, intended to prevent conflicts caused by DCPS' failure to respond to parents' concerns, has not been promoted sufficiently to allow for a determination of its effectiveness.

In 2002 DCPS contracted with a private corporation to create a Parents' Special Education Service Center that parents can call for help with a special education problem. If effective, the Center can facilitate the early resolution of disputes and reduce the number of due process hearings.

The Center's potential lies in the fact that it facilitates the movement of a parental inquiry or complaint through the system. Instead of providing advocacy, the Center provides procedural direction. The Center has trained personnel who can listen to parents' concerns by telephone, explain the next steps parents should take, and follow up with the

school system to make certain that the inquiry is moving through the process. The Center is open from 6:00 A.M. to 10:00 P.M. Monday through Friday and services are available in six different languages. The process is designed to help parents before they need to contact an attorney. In fact, once parents are represented by an attorney, the Parents' Special Education Service Center will not assist them.

Based on our visit to the Center and our interviews with its personnel, we were impressed with their commitment to bringing about early resolution of problems. Unfortunately, until recently, DCPS had done little to promote the Center, either among parents or within the school system. As a result, the Center is little known and has received only a modest number of calls so far.²⁷ In April 2003, the Center began advertising on a local television station and using placards on city buses. Since that time, the call volume has increased somewhat²⁸ but it is still too early to determine whether the Center can serve as an effective means of avoiding recurring special education concerns. A planned evaluation of this program by DCPS should provide critical information relevant to this determination.

B. At present, there is no formal state complaint procedure for parents.

IDEA requires states to establish state complaint procedures that provide a 60-day investigation and determination for situations when a parent cannot resolve a special education concern at the school district level or when an HOD has not been implemented. Such procedures could be used as an early dispute resolution mechanism and, if successful, would have the potential of reducing the incidence of due process hearings.

DCPS is currently out of compliance with this requirement, but is working to establish official complaint procedures. In May 2003, DCPS hired an Executive Director to manage a new State Complaint Office (SCO). Because the

Board is currently considering the promulgation of regulations for this office, it is unclear how the SCO will operate. If parents are to utilize state complaint procedures instead of filing for due process hearings, there will need to be a clear incentive for them to do so (e.g., a parent could use the process without hiring an attorney) and the complaint process will need to be perceived as an effective tool for achieving a fair remedy.

Nationally, only 12% of special education complaints are resolved by hearings.

There are certain impediments which should be addressed before procedures are implemented in order to ensure that the SCO is used by parents and works effectively. First, any review process implemented within DCPS will likely be perceived by parents and attorneys as biased because, unlike other states, DCPS will in effect be judging itself. In addition, under IDEA a hearing must be held within 45 days, yet a SCO decision will take 60 days. Moreover, an HOD will have greater enforceability than a decision by the SCO because attorneys can appeal to court under the *Blackman-Jones* class action. Finally, the process will be unfamiliar and untested. In particular, it is not yet clear how the SCO will differ from the Parents' Special Education Service Center. Because DCPS has only recently started publicizing the Center, it may be very confusing for parents to be offered yet another process.

If implemented well, however—with effective outreach, parent-friendly procedures, and promptly enforced decisions—the SCO has the potential to encourage parents to submit complaints without hiring an attorney or requesting a hearing. This may result in a less adversarial process and a more appropriate outcome for both parents and DCPS. But to reach this result, the SCO must be made credible and effective, or it will not be used and the number of due process hearings will continue to escalate.

C. Mediation is used far too infrequently in special education disputes in the District of Columbia.

DCPS falls far below the national average in the percentage of complaints resolved by mediation.²⁹ According to the current head of the DCPS mediation program, DCPS participated in only one mediation for the five month period marking the date of her arrival in October 2002 through March 2003. In comparison, data provided by OGC show that during the eight month period beginning in October 2001 and ending in May 2002, 20 mediations were conducted. This constitutes 2% of the total number of dispositions.³⁰

In contrast, mediation is requested and used far more frequently in other jurisdictions. For example, during 2000-2001, the national data show that 28% of the requests for special education dispute resolution were for mediation. Indeed, during this time period there were 8,070 requests for mediation and 12,914 requests for due process hearings.³¹ In addition, over one-third more mediations (5,536) than due process hearings (3,659) were actually conducted.³² In DCPS during the same period, there were 2,402 requests for due process hearings, 671 cases resolved by hearings, and 25 cases resolved through mediation.³³ Given this substantial disparity, and notwithstanding any concerns about the accuracy of the national data, DCPS' failure to rely on mediation is plainly at odds with national practice standards. We believe that this is a key contributor to the excessive number of due process hearings in the District.

1. DCPS has limited mediation capacity at the current time and no way of determining whether even the limited mediation program has been successful.

Even if DCPS' mediation program were viewed as a viable alternative to full-blown due process hearings and more parents requested mediation services, DCPS' current program does not have the capacity to perform effectively.

Several staffing limitations contribute to this problem. First, there are only two staff members—the program head and one paralegal—responsible for running the mediation program, scheduling and participating in mediations, and investigating and attempting to settle disputes prior to mediation. Second, DCPS has only four independent mediators on its roster—an inadequate number if the use of the program increases. Further, increased use of mediation would require a more significant investment of time from local school personnel as well as enhanced training.³⁴

DCPS has not conducted any evaluations of its mediation program and currently does not have the ability to determine whether the program is effective. Indeed, DCPS has failed to collect basic data about the number of mediations that have taken place, the issues involved, how the system is performing, how participants regard their experience after participating, or whether mediated agreements have led to long-term resolution of special education conflicts. Absent these data, the efficacy of the program cannot fairly be assessed.

2. DCPS’ administration of the mediation program has led to misunderstandings and further mistrust.

Bureaucratic mistakes have characterized the administration of the mediation program, bolstering the view that DCPS does not mediate in good faith. Plaintiffs’ attorneys who request mediation say they are rarely if ever contacted for the purpose of scheduling mediation sessions and DCPS officials acknowledge that this has been the case. According to DCPS, one reason this happens is that it tries to investigate and settle these matters prior to mediation. However, DCPS does not complete settlement negotiations in a timely fashion, and the impending approach of an assigned hearing date forecloses mediation which, by statute, cannot delay the hearing. To resolve this problem, DCPS may begin to schedule mediation in advance, even if there are settlement opportunities.

In addition to these administrative issues, there is evidence of critical misunderstandings about key aspects of the mediation process. For example, some parents’ attorneys have advised us that they believe inexperienced DCPS employees mediate the cases and are not likely to be impartial. However, we have determined that this is a misimpression. DCPS employees do not serve as mediators; rather, as required by IDEA, DCPS maintains a small roster of experienced mediators who contract with the school system. It appears that some attorneys have assumed that the DCPS paralegal who contacts them for scheduling purposes is the mediator assigned to their cases. In an effort to eliminate any ambiguity, DCPS has recently sought to ensure that this employee’s role is clearly explained.

Finally, in the past DCPS has failed to provide notice when it was unwilling to mediate. Under IDEA, participation in mediation is voluntary for both parties. DCPS therefore can, and does, decline to mediate certain matters. For example, DCPS regularly declines to mediate disputes in which a private placement has been requested. DCPS now routinely sends a letter to inform parents when it is unwilling to participate in mediation.

The DCPS standard mediation agreement form contributes to communication difficulties. In preprinted language, the form states that parents must withdraw their due process hearing requests as a condition of the mediation agreement. Parents who are willing to agree with the substantive proposals made by DCPS—particularly if the agreement specifically provides that DCPS performance will take significant time—must decide whether to take the risk of accepting an agreement which will require them to withdraw their hearing requests and then re-file and go to the bottom of the list if DCPS fails to do what it has promised.

Until recently, DCPS conducted little, if any, outreach to parents about the mediation program except for the an-

In 2002, 59% of complaints were resolved by hearings in the District.

nual parent handbook. However, the current director, who has managed the mediation program for less than a year, has been speaking to parents' groups, school board meetings, and other community organizations to explain the availability of mediation and to encourage its use.

At the same time, parents of special education students and their representatives repeatedly expressed the belief that DCPS has not and will not comply with commitments it makes in mediation agreements. As noted earlier—and this is a key problem in breaking the “culture of mistrust”—many parents and their attorneys told us they are convinced that the only way to secure special education services for children is to request a hearing and obtain orders compelling DCPS to comply with IDEA.

3. The unavailability of attorneys' fees constitutes a clear disincentive for participation in alternative dispute resolution.

Many DCPS administrators we interviewed expressed the view that parents' attorneys elect to resolve disputes exclusively through due process hearings because that is the only way they can receive fees from DCPS. These administrators further claim that even in IEP meetings, attorneys purposely create controversy so that they will ultimately get to a hearing where fees can be obtained. In response to this allegation, attorneys who represent parents contend that they would not deliberately attempt to keep a case open just to get to a hearing if the case could be resolved earlier. Instead, they say that because DCPS is largely unresponsive to requests for mediation or settlement, the hearing process is their only viable option.³⁵ Undoubtedly, however, the unavailability of fees for mediation influences the conduct of attorneys representing clients who do not have the wherewithal to pay attorneys' fees.

Currently, DCPS does not offer any attorneys' fees for mediation because it relies on its interpretation of case law prohibiting fee awards for all actions where there is no “pre-

vailing party.” In the District of Columbia, there have been several decisions by federal trial courts addressing fee awards for settlements in IDEA-related disputes. While these decisions are somewhat inconsistent,³⁶ it is important to note that nothing in the case law prohibits DCPS from including fees in settlement and mediation agreements; rather, the issue is when a plaintiff is a prevailing party and thus entitled to fees.

Nevertheless, in the wake of these decisions there was a significant reduction in the number of cases resolved through settlement because fees could not be awarded unless an attorney represented the prevailing party in a due process hearing. In the past, DCPS also asked attorneys to waive their fees as part of settlement agreements.³⁷ According to a report by the DC Auditor, in FY 2001 there were 1208 special education cases resolved by settlement, and in FY 2002 this number decreased by nearly 60% to 462 cases.³⁸ When it became clear that offering settlements without fees would significantly reduce the number of settlement agreements, DCPS began to negotiate payment of attorneys' fees in settlement agreements. The DCPS Office of General Counsel reports that settlement for a fixed fee has become a common practice with certain plaintiffs' attorneys. Yet the number of settlements is still very low. Only about 10-15 cases are settled each month according to OGC management.

DCPS management has raised the concern that if fees were paid for mediation, it would become one more process that lawyers could exploit for fees, and thus would not be an effective tool for reaching a final disposition. They reason that if the attorneys do not like the outcome of the mediation, they would go on to file a hearing request, and the process would become even more time-consuming and costly. In other words, mediation would become adversarial instead of collaborative and would simply add one more attorney-paid layer to an already cumbersome process.³⁹

On balance, we believe offering attorneys' fees for me-

diation will encourage more attorneys to participate, so that cases can be settled earlier and with less conflict between parents and schools. While some attorneys may use mediation as a means to earn more fees, we believe that most attorneys are motivated to act in the best interests of their clients. Because of the concerns described above, however, if this recommendation is adopted, we believe DCPS should carefully evaluate the practice to determine if payment of attorneys' fees for mediation correlates to a decrease in full-blown due process proceedings. Also, the payment of fees must go hand-in-hand with efforts to make the mediation process credible and effective.

