

**A Review of the District of Columbia Public Schools' Process  
for Reimbursing Attorney Fees in IDEA Cases**

**Clarence J. Sundram  
Court Monitor**

**Thomas Harmon  
Consultant Reviewer**

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Appendix A –DCPS Revised IDEA Administrative Fee Process, March 25, 2013

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## I. INTRODUCTION

The issue of timely and adequate compensation of plaintiffs' attorneys who prevail in special education due process complaints brought under the Individuals with Disabilities Education Act ("IDEA," 20 U. S. C. §§1400 et seq.) has arisen from time to time in the course of the implementation of the Blackman Jones Consent Decree. On August 28, 2009, class counsel filed a report on the non-payment of attorney's fees to the special education bar (*Plaintiffs' Report on the Non-payment of Attorneys Fees* [Docket #2177]) reporting that the plaintiffs' bar attributes the decrease in due process complaints to the financial difficulties faced by the plaintiffs' bar as a result of the nonpayment and under payment of attorney's fees by DCPS. In its response to this report, the District cited several factors contributing to a decrease in due process complaints including improvements in the special education system, early settlement of disputes, increased success by DCPS in due process hearings, and financial mismanagement by some plaintiffs' law firms. (*Defendants' Response to Plaintiffs' Report on Non-Payment of Fees* [Docket #2195, filed 11/3/09]. A supplemental filing by the then DCPS General Counsel, James J. Sandman, acknowledged that there were some delays in payment of attorney's fees and costs during the 2009 fiscal year due to difficulties with internal District transfer of funds, the replacement of a critical member of the DCPS invoice review team, and the introduction of new payment and processing procedures that were "intended to provide a more detailed and transparent explanation of the results of its invoice reviews." (*Declaration of James J. Sandman* [Docket #2196-2, filed 11/6/09]) There were additional filings by both parties (Docket #s 2209 & 2212).

In the year-end report for the 2009-10 School Year, the Evaluation Team addressed some of the issues and the ongoing disputes regarding payment of attorney's fees to prevailing parties

in due process complaints. This discussion serves as a useful backdrop to the current review and is therefore quoted at length below.

The conflicts over the payment of attorneys' fees that have persisted since the 2007/08 SY have compounded the dynamics involved in shifting responsibility to families for implementation of critical HOD/SA provisions. Many if not most of these families, because of their life circumstances, rely upon their attorneys to navigate a complex bureaucratic process to find and arrange for the special education and related services that have been delegated right back to them. DCPS policies and practices with respect to compensating attorneys for the time and effort required to perform work that otherwise would be the responsibility of DCPS staff can create an additional hurdle to students ultimately gaining the benefits they have won on paper, even though the policies were intended to provide a sound, uniform administrative review process for review and approval of fee invoices.

DCPS uses guidelines originally issued on October 1, 2006 for management and approval of attorney fee applications. The guidelines provide that no fees will be paid for work on cases that occurs 30 days prior to the due process complaint. Counsel are also required to submit any invoices within forty-five (45) days of the issuance of the HOD/SA which may give rise to fees, although the guidelines include provisions for submission of supplemental invoices. Finally, the guidelines provide that DCPS will make reasonable efforts to process invoices within 60 days but that if the attorney receives no acknowledgement that the invoices have been processed within 90 days of submission, counsel may consider the invoice as denied. The General Counsel's Office views itself as having established a transparent, functional, and accountable process for attorneys to submit invoices and receive payment and responses regarding invoices submitted much more quickly than alternate processes that would require independent, often lengthy, litigation in federal court. Counsel for the District maintains that this process is handled in a manner that is congruent with the office's obligations to expend funds in a fiscally responsible and appropriate manner.

The Guidelines were issued prior to DCPS' shift to a model of relying heavily on counsel to carry the weight of arranging all evaluations and compensatory services for students. The Evaluation Team reviewed a small sample of invoices. The sample cases provided by the General Counsel's office appeared reasonably handled as a whole. On the other hand, the samples provided by private counsel reflected that whole swaths of work and hours had been declared not reimbursable, including the attorneys' ongoing essential conversations with Blackman/Jones case managers regarding the cases as well as work with clients and the professionals responsible for evaluations or compensatory services. The Evaluation Team recognizes that each case presents its own particular set of facts bearing on the appropriateness of fees requested. The Evaluation Team cannot make a full evidentiary-based assessment of fee payment issues at stake and does not endeavor to do so here. Still, there are certain issues which cut across the fee cases and potentially impact the entire due process and case implementation system within the District of Columbia.

Currently, the General Counsel's office generally declines to authorize payment to attorneys for diligent investigation of cases prior to litigation that may involve work (meeting with parents; obtaining and analyzing school records, treatment and evaluation documentation) that precedes by more than 30 days the filing of a due process complaint. This type of lead work may be essential to appropriate handling of cases and due diligence in representation of students whose cases don't suddenly emerge whole cloth from a single event occurring within the 30-day period prior to the complaint. Similarly, while the Guidelines authorize supplemental billing after 45 days, private counsel contend that their capacity to obtain full compensation after the initial 45 day period also is subjected to greater cutting and diminished after this time frame, despite the fact that their obligations under most HOD/SAs now typically continue long past a 45-day period.

We think it essential to observe that the time limitations regarding eligibility for attorney fees and the application of these guidelines take on a heightened importance because the District has intentionally shifted considerable responsibility to parents to accomplish many critical tasks associated with implementing HOD/SAs, especially arranging independent evaluations and independent compensatory education which can be both time-consuming and protracted. In carrying out these tasks as well, the Evaluation Team has also seen cases in our sample where the parent and attorney have encountered difficulties in obtaining District-provided transportation services that are essential to delivering the services contained in the Settlement Agreement, resulting in delays. Parents with few resources of their own rely on attorneys to provide the support and to make the arrangements that typically are required to implement the Settlement Agreements or HODs. Under these circumstances, the current policies and practices inject uncertainty into the process of reimbursing attorneys for the time and effort they are required to expend to carry out tasks that formerly have been the responsibility of DCPS employees. We believe that these guidelines and their application should be reconsidered and revised and are pleased that the General Counsel for DCPS has now committed himself to such a review. We would additionally recommend that this review be conducted in consultation with members of the private bar, in light of the changed conditions that have transpired since the guidelines were promulgated in 2006.

*(Report of the Evaluation Team for the 2009-10 School Year, Docket #2243, filed 12/10/10, pp. 43-45, internal references omitted)*

Subsequently, DCPS issued revised guidelines for payment of attorney's fees which were adopted effective June 1, 2012. As reported in the Monitor's year-end report for the 2011-12 School Year, the number of due process complaints continues to decline, falling by almost a third from the previous year to 1,010 during the period July 1, 2011 to June 30, 2012, while the number of HOD/SAs also declined by 30% to 630 over the same period. *(Report of the Monitor for the 2011-2012 School Year, Docket #2297, filed 12/10/12)* Complaints from members of the

plaintiffs' bar over long delays in paying invoices, reductions in the amounts billed without an adequate explanation, and the lack of effective recourse to challenge such decisions have continued. In an effort to collect factual information about billing and payment practices regarding attorneys' fees the Monitor undertook the current review.

## **Purpose**

This report examines the process of receiving, reviewing, approving and paying attorney's fees and, based on a review of sample invoices, reports on the consistency of practice in setting rates, adequacy of documentation in describing the service delivered, approval of time spent on the task (to be reported in 1/10 hour increments), and the time it takes to process an invoice from the time it is submitted to the time it is approved by DCPS' Office of General Counsel (OGC) and the time it is paid by the Office of the Chief Financial Officer.

## **Methodology**

During the review interviews were conducted with:

- OGC staff, including its General Counsel, Supervising Attorney and Financial Program Analyst;
- Associate Chief Financial Officer for the Office of the Chief Financial Officer;
- Six Plaintiff attorneys; and
- Meeting with the plaintiffs' class counsel and Special Education Attorneys Roundtable.

Billing guidelines issued to the Special Education Bar by OGC on June 1, 2012 and October 1, 2006 were reviewed as were related documents, such as the Attorney Information Sheet prescribed by the guidelines. In addition, examples of settlement agreements with individual attorney fee offers were reviewed.

While on site, the last 30 invoices approved by OGC and sent to the Office of the Chief Financial Officer (OCFO) for payment on or before November 1, 2012 were reviewed.<sup>1</sup> This analysis focused on timeframes for the review, approval and payment of invoices; the consistency in approving attorney's hourly rates and the scope of adjustments to invoices made by OGC upon its review.

A subset of 10 of the 30 invoices was examined in depth off site to determine consistency in approval or adjustments to line items made by OGC.

### **Organization of Report**

Findings relating to the DCPS' process of receiving, reviewing, approving and paying invoices are presented on pages 8 to 15.

Findings concerning timeframes and hourly rates emanating from the review of 30 invoices are presented on pages 19 to 22.