D. The creation of a system for screening hearing requests appears to be increasing the number of cases resolved prior to hearings.

Even though DCPS has for some time faced hundreds of formal complaints regarding special education supports, services, and placements, it has not had an effective mechanism for promptly determining which complaints are legitimate and which are not, which should be contested and which should not, and for those that should not be contested, how they can be quickly resolved. Instead, DCPS has simply relied on the hearing process itself to resolve the complaints. This has resulted in significantly higher costs, as explained in Section IV of this report, because problems are not addressed early, plaintiffs' attorneys often use that failure to gain additional relief for their clients, and DCPS and its counsel are frequently unprepared to address and defeat complaints that on the merits should not prevail.

Previously, DCPS maintained a Dispute Resolution Committee (DRC) as a screening mechanism, staffed by attorneys from the Office of General Counsel (OGC) as well as special education administrators. The DRC was charged with investigating and developing strategies for resolving individual cases (primarily through settlements) and assisting schools in complying with HODs. The scarcity of time and

resources that DRC personnel could devote to individual cases rendered the DRC relatively ineffective and it was disbanded in early 2002.

As part of the Seven Point Plan, DCPS revived the DRC in March 2003.⁴⁰ The DRC's mission is now limited to assessing newly-filed due process hearing requests and formulating legal strategies, including settlement recommendations. However, we were informed that the DRC devotes only about five minutes to each new case. Such a time limitation is antithetical to a process intended for the meaningful exchange of information, discussion, and strategic decision-making related to the formulation of an effective plan to address and resolve the complaint.

Notwithstanding the time limitation, both OSE and OGC staff report they are pleased with the new DRC process. The DRC places the investigative burden on the Special Education Specialists (SES), who are likely to be far more knowledgeable than the attorneys about their schools. The Director of the School Support Division reported that SESs actively "compete" to close as many cases as possible, and receive rewards for successful efforts.

According to the Director of the DRC, since the time the DRC was reinstated, about 30% of cases have been withdrawn, dismissed, or won by the school system. For example, in April, the first month that the DRC was reactivated, the number of settlements was very low⁴¹ but the number of hearing requests that were withdrawn was very high. In addition, OGC recently reported "wins or partial wins" in about 35% of their hearings.⁴²

DCPS' recent experience with the DRC suggests that thorough screening of all due process requests in a manner that appropriately identifies and resolves meritorious claims will reduce the incidence of due process hearings. We are convinced, however, that more resources must be applied to this process. The DRC must have real author-

Assessment Process

DCPS Students assessed, individualized education plans (IEP) developed.

- Parents lack information on how to raise special education concerns.
- DCPS fails to make adequate and timely assessments of special education needs or to develop a realistic plan.
- Lack of accountability when IDEA responsibilities not fulfilled.

Plan reviewed at IEP meeting.

- Lack of preparation or poor attendance at meetings.
- Meetings often unduly adversarial and without impartial mediators or facilitators to help resolve conflicts.
- No training in dispute resolution for parents or school personnel.

Dispute arises.

- Insufficient mechanisms for early dispute resolution.
- Insufficient publicity for Parents Call Center.
- No incentive for DCPS personnel to resolve disputes quickly.
- Plaintiffs counsel only get fees if prevail at hearing.
- Mistrust or misunderstanding of mediation process.

Trouble Spots within the DCPS Dispute Resolution Process

Request for due process hearing filed.

- No formal intake process to screen out matters that could be resolved without a hearing.

Hearing Process.

- DCPS lawyers do not have adequate time to prepare or focus on settlements.
- Key school personnel often fail to appear at hearings.
- Student Hearing Office poorly administered.
- Hearing officer not properly trained to handle special education matters.

Post-Hearings Process.

- Inadequate system in place to ensure that DCPS complies with Hearing Officer Decisions.

Dispute Resolution Process

ity at its command to promptly and fully investigate every complaint and determine how each should be resolved. Moreover, the DRC needs the capability to ensure that the resolution it identifies will be carried out. This includes determining early on which claims should be settled and how, the authority to ensure that settlements will be enforced and, for those cases that ultimately cannot be settled, the ability to commit the resources needed to defend against the claims on the merits at a hearing.

Recommendations for Finding #4

Alternative Dispute Resolution

DCPS should formulate and implement a system of alternative dispute resolution mechanisms, including additional alternative methods to resolve special education disputes.

A. Consolidation of Dispute Resolution Mechanisms

DCPS should immediately establish policy that emphasizes resolving special education disputes as quickly as possible. As suggested earlier, the Superintendent, in conjunction with the Board of Education, should establish and publicize a policy that clearly and unequivocally specifies that DCPS is committed to addressing special education disputes in a collaborative manner and at the earliest possible opportunity, before formal proceedings become necessary. That policy should explain the alternatives available to parents and how DCPS will make them work to address parents' concerns fairly and effectively.

DCPS should designate a single point of contact for all dispute resolution mechanisms. A staff member experienced in working with parents and advocates, who can provide immediate assistance, should serve as the single point of contact. This individual's name and contact information should be publicized widely, so that there is a staff member that parents can contact when they need help. The contact person should be able to explain the benefits and drawbacks

of all complaint resolution approaches, including how long each will take, and which issues are best suited for each approach. DCPS does not need to create a new position for this function. Rather, the function could be incorporated into the Parents' Special Education Service Center, which would make sense logistically as well as alleviate parents' perception of bias. Alternatively, this duty could be assumed by the Director of the State Complaint Office, the Dispute Resolution Committee, or the Office of Mediation. Regardless, it will be important to have a single point of contact to help parents determine the best way to resolve a dispute.

DCPS should communicate clearly with parents about dispute resolution options. A fundamental principle in all communications should be that parents need to know how the special education process works, and which staff member can be contacted for help. It is not enough that a process, such as state complaint procedures, is in compliance with IDEA; it must be known, understandable, and attractive to parents. In particular, DCPS should prepare materials for parents that explain all the dispute resolution options currently available, including the Parents' Special Education Service Center, mediation, and state complaint procedures when they are established. Names and phone numbers for all offices serving special education parents and students should be included, particularly the person who serves as the single point of contact described above. These materials should emphasize DCPS' commitment to collaborative problem-solving of special education concerns and the early resolution of disputes. Many other jurisdictions, such as Iowa and Massachusetts, have already developed effective materials that can serve as models.

DCPS should record and consolidate data on all dispute resolution processes. All dispute resolution mechanisms, both formal and informal, should be entered into SETS so that DCPS can monitor which processes are being used, and whether those processes are helping parents and schools to

reach successful resolutions.

B. Parent Complaint Mechanisms: Parents' Special Education Service Center and State Complaint Office

DCPS should enhance the opportunities for parents to register special education concerns by more actively publicizing the Parents' Special Education Service Center. DCPS must far more aggressively advertise the services currently provided by the Parents' Special Education Service Center. The Center should be provided with sufficient resources to expand its current advertising program. In addition, DCPS should advertise the Center through its own mailings and at parent-school meetings.

The DC Board of Education should establish and publicize state complaint procedures consistent with the requirements of federal regulations. The Board should take great care to make the procedures effective, timely, and accessible to parents. For example, if a written request is required, the Board should provide assistance to parents in filing the complaint. Advertisements and complaint-related documents should be available in multiple languages. Effective outreach to parents will be critical. Such outreach will need to give the parents a reason to use this process instead of filing a request for a hearing; specifically, parents must be convinced that the process is less adversarial, does not require a lawyer, and produces fully enforceable decisions.

The SCO should be integrated into existing structures so that the process does not become more confusing to parents. An intake process should be developed through the existing Parents' Special Education Service Center. If the Service Center fails to resolve a complaint at the local school, it should then recommend that the parent file a complaint with the SCO, and help the parent fill out the necessary forms or direct the parent to a person who can assist them. The complaint should be referred to a staff member with authority to effectively investigate the complaint and issue a

decision within the 60-day timeline.

DCPS must take steps to ensure that decisions are neutral and enforceable. To be neutral, the SCO should not be housed within the Office of Special Education, OGC, or the Office of Compliance. Instead, it should be housed outside of DCPS entirely; this is the only way it will be perceived as neutral. And once an outside entity determines the resolution, DCPS must agree to enforce the decisions. If SCO decisions are not quickly and fully enforced, the process will lose credibility and parents will not use it.

C. Mediation Program

DCPS should take immediate steps to strengthen its existing mediation program. Mediations should be scheduled as soon as they are requested and prior to the date of the due process hearing. Parents should be immediately informed of the time and location of the mediation, as well as how they can prepare, what materials they should bring to the session, who may accompany them, and who else will be in attendance. DCPS should also implement its stated goal of involving personnel from the child's school in the mediation. In addition, DCPS should develop a process that encourages parents to request mediation at any time, rather than only through a hearing request. Finally, DCPS should abandon its blanket policy of refusing to engage in mediations that involve requests for private placements. The decision regarding whether such a placement is warranted should be made on the merits of each particular case.

DCPS must expand its conflict resolution capacity beyond the existing small cadre of mediators. To ensure impartiality and eliminate existing concerns about bias, DCPS should follow the lead of other jurisdictions and contract with an independent dispute resolution organization that can provide skilled mediators and facilitators with sufficient knowledge of special education to assist at any stage of the process. Other jurisdictions currently using such a model include Arkansas, California, Delaware, and Minnesota.

Universities also provide a valuable resource for mediation services in many other jurisdictions. Similar programs operate in the District of Columbia for domestic relations, abuse and neglect, and civil cases through the Multi-Door Dispute Resolution Center at the DC Superior Court, and in a new program for juvenile justice cases through the Center for Dispute Settlement.

To remove another barrier to early resolution of disputes, DCPS should revise DC regulations⁴³ to permit attorneys' fees to be paid to plaintiffs' counsel who play a role in mediations where an agreement is reached. While DCPS is appropriately concerned about the costs of attorneys' fees, earlier resolution of cases, including payment of attorneys' fees in situations in which attorneys are directly involved in mediating disputes, will, in the long run, substantially reduce the costs now incurred in subsidizing an expensive adversarial hearing system. Fees for attorneys should not be excluded from the negotiated agreement that results from mediation. And this policy change should be well-publicized so that attorneys are motivated to request mediation. However, because there are legitimate concerns that paying fees for mediation may in some cases make the process more adversarial, we recommend that fees be made available on a trial basis, contingent on an evaluation after six months showing that attorneys in mediation helped to increase the number of resolutions reached.