Findings arising from the line item review of a subset of invoices are presented in pages 22 to 30.

Additional findings on Settlement Agreements wherein attorney fees are specified and other concerns of attorneys are presented in pages 31 to 36. Conclusions and recommendations follow.

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<sup>1</sup> On site interviews and record reviews were conducted on November 14, 15, 28, and 29, 2012.

## II. FINDINGS

### 1. PROCESS FOR RECEIVING, REVIEWING, APPROVING AND PAYING ATTORNEY FEES

#### A. Billing Guidelines

OGC issued *DCPS Guidelines for the Payment of Attorney Fees in IDEA Cases*. The most recent, issued and effective June 1, 2012, superseded those issued on October 1, 2006.

The guidelines establish a framework for DCPS' compensation of a prevailing party's reasonable and documented attorney fees. They address issues such as:

- What to submit with an invoice – e.g., copy of the Hearing Officer Determination (HOD) or Settlement Agreement (SA), etc.;
- Hourly rates for reimbursement based on the attorney's experience;
- What will be reimbursed – e.g., services attorneys perform related to the practice of law (e.g., preparing or drafting legal opinions, providing legal advice and counsel to a client, appearing before a hearing officer, etc.), certain out-of-pocket expenses, postage, etc.
- What will not be reimbursed – e.g., expert fees, overhead, travel time to hearings, etc.

The guidelines require that services rendered be billed in 1/10 hour increments and be described in sufficient detail to determine the reasonableness of the activity. Along these lines, examples are given. Descriptions such as "Read," "Review," or "Follow up" are not recommended. Recommended descriptions cited as examples are: "Read \_\_\_\_ (explain relation to matter if unclear)," "Draft \_\_\_\_ (explain relation to matter if unclear)" and "Phone conference with \_\_\_\_ regarding \_\_\_\_."

The guidelines also require attorneys to have an Attorney Information Sheet (AIS) on file with OGC. The AIS contains information about the attorney's experience and is intended to ensure that attorneys are credited with an appropriate hourly rate based on years of experience.



Additionally, the guidelines recommend that attorneys use the Attorney Fee Worksheet in completing invoices. This electronic template expedites the review and approval process. On the left side of the template, among other things, attorneys enter in line-item fashion, the date, a description of the service rendered that date, time spent on the activity, his or her hourly rate and the total dollar amount claimed for the service; on the right side, OGC enters, upon its review, any adjustments to the line item-claim, the reason for such, the adjusted rate or time and the total amount as adjusted/approved.

Among the reasons for typically denying/adjusting line items are:

- “Not Reimbursable” – the activity was not allowable per OGC guidelines;
- “Duplicate” – the line item was a duplicate of another line item contained in the invoice;
- “Insufficient Description” – the item lacked sufficient information to determine its reasonableness/appropriateness;
- “Rate Excessive” – the hourly rate claimed by the attorney exceeded that allowed by DCPS;
- “Time Inconsistent” – the item was not claimed/billed in 1/10 hour increments in accord with billing guidelines; and
- “Excessive Time” – it was felt that the time spent on the activity was excessive/unreasonable.

There were some noteworthy differences between the October 2006 guidelines and those issued in June 2012, as described below.

#### Hourly Rates

The October 2006 guidelines listed *ranges* of hourly compensation for attorneys based on *ranges* of their years of experience. According to those guidelines:

- Lawyers admitted to the bar for less than five years would be reimbursed between \$135 and \$170 an hour.

- Lawyers admitted to the bar for five to eight years would be reimbursed between \$150 and \$225 an hour.
- Lawyers admitted to the bar for more than eight years would be reimbursed between \$200 and \$275 an hour.

The 2012 guidelines, however, set a *fixed* hourly rate for attorneys based on a *range* of experience. The range of years' experience were compatible with those specified in the Laffey Matrix; and the fixed hourly rate for each range was three-quarters of the Laffey Matrix rate, which Courts have upheld as being reasonable in IDEA-related administrative proceedings. The guidelines also specified that attorneys appointed pursuant to the Criminal Justice Act (members of the CJA and Family Court Attorney Panels) would be reimbursed at a rate of \$90 an hour. There were significant protests about this provision from attorneys affected by this lower rate. The OGC invited the submission of a legal argument about why the application of this District of Columbia statutory fee provision would be inappropriate in special education due process cases. Although several attorneys reported that they submitted e-mail responses elaborating on the reasons for their objections, this provision was retained in the final guideline.

### Supplemental Invoices

The October 2006 guidelines allowed for the submission of supplemental invoices. These guidelines required invoices to be submitted within 45 days of an HOD/SA, but specified that if an attorney incurred additional expenses pursuant to the HOD/SA, they should submit a supplemental invoice for payment. This mechanism became more relevant as DCPS adopted a practice of relying increasingly on independent evaluations and independent compensatory education, both of which placed additional obligations upon parent attorneys to assist their clients in obtaining the services. To make explicit the obligation of DCPS to compensate attorneys for the time expended in these efforts, the ADR agreement entered into by the parties provided as follows:

DCPS shall continue compensating parents' attorneys for work in securing and submitting IEEs and for securing independent compensatory education as required by and within the timelines required by HODs/SAs. Compensation for hours reasonably expended will be at the same billable rate the attorney receives for other case-related

work for a prevailing parent under the Guidelines for reimbursing private attorneys, as reviewed.

(*Agreement of the Parties Regarding Jones Compliance*, ¶ 11, Docket #2268-1, filed 8/18/11, approved by the Court 11/22/11, Docket #2273)

By its terms, this ADR agreement is binding on the parties and as enforceable as any provision of the Blackman Jones Consent Decree (Consent Decree, ¶ 113).

The June 2012 guidelines indicated that submissions for reimbursement should be made after all permissible actions for reimbursement had been completed, which would include implementation actions taken as a result of the HOD/SA. The June 1, 2012 guidelines emphasized that OGC would no longer accept supplemental invoices.

#### Disagreement with DCPS Payment Decisions

Both sets of guidelines provided information for attorneys who disagreed with OGC'S denial or adjustment of a particular charge. (Attorneys are informed of these determinations at the time OGC forwards the invoice to OCFO for payment.) Attorneys who wished to dispute OGC'S determination were instructed to request OGC reconsideration and to provide additional supporting documentation within 30 days of receipt of OGC'S determination.

Whereas the October 2006 guidelines stated that OGC would provide a final agency response to the dispute within 20 days, the June 2012 guidelines did not indicate when OGC would respond to such disputes.

#### **B. The Roles of OGC and the Office of the Chief Financial Officer**

OGC has been responsible for processing attorney invoices since approximately 2000/2001. Responsibility for this task was reportedly transferred from the Office of Special Education (OSE) at that time because OSE was experiencing significant backlogs in the management of invoices.

Two people within OGC constitute the Attorney Invoice Processing Team:

- A Financial Program Analyst whose full time responsibility is reviewing and, when necessary, adjusting invoices. The incumbent has a college degree in Business Management, assumed this responsibility in late 2011 and received intensive one-on-one, invoice-by-invoice training from his supervisor, OGC's Supervising Attorney.
- The OGC Supervising Attorney who, in addition to devoting approximately 50% of her time to supervising the Financial Program Analyst and responding to attorney fee issues, supervises a team of seven attorneys, two paralegals and other staff/interns who perform other functions within the OGC. The incumbent has about 20 years' experience with the District, the past 10 of which as the Supervising Attorney; prior to that she was a frontline attorney with in OGC.

When invoices are received by OGC, usually by email if the submitting attorney has submitted them using the electronic template, they are processed by the Financial Program Analyst, usually on a first come, first served basis. (If an invoice lacks certain required documentation, such as a copy of an HOD/SA, etc., the attorney is given notice of the need to submit the required information and the invoice is set aside from processing until the required information is received.)

Processing an invoice entails a line item review by the Financial Program Analyst of the appropriateness of the service rendered, time claimed for the service, the hourly rate claimed by the attorney and their congruence with DCPS/OGC's billing guidelines. Where necessary, adjustments to line items are made based on the review and rationales for such are documented on the invoice. (Examples of typical adjustments were discussed previously.) Use of the electronic billing template recommended by OGC facilitates the process for reviewing line items, making adjustments, documenting rationales for such and recalculating total allowable compensation.

Upon review/adjustment by the Financial Program Analyst, invoices are forwarded to the Supervising Attorney for review and approval. Once approved, the invoice, attached to a Finance Cover Sheet indicating the amount approved for payment, is forwarded to OCFO for payment.

At the same time, the attorney who submitted the invoice is sent a copy of the Finance Cover Sheet and the invoice which details adjustments so s/he can see what was approved for payment, what was adjusted on a line-item basis and the reasons for adjustments. As noted before, the attorney can request a reconsideration of the adjustments.