D. Strengthen the Formalized Intake System

DCPS should expand and strengthen its use of the DRC to screen due process hearing requests, and particularly to resolve disputes based on DCPS' failure to comply with procedural requirements, so that only requests involving substantive issues (i.e., alleged violations of FAPE and disagreements over placements) proceed to formal due process hearings. The DRC should be charged with attempting to resolve compliance issues quickly, either as soon as the dispute arises or by encouraging the use of mediation or other

less formal dispute resolution techniques. To accomplish this mission, DCPS must ensure that the DRC promptly receives notice of any hearing requests from OGC and that the DRC has the authority and resources to resolve the requests.

The DRC must have the necessary support to promptly investigate complaints when they come in, and the necessary authority both to make decisions about how the complaint should be resolved, including settlement proposals, and how to carry out those decisions. Such support and authority will be indispensable to effecting early resolution of complaints and avoiding hearings whenever possible, as well as to DCPS' efforts to rebuild its credibility and trust with parents.

The DRC must be sensitive to concerns that screening not be used in a way that further delays the resolution of disputes and the provision of needed services to children. Thus, in no circumstances should its review cause DCPS to violate the pre-existing timelines established by the IDEA or local regulations. To the contrary, we expect a well-functioning intake process will reduce current delays and streamline the process.

E. Dispute Resolution Training

DCPS should aggressively seek out programs that provide dispute resolution training to school personnel, Special Education Specialists, and parents. A number of other jurisdictions are far ahead of the District in this regard, and effective training materials are readily available for this purpose from groups such as CADRE (the National Center on Dispute Resolution, funded by the US Department of Education), the Association of Service Providers Implementing IDEA Reforms in Education Partnership (ASPIIRE), the IDEA Local Implementation by Local Administrators Partnership (ILIAD), the Families and Advocates Partnership for Education (FAPE), and the Policymaker Partnership (PMP). In addition, the US Department of Education

funds training programs in this area.

F. Establishment of Pilot Programs for Early Dispute Resolution

DCPS, in partnership with education-related organizations, should establish pilot programs in a small number of schools to help develop and evaluate training and early dispute resolution programs. In formulating overall early dispute resolution strategies that will work in the District, it makes sense to develop pilot programs in a number of schools that are representative of DCPS' student population. We recommend that DCPS establish selection criteria for school participation, and that the schools selected work closely with parents both in formulating the dispute resolution programs and assessing their effectiveness.⁴⁴

DCPS should establish local school dispute resolution pilot programs.

DCPS should utilize the pilot programs to establish new early intervention special education dispute resolution programs. New options are needed to resolve disputes at the earliest possible opportunity, including during IEP meetings. As noted earlier, other jurisdictions have had considerable success with the early use of neutral facilitators and mediators and with pre-hearing request conferences.⁴⁵ The DCPS pilot programs should include providing neutral facilitators and mediators to help resolve disputes before, during, and after IEP meetings; offering pre-hearing request conferences; and developing school-site parent advocacy and mediation programs.

Finding #5

The new Office of Administrative Hearings (OAH) presents an opportunity to improve the administration and adjudication of due process claims, but to be successful DCPS must also invest in its Office of the General Counsel (OGC)

Historically, the Student Hearing Office (SHO) has been responsible for the administration of due process claims and adjudications. That office, which recently underwent a major reorganization, has rarely had the basic resources necessary to administer a cost-effective and efficient due process system. Limitations on equipment, supplies, and facilities have at times impeded the effective administration of the system. Moreover, hearing officers have only recently been provided the specialized training and support they need to issue timely and appropriate decisions, and other supports are absent.⁴⁶ For example, hearing officers neither have ready access to a law library nor a compendium of prior HODs—the latter being a critical resource that could improve the quality and consistency of adjudications and make the decision-making process more efficient.

A. The new Office of Administrative Hearings (OAH) holds promise for improving the administration and adjudication of due process claims.

In 2002, the District enacted the Office of Administrative Hearings Establishment Act (the "Act").⁴⁷ The Act mandated the creation of a District-wide Office of Administrative Hearings (OAH) that would assume jurisdiction over the hearings of several District agencies. Jurisdiction over special education hearings was initially scheduled for transfer to the new OAH in October 2004. Recently, DCPS Superintendent Paul Vance urged the DC Council to advance the transfer date to October 2003. He acknowledged DCPS' difficulty in administering due process hearings in a timely and effective manner and emphasized that the transfer "holds the promise of significant long-term reductions in special education expenditures." On May 6, 2003, the Council passed legislation accelerating the transfer, which we expect to occur in early 2004.⁴⁸

The new OAH holds promise for improving both the administration and adjudication of due process hearings. OAH offers the advantage of a truly independent hearing

office supported by a full, professional administrative staff. Notably, the Act mandates the appointment of an Executive Director responsible for the administration of the OAH,⁴⁹ a Clerk and deputy clerks,⁵⁰ as well as an Advisory Committee.⁵¹ These provisions are expected to enhance key administrative functions, such as the scheduling of hearings and docket management. Individuals involved in the establishment of the new OAH are already working with the DC Office of Personnel Management to lease permanent space with about ten hearing rooms of varying sizes. All of the hearing rooms will be larger than current SHO hearing rooms, and each will have the equipment, technology, and furniture appropriate for formal adjudication.

Beyond provisions designed to enhance administrative performance, the Act includes a series of provisions that are likely to result in improved adjudications. First, the Act requires full-time, trained Administrative Law Judges (ALJs) with significantly greater enforcement powers and establishes minimum qualifications for ALJs.⁵² The Act also mandates the appointment of a Chief Administrative Law Judge. Among other things, the Chief ALJ must establish “standard and specialized training programs for Administrative Law Judges”⁵³ as well as develop and implement “annual performance standards for the management and disposition of cases assigned to Administrative Law Judges.” Importantly, the Act provides that ALJs have subpoena power to compel the production of documents and witnesses as well as the power to impose monetary sanctions for failure to comply with orders.⁵⁴

OAH administrators have informed us about the types of training that hearing officers are already receiving on hearing procedures generally as well as on special education matters. The OAH plans to contract with a special education expert to provide a two-day training conference for all ALJs to be assigned to special education hearings. The OAH also intends to provide specific training on special education

mediation because it plans to focus on resolving disputes through mediation and pre-hearing conferences where possible. The new OAH is also developing a case management program that will track all cases and manage documents electronically. OAH further intends to publish HODs electronically so that attorneys and the general public can become familiar with how cases are decided. OAH believes that publishing HODs will enhance consistency in decision-making and may reduce the number of hearings because their outcomes will likely become more predictable.

Not everyone we interviewed is in favor of the impending transfer of due process hearings from SHO to OAH. One prominent plaintiffs’ attorney, for example, pointed out that special education hearings are very different from all other types of disputes that will be adjudicated by the new OAH, which include licensure, employment, rent, and other business issues. Indeed, IDEA and the implementing regulations impose specific requirements for special education hearings that are not applicable to any other disputes.⁵⁵ Thus, OAH will need to adopt new rules and procedures for due process hearings. More importantly, this attorney also expressed concern that the new OAH ALJs—who will be dealing with a wide range of other business disputes day-to-day—will not have and will not be able to develop the expertise to appropriately resolve special education disputes. Specifically, the ALJs may lack an understanding of children’s educational needs, special education, DCPS operations, the pending class action cases, as well as the legal requirements imposed by IDEA and federal and DC implementing regulations.

Although these concerns are well founded, we believe that with the advent of OAH, DCPS will have an opportunity to remedy long-standing limitations in the due process complaint and hearing process. While we took considerable time to investigate and analyze the many past shortcomings in the SHO and the recent efforts to improve it, given the imminent transfer to OAH we do not think it

is helpful to address the SHO here. We do, however, make some recommendations concerning short-term improvements for that office prior to the transfer.

B. Despite recent improvements, the Office of General Counsel (OGC) is not sufficiently staffed and staff are neither adequately trained nor appropriately organized to handle the extraordinary number of due process hearing requests in a cost-efficient and effective manner.

DCPS is represented at due process hearings by the DCPS Office of General Counsel. Our research found that the extraordinary number of hearing requests—on average, about 300 new requests per month—is overwhelming the capacity of OGC to effectively handle these cases. As of January 2003, OGC had nine staff attorneys, seven of whom work on special education matters exclusively. According to OGC management, the caseload has decreased somewhat, from an average caseload of 100 cases per attorney during the previous year to about 60 cases per attorney at the present time, because several additional attorneys were hired. Even with the decreased caseload, the work is demanding and frustrating, leading to rapid burnout and, in the past, high turnover. While we heard early in our study that OGC lawyers have insufficient time and opportunity for professional development and training programs, OGC management has recently instituted an in-house training program and several attorneys have attended national conferences on special education law. OGC lawyers are also required to attend weekly staff meetings to share experiences and confer on strategy. In October 2002, OGC hired a “Supervisory Attorney,” who is charged with providing training, support, and supervision to other OGC attorneys.⁵⁶

Many OGC and plaintiffs’ attorneys told us that at due process hearings, OGC attorneys often do not contest the charges in the complaint and attempt to resolve the matter by presenting an agreement to the hearing officer. However, the OGC attorneys often fail to inform the parents’ at-

torneys that DCPS will not contest the hearing until at or shortly before the hearing, forcing the parents’ attorneys to prepare for a full-blown evidentiary hearing. This unnecessarily increases the costs that DCPS must bear.

According to plaintiffs’ attorneys, even in the large number of cases in which DCPS does not have a defense, settlement offers are not made in advance of the hearing. IDEA provides that if such an offer is made more than 10 days prior to the hearing it avoids the obligation to reimburse the parent for attorneys’ fees and costs incurred after the date of the settlement offer in those situations in which the parent declines the offer and the relief provided by the HOD is not more favorable than the relief provided by the settlement offer. DCPS’ failure to adopt case management practices that have the potential for maximizing the advantages that can be gained from this provision results in an unnecessary increase in the costs of due process adjudications.

Further, OGC staffing limitations negatively affect DCPS’ ability to appeal unfavorable HODs. Parties have 30 days after the issuance of an HOD to appeal the decision. Plaintiffs’ attorneys frequently appeal HODs when they lose and, according to the Office of Corporation Counsel (OCC), they win their appeals about half the time. Yet DCPS loses hearings far more often and rarely appeals.

The OGC is responsible for submitting requests for appeal to the Office of the Corporation Counsel. Counsel from OGC and OCC offered different reasons for the low incidence of appellate filings and as a result it remains unclear to us why more appeals have not been filed on behalf of DCPS. However, staff from both DCPS and OCC told us that communications between the two offices have been a problem in the past but have improved recently. Both offices wish to challenge more HODs and develop more favorable legal precedent for DCPS, particularly with respect to two issues: 1) whether services in excess of the “free and appropriate” requirement of IDEA are being awarded; and

2) whether timeline violations should result in placements in private schools that are paid for by DCPS and chosen by parents.