Upon receipt of OGC approved invoices, OCFO Account Payable Technicians create a payment voucher which is reviewed by an Accounts Payable Manager. Upon his/her approval, the computer system generates a randomly selected payment date, usually within two weeks of approval. On that date, the Treasury Department generates a check which is sent to the attorney the next business day. According to the Chief Financial Officer, the entire process, from receipt of an approved invoice from OGC to issuance of a check, takes no more than two-to-three weeks.

OGC is not notified by OCFO when an invoice is paid.

### **C. OGC Workload**

As will be described later, OGC does not have an automated system enabling the tracking of invoices from the time they are submitted to when they are sent to OCFO, how many are awaiting review/processing, or how long they have been pending.

Using an Excel spreadsheet, however, the Financial Program Analyst records certain information when an invoice is sent to OCFO, including the date it was submitted by the attorney, the date it was sent the OCFO and the time lapse (in days) between the two. Using this data, and hand counting the number of invoices yet to be processed, one could get a sense of workload and timeframes.

Between January 1 and October 31, 2012, OCG processed (reviewed, adjusted, approved and sent to OCFO) 322 invoices. As indicated below, a majority (54%) were processed within 60 days. A vast majority (83%) were processed within 90 days. Seven percent of the invoices took more than 300 days to process, and some of these in excess of 500 days to process, but a number of these cases were involved in litigation which contributed to the processing delays.

**Time Frames for Invoices Processed 1/1/12-10/31/12 (N=322)**

<b>Time Frame</b>	<b>Percentage</b>
<b>Within 30 Days</b>	11
<b>Within 31-60 Days</b>	43
<b>Within 61-90 Days</b>	29
<b>Within 91-180 Days</b>	08
<b>Within 181-300 Days</b>	03
<b>More than 300 Days</b>	07

Between November 1 and November 29, 2012, additional invoices were processed and sent to the OCFO; however, information about these had not yet been entered onto the above referenced spreadsheet maintained by the Financial Program Analyst.

On November 29, 2012 there were 56 invoices, in electronic or paper format, waiting to be processed:

- 25 (45%) had been submitted to OGC in November 2012;
- 19 (34%) had been submitted to OGC in October, 2012; and

- 12 (21%) had been submitted much earlier, partially processed and determined to be incomplete.

Most cases in the last category had been waiting for the completion of processing for six months or longer. According to OGC staff, they were lacking information needed to complete processing, such as signed SAs, copies of HODs, or proper orders/notices of withdrawal. Reportedly, attorneys had received notice that additional information was needed to complete processing the invoice.

#### **D. Problems/Limitations of Process**

Discussions with OGC staff and Plaintiffs attorneys revealed several problems or limitations of the existing process noted below.

##### Not All Attorneys Use OGC's Billing Template

Not all attorneys submit invoices electronically using OGC's filing template. Rather, they submit invoices in a variety of paper formats. Consequently, the OGC Financial Program Analyst must review and adjust line items, document rationales for adjustments and recalculate hourly rates, line item amounts and invoice totals by hand on the paper invoices submitted. This is a time consuming process that also sometimes leaves something to be desired in terms of clarity and legibility. It also makes review of the processing of these invoices much more difficult and weakens accountability for compliance with a consistent application of the payment guidelines.

##### OGC Lacks an Automated System for Invoice Management

OGC does not have an automated system or data base to track invoices or to analyze and manage invoice activities and information. Absent such a capacity, among other things, it cannot easily identify:

- The number of invoices received over time or within certain time frames;
- Time frames for processing such;
- Outliers, such as the numbers of invoice that have been pending or awaiting processing for certain benchmark periods, such as 60 days, 90 days, 120 days, etc.;
- Types of activities commonly invoiced (e.g., telephone conversations, preparing legal documents, etc.);
- Types of invoiced activities most commonly adjusted and the rationale (which may indicate need for clarification of billing rules); and
- Consistency, or lack thereof, in adjustments being made to invoices.

The lack of such a system also makes it virtually impossible for supervisors to understand the actual payment and processing practices, except on an anecdotal basis. It probably explains why there has been a persistent belief within OGC that any reports regarding delays in payment were attributable to a brief period of time when there was a vacancy/absence in the position of financial analyst.

#### The Lone Financial Program Analyst

In considering the above tools that are lacking (an automated data base, universal use of the electronic billing template), one must also consider that there is only one Financial Program Analyst within OGC. His primary responsibility is the processing of submitted invoices, which no one else has the training or skill to do, other than OGC's Supervising Attorney who trained the Financial Program Analyst but who also has a cadre of legal staff to supervise in other matters. If the Financial Program Analyst is out for extended leave, such as a medical leave for nearly a month which occurred in early 2012, or if he is redeployed to assist in attorney reimbursement-related litigation, which happens from time-to-time, the processing of all invoices stops.

#### There is No System or Timeframe Expectations for Processing Attorney Requests for Reconsideration of Initial OGC Determinations



According to OGC staff, they receive about one or two requests for reconsideration of OGC's initial determinations each month from attorneys. Staff indicated that the process for resolving these is "informal"-- they review the additional information provided for the item(s) in dispute and, if they agree to adjust the original determination, the attorney is notified by email and the necessary information to issue payment is sent to OCFO.

When the consultant reviewer asked to pull a sample of reconsideration requests for a certain period of time in order to review the nature of the disputed items, OGC's reconsideration determination and the timeframes for OGC's final agency response, he was informed that OGC does not have a system that tracks receipt of reconsideration requests and resolution or could enable pulling a sample of such for review.

Attorneys interviewed indicated that when they submit requests for reconsideration of OGC's initial determinations, months pass before they hear anything. One attorney reported that the firm's most recent reconsideration request was submitted four months ago and has yet to be acted on. Another reported being told by OGC staff that when an attorney submits a request for reconsideration of a disputed item, the request goes to the bottom of the pile, as there are initial invoices from attorneys which haven't yet been processed which must be given priority.

Absent timely responses from OGC over disputed items, attorneys reported feeling compelled to file court claims for reimbursement of reasonable fees. This takes time away from their practice and usually results in a settlement which, although less than what they sought, is some degree of compensation.

#### Discrepancy between June 2012 Guidelines and Attorney Information Sheet on Hourly Rates

*Invoice OGC Control # 115104* prompted the above discussion of reconsideration requests. It also highlighted another problem – a discrepancy between the June billing guidelines and the Attorney Information Sheet (AIS), also known as the *Special Education-Legal Services Personnel Information* form.

In the case of this invoice, on September 20, 2012, the attorney requested a reconsideration of OGC's determination. OGC had calculated the attorney's hourly rate on the basis of her years of practice in special education law (6.5 years) rather than her years as a practicing attorney (9 years).

The June 2012 guidelines establish hourly rates based on the number of years lawyers were "admitted to the bar." The AIS, which attorneys are requested to complete, is intended to ensure that attorneys are credited with an appropriate hourly rate. The AIS asks for the attorney's bar number and year of admission to the bar. It also asks for the number of years in legal practice in special education law; this question is followed by a note indicating "This information will be used in determining the reasonable hourly rate" which appears to be in conflict with the billing guidelines.

In an interview, OGC staff indicated that in reviewing the reconsideration request it was determined that using time spent in special education law practice as the basis for the hourly rate was inconsistent with the billing guidelines and inappropriate.

However, at the time of the November 29<sup>th</sup> interview with OGC staff, the attorney requesting reconsideration had not been notified of this, the plaintiff's bar had not been notified of the discrepancy between the guidelines and the AIS had not been revised.

In the absence of a system that makes billing and payment practices more easily reviewable, it was not possible to determine how many other attorneys were affected by the application of this informal and unpublished rule, nor how consistently it was applied to all attorneys whose years of special education practice were less than their years of admission to the bar. If this was the only attorney to whom this rule was applied, it raises the question of selective and arbitrary application of rules and practices to disadvantage an individual attorney.

## **2. A REVIEW OF THE LAST 30 INVOICES PROCESSED BY OGC**

To better understand time frames for the review, approval and payment of invoices, as well as consistency in approving attorney hourly rates and the scope of adjustments made by OGC upon its review, the last 30 invoices sent by OGC to OCFO for payment on or before November 1, 2012 were selected for review.

### **A. Overview of the 30 invoices**

The 30 invoices were submitted by 12 attorneys/firms. The attorneys had anywhere from four to more than 35 years of experience. Nine (30%) of the invoices were submitted in a format other than the electronic template suggested by OGC.

Of the 30 invoices, seven (23%) pertained to HODs and 23 (77%) pertained to SAs. Eight of the 23 SAs specified the maximum amount that would be paid for reasonable and documented attorney fees incurred or to be incurred in the matter. Such an amount was arrived at during the settlement process. In these cases, the attorneys submitted line-item invoices which were reviewed by OGC, but not adjusted, and the attorneys were paid the maximum amount specified in the SA. (The issue of SAs with maximum reimbursement amounts specified therein is discussed in more detail beginning on page 31.)