In previous years, OGC attorneys were assigned to represent specific schools. This allowed the attorneys to develop relationships with school personnel, which improved their access to records, witnesses, and information. School-based deployment also enabled the attorneys to work more cooperatively with school staff to resolve special education issues. However, this system resulted in uneven workloads among OGC attorneys and was abandoned. We have been advised that school-based deployment was recently reinstated, but it is too early to determine whether the change has had any impact.

Recommendations for Finding #5

Administration of Hearings

A. Jurisdiction of the Student Hearing Office (SHO)

Jurisdiction over due process hearings should be transferred from the SHO to the new OAH as soon as practicable. While we recognize the uncertainties involved with transferring such an important function to a new agency, our recommendation is founded on two principal considerations. First, although there are ongoing efforts to reform and improve the functioning of the SHO, we do not have confidence that these efforts will result, at least in the near term, in the fully functional, efficient, and widely respected hearing office the District urgently needs. Second, while we recognize that there are many questions yet to be answered, we are encouraged by the initial efforts of individuals involved in the establishment of the new OAH to ensure that the new office will be a well-run, professional hearing office, and that the ALJs will receive the training and supervision required to adjudicate special education disputes effectively.

Moreover, locating jurisdiction over special education hearings in a new office outside DCPS will enhance the

credibility of and public confidence in the hearing process. Unfortunately, there is a perception among many parents and others that DCPS—and the SHO as a part of DCPS—is not truly committed to providing special education services to children who are entitled to those services. Moving the authority for these hearings to a separate and independent agency should help change this perception.

B. Short-Term Changes in the Current Student Hearing Office

Sufficient resources should be provided to ensure that the SHO can retain professional staff and obtain equipment necessary to administer the office and conduct hearings. The SHO should be supplied with an adequate number of fax machines, tapes, tape recorders, and telephones to carry out its functions at a minimally acceptable level.

The SHO should upgrade the existing case docketing and tracking system. Given the time and expense needed to create another system apart from SETS, and the fact that the hearing process will eventually be transferred to OAH, our recommendation is to maintain staff who are properly trained in the SETS data system to manage all data concerning hearings, from the time of filing a hearing request to the point where HOD compliance has occurred. At a minimum, the formal docketing system used by the SHO should have the following features:

- A scheduling clerk who is fully trained in SETS and ensures that there is proper notification to all parties, assignment of case numbers, and oversight of system audits.

The new Office of Administrative Hearings holds promise for improving adjudication of due process hearings.

- Consolidation of multiple hearing requests filed on behalf of each student in order to resolve all outstanding issues involving a particular student in one hearing.
- Proper and timely filing of HODs with contemporaneous transmission to the relevant parties, including the schools.

There should be a sufficient number of personnel to effectively run the SHO in accordance with the recommendations outlined herein. This includes hiring a docketing clerk to manage the case docketing system described above, as well as a hearing officer devoted to conducting pre-hearing conferences, and additional hearing officers, if needed, to cover the volume of hearings required.

As required in other jurisdictions, hearing officers (whether part of OAH or the SHO) should be required to participate in special education training before they commence hearing cases. For example, Maryland law requires that “[I]n order to conduct a hearing, the Office of Administrative Hearings shall appoint an impartial administrative law judge who: ... (ii) [h]as received and continues to receive specialized training in matters significant to the educational review of students with disabilities.” Md. Education Code Ann. § 8-413 (c)(2)(ii). In addition to extensive training in the area of special education, hearing officers should be supervised and observed, and their decisions should be subject to review. As noted above, individuals involved in the establishment of the new OAH are already taking steps to ensure that the ALJs in the new office are adequately trained. In determining the appropriate content and scope of this training, OAH and SHO should consult with members of the plaintiffs’ bar, as well as with other professionals knowledgeable about special education law and practice. We note that OAH has already begun meeting with certain plaintiffs’ attorneys and intends to include them in drafting procedural rules for the new agency.

C. Staffing for the Office of General Counsel

DCPS should obtain an independent assessment of OGC staffing needs. OGC attorneys are a powerful resource and they have the potential for contributing in a more meaningful and substantial way to the remediation of the DCPS dispute resolution system. We expect that if properly supported, OGC attorneys could work far more proactively to identify cases that should be resolved without a hearing very early in the process and to function as skilled problem-solvers when there is an impasse between DCPS and parents. Implementation of the DRC will increase the demands on OGC staff who are already carrying very high caseloads that appear to prevent them from working as effectively as they could for their DCPS client. Indeed, in order for the DRC to be effective, OGC staff must partner with special educators so DCPS can reach informed decisions about early screening and settlement of due process hearing claims. For these reasons, we recommend that DCPS obtain an independent assessment of OGC attorney staffing that takes into account attorney qualifications, paraprofessional staffing, the structure of the office, caseload requirements, as well as equipment, and other resources necessary to meet appropriate practice standards.

D. Training for OGC and DCPS Personnel in Hearing Preparation

OGC should provide more training and supervision to staff attorneys handling due process hearings. While DCPS has improved in this regard, it is imperative that it provide OGC attorneys with access to resources such as the IDEA Law Reporter. In addition, funding should be provided to enable all attorneys to attend professional training conferences to keep abreast of recent developments in the law.

Training of school personnel by OGC attorneys will help school staff prevent IDEA violations and comply with HODs; it will also enhance coordination and enable DCPS

attorneys to represent DCPS more effectively. The OGC should emphasize to all school personnel the legal and practical importance of documenting steps taken in each case so DCPS attorneys can more effectively defend the school system. For example, schools should communicate in writing rather than by telephone, and maintain appropriate records of all correspondence. This is one of the advantages of assigning attorneys to specific schools: they can build relationships and emphasize preventive measures as well as the need for documentation.

E. Appeal of Hearing Officer Decisions (HODs)

DCPS should increase its appeals of incorrect HODs that establish unfair or unreasonable precedent. DCPS should more aggressively appeal HODs in which hearing officers have misinterpreted or misapplied IDEA. As noted earlier, both OGC and OCC are in agreement on this point. However, OGC should establish a mechanism for quickly assessing all unfavorable HODs to determine which have substantial merit. An experienced OGC attorney—perhaps the Deputy General Counsel—should be responsible for this duty, and should then complete a request for appeal that is submitted to OCC. For its part, OCC must have the resources to review and process appeal requests on a timely basis. Both OCC and OGC should establish mechanisms for ensuring timely appeals of important cases.



4 Cost Analysis

FOR TWO REASONS, WE THINK IT IS IMPORTANT TO demonstrate the costs that are associated with the failures of the due process system described in this report: first, so that DCPS and District leaders can better assess the magnitude of the problem; and second, so that more informed judgments can be made about the steps that can feasibly be taken to remedy the problem, given the severe fiscal restraints facing the District.

Regarding the first point, we believe the problem should command the District's immediate attention. Millions of dollars are diverted by this due process system away from student services and toward adversarial proceedings, and incalculable damage is done to students and their parents by the system's widespread delay of services to special education students. Regarding the second point, we believe it is imperative that the District institute reforms needed to repair the system—given that those reforms will not only allow DCPS to better serve students, but will actually save the District money in the long run.

Each missed opportunity by DCPS to resolve disputes at an early stage needlessly costs the system thousands of dol-

lars. Moreover, if resources were redirected from due process into service delivery, the overall costs incurred by the system would be significantly lower and the services demonstrably better. And while this will require temporary funding beyond current levels to bring about the needed reforms, we believe that increasing resources in the short-term will be critical both to the development of long term, sustainable, systemic cost savings and to the timely delivery of needed services for special education students.

In essence, the plan and the cost analysis offered here are simple: increasing efforts and capacity regarding identification, assessment, and service delivery will lead to a natural reduction in the number of disputes that arise. And funds invested in better management of those disputes, including the utilization of earlier forms of dispute resolution, will not only reduce the number of due process hearings—thereby saving the costs of the due process machinery—but will also considerably lower attorneys' fee costs and, at least in some cases, avoid the high costs of private placements. These important cost savings make changes to this system imperative—without even considering the largely unquantifiable

human costs to the students and parents who are now denied the timely delivery of services.

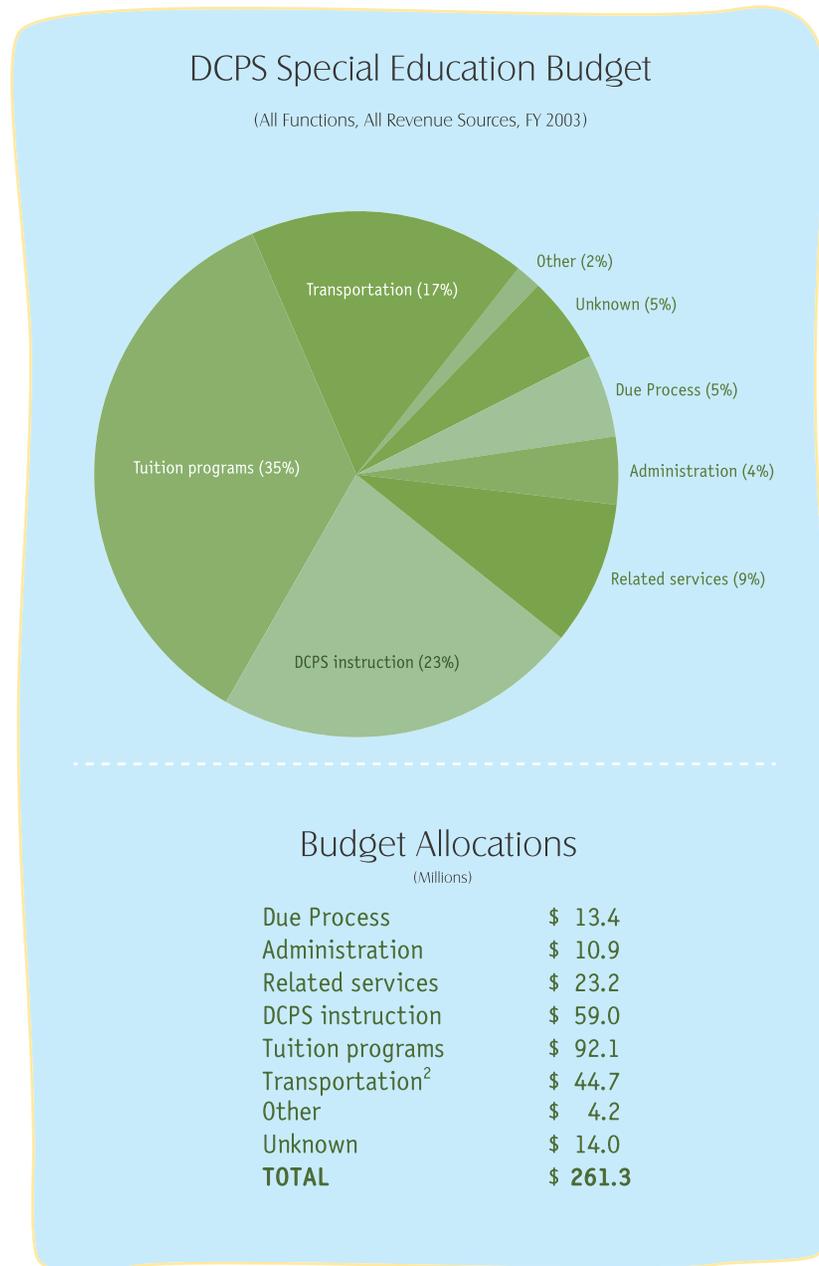
We began our cost analysis by looking to the amount in the DCPS special education budget specifically allocated to due process. In the current year, FY 2003, when all categories particular to special education are included, DCPS applies about 28% of its gross budget of \$935 million to special education.¹

As shown in the chart below, about \$13.4 million, or 5% of the special education budget, is directly assigned to due process costs. Those costs include funds for the following: DCPS counsel, hearing office and officers, attorneys' fees for prevailing parents, court and expert witness costs, and mediation and compliance.