The total amount claimed in the 30 invoices (attorney fees and costs/expenses) was \$444,709. At approximately \$2,500, cost/expense items were a minor fraction of the total and about half of the attorneys did not bill for such in their invoices.

The total amount approved for payment by OGC was \$237,861, 54.4% of the total invoiced.

## B. Timeframes for Processing and Payment

Timeframes for processing the 30 invoices, from the date submitted to OGC by the attorneys to the date OGC sent the invoice to Office of the Chief Financial Officer for payment, were as follows:

- Range: 28 to 463 Days
- Mean: 83.2 Days
- Median: 66 Days

<b>Distribution of Days for Processing the 30 Invoices</b>		
<b>Days</b>	<b># of Invoices</b>	<b>% of Total Invoices</b>
<b>1-30</b>	<b>1</b>	<b>3%</b>
<b>31-60</b>	<b>9</b>	<b>30%</b>
<b>61-90</b>	<b>17</b>	<b>57%</b>
<b>91-120</b>	<b>1</b>	<b>3%</b>
<b>259</b>	<b>1</b>	<b>3%</b>
<b>463</b>	<b>1</b>	<b>3%</b>

Interestingly, the median length of time for processing SAs with payment amounts specified therein and which are not adjusted by OGC was the same as all the invoices: 66 days.<sup>3</sup> The timeframes for processing SAs with payment amounts specified therein were as follows:

- Range: 28 to 66 Days
- Mean: 56.5 Days
- Median: 66 Days

<sup>3</sup> The median is a useful measure of central tendency in situations such as this as it is less affected by outliers, such as the few invoices which may have taken over 100 days to process.

**Distribution of Days for Processing the 8 Invoices with Specified Reimbursement Amounts**

<b>Days</b>	<b># of Invoices</b>	<b>% of Total Invoices</b>
<b>1-30</b>	<b>1</b>	<b>13%</b>
<b>31-60</b>	<b>2</b>	<b>25%</b>
<b>61-90</b>	<b>5</b>	<b>63%</b>

Timeframes for payment of the approved invoices from the point of receipt by OCFO, which is located upstairs from OGC, to the date of check issuance were as follows:

- Range: 6 to 15 Days
- Mean: 14 Days
- Median: 14 Days

As the data indicates, once an invoice is processed by OGC, payment is swift, usually with two weeks. However, most invoices (57%) took between 61 and 90 days to process and 10% took more than three months.

**C. Adjustments to Attorney Hourly Rates**

Invoices submitted by seven of the 12 attorneys were adjusted because the hourly rate claimed by the attorney was deemed excessive. With the exception of the one attorney whose time was adjusted based on her years of practice in special education law (discussed above), all other adjustments were based on the attorney's total years of experience and the adjustments made were in keeping with the hourly rates specified by OGC in its billing guidelines, i.e., 75% of the Laffey Matrix rate for the number of years of experience.

**D. Other Adjustments**

With the exception of the eight invoices for which maximum payment amounts were specified in the SA, and one case in which the invoice was denied in its entirety because OGC

determined that the party did not prevail in the hearing, all invoices were adjusted by OGC on a line-item basis for various reasons. The next section provides insights into the nature and consistency of adjustments.

### **3. AN IN-DEPTH EXAMINATION OF SELECTED INVOICES**

#### **A. Overview of Invoices Selected for Closer Examination**

Based on the on-site review of 30 invoices, copies of 11 were requested for off-site examination to gain a better understanding of the nature and consistency of line item adjustments made by OGC.<sup>4</sup>

Of the 11 requested, one could not be included in the review. As previously mentioned, not all attorneys use OGC's billing template. Where such is the case, OGC makes adjustments on the paper copy submitted by the attorney, entering reasons for the adjustments in the margins. In one of the 11 cases requested, it was impossible to read all of OGC'S marginal comments on rationales for the adjustments due to photocopying/margin settings.<sup>5</sup> Therefore the invoice was excluded from in-depth examination.

The 10 remaining invoices included in the review were submitted by nine attorneys. The total amount of attorney fees invoiced was \$127,077.80, \$86,363.90 of which (68%) was approved by OGC for payment.<sup>6</sup>

These 10 invoices had a total of 656 attorney fee line items. With the exception of one invoice, all invoices underwent adjustment by OGC upon its review. The one invoice which

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<sup>4</sup> DCPS's system of maintaining invoices and notes of adjustments to such does not allow for easy analysis of data. As such, the selected invoices were converted to an Excel spreadsheet which would allow easier analysis. This was done off site.

<sup>5</sup> Five of the 11 requested invoices were not submitted on DCPS' suggested billing template. In four of these, however, it was possible to read and record DCPS' adjustments and marginal notes concerning rationale for such.

<sup>6</sup> Invoiced costs (postage, photocopying, parking, etc.) were not included in the analysis as the total amount (\$206.36) was negligible; most attorneys did not bill for such; and, in all but one invoice, the total amount claimed was approved for payment.

didn't, and which contained 40 attorney fee line items, involved a case in which the SA specified the maximum amount to be paid. This invoice, and the issue of SAs with specified maximum reimbursement amounts, will be discussed separately in this report.

Of the 616 attorney fee items in the remaining nine invoices, 261 (43%) were adjusted by OGC upon review:

- 99 line items were denied for payment as they were deemed: "not reimbursable" or were "duplicates" of approved line items; and
- 162 line items were approved for payment but at a lesser amount as the time claimed for the service was inconsistent with OGC's requirement that time be billed in 1/10 hour increments or the time claimed for the service was deemed excessive by OGC.<sup>7</sup>

Examination of the 616 line items and adjustment to such indicated that OGC was diligent in identifying, and denying, duplicate line item claims. Only one line item contained insufficient information in the description of the activity to determine what service was performed – it simply said "n" - and this item was appropriately denied reimbursement by OGC. OGC was also consistent in the application of some of its rules/guidelines, e.g., denying claims for work performed by advocates, such as reviewing records attending meetings, etc. or denying claims for time spent in travel to hearings; and approving time spent in IEP/MDT meetings mandated by HODs/SAs.

However, the review revealed areas of inconsistency in OGC's review and approval process, as described in the following.

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<sup>7</sup> It should be noted that five of the nine invoices were adjusted in their entirety because the attorney billed at a rate not in keeping with DCPS guidelines. As the issue of excessive hourly rates has been previously discussed in the section pertaining to the 30 invoices reviewed on site, of which these invoices are a subset, adjustments for excessive hourly rates are not included in this analysis of specific line-item adjustments.

## **B. Legal Preparation**

Not surprisingly, legal preparation - activities such as drafting and reviewing legal documents, conducting legal research, preparing witnesses and exhibits, etc. – constituted the largest type of activities invoiced by attorneys. Of the 616 items invoiced, legal preparation activities accounted for 193 (31%).

Most of these invoiced items (67%) were not adjusted by OGC upon review. But 63 were, and most for good reason.

Twenty three of the 193 items were denied in their entirety by OGC: about half were duplicates of other line items approved by OGC or were billings for work performed by Educational Advocates (non -attorneys) which is prohibited by OGC guidelines. Forty additional items, although approved by OGC, were approved for payment at reduced amount. Most, 25, were reduced because the attorney billed time in other-than 1/10 hour increments. In these cases, OGC reduced the time billed to the nearest 1/10 hour increment and approved payment accordingly. (The issue of billing in 1/10 hour increments is discussed further in the report.)

However, the remaining 11 items deemed “not reimbursable” and 15 items reduced by OGC due to “excessive time” illustrate inconsistencies in the OGC review process.

In the case of *Invoice OGC Control # 114747*, for example, time spent on 10/5/11 to “prepare for pre-hearing conference” was denied by OGC as being not reimbursable. Items pertaining to time spent on the same day for a phone conversation with the hearing officer and attending the pre-hearing conference were also denied as being not reimbursable. Yet, in the case of *Invoice OGC Control # 115214*, items pertaining to preparation for the pre-hearing conference on 6/11/12 and speaking with the hearing officer by phone on 6/11/12 and attending the pre-hearing conference on 6/12/12 were approved for payment in full by OGC.



The case of *Invoice OGC Control # 115214* suggests inconsistency by OGC in making determinations on legal research. In this case, the following items were denied as not being reimbursable:

- 6/18/12 “Research IDELR case law on availability of home instruction as placement for ED student with school avoidance.”
- 6/19/12 “Research DC case law on wrap around services for student; read *Fees v. DC*.”

However, the following items in the same invoice were approved for payment by OGC:

- 6/15/12 “Research: OSSE policy statements re referral of comp. ed decision to IEP Team and HODs posted by OSSE referring comp ed. Issue to IEP Team, read *Gage v. DC*.”
- 6/18/12 “Research IDELR case law, OSEP & OSERS policy letters re LEA obligation to provide FAPE for chronically truant ED student.”

Inconsistencies were also noted in items reduced due to “excessive time” as illustrated below.

- In *Invoice OGC Control # 115206*, the attorney billed 20 minutes for “Rev’d pre-hrg order.” OGC reduced the time to 12 minutes.
- In *Invoice OGC Control # 114747*, the attorney billed 24 minutes for “Review prehearing order from J. McKeever, HO.” OGC reduced the time to 6 minutes.
- In *Invoice OGC Control #11102*, the attorney billed 20 minutes for “Rev’d pre-hearing order.” OGC reduced the time to 12 minutes.

### C. Conversations with Parents

Seventy-five items billed by attorneys pertained to their conversations with parents, their clients. This activity was subject to the most adjustments by OGC. Forty-six of these items (61%) were reduced by OGC, mostly for the reason of “excessive time” and almost exclusively for telephone conversations with parents. This matter appears to be a flash point of controversy between OGC and attorneys representing parents.

According to one attorney, OGC’s Supervising Attorney has stated that attorneys should be efficient in administrative tasks, such as phone calls and correspondence, and as such, absent extenuating circumstances, calls are calculated/approved at .1 hour (6 minutes) and e-mails and letters at .2 hour (12 minutes).

Attorneys interviewed voiced great concern about OGC’s position on this matter. Imposition of a six-minute threshold, they indicated, may be appropriate for calls made to simply inform parents of a date for an upcoming hearing. But, they reported, many calls involve much more than a rote recitation of an address, date and time for a meeting/hearing. Depending on the subject matter, the calls involve discussions of the process, terms of possible agreements, next steps, etc. Time needed for such discussions also depends on the parents’ level of understanding: those new to this aspect of their child’s educational process may have to be walked through issues in minute detail; those familiar with the system may have many more questions which warrant discussion; but, for all, it is a critically important matter as it concerns their child’s future. As one attorney said: “Six minutes to explain the entire dispute resolution process is unreasonable and perhaps unethical, as it is impossible to explain the legal process in six minutes or less.”

Notwithstanding the apparent arbitrariness of OGC’s six-minute rule (which is not stated in billing guidelines), the invoices reviewed indicated that OGC is inconsistent in its application.

In *Invoice OGC Control # 115206*, for example, the attorney describes in very terse terms two contacts with the parent:

- 4/30/12 “Tel conv w/parent re status of case.”
- 7/24/12 “Tel conv w/parent re status of case.”

For each contact, he claimed 15 minutes in time. Both claims were reduced. However, OGC reduced the 4/30 contact to six minutes and the 7/24 contact to 12 minutes.

In *Invoice OGC Control #115104*, the attorney provided fairly detailed descriptions of conversations with the parent:

- 3/8/12 “PC to parent re: records, concern that (student) has not been evaluated since 2007, no encounter tracking forms. Discuss possibility of filing due process, the process that would follow, resolution and potential hearing.”
- 4/6/12 “PC to parent, discuss review of encounter tracking forms and missed OT/speech services uncovered in review.”

For each contact, the attorney billed for 0.3 hour (18 minutes). OGC reduced the time for each to 0.1 hour (six minutes). Yet, a 7/20/12 phone call made by the attorney to the parent to discuss updates to the IEP plan and billed at 0.2 hour (12 minutes) was not adjusted by OGC.

Based on the invoices reviewed, it appeared that in most cases whenever an attorney referenced a telephone call or phone consult in his/her description of a conversation with a parent, the time spent on the activity was reduced by OGC. If those terms were not used in the description, the time spent was not adjusted.

For example, in the same invoice referenced above where two 0.3 hour phone calls to the parent were reduced to 0.1 hour, the attorney billed for another discussion with the parent. The

description was just as detailed as the ones for the phone calls and indicated that serious subjects were covered:

- 3/15/12 “Discussion w/parent regarding DCPS confirmation that no further records exist. Parent agrees to filing of due process complaint – failure to complete triennial reevaluations and failure to implement IEP (related services).”

There was no mention of telephone or phone call in the description and the time claimed by the attorney, 0.3 hour, was approved by OGC.

Other invoices contained examples of conversations with parents that lasted 0.3 to 0.4 hours which were approved by OGC without adjustment. These conversations covered the same types of topics as those in the above referenced telephone calls. It is quite possible that some of these conversations even occurred over the phone and that the phone was not referenced in the invoice description. This illustrates the approach of OGC making judgments on the appropriateness of time billed based on the vehicle of communication rather than the content of communication. This issue also extends to conversations attorneys had with people other than parents. Approximately 60 items invoiced by attorneys pertained to conversations they had with psychologists, administrators, etc. In most cases whenever the words telephone or phone appeared in the billing description, the time claimed was reduced, typically from 0.2 or 0.3 hour, to 0.1 hour. But here too, just as in telephone calls to parents, there were inconsistencies.

#### **D. Initial Consultations**

OGC staff indicated that they do not approve attorney fees for initial consultations with clients, a rule that is not published in the guidelines. The review of invoices, however, suggests that this rule is also not consistently followed. In several invoices, as indicated below, the first item billed by attorneys appeared to be initial consultations and were denied by OGC:

- *Invoice OGC Control # 115104:* 1/30/12 “Initial intake with client, discuss educational concerns with current school, plan to request emergency IEP meeting, educational records and determine next steps.”

- *Invoice OGC Control # 115111*: 9/4/11 “Initial meeting with parent. Student at Prospect, not learning to read, not getting services, school not safe for learning. Discussed legal issues and parent agreed that we should move forward to file HR if violations found.”
- *Invoice OGC Control # 115189*: 5/16/12 “Discuss with the parent to determine if DCPS has complied with her request to complete an independent educational evaluation of the student consisting of a vocational evaluation.”

However, as described below, in other invoices the first item billed by attorneys appeared to be an initial consultation, yet these were approved for payment by OGC:

- *Invoice OGC Control # 115091*: 5/31/12 “Conference with (parent) for intake about DCPS moving (student) out of Commonwealth Academy.”
- *Invoice OGC Control # 115214*: 3/13/12 “Meet w/parent; review placement history and client files.”

In other invoices, it appeared that the attorneys did not claim time for initial consultations; the first items billed (and approved for payment) pertained to drafting complaints, making telephone calls, etc.

#### **E. Billing in 1/10 Hour Increments**

OGC guidelines require that services rendered should be billed in 1/10 (0.1) hour increments. Some of the nine invoices reviewed in detail, however, indicate that OGC does not consistently apply this rule in its review and adjustment of invoices.

The case of *Invoice OGC Control # 115189* illustrates a faithful application of the rule. In this invoice, the attorney billed in 1/100 hourly increments on several occasions. For example, time spent on 5/16/12 drafting and filing the due process complaint was claimed as 2.67 hours

and the attorney sought \$866.78 in reimbursement for the service. OGC adjusted the hours to 2.6 and approved payment for \$845.00. The attorney also claimed .33 hours of service on 5/16/12 and 5/25/12 for, respectively, reviewing the student's file and having a conversation with the parent; he sought reimbursement of \$108.23 for each service. OGC adjusted the time spent for each service to 0.3 hours and approved \$97.50 payment for each. OGC cited its rationale for these adjustments as being "Time Inconsistent" with its "guidelines which state that entries should be made in 1/10 hour increments."

The case of *Invoice OGC Control # 115092* also illustrates OGC's application of the 1/10 billing rule. In this case the attorney invoiced numerous items which were not consistent with the 1/10 rule. For example: 34 service items were billed at 0.17 hours; six items were billed at .67 hours; and two items were billed 2.33 hours. OGC reduced the time claimed to the nearest 1/10 hour (e.g., 0.1, 0.6 and 2.3) and reduced the payment accordingly. The rationale for these adjustments, however, was coded as "Excessive Time" as opposed to "Inconsistent Time" which was the code used in the case described above. "Excessive Time" is a code used by OGC to designate adjustments in time, even when recorded in 1/10 hours, when OGC is of the opinion that the amount of time spent on the activity was excessive. Its use in this case was probably a coding error, but the end result was the same: reduction of time claimed to the nearest 1/10 hour.

In three invoices, though, OGC did not adjust the time claimed by attorneys to 1/10 hour increments. In the case of *Invoice OGC Control # 115089*, the attorney claimed that on 5/7/12 he spent two hours and 20 minutes reviewing records; he was approved for payment of \$498.75 for such. Had the time posted been adjusted in accord with the 1/10 hour rule (resulting in a time of 2.3 hours or 2 hours and 18 minutes) payment should have been \$491.63. There were at least 10 other instances in this approximately 40-item invoice of time spent on activities being posted in other-than 1/10 hour increments and not being adjusted to comply with the OGC rule.

In the case of *Invoice OGC Control # 115206*, five of the 22 line items were billed for times posted in other-than 1/10 hour increments. Postings were for 15 minutes, 20 minutes, two hours and 40 minutes, etc. Neither these nor the payment for such were adjusted to comply with the OGC rule. The same was true for five of the 18 line items in *Invoice OGC Control # 115102*.