These expenses are paid almost entirely out of local funds, rather than federal special education grants. By far the largest part of this \$13.4 million is fees to plaintiffs' attorneys, as demonstrated by the following breakdown:

Figures for earlier years are incomplete because of a lack of detail in District financial systems, but expenditures last year appear to be a little higher. In the several years before FY 2002, due process expenditures were much lower because of the cap on attorneys' fees, which, as noted, make up the bulk of due process costs.

Significantly, the \$13.4 million in due process costs does not cover the additional outside tuition and transportation costs that might have been avoided had DCPS responded timely and efficiently when special education disputes first arose. As the first chart above shows, the costs of outside tuition (\$92.1 million) and transportation (\$44.7 million) are two of the three largest components of the special education budget, and actual spending for 2003 transportation is currently projected at \$17-18 million over budget. While it is impossible to estimate with any precision what proportion of those costs could be avoided by an efficient dispute



31% of DCPS special education students are referred to private placement, compared to 3% nationally.

resolution system, we know (as discussed below) that the potential savings are significant in dollar terms.

Furthermore, as mentioned before, the total costs of this broken system cannot be fully quantified because the greatest cost—the damage to students who do not timely receive needed special education services—cannot be measured.

Nevertheless, even the \$13.4 million of limited direct costs tells a bleak story about our school system. A recently released study from the Special Education Expenditure Project (SEEP) estimated national expenditures on mediation and due process hearings in FY 2000 at a total of \$146 million.³ The perspective provided by this study leads to two striking findings about DCPS.

First, updated to FY 2003 dollars, the national average expenditure per case resolved was somewhere between \$8,700 and \$13,000.⁴ DCPS estimates that it will have about 2,600 hearings this year,⁵ resulting in a far lower cost per case of about \$5,100, including attorneys' fees. Given that DCPS loses at least two-thirds of its cases, the low cost suggests that DCPS invests far too little in case preparation and that it takes far too many cases to hearings only to lose them summarily. And although the cost per case in the District may at first appear to be low, by another measure—spending per special education pupil—DCPS' expenditures are shockingly high. Nationwide, in FY 2003 dollars, due process proceedings cost \$26 per special education student.⁶ In the District they cost \$303 per special education student, *if attorneys' fees are excluded*. If fees are included, DCPS spends \$1,223 per student.

As noted before, however, these direct due process costs are, unfortunately, only the beginning of DCPS' uniquely high costs. Many hearings result in orders for placements

in private schools, at significantly greater cost than public school placements for similar disabilities, and with a requirement of expensive transportation to far-flung locations. Given the severity of some children's disabilities, some private placements are inevitable. But the contrast between the District's resort to private placements (over 21% of special education students) and the rate prevailing in the rest of the country (3% of special education students) is so enormous that it suggests that at least some of these placements are unnecessary and avoidable.⁷ And as we will describe, our interviews and observations confirm this to be so.

Thirty-four percent of DCPS' special education budget this year—a total of \$92 million—is allocated to payments for private placements, compared to 12% nationally.⁸ Special education transportation accounts for 17% of the current DCPS special education budget, compared to only 7% of nation-wide special education spending. Per pupil spending on transportation for children in private placements currently averages over \$20,000 per student transported.⁹

We cannot know with certainty how many of these private placements are due solely to a lack of services in DCPS that are present in other systems, and how many arise out of mishandling or missing deadlines for initial assessments and missteps by DCPS during due process procedures. But our interviews with DCPS officials and plaintiffs' counsel alike make clear that many private placements occur simply because DCPS repeatedly fails to respond in a timely manner to a request by parents, and the parents' counsel then, by default, select a private placement that DCPS must pay for. Similarly, some of these private placements ultimately occur because problems that might have been addressed with lesser services at an earlier point become unmanageable after prolonged inattention. It is clear that some of these private placements could have been avoided altogether; and some are more expensive than was necessary even where a private placement of some kind was unavoidable.¹⁰

Because, as noted, the costs of private placements and associated transportation costs constitute over half of the total special education budget—\$136.8 million out of \$261.3 million total—some demonstration of the potentially avoidable portion of those costs must be made if one is to assess the dollars lost by our poorly-functioning due process system. For even if only a few of these placements are avoidable or are unnecessarily expensive, their cost is high.

In a comparison of total costs at DCPS special education schools and the tuition at private day schools serving children with comparable disabilities, a DCPS study found a difference of roughly \$13,000 to \$15,000.¹¹ The average student in a non-public placement also incurs roughly \$10,000 more than a special education student in DCPS for transportation.¹² Thus, it appears that each unnecessary placement could cost an additional \$20,000 to \$25,000 per student per year. As of March 2003 there were 2694 non-public placements. Even if only 100 of those placements could be avoided—which is less than 4% of the total—and using a conservative \$20,000 as the avoidable cost per placement, avoiding only that small percentage would save at least \$2 million annually. And since private placements are rarely altered once made, after 10 years of schooling at these rates, \$20 million would be spent unnecessarily.

In addition to saving several million in private placements and associated transportation costs, we believe DCPS could save a significant portion of the \$13.4 million in direct costs it now spends annually on due process. There are several stages at which DCPS could avoid those costs. The first, and most cost-effective, would be to invest in services so that disputes do not arise. If all children were served according to IDEA, and there were no disputes, DCPS could save most of the \$13.4 million per year. But some disputes are inevitable even in a well-functioning system. So the second stage where DCPS could save is by resolving complaints through informal mechanisms, where a dispute can

be resolved without ever involving an attorney. The Parents' Special Education Service Center is such a process. The third stage occurs once a formal hearing request has been filed. At this stage, DCPS can save money by determining earlier which cases can be settled or mediated, and taking to a hearing only those cases with a valid defense.

Investments in all three stages, examples of which are provided below, would pay for themselves in the form of avoided costs—even without considering the added return of more appropriate services being delivered to more students more quickly. Dollar numbers below, like those above, are based on the FY 2003 DCPS budget. The estimated savings below are just that—estimates. But we believe they easily make the case that reforming the due process system will save the District money in the long run—in addition to resolving disputes and delivering appropriate services more quickly.

Settlement

Currently DCPS litigates most of the hearing requests received.¹³ The failure to settle indefensible cases early leads to large expenditures in due process costs alone. By OGC's own estimate, DCPS has no valid defense in about 70 percent of cases. By investing in a process that would allow OGC to determine quickly which cases should be settled, it would save considerably on the costs of attorneys' fees and hearing officers. Based on the budget numbers provided earlier and fee data provided by OGC, attorneys' fees average about \$4,000 per hearing. If a case can be settled quickly, even if DCPS voluntarily includes attorneys' fees in the settlement offer, those fees should not exceed an average of more than \$1,000 to \$2,000.¹⁴ Last year, DCPS settled only 462, or 15%, of its 3,000 hearing requests. If it were to settle an additional 1,500 cases, or 65%, it could reduce costs by approximately \$2,000 on each case in attorneys' fees alone, for a total savings of approximately \$3 million.

Mediation

Nationwide, 28% of special education complaints are resolved through mediation,¹⁵ while in DCPS fewer than 2% are currently mediated. If DCPS were to mediate even 20% of its cases, this would be a vast improvement. It is difficult to quantify savings for mediation; however, even if the expense of conducting mediation is similar to the expense of conducting a hearing, there is much value to parents and schools in resolving complaints amicably. Furthermore, as with settlement agreements, mediation reduces attorneys' fees and eliminates the possibility of costly appeals.

Hearings

Strengthening settlement and mediation procedures will enable DCPS to concentrate on the cases where it has a valid defense. If DCPS went to a hearing for only 15% of its cases, the number of hearings would decrease to about 500. Since this percentage assumes hearings occur only in cases where DCPS has a valid defense, and since our recommendations assume that DCPS will have adequate time to prepare for this reduced number of hearings, it seems reasonable to also assume that DCPS would prevail in most of them, as is the case in most other school districts. This would mean paying attorneys' fees for fewer than 250 cases at hearing. This will plainly lead to substantial savings.

Reducing Disputes through Program Investment

Litigating even 15% of the current level of hearings requested (i.e., 450 of 3,000 cases) still leaves DCPS at a high rate of due process cases compared to any state in the country.¹⁶ The large savings that would bring the District down to levels of expenditure in comparable jurisdictions elsewhere must come from investment in procedures and practices that would prevent non-compliance to begin with and from investment in programs that would greatly diminish the need for private placements.

As previously stated, study of these factors and costs is beyond the scope of this project. Nonetheless, we can identify some steps that would result in savings—some smaller savings from eliminating the need for due process procedures and some major savings from preventing unnecessary private placements. As noted above, the latter could result in avoiding per student costs of \$20,000 or more in tuition and transportation. We caution the reader that savings discussed here substitute for savings from settling cases as advocated above. The measures below would prevent cases from arising in the first place, a situation far more desirable for both DCPS and special education students and their families.

Timely and accurate assessments

According to SETS data, 94 hearings were requested in SY 2001-2002 for reasons related to assessment. We believe that number may be much higher, but even at this minimum level, the potential savings from timely and accurate assessments would be well worthwhile. The average cost of a DCPS in-house assessment is about \$1,200. The typical cost of a hearing plus a private assessment is \$8,000. The difference of about \$640,000 for those 94 cases could be used to pay an additional 10 assessment professionals, enough to eliminate hearings from this cause and save the money of their consequential costs in more expensive services.¹⁷

Timely and appropriate IEP meetings

Similarly, 122 hearings were requested for failure to convene an IEP meeting.¹⁸ If DCPS held all of those IEP meetings as required, at \$5,000 per hearing, it could save approximately \$600,000 in due process costs. And ultimately, it must convene the IEP meeting anyway.

Compliance with settlement agreements and hearing officer decisions

When DCPS fails to comply with written settlements and orders of hearing officers, it has no defense to another hearing or a court action for enforcement. The system will have

to provide the services in any event, and frequently will be ordered to provide compensatory services, along with paying attorneys' fees and incurring additional in-house costs for counsel, witnesses, administrators, and the hearing office and officers. SETS data for SY 2001-2002 identifies 280 hearing requests for failure to comply with a hearing officer's decision and 371 for failure to comply with a settlement agreement, a total of 651 requests. As noted earlier in the report, interviews with counsel for both sides indicate that the number may well be closer to 900 requests.

Although DCPS may succeed in showing that the system did, in fact, comply in some cases, our research and interviews indicate that non-compliance is prevalent and recurrent, and that DCPS usually loses these enforcement proceedings. Unreasonable orders should be appealed, not disregarded, and if DCPS cannot comply for lack of appropriate programs, it might as well concede that immediately. At \$5,000 per hearing, 650 hearings cost the system well over \$3 million in due process expenditures alone. That amount could cover more adequate compliance activity and systems and provide additional programs as well.

Other examples of savings could be given, but the bottom line is this: DCPS is losing millions of dollars every year because its dispute resolution system is not functioning as it should. The repairs we have recommended will not only save money for the District in the long run, but they will help resolve problems more quickly and will release money from the wasteful due process system and make it available for services for students.



5 The Next Step

AS DETAILED IN THIS REPORT, WE BELIEVE THAT DCPS' current system of dispute resolution is dysfunctional and that implementation of the recommendations in this report will significantly improve that system. While it is clear that implementation of these recommendations will require a substantial expenditure of time, attention, and funds by DCPS, they will—in the long term—both reduce the costs associated with the process of placing children in appropriate special education programs and expedite those placements. We recognize that all of this is easier said than done and therefore offer some closing comments about getting it done and about how we might be involved in that effort.

First, we want to put our recommendations in context. As DCPS seeks to improve the special education system by expanding the scope of services it can provide directly—thereby minimizing expensive private evaluations and placements—it must undertake a systematic analysis of (1) the special education programs and related services that are and are not currently available through the DC public schools, and (2) the likely need for such programs and services by special education students.

As acknowledged earlier, such an analysis is well beyond the expertise of the project team and is outside the scope of this report. However, we note that an inventory of available services is critical to effective implementation of the recommendations outlined in this report. DCPS can make sound decisions about how to resolve a dispute without a due process hearing only if it can realistically determine the options available to provide the services at issue. And ultimately, of course, as we have earlier acknowledged, the key to avoiding due process complaints and hearings is to have in place the services whose absence are the subject of complaints. But that issue too is beyond the scope of this report.

What is within the scope of this report is the development of recommendations to make the dispute resolution system work better. We hope our recommendations will be seen as building on those in recent reports and reform plans, by offering more detail and an independent perspective. And we hope in several ways to work with DCPS, and with other outside groups, to implement our recommendations.

One way we are seeking to help with implementation is by approaching foundations interested in education reform that might provide support for specific aspects of needed DCPS reform. We have already begun that effort and are prepared to collaborate with DCPS and others to forward that undertaking.

Another way we are prepared to advance our recommendations is by offering our assistance—if desired—in further developing those recommendations. Although we have given as much detail about those recommendations as we thought was warranted in this report, we are certainly aware that much more detail and much planning will be required at the actual implementation stage, and our project team is willing to support that effort in any way we can. This could include drafting regulations, developing mediation programs, and other forms of assistance.

A third form of follow-up where we might be helpful is in the formulation of pilot programs to effectuate our recommendations. This will require much collaboration and creative thinking. For example, we suggest the development of a pilot project, with a small number of schools, to focus on increasing dispute resolution capacity and accountability at the local school level. Such a project might include:

- Dispute resolution training for key staff
- An in-school complaint and mediation process
- Outreach materials for parents
- Training of parent advocates;
- Establishment of positive incentives as well as disincentives for staff members
- A process for ensuring HOD compliance
- A survey of staff needs and opinions relating to better delivery of special education services

We would leave to DCPS' guidance the selection of schools, although we would suggest that schools be included that have a poor record of providing services and complying with hearing officer decisions. This project could also include a mentoring component, where schools with strong leadership and performance could serve as mentors to schools that need assistance.

Our point, ultimately, is that we recognize that the problem addressed in this report is a difficult one and that writing a report will not solve it. Accordingly, we want to make clear that if others agree with our recommendations, we are prepared to assist with implementation. In the end, however, groups like ours can only assist. We cannot make the necessary reform happen. Only DCPS can do that.

**DCPS is losing
billions of
dollars a year
to a broken
dispute
resolution
system.**

Appendices

Notes

Section 1: Executive Summary

1 The fact that this project has been a joint venture is unusual for both organizations. DC Appleseed's project teams usually consist of individual volunteers from several area law firms and other local and national organizations. It is more typical for Piper Rudnick to conduct its own pro bono initiatives. Piper Rudnick initiated this project, approaching the DC Appleseed Center about this study because of DC Appleseed's experience in education and policy-based research projects. Piper Rudnick donated over 2,300 hours to this project, an investment of over \$700,000 of attorney time, in addition to providing clerical assistance, facilities, and printing costs.

Section 2: Introduction

There are no notes for this section.

Section 3: Background

1 DCPS Office of Special Education. Student Education Tracking System (SETS) Report for March 26, 2003.

2 *Id.* The remaining 4% of students are identified with the following disabilities: deaf-blindness, developmental delay, hearing impairment, other health impairment, orthopedic impairment, traumatic brain injury, and visual impairment.

3 Mandlawitz, Myrna. (2003, February). *A Tale of 3 Cities: Urban Perspectives on Special Education*. Washington, DC: Center on Education Policy, pp. 19, 32, 44. (analyzing data for Chicago, Cleveland, and Milwaukee from School Year 2001, 2002).

4 US General Accounting Office. (2003, May). *District of Columbia: Structural Imbalance and Management Issues*. Washington, DC: Author, p. 60.

5 In School Year 2002-03, Arlington reported a special education population of 17.4% and Alexandria reported a special education population of 16.8%. DCPS, at the time, had 16.9%. Washington Lawyers' Committee for Civil Rights. (2003, January). *DC Public School Funding: Myth and Reality*. Washington, DC: Author.

6 The District of Columbia is exceeded only by the state of New York in the number of hearings conducted. In 2000, DCPS had just under 10,000 students in special education, compared to 650,000 in California and 435,000 in New York. In the District, the ratio of hearings (both requested and conducted) to the number of special education students is far higher than any other jurisdiction.

7 Nichols, Deborah. (2003, May 9). *Flawed Processes and Ineffective Systems of Accountability Pertaining to DCPS' Special Education Program Have Resulted in Costly Legal Fees and Exorbitant Charges for Related Services and Nonpublic Tuition*. Washington, DC: Office of the District of Columbia Auditor, p. 24. [hereinafter *Flawed Processes and Ineffective Systems*] (citing data from FY 2000-2002).

8 *Id.*

9 Schrag, Howard and Schrag Judy. (2002, November). *Dispute Resolution Pro-*

cedures, Data Collection, and Caseloads. Alexandria, VA: National Association of State Directors of Special Education, p. 6. (analyzing data from School Year 1999).

10 DCPS Office of Special Education. *SETS Report for March 26, 2003*.

11 According to SETS data provided for the period September 2001 to June 2002, hearings were requested for 1,161 students (an average of over two hearing requests per student).

12 Nichols, *Flawed Processes and Ineffective Systems* at 36.

13 Ahern, Eileen. (2002, April). *Due Process Hearings: 2001 Update*. Alexandria, VA: Project Forum, National Association of State Directors of Special Education, p. 4. (analyzing data from SY 1996, 1997, 1998, 1999, 2000).

14 Nichols, *Flawed Processes and Ineffective Systems* at 24, tbl. 8.

15 The remaining hearings were unresolved.

16 *Id.*

17 See 5 DCM.R. 3001.1 (2003) (explaining that a private placement is a placement in a non-public school, which is defined as an educational program that is governed and operated by an individual or entity, not including the federal government or any state, county, or municipal agency, or division thereof).

18 DCPS Office of Special Education, *SETS (SY 2002)* (analyzed by Piper Rudnick LLP and DC Appleseed).

19 *Blackman v. Dist. of Columbia and James Jones v. Dist. of Columbia*, 145 F. Supp. 2d 47 (D.DC 2001).

20 For a list of the team members, see the Appendix.

21 The majority of interviews were conducted between June 2002 and February 2003. The interviews were conducted primarily by a subset of the project team, and every interviewer was accompanied by a note taker to ensure accuracy. All interview notes were reviewed and edited by at least two people. In order to encourage full and frank disclosure, interviewees were told that their names would not be used in this report unless necessary for context, and then only with their permission. For this reason, we have generally not cited specific individuals throughout this report. In order to maintain consistency, a general interview protocol was used and lists of questions were developed for all interviews.

22 A number of cases and reports were reviewed during our research, including: reports filed in *Blackman v. District of Columbia and James Jones v. District of Columbia*, 145 F. Supp. 2d 47 (D.DC 2001); Report of the DC Auditor: *Flawed Processes and Ineffective Systems of Accountability Pertaining to DCPS' Special Education Program Have Resulted in Costly Legal Fees and Exorbitant Charges for Related Services and Nonpublic Tuition*, May 9, 2003; Michael Siegel, *Expenditures for Services for Special Education Students in Nonpublic Residential Programs in Selected States* (prepared for the DC State Education Office), September 2002. A complete list of the references reviewed by the Project Team is included in the Appendix.

23 20 USC. §§ 1400, et seq. (2003).

24 *Bd. of Educ. v. Rowley*, 458 US 176, 177 (1982). In *Rowley*, a child with a hearing disability was provided with a special hearing aid and support from tutors, which enabled her to perform better than the average student in her class and to advance from grade to grade. Because she could learn more easily with a sign-language interpreter, her parents insisted that the school district provide an interpreter

for all classes. The Court declined to order the interpreter and found that the child was already receiving adequate services within the definition of FAPE. The school district was not obligated to provide an education “commensurate with the opportunity provided to other children.” At the same time, the Court reinforced the importance of parental involvement in the decision-making process.

25 20 USC. § 1412(a)(3).

26 34 C.F.R. § 300.343(b) (2003).

27 20 USC. § 1415(e)(1).

28 Sen. Rpt. 105-17; H.R. Rpt. 105-95 (May 9, 1997).

29 34 C.F.R. § 300.506(a).

30 Id. at § 300.506(d)(1).

31 Id. at § 300.507(a)(1)-(2).

32 Id. at § 300.507(a)(3).

33 Id. at § 300.508.

34 Id. at § 300.509(a)(1)-(2).

35 Id. at § 300.513(a).

36 Id. at § 300.511(a).

37 Id. at §§ 300.510(b)(1), 300.512.

38 Id. at § 300.661(c)(3).

39 Id. at § 300.661(a)(1)-(4).

40 The District also has a State Education Office (SEO), but this office is not defined as the SEA by local law. The District’s SEA responsibilities have been delegated to DCPS and the Board of Education.

41 State-level functions, as defined by IDEA and interpreted by DCPS, include establishing due process procedures as well as monitoring for compliance with IDEA and the applicable federal regulations, providing transportation services, and paying for private school tuition.