#### **4. SETTLEMENT AGREEMENTS WITH SPECIFIED ATTORNEY FEES**

As previously noted, eight of the 30 invoices reviewed on site involved SAs wherein terms for attorney's reimbursement were specified. Most of these agreements included language along the lines of:

Parent agrees to accept reasonable attorney fees not to exceed (dollar amount) in reasonable and documented attorney fees. This amount represents, as full and final payment of any reasonable attorney fees and related costs incurred, or to be incurred, in this matter. Payment of the specified amount is contingent upon submission of the following: a) a certified invoice conforming to the DCPS attorney fee guidelines issued June 1, 2012 itemizing all costs incurred to date relating to the pending hearing request; and b) signature by the parent below or written authorization by the parent for the attorney to enter into this settlement agreement on the parent's behalf.

In these eight cases, the dollar amount specified in the agreement, agreed to by the attorney and paid by the District ranged from 33% to 99.6% of the amount invoiced by the attorney.

A more detailed review of one of these cases, *Invoice OGC Control # 115091*, suggests that, in approving payments, OGC is not consistent with its own guidelines or what it applies as standards for reasonable attorney fees in other cases. Further, interviews with attorneys suggest that the process for negotiating terms for attorney reimbursement in SAs is uneven.

Two attorneys collaborated in this case. The invoice total was \$ 6,022, \$6,002 of which was for the attorneys' professional services; the remaining \$19.50 was for costs such as photocopying and postage. The SA called for payment not to exceed \$6,000, which is what was approved and paid. One of the attorneys invoiced 8.75 hours of service at an hourly rate of \$350, below the hourly rate of \$371.25 specified in the June 2012 DCPS guidelines for attorneys with over 20 years' experience, which this attorney had. The second attorney, however, invoiced 9.8 hours of service at an hourly rate of \$300, which appears to be well above the DCPS guidelines. According to a March, 2012 OGC *Special Education Attorney Information* spreadsheet, this

attorney has four years' experience and thus, according to DCPS' June 2012 guidelines, is entitled to a much lower hourly rate of \$213.75.

Consistent with DCPS' June 2012 fee guidelines, at most, even adjusting upward for the lower hourly rate claimed by the first attorney, the total amount that should have been approved for payment would have been \$5,362.69: \$5343.19 for professional services and \$19.50 for costs.

A line item review of this invoice also suggested that certain activities, or time spent on such, were deemed as reasonable by OGC that would not be deemed as such in invoices submitted by other attorneys. For example:

- Whereas time spent on most initial consultations or intake sessions with parents is disallowed by OGC as being "not reimbursable," the first invoiced activity in this case was for 1.5 hours on 5/31/12 for a conference with the parent "for intake about DCPS moving [the child] out of Commonwealth Academy."
- Telephone conversations with the parent lasting 18-24 minutes were allowed when in other cases such would not be.
- And more than 4 hours, approximated 23% of the attorneys' time, were spent on legal research concerning the "definition of special education" (5/13/12) and "stay put protection" (6/19/12, 6/20/12 and 6/25/12), which, according to OGC staff, are among the most basic concepts in the field about which any attorney with experience in Special Education should be familiar.

Several attorneys interviewed reported that OGC's frontline attorneys enter these settlement discussions with "ridiculously low" payment proposals and are unwilling to:

- discuss how they arrived at the proposed offer;
- consider the time the attorney has already invested in the case; and
- discuss the amount of time in further work that would be required by the settlement.



As noted earlier, the 2011 ADR agreement requires payment for attorney time spent in implementation efforts. The refusal to pay for time spent or reasonably anticipated to be spent on such activities would be inconsistent with this agreement, especially since subsequent to the agreement, DCPS/OGC changed the attorney fee guidelines and no longer accepts supplemental invoices which would have been the vehicle through which attorneys could bill for such activities.

For example, in a recent proposed settlement agreement, the attorney obtained substantial benefits for the student represented, including an independent Comprehensive Psychological Evaluation, and independent Occupational Therapy, Physical Therapy, and Speech and Language evaluations, to be followed by an IEP meeting to discuss the evaluations, review and revise the student's IEP, if necessary. DCPS also agreed to fund ABA therapy. These independent evaluations and subsequent IEP meeting could reasonably be expected to require additional time for the attorney to assist the parent in implementation of the relief that had been secured, aside from whatever time had been spent in research, preparation and the filing of the due process complaint. DCPS offered an attorney fee not to exceed \$300 in full satisfaction of the case. It is hard to fathom a rational process by which the DCPS attorney arrived at this offer of reasonable attorneys' fees.

In another similar case, the settlement agreement offered extensive substantive relief to the student including three independent evaluations, additional staff assistance to the student, and substantial independent compensatory education. It also required a subsequent IEP meeting to review the evaluations, revise the student's IEP if necessary and discuss further compensatory education if warranted. Here as well, one could expect additional time would be required to assist the parent obtain the services authorized by the Settlement Agreement.<sup>9</sup> The attorney fee offered in this case was \$750.

Cases like these lend credence to the reports of parents attorneys. A few of them, however, indicated that they have had success in having the fee proposals modified by going

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<sup>9</sup> It is worth remembering that when these implementation obligations were the responsibility of DCPS staff, and a dedicated group of case managers were assigned the responsibility to perform this function, they were often unable to perform these functions timely, in part due to the time-consuming and difficult nature of the work.

above the head of the OGC frontline attorneys and calling the Supervising Attorney directly. More commonly, attorneys, such as the one who agreed to a settlement agreement that was 33% of the attorney invoice, indicated that the Supervising Attorney will not return their calls when they try to appeal payment offers brought to the settlement table. Several attorneys reported that when there was a protest to an unreasonably low offer of attorney fees, the response was to lower the offer still further or to rescind it entirely, sometimes accompanied by threats of unfavorable treatment of their other cases.

Attorneys generally reported that whether or not one can speak with the Supervising Attorney and draw her attention to matters of concern – be it a settlement offer perceived to be too low or action on a request for reconsideration of an OGC fee determination – depends on one’s relationship with the Supervising Attorney. As one attorney related, “The whole process is personality driven.”

As the OGC has implemented additional changes in the process for payment of attorney’s fees to prevailing parties in special education due process cases, to increase the emphasis on achieving lump sum settlements rather than reviewing detailed line item invoices, these practices in negotiating fees are a matter of concern both because they mask the issue of compliance with the provisions of the ADR agreement regarding payment for attorneys’ fees in the implementation process and because of the potential effect of these practices on the availability of legal services to indigent parents.<sup>10</sup>

Hearing the consistent reports from special education attorneys, many with long years of experience with special education as well as other areas of legal practice, raises a substantial concern that the negotiation of attorney’s fees in this context, where legal adversaries are in regular conflict over the merits of due process complaints involving different students, is infused with an animus caused by the conflicts and which spills over into the negotiation over the amount of attorney’s fees. While DCPS unquestionably has the responsibility to scrutinize fee applications and to negotiate them to an amount it deems reasonable in light of the reasonable

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<sup>10</sup> A draft of this report was submitted to the parties on March 22, 2013. Three days later, DCPS revised the fee payment process, rescinding the June 2012 Attorney Fee Guidelines. See Appendix A. See also, District of Columbia’s Response to the Court Monitor’s Draft Report, Appendix B.

time and effort expended by the prevailing party, its practices in some cases appear to be inconsistent with that responsibility, and often leave the adversary with no realistic recourse. There is no effective appeal mechanism when supervisors are inaccessible, do not return phone calls and there appears to be no supervisory control over the behavior of individual attorneys.

The current system of negotiation appears to exploit an ethical dilemma faced by parents' attorneys. Their ethical obligation requires them to subordinate their own financial interests to the legal interests of their clients. When settlement agreements are proffered that provide all or most of the relief sought in a due process complaint, but are accompanied by an unreasonably low offer of attorney's fees, attorneys report that they often have no choice but to accept the offer. They do so both because it provides immediate benefit to their client, but also because they have no realistic option to pursue the complaint to a hearing, as DCPS is likely to seek dismissal of the complaint based on mootness. DCPS regards the high rate of acceptance of its fee offers as evidence that the settlement system is working well.

Many parents' attorneys expressed exasperation over the existing process and pointed to a fundamental flaw: the existing process embodies an inherent conflict of interest – parties that prevailed in an administrative process are at the mercy of the party that did not prevail in determining the amount of fees they should be compensated; if the prevailing party is dissatisfied with that determination, s/he can ask for a reconsideration, but that request, again, is acted on (or not) by the party that did not prevail. Of course, this dynamic is at play in all fee negotiations where a fee shifting statute requires one-party to pay the other's reasonable attorney fees. However, there are additional factors at play when a small group of DCPS attorneys regularly interacts with the same members of the special education bar who represent parents/students. There is a continual risk that personal animosities and adversarial relationships can develop and expand beyond an individual case to an overall relationship between the attorneys and affect the manner in which fee negotiations are conducted.