42 In several interviews, we heard that the provision of special education services to children with limited English proficiency was a major problem for DCPS. While this issue is beyond the scope of this paper, it is an important problem to note.

43 These areas were timely initial evaluations and placements, timely reevaluations, timely implementation of HODs, placements in the Least Restrictive Environment (LRE), and implementation of surrogate parent procedures.

44 In *Petties v. District of Columbia*, 881 F. Supp. 63 (D.DC 1995), parents brought a class action under 42 USC. § 1983 challenging DCPS’ failure to maintain special education student placements and services because of the failure to pay private providers, as well as for the failure to provide safe and appropriate transportation to these placements. The District Court has issued a series of remedial orders based on these challenges and has also appointed a Special Master to monitor DCPS compliance with these orders.

45 145 F. Supp. 2d at 47.

46 The OSE Division of School Support manages the related service providers and has an assigned coordinator for social workers, occupational/physical therapists, speech/language therapists, psychologists, bilingual specialists, and transportation. The related service providers are generally assigned to multiple schools on a rotational basis.

47 District of Columbia regulations allow 120 days to assess the student, determine eligibility, and develop an IEP.

48 The OSE Division of School Support assigns a Special Education Specialist (SES) to each school. Each SES is responsible for seven to nine schools and serves as the first point of contact when a school has a special education need. The SESs are encouraged to facilitate all IEP meetings that are expected to be contentious or where an attorney will be present.

49 Diagrams illustrating the DCPS administrative structure, including the Division of Special Education, are included in the Appendix.

50 It is frequently confused with the Office of Mediation and Compliance.

51 Special Education Task Force Expansion Temporary Amendment Act of 2002, effective for 225 days after March 27, 2003 (DC Law 14-262) (temporarily codified in DC Code § 38-2501 (2003)).

Section 4: Findings & Recommendations

1 DCPS Office of Special Education, SETS (SY 2002).

2 Office of Special Education Programs, US Department of Education, Annual Report to Congress at Appendix 1, tbl. AB3.

3 It is important to note that funding for the development of school-based special education programs is not included in the local school budget. Therefore, while the level of funding provided by the Weighted Student Formula enables administrators to provide individualized services to special education students, it does not permit them to design and implement programs calculated to serve the entire special education population. Numerous principals and special education coordinators told us that the absence of such funds hindered their ability to provide the best possible services for their special education students.

4 In our interviews, teachers expressed the desire for training in the areas of assistive technology, assessments, behavioral intervention plans, crisis management, special education law, mediation, conducting IEP meetings, IEP development, classroom management and inclusion strategies.

5 It is likely that the actual number is higher since SETS does not record all of the reasons for hearing requests and they are not always listed on the request form.

6 DCPS Office of Special Education, SETS (School Year 2002) (analyzed by Piper Rudnick LLP and DC Appleseed); see also *Blackman-Jones*, 145 F. Supp. 2d at 47.

7 As of July 2003, there were only two compliance specialists due to a hiring freeze at DCPS.

8 The organizational workflow should include administration of the Teacher Assistance Team (TAT) process, with a mechanism for centralized oversight by DCPS. Currently, school personnel are trained in the process, but there are no data on how TAT is implemented in the schools. If DCPS believes that this is a process that can improve services to children, then schools must be held accountable for implementation.

9 This recommendation is consistent with Point 1.1 of the DCPS Strategic Plan. See, District of Columbia Public Schools. (2003, May 30). Special Education Strategic Plan. (available at <<http://www.k12.dc.us/dcps/special/ seannounce.html>>).

10 See, e.g. Snow, Catherine E.; Burns, Susan and Griffin, Peg. Preventing Reading Difficulties in Young Children. National Academy Press, 1998

11 PERM is an internal process for reviewing all IEPs that recommend services that are unavailable at the local school. The purpose of the review is to ensure that the IEP was developed correctly and that the placement complies with IDEA's Least Restrictive Environment requirement. If it does not, the IEP is sent back to the school for another IEP meeting. Plaintiffs' attorneys criticized this process as a violation of IDEA, arguing that it constitutes inappropriate decisionmaking made outside an IEP meeting. However, the US Department of Education assured us that the process is not only consistent with IDEA, but necessary for compliance. Some of the criticism lodged by attorneys about this process could have been avoided with clear communications about the issue and wide distribution of a written policy.

12 We note, however, that in the last year, DCPS has posted brochures describing these processes on its website: <<http://www.k12.dc.us/dcps/specialed/setipsheets.html>>.

13 20 USC. § 1412(d)(1)(B)(iv).

14 While DCPS has improved its website considerably, important information relating to policies and services are not provided online. <<http://www.k12.dc.us/dcps/specialed/specedhome.html>>

15 See generally Nichols, Flawed Processes and Ineffective Systems.

16 Id. at 9-15. The report notes, however, that these instances occur as the result of DCPS' failure to comply with IDEA timelines.

17 Id. at 15-16.

18 It is not the purpose of this paper to determine the truth of such accusations. If unethical practices are occurring, DCPS must deal with each on a case-by-case basis through appropriate legal procedures.

19 Id.

20 The hearing request form does not provide adequate space for complaint information. However, the form does invite petitioners to attach additional pages to provide more information if needed.

21 Congress first imposed a cap in the Appropriation Act for the District of Columbia for the 1999 Fiscal Year. That Act imposed a maximum payable attorney fee rate of \$50 per hour, with a maximum of \$1,300 for a given case. An exception was made to the \$1,300 ceiling for "extended or complex representation." Congress extended the cap in the FY 2000 DC Appropriation Act, but raised the ceilings to \$60 per hour and \$1,560 per case, and for FY 2001 raised the limits to \$125 per hour and \$2,500 per case. On both occasions, the exception for extended or complex litigation was retained.

In the FY 2002 DC Appropriation Act, Congress lifted the cap, but provided that DC could not use appropriated funds for that year or any subsequent fiscal year to pay for fees that may have "accrued" in prior years in excess of the caps.

22 During the FY 2002 congressional debate on the issue, Senator Hutchinson, who supported the caps, made specific reference to a letter from School Board President Peggy Cooper Cafritz and Superintendent Paul Vance. That letter stated that lifting the cap would cost the District \$12 million in additional fees and that "the result of such an expenditure will seriously and adversely affect our ability to provide educational materials, textbooks, and operational support to the students,

teachers, and staff of the DC schools."

23 H.R. 1350 § 205(i)(2)(c).

24 We understand from DCPS that these review procedures have been established. In fact, according to DCPS, the average amount per attorney invoice between September 2002 and April 2003 was \$7,633, and the average DCPS payment for invoices reviewed and approved was \$3,856.

25 Nichols, Flawed Processes and Ineffective Systems at iv.

26 30 C.F.R. §§ 300.507(c)(1)-(2) (stating that "the public agency must have procedures that require the parent of a child with a disability...to provide notice ... to the public agency in a request for a hearing" and setting minimum requirements for the information that should be included in the request).

27 The Center received a total of 295 calls regarding special education issues between the summer of 2002 and February of 2003.

28 The Center received 122 calls during March and April of 2003.

29 See Schrag and Schrag, Dispute Resolution Procedures, Data Collection, and Caseloads at 4.

30 The data on the number of mediations were somewhat inconsistent. For example, although different parameters were used (e.g., fiscal year and school year), the SETS data showed that requests for mediation were only 2% of the total number of requests for dispute resolution, and the Schrag report indicated 6%.

31 Schrag and Schrag, Dispute Resolution Procedures, Data Collection, and Caseloads at 4.

32 The Schrag study points out that the ratios vary widely from state to state and that there are concerns about the accuracy of some of the data.

33 Nichols, Flawed Processes and Ineffective Systems at 24.

34 At the beginning of the mediation program, DCPS was represented in mediation sessions exclusively by case managers. This was a shortsighted practice since local school personnel better understand the child's needs and can continue to work with the parents on the implementation of any agreement reached in mediation. DCPS is now encouraging local school personnel to become involved in mediation whenever possible.

35 We spoke to only one or two attorneys who are paid by salary and do not collect fees. Notably, these attorneys were among the few that we spoke to who regularly request mediation.

36 In *Akinseye v. District of Columbia*, 193 F.Supp.2d 134 (D.DC 2002), the court held that voluntary settlements resolving administrative proceedings that were initiated on behalf of 67 students did not qualify for attorneys' fees because the plaintiffs were not "prevailing parties" as that term was defined by the Supreme Court's ruling in *Buckhannon Board and Care Home v. West Virginia Dept. of Health & Human Resources*, 552 US 598 (2001). *Buckhannon* held, under the Fair Housing Act, that in order for a settling party to be entitled to attorneys' fees, a settlement must be subject to enforcement by a court-ordered consent decree. Id. at 604. Ten days later, in *Johnson v. District of Columbia*, 190 F.Supp.2d 34 (D.DC 2002), the court held that *Buckhannon* does not preclude awards of attorneys' fees to plaintiffs who settle IDEA claims during either administrative or judicial proceedings, because (a) a settlement agreement sufficiently alters the legal relationship between the parties and allows a plaintiff to be a prevailing party, and (b) a settlement agreement is enforceable. *Johnson*, 190 F. Supp.2d at 45. The John-

son court interpreted Buckhannon narrowly, reasoning that otherwise the purposes of IDEA would be undermined. *Id.* at 41. Akinseye is currently on appeal, and there are no other cases that conflict with its holding.

37 Several attorneys emphasized their view that this posed a conflict of interest for them. They pointed out that although the settlement offer might be in the best interest of their client, settling would mean that the attorney would not be paid. While the court in *Evans v. Jeff D.*, 475 US 717 (1986), held that a settlement with a fee waiver provision did not violate the Attorneys' Fees Awards Act of 1976, the Johnson court suggested that this would not apply to IDEA because that statute provides plaintiffs with the specific right to counsel, and a fee waiver provision would violate that right. See also *Evans*, 475 US at 732-733 (noting that a "general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." However, the court did not decide this question, because it found that plaintiffs lacked standing).

38 Nichols, *Flawed Processes and Ineffective Systems* at 24.

39 This concern is consistent with some of our observations during IEP meetings. While it is true that attorneys provide an important support for parents, they tend to come into IEP meetings requiring a specific outcome, and declaring that if that outcome is not reached, a hearing will result.

40 District of Columbia Public Schools, *Special Education Strategic Plan* at pt. 6

41 According to OGC, in recent months DCPS has entered into an average of 15 settlements per month. This is a decrease from FY 2002, in which there were 492 settlements. However, 67 hearing requests were withdrawn during April, which is over one-fourth of the 119 requests withdrawn during all of FY 2001.

42 This information was provided by the DCPS Office of General Counsel. Many of these "wins" have been appealed by plaintiffs to the federal court.

43 The regulation referred to is published at 5 DCM.R. Ch. 30.

44 For more details, see the final section of this report entitled "The Next Step"

45 CADRE offers extensive information on mediation practices in other jurisdictions. See, e.g. Beyer, Jonathan; Feinberg, Edward and Moses, Phillip. *Beyond Mediation: Strategies For Appropriate Early Dispute Resolution In Special Education*, and Miller, Valerie. *What Participants are Saying About Oregon's Mediation Process* (available at <<http://www.directionservice.org/cadre/index.cfm>>).

46 The new hearing officers hired in February of 2003 only recently received training. A 16-hour program was provided by a nationally recognized contractor in May of 2003 and included topics such as LRE, discipline, extended school year, and compensatory education.

47 DC Law. 14-76 (2002) (amending DC Code § 2-1831.01).

48 The OAH will begin operations 180 days after the confirmation of a Chief Administrative Law Judge (ALJ). The DC Council held confirmation hearings in June 2003 and confirmation is expected in the fall of 2003.

49 DC Law. 14-76 at § 15(a).

50 *Id.* at § 15(d).

51 *Id.* at § 20.

52 *Id.* at § 11(d).

53 *Id.* at § 8(a)(4).

54 *Id.* at § 12(b)(1), (8).

55 These include, for example, time-line requirements for exchanging witness lists and documents, for holding hearings, and for issuing hearing officer decisions.

56 This position is currently vacant.

Section 4: Cost Analysis & The Next Step

1 Special education is funded by federal grants and Medicaid reimbursements as well as by local funds. DCPS switches certain functions from one revenue source to another frequently; thus, one can obtain an accurate picture of allocations among special education functions only by including all revenue sources. Of the \$261 million budgeted for special education purposes, \$227 million (87%) comes from local revenues, \$20 million (8%) from Medicaid reimbursements, and \$14 million (5%) from federal grants.

2 This is the budget amount only; current spending projections for FY 2003 are \$62 million, about the same as FY 2002. Savings efforts may reduce the amount a little. Resolution of the rest of the overspending may come either from other special education functions or from elsewhere in the school system.

3 Chambers, Jay; Dhanani, Arynah; Harr, Jenifer; and Parrish, Thomas. (March 2002). *What are We Spending on Procedural Safeguards in Special Education, 1999-2000?* at 7-8. Palo Alto, CA: Special Education Expenditure Project, Center for Special Education Finance.

4 *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* at 8. The authors caution that these costs are probably underestimated because attorneys' fees paid to opposing parties were probably not included by some respondents.

5 District of Columbia Public Schools Office of Special Education. (2003). *Special Education Reform Plan-Investment and Cost Saving Plan*. Washington, DC: Author, p. 3.

6 *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* at 5-6. Because respondents did not always include attorneys' fees (see footnote 112) we have included DCPS data both with and without attorneys' fees.

7 District of Columbia Public Schools. (2002, Oct. 22) *Shared Goals, Collective Benefits*. Presentation to Mayor's Taskforce, p. 3.

8 Chambers, Jay; Harr, Jenifer; and Parrish, Thomas. (March 2002). *What are We Spending on Special Education Services in the United States, 1999-2000?* at 9. Palo Alto, CA: Special Education Expenditure Project, Center for Special Education Finance.

9 Overall, per pupil transportation is currently costing almost \$16,000 per student (\$62 million for 3,870 students, according to data provided by DCPS officials) but is twice as costly for private placements. *Shared Goals, Collective Benefits* at 4. Based on these figures, DCPS is spending \$10,900 per public school student transported and \$21,750 per nonpublic school student transported.

10 See generally Nichols, *Flawed Processes and Ineffective Systems*.

11 Data provided by the DCPS Office of Special Education, June 2003.

12 Our calculation is based on total transportation spending in FY 2002, the numbers of public vs. private placement students transported, and the assumption of twice the cost for the latter.

13 See generally Nichols, *Flawed Processes and Ineffective Systems*. In *Fiscal Year*

2000, 59%, or 1,799 requests were resolved at a hearing.

14 As earlier noted, under applicable IDEA regulations, 30 C.F.R. 300.513(c)(2), plaintiffs' attorneys have a strong incentive to settle. If a hearing officer finds that a reasonable settlement was offered and declined, they must limit attorneys' fees to the date the offer was made.

15 Schrag and Schrag, Dispute Resolution, Procedures, Data Collection and Case Loads at 4.

16 Schrag and Schrag, Dispute Resolution, Procedures, Data Collection and Case Loads at 4.

17 We note, however, that in addition to the number of assessment professionals, DCPS may also want to invest more in the quality of each assessment. According to numerous plaintiffs' attorneys, assessments are frequently inadequate and result in DCPS paying the costs of both a public and private assessment.

18 We believe this number to be higher, because SETS, or the hearing request form, may not record all reasons for a hearing request.

Team Members

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James Rathvon, Partner
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Jennifer Leonard, Georgetown Law School, student
Mary Levy, Wash. Lawyer's Committee for Civil Rights
David Marlin, Chair of DC Board of Appeals and Review
Natalie Rathvon, George Washington University
Samuel Rosaldo
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Josh Wyner, Jack Kent Cooke Foundation

Interviews and School Visits Conducted

(titles reflect positions held at time of interview)

Special Education Experts & Other Professionals

Bob Anderson, President, DC Chapter, Association for Retarded Citizens (ARC)

Laura Bassein, Program Coordinator, Michigan Special Education Mediation Program (Office of Dispute Resolution, State Court Administrative Office)

Annette Forseter, Metropolitan Area Communication Services LLC

Patricia Geary, Associate, Special Education Policy Unit, New York State Education Department

Elizabeth Giovannetti, Vice President for Education Program Design, New American Schools

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Laura Paris, Associate, Lifelong Services Team, Vocational and Educational Services for Individuals with Disabilities

Luzanne Pierce, Project Director, Early Childhood Technical Assistance Center, National Association of State Directors of Special Education

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Diane Smith, Senior Disability Legal Specialist, National Association of Protection and Advocacy Systems

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Nancy Deutsch, Attorney, Office of the General Counsel, US Dep't of Education

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Sharon Jackson Bland, Policy Analyst, State Education Office

Councilman Kevin Chavous, Member, DC Council; Chair, Committee on Education, Libraries, and Recreation

Lisa Coleman, Administrative Law Judge, DC Office of Administrative Hearings

John Dean, Administrative Law Judge, Office of Administrative Hearings

Robert Utiger, Assist't Corporation Counsel, Office of the Corporation Counsel

Martha Knisley, Director, DC Department of Mental Health

John Koskinen, City Administrator/Deputy Mayor, District of Columbia

Gregory McCarthy, Executive Office of the Mayor, Policy and Legislative Affairs, District of Columbia

Cary Pollack, Assistant Corporation Counsel, Office of the Corporation Counsel

Badiyah Sharif, DC Early Intervention Program Transition Coordinator, Office of Early Childhood Development

Connie Spinner, State Education Officer, State Education Office

Velva Spriggs, Director, Child and Youth Services, Department of Mental Health

District of Columbia Board of Education

Peggy Cooper Cafritz, President, DC Board of Education

Bonnie Cain, Staff, DC Board of Education

Laura Gardner, Member, DC Board of Education; Co-Chair, Special Educ. Committee

Tommy Wells, Member, DC Board of Education; Co-Chair, Special Education Committee

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 Bernadette Bullock, Coordinator of Mediation, Office of Special Education
 Ron DeSena, SETS Consultant, 4GL School Solutions
 Anne Gay, Assistant Superintendent, Office of Special Education
 Wendy Gee, Executive Director, Management Services
 Karen Griffin, Assistant Director, Division of Program Development, Office of Special Education
 Carol Helton, Division of Mediation and Compliance, Office of Special Education
 Karen Herbert, Attorney Advisor, Office of General Counsel
 Michael Levy, Attorney Advisor, Office of General Counsel
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 Robert Morales, Chief Financial Officer, DCPS
 Ralph Neal, Assistant Superintendent for Student Services
 Alan Patterson, Supervisory Computer Specialist, Office of Special Education
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 William Rioux, Director, Parents' Special Education Service Center
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 Judith Smith, Executive Director, Division of Mediation and Compliance, Office of Special Education
 Michael Snipes, Executive Director, Division of School Support, Office of Special Education
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 Noah Wepman, Budget Analyst, Office of Special Education

DCPS Hearing Officers

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 Betty Underdue
 Corinne Vinopol

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 Joan Gibson
 Donna Lowery-Campbell
 Jackie Pinckney-Hackett
 Paula Roberts
 Senora Simpson

Althea Tolson
 Jackie Young

Plaintiffs' Bar

Donovan Anderson, The Law Office of Donovan Anderson
 Kelly Bagby, U. Legal Services (Class Counsel, Petties lawsuit)
 Robert Berlow, Esq.
 Megan Blamble, Georgetown Family Advocacy Clinic
 Matthew Bogin, The Law Office of Matthew Bogin
 James Brown, Murrell & Brown
 Paul Dalton, Dalton & Dalton
 Rebecca Gleason, Good Shepherd Legal Services
 Elizabeth Greczek, U. Legal Services (Class Counsel, Petties lawsuit)
 Elizabeth Jester, Jester & Williams
 Margie Kohn, Kohn & Einstein
 Charles Moran, Esq. (Class Counsel, *Blackman-Jones* lawsuit)
 Travis Murrell, Murrell & Brown
 Jamie Rodriguez, Civil Staff Attorney, Office of the Public Defender, DC
 Tammy Seltzer, Bazelon Center for Mental Health Law (Class Counsel, *Blackman-Jones* lawsuit)
 LaShanda Taylor, Staff Attorney, Children's Law Center
 Donna Wulkan, Law Offices of Donna L. Wulkan

Private Schools Visited

Foundation Schools, Montgomery County
 Kingsbury Center, Washington, DC
 The Lab School of Washington, Washington, DC
 St. Coletta's School, Alexandria, VA
 St. John's Community Services, Washington, DC
 The Kennedy Institute, Washington, DC

Public (Charter and DCPS) Schools Visited

JOS-ARZ Public Charter School
 SAIL Public Charter School
 Hyde Elementary School, DCPS
 Nalle Elementary School, DCPS
 Prospect Learning Center, DCPS
 Shaed Elementary School, DCPS
 Tyler Elementary, DCPS
 Walker-Jones Elementary School, DCPS
 Wilson Senior High School, DCPS

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Glossary of Acronyms

ALJ	Administrative Law Judge
DRC	Dispute Resolution Committee
FAPE	Free and Appropriate Public Education
FY	Fiscal Year
HOD	Hearing Officer Determination
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Plan
LEA	Local Education Agency
LRE	Least Restrictive Environment
OAH	Office of Administrative Hearings
OCC	Office of Corporation Counsel
OGC	Office of General Counsel
OSE	Office of Special Education, DCPS
OSEP	Office of Special Education Programs, US Department of Education
OT/PT	Occupational Therapy/ Physical Therapy
PERM	Preliminary Education Review Meeting
SCO	State Complaint Office
SEA	State Education Agency
SES	Special Education Specialist
SETS	Special Education Tracking System
SHO	Student Hearing Office, DCPS
SY	School Year
TAT	Teacher Assistance Team

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