The conflict of interest, according to some attorneys, is at the core of the arbitrary, inconsistent and less than transparent reimbursement process that currently exists. More than one attorney speculated that these flaws are part of a conscious effort on the part of DCPS/OGC to

reduce the number of attorneys willing to represent children and their families in educational matters.

Attorneys who have had substantial practices of representing indigent parents reported that this experience with unreasonably low attorney fee offers has led them to limit the number of new indigent clients they represent. Such clients are referred to law school clinics, nonprofit agencies like the Children's Law Center or University Legal Services, all of which report they have limited capacity to fill the void, and also have case selection criteria which cause them to turn away the parents who were referred by private counsel.

## **5. SUPPLEMENTAL INVOICES**

Attorneys also expressed concern that OGC changes billing rules without an adequate grace period; consequently services that were allowable as billable activities at the time they were performed are denied payment when the invoice is submitted or cannot be submitted for reimbursement.

The issue of supplemental invoices was cited as a case in point. Prior to the June 1, 2012 guidelines, attorneys were requested to submit an initial invoice shortly after an HOD/SA was executed and to then submit supplemental invoices for additional services rendered in accord with the HOD/SA. With the issuance of the June 1, 2012 guidelines, effective that date, supplemental invoices were no longer accepted by OGC. As a result, an attorney who had submitted an initial invoice on May 15, 2012, and continued to provide services with the intent of submitting a supplemental invoice at a later date when work performed in accord with the HOD/SA was completed, could not do so effective June 1, 2012. S/he would have to absorb the cost of the services provided subsequent to the issuance of the HOD/SA. In effect, the elimination of the supplemental invoices and the recent trend towards attempting lump sum settlement agreements have clouded the issue of compliance with the ADR provision regarding payment for implementation activities of parents attorneys.

### III. CONCLUSION

The right of children to a free and appropriate education (FAPE) is unquestionable. Ensuring that parents have adequate representation in pursuit of administrative remedies when they believe that their rights to FAPE are being violated requires that those who represent them receive timely and appropriate compensation when they prevail.

As DCPS has noted, the IDEA statute provides for an application to court for payment of attorneys' fees to which a prevailing party is entitled. There is no obligation either for DCPS to provide an administrative process for fee payment or for attorneys to utilize it. However, DCPS also points out that the process they have created is a streamlined and simple process that usually results in quicker payment of attorneys' fees than resorting to an application to the court. The fact that attorneys voluntarily utilize this process and generally accept the negotiated fee despite their complaints, they argue, is evidence of nothing more than hard bargaining by DCPS attorneys who have an obligation to protect the public purse. However, having created an administrative process also requires that the rules be clear and transparent, that they be applied fairly and consistently, and that there be a functional process for review and timely decisions to address alleged errors.

The existing process for reimbursing attorney fees in IDEA cases, while accomplishing many of its goals in reviewing, processing and paying fees to prevailing parties in the vast majority of cases within a reasonable time, falls short in several ways. For example:

- While the majority of invoices for attorneys fees are processed reasonably promptly, for a significant subset timeframes for processing and paying attorney invoices are excessive;
- There is a lack of transparency as certain billing rules are not stated expressly in billing guidelines, such as the six-minute rule for telephone calls, the refusal to pay for initial consultations and intake, and the since-discontinued rule of using years of special education experience rather than years of bar admission in setting rates;
- There is a lack of evidence that DCPS is implementing the provisions of the 2011 ADR agreement that requires it to compensate attorneys for the time spent in implementing

HOD/SAs. In some cases, it is apparent that in making fee offers there has been no consideration of the time required to be spent on such activities;

- There are inconsistencies in applying billing guidelines in the review and adjustment of invoices as discussed in this report;
- Billing guidelines change without a sufficient grace period to allow for the payment of activities performed at a time they were deemed “allowable;”
- There is no clearly articulated process, with timeframes, for responding to requests for reconsideration over compensation determinations made by OGC;
- There are no protocols to guide the process of negotiating attorney fees as part of settlement agreements; and
- It appears that some attorneys have access to senior OGC staff to make their case in compensation decisions while others lack such access.

The existing system is also hampered by the lack of tools, i.e., computer/automated systems, that would allow it to better manage its activities and analyze its performance relative to timeliness and consistency in reviewing, adjusting and approving invoices for payment.

The recent practice, which is becoming increasingly prevalent, of negotiating the attorneys’ fees at the same time as substantively negotiating a resolution of the merits of the parents’ due process complaint has the risk of creating an ethical conundrum for the parents’ attorney. It creates a risk of pitting the student’s educational interests against the financial interests of the parents’ attorney in being adequately compensated for time and effort. In August 2002, the American Bar Association promulgated Ethical Guidelines for Settlement Negotiations.

#### §4.2.2 Provisions Relating to the Lawyer’s Fee provides:

When an attorney’s fee is a subject of settlement negotiations, a lawyer may not subordinate the client’s interest in a favorable settlement to the lawyer’s interest in the fee.

The accompanying Committee Notes advise:

When the amount of the attorney's fee is a subject of negotiation, a lawyer should take any available procedural steps to reduce the possibility that the lawyer's professional judgment, in negotiating the settlement terms, will be adversely influenced by the lawyer's interest in the fee. One way to do this is to postpone fee discussions until an agreement on other terms has been achieved or nearly achieved. Other possibilities include enlisting the assistance of a mediator to oversee the discussions, or agreeing that the request for fees will be presented to the court without prior agreement on a proposed figure.<sup>11</sup>

The wisdom of these guideline suggest an alteration of the current practices in some respects, and placing some distance between the settlement of the merits of a due process complaint, and the negotiation of the reasonable attorney fee for the prevailing party. Such distance may be achieved either by postponing the fee discussion or by transferring the responsibility for fee negotiations and payment to a separate unit of government (like the OSSE) that is not engaged in the adversarial process of litigating due process complaints. Another more limited alternative that ought to be considered is moving the responsibility for review of requests for reconsideration out of OGC and to the OSSE to provide a fresh look at the merits of the respective positions of the parties' positions regarding the reasonable attorneys' fees warranted. Doing so might also permit a more informed assessment of the reasonable attorney time required for the performance of implementation activities required by the HOD/SA as contemplated by the 2011 ADR agreement.

#### **IV. RECOMMENDATIONS**

1. To reduce any apparent or actual conflict of interest, consideration should be given to transferring all or part the responsibility of reviewing and approving requests for attorney fee reimbursement in IDEA cases out of DCPS OGC and to the OSSE. It is also imperative that the rules and performance of this unit be transparent and known to relevant parties.

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<sup>11</sup> Ethical Guidelines for Settlement Negotiations, p. 46 (American Bar Association, 2002).

2. The unit responsible for reviewing and approving requests for reimbursement of attorney fees should be provided with an automated system which allows for the tracking and processing of such requests (as well as requests for reconsiderations of determinations) and also allows for periodic analyses of performance. Such analysis should be done at least annually.
3. Benchmarks indicating desirable performance in the processing of invoices and appeals for reconsideration of initial determinations (i.e., timeframes, consistency, etc.) should be established.
4. The unit responsible for managing the processing of requests for reimbursement, and appeals for reconsideration, should be required to conduct periodic analyses of its performance relative these benchmarks which should serve as both: indicators of success and areas in need of improvement.
5. To ensure transparency, the above referenced benchmarks and analyses should be made available to the Court Monitor and the Plaintiffs counsel in the *Jones* case.
6. To facilitate the implementation of an automated system for the management and analysis of reimbursement requests, attorneys should be required to submit invoices in a format compatible with the automated system.
7. Billing guidelines should clearly identify all activities that are reimbursable and avoid arbitrary or hidden rules – such as thresholds for time spent on activities such as telephone conversations, drafting emails, etc. In assessing the appropriateness of time spent on activities, the attorney should provide an adequate description of the nature and content of the activity to justify the time claimed. Determinations should be made on the basis of the description of the nature and content of activity, not the mechanism, i.e., a telephone, email, etc.
8. When billing guidelines are revised, care should be taken to ensure that activities that were allowable and performed under the guidelines in effect at the time they were performed are reimbursed. Changes in billing guidelines/instructions should be promptly communicated to all parties.



9. Billing guidelines should be consistently applied in the review of invoices. Assessment of consistency should be part of the performance monitoring activities mentioned above.
10. A protocol should be developed to guide discussion of reimbursement as part of settlement agreements. All parties should have an understanding, at least, of the time already invested in a case and the amount of time expected to be spent as a result of the SA in order to engage in meaningful discussions of what would be a reasonable reimbursement amount. The protocol should also assure that hourly rates and professional services are in accord with billing guidelines.
11. As invoices for SAs with maximum reimbursement amounts specified therein do not undergo line-item adjustments, there should be a process put in place to expedite their payment. Currently, the median processing time for these invoices is the same as for all other invoices.
12. A formal process, with explicit and reasonable timeframes, should be developed for receiving, reviewing and responding with final agency determinations to requests for reconsideration filed by attorneys when they disagree with initial compensation determinations.

Appendix A



DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS

Office of the General Counsel

**MEMORANDUM**

**TO:** Members of the Special Education Bar

**THRU:** Robert Utiger  
General Counsel

**FROM:** Quinne Harris-Lindsey  
Supervisory Attorney General

**DATE:** March 25, 2013

**SUBJECT:** Revised IDEA Administrative Fee Process

Effective immediately, and applicable to all invoices currently pending, the following revisions apply:

1. The Revised Attorney Fee Guidelines, dated June 12, 2012 are rescinded as of the date of this memo.
2. OGC will continue to process the invoices of parent's counsel in IDEA cases for work performed in obtaining Independent IEEs and Compensatory Education Services at the attorney's appropriate billing rate for IDEA work in accordance with the Consent Decree in *Jones v. D.C.*
3. OGC will only negotiate a full and final settlement amount representing all past, present, and future attorney's fees claimed pursuant to work related to obtaining substantive relief through Hearing Officer Determination. If the parties are unable to reach a settlement OGC will close out the invoices and the attorney will be advised to pursue recovery of his/her fees consistent with the process set forth in IDEA.
4. Submission of attorney's fee invoices to OGC is not required before filing a petition for fees with the District Court, pursuant to the IDEA.
5. All settlement agreements will contain a sum certain for the full and final settlement of all attorney's fees, past, present, and future, related to the matter being settled.

Re: Revised IDEA Administrative Fee Process

6. The Attorney Fee Team remains the point of contact for all attorneys' fee inquiries and fee negotiations related to HODs.

All questions should be directed to Quinne Harris-Lindsey via e-mail: [quinne.harris-lindsey@dc.gov](mailto:quinne.harris-lindsey@dc.gov).

Appendix B

**DISTRICT OF COLUMBIA'S RESPONSE TO THE COURT MONITOR'S  
DRAFT "REVIEW OF THE DCPS' PROCESS ON PAYMENT FOR  
REIMBURSING ATTORNEY'S FEES IN IDEA CASES"**

Thank you for the opportunity to comment on your draft report reviewing the District of Columbia Public Schools (DCPS) payment process for attorney's fees to the Parent's Bar in IDEA cases. Before addressing specific issues raised by the draft report, we reiterate our position that the payment of fees to counsel for representation under the IDEA (IDEA fees) is not part of this litigation. The District has consistently maintained this position. In this regard, paragraphs 143-144 of the Consent Decree address fees to be paid to class counsel as plaintiffs' counsel in this case, in recognition of the plaintiffs' prevailing party status given the Court's finding on liability. Paragraph 145 of the Consent Decree addresses the award of monitoring fees to Class Counsel to secure implementation and enforcement of the *Consent Decree*, which are not applicable to individual cases and attorney fees.

Paragraph 11 of the 2011 ADR agreement allows payments to members of the Parents' Bar to assist parents in obtaining independent educational evaluations (IEE) and independent compensatory education. Attorneys are to be paid a reasonable fee for this work (Implementation Fee), if the IEE and/or independent compensatory education is secured within the timelines required by a hearing officer determination (HOD) or settlement agreement (SA). The District has agreed to compensate members of the Parents' Bar for this work in the interest of ensuring timely implementation of HODs/SAs and in recognition of cases where parents prefer to continue to rely on assistance from their attorney. Under the IDEA, an attorney's work to assist a parent on implementation of an HOD/SA is not generally compensable under the fee shifting provisions of the IDEA. Disputes relating to the payment of attorney's fees to a prevailing party are handled by randomly assigned U.S. District Court judges in accordance with the IDEA's procedures for fee awards. See 34 CFR § 300.517. Although fee issues have been discussed in this case, the District has never agreed to include IDEA fees to individual attorneys in *Jones*, and the Court has not taken jurisdiction or issued an order on fees in this context. Accordingly, the Consent Decree does not

vest the Court with authority over attorney fees to be paid based upon representation under the IDEA.

**DCPS' PAYMENT OF ATTORNEYS' FEES  
COMPORTS WITH THE IDEA AND 2011 ADR**

As the report recognizes, DCPS permitted prevailing parties in IDEA matters to submit their fee petitions first to DCPS. DCPS would review the billing records and determine the amount to which it agreed the parents were entitled and would pay that amount. DCPS took the position that this process provided the option of an administrative remedy that the prevailing party could exercise prior to seeking judicial relief related to fee payments. These payments did not automatically constitute a settlement of the claim for fees and the Parent's counsel was free to seek additional fees from the U.S. District Court in the event an issue remained with regard to compensation. As reported to the plaintiffs and Court Monitor by DCPS General Counsel, DCPS is no longer offering to administer IDEA fees. As you know, DCPS has discontinued this process, and has withdrawn the June 2012 guidance on fee invoice processing.

Whatever utility the administrative process may have had in the past, DCPS does not believe it is necessary going forward. With the sustained and ongoing improvements within the District's special education system, the volume of due process complaints has significantly declined, along with a correlating decline in the percentage of cases where the plaintiffs prevail.

Under these circumstances, DCPS is now following the same process used in a number of other jurisdictions for IDEA payments. In cases where the parties agree to settle under the IDEA, DCPS is willing to include attorney's fees negotiated between the parties in exchange for a complete release—the same practice used in other cases brought under fee shifting statutes. In cases where the merits of the underlying action are adjudicated and the plaintiff achieves prevailing party status, DCPS is committed to an attempt to settle fees on mutually agreeable terms. In most cases since the institution of this practice, settlements have been reached. In those cases where the parties cannot agree to

settle fees, plaintiffs are seeking fees in Court in accordance with IDEA procedures.

DCPS also seeks to resolve the implementation fees (for work to be done in obtaining IEEs and independent compensatory education), based on the parties' good faith estimate of the value of the Plaintiffs Counsels' anticipated work. DCPS has been able to resolve the majority of cases on this basis after arms' length negotiations, including resolution of HOD/SA fees in a global settlement along with attorneys' fees for the attorney's representation of the plaintiff in the due process proceedings. In fact, the parties are currently negotiating an agreement regarding payment of implementation fees to ensure that Parents' Counsel is neither over nor under compensated by DCPS for this work.

**THE PONTENTIAL FOR ETHICAL ISSUES SHOULD NOT ARISE IN ARMS LENGTH  
SETTLEMENT AGREEMENTS UNDER THE NEW SYSTEM IN PLACE**

The Court Monitor raises issues questioning the manner in which Settlements are reached between DCPS and members of the Plaintiff's bar. Fee settlements in case settlements are not, however, unique to the realm of IDEA settlements. Even here, when Congress has expressly allowed for fee shifting, there are nevertheless restrictions on when a party is entitled to fees, the most pertinent here is the Supreme Court's holding in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, et al.* 532 U.S. 598 (2001).

While it is difficult to fully analyze the example at page 33 of the Monitor's draft report because all the relevant facts are not presented, one possible set of facts leads to the following analysis:

The Plaintiff made a demand for services to DCPS and DCPS offered all or nearly all the relief requested in settlement, perhaps at a resolution session. This included a subsequent IEP meeting that the Monitor fears may have required extensive work by the parent's attorney but only \$750 in fees was offered (generally attendance by an attorney at an IEP meeting is not compensable unless ordered in



an HOD). Under this set of circumstances, and without knowing more details, it is entirely possible that this result is the proper result. Instead of a settlement, the District could have simply offered all the services requested and paid no fees at all. The Plaintiff's Counsel may have performed only minimal work that was compensable under the IDEA.

The District is mindful of the potential for an ethical dilemma to arise for the members of the Parent's Bar in IDEA cases. Traditionally, this dilemma is avoided in cases brought under fee shifting statutes by having the client remain responsible for paying attorneys for services provided. In cases where a plaintiff is successful, the client is entitled to any amount recovered under a fee shifting statute. In fact, this is the way the IDEA is written. Under the IDEA the prevailing party is the parent, not the attorney, and under the IDEA, it is the parent who is entitled to recover fees.

The fact that many of the clients represented by the Parent's Bar are of modest means and many of the members of the Parent's Bar take cases on a contingency basis is not unique to the District of Columbia; this same situation exists in many jurisdictions. That said, as attorneys, it is for the members of the Parent's Bar to align their practice with their ethical requirements. The Office of the General Counsel negotiates fees in the settlement of IDEA matters consistent with the negotiations conducted under other fee shifting statutes.

#### **CONCLUSION**

In summary, we believe that the practice described above reduces issues involving payments for IDEA fees, and will more clearly delineate implementation fees consistent with paragraph 11 in the 2011 ADR agreement. Further, the District is committed to working with plaintiffs' class counsel and the Parent's Bar to ensure that attorneys are fairly compensated for implementation fees on a timely basis. Under these circumstances, the District has reviewed the recommendations set forth in the report, and believes the new process will fully address a number of concerns addressed by the recommendations.